

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION &)
PATRICIA BENSINGER,)
Complainant)
v.) Docket No. 97-BEM-3257
No. 97-BEM-3669
PRIMARY CARE ASSOCIATES and)
PUNYAMURTULA S. KISHORE, MD,)
Respondents)
_____)

Appearances: J. Daniel Silverman, Esquire, for
Complainant Patricia Bensinger

Jean A. Musiker, Esquire, for Respondents
Primary Care Associates and Punyamurtula S.
Kishore, M.D.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 11, 1997, Complainant Patricia Bensinger filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged that Punyamurtula S. Kishore, M.D. (hereafter: "Kishore") and Primary Care Associates (hereafter: "PCA") discriminated against Complainant because of her gender (female) and age (date of birth: July 26, 1942) in violation of Massachusetts General Laws Chapter 151B, §§4(1) and 1(B).

Complainant alleged that Kishore discriminated against her in the terms and conditions of her employment at PCA when he reneged on his promise to hire her as a full-time clinical director, reduced her workload and hours, withheld her pay and reassigned or transferred her supervisory duties to younger female supervisors in 1996 or 1997. (Complaint No. 97-BEM-3257, dated September 11, 1997).

On October 10, 1997, Complainant filed a second complaint with the Commission in which she alleged that Kishore and PCA retaliated against her based on her participation in protected activity in violation of Massachusetts General Laws Chapter 151B, §4(4). In her second complaint, Complainant alleged that Kishore retaliated against her for filing her initial discrimination complaint when he unlawfully refused to pay her wages, did not assign new patients to her and discharged her on October 8, 1997. (Complaint No. 97-BEM-3669, dated October 10, 1997).

Attempts to conciliate this matter were unsuccessful. On September 22, 2002, Walter J. Sullivan, Jr., certified both complaints for a public hearing.

I conducted a public hearing in these complaints on September 22-25, 2003. On or about November 26, 2003, the parties submitted their post-hearing memoranda with proposed findings of fact and conclusions of law.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and

supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Patricia Bensinger, is a female who lives in Brookline, Massachusetts. Complainant's date of birth is July 26, 1942. (Complaint, dated September 11, 1997).
2. In 1966, Complainant received a bachelor's of arts degree in psychology and sociology from Youngstown State University. In 1968, Complainant received a masters' degree in social work from West Virginia University. Complainant lived in Ohio from 1968 until 1990, during which time she maintained a private practice as a social worker. (Joint Exhibit Nos. 12A and 12B).
3. From 1968 until 1969, Complainant worked as a psychiatric social worker and diagnostician at the Juvenile Justice Center in Columbus, Ohio. From 1969 to 1970, Complainant worked as a psychotherapist and diagnostician at the Cleveland Child Guidance Center, a comprehensive

out-patient mental health center, in Cleveland, Ohio. From 1973 until 1990, Complainant worked as a psychotherapist and a supervisor at the Parkview Counseling Center in Youngstown, Ohio. In this position, Complainant provided psychotherapy to children and adults on an out-patient and in-patient basis, and supervised the Center's adult and child therapists. From 1972 through 1975, Complainant also worked as an instructor in the Department of Sociology at Youngstown State University in Youngstown, Ohio. (Joint Exhibit Nos. 12A and 12B).

4. Since 1990, Complainant has worked as a licensed independent clinical social worker (LICSW) in Massachusetts. (Joint Exhibit Nos. 12A and 12B).

5. Respondent Punyamurtula S. Kishore, M.D., is a physician and is the sole proprietor of Preventative Medicine Associates, Inc., which does business as PCA.¹ Kishore received a M.B.B.S. degree in 1974 from Andhra University in Waltair, India, and received a master's degree in public health in 1979 from the Harvard School of Public Health. In 1978, Kishore was licensed as a physician in Massachusetts and has practiced in Massachusetts through the date of the instant public hearing. Kishore has focused his practice on the treatment of individuals with substance abuse issues. (Joint Exhibit No. 13).

6. In 1990, Kishore received a certificate of studies in forensic psychology from Bridgewater State College. Kishore is board certified in preventive medicine and

¹Preventative Medicine Associates, Inc., was incorporated in 1992.

public health and is certified by the American Society of Addiction Medicine as an addiction specialist. (Joint Exhibit No. 13).

7. Kishore is an assistant professor of medicine at the University of Massachusetts Medical Center in Worcester and is on staff at several hospitals in the Boston area. (Joint Exhibit No. 13). Kishore is the founder and president of the International Society of Addiction Medicine. He also the founder and executive director of the National Library of Addictions. (Joint Exhibit Nos. 13 and 17).

8. Kishore is married with two children. Kishore's spouse is a pediatric neurologist who has worked throughout their marriage.

9. During the time period relevant to these complaints, PCA operated as a for-profit medical practice that provided primary care for the addicted and substance abuse population. In June 1996, PCA was located in the Medical Arts Building, 697 Cambridge Street, Rooms 104 and 204, Brighton, Massachusetts. From 1992 to 1997, Kishore also maintained an administrative office in Chestnut Hill, Massachusetts.

10. By mid-1996, PCA provided traditional medical services such as physical examinations, immunizations and well-person physical examinations. Many patients were seen without an appointment, on a walk-in basis. By mid-1997, PCA had refocused its practice and began to provide out-patient treatment to the addicted and substance abuse

population: drug therapy, support groups and individual counseling, yoga and meditation, detoxification and case management, acupuncture through a nurse practitioner, chiropractor services, neuropsychological assessment and follow-up, addiction law services and supervised drug testing. (Joint Exhibit No. 43).

11. In 1996, Kishore also employed Karen Koenig, a part-time licensed social worker, to provide individual psychotherapy to patients during PCA's weekly clinics. Koenig's hourly rate was \$60.00 and she worked four to eight hours each week. (Joint Exhibit No. 1).

12. During the time period relevant to the instant complaint, PCA was an employer within the meaning of Massachusetts General Laws, Chapter 151B. (Joint Exhibit Nos. 1, 2 and 3).

Complainant's Private Practice

13. In 1989, Complainant began a small private practice while she worked at the Parkview Counseling Center. In her private practice, Complainant worked with adults who had issues with anxiety, depression and poor self esteem.

14. In 1990, Complainant moved to Brighton, Massachusetts, and began a private practice in which she provided short- and long-term therapy and behavioral therapy to children, individuals and families. Complainant maintained her private practice throughout the 1990's and saw approximately 10 clients per week through 1995. As part of her private practice, Complainant provided individual adult

psychotherapy to clients for whom she received direct payment or reimbursement from health insurance providers such as United Behavioral Help, Harvard Pilgrim, Options, Managed Health Network, Managed Care Group, Blue Cross and Medicare.

15. In 1991, Complainant began to work as an independent contractor for HRI Counseling Center, Inc.² (hereafter: "HRI"), in Brookline, Massachusetts. At HRI, Complainant provided psychotherapy and supervised other contract therapists. Complainant's duties at HRI included intake, assessment and ongoing treatment of children, their families and some adults. Complainant testified that she worked approximately 20-25 hours a week at HRI until 1995 when she began to expand her private practice.

16. Prior to 1995, Complainant also received training and/or certification in alternative modalities such as shock field therapy and kinesthology. In 1997, Complainant was certified as a licensed hypnotherapist and a hypnosis instructor. (Joint Exhibit No. 8).

17. Complainant acknowledged that substance abuse treatment is a recognized specialty in the mental health field, with its own certification and licensure process. Complainant does not hold a license or certification in the field of substance abuse treatment.

18. In her resume, Complainant did not describe or list any experience working with addicted populations. Complainant

²HRI is now known as "Arbour Counseling Services." (Respondent's Exhibit No. 1).

also did not list any seminars she attended that dealt with addicted populations except two that she attended in Youngstown, Ohio, in 1980. Complainant's resume includes one reference to experience with addicted populations, contained in her description of her 1990 to present private practice, which reads "Most populations and issues served including addictions." (Joint Exhibit Nos. 12A and 12B).

