

In the Matter of CITY OF EASTHAMPTON

and

DANIEL MAZZOLINI

Case No. MUP-04-4244

63. *Discrimination*
63.21 *filing a grievance*

April 23, 2009

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Richard Hayes, Esq. *Representing the City of
Easthampton*

Devin Moriarty, Esq. *Representing Daniel Mazzolini*

DECISION¹

Statement of the Case

Daniel Mazzolini (Mazzolini) filed a charge with the former Labor Relations Commission (Commission)² on October 6, 2004 alleging that the City of Easthampton (City) had engaged in prohibited practices within the meaning of Sections 10(a)(1), 10(a)(3) and 10(a)(4) of MGL c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on September 13, 2006. The complaint alleged that the City had violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law by terminating Mazzolini's employment with the City.³ The Commission dismissed the allegations that the City violated Sections 10(a)(1), 10(a)(3), and 10(a)(4) by various other actions. The City filed an answer to the complaint on September 28, 2006.

Susan Atwater, Esq., a duly-designated hearing officer of the Board, conducted a hearing on the following dates: January 18, 2007, March 19, 2007, April 2, 2007, April 6, 2007, May 24, 2007, May 25, 2007, July 23, 2007, and July 24, 2007. At the hearing, all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Mazzolini and the City filed post-hearing

briefs on or about February 14, 2008.⁴ The Hearing Officer issued Recommended Findings of Fact on December 23, 2008.

Findings of Fact⁵

The City challenged portions of the Hearing Officer's Recommended Findings of Fact.⁶ After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

The City's Sexual Harassment Policy

At the time of the events in this case, the City maintained a Sexual Harassment Policy (the Policy). The goal of the Policy was to promote a workplace that was free of sexual harassment. The Policy contained a lengthy definition of sexual harassment, including the following:

Sexual epithets, jokes, written or oral references to sexual conduct; gossip regarding one's sex life; comments on an individual's body; comments about an individual's sexual activity, deficiencies or prowess; displaying sexually suggestive objects, pictures, cartoons....

The Policy stated that the City would promptly investigate allegations of sexual harassment in a fair and expeditious manner and described the investigation as follows:

The investigation will be conducted in such a way as to maintain confidentiality to the extent practicable under the circumstances. Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of that investigation.

The Policy further stated that, where it was determined that inappropriate conduct has occurred, the City would act promptly to eliminate the conduct and impose such corrective action as is necessary, including disciplinary action where appropriate. Neither this Policy, nor any other City policy, prohibits general harassment.

1. Pursuant to the Notice of Hearing, the Commonwealth Employment Relations Board (Board) has designated this case as one in which it shall issue a decision in the first instance.

2. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Board include the Commission.

3. Mazzolini argues that the Board should also consider whether the City's decision to initiate two investigations into his conduct violated the Law even though the Board did not specifically plead that allegation in the complaint. Mazzolini correctly notes that, in some instances, the Board has considered and decided allegations outside the scope of the complaint that the parties fully litigated at the hearing. *Town of Norwell*, 18 MLC 1263, 1264 (1992). However, the former Commission

found that the allegations that pertained to events occurring over six months before October 6, 2004—the date that Mazzolini filed his charge—were untimely. Because the City initiated both investigations over six months prior to October 6, 2004, Mazzolini's allegations regarding those investigations are untimely. Moreover, Mazzolini did not request reconsideration of the allegations that the former Commission dismissed.

4. Following the close of the record, the parties transcribed the electronic recording of the hearing. The parties advised the Board by letter dated January 15, 2008 that the transcript that they provided to the Board would be the official record of the hearing.

5. The Board's jurisdiction is not contested.

6. Mazzolini did not file any challenges to the Hearing Officer's Recommended Findings of Fact.

The Contractual Grievance and Arbitration Procedure

The collective bargaining agreement between the Union and the City that was in effect at the time of the events in question contained the following grievance and arbitration procedure:

Article XVIII

A grievance is a dispute that may from time to time arise between the parties which deals with the meaning or interpretation of this agreement, and the parties agree that the following procedure for resolving said dispute shall be the sole remedy available to the parties:

Step 1 - Any aggrieved employee shall take up the grievance or dispute, orally or in writing, with the supervisor in direct command within ten (10) days of the date of the grievance or his/her knowledge of its occurrence. The supervisor shall attempt to adjust the matter and shall respond to the employee, in writing, within three (3) working days. If the employee fails to exercise this first step within said ten (10) days, he/she shall be deemed to have waived all rights and remedies to and for said grievance.

Step 2 - If the grievance has not been settled, the Union Steward and the employee shall take up the grievance orally or in writing with [the] supervisor within ten (10) days of Step 1 impasse. The supervisor shall again attempt to adjust the matter and shall respond to the Union Steward within five (5) days.

Step 3 - If the grievance is still not settled, it shall be presented in writing by the Union Steward on behalf of the aggrieved party to the Director of Public Works within three (3) days of Step 2 impasse and said Director of Public Works shall have five (5) days to respond to the Union Steward, which response shall be in writing.

Step 4 - If the grievance still remains unadjusted, it shall be jointly presented to the Mayor in writing within ten (10) days at which time the Mayor will hear the facts and circumstances surrounding the dispute and either decide the issue or reserve said decision for a period of not more than thirty (30) days.

Step 5 - If the decision of the Mayor does not settle the issue in dispute, the UNION may, within thirty (30) days after the decision of the Mayor take the case to arbitration...

[Emphasis in original.]

