

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ALLAN GILLIS and MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION,
Complainants,

v.

DOCKET NO. 01-BEM-1119

BOYS & GIRLS CLUB OF GREATER
LOWELL, INC.,
Respondent

Appearances: Justine H. Brousseau and Nina Joan Kimball for Complainant
Philip S. Nyman and Kathleen M. O'Hagan for Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

I. PROCEDURAL HISTORY

On April 24, 2001, Complainant Allan Gillis ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission") charging that Respondent Boys & Girls Club of Greater Lowell, Inc. (the "Respondent" or "Club") engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4) after he reported allegations of harassment to a member of Respondent's Board of Directors.

On May 3, 2004, the Commission found probable cause to support Complainant's claim. On March 7, 2005, the Commission certified this case for a public hearing. A public hearing was held before me on September 9 and 10, 2005. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of

the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

A. The Parties

1. Complainant Allan Gillis resides with his family in Lowell, Ma. On January 3, 2000, Complainant began working for Respondent as its Executive Director. Complainant was employed on an “at-will” basis. According to Complainant, his duties as Executive Director included record keeping; the supervision, hiring and training of the staff; oversight of the facility and programs; and, representing the Club in the community. On December 6, 2000, less than a year after being hired, Respondent terminated Complainant’s employment. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, Boys & Girls Club of Greater Lowell is a non-profit Massachusetts corporation with a principal place of business at 657 Middlesex Street, Lowell, Ma. The Club has been in existence for over 100 years. It serves about 1,500 youths from the poorest neighborhoods in Greater Lowell. The members of the Club’s Board of Directors (the “Board”) are non-paid volunteers. The members of the Board sit on various committees, including an Executive

Committee that directly oversees the activities of the Executive Director. The Executive Committee of the Boys and Girls Club at all times relevant hereto was made up of seven members: Kevin Coughlin, Susan Leggat, Steven Basilere, Vincent Cicerchia, Jr., Thomas Klessens, Eric Hanson, and Michael Kuenzler. Respondent employed six or more employees and is therefore an employer within the meaning of M.G.L. c. 151B § 1(5).

B. Evidence of Protected Activity.

3. In February 2000, Complainant hired Cuom Truong as the Club's Director of Operations. Complainant and Truong had worked together previously at the Hudson Boys and Girls Club. After he began working for Respondent, Truong and Complainant met every Thursday to talk about work issues and other matters.

4. Truong testified that the President of the Board of Directors, Kevin Coughlin, engaged in inappropriate conduct that made him feel uncomfortable. Truong testified that on a Saturday in May 2000, Coughlin came into the Club while Truong was running a special program for the children. Truong testified that Coughlin approached him while he was in the game room. According to Truong, Coughlin put his arm around him and told him that he was doing a good job and to keep up the good work. Truong stated that Coughlin's conduct made him feel uncomfortable and he thought it was "odd that [Coughlin] would come in . . . it was out of [the] blue." The following week, Truong mentioned the incident to Complainant. Specifically, Truong told Complainant, "I was really uncomfortable with [Coughlin] putting his arm around me." Truong told

Complainant, "I don't like those kinds of things." I credit Truong and Complainant's testimony regarding this matter.

5. Truong testified that Coughlin also made him feel uncomfortable when Coughlin touched him again during the summer of 2000. On this occasion, Truong claimed that Coughlin came up to him and put his arm around him and said, "Hey, this looks great." Additionally, Truong stated that Coughlin made other comments to him during his first six months at the Club that likewise made him uncomfortable. Specifically, Truong testified that on more than one occasion, Coughlin told him, "Geez, you look great, you work out." Truong testified that he reported each of these incidents to Complainant. In particular, Truong claimed he would regularly tell Complainant ". . . Allan, you know, he made another comment about me looking good." I credit Truong's testimony.

6. Complainant largely corroborated Truong's testimony. In particular, Complainant testified that in July 2000, Truong came to him regarding concerns that Coughlin had made him feel uncomfortable by touching him and making inappropriate comments. Complainant testified that Truong told him that Coughlin had made comments about his body and his physique. According to Complainant, Truong told him that he did not want to make a formal complaint, but just wanted Coughlin to stay away from him. I credit Complainant's testimony regarding this matter.

7. Complainant testified that after Truong reported his concerns to him in July, he notified the incoming President of the Board, Susan Leggat.

Complainant testified he wanted to give Leggat the “heads up” that something had happened. He testified that when he identified Truong as the staff member involved, Leggat responded, “Let me guess. It’s Kevin [Coughlin].”

