

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and SHEILA LEAHY,
Complainants

v.

Docket No.: 09-BEM-00288

CITY OF BOSTON FIRE DEPARTMENT
And JAMES BERLO,
Respondents

DECISION OF THE HEARING OFFICER ON REMAND

On April 1, 2019, the Full Commission remanded the above matter to this Hearing Officer to (i) address Complainant's claims of liability against Respondent Berlo for retaliation; (ii) make specific findings concerning Berlo's involvement in reporting Complainant to the Boston Residency Commission and Complainant's resignation in February of 2009; (iii) determine whether Respondent City of Boston should be liable for retaliation pursuant to the "cat's paw" theory of liability; (iv) determine, upon a finding of Berlo's individual liability, whether or not additional damages are warranted and whether Berlo should be held jointly and severally liable for emotional distress damages in connection to Complainant's assignment to Ladder 15; and (v) determine, upon a finding of Berlo's individual liability, whether he should be jointly and severally liable for any attorneys' fees and costs.

In my April 17, 2014 decision, I found that after Respondent Berlo was placed on paid administrative leave pending an investigation into Complainant's sexual harassment charges, Susan Morrissey (Berlo's sister) engaged in computer research to learn where

Complainant lived. Morrissey thereafter called the Boston Residency Commission to report that Complainant lived in Foxborough. Morrissey's message was received by Boston Residency Commission staffer Alysha Glazier who took the information pursuant to City of Boston Ordinance 5-5.2 which requires that Boston firefighters maintain primary residences in the City of Boston. Morrissey informed Glazier about Complainant's ownership of residential property in Foxborough and about her children's enrollment in the Foxborough public schools.

It is noteworthy that my findings make no reference to any acts of Respondent Berlo in regard to reporting Complainant's lack of Boston residency. Such an omission was intentional because there is no credible evidence in the record that Berlo was involved in these actions. The findings were meant to convey that Susan Morrissey took the initiative and was the driving force in tipping off the Residency Commission about Complainant's lack of Boston residency. I found then -- and continue to find now -- that Morrissey acted alone in notifying the City. The characterization in my conclusions of law to Morrissey and Berlo "collaborating" in regard to reporting Complainant's residency violation was only meant to reflect the likelihood that Morrissey's actions were inevitably intertwined with Berlo's employment issues, not that he encouraged or collaborated in any action to report Complainant to the Residency Commission. The credible evidence is that Morrissey initiated and carried out communications with the Boston Residency Commission independently of her brother.

Turning to whether Respondent City of Boston should be held accountable for retaliation pursuant to the "cat's paw" theory of liability, I conclude that the theory does not apply in this case. Complainant's violation of Boston's residency rule was the

proximate cause of her resignation and, but for her violation, she would not have had to resign from the Fire Department. At the time Complainant resigned, Respondent Berlo was already on disciplinary leave. Such status deprived him of influence over Departmental policy. There is no evidence that he had any impact on Complainant's resignation. The Fire Commissioner was supportive of Complainant's return to the Department the following year. From these circumstances, I conclude that the Fire Commissioner was not swayed against Complainant by any retaliatory motives on the part of Berlo or his sister.

The current case is markedly different from MCAD and Joyce v. CSX Transportation, 39 MDLR 85 (2017) in which the cat's paw theory was referenced. There, liability attached to an employer who relied on information that was "inaccurate or misleading or incomplete because of another employee's discriminatory animus." Joyce, 39 MDLR at 92. The information in this case was accurate and not, in my view, the product of any indirect discriminatory animus which filtered up the chain of command.

For the foregoing reasons, I decline to hold Respondent Berlo individually liable for retaliatory acts against Complainant and decline to hold the City liable for Complainant's resignation on the cat's paw theory of liability. Accordingly, I decline to hold Berlo responsible for emotional distress damages and for attorneys' fees and costs.

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 19th day of April.

A handwritten signature in cursive script, appearing to read "Betty E. Waxman", written over a horizontal line. The signature is fluid and includes a large, sweeping flourish at the end.

Betty E. Waxman, Esq.,
Hearing Officer