

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

CHARLEGNE MILLETT and
MCAD,
Complainants

v.

Docket No. 98 BEM 3695

LUTCO, INC.,
Respondent

Appearances: Mitchell J. Notis, Esq. for Complainant Millett
James W. Bucking, Esq. and Laura I. Sorafine Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 30, 1998, Charlegne Millett (“Complainant”) filed a complaint (98 BEM 0311) with the Massachusetts Commission Against Discrimination (“MCAD”) charging that Lutco, Inc. (“Respondent”) discriminated against her on the basis of sex and sexual orientation. Complainant withdrew her charge on April 30, 1998. On December 2, 1998, Complainant filed a second charge (98 BEM 3695) against Respondent again claiming that Lutco, Inc. discriminated against her on the basis of sex and sexual orientation and requesting that her original complaint be reactivated.

On January 22, 1999, Respondent moved to dismiss on the grounds that discrimination based on a complainant’s transsexual status is not covered in Chapter 151B. The motion was denied on October 10, 2001. In an Order of the Full Commission, the MCAD concluded that transsexuality is not “sexual orientation” as that

term is defined by M.G.L.c.151B, sec. 3(6) but that discrimination against an individual because he or she is a transsexual violates the prohibition against sex discrimination found in M.G.L.c.151B. See Millett v. Lutco, Inc., 23 MDLR 231 (2001).

The Commission issued a probable cause finding on March 31, 2006. It found that there was sufficient evidence upon which a reasonable fact finder could believe that the Complainant was subjected to: 1) discrimination based on gender, i.e., her transgendered status, and 2) retaliation. The case was certified for public hearing on July 17, 2006.

A public hearing was conducted between May 29, 2007 and August 28, 2007. The parties jointly introduced 117 Joint Exhibits. In addition, Respondent offered Exhibits 118 through 131 and “Company Exhibits”1-4. Complainant offered Exhibits 132 through 138.¹ Nine witnesses testified over seven days of public hearing: Charlegne Millett, Robert St. Cyr, Rita Hohler, Carol Schwartz, Donald Bouthillier, Jason Kallio, Alan Robillard, Martin Tremblay, and John Stowe.

To the extent the parties’ proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

¹Complainant withdrew Exhibit 136.

II. FINDINGS OF FACT

1. Complainant was hired by Respondent in August of 1996 as a Quality Engineer. At the time, she referred to herself as Charles Millett² and presented herself at work as a male employee.
2. Respondent, Lutco, Inc. (“Respondent” or “the Company”) is a business employing approximately 100-120 individuals in Worcester, Massachusetts. It manufactures ball bearings for trucks and agricultural equipment.
3. Prior to working for Respondent, Complainant had previously held the position of “ISO 9000 Quality Systems Management Representative” at the Norton Company.
4. John Stowe is Respondent’s President and CEO. At the time of public hearing, he had held that position for approximately twenty years.
5. Robert St. Cyr was Respondent’s Plant Manager from 1996-2001. He was responsible for Respondent’s manufacturing operations and had some responsibility for product quality and safety.
6. Donald Bouthillier, a twenty-eight year employee of Respondent at the time of public hearing, was Respondent’s Quality Manager with responsibility for the entire Quality Department. Bouthillier was subsequently relieved of his management responsibilities but continues to oversee some aspects of the quality system.
7. In the 1990’s, Respondent sought to enhance its quality assurance credentials by becoming “ISO-certified.” ISO refers to the International Organization for

² I will refer to Complainant using the female gender since her transition from the male to female gender was completed prior to public hearing.

Standards, an international quality assurance entity which audits and accredits the quality control systems of manufacturing companies. It assesses a product from the moment it is ordered through manufacture, shipping, and billing. Once a company is ISO certified, it can sell its products worldwide because ISO certification is a universally-accepted standard.

8. At the time Complainant was hired by Respondent, the Company did not have anyone in-house who was familiar with the ISO certification process. The Company hired Complainant because she had ISO experience as a Quality Engineer. The position was established to oversee the Company's ISO 9000 Certification Program and had a functional title of ISO Management Representative. As ISO Management Representative, Complainant was responsible for leading Respondent through two audits: first, the Case Company Quality Audit and, second, the ISO 9000 Certification, aka, the ISO Audit or ISO Registration. The Case Audit involved scrutiny by the J. I. Case Company, one of Respondent's largest customers, to determine whether Respondent met Case Company quality standards. The ISO Audit involved a similar screening process to ensure compliance with international quality standards. Preparation for both audits was essentially the same. Complainant's full-time job was to prepare for the audits, whereas everyone else employed by Respondent had other job functions in addition to audit preparation work.
9. Complainant presented herself as a male employee from the date of her hire through December of 1997.

10. For the entire time that Complainant was employed by Respondent, she reported to Don Bouthillier and shared an office with him. For approximately the first year of her employment, Complainant was responsible for becoming familiar with the Company's products, becoming familiar with quality assurance issues, and developing relationships with employees in every department. Each of Respondent's departments had an ISO element leader who was responsible for drafting ISO-compliant procedures for his/her department. In the spring of 1997, Complainant began meeting with the element leaders in order to identify and analyze the ISO standards for each aspect of the business, ensure that existing practices conformed to ISO standards, and document the Company's conforming practices.
11. Complainant and Bouthillier had lunch together several times a month prior to December of 1997 and would frequently sit next to each other at corporate meetings. When Complainant inherited her father's gun collection, she gave the collection to Bouthillier because he was a gun enthusiast.
12. Complainant, while presenting as a male employee, received a positive performance review from Bouthillier at the completion of her first year on the job. The review, in the summer of 1997, noted her "near perfect attendance," her "skill and knowledge in the areas of quality engineering and ISO," and her "timely" responses to requests for assistance. Joint Exhibit 7.
13. In the spring and summer of 1997, Company President John Stowe became frustrated with the Company's lack of progress in preparing for the upcoming quality reviews and, in particular, with Complainant's leadership of the ISO

certification process. Stowe attributed the Company's lack of progress to Complainant's lack of leadership. Transcript at Volume 7 at pp. 66-68. Stowe asked Complainant, in late summer of 1997, to work more closely with element leaders and show them how to write the required ISO specifications. Stowe and Complainant discussed hiring another person with ISO experience to help with the certification process. Complainant suggested that Stowe hire Harold Greenberg as an ISO consultant. Transcript, Volume 4 at p.131.

