

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & WAYNE ARCHER,
Complainants

v.

DOCKET NO: 02-BEM-02881

PAXSON COMMUNICATIONS
CORPORATION, INC.,
Respondent

Appearances:

William Green, Esquire, Commission Counsel for Complainant
David J. Santeusanio, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 10, 2001, Wayne Archer filed a complaint with this Commission charging Respondent, Paxson Communications Corporation, Inc., with discrimination on the basis of race, color and national origin. That complaint was dismissed for lack of probable cause in 2004. On September 3, 2002, Complainant filed a second complaint against Respondent alleging retaliation for his having filed the October 2001 complaint. On October 14, 2002, Complainant's employment was terminated. On March 10, 2002, Complainant amended the September 3, 2002 complaint to allege that he was terminated in retaliation for filing the September 3, 2002 complaint. The Investigating Commissioner issued a probable cause finding only as to the claim of retaliatory termination. All of Complainant's other claims were dismissed. Attempts to conciliate the matter failed and, following a certification conference, the investigating commissioner certified the matter for public hearing.

A public hearing was held before me on September 24-26, September 28, October 2 and 5, 2007. After careful consideration of the entire record in this matter, 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. Respondent Paxson is a television broadcasting company with headquarters in West Palm Beach, Florida. Respondent operates a television station in the Brighton section of Boston. Respondent is now known as Ion Networks. From May 1999 to June 2000 the Boston station was owned by WABU and then by DP Media. In June 2000, Respondent acquired DP Media.

2. Complainant Wayne Archer, is a black West Indian man. He was born in Kingston, Jamaica in 1969. Complainant resides in Randolph, Massachusetts with his girlfriend Lisa Faria and her son Joshua. Faria is currently employed by the WGBH Educational Foundation.

3. Complainant immigrated to the United States at the age of five. He graduated from high school in White Plains, New York, then served three years in the Army and was honorably discharged. Upon discharge from the Army, Complainant became road manager for his brother Edward Archer's Hip-Hop performing group for approximately two years.

4. Following his stint as a road manager, in approximately 1992 , Complainant formed his own music production company, Wayne World Productions. Complainant was involved in recording and mixing music, and producing sound tracks. Complainant

testified that he was successful in this business and produced a gold album for his brother

5. In the years preceding his employment with Respondent, Complainant received a certificate from Northeast Broadcasting School, worked as a sound engineer, received an Associate's Degree from Roxbury Community College, worked at the Boston VA hospital and took courses at the University of Massachusetts.

6. In May 1999, Complainant was hired as a master control operator at Respondent's Boston station, on the recommendation of Lisa Faria, who worked at the station at the time. Complainant worked the overnight shift, Monday through Thursday from 8:00 p.m. to 7:00 a.m. Complainant was responsible for monitoring the on-air signal coming from sources such as satellite or direct feed from another station. In addition he monitored the three transmitter receiver towers utilized by the station, to ensure compliance with FCC regulations. By all accounts, Complainant was a very good employee who received positive performance evaluations.

7. At the time of his hire, Complainant and Faria lived in Allston, Massachusetts, and, due to his close proximity to the station, Complainant was to fill in other shifts when needed. In December 2000, Complainant and Faria moved to Randolph which was, much farther from the station.

8. In early 2002, Complainant and Faria shared a car, which Faria used to drive her son to school and to commute back and forth to work. Faria was laid off in April 2002, but still required her car during the day to transport her son to school and to look for work.

9. Beresford Daley has worked as a master control operator for Respondent since 2000. Daley worked the overnight shift from 9:00 p.m. to 7:00 a.m. Friday, Saturday and Sunday. Daley also filled in as needed for other shifts. Daley and Complainant have been close friends since 1992 when both were students at Northeast Broadcasting School, and Complainant initially recommended Daley for the position. Daley was given a full-time shift from 3:30 p.m. to 11:30 p.m. in October 2002.

10. William Paul Spitzer worked at the Boston station from 1999 to July 2005, as a master control operator and then as master control supervisor, where he oversaw Complainant and the other master control operators. Spitzer was supervised by the station's chief engineer, Rich Mentel and later by Paul Strieby. Spitzer testified it was Respondent's custom to move master control operators from night-shift to day-shift or from part-time to full-time when a vacancy occurred. Spitzer described Complainant as a good, reliable, competent employee.