The Department of Public Works

At the time of the events in this case, the City's Department of Public Works (DPW) encompassed the following departments: Administration, Engineering, Highway, Sewer, Water Treatment Plant, Waste Water Treatment Plant (WWTP) and Motor Repair. Joseph Pipczynski (Pipczynski) was the Director of the DPW, and he supervised the Office Manager, the City Engineer, the Highway Supervisors, the Supervisor of Utilities and the Waste Water Treatment Plan Supervisor. At all relevant times, David Gagnon (Gagnon) was the Waste Water Treatment Plant Supervisor, and Brian Geraghty (Geraghty), the Head Operator, reported directly to Gagnon. Sally Peters (Peters), the only female employee in the WWTP, held the position of Industrial Pre-treatment Coordinator, and Steven Dushane (Dushane) held the position of Pump Station

Operator. The WWTP also employed operators, mechanics and an attendant.

The Physical Layout of the Waste Water Treatment Plant

The WWTP treats waste water from residential homes and industrial facilities. It houses machinery, including pumps, presses, and tanks; a mechanical/instrumentation room; a locker room; a break room where employees take breaks and eat lunch; and an office with three desks: one for Gagnon, one for Geraghty, and one for Peters. The mechanical room is in the front of the building, the office is in the back of the building, and the break room is seven or eight steps from the office.

Mazzolini's Employment with the City

The City hired Mazzolini as a waste water treatment plant attendant on October 8, 2002. Mazzolini reported directly to Geraghty. Mazzolini worked Monday through Friday cleaning the WWTP and performing other tasks. Mazzolini performed certain duties at the Sewer Plant and the Water Treatment Plant, and occasionally accompanied Dushane to the City's pump stations, but he spent the majority of his time at the WWTP. On January 6, 2003, Mazzolini received the City's Sexual Harassment Policy and signed a statement indicating that he understood the policy and his responsibility not to engage in behaviors that would constitute sexual harassment.

At some point early in Mazzolini's employment, Mazzolini, Gagnon, and Peters were sitting at the table in the break room with other WWTP employees. The conversation turned to Mazzolini's former work experience, and Mazzolini indicated that he had performed maintenance work at an apartment complex called the Meadowbrook Apartments (Meadowbrook). Mazzolini said that he had known women at Meadowbrook, prompting another employee to ask if Mazzolini had known the women in the "Biblical sense." Mazzolini responded that he had "done it doggie-style" with women at Meadowbrook.⁷ In response to Mazzolini's statement, Peters stated: "Dan, that's gross. I don't want to hear that kind of stuff." Gagnon told Peters to "deal with it." The conversation and the break ended at that point.⁸

A short time after the conversation regarding the women at Meadowbrook, Mazzolini and Gagnon had a conversation at the WWTP in Peters's presence. Mazzolini told Gagnon that he had met a woman at a bar on a previous evening and that Mazzolini and the woman subsequently engaged in sexual relations at Mazzolini's home. Mazzolini told Gagnon that while they were having sexual relations, the headboard of the bed kept hitting the wall. Mazzolini and Gagnon discussed this scenario at subsequent times in Peters's presence.

In February of 2003, Peters traveled to a City meeting in a DPW truck with Mazzolini and Geraghty to discuss mandatory furloughs for City employees. During the ride, Mazzolini stated that

7. At the hearing, Mazzolini denied making the statement attributed to him regarding the women at Meadowbrook and further denied having made any statements of a sexual nature during his employment at the WWTP. However, the Hearing Officer did not credit his testimony on these points, and Mazzolini has not challenged the Hearing Officer's credibility determination.

8. The record does not reflect the date of this conversation.

he had a new girlfriend, and that he was too heavy to be on top of her. Geraghty continued the conversation by suggesting that Mazzolini try increasing his upper body strength and trying different sexual positions.

At some subsequent point, a conversation ensued about Dushane's dog, and someone drew a picture on a chalkboard depicting the dog involved in sexual activity with a person. Peters erased the drawing, and it was redrawn within minutes.⁹ During this incident, Mazzolini made a comment within Dushane's earshot regarding the size of the dog's reproductive organs.

On various occasions, Mazzolini sat in front of Gagnon's desk, which was in the same room as Peters's desk, and he and Gagnon discussed Mazzolini's sexual activities. Peters overheard some of these conversations, and they offended her. Mazzolini also made many statements regarding sexual activity in Dushane's presence that Dushane found offensive, like stating that he would like to f—k a particular person, having sex "doggie-style", or using graphic terms to describe sexual activity. Mazzolini made statements referencing sexual activity that Peters or Dushane found offensive on a daily to weekly basis.¹⁰ Both Peters and Dushane told Mazzolini that they did not want to hear statements of a sexual nature, but Mazzolini continued to make sexual statements notwithstanding their complaints.

The "No Confidence" Vote

On April 23, 2003, the Union held a special meeting at which they voted to declare "no confidence" in Pipczynski as the DPW Director. The Union communicated the no confidence vote to Riggott and Pipczynski on May 5, 2003. When Pipczynski learned about the vote, he became upset and stated loudly to certain employees words to the effect of: "thanks for the no confidence - do you have confidence in me now?" He also asked Mazzolini how Mazzolini voted. Mazzolini told Pipczynski that he voted "no confidence" because everyone else did.

Mazzolini's Efforts to Transfer to a Different Job

At some point prior to June 19, 2003, the City posted the position of Craftsman in the Sewer Division. Mazzolini was the only employee who signed the posting signaling his intent to apply for the position. By letter dated June 19, 2003, Pipczynski temporarily assigned Mazzolini to the Sewer Division for approximately one month to read meters. Pipczynski stated in the letter that Mazzolini's work as a meter reader would be evaluated at the end of the month.