14. In the summer of 1997, Stow hired Greenberg as an ISO consultant. Transcript, Volume 4 at pp. 72 and 76.
15. In September of 1997, Complainant began to attend nursing school full-time at Quinsigamond Community College. Complainant enrolled in a two-year program with a projected graduation date in the spring of 1999. Exhibit 118. Upon graduation, Complainant planned to leave Respondent in order to become a nurse. Id. and Transcript, Volume 7 at pp. 78-79. Stowe told Complainant that he supported her career aspirations and would work with her in order to accommodate the demands of her coursework to her job.
16. After starting nursing school, Complainant began to work for Respondent at night in order to compensate for attending class during the day. When Complainant worked at night, she relied on email to communicate with fellow employees. The use of email conflicted with the practice, at the time, of employees interacting on a "face-to-face" basis. Transcript, Volume 4 at p. 151. Complainant's unavailability during normal working hours resulted in delays in responding to

questions, the rescheduling of meetings, and the postponement of the Case Quality Audit. Transcript, Volume 4 at pp. 19 and 138; Joint Exhibit 10.

17. The hiring of consultant Harold Greenberg did not alleviate Respondent's problems in preparing for the quality audits. According to St. Cyr, Respondent's employees did not get along well with Greenberg, considered him to be condescending, and resented the fact that he criticized their work but did not show them what needed to be done. Transcript, Volume 4 at p. 133. Stowe testified that Greenberg offered little assistance or leadership, failed to prepare the Company for the audits, and cost Respondent a lot of money in consulting fees. Transcript, Volume 7 at pp. 81-84. By late fall of 1997, Stowe had decided to phase out Greenberg after the Case Quality Audit in January of 1998. *Id.* at pp. 83-84.

18. On December 12, 1997, St. Cyr sent Complainant an email stating: "J.I. Case wants to come in to do their audit in January. They do not want any more delays, only a date." Joint Exhibit 10.

19. On or about December 15, 1997, Complainant met with Stowe and Respondent's Personnel Manager Brad Verge about the upcoming quality audits. At the end of the meeting, Complainant disclosed that she had been living for the past six months as a female outside of work, had changed her name and social security number the previous February, had been taking hormone therapy for over a year and a half, and was scheduled for gender reassignment surgery in the summer of 1998. Transcript, Volume 1 at pp. 140-143; Exhibit 11. Included in written material that Complainant gave to Stowe and Verge was a letter from Dr. George

- Higgins, Ph.D., a Clinical Psychologist and President of the Gender Identity Clinic in Hartford, Connecticut, stating that Complainant was a transsexual person and would be living full-time as a woman. Id.
20. Complainant had not informed anyone at the Company prior to December of 1997 that she was transgendered but acknowledged that prior to December of 1997, individuals at the Company might have been aware that she was transitioning as a result of community contacts, the publication of her name change in the newspaper, and changes to her body from hormone therapy. Id.; Transcript, Volume 2 at pp. 126-129.
21. According to Complainant, Stowe and Verge reacted to her announcement with sympathy and understanding. Transcript, Volume 1 at 142-143. Complainant testified that Stowe said, “Well, you won’t have any problems with me, but you will/may with the managers/people here.” Id. at p. 143. According to Stowe’s testimony, which I find more credible, he told Complainant that that he didn’t know how others in the Company would react but that the Company would support her decision. Stowe asked Complainant for permission to inform the supervisory staff of her transgendered status prior to Complainant making a public announcement of her name and gender change. Transcript, Volume 7 at pp. 91-92.
22. St. Cyr and Rita Hohler, the Company’s Human Resources Manager, arranged a meeting of Respondent’s managers on December 17, 2007 to inform them of Complainant’s transition. Each of Respondent’s managers subsequently held a meeting with his/her employees to inform them of Complainant’s transition, of

- the fact that the Company supported the decision, and to convey the message that the Company would not tolerate discrimination or harassment. Transcript, Volume 4 at pp. 140-142. St. Cyr and Hohler attended each of the meetings. Complainant testified that she was pleased with the meetings. Transcript, Volume 2 at p.119.
23. Complainant emailed John Stowe on the evening of December 17, 2007 to say that the managerial meeting held earlier that day about her transitioning was a “really good idea.” Exhibit 15. Complainant subsequently thanked Stowe by email for being supportive of her return to nursing school and for being understanding of her “gender dysphoria.” Exhibit 23. In a subsequent email to Robert St. Cyr, Complainant noted that people at work had been “very nice” to her over the past year and a half and that Complainant would like to “repay” them. Complainant offered to write a letter on behalf of St. Cyr if he ever needed one evidencing his experience with matters of sensitivity training and cultural diversity. Exhibit 37.
24. Following Complainant’s disclosure of her transgendered status, the Company changed its personnel and payroll records and its email system to reflect Complainant’s name change. Transcript, Volume 2 at p. 119-121; Exhibit 17.
25. Complainant frequently discussed issues related to her transitioning with Don Bouthillier. Complainant showed Bouthillier pictures of her sexual reassignment surgery and initiated topics such as electrolysis, hair transplants, hormone pills, breast growth, penis shrinkage, relations with her son, post-operative dilation, her first post-operative sexual encounter with a man, and lingerie shopping.

Transcript, Volume 6 at pp. 146-162. Bouthillier described himself as Complainant's "confidant," characterized his demeanor as "empathetic," and described their intimate discussions as occurring regularly. *Id.* at pp. 162-163. Bouthillier testified that he doesn't recall saying anything negative about Complainant's transsexuality but that he may have said, "Make sure you're doing the right thing" and/or "be cautious." *Id.* at pp. 164-165. Bouthillier acknowledged that he never again went out to lunch with Complainant after she announced she was transgendered. Transcript, Volume 6 at 181. He testified that he decided to "put the brakes on" and to "keep everything on a professional level" because he "didn't want to add any problems to her during this time" and because he didn't want to expand the time he was already spending weekly as her confidant. Transcript, Volume 6 at pp. 182 and 207-209.

26. Quality Control Technician Carol Schwartz testified that Bouthillier tried to talk Complainant out of having sexual reassignment surgery. Schwartz characterized the relationship between Complainant and Bouthillier as more tense following Bouthillier's attempt to discourage Complainant from transitioning. Transcript, Volume 5 at pp. 39-40.

27. By the end of December of 1997, the Company was behind in preparing for the Case quality assurance audit. Company President John Stowe expressed concern that Complainant's attendance at nursing school was interfering with the Company's quality assurance work. Exhibits 22 & 23.

