

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and SHEILA LEAHY,
Complainants

v.

Docket No.: 09-BEM-00288

CITY OF BOSTON,
Respondent

Appearances: Marisa Campagna, Esq. for Complainants
Amy Bratskeir and Shannon Phillips, Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 9, 2009, Sheila Leahy (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that she was subjected to sexual harassment as a Boston firefighter and subjected to retaliation for complaining about the harassment. A probable cause finding was issued on November 28, 2011 and the case was certified for a public hearing on October 31, 2012. A public hearing commenced on August 19, 2013 and continued on August 20, 22, and 26, 2013.

The following witnesses testified at the public hearing: Complainant, Respondent James Berlo, Jr., Susan Morrissey, Robert Moran, Alysha Glazier, Douglas Bell, Kevin Brooks, Edward Ferent, Michael Doherty, Kevin Foley, and Roderick Fraser.

The parties submitted eight agreed-upon exhibits. In addition, Complainant submitted five additional exhibits and Respondent submitted sixteen additional exhibits.

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. Sheila Leahy (“Complainant”) became a firefighter with the City of Boston in November of 2000. At the time she lived in South Boston on Mercer Street. She was assigned initially to Ladder 1 in Brighton and remained there for three years.
2. In 2003, Complainant was assigned to Engine 39 at the District 6 fire house on D Street in South Boston.¹ Leahy testified that she loved working there until Captain James Berlo became her supervisor.
3. James Berlo (“Captain Berlo”) was assigned to the District 6 fire house at D Street in late 2006 or early 2007 as Captain of Ladder 18 and Senior Captain of the entire house. Transcript I at 146, III at 124-125.
4. Complainant testified that on one occasion, Captain Berlo told her that his mother was a “cunt,” wasn’t a good mother, and had “barely raised them.” Transcript I at 35-36. Complainant stated that she was “just stunned” by the comments. Transcript I at 36. I credit Complainant’s testimony.
5. Complainant testified that on another occasion while they were in the front of the fire house, Captain Berlo told her to put out her left hand, he slid a temporary key ring onto her finger, and told her that she was married to Group 1 to which she was, at the time, assigned. Transcript I at 41. The incident was observed by Firefighter Edward Ferent, although he testified that Captain Berlo said that

¹ According to Complainant, fire houses are identified by their engine company. Transcript I at 50. The D Street location where Complainant worked housed both Engine 39 and Ladder 18. Transcript I at 104. A “company” constitutes a complement of firefighters assigned to a vehicle. Transcript I at 105-106.

Complainant was married to Group 3, not Group 1. Transcript III at 146. I credit Complainant's testimony.

6. Complainant testified to another incident involving her parents at a Dunkin Donuts drive-through when Captain Berlo paid for their coffee. Complainant subsequently thanked him and he said, "I'm hoping that he'll be my father-in-law someday." Transcript I at 41-42. I credit Complainant's testimony.
7. According to Complainant, Captain Berlo always seemed to be at the fire house. Her testimony in this regard was corroborated by Firefighter Kevin Foley who said that Captain Berlo came to Engine 39 almost every night that he wasn't on duty in 2007 and 2008. Transcript IV at 82. It was also corroborated by Firefighter Ferent who testified that Captain Berlo would go to the station when he was not working. Transcript III at 148. Complainant described Berlo on one such occasion as walking back and forth in order to watch her while she exercised in the fire house's workout room. Transcript I at 43. On various occasions, Captain Berlo told Complainant that he would like to see her wear "short shorts," asked if she had her period, and called her the poster girl for affirmative action. Once he ordered her to stay at the fire house during a fire call, which she did, but when he told her to do so again, she refused. Transcript I at 45. I credit Complainant's testimony.
8. At the end of 2007, Captain Berlo allocated a room in the fire house to his personal use. According to Complainant, he painted and furnished the room, changed the lock, and presented Complainant with a copy of the key to the room. Transcript I at 48-49. Complainant took the key to Captain Brooks and said she

didn't want anything to do with it. Transcript I at 49. I credit Complainant's testimony.

