

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & RUTH HOWARD,
Complainants

v.

DOCKET NO. 98-BEM-0709

MASSACHUSETTS BAY
TRANSPORATION AUTHORITY,
Respondent

Appearances:

Daniel F. MacDonald, Esquire for the Complainant
Sabrina Miles, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about March 6, 1998, Complainant Ruth Howard filed a complaint with this Commission charging Respondent with discrimination on the basis of race, color, gender and retaliation, in violation of M.G.L.c. 151B, §4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on March 11-14, 2003. After careful consideration of the record in this matter and the post-hearing submissions of the Complainant, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Massachusetts Bay Transportation Authority (MBTA) operates a public transportation system serving the greater Boston area and is an employer within the meaning of M.G.L.c.151B,§1.

2. Complainant Ruth E. Howard is an African-American woman residing in Sharon, Massachusetts. Complainant was first employed by Respondent in April 1978 as a clerk-stenographer in Respondent's Design and Construction department. Complainant retired on December 1, 2002.

3. From April 1978 to approximately 1991, Complainant held the position of clerk-stenographer at Respondent's office located on Clarendon Street, Boston. Complainant was later promoted to the position of Administrative Assistant, and in late 1992 or early 1993 she was promoted to the position of Project Coordinator at Respondent's Central Construction Office at South Station.

4. While at South Station, Complainant worked for project directors Jim Wright and then Edwin Cortez. Under Cortez, Complainant worked on the Aquarium Station and

State Street projects. Her duties as a project coordinator included overseeing the day-to-day functions of the project office, supervising clerical staff, attending meetings with the project director, and negotiating with property owners regarding compensation for land takings required for MBTA construction projects. A resident engineer, budget analyst and a representative of the department of diversity would usually attend such meetings as well. Complainant testified that her duties did not overlap with those of a budget analyst.

5. Complainant testified that the project manager was responsible for bringing together the people necessary to ensure that a project met Respondent's requirements. She stated that the duties of project manager and project coordinator might overlap, depending on the amount of responsibility the project manager gave to the project coordinator. At all times relevant to this matter, all project managers in construction reported to Jim Eng, Deputy Director of Construction.

6. In 1993 or 1994, Complainant had an ongoing dispute with Edwin Cortez, who, according to Complainant improperly assigned her clerical duties. Cortez, on the

other hand, accused Complainant of insubordination. Complainant filed an internal complaint against Cortez with the Respondent's Department of Diversity. In September 1994, Complainant transferred to a Project Coordinator position in Respondent's south construction office in Quincy.

7. While at Quincy, Complainant reported to project manager Vahid Ownjazayeri, with whom she worked on jobs including the Hingham Commuter Boat Project.

8. Ownjazayeri gave Complainant substantial responsibility. On one occasion, Ownjazayeri assigned Complainant the job of negotiating the cost of a consultant's services, resulting in a substantial savings to Respondent. According to Complainant, this was a task normally performed by the project manager, and Ownjazayeri was pleased with the cost savings obtained by Complainant. On one occasion, Complainant accompanied Ownjazayeri to a MBTA Board of Director's meeting in connection with a contract in order to answer any questions the board might have regarding the awarding of the contract.

9. When conditions on a construction project required Respondent to expend funds in excess of the original proposal the project director or project coordinator would be required to draft a "change order" or "supplement" requesting more funds. According to Complainant, writing a "change order" requires knowledge of the project's goal as well as the ability to properly explain it. In cases where the amount of money involved exceeds \$250,000, the Respondent's Board of Directions would have to approve the requested change.

10. In February, 1996 Ownjazayeri was promoted and transferred to Boston. Complainant testified that while Ownjazaryeri transitioned to the Boston job between February and June 1996, active construction projects were assigned to budget analyst Joseph Mosca, a Caucasian man, instead of her, thereby preventing Complainant from performing the duties of a Project Coordinator. She testified that Mosca attended project meetings with Jim Eng, whereas Eng told Complainant it was not necessary for her to attend such meetings.

