

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST  
DISCRIMINATION and ANNE DEMPSEY,  
Complainant

v.

Docket No. 02-SEM-01858

JEFFERSON RUBBER WORKS, INC.,  
Respondent

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

Appearances: Howard I. Wilogren, Esq., for Complainant.  
Richard J. Pentland, Esq., for Respondent.

**I. PROCEDURAL HISTORY**

On May 22, 2002, Complainant, Anne Dempsey (“Complainant” or “Dempsey”), filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”), against her former employer, Jefferson Rubber Works, Inc. (“Respondent”). In her complaint, Complainant alleged that Respondent engaged in unlawful sexual harassment and retaliation in violation of G.L. c. 151B, §§ 4(4) and (16A).

On April 3, 2003, the Commission issued a probable cause finding with respect to Complainant’s charges. On August 18, 2003, the Commission certified the case for Public Hearing. A Public Hearing was held before me on September 12, 2003, in Springfield, MA. 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**

1. Complainant, Anne Dempsey, is a female individual who worked for Respondent as a machine operator from October 5, 1998, until her termination on May 1, 2002.<sup>1</sup> Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).
2. Respondent, Jefferson Rubber Works, Inc., is a corporation with an office at 15 Coppage Drive, Worcester, MA, and is engaged in the business of manufacturing rubber injection molding. It is undisputed that Respondent employed approximately twenty-five persons; and, therefore, Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).
3. At all relevant times, Complainant's immediate supervisor on the third shift was Paul Higgins. Complainant knew and socialized with Higgins both prior to working for Respondent and after she began working on the third shift. Complainant also worked on the same floor and in the same area as her

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<sup>1</sup> Since the filing of her complaint, Complainant has married; however, in order to avoid confusion and to maintain consistency with the pleadings, I will continue to refer to Complainant by her maiden name.

boyfriend, Wayne Gain.<sup>2</sup> Gain worked for Respondent as a team leader, but he did not exercise supervisory authority over Complainant. Gain also worked alongside Higgins and shared an office with him. Complainant stated that Higgins and Gain's office had a large window facing the work area allowing an almost unexposed view into and out of the office. Complainant described the work area as an open space with no walls or partitions between the machines. She stated that as many as eight employees worked on her floor at the same time.

4. Complainant testified that during her tenure with Respondent, she received four promotions in grade with corresponding wage increases. Respondent also gave her good performance reviews. Respondent has not contested or disputed that except for her absenteeism in March - April 2002, it considered her a good employee.

5. Complainant testified that Higgins regularly made comments and jokes to her of a sexual nature. For example, she claimed that when she asked him what machine she should operate, he responded by saying "skin flute," which she believed was a reference to performing oral sex. Complainant also stated that Higgins would say, "If you want 'A4', you need knee pads."<sup>3</sup> In addition, she claimed that he stated, "Pants were optional between 4 and 6." Moreover, Complainant testified that Higgins regularly made comments about engaging in sex with a female coworker named Heather, including: having sex with Heather

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<sup>2</sup> Complainant and Gain had lived together since February 1999 and subsequently married on May 25, 2003.

<sup>3</sup> An "A4" is the highest rank of machine operator.

and giving her a promotion as a result thereof; bringing her home to his wife and then having a threesome; and, having oral sex with her at Dunkin Donuts.

According to Complainant, Higgins also bragged about having grabbed Heather's chest and ass. Complainant claimed that she asked Higgins a couple of times to "stop", and he responded by saying, "Do you want a hug?" She testified that after she complained to Higgins about his conduct, he would cease making the remarks for a couple of days, but then start making the comments again.

Complainant stated that she and Higgins were sometimes alone when he made the remarks, but at other times, employees witnessed his offensive conduct.

6. At all times relevant hereto, Geraldine ("Gerri") Flaherty worked for Respondent as the "Compensation/Benefits Administrator" and handled the human resource responsibilities for the company. Complainant testified that she spoke with Flaherty "about three times" regarding Higgins' offensive comments and, in response, Flaherty said she would talk to Higgins. Complainant also stated that she spoke with Higgins supervisor, Jeff Arnold, "one or two times" about Higgins' conduct. According to Complainant, Arnold likewise stated he would "talk to Paul." Lastly, she testified that she spoke to Respondent's General Manager about Higgins conduct, who similarly told her that he would "talk to Paul."