19. As part of her provider application to United Behavioral Health in August 1998, Complainant's 14-page resume did not include any reference to her prior work as a clinician in a detoxification center, on an in-patient or out-patient basis. In her application, Complainant did not describe the major characteristics of her private practice to include treatment of addicted populations and did not describe her areas of expertise in her daily practice to include chemical dependency or substance abuse. (Joint Exhibit No. 23).

20. As part of her New Year's resolution for 1996, Complainant decided to reduce her dependence on HRI and commit herself to building up her private practice. From January through June 1996, Complainant limited her activities at HRI to one day a week and worked on her private practice during the remainder of the week. Beginning in April 1996, Complainant attempted to increase her private practice by mailing an informational letter to various physicians and health care providers. In her letter, Complainant described the services she provided and requested that the physicians and health care providers consider her as a referral source in their clinical practices. (Joint Exhibit No. 11).

21. Prior to June 1996, Complainant received approximately 5 responses or inquiries to her informational mailings.

22. From January 1996 to June 1996, Complainant worked at least 20 hours of week calling physicians and health care providers, networking, setting up informational meetings and distributing her marketing materials. As a result of her marketing efforts, Complainant's private practice increased from approximately 8 clients to 11 or 12 clients per week by June 1996.

23. Complainant testified that, as of June 15, 1996, she was "making progress" in developing her private practice. Complainant also testified that her private practice caseload had increased to 11 ongoing clients and she began to receive "a lot more" inquiries about her services. I credit Complainant's testimony.

Complainant's Work History at PCA

24. On or about June 15, 1996, Kishore met with Complainant after he had received her marketing letter. When they met, Kishore was in the process of terminating Koenig because they disagreed over treatment philosophy. During the meeting, Kishore asked Complainant several questions about her background, described the organization at PCA and asked her about her knowledge of and experience with insurance providers. Kishore told Complainant that the majority of his medical practice involved the treatment of individuals who had various addictions and their families.

25. During their meeting, Complainant told Kishore about her private practice and the various treatment modalities that she used. I do not credit Complainant's testimony that Kishore told her that she would oversee and streamline PCA's programs, develop new programs and outreach services, perform some public relations work and supervise counselors at the PCA.

26. I do not credit Complainant's testimony that Dr. Kishore offered to hire her as the director of a clinic for patients with substance abuse problems. I also do not credit Complainant's testimony that Kishore told her, during their initial meeting, she would get full-time employment "down the road" once the substance abuse clinic "got off the ground." I credit Complainant's testimony at her deposition on August 24, 2001 that Kishore first told her about his plan to establish a clinic to provide comprehensive services under one umbrella organization about six months after she began to work at PCA.

27. Kishore testified that he was not looking for a clinical director for PCA in 1996 and did not "envision" one in 1997. I credit Kishore's testimony that he did not offer Complainant a full-time position in 1996 and did not offer her a clinical director's position at anytime in 1996 or 1997. I also credit Kishore's testimony that he only offered Complainant a part-time position to provide counseling and psychotherapy for his "stable" patients, similar to the position held by Koenig at PCA. In June 1996, Kishore told Complainant that she would work two clinics each week, four hours during each session.

28. Complainant accepted Kishore's job offer at the end of their initial meeting. I do not credit Complainant's testimony that she told Kishore that she would immediately terminate her marketing activities for her private practice. I also do not credit Complainant's testimony that she told Kishore that she would did not take any new clients in her private practice after June 15, 1996, except for relatives of old or current patients.

29. I credit Kishore's testimony that he discussed Complainant's private practice, including her psychotherapy sessions, during her interview but that she did not tell him that she planned to reduce her existing private practice after June 26, 1996. Kishore did not recall discussing Complainant's providers prior to June 26, 1996 although he knew that she had them based on her marketing letter.

30. Complainant began to work at PCA on June 27, 1996 and saw her first patient during her first or second week of employment. While employed at PCA, Complainant's pay rate was \$30.00 an hour, except for her initial week of work when she was paid \$25.00 an hour. (Joint Exhibit No. 1).

31. During her employment at PCA, Complainant did not have a written job description and she never received a performance evaluation. From June 1996 through December 1996, Kishore felt that Complainant's performance as a psychotherapist was "excellent."

32. From June 1996 to June 1997, there were 25 bi-weekly pay periods at PCA. During this period, Complainant worked

at between 22-35 hours in 9 pay periods, between 36-50 hours in 12 pay periods, and between 4-16 hours in 4 pay periods. Complainant never worked 80 hours in a pay period during her entire tenure at PCA. (Joint Exhibit Nos. 1, 3 and 4).

33. In 1996, PCA had a number of "walk-in" clients who had an intake and an initial assessment that were conducted by several individuals, including Kishore, other counselors, a nurse practitioner and a physician's assistant. Complainant felt that the "vast majority" of patients who came into PCA were not appropriate for individual psychotherapy.

34. Shortly after she began working at PCA, Complainant found a number of incomplete billing sheets and began to revise them to include the patients' diagnoses. Complainant also undertook research to write treatment plans for addicted patients at PCA.

35. Between June 1996 and December 31, 1996, Complainant drafted several forms for use at PCA: an activity sheet, an adult clinical evaluation, a treatment log, progress notes, a patient's right to treatment, initial screening and psychiatric evaluation, a medication log, and a drug disposal form. (Joint Exhibit Nos. 29A-29O). Some of these forms were similar in format, topics and subheadings to forms that Complainant used at HRI. (Respondent's Exhibit Nos. 1 and 2). During this period, Complainant also undertook research to write job descriptions and confidentiality protocols to bring PCA into compliance with federal and state law. On her own initiative and without

any expectation of compensation, Complainant also drafted three pages of a patient policy and procedures manual. (Joint Exhibit No. 39).

36. I credit Kishore's testimony that he did not recall reviewing or using Complainant's draft forms during the time period that Complainant worked at PCA. I also credit Kishore's testimony that he did not direct or ask Complainant to draft these forms or a policy/procedure manual.

37. During June 1996 through December 1996, Complainant saw approximately 15 of Kishore's patients for therapy each week. I do not credit Complainant's testimony that she continued to receive phone calls in response to her marketing letter through November 1996, but was forced to turn away potential new business because of her employment at PCA. Complainant's records show that, after June 1996, Complainant added new patients in her private practice as follows: one on June 24, 1996, one on July 29, 1996, two in October 1996, two in April 1997 and one in May 1997. In May and July 1997, Complainant advertised her private practice in Earth Star magazine for four months. (Joint Exhibit 9).

38. While Complainant and Kishore sometimes jointly interviewed clients, Complainant held one-on-one individual therapy sessions with patients of PCA. Complainant verbally advised Kishore about her therapy sessions and he read her progress notes. There was no procedure for Kishore to sign off on Complainant's treatment plans. Kishore determined the number of patients Complainant saw

and the number of hours per week she was scheduled to work, but he did not supervise her psychotherapy sessions.

39. By December 31, 1996, Complainant worked approximately 20 hours each week at PCA and devoted six to seven hours per week to her private practice patients.

40. During her employment at PCA, Complainant paid the fee to renew her social worker license in Massachusetts and maintained her malpractice insurance. Respondents PCA and Kishore never paid such fees. During her employment at PCA, Complainant did not make any changes in her provider contracts except billing notification regarding her services for PCA.

41. I do not credit Complainant's testimony that she received an additional 45 solicitations after she accepted Kishore's job offer. Complainant did not maintain any written record of the responses or inquiries she received prior to June 1996.

42. From April 1997 through October 1997, Complainant issued 46 checks to the Theosophical Society to cover the cost of office space that she rented, in part, to meet with her private clients. (Joint Exhibit No. 9).

Other Counselors Who Worked at PCA as of June 1996

43. When Kishore hired Complainant in June 1996, PCA already employed three part-time counselors: Rebecca Kayo, Charles F. Thomas, Jr., and Reverend Lewis I. Anglin. (Joint Exhibit No. 1).

44. Kayo worked as a psychologist at PCA until the end of 1996. Kayo worked part-time, between four and ten hours a week, and was paid \$10.00 an hour. (Joint Exhibit No. 1). PCA issued a Form 1099 to Kayo for 1996 in the amount of \$1,252.50. (Joint Exhibit No. 2).

