

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MARY COYNE AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 98-BEM-1908

BOSTON WATER AND SEWER
COMMISSION.

Respondent

Appearances: Kathleen M. Curry, Esq., for Complainant Coyne
Richard D. Hillman, Esq., and Lawrence P. Higgins, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 23, 1998, Mary Coyne (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that the Boston Water and Sewer Commission (“Respondent”) unlawfully discriminated against her on the basis of sex. Complainant alleges that Deputy Superintendent Mark Sheehan

subjected her to disparate treatment from male co-workers by prohibiting her from eating and drinking at her desk, criticizing her work, and staring at her in an intimidating manner.

The MCAD issued a probable cause finding and certified the case for public hearing on February 3, 2003. The case was brought to public hearing on February 23, 24, 27, 2004 and March 12, 2004. Complainant stipulated at the public hearing that her claim for emotional distress damages was limited to the period up to and including December 2000, but not beyond.

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

II. FINDINGS OF FACT

1. Complainant has been an employee of the Boston Water and Sewer Commission since 1990. She worked first in the Accounting Department as an accounts receivable clerk. In the latter part of 1997, Complainant began to work as a yard clerk on the night shift of the Operations Division. During late 1997 and 1998, her work schedule was Sunday through Thursday, 4:00 p.m. to midnight.
2. The Operations Division is located on 400 Frontage Road. It oversees repair work involving water and sewerage systems in the City of Boston.
3. The night shifts of the Operations Division are considered emergency shifts by the

- Water and Sewer Commission. As a night yard clerk in late 1997 and 1998, Complainant answered phone calls from the public consisting of reports of sewage backups, water main breaks, leakage, lack of service, and drops in water pressure. Complainant also took radio calls from crews out on the road, dispatched work crews to job assignments via the radio, and kept a record of jobs on a log sheet.
4. During late 1997 and 1998, Complainant worked in a large room within the Operations Division. During the day there were three to four yard clerks in the Operations Division but at night there was only one yard clerk. Yard clerks worked in one of six desks in the middle of the room. Complainant's desk was equipped with a radio, a telephone, and a computer. Supervisors worked in cubicles around the perimeter of the room.
 5. On February 9, 1998, Mark Sheehan became the Deputy Superintendent of Night Operations (i.e., the "night manager"). He replaced Ralph D'Onofrio. Sheehan's office was located down a hallway outside of the Operations Room. Sheehan had worked at the Boston Water and Sewer Commission since 1995. He testified that his office was about fifty feet from the Operations Room. The doors between his office and the Operations Room were generally open. Sheehan worked Mondays through Fridays, 2:00 p.m. to 10:00 p.m.
 6. Sheehan testified that he personally observed the activities of the night supervisors in the six-month period prior to his appointment to the night shift. During this period, he met regularly with other operations managers to discuss the night shift. At that time, the night shift supervisors were Gary Gillespie, Paul

Salamanca, and Dominic Maniscalco. Sheehan described the night shift supervisors in the late 1997-1998 period as being poor managers and the night shift crews as poor performers. He testified that there was no accountability over the night supervisors and crews relative to what time they arrived, what they did, and what time they left. Transcript, Volume III at 52. Sheehan testified that prior to his becoming night shift manager, the three night supervisors stayed in the Operations Room while all their crews were out in the streets by themselves. Transcript, Volume III at 53.

7. Shortly after Sheehan was appointed night shift manager, he ordered supervisor Gary Gillespie to go out on the road in order to supervise his crew. Sheehan gave the same instruction to Dominic Maniscalco. Sheehan made Paul Salamanca the senior office supervisor and ordered Salamanca to make sure that the other supervisors were out on the road following around their crews. He testified that at the end of the meeting, Salamanca said, "If you think you're going to be looking over my shoulder, you're going to have a problem." Daniel Caresi also attended this meeting. At the time he was Superintendent of Water and Sewer Commission for Day Operations. He testified that Salamanca said something to the effect, "If you're going to be watching us every minute, there's going to be trouble. I credit the testimony of Sheehan and Caresi.
8. Some time after Sheehan began as the night manager, Complainant started to keep a diary about his behavior in the workplace. Transcript, Volume I at 159. Complainant kept a record of Sheehan's actions which she considered objectionable. Complainant made notes of these matters while at work and

subsequently transcribed them into a notebook. Her first entry pertains to February 9, 1998. Complainant's Exhibit 1.

