

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and
ELAINA PASCUCCHIO,
Complainants

v.

Docket NO. 10 BEM 02954

SINGLE SOURCE SOLUTIONS
And LEONARD ARABIA,
Respondents

Appearances: Jennifer M. Norris, Esq. for Complainant
Joseph T. Desmond, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 12, 2010, Elaina Pascuccio (“Complainant”) filed charges of employment discrimination with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was sexually harassed at work by Respondent Leonard Arabia and that she was terminated after threatening to file a sexual harassment complaint against him.

A probable cause finding was issued on October 26, 2011. The case was certified to public hearing on May 31, 2013.

A public hearing was held on February 4, 6, and 7; March 3, 4, and 31; and April 28 and 29, 2014. The following witnesses testified at the Public Hearing: Complainant Pascuccio, Janine Boudreau, Respondent Arabia, Dawson Daminelli, Karen Recore, Pamela Pattavina, Robert Lugg, and Kelly Arabia. The parties presented ten (10) joint

exhibits; Complainant presented an additional seven (7) exhibits and Respondents presented an additional eight (8) exhibits.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Elaina Pascuccio works in the health care industry as a medical biller. In 2009, she worked for Single Source Healthcare LLC, a Salem, New Hampshire company owned by Janine Boudreau. Complainant's work consisted of preparing bills for nursing home facilities, including several owned by Respondent Leonard Arabia.
2. Respondent Leonard Arabia is a businessman who owns and operates various nursing home facilities and other business ventures which are located primarily in Massachusetts.
3. In October of 2009, Respondent Arabia joined Janine Boudreau as a business partner in running Single Source Healthcare LLC in Salem, New Hampshire.¹ Arabia loaned Boudreau money to make payroll at Single Source Healthcare, to purchase billing software, and to hire Robert Lugg, an employee with software experience. Arabia reviewed company timesheets. Boudreau described Arabia's status in the company as her "equal" after he provided funds for payroll. Arabia testified that he was not involved in Single Source Healthcare operations and only visited the Salem office on four occasions, but his testimony is not credible.

¹ In 2009 Boudreau fell off the deck at her house and injured her head. As a result of the injury she needed help in conducting her business. She reached out to Respondent Leonard Arabia whom she knew as a business client.

4. In the latter part of October, 2009, Boudreau and Arabia formed a new company, Single Source Solutions Inc., staffed by employees of Single Source Healthcare including Complainant. The company was incorporated by the Massachusetts Secretary of State on October 27, 2009 but the company did not begin operations until January of 2010. Joint Exhibit 8; Complainant's Exhibit 6. Arabia invested his own funds into the company. According to Boudreau, the supervisory staff of Single Source Solutions consisted of herself, Arabia, Lynn Leggerio, and Robert Lugg.
5. Boudreau testified that she and her husband Dawson Daminelli began to see Arabia and his domestic partner on a social basis beginning in the latter part of 2009. They shared meals at their respective homes. Arabia assumed the role of Boudreau's health care proxy and retained this role for approximately one year until September of 2010. In the latter part of 2009, Arabia separated from his domestic partner of twenty-seven years and began to bring a new romantic partner to Boudreau's house.
6. Complainant and Boudreau were inseparable friends. Day 5 at 1:14 and Day 7 at 4:29. Complainant, on numerous occasions, was present at Boudreau's house in 2009 and 2010 during social occasions with Arabia.
7. Complainant testified that beginning in 2009, Arabia began to make vulgar and offensive sexual comments to her at work and on social occasions. The allegations were corroborated by Janine Boudreau, Boudreau's husband, and co-worker/friend Diane Simons. According to Complainant, Arabia described various sexual acts he engaged in, told Complainant that if she wanted her paycheck she should get under her desk and "blow" him, and propositioned her to have sex with him in his office. Complainant states that she responded to Arabia's comments by saying "Shut up,"

“Screw you,” or “You’re a sick bastard.” The harassment was disputed by Karen Recore and Pamela Pattavina, employees of nursing homes owned by Arabia, but their testimony in this regard is unpersuasive. Day 6 at 4:33. I credit that Arabia engaged in some vulgar sexual banter with Complainant in 2009-2010, but I do not credit that it was as severe or pervasive as that described by Complainant, Boudreau, or Daminelli.