28. On December 31, 1997, St Cyr instructed Complainant to submit weekly reports to address the Company progress on the ISO project. Complainant's Exhibits 19 and 41; Transcript, Volume 2 at p. 194.
29. On January 8, 1998, Complainant emailed Stowe and asserted that Bob Zoppo, Brad Verge, and Don Bouthillier, rather than her nursing studies, were to blame for the Company's failure to adequately prepare for Case Audit and the ISO Certification. Exhibit 23.
30. Complainant acknowledged that in January of 1998, she was open and frequent in her criticism of Bouthillier's job performance and that she sent out numerous emails to other employees saying that Bouthillier was not doing his job. Transcript, Volume 3 at pp. 55-56. In a January 15, 1998 email to Company President Stowe criticizing Bouthillier's performance, Complainant copied nine managers and sales employees. Exhibit 31. Bouthillier testified that at Company meetings, Complainant was aggressive, hostile, and critical of the work he was doing on the quality assurance program. Transcript, Volume 6 at p. 133. Jason Kallio and St. Cyr concurred that Complainant sent out emails that were "upsetting," "destructive," and critical of Bouthillier. Exhibits 40 & 41; Transcript, Volume 4 at pp. 18-20.
31. On January 9, 1998, St. Cyr met with Complainant to inform her that the Company was running a newspaper advertisement for an ISO Management Representative. Exhibits 25 & 26. St. Cyr testified at the public hearing that he told Complainant that the Company was looking for someone to "work in parallel with her so that when she leaves we would not lose any ground" and to relieve

Don Bouthillier of some of his menial tasks. Id.; Transcript, Volume 4 at pp. 59-60. However, in deposition testimony St. Cyr characterized the advertisement as the result of Company President John Stowe's decision to demote Complainant from ISO Management Representative to ISO Technician. Transcript, Volume 4 at pp. 61-66; Volume 7 at 111-113. Stowe testified on direct examination that the advertisement constituted an exploration of all "leadership options" prior to the Case Audit and that it was a "supplemental move" to assist Complainant and replace Greenberg. Transcript, Volume 7 at p. 86. On cross-examination and at his deposition, Stowe asserted that the advertisement was placed for the purpose of finding a candidate to replace Complainant as ISO Management Representative [Transcript, Volume 7 at pp.134-138], but that he intended to keep her "in some form." Id. at 138.

32. On January 12, 1998, Complainant sent an email to Don Bouthillier reminding him to call her Charlegne rather than Charlie or Chaz. Exhibit 29.
33. On January 14, 1998, Complainant emailed Stowe that her nursing program for the 1998 winter semester involved clinical activities beginning at 2:30 p.m. on Mondays and Wednesdays, nursing classes on Tuesdays and Thursdays from 9:30 a.m. to 11:30 a.m., and a four-hour lab on Tuesdays or Thursdays. Exhibit 30.
34. In a January 21, 1998 email, Stowe instructed Complainant to reduce her email use, oversee the work of consultant Harold Greenberg, and assist employees in preparing for the quality audits. Id. Stowe indicated that Complainant's role was to help people to exceed and to coordinate the Company's quality assurance tasks,

- not to highlight the failures of fellow employees in critical emails. Id.; e.g., Exhibits 23, 25, 27, 31, 43.
35. The Case Audit took place over the course of several days, culminating in a January 21, 1998 closing meeting. Transcript, Volume 4 at pp. 154-155. On January 21st, Complainant left the Company at 8:30 a.m. and returned at 2:30 p.m. Exhibits 37 and 38. Jason Kallio and Robert St. Cyr told Complainant that she should attend the closing meeting/debriefing, but Complainant left in order to attend a hospital orientation and to meet her new nursing school teachers. Transcript, Volume 2 at 149 & Volume 4 at 155-156; Exhibits 36 & 37. St. Cyr threatened to fire her if she left, in response to which Complainant said, "You have to do what you have to do." Transcript, Volume 4 at p.156. Complainant testified that St. Cyr was "genuinely upset" over her leaving for six hours. Transcript, Volume 3 at pp. 32-33.
36. Respondent received a score of 69 out of 100 on the Case Audit. Transcript, Volume 7 at p.19. The Company was put on probation by the Case Company. Transcript, Volume 4 at p. 157. St. Cyr wanted to fire Complainant for the Company's poor performance and the fact that she left during the audit but was overruled by Company President John Stowe. Id. at 157; Transcript, Volume 7 at pp. 103-104. Stowe testified that he concurred with St. Cyr's frustration but declined to terminate Complainant because, "she's capable of being utilized to accomplish [the Company's] end goals and that to fire her would bite our nose to spite our face, and she was going to be leaving at the end of -- when she completes her training anyway." Id. at 108.

37. The day after the Case Audit, St. Cyr met with Complainant and drafted a memo about Complainant making negative remarks about other employees, failing to respond to an earlier memo on reporting, failing to make herself available, failing to communicate and abide by her work schedule, failing to conform to safety rules, failing to be present for the closing discussions of the Case Audit, and failing to place work priorities over her educational priorities. Exhibit 39.
38. On January 27, 1998, following a meeting in the training room, Jason Kallio and Complainant had a conversation on a landing platform between the main office and the factory. According to Complainant, Kallio behaved in a physically-threatening manner and accused Complainant of being negative, not doing her job, and causing the Company to do poorly on the Case Audit as a result of wearing dresses. Exhibit 134. Kallio testified that he did not recall talking to Complainant on the landing about the Case Audit, denied ever screaming at her or making any comments about her dresses, but acknowledged that he might have accused her of sending email messages that were destructive and “probably” told her that she was not a team player. Transcript, Volume 6 at 8-9, 12, and 18. I credit Complainant’s testimony that she and Kallio had words on the landing, but I do not credit Complainant’s assertion that Kallio physically threatened her.
39. On January 28, 1998, consultant Harold Greenberg wrote to John Stowe about the Case Audit. He commended Complainant as putting more effort into the Case Audit than the element leaders, blamed Robert St. Cyr for not supporting her efforts, and characterized Don Bouthillier as an embarrassment to the Company. Notwithstanding his praise of Complainant, Greenberg asserted that she was “the

wrong person for the job,” suggested that she be relieved of her responsibilities but continue to be paid pending her transition to a nursing career, and identified Jason Kallio as the best person for the job of ISO and Case Audit Project Manager. Exhibit 44.

40. On January 29, 1998, there was a meeting of the ISO 9000 Management Committee consisting of Don Bouthillier, Marty Tremblay, Bob St. Cyr, Rich Lariviere, Jason Kallio, Bob Zoppo, Brad Verge, Al Rosentals and Fran Wheeler. Exhibit 45. Committee members voiced concern that preparation for the audits had been delayed by a lack of assistance during the day and the need to wait for assistance. The Committee proposed to eliminate Complainant’s position of ISO Management Representative, have the Committee absorb the responsibilities of the position, and reconfigure Complainant’s position as ISO 9000 Implementation Technical Assistant. Complainant’s revised role involved more clerical duties. Transcript, Volume 3 at p. 75. The Committee named Bouthillier the chair of the Committee and Tremblay the vice chair. Exhibit 45. According to Company President John Stowe, he was pleased with the Committee’s proposal which was subsequently implemented. Transcript, Volume 7 at pp. 111-113. Complainant did not lose pay or benefits as a result of her job change. Transcript, Volume 3 at p. 51.
41. Complainant filed a complaint with the MCAD on January 30, 1998, alleging that she was threatened with termination as a result of her transsexual status. Exhibit 49.