9. Complainant testified that the break room was locked at night. She asserted that she had no access to it, so she couldn't eat or drink during her eight-hour shift. Transcript, Volume I at 145. Complainant testified that Sheehan did not allow her to take a break when her supervisors were out of the office. I do not credit this testimony.
10. Complainant testified that Sheehan insisted that employees eat in the break room rather than at their desks in the Operations Room. She stated that Sheehan applied the rule prohibiting coffee and muffins in the Operations Room only to her. I do not credit Complainant's assertion that the food rules were applied only to her.
11. Sheehan prohibited all individuals on the night shift in the operations area from eating food at the desks. He directed them to eat only in the break room, located just outside the Operations Room. The break room was kept locked but a key to the room was kept in the Operations Room. Sheehan testified that he took this action because the operations area had been infested with rodents and fruit flies as a result of food being kept in that area.
12. Eleni Vidalis was an operations administrator in 1998. She reported to Patrick Foley, Chief of Operations. Her hours of work were from 8:30 a.m. to 5:00 p.m. but she frequently left work later than 5:00 p.m. Her desk was approximately fifteen feet from the desks of the yard clerks. She testified that when she arrived at work in the morning, the trash barrels were full of food containers and she

observed fruit flies in the summer months.

13. Complainant testified that she had to wait hours to go to the bathroom because she didn't want to be reprimanded for missing a radio call. I do not credit this testimony. Sheehan credibly denied ever depriving Complainant of the opportunity to go to the bathroom. There is credible evidence that Complainant had access to a portable radio in order to receive transmissions while away from her desk and that the Operations Room had a telephone answering system for taking calls while Complainant was away from her desk.
14. Complainant testified that Sheehan criticized her work and shouted at her from his office. According to Complainant, he repeatedly told her that he couldn't hear her over the two-way radio, told her to speak up, ordered her to sit closer to the microphone, and chastised her for failing to respond to crews while she assisted customers on the phone. I credit Complainant's testimony to the extent that Sheehan discussed these matters with her, but I do not credit her accusation that Sheehan did so in a haranguing or abusive manner.
15. Complainant estimated that Sheehan would stare at her for ten minutes at a time on as many as five occasions during the evening, would stand by her shoulder while she performed her duties, and, on one occasion, pulled up a chair to a desk across from her in order to observe her. Transcript, Volume I at 144, 187. I do not credit this testimony.
16. Complainant testified that Sheehan's behavior terrified her and gave her tremors. She claimed to be unable to sleep and eat and to be subject to panic attacks and diarrhea after Sheehan started to manage her shift. I do not credit Complainant's

assertion that Sheehan's behavior caused these reactions.

17. Complainant denied that she ever refused to speak to Sheehan or refused to look at him when he spoke to her, but she admitted that she did not respond to Sheehan when he allegedly shouted at her or attempted to address her while she was on the phone. Transcript, Volume I at 185, 219. I do not credit Complainant's testimony denying that she refused to speak or look at Sheehan.
18. Complainant testified that personal calls were frowned upon in her office. She denied making personal calls, but admitted that she received a call from her mother every night at work at 8:00 p.m. According to Complainant, her mother called because she was concerned about Sheehan's effect on Complainant.
19. Eleni Vidalis testified that from 3:45 p.m. to 4:30 p.m., she typically worked in an area of the Operations Division that was approximately three to four feet from Complainant's desk. Vidalis said that on most late afternoons/early evenings, she would hear Complainant making personal calls, generally to her mother. Vidalis also said that she would hear phones ringing and yard clerks failing to answer the phones because they were on personal calls. Vidalis brought the issue of personal calls to the attention of Operations Chief Patrick Foley who recommended that she draft a memo regarding the rule against non-emergency personal calls. Joint Exhibit 5.
20. Complainant testified that on March 5, 1998, Sheehan came out of his office and yelled that he couldn't hear her. According to Complainant, supervisor Paul Salamanca offered to serve as an intermediary between her and Sheehan. Later that night, Salamanca went into Sheehan's office and asked Sheehan to

communicate with Complainant indirectly through him. Sheehan did not agree to do so.

