

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and NANCY BOUTIN,
Complainant

v.

Docket No. 97-BEM-2917

UNIVERSITY OF MASSACHUSETTS –
DARTMOUTH,
Respondent

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

Appearances: Christopher C. Trundy, Esq., for Complainant.
Michael P. Joyce, Esq., for Respondents.

I. PROCEDURAL HISTORY

On June 17, 1997, Complainant, Nancy Boutin (“Complainant” or “Boutin”), filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”), against her former employer, the University of Massachusetts at Dartmouth. (“Respondent” or “University”). In her complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of gender and wrongful retaliation in violation of G.L. c. 151B, §§ 4(1) and (4).

On December 6, 1999, the Commission found probable cause to credit Complainant’s allegations. On March 11, 2002, the Commission certified the case for Public Hearing. A Public Hearing was held before me in Boston, MA on February 3, 4, 10, 13, and 28, 2003. 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, Nancy Boutin presently resides in Fall River, Massachusetts. From 1989 until March 13, 1997, Complainant worked for Respondent in several capacities as a temporary, part-time, non-benefit (“03 account”) employee. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).
2. Respondent, University of Massachusetts at Dartmouth, is a state university located in Dartmouth, Massachusetts. I find that Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).
3. In 1989, Respondent initially hired Complainant as a part-time instructor to teach computer courses within the Division of Continuing Education (“DCE”). In 1992, she began working part-time for Respondent as a “technical writer”, while continuing to teach. As a “technical writer”, Complainant was responsible for drafting computer software manuals for DCE courses. Margaret “Peggy” Dias, the Director of the Academic Computing Services Department (“ACS”),

supervised Complainant's work. From 1994 until her termination, Complainant worked directly for ACS,¹ although her position was funded indirectly through DCE.

4. According to Complainant, in 1994 Dias told her that she had plenty of "user support" work in the office and she offered her a part-time user support position at ACS. A "user support" person provides computer support services to faculty and staff throughout the university. Complainant claimed that she accepted the job based on Dias' statements that she would be given the opportunity to do user support fieldwork. Contrary to Complainant's testimony, Dias claimed that she hired Complainant to produce DCE documentation because the full-time user support specialists were over-burdened with fieldwork. In support of Dias' testimony, Complainant's initial contract with ACS identified her as merely holding the position of "technical writer." Although I believe Dias and Complainant discussed the possibility of Complainant doing user support fieldwork, I credit Dias' testimony that she specifically hired Complainant as a technical writer to draft DCE documentation.

5. At all pertinent times, Brian Sullivan, Richard Legault, and Beverly Johnson worked with Complainant at ACS (or later CITS) as user support specialists. Sullivan, Legault, and Johnson worked full-time. Similar to Complainant, Johnson was a woman and a "03" contract employee. Sullivan

¹ In 1996, Respondent restructured its computing departments and merged ACS and two other departments into the department of Computing and Information Technology Services ("CITS"). CITS was divided into two groups: Educational Technology and Support Services (ETSS), and Information Technology Systems Services (ITSS). After the reorganization, Complainant worked within CITS for ETSS. At all pertinent times hereto, Dias served as Complainant's immediate supervisor.

primarily supported Windows based programs; Legault primarily supported Mac based programs; and, Johnson supported non-personal network programming. Complainant claimed that as a “user support specialist”, she was capable of supporting both “Windows” and “Macintosh” based programs. Dias acknowledged that all of the user support specialists had the obligation to write some documentation; however, the user support people had to write “New User” documentation, as opposed to the DCE documentation written by Complainant. According to Dias, the New User documents were shorter and more condensed than DCE manuals. Johnson testified that she spent 60-65% of her time drafting documentation. Dias acknowledged, however, that Sullivan and Legault spent considerable amounts of their time doing fieldwork and responding to calls for support services, while Complainant almost exclusively wrote DCE documentation. Johnson, Sullivan, and Legault all testified that they believed Complainant’s primary function at ACS was to write documentation. In addition, Jan Estes, who worked in the ACS office as a secretary/assistant prior to September 1996, likewise believed Complainant was primarily responsible for writing documentation. Estes stated that she only referred user support calls to Complainant on rare occasions when the university was experiencing an overload of computer problems. I credit Dias, Johnson, Sullivan, Legault, and Estes’ testimony.

