

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & SYREETA FRAZER,
Complainant

v.

DOCKET NO. 07SEM01663

BAY STATE GAS COMPANY,
Respondent

Appearances:

Tod A. Cochran, Esquire for the Complainant

Laura N. Raisty, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 5, 2007, Complainant Syreeta Frazer filed a complaint with this Commission charging Respondent with discrimination on the basis of gender. Specifically, Complainant alleges that Respondent denied her a promotion and subjected her to different terms and conditions of employment than similarly situated men. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me at the Commission's Springfield location on June 1 and 2, 2009. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Bay State Gas Company is a Massachusetts public utility engaged in the transmission and distribution of natural gas in non-contiguous service territories in

and around Springfield, Brockton, Lawrence and Northampton, Massachusetts, and in Portland, Maine and Portsmouth, New Hampshire (Tr. 151-2)

2. Syreeta Frazer, who is a single mother, has worked at Respondent's Springfield location since June 1999. She was hired as a Call Center Representative and has since worked as a Meter Reader and a Customer Service Representative. From January 2006 to March 2008, Complainant worked as a Meter Repair Helper in the meter repair shop. In May 2008 Complainant became a Utility Worker General or "UWG."

3. At Respondent's Springfield location, the United Steelworkers of America, AFL-CIO-CLC, Local Union No. 12026, represents two bargaining units, known as the "clerical" unit and the maintenance or "operating" unit. Complainant was at all times a member of either the clerical or operating unit.

4. William L. ("Jay") Moore, Jr. currently works for NiSource, a holding company for Bay State Gas and Columbia Gas, as a manager of human resources overseeing Columbia Gas. From April 2004 to December 2007, Moore performed the position of director of human resources overseeing all aspects of the HR department for all of the locations of Bay State Gas Northern Utilities, which employs approximately 600 people. He was responsible for enforcing all job postings, job applications and minimum qualifications. He supervised all human resources consultants, including Stella Deiana, Eva Birt and Lenice Miley. (Tr.149-152)

5. Mark Dwight has worked for Respondent for 22 years as a fleet mechanic. In addition, Dwight is currently president of the Steel Workers Local 12026. In October 2006, Dwight was the union's recording secretary. (Tr. 76-77)

6. Complainant testified that while working in the meter repair shop she determined that she would eventually like to become a field operations leader (“FOL”). (Tr. 22) To that end, she sought the advice of Janet D’Entremont, Respondent’s manager in charge of FOLs, as to the qualifications Respondent sought for these managerial positions. D’Entremont advised Complainant to obtain field experience, strong customer service experience and to join committees in order to make herself known around the company. (Tr. 23-24) Complainant joined the Respondent’s safety committee and decided to apply for the position of UWG which would give her field experience. (Tr. 24)

7. The position of Utility Worker General was bargained into existence in 2004. Many of the duties of the UWG position had previously been performed by Locate Technicians and Meter Repair Helpers. UWGS perform a variety of duties, including locating services, collections, meter repair and some gas line and appliance repair and they may be assigned to different departments within Respondent, such as meter or customer service. UWGs report to Field Operation Leaders (FOLs) . (Tr. 159-160)

8. According to Jay Moore, because UWGs work with live gas the job posting for the position has always stated a requirement that the applicant pass a mechanical comprehension test (“mct”)(Tr. 41-21,60,159)

9. Nancy Hook, who was a meter equipment servicer for six years, applied for a UWG position in January 2006 and was not required to take the “mct” because under the terms of the collective bargaining agreement ratified in 2004, all meter equipment servicers were grandfathered into the position of Utility Worker Generals. (Tr. 44; stip. 25; exh. C 4)

10. Patrick Smith, who has been employed by Respondent since May 1999, applied for a UWG position in March 2006 and was not required to take the “mct.” He testified that he was awarded the position by human resources consultant Eva Birt on April 21 or 22, 2006 but did not actually begin working in the position until July of 2006, because he continued to work in his former position until that position was filled. I credit his testimony.

