

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & JEAN FLOYD,
Complainants

v.

DOCKET NO. 09-BEM-00392

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

Appearances:

Robert Johnson, Jr., Esq. for Jean Floyd
James F. Cavanaugh, Esq. for Massachusetts Department of Correction

I. PROCEDURAL HISTORY

On February 4, 2009, Complainant Jean Floyd, an African-American woman, filed a complaint with this Commission charging Respondent Department of Correction with discrimination on the basis of race, color and gender in violation of M.G.L.c.151B. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. The complaint was amended to include claims of discriminatory and retaliatory terminations. A public hearing was held before me on April 10-11, 15-16, 18, 28-30 and May 1, 2014. Based on all the relevant, credible evidence and based on the reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Jean Floyd, was hired as a correction officer by Respondent Department of Correction in 1990. From 1990 to 2005 she worked at M.C.I. Concord and M.C.I. Longwood. She transferred to the Lemuel Shattuck Hospital Correctional Unit ("LSHCU") in May 2005.

2. Respondent Department of Correction ("Respondent" or "DOC") is a paramilitary organization where the chain of command is important and obedience to superior officers is required. Respondent operates several facilities, including LSHCU, located within the Lemuel Shattuck Hospital, a state-run facility in Boston. Inmates of Respondent receive medical care in the LSHCU and Respondent is responsible for guarding inmates while they are patients at LSHCU. Within LSHCU are two areas, 8 North and the Outpatient Department ("OPD"). 8 North operates around the clock with three shifts. OPD operates from 9:00 a.m. to 5:00 p.m.

3. Correction officers are expected to comply with the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, known as the "Blue Book." (Ex. C-20)

4. Complainant was considered a good employee by her superior and fellow officers. (Testimony of Burgwinkle, Craven, Robinson, Beers, Liberty, Melvin, Manning, Moriarty, McCormack and Simpson)

5. The chief administrator of the LSHCU is the Superintendent. James Walsh, who is white, was the superintendent from 2002 to his termination in 2010.¹ Deputy Superintendent Brian Burgwinkle, who is also white, assumed the position of Acting Superintendent for a short period of time in 2010 until his retirement on June 20, 2010. Raymond Marchelli, who is white, was superintendent from August 2010 until August 2012.

¹ Walsh was terminated for having subordinates perform personal work for him at his home.

6. Anne Manning, who is white, was deputy superintendent from July 2010 until January 2014.

7. Donna Driscoll, who is white, was assigned to LSHCU in 2007 as the Administrative Captain and was responsible for attendance and overseeing the operations of 8 North.

8. Michael Jeghers, who is white, has worked for the Respondent since 1987. He was promoted to lieutenant in 2002 and was assigned to LSHCU in June of that year. In approximately 2006, Jeghers was assigned the 7:00 a.m. to 3:00 p.m. shift, primarily on 8 North. He became the shift commander in 2008. The shift commander is responsible for the overall safety of Respondent's employees and medical staff assigned to the shift. The shift commander also oversees the activities for the shift, including inmate medical appointments. The shift commander's primary location is the control room, where he/she is expected to remain in order to keep control of the activities within 8 North. Driscoll was Jeghers' supervisor. Jeghers voluntarily transferred to Plymouth in 2012.

9. Complainant worked the 7:00 a.m. to 3:00 p.m. shift on 8 North.

10. During the relevant time period, 8 North had five correction officer posts during the 7:00 a.m. to 3:00 p.m. shift. Upon entering 8 North, and going through the units, the posts are, in order; control room officer, pedestrian trap officer, outside corridor officer, gate post officer and inside corridor officer. At some time in or around 2010, a solarium post was added.

11. In 2007 there were 41 correction staff on all three shifts on 8 North. There were 16 staff on the 7:00 to 3:00 shift, including 11 white men, 2 black men, 2 black women, and 1 Hispanic woman. (Ex. R-51)

12. In 2008 there were 40 correction staff on all shifts on 8 North. There were 17 staff on the 7:00 to 3:00 shift, including 11 white men; 2 black men; 2 black women; 1 white woman and 1 Hispanic woman. (Ex. R-51)

13. In 2009, there were 47 correction staff on 8 North. On the 7:00- 3:00 shift there were 18 staff, including 9 white men, 2 black men, 3 black women, 1 Hispanic man, 1 Hispanic woman and 1 white woman. (Ex. R-51)

14. Employees who generally worked the 7:00 to 3:00 shift on 8 North were Sgts. Hobart (white male); Simpson (black male); Boyd (white male); Officers Raymond Melvin (white male) who became a Sergeant in February 2009; Liberty (white male); Robinson (white female); Raymond (black male); Lewis (black female); and Moriarty (white male). Other employees of LSHCU were Sgt. Wendell Williams (black male) who worked 3-11; Sgt. Dyke (black female) who worked 3-11 and 7-3; and Officer Kenneth Beers (white male) who worked 3-11. Some of the employees who worked in OPD were Officers Henderson (black male); Aime (black male); and Captain Paul Craven (white).

