



City of Chicago
COMMISSION ON HUMAN RELATIONS
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IN THE MATTER OF:

Armando Ramirez

Complainant,

v.

Mexicana Airlines (Mexicana de Aviacion,
S.A. de C.V.) and Manuel Pliego

Respondents.

Case No.: 04-E-159

Date of Ruling: March 17, 2010

Date Mailed: March 24, 2010

TO:

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FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on March 17, 2009 the Chicago Commission on Human Relations issued a ruling in favor of Respondents in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek a review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

City of Chicago
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FINAL RULING

I. INTRODUCTION

On October 18, 2004, Armando Ramirez filed this Complaint with the City of Chicago Commission on Human Relations alleging discrimination because of his sexual orientation by Mexicana Airlines, specifically Mexicana de Aviacion, S.A. de C.V. (“Mexicana” or “Company”), and Mexicana’s Regional Sales Manager, Manuel Pliego (“Pliego”). (CX. 1.)¹

After an investigation and a finding of substantial evidence, an administrative hearing was held on August 5, 6, and 7, 2008, before hearing officer Violet M. Clark.² The parties filed post-hearing briefs and on January 7, 2010, the hearing officer issued her recommended ruling in favor of Respondents. Complainant filed objections to the recommended ruling. Respondents moved for leave to reply to the objections; however, the hearing officer denied the motion on March 10, 2010. Upon consideration of the recommended ruling, Complainant’s objections, and the hearing record, the Commission on Human Relations issues this final ruling accepting and adopting the recommendations of the hearing officer.

II. FINDINGS OF FACT

A. The Parties

Mexicana Airlines

1. Mexicana is an international airline headquartered in Mexico, with operations and sales offices in Mexico, the United States and Canada, among other countries. (Pre-Hearing Memorandum, p.12) Mexicana is engaged in the business of transporting passengers and cargo between various cities worldwide, including Chicago’s O’Hare International Airport. (Pre-Hearing Memorandum, p. 12)

¹ Respondents’ Exhibits are referenced as “RX ____;” Complainant’s Exhibits are referred as “CX ____.” Findings of Fact are referenced as “FOF ____.”

² The transcript of proceedings is referenced by volume number followed by page number. Volume I is the transcript of the hearing held on August 5, 2008. Volume II is the transcript of the continued hearing held on August 6, 2008. Volume III is the transcript of the continued hearing held on August 7, 2008.

2. In late 2003, Mexicana's corporate headquarters hired Sergio Alard as the new Commercial Director of Sales. Alard expanded the Chicago sales office. (III-14-15) The expansion began in November 2003, when Alard installed Manuel Pliego as the new Regional Sales Manager in Chicago. (III-15)
3. All Mexicana employees in the United States, including employees in Chicago, are employed at will. (III-10)

Manuel Pliego

4. Manuel Pliego was raised in Mexico City and lived there for 26 years. (II-7)
5. Pliego is not gay. (II-415)
6. Pliego has been employed by Mexicana as a manager for 28 years. (II-340) He is currently employed by Mexicana as Manager of Passenger Services at O'Hare Airport in Chicago. (II-340)
7. Prior to May 1, 2008, Pliego was the Regional Manager of Sales in Chicago. (II-340)
8. Soon after he arrived in Chicago, Pliego was assigned the task of identifying and recommending four new sales executive candidates for the Chicago office. (II-349-52)
9. The primary responsibility of a sales executive is to develop and maintain relationships with travel agencies throughout the greater Chicago region and in nearby states. (II -374-380)
10. Sales executives were required to report to the office on time at 9:00 a.m. and to:
 - communicate with Pliego on a regular basis to discuss their weekly sales plans, their sales activities, and the competition; (II-367-368)
 - participate in sales meetings, which typically occurred on a weekly basis in 2004; (II-367-68; I-278)
 - be creative, promote new ideas, volunteer for local events, and volunteer for travel to Mexico to promote Mexicana; (II-367-68; I-278)
 - submit their expense reports every two weeks, on the 15th and the 30th of the month; (II-271) and
 - dress professionally. (I-285; II-380-81)
11. Sales executives were required to attend numerous sales events including local presentations to groups, government officials, and different organizations to promote Mexico as a travel destination. (II-362-65)
12. Sales executives were also required to travel to Mexico to make presentations about Chicago and to promote Chicago as a tourist destination. (I-157; II-455-57; III-93, 114)

