

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & PATRICK FONG,
Complainants

v.

DOCKET NO. 10-BEM-00297

BANK OF AMERICA,
Respondent

Appearances:

Kevin G. Powers, Esq. for Patrick Fong
Alice Kokodis, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 2, 2010, Patrick Fong, a black man of Haitian national origin, filed a complaint with this Commission charging Respondent with terminating his employment on the basis of his race and national origin. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the claim failed and the case was certified for public hearing. A public hearing was held before me on November 7 & 8, 2013. After careful consideration of the record 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. Complainant Patrick Fong is a black man of Haitian national origin who immigrated to the United States in 2000 and is a United States citizen. Complainant received post-secondary school degrees in Haiti and the United States. Complainant began working as a part-time teller at Respondent's Hingham banking center on November 22, 2004. (Tr. I, 19-20, 79, 131)

2. Respondent Bank of America is headquartered in Charlotte, N.C. and operates numerous bank branches throughout Massachusetts.

3. Respondent maintains an in-house centralized employee relations function called "advice and counsel," which is located in Charlotte, N.C. Any employee can contact this in house operation by phone for advice and counsel on a variety of matters, including to report discrimination or to seek advice regarding issues with other bank employees. The advisor retains notes of his or her conversations with employees. (Tr. I; 212-13)

4. On September 1, 2006 Complainant was promoted to the full-time position of sales and service specialist at Respondent's South Weymouth banking center where he reported to the branch manager. (Tr. I; 20, 81)

5. On November 1, 2007, Complainant was promoted to the position of teller operations specialist ("TOS"). (Tr. I, 22, and 87) In this position, he was responsible for banking center operations and oversight of tellers. In the summer of 2008, the banking center manager was replaced and during this time, the South Weymouth banking center failed at least one audit (Tr. I, 88)

6. On August 26, 2008, Complainant received a written warning for failing to meet operational/compliance procedures. (Tr. I, 89; Ex. R-2) One of the deficiencies contained in the written warning was Complainant's failure to accurately maintain the logs for the bank's vault.

(Tr. I, 89; Ex. R-2) Complainant's then supervisor reported to the "advice and counsel" service that Complainant had a strong personality and was resistant to coaching and she was advised to replace him with a more experienced TOS and transfer him to a smaller banking center. (Ex. R-8)

7. In September 2008, Complainant was transferred from South Weymouth to Hingham banking center which was a smaller branch. (Tr. I, 27, 31,157; Tr. II, 7, 10, 218, Ex. R-8)

8. At the time of Complainant's transfer to Hingham, the manager of the banking center was an African-American woman whose employment was terminated approximately one month after Complainant's transfer. (Tr. I, 31, 92-95)

9. In December 2008, Brian Peak, a Caucasian man, became the manager of the Hingham banking center. (Tr. I, 33) Peak reported to Consumer Market Manager Lisa Tracey, who is white. Tracey reported to Consumer Market Executive Richard Driscoll. (Tr. I, 155, 156)

10. At the time of Peak's arrival, Complainant and a female African American sales and service specialist were employed at the site, in addition to three other associates. (Tr. I, 31, 86, 92) Peak testified that he was aware that Complainant had been transferred from Weymouth to Hingham for performance-related issues. (Tr. I, 157)

11. By January 2009, the assistant banking center manager at Hingham had resigned and his position was not filled, requiring Complainant to assume additional responsibilities. (Tr.I, p. 94-5)

12. Complainant testified that Peak treated him differently from the other associates by not having one-on-one meetings with him. (Tr. II, 122) Peak denied that he treated Complainant differently and testified credibly that he had one-on-one meetings with Complainant and the other employees at least once monthly. (Tr. I, 161)

13. Complainant also testified that Peak treated him in a discriminatory manner by speaking to him across the teller station or from a distance and by requiring Complainant to serve African-American customers while Peak served white customers. (Tr. I, 123) Peak disputed these allegations and I credit his testimony over Complainant's.

14. Peak never made any racially derogatory remarks to Complainant and Complainant acknowledged that the black female employee was treated well by Peak. (Tr. I, 122, 124)

15. In around January 2009, Complainant submitted a vacation request to Peak seeking three weeks off, including the week of April 4-14, 2009. Peak denied Complainant's request for vacation for the week of April 4-14 due to "operational needs." Peak testified credibly that he had previously requested and been approved for that week off and, as co-leader of the Hingham banking center, Complainant could not take vacation at the same time as Peak. (Tr. I, 41, 154, 179)

16. Complainant testified that in March 2009, a bank customer told him to call her if he was ever interested in employment elsewhere, but did not offer him a job or mention a salary. Complainant could not remember the customer's name, her place of employment or whether she was a regular customer. (Tr. I, 30-31, 104-106) Complainant testified that Peak overheard his conversation with the customer and mistakenly believed that Complainant had been offered another job, when he had not.

