

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD AND PATRICIA LUBOLD,
Complainants

v.

DOCKET NO. 98-BEM-3943

MASSACHUSETTS TRIAL COURT,
Respondent.

Appearances: J. Lynn Milinazzo-Gaudet, Esq., for the Complainants
Anne-Marie Ofori-Acquaah, Esq., for the Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On December 23, 1998, Complainant, Patricia Lubold, filed a complaint with this Commission charging Respondent, Massachusetts Trial Court, with unlawful discrimination in employment on the basis of gender in violation of Massachusetts General Laws (M.G.L.) chapter 151B, sections 4(1) and (16A) and retaliation in violation of section 4(4). Specifically, Complainant alleged that she had been subjected to sexual harassment, that Respondent failed to investigate and respond effectively to such harassment, and that Respondent retaliated against her after she complained about the harassment.

The Investigating Commissioner issued a finding of probable cause with respect to the allegations in the complaint. Attempts to conciliate the matter were unsuccessful

and the case was certified for public hearing.

A public hearing was held before me on June 30, July 19, 21, 22, and August 16, 2004. I have duly considered the entire record before me in making the below findings. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented. To the extent that testimony of the witnesses is not in accord with the findings herein, such testimony is not credited. To the extent the proposed findings of either party comport with my analysis and determination of the matter, they have been adopted.

II FINDINGS OF FACT

1. Complainant, Patricia Lubold, resides in East Sandwich, Massachusetts.
2. Respondent, Massachusetts Trial Court (“the Trial Court”), is an employer within the meaning of M.G.L. chapter 151B, section 1(5).
3. Complainant was hired by Respondent in the Clerk’s Office at the Wrentham District Court as a Procedures Clerk in February 1984. Complainant reported directly to the Office Manager. On occasion, Complainant performed administrative support duties, such as typing letters and taking notes, for one of the assistant Clerk-Magistrates in the office, Ross Pini, Jr.
4. In September 1991, Complainant requested and received a voluntary layoff from her position in order to care for her young children.
5. Complainant testified that between the time she was hired in 1984 and the time she left her position in 1991, she was subjected to harassing conduct by Pini. Complainant testified that this conduct included making inappropriate comments about

Complainant's physical appearance, sending Complainant anonymous poems, rubbing up against Complainant when he walked by her, and placing his hand on Complainant's hips and buttocks. Complainant also believed Pini made numerous hang-up telephone calls to her home in the evenings between 5:00 and 8:00 and on Saturday mornings, but she was never able to verify the source of any such calls.

6. Complainant testified that she did not make any complaints or reports of sexual harassment during the time period 1984-1991, because she was intimidated by Pini's position of power within the community, his claimed criminal connections, and his violent temper. Complainant also testified that she did not make a complaint because she had not informed her husband of the severity of Pini's conduct. Complainant testified that while she told Respondent she was taking a voluntary layoff in to care for her children in 1991, she also left because of Pini's harassment. Complainant acknowledged in her testimony that she did not mention sexual harassment as a reason for leaving in her complaint in this matter.

7. Pini denied Complainant's allegations of harassment during the time period 1984-1991. Pini testified that during this period Complainant often asked him for favors and for assistance relating to personal matters, such as helping her figure out mortgage payments for a prospective residence, assisting her when her car broke down on the way to work, and contacting a judge on behalf of her brother. Pini testified that he assisted Complainant on several occasions when she asked for his assistance. I credit Pini's testimony.

8. In the spring of 1992, Complainant sought to return to work at Wrentham District Court. She called Pini to express her interest in returning to a position at a Grade

9 level, the level she held previously as Procedures Clerk. Pini testified that he told Complainant that because a hiring freeze was in effect, there were no Grade 9 positions available. Complainant made several more calls to Pini in the summer of 1992, winter of 1993 and spring of 1993 to inquire about Grade 9 positions, only to be informed each time that no such positions were available, but that Grade 6, 7 and 8 level positions were available. Complainant also contacted other individuals at Wrentham District Court about Grade 9 positions, but was told that no positions were available. Complainant was also told that her recall rights under her union contract had expired by this time. Pini testified that when Complainant contacted him to ask about Grade 9 positions in October of 1993, which were still unavailable, she became very angry with him about the lack of available work. I credit Pini's testimony.

9. In early 1994, Complainant filed an internal sexual harassment complaint against Pini with Paul Edgar, Respondent's Director of Human Resources. In this complaint, Complainant alleged that Pini had failed to help her become re-employed at a Grade 9 level because she had rebuffed advances he had made three years earlier when she was working at the Wrentham District Court. Complainant also alleged that she had received hang-up telephone calls three years earlier that she believed came from Pini. Complainant testified that although she had not received such calls prior to the time she filed her complaint, she believed the calls would begin after she filed her complaint. Complainant testified that for this reason she contacted the NYNEX Annoyance Call Bureau and placed a trap on her telephone. Complainant produced evidence that on March 3, 1994, NYNEX traced a call made to her house from Wrentham District Court at 4:48 p.m. Complainant testified that she was "99% sure" that this call was made by Pini,

but acknowledged that she could not verify the source of the call.

10. On June 6, 1994, the Trial Court issued a report after conducting an investigation of Complainant's internal sexual harassment complaint. The report concluded that there was insufficient evidence that Pini had harassed Complainant. With respect to the telephone calls mentioned by Complainant, the report found there was "insufficient evidence that Mr. Pini was involved in any of the long pattern of annoying phone calls to various employees in the courthouse and Ms. Lubold's refusal to divulge the name of the person or persons whom she told of the telephone trace she was placing made it impossible to further investigate this allegation." Further, the Trial Court found that there was no evidence that Pini had made the traced call on March 3, 1994.

11. On September 29, 1997, Complainant was hired by Respondent to work as a secretary in the Clerk Magistrate's Office at the Barnstable County Juvenile Court. Employees of the Barnstable County Juvenile Court were subject to assignment and reassignment at the Court's six locations of Barnstable, Plymouth, Orleans, Nantucket, Falmouth and Martha's Vineyard. Complainant was initially hired to work in the Barnstable office. At all relevant times, the Chief Magistrate of the Barnstable County Juvenile Court was Charles Andrade.