42. After Complainant filed her MCAD complaint, she continued to work for Respondent in the capacity as ISO Technical Assistant. According to St. Cyr, Complainant's performance improved in her new role because she had less responsibility, could perform her work outside of normal working hours, and could spend more time on her nursing studies. Transcript, Volume 4 at pp. 167-168.
43. At the end of January of 1998, Complainant informed St. Cyr that she was uncomfortable using the men's bathroom in the training area. In response, St. Cyr arranged for a lock to be placed on the outer door to ensure privacy and removed the men's sign from the bathroom door. Transcript, Volume 2 at p. 122 and Volume 4 at p. 147; Exhibits 51 and 58.
44. In the same memo in which Complainant informed St. Cyr that she was uncomfortable using the men's room, Complainant accused George Jette, the assembly department's foreman, of being rude to her, of refusing to enter the quality office when she was there, and of slamming a door in her face. Exhibit 51; Transcript, Volume 5 at p. 43. St. Cyr acknowledged that Jette, who was estranged from a transgendered sibling, didn't want to have any interaction with Complainant and that on one occasion may have shouted a profanity at her. Transcript, Volume 4 at p. 53. St. Cyr testified that he told Jette that he needed to treat Complainant with respect and to interact with her regarding work issues. Id. at 53-55. St. Cyr met with Jette and Human Resources representative Rita Hohler "to formally record this situation." Exhibit 52.

45. In March of 1998, Complainant was forced to withdraw from the nursing program at Quinsigamond Community College because of her failure to maintain a “C” average in nursing courses. Exhibits 121-122; 138. Complainant switched to an undeclared major following the winter/spring semester. Exhibit 123; Transcript, Volume 3 at p. 94.
46. In April of 1998, Complainant withdrew from the MCAD her January of 1998 charge of discrimination. Exhibit 63. In her letter of withdrawal, Complainant stated that the harassment she experienced had ceased. Id.
47. In May of 1998, Complainant sent a letter to Bouthillier and St. Cyr requesting a leave of absence beginning on August 4, 1998 for gender reassignment surgery. Exhibit 66. Complainant estimated that she would out of the office for approximately three to four weeks. Id.
48. On July 3, 1998, Complainant wrote St. Cyr to complain that Bouthillier: 1) was calling her “Charlie” again, 2) played a Pink Floyd CD at work which contained the words “queer” and “coon,” 3) told her that the Pink Floyd CD was referring to her in using the word “queer” and to an African-American employee in using the word “coon,” and 4) had commented that she was named for “Joan of Arc.” Exhibit 67. Complainant wrote that she had confronted Bouthillier with her concerns, attempted to tape the confrontation, and that Bouthillier had removed his stereo from the office. Id. St. Cyr testified that he had asked Bouthillier why he said, “They’re singing about you on that song” and Bouthillier responded by saying that he was just kidding around. Transcript, Volume 4 at pp. 80-81. I credit that Bouthillier told St. Cyr that he was joking.

49. Respondent granted Complainant a leave of absence for her gender reassignment surgery in August of 1998, assisted Complainant in her efforts to obtain disability benefits from Respondent's disability insurance carrier, and assisted Complainant in trying to obtain health insurance coverage for her surgery. Exhibit 74; Transcript, Volume 2 at p. 49 and Volume 4 at pp. 169-170.
50. Complainant received a performance appraisal on August 31, 1998 which evaluated her as "fully effective" in ten out of twelve categories, superior in two categories and inapplicable in the remaining categories. Exhibit 76. Complainant received a 3 % pay raise. Transcript, Volume 3 at p. 51; 79. Complainant testified that she did not sign the evaluation (Transcript, Volume 2 at p. 56), but I do not credit her testimony.
51. When Complainant returned from her gender reassignment surgery in late August of 1998, she began to use the women's bathroom at the office. Transcript, Volume 2 at p.123. Prior to doing so, Complainant sent notes to some of the women in the office to notify them that she would be using the ladies' room. According to Complainant, none of the women objected. Id. at 124.
52. Complainant applied for re-admittance into the nursing program at Quinsigamond Community College on October 16, 1998. Exhibit 138. Complainant based her request, in part, on the fact that Respondent had granted her permission to reduce her work schedule to twenty hours per week. Id.; Transcript, Volume 7 at p. 122. There was no reduction in Complainant's work hours at that time.

53. On November 13, 1998, Complainant gave St. Cyr a humorous “raincheck for lunch” in appreciation of his supporting her transition in the workplace. Exhibit 78; Transcript, Volume 4 at p. 170.
54. St. Cyr testified that on November 18, 1998 Complainant repeatedly argued with and disparaged Bouthillier during an ISO meeting. Transcript, Volume 4 at p. 174. St. Cyr drafted a memo about the meeting in which he wrote that Complainant made snide remarks about Bouthillier, tried to undermine his integrity, questioned his ability to train and manage people, acknowledged that she did not know the Company’s products, such as “cones and inner races,” and claimed that she did not know the parts numbering system. Exhibit 79. According to the memo, participating managers were frustrated with Complainant’s behavior and felt it had a “poor effect” on the group. Id.
55. St. Cyr met with Complainant on November 20, 1998 about his perception that she had personally attacked Bouthillier at the November 18, 1998 meeting. As memorialized in a December 5, 1998 memo, St. Cyr told Complainant that she needed to respect other managers, that insubordinate behavior would not be tolerated, and that managers were afraid to confront her because they were afraid of being sued for discrimination. Exhibit 90. According to the memo, Complainant responded by saying that she needed to leave the Company, that Bouthillier was responsible for delays in the ISO certification, and that her schooling “must come first.” Id.
56. On November 24, 1998, Complainant sent Bouthillier a letter complaining about his treatment of her and his instruction to Carol Schwartz, a Quality Control

Inspector who also reported to Bouthillier, not to talk to Complainant.

Complainant sent a copy of her letter to St. Cyr. Exhibit 81. St. Cyr considered the communication to contradict his previous instruction to Complainant that she refrain from drafting and circulating critical memos about fellow employees.

Exhibit 90; Transcript, Volume 4 at p.193.

57. Schwartz testified Bouthillier played all types of music in his office, including the Pink Floyd album, "The Wall" both before and after Complainant's sexual reassignment surgery. Schwartz testified that Bouthillier once asked her not to socialize with Complainant at work because Schwartz was doing too much socializing on the job. Transcript, Volume 5 at p.42. According to Schwartz, this was not the first time she had been told not to socialize with people at work. Id.

58. On November 25, 1998, Company President John Stowe returned from a trip overseas. St. Cyr met with Stowe to inform him about the events of the prior week. Stowe had already been told about the November 18, 1998 meeting by other managers. Stowe instructed St. Cyr to treat Complainant as he would treat any other employee. Exhibit 90. St. Cyr decided to give Complainant a warning about insubordinate conduct but decided to wait until after Thanksgiving to do so.