6. In June 1996, Respondent began to acknowledge that Complainant would assume responsibility for doing some user support service work. In Complainant’s “03 contract” dated June 27, 1996, she was described as holding

the dual titles of “technical writer/user support.” Moreover, Dias wrote a memo to Pat Ford, the Asst. Director of Human Resources, stating: “Ms. Boutin has graciously accepted responsibility with the User Support Area” and “in addition to other duties, she will provide technical and user support to faculty, staff and students.” Dias explained that her reference to “other duties” referred to Complainant’s continued obligation to write DCE documentation. I credit Dias’ testimony.

7. Notwithstanding Respondent’s expressed desire for Complainant to assume some user support duties, she continued to write DCE documentation almost exclusively. According to Complainant, in August 1996 she complained to Dias that she was unfairly being denied the opportunity to do user support fieldwork. Specifically, she claimed that she told Dias that her male coworkers (Sullivan and Legault) took all the fieldwork while she exclusively wrote documentation. Complainant testified that she considered the documentation aspect of her job to be difficult and monotonous. She stated that she wanted to do user support fieldwork because the work would enhance her experience as a technician and allow her to develop working relationships within the university community. Although Complainant intimated that Sullivan and Legault were purposefully preventing her from receiving fieldwork, she admitted that faculty and staff typically called Sullivan and Legault directly for support services. Dias testified that she expressed her empathy to Complainant and explained to her that as a black female, she had experienced similar exclusion as an undergraduate student. Dias told Complainant to remain patient since the

department was being reorganized and instituting a new “team” approach, and it would take time for her to become known throughout the university community. I credit Dias’ testimony.

8. In the fall of 1996, the University reorganized the computing services department and ACS was transformed into the department of Computing and Information Technology (“CITS”). Dias testified that upon the creation of CITS, she needed part-time help to assist with user support inquiries from faculty and staff. Consequently, Complainant was assigned to a user support team headed by team leader, Ron Biron. Dias testified, however, that she specifically told Complainant she expected her to continue to produce DCE documentation and her salary would continue to be paid through DCE. I credit Dias’ testimony on this matter.

9. Although Complainant formally held both the “technical writer” and “user support” titles, she was referred to merely as a “user support specialist” in the 1996-1997 Campus Directory. Dias testified that Complainant’s title of “technical writer” did not appear in the directory because no one at the university would need to call her in that capacity. Complainant had not been previously listed in the campus directory. I credit Dias’ testimony.

10. Complainant acknowledged that at the time of the reorganization, she was working on documentation for major software packages and these projects continued to consume most of her time. With respect to one documentation project (“Access”), Complainant testified that this manual took nine months to

finish and she completed it just prior to her termination. In addition, she claimed that in early 1997, Dias asked her to take on additional documentation responsibilities.

11. In addition to the formation of user support teams, the reorganization resulted in Estes' transfer to another department. Estes had been responsible for answering telephones, obtaining and arranging supplies, and other administrative duties. After Estes left the department, her secretarial duties fell to the rest of the department and the student interns. However, problems arose when telephone calls did not get answered. Specifically, Dias testified that on or about October 2, 1996, she received complaints from faculty and staff that their inquiries were not being addressed. As a result, Dias asked the staff to sign up for phone coverage. Complainant testified that she then offered to come in on her days off to answer the phones. Although Johnson, Legault, and Sullivan all testified that they answered phones during this period, Dias admitted that Complainant handled the task of answering the phones more than her co-workers. Dias testified credibly that Complainant handled this task primarily because she was in the office more than the others. Dias then asked Complainant to write a protocol for the assignment of staff to assume telephone duty. In a draft of her proposal, Complainant suggested that she and her co-workers would be required to remain in the office on specified days. Thus, when either Sullivan or Legault were assigned to be in the office to answer calls, under the protocol they would have to relinquish or refer the fieldwork to others, including possibly Complainant. She claimed that when she presented this plan

to her colleagues, her co-workers, and particularly Bev Johnson, expressed hostility toward the protocol. Complainant also testified that neither Dias nor Biron supported her efforts to address this issue.

12. Johnson, Legault, and Sullivan testified that after the reorganization, faculty and staff continued to place calls directly to them. Thus, Complainant continued to receive considerably less calls than her coworkers because she was not widely known throughout the university community. In addition, after the reorganization, the department adopted the policy of “one stop shopping”, meaning the person receiving the call would attempt to handle the problem directly instead of shifting the issue or transferring the call to someone else. Complainant acknowledged that after the department implemented this policy, she answered questions from faculty and staff regarding software packages outside of her particular expertise. I credit Johnson, Legault, and Sullivan’s testimony on this matter.