21. Complainant telephoned John Lavey, President of her Union, on the evening of March 5, 1998 to discuss Sheehan's behavior towards her and Sheehan's refusal to use Salamanca as an intermediary. Transcript, Volume I at 183. Thereafter, Complainant spoke to Lavey by telephone on other occasions about Sheehan.
22. Sheehan described Complainant as a good yard clerk, but he acknowledged that he was not pleased with the way she responded on the radio. He testified that she did not broadcast the official time to crews so that they could use it to fill in their activity sheets. According to Sheehan, Complainant "keyed the mike" i.e., pressed a button so that her voice did not go out over the air. Sheehan testified that he knew this was occurring because he saw her do it and because he could hear a humming sound on the mike when the button was pressed. When Sheehan told Complainant that he couldn't hear her on the radio and that she needed to answer radio calls, he was, for the most part, referring to her keying the mike, not speaking too softly. I credit Sheehan's testimony.
23. Sheehan acknowledged that he expected yard clerks to put customers on hold for the time it took to give a crew member the time according to the Operation Room clock. Sheehan testified that on some occasions he told Complainant that she had to answer the crews when they called in and on other occasions he'd broadcast to the entire operations area, "Hey, got to answer these radio [calls] people." Sheehan testified that when he spoke to operations personnel in general, he would usually come to the backdoor of the room. He denied shouting at Complainant. I

credit Sheehan's testimony.

24. Sheehan testified that during the first week of March 1998, he heard phones ringing in the Operations Center. He walked out into the room and observed Paul Salamanca lying back in his chair with his feet up on his desk talking on the telephone. It was a protracted conversation. Sheehan also observed Complainant talking on the telephone. Sheehan walked up to the desk where Complainant was working and stood in front of her. From listening to Complainant's conversation, Sheehan concluded that she was talking to her mother. He asked her to please answer the telephone lines that were ringing. According to Sheehan, Complainant did not look up at him and continued talking. In response to a second request that she answer the ringing telephone lines, Complainant said, "I'm on the phone." Sheehan asked her to put her call on hold and answer the phone. Complainant did not respond to Sheehan, but Salamanca said, "She's busy. Leave her alone." Sheehan responded by saying, "You need to answer these calls." I credit Sheehan's version of this incident.

25. Sheehan testified that on the next evening, he again heard the telephones ringing in the Operations Room and observed that nobody was answering them. He walked into the Operations Room and saw Complainant on the phone. Salamanca was standing in the outer hall smoking a cigarette. Sheehan walked behind Complainant's desk and stood at the side of her desk and asked her to answer the phone. Sheehan believed that Complainant was engaged in a personal call due to the length of the conversation. Complainant did not respond and kept talking on the phone. Sheehan stood next to Complainant for approximately twenty seconds.

He repeated his request that she answer the phone. Eventually, Complainant looked at Sheehan and he again asked her to put her call on hold and answer the phone. Salamanca told Sheehan to, “Leave her alone. She’s doing the best she can. If you want to talk to her, you go through me.” Transcript, Volume III at 138-139. Sheehan responded by saying that that he was not speaking to Salamanca and that if Salamanca were doing his job, there would be no need to speak to Complainant. Id. at 140. According to Sheehan, Salamanca swore at him.

26. On March 10, 1998, representatives of the Water and Sewer Commission conducted an investigation into Complainant’s allegations that Sheehan shouted at her, stared at her and did not allow her to eat and drink at her desk. Transcript, Volume I at 205. Respondent found no evidence to support the claims of harassment. Respondent’s Exhibit 1.
27. A mediation took place on March 18, 1998 involving the Complainant, Union officials, and representatives of Respondent. The mediation was conducted by Bruce Blaisdell. Complainant began to cry during the mediation. According to Complainant, Renae Stolar, attorney for the Water and Sewer Commission, told her to go home after the mediation. Stolar denied telling Complainant to go home.
28. Complainant testified that after the mediation, Sheehan’s behavior did not change and he appeared to be very angry towards her. Complainant stopped working overtime.
29. Sometime after the mediation, James McKay replaced Paul Salamanca as section