59. On Tuesday, December 1, 1998, St. Cyr handed Complainant a warning for insubordination. Exhibit 85; 90. Complainant responded by asserting that the warning was in retaliation for her November 24, 1998 letter to Bouthillier complaining about his conduct. Exhibit 90.

60. Complainant filed a second charge of discrimination at the MCAD on December 2, 1998. Exhibit 87.

61. During the December of 1998 holiday season, Bouthillier gave Complainant, a Christmas card with several scratch tickets inside. Complainant returned it with a note saying, “Thanks Don. But I don’t feel comfortable accepting this. Charlegne.” Exhibit 93; Transcript, Volume 3 at p.p. 108-109; Transcript, Volume 6 at pp. 169-170.
62. Complainant testified that on April 13, 1999, Bouthillier ordered pizza for “everyone in the department but me.” Exhibit 106. Bouthillier testified that he never excluded Complainant from sharing pizzas which he periodically bought for his staff. Transcript, Volume 6 at p. 170-171. I credit Bouthillier’s testimony.
63. Complainant applied for and was re-admitted to the nursing program at Quinsigamond Community College for the winter/spring semester beginning in January of 1999. Exhibits 98, 124-127, and 138; Transcript, Volume 3 at p. 94. At that time, she was still working forty hours a week for Respondent. Id.
64. In or around April of 1999, Respondent successfully passed the ISO Audit. During that period, the Company experienced a downturn in business. Exhibit 101; 108; Transcript, Volume 4 at p. 115.
65. On April 21, 1999, Company President John Stowe informed Complainant that due to the completion of the ISO certification and the downturn in business, the Company planned to reduce her position to a twenty-to-thirty hour per week consulting job or part-time position. Exhibit 102; 105; Transcript, Volume 7 at p. 124. Stowe informed Complainant that he planned to implement the reduction in the summer of 1999, but could do so sooner if Complainant needed to study for finals. Id. Stowe testified that the reduction in hours reflected Complainant’s

- desire, expressed several months earlier, to cut back on her work hours in order to focus more on her nursing studies. Transcript, Volume 7 at pp. 122-123.
66. On April 26, 1999, Complainant received a second failing clinical evaluation in her nursing school coursework and was subsequently dismissed from the Quinsigamond nursing program for academic reasons. Exhibit 131; Transcript, Volume 3 at 114, 117.
67. On May 10, 1999, Complainant met with Stowe about the reduction in her hours. Exhibit 107. Stowe informed her that the position would be reduced to twenty-five hours per week, effective June 1, 1999, and that the position would be eliminated altogether as of the latter part of September of 1999. Id. Complainant accepted part-time employee status rather than a consultant position. Id. Complainant informed Stowe at that time that she wouldn't be returning to nursing school. Exhibit 106: Transcript, Volume 3 at p. 117; Volume 7 at p. 125.
68. In September of 1999, Complainant wrote to St. Cyr to complain that after her hours were cut, the Company hired Thierry Schwartz as a replacement for Quality Control Inspector Tina Bond who was out on sick leave. Exhibit 112. Complainant charged that Schwartz was performing quality management functions under Bouthillier's direction. According to St. Cyr, Schwartz was a contract employee who assisted with the responsibilities of Tina Bond during her absence and performed work on different procedures from the ones assigned to Complainant. Id. and Transcript, Volume 4 at p. 114.
69. Complainant's final day of employment was October 1, 1999. Exhibit 113.

70. Complainant testified that after her termination, she felt hurt and sad.

Complainant attended one session of therapy to deal with feelings of anger.

Complainant testified that she experienced anxiety and interference with sleep patterns. Complainant described increased difficulty in dealing with heights.

71. Complainant's income of approximately \$41,928.98 in 1998 dropped to \$30,716.00 in 1999 as a result of the Company's reducing her hours and subsequently terminating her. Complainant thereafter began to work for the U.S. Postal Service and subsequently became a high school math tutor. Transcript, Volume 2 at p. 100. Exhibit 115. In 2000, Complainant earned \$32,142.00; in 2001, she earned \$31,726.00; in 2002, she earned \$25,403.00; in 2003, she earned \$14,445.00; in 2004, she earned \$20,024.00; in 2005, she earned \$25,918.00; and in 2006, she earned approximately \$35,000.00. Id. and Transcript, Volume 2 at p. 103.

III. CONCLUSIONS OF LAW

A. Sex Discrimination

M.G.L. c. 151B, sec. 4 (1) provides that it is unlawful "for an employer, by himself or his agent, because of the . . . sex, . . . of any individual to . . . to discriminate against such individual . . . in the terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification." This prohibition against sex discrimination includes gender-based harassment (i.e., a hostile work environment) and/or gender-based disparate treatment. See Pettiford v. City of New Bedford Police Department, 26 MDLR 304, 309 (2004) (police detective subjected to gender-based harassment and gender-based disparate treatment); Nassab v. Massachusetts General

Hospital, 25 MDLR 429 (2003) (radiological technologist subjected to gender-based harassment and disparate treatment); Belopolsky v. Massachusetts Bay Transportation Authority, 25 MDLR 181 (2003) (assistant mechanical engineer subjected to gender-based harassment and gender-based disparate treatment). Discrimination against an individual because he or she is transsexual constitutes a violation of the prohibition against sex discrimination. See Millett v. Lutco, 23 MDLR 231 (2001) (Full Commission ruling denying Respondent's Motion to Dismiss).

1. *Gender-based Harassment*

Harassment in the workplace that is gender-based but not necessarily sexual in nature is a recognized form of discrimination. See McCormick v. Modern Continental Construction Co., 27 MDLR 316 (2005) (female carpenter subjected to gender-based harassment where a carving in the shape of penis was placed in her sweatshirt pocket and a wooden wedge with the word "cunt" was placed in her lunch bag); Brown v. Phoenix and Foxwood, 22 MDLR 160 (2000) (repeated derogatory comments regarding complainant's gender constituted actionable conduct); Dinsmore & Ford v. Home Security, Inc., 19 MDLR 4 (1997); Baldelli v. Town of Southborough Police Department, 17 MDLR 1541 (1995)

To establish a prima facie case of gender harassment, Complainant must show that: 1) she is a member of a protected class; 2) she was the target of speech or conduct based on membership in the class; 3) the gender-based harassment was sufficiently severe or pervasive to alter the terms or conditions of employment and create an abusive working environment; and 4) the harassment was carried out by an employee with a supervisory relationship to complainant or in a situation where the employer knew or

should have known of the harassment and failed to take prompt remedial action. MCAD Sexual Harassment in the Workplace Guidelines, p. 30, n. 23 (October 2, 2002); *citing* Fluet v. Harvard University, 23 MDLR 145, 161 (2001); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000).