13. In October 1996, Complainant confronted Biron and accused him of assigning her “administrative” duties. She likewise accused Biron of not supporting her with respect to the development of the office protocol. According to Biron, after he expressed his frustration to Complainant, she responded by telling him, “Sometimes people project their problems with their wives on others.” Biron admitted that he construed her remark as a rude and impersonal comment. Biron then got angry and raised his voice at her. Later, at Dias’ request, Complainant, Biron and Dias met to discuss this incident. Before the meeting, Complainant made the unusual request that the meeting be tape-recorded. The

tape and a transcript of their conversation were introduced at the Public Hearing. Complainant, Dias, and Biron all testified that they then dealt with the issues between Biron and Complainant in a constructive manner. I credit Biron's testimony with respect to this incident.

14. Biron testified that he was aware of Complainant's concern about getting user support fieldwork. In response, in the fall of 1996 he made Complainant the primary support person for Meeting Maker software. At this time, the University had planned to upgrade the Meeting Maker program throughout the campus in the spring semester. In January 1997, a committee led by Andrew Darling and Biron began meeting to discuss the implementation of the upgrade. The committee initially assigned Complainant the responsibility of installing the program in the Computer Sciences Department. Complainant testified that when she heard about her assignment, she joked that she had better not screw up because the Computer Science Department had particular expertise with respect to computers. She claimed that as a result of her joke, she was stripped of her responsibility for implementing the upgrade in the Computer Sciences Department. Biron claimed that the Computer Science Department had complained in the past with respect to the installation of software in their computers by ACS personnel. Consequently, he and Darling ultimately decided to assign the responsibility for installing the upgrade in the Computer Sciences Department computers to someone who worked in that department. Sullivan corroborated Biron's testimony. Biron acknowledged that this change left Complainant without any responsibilities for implementing the upgrade. He

testified that he and Darling then assigned her to install the program in her own department (ETTS). Complainant testified that she then planned to install the upgrade in the ETTS computers on February 13, 1999. However, when she arrived at work that day, she discovered that Legault had already installed the software. Legault testified that he did not install the upgrade with the intention of excluding Complainant from the project. Rather, he claimed that he knew his coworkers at ETTS would need access to the program when they arrived at work that morning, so he gratuitously took the initiative to install the program the previous evening. Biron testified that after Complainant informed him about this incident he offered her the opportunity to install the program in other departments. Complainant denied Biron made any such offer. I credit Biron, Sullivan, and Legault's testimony.

15. On March 3, 1997, Complainant received an email from Biron indicating that Sullivan and Legault would be attending a "NERCOMP" training and, as a result, Complainant had to rearrange her schedule to accommodate Sullivan. Complainant became upset and angry because she had not been invited to the conference. She expressed her displeasure in an email to Dias in which she stated, "Not only was I not invited, I wasn't even informed of the conference. [I would] like to know how you feel that you ensure that I am treated fairly in a practically 'Male environment.'" In response, Dias sent an email back to Complainant, wherein she stated that only a limited number of ETSS staff could attend the conference due to limited financial resources. Dias further wrote:

The decision of who would attend this time was based on seniority with full time staff. It is my intention to work toward offering all ETSS staff training

opportunities on a rotating basis as funds/opportunities present themselves. As a person of color and a female, I am very much in tune with issues of inclusion rather than exclusion. The issue of female/male in no way entered into this decision making process.

16. Although Complainant testified that she did not believe Dias fabricated the reasons for sending Sullivan and Legault to the conference, she thought Dias could have selected her “to make up for past discrimination against her.” Similar to Dias’ testimony, Biron stated that he did not consider the gender of the user support persons in deciding who would be selected to attend the training. In fact, he claimed he offered the training to Beverly Johnson after discovering that she had more seniority than Legault. Complainant had the least seniority in the office. I credit Dias and Biron’s testimony.

