In the Matter of COMMONWEALTH OF MASSACHUSETTS / COMMISSIONER OF ADMINISTRATION AND FINANCE, DEPARTMENT OF SOCIAL SERVICES

and

MASSACHUSETTS NURSES ASSOCIATION

Case No. SUP-4128

63.3	*discrimination - hiring, layoffs, promotion*
63.4	*other discrimination*
65.2	*concerted activities*
65.6	*employer speech*
82.11	*back pay*
82.13	*reinstatement*
92.51	*appeals to full commission*

August 24, 1998
Claudia T. Centomini, Commissioner[1]
Helen A. Moreschi, Commissioner

Susannah P. Scannell, Esq.	*Representing the Commonwealth of Massachusetts*
James F. Lamond, Esq.	*Representing the Massachusetts Nurses Association*

DECISION ON APPEAL OF ADMINISTRATIVE LAW JUDGE'S DECISION

Statement of the Case

On December 14, 1994, the Massachusetts Nurses Association (the Union) filed a charge of prohibited practice with the Labor Relations Commission alleging that the Commonwealth of Massachusetts/Commissioner of Administration and Finance, acting through the Department of Social Services (the Commonwealth) had engaged in prohibited practices within the meaning of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, on July 3, 1995, the Commission issued a complaint of prohibited practice alleging that the Commonwealth had: 1) violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law by refusing to offer a newly-created position to certain employees who had filed a complaint and testified at a Commission proceeding;[2] and 2) violated Section 10(a)(1) of the Law by refusing to offer the newly-created position to the employees and by making certain statements.

On November 9, 1995, Susan L. Atwater, a duly designated Administrative Law Judge (ALJ) of the Commission, conducted a hearing, at which both parties were given an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs. On August 5, 1996, the ALJ issued her Decision, finding that the Commonwealth had violated Section 10(a)(4) of the Law by failing to hire Anne Looney-Connole (Looney-Connole) and Eleanor Turnbull (Turnbull) in retaliation for their participation in a Commission proceeding. The ALJ also found that the Commonwealth's conduct constituted an independent violation of Section 10(a)(1) of the Law because it would tend to chill employees in the exercise of their right to participate in Commission proceedings. Finally, the ALJ found that by making a statement indicating that employees involved in the Commission proceeding should not be interviewed for the positions, the Commonwealth had independently violated Section 10(a)(1) of the Law.[3]

On August 7, 1996, the Commonwealth filed a timely notice of appeal pursuant to 456 CMR 13.15, and both parties filed Supplementary Statements. Upon consideration of the record and the parties' Supplementary Statements, we affirm the ALJ's Decision, but modify her reasoning.

Findings of Fact[4]

In its Supplementary Statement, the Commonwealth objects to portions of the ALJ's findings of fact. After reviewing the record and considering the Commonwealth's objections, we adopt the ALJ's findings, as modified, and summarize the relevant portions below.

In 1989, seven registered nurses, including Looney-Connole and Turnbull, in the Department of Social Services (DSS) filed an appeal with the Department of Personnel Administration (DPA) seeking to reclassify their positions. After DPA denied the appeal, four of the nurses, including Looney-Connole and Turnbull, appealed the matter to the Civil Service Commission and then to the Superior Court, who returned the matter to the Civil Service Commission, where the appeal was ultimately granted on January 3, 1994.

On February 24, 1994, the Commonwealth issued layoff notices to Looney-Connole, Turnbull, and other employees, effective April 24, 1994. On March 17, 1994, the Union filed a charge of prohibited practice with the Commission (case No. SUP-4050) protesting the layoffs. The Commission issued a complaint of prohibited practice in that case and conducted a hearing in January and March 1995. Both Looney-Connole and Turnbull testified at the hearing.

