COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and OANA BABU,
Complainants

Docket No. 10 WEM 00914
11 WEM 01886

v.

ASPEN DENTAL MANAGEMENT, INC.,
Respondent

Appearances: Paul Nevins and Ilir Kavaja, Esqs. For Complainant Babu
John Doran and Eric Mack, Esqs. For Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 20, 2010, Complainant Oana Babu filed charges of national origin discrimination and retaliation against Aspen Dental (re-designated as Aspen Dental Management Inc. to conform to the evidence). Complainant alleges that she was subjected to harassment because of her Romanian accent and to retaliation for voicing an objection to the "sexualized behavior" of her office manager towards male patients. On July 26, 2011, Complainant filed a second charge of discrimination based on her national origin and retaliation arising out of her termination for allegedly using a dental drill inside a patient's mouth, which she denies having done. On April 30, 2012, Complainant amended her 2011 complaint.

A probable cause finding was issued on both charges and the matters were certified for a consolidated public hearing.

A public hearing was held on December 19, 20, and 21, 2016; January 27, 2017; February 27, 2017 and May 23, 2017. The following witnesses testified at the hearing: Complainant, Dr. Paul Ala, Ricci Perla, Sarah Doyle, Adrienne LaFond, Dr. Amparo David, Ovidiu Babu, Joseph Lee, Dr. Kimberly Haynes, Lori D'Anna, Suzanne Decker, Susan Hugenberger, and dental patient "CC." Complainant submitted forty (40) exhibits and Respondent submitted exhibits A-Q.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Oana Babu was born in Romania and came to the United States when she was twenty-three years old. Transcript I at 26. She is a trained dental assistant. Transcript I at 27.
2. Respondent Aspen Dental Management, Inc. is a management company which provides administrative support such as marketing, payroll, billing, insurance, and staff supervision for independently-owned dental practices.[1] Respondent does not employ dentists but hires and manages dental staff. Respondent has grown from overseeing twenty-two practices in 2000 to currently overseeing approximately six hundred practices nationally. Transcript V at 974, 977. Respondent was Complainant's employer.

[1] The dental practices managed by Aspen Dental Management, Inc., although called "Aspen Dental" are independent from Respondent. For instance, the Leominster dental practice at issue in this case was owned by an out-of-state dentist during the relevant time frame. Transcript VI at 1099.

3. In October 2001, Complainant commenced employment at an Aspen Dental practice in Brockton, MA as a dental assistant. Transcript I at 28. Dental assistants take impressions, set up and break down rooms, and sterilize instruments. Transcript V at 859; VI at 1165. Complainant was promoted to lead dental assistant while working at the Brockton office. Transcript I at 29.
4. In 2002 and 2003, Complainant received an "exceeds expectations" for her annual performance reviews in the Brockton and Framingham offices of Aspen Dental. Complainant's Exhibits 2 & 3. Framingham Office Manager Tracie Hart commented in the 2003 evaluation that Complainant was "a wonderful addition to our team." Complainant's Exhibit 3.
5. In 2004, Complainant began to work for the Leominster office of Aspen Dental as lead dental assistant. Complainant's Exhibit 4. In her 2004 performance evaluation, the clinical director of the practice described Complainant as a "great asset to our office" and the office manager described Complainant as an "exceptional Head Assistant who is always willing to help and improve the quality of care given to our pts." Id. Complainant's 2005 performance evaluation describes her as "extremely knowledgeable" and a "valuable employee and asset to Aspen and this office." Complainant's Exhibit 5. Her 2006 evaluation rates her as exceptional in nine out of ten categories of performance. Complainant's Exhibit 6. Her 2007 evaluation rates her as exceptional in ten out of ten categories and describes her as a "very dedicated, reliable and valuable asset to this office." Complainant's Exhibit 8. Complainant's 2008 evaluation rates her as exceptional in all categories and describes her clinical and

interpersonal skills as "top notch." Complainant's Exhibit 9. Complainant did not receive any evaluations after October 3, 2008. Transcript I at 64.

6. Complainant earned $21.65 an hour in 2009. Transcript I at 149; Complainant's Exhibit 22.

7. In the summer of 2009, Adrienne Lafond took over as office manager in the Leominster office. Transcript I at 65, III at 572. In that role she reported to Regional Manager Sarah Doyle. Transcript III at 579. As office manager, Lafond supervised Complainant. Transcript III at 573.

8. Complainant testified that in late November or December 2009, she confronted Lafond about flirting with a patient ("JL") in the dental office, about unbuttoning her shirt to expose her cleavage when JL came into the office, and about allegedly making sexual comments in the office about JL. Transcript I at 85-86, 222, 225-227; Complainant's Exhibit 22. I credit Complainant's testimony in this regard.

9. According to Complainant, after the conversation about flirting, Lafond, in early December, 2009, started picking on Complainant's accent, said she could not understand Complainant, stated that Complainant's accent was driving her crazy, accused Complainant of coming from a third-world country, and asked Complainant if she had picked her husband out of a mail-order magazine. Transcript I at 87-89, 93; II at 350, 352. I credit that Lafond made disparaging comments about Complainant's accent and commented in a demeaning way about Complainant's ethnic background.

10. Lafond denies that she ever flirted with a patient at work or that Complainant cautioned her about having a flirtatious relationship at work, although she admits that she became friends with dental patient JL after she met him at work and that it led to their "hanging

out" outside of work. Transcript IV at 782-785, 791-792. Respondent's records indicate that Lafond received a counseling notice of a "first verbal warning" for texting JL on a personal device in regard to a dental procedure he had at the office about which he subsequently complained and refused to pay. Complainant's Exhibit 36; Transcript III at 616; IV at 786-791.

11. Lafond denies that she made any comments about Complainant's accent and heritage other than saying that Complainant's pronunciation of a single word was "cute." Transcript 611, 616. This denial is not credible. I find that after Complainant warned Lafond in late November/early December 2009 about flirting at work, Lafond began to make comments about Complainant's accent such as saying that patients had difficulty understanding her and that they sometimes considered her rude as a result of her accent.

12. On December 10, 2009, Complainant conducted an annual inventory of office materials. Transcript I at 95; II at 437-439; Complainant's Exhibit 10. On the next day, Lafond, and possibly Regional Manager Sara Doyle, had a conversation with Complainant about the existence of an excessive number of large-sized gloves and compound sticks in the storage room. Transcript I at 99; II at 405, 416, 443-448. Complainant was blamed for the over-stocking of gloves. Complainant testified credibly that the excess of extra-large gloves at the end of 2009 was due to the needs of a previously-employed doctor and that when she asked Lafond if the gloves should be returned for a credit or exchanged, Lafond said to keep them. Transcript I at 105. Complainant maintains that the discussion was an informal discussion and denies that she was informed at the end of the conversation that there would be disciplinary consequences for the inventory overage. Complainant's Exhibit 17; Transcript I at 102;

II at 449, 459. I credit her testimony that the conversation was an informal discussion and not a disciplinary matter.

