

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
DAVID FEMINO,

Complainant

v.

DOCKET NO. 08-BEM-02663

PICKERING WHARF HOTEL
MANAGEMENT CO., INC. d/b/a
SALEM WATERFRONT HOTEL &
SUITES, & DAVID JOHNSTONE

Respondent

Appearances: Frank J. Teague, Esq., for Complainant
Thomas K. Eagan, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On September 8, 2008, Complainant David Femino filed a charge of discrimination with this Commission against his former employer, Respondent Salem Waterfront Hotel, and former Hotel banquet captain, David Johnstone. Complainant alleged that he had been subjected to quid pro quo sexual harassment by Johnstone and that after he rejected Johnstone's advances, his employment was terminated on November 15, 2007 resulting from false charges by Johnstone that Complainant was drinking alcohol on the job. Complainant alleged that Johnstone fabricated the false charges because he rejected Johnstone's sexual advances, and refused to

submit to Johnstone's requests for sexual favors. Complainant also alleged that Johnstone subjected him to a sexually hostile work environment.

The Investigating Commissioner found probable cause to credit the allegations of the complaint and attempts at conciliation were not successful. The matter was certified for a hearing and a hearing was held before the undersigned hearing officer on April 3, 2012. The parties filed post hearing briefs in June of 2012. Having reviewed the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant is a 50 year old gay man who resides in Beverly, MA. Complainant was employed part time seasonally at Respondent's hotel in Salem, Massachusetts as a concierge from May 2006 until his termination in November of 2007. Complainant testified that he has received Social Security Disability income since 1996 for a chronic gastro-intestinal disorder, panic and anxiety disorder and post-traumatic stress resulting from a burst appendix during surgery when he was 19 years old. According to Complainant he is unable to work full-time because he is disabled.

2. Respondent, Pickering Wharf Hotel Management, Co., Inc. is a Massachusetts corporation which operates a hotel doing business as Salem Waterfront Hotel and Suites at 225 Derby Street in Salem, Massachusetts.

3. Respondent, David Johnstone, is a 47 year old gay man who resides in Lynn, MA. In 2007 and 2008 Johnstone was employed by Respondent in a supervisory role as a banquet captain at the Salem Waterfront Hotel.

4. Throughout his employment, Complainant worked as the front desk concierge for approximately 20 to 35 hours per week. Complainant worked more hours and more days during the busy tourist season from July through the end of October. During the winter season from mid-December through March of 2007, Complainant was temporarily laid off. Complainant began working again in April of 2007 when the tourist season picked up and stated that was when he first met Johnstone who was the new banquet captain.

5. Complainant occasionally filled in as a waiter for hotel functions such as banquets and weddings if the hotel was short on wait staff. He testified that he worked approximately twelve times as a banquet waiter. On the handful of occasions after April of 2007, when he worked as a banquet waiter, he worked under the direction of Johnstone, who oversaw the banquet staff. Johnstone was not Complainant's supervisor in his primary job at the Hotel as front-desk concierge. Complainant's performance evaluation in 2007 was conducted by Valerie Drapeau, who was then the Hotel's General Manager and Complainant's immediate supervisor. He received a very positive evaluation.

6. Complainant testified that beginning in April of 2007, Johnstone began persistently subjecting him to sexual remarks, including calling him a stud and sexy, requests for dates, sexual propositions, inappropriate touching and attempted bribes with prescription narcotics such as oxycontin in return for sexual favors. Complainant stated that Johnstone would follow him outside for a cigarette and that he would leave when Johnstone did this. He stated that he was offended and humiliated by such overtures and that the experience was degrading to him and upsetting and uncomfortable. He stated the environment was "toxic" and he was constantly looking over his shoulder to avoid Johnstone. I do not credit much of Complainant's testimony. I found his testimony to be exaggerated, unconvincing, and rehearsed.

