

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & MARY JANE MCSWEENEY,
Complainants

v.

DOCKET NO. 07-BEM-01947

THE TRIAL COURT OF MASSACHUSETTS,
Respondent

Appearances:

Gregory C. Howard, Esq. for Mary Jane McSweeney
Anne-Marie Ofori-Acquaah, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 6, 2007, Mary Jane McSweeney filed a complaint with this Commission charging Respondent, the Massachusetts Trial Court, with discrimination based on age and gender in violation of M.G.L.c.151B, when it rejected her for the position of Operations and Maintenance Supervisor for the Plymouth Courthouse. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on July 12-16 and August 12, 13, and 18, 2010. After consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Mary Jane McSweeney, is a female over the age of 40, born on March 30, 1945. She resides with her husband in Hyannis, Massachusetts. Complainant began her employment with the Respondent in June 1989 in the position of Senior

Administrative Assistant/Environmental Services Manager in the Respondent's Court Facilities Bureau. She is currently one of seven Regional Facilities Managers.

2. Judge Robert A. Mulligan has been the Chief Justice for Administration and Management of Respondent, Trial Court since October 2003, and is responsible for oversight and management of the Trial Court. He is also the hiring authority for Respondent. Judge Mulligan reports to the Chief Justice of the Supreme Judicial Court. Robert Panneton is Judge Mulligan's chief of staff.

3. Respondent, Trial Court, consists of seven individual judicial departments, each headed by a Chief Justice and nine administrative departments, each headed by a director who reports to Panneton.

4. Robert Panneton has worked for Respondent for 46 years and has been chief of staff to the Trial Court since October 2003. Panneton reports to Judge Mulligan, supervises the directors of the nine administrative departments of the Trial Court, the Director of Probation, and Office of the Jury Commission. He oversees the day-to-day operations of the court system.

5. The Court Facilities Bureau ("CFB") is one of nine administrative departments of the Trial Court and is responsible for the care, custody, control, maintenance and upkeep of all 63 state-owned courthouses in Massachusetts. Stephen Carroll has been the CFB's Director since its inception in 1988. Carroll reports to Robert Panneton.

6. Robert LaRocca has been the CFB's Operations Manager since 1992 and is responsible for the Bureau's fiscal and human resource matters. He is responsible for housekeeping and maintenance, and administration and finance. LaRocca reports to

Stephen Carroll and supervises all the Regional Facilities Managers, including Complainant.

7. In 2006, Anthony Granger was Statewide Building Systems Manager for the CFB. Granger has 25 years of experience managing buildings and has substantial technical knowledge and expertise. Granger is certified in HVAC, CFC (refrigeration, Freon), power plant certification training, quality assurance, safety training and hazmat. Granger oversaw all building systems, maintenance, infrastructure and capital projects. This included indoor air quality, life safety, energy management, heating and plumbing. He also handled budget matters relating to building systems. All the building systems managers in the CFB reported to Granger, who reported to Stephen Carroll. Granger recently moved from his statewide position to concentrate on new courthouses, such as the Fall River courthouse. Granger has worked with Complainant for many years and they are friendly.

8. The Division of Capital Asset Management (“DCAM”) is the state agency that manages the construction of new state buildings. DCAM also maintains ownership of, and performs capital improvements on, all state buildings, including courthouses. DCAM was involved in the design and construction of new courthouses in Worcester and Plymouth.

9. Michael McKimney has been Deputy Commissioner for DCAM’s office of planning, design and construction for over nine years and is responsible for the day- to-day management, planning and programming of state buildings and overseeing new construction and renovation of state facilities. McKimney is authorized to sign contracts on behalf of the Commonwealth with the General Contractors hired to work on state

building projects. McKimney receives regular reports and makes regular visits to locations under construction. He also attends quarterly meetings with Judge Mulligan, the Chief Justice of the SJC, Judge Cordy, Stephen Carroll, and Robert Panneton.

10. Respondent has a close working relationship with DCAM. Former Chief Justice Margaret Marshall, Chief Justice Mulligan, Panneton, Carroll and other Trial Court managers met regularly with DCAM Commissioner Dave Perini and Deputy Commissioner Michael McKimney to discuss trial court projects.

11. As a Regional Facilities Manager, Complainant oversaw the operation of seven courthouses in Suffolk County. In 2006, three facilities managers and building supervisors reported to her.¹ Complainant is currently one of seven Regional Facilities Managers, and one of only two women in that position. (Ex. R-1)

Complainant's Work History

12. Complainant earned a G.E.D. in 1990 and a B.A. in English from UMass Boston in 1999.

13. From 1962 to 1967, Complainant worked for the A&P billing department. After raising four children, Complainant became employed in 1981 as a part-time secretary in housekeeping at the Hebrew Rehabilitation Center in Roslindale. Working for various employers who held housekeeping contracts with the Hebrew Rehab, Complainant advanced to the position of assistant director for housekeeping, a position she held until her employer lost its contract with Hebrew Rehab.

14. Following her employment at the Hebrew Rehab, Complainant was employed by the Spaulding Rehabilitation Center, where she supervised the maintenance of five

¹ As of 2008, Complainant no longer manages the Dorchester and Roxbury Courts but manages the Barnstable, West Roxbury, East Boston, Brighton, South Boston and Chelsea Courts.

floors, in addition to working weekends and holidays at Mass General Hospital where she was in charge of housekeeping and maintenance reporting for two buildings.

15. In 1989, Complainant was hired by Respondent as a Senior Administrative Assistant/Environmental Services Manager at the Suffolk County courthouse complex. In 1992, Complainant's position was reclassified as Building Supervisor. According to Complainant, she was able to reduce the number of custodial employees on her shift from 65 to 35 while maintaining the same quality of work.

16. In 1993, Complainant was promoted to the position of Facilities Manager and took over management of courthouses in Roxbury, West Roxbury and Dorchester. In this position, she managed custodians, technicians, building supervisors and facilities managers. She also supervised painters, carpenters, electricians, plumbers and security personnel and began interacting with judges.

17. In 1997, Complainant acquired management of additional courthouses in East Boston, Brighton and South Boston. In 1999, Complainant became involved in the building of a new Chelsea courthouse, which was assigned to her in 2000, bringing the total number of courthouses she supervised to seven. In 2002, her position was reclassified to Regional Facilities Manager, retroactive to 2000. This is the position she currently holds. As of 2008, Complainant no longer manages the Dorchester and Roxbury courthouses but still manages the Barnstable, West Roxbury, East Boston, Brighton, South Boston and Chelsea Courthouses.

Complainant's Duties and Responsibilities

18. As a Regional Facilities Manager, Complainant works with and oversees building systems managers and building supervisors. Each morning she checks in with

building managers and systems managers to ensure operations are running smoothly and to trouble-shoot any problems. Based on their reports, she decides which courthouses to visit on any given day. Complainant spends much of each day traveling to the courthouses she oversees, addressing any problems related to maintenance and operation of the facilities and dealing with personnel issues. She also reviews job orders and purchase requests to determine what funds, equipment or staff are required to meet the needs of a particular job. With the help of her administrative assistant, Complainant enters orders into the Maintenance Management System and prepares monthly reports and other required paperwork. In 2006, Complainant supervised three Facilities Managers and Building Supervisors, as well as custodians and senior maintenance technicians. Complainant has knowledge of the technical aspects of facilities maintenance, but has no hands-on experience with technical work or the building trades. However, there is a Building Systems Manager responsible for the technical work in each region. Complainant is also trained in operating a computer based HVAC system.

