

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CINDY KEENHOLD AND
JOANNE GIESE,

COMPLAINANTS

V.

THE GALLEY RESTAURANT,
RESPONDENT

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DOCKET NOS. E-18982,
E-19069

FINDINGS OF FACT

1. Complainant Cindy Keenhold is an adult individual residing at 102 West Milton Street, Easton, PA.
2. Complainant Joanne Giese is an adult individual residing at 191-I Young Street, Easton, PA.
3. Respondent, the Galley Restaurant, is located in Windgap, PA 18091, and has at all relevant times employed four or more persons within the Commonwealth of Pennsylvania.
4. Ms. Keenhold filed a complaint alleging a violation of the Pennsylvania Human Relations Act with the Commission on September 26, 1980 at Docket No. E-18982; Ms. Giese filed a similar complaint on October 8, 1980 at Docket No. E-19069.
5. At all times relevant to this action Anthony Mitsos owned and operated the Galley Restaurant.
6. Ms. Keenhold was employed by the Galley Restaurant from August 6, 1980 until her termination on August 29, 1980.
7. Ms. Giese was employed by the Galley Restaurant from July 24, 1980 until her discharge on August 14, 1980.

8. Mr. Mitsos supervised the Complainants during their employ at the Galley Restaurant.

9. Mr. Mitsos did not condition the Complainants' continuing employment upon having sexual contact with him.

10. Mr. Mitsos fired the Complainants because of his dissatisfaction with their performance and his anger at Ms. Keenhold's attempt to suggest improvements in the way he ran the restaurant.

CONCLUSIONS OF LAW

1. Complainants are individuals within the meaning of the Pennsylvania Human Relations Act.
2. Respondent is an employer within the meaning of the Act.
3. The parties and the Commission have complied with the procedural prerequisites to a public hearing in this case.
4. The Commission has jurisdiction over the parties and subject matter of this action.
5. Sexual harassment is a form of sex discrimination and as such violates the Act.
6. Complainants have the burden of proving that their terminations violated the Act.
7. Judgments as to the credibility of witnesses and the weight to be given to particular evidence are within the discretion of the hearing Commissioner as trier of fact.
8. Complainants here have failed to establish that their discharges violated the Act.

OPINION

This case arises on complaints filed by Cindy Keenhold and Joanne Giese ("Complainants") against the Galley Restaurant ("Respondent") with the Pennsylvania Human Relations Commission ("Commission"). Ms. Keenhold's complaint was filed on September 26, 1980 at Docket No. E-18982; Ms. Giese's complaint, on October 8, 1980 at Docket No. E-19069. Each alleged that Respondent violated the Pennsylvania Human Relations Act, 43 P.S. §§ 951 et seq. ("Act") by sexually harassing and discharging the Complainant from her position as a waitress.

Commission staff investigated the complaints and found probable cause to credit the allegations. When attempts to resolve the situation through conciliation failed, the cases were consolidated and approved for public hearing. The hearing was held on February 8 and 9 and May 8, 1984, in Easton, PA., before Commissioner Thomas L. McGill, Jr., the parties having waived their statutory right to a public hearing before a panel of three Commissioners.

At all relevant times, Anthony Mitsos owned and personally operated the Galley Restaurant. The Complainants, who were briefly employed at the restaurant as waitresses, alleged in essence that Mr. Mitsos made sexual advances to them and fired them because they rejected the advances.

Respondent raises the threshold argument that the complaints fail to state a cause of action because at the time of their filing the Commission had not adopted regulations or guidelines defining sexual harassment. The complaints, as noted, were both filed in the fall of 1980; the Commission's Guidelines on Sexual Harassment appeared in the Pennsylvania Bulletin on January 31, 1981.

While the Guidelines unquestionably clarified the definition of sexual harassment, we do not agree with Respondent's implicit assertion that they prohibit conduct which was not illegal prior to their adoption. As we previously held in Kutchko v. Baum Boulevard Dodge, Docket No. E-14016, sexual harassment is a form of sex discrimination and as such is prohibited by the Act. Kutchko, decided in April of 1982, resolved a complaint which, like those now before us, was filed prior to publication of the Guidelines. We noted there that federal courts had long held sexual harassment to be violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 e et seq., the federal analog to the Act. Tompkins v. Public Service Electric and Gas Co., 568 F.2d 1044 (3rd Cir. 1977); General Electric Co. v. Pennsylvania Human Relations Commission, 469 Pa. 202, 265 A.2d 649 (1976). We therefore find that the instant complaints do state a cause of action under the Act, and turn to consideration of their merits.