11. In November 1994, two years earlier, Rocco Mancini, then Assistant Director of Construction and

Design, assigned Joseph Mosca to assist Ownjazayeri on three projects; Canton Junction Parking Improvements, Wellesley Hills and Wellesley Farms Pedestrian Overpasses and the Canton Viaduct. These projects entailed some complex financial arrangements and it was felt that Mosca's budget background would be beneficial. (Exhs. R-1; R-4)

12. In June 1996, John McAuliffe, who is Caucasian, was promoted from resident engineer to the position of Project Manager and "inherited" the Canton Junction Project from Ownjazayeri. At this time Complainant began reporting to McAuliffe.

13. Complainant testified that McAuliffe transferred many of Complainant's responsibilities to Mosca and restricted her day-to-day responsibilities. Complainant believed that her career was "going backwards."

14. Complainant testified that while McAuliffe and the Quincy office remained responsible for numerous active construction projects, including the Hingham Commuter Boat and the MBTA Police Station, there was a "drastic change in her work". Complainant was not asked to attend project meetings or perform the tasks of Project Coordinator that

she had performed under previous Project Directors. She stated that McAuliffe would sometimes refuse her requests to attend meetings or tell her he did not care whether or not she attended.

15. During this time Mosca would ask Complainant to complete supplements or change orders. She felt that her job could eventually be threatened by being assigned work by Mosca.

16. Complainant testified that while Ownjazaryeri had permitted her to review incoming mail, McAuliffe restricted the mail that Complainant saw, to the point where she saw only an occasional change order or supplement that was given to her by McAuliffe.

17. Complainant further testified that after McAuliffe became her supervisor, the secretary, Barbara Roberson, who is African-American, refused to answer Complainant's phone when she was away from her desk. Complainant later learned that her telephone extension no longer rang at Roberson's phone. A year later, a voicemail system was installed for all employees.

18. Sometime in late 1997, all of the employees of the Design and Construction departments, including Complainant and McAuliffe, were moved to a central location at 500 Arborway, Boston.

19. On August 12, 1997, Complainant wrote a memorandum to Eng and McAuliffe regarding her concerns about the mail and her telephone. In the memorandum, Complainant also complained about Roberson, as follows:

...Today I asked [Roberson] about the Resident Engineer's EON given to her on August 7, 1997 for typing. She stated that she was giving it to John McAuliffe for checking. When informed by me that I will give John the EON to review...she told me that is not how she does things... She was not going to change things now and if I did not like it it was too bad...She also stated that if I put any thing on her desk, she was not going to type it just see how long it stays there...This insubordination is [because] that she has in the past been allowed to undermine my work with impunity...

(Exh.C-6)

20. In response to Complainant's concerns, on August 19, 1997, McAuliffe issued a memorandum setting forth a procedure for distributing mail that was satisfactory to Complainant.

21. On September 23, 1997, Complainant wrote a memorandum to Eng and McAuliffe concerning her belief that

she had been assigned job tasks outside of her responsibilities, whereas Mosca was not assigned such responsibilities. Complainant stated in the memorandum that she had effectively been demoted to the position of Staff Assistant or Assistant project coordinator.

22. Complainant testified that because Eng and McAuliffe did not address her concerns, on November 12, 1997, she filed a formal complaint with Respondent's Department of Organizational Diversity in which she stated that:

I feel I am being retaliated against because of a prior complaint I filed, [against Cortez] in which I complained about not being able to carry out any of my job responsibilities...Specifically, upon being transferred to Quincy, some of my duties as Project Coordinator were assigned to either the Staff Assistant or Budget Analyst, two positions which are lower than mine. I was given duties that should have been completed by either of them or secretarial duties. I also was not included or informed about design and construction projects that were assigned to my Project Manager. When I tried to address my concerns with either my Project Manager, John McAuliff[sic] or the Assistant Director, James Eng, they continued to give me these assignments and exclude me in an effort to frustrate and humiliate me. Prior to my coming to Quincy, the Project Coordinator's position was filled by a white female, who was allowed to perform those duties as stated in the job description. They also, created a hostile work environment in that they allowed derogatory comments about blacks and females in the office; and refused to address my request for voice mail and/or a secretary to answer my phone for over a year until it was put in writing. I feel their actions are also harassing and discriminatory.

