

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and MICHELLE ROBERTS,
Complainants

v.

Docket No. 07 BEM 00199

TOWN OF ABINGTON
BOARD OF HEALTH,
Respondent

Appearances: Gerard S. McAuliffe, Esq., for Complainant
Deborah I. Ecker, Esq. and Leonard Kesten, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 19, 2007, Michelle Roberts (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that the Town of Abington Board of Health (“Respondent”) discriminated against her on the basis of sexual harassment and retaliation in violation of M.G. L. 151B, sec. 4. Complainant asserts that as Abington Health Agent, she was asked to locate sexually-explicit photographs posted by a former town employee and to respond to sexually-provocative questions from the Chairman of the Board of Health and that when she complained, she was subjected to retaliation.

On November 21, 2008, the MCAD issued a probable cause finding solely on the issue of retaliation and on July 28, 2009, certified the case for public hearing.

A public hearing was conducted on March 12, 15, and 16, 2010. The parties introduced six (6) joint exhibits into evidence. Complainant introduced an additional five (5) exhibits and Respondent introduced an additional twenty-four (24) exhibits. The following individuals testified: Michelle Roberts, Maureen Kilroy, Theresa Maze, Donna Manna, Susan Brennan, and William Creighton.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant was the Health Agent in the Town of Abington from September of 2000 through October of 2009. As Health Agent, Complainant reported to the Abington Board of Health.
2. Prior to working as Health Agent in Abington, Complainant was the Health Agent in the Town of Holbrook from 1997 to 2000. Transcript, p. 275. On July 25, 2000, Complainant filed an MCAD charge against the Holbrook Board of Health for disability discrimination, harassment, and retaliation. Respondent's Exhibit 8. Complainant testified that her prior charge against the Town of Holbrook was directed at her secretary and that she got along very well with the Holbrook Board of Health. Transcript, p. 342. However, the MCAD's Recommendation for Dismissal in the Holbrook case quotes the Complainant's assertion that a Holbrook Board of Health member told her to "shut up" and said that she did not

- know her job. Id.; Transcript, p. 566-568. The MCAD dismissed the Holbrook complainant for Lack of Probable Cause.
3. Respondent Abington Board of Health is a five-member board which oversees the Town's Health Agent.
 4. In 2001, Complainant married Dean Roberts who is related by marriage to Susan Brennan, an Abington Board of Health member from 2000 to 2005.
 5. In April of 2005, Brennan stepped down as Chair of the Abington Board of Health. Brennan nominated William Creighton as Chair but Creighton declined and nominated a new Board member, Anthony Pignone, as Chair. Respondent's Exhibit 3; Transcript, pp. 195, 410. Pignone was elected by a majority of Board members. Over the next five or six months, Complainant unsuccessfully sought to have the Board remove Pignone as Chair and/or to have other Board members assume the position of Chair. Transcript, p. 363.
 6. In May of 2005, Abington Board of Health members Pignone and Creighton met with Town Manager Phil Warren to discuss concerns about the informal manner in which the Health Department, under Complainant's leadership, was collecting cash from rabies injections and the disposal of propane tanks and about the Health Department's inability to account for the receipt of such funds. Transcript, pp. 388-389, 396-397, 412; 437, 445-447. Several months earlier, Creighton had asked the Plymouth District Attorney's Office for assistance in obtaining records from four rabies clinics held by the Abington Health Department and for propane tank fees collected by the Health Department. Respondent's Exhibit 3. The Plymouth District Attorney's Office informed Creighton that he could make a

public records request for the documents or ask the Abington Town Counsel for assistance. Id.

7. William Creighton described interactions among Abington Board of Health members in August and September of 2005 as “tense.” Transcript, p. 413. According to Creighton, there was a division in the Board between members who sought an accounting of funds and those who defended Complainant’s failure to account for the funds. Id.
8. On October 17, 2005, Abington Board of Health member Roger Atkinson proposed the removal of Pignone as Board Chair. The motion was seconded by Brennan. Transcript, p. 203. The motion did not pass.
9. On November 15, 2005, Pignone instructed Complainant to retrieve the Health Department budget, which she had submitted to the Town Manager without prior input from the Board of Health. Transcript, p. 335. At the same time, Pignone asked to see Complainant’s prior performance evaluations and her contract. Joint Exhibit 6.
10. On November 26, 2005, Complainant drafted a letter to the Board of Health in which she asked for the removal of Pignone as Board Chair for the following reasons: 1) reprimanding her for submitting the Health Department’s 2007 budget without prior approval of the Board; 2) asking Board of Health administrative assistant Maureen Kilroy to provide him with copies of Complainant’s contract and with performance evaluations pertaining to herself and Kilroy; 3) asking Kilroy at an August 29, 2005 Board meeting about the existence of a terminated employee’s pornography; 4) and asking if he could get

