

Madeline Shields

v.

Northern Elastomeric, Inc.

ESMS 5758-96
EEOC 16D960317

DECISION OF THE COMMISSION

This charge of employment discrimination was filed on December 29, 1995, and was dually filed with the U.S. Equal Employment Opportunity Commission (EEOC). The Commission has jurisdiction over this matter pursuant to NH RSA 354-A:5 and 7. Probable cause having been found by the investigating commissioner, and conciliation having failed, a hearing was conducted pursuant to RSA 354-A:21,II(c) on April 18, 2000 and May 19, 2000. Attorney Joni N. Esperian represented the complaining party; Attorney Philip Pettis represented Northern Elastomeric, Inc.

The following witnesses testified at the hearing: Madeline Shields; Thomas Zickell, president of Northern Elastomeric, Inc.; Rachel Harris, marketing manager; Charles Diman, plant manager; Don Mailhot, mechanic; Diane Capozzi, former controller; Dennis Ryan, certified public accountant, Howe, Riley & Howe; Edmund Mangini III, production supervisor; Jamie A. Karliss, quality control manager; Mark Hagopian, northern New England vice president of sales for World Class Transport. Commissioners agreed to receive the transcript of the sworn deposition of Merilee Atwell, human rights administrator, and the section of the investigator's findings report regarding witness, Paul Houle, foreman.

In deliberations on May 19, 2000, the Commissioners found and ruled as follows on complainant's allegations of gender and marital status discrimination.

I. Background

Northern Elastomeric, Inc. (NEI), is a roofing manufacturing company located in Brentwood, New Hampshire. Complainant began working for NEI on October 29, 1990. During her employment, complainant held several positions including sales, purchasing, inventory and production control. She received merit increases in salary with each promotion. By 1992, complainant's duties as purchasing manager including purchasing all incoming raw materials and arranging transportation for the finished product. At the time of her lay-off in August 1995, complainant was the most senior employee in the company.

Complainant was initially evaluated by Ken Peterson, plant manager. Complainant testified that she was moved from sales to purchasing because even though Peterson found her to be a hard worker, he said she was "too strong" or "aggressive" with customers. In 1994, complainant's supervisor was Diane Capozzi, controller.

In December 1994, Charles Diman was hired as plant manager. Diman, a chemical engineer, is 6'6" tall, weighs 295 pounds and has a "booming" voice.

According to Thomas Zickell, owner, the majority of employees in the plant area were males, with the possible exception of one or two females at the time complainant was employed. There were females working in the office area, including complainant. At the time of complainant's employment, respondent did not have a written sexual harassment or anti-harassment policy.

Complainant testified that it became immediately apparent that Diman did not like her. She claimed he yelled at her, hung up the phone on her and was routinely rude and sarcastic. She stated he would place the palms of his hands on her desk and lean toward her in an intimidating manner. Complainant, who is 5'5", described one instance when Diman stood in her doorway, blocking her exit from the room. She testified he called her "little girl" on more than one occasion and at meetings with Zickell and complainant to discuss Diman's behavior, Diman would stare at the ceiling, showing disinterest.

Complainant testified Diman also discriminated against her based upon her status as a single parent when he failed to call her at home about a problem at the plant. She alleged Diman told her that: "As a single parent, your family responsibilities override your job responsibilities and you can't help that."

Within a few months of his hire, Diman began to assign some of complainant's duties to male employees. He had Ray Bernier

purchase raw materials; assigned Don Mailhot, maintenance manager, the responsibility of purchasing the materials needed for his department; and hired Steve Mahoney as the plant engineer, and assigned him some purchasing duties. Complainant was never formally informed by management of these changes in her job duties. She also claimed Diman undermined her performance by not passing orders from Zickell on to her.

On February 6, 1995, complainant sent a memo to her supervisor, Diane Capozzi, describing Diman as difficult to deal with and that he was rude, sarcastic, and confrontational bordering on abusive. Complainant did not specifically state a belief that Diman's behavior was gender based. Capozzi said she would speak with Zickell about Diman. Complainant testified that after she wrote the February 1995 memo about Diman, Zickell told her he realized Diman was difficult to work with, but Zickell didn't want complainant to document it in writing and asked her to have faith and trust him. Zickell denied telling complainant not to document anything about Diman.

Capozzi recalled that in addition to complainant's complaints about Diman's behaviors, complainant also told her that Diman gave some of her duties to others, he wanted to move her office to the plant and told her to change her work schedule. Capozzi acknowledged that it was common knowledge that complainant and Diman had difficulties working together.

