

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & TIMOTHY BAKER
Complainants

v.

DOCKET NO. 03-BEM-02002

PLYMOUTH COUNTY
SHERIFF'S DEPARTMENT

Appearances:

Susan K. Howards, Esquire and Jeffrey M. Sanky, Esquire for Timothy Baker
Scott E. Bettencourt for the Plymouth County Sheriff's Department

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 1, 2003, Complainant, Timothy Baker, filed a complaint with this Commission charging Respondent, Plymouth County Sheriff's Department, with discrimination on the basis of gender, retaliation, and constructive discharge. The Investigating Commissioner issued a probable cause finding and the matter was certified for public hearing on November 28, 2006. A public hearing was held before me on March 5-7, 10 & 11, 2008. After careful consideration of the record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Timothy Baker (“Complainant”), has been employed by Respondent Plymouth County Sheriff’s Department since January 24, 1994. He resides in West Yarmouth, Massachusetts.

2. Respondent, Plymouth County Sheriff’s Department, operates the Plymouth County House of Correction, a correctional facility housing inmates convicted of misdemeanors and those awaiting trial within Plymouth County. Respondent employs approximately 400 individuals. Joseph F. McDonough was elected Plymouth County Sheriff in November 2000 and served until January 5, 2005. He was the sheriff at all times relevant to this matter.

3. Complainant served as a correction officer at the Plymouth County House of Correction from 1994 until April 1997, when he was promoted to the rank of lieutenant. As a lieutenant, Complainant was responsible for the operation and security of the housing units assigned to him. The lieutenant’s duties include organizing daily activities, inspecting the units, conducting monthly searches, and supervising, training, and evaluating correction officers under his supervision.

4. Lieutenants are reappointed annually and serve at the sheriff’s discretion. Complainant was first appointed a lieutenant in 1997 and was reappointed yearly from 1997 until 2003, when he was not reappointed, and resumed his former position of correction officer.

5. The jail is comprised of three self-contained zones consisting of several housing units, as well as Pod G, a segregation and disciplinary housing unit. One or two

Correction officers are assigned to each pod which houses from 62 to 139 inmates. A lieutenant oversees each zone.

6. Each lieutenant reports to unit team manager (“UTM”) and a shift commander. The UTMs work Monday through Friday and each is responsible for a particular Zone. A shift commander oversees the operation of the jail and responds to security disturbances on a given shift. In 2002 and 2003, Michael Neri (“Neri”) was the UTM for Zone One, Paul Gavoni (“Gavoni”) was the UTM for Zone Two and Ann Marie Kelly Norton (“Norton”) was the UTM for Zone Three.¹ Michael Duggan (“Duggan”) supervised Pod G.

7. In 2002 and 2003, Shift Commanders and UTMs reported to Charles Lincoln (“Lincoln”), then Director of Security, who reported to the Superintendent Brian Gillan (“Gillan”) Gillan reported to Special Sheriff Matthew Hanley (“Hanley”) and through him to Sheriff McDonough.

8. John Buckler (“Buckler”) has been Respondent’s Assistant Deputy Superintendent since 2000. Prior to working at Respondent, Buckler was a Hull police officer and police prosecutor for over 30 years. Buckler reports directly to the sheriff. His duties include conducting criminal investigations of inmates and employee sexual harassment complaints, as well as other investigations. To date he has investigated 50 sexual harassment complaints.

9. Sheriff McDonough was the chief law enforcement officer for the county and overseer of the House of Correction. McDonough testified that his policy was to require supervisors to investigate complaints of sexual harassment as soon as they were made

¹ Norton is currently an Assistant Deputy Superintendent. She supervised Complainant in 1998-1999 and 2001-2002 and gave him positive evaluations. (Exhs. 3, 5)

aware of such complaints and to turn the information over to Buckler, who investigated the complaints. Buckler would then call Sheriff McDonough's attention to any matters he thought McDonough should know about. I credit this testimony.

10. Richard Lee Cardinal, Jr. ("Cardinal"), a 20 year employee of Respondent, was an Assistant Deputy Superintendent under Sheriff McDonough, but was later demoted under McDonough's successor. Cardinal stated that Complainant occasionally came to him for advice and that Complainant had always done a good job. I credit his testimony.

11. In June of each year, the lieutenants' assignments are posted for the 12 month period beginning July 1. In June 2002, Complainant was assigned to Zone One where he reported to Neri.² Complainant worked first shift which was 7:00 a.m. to 3:00 p.m., on Friday through Tuesday.

