COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and MELISSA VERNE
Complainants

Docket Nos. 08-SEM-01954

v.

PELICAN PRODUCTS, INC.[1]
Respondent

Appearances: Harold I. Resnic, Esq. for Complainant
Mary J. Kennedy, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 2, 2008, Complainant Melissa Verne filed a charge of discrimination in employment against Respondent Pelican Products, Inc. based on national origin (Puerto Rican).[2] Complainant allegeg that she was treated differently than non-Puerto Rican employees when she received a May 19, 2008 "final" written warning for sending personal e-mails at work and that she was subjected to hostile racial comments.[3] A

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[1] On January 26, 2012, the Commission substituted Pelican Products, Inc. for Hardigg Industries based on Hardigg selling its assets to Pelican in January of 2009.

[2] Complainant was born in New York to Puerto Rican parents . Her claim, therefore, will be treated as discrimination based on ancestry (Hispanic).

[3] An amended complaint was allowed by the MCAD on November 4, 2014 but, pursuant to a motion in limine, the retaliation claim set forth in the amended complaint was dismissed by this hearing officer on the basis that they were filed more than 300 days after Complainant's termination and, hence, untimely. See G.L. c. 151B, section 5. Complainant argues that the three-hundred day requirement was tolled as a result of an internal grievance proceeding and/or a voluntary mediation process pursuant to 804 CMR section 1.10 (2) but no such grievance or mediation process ever took place. Accordingly, Complainant's April 9, 2010 disciplinary warning and her August 23, 2010 termination are excluded because they pertain to a retaliation claim that is untimely and separate from her original claim. See Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995) (characterizing retaliation as a separate claim from hostile work environment discrimination). Allegations of disparate treatment and harassment set forth in the amended complaint, on the other hand, will be considered under a continuing violation theory. See Cuddyer v. Stop and Shop Supermarket Co., 434 Mass. 521, 539 (2001) (addressing continuing violations)

probable cause finding was issued on January 26, 2012. The case was certified to public hearing on January 5, 2015.

A public hearing was held on December 15 and 17, 2015 and on February 11, 2016. The parties submitted nine (9) joint exhibits. Complainant submitted four (4) additional exhibits and Respondent submitted twenty-five (25) additional exhibits. The following individuals testified: Complainant, Karen Katsanos, Dale Lannon, Michael Otto, Sara Cahillane, and Erik Lagoy.

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 Melissa Verne was born in the United States to Puerto Rican parents. On or about December 18, 2006, she was hired by Respondent's predecessor company, Hardigg Industries, as an inventory control analyst in its South Deerfield, MA facility. She was promoted to a materials analyst position and subsequently to materials supervisor of inventory control. As a materials supervisor, Complainant supervised between fifteen and eighteen employees.
2. Respondent Pelican Products Inc. purchased Hardigg's assets in 2009. It manufactures injection molded plastic containers.
3. Complainant began to report to Michael Otto in May of 2007. Otto became Respondent's Operations Manager in 2008. He described Complainant's performance up to May of 2008 as good and testified that she was a hard worker and passionate about her job. Otto testified that he sometimes spoke to Complainant in Spanish

because he wanted to learn the language. At the time, he did not know that Complainant didn't like his speaking to her in Spanish.

4. In 2008, Karen Katsanos was Respondent's Human Resources ("HR") Director. According to Katsansos, there was no company rule against speaking Spanish at work although some employees sought to implement such a rule. I credit her testimony.

5. Complainant testified that while she was at a conference in Indiana in 2007 or 2008, she was asked by purchasing manager Dale Lannon if her jacket was decorated with a Puerto Rican gang logo. Complainant's MCAD charge of discrimination states that Lannon asked if the jacket had a gang (not a Puerto Rican gang) sign. Lannon acknowledged making a joking comment about a clothing logo that Complainant was wearing in the summer of 2007. According to Lannon, she commented that the logo reminded her of the "pink ladies" logo in the movie Grease. Lannon testified that Complainant responded by laughing and did not appear offended. Lannon testified credibly that she and Complainant were friends, that she had loaned Complainant camping equipment, and that Complainant asked her for an employment reference after she left the company. I credit Lannon's version of their conversation over Complainant's.

6. On May 14, 2008, HR Director Katsanos and Operations Manager Otto met with Complainant in response to a charge by another employee (C.U.) that Complainant had sent sexually-explicit e-mails to co-workers, including some of her direct reports, over a three-month period. Katsanos located the e-mails which included a large volume of inappropriate communications consisting of naked bodies and sexual jokes. Respondent's Exhibit 2 & 7. Complainant admitted that she sent the e-mails but said

that other employees, whom she refused to identify, also sent out sexually-explicit e-mails. Complainant asserted that she was being unfairly singled out.

7. On May 19, 2008, Complainant received a final written warning for circulating inappropriate e-mails at work. Respondent's Exhibit 3.

