

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
GERALDINE BRAY,
Complainant

v.

DOCKET NO. 05-BEM-03064

CITY OF BOSTON PUBLIC SCHOOLS,
Respondent

Appearances: Joseph Feaster, Esq. and Douglas Martin, Esq. for Complainant
Jill M. Murray, Esq. and Andrea Alves-Thomas, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 14, 2005, Complainant, Geraldine Bray, filed a complaint of discrimination against her employer, City of Boston Public Schools, alleging gender discrimination in violation of M.G.L. c. 151B §4(1) and retaliation in violation of §4(4) for her having filed an internal complaint of gender discrimination. The Investigating Commissioner found lack of probable cause to credit the allegations of gender discrimination and also found lack of probable cause on all but two of Complainant's claims of retaliation. The remaining issues certified for Hearing were whether Respondent retaliated against Complainant when assigning paraprofessionals in or around November of 2005, and whether the principal of her former school evidenced

retaliatory intent in her conversations with the principal of Complainant's newly chosen school in August of 2006. Conciliation efforts were unsuccessful and a public hearing was held before the undersigned hearing officer on June 2 and 3, 2008. The parties submitted post-hearing briefs on August 29, 2008. Having reviewed the entire record in the matter and the post hearing briefs, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. Background

1. Complainant, Geraldine Bray, was employed by the City of Boston Public Schools from 1997 to 2007. From 1997 to 2005, Complainant was employed as a teacher at the Martin Luther King Middle School, located in Dorchester, Massachusetts. Complainant obtained her bachelors degree in education from the University of Massachusetts, Boston. Complainant obtained further certification as a Special Education Moderate Needs Teacher from the Department of Education. (Testimony of Geraldine Bray)

2. Respondent, Boston Public Schools, is a department within the City of Boston, a municipal body organized under the laws of the Commonwealth of Massachusetts. Respondent's principal place of business is located a 26 Court Street in Boston, MA.

3. The Martin Luther King Middle School (King School) is a large middle school within the Boston Public School system. It has a student population of over 400 students in the 6th through 8th grades. One third of its student population is comprised of students receiving special education services. Many of the students have impulse problems or

other behavioral issues, come from foster homes and single parent homes, and most live in an inner city neighborhood surrounding the school. Approximately 50-60 staff members work at the King School. (Testimony of Leung-Tat, Testimony of Richard Salmon)

4. Audrey Leung-Tat has presided as principal of the King Middle School since 1998. Prior to becoming principal of the King School, she was the Director of Instruction at Thompson Middle School, and the Assistant Head Master of Charlestown High School. Leung-Tat testified that her primary duty is to be an instructional leader. Her responsibilities include overseeing teaching and learning, supervising and evaluating teachers, working with parents, and ensuring the school runs smoothly.

5. Richard Salmon has been the assistant principal of the King Middle School since 1998. Prior to this position, he taught social studies at the William Barton Rogers Middle School beginning in 1992. As assistant principal, Salmon's duties include: running the daily operations of the school; dealing with custodians and teachers; disciplining students; arranging lunches; coordinating buses; communicating with the students' families; and supervising and evaluating teachers and students. Throughout his tenure, Salmon assumed the role of student disciplinarian and supervisor of the 7th and 8th grade staff members, enrichment teachers, and custodial staff. (Salmon testimony)

6. The King School conducts regular education classes, resource room pull-out service classes, and special education and enrichment classes. (Leung-Tat testimony)

The School structure revolves around "clusters" of students/teachers. The clusters are: 6th grade cluster, 7th grade cluster, 8th grade cluster, the Learning Adaptive Behavior ("LAB") cluster, and the Enrichment cluster. Students who receive pull-out instructional

services are included in their respective 6th, 7th or 8th grade cluster. (Testimony of Leung-Tat, Salmon)