45. Thomas conducted a methadone clinic and ran a methadone support group for patients at PCA. Thomas also staffed the front desk at PCA and performed various intake functions. Thomas worked part-time, between four and six hours a week, and was paid \$10.00 an hour. (Joint Exhibit Nos. 1, 3 and 4). PCA issued a Form 1099 to Thomas for 1996 in the amount of \$1,776.50. (Joint Exhibit No. 2).

46. Thomas is trained as a substance abuse counselor and is certified as a criminal justice specialist. Thomas held a Rhode Island license as chemical dependency professional, a Massachusetts license as an alcohol and substance abuse counselor and national certification as a master's degree level addiction counselor. (Joint Exhibit No. 15). Thomas left PCA in June 1997.

47. Reverend Anglin provided substance abuse and spiritual counseling at PCA beginning in 1995. Anglin assisted patients of PCA to obtain social services and public assistance or housing community services. Anglin also helped patients to obtain insurance coverage from MassHealth, the Commonwealth's agency that provide health insurance coverage to the uninsured.

48. Anglin earned \$10.00 an hour and he worked part-time at PCA, averaging six to ten hours a week. (Joint Exhibit

Nos. 1, 3 and 4). PCA issued a Form 1099 to Anglin for 1996 in the amount of \$4,037.50. (Joint Exhibit No. 2).

49. In September 1996, Kishore hired a nurse practitioner to conduct two sessions a week. In September-October 1996, Kishore added addiction law services, including monthly law clinics, and hepatitis clinics to the practice at PCA.

50. In November 1996, Kishore hired Arthur Roberts, another part-time counselor, to run an evening support program for addiction services, perform outreach and serve as a liaison to Alcohol Anonymous programs. Roberts was also employed at a substance abuse treatment hospital in Worcester and was a candidate for a bachelor's of science degree from Springfield College. Roberts worked an average of 10 to 20 hours a week, and was paid \$14.00 an hour. (Joint Exhibit Nos. 1, 3, 4 and 15). Roberts left PCA on October 30, 1997 when Kishore cut his work hours.

51. Complainant interviewed Roberts but did not give her input to Kishore until after he had already hired Roberts.

52. On December 2, 1996, Paula Frawley issued a weekly schedule for all medical staff at PCA. The schedule listed Complainant, Thomas, and Roberts as counselors and Anglin as a spiritual counselor. It listed Complainant's work hours as Wednesday, 4:00 p.m. to 9:00 p.m., and Thursday, 1:00 p.m. to 5:00 p.m. The schedule also listed the following hours for counselors:

- Thomas - Tuesday, 6:00 p.m. to 9:00 p.m.
- Rev. Anglin - Tuesday, 5:30 p.m. to 8:30 p.m.

- Roberts - Tuesday and Wednesday, 6:00 p.m. to 9:00 p.m. and Saturday, 1:00 p.m. to 5:00 p.m. (Joint Exhibit No. 17A).

53. On November 22-23, 1996, Kishore organized an addiction conference in Northhampton, Massachusetts, entitled: Addiction Medicine-21st Century. The American Society of addiction Medicine, Region III, the International Society of Addiction Medicine and the National Library of Addictions sponsored the conference. Kishore was the conference director and Hilding Ohrstrum was the conference coordinator. Ohrstrum was compensated for his work on the conference from the proceeds of the conference. (Joint Exhibit No. 17).

54. Complainant was listed in the conference program as a staff member. (Joint Exhibit No. 17). Prior to the conference, Complainant assisted Kishore by identifying and calling physicians to invite them to the conference. Complainant also worked with Ohrstrum to provide administrative support during the conference.

55. In November 1996, Hilding Ohrstrum worked as the Director of Addiction Recovery Services and the Director of Substance Abuse Services for Fitzgerald & Associates, in Salem, Massachusetts. At all times relevant to these complaints, Ohrstrum was a licensed mental health counselor and a certified alcohol and drug abuse counselor who has more than 15 years of experience as a clinician in both in-patient and out-patient community mental health settings. Ohrstrum also had extensive experience managing substance abuse programs. Ohrstrum received a master's degree in

counseling from Antioch University and completed graduate hours in counseling psychology in 1981. (Joint Exhibit Nos. 15 and 17).

56. From January 23, 1997 through March 18, 1997, Ohrstrum worked a total of 170.25 hours at PCA as an independent contractor at an hourly rate of \$20.00. (Joint Exhibit No. 4). Ohrstrum's duties included public relations, marketing, organization, and the development of personnel and credentialing files for professional staff working at PCA. (Joint Exhibit No. 15). Ohrstrum did not see or treat patients at PCA.

57. While Ohrstrum worked at PCA, he prepared a draft seven-page policy and procedures document entitled: Program Design and Service Components. This draft was in response to the first question on the Department of Public Health's license application for clinics. Ohrstrum circulated the document to Complainant and Chasy for their review and comments. On the document, Ohrstrum wrote, "work in progress on DPH licensing application responding to questions 1 on design and two on specific elements." (Joint Exhibit No. 37). Kishore did not recall reading the draft document and did not discuss it with Complainant.

58. On January 5, 1997, Ohrstrum sent a memorandum to all clinical staff in which he requested certain personnel and credentialing records. Complainant responded to Ohrstrum's memorandum and provided the requested information about her records, without objection. (Joint Exhibit No. 15).

59. During the winter of 1997, Kishore considered whether he could establish a free-standing out-patient substance abuse clinic to help solve his immediate need for a better cash flow at PCA. Based on Ohrstrum's research, Kishore abandoned his proposal because licensing requirements established by the Massachusetts Department of Public Health required that he establish the proposed clinic as a non-profit organization, unlike PCA. Kishore also learned that the licensure process could have taken up to one year and require expensive renovations in PCA's offices.

60. On February 2, 1997, Kishore hired Alex S. Chasy as a full-time employee at an hourly rate of \$20.00. (Joint Exhibit No. 4). Chasy left PCA in January or February 1998.

61. Chasy was born on October 6, 1957 in Hungary and received a law degree from the University of Budapest in 1986. In January 1996, Chasy received a master's degree in social work from Boston University. From 1996 to 1997, Chasy held a part-time position with the in-patient psychiatry department at Carney Hospital and a part-time position with the addiction recovery program at Faulkner Hospital. At Carney Hospital, Chasy worked with adults who had major mental illnesses and substance abuse problems, conducted psychological assessments, crisis intervention and discharge planning. In 1993 to 1995, Chasy worked in the residential program at McLean Hospital where he counseled mentally ill adults. Chasy has also worked as a counselor for mentally retarded adults and a counselor for mentally ill adults in supported living environment. (Joint Exhibit No. 14).

62. Kishore hired Chasy to market, conduct outreach and coordinate PCA's services with hospital-based addiction treatment programs. One of Chasy's primary job duties was to increase patient referrals from hospital based treatment programs, including Faulkner Hospital, to PCA. Kishore wanted to develop a strong working relationship with nearby hospitals, because he believed that he would be able to admit PCA's out-patients into the hospitals, follow them through their in-patient hospitalization and then retain them in his medical practice. Chasy also provided counseling to patients to facilitate their admission into inpatient programs and their transition to outpatient treatment with PCA.

63. Complainant had no role in Chasy's hire at PCA. Complainant had no input into Chasy's salary, job duties, work schedule or hours and did not complete any evaluations of his job performance.

64. Aside from Complainant, Kishore did not use Chasy or any other individual to perform individual psychotherapy at PCA during the time period to the instant complaints.

65. In addition to his outreach and liaison duties, Chasy undertook additional duties while employed at PCA. Chasy answered the telephone and acted as a receptionist, talked to or met patients for their initial assessment when Kishore was late, and purchased supplies. Chasy also changed PCA's billing system by obtaining a "point of service" device. This device enabled medical providers to verify insurance coverage and referral information and ensure payment of deductibles and co-payments from

patients. I credit Kishore's testimony that this change had a positive impact on PCA's cash flow. Chasy also investigated, cured technical defects and worked with an outside billing service to resubmit bills that were previously rejected by providers and MassHealth. I also credit Kishore's testimony that he did not assign these additional duties to Chasy and that Chasy voluntarily assumed them on his own initiative.