(exh.C-4)

23. In response to the internal complaint, the Respondent's department of diversity interviewed Complainant, McAuliffe, Eng and Mosca.

24. Complainant testified that on November 19, 1997, McAuliffe informed her that he had received a call from the Department of Diversity and that they were "dragging him downtown" for an interview. He wanted to know what Complainant had told the DOD and what they were going to ask him. He told Complainant that he might "go through the roof" because he would have to "explain himself." Complainant testified that McAuliffe's demeanor during this conversation intimidated her and made her physically ill. McAuliffe denied discussing Complainant's internal complaint with her. I credit Complainant's testimony regarding this incident.

25. On December 11, 1997, McAuliffe asked Complainant to meet with him in Eng's office, where he inquired about the status of an estimate relative to the Braintree project that he claimed Complainant had failed to input into the computer system. Eng told Complainant that McAuliffe had

requested his presence at the meeting because of Complainant's filing at DOD. Complainant was not disciplined in any way as a result of the estimate being late.

26. Complainant testified that the estimate had been given to a co-worker who was unable to input it into the computer because of multiple problems with the computer system resulting from the move to Arborway. I credit her testimony.

27. On December 11, 1997, Eng wrote a memorandum to "File" regarding this meeting:

The purpose of this memorandum is to record the discussions held between Project Manager John McAuliffe and Project Coordinator Ruth Howard concerning the whereabouts of the estimate...that was given to her...two weeks ago. She said she did not know and that because of the move [to Arborway] and the system being down, she was unable to run the estimate...McAuliffe wanted to establish a procedure to complete the estimate within a one day time period. Mr. McAuliffe asked that he be notified immediately if the system is down, or her workload is preventing her from expediting the estimate in one day. Ms. Howard then claimed she is working under a (sic) extreme amount of stress and Mr. McAuliffe and I were harassing her. Ms. Howard also questioned my presence concerning the matter. Mr. McAuliffe replied that, with the pending charges, he felt more comfortable with me present. He also said he was not harassing her, but wanted me to have first hand knowledge why the estimate was not being expedited. He also informed Ms. Howard that he did not want to be called by the contractor wondering why the estimate was not run. Ms. Howard continued to contend that we were harassing her and

I stated to her that I was just trying to determine why the estimate had not been run for two weeks. The meeting was then concluded. (Exh. C-13)

28. Complainant wrote a memorandum to Eng in response to his memorandum:

The purpose of this memorandum is to clarify once again the intimidating and discriminatory environment that would upset any reasonable person... The stress I feel is real not only to me but also to my doctors. To say that I can produce...estimates without the computer equipment is unreasonable...If the purpose of the meeting was to find out about the estimate a simple inquiry would have been enough. I had to ask four times to be allowed to check back at my desk before concluding the meeting...I do object to being the only person in construction that is responsible for stopping whatever they are doing and producing...[an]estimate within 24 hours.

(Exh.C-13)

29. On December 23, 1997, Eng wrote a memorandum to Complainant stating:

I have read your memo...and I firmly believe that you are confused with a "intimidating and discriminatory environment" versus a "productive and responsive environment"...There is no way taking more than two weeks to produce a[n]estimate can be called stressful...The purpose of our meeting was...a necessity to establish a procedure with you in the privacy of an office and not in your cubicle which is much more open. It was not Mr. McAuliffe's intention to cause you stress but to allow me to see for myself his frustration trying to expedite the work for which you are responsible...