12. Michael Neri, a former marine who has worked for Respondent as a correction officer and lieutenant, has been the UTM for Zone One since 1994. Neri was described by witnesses as a hard worker who is passionate about his job and a "stickler for details," a "backbreaker" and a rigid disciplinarian who is unpopular with subordinates because of his strict adherence to policies and procedures, high standards, and practice of holding his subordinates accountable for their actions. Neri testified that it was important to document incidents in writing. (Testimony of Hanley, McDonough, Duggan, Stone, Norton and Gillan) I credit the testimony of these witnesses with regard to Neri's approach to the job and adherence to standards.

² Complainant had previously worked for Neri in 1999. In that year, Neri reprimanded Complainant for failing to complete correction officer evaluations in a timely manner. (Exh. 52) Complainant testified that the reprimand was unjustified and was in retaliation for Complainant's refusing Neri's request to write a falsely negative evaluation of a correction officer.

13. During 2002-2003, Respondent had fewer employees as a result of lieutenants on injured leave and Complainant being frequently assigned to Zones Two and Three as well as Pod G, during that year. Baker worked 16 days in Zone Three and 90 days in Pod G. On occasion, Complainant simultaneously covered Zones One and Two, which are contiguous.

14. Notwithstanding Complainant's daily assignments, which fluctuated, his permanent assignment for the year 2002-2003 was considered to be Zone One, and he was responsible for training and evaluating Zone One correction officers.

15. Patricia McGarry ("McGarry") was a substance abuse counselor on contract to Respondent. Complainant testified that in 2002, McGarry began to approach him repeatedly, leaving him notes and telephone messages expressing her interest in having a romantic relationship with him. Complainant told McGarry that he wasn't interested in a relationship with her. (Exh. 8) Complainant's co-workers joked about the matter and told Complainant that McGarry was mentally unstable. Complainant was embarrassed by McGarry's conduct, but did not report the incidents to his superiors. I credit his testimony.

16. On October 2, 2002, UTM Gavoni was informed by Zone Two lieutenant Mark Holmes that McGarry had made unwelcome advances toward Complainant which he had rejected. On October 4, Gavoni called Complainant into his office and asked about rumors that McGarry was asking him out. Gavoni was concerned that either McGarry or Complainant might file a sexual harassment claim. (Exh. 9) Complainant told Gavoni of McGarry's advances and offered Gavoni letters and tapes of her voice messages to him. Gavoni declined to review them because he understood from

Complainant that McGarry understood Complainant was not interested in her. Gavoni also interviewed McGarry, who acknowledged asking Complainant to go out with her. On October 9, 2002, Gavoni filed a report regarding the matter with Director of Security Lincoln and Superintendent Gillan. The report stated that Complainant had spoken to McGarry and that she understood he was not interested in dating her. It also noted that McGarry had told Complainant she planned to leave her job for another position. (Exh. 9)

17. Complainant testified that he did not want to file a formal complaint against McGarry because he was concerned that she might then file a complaint against him. More importantly, he believed McGarry to be politically connected to Sheriff McDonough and feared retaliation by McDonough if he made a complaint against her. I credit his testimony.

18. Complainant testified that after meeting with Gavoni, he was approached by Captain Cardinal, McGarry's supervisor, who told him he should be flattered by McGarry's attention and suggested to Complainant that he take McGarry out on a date. Cardinal discouraged Complainant from filing a complaint against McGarry, telling him that it would reflect poorly on Complainant. Cardinal denied telling Complainant to date McGarry, but did acknowledge telling Complainant not to file a complaint if McGarry was not sexually harassing him. I credit Complainant's version of their discussion.

19. On October 18, 2002, Gavoni ordered Complainant to write a report detailing McGarry's conduct. On the same day, Complainant provided Gavoni with a written report detailing McGarry's contacts with him. The report stated that he did not want to

pursue a complaint against her and that he believed she was considering leaving Respondent for employment elsewhere. (Exh. 12)

20. At the same time, McGarry complained to Captain Cardinal that correction officers were teasing her about her overtures to Complainant and to other employees.³ On October 18, 2002, Cardinal wrote a memorandum to Superintendent Gillan about McGarry's complaint. The memorandum was copied to Lincoln, H.R. Director Christiani, Asst. Deputy Superintendent ("A. D. S.") Buckler and Attorney Steven Walsh. (Exh.10)