66. For 1997, PCA issued a Form 1099 to Chasy in the amount of \$25,871.63. (Joint Exhibit No. 5).

Supervision of Professional Staff

67. When Chasy began working at PCA, he had not yet completed his LICSW licensure requirements and needed clinical supervision from another LICSW. Chasy's license was solely for his personal advancement and was not a requirement of his employment at PCA. As a professional courtesy, Kishore offered Chasy an opportunity to obtain clinical supervision from Complainant if she was willing. Kishore agreed to compensate Complainant for the time she spent in clinical supervision and compensate Chasy for the time he spent with Complainant.

68. While Complainant held some weekly sessions or meetings with Chasy to satisfy his LICSW licensing requirements, Chasy stopped attending the meetings. Complainant testified that Chasy was argumentative, resistant to her supervision and often came late to their meetings. Complainant also testified that Chasy asked her to sign off or certify that he had attended their weekly meetings even

though he did not attend them and that she refused. I credit Complainant's testimony.

69. Complainant complained to Kishore, sometime in March 1997, about Chasy's resistance to attending her weekly meetings. Kishore did not object to Chasy seeking supervision for his licensure elsewhere as he had offered it merely as a favor to Chasy. Kishore did not consider Complainant's weekly meetings to be a part of her job description or the duties that he hired her to perform; namely, to provide psychotherapy to his patients. Chasy thereafter received his clinical supervision at Cambridge Hospital.

70. Complainant did not have any role or input into the salary, work schedule, job duties, assignment of patients, or completion of performance evaluations for Roberts, Kayo, Thomas or Anglin. Complainant never met with Thomas or Anglin in a formal supervisory or training session. Complainant never wrote job descriptions for staff while she worked at PCA.

71. Complainant contended that she began to supervise Roberts, Thomas and Anglin when she offered to discuss any issues or problems they may have had on clinic night-each Wednesday night. Complainant also claimed that she introduced herself to them as the "clinical director."

72. Complainant testified that Chasy, Anglin and Roberts did not want to be accountable to her and that they refused to cooperate with her or submit to her supervision. Complainant also testified that they began to hold meetings

with Kishore and without her. Complainant believed that, as of May or June 1997, they were discriminating against her. I do not credit Complainant's testimony.

73. On May 14, 1997, Complainant sent three memoranda to the clinical staff, including Chasy, Roberts and Thomas, and copied Kishore. In these memoranda, Complainant requested that they give her a listing of the days and hours they worked, a detailed listing or description of their job duties and a weekly activity sheet listing patients seen, time spent and collateral contacts made. (Joint Exhibit No. 25). On May 14, 1997, Complainant also sent a memorandum to Chasy in which she informed him that she had assumed responsibility for assigning and reviewing his ongoing cases with him and she requested that he give her a list of his current patients, describe how often he saw them and list the payor type. (Joint Exhibit No. 25).

74. Between May 21, 1997 and June 11, 1997, Complainant signed as the "supervisor" on the clinical case assignment sheets listing Chasy, Thomas, Roberts, Adam Rice, James Castell as the assigned therapists. (Joint Exhibit 38). I credit Kishore's testimony that he never saw these forms and did not know whether they were inserted into the files of PCA's patients.

75. I do not credit Complainant's testimony that Kishore reviewed and approved her memoranda before she issued them to Chasy, Roberts and Williams. I credit Kishore's testimony that he did not review Complainant's memoranda before she issued them and did not approve them. I also credit Kishore's testimony that he never gave the

responsibility of assigning cases to Complainant and did not ask her to develop job descriptions.

76. On June 7 and 14, 1997, Complainant sent a memorandum to Kishore in which she reported that Chasy and Roberts, respectively, had not given her any of the information she had requested in her memoranda, dated May 14, 1997.

Complainant also reported that Chasy and Roberts had not complied with her written and oral directions or requests and that their inactions interfered with her ability to establish accountability and meet key federal and state policies and procedures. (Joint Exhibit Nos. 26 and 27). In her memoranda, dated June 7 and 14, 1997, Complainant referred to herself as the "clinical director and supervisor." (Joint Exhibit Nos. 26 and 27).

77. Kishore did not respond to Complainant's memoranda regarding her supervision issues with Chasy and Roberts. I credit Kishore's testimony that, in June 1997, Complainant, Roberts, Thomas, Anglin, and Chasy reported directly to him.

78. On June 17, 1997, Thomas sent a memorandum to Complainant in which he reported to her regarding his client assignments and informed her that he did not know what his job description or duties were. (Joint Exhibit No. 36). Complainant did not show Thomas' memorandum to Kishore.

79. Complainant testified that, in June or July 1997, Kishore hired Irene Manfredo, a LICSW social worker and a full-time employee at Veterans Hospital, to supervise

Chasy's work activities. Complainant testified that Roberts discussed group therapy strategies with her but that he refused to come to supervision sessions with her. Complainant also testified that, in June 1997, Roberts told her that Donna Grant was going to supervise him and see some patients. I do not credit Complainant's testimony regarding Manfredo's and Grant's alleged supervision of Chasy and Roberts, respectively.

80. I credit Kishore's testimony that he did not hire Grant or Manfredo³ as employees at PCA. I also credit Kishore's testimony that he met with Manfredo on one or two occasions while he was reviewing a model for a successful alcohol treatment program. PCA's billing records show that it submitted bills for Manfredo who met with one patient of PCA on three occasions, in July, August and September 1997. (Joint Exhibit No. 16). The parties did not submit any records to show that PCA issued a Form 1099 or a Form W-2 to Manfredo or Grant in 1996 or 1997.

Financial Conditions at PCA

81. In 1996 and 1997, PCA began to have cash flow problems although it had an increase in the number of patients. PCA's cash flow problems were caused, in part, by walk-in patients who did not have health insurance and were unable to pay for their services and by the failure of MassHealth to pay numerous claims.

³The parties did not submit any evidence to establish the ages of Manfredo, Grant or Ohrstrum.

82. By the spring of 1997, PCA fell behind in its rental payments for March and April 1997 and in its payments to vendors such as the telephone company and an office equipment provider. Complainant acknowledged that she and other staff knew that Respondents Kishore and PCA were experiencing cash flow problems beginning in the spring of 1997. (Joint Exhibit Nos. 18A-18E and 19A-19F).

83. Beginning in 1997, PCA's financial situation worsened when Kishore was no longer able to bill separately for the ancillary services PCA provided, including Complainant's psychotherapy, because of changes in insurance reimbursement policies. Under the new policies, Kishore had to "bundle" all services under one or a universal bill; thereby, he could only charge for the services of one practitioner no matter how many professionals at PCA saw the patient on one visit to PCA. Kishore testified that he then believed that he had to return to his primary care model and abandon the holistic practice model in which PCA provided multiple services to patients. Kishore also testified that he had to decrease the ancillary services provided by PCA and informed his staff of his planned return to PCA's former primary care model. I credit Kishore's testimony.

84. In the spring of 1997, it was common knowledge among the employees at PCA that Kishore's landlord had repeatedly threatened to evict PCA for non-payment of rent. Complainant also knew that MassHealth did not pay most of PCA's bills submitted in April through July 1997. In March 1997 through May 1997, Complainant also knew that Kishore was planning to move from a complementary services approach

to a primary care model and was exploring other ways to restructure his practice to increase PCA's revenues.

85. In April 1997 and June 1997, Kishore received notices from the Medical Arts of Brighton Realty Trust regarding rental arrearages for PCA that had accrued during March 1997 through June 1997. (Joint Exhibit No. 18).

86. In April 1997 through June 1997, PCA issued checks to 10 male and female employees, including Complainant, that were returned because of insufficient funds. (Joint Exhibit No. 19). I credit Kishore's testimony that seven of these employees left PCA after they received the "bounced" checks.

87. Kishore testified that he believed that PCA was in a "chaotic financial shape" by May 1997. (Joint Exhibit No. 19). I credit Kishore's testimony and find that PCA was poorly managed during the spring and summer of 1997.