In the meantime, sometime in 1994, the Department of Public Health and DSS developed a joint program to immunize children in foster care. As part of that program, funding was allocated to hire nurses to coordinate the program. DSS Coordinator of Medical Services Suzanne Tobin (Tobin) subsequently drafted a Request

1. Chairman Robert C. Dumont has recused himself from participating in this case.

2. Although the Union's charge alleged that the Employer's conduct violated Sections 10(a)(3) and (1) of the Law, the Commission considered the Union's claims as alleging that the Commonwealth violated Sections 10(a)(4) and (1) of the Law.

3. The full text of the ALJ's decision is reported at 23 MLC 57 (1996).

4. The Commission jurisdiction in this matter is uncontested.

for Qualifications for the position of Nurse Immunization Coordinator and contacted the nurses who had been laid off and invited each of them to apply. Looney-Connole, Turnbull, Barbara Smith (Smith), Lori Scott (Scott), and Ruth Surprenant (Surprenant) all applied for the position.[5]

During a conversation in October 1994, Tobin told Looney-Connole that she would be well-qualified for the position and would be told when to report for an interview. Looney-Connole, who with Turnbull was a co-chair of the Union's local affiliate, asked Tobin if her union activities or her participation in Case No. SUP-4050 would hinder her candidacy. Tobin replied that she would not hold it against her and did not think that DSS would either. Sometime later, Tobin informed Deputy Commissioner of Field Operations John T. Farley III (Farley), who is her immediate supervisor, that she had received resumes from Looney-Connole and Turnbull. Farley did not respond verbally, but sat back in his chair and gave Tobin a "quizzical frown," which she described as a "pained response" and later interpreted as an indication that she should not interview either Looney-Connole or Turnbull. Despite her earlier intention, as a consequence of her encounter with Farley, Tobin decided not to contact Looney-Connole to schedule an interview.

In early November 1994, Tobin interviewed Smith for the position. At some point during the interview, Tobin indicated that Looney-Connole might also be interested in the position but that she was not sure how it would go. Tobin said words to the effect that "it might be a problem with the goings on." When Smith asked if Tobin was referring to the Union, Tobin shook her head affirmatively. Tobin also interviewed Scott and Surprenant.

On November 21, 1994, Tobin telephoned Looney-Connole and informed her that Farley had told her not to interview her or Turnbull for the position. During that conversation Tobin also said, "You were my first choice, but I was told I cannot hire you."[6] Looney-Connole then suggested that Tobin speak with DSS Labor Counsel Dan Donahue (Donahue) about the matter, and Tobin agreed.

Thereafter, Tobin explained the situation to Donahue, who told her to interview all of the candidates that applied. Donahue then immediately met with Farley to discuss the facial expression he had made to Tobin and any resulting implications it may have had on either Looney-Connole's or Turnbull's candidacies. Donahue then met with Tobin again and reiterated that she was to interview all of the candidates. He also set up another meeting with Tobin for when the interviews were complete.

Tobin then met with Farley again, who told her she was to interview and choose the best person for the job. When Tobin responded that she would not interview Looney-Connole or Turnbull if they did not have "a decent shot at the job," Farley told her that she should choose Looney-Connole or Turnbull if they were the best qualified. Although he had not specifically told Tobin that she had the authority to decide whom to hire, Tobin believed that Farley had implied it.

Later that day, Tobin called Looney-Connole and informed her that Donahue and Farley had told her to interview Looney-Connole and that "it would all be on a level playing field." They then arranged an interview for the next day.

During the interview, Tobin and Looney-Connole spoke about the position as well as other, unrelated subjects. Looney-Connole emphasized her interest in the position. They discussed the location and possible part-time nature of the position. They also spoke of other applicants and discussed Looney-Connole's computer skills, which both agreed needed "brushing up." Tobin told Looney-Connole that she was well qualified and asked if she was interested in working part-time. Looney-Connole stated that she needed full-time work, but would take anything. During the interview, Tobin perceived a thread of anger from Looney-Connole stemming from the events surrounding the nurses' appeal, but Tobin did not share that perception with Looney-Connole and they did not discuss whether she harbored any animosity toward DSS. Tobin also interviewed Turnbull.