OIS Investigation

15. Correctional officers are required to report to Respondent all contacts they have with law enforcement, all court appearances and all contacts with former DOC inmates. (Ex. R-1)

On November 3, 2008, Respondent was contacted by a Braintree police detective who sought to interview Complainant regarding a shop-lifting incident that occurred at a Braintree store. Complainant was thought to be one of two women seen putting clothes from the store into a car registered to a former DOC inmate with whom Complainant was known to associate. Burgwinkle contacted Respondent's Office of Investigative Services regarding the incident because of the seriousness of the allegation. (Testimony of Burgwinkle; Ex. R-9; R-10)

16. On November 5, 2008, Respondent's Office of Investigative Services initiated an internal, Category II investigation into Complainant's possible involvement in shoplifting and assigned the matter to investigator Lt. Harold K. Wilkes, who is African-American. OIS investigators conduct an independent investigation and do not seek input from the administrators at the institutions where the employee works. Those administrators neither manage nor direct Category II internal investigations. (Testimony of Chad Viola)

17. Wilkes interviewed the Braintree detective and Complainant. Although Complainant was not ultimately charged with shoplifting, Respondent continued its investigation into her contacts with law enforcement and her association with a former inmate, which she did not report to Respondent.

Incident of January 25, 2009

18. While the OIS investigation of Complainant continued, on January 25, 2009, Complainant was assigned to the gate post on 8 North and Jeghers was the shift commander on that day. Complainant testified that she had no problems with Jeghers prior to that day. (Testimony of Complainant; Testimony of Jeghers; Ex. C-5)

19. Jeghers was in the control room and on a security camera he saw Complainant slouched back in her chair with her head tilted back and her legs stretched in front of her. He stated that she appeared to be sleeping, but regardless of whether she was or not, her posture was unprofessional and was visible to medical staff and inmates. Correction officers are required to be alert to their surroundings at all times. According to Complainant, Jeghers yelled to her to, "Sit up," and asked, "Do you think you're at home?" Jeghers admitted that he admonished Complainant to sit up but denied asking her if she thought she was at home. Jeghers stated that

administrators would typically review security footage from the weekend on Monday morning and if Complainant was seen appearing to be sleeping, he would be held responsible.

(Testimony of Jeghers; Testimony of Complainant)

20. According to Jeghers, Complainant did not immediately respond to his direction, so he called her on the telephone and again directed her to sit up in her chair. Complainant responded that he had "no right to tell her how to sit, eat, or go to the bathroom." Complainant told Jeghers if he looked at the cameras he would see other correction officers sitting the way she was sitting. Jeghers told her he was focused on her at that moment and not others. Jeghers filed an incident report regarding this exchange. In the report Jeghers also noted that earlier that day, Complainant had requested to leave at 12:00 p.m., and he had denied her request because of work requirements. He also noted that Complainant appeared upset. (Testimony of Jeghers; Ex. C-5; Ex. R-32)

21. After their exchange, Jeghers relieved Complainant of her post, directed her to report to the control room and instructed her to sit properly in her chair. Jeghers stated that Complainant was agitated and confrontational, and with Superintendent Walsh's permission, he sent her home. Complainant at first refused to write an incident report as ordered but did so the following day. (Ex. R-50) Sgt. Michael Boyd was Complainant's direct supervisor that day and Jeghers asked him relieve Complainant and to direct Complainant come to the control room to speak with him. Boyd wrote an incident report essentially supporting Jeghers' incident report. (Testimony of Jeghers; Testimony of Boyd; Ex. R-27)

22. Superintendent Walsh suspended Complainant for three days². Complainant testified that she was accused of sleeping on the job, even though there was no evidence that she was

² Jeghers had no authority to impose discipline and played no role in the discipline imposed on Complainant.

sleeping. Complainant appealed her 3-day suspension to Respondent's then Commissioner Harold Clarke, who affirmed the 3-day suspension. (Ex. R-6; Ex. R-7)

23. Complainant filed a complaint at MCAD on February 4, 2009, regarding the incident of January 25, 2009, while the OIS investigation was still pending.

24. On February 11, 2009, Complainant was "detached" with pay from her position pending the outcome of the OIS investigation. (Ex. C-22) She was terminated in June 2009.

Continuing OIS Investigation, Termination and Re-instatement

25. Lt. Wilkes learned from the Braintree detective that the former inmate with whom Complainant was known to associate was an active gang member and an inmate in 1996. The detective also gave Wilkes two Boston Police reports. The first report, dated August 15, 2007, stated that Complainant was a passenger in a car parked on private property with a burning marijuana blunt in the ashtray and an open beer can in the back and that she was glassy-eyed and had alcohol on her breath. Complainant was summonsed to court for trespassing, public drinking of alcohol and possession of marijuana with respect to this incident. The second police report, dated June 6, 2008, was a response to a neighbor's complaint of a domestic dispute at Complainant's apartment. She and her boyfriend, the former inmate in question, had had an argument wherein he pushed her in the chest and she threw a wine glass at him.

26. After interviewing Complainant, Wilkes issued a report to the Deputy Commissioner, finding that: (1) Complainant improperly failed to report to the Department her August 15, 2007 contact with the Boston Police and subsequent court appearance based on that contact, (2) that Complainant failed to provide the department with a single accurate residential address, (3) that Complainant lied to Wilkes, was evasive and provided contradictory statements concerning her August 15, 2007 interactions with the Boston Police, and her sobriety on that

occasion, and had contradictory explanations for her different residential addresses, (4) that Complainant improperly engaged in a relationship with a former inmate and failed to report her relationship with the former inmate, (5) that on August 15, 2007 Complainant improperly showed the Boston Police officer her department identification badge and provided evasive and untruthful responses to that officer's questions to her and, (6) that the Complainant fraudulently listed her address as her sister's place of residence to falsely qualify her son for enrollment at a public school near her sister's residence. (Testimony of Wilkes; Ex. R-10)