7. The LAB cluster is a substantially separate special education program of students with behavior issues. Many of the students in this cluster are behind grade level academically. (Barros, Leung-Tat, Salmon, Swaby) Mr. Carlos Swaby was the coordinator of the LAB cluster in the 2005-06 school year. The LAB program was also referred to by its prototype, B4. (Bray, Barros) The LAB students are substantially separate from the regular education students and receive instruction in their core subjects in this separate setting. (Barros, Leung-Tat, Salmon). They are entitled to participate in the non-core subjects, the enrichment classes, in an inclusion setting with the regular education population. Swaby determined the enrichment class schedules for the LAB students. (Bray, Leung-Tat, Salmon, Barros, Swaby)

8. The enrichment classes, including Complainant's classes, consisted of the mainstream students, assigned by homeroom, with the addition of a few LAB Cluster students in the same grade level. In 2005-06 the enrichment classes were theater arts, gym/health, computers, and computer assisted math, which was taught by Complainant. The teachers in the Enrichment Cluster rotated their classes every ten weeks, so each enrichment teacher would have every student for a period of time at least once throughout the course of the school year. (Leung-Tat, Salmon)

B. Complainant's Charges

9. Complainant was employed at the King Middle School as a Special Education Moderate Resource Room teacher from September 1997 through June 2004. She provided specialized instruction to 7th and 8th grade middle school students with moderate

learning disabilities and below grade level performance in the core subjects of Math and English Language Arts. (Bray, Leung-Tat, Salmon) For the 2004-2005 and 2005-2006 school years, Complainant assumed the position of instructor for the Computer Assisted Select Math Class. (Bray, Leung-Tat, Salmon, Swaby) This math class was part of the Enrichment Cluster. (Bray, Leung Tat, Salmon)

10. In June of 2005, complainant filed an internal complaint of discrimination with the Boston Public School's Office of Equity, alleging that Assistant Principal, Richard Salmon, discriminated against her on the basis of her gender. (Bray, Leung-Tat, Salmon) The Director of the Office of Equity investigated the complaint and met with King School Principal, Leung-Tat, in the Fall of 2005. Ms. Leung-Tat accepted the Office of Equity recommendation that Mr. Salmon no longer supervise Complainant and assigned Anastasia Gentry, who was also an assistant principal, to be Complainant's supervisor for the 2005-2006 school year. Complainant was notified of this change. (Bray, Leung-Tat, Salmon) Both Ms. Leung-Tat and Mr. Salmon testified that they did not discuss Complainant's equity complaint with anyone else at the school and I credit their testimony.

11. In 2005-2006, the number of students in the enrichment classes ranged from 28-32 students.¹ (Bray, Leung-Tat, Exs. R-2-R-6) Complainant testified she taught eight classes per day and that she was given every special education student in the school. Contrary to Complainant's assertion that she taught eight classes per day, Principal Leung-Tat testified that the standard at the time for the enrichment teachers was four classes per day. She also testified that some of the more difficult students were not

¹ A grievance was filed by the Boston Teacher's Union on behalf of the enrichment teachers charging that excessive class sizes were in violation of the Collective Bargaining Agreement for the enrichment classes. (Bray) It is not clear from the evidence how this grievance was resolved.

placed in Complainant's class because of her difficulties with classroom management. I credit Leung-Tat's testimony.

12. According to Complainant, between September and November of 2005 she was assigned a paraprofessional to escort the LAB cluster students to her class. She claims that one paraprofessional was assigned to her and another came and went, but that most of the time she didn't have a paraprofessional in her classroom. According to Complainant, the paraprofessional assigned to her classroom was removed by Mr. Salmon in October or November of 2005, and that this was in retaliation for her having filed the June 2005 complaint against him. Complainant's testimony about what occurred during this time frame was confused and contradictory. Mr. Salmon testified that he was never involved in assigning paraprofessionals and did not remove a paraprofessional from Complainant's class. I credit his testimony, which was corroborated by Carlos Swaby.