11. Peter Dwight was a full time master control operator, who worked a "split shift." Dwight's hours were 6:00 a.m. to 2:00 p.m. on two or three days per week and 1:00 p.m. to 9:00 p.m. on the other two or three days.

12. Robert Gilbert was hired as General Sales Manager at the Boston station in June 2001 and became General Manager in September 2001. Gilbert testified that his work consisted entirely of sales and he was not involved with the engineering aspects of the station. Gilbert was laid off from Respondent in June or July 2005.

13. In 2001, William Maraglia was hired as business manager of the Boston station. He was responsible for accounts payable, accounts receivable, collections, and monitoring public files for federal communications policies and procedures. Maraglia

also served as the liaison between Respondent's corporate office in Florida and the Boston station, handling and processing paperwork for new hires and terminations.

14. Emma Cordoba has been Respondent's director of human resources since 1996. Her office is situated at Respondent's West Palm Beach headquarters. Cordoba's responsibilities were to oversee the human resources department, benefits, compensation, recruitment, payroll, employee relations and terminations.

15. On August 1, 2002, Paul Strieby was hired as the chief engineer, replacing Robert Mentel, who was demoted to assistant chief engineer. Strieby supervised Spitzer, Beresford Daley, Complainant and another part-time employee. Strieby remains employed by Ion Media Networks, the successor to Paxson.

16. By 2002, Respondent had been planning for many months to automate the station and was in the process of switching to a "louth automation" system which required the station to first automate the broadcasting and then place the transmitters under remote control. The automation would eliminate the need for overnight master control operators. Plans to automate the station were common knowledge among employees, including Complainant.

17. On October 10, 2001, Complainant filed a race and national origin discrimination complaint with the MCAD, alleging that Respondent prohibited him from taking breaks during his shift, while Caucasian operators were allowed to do so. He also alleged that he was not paid for a snow day, and for the time he remained working when he was entitled to take breaks. That complaint was ultimately dismissed for lack of probable cause.

18. Between January 2002 and April 2002, Complainant and Bob Gilbert corresponded in an attempt to resolve Complainant's October 2001 complaint. Gilbert kept Emma Cordoba informed of the negotiations, and sought her advice about the matter. Gilbert testified that although he did not usually deal with personnel matters related to the engineering department, Cordoba asked him to become involved because Complainant had conflicts with Rich Mentel.

19. In late January 2002, Peter Dwight, who worked the "split shift," gave two weeks' notice that he was leaving Respondent. Cordoba instructed Gilbert to offer Complainant Dwight's shift. Shortly thereafter, Paul Spitzer asked Complainant, at the request of Maraglia and Gilbert, if he were interested in working Dwight's shift. Complainant turned down the offer, telling Spitzer that because he relied on public transportation, he would not be able to make the 6:00 a.m. shifts on time.

20. Gilbert testified that he discussed the matter with Maraglia because of the exigency of securing a position for Complainant before the elimination of the night shift. Gilbert wrote an email to Complainant on February 7, 2002; "Hi wayne I wanted to once again urge you to consider if there is any way possible to accept the day shift now open." Gilbert then advised Maraglia that he had made the offer to Complainant. After writing the memo Gilbert had no more involvement with Complainant or Cordoba and was not involved in the later decision to terminate Complainant's employment.

21. Bob Maraglia testified that he discussed Complainant's October 10, 2001 MCAD complaint with Emma Cordoba, and confirmed that she instructed him to offer Complainant Dwight's shift. Maraglia testified that although he did not know the exact hours of Dwight's shift, on January 29, 2002 he emailed Complainant: "Wayne before

going outside Pax to fill the MF day shift, I thought I would offer it to you. If you are interested, please let me know ASAP...” Maraglia testified that he never discussed the matter with Complainant in person. (Exh. C-14)

22. Spitzer stated that Maraglia did not normally get involved in hiring at that level. Spitzer testified that after Complainant declined the shift, chief engineer Rich Mentel asked Spitzer to cover Dwight’s shift. The position was never offered to anyone else because Respondent had imposed a hiring freeze.

23. On February 8, 2002, Complainant wrote to Gilbert: “Bob, as I told you per our conversation earlier this week, it is physically impossible for me to take the day shift now available due to lack of transportation. I am working on transportation, but at this time I am unable to commit to this shift. (Exh. 15)

24. Complainant testified that on April 10, 2002, he called Emma Cordoba and explained that he was unable to take Dwight’s shift because of transportation issues, but stated that he still wanted to be considered for any other shift that might be offered at a later time. According to Complainant, Cordoba told him that she could not guarantee that a shift would be available, but that if a shift opened up and he had seniority, he would be offered the shift. I credit his testimony.