8. HR Director Katsanos researched Complainant's allegation of disparate treatment by determining who had corresponded with Complainant during the relevant time frame. Katsanos learned that a white, male supervisor (M.W.) had, in the previous three months, sent three inappropriate e-mails and that a white, female non-supervisor (K.T.) had sent out numerous inappropriate e-mails Both of these employees received non-final written warnings on the basis that the white male supervisor only sent out three e-mails that were less sexually-explicit than Complainant's and the white female employee, who sent out numerous e-mails, was not a supervisor. Joint Exhibit 1; Respondent's Exhibit 6, 11.

9. On or around the same time that Complainant was disciplined for sending sexually-explicit e-mails, Complainant requested and was allowed to return to her former position as a materials analyst. Joint Exhibit 1; Respondent's Exhibit 6. She was replaced as materials supervisor on an interim basis by white, male employee Erik Lagoy. Joint Exhibit 3.

10. Following her discipline, Complainant expressed a desire to report to a new manager rather than continue to report to Mike Otto. Respondent's Exhibit 9. On or around June 12, 2008, Complainant spoke to Company President Bill Hamer about reporting to someone other than Otto so she would not have to work with employees C.U. and "Shannon." Joint Exhibit 4; Respondent's Exhibit 9. Her request was denied.

11. On or around July 9, 2008, Lagoy was given a permanent appointment to the materials supervisor position vacated by Complainant. Respondent's Exhibit 18.

12. Complainant received an annual performance rating of 258 out of a total possible score of 300 for the period of January-December of 2008. Joint Exhibit 9. Her rating resulted in a salary increase of 3.80%. Id.

13. In March of 2009, Respondent gave employee D.L. a written warning for "engaging in an inappropriate conversation with one associate about another associate which included disparaging comments." Respondent's Exhibit 19. D.L. (who is not purchasing manager Dale Lannon) was a team leader for a portion of the materials team. He reported to Complainant. Respondent's Exhibit 5 at pp. 141, 147, & 148. D.L. was disciplined for saying that Complainant and another employee could not pass a drug test. Otto testimony, Day 2 at 1:28; Cahillane testimony, Day 2 at 2:28.

14. On April 16, 2009, HR Director Sara Cahillane (successor to Katsanos) received a report from Materials Supervisor Lagoy that Complainant was called a "Puerto Rican bitch" by employee J.D. Exhibit 24. Cahillane commenced an investigation into J.D.'s alleged behavior towards Complainant on the same day that it was reported to her. Respondent's Exhibit 24; Cahillane testimony, Day 2 at 2:20. Cahillane met with Complainant as part of the investigation. Cahillane testimony, Day 2 at 2:21:58. Complainant confirmed that J.D. referred to her as a "Puerto Rican bitch" and said that she tried to ignore him. Respondent's Exhibit 24; Cahillane testimony Day 2 at 2:22:40. Cahillane testified that prior to April 16, 2009, no one reported that J.D. was using an epithet in referring to Complainant. Callihane testimony, Day 2 at 2:23. J.D. was terminated on the same day as the investigation. Respondent's Exhibit 24.

15. Complainant testified that whenever she exhibited concerns about a job-related issue, Operations Manager Otto would ask her in Spanish if she were happy ("Estas feliz?"). Otto denied the allegation against him, but I do not credit his denial. I credit that between late 2008 to mid-2010, Otto would, on occasion, ask Complainant in Spanish if she were happy.

16. Complainant testified that when she spoke Spanish in the office, Materials Supervisor Lagoy would sing "La Cucaracha." Lagoy acknowledged that he said "La Cucaracha" as a "joke" based on his not being familiar with Spanish but maintains that he stopped doing so after he learned that Complainant was offended. Lagoy testimony, Day 3 at 21:10. Lagoy testified that he never told Complainant not to speak Spanish in the office. Lagoy testimony, Day 3 at 22:18. I credit his testimony.

17. Throughout 2009 and 2010, Complainant engaged in frequent and lengthy written and verbal critiques of her o-workers and of her management team. Her critiques included disrespectful, rude, and profane statements.

18. Non-supervisory employee N.N. was terminated for the use of foul language, derogatory statements, and racial epithets in late 2009. Respondent's Exhibits 20 & 21; Cahillane testimony, Day 2 at 2:26:40. No evidence was presented at the public hearing about the nature of his statements or to whom they were directed. Id. After the discipline was implemented, Complainant and co-worker M.M. were walked to their cars because of concerns about their safety. Otto testimony, Day 2 at 1:37. I credit these allegations.

III CONCLUSIONS OF LAW

Harassment Based On National Origin

In order to prove harassment based on her Puerto Rican ancestry, Complainant must establish that: 1) she is a member of a protected class; 2) she was the target of speech or conduct based on her membership in that class; 3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and 4) the harassment was carried out by a supervisor or by a non-supervisor under circumstances in which the Respondent knew or should have known of the harassment and failed to take prompt remedial action. See College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987) (employer liable for discrimination committed by those on whom it confers authority and by non-supervisors where employer is notified and fails to take adequate remedial steps); Lattimore v. Polaroid Corp., 99 F.3rd 456, 463 (charge of hostile environment harassment may be brought in race discrimination context); DeNovellis v. Shalala, 124 F.3rd 298, 310 (1st Cir. 1997) (utterance of racial epithets is a common form of harassment).

