

COMMONWEALTH OF MASSACHUSETTS/DEPARTMENT OF CORRECTION AND KAREN AMARAL, SUP-3081 (5/19/88). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

- 63. Discrimination
- 65.211 concerted activities - "mutual aid or protection"
- 82.11 back pay
- 82.13 reinstatement
- 92.51 appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman  
 Maria C. Walsh, Commissioner  
 Elizabeth K. Boyer, Commissioner

Appearances:

- Rosemary Ford, Esq. - Representing the Commonwealth of Massachusetts
- Walter Farla, Esq. - Representing Karen Amaral

DECISION ON APPEAL  
 OF HEARING OFFICER'S DECISION

Statement of the Case

On August 12, 1987, Hearing Officer Robert B. McCormack issued his decision in this matter pursuant to the expedited hearing procedures established by Section 150E of G.L.c.150E (the Law).<sup>1</sup> The hearing officer concluded that the Commonwealth of Massachusetts, Department of Correction (Commonwealth) had discriminated against Karen Amaral by terminating her employment because of her concerted, protected activity, in violation of Sections 10(a)(3) and (1) of the Law.

The Commonwealth filed both a timely notice of appeal to the hearing officer's decision and a supplementary statement. No supplementary statement was filed by Amaral.

As elaborated below, we affirm the hearing officer's decision, although we modify his reasoning in part.

Findings of Fact

Except as noted below, we adopt the hearing officer's findings of fact.

Amaral, a Registered Nurse, commenced employment at MCI Bridgewater in June 1986. At or about the time of her hire, her immediate supervisor explained that her first six months of employment would be a probationary period, but during that time

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<sup>1</sup>The hearing officer's decision is reported at 14 MLC 1117 (H.O., 1987).



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ould not likely be terminated unless she received several warnings of unaccept-  
performance.<sup>2</sup>

On October 3, 1986, Amaral received a comprehensive, written performance  
tion which rated her in twenty-one separate areas. In fifteen of these areas  
performance was considered average and she met job requirements. Amaral was  
sidered below average in any aspect of her performance, and in no area did  
il to fully meet the job requirements.<sup>3</sup> Certain comments on Amaral's evalua-  
ndicated that she might give greater concern to special considerations and  
tions which are deemed necessary in a correctional environment. The evalua-  
ndicated her improvement in a correctional setting would come with more time  
perience. The written evaluation indicated that specific "in-service" educa-  
programs would facilitate her adjustment as a correctional nurse.<sup>4</sup> The  
tion comments specifically cited Amaral's "positive response to supervision,"  
ct that she "does not hesitate to defer to higher authority," her "generally  
ve attitude," and the fact that she "finishes all assignments and will ask for  
onal assignments." The author of the comments was Amaral's immediate super-  
Janet Bean. The Assistant Director of Nurses, Pat Tenney, concurred with  
aluation.

Amaral discussed the content of the October evaluation with Tenney shortly  
its receipt. Tenney indicated plans to send Amaral to an upcoming training  
m, where Amaral would receive a full orientation to correctional nursing.  
concluded that Amaral's performance assessment was actually a good evalua-  
or a new employee.

Tenney had conferred with Amaral several times prior to the issuance of the  
evaluation. On the first occasion Tenney told Amaral that she had a "seduc-  
walk, which Tenney wanted changed. The next conversation concerned communi-  
with Correctional Officers. Tenney advised Amaral against talking with  
rs while walking between buildings in the institution. Tenney also indicated  
maral's attendance at a special "in-service" education program would educate  
out the special employment considerations which occur in penal surroundings.  
nal pre-evaluation conversation with Tenney was prompted by Amaral's atten-  
at a seminar. Amaral attended a tuberculosis seminar on a Thursday. Friday  
r regular day off. Amaral asked her supervisor, Laura Libby, for a personal  
order to attend the seminar. Libby suggested that Amaral charge her absence  
t sick leave, since she had not taken sick leave before. Amaral did so, but  
reety mentioned that fact to others at the seminar. This raised the eye-  
of her fellow seminarians and word of it got back to Tenney, who admonished

<sup>2</sup> Amaral's testimony on this issue is uncontroverted and we therefore affirm  
aring officer's factual finding.