21. A. D. S. Buckler received the reports and began to investigate the issues concerning Complainant and McGarry. Between October 27 and 31, 2002, Buckler interviewed several employees about the rumors, as well as an offensive comment McGarry reported overhearing in the hallway. As part of this investigation, on October 29, 2002, Buckler interviewed Complainant about his relationship with McGarry. Buckler asked Complainant to write a report about his interactions with McGarry. Complainant told Buckler that he was involved in a custody dispute concerning his daughter and that he did not want to jeopardize his relationship with her by writing a report about sexual harassment or problems with a female co-worker.⁴

22. Complainant testified that he was concerned that the matter would be manipulated against him and told Buckler that he had nothing to add to his prior report. Complainant stated that Buckler told him that he did not have time to babysit the

³ There are also oblique references in the documents about an offensive remark by a Correction Officer that McGarry overheard.

⁴ Although Complainant told McGarry and his superiors that he was involved in a custody dispute, he testified at the public hearing that this was not really the case.

situation and to stay away from McGarry. Complainant offered the tapes and letters to Buckler who told Complainant that he did not need them. I credit his testimony.

23. Buckler testified that Complainant told him that he had no relationship with McGarry and had not been subjected to a hostile work environment, had not been harassed and did not want to pursue the matter. Buckler told Complainant that if he changed his mind he would re-open the investigation. I credit his testimony

24. Buckler testified that McGarry's complaint regarding co-workers consisted of vague allegations and rumors. On December 4, 2002, Buckler issued a report about McGarry's complaint concluding that most of the allegations were "rumor and innuendo" and that the "most disturbing" complaint, regarding an offensive comment overheard by McGarry, could not be substantiated. Buckler recommended that all personnel involved be required to read the sexual harassment policy and that all administrative personnel be required to attend training on how to identify and report sexual harassment. (Exh. 13)

25. Complainant testified that after his discussions with Buckler, He was called to meet with Respondent's legal counsel Walsh, now deceased. Walsh asked Complainant to give him the original audiotapes of McGarry's phone messages to him. Complainant declined but offered Walsh the chance to listen to the original or to provide Walsh with copies, but Walsh refused. I credit his testimony.

26. Complainant testified that after his meetings with Buckler, McGarry became more aggressive. She told correction officers that she and Complainant were dating and had spent New Years' Eve together. In response to her continued overtures, Complainant told her he did not have time for a relationship. I credit his testimony.

27. On January 10, 2003, Michael Neri filed an internal complaint of sexual harassment against McGarry, for commenting on his clothing and his looks. (e.g. “I love your dark hair with the burgundy shirt.” “Have you lost weight?”) The complaint also alleged that on another occasion, months earlier, McGarry had asked him for a ride home from a Correction Officers Academy graduation, but that he declined to do so. Neri testified that was made uncomfortable by McGarry’s conduct and that he filed the complaint in accordance with Respondent’s sexual harassment policy. (Testimony of Neri: Exh. 14) On January 13, 2003, Neri called McGarry into his office and in the presence of her supervisors, June Farrell and Captain Cardinal, told her he was offended by her inappropriate actions and that it better not happen again. (Exh. 15) Neri testified that he was never discouraged from making complaints against McGarry and after making his complaint he suffered no negative job actions. I credit his testimony.

28. Neri testified that on one occasion Complainant told him about McGarry engaging in offensive conduct, but he did not discuss the matter with Superintendent Gillan nor did he take any other action. He heard nothing further about the investigation. Neither Superintendent Gillan nor Sheriff McDonough discussed Complainant’s sexual harassment issue with Neri. I do not credit his testimony that he heard nothing more about the issue after his discussion with Complainant.

29. Superintendent Gillan testified that in January 2003, after learning that McGarry was trying to date Complainant, he directed Complainant to write a report about his interactions with McGarry. According to Gillan, Complainant downplayed the interactions with McGarry and told Gillan that he did not want to file a report because he was concerned for the safety of his family. Complainant did not tell the Gillan that he

had already filed a report and Gillan testified that he was not aware that Complainant had already written a report. Gillan testified that Buckler is not in his chain of command; therefore he did not receive copies of Buckler's sexual harassment investigations, although he would have been informed if sexual harassment has been found. I credit Gillan's testimony to the extent that he was not copied on Buckler's report. However, I believe that Gillan was very much aware of the goings on in the jail and knew that various investigations were on-going and that reports were being written.