As with a claim of sexual harassment, gender-based harassment must be objectively and subjectively offensive. *See* Messina v. Araserve, Inc., d/b/a ARA Campus Dining Services at Massachusetts Institute of Technology, 906 F. Supp. 34, 36 (1995) *citing* Ramsdell v. Western Massachusetts Bus Lines, Inc. 415 Mass. 673, 678, 615 N.E.2d 192 (1993). The objective standard means that the evidence of gender harassment is to be considered from the "view of a reasonable person in the plaintiff's position." Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001) *quoting* Ramsdell v. Western Massachusetts Bus Lines, Inc. 415 Mass. 673, 678 (1993). The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it unreasonably interferes with the worker's performance and what psychological harm, if any, resulted. *See* Lazure v Transit Express, Inc., 22 MDLR 16, 18 (2000).

The subjective standard is a personal one related to Complainant's own reaction to the harassing conduct. *See* Couture v. Central Oil Co., MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as . . . "in the eye of the beholder."); Conduct satisfies the subjective test where a complainant is sincerely offended by it. *See* McCormick v. Modern Continental Construction Co., 27 MDLR 316, 322 (2005) (Complainant's reaction demonstrated that she considered harassing conduct to be a serious affront to her dignity in the workplace). An individual cannot freely and

voluntarily participate in conduct and, at the same time, claim to be offended by it. See Coppentrath v. Casey, 28 MDLR 119 (2006) (where Complainant participated in and often initiated the conduct of a type she now alleges to be discriminatory, she cannot claim that the conduct was subjectively offensive to her); Candelieri v. Vanson Leathers, Inc., 24 MDLR 228 (2002) (Complainant who told dirty jokes on the job, inserted balloons under her shirt, and wore blue jeans to work with holes in the crotch and buttocks, found not to be subjectively offended by co-worker rubbing supervisor's shoulders).

An employer is strictly liable for sexual harassment committed by its supervisors, i.e., those on whom it confers authority. See College-Town, 400 Mass. 156, 165-166 (1987).³ An employer may also be liable for harassment committed by persons without actual or apparent supervisory authority, such as co-workers. MCAD Sexual Harassment in the Workplace Guidelines, p. 9 (2002) (by analogy). A complainant must show that the employer either knew or should have known about the harassing conduct and failed to take prompt, effective, and reasonable remedial action. Id.

Turning to whether Complainant satisfies the elements of a gender harassment case, the Full Commission has recognized in a prior ruling that Complainant, as a

³ The MCAD classifies employees as "supervisors" under c. 151B if they have authority to undertake or recommend employment decisions and/or the authority to direct the employee activities. See McCormick v. Modern Continental Construction Co., 27 MDLR 316, 324 (2005) (crew foreman considered to be supervisor because he communicated directives from management, directed members of crew, and controlled what they did); Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002) (employee deemed supervisor where he gives out tools and instructions, handle time cards, and let workers know about overtime); Fluet v. Harvard University, 23 MDLR 145, 163 (2001) (finding of supervisory relationship where individual assigns work, provides direction, monitors work, and recommends hiring, promotion, salary increases and discipline). Actions reasonably believed to be taken on the employer's behalf similarly confer strict liability upon an employer. See Noble v. Pereira d/b/a AUTOS by Joseph, 29 MDLR 50, 54 (2007) *citing* Girouard v. Bekiro Corp., 26 MDLR 24 (2004) and Przybycien v. Aid Maintenance Co., 13 MDLR 1266, 1382 (1991) (individual who held himself out as a supervisor and actually supervised complainant's work held to be a supervisor even though never formally designated as a supervisor or given authority to hire or fire; Floyd v. Forest Hill Cab Company, 15 MDLR 1181 (1993) (cab driver who refused to pick up a Black customer found to act with apparent authority on behalf of cab company).

transgendered individual, is a member of a protected class. See Millett v. Lutco, 23 MDLR 231 (2001) (Full Commission ruling denying Respondent's Motion to Dismiss). Following the disclosure of Complainant's transgendered status on or about December 15, 1997, her immediate supervisor and officemate, Don Bouthillier, stopped sitting at with her at meetings, refused to have lunch with her, played a CD with homophobic lyrics in the Quality Control office, instructed coworker Carol Schwartz not to socialize with Complainant in the office, and occasionally referred to Complainant as Charlie or Chaz even though Complainant had asked everyone to call her Charlegne. Jason Kallio berated Complainant for not being a team player, George Jette slammed a door in her face and refused to enter the Quality Control office when she was there, and Bob St. Cyr disciplined her for being openly critical of Bouthillier.⁴ While these actions were occurring, the Company progressively downsized and ultimately eliminated her position, beginning with her demotion to a technical support position approximately one month later, her conversion to part-time status eighteen months later, and her lay-off on October 1, 1999.

Rather than establish gender hostility, however, I conclude that these actions were motivated primarily by reasons other than Complainant's sexual identity such as her focus on nursing studies at the expense of her job duties, her neglect of her job responsibilities during the Case Audit, her over-reliance on emails to communicate, her penchant for criticizing colleagues in emails to supervisory staff, her time-consuming discussions about personal matters, and her intention to leave the office after obtaining a nursing degree. The record undeniably contains some hostile speech and conduct

⁴ Complainant also alleges that Kallio and St. Cyr criticized her for wearing dresses to work, but I conclude that there is an insufficient basis for crediting these uncorroborated allegations.

directed at Complainant's transgendered status, but the credible evidence does not establish that Complainant was the target of hostile speech or conduct based primarily on her transexuality or that the hostile speech and conduct were sufficiently severe or pervasive to alter the terms or conditions of employment and create an abusive working environment.

Moreover, the record contains more evidence of support for Complainant's transition following her December 15, 1998 disclosure than evidence of hostility. The Company provided Complainant with a leave of absence for her surgeries, assisted Complainant in her attempt to obtain insurance coverage for the surgeries, arranged for Complainant to use a private bathroom prior to the completion of her sexual reassignment surgery, and welcomed her use of the Company's ladies' rooms following her surgeries. St. Cyr met with George Jette in response to his display of hostility towards Complainant. Most significantly, Company President John Stowe communicated to one and all that Complainant was to be treated with respect.

It is undeniable that that Complainant's relationship with her immediate supervisor, Don Bouthillier, deteriorated after her transitioning, but the reasons for the deterioration are too complex to be explained by gender harassment. Whether or not Bouthillier was uncomfortable with Complainant's transitioning, I attribute their increasing interpersonal difficulties primarily to Complainant's relentless criticism of Bouthillier's job performance. Complainant's criticism was aggressive, hostile, and public. Her behavior towards Bouthillier would have undermined the parties' relationship even if Complainant had not been transitioning from male to female gender.