Complainant testified Diman's harassment continued. In the spring of 1995, Zickell made Diman her supervisor. Capozzi stated that when Zickell decided to have Diman supervise complainant, Capozzi questioned if that would result in problems because of their strong-willed personalities. Zickell explained to Capozzi that Diman should supervise complainant because Zickell wanted purchasing to be under the production area to increase communication between purchasing and scheduling. Zickell told complainant she did not have to move her office.

Complainant claims Zickell was complacent about her situation with Diman. He asked her to adjust to it and told both complainant and Diman to: "Grow up and act like adults."

Complainant testified that in July 1995 she again spoke to Capozzi about Diman's behavior, management's inaction and Zickell's order not to document what was happening. Complainant stated she told Capozzi that she was going to get an attorney and take action if things didn't change. Complainant stated a few weeks later, on August 18, 1995, she was laid off by Diman. Complainant claims respondent laid her off in retaliation for threatening to take legal action against NEI. Capozzi did not recall complainant telling her she was going to call an attorney.

Zickell testified that in the summer of 1995, the company was restructuring and downsizing because of financial difficulties. Approximately 20 employees were laid off between April and August 1995, including complainant.

Diman stated that he, Zickell and Capozzi discussed all positions necessary for lay off. Zickell indicated two office personnel would be let go and they agreed quickly on the receptionist. Diman suggested breaking up complainant's job between other employees and laying her off.

Capozzi recalled that they discussed decentralizing and eliminating complainant's position. The position was eliminated and has not been filled since complainant's lay off. Her duties were divided among other employees. Zickell, Capozzi and Diman discussed whether to offer complainant another position, but decided that the employees doing those jobs were better qualified.

Zickell testified that complainant's job elimination had nothing to do with her performance. He claimed that during complainant's employment, he had no knowledge that she had complained about gender or marital status bias by Diman. Zickell acknowledged there was an "endless stream of two personalities blaming each other." Zickell claimed he had no idea of the extent of Diman's difficulties with employees until a survey of all employees was conducted in 1996, which revealed extensive complaints about Diman's managerial style, including how he intimidated people and didn't respect employees. As a result of this survey, which was completed after complainant's lay off, Diman was demoted to a technical position, although his pay remained the same. He was also sent to sensitivity training. In 1998, Diman was returned to the plant manager position. In early 2000 he was demoted once again because his people skills had not improved.

After her lay off, complainant was given a letter to sign on August 29, 1995 regarding her severance. She testified that she read it over 100 times and decided to sign it because she thought if she refused, she would not receive her severance pay. The letter states in part that complainant would be releasing NEI from any claims attributed to her termination. Complainant states she didn't contact an attorney prior to signing the letter because she believed she would soon be quoting freight for NEI.

Complainant states after her lay off, she spoke with Capozzi at NEI about quoting freight to NEI as an independent broker. Capozzi informed complainant that Zickell agreed with complainant's proposal. Zickell testified that he told employees to offer complainant any help she needed to accomplish her plan to become a broker. Complainant also spoke with Mark Hagopian of World Class Transport, one of NEI's top 15 suppliers, about her

plan to quote freight to NEI on World Class' behalf. Hagopian testified that there was no "formal signed agreement" between them, but he assured complainant there could be an "avenue open for her to pursue."

Hagopian wrote a letter to NEI, presumably about complainant's plan to quote freight. There is no copy of this letter. Capozzi recalled that the letter presented an arrangement of an exclusive contract between NEI and World Class with complainant as the broker. Zickell testified that although he understood from Capozzi that complainant did not plan an "exclusive" contract with NEI, Hagopian's letter to Capozzi gave the impression that it was exclusive and NEI's business with World Class would be dependent on complainant. Capozzi recalled that she sent the memo back to Hagopian with her handwritten comment, "What the hell is this?" Complainant testified that as a result of this, Hagopian withdrew his offer to assist complainant as a broker.

Complainant alleged that NEI used its business relationship with World Class, and the fact that NEI owed them money to "squash" her deal to become an independent broker. Hagopian did not recall the content of his letter to NEI or what Capozzi alleged that she wrote to him. Hagopian denied NEI influenced him regarding any plans complainant had to work with him. He stated he did not end the business relationship with complainant, but that she failed to continue to contact him about her plans to broker.