30. Complainant testified that he continued to be reluctant to write further reports because McGarry had become fixated on his daughter and had left presents for her at Complainant's car. Given her somewhat irrational behavior, he feared for his family's safety. I credit his testimony. Ultimately, under pressure from Superintendent Gillan, Complainant wrote a report on January 24, 2003, stating that McGarry had occasionally called him and attempted to initiate a relationship with him, but that he had rejected her attempts. He stated that he did not wish to file a formal sexual harassment complaint because she had stopped calling him and their interaction had become professional. (Exh. 16)

31. Charles Lincoln, now retired, was Respondent's Director of Security from January 2001 to January 2004. Lincoln testified that he toured the units daily and never observed problems with Complainant's performance. Likewise, Neri had never advised him of any problems with Complainant's performance. According to Lincoln, Superintendent Gillan later told him that Complainant had not been reappointed because of his delay in writing a report and because of "what happened with a female employee." I credit Lincoln's testimony.

32. On February 6, 2003, A.D.S. Buckler sent Sheriff McDonough his reports regarding McGarry's alleged sexual harassment of Complainant and Neri. Buckler reported that Neri's incident was resolved internally and that Complainant was reluctant to pursue his claim and reported that he was not being harassed by McGarry. (Exh. 71)

33. Buckler directed McGarry to attend sexual harassment training. McGarry resigned her position on February 14, 2003, rather than attend the sexual harassment training class. Buckler notified Sheriff McDonough the same day that McGarry had resigned after having been reprimanded by Neri and ordered to undergo sexual harassment training. (Exh. 17)

Complainant's Performance

34. In 2003, Neri spoke to Complainant on several occasions about his failure to provide the required January training to the Zone One correction officers. Complainant told Neri that his frequent assignments to Pod G had made it difficult to complete his supervisory responsibilities in Zone One and asked for Neri's forbearance and advised him that the training would not be completed by the end of January. Complainant completed the training of the correction officers by April 10, 2003. (Exh. 61, 62)

35. Complainant testified that he approached Neri several times in 2002-2003 to ask about his performance, and that Neri told Complainant that nothing was out of the ordinary, except for one occasion when Neri was unhappy with the condition of a unit.

36. Neri testified that he had problems with Complainant's performance in Zone One. Neri testified that Zone One was not operating to his satisfaction in 2002- 2003, that he had regular discussions with Complainant about conditions in Zone One, and if he walked through the zone and observed that inmates had committed rules violations, he

would direct Complainant to fix the problems. I do not credit his testimony, which I find vague and unsubstantiated.

37. Neri stated that Complainant was always very polite, pleasant and cooperative and gave the impression that he was going to take care of things. He stated that despite these qualities, Complainant was not capable of being a supervisor and that the correction officers who Complainant supervised were not performing their duties. He felt that Complainant failed to address issues with the correction officers and that this was frustrating because it ultimately reflected on him. I do not credit this testimony.

38. Neri testified that he had numerous discussions with Superintendent Gillan about Complainant's performance. He did not document these conversations because he was not planning to discipline Complainant; he merely wanted his performance to improve. I do not credit his testimony. I find that if Neri's concerns about Complainant's performance were as serious as he claims they were, so as to ultimately lead to his demotion, that these concerns would have been documented.

39. On December 3, 2002, Neri noted in a weekly report to Gillan and Lincoln that when he and Complainant were inspecting a unit, pornography was discovered in an inmate's locker. Neri instructed Complainant and the correction officer assigned to the unit to pay better attention to the area and conduct more locker searches. (Exhs. 60, 61)

40. Neri testified that on April 28, 2003 he inspected unit C-1 and observed that inmates were "hanging around" and the cells were a mess. Neri immediately went to Complainant, whom he instructed to wait a short while before entering the unit, so as to appear that the inspection came from Complainant and not Neri, in order to preserve the chain of command. Correction officer David Spencer, who was on duty that day,

testified that when Neri entered the unit he asked Spencer whether Complainant had merely been signing the logbook and leaving, instead of doing rounds. Spencer testified that other than a missing light cover and an object hanging in a cell window, there was nothing else amiss in the unit. Complainant testified that when he entered the unit a few minutes later with Spencer, he saw nothing wrong and the log book showed nothing amiss. I credit Complainant's testimony.

41. Superintendent Gillan testified that he toured the facility often during the course of the year 2002-2003 and met frequently with the unit managers. Neri expressed to Gillan his frustration with Complainant many times that year. Neri told Gillan that Complainant was very pleasant but never followed through with matters such as training and evaluations of correction officers and failed to hold correction officers accountable for their actions. I do not credit his testimony because his complaints about Complainant's performance were unsubstantiated and never addressed to Complainant. .