Toward the end of the interview process, Tobin decided to divide the position into three half-time positions. A few days after completing the interviews, Tobin selected Scott, Smith, and Surprenant for the positions and notified them by telephone. Tobin testified that she relied on the following factors in reaching her decision: 1) the applicants' ability to work together as a team; 2) their computer skills; 3) their public speaking skills; 4) the part-time nature of the position and the corresponding lack of benefits; and 5) her final impressions of each of the candidates based on their interviews. Tobin testified that she selected Scott, Smith, and Surprenant because she believed it was the best mix at the time and did not select Looney-Connole because she perceived her as exhibiting anger toward DSS during the interview and believed that that anger would impair her ability to work as a team with others

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5. Two other nurses who had been laid off also applied, but subsequently withdrew their applications.

6. The Commonwealth objected to the ALJ's finding that Tobin told Looney-Connole that Farley had said that they wanted to keep the process clean and that anyone involved in the Commission suit would not be allowed to be interviewed for the position. The gravamen of the Commonwealth's argument is that the finding is not supported by substantial evidence because the ALJ credited Looney-Connole's unsubstantiated hearsay testimony. Absent a clear preponderance of relevant evidence to indicate that the hearing officer's credibility determination was incorrect, we will not overrule the determination. *Town of Hingham*, 21 MLC 1237 (1994). Section 11 of the Law specifically provides that the Commission is not bound by the technical rules of evidence. As an administrative agency, the Commission may admit and rely on evidence on which reasonable persons are accustomed to rely in serious matters. M.G.L. c.30A, §11(2); *Dwyer* v. *Commissioner of Insurance*, 375 Mass. 227 (1978). Further, whether a finding based solely on hearsay testimony constitutes substantial evidence is not a consideration of the technical admissibility of the hearsay testimony, but rather a determination concerning the reliability of the testimony upon consideration of the entire record, *See, Edward E.* v. *Department of Social Services*, 42 Mass App. Ct. 478, 480 (1997). However, here, the ALJ's finding is based upon uncorroborated hearsay and the relevant record evidence supports a different finding. Therefore, although we adopt the ALJ's findings concerning Tobin's stated impressions after her encounter with Farley, we find that, because the ALJ found that Farley made no verbal statement during the encounter, the statement attributed to him by Tobin (as reported by Looney-Connole) is not supported by substantial evidence in the record. Accordingly, we decline to adopt the ALJ's finding concerning that statement and have modified her findings accordingly.

and to perform her job duties. Neither Scott, Smith, nor Surprenant testified at the hearing in Case No. SUP-4050.

Opinion

The Commonwealth does not challenge the legal standard applied by the ALJ, but rather argues that the decision is not supported by substantial evidence. We disagree. As the ALJ correctly stated, the same elements of proof apply to alleged violations of both Section 10(a)(3) and Section 10(a)(4) of the Law. *Commonwealth of Massachusetts*, 6 MLC 1396, 1400 (1979). First, we determine whether the charging party has established a *prima facie* case of discrimination, by producing evidence to support each of four elements: 1) that the employee engaged in protected activity;[7] 2) that the employer knew of the protected activity; 3) that the employer took adverse action against the employee; and 4) that the employer's conduct was motivated by a desire to penalize or discourage the protected activity. If the charging party establishes a *prima facie* case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. Finally, if the employer produces that evidence, the employee must establish that, "but for" the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559 (1981); *Town of Clinton*, 12 MLC 1361 (1985). Here, the ALJ found, and the Commonwealth does not challenge, that the Union has established the first three elements of its *prima facie* case. Rather, the Commonwealth challenges the ALJ's finding that the Union did establish that the decision not to hire Looney-Connole or Turnbull was motivated by a desire to penalize them for participating in a Commission proceeding.