(Exh. C-16)

30. On January 8, 1998, Virginia Turner, Manager of Employment and Training, wrote to Complainant that

Respondent had completed its investigation of her complaint and found no evidence to support it. The letter stated, in part:

...The decision to assign certain projects to Joe Mosca in 1994 was based on sound business reasons and not an effort to undermine your position. Some of these projects are still going on and Mr. Mosca will remain in his present capacity until they are completed...There is no evidence to indicate that you are working outside of your classification or performing duties that should not be done by a Project Coordinator...Due to the lack of definitive evidence, the truth of what actually occurred, regarding you allegations about derogatory comments being made about blacks and or females in the workplace, can not be established. However, both Mr. Eng and Mr. McAuliffe have been instructed that such behavior is not to be tolerated, and further reports may lead to corrective action...It is my understanding that the intent of the December 10 meeting was to inquire about the status of an overdue estimate and to establish a procedure for expediting certain job functions. The procedure was established as a corrective action, not to be discriminatory.

(Exh. R-5)

31. Complainant testified that after filing her complaint, she sought out Bill Howell, an assistant Director of Construction, who reported to Mike Stoffel, Director of Construction and Engineering. Howell told Complainant that she could act as project coordinator for several upcoming projects. However, shortly after assigning Complainant some work on the Silver Line Project,

Howell told her that Stoffel had put a stop to the assignment after Eng learned of the assignment.

32. On February 9, 1998, Complainant requested that the Department of Diversity reconsider its finding, stating that The Department of Diversity had not fully investigated her complaint.

33. On April 23, 1998, Complainant filed a complaint with the Department of Diversity alleging that secretary Barbara Roberson had violated her rights under Respondent's "Dignity in the Workplace" policy by failing to give her a fax that was addressed to both her and McAuliffe. Complainant also claimed that Roberson told her: "I'm tired of your bullshit."

34. The Department of Diversity considered the complaint against Roberson and again interviewed McAuliffe in connection with its reconsideration of its earlier finding. The DOD found that there was ongoing animosity between Complainant and Roberson and that McAuliffe had told Roberson not to give a copy of a faxed change order form to anyone else until he had resolved issues related to the form. The DOD recommended meetings concerning conflict

resolution for Complainant, Roberson and others in their office.

35. A memorandum dated June 16, 1998 from Casey Ford, Respondent's Manager of Personnel Compliance to Diane Wong, Director of Diversity regarding the reconsideration review, stated in part:

...Ruth has issues...that she is performing work that is secretarial in nature and complaint that she is not being treated with the respect and authority and not being given the tasks normally associated with her job which is Project Coordinator. In the original investigation, Virginia obtained information that indicated that Ruth has caused problems in the work area during the course of her employment and that her bosses, John McAuliffe and Jim Eng, are not satisfied with her job performance...the bottom line here is that Ruth and her bosses have some sort of personality conflict which has been long-standing...it would be a good idea for you to have Ruth in to talk with her. She is quite negative in her approach to most everything, or at least she has been with me, but I think she deserves to be spoken to about his by you personally...

(Exh. R-17)

36. On June 16, 1998, Complainant sent McAuliffe a memorandum again expressing her concern that she was not receiving mail and telephone messages required to do her job.

37. On September 25, 1998, upon reconsideration, Respondent found no evidence to substantiate Complainant's allegations. (Exh. R-19).

38. Complainant testified that in 1997 and 1998 she drove to work and parked in the MBTA assigned parking area where her automobile was vandalized. Complainant never told McAuliffe that her car had been vandalized. McAuliffe testified that vandalism was rampant at the Quincy garage.

39. In 2001, Complainant applied for two job promotions to the position of Senior Project Coordinator. She interviewed with Howard Haywood, who is African-American. One position was later awarded to Darren McAuliffe, who is John McAuliffe's son. The other position was awarded to Howard B. Smith, an African-American man who is a deacon at the Myrtle Baptist Church where Howard Haywood served as pastor. ¹

40. Complainant testified that because of the conduct of Eng and McAuliffe and the cumulative stress of the work environment, she was forced to retire early.

41. John A. McAuliffe testified that he has worked for Respondent since 1992, first as an assistant project manager and, since 1995, as a project manager. At the time

¹ Joe Mosca's name appears on the list of applicants for both positions. There was no evidence as to whether he was considered for either position.

of the hearing, McAuliffe reported to Mike Stoffel, director of construction and engineering.