13. Pliego began the recruitment process for sales executives by notifying his acquaintances at the airport of the vacancies so they could distribute the information to the rest of the airport staff. (II-351-352) Ten candidates presented themselves for consideration. (II-352) Pliego interviewed the candidates. (II-354) He required each candidate to make a presentation regarding a location in Mexico. (II-354)
14. Based on the interviews, presentations, recommendations, and other information regarding the candidates, Pliego recommended Laura Martinez, Sonia Varela, and Armando Ramirez (Complainant) for the sales positions. (II-354-55) Pliego also sought input from Alfonso Moreno, Mexicana's Airport Manager, whom Pliego had known since before January, 2004. (II-352-53)
15. Pliego was not aware of Ramirez's sexual orientation at the time Ramirez was hired. (II-356-415)
16. Pliego's principal duties were to review the revenue and budget and manage human resources, company properties and agency contracts, and anything related to the Swissport staff who worked with him. (II-346)
17. Pliego did not have the authority to hire or fire employees. (II-347)
18. Pliego could recommend that employees be hired or fired. (II-347)
19. Pliego did not have the authority to eliminate positions or to reorganize the office. (II-347)
20. Sergio Alard had the authority to eliminate positions and to reorganize the office. (II-347)
21. Upon his hire in the United States, Pliego received training in human resources and other issues, including Mexicana's anti-harassment policy. (II-343-45)
22. Pliego attended three anti-harassment training sessions in the almost five years he was employed in the Chicago sales office. (*Id.*; RXs 70-71)
23. Pliego understands that sexual orientation is a protected class. (II-344)
24. Pliego received and signed a letter acknowledging he understood the professional conduct policy and the prohibition against harassment. (II-345)
25. Upon their hire, Ramirez, Varela, and Martinez each received the anti-harassment policy, and each affirmed to Mexicana that they had reviewed and read it. (I-236-38; III-14)
26. It is Mexicana's practice, and that of Lourdes Richter, Regional Director for Human Resources for the United States, to send the handbook including the anti-harassment policy and the offer letter to, and receive the acknowledgement form from, each new employee to ensure that the anti-harassment policy has been read and understood. (III-10)

27. The initial three months of employment for all Mexicana employees, including Ramirez, was an introductory period. (II-357-58; III-20-21)
28. Pliego required each employee to conduct a self-evaluation, which became their performance reviews if Pliego agreed with them. (II-357-58; III-20-21)
29. After the first three months, Pliego recommended that Ramirez, Varela, and Martinez each be moved out of the introductory period and become eligible to receive benefits. (I-257)
30. Pliego's testimony was credible.

Armando Ramirez

31. Ramirez was born in Guanajuato, Mexico in 1980 and moved to Chicago with his family when Ramirez was 7 or 8 years old. (I-137)
32. Ramirez is fluent in Spanish and English. (I-139, CX. 5)
33. Ramirez graduated from John F. Kennedy High School in 1998 and has taken a couple of workshops in journalism. (CX. 5; I-137-38)
34. Ramirez lives with his parents and a brother, Cesar, in the City of Chicago. (I-136, 201, 228, 256)
35. Ramirez's sexual orientation is gay. (Pre-Hearing Memorandum, p. 12)
36. Ramirez applied for a position as a sales account executive on February 6, 2004. (CX. 5)
37. Prior to his hire, Ramirez did not disclose his sexual orientation to anyone associated with Mexicana. (I-144)
38. Ramirez was interviewed by Pliego and Mexicana's three current sales account executives, Amparo Portillo, David Mata, and Fred Ortiz. (I-145)
39. Ramirez's interview consisted of giving a bilingual sales presentation promoting a Mexican state as a travel destination. (I-145; II-354)
40. Ramirez and two of his Swissport colleagues, Martinez and Varela, were hired effective March 1, 2004. (CX. 6)
41. Ramirez received his offer letter on February 17, 2004, which made it clear that his employment was at will and that Mexicana could discharge him at any time without notice and with or without cause. (I-235; RX 10)
42. Two of Ramirez's colleagues at Swissport, Martinez and Varela, knew Ramirez is gay. (I-144)
43. Amparo Portillo had heard "rumors" Ramirez is gay, but these conversations did not involve Pliego. (III-122, 139)

44. At the time of his hire, Ramirez signed documents acknowledging receipt of Mexicana's policies with respect to harassment, liquor and drugs, computer communications, and safe practices. (CX. 8; RX. 14)
45. Although he never signed the harassment policy, Ramirez was aware of the prohibition against harassment and assumed he could report harassment, as in any other company. (I-246)
46. Following completion of the probationary period, Ramirez was assigned to a sales territory which included downtown Chicago and certain suburbs. (I-156)
47. Ramirez was also assigned to compile materials and prepare a Power Point presentation to promote Chicago as a tourist destination. (I-157) Ramirez made a "trial run" presentation to the other sales executives. (I-158)
48. Due to the fact that Ramirez prepared the materials for the presentation and the fact that people were impressed with his delivery, Ramirez was assigned to go to Mexico to make presentations on multiple occasions. (I-157-59, 168)
49. Ramirez was one of Mexicana's best presenters while employed by Mexicana. (CX. 29; II-366, 367, 419, 455)
50. Pliego received positive feedback from his colleagues in Mexico about Ramirez's performance regarding his presentations. (II-367)
51. Ramirez was late arriving to weekly sales meetings. (I-277)
52. Ramirez did not turn in his weekly sales reports on a regular, weekly basis. (I-273-274)
53. Ramirez did not regularly turn in his expense reports on the 15th or 30th of each month. (II-107, 152-154)
54. Ramirez's testimony was not credible.
55. Ramirez's credibility was undermined in several respects as follows:
 - Ramirez denied arriving to work late at Mexicana. (I-164, 268) Ramirez's testimony was contradicted by five credible witnesses and by Ramirez himself during cross examination. (I-277)
 - Ramirez testified that he never once submitted his weekly reports late. (I-165-166) He later admitted that he turned them in late because he was traveling and because of a change in responsibilities. (I-274) The employee who was responsible for collecting the reports testified that Ramirez was almost always late turning in his reports. (III-152-54)
 - During the hearing, Ramirez insisted that on October 13, 2004, he and Pliego did not discuss the fact that Pliego evaluated Ramirez, Martinez, and Varela when deciding which of the sales people to lay off. (II-290) However, the next day, Ramirez sent an e-mail to Pliego which specifically referenced their discussion about the evaluation. (RX. 35)