9. Complainant testified that there were seven bathrooms at the Engine 39 fire house. Prior to the end of 2007, Complainant used only one bathroom, never had any problems associated with bathroom usage, and never complained to anyone about the condition of the bathrooms. Transcript I at 51. On November 27, 2007, Captain Berlo posted a notice on the bathroom she typically used which stated the following: "Please do not use this bathroom. I want only Sheila to use this." Joint Exhibit 2. The notice also stated that Complainant did not ask for special treatment, described her as "conscientious, considerate, and diligent," and said that the shower attachment was "meant for" her and informed other officers who wanted one that they could buy one for Captain Berlo to install. Id. According to Complainant, Captain Berlo hung a pink shower curtain in the bathroom in addition to posting the notice. Complainant tore down the notice because she did not want her coworkers to think she was a troublemaker, felt that it unfairly singled her out for praise, and believed that it made her a laughing stock at the fire house. Transcript I at 52. After she tore down the notice, a new one was put up dated December 18, 2007 which stated that the bathroom was for Complainant's use, that others were not to use it, and that the poster should not be taken down. Transcript I at 55-57. Complainant placed a document over the notice which mocked its words by stating, "I want to make Sheila feel uncomfortable, especially when she's using the bathroom." Transcript I at 57. According to Complainant, Captain Berlo was very upset and perplexed that she tore down the

- sign. Complainant asked Captain Berlo to stop singling her out. Transcript I at 59. I credit all of Complainant's testimony in regard to the fire house bathrooms.
10. Berlo testified that Complainant expressed dissatisfaction about the condition of the fire house bathrooms on multiple occasions in late 2007. Transcript II at 35-36. He stated that he told male firefighters not to use one of the bathrooms in response to her complaints, subsequently put up a notice, and after it was torn down, put up another notice. Transcript II at 36-39. Berlo denied that he put up a pink shower curtain. Transcript II at 42. I do not credit Berlo's testimony in regard to the fire house bathrooms.
11. Firefighter Douglas Bell described Complainant as a great coworker, reliable, a team player, never insubordinate or disrespectful, and knowledgeable about the job. Transcript III at 65-66, 69-70. He testified that Complainant never complained about the condition of the fire house bathrooms. He described the bathrooms as always maintained in an "immaculate" condition. Transcript III at 69, 85-86. According to Bell, Captain Berlo watched Complainant, followed her around, and said that Complainant "wanted" him and was in love with him. Transcript III at 75-77. Bell testified that he told Captain Berlo to stay away from Complainant and to leave her alone. Transcript III at 76. I credit Bell's testimony.
12. Firefighter Ferent testified that he began working at the D Street location on Ladder 18 in 2004 and that Complainant was already assigned there when he arrived. Transcript III at 142. According to Ferent, Complainant performed her duties "quite well," never disobeyed orders or was insubordinate, and never complained about the cleanliness of the bathrooms. Transcript III at 143-144.

- Ferent testified that Captain Berlo once said that he thought Complainant “like[d] him” in response to which Ferent said it wasn’t true. Transcript III at 146.
13. Firefighter Kevin Foley testified that he worked with Complainant for a period of time at Engine 39 and found her to be “always” a team player with “awesome” skills. Foley said that she never complained about the cleanliness of the bathroom. Transcript IV at 77-78.
14. District Fire Chief Kevin Brooks who was an Engine 39 captain from 2006-2009 described Complainant as a firefighter who never refused to follow an order, was respectful, upbeat, and never asked for special treatment because of her gender. Transcript III at 102, 106. He said that Complainant never complained about the condition of the bathrooms, never asked for her own bathroom, and declined to keep a bathroom key that Captain Berlo gave her because it made her uncomfortable to be singled out. Transcript III at 103-105. He testified that in late 2007 or early 2008, Captain Berlo, while off duty, began to show up at the fire house more and more often when Complainant was on duty and by January or February of 2008, he was showing up “pretty much daily when she worked.” Transcript III at 111-112, 120. Brooks testified that Berlo expressed “feelings” for Complainant, believed she had feelings for him, and predicted that she was going to leave her husband. Transcript III at 114. Brooks testified that the situation caused Complainant to become stressed. Transcript III at 120. He counseled Berlo to leave Complainant alone and warned Berlo that he was “heading down the wrong path.” Transcript III at 114. I credit this testimony.