42. Shift Commander William Stone, who was responsible for supervising the entire facility during his shift, testified that he was aware of no performance issues involving Complainant whom he described as a very good lieutenant. I credit his testimony.

42. As in previous years, in April 2003, Superintendent Gillan met with the UTMs Neri, Norton and Gavoni to discuss the reappointment of lieutenants and captains for the next fiscal year. At the meeting Neri recommended that Complainant not be reappointed to lieutenant. Norton testified that when asked for her input regarding the demotion of Complainant, she responded that she had no issues with Complainant when she supervised him, but she could not judge his current performance because he no longer

worked for her. Gillan and Norton both testified that incidents with McGarry and the issue of sexual harassment did not come up at the meeting. I credit their testimony.

43. Superintendent Gillan was responsible for making recommendations to the Sheriff regarding non-reappointments. Gillan testified that after meeting with the unit managers, he met with Sheriff McDonough, Special Sheriff Hanley and possibly Lincoln for the purpose of discussing reappointments. He recommended Complainant not be reappointed. He also recommended that Kathy Correa, a lieutenant in the bookings and records area, not be re-appointed. Sheriff McDonough accepted his recommendations. I credit his testimony.

44. Sheriff McDonough testified that Gillan usually made such recommendations, but he did not recall Gillan's recommendation regarding Complainant in 2003. McDonough testified that Patricia McGarry worked for his second re-election campaign in 2004, well after quitting her job with the Sheriff's department, but that she was not a significant supporter of his at the time of Complainant's demotion. He claimed that Complainant's issues with McGarry were not a factor in his decision to not reappoint Complainant. I do not credit McDonough's testimony that he did not recall the issues surrounding Complainant's non-reappointment in 2003. I credit his testimony that Gillen usually made such recommendations.

45. On April 30, 2003 a uniformed officer from the Sheriff's Department hand-delivered to Complainant in his driveway a letter from the Sheriff informing him that he was not being re-appointed as lieutenant effective July 1, 2003. (Exh. 18) Complainant was shocked and embarrassed in front of his family and neighbors. Hanley confirmed that Respondent would occasionally send a deputy out to notify an employee of their non-

reappointment as the Sheriff wanted to make sure the letter was not received by the notification deadline. I credit Hanley's testimony and find that sending a deputy to deliver non-reappointment notices and other notices was not an unusual event, given that a duty of the Sheriff's department was service of process.

46. On May 2, 2003, Complainant's next scheduled work day, shift commander Stone and Michael Duggan expressed shock at Complainant's non-reappointment. There was credible testimony from several witnesses that non-reappointment was rare.

47. On May 29 2003, Complainant met with Mark Gabriel, Deputy Director of Human Resources to challenge his demotion. Complainant testified that Gabriel told him that perhaps McGarry had said something about him that caused his non-reappointment. Gabriel denied making this statement to Complainant. Gabriel testified that he was not consulted about Complainant's re-appointment and knew only that the Sheriff did not want to reappoint him. I credit Complainant's testimony that Gabriel suggested McGarry was the reason for his non-reappointment. Gabriel's testimony in this regard was not credible.

48. On June 5, 2003 Complainant met with Special Sheriff Hanley to protest his non-reappointment. Complainant testified that at this meeting Hanley told him that his non-reappointment was related to his complaints about McGarry. Complainant stated that Hanley advised him not to pursue the matter, shut his mouth and be grateful he had a job because the Sheriff was very powerful in the community. Complainant took this as a threat and felt he was at a "dead end." I credit Complainant's testimony about this statement by Hanley, who did not expressly deny that he may have made the remark to Complainant.

50. Complainant learned that on July 1, 2003, he would be assigned as a correction officer to Zone One. The assignment caused him a great deal of anxiety, because the inmates in that unit knew him as a lieutenant and it would be difficult for him to be effective. In addition he would continue to be under Neri's management. Complainant acknowledged that because correction officers were rotated every 30 days and because he had worked in all zones, he would have had the same problem no matter what his placement. Complainant suggested that he could have been assigned to the laundry, but he acknowledged that he never requested that assignment. I credit his testimony.

51. Complainant testified that shortly after learning of his demotion he began experiencing anxiety, migraine headaches, nausea, diarrhea and insomnia. He became depressed, had no energy and had trouble controlling his emotions. He testified that he had always been the responsible and reliable one in his family and his demotion caused him to feel diminished in status within his family. I credit his testimony.