19. In 2006, the Building Systems Manager responsible for the technical aspects of Complainant's buildings was Doug Loud, who possessed the requisite technical skills. CFB's Operations Manager, LaRocca, testified that if he wanted a report on technical problems he would contact Loud. Complainant did not supervise Loud, who reported directly to Granger, the statewide Building Systems Manager.

20. Complainant testified that she is called upon more often than other regional facilities managers to perform the personnel function of conducting pre-disciplinary hearings for union employees of the court facilities as part of Respondent's disciplinary process. Complainant conducts the hearings, recommends discipline, and refers the

matters to Steve Carroll. Complainant's responsibilities also include dealing with troubled employees, and mentoring and training new supervisors on how to conduct pre-disciplinary hearings.

21. Complainant was also the CFB's designee to participate in Respondent's employee reclassification process and in 2000, she sat on a panel that evaluated whether to reclassify the positions of 400 employees.

22. In 2004, Complainant traveled to the Worcester courthouse once a week for the entire year to assist that building's regional facilities manager in dealing with troubled employees.

23. Complainant helped to facilitate accommodations for a disabled employee of the West Roxbury courthouse who was confined to a wheelchair. Working with an employee of the court capital projects department, Complainant directed employees to remove a bathroom threshold, to provide a ramp from the parking lot to the courthouse, and to widen corridors by removing baseboards. She undertook various other measures to ensure the employee was accommodated.

24. In addition to her regular duties, Complainant also assisted at other courthouses that were not directly under her supervision. She stated that whenever a new courthouse was opening, she was called upon to assist with interviewing job applicants, organizing operations, and selecting furniture, fixtures and equipment. She worked closely with other regional facilities managers and was involved with opening courts in Brockton, Chelsea, Falmouth, Fall River and East Brookfield.

25. In 2001, during the Martin Luther King Day weekend, a pipe burst at the South Boston Courthouse and flooded the building. Complainant brought in a clean-up

crew and took steps to obtain a generator to provide light and heat to the building. In addition, Complainant obtained permission from the Boston Fire Department for the court to open, despite a damaged fire panel, by assigning a crewmember to remain at the courthouse round the clock until the panel was repaired the following Monday. Complainant's pro-active measures allowed the courthouse to reopen earlier than it otherwise would have, and minimized disruption to court proceedings.

26. In 2006, Complainant assisted Judge Mulligan in preparing for the October re-dedication of the 80-year-old South Boston courthouse in honor of the late Judge Joseph Feeney. Judge Feeney had been a close friend of Judge Mulligan and the dedication of the courthouse in Feeney's name was an important project to Mulligan. Complainant testified that she and her crew worked tirelessly to ensure that the renovations were completed on time. Complainant oversaw the entire operation, which included cleaning out the third floor, repairing stairs, turning a storage closet into a bathroom, renovating another bathroom, replacing the courtroom ceiling to improve the acoustics, and installing new lighting and a new air conditioner. On the day of the dedication, Mulligan toured the building with Complainant and praised her for doing a great job with the renovations.

27. CFB's Director, Steve Carroll, testified that he has high regard for Complainant professionally because of her strong work ethic, her willingness to perform whatever tasks are requested of her and for her ability to mentor employees who encounter difficulties on the job. I credit his testimony.

28. CFB's Operations Manager, LaRocca, testified that Complainant is a very good regional facilities manager who has extensive experience with the court system, its

administration and policies and has experience working co-operatively with technical employees. LaRocca stated that Complainant possesses a very strong work ethic and sets high standards for herself and her staff. He stated that Complainant mentored and trained regional managers with respect to pre-disciplinary hearings, a process that required managerial experience, knowledge of the various jobs and union contracts, and the ability to listen and ask the right questions. LaRocca assigned Complainant to the staffing of other new buildings because of her managerial competence. He noted that Complainant received high praise from numerous judges and I credit his testimony.

29. In February 2006, LaRocca nominated Complainant for an employee excellence award. Complainant and 15 others were selected for awards from among 7,000 trial court employees. At the awards dinner, Mulligan recognized Complainant's mentoring and training skills, stating that he was privileged and honored to present the award to someone who was truly worthy. LaRocca also spoke at the dinner noting that Complainant had faced professional challenges head-on over the years, despite numerous difficulties in her personal life. Complainant testified that the personal challenges he referred to were her husband's suffering from lung cancer and her son's having incurred a brain injury caused by an accident. She testified that she felt very special on the day she received the award. I credit Complainant's testimony.

Job Classifications for Court Positions

30. Mark Conlon is currently Respondent's acting director of human resources. In 2006 and 2007 Conlon was a personnel specialist whose job included classifying positions and advising Respondent about job descriptions. Conlon testified that a Building Supervisor is a Level 14 union position that encompasses custodial and other

maintenance of a single courthouse. A Facilities Manager is a Level 16 position that involves managing a cluster of buildings or a smaller, newer building. A Regional Facilities Manager is a Level 18 position that involves management of an older larger complex, a high rise, or a number of courthouses in a region. A Buildings Systems Manager deals with the technical aspects of a building's operation, such as HVAC and other systems.

Operations & Maintenance Supervisor Position

31. With the advent of Respondent's newer, state-of-the-art courthouse complexes, Respondent developed a new senior management position within the CFB called "Operations & Maintenance Supervisor ("O&M"). DCAM assisted Steve Carroll and Conlon with development of the job description for this position. Conlon testified that DCAM envisioned the O&M position as a senior management position for the operation and management of new buildings.

32. Carroll testified that the O&M supervisor is charged with managing newer, larger, more sophisticated building systems and that in filling such positions, Respondent sought individuals with technical knowledge and familiarity with building codes and state requirements. According to Carroll, they also sought individuals with the ability to supervise and motivate employees with technical backgrounds, the ability to manage buildings safely and securely and individuals dedicated to the Trial Court's mission. Carroll testified that writing and communication skills are important because communicating with judges is a major component of the job. He stated that skills managing people are actually more important to the O & M Supervisor position than the technical skills, as the position requires someone able to lead all facets of facility

operations. Carroll viewed the Regional Facilities Manager position as a career ladder position leading to the O&M job. I credit his testimony.

33. The O & M job description states as follows:

POSITION SUMMARY

Working with the Court Facilities Department of the Administrative Office of the Trial Court, (AOTC), the Operations and Maintenance Supervisor manages all aspects of the integrated facility operations and services in one or more court facilities, regionally or multi-regionally, including a 190,000 square foot new Trial Court Complex built in Plymouth. Oversees the supervision of a large, multi-trades workforce engaged in activities associated with the operations and maintenance of court facilities. Also plans, oversees, and coordinates the implementation of construction and capital improvement projects, and directly participates in overall facilities planning for the Judicial branch at designated court locations. The incumbent implements strategic and routine programs for operating and maintaining safe and healthy court facilities, consistent with all applicable codes and regulations, guidelines and industry standard practices, including BOMA and IMFA.