12. In November of 1997, Complainant was contacted by Massachusetts State Trooper Kenneth Halloran, who was in the process of conducting a background investigation of Pini, a candidate for Clerk Magistrate of Wrentham District Court. Complainant informed Halloran of her 1994 sexual harassment complaint against Pini. Pini testified that he did not know Halloran and never spoke to him or any other state police officer about his background check. I credit Pini's testimony.

13. Complainant testified that she began to receive hang-up telephone calls at her home shortly after she spoke with Halloran in November 1997. Complainant believed these calls were generated by Pini. Complainant also testified that she noticed an increase in hang-up telephone calls at work. Complainant testified that the calls at work were similar in nature to those she received at home: the caller hung up a few seconds after Complainant answered the call and identified herself. Complainant believed these calls were also generated by Pini. Complainant acknowledged that she did not have a private telephone line at work but, rather, calls came in to a central line at the Clerk's office and that line could be answered by anyone in the office.

14. In December of 1997, Complainant told Halloran she was receiving hang-up telephone calls she believed were from Pini. After Halloran advised her to contact her local police department, Complainant reported the calls to the Sandwich Police Department and a trap was placed on her line. Complainant also contacted State Trooper John R. Kotfila regarding the calls. Neither the Sandwich nor the state investigation ultimately revealed any calls from Pini's work, home or cell phone. In addition, Pini's home telephone, cell phone and calling card records do not show any calls made to Complainant's home or to the Barnstable County Juvenile Court.

15. Pini testified that he never made any telephone calls to Complainant in the November-December 1997 time period, nor at any other time. He testified that he never had any wish to contact Complainant and that he neither attempted to make nor made any such contact. The last time Pini spoke with Complainant was in October of 1993, when she contacted him about Grade 9 job opportunities at the Wrentham Court.

16. Complainant testified that she learned from Officer Kotfila that certain calls,

such as those made at a pay phone or through store-bought calling cards, are untraceable. Complainant testified that she believed the hang-up calls may have been generated from these sources. Pini denied this allegation, testifying specifically that he never called Complainant from a pay phone and that he had never used a store-bought calling card.

17. In January of 1998, Complainant informed Chief Magistrate Andrade that she had been getting hang-up calls in the Barnstable office. Complainant told Andrade she believed the calls were from Pini. At this time Complainant also told Andrade about her 1994 sexual harassment complaint against Pini and that she was working with the State Police to reinvestigate her 1994 complaint. Andrade testified that Complainant told him that the telephone calls were similar to those she had received years ago, calls she believed were made by Pini. Andrade testified that Complainant did not indicate that the calls were frightening and she also never indicated any wish to make a charge of sexual harassment against Pini. Andrade testified that Complainant was very focused on her 1994 complaint, as she expressed to Andrade her belief that the Trial Court's investigation into that complaint had been a "cover up." I credit Andrade's testimony regarding his conversation with Complainant.

18. On January 15, 1998, Andrade called Lois Frankel, Respondent's Human Resources Coordinator for Gender Issues, to discuss various issues regarding a number of employees. Andrade mentioned to Frankel his conversation with Complainant.

19. In March of 1998, Complainant was reassigned to the Barnstable County Juvenile Court's Plymouth location. Complainant testified that hang-up calls continued to come in to the Clerk's office central line, that she believed these calls were generated by Pini, and that she was the intended recipient. Complainant testified that she

complained again to Andrade about the telephone calls. I credit Complainant's testimony.

20. Andrade testified that he responded to Complainant's complaints by taking several steps in early 1998. First, he asked Complainant to keep a log of all hang-up calls she received and to note the date, time and nature of the calls. However, he testified, even though he made this request several times, Complainant never produced a log. Second, he conducted an investigation among staff members in the Barnstable and Plymouth offices regarding hang-up calls. Andrade testified that Complainant's co-workers told him that while they occasionally received hang-up calls on the office's central line, such calls were not a problem. He testified they also told him that Complainant received no more hang-up calls than anyone else in both Barnstable and Plymouth. Third, Andrade suggested placing a trap on the office telephone. Complainant responded by telling him that a trap would be of no use since calls could not be traced if they were made from a pay phone or store-bought calling card. I credit Andrade's testimony.

21. On March 26, 1998, Andrade left a voicemail message for Lois Frankel regarding Complainant, specifically her concerns about the 1994 investigation and the hang-up calls. During the period March 27 through April 7, Andrade and Frankel attempted to contact each other by telephone numerous times, yet were unsuccessful.

22. On April 8, 1998, Andrade and Frankel had a telephone conversation about Complainant's concerns. Andrade told Frankel Complainant had informed him that the state police was reinvestigating her 1994 complaint and that she was receiving hang-up calls at work she believed were from Pini. Frankel testified that in a conversation later

that same day she told Andrade she was available to speak with Complainant about any current incidents of harassment. Frankel scheduled a meeting among herself, Complainant and Andrade for April 28, 1998, the first available date convenient for them all to meet. Frankel then wrote a letter dated April 8, 1998, in which she wrote: "I spoke with Jean Driscoll [Respondent's Labor Counsel] and called you back to ask you to let Ms. Lubold know that I would be glad to speak with her about any concerns she may have related to current incidents of sexual harassment. You suggested that I make myself available to speak with her about her situation generally. I am glad to do this, and in a third phone call we set up a meeting for the three of us in the Juvenile Court in Plymouth for 10:00 a.m. on April 28, 1998."

