

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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TRACEY JAGIELSKI AND  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
Complainants

Against

Docket No. 03 BEM 02736

BRISTOL COUNTY SHERIFF'S OFFICE,  
Respondent

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Appearances: Donald J. Fleming, Esq., for Complainant Tracey Jagielski  
Robert M. Novack, Esq. and Bruce A. Assad, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 24, 2003, Tracey Jagielski ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that she was discriminated against on the basis of sex when she was suspended for twenty-five days, not allowed to serve her suspension in increments, and demoted from her position as a Lieutenant with the Bristol County Sheriff's Department for making personal telephone calls at work. On April 6, 2006, the Investigating Commissioner granted a "Technical Amendment" in which Complainant alleged that she was discriminated against because of her sexual orientation, Lesbian, in that she was subjected to a hostile work environment, was disciplined in retaliation for her complaints to Management and to the

Commission, and was subjected to unjust disciplinary actions in comparison to male officers.

The MCAD issued a probable cause finding on May 31, 2006, and certified the case for public hearing on April 23, 2007. A public hearing was held on October 2, 2007; October 4, 2007; October 15, 2007; October 16, 2007; November 9, 2007; November 16, 2007; January 24, 2008; February 12, 2008; and February 27, 2008. The parties submitted nine (9) joint exhibits. Complainant submitted an additional twenty-three (23) exhibits, and Respondent submitted an additional thirty-two (32) exhibits.

Counsel for the parties submitted post-hearing briefs on or around August 18, 2008.

To the extent the testimony of the witnesses or other evidence is not in accord with or irrelevant to my findings, the testimony or other evidence is disregarded. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant Tracey Jagielski was hired by Respondent on September 14, 1993 as a Correction Officer. The Bristol County Sheriff's Office has two separate facilities: one in Dartmouth and one in New Bedford. Complainant works at the Dartmouth House of Correction. She is an openly gay female.
2. On December 16, 2001, Complainant was promoted to Lieutenant.  
Respondent's Exhibit 32.
3. Complainant testified that in September of 2002, she suffered from stress as a

result of separating from her then-life female partner and being forced to sell her home. Complainant took vacation time during the first week of September of 2002. On September 6, 2002, she submitted a note from her doctor stating that, “Tracey needs to be off mandatory overtime for one month for medical reasons.” Joint Exhibit 1, p.3.

4. Major James Kelly rejected Complainant’s request that she be excused from mandatory overtime on the basis that more information was needed. Joint Exhibit 1-A.
5. Complainant submitted a second note from her doctor on September 13, 2002 stating that, “[Complainant] is under my care for major Depression. Due to her new medication she is restricted to work no more than 8 hours a day, 40 hours a week for the next 30 days.” Joint Exhibit 1, p.2. Respondent granted Complainant the request for restricted duty for one month with the requirement that the request be re-evaluated every thirty-day period. Joint Exhibit 1.
6. On October 3, 2002, Respondent’s Human Resources Representative Sandra Pimentel notified Complainant that the ability to work overtime is an essential job function and that a hearing would be scheduled to determine if Complainant could continue as a Correction Officer in light of her restriction. Id. at p. 8. Fifty to sixty other officers, primarily male, received the same letter in 2002-2003 regarding their requests to be relieved from mandatory overtime.
7. On October 7, 2002, Complainant submitted a note from her doctor stating that she could resume overtime. Joint Exhibit 1, p.1; Respondent’s Exhibit 3. Her doctor’s note states that Complainant “feels much better” and is “bright, alert

and in no distress.” Respondent’s Exhibit 3.

8. On March 21, 2003, Correction Officer Robert Britto filed an incident report alleging that he was being “harassed” by Complainant and that her behavior was “unprofessional.” Respondent’s Exhibit 13. In his report, Britto described an incident on March 12, 2003 in which Complainant accused him of delaying her entrance into the Control Room of the Dartmouth Women’s Center. Britto attributed the delay to a defective buzzer. Britto also mentioned that Complainant had reported his shoveling snow while on light duty and claimed that Complainant had sarcastically asked him on repeated occasions whether the buzzer in the Control Room area was working.
9. Assistant Superintendent/Sexual Harassment Officer Romain Payant characterized Britto’s incident report as a “sexual harassment” complaint and, along with Investigator Natalie Assad, investigated the matter. Id.; Joint Exhibit 2; Joint Exhibit 9. Payant testified that he treated the matter as a sexual harassment investigation because Britto characterized the complaint in that manner and because he treats all complaints by employees of one gender against the other as potential sexual harassment complaints. The record does not support Payant’s assertion that Britto characterized his complaint as one of sexual harassment.
10. During the investigation, Complainant was prohibited from working at the Dartmouth Women’s Center in order to limit contact between her and Officer Britto. Id. The decision to temporarily remove Complainant from the Women’s Center, effective March 21, 2003, was made at the direction of Special Sheriff

Bruce Assad after a discussion with Investigators Natalie Assad and Romain Payant. Joint Exhibit 9 (report by Investigator Natalie Assad at p.1; Memo to Colonel Kelly from Assistant Superintendent Payant). The temporary transfer of employees accused of sexual harassment is a standard operating procedure employed by Respondent. Joint Exhibit 9 (report by Investigator Romain Payant at p. 4).