27. Wilkes' findings were forwarded to the Deputy Commissioner, on February 12, 2009. The Deputy Commissioner sustained the findings and ordered a Commissioner's hearing to determine if discipline was warranted on the following 11 charges:

(1) That Complainant associated with and maintained a relationship with a former inmate; (2) that Complainant did not have specific approval from her superintendent or the DOC Commissioner to associate with the former inmate and failed to report that she had contact with a former inmate; (3) That in August 2007, Complainant was a passenger in a car that was parked and idling on private property on Blue Hill Avenue (4) that the vehicle was approached by Boston Police officers, who observed a marijuana blunt burning inside the vehicle and open containers of alcohol in the vehicle, and that Complainant's breath smelled of alcohol and her eyes appeared glassy; (5) That Complainant lied and was evasive when questioned by police regarding the aforementioned conduct; (6) that during her interaction with law enforcement officials, Complainant showed her department of correction identification to obtain a personal advantage (7) that during the above-referenced interaction with law enforcement officials, Complainant was advised that she would be summoned to court for trespassing, drinking in public, and possession of marijuana; (8) Complainant appeared in court regarding the

aforementioned charges; (9) Complainant failed to promptly report, in writing, the above-referenced law enforcement contact and court appearance to her superintendent or his/her designee; (10) that Complainant provided a false address to the registry of motor vehicles in order to enroll her son in a school that he was not legitimately permitted to attend; and (11) that Complainant was evasive and lied to the department's investigator when questioned in the course of the investigation into the above allegations.(Exh. R-10)

28. After the hearing, which was conducted on April 3, 2009; the hearing officer sustained charges 3, 4, 5, 7, 9 and 11. The hearing officer did not sustain charges 1 and 6. The hearing officer partially sustained charge 2. The hearing officer concluded that Complainant was not aware that the individual was a former inmate during her association with him, but only learned this after their relationship was over and she was seeking a restraining order against him. The hearing officer concluded however, that she subsequently failed to report that relationship to the department. (Exh. R-11)

29. After considering the findings of the hearing officer, on June 8, 2009, the DOC Commissioner terminated Complainant's employment. (Ex.R-9)

30. Complainant appealed to an arbitrator who issued a decision on July 28, 2010. The arbitrator determined that Respondent did not have just cause to terminate Complainant's employment and ordered her reinstated and reduced the termination to a 60-day suspension. The arbitrator found that although Complainant failed to report contact with law enforcement, was evasive with the investigator, and gave a false address to the registry of motor vehicles, the allegations involved off-duty misconduct. She found that Complainant's previous disciplinary record concerned primarily attendance matters; that she had never been disciplined for similar matters; was a 19 year veteran of Respondent with a good work record; and there was no

indication that other employees had ever been terminated for failure to provide Respondent with information about contact with law enforcement. The arbitrator stated as follows: that she was "not convinced that [Complainant's] substantiated misconduct here disqualifies her from further, useful employment with [Respondent]. A substantial suspension would emphasize [Complainant's] need to fully heed department rules, regulations and policies in the future. At the same time, the employer would retain the services of a veteran employee. A 60-day suspension is a substantial penalty. [Complainant] is firmly on notice that future misconduct may end her career." (Exh. C-12)

31. Complainant was reinstated to her position and returned to LSHCU in August, 2010. She was assigned to work the 7:00 a.m. to 3:00 p.m. shift. Jeghers stated that following her reinstatement, Complainant continued to claim that he had gotten her fired.

32. Jeghers stated that at one time he believed Complainant was a good employee and he sought to have her as the full time control room officer but she did not want the post and the assignment never materialized. Correction officer Patricia Robinson corroborated that Complainant was offered the control room position but she turned it down because of the room's air quality. (Testimony of Jeghers; Testimony of Robinson)

Vacation and Sick Leave Incidents

33. Complainant took a sick leave day on January 24, 2011. She requested vacation days on January 27, 29, 30 and 31 but had not requested January 28 as a day off. Complainant requested the days off for a trip to Hawaii. Jeghers and Driscoll did not know that Complainant was out of state.³

³ Complainant had a long history of attendance problems that began prior to her coming to LSCU. On October 18, 2007, Complainant told Driscoll that she had called in sick on October 6, 2007, even though she was not sick, but could not come to work because a homicide occurred in her neighborhood, the police had cordoned off the area and

34. On January 28, 2011, Jeghers informed Driscoll that Complainant had not appeared for her shift. Driscoll could not reach Complainant by telephone but left her a voicemail message, instructing her to call and explain her absence. Shortly afterwards, Complainant called Jeghers from Hawaii and told him that she has spoken to Lt. McCormack, the 3 to 11 shift commander, on January 27 and advised him that she would be out sick on the 28th. Jeghers testified that he cannot grant someone time off for vacation if it is not requested at least five days prior to the absence and requests are granted by seniority, or a day off could be taken if there is an approved swap with another correction officer. At the time, Jeghers did not know Complainant was in Hawaii. (Ex. R-13).