It is well settled that, in order to establish a *prima facie* case of retaliation, a charging party need not introduce direct evidence of unlawful motivation, but rather, may offer circumstantial evidence that, when viewed with the record as a whole, establishes that the employer was unlawfully motivated. *See, Southern Worcester County Regional Vocational School District* v. *Labor Relations Commission*, 38 Mass. 414 (1982); *Town of Northborough*, 22 MLC 1527 (1996). Circumstantial factors may include: the timing of the adverse action in relation to the protected activity, *Labor Relations Commission* v. *Blue Hills Spring Water Co.*, 11 Mass. App. Ct. 50 (1981); the insubstantiality of the reasons given for the adverse action, *Town of West Springfield*, 8 MLC 1041 (1981); a departure from established procedures, *Town of Natick*, 7 MLC 1048 (1980), *aff'd sub nom. Board of Selectmen of Natick* v. *Labor Relations Commission*, 16 Mass. App. Ct. 972 (1983); expressions of animus or hostility towards a union or the protected activity, *Town of Andover*, 17 MLC 1475 (1991); or a disparity in treatment between individuals who engaged in protected activity compared with those who have not engaged in protected activity. *Boston City Hospital*, 11 MLC 1065, 1072 (1984). Here, only Looney-Connole and Turnbull participated in the Commission proceeding in Case No. SUP-4050 and only Looney-Connole and Turnbull were not selected for one of what was ultimately three positions. That fact, when considered with Tobin's statements to Smith that the "goings on" might be a problem for Looney-Connole's candidacy, establish that the Commonwealth was motivated by a desire to punish Looney-Connole and Turnbull for their participation in Case No. SUP-4050 when it failed to hire them for the position of Nurse Immunization Coordinator.

Having determined that the Union has established a *prima facie* case of retaliation, we next analyze the Commonwealth's proffered legitimate, non-discriminatory reasons for its failure to hire Looney-Connole or Turnbull.

Eleanor Turnbull

The Commonwealth contends that Turnbull was not selected for the position because she lacked public speaking skills and argues that the ALJ erred in finding that the Commonwealth had failed to meet its burden to produce evidence of a legitimate, non-discriminatory reason for not hiring Turnbull. To support its contention, the Commonwealth offered Tobin's testimony about her decision not to hire Turnbull. However, a careful review of the record, including that portion highlighted by the Commonwealth, reveals that, although Tobin testified about her selection criteria and that she was familiar with the candidates' abilities because she had worked with and trained with them for years, she offered no explanation for why she did not select Turnbull.

The employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action is more than simply stating an unsubstantiated allegation. The employer must state a lawful reason for its decision and "produce supporting facts indicating that this reason was actually a motive in the decision." *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. at 559. *See also, Boston School Committee*, MUP-9067 (March 2, 1994), *aff'd sub nom. School Committee of Boston* v. *Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996), *further app. rev. denied.* 422 Mass. 1111 (1996). Here, Tobin explained that public speaking ability was among the criteria used to make her selection and that she was aware of the candidates' abilities. However, there is nothing in the record to support the Commonwealth's contention that Tobin considered Turnbull's lack of public speaking ability when making the decision not to hire her. Therefore, we agree with the ALJ that the Commonwealth has failed to produce evidence that Turnbull's lack of public speaking skills actually motivated its decision not to hire her. Accordingly, we affirm the ALJ's decision that the Commonwealth violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law by failing to hire Eleanor Turnbull for one of the positions of Nurse Immunization Coordinator in retaliation for her participation in a Commission proceeding.

Anne Looney-Connole

The Commonwealth alleges that it did not select Looney-Connole because Tobin perceived her as exhibiting anger toward DSS during the interview and believed that that anger would impair her ability to work as a team with others and to perform her job duties.

7. In a case alleging that the employer violated Section 10(a)(4) of the Law, the determination is whether the employee participated in a Commission proceeding.