Complainant testified that Leggat said to him that she was “expecting something like this” when Truong was hired because of her knowledge of Coughlin’s prior behavior. According to Complainant, Leggat also told him she knew that Coughlin was known to like Asian men. According to Complainant, Leggat seemed “exasperated” and “frustrated that . . . we were going through this.”

Complainant testified that Leggat then asked, “Do we want to do anything about this?” Complainant claimed he replied, “No. . . . We’ll keep [Truong] away from Kevin. . . .” Leggat did not testify at the public hearing. Rather, Respondent introduced an affidavit from Leggat prepared for purposes of this litigation in which she adamantly denied that this conversation with Complainant took place. Absent Leggat’s sworn testimony, I credit Complainant’s testimony regarding this conversation.

8. Complainant testified that in September 2000, Truong again spoke with him about Coughlin. He testified that Truong stated that Coughlin had again touched him and made statements about his body that made him feel uncomfortable. Complainant testified that after Truong came to speak to him about Coughlin, he called Attorney Karen Zulon on September 16, 2000 to make sure he was doing the right thing. Attorney Zulon had no relationship with Respondent. Complainant acknowledged that he dealt with Respondent’s

attorneys regarding employment issues at the Club, but he never mentioned anything to them about the incidents between Truong and Coughlin.

9. Truong testified that in October 2000, another incident with Coughlin took place at the auction planning meeting. Truong and Complainant testified that the meeting was attended by about 15-20 people, including numerous members of the Board of Directors. Truong testified that just before the auction planning meeting started, Coughlin spoke to Truong from across the table. At the time, Truong was speaking to two members of the Board, John Crandall and Joseph Downs. According to Truong, Coughlin asked him how he was doing and then commented, "Geez, you look great. You're working out." Truong testified that he replied to Coughlin, "No. I used to work out when I was playing sports, but I don't anymore." Coughlin then stated, "I don't think it's the weights. It's your body." Truong testified that Coughlin's comments made him feel humiliated and very uncomfortable, particularly since Coughlin made the remarks in front of others. Truong testified he knew "for a fact" that other people in the room heard Coughlin's comments. Complainant witnessed this conversation and corroborated Truong's testimony. Complainant further testified that Truong appeared to be "very upset, his face was red, he kept keeping his head down, he was very agitated, moving around in his seat. He looked very uncomfortable." Complainant testified that two board members made comments to him after the meeting about Coughlin's statements to Truong. Coughlin adamantly denied that he made any such comments. I credit Complainant and Truong's testimony regarding this matter.

10. Truong and Complainant both testified that immediately after the October 4, 2000 meeting, they met in Complainant's office. Truong testified that he told Complainant, "Can you believe, you know, what just happened?" Truong further told him, "Allan, I'm really fed up with this crap. I don't need this stuff. . . . You know, I can't do this anymore. You know, I may be moving on." Complainant told Truong, "Just calm down. Think about it. Go home tonight, think about it, and just kind of think over what you want me to do and talk to me the next day." Truong testified that he reiterated to Complainant that Coughlin's conduct made him feel uncomfortable and humiliated. Complainant corroborated Truong's testimony. He also testified that he told Truong that he would talk to Leggat about Coughlin's conduct. Complainant claimed he reassured Truong that he would take care of the situation and do whatever he could to get Coughlin to stop. I credit Complainant and Truong's testimony.

11. Complainant testified that that he then called Leggat and left her a message stating, "There was another issue between Kevin and Cuom." He claimed that about a week or so later, Leggat called him back while Truong was in his office. According to both Complainant and Truong, as Complainant talked to Leggat on the phone, Complainant relayed to Truong what Leggat was saying. With Truong present, Complainant then told Leggat everything that had happened with Coughlin. Complainant testified that Leggat then asked him if he thought there was any way we could keep Truong. Complainant responded, "Yes, but, you know, we have to keep Kevin away from him, you know, or we'll lose Cuom." Complainant then asked Leggat if she could talk to Coughlin and

Leggat responded, "I promise you I'll take care of this, I'll talk to Kevin, and that Mr. Coughlin will stay away from Cuom." Complainant relayed Leggat's comment to Truong. Complainant further testified that Leggat asked, "Is there any way we can make this official, keep this off the record so that we can handle it quietly?" Complainant then asked Truong if he was comfortable with handling the matter quietly. Truong indicated that he was comfortable with keeping the matter quiet, as long as Coughlin stayed away from him. Complainant relayed this message to Leggat. Complainant testified that the telephone conversation with Leggat lasted approximately 10 to 15 minutes. Complainant further testified that after completing his phone conversation with Leggat, he talked with Truong some more just to make sure that he was comfortable with the course they had agreed upon. As indicated above, Leggat did not testify at the public hearing; therefore, I credit Complainant and Truong's testimony regarding this telephone conversation.

