

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PETER M. DATEO,
Complainants

Docket No. 09 SEM 03024
09 SEM 03201

v.

SPRINGFIELD BBQ, LLC
d/b/a FAMOUS DAVE'S BBQ
Respondent

Appearances: Hugh Heisler, Esq. for Complainant Dateo

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 23, 2009, Complainant Peter Dateo filed charges of age and gender discrimination against Famous Dave's BBQ, a restaurant located in Springfield, MA. Complainant Dateo charged that his hours as a bartender/waiter were reduced and given to young females. On or around November 24, 2009, Complainant added the allegation that he was told, upon being removed as a bartender, that the action was taken to "put a new face to the bar." On December 14, 2009, Complainant filed another charge of discrimination stating that he was fired in retaliation for filing his previous charge of discrimination.

Probable cause findings were issued on the charges in both complaints. On May 2, 2014, Complainant's counsel submitted to the Commission an unopposed motion to substitute Springfield BBQ LLC d/b/a Famous Dave's BBQ as Respondent. The matters were certified for a consolidated public hearing in 2015.

A public hearing was held on October 13, 2017. The hearing was declared to be a default hearing after counsel for Respondent stated his intention not to participate based on instructions from his client.

The following witnesses testified at the hearing: Complainant and his wife Kimberly Klimczuk. Complainant submitted eight (8) exhibits.

Following the public hearing, the Commission issued an Order on October 16, 2017 stating that the hearing had gone forward as a default proceeding pursuant to 804 CMR 1.21 (8)(b) and that Respondent had ten days to petition the Commission to vacate the entry of default for good cause shown. Respondent did not petition for removal of the default.

Based on all the credible evidence 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 Peter Dateo was born in June 1961. At age twenty-seven, he started to work as a bartender for Bennigan's Inc. (a nationwide restaurant chain) and remained employed there for twenty years. During his employment at Bennigans, Complainant received twelve "employee of the month" awards, a 1999 leadership award, and a 2001 national "hero of the year" award. Complainant was solicited for management training on multiple occasions but refused the opportunities because he enjoyed having direct interaction with customers.

2. In 2006, the Bennigan's location where Complainant worked closed. He obtained other employment in the restaurant industry. In 2008, he moved to Springfield, MA.
3. In January 2009, Complainant, at age forty-eight, obtained a position as a full-time bartender at Famous Dave's BBQ. He describes his job duties as follows: taking orders for food and drink, keeping the bar clean, washing glassware, taking dishes to the dishwasher, offering barbecue sauces in a creative manner, and maintaining an accurate account of bills. He worked an average of four shifts per week, mostly at night. He received a wage of \$5.00 per hour for a thirty-two hour week and tips of approximately \$400.00 per week, resulting in an average weekly income of \$560.
4. Complainant received uniformly positive reviews while working at Famous Dave's. Managers told him that he did a great job and thanked him for his service.
5. Complainant's supervisors at Famous Dave's originally consisted of a general manager (Mike), a kitchen manager (Mike), a bar manager (Sean), and a front-house manager (Hannah). In October 2008, they left and were replaced by a new general manager (Kevin), an assistant general manager (Brian) and a catering manager (Terry).
6. Before Hannah left, she told Complainant that Kevin and Brian said that the company needed younger females at the bar in order to attract business. Of the three male bartenders/wait staff who were employed by Respondent in 2009, one left and one was "let go." They were replaced by two female bartenders in their mid-twenties, leaving Complainant as the sole male bartender/waiter. As of

November, 2009, the bartenders/wait staff consisted of Complainant and six women who were under thirty years old.

7. On or around Sunday, November 15, 2009, Complainant asked Brian about an upcoming schedule on which Complainant only had one bar shift during the week. Brian responded by saying, "I'm sorry but I'm trying to put a new face to the bar to get business up." Complainant asked if he was "off" the bar and Brian said, "yes." Complainant then asked if he were fired and was told "no." Complainant noticed, however, that he was not scheduled to wait tables on the upcoming schedule. Brian said that was probably a mistake.
8. On or around November 23, 2009, Kevin confirmed that Complainant had been removed as a bartender but said that Complainant would continue as a waiter. Complainant made a written request for his personnel file. He was told that he could have it the following Monday (November 30, 2009).
9. Complainant never received his personnel file. He was given only one shift as a waiter after asking for his personnel file whereas other servers were given three or four shifts per week.
10. Complainant testified that after he was removed as a bartender he was shocked and saddened. He stated that he couldn't be as lively or entertaining at work as he had been previously.
11. Complainant filed charges of gender and age discrimination with the Commission on November 23, 2009 in regard to the loss of work hours. The Commission sent Respondent a copy of the complaint of discrimination the same day. Joint Exhibit 5.

