COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and J W,[1]
Complainants

v. Docket No. 08 BEM 02686

CITY OF NEWTON and
OLYMPIU ALBU,
Respondents

Appearances: Lynn Weissberg, Esq. and Alexandra Deal, Esq. for Complainant J. W.;
Donnalyn Kahn, Esq. and Angela Smagula, Esq., for City of Newton

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 15, 2008, J W ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") against Respondents City of Newton ("City") and Newton's Department of Public Works Superintendent Olympiu Albu ("Albu") charging Respondents with discrimination on the basis of gender and retaliation in violation of M.G.L. c. 151B, section 4. The charges arise out of Complainant's job as a Special Heavy Machine Operator for the City of Newton.

On May 24, 2010, the MCAD issued a probable cause finding and subsequently certified the case for public hearing.

A public hearing was conducted on March 12, 13, 16, 19, 20, and 27, 2012 and April 2, 4, 10, 25, and 30, 2012. The following individuals testified at the public hearing:

[1] Complainant legally changed her name to J W approximately twenty years ago.

Complainant, Dr. Susan Moir, Elaine Gentile, Dolores Hamilton, Paul McMullen, Tommy Perkins, Lori Burke, Henouk Desir, Jacqueline Anderson, William Crowell, Respondent Olympiu Albu, Ronald Mahan, Stephen Tocci, Gerry Baccari, Adam Szetela, Michael Jasset, Lou Camilli, Ronald Crane, and Mark Whooten.[2]

The parties submitted 36 joint exhibits; Complainant submitted an additional 43 exhibits ("Complainant's Exhibits") and Respondents submitted an additional 8 exhibits ("Respondents Exhibits"). In addition, the parties submitted various documentary and photographic aids denoted as Complainants Chalks A-JJ and Respondents Chalks B-D.[3]

Following the public hearing, the parties submitted post-hearing briefs. After the submission of briefs, Respondents submitted supplemental rulings of law dated August 20, 2012 regarding lost wages and emotional distress. Complainant moved to strike Respondents' proposed supplemental rulings of law on the basis that Respondents were granted leave to file a reply brief limited to the issue of medical and dental benefits, not all damages sought by Complainant. After reviewing relevant citations to the record, particularly Transcript VII at 7 & 11, I conclude that Complainant's Motion to Strike should be granted.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected.

[2] Prior to the public hearing, Complainant moved for an order prohibiting Respondents from questioning Complainant about her personal life and for an order regarding alleged spoliation of evidence. Both motions were denied on January 23, 2012, although the Motion in Limine regarding spoliation was denied without prejudice to Complainant making a post-public hearing request for an adverse inference on the issue of whether or not Elaine Gentile took notes during her meetings with Complainant. See Hearing Officer's Orders dated January 23, 2012.

[3] Respondent's Chalk A was withdrawn and replaced by Joint Exhibit 36.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant J W worked for the City of Newton Department of Public Works ("DPW") from November 17, 2003 until she resigned, effective August 15, 2008. She began as a truck driver/Heavy Motor Equipment Operator, the first such female employee in the City's history. At the time of her hire, Complainant possessed both a commercial driver's license and a hoisting license.
2. During the time that she was employed by the City, Complainant suffered from Addison's disease and asthma. Over the course of her employment, Complainant applied for and was granted intermittent FMLA leave in connection with these conditions.
3. The Respondent City of Newton is an employer within the meaning of G. L. c. 151B, section 1. It has a Department of Public Works ("DPW") with two yards, one at Crafts Street for the north side of the City and one at Elliot Street for the south side of the City. The yards are staffed as follows: Laborers, Heavy Motor Equipment Operators ("HMEOs") Special Heavy Motor Equipment Operators ("SHMEOs"), Working Foremen, Assistant Highway Superintendents, and Highway Superintendent. The Highway Superintendents in charge of both yards report to Stephen Tocci, Director of Highway Operations.
4. Respondent Olympiu Albu has worked for the City of Newton since 1997. He has held the position of Highway Superintendent since 2004. As Highway

Superintendent, he is responsible for repairing the infrastructure of City streets, managing snow removal, and supervising a staff of the employees.

5. The position of HMEO requires a commercial driver's license and involves truck driving and laboring chores. The next-level position is SHMEO which requires a hoisting license as well as a commercial driver's license. It involves the operation of specialized vehicles and machinery in addition to performing below-grade truck driving and laboring chores when there are more SHMEOs available than specialized equipment. Transcript IX at 164. HMEOs possessing hoisting licenses may be called upon to perform the duties of a SHMEO with an adjustment in pay. DPW employees typically work from 7:00 a.m. to 3:00 p.m. Overtime is available after 3:00 p.m.
6. Upon her hire, Complainant was assigned to work at the Crafts Street yard under the supervision of Superintendent William Crowell. While Complainant worked under Crowell's supervision, the two engaged in a consensual sexual relationship for part of 2004 and 2005.
7. Crowell was the "senior rater" on two annual performance reviews of Complainant in 2004 in which he gave her an overall performance rating of superior. Joint Exhibits 2 & 3.
8. Crowell is known as a "laid back" supervisor. He allows employees to enter management offices. He permitted Complainant and at least one other employee to have access to his office computer for personal matters during clean-up period from 2:30 to 3:00 p.m. Transcript VII at 55; XII at 58. Crowell testified that his personal relationship with Complainant did not affect his treatment of her at work, but other

employees expressed concern that he treated Complainant more favorably than male workers. Transcript V at 204, 239-241; VII at 123-125; X at 86-87.

9. Respondent Olympiu Albu was born in Romania and his first language is Romanian. He came to the United States in 1990 and began working for the City of Newton DPW in 1997 as an Assistant Highway Superintendent. He was subsequently promoted to Highway Superintendent. Prior to December of 2006, Respondent Albu worked at the Elliot Street yard. Respondent Albu has a different management style than Crowell's. Respondent Albu raises his voice when he considers that a job is not done properly and is known to tell his employees to "shut-up."
10. During the time that Complainant worked under the supervision of Crowell at Crafts Street, she applied for promotion to the position of SHMEO. Complainant was interviewed by a panel consisting of: 1) Stephen Tocci, Director of Highway Operations in charge of the Crafts and Elliot Street yards; 2) Respondent Albu, then-Elliot Street Superintendent; and 3) Crowell, then-Crafts Street Superintendent. Tocci and Albu accepted Crowell's recommendation that Complainant be promoted, resulting in Complainant's promotion on May 1, 2006. Joint Exhibit 4. She was the first and to-date only female SHMEO at the City.
11. In the latter part of 2006, Director Tocci arranged for Crowell and Albu to switch jobs. Crowell transferred to the Elliot Street yard and Respondent Albu to the Crafts Street yard, effective December 18, 2006. Joint Exhibit 5. Tocci testified that he made the transfer because it was 'good management practice." Transcript IX at 160.