12. Complainant testified that after the conversation with Leggat, he once again contacted Attorney Zulon. He testified that based on Attorney Zulon's recommendation, he gave Attorney Zulon a memo on Boys & Girls Club letterhead mentioning the details of what happened at the auction meeting and the discussion he had with Sue Leggat, asking it be kept off the record. In answer to the Hearing Officer's question as to why he contacted Attorney Zulon as opposed to any of the attorneys associated with Respondent, Complainant testified that he was trying to be discreet and handle this in a way that didn't embarrass Coughlin. I partially credit Complainant's testimony. I also believe

that Complainant contacted Attorney Zulon because he was concerned with his own potential liability stemming from Truong's allegations against Coughlin.

13. Truong testified that after he complained to Complainant about Coughlin's conduct at the auction committee meeting, he noticed that Coughlin was less visible at the Club. According to Truong, prior to this incident he would see Coughlin in the Club at least once a week or sometimes two or three times a week. I credit Truong's testimony.

14. Truong testified that about a month after the telephone conversation between Complainant and Leggat, he received a telephone call from Attorney Phil Nyman.¹ According to Truong, Attorney Nyman inquired about his incidents with Coughlin. Truong told Nyman about Coughlin's comments, the incidents of physical touching, and how Coughlin's conduct made him feel uncomfortable. According to Truong, at the end of the conversation Nyman asked him if he would sign a release. Truong replied that he wasn't comfortable signing anything at that point. On cross examination, Attorney Nyman asked Truong whether their conversation occurred after Complainant had left the Club, to which Truong answered: "No. I believe Allan was still there at the club at the time." Absent any credible evidence to the contrary, I credit Truong's testimony regarding this matter.

15. Coughlin testified that Truong's allegations of inappropriate conduct were "absolutely false." Coughlin further claimed that he did not learn about Truong's

¹ As indicated above, Attorney Nyman represents the Respondent in this action.

allegations until after Respondent had fired Complainant. Additionally, Coughlin testified that he had no knowledge of the phone call to Truong from Attorney Nyman in November 2000. I decline to credit Coughlin's testimony.

C. Evidence of Complainant's Poor Performance.

16. Complainant testified that as soon as he began working for Respondent, he faced many challenges as the new Executive Director including serious issues with personnel, financial matters, maintenance, and administrative programs. He claimed the Club "was in deep crisis" and he did not fully appreciate the seriousness of the problems until he received a report prepared by his predecessor shortly after he started working for Respondent.

17. Complainant testified that as Executive Director he regularly attended numerous meetings and appointments, which he recorded in his calendar. He also stated that he reported mainly to Coughlin and to the rest of the Executive Committee. Complainant testified that he did not receive any complaints or concerns about his performance from the time he started in January through March 2000 from any member of the Executive Committee or the Board of Directors. It is also undisputed that Respondent did not provide Complainant with a three month review as previously discussed and agreed upon when he was first hired by Respondent.

18. On April 4, 2000, Complainant attended the Club's Annual Meeting. He testified that Coughlin introduced him to the entire board of trustees and informed the trustees that Complainant was doing "a wonderful job." Complainant claimed

that he also received positive feedback from various other Board members. In addition, Complainant testified that he did not receive any complaints or concerns about his performance from April through June 2000 from any member of the Executive Committee or the Board of Directors.

19. Contrary to Complainant's assessment, members of the Executive Board testified that Complainant's performance was problematic from the beginning. Respondent claimed that numerous memoranda and performance evaluations from various Board members demonstrated Complainant's failure to follow through on requests, to meet deadlines, to supply the board with requested information, to communicate with the Board, and to meet his financial responsibilities as Executive Director. Respondent's witnesses also testified that several memoranda and performance evaluations illustrated the progressive decline in Complainant's performance both before and after Complainant engaged in any alleged "protected activity." For example, in a memorandum dated February 22, 2000, Klessens wrote to Complainant regarding the January financial information submitted to him by Complainant. In the memo, Klessens questioned certain grant money and expenses and requested the status of the year end financials. I credit the testimony of Respondent's witnesses regarding this matter.