DUTIES AND RESPONSIBILITIES

Provides technical leadership for the integrated physical plant activities and programs of the facility, to include maintenance, construction and facilities management • Oversees all facets of the daily operations of the organizational unit, ensuring compliance with state and federal laws and Trial Court policies and procedures • Works with AOTC to oversee the planning, coordination, and implementation of major capital improvement projects for the facility • Oversees commissioning and retro commissioning at the facility • Oversees the supervision of personnel, which includes work allocation, training, and problem resolution • evaluates performance and makes recommendations for personnel actions • motivates employees to achieve peak productivity and performance • Oversees the activities of external/and or internal contract personnel monitors and inspects work to ensure adherence to contract specifications and industry standards • Develops or assists with the development and implementations of policies and procedures consistent with those of the organization to ensure efficient and safe operation of the unit • Develops and implements systems and processes to establish and maintain records for the operating unit • Evaluates preventive maintenance programs • modifies programs to increase efficiency and effectiveness • Develops, implements, and administers a large, multi-faceted operating budget, to include salaries and benefits, utilities, and supplies • Establishes and maintains appropriate customer services procedures and standards • Interfaces with customers and resolves problems and conflicts as necessary

- Remains available to the facility on a 24-hour, 7-day on call basis as principal respondent to physical plant emergencies and off-standard situations, as required
- Oversees the development and implementation of physical security, safety, and disaster recovery programs, procedures, and operations for the facility
- Consults and interacts with the Division of Capital Asset Management and Maintenance, AOTC, and external consultants as appropriate regarding facilities modification/repair options, strategies, and cost; develops project specifications and prepares bid documentation
- Performs miscellaneous job-related duties as assigned
- Duties may include activities at other Trial Courthouses.

QUALIFICATIONS

Knowledge of customer service standards and procedures • Understanding of the integration of physical plant and facilities services operations of a large, complex institutional facility • Knowledge in computer aided facility management for HVAC, lighting, etc • Skill in organizing resources and establishing priorities • Ability to supervise and train employees, to include organizing, prioritizing, and scheduling work assignments • Skill in examining and re-engineering operations and procedures, formulating policy, and developing and implementing new strategies and procedures • Skill in the use of computers, preferably in a PC, Windows-based operating environment • Project management and planning skills • Ability to foster a cooperative work environment • Knowledge of building trades, repairs and maintenance • Knowledge of staff hiring procedures • Knowledge of contract administration • Strong interpersonal, communication and writing skills, and the ability to work effectively with a wide range of constituencies in a diverse judicial community • Knowledge of budgeting, cost estimating, and fiscal management principles and procedures • Knowledge of federal, state and local codes and ordinances pertinent to facilities planning, design, construction, and maintenance • Ability to respond outside of normal working hours on an on-call or pager basis • Ability to develop and implement facility contingency programs and procedures

PREFERRED QUALIFICATIONS

Bachelor's of Science degree from an accredited college or university in Facility Management, Business Administration or a related field • Building Operation certificate • Certified Plant Engineer.

(Ex. J-10)

New Courthouses

34. In 2006, Respondent was scheduled to open a new 180 million dollar court complex in Worcester and a 71 million dollar courthouse in Plymouth. Respondent worked closely with DCAM on the planning of these buildings. The 465,000 square foot Worcester complex is the largest courthouse the state has ever built, with 26 courtrooms. It is approximately three times the size of the 190,000 square foot Plymouth courthouse, which has nine courtrooms. Both Court complexes contain state-of-the-art heating, air conditioning and ventilation systems, however, they differ in some respects. Worcester has an entropy wheel by which part of the heating system recycles and Plymouth has a humidification system and has more equipment for the removal of wastewater because of its connection with local sewer systems. Both courthouses have sophisticated smoke evacuation and fire systems, sophisticated recording systems in the courtrooms and holding cells with sophisticated monitoring systems. Worcester's systems are larger because the buildings are larger, but both are large, complicated buildings with expensive internal systems that are important to maintain. The buildings were largely completed in 2006 and were expected to "come on line" at approximately the same time. (Testimony of Granger & McKimmey)

35. In 2006, Judge Mulligan toured the Worcester Courthouse with DCAM Commissioner Perini. During the tour, Perini told Mulligan that Respondent must find highly qualified people to provide technical leadership for the Worcester and Plymouth courthouses. Mulligan asked Perini for that agency's assistance in hiring an O&M for each of the new courthouses and he was committed to finding "the very best people" to run the buildings. Subsequent to his discussion with Perini, Mulligan instructed Chief of Staff to the Trial Court, Panneton, to ensure that a representative of DCAM was involved

in the hiring process in Worcester and Plymouth. Panneton testified that Mulligan told him he wanted someone from DCAM specifically on the Worcester panel but “not so much” on [the Plymouth panel] with technical knowledge who did not come from the court system. Panneton testified that he relayed Mulligan’s instructions to Stephen Carroll. I credit their testimony.

36. CFB’s practice with respect to hiring employees was for Carroll to assemble a panel of at least three people to review all applications and resumes, to determine which of the applicants to interview, and to recommend a list of the top candidates for Carroll’s review and ultimately for Judge Mulligan’s approval.

Worcester O&M Hiring Process

37. From February 13th to 27th, 2006, CFB posted a vacancy for an O&M for the new Worcester Courthouse. Carroll assembled a panel of three, including himself, to review the applications, interview the candidates and make recommendations for the position. The Worcester panel also included DCAM employee Tom Tagan and Statewide Building Systems Manager Tony Granger. Carroll testified that Tagan was placed on the panel to offer a different perspective on the candidates. Tagan is an administrator, not an engineer and held no trade license, according to Carroll. Carroll stated that he did not recall Panneton instructing him to have someone from DCAM on the Worcester or Plymouth hiring panel; however, I find that Panneton instructed Carroll to include someone from DCAM on the Worcester and Plymouth panels. There were no female candidates for the Worcester O&M position.

38. Carroll testified that the Worcester search panel sought to hire the candidate whose skills best matched the job description and who understood the state’s judicial

system. Granger testified that he helped develop the questions for the Worcester interview. Each applicant was asked the series of questions.

39. The Worcester panel recommended Joseph Indrisano, who has worked for Respondent since 1980 as a Facilities Manager and a Regional Facilities Manager for several courthouses in the Worcester area. Prior to working for Respondent, Indrisano had experience in general construction, painting and general repairs, served in the Marine Corps as a telephone lineman, and over the years took numerous technical courses at Fitchburg State College with the intention of becoming an industrial arts teacher. He did not obtain a degree. He holds no technical licenses and has no certifications in HVAC or in other highly technical areas.

40. Judge Mulligan testified that despite having reservations about the Worcester process, he did not conduct a review of the hiring process, and after conferring with Panneton, he approved the panel's recommendation and appointed Indrisano to the Worcester O&M position, effective June 5, 2006.² Working under Indrisano are licensed electricians, plumbers and carpenters.