12. Prior to Respondent Albu's transfer to Crafts Street, Complainant experienced stress as a result of the termination of her relationship with William Crowell, her father's chronic illness, and the death of a family member.

13. Complainant wrote a letter to Respondent Albu prior to his arrival at Crafts Street which apprised him that she had medical issues and that she required FMLA leave on an intermittent basis. Transcript I at 72. She left the letter on his desk. Id.

14. Respondent Albu imposed a rigid management style on the Crafts Street yard. He limited participation in morning meetings to Working Foremen and Assistant Superintendents and required that they distribute NexTels and keys to city vehicles to crew members after morning meetings rather than permit crew members to enter management offices to obtain the items.[4] Respondent Albu did not bar Complainant from the Crafts Street management offices, but he did not allow her or any other crew members to enter the offices unless sent by a foreman for a job-related reason and would challenge crew members if they showed up unexpectedly without permission. Transcript VII at 210-211.

15. Complainant testified that Respondent Albu began "zeroing in" on her right after he arrived at the Crafts Street yard, constantly yelling at, belittling, and badgering her but that he did not do so with her male counterparts. Transcript I at 76-79. I do not credit Complainant's testimony that she was singled out for abuse.

16. Complainant testified that approximately three to four weeks after Respondent Albu was transferred to the Crafts Street yard, he stated to her that, "women should be seen and not heard." Transcript I at 81-82; IV at 63. Respondent Albu denied making this

[4] An exception was made in the case of traffic laborer Tommy Perkins who had no Working Foreman at morning meetings. Transcript V at 223, 236-238.

statement and no other supervisors or employees of the City testified in corroboration of Complainant's accusation. Transcript V at 158; VII at 20; IX at 114, 167; XI at 64, 92, 162-163; and XII at 15, 74. Elaine Gentile, Director of Environmental Affairs for the City of Newton Department of Public Works and self-described "sexual harassment resource person" for the City of Newton testified at the public hearing that Respondent Albu denied making the comment when she questioned him about it in or around 2007 or 2008. Transcript IV at 132-133. In her March, 2011 deposition testimony, however, Gentile stated that when she asked Respondent Albu whether he had said that women should be at home and not in the workplace, he did not deny making the comment although he "didn't seem to understand the specifics of what he was saying or how he was saying it." Complainant's Exhibit 31 at 50-51.

17. Crafts Street HMEO Henouk Desir testified that he heard Respondent Albu once refer to Complainant as "he/she." Transcript VI at 119, 149, 163. I do not find this allegation to be credible because it was raised for the first time at the public hearing and because Mr. Desir testified in a disorganized and intemperate manner about his own alleged mistreatment by Respondent Albu on the basis of his religion and race.
18. Respondent Albu testified that when he makes crew assignments, he endeavors to keep existing crews intact but that he also takes into consideration the individual skill levels of his employees and makes crew changes if necessary. Transcript VII at 200, VIII at 78.
19. From January of 2007 through May of 2008, Complainant worked as a SHMEO at the Crafts Street yard under Respondent Albu along with the following male SHMEOs: John Murphy, Paul Stevens, Michael Antonellis, John Delicata, Mark

Ferguson, and Robert Billings. Joint Exhibts 35 and 36; Complainant's Chalk R. Complainant had less seniority as a SHMEO than her co-workers with the exception of Robert Billings, who was hired (with a hoisting license) on January 3, 2006 and promoted to SHMEO on August 17, 2007, approximately a year after Complainant's promotion. Joint Exhibit 35; Complainant's Chalk R.

20. During the time that Complainant worked at the Crafts Street yard, there was a bathroom designated as a ladies room/executive bathroom in the management offices that was used by Complainant, one or more other female employees, and several male supervisors. The bathroom was kept locked. After an incident in which the bathroom was defiled with chewing tobacco, Respondent Albu had the bathroom refurbished and the lock changed, but he neglected to inform Complainant. When Complainant confronted Respondent Albu about his having changed the lock without telling her, he responded in an angry fashion but gave her a new key to the bathroom. Transcript VIII at 16-17; IX at 4-5.

21. Respondent Albu discouraged all his field employees from returning to the Crafts Street offices during the day to use bathroom facilities. He required that they inform their foremen if they had to leave a job site for any reason, including a bathroom break, and instructed foremen to notify him or an Assistant Superintendent if an employee had to leave their field assignment. He testified credibly that he imposed this requirement so that all employees could be accounted for at all times. Transcript V at 140-142; VII at 23 & 203-207, VIII at 19-21, 105; Joint Exhibit 30 [entry 19]. Despite Complainant's testimony to the contrary, she was not singled out as having to

personally report to Respondent Albu when she needed to take a bathroom break. Transcript VIII at 106; XII at 14, 49-50.

22. Complainant informed Respondent Albu and Assistant Highway Superintendent Mike Jasset that she liked to work with Paul McMullen performing pothole and patching work on roads and sidewalks and that she did not want to work with DPW employees Bernard Arpino, Adam Szetela, Rich Rando, and John Delicata. Transcript VIII at 45, 123-126; XI at 91-92, 127. Complainant sought to operate heavy machinery as much as possible. Transcript VIII at 124-125.
23. In late April of 2007, Complainant sent Respondent Albu an undated letter in which she addressed him as "Dear O" despite the fact that "O" is not a nickname he ever used. Joint Exhibit 6; Transcript III at 106-107, 111; VIII at 32; Complainant's Exhibit 29, pp. 5, 47. Complainant's letter accuses Respondent Albu of questioning what she is doing, why she is doing it, and who told her to do it; making disapproving comments to her; making her feel "condemned for unknown crimes," and making her feel "nervous, sad and frustrated." The letter speculates that Respondent Albu "must have been let down and hurt a lot in [his] life," expresses sympathy that he carries around "pain," and advises him that, "Life is a lot easier, more fun and not as lonely if you let in the people that can help." Joint Exhibit 6.
24. Respondent Albu testified that he found the letter weird, insulting, and judgmental. Transcript V at 15, 96; VII at 166.
25. On April 26, 2007, after receiving the letter from Complainant, Respondent Albu assigned her to the property maintenance crew (a/k/a the litter crew) which is usually, but not exclusively, staffed by laborers and tasked with cutting grass,

trimming bushes, and removing trash. Transcript I at 101-102; Complainant's Exhibit 2. On that day, two regular members of the property maintenance crew were absent, other crews were performing ongoing jobs,[5] and there were fewer assignments than usual which required the use of heavy machinery. Respondent's Exhibit 7; Transcript VII at 113; VIII at 30-31, 142-143; IX at 79-80. Complainant expressed her dissatisfaction to Director Tocci at being assigned to the property maintenance crew. Transcript IX at 165. Tocci thereafter asked Respondent Albu to give Complainant a different assignment which he did. Transcript VIII at 146-147; IX at 165; Joint Exhibit 36.