20. Respondent also referred to a memorandum sent from Coughlin to Complainant dated July 12, 2000, in which Coughlin identified numerous problems including Complainant's failure to follow up on outstanding items and to provide weekly activity reports. In addition, the memorandum addressed

Complainant's failure to provide a draft of the fiscal year 2000 budget; his failure to submit operational cost estimates to the Executive Board; his failure to submit a full list of members to the Executive Board; and, his failure to submit a system for signing off on expenses including Complainant's reimbursements. The memo also stated that Board members had questioned the hours and days worked by Complainant and requested that Complainant submit a weekly time sheet to Coughlin. Complainant claimed he responded to Coughlin's memo of July 12, 2000, both verbally and in writing and he disputed many of the statements in the memo. However, Complainant did not testify or provide any credible evidence that suggests Coughlin issued the memo in response to Truong's allegations.

21. In a subsequent memorandum written to Complainant from the Executive Board a few months later, the Board referred to the July 12, 2000, memo as a first warning. Complainant claimed he did not construe the memo as a "warning" at that time, but viewed it as merely "informational in tone." Contrary to Complainant's interpretation, I believe the July 12, 2000 memo raised serious performance-related issues that directly pertained to Complainant's duties and responsibilities as Executive Director.

22. On or about August 23, 2000, Complainant received a written six-month evaluation. The evaluation outlined some positive aspects of Complainant's job performance. However, the evaluation also discussed numerous areas where Complainant needed improvement. In particular, the evaluation raised issues about Complainant's inconsistent follow up and a lack of regular communication to the Executive Board, and expressed continuing concerns regarding grant

money, and the lack of a yearly budget. Furthermore, the evaluation outlined serious ongoing financial concerns:

The financial condition of the Boys and Girls Club is not at the expectations noted at the beginning of the fiscal year. It has been disappointing that so many routine grants have been unsuccessful. This coupled with the fact that you have not submitted a FY2000 budget is a great concern.

During the months, the Finance Committee attempted to ascertain a cash flow analysis and a budget document. Additional assistance was required for the cash flow projections and has been offered for the budget. It is your responsibility to produce a meaningful budget for the operations of the Boys and Girls Club. Your complete lack of doing so is a major concern. This was brought to your attention in a memo dated July 12, 2000. To date, you have not furnished a date to have budget to the Finance Committee. You were instructed in May 2000 at an Executive Board meeting to produce a document for the June Finance Committee meeting.

It is a major part of your job to produce this document. You need to take immediate steps, as your first priority, to complete this document. If you do not have the skills necessary, you need to communicate that to us. If you are unclear on the expectations for a budget document, you need to communicate this also. It is impossible for you or the Board to monitor the Boys and Girls Club's financial status without an approved budget. You are now 8 months into the fiscal year without this in place. It is unacceptable not to have this in place at this time.

23. Complainant testified he discussed his evaluation with Coughlin, Leggat, and Cicerchia. According to Complainant, the members of the Executive Board noted there were areas where he successfully met his responsibilities, and other areas in which they felt he needed improvement.

24. Truong recalled that at about the same time Complainant received his August review, he had a conversation with Complainant in which Complainant stated he was unhappy and getting a lot of frustration from the Board members. Truong testified that Complainant looked dejected. According to Truong,

Complainant told him that he had received a lousy review. I credit Truong's testimony.

25. At all times relevant hereto, Thomas Klessens served as Chair of the Club's Finance Committee and a member of the Executive Committee.

Complainant testified that he and Klessens would regularly exchange memos about the upcoming monthly and quarterly financial statements. On November 15, 2000, Klessens sent Complainant a memorandum in which Klessens outlined Complainant's failure to handle critical budgetary responsibilities. In particular, Klessens wrote,

Over the past couple of months, you have continually agreed to meet with me on this budget, right up to October 18th and shortly thereafter, when we agreed you would schedule a meeting with me prior to the end of October to review the budget. I have not heard from you since that time until you sent me the document on November 13th. If that document was accurate and in the agreed upon format, and I drastically rearranged my schedule to accommodate you in the appropriate review process, we may have been ready for November 17th. As it is, none of this has happened and I grow weary of wasting my time documenting your problem areas."