After sending the June 19 letter to Mazzolini, Pipczynski decided to award the vacant Craftsman position to another employee who was about to lose his position in the Highway Department due to a lack of funding. Pipczynski notified Mazzolini on June 27, 2003 that Mazzolini would not receive the transfer. Pipczynski met with Mazzolini and Gagnon on July 2, 2003 to discuss the vacant posi-

tion. Pipczynski explained that the job was being held open for an employee who would be laid off. On July 2, 2003, the City reposted the Sewer position in order to give the Highway Department employee an opportunity to bid on it. Mazzolini signed the posting again, but the City subsequently awarded the position to the Highway Department employee.

On July 3, 2003, Mazzolini filed a grievance (1st grievance) over the City's failure to appoint him to the Sewer position by delivering the grievance to Pipczynski in person at Pipczynski's office. When Pipczynski received the grievance, he said: "You are a new employee and you are already putting in a grievance? I am the one that decides who gets a job around here. You are not going to get this job, and I will fight you everyway I can." Pipczynski then stated: "What about what I hear about you talking about sex?" When Mazzolini questioned the meaning of Pipczynski's statement, Pipczynski stated: "Never mind. If you did it, stop. If you didn't do it, forget about it."

The following day, July 4, 2003, Pipczynski approached Mazzolini as Mazzolini was emptying waste baskets. Pipczynski told Mazzolini again that Mazzolini was not getting the job. Mazzolini questioned Pipczynski about the meaning of Pipczynski's statements on July 3 regarding sex. Pipczynski told Mazzolini that he (Pipczynski) would say whatever he wanted to say, and Pipczynski walked away. Pipczynski denied the grievance by letter dated July 8, 2003.

At some point prior to July 10, 2003, Pipczynski asked Gagnon why the WWTP employees were not wearing uniforms. On July 10, 2003, Gagnon provided a written response that stated in pertinent part as follows:

This is in response to your letter concerning so called lack of uniforms of several WWTP employees...

The reason I write this letter is that my employees and myself are very disturbed about the following facts...In the past couple of weeks there have been grievances by employees at the treatment plant and other divisions against your rulings and the fact that a no confidence vote because of elimination of Highway Supervisor [sic]. You also reinforced that feeling you upset about these grievance when you displayed your feelings about a new employee filing a grievance [sic]. This is the employee you chasing in your car at the treatment plant just before you wrote this letter [sic]. As a union employee they have rights to grieve without recourse. So, I believe that this letter you sent was not intended for disciplinary action but for pay back. All the employees at the treatment plan [sic] would like an apology and assurance that this will not occur in the future.

By letter dated July 15, 2003, Mazzolini notified Mayor Michael Tauznick (Mayor) of his 1st grievance.¹¹ In his letter, Mazzolini stated that he would make an appointment with the Mayor's office to better explain the situation underlying the grievance. The Mayor responded to Mazzolini's July 15 letter on August 29, 2003.¹² In his August 29, 2003 letter, the Mayor advised Mazzolini

9. The record does not indicate who drew or re-drew the picture of the dog.

10. At some unspecified point, Mazzolini told Dushane that Dushane was in a cult, a statement that Dushane believed criticized his religion.

11. The record does not reflect the Union's role, if any, in this action.

12. The Mayor misplaced the letter in his office during July and August.

to notify the Mayor if Mazzolini still wished to grieve Pipczynski's decision not to award him the Sewer position.

Peters's and Dushane's Complaints Regarding Mazzolini

Dushane was offended by Mazzolini's sexual comments and told Mazzolini that he did not want to hear such statements. Dushane also told Geraghty and Gagnon that he was sick of hearing Mazzolini's sexual statements. In response to Dushane's complaints, Gagnon told Mazzolini not to talk "like that." Mazzolini ceased his comments in Dushane's presence for a short period of time, but he subsequently resumed making statements of a sexual nature. At various times, Peters voiced her displeasure with the sexual conversations to Gagnon and Geraghty. On one occasion, Gagnon told her that: "Dan's a man's man and you [have got to] deal with it." Geraghty told Peters in effect: "it's just the way men talk."

In or about June of 2003, Peters told Pipczynski in general terms about the sexual statements that Mazzolini had made in her presence.¹³ Pipczynski told Peters to speak to the Personnel Department about the matter, and Pipczynski notified City Personnel Director Raisa Riggott (Riggott) about Peters's concerns. Approximately one month later, in July of 2003, Peters told Riggott that certain conduct in the WWTP offended her, and that Mazzolini's conduct was the most offensive. She told Riggott generally about Mazzolini's statements regarding sex and relayed some of Mazzolini's statements. Peters also told Riggott that there was an atmosphere of retaliation at the WWTP, and that Gagnon was acting in a manner that made that work place unpleasant for her. Peters's meeting with Riggott lasted approximately one hour, and at its conclusion, Riggott told Peters that she would seek information from other workers. Riggott then reported Peters's allegations to Pipczynski and asked him if he was aware of the issue. Pipczynski replied that he had perceived some dissension in the WWTP.

Riggott's Investigation

After the meeting with Peters, Riggott met with some of the WWTP employees to discuss Peters's allegations. Dushane declined to be interviewed because he was uncomfortable discussing Mazzolini's statements with Riggott. Riggott did not seek to interview Mazzolini, and she did not tell Mazzolini of Peters's allegations against him or that she was investigating his conduct.

Following her interviews, Riggott contacted Pipczynski and discussed the allegations and the results of her interviews. Riggott also contacted City Labor Attorney Elaine Reall (Reall). Riggott told Reall that she wished to discuss a corrective action plan for Mazzolini, and that that she wanted to issue Mazzolini a "last and final" warning. Reall drafted a letter for Riggott's use.