26. Respondent Albu met with Dolores Hamilton, the City's Director of Human Resources, several days after receiving Complainant's "Dear O" letter . Albu and Hamilton jointly determined that Respondent Albu should respond in writing. Hamilton estimates that within one to two weeks, Albu gave her a draft copy of his response. Respondent Albu's letter to Complainant is dated May 14, 2007. Joint Exhibit 7.

27. Complainant initially testified that aside from writing a letter to Respondent Albu, she only wrote personal notes to two other co-workers -- Paul McMullen and DPW Commissioner Robert Rooney. Transcript XII at 137-140. However, the following individuals all testified to receiving personal letters from Complainant: Gerry Baccari, Adam Szetela, Mark Whooten, Doug Bartley, Tommy Perkins, and Mark Ferguson. Transcript V at 233-234; XI at 45-48, 57-60; XI at 60; XII at 74-75, 84-87;

[5] On one ongoing job, Mark Ferguson received an overtime adjustment to Working Foreman of the patch crew (an asphalt job begun under Paul McMullen) even though he was less senior than Complainant because he was already working on the job and was skilled at asphalt work due to his background as a mason. Respondent's Exhibit 7; Transcript VIII at 144-145.

Respondents' Exhibit 9. On rebuttal, Complainant admitted to writing additional letters to co-workers. Transcript XII at 126-127, 136-137.

28. Complainant alleges that she was given less overtime by Respondent Albu than that given to male SHMEOs, but it is the Union which generally determines overtime in accordance with rotating overtime lists except in circumstances involving a "continuation," i.e., where a crew remains on a job after 3:00 p.m. in order to complete a task. Complainant did not file any grievances in connection with the denial of overtime.

29. Contradictory evidence was presented about whether Respondent Albu or the Union made overtime assignments to Working Foreman and about the number of times that Complainant received overtime adjustments to Working Foreman. Complainant asserts that there were only two occasions on or after May of 2007 when she was made a Working Foreman for overtime purposes: May 17 and 22, 2007. DPW records indicate that Complainant received adjustments on other dates as well, although the nature of the adjustments is not specified. Joint Exhibits 8A and 8B. Regardless of these discrepancies, it appears that Complainant received fewer adjustments to Working Foreman on overtime than did some other SHMEOs.

30. Complainant testified that she should have been given overtime on May 9, 2007, either as Working Foreman on the permanent patch crew instead of Ronald Briggs or as operator of the Gradall instead of then-HMEO Robert Billings. Respondent Albu testified that he made Briggs the overtime Working Foreman because Briggs was more skilled and faster than Complainant in performing permanent patch work and typically filled in for the permanent patch foreman and that he assigned Billings

overtime on the 156 Gradall because Billings[6] who was not a SHMEO at the time, was already on that job and other employees were working elsewhere in the city. Transcript VII at 188-189. I do not credit these assertions because: 1) Working Foreman Adam Szetela testified convincingly that Complainant was "definitely capable" of taking over as Working Foreman of the patch crew and that her skill was "about the same" as Briggs's, 2) Albu admitted on cross-examination that Complainant was working that day near to where Billings's crew was working, and 3) there is no documentary evidence that Billings had ever before been previously assigned to operate the Gradall. Transcript IX at 20- 22; XI at 74-75; Joint Exhibit 36. Nonetheless, Complainant received two hours of overtime on the afternoon of May 9, 2007 for a different assignment that did not involve operating a machine or working as a foreman. Transcript VII at 187-191; IX at 17.

31. Complainant met with Respondent Albu in May of 2007 to discuss her belief that she was being denied overtime assignments and the opportunity to work on heavy machinery; that Billings was getting overtime assignments on a "continuation" basis that should have gone to her; and that she desired to work with Paul McMullen as much as possible. Transcript V at 159-160; VIII at 45-46 & 151-152. McMullen accompanied Complainant to the meeting in his capacity as Union representative. McMullen testified that in his opinion, Complainant appeared to receive as much overtime as everyone else and that Respondent Albu did not single Complainant out for ill-treatment, but McMullen also acknowledged that Albu and Complainant didn't get along and that Complainant shouldn't have been assigned to the litter crew

[6] Although Billings was not a SHMEO at the time, he possessed a hoisting license which, according to Departmental protocol, allowed him to operate heaving machinery on an "adjustment" basis.

because other operators weren't forced to do such work. Joint Exhibit 30 [entries 35, 36, & 39]; Transcript V at 197. McMullen's testimony regarding SHMEOs not being assigned to the litter crew conflicts with evidence that the following male SHMEOs have been assigned to the crew: John Murphy, John Delicata, and Serge Lavoie. Transcript V at 146, 224; VIII at 24; XI at 53, 71-73, 88 and XII at 26.

32. During the time that Complainant worked under Respondent Albu, she made handwritten notes about her employment experiences. Complainant's Exhibits 29; Transcript I at 88. Some notes represent her recollection of past events whereas other notes refer to incidents that took place only a day or two before the entries. Complainant's Exhibit 29, p. 1. Some notes are re-written versions of earlier notes. Id. I decline to credit specific assertions addressed by Complainant in her handwritten records because they contain vague or inaccurate dates, multiple renderings of the same situations, and recollections of incidents which are not contemporaneous with the events. Transcript I at 90, 92, 95.

33. Respondent Albu testified that a week to ten days after receiving Complainant's "Dear O" letter, he gave Complainant a written response dated May 14, 2007. Joint Exhibit 7; Transcript III at 103; Transcript VII at 173. Respondent Albu's response suggests that he and Complainant meet with Human Resources and asks for specific examples of alleged disapproving comments made by him. Complainant did not respond to the letter.

34. During the summer of 2007, there were two occasions when Complainant believed that she was assigned to work in unsafe conditions. The first occasion involved an assignment by Assistant Superintendent Lou Camilli to operate a backhoe at a job

involving a private contractor in the area of Watertown Street in Newton. According to Complainant, the contractor was present when she showed up, but the more credible testimony by Camilli is that the contractor was not present when she showed up and that he instructed her to wait for the contractor. Transcript XII at 123; VIII at 40-41; XI at 159-160. Camilli subsequently learned that the problem had been resolved without digging and instructed Complainant to leave the job site. Transcript XI at 160, 172-173. I do not credit Complainant's testimony that the contractor was present when she showed up, that the contractor expected her to dig in an area where a fiber optic cable was located without Dig Safe markings, and that she notified Respondent Albu and Camilli that she had safety concerns about the job.