26. With respect to Klessens memo dated November 15, Complainant testified that he "really didn't understand where the memo was coming from" and was "having trouble understanding exactly what [Klessens] wanted." As a result, Complainant consulted with Kathy Coleman, who worked for Respondent as an independent auditor. Complainant testified that after speaking with Coleman he discerned what Klessens was looking for. Complainant testified that he and Coleman completed the draft budget for fiscal year 2001 and submitted it to Klessens on or about November 28, 2000.

27. On November 21, 2000, Respondent gave Complainant a document dated “November 10, 2000”, entitled “Rewritten Six-Month Review, Notice of Poor Performance.” The document began,

This is a final document to the draft document dated August 23, 2000 entitled: Six-Month Evaluation of Performance...

We have amended and rewritten this document due to the serious erosion of support for your performance these past three months. This unanimous feeling of the Executive Committee was relayed to you at an Executive Meeting on September 20, 2000. We have met with you following this meeting to attempt to assist you to understand the job requirements and wishes of the Board. Unfortunately the strong feelings regarding your shortfalls in performance continue and are growing stronger.

28. The Rewritten Review indicated that Complainant had serious performance problems, including:

[A] general lack of respect for the time and roles of Board members by you. The Board does not work for you – but rather – you work for the Board. Your attitude conveys to the Board Members what is being perceived as arrogance and a non-respect for their function as Board Members. Incidences such as the follow-up to last years’ auction prizes..., your “out of process” dealings with the budget, the Personnel Committee problems, the lack of follow-up to donors, the lack of follow-through in job descriptions development and the misinformation circulated to some Board Members are just a few of the cumulative dissatisfaction points.

29. With respect to Complainant’s handling of the Club’s financial issues, the review noted,

You continue to miss many deadlines dealing with the Finance Committee. Finance Committee members have lost confidence in your reporting and in your promises for deadlines.

There have been multiple, continuing problems in the financial areas throughout the year. Among these are monthly missed deadlines for production of financial information, including monthly financials and most glaringly, the fiscal year 2000 budget. These issues continue, as, at the date of this letter the Finance Chair has not been involved in the 2001

budget despite his continued requests, and your stated commitment to review it with him before the end of October. ...

30. The evaluation concluded:

Overall, the dramatic erosion of confidence in your leadership, performance and credibility is striking to us. We are alerting you to these very serious concerns. Your future employment with this organization will be jeopardized should we not witness a dramatic improvement in all areas of your performance.

We wish to work with you, but the cumulative effects of the past months make this an increasingly difficult task. The image of the club and the stamina of our Volunteers will not be weakened or endangered by poor performance of the Executive Director. Because of the gravity of this written review, each member of the Executive Committee has signed this document. The full Board will be notified of our actions.

31. Coughlin, Leggat, and Cicerchia hand-delivered the review to Complainant on November 23, 2000. Complainant testified that after reading the document, he immediately told Coughlin, Leggat, and Cicerchia that he was shocked and had not expected anything like this. In particular, Complainant emphasized that he was surprised that the “rewritten” evaluation was so completely different from the six-month review that he had received in August. Complainant then asked Cicerchia, “Are you looking for me to leave?” According to Complainant, Cicerchia responded, “No. We don’t want you to leave. We want to work with you. We just want to make sure you’re aware of issues we have.” Complainant testified that he then asked if he could respond to the document and they responded that he could respond in writing to Coughlin. Complainant stated that he then told them he would respond after the Holiday Auction on December 7, 2000. Complainant testified that he told them he “felt like they were rewriting history.”

32. Hanson testified that at the time the Executive Committee prepared the “rewritten” evaluation, he was not aware that the Board intended to terminate Complainant. Instead, he believed the Board intended to motivate Complainant and give Complainant a period of time to change his efforts. Hanson acknowledged, however, that considering the Board gave Complainant the evaluation on November 21st and fired him on December 8, the Club did not give Complainant a “whole heck of a lot of time to correct the performance problems as outlined in that memorandum.”

33. A week after Complainant received the rewritten review, he obtained more troubling information. Specifically, he received a letter dated November 27, 2000, from Peg Roberts, the Senior Vice President of the United Way of Merrimack Valley. In the letter, Roberts indicated that the United Way had not received the quarterly reports from the Club, which were due on October 20, 2000, and, as a result, the Club was in jeopardy of losing United Way funding. Shortly thereafter, on December 8, 2000, as a result of the unanimous vote of the seven-member Executive Board, the Club terminated Complainant’s employment.