LEGAL STANDARDS

A. Gender or Marital Status Based Hostile Work Environment

NH RSA 354-A:7, I states that "[it] shall be an unlawful discriminatory practice: for an employer, because of the ... sex ... or marital status... of any individual, to ... bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

Title VII and RSA 354-A's protection is not limited to "economic" or tangible discrimination such as the denial or loss of a job or promotion. It is violated as well by a "work environment abusive to employees because of their race, gender, religion or national origin." Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993). To be actionable, harassment must be sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

In order to prove a case of sex (or marital status) discrimination based on harassment which alters the terms and conditions of employment by creating a hostile work environment, complainant must show the following:

- 1) intentional incidents of discrimination against her because of her sex or marital status;
- 2) discrimination (or harassment) which was severe or pervasive;
- 3) the behavior of respondent detrimentally affected the complainant;
- 4) the behavior in question would detrimentally affect a reasonable person of that protected category in the complainant's position;
- 5) some basis for employer liability.

B. Gender or Marital Status Based Lay Off.

In order to establish a prima facie case of employment discrimination involving the selection of complainant for lay off, using circumstantial evidence, complainant must show:

- a) that she is a member of a protected category;
- b) that she was performing her position to her employer's satisfaction;
- c) that the employer took adverse employment action against her, i.e. selected her for lay off;
- d) while continuing to have her duties performed by someone outside the protected category.

If the complainant establishes a prima facie case, the employer must articulate legitimate non-discriminatory reasons for his or her actions. If the employer does so, the complainant must then prove that the employer's reasons are a pretext for discrimination.

C. Retaliation

NH RSA 354-A:19, states that "it shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to discharge, expel or otherwise retaliate or discriminate against any person because [the person] has opposed any practices forbidden under this chapter or because [the person] has filed a complaint, testified or assisted in any proceeding under this chapter."

In order to establish a prima facie case of unlawful retaliation, a complainant must show participation in an activity protected by RSA 354-A, knowledge by defendant of that participation, a subsequent employment action adverse to the complainant, and a causal connection between the protected activity and the adverse employment action. Evidence of causation can be presented either through the inference arising from a showing of close proximity in time between the protected activity and the employer's action, or through other evidence of retaliatory motivation.

If the complainant produces evidence which would establish a prima facie case, the respondent may rebut that case by rebutting any of the essential factors of the prima facie case, or by showing legitimate, non-discriminatory reasons for the action taken against the complainant.

III. Analysis

A. SEVERANCE LETTER:

The severance letter given to complainant was dated August 29, 1999. Complainant signed the letter on that same date. The letter does not contain language that allowed complainant to "knowingly" sign, such as her right to consult an attorney or time for her to consider prior to signing. Also, it is not specific that she would be waiving her right to claim discrimination under RSA 354-A or Title VII. According to complainant, she understood that obtaining her last paycheck from respondent was contingent on her signing this letter. This gives the appearance that complainant's signature was not "voluntary."

Based upon these considerations, the Commission finds that complainant's signature on this severance letter does not bar her gender and marital status complaint before the Commission.

B. GENDER OR MARITAL STATUS BASED HOSTILE WORK ENVIRONMENT:

By the summer of 1995, complainant was the most senior employee at NEI and over time she had performed various job duties. She was hard-working and loyal. Her performance evaluations rate her as an average to above average employee and she always received her raises and bonuses.

Within weeks of Diman's hire as plant manager in December 1994, complainant informed management that she was experiencing difficulties with Diman's behaviors and the decisions he was

making regarding her duties. The evidence indicates Diman reassigned several of complainant's purchasing responsibilities to other male employees.

Complainant testified to one incident of marital status discrimination by Diman in which he said he didn't call her at home about a work related problem because she is a single mother.

It is virtually undisputed that Charles Diman engaged in hostile, abusive and intimidating behaviors toward most NEI employees, including complainant. His large physical stature lends credibility to employees who found his finger pointing, invasion of personal space, and yelling to be bullying and offensive. An employee survey taken after complainant's termination confirmed that most employees disliked working for Diman and employee morale was low because of the way he treated them. The survey was completed by plant employees, which was a predominantly male workforce. Witnesses testimonies concurred with the survey results in that their statements indicated similar difficulties working for Diman. For example, male and female witnesses both describe Diman as a "bully" and held a belief that he did not respect their opinion.

In turn, it is also not disputed, even by complainant, that she had an assertive, strong-willed personality and that some employees, including one of her prior supervisors, had difficulties working with her.

Zickell was accurately described by a witness as a "hands off manager." It is apparent Zickell preferred and expected others in the organization to handle difficult personnel issues. The evidence indicates that when he was made aware of complainant's difficulties in dealing with Diman, Zickell failed to adequately deal with her complaint. Beyond telling complainant and Diman to "Grow up and act like adults.", Zickell did nothing to address complainant's allegations regarding Diman's behaviors. In fact, in the spring of 1995, Zickell made Diman complainant's supervisor.