25. Cordoba testified that at the time of the April 10 telephone call she was unaware that Dwight worked a split shift. Cordoba stated that she told Complainant he would not be guaranteed a position when the overnight shift was eliminated but if a position were to become available, he would be notified and given the option to transfer. Cordoba denied promising Complainant the next available opening, and stated that

Complainant told her only that he could not work the day shift, but never specified that his issue was solely the inability to get to work by 6:00 a.m.

26. Cordoba testified that she took notes during this conversation. She testified that she possessed these notes a year later, on March 24, 2003, when she was deposed, but has since lost them. In 2003, Cordoba referred to her day planner to assist with Respondent's position statement and gave detailed answers regarding the April 10, 2002 telephone call in response to interrogatories. Emma Cordoba (tr.V, p.11) testified at her deposition in February that her 2002 day planner was in a credenza at her office in Florida, but when she later went back to look at it, the 2002 day planner was missing.

27. On September 3, 2002, Complainant filed a second complaint with the MCAD, alleging Respondent did not provide him with a timely performance review. Cordoba testified that Maraglia sent her a copy of the complaint and they subsequently discussed the complaint. However, she denied discussing the complaint with anyone other than Maraglia. The complaint was later amended to include a claim of retaliatory termination. The claim regarding the performance review was ultimately dismissed for lack of probable cause. I do not credit Cordoba's testimony that she only discussed the complaint with Maraglia.

28. On September 17, 2002, Complainant received an annual written evaluation in which he was rated in the "outstanding" category and was given a 5% raise.

29. On September 17, 2002, Strieby wrote an email to Maraglia and Jack Davidson, Respondent's regional manager, detailing two conversations he had with Complainant that evening. One conversation concerned Complainant's performance appraisal. Strieby quoted Complainant as saying that some of the people at the station

were “bad” and that they discriminate” and that “there are some very messed up people at the station” and why should he have to be the one to leave because of automation.

Strieby forwarded the same email to Emma Cordoba the following day, along with the message, “Emma, this is the email that I sent to Jack and Bill yesterday concerning Wayne...Thought it would be good for your records.” (Exh. R-2)

30. Complainant testified that when he arrived at the master control room on October 14, 2002 for his regular shift, Paul Strieby informed him that the overnight shift had been eliminated and that he was being laid off. Paul Spitzer was present at the control desk at the time, but Complainant had no chance to talk to him. Complainant went home and called Spitzer to say good-bye to him. Spitzer told Complainant that it was the worst day of his life, and apologized for Complainant’s predicament.

31. The following day, October 15, Beresford Daley called Complainant and told him that he had been offered a full-time master control operator position on a newly created 3:30 p.m. to 11:30 p.m. shift. Daley was apologetic and remarked that Complainant should have been offered the job. Complainant testified that he was “in shock” and disbelief after learning that Daley had been offered a full-time shift because he had seniority over Daley, who had been always worked part-time. I credit his testimony.

32. Spitzer testified that Strieby had instructed him not to tell Complainant about the new 3:30 p.m. to 11:30 p.m. shift prior to his lay off. I credit Spitzer’s testimony.

33. Strieby denied instructing Spitzer not to tell Complainant about the new shift. Strieby stated that he discussed the rearrangement of shifts with Spitzer, who told him that a day shift would be available to either Complainant or Daley and that Spitzer

recommended Daley because Complainant had declined a day shift earlier in the year and was unable to work a day shift. Strieby stated that he did not select Complainant for the new shift because of his work restrictions. I do not credit his testimony regarding his reasons for not selecting Complainant for the new shift. Strieby testified that Complainant was a very good operator and acknowledged that based on his seniority and full-time status he should have been the first one offered the new day shift.

