

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and MARJORIE O'BRIEN,
Complainants

v.

DOCKET NO. 99-BEM-0740

CITY OF LYNN SCHOOL DEPARTMENT
& JAMES MAZAREAS,
Respondents

Appearances:

James F. Lamond, Esquire for the Complainant
Kenneth W. Terrell, Esquire for the Respondents

I. PROCEDURAL HISTORY

On March 12, 1999, Complainant Marjorie O'Brien filed a complaint with this Commission charging Respondents Lynn Public Schools & James Mazareas with retaliation in violation of M.G.L.c.151B for having involuntarily transferred her after she filed internal complaints of harassment. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on August 2-5, 2004. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Marjorie O'Brien resides in Swampscott, Massachusetts. She has been employed by Respondent Lynn Public Schools since June 10, 1985, first as an

Account Clerk and later as a Principal Account Clerk in the Finance Department. On September 18, 1998, Complainant was involuntarily transferred to the Food Services Program located at English High School. Complainant retained her civil service title of Principal Account Clerk and received the same pay.

2. Respondent Lynn Public Schools is a political subdivision of the City of Lynn, Massachusetts. James Leonard was superintendent of schools until May 1998. He was succeeded by Respondent James Mazareas, who had been the assistant and associate superintendent prior to Leonard's retirement. Mazareas assumed the duties of superintendent in May 1998 and officially became superintendent in August 1998.

3. Daniel Hourihan, Manager of Financial Operations was Complainant's supervisor. Joan Desmaris was Hourihan's secretary. The other employees of the Payroll Department were Virginia Guidara, Elaine Parker, Donna Kwiatek and Phyllis Duda. Hourihan was supervised by Stephen Upton, School Business Administrator

4. In or around the fall of 1998, Maria Ciarlante-Scanlan, a co-worker of Complainant's, complained to Upton that Complainant was "upsetting the department." The complaint arose out of a personal dispute between the two women concerning the fact that Ciarlante-Scanlon's cousin and Complainant were both running for the same union position. Upton told Complainant about the complaint, but when Ciarlante-Scanlon decided not to pursue the matter, Upton considered the matter closed. Notwithstanding Ciarlante-Scanlon's decision to withdraw her complaint, Complainant

pressed Upton for an opportunity to meet with him in order to clear her name. Upton rejected her request because the complaint had been withdrawn.

5. In February 1997, Daniel Hourihan proposed to reassign certain duties within the payroll department, primarily affecting Complainant's position. Hourihan presented the proposal to employees at a meeting on February 25, 1997, attended by the employees' union representative. Complainant did not agree with the proposed changes. The employees agreed to try the changes on a trial basis.

6. In February 1997, Lynn Public Schools promulgated its first-ever "harassment policy". Mazareas and Upton received copies of it in late February. Complainant and other payroll employees were given copies in March 1997. Page 3 of the policy states, in part "Sexual harassment includes but is not limited to 1) unwelcome verbal harassment or abuse:...6) unwelcome behavior or words directed at an individual because of gender."

7. Around the time the policy was being disseminated, Mazareas encountered Complainant in an elevator along with one of Complainant's co-workers. Complainant was in tears and upset and Mazareas asked Complainant what was wrong. Complainant told Mazareas that Hourihan was harassing her and treating her unfairly. Mazareas advised her to use the new harassment policy to register her complaints against Hourihan.

8. Just after speaking with Mazareas, on March 27, 1997, Complainant submitted a nearly five page, typed internal complaint against Hourihan having to do with work-related matters and her on-going disputes with Hourihan regarding job duties and interpersonal relations. In one sentence Complainant states that Hourihan “sexually harassed” her by called her a “bitch”. (Joint Exh. 6)

9. The complaint was sent to then Superintendent Leonard to conduct an investigation. Superintendent Leonard interviewed people, including Hourihan and Upton, in the course of investigating the complaint. He wrote: “The information you have presented against Daniel Hourihan and Stephen Upton has been reviewed, and the allegations contained therein have been investigated. After careful consideration, I find no basis for your complaint of harassment.” (Joint Exh. 8). Mazareas was not involved in the processing of that complaint, and Leonard did not speak with him about it or his disposition of it.

10. In April 1997, Hourihan wrote Upton a letter describing difficulties he was having with Complainant. In his letter, Hourihan specifically asked Upton to transfer Complainant to another department. Upton declined to transfer Complainant.

11. Some time in either late 1996 or early 1997, a workplace consultant organization known as “Workplace Solutions” was hired to conduct a mandatory meeting of the Finance department employees to address morale and communication problems within the finance department. Workplace Solutions conducted a meeting with all

payroll employees, including Hourihan, in June 1997. The title of the program was “Skills for Effective Communication”.

