

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

CHERYL TAVARES-MERRITT
AND MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Complainants

v.

Docket No. 97-BEM-2980

MASSACHUSETTS DEPARTMENT
OF CORRECTIONS,
Respondent

Appearances: Gary H. Goldberg, Esquire, for Complainant
Elizabeth Day, Esquire, for Respondent

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

This case concerns an individual who claims that she was subjected to discrimination on the basis of her race, color and gender. Her complaint alleges unlawful discrimination and retaliation in violation of M.G.L. c. 151B, s 4(1) and (4).

II. PROCEDURAL HISTORY

On June 5, 1997, Complainant, Cheryl Tavares-Merritt, filed a charge of discrimination against Respondent, Massachusetts Department of Correction. The Investigating Commissioner issued a finding of Probable Cause on July 10, 2000. After

conciliation efforts failed, the matter was certified for Public Hearing. A Public Hearing was held on February 19-21, 2002, April 11-12, 2002, May 13, 20-21, 2002 and August 22, 2002.¹ Post-Hearing proposed findings of fact and conclusions of law were submitted by the parties.

I have considered the entire record of the proceedings, including all proposed findings of fact, conclusions of law and supporting arguments of the parties. To the extent the proposed findings and conclusions are not in accord with the findings therein, they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented; others have been modified to accord with my findings. To the extent the testimony of various witnesses is not in accord with the findings herein, such testimony is not credited. Having duly considered the record before me, I make the following Findings of Fact, Conclusions of Law and Order.

III. FINDINGS OF FACT

1. Respondent is an employer within the meaning of M.G.L. c.151B.
2. Complainant, a black female, commenced her employment at Respondent in 1984, as a correction officer assigned to the Treatment Center in Bridgewater, Massachusetts.
3. In 1987, while employed at Bridgewater, Complainant filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”). The MCAD found probable cause in 1989. Complainant testified that since filing her first MCAD complaint in 1987, Respondent has perceived her to be a “trouble maker.”

¹ On May 13, 2002, the Commission allowed Complainant to amend her complaint to add a charge of retaliation regarding disciplinary sanctions that occurred in May 1997.

4. In 1988, Complainant applied for a transfer to a correction program officer (CPO) position at Southeastern Correctional Center (“SECC”), a facility containing a medium security and minimum security unit. The CPO job series consists of three levels: CPO-I, CPO-II, and CPO III. Complainant was accepted for a CPO I position and initially assigned to the medium security unit. (Ex. 3)
5. In 1989, Complainant filed a retaliation complaint with the MCAD. In 1990, she withdrew her 1987 and 1989 complaints from the MCAD and filed a Superior Court complaint based on the same allegations.
6. In 1990, Complainant applied and was not selected for a Correction Counselor III position at SECC. She subsequently asked Captain Michael Brault, a member of the interview panel, how she had performed in her interview. She testified that Brault responded he had been told not to promote her, because she had filed a lawsuit. Brault testified that he said to Complainant, “If you weren’t so adversarial, you might get what you want,” but could not remember if he referred to her MCAD charges specifically. I credit Brault’s testimony.
7. In 1993, Complainant and Respondent entered into a confidential settlement agreement relating to the 1990 Superior Court complaint.
8. In June 1993, Complainant was promoted to a CPO II position, the first level supervisory job in the Correctional Program Officer series, at SECC. She received this promotion through the civil service process. As a CPO II, Complainant’s responsibilities included supervision of the two to three CPO I employees in the unit and preparation of classification boards for inmate classification hearings regarding an inmate’s placement. (Exs. 22, 76)

9. Donna Collins, a Unit Manager, testified that she heard comments that Complainant had been awarded her CPO II position due to a lawsuit. Carol Lawton, a Unit Manager, testified that she had heard that Complainant received her promotion to CPO II by filing a grievance over her test score.

10. In 1993, Complainant was transferred to the minimum security unit at SECC. She was on maternity leave from June 1993 until October 1993.

11. Complainant's annual performance evaluations ("EPRS") from 1989 through 1997 indicated that she was performing her position acceptably. Her 1988, 1989, 1992 and 1993 evaluations generally rated her performance as "meets." Her 1990 and 1991 evaluations generally rated her performance as "exceeds." Her 1994 evaluation rated her overall performance as "meets plus." Complainant's July 1, 1995 to June 30, 1996 EPRS rated her performance as satisfactory. Attached to Complainant's 1995-96 EPRS was an action plan for a CPO I, Anita Maguire, an employee Complainant supervised.