- 6 supervisor on the night shift. McKay began to function as an intermediary between Complainant and Sheehan. Sheehan spoke directly to McKay who would relay messages to her. Transcript, Volume I at 214.
30. Complainant testified that Sheehan referred to her as the “clerk” or as “Base 1.” Transcript, Volume I at 94. Sheehan denied calling Complainant “clerk” or “Base 1” when speaking to her. He testified that if he were speaking to Complainant, he would use her name. I credit Sheehan’s testimony.
31. Complainant began to see a psychiatrist, Alexandra Accardi, in March 1998. Complainant saw her once a month. At the time, Complainant was having difficulty sleeping, was losing weight, and was having panic attacks. Dr. Accardi prescribed Luvox, an antidepressant, and Klonopin. The Luvoc was subsequently changed to Celexa and the Klonopin was subsequently switched to Valium. Dr. Accardi also prescribed Trazodone, a sleeping pill. Dr. Accardi referred Complainant to a LICSW, Dr. Ursula Heinrichs, whom she saw once a week. In June 1998, Complainant began discussing with Dr. Heinrichs matters outside the workplace such as her relationship with her boyfriend and her father’s health.
32. At some point after February 1998, Complainant was diagnosed with pancreatitis. She also has a thyroid condition, diagnosed when she was ten or eleven years old. Complainant takes medication for her thyroid condition.
33. In June of 1998, Complainant took a leave pursuant to the Family Medical Leave Act (FMLA). Her physician filled out a medical certificate stating that Complainant was unable to perform the functions of her job because she was experiencing anxiety, isolation, fearfulness, nausea, gastrointestinal problems,

- insomnia and obsessive thoughts. Transcript, Volume I at 88; Joint Exhibit 2.
- Complainant was out of work from approximately June 7, 1998 to July 30, 1998. Joint Exhibits 2 and 3.
34. While Complainant was out on FMLA leave, she filed the charge of sex discrimination in this case.
35. In August 1999, Sheehan left his position as night manager in order to run a pumping station for Respondent.
36. Prior to Sheehan leaving the night shift, no grievance was ever filed on Complainant's behalf against Sheehan. Complainant testified that she urged the Union to bring a grievance on her behalf but that the Union did not do so.
37. Complainant testified that from the time that Sheehan became her supervisor in February 1998 until he departed in August 1999, she declined the opportunity to work voluntary overtime at the Water and Sewer Commission. Prior to Sheehan becoming the night manager, Complainant had worked a substantial amount of overtime. Complainant testified that she returned to working overtime after Sheehan left in August 1999. However, Complainant kept no record of missed overtime for dates following her March 18, 1998 mediation and she offered no tax returns documenting a decline in income.
38. Gary Gillespie testified that he was a supervisor on the night shift for a year or two prior to February 1998. During that time, Gillespie reported to Paul Salamanca. Gillespie described Complainant as one of his subordinates between the time she joined the shift and February 1998. After Sheehan became deputy Superintendent of Night Operations in February 1998, Gillespie was sent out of

the office to follow his crews around. He testified that he was dissatisfied with that assignment. From that point until he was involuntarily transferred in April 1998, he only saw Complainant at the end of the night shift. Gillespie did not observe the interactions between Sheehan and Complainant, but he described Complainant as frequently upset when he returned to sign out at the end of the night shift. Gillespie testified that Complainant expressed her dislike of being alone in the office with Sheehan because he would stare at her for long periods of time. Gillespie described Sheehan as very abrasive and unskilled at handling people. Transcript, Volume II at 115. Gillespie described Complainant as an efficient worker.

39. Gillespie filed an action with the MCAD alleging retaliation based on being involuntarily transferred from the night shift in April 1998 after “standing up” for Complainant. Transcript, Volume II at 143. The action was dismissed on a finding of lack of probable cause.

40. Paul Salamanca had been an operations supervisor on the night shift for six or seven years when Complainant transferred into that shift in late 1997. Salamanca testified that Sheehan came to the night shift with a reputation for being hard-nosed and disliked by the people who worked for him. Salamanca testified that Sheehan took over supervision of the night shift with the attitude that something was wrong with the way in which it operated. Salamanca testified that Sheehan treated all the people he managed in the same manner. Transcript, Volume II at 201-202. Salamanca disliked Sheehan’s management style.

