

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
PAMELA SCANLAN,

Complainants

v.

DOCKET NO. 06-BEM-00260

DEPARTMENT OF CORRECTION,

Respondent

Appearances: Regina M. Ryan, for Complainant
James F. Kavanaugh, for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 6, 2006, Complainant Pamela Scanlan filed a complaint against her employer, the Massachusetts Department of Correction, alleging discrimination based on retaliation for an internal complaint of harassment that she filed in July of 2005. Complainant alleged that she was subjected to a hostile work environment and her assignments changed after she lodged a complaint of gender harassment. Complainant further alleged that subsequent to her husband filing a complaint of discrimination with this Commission in the Fall of 2005, she was subjected to further retaliation in the form of harassment and adverse assignments. The Investigating Commissioner found probable cause to credit the allegations of the complaint and the efforts at conciliation were unsuccessful. A public hearing was held before me on April 24-

26, 2012. The parties submitted post-hearing briefs. Having reviewed the record and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Pamela Scanlan, has been employed by the Department of Correction and assigned to the Northeast Correctional Center (hereinafter the Concord Farm) as a Correction Officer I, since November of 1991.

2. The Department of Correction is a Massachusetts agency responsible for the care and custody of adult inmates sentenced to facilities within the Commonwealth's Correction System.

3. The Concord Farm, located in Concord MA is a minimum security institution and is designated as a "pre-release center." The facility houses approximately 280 inmates who are able to leave the institution's premises under supervision and are housed in dorm rooms rather than prison cells. The inmates are frequently sent outside under supervision (OUS) as work crews to perform tasks such as highway clean-up, cleaning, painting and other duties at public facilities.

4. The Administrative hierarchy at the Farm is as follows: Superintendent, Deputy Superintendent, Director of Security, Shift Commander, Administrative Lieutenant, Correction Officer II (Sergeant) and Correction Officer I. At all times relevant to this matter, James Saba was the Superintendent of the Concord Farm and Alvin Notice was the Deputy Superintendent.

5. Prior to July of 2005, the shift commanders assigned to the day shift which Complainant worked were Lt. Robert Riley and Lt. Virginia Harms. They retired in May and June of 2005, respectively. In May of 2005 Lt. Scott Maynard was promoted to Shift Commander. In April of

2005, Lt. Robert Lennon, who had transferred to the Concord Farm assumed the position of Administrative Lieutenant. Lts. Maynard and Lennon became Complainant's supervisors.

6. There are a number of different job posts for Correction Officer I and II, including building assignments, gym assignments, yard assignments, and OUS (outside under supervision). The assignment of correctional staff to particular posts is within the discretion of the Administrative Lieutenant and the Shift Commander. The Lieutenant prepares the shift rosters in advance. The Shift Commander who is responsible for supervising correction officers assigned to his or her shift, has the authority to re-assign individuals to different positions on a particular day to ensure that available posts are properly staffed and the shift operates as smoothly as possible.

7. Prior to July 1, 2005, Complainant was assigned primarily as the "control room officer," working inside the institution, however she was assigned to OUS crew assignments at least 40 to 50 times in 2004 by Lt. Harms or Lt. Riley. Superintendent Saba testified that Complainant was considered to be one of the better officers and according to Lt. Harms and Sgt. Leo Avila, the shift commander on the 7am to 3pm shift, she was primarily assigned the control room officer position because she was able to multi-task and was more capable than many of her colleagues. Avila also testified that Complainant was assigned to the control room post because she knew and understood the job well, was reliable, showed up every day, and needed little to no supervision. She was also the most senior officer at the facility in 2005.

8. In 2004, Complainant was one of only three females assigned to work at the Concord Farm. Lt. Beth Croteau was in a Superintendent's Pick position, working directly for the Superintendent in the title of ACA coordinator, and was not assigned to various posts as other officers were. Lt. Virginia Harms had management responsibilities and did not supervise work

crews. Complainant was the only female officer assigned to oversee OUS crews outside the institution. Deputy Supt. Notice denied there was a practice at Concord Farm of not sending female officers out with work crews except in instances where they were short-staffed, but I do not credit this assertion. While no officer is guaranteed a particular post, there was testimony that the Administrative Lieutenants and Shift commanders did their best to assign officers to positions where they felt comfortable and met the needs of the facility. They could consider rank/seniority in making assignments, but were not required to do so. In 2005, Complainant was the most senior officer at the facility. Despite a policy that required all officers to be rotated every six months, so that no officer would be assigned to the same post for more than six months, this did not appear to be the general practice at the facility.

