

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

KEVIN MCKENNA AND THE MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION,  
Complainants

v.

Docket No.: 00-BEM-2201

BOSTON HOUSING AUTHORITY,  
Respondent

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

Appearances: Mark Hickernell, Esq., for Complainant  
Douglas I. Louison, Esq., for Respondent

**I. PROCEDURAL HISTORY**

On July 24, 2000, Complainant Kevin McKenna filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission" or "MCAD"), against his employer the Boston Housing Authority ("Respondent" or "BHA"). In his complaint, Complainant alleged that Respondent engaged in unlawful retaliation in violation of Massachusetts General Laws, c. 151B, § 4(4).

On March 5, 2003, the Commission issued a probable cause finding with respect to Complainant's complaint. On December 26, 2003, the Commission certified the case for public hearing. A public hearing was held before me on September 13 and 14, 2004, in Boston, MA.

In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed

findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

## **II. FINDINGS OF FACT**

1. Complainant Kevin McKenna has worked as a police officer/investigator for the BHA since 1983. The BHA is an agency of the City of Boston that owns and manages public housing units in the City. During his tenure at the BHA, Complainant received numerous commendations, certificates of appreciation, and letters of recognition.

Complainant also never received any significant or severe discipline prior to 2000.

2. On March 24, 2000, Complainant received a four-day suspension from Deputy Chief Steven Melia for making “unnecessary and unprofessional comments” to a civilian BHA employee and placing his hands on a female BHA police officer. Complainant testified that the day before he received the suspension, he had testified against the BHA at a hearing conducted before the Joint Labor-Management Committee.<sup>1</sup>

3. Kent Davis is a sergeant in the BHA police department. Davis testified that sometime in the 1990’s, he filed a complaint with the Commission against the BHA and Melia. At that time, Melia was a lieutenant. Davis testified that in 2000, he asked Complainant to assist him with his claim. Specifically, Davis requested Complainant prepare an affidavit that described his observations of Melia’s harassment. On or about June 29, 2000, Complainant gave Davis a signed affidavit. In the affidavit, Complainant

---

<sup>1</sup> The Commission determined, after completing its probable cause investigation, that Complainant failed to show the four-day suspension in March 2000 was related to any activity protected under M.G.L. c. 151B; therefore, this issue was not certified for the public hearing.

stated that Melia had repeatedly harassed Davis on the basis of race. Davis is African-American. Complainant testified that he gave a copy of the affidavit to Davis and mailed the original to Davis' attorney. Davis claimed that he believed his attorney forwarded the affidavit to the Commission. Attorneys in the BHA's Legal Department handled this claim on behalf of the BHA; however, neither Davis nor Complainant provided any information as when the BHA actually received Complainant's affidavit.

Notwithstanding, I credit Davis and Complainant's testimony regarding the circumstances pertaining to Complainant's preparation of an affidavit on Davis' behalf.

4. On July 24, 2000, Complainant filed his pending complaint with the Commission. In his complaint, Complainant described his assistance to Davis. He also stated that he was a witness "in regard to Yvonne Moschella's [MCAD] case, which was pending at the Commission."<sup>2</sup> Complainant also alleged in his complaint that the BHA retaliated against him for testifying at a hearing held before the Joint Labor- Management Committee,<sup>3</sup> as well as for his anticipated testimony on behalf of a fellow officer, Kevin Pishkin, at a termination hearing.

5. The Commission notified the BHA of Complainant's complaint by letter dated July 24, 2000. According to Nancy Ann Nolan, MCAD complaints against the BHA are typically served on the Legal Dept. and time stamped upon receipt by the receptionist. Nolan, at all times relevant hereto, worked as a paralegal for the BHA Legal Dept. and her duties included processing mail and functioning as the Keeper of Records for the

---

<sup>2</sup> At the public hearing, McKenna stated that his involvement with Moschella's case was limited to telling her he would provide her with information "when needed" and discussing her claims with her on numerous occasions.

<sup>3</sup> See, *supra*, p. 2, n. 2.

Legal Dept. Although Complainant argued that the BHA must have received the letter from the Commission within days after it was purportedly sent on July 24, the letter bears the time stamp from the BHA Legal Dept. of “August 9, 2000.” I credit Nolan’s testimony.

6. On July 31, 2000, Paul Jenner filed a “civil rights” complaint against Complainant. Jenner resided in a BHA unit and worked for the BHA as a Tenant Mailroom Coordinator. In his complaint, Jenner alleged that Complainant sexually harassed and discriminated against him based on his sexual orientation. Specifically, Jenner claimed that Complainant made numerous disparaging, derogatory and inappropriate comments regarding his status as a gay individual and once touched him between his legs in an indecent and offensive manner. On August 1, 2000, the BHA placed Complainant on administrative leave with pay purportedly as a result Jenner’s complaint. Complainant believed the BHA placed him on administrative leave in retaliation for his assistance to Davis, the filing of his own complaint on July 24, and other alleged protected activities. Complainant remained on administrative leave with pay from August 1, 2000 to November 2001.<sup>4</sup> Although he received his regular salary while on administrative leave, he claimed he lost the opportunity to work overtime and paid details and, thus, suffered a loss of income totaling approximately \$56,500.

7. Joyce Tognacci, Robert Trestan, and Jill Zellmer testified on behalf of the BHA regarding the agency’s procedures for investigating complaints. Tognacci worked for the

---

<sup>4</sup> Complainant has not alleged that the BHA prolonged or delayed its investigation of Jenner’s complainant in retaliation for his protected activity. In addition, the BHA’s investigation appeared to be very thorough and intensive. Notwithstanding, I am staggered by the inordinate length of time it took to complete the investigation.