7. Gain testified that he heard Higgins regularly make the "skin flute" joke, and specifically recalled hearing him make the comment to Complainant. Gain also claimed that he heard Higgins make the remark to Complainant about needing "knee pads" to get the A4 job. In addition, Gain stated that Higgins often

made profane reference to the bodily parts of female employees (e.g., “tits”) and commented on whether certain females performed oral sex. Moreover, Gain testified that Higgins once made a highly offensive comment about Complainant, when Higgins asked him, “How could you fuck someone who looks like a man.” Lastly, Gain claimed that Higgins regularly gave employees inappropriate “Indian” sexual nicknames, such as “belly full of cum.”

8. Gain also stated that he attended a meeting with Complainant and Flaherty where Complainant specifically complained to Flaherty about some of Higgins’ offensive jokes. According to Gain, Flaherty commented that she knew Higgins’ conduct was unethical and she would try to get him supervisory training. In addition, Gain stated that he also complained to Arnold and told him about Higgins’ conduct. He claimed that Arnold likewise responded that he would talk to Higgins. Gain also testified that he spoke directly to Higgins and told him he was sick of his remarks and “had to knock it off.” Lastly, Gain testified that he would not describe Higgins as a “friend” since they only socialized two or three times outside of work.

9. On March 2, 2002, while still working on the 3<sup>rd</sup> shift, Complainant began attending the Sattler School on a full-time basis to obtain her certification as a “legal office specialist.” As a result, both Complainant and Gain asked Flaherty about changing from the 3<sup>rd</sup> shift to the 2<sup>nd</sup> shift. Flaherty acknowledged that Complainant and Gain came to see her to request a transfer to the 2<sup>nd</sup> shift. Although a spot was available for Gain, no openings were available at that time for Complainant. Consequently, in the beginning of April 2002, Gain began

working on the second shift, while Complainant continued to work on the 3<sup>rd</sup> shift. Flaherty testified that in the beginning of April 2002, Complainant then left her a voice mail message that stated she only wanted to on a work part-time basis since she was going to school full-time. I note that neither Complainant nor Gain testified that they sought the transfer in order to avoid Higgins or as a result of his conduct. Also, contrary to Complainant and Gain's testimony, Flaherty stated that they never complained to her about any sexual comments made by Higgins, although she claimed they did state, "[Higgins] yelled a lot." I credit Flaherty's testimony.

10. Complainant testified that while operating a "rutal" machine at approximately 4:00 am on April 18, 2002, Higgins approached her and asked if she knew what a particular part was used for. She claimed that she told him they were exhalation valves for gas masks; whereupon he responded, "no, they're cock umbrellas." According to Complainant, as Higgins made the crude remark, he put the part near his genital area. Complainant stated that in response to this incident, she drafted a written complaint dated "April 21, 2002", which she put in Robert DeGrace's mailbox. Respondent's sexual harassment policy listed DeGrace as the company's complaint officer. The complaint described the incident of April 18<sup>th</sup> and mentioned that "I have brought this issue up with Paul in the past, and I have asked him to stop." She further noted, "Considering I have told him to stop, and I have placed verbal complaints with a number of people from this company, this matter is becoming very intimidating seeing how Paul is my boss." Respondent admitted that it received the complaint on April 22, 2002.

11. Complainant testified that she had planned to undergo dental surgery involving multiple tooth extractions on April 24, 2002. She claimed that several weeks prior to the surgery, she told Higgins that she was having the surgery and would be out of work for five days. According to Complainant, Higgins said, “fine.” She subsequently obtained a doctor’s note, which she had delivered to Respondent. The note stated, “This patient was physically unable to perform his or her job duties from 4-24-02 to 4-29-02.” Respondent’s witnesses testified that they construed the disability certificate as meaning her period of incapacity lasted from April 24 through and including April 28, but did not excuse her from work on April 29.

12. On or about April 26, 2002, Respondent began its investigation of Complainant’s written complaint. It assembled an “ad hoc sexual harassment team” that consisted of Bob DeGrace, Jeff Arnold, and Gerri Flaherty. According to the investigative report, the team interviewed Complainant on April 26, 2002, while she was still out of work recovering from her dental surgery. Complainant admitted meeting with DeGrace to go over her allegations a few days prior to her termination. DeGrace then completed his report of the investigation on April 30, 2002. With respect to the sexual jokes made by Higgins, other than the umbrella comment, the report states, “[A]ccording to Ann, Paul [Higgins] didn’t say these things to her or where she could hear, but were things Wayne told her that Paul said.”<sup>4</sup> The report also states that she listed Gain and Dana Ashmore as witnesses to Higgins’ comments. The report further states:

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<sup>4</sup> According to the report, in addition to the umbrella comment, Complainant mentioned that Higgins made the remarks about becoming an “A4” and how he got Heather her job.