8. In late 2009, Complainant went with Arabia to look for office space for Single Source Solutions in Billerica, MA. Complainant went because Boudreau was physically unable to accompany Arabia. Complainant testified that Arabia told employees at a Ford garage next door to the proposed office space that he was opening a strip club with Complainant as the instructor. Complainant states that she was disgusted by his comments and “repulsed” later that night when she went to dinner at a restaurant with Arabia and he wanted her to taste food from his fork. Respondent Arabia denies that he made any comment about a strip club, but I credit Complainant’s testimony over Arabia’s.
9. According to Complainant, on one occasion in 2009, Arabia touched her left breast while attempting to grope or tickle her. Complainant states that she responded by saying, “Get the F... away.” Complainant alleges that this incident was witnessed by Dawson Daminelli. Day 1 at 24:07; Day 2 at 15:20, 45:50, 54:19. Daminelli denies seeing the incident but states that he heard Pascuccio exclaim that Arabia tried to touch her. Day 5 at 23:35, 25:00. Janine Boudreau testified that she was present in the office and heard what happened even though Complainant did not recall seeing Boudreau at work that day. Day 2 at 1:00:00; Day 3 at 2:40:30. Respondent Arabia

denies that the breast-groping incident occurred. I credit that some incident occurred, whether intentional or not, involving Arabia coming into contact with Complainant's breast.

10. Complainant testified that she never joked around or talked to Arabia about sexually-explicit matters, rarely swore at work, told Arabia to stop engaging in sexual conversation around her, and warned him as early as 2009 that she would file sexual harassment charges against him if he didn't stop his sexual harassment. Day 1 at 0:27. I do not credit this testimony. According to nursing home administrator Pamela Pattavina's credible testimony, it was Complainant who constantly used vulgar, sexually-explicit curse words at work and it was Janine Boudreau, rather than Leonard Arabia, who told sexually-graphic stories in the office. Day 2 at 1:07, 1:17; Day 7 at 2:37, 2:46 and 2:49.
11. Complainant testified that she complained about Arabia's behavior to Arabia himself, to Janine Boudreau, to Lynn Leggerio, and to Pamela Pattavina. Day 2 at 1:08. I do not credit Complainant's testimony. Pattavina testified credibly that Complainant never complained to her about sexual harassment, Leggerio did not testify at all, and Boudreau testified unconvincingly about receiving alleged complaints of harassment.
12. Phone records show thirty-seven (37) telephone calls between Respondent Arabia and Complainant in 2009. Joint Exhibit 5; Complainant Exhibit 1. Arabia states that a majority of the calls were so short that they may have been voice mail messages. During the following year, there were one hundred eighteen (118) telephone calls between Arabia and Complainant. Day 1 at 1:16; Joint Exhibit 5. Arabia testified that the conversations dealt with Medicaid bills. I credit Arabia's testimony that the

calls typically involved Medicaid billing questions, but I also credit that some sexual banter may have occurred.

13. Boudreau was seldom at the Single Source Solutions Billerica office in 2010 because of health issues, but she spent time at the Elizabeth Catherine Rest Home in Weymouth where Arabia maintained an office. Complainant drove Boudreau to the Weymouth office approximately four times per month to do billing and handle other matters. Boudreau testified that Arabia often attempted to kiss Complainant and that Complainant told him to “F... off.” I do not credit this testimony.
14. Respondent Arabia delivered Single Source Solutions paychecks to Complainant’s home on two or three occasions because Complainant’s Woburn house was near one of his businesses and because he seldom went to the Single Source Solutions office in Billerica. Complainant testified that on one occasion at her house, Arabia made vulgar sexual statements about her parents. I do not credit this assertion.
15. At some point in mid-2010, Single Source Solutions lost two major accounts: Lutheran Nursing Home and Annemark Nursing Home. According to Arabia, the loss of the Lutheran account was due to Lutheran having to forfeit the recoupment of federal funds and the loss of the Annemark account was due to Boudreau entering into a private business arrangement with Annemark at the expense of Single Source Solutions. As a result of these matters, Arabia, in September of 2010, told Boudreau that he no longer wanted to be in business with her. Arabia thereafter ran the Single Source Solutions business on his own and eventually commenced litigation against Boudreau and her husband.