11. Sexual Harassment Officer Payant determined that Britto's complaint against Complainant was unsubstantiated. Despite finding no sexual harassment by Complainant, Payant recommended that both Britto and Complainant attend interpersonal communication skills training because of their difficulty getting along. Complainant was directed "not rush to a judgment," to avoid the "Rumor Mill," to express positive feedback and constructive criticism, and to document insubordinate behavior. Britto was directed to learn how to operate equipment, to accept direction and constructive criticism from supervisors, and to refrain from insubordinate behavior. Id. Payant put Britto's complaint into Complainant's personnel file even though the complaint did not substantiate a finding of sexual harassment, because remedial action was imposed on Complainant.
12. Following the completion of the investigation, Complainant was re-assigned back to the Dartmouth Women's Center.
13. In or around March of 2003, Investigator Natalie Assad commenced an investigation of telephone usage by officers and supervisors at the Women's Center. Assad received data by a systems engineer which indicated that

between November 29, 2002 and March 14, 2003, sixteen telephone calls were made during Complainant's shift to her residence from her post assignment (extension 5369) and sixty-one telephone calls were made during Complainant's shift to her residence from the Watch Commander's Office (extension 5368). Joint Exhibit 3. Seven of the calls from Complainant's post lasted twenty-five minutes or longer. Id. Most of the calls from the Watch Commander's Office only lasted seconds, but nine of the calls between February and April of 2003 lasted from five to twelve minutes. Id. According to a report submitted by Natalie Assad to Major Gregory Centeio on June 4, 2003, Complainant admitted that she made phone calls from her assigned post at the desk of the Women's Center and from the Watch Commander's Office. Complainant claimed that she did so during "breaks" in order to cope with personal problems. Id.

14. Rule of Conduct 33 of the Code of Ethics of the Bristol County Sheriff's Office states that, "No BCSO [Bristol Count Sheriff Office] staff member may use the telephones of a correctional facility for personal calls during working hours, except in emergency situations." Respondent's Exhibit 1 at p.6. Complainant was familiar with the BCSO Code of Ethics. Respondent's Exhibit 5.
15. According to Complainant, she called her house in order to speak with Alexandra Ferreira, with whom she had begun a personal relationship in November of 2002 and with whom she was sharing a residence. Complainant testified that she needed to make the calls because she was experiencing stress and depression as a result of a prior relationship that had ended, the loss of her prior residence, and because she wanted to encourage Ferreira to apply to work

at the Sheriff's Office. Complainant's Exhibit 2. Complainant asserted that her telephone calls were in lieu of taking breaks. Id.

16. Complainant alleged at the public hearing that some of the calls made to her house from the Watch Commander's Office were made by Captain Mello to Alexandra Ferreira, but Complainant did not inform investigators about the Mello calls during the investigation.
17. Colonel Centeio, Superintendent Peter Perroncello, and Sheriff Thomas Hodgson testified that the telephone calls made by Complainant interfered with her ability to monitor activity inside cells, supervise unit officers, make rounds every fifteen to thirty minutes, and respond to medical emergencies, altercations, and assaults. They testified credibly that Complainant's telephone calls compromised the security of the institution and constituted a neglect of duty.
18. On June 13, 2003, Superintendent Perroncello suspended Complainant for 25 working days and demoted her to Correction Officer for making personal telephone calls while on duty. Joint Exhibit 4. The 25-day suspension was the same length suspension imposed on Correction Officer Tyson Barnes several weeks earlier for making 5 personal phone calls while on duty. Respondent's Exhibit 23.
19. Complainant grieved the discipline, but it was sustained at a Step II hearing. Joint Exhibit 5. Complainant charged that Respondent imposed the suspension in a discriminatory manner because it required that she serve her suspension on consecutive days rather than permit her to break it up as Respondent had

allegedly done for male Correction Officers. Complainant's Exhibit 3.

