

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & YVONNE ROYE,
Complainants

v.

DOCKET NO: 02-BEM-01839

MASSACHUSETTS DEPARTMENT
OF SOCIAL SERVICES,
Respondent

Appearances:

Paul Merry, Esquire for Evelyn Roye
Brian Pariser, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 5, 2002, Yvonne Roye, an African-American woman, filed a complaint with this Commission charging Respondent Department of Social Services with discrimination on the basis of race and color. On September 30, 2002, Complainant's complaint was amended to include a charge that Respondent engaged in a series of retaliatory actions after she filed her complaint, in violation of M.G.L.c.151B. The Investigating Commissioner issued a lack of probable cause finding with regard to the claims of race and color. A probable cause finding was issued solely with respect to the retaliation claim. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on September 8, 15 and 23; October

14 and 28 and November 17 and 18, 2005. After careful consideration of the evidence in the record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Yvonne Roye is an African-American woman residing in Milton, Massachusetts. Complainant holds a Master's Degree in Social Work from Simmons College and has worked as a social worker and social work supervisor since 1975. From 1993 until her retirement in 2003, Complainant worked as an Area Program Manager (APM) for Respondent Department of Social Services. At the time of her retirement, Complainant worked at the William E. Warren Center Area Office on Wareham Street in Boston, Massachusetts.

2. Respondent Department of Social Services is an agency of the Commonwealth of Massachusetts that is responsible for protecting children from abuse and neglect and is an employer within the meaning of M.G.L. c.151B. Respondent's social workers are assigned to investigate reports of abuse and neglect.

3. At all times relevant to this matter, Corinne Contarino was Area Director of the William Warren Center Area Office and was Complainant's direct supervisor. Terry Flynn was the Regional Director and was Contarino's supervisor.

4. Complainant testified that shortly after Contarino became manager, Complainant was largely ignored and subjected to ongoing mistreatment by Contarino and other Area Program Managers. Complainant attributed this misconduct to racial discrimination, a claim that is no longer before this Commission.

5. As an Area Program Manager, Complainant supervised three units consisting of five DSS social workers, each of whom was supervised by a supervisor. Complainant testified that the unit of social workers assigned to her supervision had a greater than usual number of personnel issues than those of her peers. Complainant testified that she was often in the position of serving not only as Area Program Manager but also as a unit supervisor providing direct supervision to social workers and also as a social worker, providing direct service to Respondent's clients.

6. In May, 2002, prior to filing her MCAD complaint, Complainant wrote to Contarino stating she was overwhelmed by her workload and her inability to adequately cover her duties as a result of the additional responsibilities. (Exh. C-23)

7. On June 5, 2002, Complainant filed an MCAD complaint alleging discrimination in the terms and conditions of her employment on the basis of race and color.

8. Complainant testified that Contarino's supervision of her was more intense and intrusive than her supervision of other APMs prior to her filing of her MCAD complaint,

but that the supervision became even more intense and intrusive following the filing of the complaint. Complainant testified that she was paged to Contarino's office three or four times a day to discuss work-related matters that could have been resolved easily via telephone. I credit her testimony that Contarino's supervision was intense; however, I do not believe the nature of supervision changed or intensified after Complainant filed her complaint.

9. On June 6, 2002, Contarino and Flynn agreed to seek a replacement for a supervisor whose duties Complainant had assumed, and to reassign cases that Complainant was managing for another social worker in order to lighten Complainant's work load. (Exh. C-21)

10. On or about June 18, 2002, Complainant found in her work mailbox an open envelope with a copy of her MCAD complaint. The envelope was addressed to the Executive Office of Health and Human Services, at the Warren Center, but was not addressed to a particular person. Complainant notified the MCAD about having received the complaint and was advised to return the copy of the complaint to the MCAD. The Commission re-sent the complaint to Respondent's Human Resources Office where it was received on June 26, 2002. Contarino testified that she did not receive the complaint that arrived at the Warren Center and testified that she did not learn of the complaint until sometime in July 2002. I credit Contarino's testimony.

11. Complainant testified that on the afternoon of June 25, 2002, while at work, she suffered a migraine headache. Complainant's husband picked her up at the office and took her to the hospital emergency room. At the time, Complainant had available at least 200 days of unused sick leave. Both Complainant's husband and a co-worker informed Contarino of Complainant's condition early on the morning of Wednesday, June 26, 2002. Complainant's husband later informed Contarino that Complainant would not return to work until Monday, July 1, 2003. I credit this testimony.