41. Salamanca described Complainant as an excellent clerk. He noticed that Complainant appeared to be stressed during February and March 1998. He noticed her crying. Salamanca testified that he would see Sheehan stand behind Complainant and stare at her. Transcript, Volume II at 163; 175. According to Salamanca, this occurred once every day. *Id.* at 174. Salamanca testified that on one occasion, he heard Sheehan tell Complainant to answer the radio even though customer calls were coming in. According to Salamanca, Complainant was crying as Sheehan spoke to her. On another occasion, Salamanca testified that he got into a heated discussion with Sheehan about an incident in which Sheehan accused Complainant of not responding to a radio call when Salamanca heard her respond. I do not credit Salamanca's testimony to the extent it is inconsistent with the testimony of Mark Sheehan.

III. CONCLUSIONS OF LAW

A. Gender-based hostile work environment

It is unlawful for "an employer ... because of the ... sex ... of any individual...to discriminate against such individual in compensation or in the terms, conditions or privileges of employment." M.G.L. c.151B, s.4 (1). Sex discrimination includes harassment in the workplace that is gender based but not necessarily sexual in nature. See Dinsmore & Ford v. Home Security, Inc. 19 MDLR 4 (1997); Baldelli v. Town of Southborough Police Department, 17 MDLR 1541 (1995) *citing* College-Town, Division of Interco Inc. v. MCAD, 400 Mass. 156 (1987)).

To establish liability for harassment based on gender, a complainant must prove that: (1) she is a member of a protected class; (2) she was the target of speech or conduct based on her membership in that class; (3) the speech or conduct was sufficiently severe or pervasive to alter her conditions of employment and create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to complainant, or respondent knew or should have known of the harassment and failed to take prompt remedial action. See *Fluet v. Harvard University*, 23 MDLR 145, 161 (2001); *Lazure v. Transit Express, Inc.* 22 MDLR 16, 18 (2000); *MCAD Sexual Harassment in the Workplace Guidelines*, at p.30, fn. 23 (October 2, 2002).

To constitute actionable harassment, the claimed conduct must be both objectively and subjectively offensive. See *Messina v. Araserve, Inc., d/b/a ARA Campus Dining Services at Massachusetts Institute of Technology*, 906 F. Supp. 34, 36 (1995) *citing* *Ramsdell v. Western Massachusetts Bus Lines, Inc.* 415 Mass. 673, 678, 615 N.E.2d 192 (1993). The objective standard means that the evidence of gender harassment is to be considered from the "view of a reasonable person in the plaintiff's position." *Muzzy v. Cahillane Motors, Inc.*, 434 Mass. 409 (2001) *quoting* *Ramsdell v. Western Massachusetts Bus Lines, Inc.* 415 Mass. 673, 678 (1993). The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it unreasonably interferes with the worker's performance and what psychological harm, if any, resulted. See *Lazure v Transit Express, Inc.*, 22 MDLR 16, 18 (2000). The subjective standard is a personal one related to Complainant's own reaction to the harassing conduct. See *Couture v. Central Oil Co.*, MDLR 1401, 1421 (1990)

(characterizing subjective component to sexual harassment as . . . “in the eye of the beholder.”).

Complainant is a member of a protected class by virtue of being a female yard clerk. The activities that she complains of were allegedly carried out by her supervisor, Mark Sheehan. However, the credible evidence in the case does not establish that she was the target of speech and/or conduct based on her status as a female. The evidence also fails to establish that the actions of Sheehan were sufficiently severe or pervasive to create an abusive working environment.

When Sheehan was appointed to manage the night shift, he instituted changes that were objectionable to male and female employees alike. He reassigned supervisors Gillespie and Maniscalco to the road and ordered Paul Salamanca to oversee their work in order to ensure that Gillespie and Maniscalco were out on the road and following around their crews.

Sheehan prohibited all individuals on the night shift, not just Complainant, from eating food at their desks. He directed all night shift employees to eat only in the lunchroom, located just outside the Operations Center. The lunchroom was kept locked, but a key to the lunchroom was kept in the operations room. Sheehan testified that he took this action because the Operations Center had been infested with rodents and fruit flies as a result of food being kept there. Eleni Vidalis, a daytime operations administrator in 1998, corroborated Sheehan’s explanation by testifying credibly that when she arrived at work in the morning, the trash barrels were full of food containers. She observed fruit flies in the summer months.