15. In early February of 2008, Captain Berlo asked Complainant to meet him outside of work in order to talk. Transcript I at 61. Complainant refused. Id. About a week later at the fire house, on or around February 16, 2008, he confronted Complainant and said that he had been in love with her a long time. Transcript I at 64. Complainant responded that his feelings were “never going to go anywhere” and that she “never wanted to hear it again.” Transcript I at 65. I credit Complainant’s testimony.
16. After February 16, 2008, Captain Berlo never again spoke to Complainant. Transcript I at 114; IV at 169.
17. On February 20, 2008, Complainant met with Chief of Operations Andrew O’Halloran, Chief of Personnel Michael Doherty, and John Hasson about sexual harassment charges against Captain Berlo. Respondent’s Exhibit 7. O’Halloran, offered Complainant a transfer, but she rejected the offer because she did not want to leave her coworkers at the D Street fire house. Transcript I at 68, 70; Transcript IV at 26. On February 24, 2008, Complainant filed a report about Captain Berlo that went up the chain of command to Director of Human Resources Robert Moran. Respondent’s Exhibit 7; Transcript II at 170. Complainant subsequently met with Moran and Deputy Chief Doherty. Respondent’s Exhibit 7; Transcript II at 167, 202.
18. On or around February 25, 2008, Captain Berlo was placed on paid administrative leave pending an investigation into the sexual harassment charges. Respondent’s Exhibit 7; Transcript II at 14. While on leave, Captain Berlo was prohibited from

going to the Engine 39/Ladder 18 fire house. Respondent's Exhibit 7; Transcript III at 129; IV at 24.

19. On April 4, 2008, Susan Morrissey, the sister of Captain Berlo and wife of Fire Fighter Kevin Morrissey, engaged in computer research to learn where Complainant lived. Susan Morrissey subsequently called the Boston Residency Commission to report that Complainant lived in Foxborough. Joint Exhibit 6; Transcript II at 146-148; III at 30. Morrissey testified at the MCAD public hearing that she was motivated to do so after learning about allegations that Complainant had made at a departmental hearing involving sexual harassment charges against Berlo. Transcript II at 112-116. According to Morrissey, she became "livid" upon learning that Complainant made the "despicable" and "false" accusation that her brother referred to their mother as a "cunt." Transcript II at 115-118. I do not credit Morrissey's testimony about her motivation for reporting Complainant because the departmental hearing took place *after* Morrissey called the Residency Commission on April 4, 2008 in order to report Complainant. Transcript II at 147-148.

20. On April 4, 2008, City of Boston Assistant Director of Human Resources Alysha Glazier received a phone message from Susan Morrissey regarding Complainant's residency. Joint Exhibit 6; Transcript III at 12. Glazier served as a staff member to the Boston Residency Commission, which exercised oversight of City of Boston Ordinance 5-5.2. Ordinance 5-5.2 requires that a firefighter's primary residence be in the City of Boston. Respondent's Exhibit 4. Glazier had a conversation with Susan Morrissey who provided information about

- Complainant's ownership of residential property in Foxborough and her children's enrollment in the Foxborough public schools. Transcript III at 30-31. Glazier passed the information to Boston's Investigation Unit. Transcript III at 32. According to Glazier, it was not uncommon for callers, generally anonymous, to report suspected residency violations. Transcript III at 43, 46.
21. A departmental hearing on sexual harassment charges against Captain Berlo took place on April 16, 2008. Transcript II at 179. Berlo's brother-in-law, Fire Fighter Kevin Morrissey, attended the hearing. Transcript I at 87; II at 74. Following the hearing, Captain Berlo was given a one-year unpaid suspension commencing on May 1, 2008. Transcript II at 180. He had previously been suspended on four prior occasions, once for refusing to sign an attendance sheet at a sexual harassment training seminar. Transcript II at 9; IV at 137. Captain Berlo was ordered not to go on Fire Department property during his suspension. Transcript III at 91.
22. Complainant stated that after the departmental hearing, Kevin Morrissey never spoke another word to her even though their relationship prior to the hearing had been friendly. Transcript I at 87. Kevin Morrissey also stopped talking to Firefighter Douglas Bell and a few others who attended the sexual harassment hearing. Transcript III at 75.
23. While Captain Berlo was out on suspension, Complainant saw him occasionally driving by the fire house, driving past emergency calls, driving on Mercer Street, and driving behind her on Morrissey Blvd. Transcript I at 75, 116-117. She testified that such actions were "nerve-wracking." Transcript IV at 151.