11. Robert Nowak, an external applicant, testified that he applied for a UWG position on June 2, 2006. He interviewed with Janet D’Entremont and Dave Bayeur and was offered the position a week later. He did not have to take the “mct.” Nowak testified that he accepted the position in June of 2006, gave two-weeks notice at his previous job and began the UWG position on July 10, 2006.

12. Eva Birt was a human resources consultant from August 2004 until June or July 2006. Jay Moore testified that sometime in July of 2006, after Eva Birt left her position, he learned that she had stopped administering the “mct” to applicants for UWG positions, even though the requirement appeared on the posting. (Tr. 160-162) Moore did not recall how he learned about Birt’s practice. (Tr.162) I credit his testimony.

13. Moore testified that after discussing the matter with Operations Manager Pamela Bellino, they decided to reinstate the “mct” test for the UWG position from that time forward. They did not announce the decision to reinstate the test because the requirement had always been listed in the job postings. (Tr.162-3)

14. The Human Resources Consultant position previously held by Birt remained vacant from July 2006 until November 2006.

15. Between July 2006 and November 2006, Senior Human Resources Consultant Stella Deiana, whose responsibilities then included Brockton, Lawrence and Portsmouth, New Hampshire, took on the additional responsibility for filling positions in Springfield, while Respondent sought to fill Birt's position.

16. On October 24, 2006, Respondent posted three openings for the position of UWG in Springfield. (Joint Ex. 6) These were the first UWG positions Deiana had filled since July 2006 and according to her testimony, Moore had already told her to administer the "mct" to all UWG applicants. (Tr. 202) At this time, there were 28 employees working in the UWG position; 27 men and one woman, Nancy Hook. (Ex. C-8, Tr. 40-43)

17. On October 30, 2006, Complainant submitted an application for the position to FOL Dave Bayeur, who reviewed the application with her. (Tr. 26; Ex. C-2)

18. Complainant testified that during a later conversation in the break room, Bayeur told her that UWGs had no "two-man areas," meaning that they go out in the field alone and that she would be better off in the meter shop. (Tr. 25, 27) Complainant thought it possible that Bayeur was referring to the fact that it was more difficult to schedule time off when working in the field than in her current position in the meter shop. (Tr. 27) I credit Complainant's testimony. Bayeur testified that he did not specifically remember discussing the UWG position with Complainant although he often discussed the duties and responsibilities of the UWG with interested applicants. (Tr. 122-127)

19. Bayeur testified that hiring of internal candidates is governed by seniority as determined by the collective bargaining agreement and that he was not involved in

administering the “mct” for applicants for the UWG positions in October 2006. He was also not involved in selecting the persons who were awarded those positions and never discussed the applicants with Stella Deiana. (Tr. 126-127) I credit his testimony and I find that Bayeur had no role in the selection of candidates for the October UWG openings.

20. Deiana testified that the process for filling vacant union positions begins when a manager notifies her of a vacant position. After obtaining approval from Respondent’s upper level managers she prepares the job posting. Once the job is posted, employees submit bid applications within a required period of time. (Tr. 198) Jobs are awarded to qualified candidates on the basis of seniority according the collective bargaining agreement. When all the bids have been submitted, Deiana reviews the applicants’ qualifications, confirms their seniority dates and, if needed, seeks clarification from either the supervisor or the applicants. She then awards the position to the most senior qualified bidder. (Tr. 199) With respect to the October 2006 openings, Deiana prepared and posted the jobs in Springfield. (Tr. 201-202)

21. Five applicants submitted bids for the three positions, including Complainant, Scott Ingram, Russ Ruel, Gary Whalen and Michael Rokosz. Complainant was among the most senior applicants. (Tr. 203) Deiana reviewed the job bid forms and notified the most senior applicants that they would need to take the “mct.” (Stipulated Fact #10)

22. Complainant testified that she told Deiana that previous applicants did not have to take the test and that Deiana was administering the test in a selective manner because Complainant was a woman. Deiana responded that the test was required.