12. On June 29, 2002, while at home recuperating from her headache, Complainant received a letter from Contarino via overnight mail that stated in part:

..[Your] absence comes the date after a distressing situation with one of your supervisors who informed you she would be out the remainder of the week. It leaves supervisors and managers, with an already overburdened workload, to take on the added responsibility of additional caseworkers. A similar situation occurred on Monday, May 20, 2002 when you were scheduled to meet with Marc Pizzuto's unit subsequent to his resignation. You called in sick on that day as well. I...asked for medical documentation. You failed to provide it. Your use of sick time poses the question of a pattern of sick leave abuse emerging around challenging events in your units. (Exh. C-11).

The letter went on to request medical documentation for the absence and advised Complainant that failure to document the illness may result in the denial of sick leave. On July 2, 2002, Complainant responded in writing to Contarino's letter and also provided Respondent with documentation of her illness. (Exh. 9).

13. On or about July 1, 2002, Contarino issued a formal written performance warning to Complainant, citing her failure to follow instructions relative to the monitoring of an employee under her supervision who had been removed from casework.

Complainant denied that she failed to follow the instructions given regarding this employee. I do not credit her testimony.

14. Complainant testified that on or about July 1, 2002, Respondent began monitoring her electronic mail and voice mail accounts. She testified that no other APM in her area had his or her electronic and voice mail routinely monitored. I credit this testimony.

15. Complainant planned to take vacation leave in July 2002, having applied to Contarino in May for approval of her request for vacation. According to Complainant, it was the practice for employees to submit requests for vacation time in advance to their supervisor and, once approved, to seek coverage of their responsibilities from colleagues. Complainant testified that Contarino did not respond to her vacation request until shortly before it was scheduled to begin. Other APMs and supervisors declined Complainant's request to provide coverage for her and at least one supervisor told her that he had been instructed not to cover for her. I do not credit her testimony that it was the practice to receive vacation approval prior to obtaining coverage. According to Contarino, employees were required to arrange for coverage for their vacations prior to submitting requests, and Complainant had not done so. I credit Contarino's testimony. Ultimately, Contarino arranged for coverage for Complainant and she was able to take her planned vacation.

16. On or about September 16, 2002, Terry Flynn, Respondent's Regional Director, wrote Complainant a letter informing her that he was reassigning her to a position where she would perform administrative duties, and would no longer perform social work supervision. Flynn's letter indicated that the reassignment resulted from matters of professional judgment. Complainant testified that similar incidents had occurred with other APMs but those APMs were not reassigned as a result. I do not credit her testimony.

17. Complainant testified that because of her sadness and frustration at having been reassigned, she elected to retire from DSS in late 2003, approximately two years before her intended date of retirement.

18. Corinne Contarino has worked for Respondent since 1972, first as a social worker, and later as a supervisor and APM. In 1994 Contarino became Area Director at Warren Center where she supervised the activities of APMs, supervisors and social workers, and dealt with budgetary matters. (T 4, 11/17/05)

19. Contarino testified that Complainant exhibited performance problems prior to 2002. According to Contarino, Complainant, who came to DSS from a private agency, had trouble adjusting to the fast-paced environment at the Warren Center, which was located in the inner-city. Over time, Contarino periodically discussed with Complainant her need to "pick up the pace." I credit her testimony.

20. Contarino testified that in 1997 and 1998 there were two child fatalities involving cases Respondent was managing. One of these cases was supervised by a worker under Complainant's supervision. Respondent's internal Case Investigation Unit (CIU) determined that lack of management oversight was existent. After such investigations, Contarino was responsible to report back to the special investigations unit and discuss corrective action. Accordingly, Contarino reassigned Complainant from supervision of the social worker whose case involved the fatality. I credit her testimony.

21. In February 2002, Contarino admonished Complainant in writing for having failed to obtain a waiver, as required, for permission to place a child in a home that was not licensed. This warning resulted from an incident where the courts had to intervene in the matter because after a period of months had passed, a waiver had not been obtained.