17. Complainant testified that after the Meeting Maker incident, she repeatedly tried to meet with Dias to discuss various issues with respect to her being kept from doing user support work. However, she claimed that Dias arranged and then canceled several meetings. Eventually, they met on March 5, 1997. Complainant testified that as result of not being offered to attend the NERCOMP training and not getting the same amount of fieldwork as her male coworkers, she told Dias that “someone could charge discrimination”, but she would not. Dias testified that she asked Complainant if she thought she was being subjected to “intentional discrimination.” According to Dias, Complainant responded, “No, it was unintentional.” But Complainant claimed to have further answered, the “men did not intentionally include [me], so it must have been intentional.” Complainant stated that Dias thanked her for not filing a claim and promised to monitor the

situation. I credit Dias' testimony with respect to this meeting.

18. Complainant stated that later the same day, Dias informed her there might be insufficient funds to pay her through the remainder of the fiscal year (ending June 30, 1997) and, therefore, her job was in jeopardy. Complainant believed Dias had thus implicitly threatened the loss of her job in retaliation for her complaints made earlier in the day. Dias denied that her remarks had anything to do with Complainant's complaints. She stated that she merely made her comments after reviewing the status of Complainant's available funds for the remainder of the fiscal year. I credit Dias' testimony

19. According to Complainant, Dias then gave her the names of the administrators responsible for funding her contract. On March 7, 1997, Complainant wrote separate letters to Interim Associate Provost, Robert Green, and Dean of Business and Industry, Ron McNeil. In the letters, Complainant asked for assistance with respect to the funding problems. She claimed that she handed Dias copies of these letters on March 11, 1997. Complainant testified that after Dias received the letters, Dias became angry with her because she "ignored the chain of command" and went above her head on this matter. Dias admitted that she became upset because Complainant did not copy the letters to her.

20. On March 12, 1997, Dias and Complainant had an angry exchange that ultimately resulted in Complainant's termination. Complainant testified that sometime in the morning, Dias entered her office and asked her, "Would you go

get binders.” Complainant stated she responded, “That was something Ron [Biron] would be doing. Ron said he would do things like that. Haven’t you talked to him lately?” Complainant insisted that she did not refuse the clerical task, and merely suggested Dias talk to Biron. According to Complainant, Dias then became visibly angry and stated that it wasn’t necessary for her to talk to Biron. In response, Complainant claimed she stated, “Yes, it is!” Complainant testified that Dias then said in a hostile tone, “Get in my office!” Complainant claimed she told Dias, “I think you should call [Associate Provost] Bob [Green];” but Dias just reiterated, “Come in my office.” Green was Dias’ immediate supervisor. Complainant then followed Dias into her office. Complainant testified that Dias then instructed her to, “Sit in that chair”, but she refused and remained standing. Complainant claimed that Dias then told her in a hostile and angry manner to, “Get out.” In response, Complainant claimed that she told Dias she did not want to talk to her at that time and then stated, “you never follow up on anything anyway.” Complainant then walked out of the office. She stated that several hours later, at approximately 2:30 pm, she returned to Dias’ office with documentation for Dias to proofread. Complainant testified that when she entered the office, Dias stated, “I told you, I don’t want you in here.” Complainant then left and placed the materials in Dias’ mailbox.

21. Contrary to Complainant’s version of this incident, Dias claimed that she initially went to speak to Complainant after receiving an e-mail from her regarding training materials. According to Dias, when she asked Complainant to call Jan Estes for binders, Complainant rudely responded, “I’m not going to call Jan, you

call Jan because you never follow up on anything.” Whereupon, Dias asked Complainant to meet with her in her office. Dias testified that throughout their exchange, Complainant kept her voiced raised and treated her in a rude and disrespectful manner. In addition, Dias claimed that Complainant regularly interrupted her and prevented her from speaking. Dias further stated that when Complainant turned to leave the office, she stated, “I will not give you an opportunity to cleanse your filth.” According to Dias, shortly thereafter Complainant came back into her office and said, “You better be getting all your facts down, because I will get a lawyer.” Complainant denied making this remark. I credit Dias’ testimony regarding the incidents of March 12, 1997.

22. Dias testified that shortly after her heated exchange with Complainant, she called the Human Resources office and spoke with Assistant H.R. Director, Pat Ford regarding this incident. Both Ford and Dias stated that Ford initially recommended that Dias fire Complainant. However, after they discussed Complainant’s previous complaints of gender discrimination and her threat to get a lawyer, Ford advised Dias to speak with the EEO/AA Director, George Smith. Dias then spoke with Bob Green and he likewise advised Dias to terminate Complainant’s employment for insubordination. Dias then met with Green, Smith, and a representative from Human Resources. At this meeting, Dias again brought up Complainant’s threat to sue the university and her prior complaint regarding the training incident. Dias did not mention Complainant’s complaint with respect to being denied the opportunity to install the Meeting Maker upgrade. The group advised Dias to terminate Complainant based on her rude

and insubordinate conduct. Green corroborated Dias' testimony. On March 13, 1997, Dias terminated Complainant's employment.