88. Between April 1997 and July 1997, MassHealth did not pay many of the claims submitted by PCA because of incorrect MassHealth numbers, insufficient data for the referring physician(s) and provider numbers and/or a lack of information to verify patient eligibility. During this period, MassHealth also stopped payment on some of PCA's claims because of the Commonwealth's budget crisis. (Joint Exhibit No. 18D).

89. Due to PCA's lack of cash flow, it was unable to adequately fund its payroll and its payroll service notified Kishore in June 1997 that it would no longer manage PCA's payroll. The last check issued by the payroll

service covered the pay period ending June 3, 1997. Kishore then converted all staff at PCA to payment as independent contractors, effective on June 3, 1997. I credit Kishore's testimony that Nancy Bennett, the office manager for PCA, communicated this change to all staff and told them that PCA would no longer take deductions or taxes from their paychecks beginning in June 1997.

90. I credit Kishore's testimony that he offered all staff at PCA, including Complainant, the option of being laid off or converting to independent contractor status. Approximately 50% of 25 staff left PCA after June 1997. PCA issued Form 1099s for 1997 to 12 employees, including Complainant. (Joint Exhibit No. 5).

91. I do not credit Complainant's testimony that she did not know that Kishore had changed her status from that of employee to an independent contractor in July 1997. I also do not credit Complainant's testimony that she reasonably believed she was an "employee" throughout the course of her employment at PCA. Although she was treated as an independent contractor for tax purposes after June 3, 1997, Complainant continued to see Kishore's patients at the PCA's office.

92. On July 18, 1997, two employees wrote letters to Nancy Bennett, PCA's bookkeeper, to request their back pay for a one-month period. (Joint Exhibit 19).

93. For the fiscal years ending October 31, 1996, 1997 and 1998, Preventive Medicine Associates, Inc., reported a loss of \$41,100.00, \$67,332.00 and \$10,341.00, respectively, on

its audited financial statements. In fiscal years 1996, 1997 and 1998, Kishore did not take any salary or compensation and made the following cash contributions to Preventive Medicine Associates, Inc.: \$36,535.00, \$66,547.00 and \$69,148.00, respectively. (Joint Exhibit No. 19).

94. By July 1, 1997, Complainant was seeing approximately eight clients each week in her private practice and was seeing clients at HRI about once a month.

95. On or about July 3, 1997, Kishore called Complainant and told her that he had to reduce her hours to two afternoons each week, or no more than eight hours a week, because he could not pay her. In July-August 1997, Kishore asked Complainant to terminate several patients, take them in her private practice or refer them to another service provider.

96. On July 9, 1997, Complainant testified that Kishore called her, at home, and told her that had to terminate her treatment of a client because "Medicaid had a limit" on counseling sessions.

97. During January 1997 through July 1997, Kishore hired new staff despite the financial problems at PCA. Kishore hired Brenda Baupry, a licensed psychologist, to perform clinical testing that Complainant was not qualified to perform. Kishore hired Baupry to work as an independent contractor for one month at \$60 an hour. Kishore also hired Dr. Charles, a physician, but did not pay him, because he came from a residency program at Carney

Hospital. Dr. Charles only worked at PCA for one or two weeks. Kishore also interviewed but did not hire a paralegal, a masseuse, a microbiologist, a chiropractor and an acupuncturist.

98. By July 3, 1997, Kishore owed Complainant approximately \$2,500 to \$3,000 in back wages for June and July 1997.

99. Shortly after Complainant's discussion with Kishore on July 3 and 9, 1997, she engaged attorney Michael Smith to recover her back wages. On July 25, 1997, Attorney Smith wrote a letter to Kishore in which he demanded a payment of \$3,900.00 in unpaid wages and attorneys' fees. In his letter, Attorney Smith also wrote that Kishore had unlawfully reduced Complainant's hours, had ordered her to terminate patients and had undermined her authority as a supervisor based on her age and sex. (Joint Exhibit No. 30).

100. On July 31, 1997, Kishore issued a check to Complainant in the amount of \$3,900.00 to cover her back wages. (Joint Exhibit 30A).

101. During August and September 1997, Complainant continued to work eight hours a week at PCA and 8 hours a week in her private practice.

102. Complainant testified that Kishore directed her, sometime in August 1997, to terminate two clients for financial reasons although one client was eligible for Medicaid reimbursement. Complainant also testified that

Kishore did not pay her wages in August 1997. I credit Complainant's testimony.

103. On September 11, 1997, Complainant filed a complaint against Respondents PCA and Kishore with the Commission based on age and gender discrimination. I do not credit Complainant's testimony that Kishore asked her in late September 1997 why she had not approached him to discuss her complaints prior to filing a complaint with the Commission.

104. In early October 1997, PCA owed \$5,805.65 to the Xerox Corporation and \$7,698.00 to Bell Atlantic for multiple months of unpaid bills. On October 8, 1997, Western Surety Company cancelled an insurance policy for Preventive Medicine Associates, Inc. for non-payment of premiums. (Joint Exhibit No. 19).

105. On October 8, 1997, Kishore met with Complainant and told her that he was terminating her services, effective on October 30, 1997, because of PCA's financial difficulties. (Joint Exhibit Nos. 31B and 31C). I credit Kishore's testimony that he gave Complainant the option of taking PCA's patients with her into her private practice.

106. Complainant believed that Kishore knew that she had filed a discrimination complaint when he discharged her on October 8, 1997 because she overheard other staff, including Sujata Whaley and Sharon Libby, talking about her complaint. These employees were no longer working at PCA in November 1997 but Complainant testified that they were

visiting on the premises. I do not credit Complainant's testimony.

107. On October 10, 1997, Complainant filed a second complaint with the Commission. Her complaint charged that Kishore had discriminated against her in retaliation for her earlier complaint when he failed to pay her wages, ordered her to terminate certain patients and discharged her, effective October 30, 1997.

108. Kishore testified that he received a discrimination complaint from Complainant sometime in December 1997 but he did not recall whether it was Complainant's September 1997 or October 1997 complaint. Kishore testified that he forwarded the complaint to his attorney but did not discuss it with Complainant prior to October 10, 1997. Kishore also testified that he never overheard staff at PCA discuss Complainant's discrimination charges. I credit Kishore's testimony regarding his knowledge of Complainant's complaint activity in October 1997.

109. On October 28, 1997, Fleet National Bank declined Preventive Medicine Inc.'s application for a line of credit to pay off some of its debt. (Joint Exhibit No. 18).

110. On November 3, 1997, Complainant wrote Kishore and denied that she held a "consultant" position at PCA. In her letter, Complainant also denied that she was an "independent contractor" or that she held a position as a "social worker." Complainant contended that Kishore had hired her as an employee to work as the clinical director for PCA. (Joint Exhibit No. 31A).

111. Complainant claimed that, as of January 6, 1998, Respondents Kishore and PCA did not pay \$660.00 in back wages that she earned when she worked from August 1, 1997 to October 31, 1997. (Joint Exhibit Nos. 41A-E).

112. Complainant testified that she felt humiliated, embarrassed and desperate in August 1997 and was stripped of her dignity. Complainant also testified that, after her discharge, she experienced sleeplessness, morning terrors, feelings of hopelessness, desperateness, depression, stress and anxiety for several months and lost 80 pounds during this period. Complainant testified that she had difficulty driving because she was anxious. I credit Complainant's testimony.

113. Complainant's tax return shows that PCA paid her \$9,667.50 in wages during 1996. In 1997, PCA paid Complainant \$14,107.50 in wages until June 1997 and thereafter it paid her \$7,500.00 as an independent contractor for a total of \$22,500.00 (Joint Exhibit Nos. 5 and 6). In her private practice, Complainant's fee for self-payors ranged from \$20.00 per hour to \$60.00 an hour from her insurance carriers.

114. In 1996, Respondents recovered \$1,130.00 of approximately \$7,000.00 billed in patient payments and insurance reimbursement by Complainant. In 1997, Respondents received direct payment and insurance reimbursement for \$6,275.00 of Complainant's work while it paid her over \$21,000.00. (Joint Exhibit No. 16).

115. Complainant's tax returns indicate that her business income for 1998 through 2002 was as follows: 1998--\$6,484.00; 1999--\$10,726.00; 2000--\$10,264.00; 2001--\$4,639.00; 2002--\$5,231.00. (Joint Exhibit 6).