16. Pamela Pattavina testified that Janine Boudreau once threatened to “get Lenny” [Arabia]. Day 7 at 2:43. I credit Pattavina’s testimony.
17. On Columbus Day weekend of 2010, there was a break-in at the Single Source Solutions office in Billerica. According to Arabia, the office was “cleaned out.” Day 6 at 3:09.
18. Arabia testified that he terminated Complainant because of her close relationship to Boudreau, because Complainant had cleaned out her desk prior to the break-in, because she was the only Single Source Solutions employee not to show up at the Billerica office on the morning after the break-in, and because she did not tell him that Boudreau took the Annemark account away from Single Source Solutions. Day 6 at 2:39:54, 3:16; Day 7 at 0.39. Arabia testified that he was suspicious that Complainant had knowledge of the break-in before it occurred. Day 7 at 0.41. Arabia paid Complainant for uncompensated hours of work owed to her and for her accrued vacation time, but he deducted one month of COBRA payments. Day 6 at 3:19. I credit this testimony.
19. Complainant was the only Single Source Solutions employee who was not permitted to remain with the company after the break-in.
20. According to Arabia, Complainant called him after the break-in and begged to keep her job. Day 6 at 3:14; Day 7 at 0.42. I credit this testimony.
21. After Complainant stopped working for Single Source Solutions, she received compensation from Janine Boudreau for work on the Annemark account. Day 1 at 4:02.

22. In November of 2010, Complainant brought the instant MCAD complaint against Single Source Solutions and Leonard Arabia. Boudreau assisted Complainant in drafting her MCAD documents and accompanied Complainant to the MCAD where she filed her complaint.

23. As of 2013, Complainant's Facebook page has a picture of a scantily-clad woman with the quote: "If a man can't make your panties wet, either through laughing or loving, there's no sense in keeping him around." Day 8 at 1:16.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

Timeliness

In regard to the events alleged to have occurred in 2009, the discrimination complaint is untimely. Complainant filed her action on November 12, 2010, more than three hundred days after she was allegedly first subjected to sexual harassment and long past the time when she had reason to know that the alleged harassment was pervasive and unlikely to resolve. See Cuddyer v. The Stop and Shop Supermarket Company, 434 Mass. 521 (2001) (continuing violation theory not applicable if work situation was pervasively hostile prior to the filing deadline and a reasonable person would have filed sooner).

Complainant alleges that Arabia, throughout 2009, made vulgar and offensive sexual comments to her while she was at work, described various sexual acts he engaged in with another employee whom he was "dating," told Complainant to get under her desk and "blow" him if she wanted her paycheck, propositioned her to have sex with him in his office, jokingly informed individuals working next door to their proposed office space that Single Source was opening a strip club with Complainant as the instructor, and

touched Complainant's left breast while attempting to grope or tickle her. These events, if they occurred, were sufficient to place Complainant on notice that her work situation was severely or pervasively hostile, unlikely to improve, and justified the filing of a discrimination complaint. See Cuddyer, 434 Mass. at 539. Having failed to take timely action in bringing a charge of discrimination, Complainant is now foreclosed from seeking relief for matters which allegedly occurred more than three hundred days prior to the filing of her November 12, 2010 MCAD complaint, to wit: those allegedly occurring before January 16, 2010.²

2010 Hostile Work Environment Claim

In order to establish a "hostile work environment" regarding matters alleged to have occurred on or after January 16, 2010, Complainant must prove by credible evidence that: (1) she was subjected to sexually-demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; and (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment. See MCAD Sexual Harassment in the Workplace Guidelines ("Guidelines"), II. C. (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993); College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987).

Regarding the allegations about Arabia's 2010 behavior, I do not credit testimony that he frequently attempted to kiss Complainant in the office or that he made sexual statements about her parents when he delivered Single Source Solutions paychecks to her

² The untimeliness of Complainant's 2009 claims makes it unnecessary to resolve whether Arabia was Complainant's employer in 2009 but were it necessary to resolve this issue, I would conclude that Respondent Arabia and Janine Boudreau became business partners by October of 2009 and thereafter ran Single Source Healthcare together.

home. Although Arabia may have engaged in some vulgar sexual banter at the workplace in 2010, the evidence is not convincing that he, rather than Janine Boudreau, described various sexual acts that he purportedly engaged in, that he told Complainant she should get under her desk and “blow” him if she wanted her paycheck, and that he propositioned Complainant to have sex in his office. As far as telephone communications are concerned, there is evidence that Arabia spoke to Complainant 118 times in 2010, but it is more likely than not that those calls related primarily to Medicaid billing, albeit with some sexual banter as well.