Ramirez also admitted, on cross-examination, that he and Pliego “talked” about the evaluation. (II-296)

- Ramirez denied that he and Pliego discussed a few of the reasons he was selected for layoff. (II-299) Ramirez’s testimony was contradicted by the e-mail he wrote which acknowledged that he and Pliego had discussed some of the reasons for the decision. (RX.35)

B. Mexicana’s Witnesses

Luis Rogel

56. Luis Rogel is the owner of Carnival Travel. (I-37)
57. Ramirez was assigned to Carnival Travel in 2004. (I-31)
58. Rogel asked Pliego to remove Ramirez from the Carnival account because he wanted to keep a more experienced sales executive. (I-32)
59. Ramirez did not do any work for Carnival. (I-35)
60. Rogel did not complain to Mexicana about Ramirez or about Ramirez’s performance. (I-35)
61. Rogel was a credible witness.

Laura Martinez

62. Martinez began to work for Mexicana in the Chicago office on March 1, 2004. (II-313)
63. Prior to working for Mexicana, Martinez worked with and supervised Ramirez at Swissport. (II-314)
64. Martinez and Ramirez are “very good” friends. (II-314)
65. Martinez and Ramirez had lunch together regularly when they worked for Mexicana in the Chicago office. (II-316)
66. Ramirez did not complain to Martinez about Pliego or about being harassed or discriminated against. (II-317)
67. Because of their relationship, Martinez would have expected Ramirez to tell her if he had a problem or was being treated unfairly. (II-317)
68. Martinez did not hear Pliego say anything derogatory to anyone in her presence. (II-318)
69. Martinez does not have any reason to think that Pliego discriminated against Ramirez or treated him unfairly based on what she knows of him. (II-319)
70. Laura Martinez was a credible witness.

Lourdes Richter

71. Richter has been employed by Mexicana for 22 years and is currently the Regional Director for Human Resources for the United States and Canada. (III-7)
72. Richter's duties include recruiting, hiring, firing, policy review, and implementation of state, federal and local laws for employment, benefits and payroll. (III-7)
73. Richter was responsible for drafting Mexicana's same-sex benefits policy in the last half of 2004 and recommending that the policy apply all across the United States, even in the states or cities that did not require such policies to be in place. (III-11-12)
74. Mexicana promotes gay tourism. In 2004, Pliego approved Mexicana's business relationship with the Gay and Lesbian Chamber of Commerce in Chicago. (III-168-69)
75. Mexicana has circulated an article, in an in-flight magazine available on all of its planes, promoting gay tourism in Mexico and the United States. (III-169; RX. 44)
76. In September 2004, at the request of a sales manager from New York, the human resources office created and posted a vacancy bulletin for a position in New York. (RX. 20; III-22)
77. On October 15, 2004, Richter was notified that the position was frozen and could not be filled. (II-25-26)
78. Richter agreed with Pliego's decision to lay off Ramirez. (III-34)
79. When Richter affirmed Ramirez's layoff, she did not know he is gay and did not have any reason to believe he was being recommended for layoff for any inappropriate reasons. (III-39)
80. Ramirez did not file any internal complaints with Richter about Pliego prior to his layoff. (III-39)
81. Richter prepared Ramirez's termination documents in the same manner as she had prepared documents for other employees affected by the reorganization. (III-43)
82. Lourdes Richter was a credible witness.

Amparo Portillo

83. Ramirez's sexual orientation was not a subject of conversation when Portillo was in the office. (III-123)
84. Portillo was not aware of Ramirez being treated differently because he is gay. (III-123)
85. Ramirez worked in the cubicle behind Portillo's and would pass her to get to his cubicle. (II-123)
86. Ramirez was late to work "maybe once a week." (III-123)

87. Portillo is not aware of any disparaging comments made about Ramirez at any sales meeting. (III-125)
88. Amparo Portillo was a credible witness.

Genoveva Bustamante

89. Bustamante did not hear Pliego mistreat Ramirez in any way. (III-175)
90. Bustamante heard Pliego say positive things about Ramirez. (III-175)
91. Bustamante did not hear Pliego say anything negative about gay or lesbian people. (III-176)
92. Bustamante did not see anyone treat Ramirez differently because he is gay. (III-176)
93. Bustamante did not hear anyone call Ramirez a “mariposa.” (III-176)
94. Bustamante was friendly with Ramirez and he never complained to her that he was being treated badly by anyone at Mexicana because he is gay. (III-177)
95. Mexicana markets travel to the gay community. (III-169)
96. Mexicana had a business relationship with the Gay and Lesbian Chamber of Commerce. (III-169-170)
97. Genoveva Bustamante was a credible witness.

Susana Guidino

98. Susana Guidino worked in the sales office as a secretary for Pliego in 2004. (III-149)
99. Guidino sat by the front door. (III-152)
100. When Ramirez was late to work, she would report it to Pliego because that was part of her job. (III-152)
101. Laura Martinez and Sonia Varela reported to work on time. (III-152)
102. One of Guidino’s responsibilities was to collect and review the expense reports of the sales executives. (III-149)
103. Ramirez did not turn in his expense reports on time. (III-153)
104. Susana Guidino was a credible witness.