The ALJ found that Looney-Connole's anger toward DSS stemmed from Commonwealth's unlawful layoff of Looney-Connole and others, citing the Recommended Findings of Fact and Conclusions of Law issued in Case No. SUP-4050 by Administrative Law Judge Robert B. McCormack on July 30, 1996. In its Supplementary Statement, the Commonwealth argues that ALJ erred in basing her finding that Looney-Connole's layoff was unlawful on ALJ McCormack's Recommended Findings of Fact and Conclusions of Law; an interim, non-binding recommendation. However, we need not decide if the ALJ's reliance on that decision was error, because we find that, even if the Commonwealth had met its burden to produce a legitimate, non-discriminatory reason for not hiring Looney-Connole, we find that but for the protected activity, the Commonwealth would have hired her.

If an employer satisfies its burden to produce evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives," and we consider whether the employer would have taken the adverse action but for the employee's protected activities. *Town of Stow*, 11 MLC 1312, 1319 (1984), *aff'd sub nom. Town of Stow* v. *Labor Relations Commission*, 21 Mass. App. Ct. 935 (1985)(rescript). Under this analysis, the employee bears the burden of proving that but for the protected activity, the employer would not have taken the adverse action. *Id.* Here, the employer contends that it considered Looney-Connole's anger toward DSS and determined that her anger would have impaired her ability to perform her job duties and work as a team player. However, during the same interview where Tobin allegedly formed that opinion, she also told Looney-Connole that she was well-qualified for the position. That fact, coupled the Tobin's statement on the day before the interview that Looney-Connole was Tobin's "first choice" for the position establishes that but for Looney-Connole's participation in the Commission proceeding in Case No. SUP-4050, the Commonwealth would have hired her for one of the positions. Accordingly, we affirm the ALJ's decision that the Commonwealth violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law by failing to hire Anne Looney-Connole for one of the positions of Nurse Immunization Coordinator in retaliation for her participation in a Commission proceeding.[8]

Independent 10(a)(1) Violations

The Commonwealth also argues that the ALJ erred in finding that the Commonwealth had independently violated Section 10(a)(1) of the Law. The gravamen of the Commonwealth's argument is that: 1) the ALJ's conclusion was entirely based on an alleged statement that was not supported by the record; and 2) because the record does not support the ALJ's conclusion that the Commonwealth violated Section 10(a)(4) of the Law, the record likewise does not support the ALJ's conclusion that the Commonwealth's conduct also independently violated Section 10(a)(1) of the Law.

First, even if the record does not support the ALJ's finding concerning the statement that anyone involved in the Commission proceeding would not be interviewed for the position,[9] Tobin's statement to Smith about the potential problem with Looney-Connole's candidacy because of the "goings-on" and Tobin's statement to Looney-Connole that she was Tobin's first choice for the position but had been told not to hire her, are sufficient to establish an independent violation of Section 10(a)(1) of the Law. As the ALJ correctly stated, a public employer violates Section 10(a)(1) of the Law when it engages in conduct that tends to restrain, coerce, or interfere with employees in the free exercise of their rights under the Law. *City of Fitchburg*, 22 MLC 1286 (1995).

Here, we find that Tobin's statements about the negative impact that Looney-Connole's participation in the Commission proceeding had on her candidacy would tend to chill other employees in the exercise of their right to participate in Commission proceedings. Finally, we have affirmed the ALJ's conclusion that the Commonwealth violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law by not hiring Looney-Connole and Turnbull in retaliation for their participation in a Commission proceeding and agree with her determination that, based on the totality of the circumstances, the Commonwealth's conduct would tend to chill employees in the exercise of their right to participate in Commission proceedings.

Conclusion

For the forgoing reasons, we affirm the ALJ's conclusion that the Commonwealth violated Section 10(a)(4) and, derivatively, Section 10(a)(1) of the Law by not hiring Looney-Connole and Turnbull in retaliation for participating in the Commission proceeding in Case No. SUP-4050. We also affirm the ALJ's decision that the Commonwealth independently violated Section 10(a)(1) of the Law.

ORDER

WHEREFORE, based on the forgoing, IT IS HEREBY ORDERED that the Commonwealth shall:

1. Cease and desist from:

   a. Discriminating against Looney-Connole and Turnbull for participating in a Commission proceeding.

   b. In any like manner, interfering with, coercing and restraining its employees in the exercise of their rights under the Law.