Activities of Complainant Relative to the Plymouth Courthouse

41. It was common knowledge that Complainant was interested in the O&M position in Plymouth. Complainant referred to the Plymouth Court house as her "baby." Since as early as 2001, Complainant had attended meetings and written memoranda regarding the Plymouth Courthouse to discuss storage space and to order equipment. (Jt. Exs.23; 24) She had met with Granger and others to discuss design of the loading area and requested authorization to meet with the architects. (Jt. Ex. 25) Complainant attended numerous construction meetings regarding the Plymouth courthouse. (Jt. Ex. 27)

² No evidence was introduced about the field of candidates for the Worcester O&M position

Carroll testified that Complainant undertook these tasks to assist Andy Couto, who was then Regional Facilities Manager for Barnstable and Brockton courts. (Jt. Ex. 5)

42. In October 2006, Complainant interviewed and recommended for hire to the new Plymouth courthouse a building systems manager, Joe Renzi and an assistant building systems manager, Mark Ronan. (Jt. Ex. 27) In January 2007, she created a preliminary staffing plan and interviewed and recommended staff to be hired by Respondent who would serve under the O&M. (Jt. Ex. 28) Complainant purchased a truck to be used for the O&M and was given the keying schedule. Complainant also attended the groundbreaking and topping off ceremonies at Plymouth. (R-2) Complainant anticipated being appointed to the new O&M position in Plymouth, believing that she possessed the requisite skills and experience for the job.

Plymouth O&M Selection Process

43. The O&M position for Plymouth was posted from October 4 to November 15, 2006. The posting period was four weeks longer than the usual posting to ensure a wider pool of candidates. In addition to internal posting, the job was posted on the Respondent's website, at DCAM and in building trades publications. Respondent sought to have court facilities employees on board as soon as possible for training on the new systems.

44. Carroll was aware that Complainant was interested in the Plymouth O&M position, felt it would be a natural career move for her, and knew it was closer to her home on Cape Cod. He had no reservations about her ability to perform the O&M job and believed that she was qualified for the position. I credit his testimony.

45. Complainant submitted her resume and cover letter on or about October 25, 2006. Along with her resume, Complainant submitted letters of recommendation from three judges and two clerk magistrates, all of whom she had worked with in her regional facilities manager position. The letters were highly complimentary and praised Complainant for her high level of professionalism, dedication and commitment to her job; her talent, knowledge, energy, her work ethic, leadership ability, her organizational skills and her loyal and devoted staff. All of the letter writers highly recommended Complainant for the O&M position. (Ex. Jt. 2)³

46. Carroll testified that he convened a selection panel with a broad perspective to interview and recommend a candidate for the Plymouth O&M. Carroll chose Ellen Bransfield, a long-time Land Court administrator, as a “customer,” who understood the relationships between judges and court facilities. LaRocca testified that Bransfield added credibility to the process. Granger was chosen for his technical expertise, and LaRocca was selected because the O&M would report to him. There was no representative from DCAM on the panel. Carroll could not recall why he did not include a DCAM representative on the panel and had no recollection of Panneton instructing him to do so.

47. At LaRocca’s request, Granger pre-screened the applications in order to eliminate unqualified candidates. Granger testified that no one on the Plymouth panel asked him about the Worcester interview process.

³ One recommendation was from Judge Kathleen Coffey, who wrote, in part, that Complainant “...possesses many admirable traits including a superior work ethic, personal integrity, strong leadership abilities and a wonderful sense of humor. All of these qualities have earned her the respect and support of the people she supervises and the many judges she interacts with on a daily basis in the performance of her duties...the buildings under her supervision are remarkable for their record of cleanliness, safety and beauty.”

48. Although it was a desirable position, Complainant was the only internal candidate for the position. The panel interviewed 11 of 25 applicants and developed five questions with five possible points per question, for a high score of 25 points.

Complainant knew who was on the interview panel before her interview.

49. Ronald DePesa submitted an application for the Plymouth Operations & Management Supervisor position and he was ultimately selected over Complainant for the position. DePesa was born on July 12, 1953 and is eight years younger than Complainant. He continues to hold the O &M Supervisor position in Plymouth. DePesa has an Associate's Degree in Building Technology and a Bachelor of Science degree in project management from Wentworth Institute of Technology. He has licenses in refrigeration, oil burners, pipefitting, sprinklers, and wastewater Grade I. He also has a Backflow certificate and a Title 5 Inspector's certificate. He is an indoor air quality investigator, a certified engineering technician, a member of the Massachusetts Facility Managers Association and Refrigeration Service Engineering Society. (Jt. Ex. 3) He also teaches courses in HVAC-R, oil burners and facilities management at the Peterson School of Trades.

50. DePesa worked at Boston College from 1985 to 2003. His first job there was in the department of buildings and grounds (later called the Department of Facilities Management) as an HVAC mechanic. Over time, his duties were expanded and in about 1992, the combined shops he ran were renamed the Mechanical Shop, where he supervised six HVAC mechanics, two preventive maintenance mechanics, six plumbers and two Emergency Management Systems (EMS) mechanics. He also managed the budget for the Mechanical Shop.

51. When DePesa left Boston College, his title was Facilities Manager. He oversaw the combined mechanical services and was in charge of the following technical services: electrical, mechanical, carpentry, central heating plant, and garage. He was also responsible for ensuring that the HVAC system at the college ran properly. DePesa did not supervise carpenters and electricians, nor did he supervise the college's continuously operated steam plant or its science building, both of which had their own managers. DePesa reported directly to Terrence Leahy, who was in charge of all union shops. Leahy reported to the Director of Facilities Management, who reported to the Vice President for Facilities Management.

52. In 2003, DePesa left Boston College for the position of Facility Manager for the Norwell Public Schools, where he managed all of the school buildings and supervised a custodial supervisor and 15 custodians. He reported to the Director of Business Services.

53. The process for the Plymouth O&M interview consisted of a number of questions asked to all the candidates. After each interview, rather than individually scoring the candidates' answers, the panel discussed the candidate's response to each question and agreed upon a score for each question and a total score for each candidate, (Ex. 5a; 5b) LaRocca testified that after Complainant's interview, he offered to recuse himself from participating in rating her because she was the only internal candidate, but the others did not believe this was necessary. Granger and Bransfield each testified that LaRocca never offered to recuse himself, and Bransfield did not then know that LaRocca was Complainant's direct supervisor. Complainant scored the highest with a 23.5; Neil Kilpeck scored second and DePesa scored third with 20.5.

54. LaRocca drafted a memorandum to Carroll explaining the panel's decision and draft recommendation, and sent it to Bransfield to edit. (R-3) Bransfield testified that she returned the memorandum to LaRocca with her edits and suggestions that LaRocca adopted, and on December 14, 2006, the panel submitted the names of the three top candidates to Carroll. After her interview, another Regional Facilities Manager told Complainant that she had received the high score and that the panel had recommended her to Carroll.

55. On December 20, 2006, Carroll sent the names of the candidates to Judge Mulligan, via Panneton, along with a memorandum, in which he wrote that Complainant scored the highest and was the committee's unanimous choice for the position. He also detailed Complainant's work experience. In the memorandum, Carroll noted that Complainant was involved in planning for the opening of the Chelsea, Falmouth and Brockton courthouses, but he did not mention that Complainant had worked on the new Plymouth courthouse for a number of years. Carroll included with the memorandum only Complainant's application and resume, although typically after such a search process, he would send all of the candidates' applications.

56. Panneton testified that upon receiving Carroll's memorandum he asked Carroll why Tagan had not been on the interview panel. Carroll responded that Tagan had a potential conflict with Kilpeck, who oversaw two state office buildings and who may have interacted with Tagan in that capacity. Panneton told Carroll that he should have informed him if he were concerned about conflicts or substituted another DCAM employee. Panneton further suggested to Carroll that if he were concerned about conflicts, he had only to look at the three panel members, all of whom were well

acquainted with Complainant. Panneton reported this conversation to Judge Mulligan. I credit Panneton's testimony.