[Ann] was also asked for detail about her written complaint where she stated that she “placed verbal complaints with a number of people from this company.” Ann said she was referring to the time she was out because her “mouth hurt” and she complained to Jeff Arnold and Gerri Flaherty that someone other than her boss found out and said something to her. Both Jeff and Gerri remember the incident, and said it was general complaint against Paul, not a sexual harassment complaint.

13. Although Complainant listed only Gain and Ashmore as witnesses, the ad hoc committee interviewed other machine operators who worked with Complainant and Higgins on the 3<sup>rd</sup> shift. Specifically, they interviewed Dana Ashmore by telephone, and met with Nikola Pelteku and Tommy Barbosa. When Ashmore was asked whether he saw or heard Higgins make any sexual comments to Complainant, Ashmore apparently responded, “She’s lying. They have a game going on, she and Wayne.” Both Pelteku and Barbosa stated that he never heard or saw Higgins make any such comments. The investigative committee also spoke with Higgins, who denied making the comments referred to in Complainant’s complaint or making any other sexual remark. On or about April 30, 2002, the investigative committee recommended that no disciplinary action be taken against Higgins since it could not determine if any harassment had occurred. Specifically, the committee determined:

[T]here is not sufficient basis to say that sexual harassment occurred. The team suspects the accusation may have been put forward as way to get Ann transferred to another shift, since both Ann and Wayne have been trying to get transferred for some time. Wayne was just recently transferred to 2<sup>nd</sup> shift, and Ann requested again a week before the complaint was received to be transferred to 2<sup>nd</sup> shift as a part-timer.

14. Arnold and Flaherty corroborated the conversations with the witnesses as described in the investigative committee’s report. However, they admitted that

they did not interview all of the machine operators who worked on the 3<sup>rd</sup> shift. In addition, although Complainant listed Gain as a witness, Flaherty acknowledged that the investigative committee did not interview him because he is Complainant's "domestic partner" and "the team felt he could not be considered an impartial witness."<sup>5</sup> Although Flaherty testified that she received some training on conducting investigations of sexual harassment complaints, she acknowledged that this was her first sexual harassment investigation. I credit Arnold and Flaherty's testimony. Moreover, I credit the statements contained in the report attributable to Complainant since she has not established by credible evidence that such statements were false or inaccurate.

15. Jeff Arnold worked for Respondent from 1994 to August 2002. At the time Respondent terminated Complainant's employment, Arnold held the position of lead supervisor. Arnold testified that Complainant never complained to him about Higgins making any inappropriate sexual comments. I credit Arnold's testimony.

16. Lisa Haynes testified that she worked for Respondent from 1998 to 2000 as a machine operator. Haynes claimed that she never heard Higgins say anything of a sexual nature. However, she admitted to only working with Complainant from late 1998 through 1999. I credit Haynes' testimony.

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<sup>5</sup> Notwithstanding the nature of the relationship between Complainant and Gain, I believe Respondent should have interviewed Gain as part of its obligation to provide an effective and thorough investigation of Complainant's charges. However, contrary to Complainant's contention, I do not find this flaw relevant to the central issues in this case.

17. Paul Higgins has worked for Respondent from 1990 to the present time as a supervisor. He testified that he met Complainant before she began working for Respondent and he and his wife regularly socialized with Complainant and her prior boyfriend and, subsequently, with Complainant and Gain. Contrary to Gain's testimony, Higgins claimed that he had socialized with Complainant and Gain about ten to twelve times, including watching TV, drinking beers, and celebrating New Year's Eve together in 2000. He also stated that Complainant came over to his house alone on two occasions and she and Gain had stayed over at his house. I credit Higgins' testimony on this matter.

18. Higgins denied making the inappropriate comments alleged by Complainant, including the remark about the cock umbrella. Instead, he claimed that Gain made the comment about the cock umbrella and made the inappropriate sexual gesture.<sup>6</sup> Higgins also denied making any of the sexual comments pertaining to Heather. In addition, Higgins denied ever telling Complainant to "give me a hug" or words to that affect. On the other hand, he stated that Complainant once told him to "suck my dick", and he claimed that she mentioned she heard the remark in the movie "G.I. Jane." Complainant testified that she might have made the profane comment and referenced the movie "G.I. Jane", but she did not believe she made the remark at work. Moreover, she admitted to possibly making sexual jokes with Gain "because we were dating"; however, she denied engaging in any sexual or offensive conduct with anyone else.