34. Tom Klessens testified that in his capacity as Chairman of the Finance Committee and as a member of the Executive Board, he interacted regularly with Complainant. He claimed that he had two or three meetings with Complainant each month in addition to the Committee and Board meetings. Klessens stated he had multiple conversations with Complainant about the budget, starting with the 2000 budget, which began probably “from day one, but with increasing

urgency as the spring and summer came along.” He claimed that from January 2000 through June 2000, Klessens asked Complainant on multiple occasions to prepare the budget. Klessens further indicated that Complainant was not able to meet the financial duties that were imposed upon him, “He was regularly late, missed deadlines on a recurring basis. The work that he produced, in addition to being late, was not even close to sufficient for what the product was suppose to be. So he produced pretty poor work.” Klessens claimed Complainant was instructed to produce the 2000 budget for the June finance Committee meeting. Klessens testified that as of August 23, 2000, Complainant had still not produced a 2000 budget. He claimed that as fall approached, the 2000 budget was given up on, and replaced with simple cash in cash out statement. By the fall, Klessens began talking to Complainant about a budget for the 2001. Klessens claimed that thereafter he continued to monitor Complainant’s progress toward preparing the 2001 budget. Klessens noted that Complainant did not complete the 2001 budget in a timely manner and then when he did submit his first draft, “it was not a quality effort.” Klessens testified that he drafted the financial section contained in the Rewritten Review dated November 10, 2000. Subsequently, Klessens stated he became aware that Complainant had failed to get the United Way the documentation it needed as outlined in the letter dated November 27, 2000. Klessens acknowledged being part of the group that made the decision to terminate Complainant. According to Klessens, the Board decided to terminate Complainant for continually missing deadlines as well as the numerous reasons documented in the August and November reviews. Klessens testified that he did

not know anything about the alleged incidents between Coughlin and Truong until sometime in 2001. I credit Klessens testimony.

35. Kevin Coughlin testified that pursuant to his role as Chairman of the Board, he had the primary responsibility of supervising Complainant's work performance. With respect to Complainant's performance problems, Coughlin indicated that members of the Board first noticed that Complainant could not keep his appointments and failed to follow through with requests. Coughlin claimed that in the first three months the Board reached the consensus that Complainant met minimum performance standards. He testified that as the months went on the issues became more pressing. Coughlin testified that Complainant was particularly weak in the finance area. "In the first six months, he was unable to complete any budgets and any projections, so that at the six month mark we really weren't any farther ahead than we were in January when he started in terms of trying to put budgets together and complete a budget." According to Coughlin, Complainant usually had an excuse for his deficiencies. Coughlin stated that he drafted the July 12, 2000 memo to Complainant to highlight the finance committee's concerns regarding the accuracy of Complainant's representations. Coughlin testified that in November of 2000, the Executive Committee decided to terminate Complainant due to the budget problems and issues regarding Complainant's dealings with the Board. I credit Coughlin's testimony with respect to Complainant's performance problems.

36. Michael Kuenzler testified that he held the position of Chair of the Club's Personnel Committee and served on the Club's Auction Committee and Golf

Committee. As a result of his committee work, Kuenzler claimed he had regular dealings with Complainant. Kuenzler noted that while he often dealt with Complainant regarding personnel matters, Complainant never reported to him any alleged incidents between Truong and Coughlin. Kuenzler testified that the Executive Committee executed the Rewritten Review in November because they had major issues with Complainant's performance. To Kuenzler's knowledge, problems with Complainant's work performance began in the spring of 2000. In connection with the Personnel Committee, Kuenzler testified that Complainant's biggest problems pertained to his lack of communication with the Committee and his failure to follow through on information requested by Board members.

Kuenzler claimed that on several occasions he talked to Complainant about these issues. During these discussions, Kuenzler stated he would constantly ask Complainant for information that he would never receive. Kuenzler indicated that the November written review was intended as a final warning and unless Complainant turned things around immediately, he would be fired. Kuenzler reiterated that the entire Executive Committee made the decision to terminate Complainant's performance. I credit Kuenzler's testimony.

37. Eric Hanson testified that he served as a member of the Executive Committee and the Auction Committee. Hanson described Complainant's work performance as "historically disorganized." According to Hanson, the Executive Board or Auction Committee would repeatedly ask Complainant for information and Complainant would indicate that we would have it at the next meeting. However, Complainant repeatedly failed to provide the requested information at

the next meeting. Hanson testified that drafts of the November memo dated November 10th were circulated amongst the members of Executive Committee, and all of the members agreed with the conclusions stated therein. I credit Hanson's testimony.