Treatment of Other Employees at PCA

116. Eleanor Burke is a female who was born on September 24, 1929. Burke has worked with Kishore for at least 20 years during which she performed various administrative tasks. Burke worked at PCA from 1993 to the end of 1996⁴ and performed various administrative duties, including maintaining a library for the National Library of Addictions. Burke sometimes worked as a receptionist at PCA but did not perform billing. Burke worked with Kishore on the national addictions conference he held in November 1996.

117. Burke left PCA in late 1996 because of its financial difficulties and that of Kishore. When Burke left PCA, she was an employee and not an independent contractor. Burke testified that she generally worked 40 hours a week at PCA during 1993 to 1996. Burke never received a performance evaluation from Kishore and never saw Kishore use performance evaluations at PCA.

118. Burke knew that Complainant saw patients as a "social worker." Burke testified that she did not know Complainant to be a clinical director. During the time period that

⁴Although she no longer works for Kishore or PCA, Burke testified that she worked for Kishore on other occasions after January 1997 but did not recall the dates.

Burke worked at PCA, Complainant never complained to her about Kishore or the work she performed at PCA.

119. Paula J. Smith is a female who was born on January 4, 1945. From August 1997 to the end of February or beginning of March 1998, Smith worked at the front desk and signed in patients at PCA. Smith regularly worked on Friday evenings, Saturdays and occasionally on Sunday and during the week. In or about October 1997, Kishore assigned Smith to open mail and write out bills for which he signed checks, including rent, answering service billing service and bottled water. Smith understood that she was hired as an "employee" although she reported her own taxes as PCA did not deduct them.

120. When Smith began working at PCA, she observed that Kishore required more organization in his office. Smith discovered a substantial volume of old, unopened mail, including bills in arrears. While none of Smith's weekly checks bounced, she knew that the checks for other workers "bounced."

121. While Smith sometimes worked with Chasy, she did not recall meeting Complainant prior to the instant hearing.

122. Sarah J. Farry is a female who was born on June 2, 1950. Farry has worked as a nurse practitioner for PCA since May 2002. Farry also worked as a nurse practitioner at PCA in 1996 and 1997 on Tuesday and Thursday evenings from 6:00 p.m. to 9:00 p.m. Farry saw patients and addressed their medical and/or substance abuse issue(s). Farry also worked with Anglin who conducted alcoholism and

spiritual counseling sessions and ran Alcoholic Anonymous (AA) groups. PCA issued a Form 1099 to Farry for 1996 in the amount of \$2,300.50. (Joint Exhibit No. 2). Farry testified that Kishore did not offer her any benefits or conduct a performance evaluation of her work.

123. Farry testified that she did not know Complainant, had never heard her name, and did not know of any individual who held the title of clinical director at PCA during 1996 and 1997.

124. Smith testified that Kishore did not pay her and other workers for a one month period. Farry testified that she knew that PCA was having financial difficulties and that she and other employees were paid late. In August 1997, Farry learned that Kishore was experiencing financial difficulties.

125. Smith and Farry testified that they never witnessed Dr. Kishore treat employees differently due to age or gender. I credit their testimony. Burke testified that she never saw Kishore treat any employees differently because of their age or gender and that she had no complaints about how he treated her. Burke also testified that Kishore treated all employees with "great respect." I credit Burke's testimony.

III. CONCLUSIONS OF LAW

A. Claim Based on Gender and Age Discrimination

Massachusetts General Laws, Chapter 151B, §§4(1) and 4(1B), makes it unlawful to discriminate in employment based on an individual's gender and/or age. Chapter 151B protects individuals who are forty years or older when the alleged discrimination occurred. See e.g., Hurley, Ford & Massachusetts Commission Against Discrimination v. Melrose Police Department, 27 MDLR 7 (2005); General Laws, Chapter 151B, §1(8). In her initial complaint, No. 97-BEM-3257, Complainant alleged that Kishore discriminated against her based on her gender (female) and age (55 years old) when he reneged on his promise to hire her as a clinical director at PCA, withheld her pay and reassigned her supervisory duties to younger female employees who had lesser supervisory and clinical experience.

In the absence of direct evidence of an unlawful motive based on Complainant's gender and/or age, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).⁵ See also Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005); Lipchitz

⁵Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

v. Raytheon Company, 434 Mass. 493, 504 (2001)(Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation).

To establish a prima facie case of discrimination based on her gender and/or age, Complainant must show by credible evidence that (1) she is a member of a protected group based on her gender and/or age, i.e., that she was a female and/or 40 years or older when Kishore took the alleged adverse employment actions at issue in the instant complaint; (2) she was capably performing her duties and responsibilities as a psychotherapist or counselor when Kishore took the alleged adverse employment actions at issue; (3) Kishore subjected her to adverse employment actions in 1996 and 1997; specifically, that Kishore did not hire her to be a clinical director at PCA, as promised, withheld her pay and reassigned her supervisory duties to younger female employees who had lesser supervisory and clinical experience; (4) similarly situated employees not of Complainant's protected group(s) were treated differently or that Kishore's actions occurred under circumstances that would raise a reasonable inference of unlawful discrimination based on her gender and/or age. See e.g., Knight v. Avon Products, 433 Mass. 413, 420-21 (2003), quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-312 (1996); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Stephan and Massachusetts Commission Against Discrimination v. SPS New England, Inc., 26 MDLR 332 (2004).

Since Complainant is a female, she has shown that she is a member of a protected group based on her gender. Complainant has also proved that she is a member of a protected group based on her age because she was 55 years old when Kishore took the alleged adverse employment actions at issue in these complaints. Lee v. President & Fellows of Harvard College, 60 Mass. App. Ct. 836 (2004). There is also no dispute in the hearing record that Complainant adequately performed her duties as a counselor or psychotherapist while she worked at PCA in 1996 and 1997. See Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003).

Complainant has failed, however, to meet the remaining elements of her prima facie case of discrimination based on her gender and/or age. First, based on the totality of evidence in the hearing record, I find that Complainant has not proved that Kishore offered her a full-time position and/or a position as a clinical director at PCA at anytime in 1996 or 1997. I fully credit Kishore's testimony that he hired Complainant solely as a part-time counselor to provide individual psychotherapy to patients at PCA in a manner similar to Koenig, Complainant's predecessor, but a less costly hourly rate. While Kishore may have discussed his plans to establish a clinic to serve addicted populations with Complainant, he did not operate such a clinic at PCA in June 1996 and 1997, nor did PCA have a department designated for counseling over which Kishore assigned management responsibilities to Complainant. In addition, the totality of the evidence in the record established that Kishore abandoned his "plans" for a clinic in early 1997, for economic reasons, based on Ohrstrum's

research and his understanding that he would have to operate the clinic as a not-for-profit organization under public health licensing requirements.

Complainant did not produce any evidence to establish that Kishore assigned her to work a full-time shift, i.e., 40 hours a week, or that she worked a full-time shift at anytime while she worked at PCA. To the contrary, PCA's records establish that Complainant never worked more than 25 hours in any week during her first year of employment at PCA . (Joint Exhibit No. 1). In addition, it is undisputed that Complainant continued her consultant work for HRI and maintained her private practice throughout the entire time period that she worked at PCA.

During her employment at PCA, Complainant did not perform any duties that were consistent with those that would have been reasonably attributable to a clinical director. While Complainant contended that one of her responsibilities was to supervise other counselors at PCA, she had no input into the hiring, salary, work hours, or job duties of other counselors nor did she evaluate their work performance or provide training. Complainant also did not prove that she actually supervised other counselors during her tenure at PCA. To the contrary, Complainant testified that the counselors consistently rejected her attempts to supervise their activities and that they never met with her in supervision sessions. I also find that Complainant's short-lived supervision of Chasy for purposes of his clinical licensing requirements is not sufficient, by itself, to establish that she functioned as his supervisor. Rather, I find that Complainant's clinical

supervision of Chasy was voluntary, was not required by PCA as part of her job duties and was conducted solely for Chasy's benefit. Finally, none of the witnesses who testified at the hearing referred to Complainant as a clinical director nor did they believe that PCA had hired a clinical director during 1996 and 1997. Their testimony is consistent with the staff schedule for PCA, dated December 2, 1996, wherein Complainant is listed as a "counselor" along with Thomas, Anglin and Roberts, the other staff counselors at PCA. (Joint Exhibit No. 17A).