13. Carlos Swaby, the LAB Cluster coordinator, was charged with supervising the paraprofessional aides and coordinating their assignments. During the 2005-2006 school year, the three paraprofessionals assigned to the LAB Cluster were Doris Barros, Anthony Oates, and Leanna Talbert. (Barros, Leung-Tat, Salmon, Swaby) The paraprofessional aides were assigned to monitor students in the LAB Cluster but they were not assigned to a particular teacher. (Barros) One of their duties was to escort LAB Cluster students to their enrichment classes. (Barros) They also escorted LAB students to the bathroom and removed LAB students from the class to "de-escalate" their behavior when they were acting out in class. (Barros)

14. Both Principal Leung-Tat and Carlos Swaby testified that a number of factors could affect the assignment of paraprofessionals to enrichment classes. These included the absenteeism of LAB students, and decisions that particular LAB students needed additional assistance and monitoring on a given day because of behavioral issues. Because the assignment of a paraprofessional to a student changed on a daily basis, there were times when a LAB student would go to an enrichment class without a paraprofessional. (Leung-Tat, Swaby) Ms. Leung Tat also testified that enrichment class teachers were not entitled to, nor required to have, a paraprofessional in the classroom at all times. I credit the testimony of Swaby and Leung-Tat regarding the assignment of paraprofessionals.

15. Complainant's computer math classroom was on the third floor of the school building because it was wired for the computers necessary for the course. All of the remaining enrichment classes were located on the basement level. Since all the other enrichment classes were on the basement level, the paraprofessional assigned to escort the LAB cluster students to these classes would be stationed in the hallway so as to be accessible to all of the enrichment teachers for assistance. (Leung-Tat, Barros)

16. Doris Barros testified that for the 2005-2006 school year, she was assigned as a LAB Cluster paraprofessional to monitor and assist the 7th grade LAB students. When she escorted these LAB students to enrichment classes in the basement she would situate herself in the basement hallway. Due to a disagreement Complainant had with Anthony Oates, the paraprofessional assigned primarily to 8th grade LAB students, Complainant requested that he no longer accompany students to her class. Therefore, LAB Cluster co-coordinator, Swaby, directed Barros to also accompany the 8th grade LAB students to

Complainant's class. (Barros, Swaby) Barros stated that the 8th grade students were tough and that Complainant had difficulty managing them. Due to Complainant's difficulties managing students' behavior, and because Complainant's class was located on the third floor, Barros would accompany LAB students to Complainant's class. Barros testified that there were usually 3 to 4 LAB students in Complainant's class and on occasions when problems arose involving the LAB students, she would remove them from the classroom. If necessary, she reported the incident to Mr. Swaby or Mr. Salmon.

17. Complainant testified that she felt unsafe in every class because there was a lot of tension and conflict between the regular students and the LAB Cluster students and she was concerned that a major fight would break out. On one occasion her finger was injured because of an altercation between students. Complainant claimed to have filed a number of incident reports during the 2005 and 2006 school year regarding safety issues in her classroom because of the absence of a paraprofessional. She alleges she received no positive response to the incident reports she submitted to the Principal's office.² Complainant also claimed that on numerous occasions she would call the office for help and no one would come. Swaby testified that in response to Complainant's safety concerns, he removed LAB students from Complainant's enrichment class on more than one occasion because of misbehavior. I credit his testimony. Barros testified that she was removed from Complainant's class on one occasion by Swaby when there was an altercation involving the LAB students, but stated that the students involved were also removed from the classroom.

² She also claimed to have filed at least six grievances with the Union regarding her class size and the absence of a paraprofessional. No one from the King School administration had ever seen or could identify the grievances and they were not produced by Complainant in discovery. I accepted the purported Class Size Grievance forms (C-2 through C-6) *de bene*, but decline to admit them into evidence.

18. According to Complainant, the failure to respond to her complaints about safety began to occur after June of 2005 when she made a complaint of gender discrimination against Mr. Salmon with the Office of Equity. She believed the administration's non-responsiveness was in retaliation for her having complained. Mr. Salmon testified that he made no decisions regarding the assignment of paraprofessionals to Complainant's class. Mr. Swaby, who did make these decisions, knew nothing about Complainant's complaint against Mr. Salmon. Ms. Barros testified that she understood vaguely from Complainant that there had been some previous problem between Complainant and Mr. Salmon, but she knew nothing of a discrimination complaint. I do not credit Complainant's assertion that the administration failed to respond to her safety concerns for retaliatory reasons.