20. According to the credible testimony of Superintendent Perroncello and Sheriff Hodgson, it is the standard practice for employees to serve their suspensions on consecutive days in order for employees to put the discipline behind them as quickly as possible but the standard practice can be altered based on staffing needs of the facility. Id.; Joint Exhibit 6.
21. Complainant testified that following her suspension and demotion, Sheriff Hodgson, Colonel Kelly, and Superintendent Perroncello told her that her discipline was too harsh and that she should "get her bars back." The Sheriff, Kelly, and Perroncello all deny the statements attributed to them. Kelly's denial is corroborated by his rejection of Complainant's Step 1 grievance. Joint Exhibit 5. Perroncello's denial is corroborated by his June 13, 2003 letter to Complainant characterizing the demotion and 25-day suspension as "his" decision. Joint Exhibit 4. I do not credit Complainant's testimony that she was told by one or more of her superiors that her discipline was too harsh and that her demotion should be rescinded, but I do credit that one or more of them may have said that she should put the discipline behind her, keep taking promotional exams, and work her way back to a supervisory position.
22. On July 26, 2003, an incident took place between Correction Officer Britto and Complainant. Following a break, Britto returned to the Control Desk area of the Dartmouth Women's Center where Complainant was on duty and stood near Complainant. Complainant said to Britto, "Can I help you with something?" to which Britto replied in the negative. Complainant then asked whether Britto

was still on light duty, to which Britto answered in the affirmative.

Complainant told Britto that he was prohibited from having contact with inmates while on light duty status and that he should leave the area since several inmates were present on a painting assignment. According to Britto, Complainant picked up the phone and called the Watch Commander, Lt. Farrington, in order to report the incident. Officer Britto asserts that he did not have any inmate contact and was “standing by the door minding my own business.” Joint Exhibit 9 at p. 22. Britto denies laughing or taunting Complainant. Joint Exhibit 9 (report by Captain Mello to Colonel Kelly dated August 5, 2003). According to Complainant, Officer Britto stood in the area with his hands in his pockets, rocked back and forth on his feet, and stared at her with a grin on his face for approximately five minutes in order to ridicule her for being suspended and demoted. I credit Complainant’s assertion that on July 26, 2003, after Officer Britto finished his break he stood for some minutes in an area where he could observe and be observed by Complainant and possibly did so to annoy Complainant.

23. On October 24, 2003, Complainant filed an MCAD complaint alleging that she was discriminated against on the basis of sex when she was suspended for twenty-five days, not allowed to “break up” the service of the suspension, and demoted from her position as a Lieutenant. Her complaint was subsequently amended to include allegations of discrimination based on her sexual orientation and retaliation.
24. Complainant sought reinstatement as a Lieutenant and in order to qualify, she

re-took the Lieutenant's exam. Complainant scored a 55, which was the lowest score above the cutoff point. Complainant was scheduled for an interview on November 6, 2003. Respondent's Exhibit 25. The interview panelists for the oral interview phase of the promotional examination consisted of correction officials outside of the Bristol County Sheriff's Office who knew nothing about the candidates. Two members of the interview panel, Anthony Moniz and Joseph Vito, testified at the MCAD public hearing. They stated that Complainant's behavior at her interview was the strangest that they had ever encountered at an interview. According to Moniz and Vito, when Complainant entered the interview, she was asked to tell the panel something about herself and she proceeded to throw her MCAD complaint at the panel and to "rant and rave" about the Bristol County Sheriff's Department. At one point, a panel member got her a glass of water to calm her down. The panel's handwritten interview notes indicate that the panel members found Complainant unqualified for promotion. Respondent's Exhibit 21. Complainant testified that when she emerged from her interview, she was observed crying by Officer Susan Cripps, who was waiting to be interviewed. However, the interview schedule indicates that Cripps was interviewed an hour before Complainant. Respondent's Exhibit 24.

25. On December 8, 2004, Lt. Raymond Jesus was assigned to the EB unit of the Women's Center at Dartmouth, and Complainant was assigned to the EA unit. According to a report filed by Complainant, at approximately 9:50 a.m., Complainant looked through the window from the EA unit into the EB unit and

observed two inmates dancing together slowly as Lt. Jesus watched, laughed, sang, and yelled, "I forgot my dollar bills" and "We will rock you." Id.

Complainant observed one of the dancing inmates caress the face of the inmate with whom she was dancing as Lt. Jesus and ten to fifteen inmates stared at them, laughed, and cheered. Id. Social Worker Annuszczyk corroborated in a separate report that she observed several female inmates dancing in an intimate fashion, both slowly and fast, while Lt. Jesus yelled "where's my dollar" and later banged on the desk and sang "We will rock you." Respondent's Exhibit 8, 17. Complainant took sick leave at 10:45 a.m. in order to leave the facility, although Major Lancaster had offered to move her to another unit for the rest of her shift. Respondent's Exhibit 8.