Firefighter Ferent also saw Captain Berlo driving by the fire house during the one-year suspension. Transcript III at 151. According to Ferent, Captain Berlo would reduce his speed to an almost “crawl” as he approached the fire house and would look in. Id. Firefighter Foley testified that he saw Captain Berlo driving around the premises of Engine 39 on a handful of occasions during the year he was on suspension. Transcript IV at 83.

24. In January of 2009, Complainant received a letter from the City of Boston raising questions about whether she was complying with the City of Boston residency requirement for firefighters. Transcript I at 88. Complainant was placed on administrative leave with pay pending the outcome of a hearing by the Residency Compliance Commission. Transcript I at 120. Respondent’s Exhibit 2. Complainant resigned from the Fire Department in February of 2009. Prior to resigning, Complainant had earned \$ 82, 892.00 as a firefighter in 2008.
25. Complainant acknowledges that in 2008 and early 2009, she “more often than not” slept in the Foxborough home that she shared with her husband and children, but claims that she also slept approximately two days a week at a Mercer Street home in south Boston where she had lived as a child. Transcript I at 125-127, 165. Complainant testified that the residency requirement put a strain on her marriage because her husband did not want to live in Boston. Transcript I at 128, 130. Complainant and her husband subsequently divorced.
26. In March of 2009, Complainant moved full-time to Dorchester and wrote to the City requesting reinstatement. Transcript I at 84, 90. Boston Fire Commissioner Fraser contacted Assistant Director of Human Resources Alysha Glazier about the

- legal standards pertaining to reinstatement. Transcript III at 19. Glazier and Boston Fire Department Human Resource Director Robert Moran both testified that Fire Commissioner Fraser had the option, but not the obligation, to rehire an individual who resigned due to noncompliance with the residency ordinance. Respondent's Exhibit 4; Transcript II at 212, III at 20, 55-56. Commissioner Fraser testified that there is a one-year "moratorium" on coming back to the City after leaving due to a violation of the residency ordinance. Transcript IV at 126-127.
27. According to Glazier, Fire Commissioner Fraser was "pushing heavily" to rehire Complainant and another firefighter, Kevin Foley, who had resigned under similar circumstances. Transcript III at 57.
28. Within a few months of moving to Dorchester, Complainant saw Captain Berlo driving in her neighborhood. Transcript I at 85.
29. In May of 2009, Captain Berlo returned to work from his year-long suspension. Transcript II at 186. He went into a pool from which he filled in at vacant positions rather than returning to a permanent assignment at the D Street fire house. Transcript IV at 31, 62.
30. Complainant was rehired as a City of Boston firefighter in March of 2010. Transcript I at 90. During the thirteen months that Complainant did not work as a firefighter, she was employed by Cataldo Ambulance Company. Transcript I at 155. She earned \$16.00 per hour for a total of \$33,400.00 in 2009 and \$10,000.00 in 2010. Transcript I at 93; IV at 149-150. Complainant did not apply for unemployment benefits. Transcript I at 155.