35. Lt. McCormack did not work on the 27th. He testified that Complainant called him on January 26th and asked him whether her requested time off had been approved. He told her that she had been granted leave for January 27, January 29, January 30 and January 31, but January 28 had not been approved and she had not requested it. He denied discussing Complainant's using sick time on January 28. McCormack testified that Complainant could have requested the day off ahead of time and it would have been granted because of her seniority, but she had failed to do so. (Testimony of McCormack)

36. On February 2, 2011, Complainant contacted Deputy Manning via telephone and told Manning that snowy weather had caused the cancellation of a flight on her return trip from Hawaii and she was stranded in Atlanta. Manning granted Complainant the next day off as a personal day. (Testimony of Manning)

37. On February 5, 2011, Complainant called in to the control room at 6:53 to state that she would be late. She punched in at 7:43. On February 7, Driscoll asked Complainant to draft

she could not leave her home. Driscoll discovered that the murder had occurred on October 4 and that Complainant had been less than truthful about her reason for not being at work. (Ex. R-58; testimony of Driscoll)

an incident report regarding her tardiness. Complainant called Deputy Manning to explain that she was caring for her elderly mother that morning and stated that she felt Driscoll and Jeghers were out to get her. Manning told her that she was not aware of any issues between them and directed her to draft an incident report. Complainant noted in her incident report that she was tending to her mother who was not feeling well on February 5th and was waiting for her sister to arrive to relieve her so she could report to work. Later, when Driscoll asked Complainant the reason for tardiness, she told Driscoll that she had overslept. (Testimony of Manning; Testimony of Driscoll)

38. On February 7, Complainant left work using five hours of sick time, but failed to submit a sick leave slip upon her return. Respondent's policy is that when an employee requests sick time in conjunction with time off, there is reason to question the validity of the sick time. In such instances, an administrator may issue an "attachment D" to an employee which requires the employee to produce medical documentation to substantiate the sick time.

39. Since Complainant used sick leave time immediately prior to her vacation time, Superintendent Marchilli decided to issue to her an attachment D. Deputy Manning then scheduled a meeting with Complainant on February 10, 2011, for the purpose of serving her with the attachment D. Captain Craven accompanied Manning to the meeting and Complainant was accompanied by Correction Officer Robert Henderson, a union steward at LSHCU. At the meeting Complainant signed the attachment D.

40. After serving the attachment D, Manning then discussed the issues Complainant had raised during their February 7th telephone call, i.e., Complainant's need to care for her elderly mother, for which Manning suggested FMLA leave, and Complainant's stated concern that Jeghers and Driscoll had it out for her. Complainant responded that the latter concern was based

on information she had received from unnamed individuals that Jeghers and Driscoll did not believe she should have been reinstated after her termination. Manning told Complainant that if she had more specific information, to come and speak with her. (Testimony of Manning; Ex. R-42)

41. On March 3, 2011, Driscoll and Craven conducted a fact-finding hearing and concluded that Complainant had committed several attendance related violations and was less than truthful in responding to Driscoll's questions. Driscoll concluded that Complainant had violated Respondent's sick leave policy and other rules. (Ex. R-13)

42. After reviewing Driscoll's findings, Superintendent Marchilli requested a Commissioner's hearing, because the maximum penalty he could impose was a 3-day suspension. Given that Complainant's most recent discipline was a 60-day suspension and a final warning, he felt a Commissioner's hearing would be the best way to address the current situation. (Testimony of Marchilli; Ex. R-13)

43. A Commissioner's hearing was held on June 16, 2011. The charges were as follows: (1) that Complainant was a no call, no show on January 28, 2011; (2) that Complainant was in Hawaii on January 28, was absent from work without approval, and used poor judgment by going on a planned trip without being approved for time off in advance; (3) that Complainant sought to use sick leave for January 24, 2011, for which she was later issued an attachment D directing her to submit medical evidence to justify her absence, which she failed to do; (4) that Complainant was one hour late for work on February 5, 2011 and failed to notify the institution prior to her shift that she would be late; (5) that on February 7, 2011, Complainant left work early seeking to use five hours of family sick time and failed to submit a sick leave slip upon returning to work; and (6) Complainant was untruthful when questioned by Captain Driscoll on

March 3, 2011 at a fact-finding hearing concerning the above matters. (Ex. R-15) On June 28, a hearing officer upheld each of the charges against Complainant, who chose not to testify at the Commissioner's hearing held on June 16, 2001. (Ex. R-15)

Incident of April 4, 2011

44. On April 4, 2011, an inmate required medical treatment at the Shattuck Hospital's Intensive Care Unit for medical treatment. The inmate was a "Level A" escape risk inmate because he had previously attempted to escape from LSHCU and was considered dangerous. Such inmates are assigned four correction officers to escort and observe them during the medical procedure. According to protocol, two armed correction officers are to be stationed outside the room and two unarmed correction officers are stationed in the room monitoring the inmate. Escorting the inmate on April 4 were four correction officers; Complainant, an African-American male correction officer, an African-American female correction officer and a white male correction officer. The two African American officers were the armed correction officers, and Complainant and the white male officer were unarmed.

45. On April 4, 2011, Deputy Manning observed during her rounds that three correction officers, including Complainant, who were assigned to guard a Level A escape risk inmate, were instead watching television in the room adjacent to the inmate's room. Manning asked the three what was on TV and they did not respond. Manning had to step over the three officers' legs in order to shut off the TV. The fourth correction officer was inside the inmate's room with the medical staff. Complainant was one of the unarmed correction officers assigned to the inmate and pursuant to protocol was required to be in the room with him. (Testimony of Manning)

46. Manning contacted the shift commander and directed that the three correction officers be re-assigned. She did not have the other unarmed officer reassigned because he was in the room with the inmate, according to protocol. (Testimony of Manning)

47. Following the April 4, 2011 incident, Marchilli assigned Driscoll and Craven to conduct a fact-finding hearing regarding Complainant and the other two correction officers who were watching TV while on assignment to guard an inmate. Complainant admitted that she did not hear Manning come in to the adjacent room where they were watching TV, but stated that she could observe the inmate from the adjacent room. She stated that the hospital staff did not like the correction officers standing around the hallways because that impeded their work.