52. On June 18, 2003 Complainant sought treatment with Paul Laemmle, a clinical psychologist. On June 30, 2003, Laemmle wrote that Complainant was "suffering from extreme stress and anxiety which appears to be a result of a demotion at work as well as what he feels is a negative discriminatory attitude by the administration." Laemmle recommended that Complainant remain out of work on medical leave due to stress. (Exh. 21) Complainant began a leave and did not report to the correction officer position. On August 25, 2003⁵ Laemmle wrote that Complainant's "extreme anxiety was triggered by a recent demotion and negative work evaluation... and discrimination against him by his superiors and has been receiving once a week psychotherapy to assist

⁵ The parties agreed that the letter was incorrectly dated August 25, 2001

him to diminish his anxiety and panic attacks... the test results [from psychological testing] indicated that [Complainant's] anxiety was extremely high." (Exh.44)

53. Mark Gabriel, Respondent's deputy director of human resources, testified that after Complainant was not reappointed to lieutenant, Gabriel and Sheriff McDonough were concerned about the timing of Complainant's leave. Since it came on the heels of his non-reappointment, they wanted to make sure that he had a bona fide medical condition. Therefore, Complainant was placed on a paid leave status, pending an evaluation by an independent medical examiner to corroborate his condition.

54. Complainant was referred to Respondent's independent medical examiner, psychologist Guy Seymour and was scheduled for psychological testing on July 21, 2003. (Exh. 22) Complainant testified that he was unable to complete the testing because of anxiety and he left after about two hours.

55. The following day Complainant received a letter from Respondent, stating that he was being placed on unpaid unauthorized leave because of his failure to complete the tests. His tests were rescheduled, and he ultimately completed the evaluation on July 28, 2003 and was restored to paid status. (Exh. 25)

56. Complainant filed his complaint with the MCAD on August 1, 2003. On August 21, 2003 he received a letter from Gabriel ordering him to return to work on August 25, 2003. (Exh. 25) However, in a letter to Gabriel dated August 21, 2003, Dr. Laemmle had recommended Complainant remain on leave. The doctor's letter crossed in the mail with Gabriel's and Complainant was placed on unauthorized leave status as of August 25, 2003. (Exh. 27) However, on August 8, 2003, Dr. Seymour, the independent medical examiner wrote to Gabriel that Complainant would be able to return to work in

“the near future” but did not specify a date. (Exh. 68) Gabriel’s testimony that subsequent telephone communications between him and Dr. Seymour contradicted Seymour’s letter and that Seymour recommended Complainant return to work is not credible.

57. On December 9, 2003, Gabriel wrote to Complainant stating that he had not received an update from Complainant after Complainant had informed him that Laemmle would clear him for return to duty on November 26. Gabriel wrote that if Complainant did not provide him with the updated information on or before December 12, his employment would be terminated. (Exh. 32)

58. On December 9, 2003, Gabriel wrote to Complainant that Respondent planned to terminate his health and dental coverage. (Exh. 33) Gabriel testified that Complainant had mistakenly been receiving the benefits during his leave and that such benefits are not available to employees on leave.

59. Gabriel testified that he had received a number of conflicting physician reports regarding Complainant’s ability to return to work. He testified that Complainant’s employment was never terminated and he had no interruption of service for purposes of his pension, seniority and benefits. Despite the conflicting physician’s reports, I find that Gabriel did not adequately explain why Complainant was placed on unauthorized leave and was not permitted to use his accrued sick leave.

60. On March 29, 2004 Complainant returned to work as a correction officer. He testified that although the shift commanders have been good to him, it is still a hostile place for him as Gillan and Neri glare at him, suggesting that they make him feel uncomfortable and intimidated. I credit his testimony.

61. After going out on leave, Complainant filed a Workers' Compensation claim and on March 17, 2005, received a lump sum settlement of \$30,000.00 for lost compensation for a closed period of time from July 1, 2003 through March 2004. (Exh.53)

62. Through the fiscal year 2007-2008 Complainant would have earned \$39,196.95 more as a lieutenant than he has earned as a correction officer. In fiscal year 2003-2004 the difference between the lieutenant's salary and the correction officer salary was \$9,039.00; in fiscal year 2004-2005 the difference was \$8,666.43; in 2005-2006 the difference was \$7,569.82; in 2006-207 the difference was \$8,349.67 and in 2007-2008 the difference was \$5,572.03.

63. Complainant incurred costs of \$1,905.00 for unreimbursed medical expenses and co-pays. He also incurred costs of \$558.87 to replace insurance coverage that was wrongfully withheld by Respondent.