Complainant's supervisor, Lawton, testified that she attached Maguire's action plan because she was concerned about Maguire's performance and believed Complainant should have been monitoring Maguire's performance as one of her supervisory duties. (Ex. 9)

12. In mid-1996, Paul Cruz became Complainant's Unit Manager. Since there were no CPO IIIs in the unit, Cruz became Complainant's immediate supervisor. He signed her 1996 and 1997 EPRSs, in which she was rated satisfactory. Complainant testified she had a good working relationship with Cruz from August 1996 until December 1996. (Ex. 9)

13. Cruz reported to Deputy Superintendent Lisa Mitchell, who was supervised by Superintendent John Marshall.

14. On or about January 3, 1997, Respondent issued a vacancy announcement for two CPO III positions at SECC. Twenty-four candidates, including Complainant, applied for the position. The applicants included eleven males, thirteen females, two African-Americans and one Hispanic. (Exs. 2, 7)

15. Pursuant to Respondent's hiring policy, a panel of three employees interviewed candidates for the CPO III position. The panel was composed of Lawton (a Caucasian female), Cruz (a Caucasian male) and CPO III Annie Holman (an African American female). Lawton, who testified that she has been a member of 50 to 100 interview panels at Respondent, chaired the panel. (Exs. 16, 46)

16. The panel interviewed 22 candidates, a larger than usual number of applicants for a position. Complainant's interview took place on February 19, 1997. Due to his vacation schedule during the week of February 16, 1997, applicant William Martin was interviewed at the beginning of the following week. Cruz, Holman and Lawton recalled interviewing Martin, but could not recall the date of his interview.

17. Lawton testified that the panel asked each applicant the same nine questions. The panel was required to complete a rating sheet used for all Respondent vacancies on each applicant, scoring the applicant in twenty (20) categories that included education and work experience, problem solving skills and judgment, interpersonal skills, initiative and related experience, EPRSs, attendance, Respondent training and experience and awards and achievements. Lawton testified that the panel completed the rating sheets based on their individual notes and the panel's discussion and assigned an overall ranking to each candidate. Holman stated that in rating a candidate she considered the application, interview and the applicants' experience, but did not consider her experience with an

applicant outside of the interview. Lawton acknowledged that she took a previous relationship with an applicant into account. Cruz testified that his knowledge of Complainant was part of his discussion of her candidacy with the panel, but that he used only her application and interview as criteria for making a recommendation. (Exs. 4, 6,63)

18. Cruz testified that he did not believe that Complainant was qualified for a CPO III position based on her difficulty with organizational skills and in ability to work effectively with people. He did not recommend her for a second interview.

19. The ratings of numerous CPO III applicants were inconsistent with their rankings. For example, while Complainant's rating total was 36 and she was ranked fourth, candidates with a higher score were ranked below her. There were also discrepancies in the ratings relating to a candidate's attendance, EPRS ratings, and awards/achievements. (Exs. 63, 70)

20. Following Complainant's interview, she attempted to obtain feedback from Cruz on how she had done. She testified that she subsequently learned Cruz told Lawton that she had asked him about her performance in her interview. After that her relationship with Cruz changed and became strained.

21. On or around February 25, 1997, Complainant questioned Elizabeth Boardman regarding the selection process for the CPO III position. Boardman testified that she told Complainant she had heard that second interviews had been scheduled. Boardman stated that Complainant responded she had not been notified to appear for a second interview and there would be "hell to pay and she would be playing the race card if she didn't get one of those positions." Boardman notified Lawton of Complainant's inquiry and

submitted an incident report (a report of some significant incident that has occurred which is sent to the Superintendent). The report included a reference to Complainant's "race card" statement. Lawton also submitted an incident report, but made no reference to the race card statement. Mitchell testified that she considered Complainant's attempt to obtain information inappropriate, but did not speak with Complainant about her attempts to solicit information. (Exs. 59, 66, 67)

22. Respondent's Hiring and Selection Policy requires that upon completion of all interviews, the interview panel complete a written summary of recommended candidates and forward it to the Hiring Authority. This policy also states that any interviews that fail to comply with its requirements will result in a re-initiation of the interview process. The panel recommended candidates to Mitchell for a second interview. The panel did not provide her with a written summary of the applicants as required, but communicated to her verbally which candidates the panel recommended for second interviews. (Ex. 46)

23. On February 28, 1997, Mitchell interviewed five candidates, including Complainant, Martin and Mark Yuille. She testified that she considered her prior experience with an applicant as well as their application package.

24. Complainant testified that during her second interview, Mitchell did not ask her questions concerning her present job or why she wanted a promotion. She stated that Mitchell reprimanded her about her comment regarding not receiving a second interview and her threat to file a grievance. At the hearing, Complainant denied making these statements. Mitchell denied reprimanding Complainant or asking her if she was planning to file a grievance. I credit Mitchell's testimony.