Ramirez's Witness

Elvia Giannatsous

105. Giannatsous' testimony was not credible.
106. Giannatsous' bias against Mexicana was evident throughout her testimony. (I-71-72, 77-78) For example:
 - Giannatsous admitted that she had been repressing her negative feelings about a former manager (Esteban Salazar) for years, causing her to consider suicide. (I-107-108)
 - Giannatsous falsely accused Pliego of stealing money from Mexicana by falsifying his expense reports. (I-127) Giannatsous alleged she informed Richter of the alleged theft. (I-127) Richter, who was a credible witness, testified that Giannatsous had never reported an alleged theft to her. (III-50)
 - Giannatsous admitted that she falsified her resumés. (I-91-94)
107. Five credible witnesses testified that Giannatsous is dishonest, not to be trusted, a gossip, physically intimidating, and manipulative. (II-327; III-49, 126-27, 159-60.)

C. Ramirez's Layoff from Mexicana

108. In early October 2004, Mexicana's corporate headquarters decided to reduce the workforce in Chicago, to reduce some operating costs. (III-25-29)
109. Several positions in the United States were affected, including several positions in regions which had sought approval from Mexico to fill, but which were declared to be frozen and not open. (III-25-29; RX 21)
110. In addition, positions were cut, including one of the recently created sales executive positions in Chicago. (III-25-29)
111. On approximately October 6, 2004, Pliego learned that due to a reorganization taking place throughout Mexicana's United States operations, he had to reduce the number of sales executives by one. (II-384-85)
112. Pliego was directed to recommend one sales executive to be laid off. (II-385-387, 396)
113. To determine who he could most easily do without and who should be laid off, Pliego evaluated Ramirez, Martinez, and Varela. (II-385-87)
114. Pliego worked with Salazar to create nine factors he would use to evaluate the performance of the three sales executives. (II-387-89)
115. Salazar devised with the scoring system to measure the executives, with "1" being good, "2" being fair, and "3" being poor. (III-103; RX 22)

116. Pliego applied the scoring system to the nine factors for each of the three sales executives, to determine how they were performing as compared to each other. (II-391; RX 22)
117. The factors included, among others, punctuality, reports, projects, communication, and presentations. (RX 22)
118. Ramirez was regularly late to work throughout his employment with Mexicana. (III-151-52; III-177; III-123, III-321, 325; I-277)
119. Ramirez almost always turned in his expense reports late. (III-153)
120. Varela and Martinez were not late to work or to meetings, and they turned in their sales and expense reports on time. (II-379-80; III-154, 161)
121. Pliego determined that Martinez performed the best of the three executives with a score of 12, followed by Varela with a 14, and Ramirez scored the poorest with a 21. (II-379-80; III-154, 161)
122. Pliego presented his analysis to Salazar, his boss, who agreed with Pliego's analysis. (III-112)
123. Pliego and Salazar presented the recommendation that Ramirez be selected for the layoff, and the reasons for the recommendation, to Richter on October 8, 2004. (III-31)
124. Richter requested that the analysis Pliego performed be reduced to writing and submitted to her for review. (III-31)
125. Based on the recommendation, Richter approved the decision to lay off Ramirez, effective October 15, 2004. (III-30, 33-34, 39, RX 23)
126. Upon confirming Ramirez's selection for the layoff due to the reorganization, Richter processed the paperwork and communications necessary to lay off Ramirez. (III-41-45; RXs 28, 36, 38, and 39)
127. Richter sent Pliego, among other things, a termination letter identifying the economic reasons for the layoff, a letter of recommendation typically offered to employees affected by a Mexicana reorganization, and a letter authorizing Ramirez to travel on Mexicana for 60 days beginning on October 16, 2004. (RXs. 25, 26, and 27)
128. These were standard documents Mexicana had used before Ramirez's layoff, and has continued to use for the employees who were laid off after Ramirez. (Varela was the next sales executive to be laid off after Ramirez, Ortiz, and eventually Pliego himself.) (II-407-08; III-37-41; RXs 49, 50, 54, 59, 60, and 73)
129. Pliego met with Ramirez on October 13, 2004, and provided Ramirez with his termination letter and informed Ramirez that he was being laid off effective October 15, 2004, for economic reasons and due to a corporate reorganization with Mexicana. (II-397-98, RXs 25 and 35)

130. Pliego and Ramirez discussed several reasons Ramirez was ultimately selected for the layoff, and they discussed Pliego's performance analysis that resulted in his decision to recommend Ramirez for the layoff. (II-397-98)
131. Ramirez asked whether there was an opportunity to transfer to a sales executive position that had been posted in New York. (II-397)
132. The New York position had been frozen as part of the corporate reorganization, was never formally approved for posting by the CFO in Mexico, and was never filled. (III-23-25; RX 21)
133. There were no available sales executive positions in the United States into which Ramirez could transfer. (III-81)
134. Pliego offered to provide a positive reference for Ramirez to apply for a Swissport position at O'Hare Airport so that Ramirez could continue to work with Mexicana or another airline, such as Aeromexico Airlines. (II-398; III-42)
135. On October 14, 2004, Ramirez sent an e-mail to Pliego and Richter confirming that Pliego had discussed with Ramirez a few of the reasons he had been selected for the layoff, requesting a copy of the analysis that Ramirez and Pliego discussed, requesting a copy of his personnel file, and expressing interest in the New York position. (RX 35)
136. Ramirez, in his October 14, 2004 e-mail to Richter, did not question the legitimacy of the termination, nor did he complain of harassment or inappropriate comments by Pliego. (RX 35)
137. On October 15, 2004, Ramirez came to the office and completed his expense reports and sales plans dating back to September 15, 2004. (III-222; II-373; RX 19)
138. At the end of the day on October 15, 2004, Ramirez met with Pliego and was presented with a proposed Settlement and Release Agreement, with an effective date of October 16, 2004. (II-402; RX 37)
139. After his employment with Mexicana ended, Ramirez knew that he could go back to work for Swissport at O'Hare Airport, but he did not apply for a job with Swissport for six months. (I-260-66)
140. When Ramirez applied for a position with Swissport, he was hired. (I-262)