his penis pierced during a discussion regarding tattooing and piercing regulations. Joint Exhibit 6; Respondent Exhibit 1. Complainant testified at the public hearing that Pignone's reference to pornography consisted of his asking for copies of the terminated employee's pornographic pictures and that his question about whether he could get his penis pierced occurred during a discussion about pending tattooing and piercing regulations. Transcript, pp. 369-370. According to Board of Health member Creighton, he has no memory of Pignone ever asking to see pornographic material of a terminated employee. Creighton testified that Complainant herself brought pictures related to piercings and tattooing to one Board meeting after she attended a conference on body piercing and body art. Transcript, pp.414, 453.

11. On November 28, 2005, Complainant attended a meeting of the Board of Health at which she read her November 26, 2005 letter calling for Pignone's ouster. Transcript, pp. 112, 367. After Complainant read the letter, Atkinson made a motion to reorganize the Board to remove Pignone as Chair. Brennan and Atkinson voted in favor of the motion, but it did not pass. Complainant testified that she wanted Pignone "gone" because "for months he'd been hostile, demeaning, demanding ..." Transcript, p. 373. According to Complainant, Pignone had an "arrogant attitude" and a "demanding style" which she didn't like. Transcript, p. 529.

12. During the November 28, 2005 meeting of the Abington Board of Health, board member Brennan called Pignone a "jamokey." Transcript, pp. 196-197. Brennan

testified that by using the term, she intended to convey that she thought Pignone was a “jerk” or a “putz.” Transcript, pp. 199-200.

13. Complainant sent a copy of her November 26, 2005 letter to Town Manager Phil Warren. Complainant’s secretary, Maureen Kilroy, also drafted a memo about Pignone in which she complained about his asking her, on August 29, 2005, about the existence of pornographic pictures implicated in the termination of an Abington employee and about his using an obscenity in regard to the possibility that the employee might lose his pension. Joint Exhibit 6.
14. Warren conducted an investigation into Pignone’s conduct. The investigation commenced after receipt of Complainant’s letter and ended on or around January 20, 2006. Complainant’s Exhibit 1. Warren determined that Pignone’s statements, as described by Complainant in her letter, might have violated the Town of Abington’s Policy Against Harassment but concluded that Pignone’s actions did not constitute sexual harassment. Complainant’s Exhibit 1; Transcript, p. 297.
15. On December 14, 2005, Abington Town Accountant Anthony Sulemonte issued a report which cleared Complainant of financial wrongdoing although the report specified that the Abington Health Department should provide monthly financial reports to the Board of Health. Respondent Exhibit 12. Transcript, pp. 393, 417, 551. The report stated, inaccurately, that the Health Department kept an accurate account of money it received for the disposal of propane tanks. Transcript, p. 532. Complainant acknowledged at the public hearing that she did not keep track

- of how much cash the Health Department collected as a result of the disposal of propane tanks. Transcript, p. 588.
16. Abington Board of Health member Creighton testified that he was not satisfied with the Town Accountant's report because it failed to account for the cash funds collected by the Health Department or to address the fact that no record was kept of cash for propane tank disposals. Transcript, pp. 416, 531-532.
 17. On January 9, 2006, there was a meeting of the Abington Board of Health at which Board of Health member Atkinson again tried to remove Pignone as Chair and again was unsuccessful. Transcript, pp. 375-376. At the same meeting, the Board voted to require monthly financial reports by the Health Department but it never received any. Transcript, p. 417.
 18. At a February 13, 2006 meeting of the Board of Health, Creighton left the meeting in order to prevent Atkinson and Brennan from calling for a vote of the three present members and moving for the ouster of Pignone as Chair. Transcript, pp. 377-378, 418. Following the meeting, Complainant and her administrative assistant Maureen Kilroy wrote to the Town Manager to "document" Creighton's behavior and characterize it as "peculiar, unsettling and hostile." Respondent's Exhibit 10
 19. In April of 2006, Pignone was re-elected as Board Chair. Transcript, p. 537.
 20. On June 2, 2006, the state Inspector General wrote the Abington Board of Health about lack of proper accounting for funds from rabies inoculations and from the recycling of propane tanks. Complainant's Exhibit 3; Respondent's Exhibit 2; Transcript, p. 386. The Report confirmed that funds were not accounted for but