25. Following the second interview, Mitchell recommended Martin and Yuille for the CPO III position. Effective August 24, 1997, Martin was approved for the position. A transfer candidate filled the second vacancy, transferring to the position ahead of Yuille. Pursuant to applicable collective bargaining agreements, transfer candidates, where appropriate, have priority over other employees for an open position. Although Respondent's Hiring and Selection Policy requires that all non-selected applicants receive written notification of their non-selection, Complainant did not receive such notification. (Exs. 7, 46, 68)

26. Martin, a Records Manager for Old Colony Correctional Center, had thirteen years of experience at Respondent. He had held a CPO III position from May 1990 until May 1992, at which time he was demoted to a CPO II, because he had not taken the requisite civil service examination for a CPO III position. Martin's evaluations rated his performance as "exceeds" and he had a strong attendance record. He submitted an almost identical application to one he had used for his Records Manager position in 1996, but this application was unsigned. He testified that he did not know why he failed to sign it. (Ex. 4)

27. On his application, Martin listed Mitchell and two co-workers as character references, testifying that he did so because he did not have friends in the area and the only people that he was close to were family and relatives. Lawton and Holman testified that it was common practice to list co-workers as character references. Mitchell testified that she had previously been Martin's supervisor, but that at the time she interviewed Martin, she was not aware that he had listed her as a character reference. (Ex 4) I credit Mitchell's testimony that she was not aware Martin had listed her as a character reference

and find his reliance on her as a reference did not play a role in Mitchell's recommendation.

28. Brault and Lawton testified that at times superiors have influenced an interview panel's recommendation by indicating the candidate they wanted selected for a position. However, Lawton testified that in this case she was not influenced to select or favorably consider any of the candidates for the CPO III position and stated she has never been directed to select a particular applicant for a position. Holman also testified that she has never been directed to select a particular applicant for a position. Mitchell testified that she was told only to consider applicants who were CPO IIs for the CPO III position. (Ex. 63)

29. During the selection process, the panel members were not aware that Complainant had filed prior MCAD complaints. Mitchell was aware of Complainant's prior MCAD charges, testifying that she learned of them in the mid-1980s. Subsequently she had been a member of the hiring panel that interviewed and recommended Complainant for a CPO I position in 1988. Neither of Complainant's MCAD charges named Cruz or Mitchell as parties.

30. On Friday, March 28, 1997, Complainant, Cruz and Maureen Damiano served on an interview panel. Complainant testified that during the course of that day, she made a request to Cruz to take time off on Monday, March 31. According to Complainant, after inquiring as to which form of leave time Complainant intended to use, Cruz granted her the day off. Cruz testified that when Complainant indicated she might need the entire day off, he responded that she could take only a couple hours, but no more. Damiano testified that she heard some of this exchange and recalled Cruz asking Complainant to let him

know what type of leave time she intended to use. A memorandum drafted by Damiano on November 3, 1997, states she witnessed a conversation between Complainant and Cruz in which Complainant asked Cruz if she could have time off on Monday March 31 for personal reasons, that he asked her if she was going to need a full or half day and that she replied that she was not sure, but thought it would be a full day that Cruz approved. (Ex. 41) I find that Damiano could not remember whether she had overheard the entire conversation between Complainant and Cruz and accordingly, I find that her memorandum and testimony are not reliable. I credit Cruz's assertion that he did not grant Complainant the entire day off.

31. Complainant did not report to work on March 31, 1997, nor did she call in to inform Respondent that she would not be in. On April 1, 1997, a snowstorm resulted in non-essential employees being excused from work and Complainant did not report for work that day.

32. On April 2, a reclassification board hearing was scheduled. That morning, Complainant was late for work. When the boards could not be located the morning of April 2, the classification team had to leave SECC without them, but was able to hold the hearing with no repercussions to the inmates. One of Complainant's CPO II responsibilities was preparing reclassification boards for classification hearings regarding an inmate's placement. Complainant testified that on March 6, 1997, she delegated responsibility for preparing the boards to Maguire and did not subsequently check with her on her progress. (Ex. 26)

33. Department regulations require that a classification hearing be held within twenty working days of the transfer of an inmate to higher security. Although the parties dispute

whether the end of the twenty-day period fell on April 2 or a later date, I find that Respondent acted on an assumption that the classification boards should have been ready for the classification team on April 2, 1997.

34. Cruz and Complainant met twice on April 4, 1997. Their first discussion related to Complainant's tardiness issues, her March 31 absence and the failure to provide classification boards on the date they were needed. During the second discussion, occurring between 3:30 and 4:00 p.m., Cruz testified that Complainant's attitude was negative and that he told her that she was "going back to the way she used to be" referring to past problems with tardiness and performance. Complainant testified that she found Cruz's comments belittling and intimidating and felt they were a reference to her prior MCAD complaints. I find that viewed in the context of Complainant's March 31 unauthorized absence and the classification boards not being completed in a timely manner two days earlier, Cruz's comment referred to Complainant's recent tardiness and deficient performance and was not a reference to her prior MCAD complaints.