The fact that sexual banter appears to have been rampant in the workplace requires an assessment of its severity, source, and impact on Complainant. Insofar as its impact on Complainant is concerned, the subjective standard of sexual harassment means that an employee must personally experience the behavior as unwelcome. The standard is a personal one, based on Complainant’s own reaction to the harassing conduct. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as ... “in the eye of the beholder.”); Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

Complainant testified that she never joked at work, did not discuss sexually-explicit matters, and rarely swore. The credible evidence, however, paints a different picture. I credit the testimony of Pamela Pattavina that Complainant used vulgar, sexually-explicit curse words at work and that Complainant’s close friend and boss Janine Boudreau was the person who generated much of the sexual banter in the workplace.

To the extent that Respondent Arabia made off-color remarks, the evidence establishes that Complainant was neither upset nor intimidated by such statements. Complainant responded to Arabia's sexual banter by saying "Shut up," "Screw you," or "You're a sick bastard." Her comfort level with sexual banter is reflected in her 2013 Facebook page which has a picture of a scantily-clad woman with the quote: "If a man can't make your panties wet, either through laughing or loving, there's no sense in keeping him around." Complainant could not have found the workplace intolerable, moreover, since she begged Arabia to retain her as an employee in late 2010.

Based on the foregoing, I conclude that the claim of a hostile work environment was contrived. My conclusion is supported by the credible testimony of Pattavina that Janine Boudreau -- Complainant's inseparable friend -- threatened to "get Lenny" in regard to the dissolution of their business dealings and the fact that Boudreau assisted Complainant with the filing of her complaint and accompanied Complainant to the MCAD.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of direct evidence of a retaliatory motive, the MCAD must follow the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green,

411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655 (2000).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Once a prima facie case is established, the burden shifts to Respondents at the second stage of proof to articulate a legitimate, non-retaliatory reason for their action(s) supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) citing McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). If Respondents succeed in doing so, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the

proffered explanation is not true and that Respondents are covering up a retaliatory motive which is a motivating cause of the adverse employment action. Id.

Turning to whether Complainant has satisfied the elements of a prima facie case, I accept that some protected activity occurred in the form of Complainant voicing negative reactions in response to Arabia's inappropriate behavior. There is credible evidence that Complainant reacted to Arabia's verbal antics by saying, "Shut up," "Screw you," or "You're a sick bastard." There is also credible evidence that Complainant responded to the 2009 breast grope/tickle incident by telling Arabia to, "Get the F... away." These reactions are sufficient to constitute an "informal voicing of complaints." Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997); see also Augborg v. American Drug Stores, 21 MDLR 238, 242 (1999) (where employee complained about discrimination but did not file a formal discrimination charge, there is liability for unlawful retaliation). For purposes of establishing a prima facie case, Complainant's negative reactions were protected activity of which Respondent Arabia was aware.

Following the protected activity, Arabia subjected Complainant to an adverse employment action in October of 2010 when he terminated her employment from Single Source Solutions. The remaining question in evaluating the existence of a prima facie case is whether there was a causal connection between the protected activity and Complainant's termination.

Determining causation requires consideration of all factors related to Complainant's termination. Complainant focuses on her negative reaction to Arabia's boorish behavior but another factor leading to her termination was the break-in at the

Single Source Solutions office in Billerica on or after Columbus Day weekend of 2010 which resulted in the office being “cleaned out.”

I credit the testimony of Arabia that he terminated Complainant based on his belief that she was complicit in the break-in. Arabia testified credibly that he terminated Complainant because of her close relationship to Boudreau, because she cleaned out her desk prior to the break-in suggesting that she had knowledge of the break-in before it occurred, because she was the only Single Source Solutions employee not to show up at the Billerica office on the morning after the break-in, and because she did not tell him that Boudreau took the Annemark account away from Single Source Solutions. Since Arabia was not motivated by retaliatory animus in response to protected activity, Complainant cannot prevail on her retaliation claim. See Mole v University of Massachusetts, 442 Mass. 582, 598-601(2004) (where decision by employer is unrelated to retaliatory motive of a supervisor, the employer’s decision breaks the causal connection between supervisor’s retaliatory animus and the adverse action); Roughneen v. Bennington Floors, Inc., 32 MDLR 197 (2010) (no retaliation on part of employer where employee was not fired for protesting a co-worker’s sexual advances but, rather, for other reasons).

IV. ORDER

The complaint is dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 2nd day of March, 2015.

Betty E. Waxman, Esq.,
Hearing Officer