- did not focus on what happened to the money. Transcript, pp. 418-419. The Inspector General's report was characterized in a June 6, 2006 newspaper article as "exonerating" Complainant. Respondent Exhibit 11; Transcript, p. 538.
21. On June 9, 2006, Complainant's husband was arrested and charged with possession of cocaine with intent to distribute. Transcript, p. 382. He had previously been tried on drunk driving charges. Transcript, p. 333.
22. Complainant's attorney, Gerard McAuliffe, wrote Town Manager Phil Warren on June 9, 2006 that the Board of Health, acting through its Chair, "continues to retaliate against [Complainant] as a result of her filing a sexual harassment complaint against the Chairman" and that "addressing [Complainant's] employment contract" was "further retaliat[ion]." Respondent Exhibit 7. The "sexual harassment complaint" mentioned by attorney McAuliffe refers to Complainant's November 26, 2005 letter.
23. On June 12, 2006, a majority of Board of Health members expressed concern about the unaccounted-for cash that was discussed in the Inspector General's Report. Transcript, p. 539. During the meeting, Board member Christine Hickey reported that she had attempted, unsuccessfully, to research the Town's income from rabies inoculations during the 2001-2004 period. Respondent's Exhibit 14. Creighton made a motion to refer the matter to the Plymouth District Attorney because of the incompleteness of the Inspector General's report. *Id.*; Transcript, pp. 420, 441. Three members of the Board voted to refer the matter to the District Attorney.

24. On June 23, 2006, a local newspaper reported that the Abington Board of Health had referred the Inspector General's report to the Plymouth District Attorney. Complainant's Exhibit 3. The District Attorney subsequently dismissed the matter. Transcript, p. 540.
25. On July 14, 2006, the Inspector General requested that the Abington Board of Health provide documentation showing that the Abington Health Department had accounted for funds from rabies inoculations and propane tank disposals, as asserted by Complainant to the press. Respondent Exhibit 16. Board Chair Pignone requested Complainant to gather documents showing that funds from rabies inoculations and propane disposal fees were maintained in revolving accounts. Respondent's Exhibit 15. No documents could be found showing that the fees were turned over to the Town Treasurer. Respondent's Exhibit 16. On September 13, 2006, the Inspector General was informed that no such documentation existed. Id.
26. At some point during the summer of 2006, Complainant's multi-year contract expired and she was offered a one-year contract.
27. On August 5, 2006, Complainant's husband was incarcerated for violating the terms of his probation. He was subsequently sentenced to two years in prison after a jury trial. Transcript, pp. 383; 554.
28. Beginning on August 6, 2006, Complainant took a six-week medical leave of absence from work for stress and depression. Transcript, p. 542.
29. While Complainant worked for the Town of Abington, she used a cell phone issued by the Center for Disease Control/ Emergency Preparedness Coalition.

The Center paid for 500 minutes of usage per month. Transcript, p. 324.

Complainant testified that she used the phone for personal calls as well as for work and that she paid for usage exceeding 500 minutes per month. *Id.* at 325.

At a Board meeting in the fall of 2006, Complainant threw the phone on the ground in the direction of Health Board member Creighton when he questioned her usage of the phone. Transcript, pp. 326; 559-559. According to Creighton, Complainant threw the cell phone at him. Transcript, p. 477.

30. In October of 2006, Pignone left the Board of Health.

31. On October 15, 2006, the Board voted to deny Complainant overtime pay at the rate of time and one-half for attending Board of Health meetings on Monday evenings. Transcript, pp. 316; 562-563. According to Complainant, she had previously earned such overtime pay for attending Board meetings at night. Transcript, pp. 327, 329, 331-332. Complainant denied that she took compensatory time for attending Board meetings. Transcript, pp. 571, 589. The 2006-2011 contract for the Abington Health Officer states that the Health Officer's work schedule "shall consist of a thirty-five (35) hour workweek and all regularly-scheduled Board of Health meetings." Joint Exhibit 1.