D. Ramirez's Allegations of Harassment And Discrimination

141. Ramirez alleges that Pliego used an offensive term, based on sexual orientation, and referred to Ramirez as "mariposa." (I-177)
142. "Mariposa," literally translated, means "butterfly" in English. (I-139)
143. The word "mariposa" is also used, "depend[ing] how you say it," as a derogatory word for a gay person. (II-139-40)

144. The monarch butterfly was used in all of Mexicana's Morelia, Michoacan materials. (III-125; 156)
145. The word "mariposa" was used in conjunction with that promotional effort. (III-125; 156)
146. Pliego did not use the word "mariposa" to refer to Ramirez. (II-382)
147. Ramirez alleges that Pliego used an offensive term, based on sexual orientation, when he commented on Ramirez's hairstyle.
148. Pliego did not comment on Ramirez's hair by saying, "What a little hairstyle." (II-381)
149. Pliego did not tell Ramirez that Pliego could not sleep on a flight because there was a "joto" (a derogatory term for a gay man) sitting next to him. (II-384)
150. Pliego did not say to Ramirez that "people like you should go to work somewhere else where they feel more comfortable." (II-403)
151. Ramirez first raised the allegations of harassment and discrimination by Pliego because of his sexual orientation after his employment with Mexicana was terminated. (I-246-47, 254)
152. Ramirez never complained to anyone at work, including Mexicana's human resources department or even his closest friends, that he had suffered any harassment or discrimination. (I-246-47, 254)
153. Ramirez did not complain about Pliego or harassment to Martinez, his close friend with whom he shared the most confidential of information regarding his medical condition when they worked together at Swissport. (I-247, 249-50)
154. Ramirez did not complain about Pliego or harassment to Moreno-Santa, whom he respected, who he knew was a Mexicana manager, and who liked Ramirez enough to recommend him for the sales executive position. (I-255)

Mexicana's Anti-Harassment Policy

155. Mexicana's anti-harassment policy is to treat claims of harassment very seriously. (I-238-39; RX 15)
156. When Bustamante complained to Richter that Esteban Salazar had engaged in harassment, Richter investigated the complaint and terminated Salazar's employment three weeks later. (III-9-10, 171-72)
157. When a Mexicana employee at O'Hare Airport made an inappropriate comment about a female employee, Moreno-Santa took the complaint seriously. The complaint led to the alleged harasser's suspension. (III-193-94)

158. Mexicana regularly trains its managers on harassment prevention. (III-9-11; II-343-46)
159. Mexicana conducts initial training before employees assume managerial responsibilities and also refresher training sessions every two years thereafter. (II-343-46)

III. CONCLUSIONS OF LAW

1. This is a sexual orientation discrimination case in which Complainant Ramirez claims he was subjected to a hostile work environment and laid off because of his sexual orientation, homosexual or gay.
2. Ramirez has failed prove that he was subjected to an offensive work environment or that he was laid off in violation of the Human Rights Ordinance, Section 2-160-030, Chicago Municipal Code, which provides that it is unlawful to discharge an individual "because of the individual's...sexual orientation."
3. Manuel Pliego is a "person" pursuant to Section 2-160-030 of the ordinance and is subject to its provisions.
4. Mexicana is a "person" pursuant to Section 2-160-030 of the ordinance and is subject to its provisions.
5. The City of Chicago Commission on Human Relations has proper jurisdiction over the parties and the subject matter of the cause.

A. Credibility

6. The direct contradiction between Ramirez's claims and Respondents' testimony requires a judgment concerning the credibility of witnesses. It is well established that the hearing officer and the members of the Commission must determine the credibility of witnesses, choose among conflicting factual inferences, and weigh the evidence. *Guy v. First Chicago Futures*, CCHR No. 97-E-92 (Nov. 17, 2004); *Bray v. Sandpiper Too, Inc. et al.* CCHR No. 94-E-43 (Jan, 19, 1996). Moreover, the Commission can disregard the testimony of any witness if it is determined that the witness was not telling the truth. *Guy, supra.* at 8, *Bray, supra.* at 4. Based on the above authority and a review of all of the evidence presented in this case, the hearing officer found that Ramirez was not a credible witness but Pliego was.
 - a. In the hearing officer's view, throughout the hearing Ramirez's testimony was not logical and was not believable. In addition, a significant amount of his testimony was not supported by the credible testimony of other witnesses or by e-mails Ramirez authored prior to hearing. Therefore, the majority of Ramirez's testimony has been disregarded.
 - b. In contrast, the hearing officer found the testimony of Respondent Pliego and Respondents' witnesses to be credible, crediting their testimony and disregarding the majority of the testimony of Complainant and of his witness Giannatsous, who was also found not credible.