III. CONCLUSIONS OF LAW

A. Gender Discrimination

Complainant alleges that he was a victim of gender discrimination in that Respondent failed to adequately investigate his claim of sexual harassment against Patricia McGarry and in that he was treated less favorably than McGarry by Respondent in its handling of his allegations of sexual harassment. M.G.L. c.151B §4(1) prohibits an employer from discriminating against an employee in the terms and conditions of employment on the basis of gender. In order to establish a prima facie case of gender discrimination, Complainant must show that he is a member of a protected class, that he was subjected to adverse treatment and that similarly situated persons not of his protected

class were treated differently. 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 his prima facie case by virtue of his gender, male.

Complainant argues that Respondent failed to act on his claim of sexual harassment against McGarry, yet thoroughly investigated McGarry's claim of sexual harassment. I do not agree. Complainant was questioned by his superiors about his concerns regarding McGarry's inappropriate behavior. Despite his reluctance to file written reports about the matter, his superiors pursued him until he did so, and in his reports he downplayed the incidents.⁶ McGarry voluntarily reported to her superiors certain alleged teasing by co-workers that was also investigated by Respondent in the same manner. As a result of Respondent's investigations, McGarry was ordered to undergo sexual harassment training and chose to resign rather than do so. While Complainant did not pursue a formal complaint, Buckler nonetheless investigated his allegations against McGarry. Similarly, Respondent investigated an allegation of sexual harassment against McGarry by Neri and reported the results of his investigation to the Sheriff. To be sure, Respondent's investigation of Complainant's allegation was not thorough. Complainant's superiors rejected his offer to show them letters and voice mails from McGarry. While Respondent's actions in this regard demonstrate their reluctance to adequately investigate sexual harassment, I conclude that their actions in this regard were not motivated by gender bias, but by either political or retaliatory

⁶ Complainant's sexual harassment claim was dismissed for lack of probable cause and is not before the commission. Therefore his assertion that Respondent did not adequately investigate his allegations against McGarry is relevant only as to whether he was treated differently from McGarry regarding the investigation.

considerations. Therefore, I conclude that Complainant has failed to make a prima facie case of gender discrimination, as he was not treated in a disparate manner with regard to matters of sexual harassment.

B. Retaliation

Complainant alleges that Respondent demoted him in retaliation for having complained of sexual harassment. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected him 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). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000)

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); See Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the

employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. *Id.* at 504; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). That Respondent knew of a discrimination claim and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation. Respondent does not contest that Complainant satisfies the first two elements of his prima facie case. I conclude that the credible evidence also establishes a causal connection between Complainant's expressions of concern about sexual harassment and his demotion. Neri and Gillan recommended that Complainant not be reappointed to lieutenant within months after they learned of the incidents involving McGarry and ordering him to write a report these incidents. No other significant intervening event occurred.

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the adverse action. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. Respondent's articulated reason for not reappointing Complainant to the position of

lieutenant was Complainant's inadequate performance in the position of lieutenant. In support of its asserted reason, Respondent offered evidence that Neri was a strict, no-nonsense, supervisor whose dissatisfaction with Complainant's performance caused him and Superintendent Gillan to recommend Complainant's non-reappointment. The evidence of poor performance included a reprimand from Neri regarding Complainant's failure to conduct timely training of the correction officers under his supervision, and reports of incidents wherein Neri called Complainant into a unit that he said was out of control and when an inmate was found to have been in possession of pornography. Neri testified that though pleasant and agreeable, Complainant did not follow through on his obligations and duties as a lieutenant. Gillan testified similarly that Complainant was affable and agreeable but did not follow through on his obligations. Other than the testimony of Gillan and Neri, there is no other credible evidence to support this contention. The stated reason is belied by the fact that Neri had never documented anything other than the few, minor incidents that supposedly occurred at the end of Complainant's appointment. His failure to document incidents which he felt were serious enough to merit a demotion, contradicts his testimony that it was important to document events. Further, the testimony of Neri and Gillan was otherwise vague and unconvincing, given the testimony of several other witnesses who testified that Baker was a good lieutenant with a virtually unblemished work record. There was also testimony that the refusal to reappoint a lieutenant was the exception, not the rule. Therefore, I do not credit the testimony of Neri and Gillan that Baker's poor performance was the reason for their recommendation of demotion. I conclude Respondents have not credibly articulated a legitimate nondiscriminatory reason for their actions. Therefore, I conclude that

Respondent has not met its burden of articulating legitimate, non-discriminatory reasons for its adverse action that is supported by some credible evidence. I concur with Complainant that the scant evidence of Complainant's purported deficient performance and the lack of supporting documentation or testimony other than Neri's and Gillan's supports the conclusion that Respondent's reasons for demoting him are not credible. Respondent has thus failed to rebut Complainant's prima facie case of retaliation, and I conclude that their demotion of Complainant constitutes unlawful retaliation in violation of M.G.L.c.151B§ 4(4).