While Complainant referred to herself, for the first time, as a "clinical director and supervisor" in her memoranda, dated June 7 and 14, 1997, I find that her reference was entirely self-serving and represented an attempt to unilaterally change her role and the scope of her job duties at PCA. (Joint Exhibit Nos. 26 and 17). In addition, Complainant may have conducted some minimal research but she did not develop the personnel policies or detailed manuals that she understood were part of the clinical director's duties and responsibilities.

Second, Complainant did not establish that Kishore transferred her alleged supervisory duties to younger less qualified individuals who were not of her protected group(s). Complainant did not prove that Kishore hired Manfredo and Grant to assume her supervisory functions. As discussed herein, there is no evidence that Complainant supervised counselors or staff at PCA or that Kishore assigned supervisory duties to her. Rather, I credit Kishore's testimony that he supervised Complainant and the other counselors at PCA during the time period relevant to

these complaints. In addition, Complainant produced no credible, objective evidence regarding the ages of Manfredo or Grant or their qualifications, background and experience. Even if Complainant had submitted evidence of their ages, there is no evidence that PCA hired Manfredo or Grant in 1996 or 1997 as an employee or independent contractor or that Kishore assigned them to supervise Chasy and/or Roberts. Accordingly, I conclude that Complainant has presented no evidence that Manfredo and/or Grant assumed any of her purported supervisory duties or responsibilities in 1997.

While there is no dispute that Kishore reduced Complainant's work hours and withheld her wages beginning on or after July 3, 1997, Complainant has not shown that Kishore treated her differently or less favorably than similarly situated employees, not of Complainant's protected group(s). Complainant contends that Kishore treated Chasy, a younger, male employee, more favorably than her because he hired Chasy on a full-time basis in February 1997, assigned some of Complainant's job duties to him, paid his wages during 1997 and retained him on PCA's payroll while he discharged Complainant on July 30, 1997.

For the reasons discussed below, I summarily reject Complainant's contention that Chasy is similarly situated to her "in terms of performance qualifications and conduct, without such differentiating or mitigating circumstances that would distinguish their situations." Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994), cert. denied, 514 U.S. 1108 (1995), quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); Matthews v. Ocean

Spray Cranberries, Inc., 426 Mass. 122 (1997); Massachusetts Commission Against Discrimination & Gillis v. Raytheon Company, ___ MDLR ___ (2005); Glover v. Boston Fire Department, 22 MDLR 95 (2000). First, I find that Complainant's primary job duties and functions differed significantly from those of Chasy's. Kishore hired Complainant in 1996 to provide individual psychotherapy to patients as a replacement for Koenig while he hired Chasy in 1997 to perform different duties and functions. I fully credit Kishore's testimony that he hired Chasy to market, conduct outreach, serve as a liaison with in-patient, hospital-based addiction treatment programs and provide counseling to patients to facilitate their admission into inpatient programs and their transition to outpatient treatment with PCA.

I also find that Chasy and Complainant are not similarly situated in terms of their hourly rates at PCA and their education, training and experience. While Complainant had almost 30 years experience as a psychotherapist prior to working at PCA, she had no background or experience, unlike Chasy, in providing the type of services to addicted populations that Kishore wanted to serve as part of his practice. There is also no evidence in the record that Chasy provided individual psychotherapy on an ongoing basis to patients at PCA before or after Kishore discharged Complainant, effective October 30, 1997. While Chasy periodically screened new patients to assess their needs and the appropriate services to be provided by PCA, there is no evidence that these patients were assigned to Chasy for individual psychotherapy. In addition, there were other employees at PCA in 1997 who

also conducted initial assessments, including a nurse practitioner, a physician's assistant and counselors, but did not provide individual psychotherapy.

Chasy gradually undertook additional duties and tasks at PCA that included administrative and clerical functions such as answering the telephones, serving as a receptionist and buying supplies. Chasy also undertook more significant duties when he changed PCA's billing system and worked with an outside billing service to help to resolve Kishore's chronic problems with PCA's account receivables. I credit Kishore's testimony that Chasy undertook these tasks on his own initiative and that they had a positive impact on PCA's cash flow. Complainant did not produce any evidence to establish that she also performed these tasks nor did she contend that Kishore had assigned them to her prior to Chasy's hire in February 1997.

I also summarily reject Complainant's comparison to Ohrstrum as I find that Kishore hired him, as an independent contractor, for eight or nine weeks to perform a few tasks that he had not assigned to Complainant; specifically, Ohrstrum investigated the feasibility of establishing a free-standing substance abuse clinic and established personnel files with credentialing information for staff at PCA. I also find that Ohrstrum was certainly more qualified than Complainant to perform these tasks based on his superior and extensive management experience with budgets and substance clinics. There is also no evidence that Ohrstrum supervised counselors at PCA or counseled patients.

I reject Complainant's contention that Kishore treated her differently based on her gender and/or age when he converted her to an independent contractor position in June 1997 and withheld her pay during various time periods after June 1997. The evidence in the record is undisputed that Kishore converted all employees at PCA to independent contractors in June 1997, based on his ongoing, well-documented financial difficulties at Respondent. (Joint Exhibit No. 5). Similarly, it was clearly established in the record that PCA issued dishonored checks during the relevant time period to Complainant and 10 other employees, including male and female employees.⁶ Accordingly, I find that Complainant has not shown that Respondents treated Complainant differently or less favorably than younger male employees regarding her conversion to an independent contractor position or PCA's failure to timely pay her for wages earned during various time periods after July 1997. See e.g., Massachusetts Commission Against Discrimination & Kampion v. Cisco Systems, Inc., 25 MDLR 464 (2003)(the complainant failed to show that her employer treated her differently from similarly situated younger male employees), affirmed by Full Commission, 26 MDLR 43 (2004). For the above reasons, I conclude that Complainant did not establish a prima facie case of discrimination based on her gender and/or age in violation of Chapter 151B, §§4(1) and 4(1B) when Kishore took the employment actions at issue in this complaint.

Assuming arguendo that Complainant has established a prima facie case of discrimination based on her gender

⁶The parties did not submit evidence regarding the ages of these employees.

and/or and age, the burden shifts to Kishore and PCA to articulate a legitimate, non-discriminatory reason(s) for their employment actions. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, 432 Mass. at 116-118. If Respondents meet their burden of production, Complainant must then show by a preponderance of the evidence in the record that Respondents' proffered reason(s) was not the real reason for their actions and that Respondents acted with a discriminatory intent, motive or state of mind based on her gender and/or age. See Lipchitz, 434 Mass. at 504; Blare v. Husky, 419 Mass. 437, 443 (1995). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Respondent] for making the adverse decision is false." Lipchitz, supra. Complainant retains the ultimate burden of proving that the alleged adverse employment actions were the result of a discriminatory animus based on her gender and/or age. Id.; Abramian, 432 Mass. at 117.

Based on the totality of the evidence in the record, I find that Kishore has articulated legitimate, nondiscriminatory reasons for the employment actions at issue in this complaint. As discussed above, I fully credit Kishore's testimony that he never promised Complainant a full-time position or a clinical director position at PCA in 1996 or 1997 and that he never assigned Complainant to supervise the counselors at PCA. I also credit Kishore's testimony that he reduced Complainant's work hours beginning in June 1997 and did not pay her, along with 11 other employees, during certain pay periods in June and August 1997 because of the ongoing financial

difficulties at PCA. The documentation submitted by Respondents amply corroborates the fact that PCA experienced chronic cash flow problems in 1996 and 1997 that resulted in its failure to timely pay rent, vendors and wages to its staff, including Complainant. (Joint Exhibit Nos. 18 and 19).