42. McAuliffe had never supervised a project coordinator until Complainant was assigned to him. He testified that he "inherited" the Canton Junction project from Ownjazaryeri, and that as both Complainant and Mosca had already been working on the project, they continued to work on it after he took it over. I credit this testimony.

43. According to McAuliffe, Mosca worked for him only on the Canton Junction project and did not technically report to him. He stated that Mosca had previously negotiated a \$1.5 million contract with Amtrak and as a budget background was able to monitor the budgetary aspect of the Canton Junction project. I credit this testimony.

44. McAuliffe testified that he assigned Complainant to draft change orders with respect to the North Quincy project. He denied assigning Mosca to perform the duties of a project coordinator. I credit this testimony. I find that Mosca was assigned work on the basis of his

familiarity with ongoing projects, as well as his expertise in budgetary matters.

45. McAuliffe testified that there was an ongoing dispute between Complainant and his former secretary, Barbara Roberson over whether Complainant could read the incoming mail. As a result, McAuliffe issued a memorandum regarding the procedure for distributing mail. When Complainant complained about her telephone, McAuliffe told her to talk to the office manager, as he had nothing to do with the phones. I credit this testimony.

46. McAuliffe testified that, as a result of reorganization, the department was divided into separate design and construction departments, with McAuliffe and Complainant remaining in construction. After the reorganization, McAuliffe was not assigned a project until after the design phase, resulting in a 60-70% decrease in work for him and Complainant. I credit this testimony, although there was conflicting testimony as to whether this reorganization took place during the late 1990s or the early 2000s.

47. McAuliffe testified that he was shocked to learn of Complainant's retirement. Instead of telling him that she was going to retire, he found a yellow sticky on his desk from Complainant informing him of her retirement date.

48. McAuliffe never reprimanded Complainant or decreased the amount of work assigned to her. He stated that he called other project managers at times and asked them to assign work to Complainant because she had nothing to do. I credit this testimony.

49. On April 2, 2001, Respondent posted the position of Senior Project Coordinator in the Design and Construction Department. The duties described as:

Assist in the planning, development, and administration of various MBTA construction projects. The selected candidate will attend internal and external meetings to assist with coordination issues, including interaction with legislators, town officials, community advocacy groups and other interested parties. Additional duties include: organizing and maintaining effective means to interpret, present and communicate project information at internal and external meetings with legislators and public agencies. The Senior Project Coordinator will distribute project information to MBTA departments and public agencies service and perform related duties and projects as assigned.

The requirements are as follows; A Bachelor's Degree in Business Administration, Public Administration, Political Science or related field is required. Three years of experience working in or with state and local government on public policy or construction issues, preferably on transit related issues, is also required. A High School Diploma and two additional years of experience working in or with state and local government on public

policy or construction issues can be substituted for the above educational requirement. Additional requirements include: demonstrated strong verbal and written communication skills; the ability to handle multiple tasks concurrently; and the ability to work effectively in a diverse workforce.

(Exh. C-19)

50. Complainant applied for the posted position, and interviewed with Howard Haywood, Assistant General Manager for Design and Construction. Haywood, who is African-American, did not testify at the public hearing.

51. Darren McAuliffe is the son of John McAuliffe. In May 2001, Darren McAuliffe applied for the position of Senior Project Coordinator that was posted on April 2, 2001. He interviewed with Jane Marra as well as Howard Haywood. Darren McAuliffe had no prior experience working for the Respondent; however, he had experience as a Project Coordinator for the construction of Great Woods Center for the Performing Arts and for O'Connell Development Company, where he developed commercial and residential projects.

52. On April 25, 2001 Howard Haywood wrote a memorandum to Jane Marra, stating "On Wednesday, April 25, 2001, I conducted interviews with three candidates for the referenced position. All the candidates met the minimum requirements for the position. Based on his previous

experience and background, I am recommending that Darrin M. McAuliffe be offered the position." (Exh. R-26)

53. In or around May 2001, a second Senior Project Coordinator position was posted. Complainant applied for this position as well, and was again interviewed by Howard Haywood.