BHA as its Human Resources Director; Trestan served as the BHA's Director of Civil Rights; and, Zellmer worked as the BHA's EEO Officer and Investigator. They all testified credibly that the BHA's Office of Civil Rights ("OCR") is responsible for investigating complaints of workplace discrimination, including employment discrimination complaints against the BHA police department. Although the BHA does not have a policy regarding the circumstances upon which an employee is placed on administrative leave, Tognacci, Trestan, and Zellmer testified that when a civil rights complaint is filed against an employee, the BHA often places the employee on administrative leave with pay pending the completion of the investigation. I credit Tognacci, Trestan, and Zellmer's testimony.

8. Complainant claimed that Jenner had also made accusations against other BHA employees, but he was the only person placed on administrative leave. Zellmer, however, testified credibly that Jenner had not specifically named any other employee in his complaint and did not allege anyone other than Complainant had touched him inappropriately. Both Zellmer and Trestan also claimed that they discussed the issue of administrative leave with personnel in the Human Resources and Legal departments. Trestan testified that they decided to place Complainant on administrative leave after considering the seriousness of the allegations and to ensure Complainant would not have any contact with Jenner.<sup>5</sup> Tognacci, Trestan, and Zellmer all denied having any knowledge of Complainant's MCAD complaint at the time he was placed on administrative leave. They also denied knowing anything about Complainant's assistance to Davis at this time. In addition, Trestan and Zellmer denied that the Legal

---

<sup>5</sup> The letter given to McKenna on August 1, 2000, also prohibited him from entering onto any BHA property.

Dept. had advised them, prior to this decision, about Complainant's complaint or his involvement in the Davis matter. I credit Tognacci, Trestan, and Zellmer's testimony.

9. Complainant testified that shortly after his return to work in November 2001, Melia entered the roll call room one morning and began screaming at him. Complainant believed Melia's actions were in response to an article in the Boston Herald about Jenner's complaint. Complainant testified that as a result of Melia's conduct, he began to experience difficulty in breathing, chest pain, and numbness in his fingers, which necessitated him being taken to a hospital by ambulance. Complainant also claimed that as a result of being placed on administrative leave and the resultant loss in income, he suffered numerous financial woes that necessitated his filing for bankruptcy in December 2001. He further stated that his being placed on leave adversely affected his marriage and damaged his reputation. Lastly, he testified that he was subsequently diagnosed with post-traumatic stress disorder. I decline to credit Complainant's testimony with respect to the casual connection between his being placed on administrative leave and his physical and emotional problems or his dire financial situation. To the contrary, I find that Complainant's emotional distress and personal problems primarily stem from his involvement in the Jenner matter.

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

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

proceeding alleging a violation of c. 151B. Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *quoting*, Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley, 22 MDLR at 215, *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997).

In the absence of any direct evidence of retaliatory motive, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent knew he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory

intent, motive, or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); *see*, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that “one or more of the reasons advanced by the employer for making the adverse decision is false.” Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent’s adverse actions were the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

As an initial matter, Complainant has clearly established that he engaged in protected activity by virtue of his assistance to Davis in June 2000 and the filing of his own MCAD complaint on July 24, 2000. I also find that the BHA took adverse action against Complainant on August 1, 2000, when it placed him on administrative leave as a result of Jenner’s civil rights complaint, and thus deprived him of the opportunity to work overtime and paid details. However, it remains to be seen whether Respondent was aware of Complainant’s protected activity prior to placing him on administrative leave. Although I credited Complainant’s testimony that he provided his affidavit to Davis and Davis’s attorney at the end of June 2000, neither Davis nor Complainant provided any evidence as to when the BHA Legal Dept. may have received the affidavit. Moreover, I am not convinced that the Legal Dept. received Complainant’s complaint prior to his being placed on administrative leave. While it may seem somewhat implausible that a letter purportedly sent from the Commission’s Boston office on July 24 would take over two weeks to arrive at the BHA’s office located approximately one mile away, Complainant has failed to provide any credible evidence that the BHA became aware of his complaint on or before August 1. In addition, I credited Nolan’s testimony that MCAD complaints against Respondent are typically served on the Legal Dept. and time

stamped upon receipt by the receptionist. Thus, I believe the BHA likely first had notice of Complainant's complaint on August 9, 2000, as indicated by the time stamp.

Moreover, even if I assume, *arguendo*, that the BHA did have actual knowledge of Complainant's protected activity and likewise presuppose that Complainant has established a *prima facie* case of retaliation, Respondent has nonetheless articulated legitimate non-discriminatory reasons for its action. Specifically, I credited Tognacci, Trestan, and Zellmer's testimony that Respondent decided to place Complainant on administrative leave after considering the seriousness of Jenner's charges and in order to keep the parties separated. I further credited their testimony regarding Respondent's procedures for handling civil rights complaints. In particular, Respondent's witnesses testified credibly that Respondent regularly placed employees on administrative leave pending the investigation of a civil rights complaint. Lastly, Complainant has failed to show that the reasons articulated by Respondent were false or not the real reasons for its actions. Although Complainant attempted to show that Jenner's allegations may have been false or implausible, nonetheless, I find that Respondent's officials justifiably treated Jenner's complaint as a serious matter and understandably placed Complainant on administrative leave. More importantly, I credited Tognacci, Trestan, and Zellmer's testimony that they had no knowledge of Complainant's protected activity at the time Respondent decided to place Complainant on leave and Complainant has failed to introduce any credible evidence to the contrary. Consequently, Complainant has not shown that Respondent acted with retaliatory intent, motive, or state of mind when it placed him on administrative leave. Complainant has, therefore, failed to establish that Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4).

**IV. ORDER**

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

So Ordered this 15th day of August, 2005.

---

Edward R. Mitnick  
Hearing Officer