13. The job description for lead dental assistant states that incumbents should be "capable of entering the dental supply order into the requisition system for management review." Complainant's Exhibit 11. Complainant credibly testified that despite this reference in the job description, she was never trained about how to place dental supply orders into the computerized requisition system. Instead, she made lists of needed items identified by their item numbers and prices which she gave to the office manager who entered the items into the computer. Complainant's Exhibit 11 & 22; Transcript I at 75-79, 105; II at 288, 336-338, 404-405, 488. Office Manager Lafond acknowledged that she input orders for dental supplies into the computer system based on a spreadsheet filled out by Complainant. Transcript III at 588. Lafond testified that if the spreadsheet indicated an "abundant" amount of a certain item, she would look to see if the amount was really needed. Transcript III at 589. I find that Office Manager Lafond was responsible for entering inventory orders into the computer and for ensuring that the Leominster office stayed within budget. Transcript II at 488-490, 506; IV at 801, V at 941-942. Despite her role in the inventory process, Lafond was not written up for allowing excessive inventory to accumulate in the Leominster office in 2009. Transcript IV at 801.
14. On or around December 18, 2009, Complainant began a two-week vacation. She returned to work on January 4, 2010. Transcript I at 101.
15. When Complainant returned from vacation on January 4, 2010, she received a document designated as a "second warning" which stated that she was being demoted from lead dental assistant to dental assistant. Complainant's Exhibit 14. The document

was signed by Office Manager Adrienne Lafond. Id. It lists three infractions: 1) unacceptable customer service (patient complaints that they were spoken to rudely/disrespectfully); 2) unsatisfactory work performance (over-ordering of dental supplies); and 3) safety/health compliance violation ("failed to complete weekly spore testing ... no documentation for at least five months"). Id. The document states that a previous "warning" had been given on December 10, 2009. Transcript II at 459, 498-499. I do not credit the characterization of the December 10, 2009 conversation as a "first warning."

16. Accompanying Complainant's demotion was a reduction in her pay from $21.50 per hour to $18.50 per hour. Complainant's Exhibit 14.

17. Complainant wrote to Aspen's HR Department on January 4, 2010 to protest her demotion and reduction in pay on the basis that: 1) she had been instructed not to continue every-other-day spore testing after 2006 because it was superseded by the weekly biological spore tests required by "OSHA" (Occupational Safety and Health Administration) for determining the effectiveness of sterilization procedures; 2) she was told by Lafond to retain extra inventory items; 3) she was never issued a prior warning; 4) she treated all patients with respect and dignity and 5) her $21.50 hourly rate resulted from annual raises based on seniority not from her position as lead dental assistant so that being demoted should not have impacted her hourly rate. Complainant's Exhibits 17 & 18; Transcript II at 346, 426.

18. Despite Complainant's protest, her hourly rate of $21.50 was not reinstated. I find that this was due, at least in part, to Lafond's resentment that Complainant had received $21.50 per hour as a lead dental assistant whereas she (Lafond) was received $15.00 an

hour as a lead dental assistant when hired in 2007 and only $19.00 an hour when promoted to office manager in the Leominster office in mid-2009. Transcript II at 461; III at 571-672, 632,-638.

19. Spore testing is the process by which it is determined whether there are any live bacteria in the "autoclave" -- the machine which sterilizes dental instruments by killing bacteria. Transcript II at 425. Spore testing involves placing of strips paper inside the autoclave and observing whether they turn the proper color to indicate that the sterilization process has been successfully completed. Transcript II at 314-315, 408-409. I credit Complainant's testimony that testing on an every-other day basis was discontinued in the Leominister office after the introduction of weekly Pelvue sterilization pouches.[2] Complainant's Exhibits 17 & 18; Transcript I at 72; II at 408-413. Every other-day spore testing is not required by OSHA, although it is useful in detecting if there are false positives in weekly spore tests. Transcript II at 433.

20. Regional Manager Sarah Doyle disagreed with Complainant's assertion that every-other day testing was no longer required after the introduction of weekly OSHA spore testing, stating that the two types of spore testing were conducted simultaneously because positive results on the weekly tests could be diagnosed as "false positives" if the every-other day test results were negative. Transcript II at 431-433. Doyle's testimony in this regard is not as credible as Complainant's. Respondent's 2003 SOP (standard operating procedure) states that dental assistants are only responsible for

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[2] The witnesses contradicted one another about whether "SPS" testing referred to weekly or every-other day spore tests. Transcript II at 408. It is not necessary to resolve this matter.

running spore strips through the sterilizer *weekly.* Respondent's Exhibit H (revised in 2004).

21. Complainant asserted that it was the duty of office manager to make sure the OSHA-mandated weekly spore tests were done and submitted to "corporate" in an office tote bag for transmission to an outside company, although the actual testing could be done by any dental assistant. Transcript I at 67, 70-71, 103; II at 329-333, 410-411. Regional Manager Doyle acknowledged that any dental assistant could perform spore tests, that the ultimate responsibility for logging-in and sending weekly spore test results to corporate headquarters for submission to OSHA belonged to her and, secondarily, to the office manager, and that the lack of reports indicated a dereliction on her part and Lafond's. Transcript II at Transcript II at 430-435, 451-452, 488, 496-497. Nonetheless, Doyle maintains that Complainant was responsible for a "bunch" of missing spore test results in the Leominster office. Transcript II at 433-434, 451, 455-456. I do not credit Doyle's testimony in this regard.

22. Office Manager Lafond acknowledged that she was not written up for failure to complete the spore tests even though it was her job to ensure compliance with OSHA and regulatory practices, including spore testing. Transcript III at 668-669; IV at 800-801.

23. Complainant testified that when she asked about the accusation that she spoke rudely or disrespectfully to patients, Lafond said that because of Complainant's thick accent, patients might think she was being rude. Transcript I at 107. Prior to that communication, Complainant had not been informed that any patients thought she was rude. Id. Regional Manager Doyle testified that there were occasions when she

observed Complainant being "stern" with a patient, interrupting someone or walking away while another person was talking. Transcript II at 457. She acknowledged that she never put any patient complaints in writing because they weren't "overly severe and because Complainant had very good clinical skills." Id. at 458.

24. Complainant's letter to Aspen Dental was typed up by her husband, Ovidiu Babu, in English based on what Complainant dictated to him in Romanian. Transcript IV at 725-726, 730. According to Complainant's husband, Complainant was very upset after the January 4, 2010 meeting, cried at home, started keeping to herself, and became very quiet. Transcript IV at 723, 734. He testified that Complainant retreated from her family, didn't want to go out anymore, stopped going to parent-teacher conferences and church, didn't like talking anymore, gained a lot of weight, became anxious, started taking antidepressants and anti-anxiety medication, and started losing her hair. Transcript IV at 736-738. Complainant had previously taken antidepressant medication for about six months when her father died in 2005. Transcript IV at 757, 776-777.