<sup>3</sup> In fact, the Assistant Director of Nurses, Pat Tenney, conceded that  
's clinical abilities were fine.

<sup>4</sup> The evaluation issued in early October. The next such in-service orienta-  
ession was scheduled to take place in mid-November.

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amaral that such actions disrupted morale and that she should not do it again. Despite these earlier conversations with Amaral, Tenney endorsed Amaral's positive October performance evaluation.

About October 1, 1986, Amaral and some of her co-workers developed red, itchy, raised areas on their skin, particularly on their faces. As a consequence, Amaral decided to visit a dermatologist. The employees speculated that the skin infections resulted from a mold or fungus which was prevalent on the walls of the nurses' station.

On or about October 17, 1986, Amaral orally complained about this condition to Tenney. Tenney instructed her to put the complaint in writing and to list the other employees who also were complaining. This prompted Amaral to compose the following memorandum entitled "Fumigation":

Over the past several weeks we have noticed many red, raised, itchy areas on our bodies especially the face. We believe the source of the problem is from the SECC nurse's station & we would like some sort of action to alleviate this health problem.

Amaral was first to sign the memorandum and three of her co-workers also signed. A fourth co-worker, Jayne Couto, had earlier complained of a rash. Amaral wrote Couto's name on the memorandum to indicate Couto's earlier complaint. Amaral made no secret of her actions in this respect and, in fact, left a copy of the complaint for Couto.

Amaral believed that Couto had assented to Amaral's adding of her name to the complaint. Couto, however, denied having given such assent. In fact, Couto subsequently made a special point, orally and in writing, to notify Tenney that she did not authorize Amaral to complain for her or to sign her name to any complaint. Couto, like Amaral, was a probationary employee, and had begun her employment in July.

As a result of Amaral's complaint, the Employer sought the services of an exterminator. The nurses' station was promptly closed and the employees were moved to a new area. Tenney advised the employees that they could, if they wished, be examined by a physician.

On October 29, 1986, Amaral received a letter of termination. The communication stated:

Dear Ms. Amaral:

You were hired on 6-8-86. Since that time I spoke with you on two occasions regarding your inability to adjust to the correctional system at MCI-Bridgewater.

Please also note that since your evaluation of 10-3-86 you have failed to successfully complete your Probation Period. Additionally, I discussed your adjustment with Chief of Professional Services



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(Ms. Jean Douglas). We have jointly reached a decision regarding your tenure.

This is to advise you that your services are terminated from the Department of Correction effective 11-16-86, during your Probationary Period.

Sincerely,

Patricia A. Tenney, RNC  
Assistant Director of Nursing.

Termination letter was sent within the same month as the issuance of the evaluation twelve days after Amaral's complaint concerning the condition of the station.

Amaral and Couto happened to meet approximately one week after Amaral learned of her termination. Amaral expressed her belief that she was being terminated because Couto had complained to the Assistant Director of Nurses that Amaral had used her name. Couto replied that she was upset because Amaral had signed her name to the complaint and that she needed her job and didn't want to get into a confrontation with Tenney.<sup>5</sup> Couto promptly advised Tenney of her confrontation.<sup>6</sup> Shortly thereafter, and before her scheduled November 16 termination deadline, Amaral was advised from the premises and advised not to return.

#### OPINION

The Commission applies a three-step analysis when reviewing an alleged violation of Section 10(a)(3). Trustees of Forbes Library v. Labor Relations Commission, 84 Mass. 559, 565-566 (1981); Town of Clinton, 12 MLC 1361, 1364 (1985); City Hospital, 11 MLC 1065, 1071 (1984). First, the Commission determines if a prima facie case has been established. In order to establish a prima facie case of discrimination based on protected activities, the charging party must present evidence to support each of the following elements: that the employee engaged in an activity protected by Section 2 of the Law, that the employer knew of this activity, that the employer took adverse action against the employee, and that the adverse action was motivated by the employer's desire to penalize or discourage the protected activity. Town of Clinton, 12 MLC at 1364, Boston City Hospital, 11 MLC at 1065; City of Boston (Police Department), 8 MLC 1872, 1874 (1982).