22. In Complainant's 2001 evaluation, Contarino noted that Complainant had difficulty managing work performance issues within her "cluster", needed to tighten responsibility for managerial decisions, and needed to review risk factors to children when social workers failed to do their jobs. (Exh. C-8, testimony of Contarino)

23. In Complainant's 2002 performance evaluation, Contarino noted that Complainant had a difficult year with increasing stress and inability to adequately service families and maintain the safety of children. According to the evaluation, Complainant failed to follow accepted practice in regard to waivers for child placements, delayed

permanency planning for children and exhibited faulty judgment in regard to case management. (Exh. C-7)

24. Contarino testified that in May 2002, Complainant wrote to her that she felt overwhelmed by her workload and would not be able to cover her duties adequately as a result of increased responsibility. After consulting with her supervisor, Regional Director Terry Flynn, Contarino responded in writing to Complainant's letter. On June 6, 2002, Respondent took steps to address Complainant's concerns about her caseload. Respondent agreed to post a replacement for a worker, whose supervisory duties Complainant was covering, and to reassign to another social worker the cases Complainant was covering. I credit this testimony.

25. Contarino testified that in response to complaints from other staff that Complainant did not reply to messages in a timely manner and because Complainant had complained of being overwhelmed by her duties, on June 7, 2002, Contarino offered to assist Complainant with monitoring her e-mail and voice-mail messages. I credit this testimony. Contarino initiated this monitoring one day after Complainant filed her MCAD complaint and was unaware at that time of the complaint having been filed. I credit her testimony.

26. Contarino testified that Complainant's absence from work from June 26 to June 28 coincided with the absence of a supervisor under Complainant's management. Several weeks earlier, Complainant had also been out of work the day of an important

scheduled meeting. As a result, Contarino viewed Complainant's absence on June 26- June 28 as a potential emerging pattern of sick leave abuse. Contarino noted that Complainant was not disciplined as a result of her use of sick leave. I credit Contarino's testimony.

27. Contarino testified that in late May, Complainant submitted to her a request for vacation leave for the period July 15, 2002 to July 26, 2002. Contarino expected her managers to arrange for coverage of their duties prior to her approving their requests for vacation leave. Since Complainant had not yet done this, Contarino advised Complainant to re-submit her request for vacation leave after arranging for coverage. According to Contarino, Complainant made no attempt to obtain coverage for her duties until July 8, 2002. Nonetheless, Contarino obtained coverage for Complainant, ultimately approved her request and Complainant was allowed to take her vacation. I credit her testimony.

28. Terry Flynn has worked at Respondent and its predecessor Department of Public Welfare since 1978. Flynn was Acting Regional Director of Respondent's Boston Area from November 2000 until January 2003, when he was officially appointed Regional Director. Flynn's duties include overseeing five area offices, managing a staff of 20, clinical and financial management, community outreach, community development and managing contracts.

29. Flynn testified that shortly after September 11, 2001, Respondent experienced a significant financial crisis and budget shortfalls. As a result, in the winter and spring of

2002, a significant number of social workers were laid off state-wide, including 45 social workers and one supervisor in the Boston Area. Flynn described this as a very difficult period where the remaining staff had to assume the responsibilities of those who were laid off. In addition, Respondent could not fill positions that had been vacated through retirements and voluntary resignations. I credit his testimony.

30. Flynn testified that while the lay-offs put pressure on the Boston Region, only one of 20 APMs was laid off. He stated that the impact was greater on the social work staff than on the APMs. I credit his testimony.

31. Flynn testified although he generally had no direct contact with APMS, in April 2002, Contarino contacted him about a case regarding risk to a child. One of the workers involved in the case was placed on administrative duties and another worker resigned. Complainant was required to cover the cases of the worker who resigned as well as the worker who was placed on administrative duties. It was then that Complainant voiced concerns about not being able to handle her work load. I credit his testimony.

32. Flynn testified that he was troubled by the nature of Complainant's concerns and how she described her job. She talked about working 12 hour days, leaving the building with a feeling of dread, feeling unable to meet her responsibilities and being concerned about getting blamed. She also mentioned the lack of personnel. As a result, Flynn spoke with Contarino and determined that they would fill the supervisory position

and disburse the cases of the worker who had resigned. Complainant agreed with these changes. Flynn did not believe that Complainant's work load warranted further adjustment as she carried a workload that was at or below average for an APM at the time. I credit his testimony.

33. Flynn testified that he made the decision to transfer Complainant to the regional office just prior to writing the letter of reassignment. He testified that the issues arose in May, and despite a number of attempts to address Complainant's concerns, she was still unable to meet the challenges of the job. Flynn testified that he felt that Complainant was putting the safety and well-being of children at risk and made the decision to transfer her for these reasons. I credit his testimony.