9. Complainant's husband William Scanlan, is also a correction officer with the Department of Correction currently working at a different facility. From 1987 until March of 2005, Mr. Scanlan worked at the Concord Farm. He worked the 3p.m. to 11p.m. shift, and the Scanlan's had an arrangement whereby they were allowed to hand-off their son in the facility parking lot at the end of Complainant's shift. Complainant stated when her husband was transferred to another facility, being able to swap assignments with other correction officers was very important to her because of child care needs. (Ex. C-1)

10. In March of 2005, Complainant's husband was demoted from Lt. to Sgt. and transferred to NCCI Gardner. Superintendent Saba was involved in the investigation surrounding his demotion and transfer. On June 29, 2005, just three days before the events giving rise to Complainant's initial charge of harassment against Lt. Maynard, Mr. Scanlan was investigated by the State Police for allegedly making threats against the Commissioner of the Department and he was suspended for three days. In a subsequent Civil Service proceeding

those allegations and the underlying discipline were determined to be unfounded and the suspension, demotion and transfer were overturned and Mr. Scanlan was fully exonerated of any wrongdoing.

11. On July 1, 2005, Complainant arrived at work and upon reviewing the roster for the day, found that she was assigned to take an outside work crew to Chelsea and Sgt. Bloomfield was assigned to transport a crew to Boston/State House. Sgt. Bloomfield had been assigned Boston/State House for an extended period of time, had received training for and was familiar with the assignment. Complainant understood that only a handful of officers were specifically trained to go to the State House and they had keys for the facility. Complainant had never been assigned to the State House crew, nor had any other female officer.

12. Upon retrieving her equipment to take her crew to Chelsea, Complainant was advised by Lt. Lennon that instead of Chelsea, she was to go to the State House in Boston. Having never been assigned to the State House, Complainant was unfamiliar with the assignment and was uncomfortable and nervous about driving into the city and unfamiliar territory, particularly with a crew of male inmates. She testified that she was very upset when she learned her assignment had been changed, and became sick to her stomach at the prospect of having to drive into Boston with a crew of eight male inmates, to an unfamiliar assignment with no advance training. Complainant suspected that Lt. Maynard had a role in her last minute reassignment to Boston because she had witnessed him conversing with Lt. Lennon just prior to Lennon announcing the change. Complainant believed that Lt. Maynard made the change to deliberately upset and harass her, and she felt so ill that she advised Lt. Lennon she was going home sick. She then proceeded to the shift commander's office to call her husband and stated that during that conversation, Lt. Maynard stood outside the office staring at her in a very intimidating manner.

This further upset Complainant and she told her husband that she believed Maynard was deliberately harassing her. I credit her testimony.

13. Lt. Maynard admitted standing outside the office and making eye contact with Complainant. He believed she was talking to her husband or retired Lt. Harms and “seeking some direction,” about the assignment she had been given. He did not know at the time that Complainant had informed Lt. Lennon she was going home sick and when he learned this from Lennon he sarcastically responded, “wonderful.” Maynard testified that he might have assigned Complainant to the State House/Boston crew on July 1, 2005 and would have done so because they were short-handed, but claims he did not know Complainant would be uncomfortable with this assignment. I do not credit this testimony.