D. Damages

38. Complainant testified that after he received the notice of termination, he called his wife, Lisa, and told her she needed to come pick him up. Lisa Gillis testified that when she arrived at the Club "Allan was pretty shook up." She testified that the termination was a shock to him and the family. She explained that her husband was their only source of income and health insurance. Mike Zulon, a friend of Complainant's, likewise observed that Complainant seemed "[v]ery upset, very disillusioned" after the termination. Similarly, Complainant's mother, Joan Gillis, testified that her son was "shocked" and he "could not understand why he was terminated." Complainant testified that the week after his termination, the local newspaper, the Lowell Sun, ran an article with his picture in it stating that he had been fired from the Club. Complainant stated that he felt "humiliated" after he saw the article.

39. Complainant testified that after being terminated from the Club on December 8, 2000, he remained unemployed for approximately 2½ years. Complainant claimed that as of the time of the public hearing, he suffered \$217,585.00 in lost wages, which took into account the \$48,992 he earned or collected since being fired by the Club. He claimed that after the Club terminated his employment, he applied for numerous positions, but could not land a job.

Eventually, in 2002, he began working at the National Association of Self-Employed (“NASE”) as an independent insurance agent. He held that position for approximately 1½ years. Complainant testified that he left NASE because he “wasn’t making any money there.” Since 2003, Complainant has been employed at Agassiz Village, Inc., as a grant writer in the development office, working approximately 15 hours per week throughout the school year. Agassiz Village is a non-profit summer camp in Portland, Maine. During the summer of 2004 and 2005, Complainant worked 40 hours a week for eight weeks. Lisa Gillis testified that Complainant presently makes \$15 per hour.

40. Complainant testified that the termination affected him professionally, emotionally, and financially. With respect to his professional credentials, Complainant testified that since the termination, he has been unable to find a full-time position in the non-profit field. Complainant further claimed that the termination created a great financial burden to his family since they suddenly had no income. He testified that his wife was forced to take a full time job for very low wages. Lisa Gillis explained that they had a new mortgage and had no plans on how they could meet their financial obligations. She testified that lack of health insurance was another concern particularly since they had a new baby and a young child. Complainant’s mother, Joan Gillis, eventually moved in with them to help them financially. I credit Lisa Gillis’ testimony.

41. Lisa Gillis further testified that as a result of their financial crisis, she sold a home in South Boston that she had owned before they had gotten married. She

claimed that they had hoped to hold on to the house and pass it on to their children. I credit Lisa Gillis' testimony.

42. According to Complainant, to this day he avoids going into Lowell because he doesn't want to run into people associated with the Club and fears that he will be embarrassed about what they might say. Complainant further testified that he has lost his confidence. In addition, he claimed that the termination affected his marriage and his relationship with his kids. He stated he felt responsible for putting his family in a position where they had to sell his wife's house that she had purchased when she was twenty-four years old. Additionally, Complainant testified that there were times that he "didn't want to get out of bed."

43. Lisa Gillis testified that before the termination, Complainant was a "[v]ery outgoing person, very friendly, and very involved with the community." However, after the termination, she testified her husband "pretty much shut down for a period of time", particularly after the article appeared in the newspaper. Lisa Gillis further claimed that her husband's confidence level definitely dropped and hasn't come back. She noted that he was not the outgoing person he used to be. Complainant's friend Mike Zulon corroborated Lisa Gillis' testimony.

III. CONCLUSIONS OF LAW

Complainant has alleged that Respondent engaged in unlawful retaliation. M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under M.G.L. c. 151B or because he has filed a complaint,

testified, or assisted in any proceeding alleging a violation of M.G.L. c. 151B. 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). 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, 22 MDLR at 215, citing, Bain v. Springfield, 424 Mass. 758, 765 (1997).

The Commission has broadly interpreted the retaliation provision to apply to instances where an employee participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). Thomas v. King Arthur's Motel & Lounge, Inc., 24 MDLR 66, 74 (2002). In addition, the Commission has held that "participation" includes a variety of pre-charge and non-charge conduct, such as instances where a complainant has orally "opposed" an unlawful employment practice or action under G.L. c. 151B (the "opposition" clause). Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000); Thomas, 24 MDLR at 74; MCAD Guidelines at IX.A. The statutory protection against employer retaliation extends, therefore, to "informal voicing of complaints" alleging discrimination. Sumner v. United States Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990); Thomas, 24 MDLR at 74; Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997).

In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v.