35. Complainant testified that on another occasion she was assigned to remove a tree trunk entangled in a gas gate near the Sons of Italy Lodge on Adams Street in Newton so that a bench could be installed. However, the credible evidence does not support Complainant's assertion that a tree or stump was in the vicinity at the time she was assigned to work at that location. Transcript VIII at 167-172, 175; IX at 95-96, 137. Documentation indicates that on September 6, 2007, Complainant was assigned to a job in the area of the Sons of Italy Lodge on Adams Street during which she operated a backhoe in order to move equipment rather than a tree truck. The purpose of the job was to pour and finish concrete in connection with the installation of a bench but not to dig. Transcript VIII at 42; XI at 135; XII at 94. There is no credible evidence that Complainant complained about safety conditions on the job.

36. In August of 2007, the City acquired a new machine -- the 121 backhoe. Director Tocci learned that Respondent Albu was planning to assign the machine to Robert

Billings who was promoted to SHMEO on August 17, 2007, approximately fourteen months after Complainant was promoted to SHMEO. In response, Tocci asked Respondent Albu to assign the machine to Complainant. Transcript X at 11, 13.

37. On October 29, 2007**,** Complainant was notified that she was named the DPW Employee of the Year. Joint Exhibits 8, 28, & 29. The "Employee of the Year" award was determined by employee vote. In a memorandum regarding the selection of Complainant, Highway Director Tocci referred to Complainant as seeking to "perfect her skills," and mentioned her willingness to help out others on or off the job as well as her "caring personality." Joint Exhibit 28.

38. Respondent Albu testified that Complainant was an average employee, "close" to Billings in skill-level," "pretty good" on the Bobcat, not as proficient as Billings on the Backhoe Loader because Billings knew how to dig in critical areas and tight spaces, and of similar capability to Billings on the Gradall. Transcript VII at 201, VIII at 97-98; IX at 32, 38-39, 57; Joint Exhibit 36. Assistant Superintendent Mike Jasset testified at the public hearing that Complainant was "okay" in operating heavy machinery and had an "adequate" work ethic, but he told Investigator Mitnick that Complainant was "above average" and served as the back-up operator on the Gradall. Transcript XI at 90, 114, 117, 123. Complainant's Foreman Gerry Baccari testified that her capabilities on the Gradall were "pretty good" but not as good as Billings, although he told Mitnick that it was Complainant who was slightly better. Transcript XI at 33. Paul McMullen testified that, "Whatever she [Complainant] did, she did good." Transcript V at 133. Working Foreman Adam Szetela testified that Complainant was a "good worker" who was average on the Bobcat. Transcript XI at

57, 69. Coworker Mark Whooten testified at the public hearing that Complainant operated heavy equipment, other than the Bobcat, in a jerky manner making movements that were too hard. Transcript XI at 100-102. He told Mitnick that Complainant was "awful with machinery," except for the Bobcat which he characterized as the easiest machine to operate. Joint Exhibit 27 at 9; Joint Exhibit 30 at 43; Transcript XI at 30-31; XII at 63, 89, 91. Complainant herself stated in a letter to co-worker Whooten that she "suck[ed]" on the "JCB" (i.e., backhoe). Respondent's Exhibit 9; Transcript XII at 84-85, 89.

39. Complainant asserts that during the winter of 2007-2008, she was given fewer heavy machinery assignments than was Billings.

40. During the months prior to February of 2008, Complainant met with Elaine Gentile to discuss various matters which she claimed constituted disparate treatment gender discrimination. Transcript V at 28-29. She told Gentile that she did not want to make a formal complaint. Transcript IV at 122-127, 131, 172-173, 180-182, 200; V at 29. Gentile investigated the issues and determined that the allegations lacked merit. Transcript IV at 176, 190-191. She suggested that Complainant file a grievance with her Union. Transcript IV at 181. Gentile presented contradictory and confused public hearing testimony about whether or not she took notes during her meetings with Complainant and others. Transcript IV at 140-142, 147-149, 171, 179-180, 192-196, & 201-202. The weight of the evidence indicates that Gentile did take notes but that she inadvertently failed to retain them. I decline to make an adverse inference that the notes would have buttressed Complainant's public hearing testimony or undercut Respondent Albu's public hearing testimony because I find that the notes

were not intentionally withheld, were not negligently or intentionally destroyed, would not have played a significant role in resolving the issues in dispute, and did not prejudice Complainant by their failure to be produced.

41. In February of 2008, Tocci and Complainant met with Dolores Hamilton, Human Resource Director for the City of Newton. Hamilton credibly denied Complainant's allegations that she said: 1) "this is like something out of the fifties;" 2) that she yelled out of her door in an effort to locate a sexual harassment handbook; 3) that she suggested Complainant take FMLA to try out another job; 4) and that she believed Complainant definitely had a case of discrimination against the City. Transcript II at 98, 137; V at 99-100, 109, 116-117. Hamilton credibly testified that Complainant did not want her claims investigated because she did not want to "lose control" of the process. Transcript V at 100.

42. Notwithstanding Complainant's reluctance to have her claims investigated, the City hired an outside investigator, Edward Mitnick, to examine Complainant's concerns. Transcript V at 39, 101-102. Mitnick interviewed employees of the City on February 26, 2008 and reviewed documentation relating to Complainant's allegations. Joint Exhibit 30. His notes indicate that numerous male employees also had issues with Respondent Albu's management style and that some transferred or quit as a result. Id.

43. Complainant took an administrative leave from March 3-7, 2008 based on her perception that she was experiencing hostility from her co-workers which caused her to become distracted and distraught.

44. In March of 2008, Complainant was assigned to operate a front-end loader at the City's Rumford Avenue facility in order to "screen" loam. Transcript IX at 26, 170-171. The Rumford Avenue facility serves as the City's recycling center and the loam screening center. Complainant was assigned to operate a front-end loader designated as vehicle 129. It was an old piece of equipment which like most Department heavy machinery at the time, lacked air-conditioning. Transcript V at 151-152, XII at 23. Records of assignments in 2007 and 2008 indicate that other SHMEOs, chiefly John Murphy, were also assigned to vehicle 129. Joint Exhibit 36; Complainant Exhibit 8a. Complainant screened loam for several weeks and then began to complain that heat and dust were adversely impacting her asthma. Complainant alleged that she was barred from leaving Rumford Avenue to fuel-up the front-end loader and that she should have been assigned to front-end loader 104 in lieu of vehicle 129. I do not credit these allegations since vehicles at Rumford Avenue receive fuel on site by a fuel truck and since vehicle 104 is reserved for recycling functions except when deployed for sanding and snow removal purposes. Transcript VIII at 51-52, 93, 95; X at 79, 82-83; XII at 22, 24.
45. In a letter dated April 3, 2008, Complainant wrote to Newton Mayor David Cohen to complain about her treatment by Respondent Albu and about the Mitnick investigation. Joint Exhibit 15.
46. On April 7, 2008, Complainant filled out a vehicle condition report ("VCR") for vehicle 129 which indicated that the vehicle had a gas tank leak and a possible problem with the emergency brake. Respondent's Exhibit 1. Garage personnel found no such problems with the vehicle. Complainant alleged that she filled out other

VCRs for vehicle 129 on April 22 and 23, 2008, but these forms were never received by the garage. Transcript III at 162,164; IX at 101-102, 124-125; Joint Exhibits 11 & 32.