48. On April 25, 2011, Driscoll submitted the results of her fact-finding hearing to Marchilli. She concluded that Complainant had committed several security-related violations.⁴ After reviewing Driscoll's findings, Marchilli requested a Commissioner's Hearing which was held on September 11, 2011. The hearing officer sustained each of the charges against Complainant. (Ex. R-13)

Incident of May 30, 2011

49. On May 30, 2011, Correction Officer Keith Liberty, who was assigned to 8 North, lost a security key ring containing three security keys that were in his pocket. Liberty was assigned to a position in the inside corridor. He did not immediately report the keys missing.

50. Jeghers was not working on May 30 and Lieutenant McCormack was the 8 North shift commander. McCormack testified that the loss of the key ring was a significant security breach. When he learned it was missing, about an hour after it was lost, he ordered that 8 North be locked down to prevent individuals from entering and exiting the unit. The correctional staff

⁴ Driscoll also conducted a fact-finding hearing with respect to each officer who was out of position; one admitted that the television was on and should not have been on, and that from where he was sitting he could not fully see the inmate. He apologized for the incident. (Ex. R-53)

then strip-searched each inmate and searched each cell. The process was repeated and the key ring was not found. McCormack had each officer scanned with a hand-held medical detector and they were required to display the contents of their pockets. (Testimony of McCormack)

51. McCormack then reported to Superintendent Marchilli that the key ring could not be located and Marchilli directed McCormack to repeat the search process for a third time. (Testimony of McCormack)

52. The only correction officer assigned to 8 North that shift who was not present during the searches for the key was Complainant, who was allowed to leave by McCormack at approximately noon that day, before McCormack learned that the key was missing.⁵ (Testimony of McCormack)

53. Security video of that date revealed Liberty carrying the security ring in his pocket and the ring falling from his pocket to the floor. The footage also shows Complainant picking up the object that fell from Liberty's pocket. (Exhs. R-22; R-39; R-40) On the video, the object appears as a brown blob.

54. Based on Liberty's mishandling of the key ring and the video footage showing Complainant picking up the object that fell from Liberty's pocket from the floor, Marchilli requested that OIS investigate the matter. (Testimony of Marchilli)

55. On June 1, 2011, OIS initiated an investigation and assigned the matter to Chad Viola. Viola testified credibly that OIS investigators conduct an independent investigation and do not seek input from the administrators assigned to the institutions where the allegations have arisen and that those administrators neither manage nor direct these investigations. (Testimony of Viola)

⁵ Complainant was often allowed to leave early on certain days, depending of staffing needs.

56. During his investigation, Viola interviewed Liberty, Complainant and many others and reviewed documents and video footage. (Testimony of Viola)

57. Viola did not find Complainant credible. She could not initially recall her post assignment on May 30 but recalled Liberty's assignment that day. When Viola asked Complainant whether she had a role in the missing keys, she responded that the staff was covering for Liberty; she also stated that she had a good relationship with Liberty, but that he was dumb and could not spell the word "cat."⁶ Viola showed her the video of her picking an object off the floor and Complainant stated that she did not recall what it was. (Testimony of Viola; Ex. R-22)

58. Following the May 30 incident, Respondent conducted a "re-enactment" of Liberty's dropping the keys which showed on video of the re-enactment that a duplicate key ring looked the same as the object Liberty dropped and Complainant picked up. (Ex. R-22)

59. Viola submitted a written report of his investigation, concluding that Liberty dropped the security key ring and Complainant picked it up and took possession of it. He concluded that Complainant had violated several rules regarding the department's control of locks and keys. (Ex. R-28; Testimony of Viola)

60. The security key ring was found weeks later in an elevator shaft of the main LSHCU elevators. Security video showed Complainant leaving 8 North on May 30 via one of the elevators. (Ex. R-28)

61. On October 24, 2011, a Commissioner's Hearing was held concerning the charges against Complainant with regard to the security key ring. The hearing officer found that Complainant picked up the keys, removed them from the institution, on the theory that LSHCU

⁶ There was testimony that Complainant was a "germaphobe," who was very neat, frequently washed her work area and often complained about Liberty's poor hygiene. (Testimony of Driscoll; testimony of Robinson)

ended at the pedestrian trap, that Complainant failed to return the keys and that she lied about her involvement in the matter. (Ex. R-23)

62. On or about November 22, 2011 Respondent's Commissioner terminated Complainant's employment, upon considering the results of three commissioner's hearings held on June 16, 2001, September 11, 2011 and October 24, 2011 regarding Complainant's attendance related issues, her failure to adhere to protocol in properly guarding a level A escape risk inmate and Complainant's possession and removal of the security key ring from LSHCU. (Ex. R-12)