17. I do not credit Complainant's testimony regarding the conversation with said customer. His testimony with regard to the purported conversation was contradictory, evasive and vague. In addition, Complainant's testimony contradicted his written rebuttal to Respondent's position statement, wherein he claimed to have told Peak that a customer offered

him a position paying \$6,000 more than his position at Respondent. (Ex. R-5) Complainant's testimony is also in contradiction to Peak's credible testimony regarding this matter.

18. Peak testified that sometime in March 2009, Complainant told him directly that he was resigning because he had been offered a position with a competitor at \$5,000 to \$6,000 more than his salary at Respondent and if Peak wished him to stay, Respondent would have to increase his salary by \$5,000 or \$6,000. He told Peak that he would continue to work at Respondent until the end of April 2009. (Tr. I, 160, 163)

19. Peak testified that he repeatedly asked Complainant to submit a formal letter of resignation, but that Complainant did not do so. (Tr. I, 160) I credit his testimony.

20. Tracey testified credibly that Peak called her to report that Complainant had resigned. Tracey stated that, in mid-March 2009, while visiting the Hingham branch, she had a discussion with Complainant in the back conference room, during which Complainant told her that he wanted a \$5,000 pay increase was going to work for a competitor. Tracey accepted Complainant's four week notice and then posted Complainant's job.

21. Peak testified that sometime in April 2009, an employee informed him that she had witnessed Complainant forging Peak's initials on the vault log on March 25, 2009. Complainant testified that that Peak gave him permission to do so on another occasion; however, he denied forging Peak's initials on March 25, 2009. I do not credit Complainant's testimony. Peak denied that he ever gave Complainant the authority to use his initials.¹ I credit Peak's testimony.

22. Peak testified that after learning of the forgery, he made a copy of the log with the forged initials and asked Complainant why he had forged his initials. Complainant told Peak that he was concerned about failing another audit and wanted to make sure the log was in

¹ Peak was on vacation in early April, 2009, but did not remember the exact dates he was off.

compliance. Peak told Complainant forging his initials was unacceptable and that he would get back to him about it. (Tr. I, 169-170) I credit Peak's testimony.

23. Complainant testified that on or about April 9, 2009, he saw a job opening for the position of assistant manager at the Weymouth Banking Center and applied for the position online. (Tr. I, 45) Complainant testified that on April 10, 2009, while Peak was on vacation, he spoke to Tracey about the assistant manager position and she was supportive of his interest in the position. (Tr. I, 46) I do not credit his testimony that Tracey was supportive of his applying for an assistant manager position.

24. According to Tracey, in early April, 2009, she and Complainant met again and he told her that he had changed his mind about resigning and that he wished to remain at the bank and apply for an assistant manager position at a different branch. Tracy was surprised and told Complainant that she would have to speak with her supervisor and Peak about the matter. I credit her testimony.

25. Tracey testified that she told Complainant that she did not feel comfortable offering him the position of assistant manager since he had just resigned from the TOS position, calling into question his commitment to the bank. (Tr. II, 15; I, 49) In addition, Tracey was not convinced that Complainant was qualified for the assistant manager position. (Tr. I, 121) I credit her testimony.

26. Subsequent to her discussion with Complainant, Tracey learned from Peak that Complainant had forged Peak's initials on a log for a vault that required two sets of initials. (Tr. I, 84)

27. On April 17, 2009, Tracey and Peak together called Respondent's "advice and counsel" service for guidance on how to proceed with the matter. They informed the

representative of the “advice and counsel” service that Complainant had resigned, but sought to rescind his resignation and remain at the bank and apply for a different position. Also, they also reported that Complainant had forged Peak’s initials on the vault log. (Tr. II, 16-20)

28. Tracey testified that she and Peak were advised that the bank’s legal department would be contacted about the forgery, but that meanwhile she could continue to reject Complainant’s attempt to rescind his resignation and could choose to “accelerate” his resignation and pay him through the end of the month. (Tr. II, 19)

29. On Monday, April 27, 2009, when Complainant arrived at work, Peak asked him to come to the back room, and in the presence of another bank manager, Peak told Complainant that the marketing team had decided to terminate his employment because he had notified Respondent of another job offer and stated he would resign to accept that offer if not given a raise, which Respondent considered a resignation. Complainant argued that he had never followed up on the job offer, but Peak apologized, stating that the marketing team considered him to have resigned his employment. According to Complainant, they did not mention the forgery of initials. I credit his testimony. (Tr. I, p. 52-3)

30. Tracey testified that after Complainant’s separation, the TOS position was first offered to the African-American sales person in Hingham. She declined the offer because she lived some 45 minutes away and she was promoted instead to a TOS position in the Brockton office, closer to her home. Respondent then hired a Caucasian woman who had worked for Respondent for 20 years into the TOS position in Hingham. I credit Tracey’s testimony.