On August 8, 2003, Riggott issued a letter (written warning) to Mazzolini that stated in pertinent part as follows:

This office has conducted a thorough investigation of your recent conduct. It has been determined that you have by your actions and comments created a hostile work environment for fellow employees. Sexual harassment, and other forms of workplace harassment are not acceptable conduct and will not be tolerated in any City workplace. This letter represents a "last chance" written warning. If you continue to engage in any behavior that violates the City's sexual harassment policy, you will be required, at your own expense, to attend an additional sexual harassment training session. I will make arrangements with you and your supervisor within the next week to implement such training.¹⁴

It has also come to my attention that you publicly denounced the recent sexual harassment training provided by the City as a waste of time.¹⁵ Again, unless you are willing and able to abide by City policy, and Massachusetts' law, you would do well to submit your resignation and seek work elsewhere. Your insubordinate and uncooperative behavior is not acceptable. It is the City's clear responsibility to take any and all actions to eliminate and prevent instances of workplace harassment. Such training is a serious matter; it is not a joke and your public refusal to abide by City policy does not demonstrate the type of attitude necessary to succeed in a municipal job.

For the next 12 months you will be closely monitored regarding your work behavior, your demonstrated commitment to changing your unacceptable behavior and your overall job performance. Your recent request for another position will be denied, and all such additional requests for transfers and/or promotions will be denied until the City is satisfied that you have corrected your behavior.¹⁶

Soon after August 8, 2003, Gagnon approached Peters and told her that Mazzolini had received "a letter", and that Peters was a big troublemaker. For a short period of time following this exchange, some of the employees in the WWTP did not speak to Peters. At a certain point, Mazzolini and Gagnon resumed speaking in Peters's presence, and some of their conversations included sexual statements that offended Peters.

The Disciplinary Grievances

Mazzolini filed a grievance on August 12, 2003 (2nd grievance) over the August 8 written warning. When Mazzolini gave the grievance to Pipczynski, Pipczynski stated loudly: "Another grievance? You just don't get it do you? But you are going to get it." Pipczynski then left the room with the grievance in his hand. Pipczynski did not respond in writing to Mazzolini's 2nd grievance.

On August 18, 2003, Riggott issued the following letter to Mazzolini:

As you are aware, the City has established a sexual harassment policy to eliminate all types of harassment and hostile work environments within all City departments. Based upon the findings of

13. Dushane also told Pipczynski that he was uncomfortable with Mazzolini's statements, but the record does not pinpoint the timing of this complaint.

14. There is no evidence in the record indicating that the City implemented this requirement.

15. The record does not clearly identify how Riggott acquired information about critical statements that Mazzolini may have made regarding the City's sexual harassment training session.

16. Reall did not draft or suggest the last sentence of this letter. This was the first time that the City had denied an employee a future promotion for a disciplinary purpose.

my recent investigation of your conduct and as part of the discipline process, I am formally referring you to our Employee Assistance Program (EAP). As a condition of employment, you are required to report to the office of Patrick Fleming at 151 Main Street, 3rd Floor, in Northampton at 6:00 p.m. on Thursday, August 21, 2003 for a complete assessment. If you do not show up for this appointment or any future referral appointments that are scheduled for you, you will be subject to further discipline up to and including termination.

If you are unable to keep this schedule appointment due to a prior commitment, you must contact Patrick Fleming's office directly at 584-0390 to reschedule your visit. You will personally be responsible for any costs that are incurred for any referral appointments that are arranged for you thereafter.¹⁷ These appointments should not be scheduled during your normal working hours. You must sign a release form when you arrive at the office. By signing the release form, the City will be advised as to whether or not you have accessed the program and are willing to follow through with their recommendations. No other information will be released.¹⁸

Mazzolini attended the EAP appointment and filed a grievance (3rd grievance) on August 25, 2003 over his required participation.¹⁹

Mazzolini's Additional Job Grievances

Mazzolini filed a 4th grievance on August 26, 2003, challenging the City's decision not to award him the position that he had sought in July. In letters dated August 28, 2003, Pipczynski denied Mazzolini's 3rd and 4th grievances.

On or about September 2, 2003, Mazzolini forwarded a letter to the Mayor requesting his review of the grievances that Mazzolini had previously filed. The Mayor responded to Mazzolini's September 2 letter on September 9, 2003, affirming the City's decisions on Mazzolini's 2nd, 3rd and 4th grievances.

On November 10, 2003, Mazzolini delivered a 5th grievance to Pipczynski challenging the City's failure to award him the position that he had previously sought. Pipczynski was annoyed by the grievance and tore it up and threw it in a trash can. He then told Mazzolini to go back to work and stop wasting the taxpayers' money. On November 13, 2003, Mazzolini filed a grievance (6th grievance) alleging that Pipczynski had violated Mazzolini's Union rights by tearing up and discarding Mazzolini's 5th grievance.

Pipczynski denied Mazzolini's 5th and 6th grievances by letter dated December 12, 2003. In his denial letter, Pipczynski noted that Riggott's written warning stated that Mazzolini would be denied all future promotions until the City was satisfied that Mazzolini had corrected his behavior.

On December 15, 2003, after he had received Pipczynski's December 12 letter denying his grievances, Mazzolini forwarded a

letter to the Mayor. In his December 15 letter, Mazzolini described his failure to receive the Sewer position, denied that he had made any remarks of a sexual nature, and asked the Mayor to meet with him and award him the position that he had been seeking.

The Union's Action

Union staff representative Donna Bowler (Bowler) contacted Riggott by letter dated August 22, 2003, and asked Riggott to tell the Union and Mazzolini what specific behaviors, actions or words the City deemed to constitute sexual harassment, and to provide copies of all paperwork produced as part of Riggott's investigation. The City did not provide any information to the Union in response to this request.²⁰ In September and early October of 2003, the Union again requested information from Riggott regarding the issues underlying Mazzolini's discipline and asked the City to hold the August 12 and 25 grievances in abeyance pending receipt of information from the City. The City did not provide the requested information in response to these letters.²¹ On January 8, 2004, the Union demanded to meet with the City regarding Mazzolini's grievances and the Union's belief that the City had dealt directly with Mazzolini in violation of the Law.