63. On appeal, the Civil Service Commission affirmed Complainant's termination. The Civil Service Commission hearing officer concluded that he could not definitely identify the item that Liberty dropped as the key ring and therefore did not sustain the charge that Complainant removed the key ring from LSHCU; however she stated that the Respondent had reason to strongly suspect Complainant's involvement in the missing keys. He ruled that had the alleged actions been established, such actions would constitute serious misconduct that standing alone would have warranted the termination of any employee.⁷ The hearing officer concluded that Complainant's vacation and sick leave violations would not warrant termination, nor would her watching TV instead of guarding a high risk inmate (the other two correction officers got one

⁷ Upon viewing the video numerous times, I find it reasonable to conclude Liberty dropped the keys and Complainant picked them up.

and two day suspensions). However, he noted that Complainant had been disciplined 13 times for failing to provide medical evidence after using sick leave. She was also disciplined on another occasion for watching television on duty and had been warned on previous occasions that she was in danger of losing her job, and had been suspended and warned that her job was on the line. Considering this disciplinary history, Respondent was justified in terminating Complainant's employment. (Ex. R-14)

Insubordination

64. Complainant cited an incident of disparate treatment of a similarly situated correction officer. She submitted evidence that on or about March 3, 2008, Correctional Officer Garry Moriarty (white) had a verbal altercation with a nurse whom he felt was not following hygiene procedures. Jeghers attempted to calm Moriarty down, but he raised his voice to Lt. Jeghers in front of a prisoner. Jeghers instructed him to write an incident report and Moriarty initially refused and told Jeghers that the computer was not working, which Jeghers discovered was untrue. Jeghers wrote an incident report regarding the matter and Walsh disciplined Moriarty with a written reprimand. (Testimony of Moriarty; Testimony of Jeghers: Ex. R-50)

Sleeping

65. Complainant stated that she maintained a private journal in which she identified conduct by white male correctional staff by which they were not disciplined for sleeping on the job and other matters. (Exh. C-3) Many of the entries could not be corroborated or challenged; however, other several other entries were shown to be fabricated, as they did not match up with the attendance records of the alleged participants.

66. Complainant alleged that Lt. McCormack was never disciplined for attendance issues. Driscoll testified that she observed McCormack sleeping on duty on April 12, 2010

reported him and he was suspended for two days. McCormack was suspended for 3 days for excessive tardiness in 2008. The evidence showed that McCormack received two oral warnings, a written reprimand, a one-day suspension and a three-day suspension from Superintendent Walsh for tardiness, no-call, no-show. (Exh. R-37; Testimony of Driscoll; See; R-33 Lewis v. DOC; Ex. R-34 Lewis v. DOC; Ex. R-35 Lewis v. DOC)

67. Jeghers testified that he never observed a correction officer sleeping at his or her post. He stated he would be required to draft an incident report if he ever observed such conduct. (Testimony of Jeghers) I do not credit his testimony in this regard. I find that the practice when correctional staff was observed dozing or sleeping was often to rouse them and tell them to take a walk or get coffee and to resolve the matter informally, as Jeghers attempted to do with Complainant. (Testimony of Simpson; Testimony of Moriarty)

68. Complainant stated that on July 19, 2008, Moriarty was asleep and she pointed it out to Jeghers, who said to Complainant; "He's tired. He works three jobs and has a family to provide for." I do not credit her testimony. Jeghers' attendance calendar and the IMS log indicated that Jeghers was on vacation that week and was not on duty on July 19, 2008. (Testimony of Driscoll; Ex. C-3; Ex. R-16) Moriarty testified that he has nodded off at work several times and has been told to go stretch his legs. He denied sleeping in the control room.

69. Keith Liberty was found sleeping on duty on July 13, 2012 and on July 24, 2012. On another occasion, he called in advance of his shift and requested a day off, which was denied, but he did not appear for work. By agreement with Respondent and the Union, he was suspended for five days, with three days held in abeyance. (Testimony of Liberty; Ex. R-36; Lewis v. DOC, Ex. 45)

70. Complainant stated that on February 23, 2009, Superintendent Walsh accused her of reading on duty. However, the attendance calendar shows that Complainant had been "detached" or suspended with pay beginning on February 12 and was not on duty on February 23, 2009. (Testimony of Driscoll; Ex. C- 3; R-62)

71. Complainant stated that on July 24, 2009, Jeghers was late for his 7:00 a.m. to 3:00 p.m. shift and someone else punched his time card. However Jeghers' attendance calendar and the time logs indicate that he was not on duty that day. (Testimony of Driscoll; Ex. C- 3; R-66)

72. Complainant stated that on February 5, 2011, Sgt. Melvin was asleep while assigned to the solarium post. Driscoll stated that Sgt. Sondra Dyke, who is African-American, was the shift commander on that day and Jeghers was not working. Complainant did not raise the issue with Sgt. Dyke, with whom she was friendly (Testimony of Driscoll; Ex. C-3: Ex. R-64)

73. Complainant alleges that on February 7, 2011, Sgt. Boyd, who was assigned to the inside corridor on 8 North, was asleep. Boyd's attendance calendar and the IMS log indicate that he was on vacation that day. (Testimony of Driscoll; Ex. C-3; Ex. R-65)

74. Complainant claims that she lost \$747.48 as a result of the 3 day suspension on January 29-31, 2009. (Her gross daily earnings of $\$249.16 \times 3 = \747.48) (Respondent's post-hearing submission, dated June 12, 2014, Tab B)

75. Complainant and her witnesses testified extensively about her emotional distress, but such testimony was primarily relative to her termination. She stated that she was having trouble dealing with the medical problems of her parents and her child when she received her three-day suspension and I find that this caused her some emotional distress. (Testimony of Complainant)

III. CONCLUSIONS OF LAW

Complainant has alleged that Respondent subjected her to disparate treatment in violation of G.L. c. 151B, based on her race, color and gender when it issued her a three day suspension and subsequently terminated her employment on two occasions. She also asserts that her termination was in retaliation for having engaged in the protected activity of filing a complaint of discrimination with this Commission.