23. Complainant testified that as a result of the disparate treatment she received during the course of her employment, she suffered mental anguish, embarrassment, and humiliation. After her termination, she sought counseling with a licensed social worker on two occasions, May 15, 1997 and June 6, 1997. The clinician's notes from these sessions reflect that Complainant expressed feelings of anxiety, depression, anger, and hopelessness as a result of the loss of her job due to sex discrimination. Complainant subsequently resumed therapy in July 2000, after experiencing anxiety related to the handling of her discrimination claim.

24. From March 1996 to December 31, 1996, Complainant earned \$19,102.50 from the University. From January until her termination on March 13, 1997, she earned \$8,490.00. For the remainder of 1997, she collected unemployment totaling \$7,225, and earned an additional \$2,000 from other jobs. According to Complainant's tax records, in 1998 Complainant earned a total of \$15,092.30; in 1999 she earned \$8,856.90; in 2000 she earned \$2,6654.83; in 2001 she earned \$6,302.47; and, in 2002 she earned \$7,447.64.

III. CONCLUSIONS OF LAW

A. GENDER DISCRIMINATION

Complainant has claimed that Respondent subjected her to adverse terms and conditions of her employment based on her female status. M.G.L. c. 151 B,

§ 4 (1), prohibits an employer from discriminating against an employee on the basis of sex with respect to the terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification. In order to prove a prima facie case of disparate treatment sex discrimination, Complainant must show that she is a member of a protected class; she was adequately performing the essential duties of the job; and, Respondent treated her differently from other similarly situated persons not of her protected class with respect to terms, conditions or privileges of employment. Wheelock College v. MCAD, 371 Mass 130, 134-136(1996); Perotta v. Rivkind, Baker & Braverman, 24 MDLR 30, 35 (2002); Williams v. New Bedford Free Public Library, 18 MDLR 123 (1996).

Complainant specifically alleged that Respondent treated her differently from Sullivan and Legault with respect to work assignments. Although Complainant has established that she is a member of a protected class and she adequately performed the essential duties of her job, she has failed to establish that Sullivan and Legault were similarly situated coworkers. I credited Dias' testimony that she hired Complainant to work at ACS as a technical writer to draft DCE documentation manuals. Sullivan and Legault, however, held user support positions, which had distinctly different duties and responsibilities. Therefore, Complainant cannot justifiably compare her initial position as a "technical writer" with the "user support" positions held by Sullivan and Legault.

Moreover, after Respondent gave Complainant the dual title of "technical writer/user support" in 1996, she was still primarily responsible for writing documentation. As exemplified in Dias' memo to Ford dated June 27, 1996,

Complainant accepted the responsibility of doing user support work, “in addition to [her] other duties.” Dias testified credibly that her reference to “other duties” referred to Complainant’s continued obligation to write DCE documentation. I also credited Dias’ testimony that she specifically told Complainant she still had to focus on writing DCE documentation, notwithstanding her additional user support responsibilities.

Furthermore, I believe that Dias and Biron made good faith efforts to get her some user support work, but faculty and staff hindered these efforts by continuing to directly call the other user support persons with whom they had established relationships. In particular, the evidence strongly supports the conclusion that Complainant did not get user support fieldwork because she was not well known in the campus community. Respondent only began recognizing Complainant as a user support person in June 1996, while Sullivan, Johnson, and Legault had worked in user support at the University for many years. Her ability to make a name for herself as a user support person was also hampered by her working in the office only three days per week, while the other user support persons worked full-time. Additionally, Complainant admitted that she had to spend a considerable amount of time in the office writing DCE documentation and thus had less time to devote to user support work.

Complainant has also failed to show that she was treated differently from similarly situated male co-workers with respect to her not being invited to the training conference. I credited Biron and Dias’ testimony that Sullivan and Legault were invited to attend the training based on their seniority in the unit.