Events That Occurred After the Written Warning

Between September of 2003 and February of 2004, Mazzolini continued to make comments within Peters's earshot that Peters found offensive. At some point prior to February 9, 2004, Riggott told Pipczynski that he needed to talk to the individuals at the WWTP about the allegations that Peters had made against Mazzolini. On or about February 10, 2004, Pipczynski initiated a meeting in Pipczynski's office with Mazzolini, Gagnon, Geraghty and Union Steward Paul Bouthilette. Pipczynski told Mazzolini that employees at the WWTP had complained about Mazzolini's conduct at the WWTP, and that Mazzolini's conduct had created a work environment at the WWTP which could precipitate a lawsuit against the City. Pipczynski forcefully told Mazzolini to "fix it" or Mazzolini would be terminated, and Gagnon and Geraghty would lose their houses. When Mazzolini told Pipczynski that he did not know what to fix, Pipczynski told him that Mazzolini should speak to Riggott about the issue.

Following the meeting, Mazzolini went to ask Riggott about the allegations against him. Riggott told Mazzolini that she did not have any information for him, and she did not give him any details about the allegations against him.

Mazzolini's Complaint Against Pipczynski

On or about February 12, 2004, Mazzolini filed a written complaint with Riggott alleging that Pipczynski had harassed Mazzolini on six occasions. Riggott did not interview Mazzolini

17. City had previously referred individuals to the City's EAP program, but had never required any individual to absorb the cost of the referral.

18. Riggott knew of Mazzolini's grievances at the time that she gave Mazzolini the August 18th letter. Riggott receives copies of grievances at the time that they are filed with Pipczynski, and Pipczynski sent copies of all of his letters denying Mazzolini's grievances to the Mayor and to Riggott.

19. There is no evidence in the record of any particular action by Mazzolini that occurred between the written warning and the August 18th letter.

20. The City had not told Mazzolini what specific statements or conduct of his had constituted sexual harassment.

21. There is no evidence that the City provided the Union with the information that it sought prior to forwarding a copy of Reall's March 23, 2004 report.

regarding this complaint, and the City did not investigate or discipline Pipczynski for any of the conduct that Mazzolini alleged.²²

Peters's Written Complaint

At some point in February of 2004, Bowler contacted Peters and suggested that Peters file a written complaint of sexual harassment with the Equal Employment Opportunity Commission (EEOC) or the City to document the conduct by Mazzolini that Peters found offensive. Peters wrote the following memorandum (written complaint) and gave it to Riggott on or about February 25, 2004:

This letter is to submit a formal complaint of Sexual Harassment against Dan Mazzolini and of Retaliation by David Gagnon.

In August 2003 I participated in an investigation by the Personnel Department into Dan's conduct at the Wastewater Treatment Plant. The retaliation and intimidation toward me by David Gagnon that followed is historically based in Dave's "management style."

During the August interview, I informed you of a hostile work environment polluted with Dan's stories of sexual prowess and exploits.

Specifically, I mentioned that while riding in a pickup driven by Brian Geraghty going to the mandatory Furlough Meeting (Feb. 2003) Dan mentioned that he had to lose weight because his new girlfriend told him that "he was too heavy on top of her." When I expressly stated directly to Dan: "Dan, that is more than I want to hear!" Dan, clearly enjoying my discomfort, went on to tell Brian that he has started doing upper-body strengthening exercises in order to better support his frame on top of her 110 pound body.

Also, I mentioned another incidence that occurred in the Treatment Plant break room in the presence of David Gagnon, myself and one or two others: Dan was bragging about his sexual conquest of all (or nearly all) of the women at the Meadowbrook Apartment complex where he once was employed. He went on to say that he'd "done it doggy-style with all the women." Again, I told Dan directly that his talk was more than I wanted to hear, but this time Dave chimed in to encourage Dan's story.

There were numerous overheard conversations between Dan and Steve about Steve's dog in various dog-human sexual situations. Adding to the uncomfortable work atmosphere were Dog drawings on the chalkboard.

Retaliation toward me followed immediately after Dan received a letter. Dave didn't speak to me, Brian didn't speak to me, in fact nobody spoke to me; if I walked into the break room, everybody stopped talking and/or left the room; I was forbidden to go to the DPW office, but no reason was given. There was a palpable atmosphere of hatred that caused me a significant amount of emotional distress. While I was out on sick leave for an appendectomy, Dave organized the fall Steak Cookout, excluding me. However, he left foil-wrapped potatoes in the fridge to ensure that I was aware of my exclusion. Dave is a bully, NOT a manager! The culture at the Treatment Plant is one of finding a person's weak spot and exploiting it.

Over the course of the last six months, I have come to realize that Dave's behavior has long, historical roots that date back to the wretched treatment of Bob Kacmarczyk, and other nastiness that I endured. There were other incidences where the guys stopped talking to me, but my "spies" revealed the reasons:

Within a month or two of receiving my (required) Grade 6 license there was a hostile silence - because "I was too smart."

Within days of passing my CDL learner's permit - nobody was allowed to help me with the circle check until Bill Forrester intervened. The atmosphere only got WORSE until I backed down and made no further effort to pursue a CDL license.

The list could go on and on...even the contractors from Waterline noticed Dave's attitude.

I sincerely hope that there is some solution to this situation that will lessen my feeling of ostracism and foster a better work atmosphere for ALL treatment plant workers. [emphasis in original.]