32. In November of 2006, the Board voted to prohibit Complainant from speaking to the press, running the rabies clinic, serving as liaison to the Emergency Preparedness Coalition, self-selecting seminars to attend during work hours, and using work days to attend seminars. Transcript, pp. 317-319, 491. According to Article XIII of her employment contract, the Board of Health was to pay for "all reasonable expenses incurred while attending any and all meetings, conferences

seminars, etc. that the Health Officer deems necessary for his/her professional development.” Joint Exhibit 1.

33. Around November/December of 2006, the Board of Health offered Complainant a new five-year contract. Transcript, p. 423.

34. Complainant resigned as Health Agent on or around October 1, 2009 at which time she started a new job as the Health Director in the Town of Plymouth. At the time of her resignation, Complainant earned approximately \$60,000.00 as Abington Health Agent. Joint Exhibit 1. Complainant’s position as Health Director for the Town of Plymouth is a “bigger position” than the one she had in Abington with a higher salary, although Complainant has a longer commute to work. Transcript, pp. 274; 321.

III. CONCLUSIONS OF LAW

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).

To prove a prima facie case for retaliation, Complainant must demonstrate that she: (1) engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment

action; and (4) a causal connection existed between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if she “has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, s.5].” While proximity in time is a factor, “... the mere fact that one event followed another is not sufficient to make out a causal link.” MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew of a discrimination claim and thereafter took some adverse action against the Complainant does not, by itself, establish causation, but it may be a significant factor in establishing a causal relationship. “Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing or threatening to file, a discrimination complaint.” Pardo v. General Hospital Corp., 446 Mass. 1, 21 (2006) *quoting* Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to

Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent. See id.

The evidence in this case is sufficient to establish protected activity consisting of: 1) reading aloud a letter to the Board of Health in which she asked for the removal of Pignone as Chair based, in part, on his inquiring about a terminated employee's pornography and asking whether he could get his penis pierced; 2) sending a copy of her letter to the Town Manager; and 3) having her attorney write the Town Manager to complain about the Board's retaliatory conduct towards her for complaining about Pignone. Although Complainant's underlying claim of sexual harassment against Pignone was found to lack probable cause by the MCAD, such a finding is not fatal to Complainant's retaliation charge as long as the retaliation charge consists of a reasonable and good faith belief that the conduct being opposed constitutes unlawful discrimination. See MCAD's Sexual Harassment in the Workplace Guidelines, Part IX – Retaliation, p. 26 (2002); Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 121 (2000) (recognizing that jury may find retaliation even in absence of discrimination). Although the question is close, I presume good faith was present when Complainant

charged Pignone with sexual harassment in light of the Town Manager's finding that Pignone's statements might have violated the Town of Abington's Policy Against Harassment. Compare Clark County School District v. Breedon, 532, U.S. 286 (2001) (supervisor reading a sexual comment from an evaluation of a job applicant does not constitute protected activity because no reasonable person could have believed it violated Title VII standards); Guazzaloca v. C.F. Motorfreight, 25 MDLR 200, 204 (2003) (fabricated charge of sexual assault does not satisfy requirement that retaliation claim constitute a good faith claim of unlawful discrimination).

As far as the second prong of the analysis is concerned, there is no dispute that Respondent was aware of Complainant's protected activity. The Town Manager not only learned of the protected activity, he took steps to investigate the conduct which formed the basis of Complainant's charge.

Turning to prong three, there is evidence that following the protected activity, Respondent subjected Complainant to adverse employment action in the form of investigating the collection of cash funds by the Health Department, focusing blame on Complainant for inadequate accounting practices, instructing Complainant's office to produce monthly financial reports, referring the matter to the state Inspector General and to the Plymouth District Attorney, and requiring Complainant to gather documents showing that funds from rabies inoculations and propane disposal fees were maintained in a revolving account. The Board also voted to deny Complainant overtime pay at the rate of time and one-half for attending Board of Health meetings and voted to prohibit Complainant from speaking to the press, running the rabies clinic, serving as liaison to the Emergency Preparedness Coalition, and self-selecting seminars to attend during work

hours despite a contract term requiring the Board to pay “all reasonable expenses for meetings, conferences and seminars that the Health Officer deems necessary.”