34. When questioned whether the 3:30 to 11:30 shift was a “day shift” Strieby stated “No.” He stated: “We’re not calling that a night shift. Day is when the sunshine is shining, is primarily a day shift....in television...you might say it’s a little gray because you’re starting in the afternoon. You’re working through some of the main important parts. You’re working through prime time...And it’s not---the overnight is not quote/unquote a night. So it’s kind of, you know, maybe I used the language improperly, as far as...what it’s called...” The hearing officer: “Well I guess my question is, if you know somebody can’t work a day shift, I don’t know how that translates to they can’t work 3:30 to 11:30?” Strieby: “That would translate to me, it would be---it’s the overnight. It’s the one that goes from 11 o’clock or 10 o’clock at night, and basically works, we typically call graveyard, way overnight. That’s distinguished from anything that’s during the day and going into prime-time.” (Tr.IV, p.187-189)

35. After making the decision, Strieby told Maraglia that Complainant was going to be laid off and Daley would become full time. He denied discussing with Maraglia whether Complainant should be offered the job.

36. Strieby stated that either Maraglia or Gilbert had told him that Complainant had ongoing legal complaints against Respondent, but he never discussed those matters

with Cordoba. Strieby denied knowledge of Complainant's September 3, 2002 complaint. I do not credit his testimony.

37. Gilbert testified that he told Strieby when he was hired about Complainant's inability to work the day shift because of transportation issues. Maraglia told Gilbert in August 2002 that Daley would be offered the new shift because Complainant had already stated he would not take a day shift. Maraglia notified Cordoba's assistant, Raquel Tavares, that Complainant would be laid off and she sent him paperwork from the corporate office relative to Complainant's lay-off, including a "settlement and release" which he reviewed with Strieby. He explained the paperwork to Complainant, who refused to sign the settlement and release, because he felt he had been singled out and mistreated. Maraglia knew Complainant had several claims pending at the MCAD at the time.

38. Maraglia received Complainant's second MCAD complaint in September 2002 and faxed it to Cordoba, but did not follow up with her on the matter. He denied discussing the complaint with Strieby, Spitzer or Gilbert. I do not credit his testimony that he did not discuss the complaint with Cordoba or with Strieby or Gilbert. Maraglia left Paxson in March 2003.

39. Cordoba testified that she knew by September 2002 that Respondent was eliminating the night shift in Boston, but did not discuss the issue with Maraglia, Gilbert or Strieby because they were to make decisions regarding the shifts. I do not credit her testimony that she did not discuss the shifts with Maraglia, Gilbert or Strieby. Cordoba stated she was unaware at the time that a new 3:30 p.m. to 11:30 p.m. shift had been created and denied having prior knowledge of who would be offered the new shift. She

stated when Gilbert and Maraglia told her Complainant was to be laid off, she did not object or respond that Complainant should get the next open position.

40. Complainant testified that after receiving Daley's call informing him that Daley had been offered the full-time job, he was in shock, hurt and broke down crying in disbelief. He stated that he was devastated, crushed and felt that he was not respected. I credit his testimony.

41. Complainant testified that on October 16, 2002, he called Emma Cordoba to discuss the circumstances surrounding his lay-off and the job offer to Daley. According to Complainant, Cordoba responded that "It wasn't right," and that she intended to call the station to find out what happened and get back to him. Complainant and Faria each testified that, unbeknownst to Cordoba, Faria listened in on this call. Complainant testified that subsequent to the October 16 conversation with Cordoba he twice left telephone messages with her assistant to call him but Cordoba never returned his calls. I credit his testimony.

42. Cordoba denied telling Complainant that "It was not right." She stated that she would have had to investigate Complainant's allegations before promising anything to Complainant. Cordoba denied that Complainant ever called her again after October 16, 2002. I do not credit her testimony.

43. On April 4, 2006, Cordoba wrote a letter to an MCAD investigator, stating that Daley's night shift position had been eliminated earlier in the year and he was continuing to work at the station on a part time basis. (Ex. 35) Daley testified that this letter was incorrect.

44. Complainant testified that prior to his termination, he spent a lot of time with Faria's son, Josh, with whom he shared a father-son relationship. He testified that because Faria worked days and he worked nights, he greeted Josh when he arrived home from school, assisted him with homework and drove him to after school activities. Complainant coached Josh's Little League team and served as a Little League Umpire for a number of years. Complainant ate supper with Faria and her son as often as possible. They also watched TV, laughed and joked together. Prior to his termination, Complainant assisted his neighbors by clearing their walkways of snow and raking their leaves. I credit his testimony.