General Laws c.151B s. 4(1) prohibits discrimination in the terms and conditions of employment on account of gender, race and color. In order to establish a prima facie case of gender, race and color discrimination, Complainant must show that she is a member of a protected class, that she was subjected to adverse treatment and that similarly situated persons not of her protected class were treated differently. Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). Once a prima facie case is established, Respondent must articulate a legitimate non-discriminatory reason for its actions. Abramian, supra, at p. 116. If Complainant can demonstrate that the articulated reason or reasons are a pretext for discrimination and that Respondent acted with discriminatory intent, motive or state of mind, then she will prevail. Lipschitz v. Raytheon Co., 434 Mass. 493 (2001).

In this case, Complainant, who is an African-American woman, was adequately performing her position as a Correction Officer at Lemuel Shattuck Hospital Correctional Unit. Complainant contends that she was mistreated and subjected to disparate treatment by Lt. Jeghers on the basis of her gender, race and color. Complainant further alleges that Respondent administered discipline in a selective manner and that was discriminatory. Complainant alleges

that she was treated more harshly than similarly situated white males for the same or similar conduct.

With respect to the incident of January 25, 2009, which resulted in Complainant's three day suspension, I conclude that Complainant has established a prima facie case of discrimination on the basis of her gender, race and color. Complainant was slouching in her chair and appeared to be sleeping when Lieutenant Jeghers called out to her and directed her to sit up. Instead of obeying his directive, Complainant argued with Jeghers that he could not tell her what to do, and she initially refused to write an incident report when ordered to do so. Jeghers received permission from Superintendent Walsh to relieve Complainant of duty and he wrote an incident report that resulted in Walsh issuing her a 3-day suspension.

There is no question that Complainant appeared to be sleeping and behaved in an insubordinate manner. Jeghers was justified in filing an incident report regarding the matter, because Respondent is a paramilitary organization wherein it is of paramount importance for officers to follow the directives of their superiors in order to ensure the safety of the inmates, correctional staff and medical staff. Furthermore, there is no question that the matter would not have been reported had Complainant complied with Jeghers' direction initially and that she escalated the incident.

I nonetheless conclude that the discipline imposed by Walsh was far more severe than the discipline received by Moriarty for a similar incident wherein Moriarty yelled at a nurse and at Jeghers and initially refused to write an incident report, claiming the computer was broken when it was not. Therefore I conclude that Complainant has established that she was treated

more harshly than a similarly situated white male correction officer with respect to her suspension.⁸

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian, supra.; Wheelock College, supra.; Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986).

Other than Jeghers' testimony that Moriarty's anger was understandable because of the nurse's failure to follow proper hygiene protocol, Respondent articulates no other legitimate reason for the disparate discipline. I therefore conclude that Respondent has failed to meet its burden of production with respect to articulating non-discriminatory reasons for the harsher discipline imposed on Complainant. Since Complainant's claims with respect to the suspension remain unanswered, I therefore conclude that it is liable for disparate treatment of Complainant based on her gender, race and color discrimination with respect to the issuance of a 3 day suspension for her insubordinate conduct with Jeghers.

First Termination, reduced to a 60-day suspension

Complainant further alleges that her first termination, which was ultimately reduced by an arbitrator to a 60-day suspension, was discriminatory and/or retaliation for her having filed a complaint of discrimination regarding the 3-day suspension.

⁸ Other than the incident with Moriarty, I conclude that Complainant had failed to establish that she was subjected to harsher discipline than other similarly situated male correction officers. The Moriarty matter is similar to Complainant's because they both involved insubordination during exchanges with Lt. Jeghers. The evidence does not support Complainant's allegations regarding disparate discipline of white male and black female officers for violations such as sleeping on the job. In such instances white males were shown to have been disciplined contrary to Complainant's assertion or were found to have been absent on the days she alleged to have witnessed such conduct.

As stated above, in order to establish a prima facie case of discrimination, Complainant must establish that she is a member of a protected class, who was subject to an adverse action and was treated differently from similarly situated persons not of her protected class. I conclude that Complainant has failed to establish a prima facie case of discrimination with respect to her first termination, which was based on her unreported association with a former DOC inmate, and unreported contact with law enforcement officials and other related incidents, which included criminal charges. There was no evidence that Complainant was treated differently from white males in this regard. The fact that the investigation was conducted by an African American investigator and was ultimately upheld by Respondent's then African American Commissioner, lead me to conclude there was less likelihood of the potential for bias based on Complainant's race. More importantly, the severity of conduct with which she was charged was of paramount consideration. While the matter was ultimately heard by an arbitrator which reduced her termination to a 60 day suspension, there was no evidence that her termination, even if found to be unduly harsh by the arbitrator, was motivated by discriminatory animus or constituted disparate treatment. Respondent introduced evidence that white male officers were issued suspensions and terminations for similar activities. The individuals chosen as comparators by Respondent do not necessarily represent the universe of all employees disciplined by the DOC.⁹ Notwithstanding, the arbitrator despite reducing the discipline noted that the violations committed by Complainant were very serious and she was put on notice that she was in jeopardy of losing her job. I conclude that Complainant failed to establish by a preponderance of the evidence that her first termination was based on discriminatory animus.¹⁰