25. On January 5, 2010, Complainant discussed her "second warning" and demotion with Regional Manager Sarah Doyle. According to Doyle, as part of the conversation she discovered that Complainant had not consistently performed every-other-day SPS testing as well as weekly testing. Transcript II at 463. Doyle issued a revised disciplinary notice on the same day by adding the accusation that Complainant failed to complete SPS testing three times per week, deleted the third alleged infraction pertaining to repeated patient complaints about rudeness, deleted the reference to a prior (but not current) warning regarding the over-ordering of supplies, and added a reference to an alleged previous disciplinary conversation about Complainant

performing procedures outside the scope of clinical permission. Complainant's Exhibit 15; Transcript II at 466. According to Vice President of Human Resources Suzanne Decker, the reference to patient complaints was "basically negated" in the second version of the warning/demotion. Transcript V at 999.

26. Doyle told Complainant that the added reference to performing procedures outside the scope of her clinical permission pertained to a prior "disciplinary conversation" arising out of an incident involving Aspen dentist Dr. Boppana two years previously; that weekly spore tests were missing for a few weeks in 2008 and 2009; and that she was paid too much in comparison with other lead dental assistants. Complainant's Exhibit 18; Transcript I at 115.

27. According to Doyle, the previous "disciplinary conversation" was a 2008 discussion involving herself, Complainant, and District Director Lori D'Anna arising out of a doctor's complaint that Complainant said "something" to a patient that the doctor felt she shouldn't have said which led to D'Anna telling Complainant that she couldn't tell doctors what to do or how to do it. Transcript II at 467-469, 471. D'Anna describes this as Complainant overstepping her role. Transcript V at 931-934. D'Anna testified that the concern was addressed in a verbal discussion, not through formal discipline. Transcript V at 934.

28. According to Complainant, the prior matter pertained to Dr. Boppana becoming upset with her because he mistakenly thought she had reported him to "corporate." Complainant testified that she was told by District Director Lori D'Anna and then-Regional Manager "Maura" not to question doctors but that she never before received any type of discipline. Transcript II at 361-363, 396. I credit this testimony.

29. Complainant met with Doyle and Lafond on the evening of January 5, 2010 to discuss LaFond's remarks about Complainant's accent. Complainant's Exhibit 18. Complainant accused Lafond of expressing hostility in regard to her accent as evidenced by comments such as, "your accent is driving me crazy" and "maybe [you] don't mean to be rude but [you're] accent is rude" whereas Lafond maintained that she considered Complainant's accent to be "cute." Id.; Complainant's Exhibit 25.

30. Complainant testified that after her demotion, she cried, was not able to sleep at night, had chest pain, and was given a prescription from her nurse practitioner for anxiety and depression. Transcript I at 166, 168; Complainant's Exhibit 22. Complainant asserts that she gained forty to forty-five pounds, lost hair, isolated herself from her family, and was no longer comfortable around American people who only spoke English. Transcript I at 168-169.

31. In February of 2010, Regional Manager Sarah Doyle reviewed Complainant's performance following her demotion and noted in writing that that there were "very positive results with patient interactions so far." Complainant's Exhibit 16. Doyle also noted that "we decided to split ordering responsibilities amongst DA [dental assistant] team ... Spore testing being completed weekly." Id. According to Complainant, Doyle offered to reinstate her old title and responsibilities but not her hourly pay, whereas Doyle testified that she did not consider restoring Complainant to her prior position at that time. Transcript I at 126; II at 477. I credit Complainant's version over Doyle's.

32. Complainant testified that following her demotion, Office Manager Lafond began to direct her, but not other dental assistants, to clean dental chairs with bleach, to clean office bathrooms including toilets and the sink, and to clean the office floor. Transcript

I at 128-129, 214-216. Cleaning the office is not listed in the job specifications for either dental assistant or lead dental assistant. Transcript II at 421; Complainant's Exhibit 11; Respondent's Exhibit E. Lafond testified that nobody was "required" to clean toilets but that staff agreed to do so as well as to vacuum and to clean dental chairs because the cleaning crew only came in once a week and the staff needed to make sure that the office stayed clean. Transcript III at 620-621; IV at 821-822. I do not credit that employees volunteered to perform cleaning tasks but, rather, that multiple employees, including Complainant, performed such tasks at the direction of Lafond.

33. Complainant testified that Lafond started to require that she submit doctor's notes when she called in late, missed work for a scheduled doctor's appointment, or when she was absent due to sickness; gave her a hard time about vacation requests; and denied her two days of bereavement leave when her father-in-law died. Transcript I at 132-136, 150; Complainant's Exhibits 20-22.[3] Lafond testified that everyone had to bring in notes if they were absent from work for being sick or for going to a doctor's appointment. Transcript IV at 818-819. Lafond's testimony is contradicted by the Company Handbook which states that in cases of *repeated* absences, such a note *may* be required. Respondent's Exhibit 1 [emphasis supplied]. I credit Complainant's assertion that Lafond started to require that she submit doctor's notes anytime she missed work. Transcript II at 301. I likewise credit that Lafond started to give Complainant a hard time about vacation requests.

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[3] Respondent asserts that it has no record of receiving Complainant's Exhibit 22. I credit Complainant's testimony that she faxed it to Respondent's Human Resource Office. Transcript I at 142-145.

34. On March 2, 2010, Complainant wrote to Respondent's Human Resource Managers Benjamin Laurel and Sue Decker, asserting that her problems at work began in November 2009 after she accused Lafond of flirting with a male patient. Complainant's Exhibit 22.

35. On April 20, 2010, Complainant filed with the MCAD charges of national origin discrimination and retaliation against Respondent alleging that she was subjected to harassment because of her Romanian accent and to harassment and retaliation for voicing an objection to the "sexualized behavior" of her office manager towards male patients. Complainant testified that after filing this complaint, instances of harassment diminished but they re-commenced at the end of 2010 when Lafond denied her the same two weeks of vacation in December that she had taken for the past six to eight years. Transcript I at 152.

36. Vice President of Human Resources Suzanne Decker testified that she recalls having conversations with Doyle about Complainant's charges of discrimination. Transcript V at 996. Decker testified that any MCAD complaint sent to Respondent would have been directed to her and that she would have contacted Regional Manager Sarah Doyle about the complaint Transcript V at 993, 995.

37. In December 2010, Complainant's hourly rate of pay increased from $18.50 to $19.05. Transcript I at 197-198.

38. In early January 2011, Dr. Paul Ala commenced employment at Aspen Dental in Leominster as an associate dentist. Transcript II at 234. During the approximately six-month period that he worked with Complainant, he found her work to be "excellent." Id.