31. During the period that Complainant was not working for the City of Boston, she periodically met with a retired Employee Assistance Program counselor. Transcript I at 95. She received a prescription from her primary care physician for anti-anxiety medication but stopped taking it after a month because she found it to be ineffective and numbing. Transcript I at 137-138.
32. Complainant testified that after she returned to the Boston Fire Department in March of 2010, her base salary was what it would have been had she not resigned but some of her previously-earned sick time was not reinstated and she was forced to use some of her retirement savings during the thirteen months that she out of work. Transcript I at 93-94. Complainant earned \$92,164.00 as a firefighter for 2010 (March to December). Transcript IV at 166.
33. Complainant expected to be reinstated to Engine 39 where she had friends who would swap shifts with her but was told that she was going to be assigned to another company. Transcript I at 91; IV at 149. Complainant was informed that she was being assigned away from Engine 39 to “get a fresh start,” but she believed it was because Captain Berlo’s brother-in-law, Kevin Morrissey, still worked at the house and would feel uncomfortable if she were to return to that location. Id. Deputy Fire Chief Michael Doherty, who handled Boston Fire Department personnel matters between 2007 and 2011, acknowledged that Complainant was not permitted to return to Engine 39 because of Kevin Morrissey’s presence at the fire house. Transcript IV at 50. Commissioner Fraser testified that because Complainant resigned, she temporarily lost her seniority

rights under the collective bargaining agreement² and had to go wherever she was assigned. Transcript IV at 145. Upon her return in March of 2010, Complainant was shown a list of available openings from which she chose Ladder 15. Transcript IV at 158. After working at Ladder 15 for a period of time, Complainant transferred to Engine 2 in South Boston. Complainant testified that returning to work after her resignation was harder and less enjoyable than during her first six years on the Fire Department and that she gained about twenty-five pounds during this period. She acknowledged that around the same time, she also got divorced, which contributed to her stress. Transcript I at 96-97.

34. In October of 2010, Captain Berlo, while off-duty, was involved in a confrontation with Firefighter Douglas Bell at the Engine 39 fire house. Transcript IV at 119. Bell testified that he slid down the fire pole in order to respond to a medical call and was confronted by Captain Berlo, who entered the fire house while off duty and looked at Bell in a “threatening manner” with a cup of coffee in his hand. Transcript III at 88-89. Berlo was put on administrative leave with pay as a result of the incident, pending the outcome of a disciplinary hearing. Complainant was not present when the incident occurred as she no longer worked at Engine 39. Transcript IV at 168.
35. In December of 2010, Complainant sought and received from the Dorchester District Court a harassment prevention order against Captain Berlo. Transcript I at 82-83. At the time, Complainant was working at headquarters on light duty

² Complainant testified that she lost her seniority for “double” the amount of time she was off the force, i.e., after she was back on the force for twenty-six months, her lost seniority rights were returned to her. Transcript IV at 159.

after being out on full disability leave due to a torn rotator cuff. Transcript I at 30, 80; IV at 174. Complainant testified that she obtained the order because of an incident in front of headquarters when Captain Berlo “stared [her] down” through the window of a departmental van before she entered headquarters and thereafter remained outside so that Complainant was afraid to leave the building once she entered it. Transcript I at 80-82.

36. After Complainant secured the harassment prevention order, Captain Berlo obtained tour of duty reports involving Complainant and showed them to his sister, Susan Morrissey. Transcript II at 59. Susan Morrissey took the tour reports to the Suffolk County District Attorney’s Office along with a “YouTube” of Complainant allegedly “flash mobbing” and running a road race while out of work due to her shoulder injury. Transcript II at 60, 123-126; IV at 174. Morrissey and Berlo also went to the FBI to report alleged disability abuses by Complainant. Transcript II at 136-137. The allegations were never proven to be credible.
37. Prior to Captain Berlo’s disciplinary hearing in regard to the incident for which he was on administrative leave with pay, he retired in early 2011. Transcript II at 10, 182; Transcript III at 90, 92.
38. Since the fall of 2011, Complainant has served as a fire instructor at the Fire Training Academy. For the calendar year 2011, Complainant earned \$108,826 as a firefighter. Transcript IV at 166.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

Pursuant to G.L. c. 151B, section 5, a hostile work environment claim must be brought within three hundred days of at least one incident of sexual harassment sufficient to revive the timeliness of earlier matters occurring outside the limitations period. See Cuddy v. The Stop and Shop Supermarket Co. 434 Mass. 521, 533 (2001). The hostile work environment claim in this case was brought on February 9, 2009. Thus, Complainant must allege and prove that at least one incident of sexual harassment by Captain Berlo took place within three hundred days prior to filing, i.e., on or after April 16, 2008, and that the timely incident served as an “anchoring” event for substantially-related, earlier allegations of sexual harassment.