45. Complainant testified that after his termination, he was hurt and began to withdraw from his family. He stopped spending time with Josh, and would often stay in bed all day. He stopped eating dinner with Faria and her son, and suffered from insomnia and restlessness. Complainant testified that as time passed he began to have violent nightmares, and on occasion kicked and punched Faria in his sleep. He stated that he developed painful muscle spasms in his back and was tormented by feelings of anger and resentment. He stopped helping his neighbors and did not socialize. He stopped coaching and attending Little League games and would watch the games from his car to avoid interacting with other parents because he did not want to explain why he was no longer coaching. Complainant testified that he hasn't gone out socially since his layoff. Faria's testimony essentially corroborated that of Complainant regarding these changes in his mood and conduct. I do not credit Complainant's testimony with respect to having violent nightmares and that he has not gone out socially for five years. I otherwise credit his testimony.

46. Complainant testified that although he was not terribly close to his parents and siblings, he had kept in touch with them prior to his lay-off. After his lay-off, he avoided his family because he does not want to explain what he is going through. He stated that when his was growing up, his parents, Jamaican immigrants, told him that they experienced racism and discrimination at their jobs in a hospital, but never complained to their employers. Complainant testified that he felt obligated to speak out about the discrimination at his work place and that he was not going to “take it” as his parents had, or else he would be an “enabler.” Complainant testified that he sometimes wonders whether it was worth losing his job to speak up. He stated that his termination strained his relationship with Faria but also made them stronger. I credit his testimony.

47. Faria testified that she became concerned about Complainant’s mood changes and nightmares and strongly urged him to seek professional counseling. She found an agency in Quincy that took patients on a sliding-fee scale.

48. Complainant had four sessions with social worker Lorraine Bernier at the Maria Droste Agency. He testified that he stopped seeing Bernier because the sessions did not alleviate his feelings about his situation and he felt that mental health treatment would not resolve his problem; he testified that he needs to resolve his MCAD case in order to “have closure” and “put his life back together.”

49. Complainant testified that he continues to suffer from depression, anger, hurt and turmoil as a result of the termination. He still has insomnia and an inability to focus and states that it is like torment. He still has to wake up every day and deal with it and the feelings of uncertainty gnaw at him and he suffers from anxiety attacks and has passed out on two occasions.

50. I find that Complainant suffered distress as the result of his lay-off, although I believe that his testimony on this issue, (as well as Faria's) was exaggerated in some respects. For example, Complainant testified that he told Sister Bernier about his violent nightmares; however according to the credible testimony of Sister Bernier, he did not tell her about nightmares. Likewise, Complainant testified that he told Bernier that what had happened to him at Paxson was part of a larger problem in the country and Sister Bernier told him that "it is only going to get worse." Sister Bernier denied that this conversation took place, and stated that she would never tell a patient being treated for depression that things were going to get worse." Complainant's testimony in this regard is not credible.

51. Complainant testified that he has earned no income since his termination in October 2002. In 2002, Complainant received unemployment compensation of \$3,292.00 and wages of \$25,614.00. In 2003 Complainant received \$9,695.00 in unemployment compensation. At the time of Complainant's termination, his hourly wage was \$13.78, or 28,662.40 per year ($\$13.78 \times 40 \text{ hrs} \times 52 \text{ weeks}$).

52. Since his termination Complainant has sent out no resumes or employment applications and has never utilized the Division of Employment's resume service, job posting service or job training service. He once tried unsuccessfully to contact the Career Resources Department at the Mass College of Communication.

53. Complainant did not utilize the services of an employment agency, did not seek work with a temporary placement agency and did not review postings at the Division of Workforce Development. He periodically reviewed the Boston Sunday Globe job postings, the Suburban Shopper and Money Saver. In 2003 he reviewed ads once every two weeks. In 2004 and 2005 he reviewed ads about once a week and in 2006

he reviewed ads about once or twice a week. In 2003, he reviewed Yahoo and monster.com every two or three months. He reviewed these sites once a month in 2004, 2005 and 2006.

54. Complainant testified that Faria, who had also been laid off, was utilizing the services of a headhunter who also informally looked for jobs for Complainant. He testified that when Faria obtained employment at WGBH, Complainant asked her to try to get him a job in master control; however he was not actively involved in finding a job.

55. Complainant testified that he decided to refocus on his musical abilities and return to the music industry, where he had worked prior to Respondent. Complainant testified that within two months of his lay-off he had purchased \$5,000.00 worth of equipment for use in his music business and started a record label. Complainant stated that in the music industry he could control his clientele and his interactions. He stated that musicians are tolerant and do not get “hung up” on peoples’ appearance.