47. Investigator Mitnick drafted a report dated April 8, 2008, in which he determined that there was insufficient credible evidence to support Complainant's allegations that she was subjected to disparate treatment on the basis of gender. Joint Exhibit 27.

48. Complainant testified that she was so despondent upon learning the results of the Mitnick investigation that she contemplated suicide. Transcript I at 164. Complainant's niece testified that after learning the results of the investigation, Complainant became demoralized, had nightmares and difficulty sleeping, and agonized over what to do. Transcript VI at 174.

49. In April of 2008, Complainant complained to Lori Burke, the City's Worker's Compensation Manager and Health and Safety Officer, that dust from Rumford Avenue was affecting her asthma. Burke arranged for Complainant to be seen by Dr. Hashimoto at "Health at Work," an occupational health clinic at the Newton-Wellesley Hospital. Dr. Hashimoto specializes in air quality and respiratory issues. Transcript VI at 73. Complainant was examined by Dr. Hashimoto on April 24, 2008. Dr. Hashimoto wrote a medical report noting a "normal exam" of Complainant and normal spirometry readings but recommending that Complainant work in a different, air-conditioned front-end loader offering protection from dust. Joint Exhibit 13;Transcript VI at 75-78; Respondent's Exhibit 2.

50. On April 25, 2008, Highway Director Tocci assigned Complainant to vehicle 176, an air-conditioned trackless machine (a "grinder"), to pulverize asphalt on Shorncliffe

Road. Transcript IX at 176. Vehicle 176 had an air-conditioning control designated by a snowflake located next to its ignition control. Respondent's Chalks C & D. Complainant testified that she was not aware that vehicle 176 was air-conditioned, but this testimony is not credible in light of the visibility of the air-conditioning control and her communication to Dr. Hashimoto that the vehicle was air-conditioned. Complainant's Exhibit 14B.[7] Vehicle 176 has various attachments for its front end such as a sweeper, a plow, and a grinder. Transcript VIII at 53, XII at 25. A water tank can be connected to vehicle 176 in conjunction with a sweeper attachment but not in connection with a grinder attachment. Transcript VIII at 54, 192-193, IX at 111-112. Complainant was assigned to grind asphalt using vehicle 176.

51. Complainant returned to Health at Work on April 28, 2008. After the visit, Dr. Hashimoto recommended "continued availability of air-conditioned unit and protection against dust and fumes." Complainant Exhibit 14A & B.

52. Complainant, accompanied by co-worker Tommy Perkins, met with Gentile to discuss the impact of exposure to fumes from vehicle 176. Complainant testified that vehicle 176 had a problem with fumes and particulates because of a broken window latch, but her testimony is exaggerated in this regard because the window could have been tied shut.

53. On April 30, 2008, Complainant brought vehicle 176 to the City garage for repair. She filled out a VCR which indicated that the vehicle had problems with the starter, fumes, a broken window latch, and broken teeth. Joint Exhibit 12. The garage found

[7] A medical report by Dr. Hashimoto dated April 28, 2008 references Complainant's statement that the "cab is air conditioned although the dust and fumes come through below [but she] has fixed this by plugging up the openings below with rags." Complainant's Exhibit 14B.

no problem with the starter, teeth that were worn but functional, no holes in the floorboards, and a broken window latch which could be rectified by tying the window closed. Transcript IX at 105-107, 109, 133, 147-148.[8] The vehicle was left in the garage overnight for the latch to be repaired. The following morning, May 1, 2008, vehicle 176 was no longer at the garage. Transcript IX at 107. Complainant was seen operating it that day on Shorncliffe Road wearing a respirator and using the vehicle's air-conditioning. Transcript IX at 133, 143, 176. Later that day, Director Tocci encountered Complainant on Shorncliffe Road. He testified that Complainant was upset about her exposure to fumes as a result of grinding asphalt. Transcript IX at 177, 224.

54. Director Tocci, in consultation with Lori Burke, decided to assign Complainant to the property maintenance crew (a/k/a/ the litter crew) because it involved working in an environment free from toxic fumes. Transcript IX at 179. Complainant was assigned to the litter crew from May 1, 2008 to May 16, 2008, but she only functioned as a crew member for five days during that period. Joint Exhibit 36. Complainant testified that during the time she was assigned to the litter crew, she was told by Respondent Albu that if she had to go to the bathroom or leave the worksite for any other reason, she had to personally call him to get permission. Transcript II at 126-128. I do not credit this testimony.

55. On May 12, 2008, Complainant again saw Dr. Hashimoto. Complainant sought an opinion as to whether she could operate heavy machinery. Dr. Hashimoto cleared her to operate heavy machines on an unrestricted basis except for the requirement of air-conditioning when grinding asphalt or screening loam. Joint Exhibit 14. Following

[8] Complainant disputes that the window could have been tied closed, but her assertion is not credible.

Dr. Hashimoto's report, Complainant was not given an opportunity to work overtime on a subsequent Saturday when it was her turn, but she was assigned, beginning on May 19, 2008, to operate vehicles 130 and 156. Transcript II at 131-132.

56. In late May of 2008, Complainant requested an unpaid leave of absence to try working at another job. Transcript II at 136-137; IV at 90. Complainant testified that she made the request at the suggestion of Human Resource Director Hamilton and DPW Commissioner Thomas Daley. Transcript II at 137; IV at 35. Hamilton credibly denied making such a suggestion. Transcript V at 109. The request was denied by the City because City workers are not permitted to use a leave of absence or FMLA to try out other jobs. Transcript V at 105-108; VI at 91, 94-95. I do not credit Complainant's testimony that Newton officials suggested that she use FMLA leave to explore another job prospect.

57. In June of 2008, Complainant applied for FMLA leave from June 17, 2008 to September 17, 2008 due to "acute stress" based on a form signed by L.I.C.S.W Candace Foster. Joint Exhibits 17A & B. Complainant's FMLA application was initially denied by the City because of incompleteness and subjectivity. The City then sought a second opinion. The second opinion consisted of a full psychiatric exam by Dr. Robert M. Weiner, M.D. (Board Certified by the American Board of Psychiatry and Neurology and the American Board of Forensic Psychiatry), resulting in a conclusion contrary to the first opinion. Joint Exhibit 18. The parties obtained a third opinion from Dr. Lloyd F. Price (Diplomat of the American Board of Psychiatry and Neurology in Psychiatry, Child and Adolescent and Forensic Psychiatry) which concluded that Complainant suffered from depression as of June 17, 2008 causing an

inability to safely operate heavy machinery. Joint Exhibits 22 & 23. Prior to Complainant's FMLA request, the City had never required second or third opinions for requested FMLA leaves, but it has done so since that time in matters involving both men and women. Transcript VI at 91-92.