Riggott forwarded Peters's written complaint to Reall on the same day that she received it. Riggott attached the following documents to the complaint: 1) the harassment complaint that Mazzolini filed against Pipczynski; 2) a letter written by Mazzolini to "whom it may concern" that described the Union's no-confidence vote; Pipczynski's angry response; Mazzolini's 1st and 2nd grievances; Pipczynski's response to Mazzolini's first grievance; and Pipczynski's observation of Mazzolini while Mazzolini was cutting grass on July 10, 2003; 3) Gagnon's July 10, 2003 letter to Pipczynski regarding the uniforms; and 4) a memo from Mazzolini to Bowler stating that Pipczynski threw Mazzolini's 5th grievance in the trash.

Reall's Investigation and Report

Following receipt of Peters's written complaint, the Mayor met with Riggott and Pipczynski. Riggott and Pipczynski told the Mayor that they had determined that Mazzolini had engaged in sexually harassing conduct, and indicated that they were leaning in the direction of terminating Mazzolini. Consequently, the Mayor asked Riggott to ascertain if Reall could conduct an "independent investigation" into Peters's allegations.

Riggott contacted Reall and they discussed Peters's complaint. Reall told Riggott that she (Reall) could conduct an investigation into Peters's allegations, and the City retained Reall to do so. At the time of her investigation, Reall was aware of the grievances that Mazzolini had previously filed.

Reall began her investigation on March 1, 2004 by reviewing the City's Equal Employment Opportunity Policy (EEO Policy) and the collective bargaining agreement between the City and the Union. Reall then interviewed every employee and supervisor who worked at the WWTP, concluding the interviews on March 19,

22. The City challenged the Hearing Officer's credibility determination that Riggott failed to conduct an investigation into Mazzolini's complaint. We will not disturb a hearing officer's credibility determination absent a clear preponderance of all relevant evidence that the determination is incorrect. *City of Somerville*, 23 MLC 11, 12 (1996). If the reason for the credibility determination is clearly stated and the evidence does not require a contrary finding, we will not amend the finding. *Vinal v. Contributory Retirement Appeal Board*, 13 Mass. App. Ct. 85 (1982). Here, the

Hearing Officer explained that she did not credit Riggott's testimony on this issue because some of Riggott's testimony surrounding this issue was inaccurate and implausible. We find no evidence in the record that requires a contrary finding. Therefore, we will not disturb the Hearing Officer's credibility determination.

2003.²³ Union President David Kieliszek and Bowler attended all of the interviews along with Riggott.²⁴

In his interview, Dushane told Reall about statements that Mazzolini had made describing sexual activity and denigrating Dushane's religion. For example, Dushane told Reall that Mazzolini had described "cornholing" women and stated that "his girlfriend doesn't want him on top anymore." In her interview, Peters told Reall that Mazzolini had made many statements of a sexual nature that Peters found offensive, and Peters cited examples, such as discussing having "doggie-style" sex with women at the Meadowbrook apartments.²⁵ Peters told Reall that, after she complained about Mazzolini's conduct to Riggott, she was subjected to retaliation and given the "silent treatment" by many male employees but still routinely heard statements from Mazzolini that she found to be obscene. In his interview, employee Bill Heron (Heron) told Reall that Mazzolini made the following statement regarding a murder victim: "I f—— her up the a—— before I killed her."²⁶

Reall's Report

Reall's report identified Mazzolini, Gagnon and Geraghty as "alleged harasser/retaliators." Reall described her interviews with Mazzolini, Gagnon and Geraghty in her report and noted their responses to the allegations and statements attributed to them.²⁷ Reall's report expressed her conclusion that there was merit to the allegations²⁸ that Mazzolini had subjected Dushane to religious harassment and a hostile workplace.²⁹ She also determined that there was merit to Peters's hostile work environment/sex discrimination allegations. In her report, Reall documented the factual basis for her conclusions by describing the statements that Peters, Dushane and others attributed to Mazzolini. Reall's report stated that every employee and supervisor other than Geraghty admitted that Mazzolini had acted in a less than appropriate fashion, that "numerous employees" admitted hearing Mazzolini repeatedly tell "dirty" jokes and talk explicitly about sex, and that "every employee questioned provided some type of example of inappropriate, sexually graphic language used by Mr. Mazzolini in the workplace."

As a result of her investigation, Reall found that "the pervasive and sexually charged nature of the WWTP was not adequately addressed by the supervisors assigned to the WWTP [and the] remedial, corrective action taken by the City with respect to the principal harasser (Mr. Mazzolini) has failed to correct or remedy the hostile work environment." Reall's report contained the following

recommendations based on her review of the City's exposure to legal liability under state and federal law:

- 1) Remove Mazzolini from the work force;
- 2) Implement a training program focused on what constitutes an appropriate, professional work environment at the WWTP;
- 3) Impose the following supervisory discipline:
 - a. Demote Gagnon and transfer him out of the WWTP.
 - b. Issue Geraghty a comprehensive written warning, require Geraghty to complete a City approved supervisory training course, and closely evaluate and monitor Geraghty's progress.

Reall's report contained the following written rationale for recommending Mazzolini's termination:

This individual has been credibly cited as engaging in harassing behavior throughout the term of his employment. He has rejected the City's attempt at training and does not acknowledge any need for any change in his workplace behavior. This investigation revealed that his conduct appears to be the direct and proximate cause of the hostile and tense work environment experience by the complaining parties... In light of the fact that Mr. Mazzolini categorically denies ever having done or said anything that warranted a Final Letter of Warning, has stated that his view that sexual harassment training is "BS" and refuses to take responsibility for his harassment of Steve Dushane, it is unlikely that further internal remediation is possible with this individual.