57. Carroll denied that Panneton questioned him about Tagan not being on the panel. I do not credit Carroll's testimony in this regard. Carroll recalled that Panneton told him that the application process was going to be re-examined and asked Carroll to provide him with the candidates' applications.

58. Judge Mulligan testified that when he learned that there was no representative from DCAM on the interview panel, and knowing that Carroll and LaRocca both liked Complainant and had worked with her for many years, and that LaRocca was aware of her strong interest in the position, he became skeptical of the fairness and objectivity of the process. He believed that the hiring process gave Complainant an unfair advantage and that LaRocca should not have been on the panel. The Judge also thought that Granger's judgment might have been affected by the fact that he knew Complainant wanted the position. He believed that Bransfield was the only member of the panel who could make an independent judgment.

59. Judge Mulligan testified that because of these concerns, he asked DCAM Deputy Commissioner Michael McKimney to review the top five candidates' qualifications. McKimney was heavily involved with the construction of the Plymouth and Worcester courthouses, and Mulligan believed he would make an independent evaluation. Mulligan instructed Panneton to sit in while McKimney look at the finalists' resumes, and to schedule interviews with him.

60. On January 26, 2007, Panneton and McKimney met for approximately two hours as McKimney reviewed the applications of the top five candidates, giving his

opinion of each candidate along with his recommendation. McKimney “leafed through” each of the applications, commenting as he went through them. Panneton took notes as McKimney commented on the applications and did not ask McKimney to elaborate on his comments. When he finished, Panneton asked him for his opinion of the qualifications of the five.

61. McKimney testified that he told Panneton that Complainant was a highly qualified career employee of the trial court, who had obviously impressed colleagues in view of the number of letters of recommendations attached to her application. Panneton’s notes regarding McKimney’s comments on Complainant’s application were: “qualified” and “devil you know is better.” McKimney testified that he was referring to the saying, “the devil you know is better than the devil you don’t know,” meaning that Complainant was a known quantity.

62. McKimney testified that he told Panneton that he was impressed with DePesa’s educational background and his degree from Wentworth, a school that, in his experience, trained people well. He was also impressed by DePesa’s position as facility manager at Boston College, a multiple building campus with sophisticated systems. He also looked favorably on DePesa’s multiple licenses and hands-on experience in mechanical systems. Panneton’s notes regarding McKimney’s comments on DePesa stated “has the right credentials, good education, guy might be alright, strong.” (Jt. Ex. 11)

63. McKimney then ranked DePesa first because of his “credentials and Wentworth.” He ranked Complaint second, with the words, “great experience, known quantity.”

64. McKimney testified that he did not convey his thoughts and impressions of the applications and resumes of the candidates to anyone other than Panneton and had no further involvement in the selection process. According to Judge Mulligan, after McKimney reviewed the applications with Panneton, Judge Mulligan joined them in Panneton's office, and McKimney told the Judge that in his opinion, DePesa was the strongest candidate, Complainant was second and that Kilpeck was overqualified. I credit McKimney's testimony that he did not meet with or speak to the Judge after he reviewed the applications with Panneton. McKimney's testimony in this regard is consistent with Panneton's, who testified that he alone advised the Judge about his meeting with McKimney. Panneton then directed Judge Mulligan's administrative assistant to call the candidates and set up appointments with Mulligan.

65. Complainant called Carroll to tell him she was meeting with Judge Mulligan. Both Carroll and Complainant testified that they discussed this meeting as a "meet and greet." Complainant testified that she believed she already had the job and was not aware that that her meeting with the Judge was a formal interview. This view is inconsistent with Carroll's testimony that Panneton told him that there was going to be a "re-examination" of the interview process." I believe that Complainant knew that she was being re-interviewed for the position by Mulligan.

Judge Mulligan Interviews the Candidates

66. Judge Mulligan interviewed the top five candidates on or about February 1, 2007. The Judge testified that the first question he asked each candidate was, "Why do you want this position?" He then asked questions about each person's education and experience. He asked them what about their background made them the best candidate

for the position. The last question he asked each candidate was “Is there anything you want me to know about you that I haven’t asked?” Panneton was present at the interviews and took notes. He did not show the notes to Judge Mulligan. Panneton had possession of the candidates’ applications and resumes and did not give them to Judge Mulligan.

67. DePesa responded that he wanted the position because it would be an honor and privilege to work at the courthouse. He told Mulligan he was a workaholic and once slept at the school in Norwell to monitor the frozen pipes. Judge Mulligan asked him about growing up in Hyde Park and attending Wentworth Institute. The Judge also asked him general questions about building systems and his familiarity with older and newer buildings. DePesa told Judge Mulligan he was in charge of operating and developing the DDC (direct data control), HVAC and plumbing systems at Boston College and explained how the plant had grown. He described working long hours under great pressure when trying to open the Alumni Stadium and working with the DDC and EMS (energy management system). Judge Mulligan testified credibly that he believed DePesa was, at that time, the second in command to the facilities director at Boston College. Although the Judge was not correct in this assumption, I find that this was an innocent error, given the numerous organizational changes at B.C during DePesa’s time there. Judge Mulligan testified that he was very impressed with DePesa’s attitude, character and technical expertise, which he believed was the overarching need in the position. DePesa’s testimony regarding the interview corroborated that of Judge Mulligan. DePesa testified that he accurately described his job as Facilities Manager for technical services, but that he never told Judge Mulligan he was second in command at B.C. Judge

Mulligan testified that he is currently not aware of the scope of DePesa's duties at B.C., but believed, at the time he made the decision to hire DePesa, that DePesa had been second in command to the manager of all B.C.'s facilities and was very high up.

68. Judge Mulligan interviewed Complainant on February 1, 2007. She told him she wanted the job because it paid more and was a shorter commute. He found her answer to this question to be "unprofessional" and felt she should have given a substantive response. Complainant stated that at the time she believed that she had been selected for the job because Carroll had informed her that the meeting with the Judge was simply a "meet and greet." Complainant testified that she never would have said she wanted the job because of the money and proximity to her home had she known it was a formal interview. I believe that Complainant knew that the interview process had been re-opened and I believe that she gave this response light-heartedly, as a way of beginning the discussion. Judge Mulligan asked her about her background, growing up in Jamaica Plain, and her work in housekeeping at her previous employers. Judge Mulligan's testimony and Panneton's notes taken at the interview indicate that Complainant was also given the opportunity to speak at length about her experience at the Trial Court.

69. At Mulligan's request, Panneton checked DePesa's references. On February 19, 2007, Panneton spoke to Terrence Leahy, DePesa's immediate supervisor at Boston College about DePesa's job performance. Panneton's notes from the conversation with Leahy are as follows: "Very conscientious, great guy, reliable, dependable, ran Johnson Control System, high moral character, left for Norwell School System." Panneton did not contact the Norwell Schools because DePesa asked Respondent not to contact his then current employer.

70. Judge Mulligan selected DePesa for the O&M position in Plymouth. He testified that in his judgment, DePesa was the most qualified candidate based on his experience, his technical licenses and qualifications, and his degree from Wentworth. The Judge stated that he believed that DePesa's technical background would enable him to learn the building systems, troubleshoot and diagnose problems with building systems, and evaluate the work of outside contractors. He also testified that he believed that the hours of work required to acquire DePesa's licenses, and his knowledge of code, enhanced his technical experience and would give him an edge in interfacing with technical staff and outside vendors. He denied that Complainant's age and gender had any bearing on his decision.