There is no dispute that Complainant's ancestry is Puerto Rican. As for alleged instances of offensive speech or conduct based on such ancestry, some of Complainant's allegations withstand factual scrutiny while others do not. Those that withstand factual scrutiny consist of supervisor Lagoy saying/singing "La Cucheracha" when Complainant spoke Spanish at work, supervisor Otto asking her in Spanish if she were happy ("Estas feliz?"), non-supervisory employee J.D. calling her a "Puerto Rican bitch," and team leader D.L., who reported to Complainant, saying that she couldn't pass a drug test.

The offensive commentary by J.D. and D.L. led to the former's termination and the latter's written warning. Credible evidence establishes that as soon as Respondent's

Director of Human Resources became aware of J.D.'s use of the epithet "Puerto Rican bitch" on the morning of April 16, 2009, she conducted an immediate investigation and terminated J.D. the same day. Such action satisfies the requirement that an employer take adequate remedial steps when notified that a non-supervisory employee has engaged in harassment.

Turning to employee D.L., who stated that Complainant could not pass a drug test, there is no evidence about the precise length of time between company officials learning about his misconduct and imposing discipline, but it does establish that D.L. received a written warning for "an inappropriate conversation" with a third person during which he made "disparaging comments" about Complainant. It is noteworthy that D.L. did not supervise Complainant; rather, he reported to her. After the company learned that D.L. had uttered a taunt about Complainant and another employee related to alleged drug use, Respondent took remedial action in the form of written discipline. As with employee J.D., the action taken to address D.L.'s conversation was sufficient to rebut the claim of a hostile work environment. Compare Augis Corp. v MCAD, 75 Mass. App. Ct, 398, 401 (2009) (liability where company failed to act after being put on notice of racial slur).

The other matters established at hearing consist of supervisor Lagoy saying/singing "La Cucheracha" when Complainant spoke Spanish at work and supervisor Otto asking her in Spanish if she were happy ("Estas feliz?"). Both Lagoy and Otto acknowledged that they sometimes engaged in these activities. The question is whether these circumstances are sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, humiliating or abusive working

environment. See Augis Corp. v MCAD, 75 Mass. App. Ct, 398, 401 (2009) *citing* Gnerre v. MCAD, 402 Mass 502, 507-508 (1988) (actionable racial harassment must be sufficiently pervasive to alter the conditions of a victim's employment). I conclude that they are not. Both Otto and Lagoy testified that they stopped engaging in the conduct after Complainant made clear that she found it offensive. Their actions were, neither singly nor collectively, sufficiently severe or pervasive to create an abusive or hostile work environment.

My conclusion that the workplace was not a hostile work environment is supported by Complainant's failure to prove by credible testimony or otherwise that supervisor Lagoy told her not to speak Spanish at work, that purchasing manager Dale Lannon asked her if she were wearing a Puerto Rican gang logo on her jacket (as opposed to a "pink ladies" logo from the movie "Grease"), and that co-workers said a job applicant looked like her sister because they were both Puerto Rican. What remains is evidence of some minor, albeit unpleasant, interactions in the workplace which the employer took aggressive steps to monitor and control. The strife did not materialize to a degree supporting a charge of actionable harassment based on ancestry.

Disparate Treatment Race Discrimination

In order to prevail on a charge of disparate treatment discrimination under M.G.L. c. 151B, s. 4(1), Complainant may establish a prima facie case based on circumstantial evidence by showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of her protected class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President

& Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). A qualified individual need only establish circumstances "which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Complainant meets this burden by presenting a performance appraisal showing that she was a satisfactory employee in 2008 who received a final written warning for sending sexually-explicit e-mails at work whereas several other employees received non-final written warnings for sending sexually-explicit e-mails.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must persuade the fact-finder by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for discrimination. See Abramian, 432 Mass. 117-118; Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001).

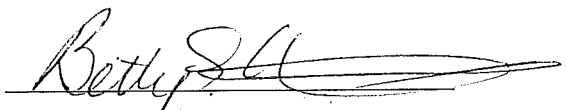
Respondent's reasons for singling out Complainant for a final written warning were that she sent sexually-explicit e-mails to supervisees and co-workers alike and that she engaged in this activity over a three-month period. According to HR Director Katsanos, Complainant's e-mails included a large volume of inappropriate communications consisting of naked bodies and sexual jokes. During the same three-month period, a white male supervisor sent just three inappropriate e-mails that were less

sexually explicit than the ones sent by Complainant. A white, female employee sent out a large volume of inappropriate e-mails but the white, female employee, unlike Complainant, was not a supervisor. These distinctions establish valid, job-related reasons for giving the other employees lesser discipline than Complainant. At stage three, Complainant fails to rebut Respondent's rationale for its personnel actions.

IV. ORDER

The case is hereby 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 28th day of July, 2016.



Betty E. Waxman, Esq.,
Hearing Officer