23. On April 9, 1998, after learning of the April 28 meeting date from Andrade, Complainant immediately instructed Andrade to cancel the meeting. In an e-mail to Andrade dated April 9, Complainant told Andrade that she believed Jean Driscoll had excluded and covered up witness statements relating to the 1994 complaint, and also that Driscoll was "playing the stall game." Complainant wrote: "I have been so wronged and as we are well aware very angry with the trial court and at this point would gain some justice by exposing what they did by using the media. This would be the quickest way for closure for me." In an e-mail later that morning, Complainant told Andrade that "the trial court needs to fix their mess with me," that "this was quashed from high up." Complainant also told Andrade that she intended to speak with the media about her 1994 complaint if Respondent did not respond by the following afternoon: "The clock is ticking and rings tomorrow at 4:30, I'm done being nice and trusting with them, and would gain some much needed closure by letting the media run with it...." Complainant

did not mention hang-up calls in either of her April 9 e-mails.

24. On April 14, 1998, Complainant and Frankel had a telephone conversation in which Complainant told Frankel that the state had reinvestigated her 1994 complaint and re-interviewed all of the witnesses in the trial court's original investigation. Complainant informed Frankel that Pini's name had been withdrawn from consideration for Clerk Magistrate as a result of the reinvestigation, and she also stated that she had been told by others that she "held all the cards." Frankel advised Complainant that while she would be happy to speak with Complainant about current issues, she could not go into events that occurred four years prior. When Complainant told her that knowledge of those event was necessary to an understanding of more recent events, Frankel agreed to obtain copies of Complainant's 1994 sexual harassment allegations and a copy of the trial court's investigatory report. Frankel also promised to contact her supervisor, Paul Edgar, to inquire into the handling of the 1994 complaint. Complainant and Frankel then agreed to meet on April 28, as originally planned. Frankel testified that Complainant did not mention hang-up calls during this conversation. I credit Frankel's testimony.

25. On April 15, Frankel spoke with Paul Edgar about Complainant and also asked for permission to contact Halloran regarding what Complainant had told her about an official investigation. Edgar explained to Frankel that Respondent could not reopen an investigation into a case that had been resolved and closed for four years. However, he did grant her permission to contact Halloran.

26. On April 22, 1998, Frankel had a telephone conversation with Trooper Halloran. Frankel took five pages of notes during this conversation. The notes reflect that, contrary to what Complainant had represented, Halloran told Frankel his office had

not reinvestigated Complainant's 1994 complaint. He explained that his office's job was to conduct a confidential background check on Pini, but not to conduct an investigation into her allegations, and he stated specifically that he did not tell Complainant she had a case, criminal or otherwise. Halloran told Frankel that Complainant had one witness that corroborated some of her allegations, but that he did not remember which aspects of the allegations and he did not know "how good a witness" she was. Halloran also said about Complainant: "seemed sincere, not making anything up, decent person, but who knows."

27. On April 24, 1998, Frankel informed Complainant that Respondent could not conduct a reinvestigation of the 1994 complaint, but that she was available to discuss any current complaints of sexual harassment. Complainant also testified that Frankel asked her during this conversation if she had any proof regarding the origin of the hang-up calls and that she told Frankel she could not prove the origin of the calls without traps.

Complainant testified that Frankel did not state expressly that she would not investigate the hang-up calls, but that she, Complainant, "inferred that she wouldn't." Contradicting Complainant's testimony, Frankel testified that they did not discuss hang-up calls at all during this conversation and that Complainant never mentioned them. Frankel's notes of her telephone conversations corroborate this testimony, as hang-up calls are not mentioned in the April 24 entries of the telephone log, which are very detailed. I credit Frankel's testimony that Complainant did not mention hang-up calls during this conversation.

28. On April 24, 1998, Complainant called Frankel and cancelled the April 28 meeting among her, Andrade and Frankel. Complainant testified that she "thought it was hopeless and a waste of time." Frankel's notes regarding Complainant's cancellation

state: “She said that since I said we would be focusing on the present and future, and she is very happy with Charlie Andrade, it was just too late to pursue. I said several times that it was important that she understand I remain available to meet with her.” I credit Frankel’s testimony regarding her continued willingness and availability to meet with Complainant after Complainant cancelled the April 28 meeting.

29. On April 28, 1998, Frankel called Andrade to make sure he knew that Complainant had made the decision to cancel the meeting, but that she was still available to meet with Complainant.

30. Andrade testified that in addition to calling Frankel on Complainant’s behalf, investigating hang-up calls in Barnstable and Plymouth with other staff members, requesting that Complainant keep a call log, suggesting traps for the telephone lines, and encouraging Complainant to contact her union representative for help, he also referred Complainant to an attorney of his own personal acquaintance. Andrade testified that he was very concerned for Complainant and he wanted to help her in any way he could. Complainant followed up on Andrade’s referral and mentioned the conversation she had with the attorney, Pam, several times in an April 9, 1998 e-mail to Andrade entitled “Pam is wonderful, where was she 5 yrs ago?” Andrade testified that Complainant did not indicate that she was dissatisfied with his response to her complaints but, rather, she seemed pleased and appreciative. I credit Andrade’s testimony.

31. Complainant testified that she continued to receive hang-up calls on a regular basis until June or July of 1998, but that the calls stopped in August. Complainant testified that she made occasional attempts to keep a log of the calls, but that focusing on the calls caused her distress. Complainant stated that her therapist advised her to try to

ignore the calls.

32. Andrade testified that since he did not work in Plymouth, he did not see Complainant on a regular basis. He stated that Complainant called him “at various times” to report hang-up calls, but they did not speak on a weekly basis. Andrade testified that because Complainant did not file or indicate a wish to file a sexual harassment complaint, he did not initiate a formal sexual harassment investigation at Respondent. Andrade testified that Complainant told him that the caller of the hang-up calls never spoke and that she could not determine that Pini was the caller. I credit Andrade’s testimony.