34. Flynn testified that in his letter reassigning Complainant he discussed cases that he felt were significant and showed examples of Complainant's poor decision making. He described one instance where on a Friday, a child showed a social worker some marks and stated he had been whipped with a cord. Complainant determined that the child could be left in the home over the weekend. However, the child was abused again and had to be removed from the home on an emergency basis during the weekend. He testified that while social workers had discretion in deciding whether to remove a child from a home, given the information he received in this case, the proper decision, in his view, would have been to remove the child on the Friday. Flynn also testified that Respondent's policy was to examine cases such as this one where a decision resulted in a poor outcome and to learn from its mistakes. He was concerned that in discussing this

matter with Complainant, she told him that she wouldn't have done anything differently, leading him to believe she was unwilling to learn from her error in judgment. I credit his testimony.

35. Flynn also testified about another case that he considered in his decision to transfer Complainant. In August 2002, Complainant supported the decision of a social worker to provide MBTA fare to a 17-year-old whose case Respondent managed to travel to Quincy on his own, although arrangements had not been made for a placement in Quincy. The child ended up returning to Boston on the MBTA and went to the police station seeking assistance and was held on a warrant. Flynn stated that this was significant because one of the most important issues regarding children is transition. In this case the child was not supported well enough, and Complainant exercised poor judgment. I credit this testimony.

36. Flynn testified that prior to reassigning Complainant he had discussions with her regarding a possible transfer. He was concerned that after relieving Complainant of some responsibilities in June, she still felt that she was under too much stress and believed that reassignment would alleviate her stress. He was concerned that time was taking its toll on her. (T1, 11/17/05). Flynn acknowledged that Complainant took pride in her work and would have preferred to stay on as an APM. I credit his testimony.

III. CONCLUSIONS OF LAW

Complainant has alleged that she was subjected to retaliation filing a complaint with this Commission, including warning her of sick leave abuse, refusing to approve her vacation, monitoring her emails and voicemails, scrutinizing her work, and ultimately transferring her out of her position. In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware of the protected activity and that Respondent subjected her to an adverse action and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29,41(2003).

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.

The sequence and timing of events in the present case do not support an inference of retaliation. Complainant's performance problems began long before she filed her original complaint in June 2002. Where Complainant's performance problems and Respondent's concerns with these problems predate Respondent's knowledge that she engaged in protected activity, I decline to draw the inference that subsequent actions, taken after

Respondent learned of her complaint, were motivated by retaliation; Prader v. Leading Edge Prods., Inc., 39 Mass.App. Ct. 616, 617 618 (1996) (employee fired after receiving back pay award claimed retaliation; summary judgment for employer based on prior performance evaluation which, "although in general favorable to the plaintiff, stated that the plaintiff needed improvement" in various categories). Here, there is undisputed evidence that Complainant had had difficulty managing her work load prior to the Respondent's awareness of her discrimination charge. Respondent took some action to address these problems and its concerns prior to knowing of Complainant's complaint. Respondent's actions subsequent to Complainant's filing her complaint were merely a continuation of measures, already begun, to improve Complainant's performance. The record evidence does not support an inference that Complainant's discrimination complaint motivated the various employment decisions of which she now complains, such as; warning her of sick leave abuse, insuring that her vacation was covered, monitoring her emails and voicemails, monitoring her work, and ultimately transferring Complainant. Mole v. University of Massachusetts, et al, 442 Mass. 582 (2004). Contarino's letter accusing Complainant of potential leave abuse was written, according to Contarino's credible testimony, out of concern that Complainant was inappropriately using sick leave to avoid stressful office situations while neglecting her duties. With respect to Complainant's vacation request, Contarino testified credibly that Complainant was required to obtain coverage for her vacation in advance of its approval, which she did not do. Notwithstanding Complainant's failure in this regard, Contarino ultimately obtained coverage for Complainant and allowed her to take her vacation. With respect to the monitoring of Complainant's email and voice mail, Contarino testified credibly that this monitoring was implemented because of

complaints that Complainant failed to respond in a timely manner to emails. Finally, with respect to the transfer of Complainant to administrative duties, according to the credible testimony of Terry Flynn, the Regional Director who made the transfer decision, he was motivated both by concern for the safety of children under the care of DSS after Complainant's questionable judgment put children at risk, as well as by Complainant's expressed concern about her ability to handle her caseload after Respondent had already made adjustments to her workload.

For the reasons stated above, I conclude that Respondent did not engage in unlawful retaliation, and I further conclude that this matter must be dismissed.

IV. ORDER

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

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 19th day of July, 2006.

JUDITH E. KAPLAN
Hearing Officer