B. Claim of Harassment Based on Sexual Orientation

7. The Human Rights Ordinance prohibits any person from discriminating against an individual with respect to a “term or condition of employment” because of that individual’s sexual orientation. Section 2-160-030, Chicago Municipal Code; see also Section 2-160-202(1), defining “sexual orientation” as “the actual or perceived state of heterosexuality, homosexuality, or bisexuality.” The regulations which govern the Human Rights Ordinance define prohibited discrimination to include any harassment against an employee based on that employee’s actual or perceived homosexuality. Under Reg. 345.100, harassment includes “slurs and other verbal or physical conduct” relating to any individual’s sexual orientation which creates an “intimidating, hostile or offensive working environment.”
8. The Commission has held that to prove a hostile work environment claim, the employment situation must be “deeply repugnant.” *Guy, supra.*, and *Austin v. Harrington*, CCHR No. 94-E-237 (Oct. 23, 1997). When determining whether a hostile work environment exists, the Commission has been guided by federal precedent and it recognizes the existence of such an environment “only if the challenged conduct is ‘sufficiently severe or pervasive to alter the conditions of [the complainant’s] employment and create an abusive working environment.’” *Bahena v. Adjustable Clamp Company*, CCHR No. 99-E-111 (July 28, 2003); *Luckett v. Chicago Dept. of Aviation*, CCHR No. 97-E-115 (Oct. 18, 2000); *Escobedo v. Homak Mfg. Co., Inc.*, CCHR No. 93-E-7, at 6 (May 15, 1996), quoting *Saxton v. America Tel. & Tel. Co.*, 10 F.3d 526 533 (7th Cir. 1993); *Osswald v. Yvette Wintergarden e. al.*, CCHR No. 93-E-93 at 11 (July 19, 1995), citing to *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). “When considering whether the conduct creates a hostile environment, the Commission considers ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s performance.’” *Escobedo, supra.* at 7, quoting *Harris, supra.* at 23. A Complainant’s own subjective beliefs are insufficient to establish a violation of the Ordinance. The conduct in question must be both “objectively offensive to an employee in the Complainant’s situation” and “subjectively offensive” to Complainant himself. *Escobedo, supra.* at 6; *Osswald, supra.* at 11.
9. Complainant has properly alleged a *prima facie* case of harassment based on his sexual orientation. He contends, among other things, that Pliego made seven comments that he found offensive. Ramirez maintains that on two occasions, Pliego referred to him as a “mariposa.” (I-184) He also asserts that Pliego made the Spanish equivalent of the statements: “[W]hat a little hairstyle” (I-174); “look at that little tie” (I-173.); and “[A]re you talking to your little friend?” (I-178). The sixth alleged statement is that Pliego once told Ramirez that he could not sleep on a flight because there was a “joto” (a derogatory term for a gay man) sitting next to him. (I-186) The seventh statement allegedly occurred during the meeting on October 13, 2004. During that meeting, Ramirez alleges, Pliego told Ramirez that his position had been eliminated and “people like you should go work somewhere else where they feel more comfortable.” (I-191) Finally, Ramirez alleges that Pliego offered two soccer tickets to senior account executives but not to him. (I-187)

10. The Commission has rejected claims involving similar conduct. In *Guy, supra.*, the Commission found no racial harassment where the six incidents described were not sufficiently severe or pervasive to create a hostile work environment. In addition, courts have rejected claims involving far more severe conduct. See, for example, *Rogus v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003), where ten offensive comments, four of which were sexual in nature, made over the course of several months were found insufficient to create an objectively offensive work environment. See also *Pratt v. Family Health Systems, Inc.*, 280 F.3d 749, 754 (7th Cir. 2002); *Russell v. Board of Trustees of University of Illinois at Chicago*, 243 F.3d 336, 343; and *Pryor v. Seyfarth Shaw, Fairweather & Geraldson*, 212 F.3d 976, 977-78 (7th Cir. 2000). Consequently, Ramirez has failed to prove a *prima facie* case of hostile work environment harassment based on his sexual orientation.
11. In this case, even assuming the asserted conduct occurred and Ramirez perceived the statements to be directed at his sexual orientation, the conduct as described was not objectively offensive. Ramirez described, at most, seven isolated comments and one failure to receive tickets to a soccer game, over an eight-month period. The statements when viewed objectively do not reference or relate, in any way, to Ramirez's sexual orientation. Moreover, none of the comments as described were physically threatening or humiliating. Further, Ramirez did not present any evidence that Pliego did not give him a ticket to the soccer game because of his sexual orientation. Therefore, Ramirez has failed to prove that either the claimed comments or his failure to receive a ticket to the soccer game were objectively offensive.
 - a. Also, Ramirez has failed to prove that any of the allegedly harassing comments or actions were subjectively offensive or that any of them unreasonably interfered with his performance. Ramirez's assertion that he was offended by the alleged comments, by itself, is not sufficient to prove Ramirez found the alleged statements to be subjectively offensive. In addition to his assertion that the alleged statements were offensive to him, Ramirez must prove that the alleged comments and actions unreasonably interfered with his performance. Ramirez has failed to prove this element of his *prima facie* case of hostile work environment discrimination. Neither Ramirez or any other witness testified that his demeanor changed over time due to any alleged harassment or for any other reason. Ramirez testified that he did not lose sleep or his appetite. (I-200-02) Significantly, Ramirez testified that he wanted to remain in his position despite the alleged harassment. (I-265) This fact alone is contrary to Ramirez's contention that the alleged comments created a hostile work environment.
 - b. Finally, Ramirez's failure to complain—to the company or to close colleagues—about the alleged harassment during his employment and/or at the time he learned he was being laid off is additional evidence that he did not find his work environment intolerable. In *Bahena, supra.*, the Commission considered the fact that the complainant had failed to complain about the alleged harassment in dismissing the complainant's harassment claim. The complainant argued—as does Ramirez in this case—that he did not complain because he was trying to protect his job. However, the Commission rejected that argument because the complainant “had to know that his job was on the line when he was suspended.” In this case, Ramirez certainly knew his job was on the line when Pliego told him that his position was being eliminated,