71. Judge Mulligan testified that he recognized Complainant had worked hard to rise to her current position and that she had performed well throughout her time with Respondent, but believed she did not have the technical expertise to handle the position and to deal with hands-on problems and she did not have a relevant degree. In his view, technical expertise was important in order to troubleshoot and diagnose problems and to determine whether outside help was needed and if outside vendors were proposing the correct remedy. He claimed he was not looking for a generalist, but for someone with specific knowledge of technical systems. Mulligan acknowledged that Complainant had overseen vast improvements to the South Boston Court house in preparation for the dedication to Judge Feeney and improvements at the West Roxbury Courthouse. Judge Mulligan acknowledged that Complainant did her job very well, but stated she did not possess the credentials he was seeking for the O& M position. He downplayed Complainant's strengths in management and her knowledge of, and experience with, the

court systems by stating that the O&M's subordinates could assume such tasks as interacting with judges and managing the custodial group. As to the numerous glowing letters of recommendation Complainant received from clerks and judges regarding her work as Regional Facilities Manager, the Judge testified that he frequently receives such letters and does not always ascribe much value to them. (Ex. 2)

72. Judge Mulligan testified that choosing Complainant would have been the "path of least resistance," and would have made seem like him a "good guy" and that decision would have "fit well with the people in court facilities." He stated that by choosing DePesa, he was "bucking the system, as usual," but he was trying to make the right decision and not the popular decision.

73. Panneton notified Carroll that Mulligan had selected DePesa for the O&M position, and DePesa was appointed to the position in April 2007. His starting salary was \$83,095.96. After one year, he received a step increase to \$93,021, his current salary.

74. DePesa testified that when he began the position, the Plymouth Court House was about 90% completed but the systems were not finished and a lot of work remained. At that time, Joe Renzi, the building systems manager and Mark Ronan, the assistant building systems manager had already been hired. Renzi's job is to operate the technical side of the building, including the mechanical systems, engine management and boilers. Ronan is a master plumber. Granger testified that Renzi, who is currently buildings system manager at the Fall River courthouse, was assigned to Brockton and Plymouth while construction was going on. Renzi is a master plumber, master pipe fitter, and is state certified as a refrigeration technician, fire sprinkler, pipe welder. Carroll testified that in addition to Renzi and Ronan, an electrician and an HVAC technician had been

hired for the Plymouth courthouse. In addition, an engineer who ran the John Adams courthouse and Granger were available to assist at all courthouses.

75. DePesa testified that the O&M position is highly technical and that there is a building manager between him and the six or seven maintenance workers. He stated that the total number of court facility workers in the building is “in the teens.” DePesa testified that his job is to operate the building safely, with concern for the occupants, while taking costs, including overtime, into consideration. He stated that all his duties are performed with a view towards customer service.

76. According to Carroll, cleaning is a major part of the courthouse responsibilities. There were nine custodians and a supervisor reporting to DePesa at the Plymouth facility. The facility manager, Doug Firth, runs two housekeeping and general maintenance shifts. Carroll testified that in every courthouse there are subordinates who have licenses in the trades working under the O&M supervisors, and that their presence eliminates the requirement that the O&M have skills or direct experience in the trades. I credit his testimony.

77. Complainant testified that the Plymouth courthouse is very similar to the relatively new courthouse in Chelsea, which she oversaw as part of her responsibilities and she could have handled oversight of the Plymouth courthouse easily since she was responsible for seven buildings previously. Complainant was confident that she would have done an excellent job had she been hired for the Plymouth O& M position. She testified that an O&M cannot supervise a master plumber, a master electrician or an HVAC technician.

78. Judge Mulligan testified credibly that this was not the first time he has rejected a panel's recommendation. He rejected a group of court officers that were recommended for hire because of an inadequate representation of women and minorities. With respect to the probation department, he claims to have rejected recommendations over the years if qualified minority candidates were overlooked or if he suspected a candidate was recommended based on nepotism, and he has asked to see scoring sheets on many occasions. Judge Mulligan testified that he is committed to appointing women to high positions, and has appointed women to be chief justices of the various courts and two females to manage security force for the courts. Mulligan testified that 33% of the employees at the management level of Operations & Management are women and 23.3% of the employees at Complainant's current management level are women.

79. Respondent's Affirmative Action plan states, in part that screening panels should contain "several members of the staff with whom the candidate will be working..." (Ex.C-1) With respect to promotions and transfers, the Affirmative Action Plan states that, "When the name of a candidate for a position is submitted to the Administrative Office of the Trial Court for approval, the Affirmative Action Officer reviews the process used in filling the position."(Ex. C-1)

80. Respondent's Affirmative Action officer, Myra Dandridge, testified that she signed off on the paperwork appointing DePesa to the O&M position, but she did not know at the time that the Respondent's panel had first recommended Complainant for the position. I credit her testimony. (Jt. Ex. 16)

81. The only other O&M employed by the CFB is Nick Galotti, who was Director of Facility Management for the Edward Brooke Courthouse until he was reclassified to the position of O&M on January 1, 2007. The Brooke Courthouse, completed in 2000, is the state's second largest new courthouse.

82. Carroll has filled five management positions since 2003; Galotti, DePesa, Granger, Antoniewicz and Indrisano, all of whom are male. There has been a hiring freeze in the trial court since 2008.

Emotional Distress

83. Complainant testified credibly that she was devastated when she learned that DePesa had been awarded the Plymouth O&M position. She had spent her entire career developing her skills, working her way up through the court facilities, felt she was eminently qualified for the position, and knew "something was wrong." She felt that Judge Mulligan had dismissed all her hard work and dedication, and disregarded her as a "nobody" who did not even deserve his full attention at the interview.

84. Complainant testified credibly that she was known as the "go to" person at the trial court and was highly qualified for the O& M position. Respondent's failure to promote her was a blow to her self-esteem, which she realized was heavily tied to her job. She stated that people look at her differently now and will not look her in the eye because they do not want to see her pain. To this day, she has not recovered from being rejected for this position, is frequently depressed, and cries often. Her husband has told her that she is a shell of her former self. Complainant testified that the entire ordeal has been

awful and she continues to wonder at the injustice and how all her accomplishments and hard work were dismissed.

85. Complainant testified credibly that she finally realized she needed to get some professional help for her emotional distress and made an appointment with an EAP counselor, Susan Cavallerano, whom she saw six times. Cavallerano tried to assist Complainant with relaxation techniques and to help with her sense of self-worth. Cavallerano's notes from May 27, 2009 to June 30, 2009 indicate that Complainant was anxious about her upcoming deposition and Judge Mulligan's deposition, at which she would be present. During one session, Complainant told Cavallerano that she felt like she "had to win" her discrimination case to be vindicated. Complainant had a great deal of anxiety resulting from the fact that she felt compelled to file a complaint for gender discrimination and having to face the Judge in these proceedings.