Complainant accused Sheehan of not allowing her to take a break when her

supervisors were out of the office. She asserted that Sheehan's rule prohibiting coffee and muffins in the Operations Room applied only to her. Complainant testified that she had to wait hours to go to the bathroom because she didn't want to be reprimanded for missing a radio call. In response to these accusations, Sheehan credibly denied ever depriving Complainant of an opportunity to use the bathroom or depriving Complainant of her two fifteen minute breaks. I credit Sheehan's testimony and conclude that the evidence does not demonstrate that Complainant was treated differently from male workers on the night shift.

The evidence is also insufficient to support the contention that Complainant was subjected to an abusive working environment. According to Complainant, Sheehan harassed her for the manner in which she responded to radio transmissions, insisting that he couldn't hear her over the two-way radio. Complainant testified that Sheehan yelled at her from his office to sit closer to the microphone of her radio and speak up and that he yelled at her for failing to respond to crews on the radio while she was busy assisting customers over the phone. Sheehan, for his part, denied ever shouting at Complainant. He testified that on some occasions he told Complainant that she had to answer the crews when they called in and on other occasions he communicated from the backdoor of the Operations Room, "Hey, got to answer these radio [calls] people." I credit Sheehan's version of these circumstances over Complainant's.

Complainant estimated that Sheehan would stare at her for ten minutes at a time on as many as five occasions during the evening, would stand over her shoulder while she performed her duties, and, on one occasion, pulled up a chair to a desk across from her in order to watch her. Sheehan denied doing so and estimated that he observed

Complainant for, at most, twenty seconds. I credit Sheehan's testimony.

Complainant denied making personal calls, but admitted that she received a call from her mother every night at work at 8:00 p.m. Eleni Vidalis testified that on most days during the later afternoon/early evening, she would hear Complainant making personal calls to her mother. It was Vidalis who brought the issue of personal calls to the attention of Patrick Foley, the Chief of Operations. Foley recommended that Vidalis draft a memo regarding the rule against non-emergency personal calls.

In short, I resolve the conflicting evidence in favor of Respondent. It is clear from the evidence that Sheehan assumed management responsibility for the night shift in 1998 with a mandate to improve operations. In order to accomplish this objective, he instituted changes which were not popular with the staff. Rather than cooperate with Sheehan, Complainant began almost immediately to document his conduct in a personal diary. When Sheehan addressed Complainant, she often refused to acknowledge him. Complainant made much of the unreasonable demands that Sheehan imposed on her relative to handling the radio and responding to customer calls, but the real issue appears to be that she ignored work crews and customers while she talked to her mother on the phone. Because Complainant was in the office more than her male co-workers, she may have felt the brunt of Sheehan's reform efforts, but the new rules were not directed to her as a female employee nor were they exclusively applied to her. One of Sheehan's harshest critics, Paul Salamanca, testified that Sheehan treated all the people he managed in the same manner.

B. Gender Discrimination Based On Disparate Treatment

Complainant may establish a prima facie case of disparate treatment discrimination based on sex through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case, Complainant must show that: 1) she is a member of a protected class; 2) she was adequately performing the duties of the job at issue; 3) she was subject to adverse treatment; and 4) she was treated differently from other employees similarly situated but not members of the protected class. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts).

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

reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

Complainant is a member of a protected class and was, by all accounts, adequately performing the duties of her position. Her supervisor, Mark Sheehan, described her as a good yard clerk. An argument can be made that she was subjected to adverse treatment in the sense that she was allegedly told not to eat or drink at her desk, not to go to the bathroom unless a supervisor were in the Operations room, and not to answer the phone when water and sewer crews were trying to communicate with the Operations Division. Thus, Complainant has established three elements of a prima facie case of disparate treatment based on sex.

Complainant fails to prove the fourth element of a prima facie case, however, because there is no credible evidence that she was treated differently from other employees similarly-situated but not members of the protected class. See Part III A, supra.

Based on the foregoing, the complaint is hereby dismissed.

Betty E. Waxman, Hearing Officer
December 29, 2005