yet he did not raise the issue of harassment with the company at that time. Before the decision to eliminate his position was made, there is nothing to suggest that the company would not have seriously considered a harassment complaint or that Ramirez's job would have been threatened if he complained. On at least two occasions, in response to an allegation of harassment, the company had taken significant disciplinary action against the offenders. (FOFs 157 and 158) The hearing officer credited Respondent's evidence that Ramirez had been made aware of the applicable policy when hired. Yet during his employment, despite having ample opportunity to follow Mexicana's harassment policy and complain to the human resources department, Ramirez failed to do so.

12. In sum, after examining all of the evidence and consistent with the hearing officer's recommendation, the Commission concludes that Ramirez has failed to sustain his burden of showing that either Mexicana or Pliego subjected him to a hostile work environment based on his sexual orientation.

C. Claim of Layoff Based on Sexual Orientation

13. Ramirez argues that he was discharged because of his sexual orientation. Mexicana and Pliego assert that Ramirez was laid off because Mexicana eliminated one sales executive position and Ramirez's work performance was not good as that of the other two sales executives. As discussed below, Ramirez has failed to prove by a preponderance of the evidence that his sexual orientation had any role in Pliego's decision to recommend his termination or Mexicana's decision that he would be the sales executive laid off.
14. To prove that he was discharged in violation of the Human Rights Ordinance, Ramirez "bears the burden of providing by a preponderance of the evidence that h[is] sexual orientation, being a [gay man], caused h[is] termination by having 'played a part' in the termination decision." *Bahena, supra.*, citing *Klimek v. Haymarket/Maryville*, CCHR No. 91-E-117 at 15 (June 16, 1993). In this case, Ramirez does not have any "direct" evidence that sexual orientation discrimination motivated his discharge. See *Bahena, supra.* at 31, citing *Richardson v. Chicago Area Council of Boy Scouts of America*, CCHR No. 92-E-80 at 32 (Feb. 21, 1996), explaining that "direct evidence" is evidence that, if believed, requires no "resort to inferences. The illegality of the act is proved directly by reference to some policy, statement or action" of the respondent and/or decision maker. As further explained in *Chimpoulis and Richardson v. J & O Corp. et al.*, CCHR No. 97-E-123, 127, (Sept. 20, 2000), direct evidence may be in the form of an acknowledgement of discriminatory intent by the employer or its agents. Complainant has not provided any direct evidence of discriminatory intent. Therefore it is necessary to consider whether he has proved by the indirect method that his sexual orientation motivated his termination, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under this method, if a complainant establishes a *prima facie* case, the burden then shifts to the respondent to articulate a legitimate, non-discriminatory reason for the complainant's termination. *Pruitt v. John O. Butler Co. et al.*, CCHR No. 97-E-42 (Dec. 6, 2000); and *Adams v. Chicago Fire Dept.*, CCHR No. 92-E-72 (Sept. 20, 1995). If the respondent articulates a legitimate, non-discriminatory reason for the discharge, the complainant can still prevail by showing that the purported

reason for termination was a pretext for discrimination. *Id.* See, for example, *Bahena* at 31; *Richardson* at 30-31, and *Klimek* at 15.