Much of the evidence which Complainant relies upon to support her charges about the Company's harassment in general and Bouthillier's hostile conduct in particular consists of contemporaneous notes she made of conversations with coworkers and supervisors. These notes are self-serving and subjective. Complainant's written record of what transpired between herself and her coworkers reduces complex office matters to one-dimensional reflections of her own grievances. E.g. Exhibits 32, 33, 36, 42, 46, and 134. Additionally, Complainant's credibility is adversely affected by the contradictory statements which she made at deposition and at public hearing. For instance, at the public hearing Complainant denied being open and frequent in her criticism of Bouthillier but in her deposition she admitted that she was. At public hearing Complainant denied that her job no longer had great significance to the Company at the time of her termination, but in her deposition she agreed that her job no longer had great significance by that point. At public hearing, Complainant denied that she discussed with Bouthillier intimate details about her physical anatomy and her sexual encounters, but in her deposition she admitted that she did. Complainant's credibility is further undermined by her unconvincing denial that she signed an August of 1998 performance appraisal and by her failure to call any witnesses to corroborate her version of the alleged events.

While some occurrences appear to have been motivated by discomfort with Complainant's transgendered status such as Bouthillier's Pink Floyd comment, Jette's slamming a door in her face and Jette's refusing to enter the Quality Control office in her presence, I do not consider these incidents to be sufficiently severe or pervasive to have altered the terms and conditions of Complainant's employment or to have created an abusive work environment. As Respondent asserts, Chapter 151B is not a manners

statute that penalizes employers for incidents of rudeness, but rather, a law that protects employees from an environment pervaded by discriminatory harassment and abuse.

Moreover, some matters that might be egregious in isolation appear less so in the context of the supportive actions which the Company took on Complainant's behalf. For example, St. Cyr took informal and formal action to address Jette's behavior towards Complainant. Exhibit 52. Bouthillier, notwithstanding the Pink Floyd incident, his decision to stop going out to lunch with Complainant, and his occasional reference to her as "Charlie" or "Chaz," served as Complainant's confidant in regard to many intimate disclosures about her transexuality, shared an office with her, and removed his recording equipment from the office as soon as Complainant objected to the Pink Floyd CD. St. Cyr was so supportive of Complainant that she offered to write a letter of recommendation on his behalf attesting to his experience with sensitivity training and cultural diversity. Complainant thanked him for his "continued support" in July of 1998, and presented him with a humorous "rain check for lunch" in November of 1998 in appreciation of his assistance with her transition.

The leadership provided by Company President John Stowe was singularly devoid of gender bias. Although Stowe demoted Complainant to a Quality Technician in February of 1998, subsequently cut her hours, and ultimately laid her off, he initially hired consultant Harold Greenberg to help Complainant succeed at her job, was supportive of her nursing studies even though they inconvenienced the Company, and demanded that Company employees treat Complainant's transitioning with respect. Stowe granted Complainant a leave of absence for her surgeries and permitted her to work nights in order to facilitate her career change. The evidence supports Stowe's

contention that he sincerely believed that Complainant intended to leave her job in the spring or summer of 1999. I conclude that Stowe's reduction in Complainant's hours, his downgrading of her responsibilities, and his ultimate decision to lay her off were due to Complainant's plan to change careers and her performance deficiencies, not as a result of bias related to her transgendered status.

2. *Gender-Based Disparate Treatment*

Sex discrimination can also take the form of disparate treatment. See Pettiford v. City of New Bedford Police Department, 26 MDLR 304, 309 (2004) *citing* Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (Female police detective subjected to gender-based discrimination when she, alone, was denied training, undercover assignments, a partner, injured on duty benefits, and a permanent cruiser assignment); Belopolsky v. Massachusetts Bay Transportation Authority, 25 MDLR 181 (2003) (Female assistant mechanical engineer given inferior work station and denied equipment with which to do her job whereas male assistant mechanical engineers had adequate offices, drafting tables, computers, and appropriate software); Nassab v. Massachusetts General Hospital, 25 MDLR 429 (2003) (radiological technologist subjected to disparate treatment in the form of an involuntary transfer, the loss of income, and harsher treatment than male technologists).

Apart from direct evidence of discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419

Mass. 437, 444-445 (1995). To establish a prima facie case, Complainant must show that: 1) she is a member of a protected class; 2) she was adequately performing the duties of the job at issue; 3) she was subject to adverse treatment; and 4) she was treated differently from other employees similarly situated but not members of the protected class. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext. See Blare, 419 Mass. at 444-445. Complainants may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

Following Complainant's disclosure of her transgendered status on or about December 15, 1997, the following adverse actions were taken with respect to

Complainant: her position of ISO Management Representative was downgraded to Technical Assistant (albeit with the same pay and benefits) on or around January 29, 1998, her position was reduced to twenty-five hours per week on June 1, 1999, and her position was eliminated altogether on October 1, 1999. No comparable steps were taken with respect to any other employees involved in the Company's quality assurance project, resulting in the conclusion that Complainant was treated differently from similarly-situated employees who were not in Complainant's protected class, i.e., non-transgendered employees. Although no employee except Complainant had the sole job responsibility to prepare for the quality assurance audits, other members of Respondent's workforce were element leaders with significant responsibility in preparing for the Case and ISO Audits. As such, they are appropriate comparators for the purpose of assessing their treatment relative to Complainant's.

The final element of Complainant's prima facie case is whether Complainant was adequately performing the duties of her job. The parties dispute the adequacy of Complainant's performance between the summer of 1997 and her assumption of the ISO Technical Assistant role on or around January 29, 1998. Before and after that period, however, the parties agree, and Complainant's performance evaluations reflect, her adequate performance. For the purposes of proceeding with the analysis at hand, I consider Complainant's performance sufficient to make out a prima facie case of disparate treatment discrimination.

At the second stage of proof, Respondent articulates as legitimate, nondiscriminatory reasons for downsizing Complainant's job and ultimately laying her off that Complainant's focused on nursing studies at the expense of her job duties,

walked out of the office on the closing day of the Case Audit, communicated her intention to leave the Company after obtaining a nursing degree, over-relied on emails to communicate, and disseminated emails that were inappropriately critical of coworkers. In addition to focusing on Complainant's conduct, Respondent defends its cutting of Complainant's hours and her subsequent layoff on the basis that the quality audits were completed and the Company was experiencing a downturn in business.

Respondent's reasons at stage two are supported by credible testimony by Company President Stowe that in the spring and summer of 1997, he became frustrated with the Company's lack of progress in preparing for the upcoming quality reviews and that he attributed this lack of progress to Complainant's failure to work closely with element leaders and to her concentration on nursing school at the expense of her job. The fact that Stowe hired Harold Greenberg as an ISO consultant supports Stowe's assertion that Complainant was deficient in performing her duties. A compilation of critical emails attests to the Company's dissatisfaction with Complainant's finger-pointing at co-workers.