12. On the following day, Complainant submitted an amendment to the MCAD complaint adding an allegation that he was told that his removal as a bartender was in order to “put a new face to the bar.” The Commission sent the amended complaint to Respondent on November 30, 2009. Joint Exhibit 6.
13. On or around December 2, 2009, Complainant asked about his personnel file. Kevin responded by saying, “Why are you making waves? I can reduce the hours of anyone I want.” Complainant stated that his hours couldn’t legally be reduced if the reasons were discriminatory.
14. Complainant went to work on Sunday, December 6, 2009. At the end of the shift, Complainant asked about his next shift and was told by Brian that he was terminated.
15. After his termination Complainant, on December 14, 2009, filed another charge of discrimination with the Commission alleging that he was terminated in retaliation for his previous filings.
16. Complainant testified that he was very sad to lose his job. He said that it decimated his ego to be fired. He stated that his self-confidence diminished and he started to doubt himself. Complainant testified that he couldn’t sleep, couldn’t get out of bed, gained a lot of weight, and had to take blood pressure medication for eight months. For a while he spent time playing “stupid” video games and watching TV. He stayed home unless he was looking for jobs because he couldn’t afford to spend money on entertainment. He was upset that he couldn’t get Christmas gifts for his family and had to borrow money from his sister. Complainant testified that he felt depressed for up to two years.

17. Complainant's wife, Kimberly Klimsuk, has lived with Complainant since 2008.

She said that prior to his termination, he was a bartender whom everyone loved and called "Sweet Pete." She said that after he was fired, he was "utterly demoralized, devastated, depressed, and felt useless." She described his depression as severe for about a year. She said that he stopped going to social activities such as a board game group and withdrew from friends and family.

18. Complainant attempted to find other bartending jobs for over a year. He applied for as many jobs as he could. In the interim, he took part-time jobs answering calls for a law firm, working at Six Flags as a seasonal employee, and serving as a weekend functions employee. In May 2012, Complainant accepted a full-time job as a call center employee at "Tingo."

19. Complainant earned \$17,000.00 in 2010; \$3,946.00 in 2011; and \$20,311.00 in 2012.

20. Famous Dave's closed in July or August 2012.

III. CONCLUSIONS OF LAW

A. Gender Discrimination

Complainant may prevail on a charge of disparate treatment employment discrimination on the basis of circumstantial evidence¹ showing that he: (1) is a member

¹ There is evidence in this case which could be construed as direct evidence of age and gender discrimination, to wit: 1) a former manager saying that the current managers expressed a need for younger females at the bar in order to attract business and 2) the general manager saying that he was trying to put a "new face" to the bar. See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000) quoting Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as creating an "inescapable or at least highly probable inference of bias). While the comments are credible, I decline to analyze the case under a direct evidence standard of review because the comments are hearsay and the

of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s). See 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. MCAD, 431 Mass. 655, 665-666 n.22 (2000) (prima case established where protected class member applies for position, is not selected, and employer seeks or fills position with similarly-qualified individual). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment discrimination as “not onerous,” requiring only that a qualified individual establish circumstances “which give rise to an inference of unlawful discrimination.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Applying the aforementioned principles to the credible evidence in this case, Complainant, a male, obtained a position as a bartender at Famous Dave’s at age forty-eight. He received uniformly positive reviews during his first ten months on the job, but he was removed as a bartender in mid-November, 2009, thereafter given only one shift as a waiter, and terminated completely on December 6, 2009. During the same period, two other male bartenders left the bar’s employ and were replaced by two female bartenders in their mid-twenties, leaving Complainant as the sole male bartender/waiter. This evidence is sufficient to establish a prima facie case of age and gender discrimination.

latter statement lacks specificity. Nonetheless, the comments serve to buttress the circumstantial evidence of discrimination discussed in this section.