54. On May 18, 2001, Haywood issued a memorandum to Jane Marra stating: "I have completed interviews for the referenced position and based on his experience, I recommend candidate Howard B. Smith be offered the position. Please note that candidate Joan McLaurin, who was selected to be interviewed, declined." (Exh. R-29)

55. Howard Smith, who is African-American, testified that he applied for and was selected for the position of Senior Project Coordinator posted by the Respondent in April 2001. Smith has a B.S. in biology and chemistry from Knoxville College. Prior to working for Respondent, Smith was a human services manager at Algonquin Gas Transmission. Smith testified that he has no work background in construction.

56. Smith is a deacon at the Myrtle Baptist Church, where Howard Haywood is pastor. Smith has known Haywood for over twelve years.

57. Jane Marra is a human resources manager for Respondent. She testified that in February 2001 she had an "informational interview" with Darren McAuliffe. She stated any interested person could request an informational interview that is not an interview for a particular job, but serves to provide the interviewee with information about jobs at Respondent.

58. Marra testified that for both of the MBTA job postings for the positions of Senior Project Coordinator, the department of human resources screened the applicants and forwarded the resumes of qualified applicants to Haywood, who determined which candidates he wished to interview.

59. Marra testified that Haywood was responsible for writing the job descriptions for the two Senior Project Coordinator positions, and that the job descriptions for the two were different from one another. For the Senior Project Coordinator position (3949), the requirements state that a bachelor's degree in business engineering or related

field is required with three years experience working as a liaison with employees and external vendors on construction or engineering-related issues.

III. Conclusions of Law

A. Gender and Race Discrimination

M.G.L.c.151B, sec. 4 prohibits discrimination in employment on the basis of race, color and gender. Complainant alleges that Respondent discriminated against her on these bases by assigning work to a Caucasian man instead of to her. In order to establish a prima facie case of race and/or gender discrimination, Complainant must show that she was a member of a protected class, that she was qualified and reasonably performing her job, that she was subject to adverse treatment and that she was treated differently from other employees similarly situated who were not members of the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). Complainant has established the first prong of her prima facie case by virtue of her race and color, African-American and her gender, female. She has also established that she was adequately performing her job. However, while Complainant

testified that Joe Mosca, a Caucasian male and a budget analyst, was assigned additional duties consistent with those of a project manager, there was no evidence to substantiate her claim that Mosca was similarly situated to her. 1 The Complainant must show that the person to whom she compares herself is "roughly equivalent", Perkins v. Brigham & Women's Hospital, 78 F.3d. 747, 751(1st Cir. 1996) or "comparably credentialed." Mack v. Great Atlantic & Pacific Tea Company, Inc., 871 F2d. 179, 182(1989). The evidence showed that Mosca was assigned to various projects because of his expertise in budgetary matters, and that in fact, he had been assigned to various projects on this basis since 1994, before Complainant worked for McAuliffe. Further, there was no evidence to support Complainant's allegations that she was subject to adverse terms and conditions of employment on account of her race, color or gender. Complainant cannot establish a prima facie case by a mere recitation of her beliefs; she must produce some credible evidence in support of the allegation that she was given fewer assignments than Mosca or that race and gender were the motivating factors in Respondent's assignments of duties. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination on the

basis of race, color and gender with respect to the assignments given to Mosca.

Assuming that Complainant had established a prima facie case of discrimination, the burden shifts to Respondent to articulate legitimate, non-discriminatory reasons for its conduct. In this case, McAuliffe testified that he "inherited" Mosca because of his prior work on the Canton project and did not supervise Mosca on any other projects. Further, there was evidence that in November 1994, Rocco Mancini, then Assistant Director of Construction and Design, had assigned Joseph Mosca to assist Ownjazayeri on several projects because of his budget background. Mosca continued to work on aspects of these and other projects having to do with budgetary matters. Therefore, I conclude that Respondent has established legitimate, non-discriminatory reasons for assigning Mosca to particular projects.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduction, the burden shifts to Complainant to establish that the reasons articulated by Respondent are pretext for discrimination. Abramian v. President & Fellows of Harvard College, supra. Complainant has failed to establish that Respondent's

reasons for utilizing Mosca were a pretext for race, color and gender discrimination.