<sup>5</sup>The hearing officer credited Amaral's testimony rather than Couto's version of events. We affirm this determination, as the Commonwealth has not demonstrated by a clear preponderance of record evidence that it was erroneous. Boston City Hospital, 10 MLC 1511 (1984).

<sup>6</sup>In its supplementary statement, the Commonwealth correctly noted that Amaral immediately reported her confrontation with Amaral.

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Once the charging party has established a *prima facie* case, the employer may rebut it by producing evidence that the action was motivated by a legitimate reason. Town of Clinton, 12 MLC at 1365; Boston City Hospital, 11 MLC at 1071. If the employer produces such evidence, the final aspect of the analysis is undertaken. We then consider whether the employer would not have taken the adverse action "but for" the employee's protected activity. Town of Clinton, 12 MLC at 1364; Boston City Hospital, 11 MLC at 1071; cf. Trustees of Forbes Library, 384 Mass. at 566.

Direct evidence establishes the initial elements of Amaral's *prima facie* case. Amaral, in concert with co-workers, voiced a complaint concerning employee working conditions. Such activity has long been considered protected by Section 2 of the Law. Town of Shrewsbury, 5 MLC 1519, 1523 (1978). The Employer was well aware of Amaral's activity, as Amaral had transmitted her complaint directly to Tenney. Adverse personnel action was certainly taken: Amaral was fired. Direct evidence of the motivational element, however, is not present in the record.

It is well-established, however, that unlawful employer motivation may be proven by circumstantial evidence and the reasonable inferences drawn therefrom. Commonwealth of Massachusetts, 6 MLC 2041, 2045 (1980). Circumstantial factors which may affect a finding of improper motive include the timing of the adverse action in relation to the protected activity and the insubstantiality of the reasons advanced by the employer for the termination. Boston City Hospital, 11 MLC at 1702; Town of West Springfield, 8 MLC 1041, 1047-48 (1981). A review of the record in the instant case supports a finding of improper employer motivation.

The sequence and timing of events at MCI Bridgewater provide a firm foundation for a finding of unlawful motivation. Amaral's quite satisfactory performance evaluation was endorsed by Tenney on October 3, 1986. On October 17, Amaral presented Tenney with her working condition complaint. A scant twelve days later the termination notice issued. The proximity of the events supports an inference that the complaint and termination were causally related.

We now turn our review to the substantive reasons advanced for Amaral's dismissal. Our analysis is hampered by the Commonwealth's failure to clearly advance or delineate the basis for its termination decision. The termination letter of October 29, 1986, is largely uninformative. The letter refers to two occasions in which Tenney claims to have spoken with Amaral about her inability to adjust to the Bridgewater correctional setting. The letter also indicates that since the issuance of her October evaluation Amaral failed to complete her probationary period. It remains unclear from the dismissal letter what events, whether preceding or following the evaluation, prompted the termination.

The Commonwealth's testimonial evidence failed to further clarify the grounds for termination. At hearing in this case, Tenney testified concerning several complaints and incidents which pre-dated the October evaluation. Tenney also testified that she had harbored some doubts about Amaral at the time of the formulation of the evaluation. The doubts allegedly included: concern about Amaral's maturity, concern about her ability to function as a team player, and her need for further training. Yet, since Tenney endorsed a positive performance evaluation which reflected none of these doubts, we conclude that Tenney resolved any doubts she may



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d in Amaral's favor. Moreover, Tenney never indicated that these concerns y motivated the decision to terminate.

The Commonwealth has thus failed to clearly articulate the reasons for s dismissal. In its supplementary statement the Employer argues that pre- ion incidents, Tenney's doubts, and post-evaluation events motivated the n. Our review of the evidence, however, leads us to conclude that none of tors alluded to by the Commonwealth were advanced in the record in this substantiate Amaral's dismissal.

We concur with the hearing officer's assessment of the pre-evaluation com- and incidents concerning Amaral. The incidents included, inter alia, s one-day use of sick leave, her sociability in a penal setting, and her lly inappropriate gait. The hearing officer found that the so-called infrac- ere not considered serious when they occurred and, in fact, bordered on the . As the hearing officer correctly noted, the resurrection of previously d transgressions and the triviality of reasons for discharge are factors to r in determining unlawful employer motivation. Mount Wachusett Community ;, 1 MLC 1496, 1506 (1975); aff'd Mass. Board of Regents Community Colleges r Relations Commission, 377 Mass. 847 (1979). The Commonwealth's reliance incidents at hearing is further circumstantial evidence of the absence of l reason for the discharge and supports the inference of improper motivation.