58. Complainant began working for another construction company, A.R. Belli, in June of 2008, while still employed by the City of Newton. Transcript IV at 22. The situation came to light when Highway Director Tocci inspected snow plowing equipment in Wayland, MA and saw Complainant operating a front end loader. Joint Exhibit 34. Complainant resigned from her position with the City, effective August 15, 2008. Joint Exhibit 19.

59. At the time that Complainant left the employ of the City of Newton in August of 2008, her salary was $48,809.60 annually. Transcript V at 84. She was on the City's health insurance and dental plans. Complainant's Exhibit 19. Complainant earned income of $68,859.00 in 2008, consisting of $21,076.89 from the City of Newton for the first half of 2008; $44,742.80 from A.R. Belli for the second half of 2008; and $2,512.00 in unemployment compensation. Joint Exhibit 24. Complainant's 2009 income was $51,091.00 in wages from A.R. Belli and $ 9,809.00 in unemployment compensation. Joint Exhibit 24. Complainant's 2010 income was $41,712.00 in wages from A.R. Belli and $14,984.00 in unemployment compensation. Id. Complainant was not rehired by A.R. Belli in 2011. Complainant was unemployed from the fall of 2010 to the public hearing.

60. After leaving the employ of the City, Complainant purchased medical and dental coverage through COBRA from September to November of 2009, at the total cost of

$5,999.21 for health coverage and $420.81 for dental coverage. At the end of 2009, Complainant purchased health insurance through A.R. Belli for which she paid the full amount of $494.25 monthly. Complainant's Exhibit 20. In October of 2010, Complainant purchased health insurance through a COBRA arrangement with A.R. Belli at the rate of $494.25 monthly through August of 2011 and then paid $533.05 monthly until her health coverage under COBRA expired in April of 2012. Complainant Exhibit 25.

61. Complainant saw the following therapists during the time she worked for the City of Newton and in subsequent years: Jessica Shore, Rina Dubin and Jessica Reed. Transcript IV at 95, 100. Complainant incurred out-of-pocket costs for this therapy in the amount of $1,415.00. Complainant Exhibit 27.

62. Complainant testified that her experience working for Respondent Albu caused her to become nervous, anxious, apprehensive, and worried. She testified that she had nightmares and could not sleep. She claimed that co-workers stopped talking to her which made her feel isolated. Transcript I at 155; II at 180. She described herself as "broken spiritually," quieter than she used to be, no longer "there" for people, and not the same person that she formerly was. Transcript I at 93, II at 181. She told Elaine Gentile at their meetings that she experienced nightmares, lack of sleep, and flare-ups of her Addison's disease as a result of alleged discriminatory treatment. Transcript I at 142-143. Complainant testified that she had planned to work for the City until she retired but as of 2008, felt that conditions had become so intolerable that she had to resign. Transcript II at 141-142. Complainant's niece testified that Complainant lost close friends from work and no longer participated in family activities in the same

manner as she had done previously. I do not credit that the aforesaid matters were caused by Respondents' discriminatory treatment of Complainant.

63. Dr. Susan Moir testified as an expert witness for Complainant. Dr. Moir is the Director of the Labor Resource Center at the University of Massachusetts Boston. She has a Master's Degree and a Doctorate in work environment policy and teaches a variety of classes in labor studies. Transcript II at 6; Complainant's Exhibit 9. Dr. Moir conducts research on workplace discrimination, low-wage workers, and women in non-traditional fields such as construction. Transcript II at 8-9; Complainant's Exhibit 9. Dr. Moir testified about the isolation, hostility, disrespect, and lack of training that women experience in such fields and the resulting high dropout rates for women in non-traditional fields. Transcript II at 25. Dr. Moir testified about the affirmative steps that management must take to support women in non-traditional fields and asserted that unless such steps are taken, the construction workplace is *per se* hostile to women. Transcript II at 86; Complainant's Exhibit at 10. I credit some of Dr. Moir's observations about women in construction but do not accept her conclusion that the construction workplace is *per se* hostile to women because such a conclusion conflicts with the legal standard set forth in the General Laws, Chapter 151B.

II. CONCLUSIONS OF LAW

A. Gender Discrimination

In order to prevail on a charge of disparate treatment gender discrimination under M.G.L. c. 151B, section 4(1), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts

Commission Against Discrimination, 431 Mass. 655 (2000). Insofar as direct evidence is concerned, Complainant maintains that Respondent Albu made a hostile remark about women in the workplace and referred to Complainant as a "he/she."

Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). Not every remark constitutes direct evidence of discrimination. Some insignificant statements may be characterized as stray remarks which do not go to the heart of the matter alleged to be discriminatory. See Wynn & Wynn, 431 Mass. 655, 667 (2000) *quoting* Johansen v. NCT Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991).

Derogatory words about women in the workplace might constitute a "highly probable inference" of gender bias, but the evidence here is too equivocal to support such an accusation. Complainant alleges that Respondent Albu made an offensive statement in late 2006 or early 2007 about women being seen and not heard, but it is significant that she did not mention this comment in her April of 2007 letter addressing concerns about their working relationship. Complainant's explanation for refraining from mentioning the comment is that she was trying to "extend an olive branch," in her April 07 letter, but such a rationale is not convincing because the letter is replete with other accusations against Respondent Albu.

Complainant's assertion is also undercut by the fact that no other supervisors or employees of the City testified at the public hearing in corroboration of Complainant's accusation. Elaine Gentile denied at the public hearing that Albu acknowledged making a derogatory comment about women in the workplace when she questioned him about it.

Complainant makes the noteworthy point that Gentile testified in a contradictory fashion at her deposition wherein she admitted hearing that Respondent Albu had allegedly said "something to the effect that women should be at home and they shouldn't be in the workplace." Gentile's deposition testimony indicates that when she pursued the matter with Respondent Albu, he did not deny making the comment. However, Gentile also noted at deposition that Albu, "didn't seem to understand the specifics of what he was saying or how he was saying it."[9] In totality, these references fall short of establishing that Respondent Albu intentionally made a disparaging comment about women in the workplace.

Similarly unpersuasive is the accusation by witness Henouk Desire that Respondent Albu allegedly referred to Complainant as "he/she." The "he/she" accusation was raised for the first time at the public hearing by a witness with his own workplace grievances towards Respondent Albu. The weight of the evidence does not support the statement as a credible accusation.