As noted, both Complainants allege that they were terminated because of their rejection of Mr. Mitsos' sexual advances. Each requests reinstatement and payment of wages lost as a result of the alleged discriminatory treatment. To prevail therefore they must prove by a preponderance of the evidence both that sexual harassment as defined by caselaw or our guidelines took place and that their terminations were caused by their reactions to the harassment.¹ This determination must be made on the basis of decisions about the credibility of various witnesses, and the inferences to be drawn from the evidence, matters which are uniquely the responsibility of the Hearing Commissioner as trier of fact. Carr v. Com., State Board of Pharmacy, 48 Pa. Cmwlth. 330, 409 A.2d 941 (1980).

Ms. Keenhold testified that her termination followed by a few days an incident wherein Mr. Mitsos put his arms around her and kissed her neck,

after which she pushed him away. Ms. Giese testified that she was terminated the day after she told Mr. Mitsos "Don't do that" when he made a gesture to her that she interpreted as sexual. They argue that the later events were caused by the earlier ones. Each also testified that she observed Mr. Mitsos making sexual comments and gestures to other waitresses, and touching them. There was rather equivocal testimony about the favoritism which Mr. Mitsos displayed to certain employees. Each Complainant testified that Mr. Mitsos at no time expressly demanded any sort of sexual contact with her, nor stated, directly or indirectly, that her continuing employment was dependent upon agreeing to have such contact with him.

Mr. Mitsos himself testified that he terminated each Complainant because of poor performance and related factors. Ms. Keenhold he depicted as a disgruntled employee who complained constantly and was discharged when she presented him with a list of complaints about and suggested improvements in his way of running the restaurant. Ms. Giese he described as sloppy and unkempt in her personal appearance. He testified that he fired her after receiving complaints from customers about the way Ms. Giese served them.

Other current and former Galley employees also testified on behalf of both the Complainants and the Respondent. There was considerable conflict in this testimony about the nature of the interaction between Mr. Mitsos and his staff; however, no one testified that her employment was directly or indirectly made conditional upon acceding to sexual demands from him.

As noted, resolution of issues relating to the credibility of witnesses is uniquely the function of the trier of fact, who alone has the opportunity and obligation to carefully observe the witnesses' demeanor as they testify. Based on such observation, the undersigned hearing Commissioner is unable to conclude that either Complainant has met her burden of proving that she was terminated because of her rejection of sexual advances from Mr. Mitsos.

The record establishes that Mr. Mitsos was, at best, a difficult man for whom to work. By all accounts he was demanding and volatile, becoming very angry when his expectations were not met and expressing anger freely and loudly, with strong and sometimes vulgar language. A number of witnesses who were former employees testified that they left his employ in the wake of heated arguments with him. The atmosphere in the restaurant was credibly described as frequently tense and in general dependent upon Mr. Mitsos' moods. It is perhaps the case that what he characterized as friendliness between himself and his staff involved less warmth and more appeasement than Mr. Mitsos' own testimony would suggest.

However, catering to the moods of a difficult boss is not the same thing as being forced to submit to his sexual advances; on this record, after carefully weighing the conflicting evidence, the Hearing Commissioner is not persuaded that Mr. Mitsos made sexual advances to the Complainants and fired them because those advances were rejected. Unwelcome sexual conduct of any sort, including vulgar language, cannot of course be condoned, but in these cases the necessary connection between such conduct as might have occurred and the termination of the Complainants has not been made. To the extent that this decision is based upon determinations of credibility, those have been made in favor of Respondent's witnesses. It is found to be more credible that Complainants were discharged because of Mr. Mitsos' dissatisfaction with their performance and, in Ms. Keenhold's case, his outrage when she suggested the need for change in the way he ran his restaurant.

It is not a novel observation that absolute certainty is rarely achieved in cases whose resolution depends upon the weighing of conflicting evidence, as is the case here. It is the Commissioner's conviction, however, that Complainants have not proven by a preponderance of the evidence that their discharges violated the Pennsylvania Human Relations Act; their cases must therefore be dismissed.

FOOTNOTE

1. This is not to suggest that sexual harassment alone, without a related event such as termination, does not violate the Act. That it does is made clear both by our guidelines and, by analogy, federal caselaw. See Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

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RECOMMENDATION OF HEARING COMMISSIONER

Upon consideration of the entire record in these cases, the Hearing Commissioner concludes that Respondent did not violate Section 5(a) of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.


THOMAS L. MCGILL, JR.
HEARING COMMISSIONER

2-25-85
DATE

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ORDER

AND NOW, this 28th day of February, 1985,
the Pennsylvania Human Relations Commission hereby adopts the foregoing
findings of fact, conclusions of law, and opinion, in accordance with the
recommendation of the hearing Commissioner, pursuant to Section 9 of the
Act, and therefore

O R D E R S

that the complaints in these cases be, and the same hereby are,
DISMISSED.

Pennsylvania Human Relations Commission

By: Doris M. Leader Vice Chairperson
Doris M. Leader, Vice-Chairperson

ATTEST: John P. Wisniewski

By: John P. Wisniewski, Assistant Secretary