33. At all times relevant to this matter, Linda Pomroy was the manager of the Barnstable office of the Barnstable County Juvenile Court. Pomroy was Complainant’s supervisor in the Barnstable office. Pomroy testified that incoming calls were received by one central line in that office and that anybody in the office could answer the line. She stated that the first person available picked up the call and answered “Juvenile Court.” Pomroy stated that her office received an average of three to four hang-up calls per day. Pomroy testified that such calls were received before Complainant worked in the office, while she worked there, and after she was transferred to Plymouth. Pomroy speculated about several reasons for the hang-up calls: callers may occasionally confuse the regular number with the fax number, callers may be trying to reach the District Court (whose number was inaccurately listed under Juvenile Court in the telephone book) and hang up when they hear the line answered “Juvenile Court,” and callers might hang up due to the line’s poor reception caused by the office’s basement location. Pomroy testified that she did not recall Complainant complaining about any hang-up calls. She

also testified that Complainant did not mention concerns about or reports of sexual harassment, either in 1994 or 1997-98. She stated that Complainant was a “good employee” who was “happy, “joked,” and was “good with people.” I credit Pomroy’s testimony.

34. At all times relevant to this matter, Arlene Mason was a secretary in the Plymouth office of the Barnstable County Juvenile Court. Complainant and Mason shared office space and were both responsible for answering the telephone. Mason testified that the Court was very busy and that the work pace was “crazy.” She stated that the office received many hang-up calls before, during and after Complainant’s tenure at the Plymouth office. Mason stated that the Plymouth Juvenile Court is the only trial court listed under “Trial Court” in the Plymouth telephone book, and she believed that this was the reason her office received so many wrong numbers and hang-up calls. Mason testified that she believed most callers simply hung up when the line was answered “Juvenile Court” and they were trying to reach the Register’s Office, District Court, Probate Court or Town Hall. Mason stated that hang-up calls “got to be a routine thing” in Plymouth. Mason testified that she recalled one time Complainant mentioned hang-up calls to her. She stated that one day Complainant asked her if she had received any hang-up calls on that particular day, and when Mason replied that she had not, Complainant became upset with her. Mason testified that Complainant never told her that she felt scared or threatened by any hang-up calls that came into the office. Mason stated that after Complainant left Plymouth, the office continued to receive hang-up calls on a steady basis. I credit Mason’s testimony.

35. Mason also testified that she had several concerns about Complainant’s job

performance. Mason testified that Complainant often complained about not having been trained to perform certain office tasks, and therefore was sometimes not willing or available to assist Mason. Mason stated that she sometimes became frustrated with Complainant because she did not help enough in an office that had a heavy workload and fast pace. Mason testified that she spoke to Pomroy and Andrade about Complainant, and that she told them she needed a co-worker who could perform the tasks that needed to get done in the office. I credit Mason's testimony.

36. On September 27, 1998, Complainant was reassigned to the Orleans Office of the Juvenile Court. Complainant was the only clerical employee in this office. Andrade testified that he transferred Complainant to the Orleans office because he had received complaints about Complainant from Mason, and that he had the impression Complainant and Mason did not get along well in an office where it was essential that they work together. Andrade stated that when an opening came up in the Orleans office, he viewed it as a good opportunity to allow Complainant to work in an office that she could manage by herself. Andrade testified that he felt concern for Complainant and thought working in a single-person office might lessen the stress she was experiencing. I credit Andrade's testimony.

37. Complainant testified that after she transferred to the Orleans office, she no longer received hang-up calls.

38. On October 16, 1998, a meeting was held among Complainant, Complainant's husband, Andrade, and Jack Buckley, Complainant's union representative. The purpose of the meeting was to discuss Complainant's concern about hang-up calls she had received prior to her transfer. One of the results of this meeting was the

placement by Respondent of a telephone trap on the Orleans telephone line on October 29, 1998. When Andrade commented during the meeting that Complainant had not received any hang-up calls since she had transferred to Orleans, Complainant did not contradict him. At the hearing, Complainant testified that although she never received any hang-up calls in Orleans, she believed “it was only a matter of time” until she received them.

39. On October 29, 1998, Complainant sent an anonymous fax to Pini from the Orleans office to the Wrentham District Court. The fax consisted of Respondent’s sexual harassment policy and was addressed to “A. Ross Pini, Jr.” Complainant acknowledged that she sent this fax in order to lure Pini into making hang-up calls that could be traced to the Orleans telephone line.

40. Pini reported this fax to Daniel Winslow, then First Justice of the Wrentham District Court.

41. On November 5, 1998, Winslow sent a letter to Chief Justice of Administration Barbara Dortch-Okara of the Massachusetts Trial Court in which he reported the fax and requested that an investigation be instituted and, if appropriate, corrective action be taken.

42. On November 5, 1998, Andrade met with Complainant in the Orleans office and notified her of the possibility that the Trial Court would be conducting an investigation into the transmission of the fax. Andrade suggested to Complainant that she contact her union representative and her attorney, since disciplinary action could result.

43. On November 18, 1998, Complainant sent a letter to Frankel in which she stated that she was filing a complaint of “continued sexual harassment by a management

agent of the Trial Court, Mr. A. Ross Pini, Jr.” Complainant did not include specific allegations of harassment in this letter. Complainant wrote: “I formally request that the Trial Court conduct this investigation with an outside independent agency. Due to the nature of this complaint and the history involved, I demand immediate resolution and results.”

44. On November 20, 1998, Complainant sent a letter to Chief Justice Dortch-Okara outlining the 1994 investigation, her involvement in the background check of Pini, and the “annoying hang-up calls from Mr. Pini.” In this letter, Complainant requested that “an unbiased [sic] investigation be done by an outside agency.”

45. On November 29, 1998, Frankel responded to Complainant’s November 18 letter. Frankel sent a letter to Complainant asking her for “information and clarification” of the substance of her complaint so that an appropriate response could be given. Frankel also asked Complainant to delineate the reasons why she requested an investigation with an outside, independent agency, stating that the Trial Court needed “substantive reasons” when departing from its customary investigatory procedures. Frankel also reiterated the ways she and Andrade had tried to assist Complainant since the time Complainant brought matters to their attention. Specifically, Frankel mentioned her telephone conversation with Halloran following up on Complainant’s assertion that the state was reopening an investigation into the 1994 complaint and her attempts to set up an April 1998 meeting with Complainant, which Complainant cancelled. Frankel also mentioned the October 1998 meeting with the union representative and Andrade, Andrade’s questioning of his staff in an effort to corroborate Complainant’s report of hang-up calls, and Complainant’s earlier rebuffs of Andrade’s suggestion about installing

telephone traps. In addition, Frankel attached to the letter the appropriate form for lodging a sexual harassment complaint. Frankel indicated the ways in which the form allowed Complainant to elaborate on her claim and she also offered to assist Complainant in filling out the form.