⁹ Submitted after the public hearing by Respondent and assigned as Ex. R-70

¹⁰ The evidence of supposed disparate treatment regarding this termination introduced by Complainant was insufficient to establish a prima facie case. The parties were permitted to engage in additional discovery during and even after the hearing. Respondent was instructed to provide Complainant with the disciplinary records of any

In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected her to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence of a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." Complainant's MCAD complaint is

alleged comparators within the relevant time period. Complainant did not offer any such records as evidence of disparate treatment. Statistics compiled by Complainant purporting to show disparate discipline meted out to black employees at LSHCU were presented in an unclear manner, appeared duplicative in some places and lacked detail. Thus they were of little probative value in this matter.

protected activity. Fluet v. Complainant v. Harvard University, et al, 23 MDLR145 (2001).

While proximity in time is a factor, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). That Respondent knew of a discrimination claim and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation.

With respect to the first termination, Complainant has failed to establish a prima face claim of retaliatory termination. Although the filing of her MCAD complaint is protected activity, the Complainant's first termination was precipitated by events unrelated to the workplace that occurred prior to the filing of her MCAD complaint and thus she cannot establish causation. Moreover, the events were brought to Respondent's attention by the Braintree Police Department and the incident was immediately referred by LSHCU's administrator to OIS, a centralized department that was independent of the LSHCU, which conducted an investigation in which LSHCU administrators had no involvement.

Second Termination

Complainant was ultimately terminated again after having been reinstated and her appeals were unsuccessful. Complainant's subsequent termination was based on several matters, including incidents of tardiness and sick leave, a more serious incident of watching television while she was required to be guarding a dangerous inmate and for an egregious infraction wherein she observed a co-worker accidentally drop his keys. She is alleged to have retrieved the keys and thrown them into an elevator shaft. Complainant's involvement in this event was

caught on video. The missing keys resulted in the entire institution being locked down and turned upside down with inmates and staff being searched three times. The evidence portrayed a workplace where relationships with superior officers and command staff were strained and employees were divided to some degree along racial lines. Complainant asserts that these divisions resulted in her termination because they caused Jeghers and other superior officers to report "minor" attendance issues and other matters which could have been handled less formally by the command staff in manner that would not have led to Complainant's termination. The evidence does not support this assertion. While the evidence suggests that Driscoll was building a termination case against Complainant by investigating and reporting the attendance issues surrounding her vacation and her subsequent tardiness, Complainant had a history of discipline related to attendance and lack of truthfulness on this issue. This history justified an investigation into such matters. Complainant committed other infractions including failing to guard a potentially violent inmate who had previously escaped from Respondent's custody, a far more serious event that justified discipline.

I conclude that even disregarding these other infractions around attendance and inattention to the inmate, the evidence is clear that Complainant committed the malevolent act of pocketing a co-worker's keys, throwing them down an elevator shaft and proceeding to leave the institution, before it went into lockdown and was turned upside down in a vain attempt to locate the keys.¹¹ I conclude that this incident alone justified Complainant's termination and there is no evidence that race, gender or retaliatory animus motivated Respondent's decision to terminate her employment.

¹¹ I note that the Civil Service decision did not conclude that Complainant picked up Liberty's keys, because they appeared on the video to be a "brown blob." While the Commission is obligated to take into evidence and consider the administrative decisions of other agencies, it is not bound by them. City of Boston v. MCAD, 39 Mass. App. Ct. 234, 240-41(1995)I watched the video a number of times and have no doubt that Complainant picked up the keys and pocketed them, and from there I draw the inference that she threw them away.

For the reasons stated above, the Complainant's claims of discriminatory and retaliatory termination are hereby dismissed. The Respondent is liable for engaging in unlawful disparate discipline based on Complainant's race and gender for imposing a 3-day suspension on Complainant for insubordinate conduct resulting from her talking back to Lt. Jeghers, a much harsher punishment than that imposed on a white male correction officer for similar conduct. Respondent is hereby ordered to reimburse Complainant for the three-day's pay and damages for emotional distress as discussed below.

IV. REMEDY

Pursuant to M.G.L. c.151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's

unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. at 576.

Having concluded that Complainant's initial three day suspension constituted unlawful disparate treatment and caused her some emotional distress, I conclude that she is entitled to damages for the distress she suffered in the amount of \$1,000. It is clear from Complainant's testimony that the majority of her emotional upset arose from other events and resulting actions by Respondent that I have found were not unlawful, thus the de minimus award.

B. Lost Wages

I conclude that Complainant is also entitled to be compensated for the wages she lost during her three-day suspension in the amount of \$747.48 (Her gross daily earnings of \$249.16 x 3= \$747.48)

V. ORDER

1. Respondent shall cease and desist from engaging in discriminatory conduct that results in disparate disciplinary treatment of employees based on race and gender in violation of M.G.L.c. 151B, sec. 4.

2. Respondent shall pay to Complainant the sum of \$1,000.00 for emotional distress damages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3. Respondent shall pay to Complainant the sum of \$747.48 for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4. The Complainant's charges of unlawful termination and retaliation are hereby dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order. Complainant may also file a petition for attorney's fees and costs.

SO ORDERED, this 15th day of May, 2015


JUDITH E. KAPLAN
Hearing Officer