Finally, Complainant did not produce any documents or witness testimony to establish that Kishore's actions were motivated by a discriminatory animus based on her gender and/or age. I fully credit the testimony of Burke (74 years old), Farry (58 years old) and Smith (53 years old) that they never saw Kishore treat any employees differently because of their gender and/or age. An additional factor that belies Kishore's discriminatory animus based on Complainant's gender and/or age is the fact that he hired Complainant in June 1996, only a few months before Kishore began to take the alleged adverse employment actions at issue in this complaint. See e.g., Landry v. Dana-Farber Cancer Institute, Inc., 24 MDLR 214 (2002); Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (1st Cir. 2002) ("When the same person hires and later fires the employee who claims the firing was discriminatory, judges are skeptical, because why would someone who disliked whites, or Germans, or members of some other group to be working for him have hired such a person in the first place"); Gillie-Harp v. Cardinal Health, Inc. d/b/a Cardinal Distribution, 249 F.Supp. 2d 1113, 1119 (2003) ("the so-called 'same-actor inference' is grounded in the psychological assumption that employers are unlikely to hire individuals from a group the employer dislikes and then fire them once they are on the job"). Complainant has

offered no reasonable explanation for Kishore's alleged change in his attitude or treatment of her.

I conclude therefore that Complainant has not proven by a preponderance of the evidence in the record that Kishore's proffered reason(s) were false or that he acted with a discriminatory intent, motive or state of mind based on her gender and/or age. Lipchitz, supra. I also conclude that Complainant has failed to establish that Respondents engaged in unlawful discrimination based on her gender and/or age in violation of Chapter 151B, §§4(1) and 4(1B).

B. Retaliation Claim

In her second complaint, No. 97-BEM-3666, Complainant alleged that Kishore retaliated against her for her participation in protected activity when he unlawfully refused to pay her wages, did not assign new patients to her and ordered her to terminate the patients whom she was seeing at PCA. Complainant also alleged that Kishore retaliated against her when he discharged her, effective October 31, 1997. (Complaint, dated October 10, 1997).

Massachusetts General Laws, Chapter 151B, §4(4), prohibits an employer from retaliating against an employee who has participated in protected activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." See

Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208, 215 (2000), citing Bain v. Springfield, 424 Mass. 758, 765 (1997). In addition, Chapter 151B, §4, paragraph 4(A) makes it unlawful "[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter." Retaliation is a separate and independent claim of discrimination, "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful [employment] practice." See Pontremoli v. Spaulding Rehabilitation Hospital, 51 Mass. App. Ct. 622, 625 (2001); Abramian v. President & Fellows of Harvard, supra.; Fountas v. Medford Public Schools, 22 MDLR 264 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

The Commission and courts broadly interpret Chapter 151B's anti-retaliation provision to apply to both informal and formal actions opposing unlawful employment practices. See e.g., Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999). The anti-retaliation provision applies to instances where an individual participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). "Participation" includes a formal action such as filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. Massachusetts Commission Against Discrimination & Ramos v. New World Security Associates, Inc., 26 MDLR 173

(2004).

To establish a prima facie case of unlawful retaliation in the absence of direct evidence of a retaliatory motive, as in this case, Complainant must show by credible evidence that: (1) she participated in protected activity; (2) Kishore knew about Complainant's participation in protected activity prior to taking the adverse employment action(s) at issue in this complaint; (3) Complainant suffered an adverse employment action(s) after she participated in protected activity; (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and Kishore's adverse employment actions. See Wareing and Massachusetts Commission Against Discrimination v. New Bedford School Department, supra.; Hudson v. Pembroke/Hanover Elks Lodge, et. al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Since a link between protected activity and the adverse employment action(s) at issue is not always explicit, the Commission can infer "a causal connection where the timing of events makes an inference reasonable." See Ritchie v. Department of State Police, 60 Mass. App. Ct. 599 (2004) ("close temporal proximity between the protected activity and the adverse employment action permits an inference of the casual nexus necessary for a finding of retaliation"); Kealy v. City of Lowell, Department of Public Schools, 21 MDLR 19 (1998), citing Cimino v. BLH Electronics, Inc., 5 MDLR 1263, 1287 (1983) (finding retaliation where the discharge occurred within 15

months after the protected activity); Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 1144-1145 (1995)(termination taken within six weeks of participation in protected activity); Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976).

I find that Complainant participated in protected activity when her attorney wrote to Kishore on July 25, 1997 and demanded a payment of \$3,900.00 in unpaid wages and attorneys' fees. In his letter, Complainant's attorney also wrote that Kishore had unlawfully reduced Complainant's hours, ordered her to terminate her patients and undermined her authority as a supervisor based on her gender and age. (Joint Exhibit No. 30). Complainant also participated in protected activity when she filed her initial discrimination complaint with the Commission on September 11, 1997.

It is undisputed that Kishore knew about Complainant's July 25 letter because he responded to it by issuing a check to Complainant on July 31, 1997 for the full amount of her back wages. (Joint Exhibit No. 30A). However, I credit Kishore's testimony that he did not know about Complainant's September 11 complaint until sometime in December 1997. I reject Complainant's contention that Kishore knew about her September 11 complaint at an earlier date because she overheard certain staff at PCA discussing it sometime in November 1997.

I also find that Kishore had already taken the alleged adverse employment actions that Complainant described in her July 25 letter before he received her letter. The

testimony in the record is undisputed that Kishore told Complainant on July 2 and 9, 1997 that he had to reduce her hours to no more than eight hours each week and that she had to terminate treatment of her patients at PCA. Of course, there is no dispute that Kishore knew of Complainant's July 25 letter when he told her on October 8, 1997 that he was terminating her services, effective October 30. (Joint Exhibit Nos. 31B and 31C). Since less than six months elapsed between Kishore's receipt of Complainant's April 25 letter and his decision on October 8 to terminate her services, Complainant has established a temporal proximity sufficient to permit an inference of a causal nexus regarding her termination. Ritchie v. Department of State Police, supra. For these reasons, I conclude that Complainant has established a prima facie case of retaliation based on her termination, effective October 30, 1997.

I conclude, however, that Kishore has articulated a legitimate, non-discriminatory reason for terminating Complainant's services, effective October 30, 1997; specifically, that he could no longer afford her psychotherapist's position given the well-documented and ongoing financial difficulties at PCA. As discussed above, Kishore provided detailed documentation to establish the ongoing and chronic cash flow problems at PCA and his unsuccessful efforts to remedy such problems. Kishore also submitted sufficient evidence to establish that PCA had a substantial disparity between the amount of direct payments and insurance reimbursement it received as compared to the wages and independent contractor payments it made to Complainant to cover the psychotherapy services she

provided in 1996 and 1997. (Joint Exhibit No. 16). While PCA's financial difficulties may have resulted, in part, from Respondent's Kishore's mismanagement, there is no evidence that Complainant was singled out to bear the brunt of Kishore's actions because of her participation in protected activity. As discussed above, all employees at PCA were converted to an independent contractor status simultaneous with Complainant in June 1997 and several left because of Kishore's failure to pay them.

I also conclude that Complainant offered no credible, objective evidence to show that Kishore's claim that PCA had substantial financial difficulties in 1996 and 1997 is false or that it was based on a retaliatory animus based on her participation in protected activity. Since I cannot draw an inference that Complainant's termination was motivated by a retaliatory animus, I conclude that Respondents did not engage in unlawful discrimination in violation of Chapter 151B, Section 4(4).

IV. ORDER

For the reasons set forth above, the complaints in this matter are hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may file 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 5TH day of December, 2005

Kenneth B. Grooms
Hearing Officer⁷

⁷ Given my findings and conclusions in this case, I have not reached the issue of whether Complainant's allegations in her initial complaint are untimely since they may have occurred more than six months prior September 11, 1997. See e.g., Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001). I also have not reached the issue of whether Complainant was an "independent contractor" on or after June 3, 1997 such that the Commission did not have jurisdiction over the allegations Complainant raised in her second complaint. See e.g., Athol Daily News v. Board of Review of the Division of Employment and Training, 439 mass. 171 (2003) the factors for determining whether an individual is an independent contractor are whether the services were performed: (1) free from the control or direction of the employer; (2) outside of the usual course of business, or outside of all of the places of business, of the enterprise; (3) as part of an independently established trade, occupation, profession or business of the employee); Comey v. Hill, 387 Mass. 11, 16 (1982); Marx v. South Shore Publishing Co., 2 MDLR 1115 (1980).