39. Complainant was terminated on July 25, 2011 for allegedly using a hand piece inside the mouth of a patient (hereafter referred to as "CC"). Complainant vehemently denies this accusation. Complainant's Exhibit 23; Transcript I at 156, 161; V at 1024.

40. The alleged incident involved a patient of Dr. Kimberly Haynes who was, at the time, the newly-appointed clinical director of the Leominster office. Dr. Haynes had recently finished her clinical training. Transcript I at 156. Dr. Haynes testified that at the time of the alleged incident, she was not aware that Complainant had filed a charge of discrimination in April 2010 against Aspen Dental. Transcript V at 861.

41. Patient CC testified at the public hearing that she always went to the Leominster location of Aspen Dental. Transcript VI at 1242-1243, 1274. She testified that on one occasion, an assistant "Sat me down ... asked me what I was there for. ... grabbed [what I assume was] a drill ... and started buzzing away ... for a minute or two, then stopped ... and the doctor came in and he picked up the same tool." Transcript VI at 1280.[4] According to CC, the assistant worked on her tooth without Novocain but, inexplicably, the drilling did not hurt. Transcript VI at 1304, 1306, 1308. The patient testified that she asked the dentist if the assistant was "allowed to do that" and was told no. Patient CC stated that there was no further conversation about the incident. Transcript VI at 1280, 1303.

42. CC stated that the individual about whom she complained had dark hair, some "ethnicity" in terms of skin color but no accent and described her as slim and less than 5'7" tall. Transcript VI at 1281-1282. Complainant is blond, large-boned, stands

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[4] In another description of the same incident, Patient CC said that a dental hygienist or dental assistant "just came in and ... was drilling ... [and then] left." Transcript VI at 1249. The patient stated that she assumed the instrument was a drill because the dentist used the same instrument. Transcript VI at 1276.

5"11" without shoes and 6'1" wearing dental assistant clogs, and speaks with a discernable accent. Transcript VI at 1086-1088. The patient had the opportunity to view Complainant and did not recognize her. Transcript VI at 1256, 1298. CC testified that she complained immediately to a male dentist (whereas Dr. Haynes is female) about the assistant's alleged drilling on her natural tooth. Transcript VI at 1250, 1293. Based on the foregoing, I find that the patient's memory is not accurate.

43. Complainant testified that she made a temporary crown for a patient on Wednesday, July 20, 2011 at the request of Dr. Haynes and placed it inside the patient's mouth. Transcript V at 1024, 1032. She testified that the process she followed was to check the bite using blue "articulating" paper that shows blue marks if there are any high spots and if such marks appear, to take the temporary crown out of the patient's mouth and adjust it using a slow speed rotating instrument called an "adjustment bur" which makes a loud, vibrating noise and then reposition the temporary crown back in the patient's mouth. Transcript V at 1033-1035. I credit this testimony.

44. Complainant did not work on Thursday or Friday July 21 and 22, 2011. She returned to work on Monday, July 25, 2011. When she returned, she learned that CC had returned to the office complaining that her temporary crown had fallen off and that she (Complainant) was being accused of using a drill inside CC's mouth. Transcript I at 158-161. Complainant was terminated that day.

45. Dr. Haynes initially testified at the public hearing via skype from Texas that on July 20, 2011 she: 1) drilled the cracked tooth of CC in order to "reduce" it in preparation for fitting it with a temporary crown; 2) left CC with Complainant who placed a mold inside the patient's mouth and made a temporary crown from the impression; and 3)

returned to cement the temporary crown into the patient's mouth. Transcript V at 875-878. Dr. Haynes stated that when she returned to cement the crown, CC was red in the face, visibly upset, and reported that Complainant had placed a high speed dental instrument in her mouth and made adjustments to her tooth while Dr. Haynes was gone. Transcript V at 879, 890, 893. Dr. Haynes testified that she examined the tooth and saw that it had been modified and that "there were marks on the temporary crown" and "an actual hole in the temporary crown." Id. at 880, 904. This testimony is inconsistent with events described in CC's medical chart and was subsequently retracted by Dr. Haynes.

46. The patient's medical chart contains an entry on July 20, 2011 signed by Dr. Haynes which states that: "Temporary [was] completed by Oana." Complainant's Exhibit 39. The chart contains another entry two days later which states that the patient returned on July 22, 2011 because the temporary crown fell off due to the tooth not having been reduced enough by Dr. Haynes. According to the chart, the patient informed Dr. Haynes at the second visit that "the assistant was aware of the 'hole' in the temporary" and had reduced her tooth with a hand piece while making the temporary crown. Id.; MCAD Charge of Discrimination (7/26/11). Although the patient does not state when Complainant became aware of the hole and allegedly reduced the tooth, I conclude that the patient was referring to the visit of July 20, 2011 because Complainant was not at work during the second (July 22) visit. No rational explanation was offered for how a hole occurred in the temporary crown during the same visit at which it was made and for why the patient did not mention the hole until two days later.

47. Dr. Haynes testified again via skype after reviewing the patient's medical record. During her second day of testimony, Dr. Haynes modified her previous testimony to state that during CC's first visit on July 20, 2011, it was Complainant who cemented the temporary crown over the patient's reduced tooth, that she (Dr. Haynes) failed to reduce CC's tooth sufficiently during the first visit which caused a hole in the temporary crown and caused it to fall off, and that CC was upset during the *second* visit on July 22, 2011 at which time CC allegedly complained about Complainant drilling inside her mouth two days earlier. Transcript VI at 1149, 1163-1165, 1178, 1184-1185, 1230, 1234. Although I credit that CC returned for a second visit and complained about something that happened during her first visit, I do not credit that she identified Complainant as the culprit nor that she appeared upset and red in the neck about what happened two days earlier.

48. Dr. Haynes asserted that dental assistants are permitted to cement temporary crowns inside a patient's mouth, to remove excess acrylic cement from a temporary crown inside a patient's mouth, to remove excess acrylic cement from a temporary crown outside a patient's mouth with a hand piece and rotary bur, and to do anything else that is reversible. Transcript V at 859, 910; VI at 1165, 1179, 1226-1229.

49. According to Dr. Haynes, she spoke to Complainant within a day of the alleged incident at which time Complainant denied that she had drilled inside the patient's mouth. Transcript V at 883, 889. Dr. Haynes reported the patient's accusations to Office Manager Lafond who terminated Complainant per notice dated July 25, 2011. Complainant's Exhibit 23. Transcript V at 883.