7. Johnstone denied making any sexual overtures to Complainant and stated that they were friendly, discussed the fact that they were both gay and that Johnstone was going through a break-up. Johnstone stated that they occasionally took cigarette breaks together off of hotel property and discussed their personal lives. I credit Johnstone's testimony that he and Complainant became friendly, that they discussed their love lives and sexual matters, and that they basically enjoyed each other's company and sharing their experiences as gay men. Johnstone also stated that they discussed their health problems and the pain medications Johnstone had been prescribed for degenerative disc disease such as percocet and oxycontin. Johnstone also suffered from and was treated for colon cancer while working for Respondent. He denied ever offering narcotics or medications to Complainant. Johnstone's testimony was straightforward and responsive and I found him to be largely a credible witness.

8. Complainant testified that sometime in the fall of 2007, Johnstone called him at home, said he was in the area and asked if he could come over and smoke a joint with Complainant. Complainant testified that he invited Johnstone to come to his home even though he was apprehensive about doing so. He claimed that he invited Johnstone to his home so he could discuss how uncomfortable Johnstone's behavior made him and to ask him to stop making sexual overtures. He stated that they smoked a joint and Johnstone put his hand on Complainant's thigh whereupon he asked Johnstone to leave. Johnstone admitted that he phoned Complainant because he was in the area and asked if he could stop over and bring some coffee. He stated that he did so as a friendly gesture because he and Complainant had talked about getting together for coffee. He denied making sexual advances to Complainant. I credit his testimony that he did not make unwelcome sexual advances to Complainant.

9. Complainant never reported to anyone in management, including his immediate supervisor, Valerie Drapeau, the alleged inappropriate conduct by Johnstone which he claims created a hostile, degrading and humiliating work environment for him. Complainant's assertion that he did not lodge a complaint against Johnstone because he feared for his job is not credible. Johnstone was not Complainant's supervisor and according to Complainant he was on good terms with his supervisor, Valerie Drapeau. He stated that he did not want to lose the opportunity to work occasionally as a banquet waiter because he needed the money and did not want to make an issue of his sexuality. I believe that if Complainant were as upset by Johnstone's alleged behavior as he claimed to be, he would have discussed the issue with his supervisor.

10. On November 10, 2007, after working an afternoon shift as the concierge, Complainant agreed, at Johnstone's request, to work as a banquet waiter that evening because the hotel was short-handed on wait staff. Johnstone was the banquet captain supervisor that evening. Between the cocktail and dinner hour, Johnstone saw Complainant coming from the Regatta Pub kitchen with a drink that he suspected contained alcohol because of its color. He stated that Complainant had been tired earlier and not eager to work the banquet, but at the time, seemed more enthusiastic and in a better mood, like he'd had a boost. This also led him to suspect that Complainant might be drinking alcohol. Consumption of alcohol by employees on the Hotel premises is strictly forbidden and prohibited by the employee handbook. According to Complainant, there were management concerns that some bartenders or banquet wait-staff were consuming alcohol while on the job. Complainant claimed that his drink was watered down cranberry juice and that he does not drink alcohol because of his stomach disorder. While Complainant was taking a cigarette break, Johnstone tasted the drink and asked another waiter to

taste it and they both believed it to contain vodka. Johnstone claimed that when he confronted Complainant about the drink and asked who was pouring for him, Complainant denied there was alcohol in the drink and threw it in a trash barrel. When Johnstone pressed Complainant, telling him that he and another waiter had tasted the drink, Complainant said something to the effect of "it was just one." Both Complainant and Johnstone testified that Complainant then threw the drink away. Complainant claimed that Johnstone asked him to taste the drink and he refused and threw it away because he did not know whose drink it was because there were some dozen drinks on the shelf. Johnstone accused Complainant of having lied to him about drinking and told Complainant this was a problem and he'd have to decide what to do about it. I credit Johnstone's testimony that he believed Complainant was drinking and lied to him about it. Johnstone spoke to his supervisor about the incident later that night or the next day and was asked to prepare a statement about the incident. He did not speak to Complainant again and did not participate in the decision to terminate Complainant's employment.