35. After her conversation with Cruz, Complainant became very upset and called her doctor, who suggested that she leave work. Complainant testified that, believing Cruz had already left for the day, she did not inform him that she was leaving. She called Mitchell between 4:00 and 4:30 p.m. and informed her secretary that she was not feeling well and would be leaving. Mitchell's secretary left Mitchell a handwritten note on her desk, stating Complainant was leaving to see her doctor. (Ex. 52)

36. As part of her CPO II responsibilities, Complainant completed and submitted weekly attendance reports for herself and the unit's CPO I employees. On April 4, 1997, Complainant submitted a weekly attendance report, using vacation time for her March 31

absence and not marking herself tardy on April 2, 1997. On April 5, 1997, Cruz submitted an attendance report for the unit for the week ending April 5, 1997, recording Complainant's March 31 absence as eight hours without pay. Mitchell subsequently stopped Complainant's practice of signing her own attendance reports. (Exs. 48 and 49)

37. On Monday, April 7, 1997, Complainant called in sick. A letter dated April 7 from Dr. Ralph Angus stated that Complainant was being treated for anxiety, on medication and unable to work from April 7 until April 21, 1997. (Ex. 12)

38. Mitchell stated that she learned from Cruz on or about April 7 that Complainant had left early on April 4, and she relied on Cruz's version of what had occurred on that day and did not ask Complainant for a report. On April 24, Cruz wrote two incident reports relating to Complainant's calling in sick for the weeks of April 7 and April 14. (Exs. 12, 71)

39. Complainant testified that at times Mitchell refused to meet with her unless Cruz was present. Mitchell denied this and stated that she and Complainant met alone to discuss Complainant's issues with Cruz on one or two occasions in April 1997. Mitchell stated that Complainant appeared to have some conflict with Cruz, but did not raise the subject of discrimination or retaliation. I credit Mitchell's testimony.

40. Mitchell testified that she believed that the possibility of discipline regarding Complainant's actions was discussed with Superintendent Marshall at some point between April 4 and April 28, 1997, but could not recall the specific dates of the conversation.

41. Complainant returned to work on April 28, 1997, following a week of previously approved vacation time. That day she submitted two Industrial Accident Incident

Reports. In one report she wrote that she was being subjected to unfair, discriminatory treatment. She alleged that Cruz had created a hostile environment for her by referring to Mitchell as 'Momma,' and commenting that 'corrections is the way it is because there are too many women.' According to Cruz, Mitchell was alleged to have stated that she did not want any more females promoted. In the other Industrial Accident report, Complainant did not mention discrimination or a hostile work environment. (Exs. 14, 15)

42. Mitchell testified that she did not recall the date that she saw Complainant's Industrial Accident reports. She did not contact Complainant concerning her allegations of gender discrimination nor did she report Complainant's allegations of discrimination to the affirmative action office. Mitchell stated that she discussed Complainant's claims of discrimination with Cruz and asked him to respond, but no formal investigation was conducted. Collins, who served as an affirmative action officer in 1994, testified that Superintendent Marshall had an obligation to investigate Complainant's allegations of discrimination.

43. Cruz testified that Superintendent Marshall asked him to respond to the allegations of discrimination contained in Complainant's Industrial Accident report. He responded by memorandum dated April 28, 1997, informing Marshall that Complainant had left work without permission on April 4, and that she had submitted a time sheet for a vacation day taken on March 31, an absence he did not approve. Cruz attached his April 4 and April 10 incident reports to the memorandum. (Ex. 60)

44. Complainant submitted a Notice of Injury claim to the State Board of Retirement and to the Department of Industrial Accidents. On April 29, 1997, Superintendent Marshall wrote to the Industrial Accident Coordinator challenging Complainant's claim. (Ex. 16)

45. On May 1, 1997, Complainant received a written warning from Superintendent Marshall for failure to provide classification boards on time. Mitchell testified that although Complainant had delegated the task to Maguire, assigning this task to a subordinate was not an acceptable defense for Complainant's not completing the boards in a timely manner. By letter dated May 16, 1997, Complainant disputed the allegations and asked that the reprimand be removed from her file. (Exs. 25, 27)

46. Neither Maguire nor Cruz were disciplined for failure to conduct classification boards. Mitchell testified that she could not identify any other CPO at SECC who had not completed classification boards on time and accordingly, she did not know of any other SECC employee disciplined for failing to complete classification boards in a timely fashion.

47. On May 1, 1997, Complainant also received a one day suspension from Superintendent Marshall for actions that included her failure to report to work or notify Respondent of her absence on March 31, 1997. This discipline was also for the tone of her April 4 interactions with Cruz, leaving without authorization on that date and submitting an unauthorized attendance report to the Payroll Department in which she attempted to claim the March 31 absence as vacation time. By letter dated May 16, 1997, Complainant responded to the Superintendent's suspension, stating that she was subjected to a hostile working environment and discriminatory practices. (Exs. 26, 28, 34)

48. On May 19, 1997, Mitchell gave Complainant a written warning regarding tardiness. (Ex. 32)

49. On May 19, 1997, Complainant wrote an incident report stating that at 12:50 p.m. that day she had made an attempt to hold classification boards, but was unsuccessful due to unavailability of staff. (Ex. 29)