Between April 16, 2008 and February 9, 2009, the following events occurred. There was a hearing on sexual harassment charges against Captain Berlo on April 16, 2008 after which Captain Berlo was given a one-year unpaid suspension from May of 2008 through May of 2009. While Captain Berlo was out on suspension, Complainant saw him occasionally driving by the fire house, driving past emergency calls, driving on Mercer Street in South Boston and driving behind her on Morrissey Blvd.

Complainant describes Captain Berlo’s actions in driving by the fire house, past emergency calls, and on streets in her neighborhood as “nerve-wracking.” She does not, however, claim that Captain Berlo confronted her on any occasion during the three-hundred day period prior to filing her discrimination complaint. In fact, after February 16, 2008, Captain Berlo never again spoke to Complainant. On February 20, 2008, he was placed on paid administrative leave pending an investigation into sexual harassment

charges against him and was prohibited from going to the Engine 39 fire house. Thus, Captain Berlo, by all accounts, had no face-to-face encounters with Complainant during the statute of limitations period. Complainant asserts that during the three-hundred day limitations period she observed him driving around the fire house, past fire calls, and in her neighborhood. Such activity understandably caused discomfort to Complainant. But, as Complainant acknowledged in her MCAD complaint, Captain Berlo lived near all of these destinations. Thus, there was a reasonable expectation that Complainant would occasionally see him in his car.

The case is replete with untimely, yet credible, allegations of sexual harassment occurring in 2007 and early 2008, culminating in Captain Berlo's unwelcome profession of love to Complainant in early April of 2008 which led to Captain Berlo's year-long suspension. Subsequent to April 16, 2008, however, Captain Berlo was removed from active duty. Complainant thereafter occasionally saw him on the street but did not thereafter interact with him. Although Complainant may have found such sightings to be disturbing, they are not sufficient to anchor his prior acts of harassment and revive claims that had become stale.

Complainant attempts to circumvent the three-hundred day statute of limitations by relying on 804 CMR 1:10 (2), a regulation which permits a tolling of the deadline when, "pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within the three hundred days of the conduct complained of and subsequently files a complaint within three hundred days of the outcome of such proceedings(s)." The proceedings undertaken by the Boston Fire Department against Captain Berlo in April of 2008 consist of an internal disciplinary

action, not a grievance proceeding pursuant to an employment contract. The internal disciplinary action is not a basis for tolling under 804 CMR 1.01 (2).

Based on the foregoing, I conclude that the sexual harassment claim must be dismissed.

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 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). In the absence of direct evidence of a retaliatory motive, the MCAD must follow the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). *See also* Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655 (2000).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. *See* Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its

own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Once a prima facie case is established, the burden shifts to Respondents at the second stage of proof to articulate a legitimate, non-retaliatory reason for their action(s) supported by credible evidence. See 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 Respondents succeed in doing so, 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 retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondents are covering up a retaliatory motive which is a motivating cause of the adverse employment action. Id.

Applying the aforementioned elements to the matter at hand, protected activity occurred when Complainant went to Captain Brooks for assistance in February of 2008 in regard to her concerns about Captain Berlo's behavior and when she had subsequent conversations with Andrew O'Halloran of the Fire Department's personnel staff. Those communications led to Captain Berlo being placed on administrative leave, being the subject of a sexual harassment hearing, and being placed on a one-year suspension.

Complainant asserts that she was thereafter subjected to an adverse employment action when Susan Morrissey called the Boston Residency Commission on April 4, 2008 to report that she (Complainant) was living in Foxborough. Complainant maintains that

Morrissey was an agent for her brother who was, in turn, a supervisory employee of the Respondent Fire Department. Complainant alleges that as a result of the call: 1) her residency was questioned by the City of Boston; 2) she was placed on administrative leave with pay pending the outcome of a hearing by the Residency Compliance Commission; and 3) her resignation was accepted by the Fire Department in February of 2009 in lieu of dismissal.