46. Complainant testified that it was “insulting and upsetting” to get Frankel’s letter and she did not respond to it.

47. When Frankel received no response to her letter from Complainant, she sent a second letter on December 4, 1998. In this letter, Frankel informed Complainant that Complainant’s letter to Dortch-Okara had been referred to her. Frankel again asked Complainant for further information about the nature of her complaint and again offered to assist Complainant in filling out the form she had attached with her previous letter. Complainant did not respond to Frankel’s December 4 letter.

48. On January 5, 1999, Frankel sent a third letter to Complainant. In this letter, Frankel specified the days she was available and wrote that she hoped Complainant would contact her. Complainant did not respond to this letter. Complainant testified that she considered Frankel’s three letters to be “ridiculous” and she believed they were written only because Complainant’s union had “pushed the issue.”

49. On January 11, 1999, Complainant wrote to a union attorney and requested that he tell Frankel not to communicate with Complainant but, instead, to send any correspondence to the union or the MCAD.

50. On January 20, 1999, Complainant wrote a letter to Dortch-Okara referencing the letters she had received from Frankel, specifically Frankel’s offer to assist Complainant in filling out a sexual harassment complaint. Complainant wrote: “I will

not go through another investigation which the trial court conducts, based on what transpired in 1994 and most recently what the State Police informed me of. Simply, I cannot trust the trial court to handle this objectively. I do not think asking for an outside agency to conduct an independent investigation is unfair.” Complainant also asked Dortch-Okara not to show her letter to Frankel.

51. During the same period that Complainant was pursuing an investigation of the hang-up calls, Respondent was proceeding with an investigation of her October fax transmission to Pini.

52. On November 27, 1998, Andrade sent a letter to Complainant informing her that he would hold an informal hearing on December 10, 1998, to determine if there was just cause to discipline her for sending the fax. In this letter, Andrade notified Complainant that Judge Winslow had filed a complaint alleging harassment by Complainant of Pini. Andrade stated the allegations included in the complaint included harassment, since Complainant’s misspelling of Pini as “Pinis” “phonetically alluded to the male anatomy,” a demonstration of a “lack of respect toward a person in authority,” and “negligent or improper use of Trial Court property or equipment.”

53. On December 10, 1998, Andrade conducted an informal hearing regarding the fax transmission. Complainant and a union business agent attended the hearing.

54. On December 14, 1998, Andrade issued Complainant a written reprimand for “improper use of Trial Court equipment” and “harassment.” While Andrade stated in the reprimand that he accepted Complainant’s explanation for why she misspelled Pini’s last name, he nevertheless reprimanded her for “harassment of Mr. Pini (sending the document to him at his place of employment).” Complainant was very upset about the

reprimand for harassment. She testified that at the conclusion of the meeting they all three agreed that Complainant would be disciplined for “unauthorized use of equipment” only. Consequently, on December 23, 1998, Complainant filed a grievance with her union regarding the December 14 reprimand.

55. Complainant testified that she was very upset after she received the December 14 reprimand. She stated that she thought Respondent was trying to make it look like she had sexually harassed Pini, when all along she believed that she was the victim of sexual harassment by Pini. Complainant also testified that she thought Respondent was getting ready to fire her because Andrade had reprimanded her for two things rather than the one she believed they had agreed upon.

56. On December 23, 1998, Complainant filed the instant complaint with this Commission.

57. On January 4, 1999, Complainant received a written warning for two workplaces absences that had occurred on October 2, 1998 and December 24, 1998.

58. The first absence, October 2, had been discussed by Complainant and Andrade on October 9, 1998, when they met specifically for the purpose of reviewing certain concerns Andrade had about Complainant’s work performance. The October 2 absence was unauthorized because after Linda Pomroy had refused Complainant’s request to take the day off as a personal day, due to insufficient coverage in the office, Complainant took the day off anyway as a sick day. Andrade testified that he advised Complainant on October 9 that her unauthorized absence a week earlier was unacceptable and should not be repeated. Complainant assured Andrade that the situation would not happen again. The second absence, December 24, was also unauthorized. Pomroy

testified that when Complainant called her at 7:15 a.m. that morning to ask if the courts were closed due to snowfall, Pomroy stated that the courts were open and that Complainant should report to work as usual. Complainant did not report to work on December 24. Pomroy testified that Complainant's last-minute, unauthorized absence caused coverage problems, since Complainant was the only clerical employee employed in the Orleans office and because it was Christmas Eve day. Following her December 24 absence, Complainant requested that she be able to take a personal day retroactively, but Andrade denied this request. Complainant testified that she attempted to drive to work on December 24, but was hindered from doing so because of hazardous road conditions. Complainant testified that she requested the retroactive personal day pursuant to a provision in the Collective Bargaining Agreement allowing for after-the-fact personal days in case of an emergency. Complainant was the only employee of the Clerk Magistrate's office who did not report for work on December 24 as scheduled. Pomroy testified that the snowfall that day was not very heavy, as evidenced by the fact that one of her employees drove from her home in Eastham to report to work in Plymouth and reported no driving problems.

59. The January 4, 1999 warning was for the December 24, 1998 absence. Andrade wrote, inter alia: "Everybody who was scheduled to work on December 24, 1998, made it to work and the courts were open all day. I find your excuse for not going to work unacceptable." Andrade testified that under the circumstances, where every other employee was able to come to work, he did not consider Complainant's professed inability to drive to work an "emergency" under the Collective Bargaining Agreement provision Complainant sought to invoke in order to receive a retroactive personal day.