Complainant had the least amount of seniority in the office. In addition, Biron testified credibly that after he discovered that Beverly Johnson, a female user support person, had more seniority than Legault, he offered her the opportunity to attend the training. Complainant also failed to establish that she was treated differently based on her gender with respect to the assignment of administrative duties. To the contrary, the evidence supported the conclusion that she answered the phone more than her coworkers, including Beverly Johnson, because she was in the office more than her coworkers. With respect to the Meeting Maker project, Complainant likewise failed to present any credible evidence that Respondent's decision to assign the responsibility of installing the software to others was based on her gender. In particular, I credited Biron's testimony that he offered Complainant the opportunity to install the software upgrade in other departments. Lastly, Complainant failed to present any credible evidence that Sullivan and Legault intentionally failed to give her user support fieldwork. As stated above, Complainant admitted that Sullivan and Legault received most of the user support calls because faculty and staff called them directly and, unlike Complainant, had established themselves throughout the University. I also credited Legault's testimony that he installed the Meeting Maker project in the ETTS offices as a gratuitous gesture even though Complainant had been assigned that responsibility. Under these circumstances, Complainant has failed to establish a prima facie case of gender discrimination in violation of G.L. c. 151B, § 4(1).

B. RETALIATION

Complainant has also alleged that Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4). 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 208, 215 (2000), *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995). M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel, or otherwise discriminate against any person because she has opposed any practices forbidden under c. 151B or because she 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 at 215 (2000), *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997); *see*, Sexual Harassment Guidelines, at 25-28.

In the absence of any direct evidence of retaliatory motive, as in this case, 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) she engaged in protected activity; (2) Respondent knew she had engaged in protected activity; (3) Respondent subjected her 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.

Complainant has established that she engaged in protected activity and Respondent knew of such activity. On more than one occasion, she complained to Dias about possible gender discrimination. She also proved that Respondent subjected her to an adverse employment action when Dias terminated her employment on March 13, 1997. I do not believe, however, that Dias’ alleged “implied threat” of job loss due to lack of funding constituted an adverse employment action as nothing apparently ever happened as a result of her

remarks and I credited Dias' testimony that her comments about the funding were simply based on her review of the remaining available funds for the fiscal year.² In addition, Complainant has neither alleged nor substantiated by credible evidence that she failed to receive "user support" fieldwork as a result of her complaints.

Having satisfied the first three elements of a prima facie case, Complainant must establish a casual connection between her complaints of gender discrimination and her termination. I believe the evidence strongly supports the conclusion that Dias terminated Complainant as a result of her rude and insubordinate conduct on March 12, 1997, and not as a result of her complaints of discrimination. I credited Dias' testimony that Complainant instigated the argument when she responded to Dias in an unreasonable and hostile manner after Dias simply requested that she call Jan Estes for binders. Dias testified credibly that she made the request only after she received an email from Complainant inquiring about the availability of training materials. In addition, Complainant's contention that Dias "intentionally attempted to provoke" her is simply unsupported by any credible evidence. Consequently, Complainant has failed to establish a prima facie case of retaliation.

Moreover, assuming arguendo that Complainant could establish a causal connection between her termination and her complaints of discrimination,

² Even if the "implied threat" of job loss for lack of funds could arguably constitute an adverse employment action, and a casual connection between the possible lack of available funds and Dias' so-called "implied threat" could be established, I find that Dias made this remark for a legitimate non-discriminatory reason, namely, the possibility that Complainant's contract may run out of available funds prior to the end of the fiscal year. Further, Complainant failed to establish that Dias' statements were false or that she made the remarks for nefarious reasons.

Complainant has still failed to prove that Respondent engaged in unlawful retaliation. Respondent articulated a legitimate, non-discriminatory reason supported by credible evidence for terminating Complainant's employment. As stated above, I credited Dias' testimony that Complainant acted in a hostile, rude, and insubordinate manner on March 12, 1997, and her conduct prompted her termination. Although Complainant argued that Dias fabricated the circumstances of the disagreement and then sought approval from her superiors upon false pretenses and deceit, I found Dias' testimony as well as the testimony of University's other witnesses to be credible. Complainant has, therefore, failed to prove that Respondent acted with retaliatory intent, motive, or state of mind.

Consequently, Complainant has failed to establish that Respondent engaged in unlawful retaliation in violation of 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 14th day of November, 2003.

EDWARD R. MITNICK
Hearing Officer