C. RETALIATION:

Complainant alleges that in July 1995 she told Capozzi that she was going to get an attorney and take action against the company if things didn't change regarding Diman. Capozzi testified that she did not recall complainant's threat to contact an attorney.

Complainant was laid off by Diman on August 18, 1995. Zickell, Capozzi and Diman testified that complainant's lay off was a result of the elimination of her position because of the

company's financial difficulties and she has not been replaced. Approximately twenty other employees were also laid off about the same time as complainant.

After her lay off, complainant spoke with Capozzi about her plan to quote freight to NEI as an independent broker. Zickell agreed to this plan and told NEI employees to give complainant any assistance she needed. Capozzi and Hagopian of World Class Transport agree they communicated about complainant's idea to broker, but do not confirm that NEI had a negative impact on complainant's ability to work with World Class as a broker.

CONCLUSIONS:

There was evidence that Charles Diman created a hostile work environment for many NEI employees, including complainant. An analysis of the entire record shows that his supervisory skills were poor and he was unable to effectively communicate with employees. He was known to be rude, sarcastic, intimidating, hostile and disrespectful.

It was apparent that Diman and complainant did not get along. Diman took some of complainant's work responsibilities and gave them to other male employees, he attempted to move her office to the plant despite complainant's objections, and was openly hostile toward her.

The evidence shows that Diman also treated other employees in a hostile manner. Witnesses concur that he didn't respect the opinions of others, male and female, and that he "bullied" many employees. A 1996 survey of the plant's predominantly male workforce, indicated that most employees had complaints about Diman that were similar to complainant's.

Upset with Diman's treatment, complainant complained to Capozzi, her supervisor, and later when the harassing behaviors continued, she spoke with Zickell.

It was apparent from the entire record that Zickell incompetently handled the substantial personnel issues caused by Diman's behavior and treatment of employees, including complainant. The Commission is dismayed⁵¹ by Zickell's lack of concern and failure to investigate complainant's complaint of harassment by her supervisor. The evidence indicates Zickell chose to be "un-involved" with his employees. Therefore, it is credible, although inexcusable, that he would be either unaware of Diman's behavior, or more likely, that he chose not to directly deal with these concerns. According to Zickell, the employee survey in 1996, which overwhelmingly described serious deficiencies in Diman's people skills, made him realize the

extent of the problems caused by Diman's behaviors. Unfortunately, this "revelation" occurred after complainant was no longer employed by respondent.

Although the Commission found respondent failed to meet its obligation as an employer to protect complainant, or any other employee, from a hostile work environment, there was insufficient evidence that the environment was a result of gender discrimination by Diman.

In regard to complainant's marital status allegation, the commission finds that the single occurrence alleged by complainant could be interpreted in two ways. One could state that when Diman didn't call complainant at home outside work hours he was being sensitive to her needs as a single mother. Or, as alleged by complainant, his actions could be interpreted that he was using her single parent status as a detriment. The Commission finds that this single incident, which is open to interpretation, does not support a finding of marital status discrimination.

The Commission finds that Diman's references to complainant as "little girl" and the one "single mother" remark were insufficient to show a severe and pervasive hostile work environment based upon gender or marital status discrimination.

There was substantial evidence to support respondent's position that complainant's job was eliminated and she was laid off as a result of the company's financial difficulties. Her duties were given to other employees and no one was hired to replace her.

The evidence did not support complainant's allegation that she threatened respondent that she would contact an attorney about Diman's harassment. Also, as stated above, the evidence supports respondent's non-discriminatory reason for complainant's lay off. Lastly, there was insufficient evidence to support complainant's allegation that NEI adversely affected her plans to broker with World Class Transport. Therefore, there is insufficient evidence to prove complainant's claim of retaliation.

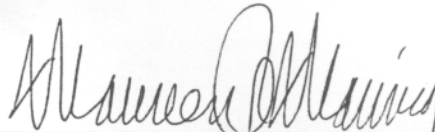
Accordingly, the Commission Rules that Madeline Shields was not discriminated against by Northern Elastomeric, Inc. and dismisses the case.

However, the Commission orders NEI to create sexual harassment and anti-harassment policies and to disseminate these policies to all of its employees. A copy of these policies are to be submitted to the Commission within thirty days of receipt of this order.

So Ordered,

8-30-00

Date



Maureen Raiche Manning, Esq.
Chair for the Hearing Commission

Commissioner Loren Jean
Commissioner Phillip P. Palmer