Complainant contends that Respondent continued to engage in acts of retaliation following his demotion, including failing to provide him with the appropriate uniform prior to his returning to the facility as a correction officer, sending notices to him at home in marked Sheriff's Department vehicles and designating his leave of absence as "unauthorized" and "unpaid" after his treating therapist stated he could not yet return to work. However, I am not persuaded that all these actions constituted acts of retaliation. There was testimony that Respondent on occasion delivered letters in person, a practice that is in keeping with Respondent's duties as process server. Further, there is no evidence that telling Complainant to pick up his new uniform on his first day back was motivated by retaliatory animus. More troubling is the placing of Complainant on unauthorized leave on August 25, 2004, only weeks after Complainant filed his complaint with this Commission. Respondent's explanation for placing Complainant on unauthorized leave; that medical reports regarding his ability to return to work were conflicting, was not credible, given that the independent medical examiner did not at that time recommend in writing that Complainant was capable of returning to work at the

time. I therefore conclude that Complainant's being placed on unauthorized leave was unlawful retaliation in violation of M.G.L. c. 151B §4(4).⁷

IV. REMEDY

Pursuant to M.G.L.c.151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of retaliation by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, at al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

⁷ The investigating commissioner certified a claim for constructive discharge (where Complainant resigns under working conditions so intolerable that a reasonable person would be compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995) However, there was no evidence that Complainant resigned his position. Therefore the claim for constructive discharge is dismissed.

Based on Complainant's credible testimony, I am persuaded that he suffered emotional distress as a result of Respondent's unlawful conduct. Complainant testified credibly that shortly after learning of his demotion he began experiencing anxiety, migraine headaches, nausea, diarrhea and insomnia. He became depressed, had no energy and had trouble controlling his emotions. Complainant sought treatment with Paul Laemmle, a clinical psychologist who recommended he take a medical leave of absence due to stress. (Exh. 21) He was out on leave for approximately nine months.

Thus I conclude that Complainant's demotion was the source of emotional distress that continued for some time. Complainant has persuaded me that he was adversely affected by his demotion and that his emotional well being, his daily activities, social life and his self-esteem suffered. His testimony was supported by the records of his treating mental health professional. While acknowledging that some of the sources of Complainant's emotional distress (sexual harassment, sex discrimination) are not compensable because of the dismissal of these claims, I nonetheless conclude that the lion's share of Complainant's emotional distress emanated from his retaliatory demotion and I conclude that Complainant is entitled to an award of \$75,000.00 for the emotional distress he suffered as a result of Respondents' unlawful retaliation.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Respondent must prove that: a) one or more discoverable opportunities for comparable employment were

available in a location as convenient as, or more convenient than, the place of former employment; b) the improperly discharged employee unreasonably made no attempt to apply for any such job and (c) it was reasonably likely that the former employee would obtain one of these comparable jobs. Black v. School Committee of Malden, 369 Mass. 657, 662 (1976). There was testimony that lieutenant positions became available after Complainant's demotion for which he did not apply because he believed his efforts would be futile. There was no evidence as to when the positions became available. I conclude that Complainant has mitigated his damages by continuing to work as a correction officer at Respondent, and that he is entitled to lost wages in the amount of \$39,196.95 (see finding of fact #62) to compensate him for the pay he would have earned had he not been unlawfully demoted. I further order that Complainant be appointed to the next available position of lieutenant.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

- 1) Respondent immediately cease and desist from discriminating on the basis of retaliation.
- 2) Respondent pay to Complainant the amount of \$75,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this

order.

- 3) Respondent pay to Complainant the amount of \$39,196.95 in lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
 - 4) Respondent pay Complainant the sum of \$1,905.00 for unreimbursed medical expenses and co-pays.
 - 5) Respondent pay Complainant the sum of \$558.87 to for the cost of incurred insurance coverage.
 - 6) Respondent is hereby ordered to appoint Complainant to the next available lieutenant position commensurate with his previous position
- Payment shall be made within 60 days of receipt of this order.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to 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 5th day of March, 2009.

JUDITH E. KAPLAN,
Hearing Officer