50. On May 30, 1997, Cruz wrote an incident report regarding a meeting he had had with Complainant to discuss classification issues. He stated that Complainant “is becoming increasingly more difficult to manage. She is extremely challenging and hostile.” (Ex. 74)

51. By letter dated June 5, 1997, Cruz informed Marshall that he had received a telephone call from Julie Kelly, a CPO I supervised by Complainant, requesting a transfer due in part to her discomfort working under Complainant. (Ex. 75)

52. Complainant testified that Cruz referred to Mitchell frequently as “momma” and also told Complainant that Mitchell had expressed to him on March 28, 1997, that she did not want to hire any more females. She testified that Cruz stated “corrections is the way it is because they have too many females,” and that he did not need a wife because working with Complainant “was like having a wife.” Mitchell and Cruz denied making these comments. I credit Cruz’s testimony.

53. Mitchell testified that she has never heard herself referred to as ‘Momma.’ Mary Hyde, a SECC Word Processor for twelve years, Jennifer DeCoursey, a CPO I assigned to SECC, Jay Gadsden, a thirteen year employee, Collins, and Boardman testified that they never heard Cruz refer to Mitchell as ‘Momma’ or make sexist or racist comments. Boardman stated she has referred to Mitchell as ‘Momma.’ Lawton testified that she had heard Mitchell referred to as ‘Momma’, but not by Cruz.

54. Gadsden testified that Complainant had attendance and tardiness issues. Collins, who supervised Complainant in 1993, testified that she had “some tardiness issues” and that

there were “challenges” with her in terms of interpersonal relationships. Brault stated that he supervised Complainant for a year and a half to two years and that she had an attendance problem. Lawton testified that when she supervised Complainant from 1995 through 1996 it was common for Complainant to be tardy and difficult to depend on. I credit their testimony.

55. During the summer of 1993 or 1994, Complainant informed Gadsden that she had filed MCAD complaints. Gadsden testified that he told Cruz at some point in 1997 or 1998 that Complainant had filed a complaint. Complainant contended that Cruz and Gadsden’s conversation regarding her MCAD charges occurred as part of a March 10, 1997 conversation following the wake of an employee’s father. Cruz testified that he did not learn of Complainant’s MCAD complaints in March 1997 and that he did not become aware that she had filed these charges until a 1998 conversation with Gadsden, wherein they were discussing the difficulties of working at SECC. (Ex. 62) I credit Cruz’s testimony.

56. During the years that Cruz was Unit Manager, there was no CPO III in the unit and Complainant was the only CPO II. Complainant testified that from 1993 until 1997, she performed the duties of a CPO III such as supervising the unit, preparing classification boards, acting as Unit Manager in the Unit Manager’s absence and functioning as the Unit Manager’s right hand person. Cruz testified that it was common for employees to work outside their job classification without being remunerated or being reclassified. Mitchell testified that staff shortages were a problem at SECC in terms of the duties staff were required to perform. I credit Cruz and Mitchell’s testimony.

57. Complainant testified that she became less trusting, more anxious and fearful, and had nightmares due to what she perceived as a hostile work environment. In April 1997, she began counseling with Dr. Ronald Werner, Ph. D., and met with him on five occasions. Werner testified that Complainant informed him that she was being harassed and discriminated against, because she was the only black female in her section. She told him that because she had previously filed a race complaint, Respondent viewed her as a “troublemaker.” He diagnosed her as suffering from an adjustment disorder with anxiety and depression. (Ex. 13)

58. By letters to Superintendent Marshall, dated June 3, 1997 and December 10, 1997, Complainant requested to transfer from SECC. Her requests were denied. CPO I Kelly’s June 1997 request for a transfer from SECC was also denied. (Exs. 36, 37, 42, 43, 77)

59. In July and September 1997, Complainant was issued written warnings regarding tardiness. (Exs. 39,40)

60. In December 1997, Complainant sustained extensive injuries in a non-work related automobile accident. She was out of work until June 1998.

61. From March until December 1997, Marshall issued 42 reprimands and 47 suspensions to SECC CPOs. The reprimands were primarily for tardiness and attendance infractions with two performance related violations. Suspensions were for attendance and performance infractions. The majority of discipline was issued to white males. (Ex. 64)

IV. CONCLUSIONS OF LAW

A. Race and Gender Discrimination

M.G.L. c. 151B, s. 4 (1) prohibits discrimination in the terms and conditions of employment based on race, color and gender. In the present case, Complainant alleges that she was discriminated against on these bases with regard to her non-selection for promotion to CPO III, arguing that the interview and selection process for the position was so subjective and irregular as to cause the process to be defective, biased, and therefore discriminatory, preventing her any opportunity for selection. Complainant also argues that she was subjected to disparate treatment and to a hostile work environment at SECC.