50. Lafond did not speak to CC before Complainant was terminated. Lafond consulted with Regional Director Sarah Doyle and District Director Lori D'Anna, neither of whom spoke to CC. Transcript III at 624; IV at 824; V at 866, 934, 936. D'Anna testified that she authorized the termination after conferring with Doyle and Dr. Haynes. Transcript V at 968. The termination notice states that on July 20, 2011, Complainant made adjustments to the patient's temporary crown and to the tooth itself using a hand piece and that this was "not the first time that [Complainant] has received disciplinary action for working outside of her scope of practice." Complainant's Exhibit 23. An internal office memo about the incident states that is was Complainant's third disciplinary action. Id.

51. Dr. Ala testified that he was informed of Complainant's termination by Office Manager Lafond who attributed the termination to Complainant using a hand piece inside a patient's mouth and to a language barrier, although on cross-examination Dr. Ala stated that the language issue was only mentioned as a ground for Complainant's discrimination suit against Aspen Dental. Transcript II at 236, 250, 265-267. According to Dr. Ala, Lafond told him not to be concerned about Complainant's termination because he was being named by Complainant in a discrimination case. Id. at 239, 264; Complainant's Exhibit 31. I credit Dr. Ala's testimony on direct examination that Lafond considered Complainant to have a language barrier and that this perception was a ground for termination.

52. Dr. Ala testified that he was surprised that Complainant was being accused of using a hand piece inside a patient's mouth because he "never saw her express a desire or to do anything in that nature." Id. at 237. He said that if a patient complained about an

unauthorized practice, he would interview the patient, the accused assistant, and anyone else who had knowledge of the incident because patients don't "really understand a lot of what is going on and a lot of times, they're misled by their perception." Transcript II at 239-240.

53. On July 26, 2011, following her termination by Respondent, Complainant filed for unemployment compensation. Transcript II at 397-398. She collected unemployment for a year and four months. For the first six months she received $493 per week and thereafter approximately $450 a week. Transcript I at 186-189.

54. Complainant looked for other employment following her termination by Respondent. Complainant applied for dental positions on-line using Craigslist and Indeed.com. Transcript IV at 741; VI at 1065. She sent out resumes as e-mail and in regular mail. Complainant's husband, who helped her respond to dental openings, estimates that his wife applied to two or three jobs per week. Transcript IV at 754. I credit this claim.

55. Prior to receiving her current job, she received two interviews for dental assistant positions, one in Bolton, MA in September 2012 and one in Wellesley, MA in March 2013. Transcript I at 170. Complainant was interviewed by the Bolton office manager who asked her if she could return for a "working interview" to demonstrate her skills. Transcript I at 171. Complainant testified that she was never invited to return and was ultimately told that another individual had been hired. Transcript I at 172. From these facts, Complainant infers that Respondent gave the Bolton dental practice a bad reference about her. I do not credit this assertion. The owner of the Bolton practice, Dr. Amparo David, DMD, testified that she has no recollection of interviewing Complainant. Transcript IV at 701. Dr. David stated that she tells individuals who are

interviewed for positions, "we'll call you, we'll probably call you sometime within the end of the month." Transcript IV at 707. According to Dr. David, sometimes she does call and sometimes she doesn't. Id. Dr. David also stated that when she conducts first interviews, she always shows candidates around the office even if she doesn't intend to hire them and that sometimes she discusses scheduling and sometime she doesn't. Transcript IV at 708-709. Dr. David testified that she never checks references. Transcript IV at 709-710. While I do not credit the claim that Dr. David never checks references, I do credit that she did not receive negative information about Complainant.

56. Complainant testified that she was interviewed at Wellesley Dental by Dr. Joseph Lee who said he was very impressed with her skills. He, too, never called her back. Transcript I in 173. Dr. Lee testified that Complainant was a top candidate but that he had not finished interviews when he spoke to her, and he ultimately decided to hire someone else. Transcript V at 842-844, 849. Dr. Lee testified that he does not personally check references, he has no recollection of whether his office manager called Aspen Dental for a reference about Complainant, and he does not recall why he hired the preferred candidate over Complainant. Transcript V at 844, 849-851. His office manager, Susan Hugenberger, testified that she only contacts prior employers if applicants gave their names as references. Transcript VI at 1051, 1058. She stated that it is not her practice to call prior employers. Transcript VI at 1061. Hugenberger has no recollection of Complainant. Transcript VI at 1048. Complainant has no evidence to support the claim that Respondent provided a negative reference to Wellesley Dental. Transcript II at 385.

57. Complainant found a job in September 2013 at Aim Dental. She started working less than full time earning $15 per hour and after three months earned $16 per hour through April of 2014. Transcript I at 174-175. In April 2015, she began making $20 per hour with benefits and in January 2016, was raised to $22 per hour.

III. CONCLUSIONS OF LAW

A. National Origin Discrimination

Direct Evidence

Complainant charges that she was the subject of employment discrimination based, in part, on her national origin which is Romanian. In support thereof Complainant asserts that Office Manager Adrienne Lafond made negative comments about her accent, demoted her for false reasons, and unfairly denied her vacation time in contrast to other employees who were not denied time off. Because Complainant contrasts her treatment to that of other employees, I will evaluate her national origin claim using a disparate treatment analysis.

Under M.G.L. c. 151B section 4(1), one method of establishing a prima facie case of disparate treatment employment discrimination based on national origin is by proffering direct evidence of discrimination. Such evidence, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991); Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000). In a direct evidence case, a complainant does not have to adhere to the three stage burden shifting paradigm set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1972). Rather, Complainant must

prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. See Fountas, 22 MDLR at 269. If Complainant meets her initial burden, the burden of persuasion shifts to Respondent, "who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive." Wynn & Wynn, 431 Mass. at 667, *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989); Fountas, 22 MDLR at 269.

Complainant offers direct evidence of national origin discrimination in the form of statements by Office Manager Lafond that she could not understand Complainant, that Complainant's accent was driving her crazy, that Complainant came from a third-world country, that patients had difficulty understanding Complainant, that patients sometimes considered Complainant rude as a result of her accent, and that Complainant was terminated, in part, because of a "language barrier." I credit that Lafond made such statements over her unconvincing assertion that she found Complainant's accent "cute" and that she only mentioned a language barrier to Dr. Ala in regard to describing Complainant's lawsuit.

Lafond's disparaging comments evince a demeaning attitude about Complainant's national origin which had a direct impact on the demotion and termination actions. See Chief Justice for Administration and Management of the Trial Court v MCAD, 439 Mass. 729, 732, n. 11 (2003) (direct evidence typically consists of statements of discriminatory intent attributable to an employer). Such remarks may not be dismissed as mere stray comments. Compare Wynn & Wynn, 431 Mass. at 667, *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J.,

concurring) (statements made that are unrelated to the decisional process do not constitute direct evidence); Yu v. Li, 28 MDLR 212 (2006) (stray remarks consist of comments that are isolated, occasional, random, or casual). Lafond's derogatory statements about Complainant's accent and its impact on patients create a highly probable inference of forbidden bias which played a motivating part in the challenged employment actions. See Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass. 729 (2003).