56. Complainant testified that since returning to the music industry, he has produced and submitted at least 15 sound tracks to people in the music business for consideration and has made numerous attempts to earn money through the production aspect of the business. Complainant stated he has been doing this type of work since 1990 and claimed that since his termination he often works at least 10 hours per day, sometimes works 18 hours straight, and sometimes works 80-hour weeks.

57. Complainant testified that although he has not made any money for five years, he had past success in the music business and knows from experience that success in the music business does not come overnight. Complainant stated that as a result of his lay-off he is “not in a partying mood” and his inability to attend parties and functions is a

major impediment to succeeding. He set up the company World Records in order to release another project, Bona Fide Blends. Complainant founded Wayne World Productions in 1991 in New York. When asked on cross-examination why Wayne World Productions was dissolved in 1995, Complainant claimed he was not aware of the company's dissolution.

58. Sister Lorraine Marie Bernier is a social worker at Good Shepherd Maria Droste Services. Sister Bernier received an undergraduate degree from Sienna College and a Master's Degree in Social Work from Boston College. She has been in the field of human services for forty years and in the field of social work for 21 years. On February 5, 2002, Complainant called her and underwent an initial telephone interview. After reviewing the intake with her clinical director, she took Complainant on as a client. She saw Complainant on February 19 at which time she did an assessment of his well-being. She saw Complainant again on February 27 and on March 5, 2007 in therapy sessions.

59. During one session, Complainant told Sister Bernier about the subject of his first MCAD complaint, regarding Respondent's refusal to allow him to take breaks. He also discussed that he was laid off and a less experienced employee was given a full-time position. Sister Bernier testified that Complainant did not feel counseling was very helpful and she stressed to him that it could be helpful if he could use a therapy relationship to talk about his feelings of rejection, anger, sadness and depression. She noted that Complainant showed some of the classic symptoms of depression and questioned him about looking for work, but he lacked motivation. He told her that his day consisted primarily of watching television, and that he had low energy and fatigue, poor self-image and poor self-esteem. He had difficulty making decisions and had

feelings of hopelessness. He never told her he had nightmares. He did not tell her that his layoff affected his relationships. He told her he was looking forward to it leaving the house in the evening for baseball practice once the season began.

60. Sister Bernier testified that she would have explored many more areas of Complainant's life if he had continued his sessions, such as his childhood, history of depression and relationships with family members. I credit Sister Bernier's testimony in its entirety.

61. Peter Cohen, a vocational expert witness called by Respondent, testified that in his opinion, within a reasonable degree of certainty, Complainant's efforts to find full employment have been negligible. He also stated that if Complainant had engaged in a reasonable job search, it is reasonably likely that he would have obtained a job comparable to the master control operator position that he held at Respondent. Mr. Cohen acknowledged that Complainant had experience and past success in the music industry and did not place a time frame on when it was no longer realistic to continue to work in the music industry without financial success. I credit his testimony. (Tr.V, p. 40-41; Exh. R-14)

III. CONCLUSIONS OF LAW

Complainant has alleged that Respondent laid him off in retaliation for having filed a complaint of discrimination with this Commission. 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.*; 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. I conclude that the credible evidence establishes a causal connection between Complainant's filing a complaint of retaliation and the termination of Complainant's employment. Cordoba assured Complainant on April 10, 2002 that when the overnight shift was eliminated, he could have first priority for any open shift. Maraglia received Complainant's retaliation claim on or about September 3, 2002 and he then faxed the complaint to Cordoba. Subsequently, Maraglia told Cordoba that Complainant was going to be laid off, Cordoba did not ask Maraglia whether there was another shift available for Complainant, Complainant's performance evaluation of September 17, 2002 rated him "outstanding" and finally, that Complainant's supervisor, Paul Spitzer, testified credibly that Strieby told him not to tell Complainant about the new shift.

If the Complainant establishes 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 offering Complainant the new, full-time shift was his inability to work a "day shift" and his past rejection of a "day shift."

Complainant has persuaded me that Respondent's articulated, non-discriminatory reason for terminating his employment is pretext for unlawful retaliation. Respondent's managers' assertions that Complainant's rejection of a "split shift" in April 2002 led to the presumption that he could not work a 3:30 pm. to 11:00 p.m. shift in October 2002, is not credible. Strieby, who made the decision to terminate Complainant's employment, did not adequately explain how a 3:30 to 11:30 pm shift was considered a "day shift."