The foregoing actions took place as alleged but cannot be laid at Respondent's doorstep so as to establish an adverse employment action by the Employer that is causally related to Complainant's protected activity. In reporting Complainant's residency violation, Morrissey acted as an independent citizen. She collaborated with her brother who also acted in his private capacity. James Berlo was, at the time, on administrative leave from his supervisory position with the Fire Department and not permitted to function in a supervisory capacity. Berlo and his sister acted in a manner that was separate and distinct from the Respondent Fire Department.

Rather than serving as agents of the Fire Department in reporting Complainant's residency violation, Berlo and his sister acted as tipsters who, for personal reasons, supplied information to the Boston Residency Commission. According to former Residency Commission staff person Alysha Glazier, tipsters are a common source of information to the Commission and are frequently anonymous. Such individuals may be motivated by a variety of reasons, including personal grudges against employees as was the case here.

The Fire Department, itself, played no retaliatory role in regard to the residency matter. When evidence came to light that Complainant's principal residence was in

Foxborough rather than Boston,³ the Fire Department took legitimate steps to place her on administrative leave with pay pending the outcome of a hearing by the Boston Residency Compliance Commission. See Mole v University of Massachusetts, 442 Mass. 582, 598-601(2004) (where decision by employer is unrelated to retaliatory motive of a supervisor, the employer's decision breaks the causal connection between supervisor's retaliatory animus and the adverse action); Roughneen v. Bennington Floors, Inc., 32 MDLR 197 (2010) (no retaliation on part of employer where employee was not fired for protesting a co-worker's sexual advances but, rather, for other reasons). Complainant could have disputed the residency matter but she chose to resign from the employ of the City of Boston. Having short-circuited the hearing process and failed to establish Boston residency, Complainant was required to remain off the force for a year.⁴

It is noteworthy that Fire Commissioner Fraser actively supported Complainant's return to the Fire Department in March of 2010. Although Commissioner Fraser was not obligated to rehire Complainant, he nonetheless chose to exercise his option to do so by "pushing heavily" for her reinstatement. His efforts contradict any contention that the Fire Department acted with retaliatory animus the previous year when Complainant submitted her resignation.

The foregoing demonstrates that Complainant's departure from the Fire Department was neither facilitated nor encouraged by Respondent in retaliation for her charge of

³ The residency ordinance states that "residence shall be the actual principal residence of the individual, where he or she normally eats and sleeps and maintains his or her normal personal and household effects." City of Boston Ordinance Regarding Residency of City Employees 5-5.3.

⁴ Complainant disputes that the ordinance precluded Commissioner Fraser from reinstating her for a year after she left the employ of the City. Such an argument is misguided in light of language in the ordinance which states that, "No person so stricken from a payroll shall be reemployed by the city for a period of one year following the cessation of his or her employment." City of Boston Ordinance Regarding Residency of City Employees 5-5.3.

sexual harassment. However, the circumstances surrounding Complainant's return to the Fire Department are another matter. Upon Complainant's return as a City of Boston firefighter in March of 2010, she was assigned to Ladder 15 rather than reinstated to Engine 39 where she had previously worked, had friends, and was comfortable. Complainant was informed that she was being assigned away from Engine 39 to "get a fresh start," but Deputy Fire Chief Michael Doherty who handled Boston Fire Department personnel matters between 2007 and 2011, acknowledged that Complainant was not permitted to return to Engine 39 because of Kevin Morrissey's presence at the fire house. That Kevin Morrissey blamed Complainant for making a complaint of sexual harassment against his brother-in law is manifest by the fact that he never spoke another word to Complainant after Captain Berlo's sexual harassment hearing. Prior to the sexual harassment hearing the relationship between Complainant and Kevin Morrissey had been friendly.

Complainant testified that returning to work after her resignation was harder and less enjoyable than it had been during her first six years on the Fire Department. Because she was assigned to an unfamiliar location and was not friends with her co-workers, Complainant had difficulty swapping shifts. She therefore lost the flexibility she would have had at Engine 39. Complainant gained about twenty-five pounds during this period. Complainant acknowledged that around this time she also got divorced, which contributed to her stress, but nonetheless made a convincing showing that her work was less satisfying and more difficult than it would have been had she returned to work with her former colleagues.