Since there is direct evidence of national origin discrimination, the burden shifts to Respondent to prove that Complainant would have been demoted and terminated even in the absence of the national origin discrimination demonstrated by Lafond's comments. See Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 302. (discussed in Part A. 2, below. Even if the remarks do not constitute direct evidence sufficient to invoke a mixed motive analysis as opposed to an indirect evidence analysis, they lend powerful support and context to the analysis below.

Indirect Evidence

In the absence of direct evidence of a retaliatory motive, Complainant may prevail on a charge of disparate treatment employment discrimination with circumstantial evidence showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s). See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665-666 n.22 (2000) (prima case established where protected class member applies for

position, is not selected, and employer seeks or fills position with similarly-qualified individual). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as "not onerous," requiring only that a qualified individual establish circumstances "which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky, 419 Mass. 437 (1995).

Regarding the elements of a prima facie case, Complainant's Romanian national origin is undisputed. There are numerous performance assessments of Complainant up to 2008 attesting to Complainant exceeding job expectations, being a great asset to the office, and having clinical and interpersonal skills that are "top notch." Even after Complainant was demoted, Regional Manager Sarah Doyle commented favorably on Complainant's patient interactions and Dr. Ala, with whom Complainant worked in 2011, evaluated her work as excellent. That Complainant suffered adverse employment actions is undisputed in light of her demotion and termination. The record contains no evidence of similar treatment imposed on others. To the contrary, individuals who bore responsibility for mismanaging inventory and for failing to oversee spore testing -- the same matters that resulted in Complainant's demotion -- appear to have received no penalties for their shortcomings. Based on the foregoing, Complainant has made out a prima facie case of disparate treatment discrimination.

Since the foregoing circumstances support a prima facie case of discrimination based on national origin, the burden of production shifts to Respondent to articulate and produce some credible evidence to support a legitimate, nondiscriminatory reason for demoting and later terminating Complainant. See Sullivan v. Liberty Mutual Insurance

Co., 444 Mass. 34, 50 (2005) *quoting* Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 238 (1976). I will address this matter along with Respondent's burden under a mixed-motive analysis. In order to avoid liability under either approach, Respondent must come forward with credible evidence that it would have demoted and terminated Complainant even in the absence of its supervisors' demonstrative impatience over Complainant's communication skills.

The reasons proffered by Respondent for taking disciplinary action against Complainant are numerous and varied. Complainant was blamed for the over-ordering dental supplies, speaking rudely to patients, failing to complete spore testing, over-stepping her role by discussing x-rays and treatment plans with a patient, and using a hand piece inside a patient's mouth. These matters, had they actually occurred, would have constituted legitimate, nondiscriminatory reasons for demoting and terminating Complainant under both an indirect and a direct evidence analysis.

While the reasons pass muster as hypothetical rationales, none constitute a legitimate basis for discipline when the evidence is closely scrutinized at stage three. At this stage of analysis Complainant must persuade the factfinder that one or more of the employer's reasons are false, allowing, but not requiring, the fact finder to infer that the employer is covering up a discriminatory motive. See Chief Justice of the Trial Court, 439 Mass. 729, 733 (fact finder determining at stage three that a legitimate reason advanced at stage two is actually a pretext; see also Sullivan, 444 Mass. at 55; Lipchitz v. Raytheon, 434 Mass. 493, 501 (2001).

Insofar as the alleged over-ordering of supplies is concerned, I credit

Complainant's assertion that the excess of extra-large gloves at the end of 2009 was due to the needs of a previously-employed doctor and that Lafond instructed Complainant to keep the gloves rather than return them for a credit or exchange them for other items. In any event, it was not Complainant's responsibility to place dental supply orders into the computerized requisition system. Rather, Complainant gave lists of items to Office Manager Lafond who entered them into the computer after determining whether the amounts identified by Complainant were really needed. Thus, it was Lafond, not Complainant, who was responsible for the over-ordering of inventory. Despite Lafond's responsibility for managing inventory, she treated Complainant as the culprit for the overstocking of gloves and compound sticks, inflated an informal conversation on December 11, 2009 about those items into the first step on Complainant's progressive discipline ladder, and subsequently labeled the same communication as a second warning/demotion after reiterating it in written form on January 4, 2010. As a result, Complainant received two disciplines for the same charge of alleged mismanagement whereas the actual culprits received none.

After the attempt to turn the December 2009 conversation into a first warning was retracted, another undocumented matter was substituted in its place as a prior "warning." That matter -- a concern from years earlier about Complainant allegedly discussing x-rays and treatment plans with a patient -- consisted of undocumented hearsay denied by Complainant which Regional Manager Lori D'Anna conceded had never been the basis for discipline. Its belated inclusion in Respondent's second warning/demotion supports Complainant's position the charges against her were not a legitimate ground for

discipline.[5]

Insofar as Complainant's alleged rudeness is concerned, I credit her testimony that she treated all patients with respect and dignity. Her assertion is corroborated by her yearly performance assessments between 2002 and 2008 which rate her as exceeding expectations, describe her as a "wonderful addition to our team" and "a great asset to our office." Significantly, in 2008, Complainant's *interpersonal* skills were rated as "top notch." Dr. Paul Ala who worked with Complainant for the first eight months of 2011 described Complainant as "excellent." An allegation that Complainant was rude to patients has no support in Complainant's personnel record despite it serving as a ground for demotion before it was deleted on January 5, 2010. Regional Manager Sarah Doyle conceded that she never put any patient complaints about Complainant's being "stern" to patients in writing because they weren't "overly severe" and because Complainant had very good clinical skills. To rely on such accusations in light of this concession is both unconvincing and unfair.

Turning to the issue of spore testing, Complainant was demoted for failing to complete weekly spore testing, but the responsibility for implementing OSHA's safety/regulatory requirements was shared by Office Manager Lafond and Regional Manager Sarah Doyle as well as Complainant. Doyle conceded that she bore the "ultimate responsibility" for ensuring test compliance, that it was the job of the office manager to send weekly spore test results to corporate headquarters, and that the lack of weekly spore reports indicated a dereliction on her part and Lafond's. Nonetheless,

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[5] The same undocumented hearsay was used to characterize the "hand piece" incident leading to Complainant's termination as "not the first time that Complainant received disciplinary action for working outside of her scope of practice." Complainant's Exhibit 23.

neither she nor Lafond were disciplined for their failures. Regarding every-other day spore testing which was added to the warning/demotion issued to Complainant in a revised disciplinary notice, I credit Complainant's assertion that such testing was no longer required after the introduction of weekly OSHA spore testing and that she was instructed by a prior office manager to terminate the practice.