2. Take the following affirmative action which will effectuate the purposes of the Law.

   a. Immediately offer Looney-Connole and Turnbull a position as a Nurse Immunization Coordinator.

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8. We note that the record does not establish that either Tobin or Farley harbored any independent animus toward either Turnbull or Looney-Connole. However, we find that, even if Tobin misunderstood Farley's reaction when told that Looney-Connole and Turnbull had applied for the position and further misinterpreted that reaction as a directive not to interview them, the record establishes that Commonwealth did not hire Looney-Connole or Turnbull for the position because of their participation in the Commission proceeding in Case No. SUP-4050.

9. See our discussion above at n.6.

b. Make Looney-Connole and Turnbull whole for any loss of wages and benefits suffered as a result of the Commonwealth's unlawful refusal to hire them, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6B, compounded quarterly.

c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees.

d. Notify the Commission, in writing, within ten (10) days of receipt of this Decision and Order, of the steps taken to comply therewith.

SO ORDERED.

NOTICE TO EMPLOYEES

The Labor Relations Commission has found that the Commonwealth of Massachusetts/Commissioner of Administration and Finance, acting through the Department of Social Services, has violated Massachusetts General Laws c.150E, §§10(a)(1) and (4) by failing to hire Anne Looney-Connole and Eleanor Turnbull in retaliation for participating in a Commission proceeding.

WE WILL NOT discriminate against our employees because they participate in proceedings at the Labor Relations Commission;

WE WILL NOT in any manner, interfere with, coerce and restrain its employees in the exercise of their rights under the Law;

WE WILL offer a position as a Nurse Immunization Coordinator to Anne Looney-Connole and Eleanor Turnbull and make them whole for any wages and benefits suffered as a result of our unlawful conduct.

[signed]
For the Commonwealth of Massachusetts

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In the Matter of COMMONWEALTH OF MASSACHUSETTS COMMISSIONER OF ADMINISTRATION AND FINANCE

and

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, LOCAL 509

Case No. SUP-4131

27.1	*prohibited practice*
53.5	*other influences on bargaining*
67.61	*bargaining with individuals*
91.1	*dismissal*

August 25, 1998
Robert C. Dumont, Chairman
Claudia T. Centomini, Commissioner
Helen A. Moreschi, Commissioner (Dissenting Opinion)

Susan M. Myers, Esq.	*Representing the Commonwealth of Massachusetts*
Matthew D. Jones, Esq.	*Representing Service Employees International Union, Local 509*

DECISION

Statement of the Case

The Service Employees International Union, AFL-CIO, Local 509 (the Union) filed a prohibited labor practice charge with the Labor Relations Commission (the Commission) on December 27, 1994, alleging that the Commonwealth of Massachusetts, Commissioner of Administration and Finance (the Commonwealth) had engaged in a prohibited practice within the meaning of Sections 10(a)(5) and (1) of M.G.L. c.150E (the Law). Specifically, the Union alleged that the Commonwealth had bypassed the Union and dealt directly with bargaining unit employees by surveying them about sick leave use.

Following an investigation, the Commission issued a complaint of prohibited practices on June 20, 1995 alleging that the Commonwealth had violated Sections 10 (a)(5) and, derivatively, Section 10 (a)(1) of the Law by engaging in direct dealing with bargaining unit members when it surveyed them about mandatory subjects of bargaining while negotiations were pending.

On November 7, 1995, Chief Counsel John Cochran, acting as administrative law judge, conducted an evidentiary hearing at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses and to introduce documentary evidence. Both parties submitted post-hearing briefs. Pursuant to 456 CMR 13.02(2), the administrative law judge issued his recommended findings of facts on March 20, 1998. The Union filed a challenge to those recommended findings, which we have considered along with the arguments of the parties. The Commonwealth filed no challenges to the recommended facts.