31. Complainant’s personnel file contained no documents relative to his separation, including any document stating he had resigned or been terminated. Respondent could not explain the absence of such documents.

III. CONCLUSIONS OF LAW

M.G.L.c.151B §4(1) prohibits discrimination in employment on the basis of race, color and national origin. Complainant alleges that Respondent discriminated against him based on his race, color and national origin by subjecting him to disparate treatment and terminating his employment. In order to establish a prima facie case of race, color and national origin discrimination, Complainant must show that he was a member of a protected class, that he was qualified for and adequately performing his job and that he was subjected to adverse treatment different from similarly situated employees not in his protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976).

Complainant has established that he was a member of a protected class by virtue of his Haitian national origin and his race and color, black. He has also established that he was qualified and was adequately performing his job.² Complainant has failed to persuade me that he was subjected to disparate terms and conditions of employment. I did not credit Complainant's assertions that his manager Brian Peak treated him differently from other employees. Moreover, there was no evidence that Peak's denying Complainant a week's vacation was due to discriminatory animus.

Complainant contends that he was offered another job, but never resigned from Respondent, and yet was terminated by Respondent for having resigned. I conclude that Respondent subjected Complainant to an adverse action when it terminated his employment regardless of whether it was a termination, as Complainant contends, or a refusal to allow him to rescind his resignation, as Respondent asserts. Finally, Complainant was replaced by a white

² Respondent stipulated that Complainant was not terminated for performance-related matters and stated that its position has always been that Complainant resigned his position. (Tr. I, 210-11)

woman. Therefore, I conclude that Complainant has established a prima facie case of unlawful discrimination.

Once Complainant has established a prima facie of discrimination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its actions. Abramian, supra, at 116; Wheelock College, supra, at 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) Respondent's articulated reasons for accelerating Complainant's resignation were that Complainant announced that he had been offered a better paying job at another bank and was resigning effective at the end of April 2009, sought a \$5000 raise in lieu of resignation, and then attempted to rescind his resignation and apply for a promotion at another branch of Respondent. Respondent's manager Tracey testified credibly that Complainant's attempt to rescind his resignation and remain with the bank, after Respondent essentially called his bluff by not offering him a raise, caused her to question Complainant's loyalty and commitment to the bank. Moreover, she did not believe he was qualified for the assistant manager position that he sought. I conclude that Respondent has met its burden of articulating legitimate, non-discriminatory reasons for its actions.

Once Respondent has articulated a legitimate, non-discriminatory reason, Complainant must prove that Respondent's reasons are a pretext for unlawful discrimination. A fact finder may, but need not, draw the inference that an employer is covering up a discriminatory intent, motive or state of mind if one or more of the reasons identified by the employer is false. Lipchitz v. Raytheon Company, 434 Mass. 493, 498, 507 (2001). The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making,

but need only prove that “discriminatory animus was a material and important ingredient in the decision making calculus.” Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

Complainant argues that Respondent’s inability to produce documentation relative to Complainant’s separation from his employment is evidence of pretext. I do not concur. While the lack of documentation regarding Complainant’s separation from Respondent is puzzling, there is no evidence that the termination decision or process was motivated by discriminatory animus or intended to cover up discrimination. I find that Respondent articulated a reasonable belief that Complainant’s resignation, request for more money in lieu of resignation, and subsequent attempt to rescind his resignation were troubling to Respondent and led Complainant’s superiors to question his loyalty and commitment to the bank, and that these concerns justified Respondent’s “acceleration” of Complainant’s resignation.

In addition to the above, Complainant’s vague and contradictory testimony regarding the purported job offer lead me to draw the inference that he fabricated the story about accepting a better paying banking job elsewhere in the hope that Respondent would offer him a raise to entice him remain at the bank. However, when Respondent did not offer him a raise, Complainant retracted or altered his story. Perhaps seeing through this subterfuge, Respondent justifiably refused to allow Complainant to rescind his resignation.

Even if Complainant’s separation from Respondent were deemed an outright termination, there is insufficient credible evidence to support a conclusion that the reasons Respondent articulated for its actions were not the real reasons for the termination, or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz, supra, at

503 (2001). I therefore conclude that Respondent did not engage in unlawful discrimination in violation of G.L. c. 151B and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. 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 25th day of June, 2014.

JUDITH E. KAPLAN,
Hearing Officer