11. The following Thursday, November 15, 2007, when Complainant reported to work he was asked to meet with the Hotel's new General Manager, John Bercume, the rooms manager, Jonathan Arruda and departing General Manager, Valerie Drapeau. Complainant was presented with a written statement by Johnstone dated November 10, 2007 claiming that he had confronted Complainant with drinking on duty and that Complainant first denied but then admitted it. (Ex. 6) After being shown the statement Complainant was notified by newly hired manager John Bercume that his employment was terminated for violation of the Hotel's written policy regarding drinking alcohol while on the job. While Complainant was permitted to refute the allegations in writing, the decision to terminate his employment had been made and he was

escorted off the premises by Arruda. Johnstone was not present at this meeting and it appears that Respondent conducted no further investigation of the incident.

12. At the hearing Complainant accused a number of hotel employees by name of drinking alcohol and using illegal drugs on the hotel premises. He claimed that Johnstone sold marijuana at work. After Complainant was terminated, he left several harassing voice mail messages on Johnstone's cell phone and Johnstone's sister's home telephone saying he could not believe Johnstone had turned him in for drinking and referring to Johnstone and his sister in some very unflattering and abusive terms. Johnstone's sister was so frightened and upset that he contacted the Hotels's owner and general manager who advised him to contact the police. He reported the incidents to the police and believes they spoke to Complainant at his home. Thereafter the phone calls ceased. Complainant never complained about abusive behavior to Johnstone and never accused him of sexual harassment before he was terminated, nor did he suggest to Johnstone that his behavior was offensive or unwelcome. Complainant never reported to Respondent's management that Johnstone had sexually harassed him. Respondent's first notice of the allegations was a letter from Complainant's attorney subsequent to his termination.

13. Johnstone testified that he has been in the restaurant business since he was twelve year old when he started as a dishwasher. Prior to being hired as the banquet captain at Respondent, he was a cook for twenty years and a waiter and manager in various restaurants. He stated that the impropriety of sexual harassment on the job has been drilled into him his entire career since he was seventeen years old and he has been trained to treat co-workers and subordinates with respect. He denied making sexual overtures to Complainant and stated he has never before been accused of sexual harassment. I largely credit this testimony.

14. Complainant testified that subsequent to being terminated from Respondent he has applied for some 300 jobs but has not received one job interview. I do not find this assertion to be credible.

15. Thomas M. Rockett, one of the owners of Respondent Hotel testified that his information from Hotel managers was that Johnstone was a great and loyal employee who battled through a difficult illness and worked hard. He also testified that Complainant was a good concierge and was good with the Hotel customers. He stated that when he was told about the allegation that Complainant had been drinking while on duty, he made the decision that Complainant should be fired for violation of company policy and directed his managers to do so. He testified that he has terminated other employees for drinking on duty pursuant to the Hotel's strict policy forbidding such conduct. Subsequent to Complainant's termination Rockett was present when Johnstone came to seek advice about Complainant's harassing phone messages and stated that Johnstone was so upset that he was shaking.

III. CONCLUSIONS OF LAW

General Laws c. 151B s. 4(16A) makes it unlawful for any employer personally or through its agents to sexually harass any employee. Complainant has alleged quid pro quo sexual harassment and hostile work environment sexual harassment by Respondents.¹ His claims are against his former employer and David Johnstone individually. Complainant asserts that the Respondent Hotel is vicariously liable for alleged sexual misconduct by Johnstone because Complainant worked under Johnstone's direction on a handful of occasions when

¹ G.L. c. 151B s. 1(18) defines sexual harassment as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, request or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment."

Complainant filled in as a banquet waiter. *See College-Town Div. of Interco Inc. v. MCAD*, 400 Mass. 156 (1987) Unlawful sexual harassment is not limited to conduct between males and females and may occur between individuals of the same gender. *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 290 (1993).

In order to prove a claim of sexual harassment the Complainant must show that he was subjected to unwelcome sexual advances or overtures or to persistent and unwelcome conduct of a sexual nature that created a hostile work environment. Complainant must show that as a result of rejecting sexual advances, he suffered an adverse employment action or that the conduct complained of created a sexually hostile work environment. He must also demonstrate that Respondents were aware of the unlawful conduct or can be deemed to have had constructive knowledge and failed to take steps to remedy the situation.