Since the foregoing circumstances support a prima facie case of discrimination based on age and gender, the burden of production shifts to Respondent to articulate and produce some credible evidence to support a legitimate, nondiscriminatory reason for demoting and later terminating Complainant. See Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34, 50 (2005) quoting Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 238 (1976). Respondent declined to participate in the hearing and therefore failed to rebut the prima facie case.

Respondent's failure to rebut the prima facie case is compounded by evidence that as of November, 2009, the bartenders/wait staff consisted of Complainant and six women who were under thirty years old. This change in personnel makes clear that the general manager's efforts to "put a new face to the bar" consisted of replacing male staff with young females in contravention to G. L. c. 151B, section 4(1) and (1B).

Retaliation

Retaliation is defined by Chapter 151B, sec. 4 (4) as punishing an individual's opposition to practices forbidden under Chapter 151B. 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 a case where circumstantial evidence is offered in support of a retaliatory motive, the MCAD follows 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). The first part of the framework requires that Complainant set forth a prima facie case of retaliation by demonstrating that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him 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, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

There is un rebutted evidence that Complainant filed charges of gender and age discrimination with the Commission on November 23, 2009 (amended on the following day). He alleged that he lost hours of work and was removed from the position of bartender due to age and gender discrimination. The Commission sent the amended complaint to Respondent on November 30, 2009. On Sunday, December 6, 2009, Complainant was terminated at the end of his shift as a server. This evidence satisfies the requirements of a prima facie case. It is, moreover, supported by Complainant's credible assertion that when he asked for his personnel file on or around December 2, 2009, his manager responded by saying, "Why are you making waves?"

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for its action supported by credible evidence. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000); 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).

Respondent defaulted at the public hearing and therefore failed to offer any evidence in rebuttal to the prima facie case.

IV. Damages

A. Emotional Distress

Upon a finding of unlawful discrimination, the Commission is authorized to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See id. at 576; Buckley Nursing Home, 20 Mass. App. Ct. at 182-183. Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 Mass. at 576.

Complainant testified with great sincerity that he was very sad to lose his job. He provided convincing testimony that the loss of his job decimated his ego, diminished his self-confidence, and caused him to doubt himself. Complainant testified that he couldn't sleep, couldn't get out of bed, gained a lot of weight, and had to take blood pressure medication for eight months. He said that he spent time playing "stupid" video games

watching TV, and stayed at home unless he was looking for jobs because he couldn't afford to spend money on entertainment. He was upset that he couldn't get Christmas gifts for his family and had to borrow money from his sister. Complainant described feeling depressed for up to two years.

Complainant's wife testified that after Complainant was fired, he was "utterly demoralized, devastated, depressed, and felt useless." She described his depression as severe for about a year. She said that he stopped going to social activities such as a board game group and withdrew from friends and family.

Based on the foregoing, I conclude that Complainant is entitled to \$ 75,000.00 in emotional distress damages.

B. Lost Wages and Benefits

Chapter 151B provides monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. See Stonehill College v. MCAD, 441 Mass. 549, 586-587 (2004) *citing* Bournewood Hosp., Inc. v. MCAD, 371 Mass. 303, 315-316 (1976).

During the eleven months that Complainant worked for Respondent, he earned a weekly income of approximately \$560.00 per week. Thus, Complainant would have earned \$29,120.00 in 2009, had he not been terminated, based on a fifty-two week year.

After Complainant's employment was terminated, he attempted to find other bartending jobs for over a year. He applied for as many jobs as he could. While he applied, he took part-time jobs answering calls for a law firm, working at Six Flags as a seasonal employee, and serving as a weekend functions employee. In 2010, Complainant earned \$17,000.00; in 2011, he earned \$3,946.00; in 2012, he earned \$20,311.00.

Complainant accepted a full-time job as a call center employee at "Tingo" in May 2012. Famous Dave's closed in July or August 2012.

Based on the foregoing, I conclude that Complainant is entitled to back pay damages in the amount of \$43,939.00 for the period from December 1, 2009 through August 2012.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

- (1) Cease and desist from any and all acts of age and gender discrimination;
- (2) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$43,9339.00 in back pay damages plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (3) Pay Complainant within sixty (60) days of receipt of this decision, the sum of \$75,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

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. Complainant's attorney may file a timely petition for attorneys' fees.

So ordered this 11th day of January, 2018.

A handwritten signature in cursive script, appearing to read "Betty E. Waxman", written over a horizontal line.

Betty E. Waxman, Esq.,
Hearing Officer