Complainant's assignment to Ladder 15 was causally-related to her charge of sexual harassment because it resulted from Respondent's determination that she not be allowed to return to Engine 39 in deference to James Berlo's brother-in-law. Complainant lost the benefit of working with friends and colleagues at Engine 39 with whom she could swap shifts. The loss of such an opportunity, in conjunction with the loss of seniority that accompanied her resignation, meant that Complainant had a less favorable schedule than she had previously and increased difficulty modifying her schedule. Such a situation constitutes "tak[ing] something of consequence from the employee." Blackie v. Maine, 75 F. 3d 716, 725 (1st Cir. 1996). The new location to which Complainant was assigned "materially disadvantage[ed]" her. Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997); see Magill v. Massachusetts State Police, 24 MDLR 355 (2002) (refusal to permit Complainant to transfer from one barracks to another constituted an adverse action in retaliation for Complainant filing of a sexual harassment complaint).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for its action, supported by credible evidence. Respondent failed to do so. Instead, it acknowledged that it declined to return Complainant to Engine 39 because Captain Berlo's brother-in-law, Kevin Morrissey, still worked at the house and would feel uncomfortable if she were to return to that location. Accordingly, the facts establish retaliatory conduct in regard to Complainant's assignment in March of 2010.

IV. REMEDIES AND DAMAGES

A. Lost Wages and Benefits

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

Since I have determined that Complainant's resignation from the Fire Department in 2009 was directly and proximately caused by her violation of the Boston Residency Ordinance rather than by the retaliatory actions of individuals acting as agents of the Boston Fire Department, Complainant is not entitled to monetary compensation for loss of income between her resignation and her return to the Fire Department in 2010.

Complainant testified that after she returned to the Boston Fire Department in March of 2010, her base salary was the same as it would have been had she not resigned. Thus, she sustained no loss of income after she was re-hired. Although Complainant testified that some of her previously-earned sick time was not reinstated upon her return, she failed to substantiate this claim. For these reasons, I decline to award compensation for the loss of compensation and benefits.

B. Emotional Distress Damages

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

to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 at 576.

As the Supreme Judicial Court has noted, there must be substantial evidence of a causal link between the claimed emotional distress and the alleged discriminatory conduct. See DeRoche v. MCAD, 447 Mass.1, 8 (2006) (where the Court determined that there was no causal connection between the discriminatory act of retaliation and the employee's emotional distress); Stonehill College v. MCAD, 441 Mass. at 576.

Complainants may, in addition to suffering distress caused by discrimination, suffer distress from factors unrelated to the discriminatory act. See Williams v. Karl Storz Endovision Inc., 24 MDLR 91 (2002) (and cases cited); Raffurty v. Keyland Corporation, 22 MDLR 125, 128 (2000). While the presence of other stressors does not absolve a respondent from liability, the amount of distress should be apportioned as equitably as possible.

For the reasons set forth above, Complainant is not entitled to emotional distress damages for the circumstances prior to her return to the Fire Department in March of

2010. As far as the circumstances in March of 2010 and beyond are concerned, Complainant was experiencing a turbulent period in her life marked by divorce, changing employment, and a new living situation. Complainant testified convincingly that her assignment to Ladder 15 rather than Engine 39 contributed to her stress since it separated her from friends and colleagues from whom she could have drawn for support, both emotional and practical. I credit Complainant's testimony that the friends and colleagues she had at Engine 39 would have assisted her in managing her schedule by swapping shifts when necessary. Complainant was deprived of such support so that Captain Berlo's brother-in-law would not be made uncomfortable by having to tolerate Complainant's presence. Based on these circumstances, I conclude that Complainant is entitled to \$25,000.00 in emotional distress damages.

VI. ORDER

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

- (1) Cease and desist from all acts of retaliation;
- (2) Pay Complainant the sum of \$25,000.00 in emotional distress damages with interest at the rate of twelve per cent per annum continuing until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

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

after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 17th day of April, 2014.

Betty E. Waxman, Esq.,
Hearing Officer