Complainant alleges that Johnstone subjected him to persistent and continuous sexual comments, overtures, overt propositions and touching from the time he first met him in April of 2007. He claims that they interacted frequently at work and that he tried to avoid Johnstone, but Johnstone would follow him outside to have a cigarette break. He alleged that Johnstone's inappropriate conduct occurred when no other employees were present or could overhear their discussions. I do not credit Complainant's testimony that he was the victim of persistent unwelcome sexual advances or overtures by Johnstone. I found his testimony about Johnstone's alleged overtures to be unconvincing. I am also not persuaded that he chose not to mention the alleged offensive conduct to his supervisor or anyone else at the hotel because he feared for his job or did not want to make an issue of his sexuality. Rather, I believe that he and Johnstone struck up a friendship, frequently took cigarette breaks off the premises together and shared some of their personal life experiences as gay men and discussed their past and current

relationships. I also believe that they discussed sexual matters and health issues and medications that Johnstone was taking. Johnstone denied that he made unwelcome sexual overtures and advances to Complainant and I credit his testimony.

While I am not persuaded that Johnstone engaged in the conduct alleged by Complainant, even if Johnstone had subjected Complainant to inappropriate sexual comments or advances, or explored the possibility of a sexual relationship with him, I remain unconvinced that Complainant was humiliated, intimidated or fearful of Johnstone. Had he been as apprehensive of Johnstone's alleged advances as he claimed, I do not believe he would have allowed Johnstone to come to his home. Moreover, there is no evidence that Complainant was unable to perform his job as front desk concierge and management confirmed that he performed that job ably. I conclude that Complainant was not subjected to a hostile work environment.

Moreover, since Complainant's job at the hotel was as concierge and Johnstone was not his supervisor, Complainant had an obligation to report any unwelcome and offensive behavior to someone in management. Complainant never informed anyone in management, including his immediate supervisor, Drapeau of any offensive or unwelcome sexual conduct by Johnstone. Complainant admitted that there were no witnesses to any such offensive conduct even though he testified that it occurred frequently. Complainant worked under Johnstone's direction on fewer than a handful of occasions. I conclude that the Hotel management had no knowledge of Complainant's allegations and that the circumstances are insufficient to render Johnstone Complainant's supervisor or manager for purposes of vicarious liability.

Finally, as to the circumstances leading to Complainant's termination, I remain unconvinced that Johnstone was motivated by discriminatory animus because Complainant rejected sexual advances by him. I credit Johnstone's testimony that he genuinely believed

Complainant to be drinking while on duty on the night in question in violation of Hotel policy, and that Complainant lied to him when first confronted. He was angry that Complainant lied to him. I also conclude that he was concerned about his own job and the danger of sanctioning behavior that violated the Hotel's policy. This is particularly true where there was a witness to the incident who might otherwise have reported it to management. I believe this concern largely motivated his decision to notify management. Once management directed him to write a statement about the incident, he had no further involvement in the decision to terminate Complainant's employment.

The evidence is that the Hotel's owner directed his managers to terminate Complainant's employment upon learning of the incident. He learned of the incident at the going away party for out-going General Manager, Drapeau. It is unclear whether the managers involved, who no longer work for Respondent and who did not testify at the hearing, made any independent inquiry or investigation of Johnstone's allegations prior to notifying the owner.² While it can be argued that Hotel management had an obligation to independently verify and investigate the events in question, that issue is separate and apart from whether the termination was occasioned by discriminatory motive. I conclude that there was no discriminatory animus behind the decision to terminate Complainant's employment.³

Given all of the above, I conclude that Complainant was not subjected to sexual harassment in violation of G.L. c.151B and that his termination was not the result of quid pro quo sexual harassment.

² Management of the Hotel was clearly in transition at the time, as one General Manager was leaving and a new General Manager had just commenced his employment.

³ Where the decision maker relied on Johnstone's report of the incident, the employer might be liable for unlawful termination if Johnstone was found to be biased, particularly where the employer appears to not have independently investigated the allegations. However, since I concluded that Johnstone did not act with discriminatory animus, this theory of liability does not apply.

IV. ORDER

For the reasons stated above, the complaint is dismissed. This decision represents the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, 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 to 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 28th day of December, 2012.

Eugenia M. Guastaferrri
Hearing Officer