The basis for Complainant's ultimate discipline consisting of her July 2011 termination rests on the charge that Complainant drilled inside Patient CC's mouth, a charge which Complainant vehemently denies. It is difficult, in 2017, to reconcile conflicting accounts of what transpired in 2011. Patient CC, called to testify in this matter, continues to maintain that a dental hygienist or assistant grabbed a drill and started "buzzing away for a minute or two" on one of her teeth and then stopped, after which a dentist came in and picked up the same tool. Nonetheless, CC did not recognize Complainant at the public hearing and made the improbable claim that the drilling did not hurt even though Novocain was not administered. CC stated that she reported the incident immediately to the dentist even though her medical chart indicates that she reported it on a return visit two days later. At the public hearing, CC described the dentist as a male whereas Dr. Haynes, the dentist in question, is female. CC described the hygienist/assistant as short, slim, with dark hair and with no accent whereas Complainant is tall, blond, large-boned and has a discernible accent. These factors do not wholly invalidate CC's accusation since there is a contemporaneous reference in her medical chart about the alleged use of a hand piece by a dental assistant, but they cast doubt on what actually transpired.

Complainant, for her part, adamantly denies that she used a hand piece inside CC's mouth. Complainant maintains that she adjusted a temporary crown *outside* of CC's mouth during the patient's initial visit in July 2011 by using a slow speed rotating instrument called an adjustment bur which makes a loud vibrating noise. According to Complainant, she then repositioned the temporary crown back inside the patient's mouth. I find this description to be more credible than the versions offered by Respondents' witnesses. Although CC confidently asserted at the public hearing that a technician worked *inside* her mouth in 2011, it is possible that the patient was misled by an inaccurate perception of what transpired. Such a possibility was raised by Dr. Ala at the public hearing who testified that patients are frequently misled by their perception of what is going on. He noted that he would have interviewed the patient, the accused, and anyone else with knowledge of the incident in order to avoid a misunderstanding. None of these steps were taken before Complainant's career was abruptly terminated.

Dr. Haynes's testimony about the incident, rather than clarifying what transpired, casts more confusion about what occurred. On her initial day of testimony, Dr. Haynes asserted that CC was visibly upset and red in the face during her first visit in July 2011 when she reported that a technician had drilled inside her mouth. After reviewing her chart notes, however, Dr. Haynes amended her testimony to claim that CC returned to the office two days later complaining that her temporary crown had fallen off and only then accused an assistant of using a drill inside her mouth during the first visit.

My findings of fact credit Complainant's version of the events and discredit the versions presented by Respondent's witnesses, leading to an inference of discriminatory animus. See Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Abramian v.

President & Fellows of Harvard College, 402 Mass. 107 (2000) (third step of circumstantial method of proof may be satisfied by proof that one or more of the reasons advanced by the employer is false leading to inference of discriminatory animus). The falsity of Respondent's reasons point to discriminatory animus as the "determinative cause" for the employer's action. See Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001). Finding fault with Complainant over matters attributable to others, the manufacture of a progressive discipline ladder out of a repetition of the same allegations, the dredging up of undocumented hearsay as a basis for discipline, and the failure to adequately investigate Patient's CC accusation suggest that the treatment of Complainant was more than a clash of personalities, more than resentment over Complainant's general outspokenness[6] and more than jealousy over Complainant's hourly wage. See Chief Justice of the Trial Court, 439 Mass. at 735 (even if non-discriminatory reasons play a role in adverse employment action, decision may still be unlawful if discriminatory animus was a "material and important ingredient."

The aforesaid evidence of an indirect nature is buttressed by direct evidence of national origin discrimination consisting of Lafond's comments about Complainant's accent and her national origin and Dr. Ala's statement on direct examination that Complainant's "language barrier" was cited by Lafond as a reason for Complainant's termination. Based on the foregoing, I conclude that Complainant's national origin was a material and important ingredient motivating the actions taken against Complainant and that but for Complainant's national origin, Respondent's supervisors would not have

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[6] The role of Lafond's resentment at being criticized for flirting with a male patient is discussed in more detail in Part III.B, infra.

issued disciplinary warnings, demoted, and terminated Complainant.

B. Retaliation

After objecting to the sexualized behavior of her office manager towards male patients in late 2009, Complainant asserts that: a) she was blamed for mismanaging inventory, speaking rudely to patients, and failing to conduct spore testing; b) she was demoted from her position as lead dental assistant, effective January 4, 2010; and c) she was forced to accept a three dollar reduction in her hourly pay. Complainant was thereafter required to submit doctor's notes for all absences despite the fact that such notes are not required by company policy. Following the filing of Complainant's April 20, 2010 MCAD complaint accusing Lafond of retaliation and national origin discrimination, Lafond denied Complainant the same two weeks of vacation in December 2010 that she had taken for the prior six to eight years. During the following year, Lafond issued Complainant a notice of termination on July 25, 2011. The time frame outlined by the above sequence of events is protracted, but I nonetheless conclude that these events establish a viable claim of retaliation.

Retaliation is defined by Chapter 151B, sec. 4 (4) as punishing an individual's opposition to practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). The evidence in the record does not establish that Lafond's flirtation with male patient JL was sufficiently severe or pervasive to actually violate Chapter 151B, but an activity need not satisfy such

a standard for its opposition to merit protection. See Guazzaloca v. C.F Motorfreight, 25 MDLR 200 (2003) (protected activity requires a reasonable and good faith belief that the conduct being opposed constitutes unlawful discrimination); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (statutory protection against retaliation extends to the informal complaints alleging discrimination). That Complainant initially framed her concerns about Lafond's conduct in an informal, non-confrontational manner does not detract from the validity of her protected activity. See Crawford v. Metropolitan Government of Nashville and Davidson City, 555 U.S. 271 (2009) (protected activity found where employee did not initiate a complaint of sexual harassment but only answered questions during an internal investigation). Such restraint is to be expected when a subordinate communicates with a superior in a company.

Lafond denies that she ever flirted with JL at work or that Complainant cautioned her about having a flirtatious relationship at work, but her denials do not ring true in light of the verbal warning imposed on Lafond for crossing professional boundaries in her communications with JL. It is more likely than not that in late November or December 2009, Complainant did, in fact, confront Lafond about flirting with JL in the dental office, unbuttoning her shirt to expose her cleavage when he came into the office, and making sexual comments about him. I credit that Complainant raised the issue out of concern that Lafond's behavior could subject the practice to a sexual harassment claim. As such, it constituted protected activity.

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD,

371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case by demonstrating that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Applying the aforementioned principles to the credible evidence in this case, there is no doubt that Respondent was on notice of Complainant's protected activity through her communications with Lafond and by the MCAD complaint which Complainant brought in April 2010 formally charging Respondent with retaliation. These communications unleashed a series of negative events over a period of approximately eighteen months that adversely impacted Complainant. The events ranged from warnings to a demotion to termination, all discussed in Part III.A., *supra*.