In order to prevail on a claim of discrimination for failure to promote, absent direct evidence, a Complainant must show that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was not selected for the position; and (4) Respondent sought to fill the position by hiring another individual with qualifications similar to hers. Wynn & Wynn v. Mass. Comm. Against Discrimination, 431 Mass. 655, 665 n. 22 (2000)

If Complainant successfully establishes a prima facie case, the burden then shifts to the second stage of proof whereby the employer must articulate a legitimate, nondiscriminatory reason for its action. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995), citing McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).

Finally, if the Respondent has asserted a nondiscriminatory explanation for its employment decision, Complainant bears the burden to persuade the fact-finder, by a fair preponderance of the evidence, that the Respondent's articulated justification is not the real reason, but a pretext for unlawful discrimination. Abramian v. President & Fellows

of Harvard College, 432 Mass. 107 (2000). Complainant must ultimately prove by a preponderance of the evidence that the Respondent was motivated by discriminatory animus. Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). Complainant may meet this burden with circumstantial evidence such as the inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the employer is false. Id. at 504.

I conclude, based on the record evidence, that Complainant has established a prima facie case of discrimination against Respondent with regard to her non-selection as a CPO III. By virtue of her race and color, and gender, Complainant is a member of two protected classes. She met the minimum requirements for the position, was not selected, and two white males were recommended, with Martin, one of them, being promoted.

Respondent argues that Complainant was not selected for promotion because she was not the most qualified candidate and that the selection of Martin was not discriminatory because he was the most qualified for the job, based on criteria which included his prior experience as a CPO III, attendance record and performance evaluations. Respondent has satisfied its burden by articulating nondiscriminatory reasons for failing to promote Complainant to the CPO III position that are supported by credible evidence.

Once Respondent has articulated legitimate, non-discriminatory reasons for its employment actions, Complainant must prove by a preponderance of the evidence that Respondent's stated reasons for its actions masked a discriminatory motive. Complainant argues that Respondent violated its own hiring and selection policy by failing to properly review applications, utilizing inappropriate and irrelevant factors and a subjective rating

system which created a bias favoring Martin and male employees, assigning false and inaccurate ratings for the majority of candidates, failing to provide a written summary of recommended candidates to Mitchell, failing to provide non-selection letters to applicants, and permitting a conflict of interest with regard to Martin's listing Mitchell as a character reference. Complainant further alleges that pressure was placed on the interviewing panel by superiors to select specific candidates. She also alleges that Lawton and Mitchell's previous knowledge of a candidate tainted their objectivity and that the attachment of Maguire's action plan to Complainant's 1995-1996 performance evaluation conveyed the false impression to the panel that Complainant was on an action plan. Additionally, Complainant argues that Cruz and Mitchell's alleged comments regarding women in corrections influenced her non-selection.

Complainant's allegations that there were some irregularities in the interview and selection process are supported by the record. However, these irregularities were minor and the weight of the evidence does not support a finding that these minor irregularities in the selection process were motivated by discriminatory animus against Complainant. Nor did the record show that Lawton's or Mitchell's previous knowledge of an applicant impacted the panel's opinion that Martin was the most qualified candidate. Nor is there evidence that the panel or Mitchell believed Complainant's performance was subject to an action plan. There is also no evidence that superiors placed pressure on the interviewing panel to select specific candidates for the CPO III position. Further, discrepancies in the applicants' ratings and their rankings were not shown to be motivated by discriminatory animus. The rankings legitimately reflected the panel's belief that Martin was the most qualified candidate. Evidence tending to prove that an

applicant was treated differently from other prospective employees and that the employer's standard practices were not followed may support the conclusion that the employer's explanation for not hiring a candidate is a pretext for unlawful race discrimination. See Buckley Nursing Home v. Mass. Comm'n Against Discrimination, 20 Mass. App. Ct. 172 (1985). However, I find that Complainant did not demonstrate that her application was treated differently from other candidates. Complainant has also not proven that Respondent's failure to follow standard practices to the letter was evidence of race or gender discrimination. Based on the above, I conclude that Complainant did not prove that Respondent's failure to select her for the CPO III position was based on reasons related to race and gender discrimination.

In order to prevail on her claim of discrimination with regard to disparate treatment based on race and gender, Complainant must show that: 1) she is a member of a protected class; 2) she was adequately performing the essential functions of her job; 3) she experienced an adverse employment action and 4) similarly situated employees outside her protected class were treated more favorably in like circumstances. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Lipchitz v. Raytheon Company, 434 Mass. 493 (2001).

Complainant is a member of a protected class who was performing her position adequately and was disciplined by Respondent in May 1997 for failure to complete classification boards in a timely manner and for attendance violations. She alleges that neither Cruz nor McGuire were disciplined for this incident and that Respondent scrutinized and disciplined her with regard to tardiness more harshly than other employees. Complainant has made out a prima facie case.