B. RETALIATION

Complainant has alleged that she was subjected to retaliation and rejected for two promotions in 2001 in retaliation for filing a complaint with Respondent's Department of Diversity. In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware of the protected activity and that Respondent subjected her to an adverse action and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29,41(2003).

Complainant cites several interactions with McAuliffe and Eng as examples of retaliatory conduct. I will address each as alleged. When McAuliffe expressed annoyance to Complainant about having to report for an interview at the Department of Diversity, while his actions may have been inappropriate, McAuliffe took no adverse action against Complainant nor did he threaten any job action. Thus I conclude that this conduct did not constitute an adverse action necessary to establish a prima facie case of

retaliation. Further, on another occasion when McAuliffe called in Complainant in the presence of his boss, Jim Eng to discuss a legitimate concern regarding Complainant's failure to complete an assignment, he likewise did not threaten or take an adverse job action against Complainant. The fact that he wanted a witness present after Complainant had filed a complaint against him is not retaliation. The evidence indicated a long-standing conflict between Complainant and her bosses encompassing a variety of work-related matters more akin to union issues. Complainant likewise viewed Roberson's refusal to provide her with a fax as an example of retaliation, but the evidence showed that there was an ongoing personality dispute between the two that predated Complainant's internal complaints to the Department of Diversity.

With respect to Complainant's unsuccessful applications for two promotions in 2001, I conclude that Complainant has failed to establish a prima facie case of retaliatory failure to hire. Complainant has established that she exercised rights under c.151B when filing her internal complaints against Respondent. However, she has failed to establish that Howard Haywood, the decision maker who hired both Darrin McAuliffe and Howard Smith, was aware of Complainant's internal complaint. Further, while

Complainant may have been qualified for the positions in question, I conclude that Darrin McAuliffe was also qualified for the position to which he was selected by virtue of his work experience as a project manager on construction projects. Further I draw the inference that Haywood was motivated by favoritism and nepotism as well, in choosing McAuliffe, the son of John McAuliffe.

Likewise, Haywood's motivation for hiring his friend, Howard Smith who had few obvious transferable skills, for a similar position, appears to have been favoritism. While this may have been unfair to Complainant, it does not constitute unlawful retaliation. Alves v. Town of Freetown, 17 MDLR 1329, 1342 (1995). (Nothing in G.L. c. 151B prohibits employers from engaging in nepotism); MCAD & Helene MacNeal v. Boston Public Schools, 25 MDLR 132, 138, 2003 ("The law does not protect against personality conflict, cronyism, favoritism, or other acts of harassment or unfair conduct unrelated to a protected class.") [citations omitted]. Thus I conclude that the Respondent's failure to promote Complainant did not constitute unlawful retaliation.

While Complainant did not make an express claim of gender discrimination with respect to the promotions, this issue merits discussion. In order to establish a prima

facie case of discriminatory failure to promote, Complainant must show that she is a member of a protected class who was qualified for the position, who was denied the position and the position was awarded to someone not of her protected class. Alves v. Town of Freetown Police & Board of Selectmen, 18 MDLR 115 (1996). Complainant has established that she applied for, was qualified for and was rejected for positions that were then awarded to men. However, as stated above, Respondent established that its motivation for hiring McAuliffe and Smith was nepotism and favoritism, and not unlawful discrimination. Thus I conclude that Respondent did not engage in unlawful retaliation or discrimination in violation of M.G.L. c.151B.

C. HOSTILE WORK ENVIRONMENT

Complainant has failed to establish the existence of a hostile work environment on any protected basis. While allegations of negative statements about black women were set forth in Complainant's complaint to the commission and in her internal complaint, she did not testify to any such incidents of offensive language or conduct directed at her race, color or gender.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED THIS 3rd DAY OF June, 2004.

JUDITH E. KAPLAN
Hearing Officer