Complainant complained to union representative Dwight, who spoke to Deiana and reported back to Complainant that she had to take the test. (Tr. 28-29)

23. Four of the five applicants were administered the “mct.” The passing score was 70% or 21 out of 30. Complainant answered 16 of 30 questions correctly, a failing score. Gary Whalen and Russ Ruel answered 29 of 30 questions correctly. Scott Ingram answered 28 of 30 questions correctly. Whalen and Ingram were awarded UWG positions on November 27, 2006 and Ruel was awarded the UWG position on December 7, 2006. There was no evidence of impropriety in the administration of the test.

24. After learning that she had failed the test, Complainant again protested to Dwight, who called Moore and proposed that Respondent award Complainant a UWG position contingent on her passing Department of Transportation operator qualifications tests within six months.¹ Dwight and Moore both testified that the federally mandated tests are more comprehensive than the “mct” and Dwight took the position that these tests rendered the “mct” obsolete since they are mandatory for all employees working with live gas, including UWGs. Moore rejected that proposal and told Dwight that the “mct” was required. (Tr. 79-81; 164-165)

25. Complainant did not file a complaint at the time she failed the “mct” because Moore assured her that from that time forward all applicants would be required to take the test and if she took and passed the test for the next posted UWG position she would be awarded the position. (Tr. 46, 65)

¹ Under the collective bargaining agreement, Respondent could remove an employee from a new position for poor performance within the first six months in the new job (Tr. 80-81)

26. On November 20, 2006, Lenice Miley was hired as a human resources consultant to replace Eva Birt and became responsible for filing vacancies in Springfield. (Tr. 208) Miley testified that she received most of her training from Deiana.

27. Miley testified that as instructed, she administered the “mct” to all locate technicians hired from outside the company because they work with live gas. (Tr. 213-214) I credit her testimony.

28. The next UWG opening in Springfield was posted in May 2007. This was the first Utility Worker General vacancy Miley had handled and she followed the same procedure for soliciting internal candidates for an open position as described by Deiana. The four applicants for the position were Michael Rokosz, Felix Diaz, Daniel Heggie and Mark Pariseau. (Stipulated Fact #19) Complainant did not apply for this position because she was bitter and unhappy about her rejection for the previous opening and decided instead to focus on her schooling. (Tr. 52-53)

29. Of the four applicants for the May 2007 posting, Mike Rokosz was the senior applicant. (Tr. 214) Miley testified that upon reviewing Rokosz’s record in Respondent’s PeopleSoft human resources system, she saw that he had been hired by Respondent from outside the company on June 19, 2006 as a locate technician.² (Tr. 103-104)

30. Miley testified that because Rokosz had been hired as a locate technician in 2006, she mistakenly assumed he had been administered the “mct” at the time of his hire and therefore awarded the UWG job to him on May 17, 2007 without giving him the test. I credit her testimony.

² Rokosz had originally applied for the Utility Worker General position in October 2006 but was not given the test or awarded the position at that time because he did not have enough seniority. (Vol. I, 103-104)

31. On May 18, 2007, the day after Rokosz was awarded the position, he told Complainant, with whom he worked in the meter repair shop, that he had not taken the “mct.” On May 21, 2007, Complainant complained to Mark Dwight who told Complainant he would speak to Moore about the matter. (Tr. 83)

32. Dwight testified that when he spoke to Moore on or about May 22, 2006, Moore told him that Rokosz did not have to take the test because he had plenty of field experience. (Tr.83) Dwight told Moore that Complainant was likely to file an MCAD complaint and recommended he discuss the matter with her. (Tr. 84)

33. Moore denied discussing Rokosz’s qualifications with Dwight. Moore testified that Dwight did not even mention Rokosz by name and told Moore only that someone in the Springfield area had been awarded a UWG position without taking the “mct.” However, Moore assumed Dwight was referring to someone who worked in the meter shop with Complainant.³ (Tr.166-168) I credit Moore’s version of the May 22 conversation and find that Moore did not know to whom Dwight was referring in the conversation.