60. Andrade testified that the January 4 warning was for the December 24 absence, not the October 2 absence. Andrade testified that he referred to the October 2 absence in the warning only to demonstrate, by way of background information, that Complainant had prior notice that unauthorized absences were deemed unacceptable and subject to discipline. After referring to the events of October 2 absence, Andrade wrote, “You told me nothing like that would ever happen again.” I credit Andrade’s testimony.

61. A written warning is the lowest form of discipline according to Respondent’s progressive discipline policy.

62. Complainant filed a grievance with her union regarding the January 4 warning.

63. On January 14, 1999, Andrade issued Complainant a written warning pertaining to three violations of Respondent’s procedural policies on collection and deposit of court monies. The first incident, which Complainant and Andrade had discussed at their October 9, 1998, meeting about Complainant’s work performance, occurred on September 30, 1998. On this day, Complainant failed to deposit certain court monies, as she was directed to do, and instead took the monies home overnight before depositing them the following day. When Complainant and Andrade discussed this matter on October 9, Andrade informed her that her actions had violated Respondent’s bookkeeping and accounting procedures, and Complainant stated she understood. The second incident, which occurred on November 6, 1998, involved Complainant’s failure to report a missing bail recognizance check to proper authorities and resulted in accounting delays. The third incident, which occurred on December 15, 1998, involved a bookkeeping error. The second and third incidents were reported to

Andrade in early January 1999 by Diane Foster, an Account Clerk at Respondent.

64. Complainant filed a grievance with her union regarding the January 14 warning.

65. Andrade testified that he received notification on January 15, 1999, that Complainant had filed a complaint with the MCAD. Such notification was sent to him in a confidential communication on January 13, 1999, by Respondent's Labor Counsel. I credit Andrade's testimony that he first learned of this complaint on January 15.

66. Complainant's three grievances relating to her written reprimands and warnings were resolved in 1999. Regarding the December 14, 1998 reprimand, Andrade and union attorney Robert Manning agreed in May 1999 that the reprimand would be reduced to a warning. While Andrade was initially advised in June 1999 by Respondent's Counsel that he could not make this change due to the pending MCAD complaint, the change was made on July 18, 1999. Regarding the January 4, 1999 warning, a Trial Court hearing officer determined on August 3, 1999 that it should be amended to remove all references to the December 24 absence. Regarding the January 14, 1999 warning, the same Trial Court officer found that there was "just cause" to issue this warning with respect to all three incidents. However, an arbitrator later made a finding of "no just cause" in November 1999 and the January 14 warning was removed from Complainant's personnel file.

III. CONCLUSIONS OF LAW

A. Sexual Harassment Claim

Massachusetts General Laws chapter 151B, section 4(16A) makes it unlawful "for

any employer, personally or through its agents, to sexually harass any employee.” The definition of sexual harassment includes “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.” M.G.L. chapter 151B, section 1(18).

Complainant alleges in this matter that Respondent is liable for sexual harassment in the form of a hostile work environment created as a result of hang-up telephone calls she claimed to have received between November 1997 and June or July 1998. Complainant also claims that Respondent failed to take appropriate measures to remedy Complainant’s complaints regarding the alleged calls.

As a threshold matter, Complainant must show that the hang-up calls she claims to have received qualify as “sexual harassment.” I find that Complainant has failed to make this showing, as she did not demonstrate that there was any “verbal or physical conduct of a sexual nature” associated with the calls. Complainant testified that the calls consistently followed the following pattern: the telephone rang, Complainant answered the telephone, the caller paused for several seconds without speaking, and then the caller hung up. Complainant did not testify that the caller used any obscenities, referred to any sexual conduct, requested any sexual favors, or contained any sexual content. Indeed, she specified that the calls were completely silent and, therefore, consisted of no content at all. While sexually harassing behavior need not be motivated by sexual desire to support an inference of discrimination, it must, at a minimum, be sex-based in order to be a recognizable form of sexual harassment. See Massachusetts Commission Against

Discrimination Sexual Harassment in the Workplace Guidelines (2002).

Further, Complainant did not demonstrate that the hang-up calls created a hostile work environment “pervaded by sexual harassment or abuse, with the resulting intimidation, humiliation and stigmatization [that] poses a formidable barrier to full participation of the employee in the workplace.” College-Town v. MCAD, 400 Mass. 156, 162 (1987). While Complainant attempted to connect the hang-up calls to her 1994 sexual harassment complaint against Pini and therefore show a pattern of sexual conduct, her attempt to substantiate any such link failed. First, according to Complainant’s own testimony, she was never able to show that Pini was the originator of any calls, either to her home or office. Second, according to credible testimony received at the hearing from Pomroy and Mason, hang-up calls came into the Barnstable and Plymouth offices at a steady rate for a variety of common and legitimate reasons; these calls came to a central, non-personalized line answered by numerous individuals, not just Complainant; and these calls were received prior to, during and after Complainant’s respective tenures at both of these offices. Such testimony clearly belies Complainant’s claim that the hang-up calls were targeted at and intended exclusively for the purpose of harassing her. Third, Respondent’s investigation of Complainant’s 1994 complaint yielded no finding of sexual harassment by Pini but, rather, determined that there was a lack of sufficient evidence to make such a finding. Given this determination, Complainant’s attempt to link the calls to a prior unsubstantiated claim falls markedly short of showing a pattern of pervasive harassment and/or abuse.

In addition, Complainant presented no evidence showing that the calls, if made, were intended to intimidate and humiliate her and she did not demonstrate that she was in

any way hampered from performing her job. Cf. Carney v. Town of Falmouth Police Department, 16 MDLR 1644 (1994) (repetitious hang-up and completed telephone calls traced to supervisor created sexually harassing work environment where supervisor and Complainant had previous 2 ½ year romantic relationship that Complainant ended and where supervisor tried to intimidate Complainant, as evidenced by trying to hit and sabotage Complainant’s car, leading to restraining order against supervisor). In particular, Complainant did not demonstrate that the calls were intended to intimidate or humiliate her in a sexual or sex-based manner.