12. During the meeting, employees were asked to identify problems. Some claimed that Hourihan was responsible for problems in payroll. At one point, Hourihan got upset and angrily left the meeting, stating that if he stayed he would want to “throw a hand grenade” at Complainant.

13. In September 1997, Hourihan wrote another letter to Upton complaining of problems he was having with Complainant. Hourihan wrote:

I am requesting your assistance in dealing with a deteriorating situation in the payroll department. Ms. O’Brien has created a tense, abusive, disrespectful, insubordinate atmosphere. I feel that my authority is constantly being challenged and threatened. Yesterday’s incident involved a request for overtime. (Since her entire payroll takes only 6 hours, I questioned the need) I was immediately subjected to a tirade of why she was being singled out and that she does not like being questioned. I informed her that as the Manager of the department it is not only my prerogative but my responsibility to monitor the overtime expended. I told her that her constant threats to me and the other employees could be interpreted as harassment to which she yelled, “try and prove it”. I have received constant complaints from most everybody in the department about her attitude and abuse towards them... I have tried counseling her. I have even brought in Workplace Solutions for departmental counseling all to no avail. At this point, I have taken every step I can think of and the situation seems to be worsening. The department cannot function with this tension.

(Joint Exh. 11).

14. On September 24, 1997, following a disciplinary hearing, in response to Hourihan’s letter, Upton issued Complainant a letter of reprimand. (Joint Exh. 14)

15. In October 1997, Hourihan wrote yet another letter to Upton complaining of additional problems he was having with Complainant. In response to that letter,

following a civil service hearing, Superintendent Leonard imposed a one-day suspension on Complainant.

16. In March 1998, Hourihan and Human Resources manager Pat Libby told Upton that Donna Kwiatek and Phyllis Duda reported that Complainant had taken pictures of their workstation. Hourihan told Upton, "I...do not know at this point where else to go other than transferring her from this department." Upton did not take any disciplinary action as a result of these complaints.

17. In May 1998, co-workers complained to Upton about a work-related telephone call made by Complainant in connection with a software company with which the department did business.

18. Mazareas was aware of all the complaints against Complainant by her co-workers. He testified that he believed that there was a problem with internal squabbling among the clerks in that department and that Complainant was the root of that problem. I credit his testimony.

19. On Tuesday, September 15, 1998, while sitting at a table in the employee break room with co-workers Virginia Guidara, Carol Fila and Anne Tibbetts, Complainant saw Joseph Govain, the president of the teachers' union and got up to speak to Govain in the hallway. While Complainant was speaking to Govain, Hourihan walked by and instructed her how to handle a work-related matter. Complainant responded that

she would confirm Hourihan's instruction in writing as she had been written up previously for not following instructions. Hourihan was upset by Complainant's comment and angrily walked off. As he walked away from Complainant, Hourihan stated, "Why don't you send the letter to President Clinton. You have sent letters to everyone else."

20. Complainant testified that she saw Hourihan make an obscene gesture with his hand as he was walking away and invoking President Clinton's name. Although she did not describe the gesture at the public hearing, in her initial Complainant, she described the gesture as simulating oral sex. I do not credit her testimony about this incident.

21. Virginia Guidara testified at the public hearing that she was friendly with Complainant and was present in the lunchroom with Complainant at the time of the exchange with Hourihan. She stated that although she was looking at Hourihan when he made the statement about President Clinton, she did not see him make a gesture. She testified that Complainant was upset and said to her co-workers, "Did you see that?" I credit her testimony.

22. Carol Fila similarly testified at the public hearing that she was present in the lunchroom with Complainant and witnessed the exchange, but did not see Hourihan make any hand gestures. She also testified that Complainant was upset about the incident. I credit her testimony.

23. Donna Kwiatek and Phyllis Duda testified that there was a lot of tension in the office that they attributed to Complainant and they complained about her to managers. I credit their testimony.

24. Following this incident, Complainant contacted Janet Birchenough, the Director of Equity and Program Support, in order to obtain a copy of a complaint form and to discuss filing an internal complaint about the incident. At Birchenough's request, Complainant showed her the gesture that she alleged was obscene. Birchenough testified that Complainant did not describe the gesture as simulating oral sex. Complainant did not explain what she thought the gesture meant. According to Birchenough's testimony, she told Complainant that she did not think that the gesture was obscene. She also reminded Complainant that she had previously filed a complaint of harassment that had been found not to be harassment and informed her that if she filed a second complaint of harassment that was found to be unsubstantiated that she would be building a case against herself. I credit Birchenough's testimony.