Respondent argues that its decisions to reprimand and suspend Complainant were the direct result of her neglect and willful misconduct. Respondent disciplined Complainant for not completing classification boards on time because it remained Complainant's ultimate responsibility to ensure that the work was completed despite the fact that she delegated it to McGuire. Respondent notes that Complainant had ample notice of her responsibility to supervise McGuire's performance, as reflected in the attachment of McGuire's action plan to Complainant's 1995-1996 EPRS. Respondent asserts that Complainant's one day suspension for attendance violations was justified because each of the actions cited as the basis for the suspension would have warranted discipline standing alone. The suspension was justified by Complainant's lengthy history of attendance problems and was based on Respondent's position that Cruz had denied Complainant's request for the entire day off on March 31 and her failure to report to work that day or inform Respondent of her absence. Respondent also provided evidence that many SECC employees not in Complainant's protected classes were disciplined for tardiness and attendance violations. I conclude that Respondent has articulated legitimate, nondiscriminatory reasons for its actions that are supported by credible evidence.

Complainant argues that her subordinate and unit manager were not disciplined for failure to complete classification boards in a timely manner and that this is evidence of pretext. However, Maguire, a CPO I, and Cruz, a Unit Manager, are not similarly situated to Complainant, a CPO II. Additionally, Mitchell testified credibly that although Complainant had delegated preparation of the classification boards to Maguire, assignment of this task to a subordinate was not an acceptable defense for Complainant's

failure to complete the boards on time and that Complainant remained responsible for this duty. Mitchell also stated that she did not know of any other CPOs at SECC who had failed to complete classification boards on time. Complainant points to her May 19, 1997 incident report which alleges her unsuccessful attempt to hold classification boards was due to lack of staff. However, even if this were true, it does not suggest that Respondent's discipline of Complainant for failure to complete the April 2, 1997 classification boards in a timely manner was motivated by discriminatory intent, motive or state of mind. Further, the statistics submitted by Respondent regarding discipline of all employees supported Respondent's position that Complainant was not singled out for discipline based on race or gender.

I further conclude that Complainant did not prove that Respondent's discipline for her absence on March 31 was pretextual. Based on Cruz's testimony, I find that Respondent legitimately believed Cruz granted Complainant only partial leave on that day. I also find that Mitchell's reliance on Cruz's version of events surrounding Complainant's misconduct was not shown to be misplaced or motivated by race or gender. Mitchell relied on the representations of Cruz, the Unit Manager, about the behavior of one of his subordinates. Even assuming *arguendo* that Cruz had granted Complainant the full day off on March 31, the evidence does not support Complainant's charge that her race or gender motivated Respondent's decision to discipline her for what was reported by Cruz as an unauthorized absence. Further, credible testimony by witnesses Collins, Lawton, Gadsden and Brault support Respondent's argument that its discipline of Complainant was based on her history of tardiness and not on a discriminatory reason.

Finally, Complainant did not produce sufficient evidence to support her claim that as a CPO II she was performing work more appropriately performed by a CPO III, without the accompanying pay or title. She was unable to identify similarly situated CPOs not in her protected class who were reclassified from CPO IIs to CPO IIIs by Respondent. In crediting Cruz's and Mitchell's testimony that it was common for employees to work outside their job classification without being paid or being reclassified, I note that employees are often required to undertake responsibilities beyond and above their job title in the normal course of business and that this reality, although frustrating, does not amount to disparate treatment without further proof that others not of Complainant's protected classes were exempt from similar demands from time to time.

In sum, Complainant failed to provide evidence of similarly situated employees who had a similar employment history and engaged in the same misconduct but were treated more favorably to substantiate her contention that she was treated disparately based on race or gender.

Finally, Complainant has not demonstrated that she was subjected to a hostile work environment on the bases of either race, color or gender. In order to demonstrate a hostile work environment based on race and color and gender, Complainant must show that she was subjected to unwelcome verbal or physical conduct, related to her race or gender, which created a hostile, humiliating or offensive work environment and interfered with her ability to perform her job. College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156 (1987). The harassing conduct must be objectively offensive to a reasonable person and subjectively offensive from the perspective of the Complainant. Ramsdell v. Western Massachusetts Bus Lines, 415 Mass. 673 (1993).

In this case, although Complainant was the only African American employee in the SECC minimum unit, she offered no evidence of conduct or speech that was racially offensive. With regard to being subjected to a sexually hostile environment, Complainant alleged numerous references by Cruz to Mitchell as “momma,” as well as comments including “corrections is the way it is because of too many females” and “working with you is like having a wife.” Complainant also contended Mitchell stated that she did not want to hire any more females. However, Complainant failed to produce any witness to corroborate Cruz’s alleged comments, while Respondent offered credible testimony that he did not make racist or sexist comments. She also failed to offer evidence to substantiate her contention that Mitchell did not want to hire any more females. Moreover, even if made, Cruz’s alleged comments were not sufficiently severe or pervasive to create a hostile work environment that altered the conditions of Complainant’s employment. While Complainant clearly perceives that she was treated unjustly and claims she required a two week medical leave in April 1997 due to stress resulting from her interactions with Cruz, she did not demonstrate that she was subjected to a hostile work environment that was objectively offensive to a reasonable person. Accordingly, I conclude that Complainant was not subjected to discrimination on the basis of her race or color in violation of M.G.L. c. 151B.