26. On December 16, 2004, Lt. Jesus escorted Jeff Bohning, a civilian fire safety inspector, to the EA/EB hallway of the Women's Center. While in the hallway, Jesus made the following comment to Bohning, "This is her honey spot, she doesn't like men down here." Respondent Exhibit 7A. At the time that Jesus made the comment, he did not know that the intercom was on and that Complainant could hear the comment from inside the EA unit. When Complainant informed Jesus that she heard his remark, he apologized to her. According to Complainant's report, he said, "Tracey, I'm sorry, it was only guy talk." Respondent's Exhibit 7A.

27. On January 13, 2005, Lt. Jesus was demoted in rank from Lieutenant to Correction Officer, suspended for three days without pay, and required to attend remedial training for permitting female inmates to play music and intimately

dance, for fraternizing, and for engaging in horseplay with the inmates by singing and shouting remarks at them, and for permitting two inmates to caress each other while he watched. Respondent's Exhibit 9.

28. During the beginning of 2004, the Bristol County Sheriff's Office attempted, unsuccessfully, to implement a new approach to the care and custody of inmates in the Dartmouth Women's Center in which Social Workers were given some security functions. According to Sheriff Hodgson, the approach failed because it led to turf wars between Social Workers and Correction Officers. See e.g. Complainant's Exhibit 10.

29. On February 20, 2004,<sup>1</sup> Complainant drafted a memo to Major Edward Casey in which she stated that her concerns are "twisted and made to look like I am trying to start trouble because I speak up and care about safety issues within the facility." Complainant's Exhibit 18, pp. 4-5. According to Complainant, she was told she was "too harsh on the inmates." Id. Complainant also asserted that Gen Andrade made "a derogatory, discriminating remark about a certain lifestyle." Id. On February 27, 2004, Complainant wrote another memo to Major Casey which included the comment that, "Once again I feel I am being harassed due to the fact I came forward with safety concerns and issues within the Women's Center." Complainant's Exhibit 18, p. 7.

30. On February 27, 2004, Complainant turned off her radio while attending a seminar at 1:00 p.m. After the seminar, she forgot to turn her radio back on. Captain Gonzaga tried to reach Complainant by radio to assign her overtime,

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<sup>1</sup> The memo is dated, incorrectly, as February 20, 2003.

was unable to reach her, and had to instruct Lt. Cardoso to locate her. Captain Gonzaga gave Complainant a letter of counseling to remind her to keep her radio on and operational at all times. Complainant's Exhibit 18, p. 11.

Complainant wrote a memo to Major Edward Casey on the same day as the radio incident stating that she felt she was being harassed as a result of recently coming forward with "safety issues and concerns that have occurred at the Dartmouth Women's Center." Complainant's Exhibit 18, p. 9.

31. On March 17, 2004, Complainant drafted an incident report in which she charged that Caseworker Gen Andrade had falsely accused her of encouraging inmates to file grievances and that Andrade's "slander and unprofessional behavior" were creating a hostile working environment. Complainant's Exhibit 6.
32. On July 16, 2004, Complainant received a letter of commendation from Lt. Colonel Gregory Centeio describing her as doing a "great job" in the EB Unit. Complainant's Exhibit 19.
33. In August of 2005, Complainant was assigned to the Health Services Unit which provides health care to inmates. On August 11, 2005, Correction Officer Theodore Borges reportedly placed his hand on the inner thigh of a female phlebotomist employed at the Unit. An investigation was commenced by Assistant Superintendent/Sexual Harassment Officer Romain Payant and Sexual Harassment Investigator Natalie Assad. Payant arranged for Borges to be transferred pending the results of the investigation. Payant also arranged for Complainant to be transferred from the Unit for the duration of the investigation

based on information he received on August 24, 2005 from Nurse Brenda Ducharme. Ducharme reported that Complainant had said to her on August 19, 2005, "I hear Teddy has been transferred. Who opened their mouth and started this whole thing between Michelle and Teddy -- was it Kristine?" Respondent's Exhibits 20 and 31.

34. On August 26, 2005, Complainant drafted an incident report about the Health Services Unit in which she faulted a nurse practitioner for being uncooperative, described Dr. Susan Andrews as being hostile and dismissive of security, and discussed concerns about inappropriate sexual behavior and lax security. Respondent's Exhibit 20.
35. Complainant was interviewed by Assistant Superintendent/Sexual Harassment Officer Payant, attorney Lorraine Rousseau, and Internal Affairs Investigator Natalie Assad on September 7, 2005 about the sexual harassment case involving Borges and the female phlebotomist. Id.
36. Following the interview, the Department concluded that Complainant had not compromised the sexual harassment investigation and returned her to the Health Services Unit. Respondent's Exhibit 20.
37. Complainant sought several Captain promotions in 2006. One of the Captain positions which Complainant sought was initially open only to members of the International Brotherhood of Correction Officers (IBCO) of which Complainant was not a member. Respondent's Exhibit 26. When no IBCO member bid for the post, a promotional exam was held on February 11, 2006, limited to employees having at least one year of service as a Lieutenant. Respondent's