25. Complainant filed an internal harassment complaint regarding this incident on September 15, 1998. This complaint of harassment was investigated by Mazareas. As part of his investigation, Mazareas scheduled interviews of all individuals identified in the complaint, including Complainant, Hourihan, and the four individuals Complainant identified as being in the area at the time of the incident. (Joint Exh. 18).

26. Mazareas asked Birchenough to sit in on the interviews, which he conducted on September 19, 1998. All of the witnesses identified by Complainant told Mazareas that they did not see Hourihan make an offensive gesture. At the conclusion of the interviews, Mazareas asked Birchenough for her opinion regarding the merits of the complaint. Birchenough told Mazareas that the complaint was unsubstantiated and that she did not believe the complaint was true, as none of the witnesses identified by Complainant had corroborated the allegations.

27. On September 18, 1998, Mazareas denied the complaint on the grounds that there was no corroboration by witnesses.

28. By letter dated September 19, 1998, Mazareas notified Complainant that she was being involuntarily transferred to the Food Service Program located at English High School. Mazareas acknowledged that one of the reasons for the transfer was Complainant's numerous, baseless written complaints against Hourihan.

29. The position to which Complainant was transferred was responsible for administering the free and reduced lunch program. Prior to Complainant's transfer, the Food Services Department hired temporary employees each year to administer the program's applications.

III. CONCLUSIONS OF LAW

In order to establish a prima facie case of retaliation, Complainant must show that she engaged in protected conduct, that she suffered some adverse action, and that "a causal connection existed between the protected conduct and the adverse action." Mole v. University of Massachusetts, et al, 442 Mass. 582 (2004). MCAD Sexual Harassment in the Workplace Guidelines, IX, (October 2, 2002) In order to be considered protected activity, the activity must be reasonable and not disruptive to the employer's business. MCAD Sexual Harassment in the Workplace Guidelines, *supra*, at IX, A. The fact that a complaint is later found to be unmeritorious does not preclude a retaliation claim based on the protected activity of pursuing that complaint. Mole, *supra*, 442 Mass. at 591 n. 13. However, a Complainant must show at a minimum that she reasonably and in good faith believed that the employer was engaged in wrongful discrimination and that she acted reasonably in response to her belief. Id, at IX, A. I conclude that Complainant failed to establish a prima facie case of unlawful retaliation in this matter. The evidence in this case shows that Complainant worked in an unpleasant and contentious work environment. She had filed written complaints against Hourihan and he had made numerous written complaints against her. All of the complaints and counter-complaints concerned work-related matters and were not sexual in nature. I conclude that Complainant's internal complaint made against Hourihan following the incident on September 13 did not constitute "protected conduct" as no reasonable person under the

circumstances would believe that Hourihan's conduct constituted sexual harassment. Respondents conducted a thorough investigation and reasonably concluded that Hourihan did not make an obscene gesture.¹ Further, witnesses to the event testified credibly that they did not see Hourihan make a gesture. I further conclude that Complainant did not possess a good faith belief that Hourihan engaged in sexual harassment, but instead conclude that Complainant filed the complaint in an effort to further her cause in her work-related dispute with Hourihan. The evidence portrayed an office where interpersonal hostility pervaded the atmosphere. However, the enmity did not result from discriminatory animus, but from a personality conflict between Complainant and her supervisor and co-workers. I therefore conclude that Complainant's conduct does not constitute protected activity and I conclude that Respondents did not engage in unlawful retaliation. Regan v. Amtrak, 23 MDLR 103 (2001) (name-calling and baiting of fellow employees are not protected activity) See Hochstadt v. Worcester Foundation for Experimental Biology, 545 F. 2d 222 (1st Cir. 1976) (upholding discharge of scientist for disruptive activities associated with her complaints of discrimination on basis that such activities were not protected conduct).

¹ Even assuming arguendo, that Hourihan made a gesture simulating oral sex, I conclude that Complainant could not reasonably believe that one gesture under these circumstances would have created a sexually hostile work environment for her. In this context its meaning could not reasonably have been interpreted as a sexual come-on or offensive innuendo. Prader vs. Leading Edge Products, Inc., 39 Mass. App. Ct. 616 (1996)

IV. ORDER

For the reasons stated above, I hereby order the complaint in this matter be dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a notice of appeal within ten days of receipt of this order and a petition for review within 30 days of receipt of this order.

SO ORDERED, this 11th day of April, 2005.

JUDITH E. KAPLAN,
Hearing Officer