19. In January of 2006 Complainant took a leave of absence pursuant to the recommendation of her psychiatrist, Dr. Carbone. This leave of absence was motivated in part due to stress resulting from the failing health/terminal illness of her mother. (Bray, Ex. R-1) Complainant testified that her mother's health and incidents at school caused her significant psychological stress and impacted her physical health. Complainant remained on leave for almost six months. In the Spring of 2006, while still on medical leave, Complainant requested as an accommodation to her respiratory illness, that her classroom be moved so that she would not have to climb stairs. Her request was granted and her classroom was moved to an available empty classroom on the basement level. (Bray, Leung-Tat, Salmon) Complainant's medical leave was extended numerous times until June 19, 2006 when she returned for one day to collect her belongings. (Bray, Leung-Tat, Salmon, Ex. C-12)

20. In the summer of 2006, Complainant applied for a position as a Behavior Lab specialist at the Hamilton Elementary School. In July of 2006, she interviewed for the position with the principal of the school, Mr. Ruby Ababio-Fernandez. (Bray, Ababio-Fernandez) Ms. Ababio-Fernandez called the principal of the King School, Ms. Leung-Tat, to obtain a reference for Complainant. Ababio-Fernandez discussed with Leung-Tat the position Complainant was being considered for at the Hamilton School and Leung-Tat highly recommended Complainant for the position, telling Ababio-Fernandez that Complainant did very well in small classroom settings. Both Ababio-Fernandez and Leung-Tat testified that at no time during their conversation was there any discussion about Complainant's discrimination complaint and I credit their testimony.

21. Complainant was hired for the position at the Hamilton School. After the 2006-2007 school year began, Ababio-Fernandez spoke only once to Leung-Tat at a principals' meeting. At this meeting Ababio-Fernandez told Leung-Tat that Complainant was a good fit at the Hamilton and her employment there was going well. There was no mention of Complainant's discrimination complaint during this brief conversation. (Ababio-Fernandez)

22. Complainant has a lengthy history of suffering from depression, anxiety, respiratory illness, migraines, neck pain, and other injuries. She received treatment for these illnesses prior to the years she began working for Respondent and had begun counseling with Dr. Carbone as early as 2002. Her treatment included taking several anti-depressant medications and medications for pain. These included Celexa, Zoloft, Ativan, Oxycontin and Oxycodone. (Bray, R-1)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(4) prohibits retaliation by any person against someone who has filed a complaint with the MCAD, assisted in such a complaint, or who has engaged in other protected activity, including opposing practices forbidden by M.G.L. c. 151B. The statute makes it unlawful “for any person, [or] 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.” See Kelley v. Plymouth County Sheriff’s Department, et al., 22 MDLR 208, 215 (2000) *citing* Bain v. City of Springfield, 424 Mass. 758, 765 (1997). Retaliation is a separate and independent claim of discrimination, “motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful employment practice.” Kelley, supra. at 215 quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In order to prove a claim of retaliation, Complainant must state a *prima facie* case consisting of the following elements: (1) that she engaged in protected activity; (2) that her employer knew of the activity and subjected Complainant to an adverse employment action; and (3) there is a causal connection between the adverse action and the protected activity. See MacCormack v. Boston Edison Co., 423 Mass. 652, 662-6 (1996).

Complainant engaged in protected activity when, in June of 2005, she filed an internal complaint of gender discrimination with Respondent’s Office of Equity against assistant principal of the King School, Richard Salmon. While there appears not to have been any official finding of discrimination by the Office of Equity,³ the Director did make a recommendation that Complainant no longer be supervised by Mr. Salmon. King

³ The Commission found Lack of Probable Cause on Complainant’s gender complaint.

School principal, Ms. Leung-Tat, accepted that recommendation and in 2005- 2006 transferred supervision of Complainant to another assistant principal, Ms. Gentry.

Complainant has alleged that after filing her internal complaint in June of 2005, and upon commencement of the new school year in September of 2005, the administrators at the King School engaged in retaliation by not assigning a paraprofessional to her classroom to deal with difficult LAB Cluster students, by removing a paraprofessional from her classroom and by failing to answer Complainant's calls for assistance when she felt her safety was at issue. Complainant has alleged that the difficulties she encountered in the classroom in the fall semester of 2005 constituted adverse action by the school administration and resulted from her having filed a complaint of discrimination against Salmon. She claims the resulting stress she suffered caused her to take a medical leave of absence for the entire second semester.