Even assuming Complainant could show that the hang-up calls constituted harassment and a hostile work environment, which she cannot, I find that Respondent undertook appropriate measures to remedy her complaint.

It is well-established that employers have a duty to investigate complaints of harassment and deal appropriately with offending personnel. College-Town Division of Interco, Inc. v. MCAD, 400 Mass. 156, 167-68 (1987). In order for liability to attach, it must be shown that “the harassment was carried out by an employee with a supervisory relationship to Complainant, or Respondent knew or should have known of the harassment and failed to take prompt action.” Beldo v. University of Massachusetts Boston, 20 MDLR 105, 111 (1998) (citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, supra, at 162.). As has been stated, the hang-up calls complained about by Complainant cannot be termed “harassment” according to the applicable legal definition, and even if they could, it cannot be said that Respondent failed to “take prompt action.”

After Complainant first brought the matter of hang-up calls and her displeasure

with the results of the 1994 investigation to Andrade in January 1998, he mentioned his discussion to Frankel on January 15, 1998. He followed up on this initial contact in March 1998, when he called Frankel to report that Complainant was still upset about the 1994 investigation and that she said she was getting hang-up calls at her new office location in Plymouth. Frankel set up a meeting for the three of them on April 28, 1998, in order that they could discuss fully Complainant's concerns. However, Complainant cancelled this meeting almost as soon as it was set, and then, after the meeting was rescheduled following a conversation between Frankel and Complainant, Complainant cancelled the meeting again. It must be said, therefore, that it was Complainant and not Respondent who hindered any investigation at this juncture.

It is notable that Complainant cancelled the April 28 meeting the second time after she learned from Frankel that only current events, and not the 1994 investigation, were to be discussed at the meeting. Both Frankel and Andrade testified that Complainant's main concern and focus during all of their respective conversations was a reopening of the 1994 investigation she believed to be a "cover up" rather than hang-up calls. Complainant did not mention hang-up calls in her numerous e-mails written in April 1998, and she did not mention hang-up calls in her several conversations with Frankel during April 1998. In addition, Complainant did not state that she believed the hang-up calls were a form of sexual harassment, she never filed or indicated any wish to file an internal complaint of sexual harassment and, other than making a bald-faced assertion about who she believed to be the source of the calls, she could not show in any way that the alleged calls were coming from Pini. Under these circumstances, I find it entirely credible that Andrade and Frankel did not believe Complainant was making a

complaint of sexual harassment in early 1998 and I believe it was reasonable that they did not launch a full-fledged, official investigation into sexual harassment at this time.

Moreover, I affirmatively find that the steps Andrade and Frankel did take in early 1998 were prompt and reasonable steps.

Andrade interviewed Complainant's co-workers in Barnstable and Plymouth for corroboration about hang-up calls, although such corroboration was not forthcoming. Andrade asked Complainant to keep a detailed log of all calls so that they might detect some sort of pattern, but Complainant never did so. Andrade suggested traps on office telephones, but Complainant told him they would be futile because calls from pay phones and store-bought calling cards could not be traced. And Andrade suggested that Complainant contact not only her union representative, but also a private attorney, who was a personal friend of Andrade. Following Andrade's suggestion, Complainant contacted this attorney and subsequently sent Andrade an appreciative e-mail. Similarly, Frankel attempted to respond to Complainant promptly and effectively. She spoke to Complainant several times, called Driscoll and Edgar to inquire into and address Complainant's concerns about the 1994 investigation, contacted Halloran to investigate what Complainant had told him about a possible reopening of the 1994 complaint, and set up a time to meet at the first mutually convenient time. The fact that Complainant cancelled this meeting twice cannot fairly be attributed to Frankel, as Frankel went out of her way to arrange for Complainant to agree to a rescheduling of the April 28 meeting and to make sure that Andrade conveyed Frankel's willingness to meet even after Complainant cancelled the second time. I find that both Frankel's and Andrade's response to Complainant's complaints in early 1998 were reasonable under the

circumstances and did not constitute in any way a failure to investigate.

Likewise, I find that Respondent took immediate and effective steps after Complainant made clear her intention to file a sexual harassment complaint on November 18, 1998. Two days later, on November 20, Frankel sent Complainant a letter asking Complainant for details of her complaint and offered Complainant assistance in filling out the attached complaint form. Frankel followed up this letter with two more letters in December 1998 and January 1999, in which she continued to ask for elaboration of Complainant's claim and continued to offer Complainant assistance in filling out the form, which she wrote was "intended to facilitate the investigation, not to stand as an obstacle." That Complainant spurned Frankel's efforts repeatedly by refusing to respond to all three letters cannot be blamed upon Frankel or, by extension, Respondent. While an employer certainly has the responsibility to investigate employee complaints, an employee has a concomitant responsibility to cooperate with an employer who is trying to investigate her claims. At the very least, an employee has a corresponding duty to participate in the investigation and not unreasonably withhold information or material uniquely in the employee's control. See, e.g., Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998); EEOC Enforcement Guidance 915.002 ("If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate with the investigation, the complaint would not qualify as an effort to avoid harm."). Where Frankel had no connection whatsoever to the investigation or resolution of Complainant's 1994 complaint and had at all relevant times indicated a willingness to assist Complainant, I do not find Complainant's testimony that she did not trust Frankel and found Frankel's letter "insulting," and

“ridiculous” a reasonable basis for refusing to respond to Frankel and participate in Respondent’s 1998-1999 investigation. Similarly, I find Frankel’s request for Complainant to provide a reason to engage an “independent agency” reasonable under the circumstances and do not believe it can be construed as an attempt to delay or impede an investigation into Complainant’s claims. At this time, as in early 1998, Complainant is the individual who actively hindered the investigation of her own claims.

B. Retaliation Claim

Massachusetts General Laws chapter 151B, section 4(4) provides that it is unlawful for an 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 the statute.

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 v. Plymouth Sheriff’s Department, 22 MDLR 208, 215 (2000) quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D.Mass. 1995).