In the absence of direct evidence of forbidden bias, Complainant may attempt to establish a prima facie case of employment discrimination on the basis of indirect evidence which shows that Complainant: (1) is a member of a protected class; (2) was performing satisfactorily; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not in the protected class(es). See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts). Once Complainant has established a prima facie case of discrimination, the

[9] Having been born in Romania and emigrated to the U.S. as an adult, Respondent Albu is a non-native English speaker with a limited understanding of English idioms.

burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondents do so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondents' adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

The parties do not dispute that Complainant -- the only female SHMEO working for the City of Newton -- was a member of a protected class based on gender and was a satisfactory, if not better, employee. The issue in dispute is whether she suffered from adverse employment actions as a result of being treated differently from similarly-situated males. As Respondents note, Complainant's mere presence in an otherwise male-dominated field does not equate to disparate treatment, although it undoubtedly presents greater challenges to a female employee than working in a gender-balanced environment.

According to Respondents, Complainant initially had a more, not less, advantageous, situation than her male counterparts while working as a HMEO under the supervision of William Crowell with whom she had an intimate relationship. While Complainant was under the supervision of Crowell, she received an adjustment in pay for operating heavy machinery for training purposes in contrast to similarly-situated males, was permitted to

use Crowell's office computer while some similarly-situated males were not, and received glowing evaluations from Crowell.

Complainant lost her favored status, according to Respondents, when Crowell was transferred away from Crafts Street in December of 2006 and Respondent Albu was transferred to Crafts Street. City officials describe Albu as a strict supervisor who raises his voice with all workers when they are not focused on their jobs and is known to tell employees to "shut up" on occasion. Respondent Albu imposed a rigid management style in the Crafts Street yard, limited participation in morning meetings to Working Foremen and Assistant Superintendents, prohibited non-supervisory crew members from entering management offices in order to take NexTels and keys, and prohibited crew members from using office computers. He challenged Complainant, as he did with male crew members, if she showed up at the Crafts Street office during the work day without being sent by a supervisor, but he did not bar her from Crafts Street.

Respondent Albu's management style was a departure from Superintendent Crowell's more relaxed style, but it constituted a stylistic difference, not a substantive one. See Bain v. City of Springfield, 424 Mass. 758, 766 (1997) (Mayor acting coldly towards plaintiff and using hostile body language too subjective and intangible to make out a case under Chapter 151B); LaValley v. Quebecor World Book Services, LLC, 315 F. Supp. 2d 136, 147 (D. Mass. 2004) (Supervisor yelling at, reprimanding, interfering with conversations of female utility worker and placing her at building's far end did not constitute adverse employment actions). The evidence, moreover, does not establish that Respondent Albu directed his ire solely at Complainant. I do not credit the accusation that Respondent Albu began "zeroing in" on Complainant upon arriving at the Crafts

Street yard and that he yelled at, belittled, and badged her in a manner that set her apart from male employees. My conclusion is buttressed by evidence that numerous male employees also had issues with Respondent Albu's management style and that some transferred or quit as a result.

Regarding bathroom use, Complainant alleges that after Respondent Albu became her supervisor, she needed his permission when she sought to take a bathroom break, but the credible evidence establishes that *all* workers who sought to leave worksites for a bathroom break had to obtain permission from their working foremen who, in turn, had to notify management. The evidence likewise establishes that Respondent Albu did not commit a discriminatory act when he changed the lock on the executive/ladies bathroom at Crafts Street because he did so to prevent certain male workers from defiling the bathroom, not to prevent Complainant from using it.

Turning to the allegation that Respondent Albu assigned Complainant to unsafe conditions on two occasions, the credible evidence similarly fails to support Complainant's charges. Regarding the first occasion, Complainant was assigned to operate a backhoe at a job involving a private contractor on or around Watertown Street. Despite Complainant's allegation to the contrary, the persuasive evidence is that the contractor never showed up and the problem was resolved without any digging. Regarding the second occasion, Complainant testified that she was assigned to remove a tree trunk entangled in a gas gate near the Sons of Italy Lodge on Adams Street in Newton so that a bench could be installed. The more persuasive evidence, however, is

that she was assigned to move equipment as part of a large job involving the installation of a bench.[10]

Insofar as other examples of alleged disparate treatment are concerned, Complainant asserts that she, alone, was assigned to the litter view crew out of all SHMEOs, but the evidence indicates that males SHMEOs such as John Murphy, John Delicata, and Serge Lavoie were also assigned to perform such work. Complainant is correct that the litter crew is usually staffed by laborers who are tasked with cutting grass, trimming bushes and removing trash, but the job descriptions of HMEOs and SHMEOs include the requirement of performing laboring chores when the need arises. On April 26, 2007, two of the regular members of the litter crew were absent, other crews were performing ongoing jobs, and there were fewer assignments than usual that day which required the use of heavy machinery. Once Complainant expressed her dissatisfaction about the assignment to Director Tocci, she was removed from the litter crew the next day and was not re-assigned to the litter crew for over a year. In May of 2008 when she again received a litter crew assignment, it was made to protect Complainant from exposure to toxins in other locations. The aforesaid circumstances cannot be deemed discriminatory.

In addition to the instances cited above, Complainant cites as evidence of disparate treatment that Respondent Albu initially assigned Robert Billings to the City's new

[10] In resolving these and other credibility disputes, I am influenced by instances in which Complainant proved to be a less than credible witness. For example, Complainant initially testified that aside from writing a letter to Respondent Albu, she only wrote personal notes to two other co-workers, but six co-workers testified to receiving such letters from Complainant. Complainant testified that Dolores Hamilton described Complainant's allegations as "something out of the fifties," suggested (along with DPW Commissioner Thomas Daley) that Complainant take FMLA to try out another job, and communicated her belief that Complainant definitely had a case of discrimination against the City. The record does not support any of these claims. Complainant also undermined her credibility by alleging that she was barred from leaving Rumford Avenue to fuel-up the front-end loader when credible evidence establishes that vehicles at Rumford Avenue receive fuel at the site by a fuel truck. Finally, Complainant asserted that she failed to notice that vehicle 176 was air-conditioned when the vehicle had a clearly-designated air-conditioning button just inches away from the ignition switch and despite reporting to Dr. Hashimoto that the it was air-conditioned.

backhoe machine until Director Tocci instructed Albu to assign the machine to her. Respondent Albu acknowledged at the public hearing that he believed Billings to be a more skilled backhoe operator than Complainant. Complainant herself acknowledged that was not proficient on the backhoe. Complainant's selection as 2007 DPW employee of the year attests, in general, to the adequacy of her skills as an operator of heavy equipment, but it does not signify that her skill level matched or exceeded her co-workers on all pieces of equipment. As with the new backhoe machine, Complainant's assignment to vehicle 129, an old front-end loader, cannot be deemed discriminatory since records of assignments in 2007 and 2008 indicate that male SHMEOs, chiefly John Murphy, were also assigned to it.