34. After his conversation with Moore, Dwight contacted Director of Operations Pam Bellino and told her that Complainant planned to file a discrimination complaint. (Tr. 86)

35. On the same day, May 22, 2007, Moore sent Miley an e-mail: “I received a call from Mark Dwight. He was calling me about Syretta Johnson.⁴ [sic] She wants to file a discrimination suite [sic] because we did not give the “mct” to the recently awarded position in the meter shop. We have to have the test given.” (Stipulated Exhibit 8)

³ Moore testified that it was not uncommon for him to speak informally with union representatives about employees without mentioning the employees by name in order to protect their identity.

⁴ Moore testified that he was referring to Complainant Syreeta Frazer.

36. Miley testified that because Moore did not mention the position in his email, she believed Moore was referring to a Meter Repair Helper position awarded to Philip Gallagher in January 2007; however, because she had not been giving the “mct” to applicants for meter shop positions she was confused and responded to Moore by e-mail the same day: “When I handled that opening last year I was not aware that I was supposed to give that test. Sorry about that. I have the [Meter Repair Helper] job posted again and I will make sure that we provide the test. Is that just for candidates who are not already operations bargaining unit members?” (Stipulated Exhibit 8)

37. After exchanging emails, Miley and Moore met in order to clear up the confusion and Moore confirmed to her that applicants for the Meter Repair Helper position were not required to take the “mct.” Miley testified that after meeting with Moore, she considered the issue raised in the email resolved. (Tr. 220-223) I credit her testimony.

38. On June 29, Bellino called Miley to inform her that Complainant was considering filing a discrimination complaint because Mike Rokosz was awarded the UWG position without taking the “mct.” Miley testified that this was when she first learned that Rokosz had never taken the test. (Ex. 9; Tr. 215-216) I credit her testimony. After discussing the matter with Bellino and Moore, they agreed Miley would administer the test to Rokosz as soon as possible. Rokosz took and passed the test on July 6, 2007.

39. A UWG position was posted in March 2008, Complainant applied for the position, took and passed the “mct” and was awarded a UWG position in March 2008. She continues to work in the position. (Tr. 52-54)

40. Since May 2007, Respondent has hired eight Utility Worker Generals in Springfield, including seven internal and one external candidate. Each successful candidate, including Complainant, took and passed the “mct.” (Tr. 222, 223)

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on gender. Complainant asserts that Respondent discriminated against her on the basis of her gender by subjecting her to different terms and conditions of employment when it selectively enforced the requirement of a mechanical comprehension test only when Complainant, a female, was in the pool of applicants for the position of Utility Worker General. Absent direct evidence of discrimination, in order to establish a prima facie case of gender discrimination, Complainant must establish that: (1) she is a member of a protected class; (2) she was performing her position in a satisfactory manner; (3) she suffered an adverse employment action; and (4) similarly-situated, qualified persons not of her protected class were not treated in a like manner in circumstances that give rise to an inference of discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Matthews v. Ocean Spray Cranberries, Inc., 326 Mass. 122, 129 (1997).

Complainant offered evidence that both before and after she applied for the position of Utility Worker General, Respondent awarded the position to men who were not required to take the mechanical comprehension test (“mct.”) Further, Complainant offered a comment made by a supervisor in charge of UWGs that she would be better off in the meter shop. She also asserts that the almost total absence of women in the position

of Utility Worker General is further evidence of an atmosphere of gender discrimination within Respondent and in the hiring process.