Moreover, while Strieby claimed he did not discuss issues regarding Complainant with Respondent's managers, his testimony was inconsistent with an email he sent to Cordoba, Maraglia and regional manager Jack Davidson, on September 17 and 18, relating conversations with Complainant that he thought would be "good for [Cordoba's] files." Strieby never discussed with Complainant the possibility of taking the new shift despite acknowledging that Complainant was a good employee who, by virtue of his tenure and by past practice, would be the logical choice for the position. Moreover, Complainant's supervisor, Paul Spitzer, testified credibly that Strieby advised him not to tell Complainant about the new shift. I infer from the credible evidence that Strieby did not offer the full time position to Complainant because he had been instructed by Respondent's managers not to offer him the position, out of Respondent's concerns about Complainant's allegations of discrimination, including his complaint of September 3, 2002.¹ Therefore, I conclude that Respondent terminated Complainant's employment constitutes unlawful retaliation, in violation of M.G.L.c.151B§4(4).²

IV. REMEDY

Pursuant to M.G.L.c.151B s. 5, the Commission is authorized to grant remedies 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 his termination by Respondents. Bowen v. Colonnade Hotel, 4 MDLR

¹While the issue certified for public hearing is limited to retaliatory termination for filing the September 3, 2002 complaint, the evidence at the hearing showed that Respondent's decision to terminate Complainant's employment was based not only on the complaint of September 2, 2002, but on several complaints of discrimination both internal and at the MCAD. The right of the hearing officer to consider all the evidence adduced at public hearing in rendering her decision has long been recognized by the Commission. See e.g., Riggs v. Town of Oak Bluffs, 23 MDLR 306, 311 (2001). Thus, to the extent that this decision looks beyond Complainant's September 2, 2002 complaint, it is consistent with the Commission's authority.

² Because of my finding in favor of Complainant, I need not rule on Complainant's Motion for a Directed Verdict by Reason of Spoliation.

1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

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.

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 he was upset about losing his job. He suffered from insomnia and anxiety and there were times that he could not get out of bed. He and his girlfriend Lisa Faria both testified that he spent less time with her son and gave up activities he had previously enjoyed, such as baseball and coaching. Thus I conclude that Complainant’s termination was the source of emotional distress that continued for some time. However, Complainant also testified that he constantly worked at his music business, sometimes up

to 80 hours per week, and I am not convinced that he would have been able to devote so much time and energy to his business, had his emotional distress been as severe as he claims. Nonetheless, Complainant has persuaded me that he was adversely affected by his termination and that his emotional well being, his daily activities, social life and his close relationships suffered. I conclude that that Complainant is entitled to an award of \$30,000.00 for the emotional distress he suffered as a result of Respondents' unlawful conduct

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 has established the facts necessary to meet its burden of proving failure to mitigate.

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).

Respondent produced evidence by way of expert testimony regarding the existence of comparable jobs during the relevant time period and that it was reasonably likely that Complainant would have obtained one of these comparable jobs, had he looked for work. Complainant testified that he did not look for work, and instead became

self-employed in the music industry. Respondent's expert focused on jobs similar to master control operator. When asked how long Complainant could have reasonably worked at his music business without income, before reasonably concluding it was necessary to look for work, the expert stated it depended on the circumstances.

While I conclude that it may have been reasonable for Complainant to return to the music industry where he had some experience and past success, I conclude that after a year's time without any income from the business, Complainant should have reasonably begun to look for work related to his master control operation position, which according to Respondent's expert, was available in the local economy. Thus I conclude that Respondent has met its burden of proof to establish Complainant's failure to mitigate damages. I find Complainant's failure to seek other jobs after a period of one year constitutes an unreasonable failure to mitigate his damages.

I do conclude that complainant is entitled to one years' compensation for lost wages. Complainant's wages for one year, had he not been terminated by Respondent would have been \$28,662.40. ($\$13.78/\text{hr} \times 40 \text{ hrs} \times 52 \text{ weeks}$). Complainant received unemployment compensation totaling \$12,987.00. I conclude that Complainant is entitled to lost wages in the amount of \$15,675.40 ($\$28,662.40 - \$12,987.00$) to compensate him for the pay he would have earned had he not been unlawfully terminated.

VI. 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 \$30,000.00 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 \$15,675.40 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. 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 18th day of July, 2008.

JUDITH E. KAPLAN,
Hearing Officer