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<sup>6</sup> Higgins admitted that he never informed the investigative committee about Gain's offensive conduct.

19. Flaherty testified that on April 29, 2002, Complainant asked her to pay her all the “monies owed” to her by the company during her absence for the dental surgery. Flaherty explained that her conversation with Complainant pertained to Complainant’s use of vacation time during her absence. Flaherty also acknowledged that Complainant’s use of vacation time had nothing to do with her termination two days later. I credit Flaherty’s testimony.

20. Complainant claimed that she had expected to return to work on April 30, 2002, but she slept through her shift and never reported to work or called in to report her absence (i.e., “no show/no call”). She stated that she did not report to work because she still experienced severe pain from the dental surgery.

21. According to Respondent’s “Attendance Recorder”, Complainant had a very good attendance record during the months of January – February, 2002. However, shortly after she started going to school full-time and requested a transfer to the 2<sup>nd</sup> shift, she began to frequently miss work. Specifically, in the company’s “Attendance Recorder” and the “Sickbook call in log”, Complainant was listed as “out sick” on March 27 and “NSNC” (no show/no call) on April 2. She also reported “late” for work on April 9, and reported she could not report to work on April 10 and 11, because her car was “stuck in driveway.” In addition, she called in sick on April 22 and 23. The recorder also listed her as being out from April 24 to 28, presumably in connection with her dental surgery. Lastly, the log and recorder showed her as “NSNC” on April 29 and 30.

22. On May 1, 2002, Complainant returned to work whereupon she was told by Higgins that he had received an email to terminate her employment. Flaherty testified that Complainant was officially terminated on May 1, 2002, for violating the company's "no show/no call policy." Specifically, Respondent claimed that it terminated Complainant for violating the NSNC policy on April 29 and 30. According to Flaherty, the policy required an employee to call in at least two hours before the start of his or her scheduled shift if going to be absent. If an employee violated the no show/no call policy two days in a row, then the company construed the absences as a "voluntary quit", resulting in the employee's termination. Section 4.8 of Respondent's Employee's Handbook contains the company's Attendance Policy and clearly states, "Two (2) NSNC . . . No Show No Call – Unauthorized absence from work for two consecutive days – Termination." Complainant admitted that she knew she could be terminated for not showing up or calling in a certain number of times. In addition, she readily acknowledged that she violated Respondent's no show/no call policy on April 30. She believed, however, that she had a valid dentist's note excusing her from work on April 29; and, therefore, she did not violate the no show/no call policy two days in a row. Instead, Complainant claimed that Respondent terminated her employment in retaliation for her complaint against Higgins.

23. Complainant testified that the termination adversely affected her "emotional health." She claimed that she subsequently stopped eating, started to sleep more, suffered from nausea, felt depressed, cried all the time, and "did not feel good about myself." She stated she became easily irritable with Gain, which

impacted their relationship. Complainant complained that prior to her termination, she and Gain engaged in sexual relations several times a week, but afterward, they did not have sex for several months. Based on my observations of Complainant during her testimony, and considering the inconsistencies in her testimony, I specifically discredit her testimony regarding the emotional distress she allegedly incurred as a result of the termination.

24. At the time of her termination, Respondent compensated Complainant at the rate of \$13.50 per hour. Complainant claimed she eventually obtained another job on May 2, 2003; and, thus, lost a total of \$39,400 for the one year period following her termination. However, Complainant admitted that she continued to attend the Sattler School on a full-time basis until March 2003. Complainant also claimed that she lost the value of participating in Respondent's medical and dental plans, and 401K plan. Moreover, after the termination, Complainant claimed she incurred \$587.06 in dental bills that would have been covered by Respondent's dental insurance had she not been terminated.

### **III. CONCLUSIONS OF LAW**

#### **A. SEXUAL HARASSMENT**

Massachusetts General Laws, c. 151B, § 4(16A) prohibits sexual harassment in employment. "Sexual harassment" is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or

as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." M.G.L. c. 151B, § 1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987); see, Massachusetts Commission Against Discrimination Sexual Harassment in the Workplace Guidelines, at 2, 4 (2002) ("Sexual Harassment Guidelines").