In October of 2006 Complainant applied for the position of Utility Worker General. Shortly after she filed her application, the supervisor of UWGs told Complainant that she would be better off working in the meter shop. While Complainant was the most senior applicant, she failed a mechanical comprehension test (“mct”) required of the position and was not awarded one of three available positions at the time. The three most senior male applicants who were offered the positions took and passed the “mct.” Complainant produced credible evidence that the test, which was a requirement of the position, was not given to applicants from 2004 until October 2006. However, the fact that the three successful male applicants who applied with her were also required to take the test undercuts her argument that she was targeted as a female and was subjected to disparate treatment with respect to these job openings. Therefore, I conclude that Complainant has failed to establish a prima facie case of gender discrimination because at the time of her application, all candidates were required to take the test, and similarly situated male applicants were not treated differently from her. Moreover, even if the remarks of supervisor Bayeur that Complainant would be better off in the meter shop could be construed as motivated by gender bias, the credible evidence showed that he had no connection to the selection process, which was governed by the collective bargaining agreement and was based solely on seniority and passage of the “mct.”

Complainant points to the fact that when the Utility Worker General position was posted again in May 2007, the most senior applicant for the position, Mike Rokosz, was immediately offered the position without being required to take the “mct.” She argues

that Respondent's disparate treatment of male applicants for the position both before and after she applied is evidence of a discriminatory hiring practice.

Assuming arguendo that Complainant has established a prima facie case of gender discrimination by virtue of the fact that Rokosz was not required to take the examination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000); Wheelock College v. MCAD, 371 Mass. 130, 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986). I conclude that Respondent has successfully demonstrated through credible testimony that the failure to require the test of certain male applicants who were offered positions prior and subsequent to October of 2006 was based on misunderstandings on the part of those employees in human resources who were required to administer the test.

Respondent offered several non-discriminatory reasons for why it failed to administer the "mct" to those male applicants. Jay Moore stated that he learned for the first time in July 2006 that the test had not been given by former human resources consultant Eva Birt for two years, and that this was an error. Subsequent to discovering this, he determined that the test would be given to all applicants henceforth. Respondent contends that at that time, Moore could not have foreseen that Complainant would apply for the position in October 2006, and therefore the decision to re-instate the test could not have been motivated by discriminatory animus. There is no evidence that the decision to re-instate that test was based on any motivation other than the discovery of Birt's failure

to adhere to the requirements of the job posting and the need to comply with safety regulations for employees who deal with live gas.

Respondent's reason for allowing Mike Rokosz to assume the position of Utility Worker General in May 2007 without first administering the test was based on the erroneous assumption of human resources consultant Lenice Miley that Rokosz had taken and passed the test when he was first hired into the company as a locate technician. Since she believed that passing the "mct" was a requirement for external candidates hired into the position of locate technician, this assumption was not altogether unwarranted.

Once Respondent proffers evidence of legitimate, non-discriminatory reasons for its actions, the Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. I conclude that Complainant has failed to produce evidence of pretext. Complainant suggests that Moore's failure to issue a written policy that the test was required of all applicants for the position evidenced pretext. However, Moore testified credibly that it was not necessary to re-state the policy in writing because the test requirement was written in the job posting, and had never ceased to be noted there. Respondent's position is that he needed only to re-iterate to Deiana who was the sole human resources employee working the area at the time, that compliance with the job posting requirements, including making certain the necessary tests were administered, was necessary. Having discovered Birt's failure to administer the test, Moore instructed Deiana to insure that the test was administered to future candidates. I found Moore's explanation credible. Likewise, I conclude that Respondent's explanation for the failure to administer the test to Rokosz is not a pretext for discrimination. As stated above, Miley's erroneous assumption that Rokosz had previously taken the test because her own

practice was to give the test to all external candidates hired as locate technicians may evidence poor communication and training among human resources staff, but it is not evidence of discriminatory animus on the part of human resource staff. Given all of the above, I conclude that Respondent did not violate M.G.L. c. 151B when it required Complainant take and pass the “mct” test as a requirement of the UWG job.

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M.G.L. c. 151B, §5, it is hereby ordered that the complaint in this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 23rd day of March 2010.

JUDITH E. KAPLAN
Hearing Officer