Apart from the specific charges addressed above, Complainant asserts more generally that during the winter of 2007-2008, she was given fewer heavy machinery assignments than her junior male counterpart, Robert Billings, and denied equal opportunities for overtime and adjustments to Working Foreman. Such claims ignore the fact that between January and September of 2007, Complainant received *more*, not fewer, heavy machinery assignments than Billings and that from September through December of 2007, Complainant and Billings received approximately the same number and percentage of heavy machinery assignments. Beginning in January of 2008, Billings did, in fact, overtake Complainant in regard to heavy machinery assignments, but this reversal must take into account Complainant's desire to work with Paul McMullen, her desire not to work with Bernard Arpino, Adam Szetela, Rich Rando, and John Delicata, and her desire to perform work that did not exacerbate her asthma symptoms. Even so, there were times

when she received more opportunities to operate some of the Department's heavy equipment than did other male SHMEOs.

There are, to be sure, some situations which raise questions of fairness. For instance, Complainant maintains that she should have been given overtime on May 9, 2007 as Working Foreman on the permanent patch crew or as operator of the Gradall, notwithstanding Respondent Albu's explanations that he chose Ronald Briggs as Working Forman of the patch crew because Briggs was more skilled than Complainant at asphalt patching and the usual substitute for the permanent patch foreman and that he selected Robert Billings to operate the Gradall because Billings was already on the assignment and familiar with the work being done that day. Albu's explanations in these respects are not convincing because Complainant was an experienced member of the permanent patch crew, was assigned to a work site close to Billings' crew on May 9, 2007, and there is no documentary evidence that Billings had ever before been previously assigned to operate the Gradall. Thus, in regard to the circumstances of May 9, 2007, Complainant's allegations appear to be credible. Nonetheless, the evidence also indicates that Complainant earned two hours of overtime that day and failed to grieve the non-selections. In sum, these matters are an insufficient basis upon which to anchor a disparate treatment charge.

To the extent that Complainant failed to receive various assignments she sought, it is more likely than not that Respondent Albu harbored a negative attitude towards Complainant resulting from a critical letter she wrote to him in late April of 2007 rather than from gender bias. The letter is addressed to "O" despite the fact that "O" is not a nickname that Respondent Albu ever used. The letter accuses Albu of questioning

Complainant's actions, making disapproving comments, making her feel "condemned for unknown crimes," and making her feel "nervous, sad and frustrated," speculates that he "must have been let down and hurt a lot in [his] life," expresses sympathy that he carries around "pain," and advises him that, "[l]ife is a lot easier, more fun and not as lonely if you let in the people that can help." Respondent Albu testified credibly that he found the letter weird, insulting, and judgmental.

At the public hearing, Complainant attempted to recast the letter as an "olive branch," but its contents are patronizing and critical rather than conciliatory. Notably, the letter, which makes numerous inappropriate assumptions about Respondent Albu's personal life, is devoid of any accusation regarding alleged gender bias. I credit the likelihood that this letter, not gender issues, resulted in a souring of the working relationship between Complainant and Respondent Albu. This conclusion is buttressed by the fact that Complainant's former friend and colleague, Paul McMullen, testified at the public hearing that he did not think that Albu "singled out" Complainant, although he acknowledged that they didn't seem to get along. The fact that male employees also had a difficult time working for Respondent Albu supports the conclusion that Complainant was not targeted because of her gender.

The assignments given to Complainant and her fellow SHMEOs, in sum, reflect numerous considerations pertaining to job skills, personalities, the composition of work crews, the Union's control over most overtime decisions, attendance, and the types of jobs needing to be performed. When all of these considerations are examined, they appear to constitute a complex matrix of factors. A preponderance of the evidence does not establish that gender bias played a predominant role.

Finally, Complainant challenges the legitimacy of Respondents seeking additional information regarding her application for a three-month FMLA leave for "acute stress." Complainant asserts that the City had no basis to do so even though she had previously sought an FMLA leave to try out another job, followed by a second FMLA request deemed to be incomplete, unclear, and subjective. Contrary to Complainant's assertion, the City properly exercised its right to obtain follow-up opinions which ultimately resulted in the City granting Respondent a leave. See 29 U.S.C section 2613 (a)-(c) (Employer may require an employee to furnish a second opinion by a health care provider approved and paid for by the employer and, if the second opinion differs from the original one, may require a third opinion by a health care provider designated jointly by the parties at the employer's expense). The fact that the City had no prior history of requesting second or third opinions does not invalidate the process in this case, in light of the unusual circumstances.[11]

For the reasons set forth above, I conclude that Complainant has failed to sustain her burden of establishing that she was subjected to disparate treatment based on her gender. Complainant likewise fails to establish gender harassment and constructive discharge based on the same set of operative facts and for similar reasons.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. 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

[11] The City has since required second opinions in FMLA matters involving both men and women. Transcript VI at 92.

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).

To prove a prima facie case for retaliation, Complainant must demonstrate that she: (1) engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if she "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]." 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 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew of a discrimination claim and thereafter took some adverse action against the Complainant does not, by itself, establish causation, but it may be a significant factor in establishing a causal relationship. "Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing or threatening to file, a discrimination complaint." Pardo v. General Hospital Corp., 446 Mass. 1, 21 (2006) *quoting* Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); 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). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant 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 discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 501, 504 (2001).

As discussed, *supra,* the "Dear O" letter does not accuse Respondents of gender discrimination and, thus, does not constitute protected activity. In that letter, Complainant accuses Respondent Albu of "always question[ing] what I'm doing, why I'm doing it, who said I could or should do this and then make a disapproving comment of me to me," but nowhere does the letter attribute Respondent Albu's allegedly hostile conduct to her gender.

Apart from the "Dear O' letter, Complainant cites her communications with Elaine Gentile in the months prior to February of 2008 constituting protected activity. During that period, Complainant met with Elaine Gentile to discuss various matters which she attributed to disparate treatment gender discrimination. These discussions satisfy the requirement of protected activity.

Complainant alleges that following her discussions with Gentile, she was prevented from using the Crafts Street ladies room, banned from the Crafts Street office, assigned her to unsafe or unhealthy jobs, and otherwise singled her out for mistreatment. For the reasons set forth in regard to Part II. A., above. I conclude that these alleged adverse actions did not take place as Complainant alleged and/or for the reasons asserted by Complainant.

IV. ORDER

The case is hereby dismissed. 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 receipt of this Order.

So ordered this 17th day of December, 2012.

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Betty E. Waxman, Hearing Officer