In this case, Complainant has alleged that Respondent created a hostile work environment within the meaning of § 1(18)(b). In order to establish a case of hostile work environment sexual harassment, Complainant must establish by a preponderance of the evidence that (1) she was subjected to unwelcome verbal or physical conduct of a sexual nature; (2) the words or acts were sufficiently severe or pervasive to alter her conditions of employment and create an abusive working environment; and, (3) the harassment was carried out by an employee with a supervisory relationship to Complainant, or Respondents knew or should have known of the harassment and failed to take prompt remedial action. College-Town, 400 Mass. at 162.

I find that Complainant has failed to establish a case of hostile work environment sexual harassment. Although I believe Higgins probably made some boorish and profane comments, Complainant has not established that she found the remarks unwelcome. In particular, I found Complainant and Gain's credibility regarding Higgins' conduct to be completely undermined by their inconsistent statements. For example, at the public hearing, Complainant

testified that Higgins made all of the remarks directly to her. However, according to the report of the investigative committee, which she did not dispute, she told DeGrace that aside from the umbrella comment, “Higgins didn’t say these things to her or where she could hear, but were things Wayne told her that Paul said.” Gain’s testimony that he heard Higgins make these comments directly to Complainant was also inconsistent with her statements to the investigative committee. I also found that Complainant and Gain’s testimony regarding their alleged complaints to Respondent’s supervisors lacked credibility. Instead, I credited Flaherty and Arnold’s testimony that Complainant and Gain never complained to them about Higgins’ offensive sexual conduct. Moreover, Flaherty testified credibly that Complainant only complained that Higgins “yelled a lot” and once revealed allegedly confidential medical information. Lastly, I note that Complainant filed her internal complaint shortly after she started going to school full-time, after Respondent denied her request to work on the 2<sup>nd</sup> shift, and after she began missing work on a regular basis. Under these circumstances, Complainant has failed to prove that Respondent engaged in unlawful sexual harassment in violation of M.G.L. c. 151B, § 4(16A).

## **B. RETALIATION**

Complainant has also alleged that Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4). Retaliation is a separate claim from discrimination, “motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *quoting*,

Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995). M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel or otherwise discriminate against any person because she has opposed any practices forbidden under c. 151B or because she has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B. Kelley, 22 MDLR at 215, *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997); see, Sexual Harassment Guidelines, at 25-28.

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) she engaged in protected activity; (2) Respondent knew she had engaged in protected activity; (3) Respondent subjected her 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,

non-discriminatory 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. Clearly, Complainant engaged in protected activity by virtue of the filing of her internal complaint on April 21, 2002. In addition, Respondent has admitted that it received her complaint and conducted an investigation in response thereto. Moreover, Respondent did not dispute that it subjected Complainant to an adverse employment action when it terminated her employment on May 1, 2002. Lastly, the short period of time between the filing of her complaint and her termination raises a permissible inference that a causal connection existed between the filing of her complaint and her termination.

The burden of production now shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its action. I find that Respondent has met its burden. Flaherty testified credibly that Respondent fired Complainant as a result of her “no show/no call” on April

29 and 30. Section 4.8 of Respondent's Employee's Handbook contains the company's Attendance Policy and clearly states, "Two (2) NSNC . . . No Show No Call – Unauthorized absence from work for two consecutive days – Termination."

Consequently, in order to prevail, Complainant must now show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. I find that Complainant has failed to meet this burden. With respect to the no show/no call incidents on April 29 and 30, Complainant readily admitted that she failed to show up for work or call in on April 30. However, she claimed that Respondent falsely listed her as "NSNC" on April 29. Specifically, she relies on the disability certificate for her dental surgery, which stated that she was physically unable to perform her job "from 4-24-02 to 4-29-02." Thus, according to Complainant, she should not have been listed as NSNC on April 29 because she had a dentist's note justifying her absence.

Although a literal reading of the dentist's note would support Complainant's assertion that she should not have been listed as NSNC on April 29, I find that Respondent's agents testified in a credible manner and appeared to act in good faith in the performance of their duties with respect to their strict enforcement of Respondents NSNC policy. Complainant also did not dispute that she had a fairly poor attendance record in the month preceding her termination. In addition, Complainant failed to introduce any evidence that Respondent treated her in a disparate manner compared to other employees with respect to its interpretation of her disability certificate or its enforcement of

its NSNC policy. In fact, Complainant admitted that she knew she could be terminated for not showing up or calling in after a certain number of times. Under these circumstances, I find that Complainant has 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 8<sup>th</sup> day of April, 2004.

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EDWARD R. MITNICK  
Hearing Officer