We also find Tenney's opinion of Amaral, as expressed at the hearing in this o conflict materially with her October 1986 formal performance evaluation. s testimonial description of Amaral as "not a team player" and "disruptive small nursing staff...both to the supervisors and to her fellow workers" its sharply and incredibly with Tenney's endorsement of the evaluation assess- at Amaral has a "positive response to supervision," that she "does not hesi- ) defer to higher authority," and that she has a "generally positive atti- The Commonwealth offered no explanation for the swift and dramatic change ey's opinion. So far as the evidence indicates, the only conduct in which engaged between the issuance of the evaluation and Amaral's termination s mission of the working condition complaint.<sup>7</sup> We find this otherwise inex- le reversal in Tenney's opinion of Amaral to be a persuasive indicator of l employer motivation.

We have concluded that each reason suggested for Amaral's termination lacks

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<sup>7</sup>The Commonwealth supplied no other evidence to support the assertion that failed to successfully complete her probationary period following the ce of the October 3, 1986 evaluation. In its supplementary statement, the wealth suggests that Amaral committed a serious breach of nursing practice by dly "forging" Couto's name on the working condition complaint. The evidence ted by the Commonwealth, however, fails to substantiate that allegation. At aring in this case, Tenney testified that the complaint played absolutely e in the decision to terminate Amaral.

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substance. Further, the timing of the adverse action following the protected activity indicates a causal relationship. Therefore, we are persuaded that Amaral has produced sufficient evidence of improper Employer motivation. Amaral has thus established a prima facie case of discrimination based on protected activity.

The Commonwealth has failed to rebut the prima facie showing of discrimination. The Employer bore the burden of establishing a legitimate basis for the action taken and for producing evidence that the stated reason actually motivated the action. However, there is insufficient evidence on the record to demonstrate that the Employer had legitimate reasons which actually motivated the decision to terminate Amaral.

#### CONCLUSION

Based on the foregoing, we affirm the hearing officer's conclusion that the Commonwealth violated Section 10(a)(1) and 10(a)(3) of the Law by terminating Amaral's employment because of her concerted, protected activity.

#### ORDER

Based on the foregoing finding and rulings, and pursuant to the Commission's authority under Section 11 of the Law, IT IS HEREBY ORDERED that the Employer shall:

1. Cease and desist from discriminating against Amaral, or any other employees, because of their concerted, protected activities.
2. Immediately offer Amaral reinstatement to her former position, and make her whole for any loss of benefits and wages suffered as a result of the Employer's decision to discharge her, plus interest on any sums owing at the rate specified in G.L. c.231, Section 6B, with quarterly computation of interest from the date of discharge.
3. Sign and post the attached Notice to Employees conspicuously in all places where notices to employees are customarily posted, and allow the same to remain for a period of thirty (30) consecutive days.
4. Notify the Commission, in writing, within thirty (30) days of the service of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN  
MARIA C. WALSH, COMMISSIONER  
ELIZABETH K. BOYER, COMMISSIONER



NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF  
 THE MASSACHUSETTS LABOR RELATIONS COMMISSION  
 AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has determined that the Commonwealth of Massachusetts, Department of Correction, violated Sections 10(a)(1) and (3) of Chapter 150E, the Massachusetts Public Employee Collective Bargaining Law, by discharging Karen Amaral for making a complaint concerning conditions at the nurses' station. The Commission has ordered the Department of Correction to post this notice and abide by what it says.

Massachusetts General Laws, Chapter 150E gives public employees the following rights:

To engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT do anything that interferes with, restrains or coerces employees in the exercise of these rights.

WE WILL NOT discriminate against our employees because they complain of unsafe or unhealthy conditions in their work places.

WE WILL immediately offer Karen Amaral reinstatement to her former position as a Registered Nurse, and will make her whole for any loss of benefits and wages she has suffered as a result of our decision to discharge her, plus interest on amounts owing at the rate specified in G.L. Chapter 231, Sections 6B, with retro-computation from the dates of discharge.

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 Director of Nurses