Although Reall noted that the issue was outside of her investigatory charge, Reall found that Pipczynski occasionally yelled at his subordinates, and she recommended that the City send Pipczynski to a training workshop regarding discipline or dealing with difficult employees. Reall submitted her report, dated March 23, 2004, to Riggott, and Riggott forwarded it to the Mayor.

The City's Decision to Terminate Mazzolini

The Mayor and Riggott subsequently met to discuss the report. The Mayor did not undertake any independent inquiry into the matters addressed in the report, and he asked Riggott to implement all of Reall's recommendations. On April 7, 2004, Riggott convened a meeting with Pipczynski, Union representative Jonathon Tuttle (Tuttle) and Mazzolini. Pipczynski told Mazzolini that he was terminated and gave Mazzolini a letter signed by Riggott³⁰ that stated as follows:

Today at approximately 10:00 a.m. you are being provided the opportunity to explain why the City of Easthampton should not, effective immediately, terminate your employment as attendant in the City's Waste Water Treatment Plant. A review of your personnel

23. After the City initiated Reall's investigation, Pipczynski encouraged Dushane to report the statements and conduct that Dushane had observed from Mazzolini.

24. We have amended this finding of fact to more accurately reflect the attendees at Reall's investigation.

25. Peters also told Reall about conduct by Gagnon that Peters found to be offensive and/or retaliatory.

26. The record included notes that Riggott took during Reall's interviews, and the parties stipulated that the notes accurately reflect statements made by the interviewees to Reall. Heron's statement is included in the notes of his interview.

27. Reall's report stated that Mazzolini denied saying anything of a sexual nature in the workplace or "razzing" Dushane about his religion. Reall also stated in her report that Gagnon denied hearing Mazzolini make any sexually explicit remarks.

28. Reall's report indicates that the City had received a written complaint from a male co-worker of Peters's, and suggests that Dushane was the complainant. However, the record contains no evidence that Dushane ever filed a written complaint with the City.

29. Reall relied on various factors in making her determination, like her perceived credibility of the interviewees and corroboration of statements by other interviewees.

30. Riggott signed the letter, but the Mayor authorized the termination decision.

file reveals that you were given a Last and Final Warning on August 8, 2003. As part of that warning you were strongly counseled that any further conduct involving sexually inappropriate or harassing work conduct would result in termination of employment.

As a result of two additional written complaints of harassment filed by separate members of your bargaining unit,³¹ an investigation of the work environment at the Waste Water Treatment Plant was conducted by an outside investigator during March of 2004. During such investigation you denied saying or doing anything of a sexual, racial or religious nature, or engaging in any form of behavior that a reasonable person might view as intimidating or harassing. You also indicated that you did not “understand” and in no way accepted the validity of the earlier Final Warning.

The results of the City’s investigation do not support your blanket denial of such actions. A substantial majority of your fellow co-workers supported the allegations contained in such complaints and offered other examples of serious, sustained breaches of appropriate work behavior. The City provides regular training around the issue of sexual harassment. It also maintains a clearly communicated policy of enforcing equal employment opportunity in the work place. Your failure, despite participation in such training and the issuance of a Last and Final Warning, to follow the City’s standard of appropriate work behavior leaves the City with no choice but to end your employment....

Mazzolini filed a grievance over his termination on April 7, 2004. Pipczynski denied the grievance on April 12, 2004. At no point prior to his termination did anyone from the City tell Mazzolini what specific allegations Peters and Dushane had made against him.³²

Pipczynski did not attend training as Reall recommended in her report. Geraghty and Gagnon resigned before the City implemented the disciplinary action that Reall had recommended for them.

Opinion

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the Law. *Southern Worcester Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982); *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996). The Board traditionally applies a three-step analysis to Section 10(a)(3) discrimination cases. *Town of Clinton*, 12 MLC 1361 (1985) (citing *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981)). First, the Board determines whether the charging party has established a *prima facie* case of discrimination by producing evidence to support each of the following four elements: 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer took adverse action against the employee; and 4) 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. Once the employer produces lawful rea-

sons for its actions, the employee must prove that, “but for” the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library*, 384 Mass. at 565-66; *Bristol County*, 26 MLC 105, 109 (2000).

In discrimination cases where the charging party has proffered direct evidence of discrimination, the Board applies the two-step analysis articulated in *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000); *Town of Dennis*, 29 MLC 79, 83 (2002). Direct evidence is evidence that, “if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.” *Wynn & Wynn*, 431 Mass. at 667 (citing *Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991)). Under the *Wynn & Wynn* two-step analysis, the charging party must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer who may prevail by proving that it would have made the same decision even without the illegitimate motive. *Id.* at 669 - 70.

In this case, undisputed evidence discloses that Mazzolini engaged in protected, concerted activity by filing grievances, and that Pipczynski and the Mayor were well-acquainted with Mazzolini’s grievances. There is also no dispute that City’s decision to terminate Mazzolini constitutes adverse action. *Town of Athol*, 25 MLC 208, 211 (1999). The City acknowledges that Pipczynski was “irked” and “annoyed” by Mazzolini’s protected activity. We further find that Pipczynski expressed disdain for Mazzolini’s grievances and implicitly threatened Mazzolini with negative consequences for filing the grievances. We therefore conclude that Mazzolini has established all four elements of the *prima facie* case set forth above. We further conclude that Pipczynski’s actions, particularly his statements to Mazzolini after Mazzolini filed the 1st and 2nd grievances and his act of tearing up and throwing away the 5th grievance in front of Mazzolini, constitutes direct evidence of anti-union animus. *See Town of Brookfield*, 28 MLC 320, 328 (2002) (selectman’s statement that unions were trouble and employee might not be around to enjoy a union constituted direct evidence of anti-union animus).