The sole remaining issue is whether a causal connection exists between the protected activity and the adverse employment actions. I conclude that such a connection does exist. As soon as Complainant warned Lafond in late November/December 2009 about flirting at work, Lafond began to say that patients had difficulty understanding Complainant and sometimes perceived her to be rude as a result of her accent. Within days, Complainant was blamed for over-stocking gloves. Within

weeks, she received a so-called "second" warning for the same over-stocking accusation, was disciplined for other matters that do not withstand scrutiny, and was demoted from her lead dental assistant position. All of these matters took place between late November 2009, at the earliest, and January 4, 2010 whereas prior to that period Complainant received glowing reviews. Such circumstances are sufficient to establish the causal relationship required for a prima facie case of retaliation.

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for its action supported by credible evidence. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). Respondent denied that there was any retaliatory animus in this matter, asserting that Complainant mismanaged inventory, failed to complete spore testing, performed procedures outside the scope of her clinical permission, and used a hand piece inside a patient's mouth. There is sufficient evidence in support of these allegations to satisfy Respondent's burden at stage two.

Once Respondent provides legitimate, non-retaliatory reasons for its treatment of Complainant, the burden then shifts back to her at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason but a pretext for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001); Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655, 666 (2000). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that

the proffered explanation is not true and that Respondent is covering up a retaliatory rationale which is a motivating cause of the adverse employment action. Id.

In regard to the "second warning" and demotion imposed upon Complainant in January 2010, I conclude that Complainant fulfills her stage three burden by proving that her protected activity was the motivating cause of her adverse treatment. See Wynn and Wynn, 431 Mass. at 666-667 (2000). To be sure, Lafond's resentment at Complainant's hourly wage may have also played a role, but even if it did, such resentment did not cause Lafond to impose discipline warnings on Complainant prior to Lafond being criticized for flirting with JL. It was only after the criticism that Lafond resorted to discipline, began to require doctor's notes for each of Complainant's absences, and denied her bereavement leave. Even if non-protected activity played a role in Lafond's treatment of Complainant, the evidence establishes that retaliatory animus was a "material and important ingredient" in Complainant's warning and demotion. Chief Justice of the Trial Court, 439 Mass. at 735 *quoting* Lipchitz v. Raytheon Co., 434 Mass. 493, 506 (2001).

Turning to Complainant's termination in July 2011, the causal connection between Complainant's MCAD complaint and her firing fourteen months later is more protracted than the matters discussed above, but the evidence convinces me that a relationship does, in fact, exist. Complainant filed charges of national origin discrimination and retaliation with the MCAD on April 20, 2010. Instances of harassment initially diminished after the filing, but they re-commenced at the end of 2010 when Lafond denied Complainant the same two weeks of vacation that she had taken for the past six to eight years and culminated on July 25, 2011, when Complainant

was terminated. Her dismissal was imposed in haste and was taken without a proper investigation. According to Dr. Ala's credible testimony on direct examination, Lafond cited Complainant's discrimination suit as a reason why he shouldn't be concerned about her situation. These matters support the conclusion of a link between her suit and her dismissal, as does the fact that not a single administrative supervisor reached out to speak to Patient CC even though Complainant adamantly denied the conduct of which she was accused. It defies credulity that no supervisor would have spoken to the patient before separating a long-term employee over a single incident. Even if an incident occurred for which Complainant bears some culpability, administrators jumped at the opportunity to rid themselves of Complainant at the expense of investigating what actually happened. As well, an internal memo justified the action on the basis that it was Complainant's third discipline, but this characterization is another example of blaming Complainant multiple times for the same conduct. Such circumstances establish that retaliatory animus played a motivating role in each of the adverse actions experienced by Complainant, including her dismissal.

IV. Damages

A. Emotional Distress

Upon a finding of unlawful discrimination, the Commission is authorized to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged

harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See id. at 576; Buckley Nursing Home, 20 Mass. App. Ct. at 182-183. Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 Mass. at 576.

Complainant testified that after her demotion, she cried, was not able to sleep at night, had chest pain, and was given a prescription from her nurse practitioner for anxiety and depression. Complainant asserts that she gained forty to forty-five pounds, lost hair, isolated herself from her family, and was no longer comfortable around Americans who spoke only English.

According to Complainant's husband, Complainant was very upset after the January 4, 2010 meeting which preceded her demotion, cried at home, started keeping to herself, and became very quiet. He testified that Complainant retreated from her family, didn't want to go out anymore, stopped going to parent-teacher conferences and church, gained a lot of weight, became anxious, started taking antidepressants and anti-anxiety medication, and started losing her hair.

Complainant's husband testified that after she was fired, Complainant slept in a separate bedroom for a long time. He described a post-termination incident when he found her in the laundry room of their house, saw that she was crying, and heard her say that she, "can't let it go" and "you're lucky I don't kill myself -- I don't hang myself."

Mr. Babu testified that he responded by convening a family meeting and by having his mother-in-law keep an eye on his wife.

Based on the foregoing, I conclude that Complainant is entitled to $150,000 in emotional distress damages.

B. Lost Wages and Benefits

Chapter 151B provides for monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. See Stonehill College v. MCAD, 441 Mass. 549, 586-587 (2004) *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976).

Following her termination by Respondent, Complainant received unemployment compensation for a year and four months. For the first six months she received $493 per week and thereafter approximately $450 a week.

Complainant looked assiduously for other employment following her termination by Respondent. Complainant applied for dental positions on-line using Craigslist and Indeed.com. She sent out resumes through email and the post office. Complainant's husband, who helped her apply for jobs, estimates that his wife applied for two or three positions per week. I credit this claim.

Complainant found a job in September 2013 at Aim Dental. She started working less than full time earning $15 per hour and after three months earned $16 per hour through April of 2014. In April 2015, she began making $20 per hour with benefits and in January 2016, received a raise to $22 per hour.

Based on the foregoing, Complainant is entitled to $78,868.00 in lost wages consisting of: a) $6,240.00 in lost income between January 4, 2010 and December 30,

2010; b) $2,488.00 in lost income between January 2011 and July 25, 2011; c) $9, 542.00 in lost income between July 26, 2011 and February 1, 2012; d) $18, 550.00 in lost income between February 1, 2012 and December 30, 2012; e) $29,813.00 in lost income between January 1, 2013 and September 1, 2013; f) $1,380.00 in lost income between September 2, 2013 and November 1, 2013; g) $5,720.00 in lost income between November 2, 2013 and April 30, 2014; and h) $5,136.00 in lost income between May 1, 2014 and January 1, 2016.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent Aspen Dental Management, Inc. is ordered to:

(1) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of $78,868.00 in back pay damages plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(2) pay Complainant within sixty (60) days of receipt of this decision, the sum of $150,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of

So ordered this 28th day of August, 2017.

Betty E. Waxman, Esq.,
Hearing Officer