In order to establish a prima facie case of retaliation, Complainant must show that (1) she engaged in a protected activity; (2) Respondent was aware of the protected activity; (3) Complainant was subjected to adverse employment action; and (4) absent other evidence establishing retaliatory intent, the adverse action followed the protected activity within such time that retaliatory motive can be inferred. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Ruffino, 908 F.Supp. at 1044; Kelley, 22 MDLR at 215. Complainant’s underlying claim need not have been proven

for her to pursue a claim of retaliation. Bain v. City of Springfield, 424 Mass. 758, 765 (1997). Once Complainant has established a prima facie case, the burden shifts to Respondent to articulate a legitimate, nondiscriminatory reason for its action. The burden then shifts back to Complainant to demonstrate that the proffered reason is not the real reason but pretext for discrimination, and that the action at issue was motivated by retaliatory animus. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-69 (2002); Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 121 (2000).

I find that Complainant established a prima facie case of retaliation in this matter. She engaged in protected activity on November 18, 1998, when she communicated her intent to file an internal complaint of sexual harassment against Pini, and again on December 23, 1998, when she filed her complaint with this Commission. Respondent was aware of both of these activities. Complainant was subjected to three instances of discipline on December 14, 1998 and on January 4 and 14, 1999. There is no direct evidence evincing retaliatory intent regarding these instances of discipline, yet the dates on which the discipline was received occurred closely enough in time to November 18 and December 23, 1998 for retaliatory intent to be inferred.

However, I find that Respondent has satisfied its corresponding burden by articulating legitimate reasons for its actions on December 14, 1998 and January 4 and 14, 1999.

With respect to the December 14, 1998 reprimand, the relevant protected activity occurred on November 18, 1998, the date of Complainant's letter to Frankel. Yet it is undisputed that Complainant had been notified by Andrade in a meeting on November 5,

some two weeks before November 18 that discipline could result from her transmission of the October 29 fax to Pini. It is also undisputed that Andrade had been advised by Judge Winslow that corrective action should be taken if an investigation ultimately showed that Complainant sent the fax. Complainant does not dispute the fact that she was disciplined, as she acknowledged in her testimony that at her December 10 meeting with Andrade and a union business agent she admitted sending the fax and conceded that some discipline was appropriate. What she does dispute is the specific wording of the December 14 reprimand, because it mentioned not only “improper use of the Trial Court equipment” but “harassment” as well. Complainant alleges that because it was agreed on December 10 that she would be disciplined only on the “improper use” charge, the wording of the reprimand evinced retaliation by Andrade. In view of the evidence in this matter, I believe this is a distinction without a difference. Complainant testified specifically that she was upset after receiving the December 14 reprimand because she felt that she was being accused of sexual harassment of Pini where all along she believed herself to be the victim of sexual harassment by Pini. While Complainant’s feelings in this regard may be understandable, they do not necessarily comport with or lead to a finding of retaliatory action on the part of Andrade. I do not believe that by including the word “harassment” in the reprimand Andrade intended to accuse Complainant of sexual harassment, because he specifically noted in the reprimand that he had accepted Complainant’s explanation about the misspelling of Pini’s name as “Pinis.” The “harassment” mentioned in the reprimand, therefore, had nothing to do with sexual harassment, but was “harassment of Mr. Pini (sending the fax to him at his place of employment)” and had to do with the act of sending the fax. This discipline was

legitimate and justified under the circumstances, and Complainant has failed to persuade me that Andrade had any retaliatory intent when he issued the reprimand, either in form or substance.

With respect to the January 4 and January 14, 1999 warnings, the relevant protected activity occurred on December 23, 1998, when Complainant filed her MCAD complaint. Yet the un rebutted evidence in this case is that Andrade did not learn of this complaint until January 15, 1999: therefore any claim that Andrade retaliated against Complainant for this complaint must fail. To the extent that Complainant alleges Andrade retaliated against her for her November 18, 1998 internal complaint, this claim is similarly unsupported by the evidence. First, because neither of these disciplinary measures was initiated by Andrade nor were they related to any difficulties with him, it cannot be said that Andrade fabricated the offending incidents for the purpose of retaliating against Complainant. The December 24, 1998 absence, which was the basis for the January 4 warning, was reported to him by Linda Pomroy, and the November 6 and December 15, 1998 incidents underlying the January 14 warning were reported to him by Diane Foster. In response to these reports from others, Andrade issued the lowest form of discipline under Respondent's progressive discipline policy. Second, Complainant did not provide any evidence that she was treated any differently from other employees who committed the same or similar offenses. Third, because the majority of the performance problems for which she was disciplined predated November 18 by several months, her claim of retaliation is without merit. It is undisputed that Andrade and Complainant met on October 9, 1998 to discuss Complainant's performance problems, including her September 30 conveyance of court monies to her residence and

her October 2 unauthorized absence. It is also undisputed that Complainant was duly warned about fiscal improprieties and unauthorized absences going forward, and that she agreed not to commit these offenses again. The warnings that Complainant received on January 4 and 14, which addressed later fiscal improprieties and another unauthorized absence, are consistent with her record of performance problems before any protected activity occurred. See, e.g., Mole v. University of Massachusetts, supra (where an employee has a record of performance problems that predate alleged retaliatory action, it is not permissible to infer that subsequent disciplinary actions, taken after protected activity, are retaliatory).

Accordingly, I find that the discipline imposed by Andrade on the three dates at issue was for legitimate and non-retaliatory reasons, and I am not persuaded by Complainant that these reasons constituted pretext for unlawful action on the part of Respondent.

IV. ORDER

Based on the foregoing, it is hereby ordered that the Complaint be dismissed.

This decision represents the final decision of the Hearing Commissioner. Any party aggrieved by the decision may file a notice of appeal with the Full Commission within ten (10) days of receipt of this decision and a petition for review within thirty (30) days of receipt.

So Ordered this 14th day of July, 2005

Walter J. Sullivan, Jr.
Hearing Commissioner