86. Complainant testified credibly that she began to have headaches, stomachaches, insomnia and hives after being rejected for the O&M position. On one occasion, heart palpitations sent her to the emergency room where she was advised her symptoms resulted from anxiety. Complainant's records from Harvard Vanguard dated 3/4/2010; 4/20/2010 and 5/20/2010 indicate that Complainant saw Edith Braun, MD on April 20, 2010 as a follow-up to her emergency visit to Cape Cod Hospital for heart palpitations. According to Braun's notes, Complainant was anxious because of her upcoming discrimination case and her lawyer's fees. Braun diagnosed her with anxiety and prescribed Celexa. Complainant saw Braun on May 20, 2010 for a follow-up visit. Complainant testified that the medication relieved her anxiety somewhat.⁴

⁴ The May 3, 2010 visit was for an unrelated medical issue.

87. Complainant testified credibly that the higher paying O&M position would have allowed her and her husband to subsidize their handicapped son's income, allowing him to live independently. If she retires at her current salary, her son will have to sell his home and live with them. At the time of the public hearing Complainant was 65 and she stated that she planned to work another ten years. In her deposition she said her intention was to work another five years.

88. At the time the O&M was appointed, Complainant's salary was \$70,299.00. DePesa's starting salary was at Tier 1, Step 4, an annual salary of \$83,095.96 (Ex. J-16)

89. At the close of the public hearing, the parties submitted Complainant's projected back pay with a start date of April 2, 2007, and front pay, using a cut-off date of March 30, 2015. From April 2, 2007 to the date of the public hearing, August 15, 2010, Complainant earned \$236,855.37. Had she been appointed to the O&M position, her income from wages would have been \$266,913.67. Thus, any lost wages for that period would total \$30,058.29. Complainant's projected salary from August 15, 2010 until March 30, 2015 in her current position is \$324,729.80. Had she been appointed to the O&M position, her projected salary for that same time period is \$451,198.87. Thus, any front pay losses would total \$126, 469.07. ⁵

III. CONCLUSIONS OF LAW

M.G.L. c.151B§4(1) prohibits an employer from discriminating against an employee in the terms and conditions of employment, including in promotional

⁵ Letter of Anne-Marie Ofori-Acquaah, Esquire dated September 2, 2010, with attached Exhibits A & B

opportunities on the basis of gender.⁶ In order to establish a prima facie case of discriminatory failure to promote, Complainant must show that she is a member of a protected class who was qualified for the position, that she was denied the position and the position was awarded to someone not of her protected class. Alves v. Town of Freetown Police & Board of Selectmen, 18 MDLR 112 (1996); See also Puckett v. Commercial Aviation Services, 24 MDLR 77 (2002). (finding evidence of race discrimination when persons outside of the Complainant's protected category were selected for promotional opportunities that were denied to the Complainant, a qualified candidate). I find that Complainant has established a prima facie case of discrimination based on gender.

Complainant is a member of a protected class based upon her gender. Further, Complainant has demonstrated that her job performance as a Regional Facilities Manager was excellent, that she was qualified for the promotion, that she received the highest rating after an interview for the promotion by an internal hiring panel and her name was put forward to Judge Mulligan for approval. Notwithstanding her superior credentials as an internal candidate, Respondent added an additional layer of scrutiny to the hiring process and ultimately rejected Complainant for the position of O&M at the Plymouth courthouse, offering the position to a male candidate.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000). Respondent's articulated reason for rejecting the selection committee's recommendation of Complainant, conducting a second review of the top applicants and

⁶ Complainant presented no evidence of age discrimination

hiring an external candidate, was that Judge Mulligan, the hiring authority, believed the selection process was rigged in favor of Complainant because the panel included members who knew and liked Complainant and did not include a representative from DCAM.

Given Judge Mulligan's stated concerns, he requested that DCAM Deputy Commissioner McKimney review the resumes of the top five applicants. McKimney rated Complainant second and Ron DePesa first. Subsequent to McKimney's review, Judge Mulligan interviewed the top candidates, stating that he concluded DePesa was better qualified than Complainant because he possessed HVAC and other licenses, had a degree from Wentworth and relevant experience. He stated that he preferred someone with more technical skills and experience than Complainant for the O&M position, despite recognizing that Complainant had performed her duties as a Facilities Manager with the court system very well for many years." It is also clear that Judge Mulligan rejected Complainant to express his disapproval of Carroll not obeying his instructions to have a DCAM representative on the hiring panel, and whom he viewed as favoring the internal candidate. I find that Respondent has articulated a legitimate, non-discriminatory reason for its actions.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

Judge Mulligan articulated some concerns that because Complainant was an internal candidate and her selection was supported internally by managers at high level,

he wished to dispel any notion that the hire would be viewed as a patronage appointment. In his words, by choosing DePesa over the popular Complainant, he was “bucking the system.”

These reasons, if viewed in the vacuum of this one hiring, might withstand the scrutiny of pretext. However, given the comparative evidence regarding the promotion to the same position at the Worcester courthouse, a strong inference of gender bias, albeit perhaps unconscious, is raised. This is precisely why evidence of comparators being treated differently is often necessary to prove a claim of discrimination. I conclude that Complainant has established that Respondent’s reasons for rejecting the hiring panel’s assessment and subjecting her to further scrutiny of her credentials, and an additional interview with Judge Mulligan and ultimately rejecting her for the position of O&M in favor of a man, do not withstand scrutiny.

One of Respondent’s stated reasons for rejecting the selection panel’s recommendation was that the panel did not include a DCAM employee and included LaRocca and Granger, both of whom Judge Mulligan felt might be biased in favor of Complainant because they had “worked with” and “liked” her. Judge Mulligan believed that Ellen Bransfield, a Land Court administrator, was the only member of the panel who was not biased in favor of Complainant. While there was evidence that LaRocca and Carroll favored Complainant for the position,⁷ there was no evidence that nepotism or patronage were motives in selecting her, or that she was chosen over a more qualified candidate. All the evidence demonstrates that Complainant was a hard working, highly

⁷ While it is apparent that Complainant was being groomed for the position by attending construction meetings, hiring staff, and performing other duties related to the Plymouth Courthouse, Judge Mulligan did not know of these activities until after the hiring process and thus they could not have influenced his decision. Nonetheless, given her qualifications and stellar track record with the court system, her familiarity with the new Courthouse should have enhanced, and not diminished her credentials.

productive and skilled Facilities Manager who was greatly respected for her many years of fine work. The evidence is clear that any move to promote Complainant or give her an inside edge was motivated solely by the desire to promote a career employee who had demonstrated the skills and abilities and leadership to competently perform the job and who had earned the promotion. In Carroll's opinion, this promotion was a natural progression in Complainant's career ladder. Moreover, this stated concern over promoting an insider did not affect the hiring of Indrisano to be the Worcester O& M. It is also clear that the inclusion of LaRocca and Granger on the hiring panel was not in any way unorthodox, and was consistent with Respondent's own Affirmative Action plan, which recommends that screening panels should include "several members of the staff with whom the candidate will be working," (Ex. C-1)