- a. Thus under the indirect method of proof, Ramirez must first establish a *prima facie* case by showing (1) that he was known or perceived to be homosexual; (2) that an adverse action was taken against him; (3) that he was meeting Mexicana's legitimate expectations at the time of the adverse action; and (4) that similarly situated persons not known or perceived to be homosexual were treated differently. *Bahena* at 31. Ramirez has failed to prove the first and fourth elements of his *prima facie* case.
 - b. Ramirez has failed to prove that Richter, the decision maker, or Pliego, the person who recommended the layoff decision, either knew or perceived Ramirez to be gay. Richter and Pliego credibly testified, according to the hearing officer, that they did not know Ramirez is gay. Further, Ramirez testified that he did not tell anyone at Mexicana that he is gay. Therefore, Ramirez has failed to prove the first element of his *prima facie* case of discrimination.
 - c. In addition, Ramirez has failed to prove that he was similarly situated to Varela and Martinez, who are not gay and who were not terminated. Specifically, Ramirez failed to prove that his work performance was comparable to that of Varela or Martinez. In making the layoff decision, Pliego used a nine factor analysis. The nine factor analysis was applied to each of the three sales executives. The sales executive with the lowest overall score was determined to be the best performer or most valuable. The sales executive with the highest score was the least proficient performer or the least valuable. Using the scoring system, Martinez had a rating of 12, followed by Varela with 14, and Ramirez with a score of 21. Ramirez's score was less favorable than those of both Varela and Martinez. Therefore, Ramirez was not similarly situated to Varela and Martinez in that he had not received as favorable a score in this analysis. Consequently, Ramirez failed to prove the second element of his *prima facie* case of discrimination based on his sexual orientation.
 - d. Finally, Ramirez did not present any evidence of any practice of disparate treatment based on sexual orientation by Mexicana or by Pliego. Nor was there any evidence of company bias against homosexuals. To the contrary, Richter credibly testified that Mexicana provides the same benefits to its homosexual employees as it does to its heterosexual employees, regardless of whether it is required by law. Moreover, Mexicana specifically markets travel to the gay community. In addition, the Chicago office had a "business relationship" with the Gay and Lesbian Chamber of Commerce in Chicago. Based on these facts and the credibility determinations of the hearing officer, the Commission finds that Ramirez has failed to prove that his layoff was motivated by any discriminatory intent or animus.
15. Even assuming that Ramirez supported his *prima facie* case of discharge based on sexual orientation, Respondents not only articulated but also proved a legitimate, non-discriminatory basis for their decision. The hearing officer found that Mexicana and

Pliego introduced credible evidence to prove a legitimate, non-discriminatory basis for the decision to lay off Ramirez. The Commission agrees and adopts this finding.

16. Specifically, Mexicana proved that it eliminated one sales executive position pursuant to a corporate reorganization. To determine which sales executive position to eliminate, Pliego evaluated the performance of the three least senior sales executives. Ramirez received the highest score on the evaluation, which indicated he was the worst performer of the group. Consequently, Ramirez was selected for layoff. Therefore, even if Ramirez had proven a *prima facie* case of discrimination based on his sexual orientation, which he did not do, Respondents successfully presented credible evidence of a legitimate, non-discriminatory reason for terminating Ramirez.
17. The articulation of a legitimate, non-discriminatory reason for the termination requires Ramirez to prove that the articulated reason is pretextual. To do so, Ramirez must prove that Pliego's and Mexicana's stated reasons for his termination were not the real reasons. In this case, Respondents provided credible evidence to support their reasons. Ramirez has failed to produce sufficient, credible evidence to support a finding that the reasons given by Pliego and by Mexicana for terminating him were not the real reasons for the termination. Thus, Ramirez has failed to prove pretext and so has failed to prove that he was terminated because of his sexual orientation.

IV. COMPLAINANT'S OBJECTIONS

The Commission has reviewed and considered Complainant's objections, and finds nothing to warrant rejection or modification of the hearing officer's recommended ruling. As provided in §2-120-510(l) of the Chicago Municipal Code, the Commission must and does adopt the findings of fact recommended by a hearing officer if they are not contrary to the evidence presented at the hearing. The hearing officer's findings in this case are consistent with the evidence and well-supported in the hearing record. Determining credibility of witnesses and the reliability of their testimony and related evidence is a key function of hearing officers, who have the opportunity to observe the demeanor of those who testify. *Poole v. Perry & Assoc.*, CCHR No. 02-E-161 (Feb. 15, 2006). The hearing officer carefully explained the reasons for her credibility determinations and the Commission does not find them to be against the weight of the evidence.

The testimony of Lourdes Richter made clear that during and after the time of Complainant's termination, Mexicana was reducing its U.S. workforce. Chicago-based managers were required to select one sales executive to be laid off. Complainant disputes that this was a legitimate decision, citing as one example that salaries were raised despite claims of need to reduce costs. However, it is immaterial whether Mexicana made a correct management decision in requiring this layoff or whether the decision to select Complainant as the sales executive to be laid off was the best choice, as long as sexual orientation was not a motivating factor.

Respondents have not disputed that Complainant had strengths as a salesperson, especially his proficiency in delivering presentations. They even offered him a job lead and positive job reference at the time of layoff. There was no evidence Complainant would have been discharged for the deficiencies Respondents cited had a layoff not been required. However, given that a decision had to be made, under such circumstances, it is not surprising or unreasonable that criteria such as tardiness and late presentation of reports, which might not have been cause for discharge of an otherwise acceptable employee, can become critical factors when

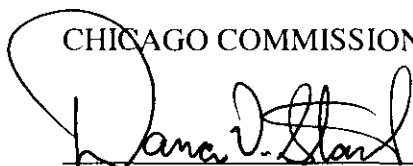
considering three sales executives of equivalent company seniority who apparently all were performing acceptably and were not under threat of discharge prior to the directive to eliminate a position.

Most importantly, despite these argument by Complainant, there is insufficient credible evidence to support an inference that Complainant's actual or perceived sexual orientation was a factor in the decision that Complainant would be laid off.

IV. CONCLUSION

In summary, the Commission adopts the recommendation of the hearing officer and finds that Respondents Mexicana Airlines and Manuel Pliego did not subject Complainant Armando Ramirez to a hostile work environment based on his sexual orientation or discriminate against him based on sexual orientation in terminating him from his position of sales executive. Because the Commission finds in favor of Respondents, this Complaint is DISMISSED.

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Dana V. Starks, Chair and Commissioner
Entered: March 17, 2010