Exhibit 27. Complainant did not apply for or take the exam and had not been a Lieutenant since 2003. The highest scorer on the exam, Paul Almeida, was awarded the position, effective July 2, 2006. Respondent's Exhibits 11, 12A, 28. A second Captain vacancy was also restricted initially to members of the IBCO. After no IBCO members bid for the position, an appointment was made from the February 11, 2006 promotional exam. Respondent's Exhibits 11, 28. Lt. Bradford Simmons, one of the second highest ranking candidates, was awarded the position, effective July 2, 2006. Respondent's Exhibit 11, 12B. A third Captain vacancy was filled from the February 11, 2006 promotional exam by third-ranking candidate, Lt. Gabriel Baroody, effective January 28, 2007. Respondent Exhibits 11, 12C.

38. Complainant applied, unsuccessfully, for a vacancy in a K-9 position in 2006.

The position was filled by a panel of four individuals who evaluated the candidates. The panel asked all of the candidates the same questions, each panel member graded the answers of the candidates, and each panel member ranked his/her top three candidates. Respondent's Exhibits 29 and 30. The successful candidate, Anthony Pereira, appeared in the top three selections of each of the four panel members. Id. Complainant was only ranked in the top three by one panel member as that panel member's third choice. Id.

39. Complainant applied, unsuccessfully, for several canteen positions in 2006.

Rather than select a Correction Officer for either position, Respondent filled the positions for ninety days by interim interns who were given no benefits and subsequently privatized the positions. Complainant's Exhibit 5.

### III. CONCLUSIONS OF LAW

#### A. Sex Discrimination

M.G.L. c. 151B, sec. 4 (1) prohibits discrimination in employment on the basis of one's sex, i.e. gender, and one's sexual orientation. Prohibited forms of such discrimination include the creation of a hostile work environment and disparate treatment. See Pettiford v. City of New Bedford Police Department, 26 MDLR 304, 309 (2004) (female police detective subjected to gender-based harassment and gender-based disparate treatment); Nassab v. Massachusetts General Hospital, 25 MDLR 429 (2003) (female radiological technologist subjected to gender-based harassment and gender-based treatment); Moore v. Boston Fire Department, 22 MDLR 294 (2000) (female, black, gay fire fighter subjected to harassment and disparate treatment based on gender, race and sexual orientation)

##### 1. *Hostile Work Environment*

Harassment in the workplace that is based on gender or sexual orientation is a recognized form of discrimination. See McCormick v. Modern Continental Construction Co., 27 MDLR 316 (2005) (female carpenter subjected to gender-based harassment where a carving in the shape of penis was placed in her sweatshirt pocket and a wooden wedge with the word "cunt" was placed in her lunch bag); Brown v. Phoenix and Foxwood, 22 MDLR 160 (2000) (repeated derogatory comments regarding complainant's gender constituted actionable conduct); Dinsmore & Ford v. Home Security, Inc., 19 MDLR 4 (1997); Baldelli v. Town of Southborough Police Department, 17 MDLR 1541 (1995).

To establish a prima facie case of harassment based on gender or sexual orientation, Complainant must show that: 1) she is a member of a protected class; 2) she was the target of speech or conduct based on her gender and/or sexual orientation; 3) the harassment was sufficiently severe or pervasive to alter the terms or conditions of employment and create an abusive working environment; and 4) the harassment was carried out by an employee with a supervisory relationship to Complainant or in a situation where the employer knew or should have known of the harassment and failed to take prompt remedial action. MCAD Sexual Harassment in the Workplace Guidelines, p. 30, n. 23 (October 2, 2002); *citing* Fluet v. Harvard University, 23 MDLR 145, 161 (2001); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000).

Such harassment must be objectively and subjectively offensive. *See* Messina v. Araserve, Inc., d/b/a ARA Campus Dining Services at Massachusetts Institute of Technology, 906 F. Supp. 34, 36 (1995) *citing* Ramsdell v. Western Massachusetts Bus Lines, Inc. 415 Mass. 673, 678, 615 N.E.2d 192 (1993). The objective standard means that the evidence of gender harassment is to be considered from the "view of a reasonable person in the plaintiff's position." Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001) *quoting* Ramsdell v. Western Massachusetts Bus Lines, Inc. 415 Mass. 673, 678 (1993). The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it unreasonably interferes with the worker's performance and what psychological harm, if any, resulted. *See* Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000).