Respondent's rationale for re-examining the Plymouth O&M hiring process does not withstand scrutiny because it is entirely at odds with the hands-off approach Judge Mulligan assumed with respect to the hiring process months earlier for the O&M position at the Worcester courthouse, a complex nearly three times the size of Plymouth with similar state of the art technical systems. The applicant pool for the O&M position in Worcester contained no women, the position was posted for a much shorter period of time than the Plymouth position, and the successful candidate was an insider, Joseph Indrisano, who, like Complainant, was a long-time employee of Respondent and whose career path as a Facilities Manager and a Regional Facilities Manager mirrored that of Complainant. Indrisano's promotion occurred after Judge Mulligan was advised to consider the technical qualifications of candidates for the job. However, like Complainant, Indrisano had no technical licenses, a fact that undercuts Respondent's

assertion that Complainant was not chosen for the position because of her lack of technical qualifications. While Mulligan testified that he had reservations about the Worcester recommendation, he did not discuss his reservations with anyone other than Panneton, never undertook a review of the selection process and appointed Indrisano to the Worcester O&M position. Respondent's reasons for not choosing Complainant for the position are undercut by Respondent's witness, Michael McKimmey who deemed Complainant well qualified for the position by dint of her long, successful career at Respondent, the fact that she had years of experience as a court facilities manager in a number of court houses and that she was well regarded by colleagues and was a known quantity. Though Respondent argued that the O&M needed a technical background in order to manage the state-of the-art Plymouth Courthouse, there was ample evidence that the that the O&M was not required to perform hands-on technical duties, or have first hand knowledge of how to operate the technology, but that these duties were performed by subordinates with technical skills and the requisite licenses. While DePesa had an impressive technical background, it was clear that this was not a requirement of the O& M Supervisor position and was not considered an essential requirement for a male candidate's appointment to the position. In contrast, Complainant's demonstrated managerial and human resource skills were dismissed by Respondent's assertion that subordinates could perform this aspect of the O& M job.

I credit Judge Mulligan's testimony that he has undertaken to place women in positions of authority, including chief judges and court officers, and that he has in the past rejected pools of candidates where there was insufficient minority or female representation, and there is no evidence that he engaged in conscious sex discrimination.

However, protection from discrimination extends not only to conscious, overt and blatant acts of discrimination. The law also safeguards employees from adverse treatment resulting from unconscious and unspoken assumptions and stereotypes based on one's protected class. Employment decisions that are the result of 'stereotypical thinking about a protected characteristic or members of a protected class, whether conscious or unconscious, are actionable under G.L. c. 151B.' Lipchitz v. Raytheon, 434 Mass. 493, see also Thomas v. Eastman Kodak Co., 183 F.2d 458, 469 (1st Cir.) 1999. In the instant case, Respondent subjected Complainant to a re-examination of the application process, something he did not do in connection with O&M hiring process at the Worcester courthouse. Despite asserted concerns about the successful candidate in that hiring process, who was an insider with experience nearly identical to that of Complainant, the male candidate was appointed. Such disparate treatment of a similarly situated comparator suggests that the view that Complainant was not as capable of performing the O&M position was likely colored by gender stereotypes about a woman's ability to perform a top managerial job that is traditionally held by men.

Where, as here, a Complainant provides ample evidence of disparate treatment, the fact that the decision-maker may not have been aware of that motivation, even within himself, neither alters the fact of its existence nor excuses it. “ 'Unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination.' ” See Thomas v. Eastman Kodak Company, 183 F.3d 38 (1st Cir. 1999); citing Hopkins v. Price Waterhouse, 825 F.2d 458, 469 (D.C. 1987); see also Andrade v. Stop & Shop, 23 MDLR 213, 217 (2001).

Establishing that Respondent's stated reasons for its action were pretextual permits an inference of unlawful discrimination. Abramian, 432 Mass 107. Based on the above, I conclude that Complainant has demonstrated that the articulated reasons for not promoting her are pretextual and that unconscious “discriminatory animus was a material and important ingredient in the decision making calculus.” Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

Accordingly, I conclude that Respondent's action of denying Complainant a promotion to the position of O&M at the Plymouth courthouse was unlawful gender discrimination in violation of G. L. c. 151B, Section 4 (1).⁸

IV. REMEDY

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

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the

⁸ Complainant did not present evidence of age discrimination and did not argue that claim in her post-hearing brief. Therefore, I conclude that her claim of age discrimination should be dismissed.

length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on the credible testimony of Complainant I am persuaded that she suffered emotional distress as a result of Respondents’ unlawful actions. Complainant testified that she was known as the “go to” person at the trial court and was highly qualified for the O& M position. Respondent’s failure to promote her was a huge blow to her self-esteem, which she realized was heavily tied to her job. I find that not being chosen for the position caused her great embarrassment and humiliation as she had contributed substantially to the successful planning and completion of the Plymouth Courthouse. She stated that co-workers view her differently now and will not look her in the eye because they do not want to see her pain. She stated that she still has not recovered from being rejected for this position, is frequently depressed, and cries often. Her husband has told her that she is a shell of her former self. She testified that the entire ordeal has been awful and she continues to wonder at the unfairness of not being selected for reasons she views as discriminatory.

Complainant testified that she finally realized she needed to get some professional help for her emotional distress and saw an EAP counselor for a month in

2009. The counselor's notes indicate that Complainant was anxious about her upcoming deposition and Judge Mulligan's deposition, at which she would be present. During one session, Complainant told the counselor that she felt she "had to win" her discrimination case to be vindicated. It is clear that Complainant suffered a great deal as a result of not receiving the promotion and at having to take legal action to vindicate her rights and have to face the Judge with such accusations as part of these proceedings, something that she found very difficult to do and which took enormous courage.

Complainant testified that she began to have headaches, stomachaches, insomnia and hives after being rejected for the O&M position. On one occasion, heart palpitations sent her to the emergency room where she was advised her symptoms resulted from anxiety. According to the notes of Edith Braun, MD on April 20, 2010, Complainant was anxious because of her upcoming discrimination case and her lawyer's fees. Braun diagnosed her with anxiety and prescribed Celexa. A month later, the medication had relieved her anxiety somewhat. I conclude that Complainant suffered from emotional distress as a direct result of Respondent's discriminatory acts and I conclude that an award in the amount of \$50,000.00 is appropriate compensation for the emotional distress she suffered.

B. Lost Wages

I conclude that Complainant is entitled to lost wages from April 2, 2007 and front pay using the cut-off date of March 30, 2015. From April 2, 2007 to the date of the public hearing, August 15, 2010, Complainant's earnings totaled \$236,855.37. Had she been appointed to the O&M position, she would have earned \$266,913.67. Thus, I find she is entitled to an award of back pay in the amount of \$30,058.29. I believe that

Complainant intended to work for 5 more years as she stated in her deposition, and that she is entitled to front pay in the amount representing the difference in salary in her current position for the next five years and what she would have earned during that same time period in the O& M position. Complainant's projected front pay from August 15, 2010 until March 30, 2015 in her current position is \$324,729.80. Had she been appointed to the O&M position, she would have earned \$451,198.87 during that same time period. Thus, I find she is entitled to an award of front pay in the amount of \$126,469.07.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondent immediately cease and desist from engaging in discriminatory promotion practices on the basis of gender.
3. Respondent pay to Complainant the sum of \$50,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
4. Respondent pay to Complainant the sum of \$30,058.29 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

5. Respondent pay to Complainant the sum of \$126, 469.07 in damages for front pay.

6. Respondent shall recalculate Complainant's pension based on the pay she would have received had she been appointed to the O & M position. Should such calculations require Complainant to make additional contributions to her pension, such contributions shall be calculated accordingly.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 11th day of August 2011

JUDITH E. KAPLAN,
Hearing Officer