The City nevertheless contends that Mazzolini cannot meet his initial burden because the Mayor, not Pipczynski, decided to terminate Mazzolini and the Mayor held no animus against Mazzolini’s concerted, protected activities. We disagree. Although Pipczynski did not make the ultimate termination decision, his authority to deny Mazzolini the Craftsman position that Mazzolini sought demonstrates that Pipczynski’s words and conduct can constitute direct evidence of unlawful animus. *See Wynn & Wynn*, 431 Mass. at 667 (stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy a charging party’s threshold burden). Additionally, Pipczynski’s conduct infected the Mayor’s decision to terminate Mazzolini with the anti-union animus that Pipczynski

31. As previously noted, the record contains no evidence of a second written complaint.

32. We have modified this finding of fact to more accurately conform to the record evidence.

harbored. Pipczynski participated in the termination process when he and Riggott told the Mayor that they were leaning in the direction of terminating Mazzolini, thereby prompting the Mayor to investigate the formal investigation, a significant step in the termination process. This evidence of unlawful animus permeating the Mayor's decision persuades us that unlawful animus played a motivating part in the challenged decision. *Cf. Board of Regents, 12 MLC 1315, 1335 (1985)* (where the decision-maker does not make an independent review of the facts and bases the decision to act on the evaluations and recommendations of other supervisors, the motives of the supervisors in a discrimination case will be imputed to the decision-maker).

Because Mazzolini has established through direct evidence that a proscribed factor played a motivating part in the challenged, adverse employment action, we shift the burden to the City to show that its legitimate reason, standing alone, would have induced it to make the same decision. *Wynn & Wynn, 431 Mass. at 666* (citing *Johansen, 30 Mass. App. Ct. at 301*).

The City contends that the Mayor decided to terminate Mazzolini because the investigation disclosed that Mazzolini had engaged in continuing and ongoing harassment of employees, and because Mazzolini was unable to correct his behavior after warning. Because credible evidence establishes that Mazzolini subjected Dushane and Peters to unwelcome, sexually offensive conduct, we find that the City's proffered reason was legitimate and not pretextual. *Boston Water & Sewer Commission, 29 MLC 176, 181 (2003)*.

Mazzolini argues that the unlawful motivation behind the City's decision to terminate him is readily apparent from a variety of factors, like the timing of the termination; one month after Mazzolini filed a complaint against Pipczynski and two months after the Union had threatened legal action against the City. Mazzolini contends that the City's proffered reasons were trivial because the alleged harassment occurred when Mazzolini was not speaking directly to Peters, and thus Peters was the recipient of less objectionable "secondhand harassment." Mazzolini also contends that, on the one occasion that he allegedly spoke directly to Dushane about sex, Mazzolini ceased the conversation upon Dushane's request, and his alleged statements about Dushane's religion were isolated instances. Finally, Mazzolini argues that the second investigation was based on events that occurred prior to the first investigation and prior to the discipline that Mazzolini had received in August of 2003.

We find that the City has satisfied its burden to demonstrate that the findings, conclusions and recommendations in Reall's report, standing alone, would have induced the Mayor to terminate Mazzolini. Although the City's initial efforts to investigate Peters's verbal complaints were not error-free, the formal investigation that followed Reall's written complaint yielded concrete evi-

dence from multiple employees that Mazzolini had engaged in unwelcome and sexually offensive conduct. Faced with the knowledge of Mazzolini's conduct and its effects on Dushane and Peters, the City was obligated to take prompt remedial action. See generally, *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 167 (1986)* (employer is liable for sexual harassment in workplace under MGL c. 151B, if employer is aware of sexual harassment and fails to take adequate steps to remedy the situation). The timing of the City's action supports the City's contention because the Mayor terminated Mazzolini within two weeks of receiving the report. The City did not single Mazzolini out from other employees who Reall determined had also engaged in sexually harassing conduct, because the Mayor had asked Riggott to implement Reall's disciplinary recommendations for Geraghty and Gagnon. Therefore, there is no evidence that the City would have treated Mazzolini differently if he had not engaged in protected, concerted activity. Although the City imposed harsher discipline on Mazzolini than it imposed on Gagnon or Geraghty, any disparate treatment may have been warranted because Reall's report described Mazzolini as the "principal harasser", and the City had previously warned Mazzolini not to engage in workplace harassment.³³

Additionally, we find no merit in Mazzolini's argument that the conduct at issue was trivial or isolated. Credible evidence demonstrates that Mazzolini made unwelcome sexual comments to two employees who communicated their discomfort to him on numerous occasions, and we need not consider whether so-called "secondhand harassment" is less offensive or actionable than first-hand harassment.³⁴

Lastly, we are not persuaded that the City terminated Mazzolini solely for conduct that it had addressed in prior discipline. The credited evidence demonstrates that Mazzolini continued to make unwelcome sexual comments to Peters after he received the last chance written warning. Moreover, the City initiated the second investigation a short time after Peters submitted her written complaint at the end of February of 2004. Accordingly, we find that the City would have terminated Mazzolini's employment regardless of whether he had engaged in concerted, protected activity.

CONCLUSION

For the reasons cited above, we conclude that the City did not violate Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law, and we dismiss the complaint.

SO ORDERED.

* * * * *

33. Although the City may not have told Mazzolini what specific words or actions constituted sexual harassment, the City's August 8, 2003 letter clearly advised him that sexual harassment and other forms of workplace harassment would not be tolerated in any City workplace. Additionally, Peters had told Mazzolini that she did not want to hear any comments of a sexual nature.

34. We express no opinion on whether Mazzolini's conduct constitutes unlawful sexual discrimination under MGL c. 151B. Our decision is limited to our conclusion that the City did not violate MGL c. 150E when it terminated Mazzolini.