Complainant also alleges that King School principal, Leung-Tat, sabotaged her relationship with the principal at the new school she transferred to in 2006 by discussing her discrimination complaint with the principal of that School, and that this action was also retaliatory.

Respondent has asserted credibly that neither Mr. Salmon nor Ms. Leung-Tat had any involvement in the assignment of paraprofessionals at the King School. Mr. Salmon testified that he never sought to have a paraprofessional removed from Complainant's classroom. Mr. Swaby, who ran his program with autonomy, was responsible for managing and assigning paraprofessionals. Both he and Ms. Barros testified that they provided paraprofessional assistance to Complainant when LAB students were in her classroom and came to her aide when she needed assistance. Doris Barros, the

paraprofessional assigned to escort LAB Cluster students to Complainant's computer math class, testified that she remained in the classroom and removed students if there were any difficulties. Mr. Swaby testified that he responded to Complainant's calls for assistance and removed unruly LAB students from her classroom on a number of occasions.

Leung-Tat and Swaby also testified credibly that Complainant was not entitled to, nor was Respondent required to provide a paraprofessional in her classroom at all times. They discussed the legitimate logistical and resource considerations which governed the assignment of paraprofessionals on any given day. If on occasion, a paraprofessional was not available to assist Complainant, there is no credible evidence that this was motivated by retaliation, but that it was simply an issue of allocation of resources within a large school with a needy student population. There was testimony that many of the students in the LAB cluster and throughout the school had behavioral and learning problems, that Complainant was not always able to manage her classroom, and that she frequently sought assistance. While Complainant may have had some difficulty controlling her classroom with resulting concerns for her safety, there is no credible evidence that Respondent deliberately subjected her to larger class sizes or refused to respond to her security concerns for retaliatory reasons. In fact, the more credible testimony was that Complainant had the same size class as other enrichment teachers and, in fact, received more assistance than the other teachers because of difficulty managing the students. If indeed, Complainant was overwhelmed by the behavioral issues of her students it was clearly not because school administrators neglected to assist her out of retaliatory animus. Complainant's allegations of adverse employment action, and in fact her entire claim of

retaliation, appear to be based on “subjective feelings of disappointment and disillusionment,” and as such are insufficient to satisfy an essential element of a viable claim of retaliation. See MacCormack, 423 Mass. at 663-664.

I conclude that Complainant has failed to prove any causal connection between the problems she encountered in the classroom and her previously having filed a discrimination complaint. Nor does the evidence support a conclusion that there is any causal connection between Complainant’s seeking a medical leave of absence from January to June of 2006 and her allegations of retaliation. There was evidence that in addition to the stress at school, Complainant sought a medical leave for reasons relating to her mother’s terminal illness and failing health. Moreover, many of the ailments, both physical and mental that Complainant claimed resulted from the stress of retaliation, were pre-existing conditions for which she had received treatment and medication for many years.

Finally, Complainant has failed to prove that Ms. Leung-Tat had any conversation about Complainant’s discrimination charges with the principal of the Hamilton School, Ms. Ababio-Fernandez. Both Leung-Tat and Ababio-Fernandez testified credibly that their discussions were about nothing more than Complainant’s qualifications for the job at the Hamilton School and Ms. Leung-Tat recommended her for the job. Complainant secured the job at the Hamilton School and began teaching there in the Fall of 2006. There is no evidence in the record that she was subjected to any adverse action subsequent to the commencement of her employment at the Hamilton School.

Given all of the above, I conclude that Complainant has failed to establish a prima facie case of retaliation against Respondent in violation of G.L. c. 151B, and that her complaint should be dismissed.

IV. ORDER

For all of the foregoing reasons, I hereby order the complaint in this matter dismissed. This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to 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 25th day of March, 2009.

Eugenia M. Guastaferr
Hearing Officer