Retaliation

Complainant also alleges that as a result of filing two complaints with the MCAD in 1987 and 1989, she was not selected for the CPO III position. She further contends that she was disciplined on May 1, 1997 as a result of allegations of discrimination contained

in her April 28, 1997 Industrial Accident report and was subjected to a hostile work environment due to these protected activities.

In order to establish a prima facie case of unlawful retaliation, Complainant must prove that she engaged in protected activity that Respondent was aware of, was subjected to an adverse action and a causal connection existed between the protected activity and the adverse employment action. Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995). Retaliation is a separate claim from discrimination, “motivated, at least in part, by a distinct intent to punish or rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208 (2000) quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

Complainant has not made out a prima facie case that her non-selection for the CPO III promotion was in retaliation for filing prior MCAD complaints. Although her filing MCAD complaints against Respondent in 1987 and 1989 was protected activity that certain of Respondent’s employees, including Mitchell, were aware of, and she subsequently did not receive a 1997 promotion based, in part, on lack of a recommendation by Mitchell, Complainant did not present sufficient evidence of a causal connection between the protected activity and the adverse employment action. Brault’s testimony that Complainant was allegedly not promoted in 1990 because she had filed a complaint is outweighed in relevance by Mitchell’s credible testimony that despite knowing about Complainant’s MCAD complaints in the 1980s, she subsequently recommended her for hire as a CPO I. Additionally, testimony by Brault and Lawton concerning undue influence by superiors on the selection process was not demonstrated

to have played a role in this CPO III selection process. Finally, the time that elapsed between Complainant's filing of her MCAD charges and her non-selection for promotion to CPO III is simply too extended a time period to establish a causal connection between the two events. Even assuming arguendo that Complainant made out a prima facie case based on Respondent's alleged perception of her as troublemaker because she had filed MCAD charges in the 1980s, Respondent has articulated a legitimate, non-discriminatory reason for its promotion decision that Complainant has not proved is pretextual.

Complainant does, however, make out a prima facie case with regard to her contention that the May 1, 1997 discipline imposed on her was in retaliation for the allegations of discrimination contained in her April 28, 1997 Industrial Accident report. The record showed that the acts which prompted the May 1 written warning to Complainant and one day suspension were known to Respondent as early as April 7, 1997, but that no disciplinary action was taken against Complainant until May 1, within three days of her filing her Industrial Accident report alleging discrimination. The temporal proximity between Complainant's charges and Respondent's imposition of discipline raises the inference that the discipline may have been retaliatory.

Respondent argues that Complainant was disciplined because of her own misconduct, that its actions in response to her violation of departmental policy were warranted, and non-retaliatory, and that Complainant had a history of tardiness predating her Industrial Accident report. I find Respondent's reasons for its actions and their timing is supported by credible evidence.

Complainant's attempt to show that Respondent's articulated reasons are pretextual is not persuasive. Complainant argues Cruz learned of her earlier MCAD

complaints on March 10, 1997, and that this knowledge supports a retaliatory motive. I am not persuaded that the evidence supports a finding that Cruz actually knew of her complaints in March 1997 or that this knowledge played a role in his subsequent actions towards Complainant. The evidence demonstrates that after an initially good working relationship in the latter part of 1996, problems arose between Complainant and Cruz in early 1997 due to Complainant's inquiry to Cruz regarding her job interview and her non-selection for the position. These problems escalated over the dispute about Complainant's time off on March 31 and her failure to complete classification boards in a timely manner on April 2. Mitchell credibly testified that she learned from Cruz on or about April 7 that Complainant had left early on April 4. She relied on Cruz's version of what had occurred on that day and did not ask Complainant for a report. Cruz and Mitchell testified that when Complainant filed her Industrial Accident report on April 28, Marshall asked Cruz to respond to Complainant's discrimination and hostile environment allegations. Based on Cruz's informing him by memoranda dated April 28, Marshall promptly imposed the discipline about which Complainant complains.

Weighing the evidence and time-frame set forth above, I am not persuaded that Respondent harbored a retaliatory motive or that retaliation against Complainant was a determinative factor in its discipline. The mere fact that one event followed another is not sufficient to make out a causal link. McCormack v Boston Edison, 423 Mass. 652 (1996).

Having found that Complainant has not submitted credible evidence to show the required causal connection between protected activity and an adverse action to support a claim of retaliation, I conclude that Respondent did not violate M.G.L. c. 151B, §4 (4).

V. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, I hereby order that the complaint in this matter shall be dismissed.

This constitutes the final order of the Hearing Commissioner. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

So Ordered this 24th day of October, 2003

Walter J. Sullivan, Jr.
Hearing Commissioner