The subjective standard is a personal one related to Complainant's own reaction to the harassing conduct. See Couture v. Central Oil Co., MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as . . . "in the eye of the beholder."). Conduct satisfies the subjective test where a complainant is sincerely offended by it. See McCormick v. Modern Continental Construction Co., 27 MDLR 316, 322 (2005) (complainant's reaction demonstrated that she considered harassing conduct to be a serious affront to her dignity in the workplace). An individual cannot freely and voluntarily participate in conduct and, at the same time, claim to be offended by it. See Coppenrath v. Casey, 28 MDLR 119 (2006) (where complainant participated in and often initiated the conduct of a type she now alleges to be discriminatory, she cannot claim that the conduct was subjectively offensive to her); Candelieri v. Vanson Leathers, Inc., 24 MDLR 228 (2002) (complainant who told dirty jokes on the job, inserted balloons under her shirt, and wore blue jeans to work with holes in the crotch and buttocks, found not to be subjectively offended by co-worker rubbing supervisor's shoulders).

An employer is strictly liable for sexual harassment committed by its supervisors, i.e., those on whom it confers authority. See College-Town, 400 Mass. 156, 165-166 (1987). An employer may also be liable for harassment committed by persons without actual or apparent supervisory authority, such as co-workers. MCAD Sexual Harassment in the Workplace Guidelines, p. 9 (2002) (by analogy). A complainant must show that the employer either knew or should have known about the harassing conduct and failed to take prompt, effective, and reasonable remedial action. Id.

Turning to whether Complainant satisfies the elements of a hostile work environment claim, the evidence establishes that Complainant is a female Correction

Officer who is openly gay. She has incurred setbacks in her professional career which she proffers as evidence of gender and sexual orientation harassment. A close look at the negative incidents, however, fails to support her claim. In some situations, Complainant was treated in the same manner as heterosexual, male Correction Officers, such as in 2002 when she asked to be excused from overtime. Complainant's request was initially rejected for lack of documentation but then acted on favorably by the Department for a thirty-day period after she provided a doctor's note supporting her request. There is no evidence that the Department treated Complainant differently from other Correction Officers in responding to her request for a restricted schedule. In fact, the evidence supports Respondent's assertion that fifty to sixty Correction Officers, mostly male, made similar requests and received the same response.

Other circumstances fail to establish that Complainant was the target of speech or conduct based on her gender and/or sexual orientation because the alleged incidents had little, if anything, to do with Complainant. For instance, in 2004, Lt. Jesus permitted inmates to dance together in an intimate fashion while he laughed sang and made suggestive comments. Nothing in the record supports Complainant's assumption that the incident was staged to harass her or even that it happened with the knowledge that she was watching. Rather than have anything to do with Complainant, the incident began as a failure of supervision on the part of Lt. Jesus and ended with his suspension and demotion.

Disciplinary action taken against Complainant for legitimate and job-related reasons also fails to support a claim that she was the target of conduct based on her gender and/or sexual orientation. In 2003, Complainant was suspended for twenty-five

days and demoted for making numerous and lengthy telephone calls to her house while on duty. There is credible evidence that Complainant's telephone calls interfered with her ability to monitor activity inside cells, supervise unit officers, make rounds, and respond to medical emergencies and/or altercations. Respondent's imposition of discipline was an appropriate response to the neglect of duty. Although Complainant maintains that some of her supervisors characterized the discipline as "too harsh," her claim is not believable in light of their convincing denials and their failure to reduce her discipline when they had the opportunity to do so. Complainant also failed to prove that she was required to serve her suspension on consecutive days whereas male or heterosexual correction officers were allowed to do so in increments. The record contains credible evidence that Correction Officers generally serve their suspensions on consecutive days, subject only to deviations based on the staffing needs of the facility, not the financial distress of the officers. As with the twenty-five day suspension, Complainant's receipt of a letter of counseling for turning off her radio while attending a seminar and then forgetting to turn it back on was based on job-related misconduct rather than her gender or sexual orientation.

Still other incidents cited by Complainant fail to support a hostile work environment claim because they are isolated matters that were insufficiently severe or pervasive to alter the terms or conditions of her employment. Complainant describes one such matter in 2003 in which Correction Officer Britto looked at her with a grin on his face for approximately five minutes, allegedly to ridicule her for being suspended and demoted. On another occasion, Lt. Jesus made a sexually-explicit comment to a civilian fire safety inspector about Complainant when he did not know that the intercom was on.