The fourth prong of a prima facie case of retaliation requires evidence of a causal connection between Complainant’s protected activity and subsequent adverse employment actions. Such evidence can be inferred from the timing of the relevant events, i.e., where an adverse employment action follows “close on the heels of protected activity.” Mole v. University of Massachusetts, 442 Mass. 582 (2004) quoting Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st Cir. 1988). Here, adverse employment actions took place in January of 2006 when the Board of Health voted to require monthly financial reports from the Health Department; on June 12, 2006, when a majority of Board of Health members voted to refer the Health Department’s accounting matters to the District Attorney; at a Board meeting in the fall of 2006, when Creighton read out loud Complainant’s cell phone bills in order to question her usage of the phone; on October 15, 2006, when the Board voted to deny Complainant overtime pay for attending Board meetings and in November of 2006, when the Board voted to prohibit Complainant from speaking to the press, running the rabies clinic, serving as liaison to the Emergency Preparedness Coalition, and self-selecting seminars to attend during work hours. The foregoing list of events establishes that negative employment actions began just weeks after Complainant charged Pignone with sexually-harassing conduct and continued for over a year. There was no gap between the protected conduct and the negative actions which, if sufficiently large, would refute a prima facie inference of causal connection. Compare Clark Country School District v. Breeden, 532 U.S. 286 (2001) (twenty months

between employer's knowledge of protected activity and adverse employment action is not prima facie evidence of causality because the time frame not "very close").

Although the evidence in this case is sufficient to support a prima facie case, it fails to withstand analysis at stage two. The inference that Complainant's protected activity in late November of 2005 caused Respondent to subsequently take adverse employment actions against Complainant is undermined by the fact that prior to Complainant's charge of sexual harassment, there was already a contentious relationship between Complainant and some members of the Board. In early 2005, Creighton asked the Plymouth District Attorney for assistance in obtaining financial records of the Board of Health. In May of 2005, Pignone and Creighton met with Town Manager Phil Warren to discuss concerns about the Board of Health's record keeping practices. In mid-November, 2005, Pignone instructed Complainant to retrieve the budget she had submitted to the Town Manager and demanded to see Complainant's prior performance evaluations and her contract. All of these actions took place prior to Complainant's protected activity and thus, cannot be characterized as a reaction to it.

To the extent that a majority of Board members continued to press for an accounting of Departmental funds following Complainant's exercise of protected activity, their actions were a continuation of their former scrutiny, not retaliatory behavior. The legitimacy of the Board's concern about finances was confirmed by the Inspector General's report of June 2, 2006. Board members also had a legitimate basis for denying Complainant overtime pay at the rate of time and one-half for attending Board of Health meetings on Monday evenings, notwithstanding Complainant's previous receipt of time and one-half for the meetings. Complainant's 2006-2011 contract states that

Complainant's work schedule "shall consist of a thirty-five (35) hour workweek **and** all regularly-scheduled Board of Health meetings." Joint Exhibit 1 [emphasis supplied]. Such wording effectively precludes overtime pay for Board meetings. Finally, the fact that the Board offered Complainant a one-year contract extension in the summer of 2006 and subsequently gave her a five-year contract in November/December of 2006 undercuts Complainant's assertion that the Board responded to her protected activity by retaliating against her.

Based on the foregoing, I conclude that Respondent has articulated non-retaliatory reasons for its action supported by credible evidence. Complainant at stage three fails to present any credible evidence to show that the articulated justifications were not genuine, but, rather, a pretext for discrimination. In fact, Complainant admitted at the public hearing that her real problem with Pignone was that he had an "arrogant attitude" and a "demanding style" which Complainant didn't like and that she wanted Pignone "gone" because "for months he'd been hostile, demeaning, demanding ..." The evidence indicates that Complainant's retaliation charge is, in reality, an attempt to silence Pignone and other Board members who differed with her on valid, job-related grounds. This conclusion is supported by Complainant's prior employment history which contains a similar action against a former employer, the Holbrook Board of Health. Complainant's action against the Holbrook Board of Health likewise contains a charge of retaliation that was dismissed by the Commission for lacking probable cause.

In conclusion, Respondent has offered a legitimate rationale for its actions and Complainant, at stage three, has failed to provide credible evidence that Respondent's articulated justifications for its conduct are not the real reason, but a pretext for

retaliation. Accordingly, Respondent's actions did not constitute retaliation in violation of G. L. c. 151B.

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 15th day of June, 2010.

Betty E. Waxman, Hearing Officer