President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent knew he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that “one or more of the reasons advanced by the employer for making the adverse decision is false.” Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving

that Respondent's adverse actions were the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

I find that Complainant has established a prima facie case of retaliation. First, Complainant engaged in protected activity by virtue of his complaints to Leggat about Coughlin's conduct. Specifically, Complainant informed Leggat in July and October 2000 that Coughlin had inappropriately touched Truong and made offensive comments to Truong about his body. Although no credible evidence exists that Leggat discussed Complainant's complaints with any other members of the Board of Directors, Leggat is nonetheless an agent of Respondent. Consequently, by virtue of Complainant's conversations with Leggat, Respondent knew of Complainant's protected activity. Lastly, as a result of the close proximity in time between Complainant's conversation with Leggat and his subsequent receipt of the highly negative evaluation, I find that a causal connection existed between the protected activity and the adverse employment action. In particular, in October 2000, Complainant informed Leggat of the details of Coughlin's offensive conduct and approximately one month later the Executive Committee issued the highly negative "rewritten" evaluation dated November 10, 2000. As stated above, the negative evaluation started the wheels in motion that lead to Complainant's termination less than a month later. Additionally, both Leggat and Coughlin participated in the drafting of the rewritten review and voted in favor of terminating Complainant's employment.

Since Complainant has established a prima facie case of retaliation, the burden of production now shifts to Respondent to articulate and produce credible

evidence to support a legitimate, nondiscriminatory reason for the termination. Respondent has met this burden. Respondent submitted a considerable amount of credible evidence indicating that Complainant, both before and after any alleged protected activity, had not performed his duties as the Executive Director consistent with the reasonable expectations of the Executive Board or the Board of Directors. In particular, Klessens stated that Complainant's problems with the budget and finances started "from day one." Moreover, Coughlin outlined several issues with Complainant's job performance in the memorandum of July 12, 2000. The problems continued into the summer and were raised again in Complainant's six month employment review. Specifically, on or about August 23, 2000, Complainant received his six-month evaluation, which contained continuing concerns regarding grant money, the lack of a budget, and the repeated failure to follow up on many items. In addition the August review outlined serious financial concerns.

The August review was followed by a "rewritten" review dated November 10, 2000 that indicated Complainant's performance continued to decline. The concerns by the Executive Board were apparently relayed to Complainant at an Executive meeting on September 20, 2000, but continued to persist. The November 10 memo outlined some of the same issues raised in the July memo and August review, namely, the lack of communication to the board, the failure to follow up with the Board's requests, and the failure to meet weekly deadlines. Even after the November review, problems continued. Specifically, Complainant received a letter dated November 27, 2000, from the Senior Vice President of the

United Way, stating they the Club risked losing United Way funding as a result of it not having received quarterly reports.

In addition, Tom Klessens, Michael Kuenzler, and Eric Hanson all testified credibly regarding the numerous problems they personally observed regarding Complainant's performance on a multitude of issues. Furthermore, all of these witnesses claimed that Complainant's performance deteriorated considerably by the fall of 2000. These individuals both approved the highly negative review in November 2000 and voted in favor of his termination the following month. I also credited their testimony that they had no knowledge of either Complainant's complaints to Leggat or the Coughlin's purported inappropriate conduct toward Truong. Consequently, Respondent has established legitimate non-discriminatory reasons for its decision to terminate Complainant's employment.

Complainant, thus, must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. Complainant has failed to meet this burden. In particular, Complainant has failed to prove that one or more of the reasons advanced by the Respondent for terminating his employment were false. Additionally, Complainant cannot rebut the overwhelming credible evidence of his unsatisfactory work performance. As indicated above, I credited the testimony of numerous members of the Executive Board regarding their personal dealings with Complainant and their observations of his work, which deteriorated considerably in the fall of 2000. Moreover, Complainant has not introduced any credible evidence that these individuals had knowledge of either Complainant's complaints to Leggat or Coughlin's purported

inappropriate conduct toward Truong. Although Complainant arguably might be able to establish that Leggat or Coughlin acted with retaliatory intent, he has failed to introduce any credible evidence that Klessens, Kuenzler, Hanson or any other member of the Executive Committee acted with retaliatory animus. Furthermore, Complainant has not introduced any evidence that Leggat or Coughlin attempted to unduly influence the other members of the Executive Board. Under these circumstances, Complainant cannot establish that Respondent's articulated reasons were a pretext for unlawful retaliation. Complainant has, therefore, failed to establish that Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4).

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 3rd day of January, 2007.

EDWARD R. MITNICK
Hearing Officer