Two other incidents involve Sexual Harassment Officer Romain Payant mischaracterizing non-sexual allegations against Complainant as claims of sexual harassment and temporarily transferring her to another assignment, pending an investigation of the allegations. In one of the incidents, Payant investigated a claim by Officer Britto who asserted that Complainant falsely accused him of failing to buzz her into the Control Room of the Women's Center. In another instance, Payant investigated a claim by a nurse who accused Complainant of demanding information about an individual who reported a fellow Correction Officer for sexual misconduct. These incidents range from trivial to troubling, but, even in totality, they failed to alter the conditions of Complainant's employment. I conclude that they are insufficiently severe or pervasive to support a hostile work environment claim.

It is also noteworthy that Complainant attributed much of her perceived harassment, not to gender or sexual orientation, but to coming forward with "safety concerns and issues within the Women's Center." Security matters lie outside the purview of c. 151B. According to Complainant's own memos, she was subject to criticism for being too hard on inmates and fellow Correction Officers. Complainant's sole reference to a "certain lifestyle" is too vague to link Complainant's discipline to discriminatory animus.

## *2. Disparate Treatment*

Discrimination based on gender or sexual orientation can also take the form of disparate treatment. See Pettiford v. City of New Bedford Police Department, 26 MDLR 304, 309 (2004) *citing* Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (female police detective subjected to gender-based discrimination when

she, alone, was denied training, undercover assignments, a partner, injured on duty benefits, and a permanent cruiser assignment); Belopolsky v. Massachusetts Bay Transportation Authority, 25 MDLR 181 (2003) (female assistant mechanical engineer given inferior work station and denied equipment with which to do her job whereas male assistant mechanical engineers had adequate offices, drafting tables, computers, and appropriate software); Nassab v. Massachusetts General Hospital, 25 MDLR 429 (2003) (radiological technologist subjected to disparate treatment in the form of an involuntary transfer, the loss of income, and harsher treatment than male technologists).

Apart from direct evidence of discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case, Complainant must show that: 1) she is a member of a protected class; 2) she was adequately performing the duties of the job at issue; 3) she was subject to adverse treatment; and 4) she was treated differently from other employees similarly-situated but not members of the protected class. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts

back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext. See Blare, 419 Mass. at 444-445. Complainants may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

As a female, gay Correction Officer, Complainant is a member of two protected classes. Both sides concur that Complainant was a generally competent Correction Officer, notwithstanding incidents that led to discipline. Support for her competency is found in a Letter of Commendation on July 16, 2004 which praises Complainant for doing a “great job.” Complainant cites three categories of adverse treatment giving rise to the contention that she treated differently from other employees similarly-situated but not members of her protected classes. The first category involves her discipline for making personal phone calls while on duty; the second category involves her temporary transfers by Sexual Harassment Officer Romain Payant during investigations of her alleged misconduct, and the third involves her failure to receive various promotions and assignments.

As far as the discipline for making personal phone calls is concerned, the twenty-five day suspension and demotion may have been harsh, but it was in keeping with the

type of discipline handed out to male Correction Officers. Colonel Centeio, Superintendent Perroncello, and Sheriff Hodgson all testified credibly that Complainant's telephone calls compromised the security of the Dartmouth Women's Center and constituted a neglect of duty. The 25-day suspension was the same length suspension imposed on Correction Officer Tyson Barnes several weeks earlier for making only 5 personal phone calls while on duty and the demotion was identical to that imposed on Lt. Jesus for instigating an incident in which inmates danced together in a sexually-provocative manner. While the discipline handed down to Barnes and Jesus was not identical to the discipline imposed on Complainant, neither was their conduct. The outcomes were sufficiently similar, however, to rebut Complainant's claim of disparate treatment.

Insofar as Complainant was required to serve her suspension on consecutive days, I credit the testimony of Respondent's witnesses that it is standard practice for employees to serve suspensions on consecutive days but that the practice can be altered based on staffing needs of the facility. Respondent's refusal to allow Complainant to break up her suspension in order to minimize its financial impact is not a sufficient basis on which to draw a conclusion of disparate treatment.

Turning to the incidents in which Payant transferred Complainant out of her regular assignment while he investigated claims made against her, the evidence indicates that Payant did so pursuant to his usual investigatory practices which are to: 1) treat all complaints by employees of one gender against the other as potential sexual harassment complaints and 2) temporarily transfer employees accused of sexual harassment until the matter is resolved. One harassment complaint against Complainant came from Officer

Britto who alleged that Complainant “harassed” him by accusing him of delaying her entrance into the Control Room, reporting him for shoveling snow while on light duty, and addressing him in a sarcastic manner. In another matter, Nurse Ducharme reported that Complainant demanded to know who reported a fellow Correction Officer of sexual misconduct. In Payant’s view, the issues justified the temporary transfer of Complainant pending the outcome of his investigations into her conduct. It is possible to disagree with Payant’s judgment, but there is insufficient evidence to conclude that he acted with discriminatory animus.