Complainant maintains that dissatisfaction with her job performance was a pretext for reducing her hours and responsibilities and ultimately laying her off, but the credible evidence demonstrates otherwise. After starting nursing school, Complainant began to work for Respondent at night in order to compensate for attending class during the day, relied on emails to communicate with fellow employees, and limited her face-to-face interactions with co-workers. Complainant's unavailability resulted in delays in responding to questions, the rescheduling of meetings, and the postponement of the Case Quality Audit. Management's frustration is expressed in a December 12, 1997

communication to Complainant stating: “[Case] ... do[es] not want any more delays, only a date.” Significantly, this expression of impatience predates Complainant’s disclosure of her transgendered status.

Even if Complainant’s performance had not been deficient prior to January of 1998, the circumstances surrounding the Case audit would be sufficient to justify the negative consequences that Complainant attributes to disparate treatment. While other employees played a role in the Case Audit, Complainant’s job was the only one devoted solely to the project. The Company reasonably held Complainant accountable for its poor performance, particularly in light of Complainant’s departure on day three of the Audit. Those circumstances, buttressed by Stowe’s subsequent instructions that she reduce her email use and refrain from focusing on the deficiencies of co-workers, provide convincing evidence that Respondent’s dissatisfaction with Complainant was based on her job performance and not a result of discriminatory animus. Additional job related reasons for reducing Complainant’s hours and ultimately laying her off include Complainant’s need for more time to study and Respondent’s downturn in business in 1999.

To be sure, the Company’s multiple justifications for advertising in January of 1998 for an ISO Management Representative (i.e., assist Complainant, replace Complainant, replace Greenberg, anticipate Complainant’s departure, and explore all leadership options) raise the specter of pretext. On balance, however, they fail to support a conclusion of pretext because they all share the common goal of reducing Complainant’s role in the quality assurance program, a goal that is consistent with Respondent’s dissatisfaction with Complainant’s performance.

Harold Greenberg's January 28, 1998 communication to Stowe supports Respondent's position insofar as he maintains that Complainant was, "the wrong person for the job" and suggests that she be relieved of her responsibilities. The Company heeded this advice when it reduced Complainant's responsibilities for a period of eighteen months and then laid her off when she was scheduled to finish nursing school. The fact that Stowe disregarded Greenberg's negative comments about Bouthillier and put Bouthillier in charge of the Quality Assurance Project following Complainant's demotion does not demonstrate disparate treatment as much as Stowe's belief that Greenberg was attempting unfairly to shift the blame for the Company's poor performance on the Case Audit from his own shoulders to Bouthillier's. Stowe's confidence in Bouthillier is buttressed by the credible testimony of St. Cyr attesting to Bouthillier's positive attributes and the fact that Bouthillier steered the Company to a successful conclusion of the ISO project.

Respondent's treatment of Complainant over the eighteen-month period following the Case Audit suggests forbearance rather than discriminatory animus. The Company did not take steps to layoff Complainant until she was scheduled to graduate from nursing school. When Complainant's nursing career unexpectedly failed to materialize in the summer/fall of 1999, Respondent was under no obligation to retain Complainant in lieu of hiring Thierry Schwartz as a contract employee to replace Quality Inspector Tina Bond.

For the foregoing reasons, I conclude that the Company's decision not to retain Complainant was motivated by job-related considerations and that Respondent did not discriminate against Complainant on the basis of sex.

C. Retaliation

Pursuant to M.G.L. c. 151B, sec. 4(4), it is unlawful for any person or any employer “to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter, or because he has filed a complaint, testified, or assisted in any proceeding under section five.” In addition, sec. 4 (4A) makes it unlawful “for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.” These sections comprise chapter 151B’s prohibition against retaliation. See Kelley v. Plymouth Sheriff’s Department, 22 MDLR 208, 215 (2000), *citing* Bain v. Springfield, 424 Mass. 758, 765 (1997).

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 *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In order to establish a prima facie case of retaliation through indirect evidence, Complainant must show that she engaged in a protected activity, that Respondent was aware of that activity, that Complainant was subsequently subjected to an adverse employment action, and that, absent other evidence of retaliatory intent, the adverse action followed the protected activity within such time that retaliatory intent can be inferred. See Mole v. University of Massachusetts, 442 Mass. 582 (2004); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Cimino v. BUT Electronics, 18 MDLR 197 (1996).

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 action. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2002); Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that the proffered reason is not, in fact, the real reason for the conduct at issue and that said conduct was motivated by a retaliatory animus. See Weber, 434 Mass. at 777; Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian, 432 Mass. at 118.

The Commission interprets Chapter 151B's anti-retaliation provisions to apply to protected activity in the form of both formal and informal complaints as long as they challenge practices reasonably believed unlawful under c. 151B. See e.g., Auburg v. American Drug Stores, 21 MDLR 238, 242 (1999) (voicing of informal complaint protected under c. 151B); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (same). Protected activity requires a reasonable and good faith belief that the conduct being challenged could be construed as violating c. 151B. See Clark County School District v. Breeden, 532 U.S. 286 (2001); Guazzaloca v. VCF Motorfreight, 25 MDLR 200 (2003) (Complaining about poor job evaluation or denial of promotion, without more, does not constitute protected activity). Adverse employment actions include discharges, demotions, transfers, reduction in salary, and the removal of job responsibilities but not merely coldness or aloofness from coworkers. See Bain v. City of Springfield, 424 Mass. 758 (1997) (Cold behavior and hostile body language are too subjective and intangible to support retaliation claim).

In support of her retaliation claim, Complainant characterizes her November 24, 1998 letter to Bouthillier which she copied to St. Cyr as protected activity, i.e., a harassment complaint. However, Complainant's letter nowhere mentions harassment or, for that matter, any other alleged violation of c. 151B. Instead, the memo focuses on Bouthillier's reaction to her criticism of his work. Complainant drafted the memo four days after St. Cyr told Complainant that she needed to respect other managers, that insubordinate behavior would not be tolerated, and that managers were afraid to confront her because they feared being sued for discrimination. St. Cyr considered Complainant's November 24, 1998 communication to be insubordinate insofar as it contradicted his previous instruction that she refrain from drafting and circulating critical memos about fellow employees. In response to what St. Cyr perceived to be insubordinate behavior, he gave Complainant a final warning for insubordination on December 1, 1998.

Whether or not the November 24, 1998 letter is insubordinate, it fails to satisfy the requirements of protected activity. It was not until after Complainant received the December 1, 1998 warning that she first characterized her November 24, 1998 memo as a harassment complaint and asserted that the warning was in retaliation for the complaint. I conclude that Complainant's letter fails to pass muster as informal action opposing protected activity and that, in any event, St. Cyr's warning is not retaliatory because it was imposed before, not after, Complainant explained that her complaint involved an allegation of harassment.

IV. ORDER

The case 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 27th day of June, 2008.

Betty E. Waxman, Esq.,
Hearing Officer