Finally, Complainant points to her failure to receive various promotions and assignments as evidence of disparate treatment but this claim, as well, must be rejected. Complainant was not promoted to Captain in 2006 because she was not a member of the IBCO union, whose members, alone, were initially eligible for the vacancies. When a promotional exam was subsequently given, Complainant was ineligible to take the test. Complainant failed to obtain a K-9 position because she received a lower ranking than other applicants by an unbiased panel of evaluators. The canteen positions which Complainant sought were temporarily filled by interns rather than by Correction Officers and were subsequently privatized. There is no credible evidence that Complainant was deprived of any of these positions as a result of disparate treatment.

C. Retaliation

Pursuant to M.G.L. c. 151B, sec. 4(4), it is unlawful for any person or any employer “to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter, or because he has filed a

complaint, testified, or assisted in any proceeding under section five.” In addition, sec. 4 (4A) makes it unlawful “for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.” These sections comprise chapter 151B’s prohibition against retaliation. See Kelley v. Plymouth Sheriff’s Department, 22 MDLR 208, 215 (2000), *citing* Bain v. Springfield, 424 Mass. 758, 765 (1997).

Retaliation is a separate claim from discrimination, “motivated, at least, in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley, 22 MDLR at 215 *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 through indirect evidence, Complainant must show that she engaged in a protected activity, that Respondent was aware of that activity, that Complainant was subsequently subjected to an adverse employment action, and that, absent other evidence of retaliatory intent, the adverse action followed the protected activity within such time that retaliatory intent can be inferred. See Mole v. University of Massachusetts, 442 Mass. 582 (2004); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Cimino v. BUT Electronics, 18 MDLR 197 (1996).

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 action. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2002); Wynn & Wynn, 431 Mass. at 665. If Respondent

meets this burden, then Complainant must show by a preponderance of the evidence that the proffered reason is not, in fact, the real reason for the conduct at issue and that said conduct was motivated by a retaliatory animus. See Weber, 434 Mass. at 777; Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian, 432 Mass. at 118.

The Commission interprets Chapter 151B's anti-retaliation provisions to apply to protected activity in the form of both formal and informal complaints as long as they challenge practices reasonably believed unlawful under c. 151B. See e.g., Auburg v. American Drug Stores, 21 MDLR 238, 242 (1999) (voicing of informal complaint protected under c. 151B); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (same). Protected activity requires a reasonable and good faith belief that the conduct being challenged could be construed as violating c. 151B. See Clark County School District v. Breeden, 532 U.S. 286 (2001); Guazzaloca v. VCF Motorfreight, 25 MDLR 200 (2003) (complaining about poor job evaluation or denial of promotion, without more, does not constitute protected activity). Adverse employment actions include discharges, demotions, transfers, reduction in salary, and the removal of job responsibilities but not merely coldness or aloofness from coworkers. See Bain v. City of Springfield, 424 Mass. 758 (1997) (cold behavior and hostile body language are too subjective and intangible to support retaliation claim).

In support of her retaliation claim, Complainant alleges that she was repeatedly disciplined in retaliation for her complaints to senior management and to the Commission. Complainant ties much of her discipline to coming forward with concerns about safety, staff behavior, and inmate decorum, rather than concerns about gender or sexual orientation. To the extent that Complainant's issues fail to challenge practices

reasonably believed to be unlawful under c. 151B, they fail to support a retaliation claim.

After Complainant filed a charge at the MCAD on October 24, 2003, however, her claims constituted protected activity. Following the charge, Complainant was interviewed for a Lieutenant's promotion on November 6, 2003, which she did not receive. Complainant's failure to be selected followed her protected activity within such time frame that retaliatory intent can be inferred. This prima facie case of retaliation falters, nonetheless, in the face of Respondent's legitimate, nondiscriminatory reasons for not promoting her, to wit: Complainant's score of 55 on the Lieutenant's test (the lowest score above the cutoff point) and her disturbing interview performance. The interview panelists, who were not employees of the Bristol County Sheriff's Office, testified that Complainant's behavior was the strangest that they had ever encountered at an interview. According to two of the interviewers, Complainant threw her MCAD complaint at the panel and "ranted and raved" about the Sheriff's Department. Complainant failed to rebut this credible and convincing evidence. While Complainant experienced other negative employment actions after the filing of her MCAD charge, it is not possible to infer retaliatory intent from these actions since they are too attenuated in time from the filing of the MCAD complaint. Accordingly, Complainant has failed to demonstrate that Respondent's actions were motivated by a retaliatory animus.

#### IV. ORDER

For the reasons set forth in this decision, the Complaint is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a

Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 7th day of January, 2009.

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Betty E. Waxman, Esq., Hearing Officer