14. Subsequent to leaving the Farm on July 1, 2005, Complainant reviewed Respondent’s Policy for prevention of discrimination and retaliation in the workplace and contacted Deputy Superintendent Notice by phone and advised him that she was being harassed by Lt. Maynard.¹ Complainant made a formal written complaint of harassment against Lt. Maynard on July 4, 2005, her next scheduled shift. (Ex. C-1, Confidential Incident Report) In this report she stated her belief that Lt. Maynard was harassing her by assigning her to the Boston work crew and stated that it was established practice at the institution that female officers should not be used for crews unless staffing levels mandate there are no other options. She also noted that certain outside crew assignments are not appropriate for female officers because of non-existent or very unsanitary bathroom facilities, and that her prior supervisors had taken this into account when making assignments. She noted three specific crews that she felt comfortable taking, if

¹ There is some confusion about whether Complainant alleged that she was being “sexually harassed” by Maynard or merely harassed, or harassed on account of her gender. Respondent’s incident report of the Complainant’s phone call to Notice indicates that she informed him she was filing a complaint of sexual harassment. (Ex. R-4) However in her subsequent written complaint, Complainant explicitly addresses issues related to her gender and assignments that are not appropriate for female officers. (Ex. C-1)

necessary. In her report, Complainant also claimed that Maynard had warned other officers, that if they swapped assignments with Complainant, they would be assigned to work outside the institution. She believed that this admonition manifested Maynard's intent to assign her to outside work crews on a permanent basis.² She also knew that this threat made it unlikely that other officers would be willing to swap assignments with her in the future, and that this would negatively impact her child care needs.

15. The Respondent's policy addressing the prevention and elimination of discrimination and retaliation provides that such complaints are designated as Category II complaints for purposes of investigation and are generally referred to Internal Affairs for an independent review to be conducted outside the institution. (Ex. R-13) Such complaints are distinct from Category I complainants which are investigated within the institution. Superintendent Saba deemed Complainant's charge to be a Category I complaint and ordered the investigation to be done in-house. Deputy Supt. Notice was assigned to conduct the internal investigation into Complainant's claim of harassment. He claimed that the Commissioner's office determined that the matter should be handled internally. His claim is inconsistent with Superintendent Saba's testimony.

16. Complainant asserted that hearing nothing about her report of harassment, she continued to ask Deputy Supt. Notice for a copy of his findings with respect to her complaint against Maynard. She heard nothing until August 23, 2005, almost two months later, when Notice had an impromptu conversation with her. Complainant testified that their conversation was not recorded and there were no witnesses present.

² Complainant also indicated in this report that she believed Lt. Maynard's adverse actions toward her prior to and on July 1, 2005, were motivated by animosity towards her husband and her friendship with other officers whom he disliked.

Notice claimed that his administrative assistant was present for the interview and took notes as was his usual practice. He did not tape record the interview with Complainant as was required by Respondent's policy and he interviewed no other witnesses. Notice claimed that because Complainant raised no "buzzwords" related to harassment he determined that no further investigation was merited. Notice's report of his interview with Complainant states that she denied that she was subjected to an uncomfortable or hostile work environment by Maynard but mentioned the sanitary issue related to restroom facilities for women. His report claims he told Complainant there was no evidence to support a sexual harassment or a hostile work environment charge against Maynard.³ Lt. Maynard was exonerated of the charge that he violated DOC policy. Notice stated he would recommend the matter be administratively closed. (Ex. R-5) Notice's findings were not sent to the Office of Affirmative Action for review as required by Department Policy. Complainant received written notice that her allegations were not sustained in a letter from the Superintendent dated October 24, 2005. (Ex. C-5) This was some four months after she had filed her complaint and two months after the investigation was ostensibly completed.

17. Complainant testified that she informed Notice on August 23, 2005 that her work environment remained hostile and uncomfortable because of Lt. Maynard, but that it was not "sexual harassment," and she continued to keep contemporaneous handwritten notes as events unfolded. During their August 23, 2005 conversation, Complainant was explicit that she did not believe the issues with Lt. Maynard were resolved and that she would continue to remain on

³ Complainant admitted that the harassment was not "sexual" but she did raise issues specific to her "gender" and I find that she had a good faith belief that she was engaging in protected activity under G.L.c. 151B when she complained that it was not appropriate to send female officers out on work crews to locations with non-existent or extremely unsanitary bathroom facilities.

guard and continue to report any inappropriate behavior by him. Despite Complainant's stated concerns, Lt. Maynard remained Complainant's supervisor until he retired in September of 2007.

18. During the month of July 2005, Lt. Maynard continued to assign Complainant to supervise crews outside the facility, sometimes to locations that he knew had inadequate or inaccessible bathroom facilities. When Complainant began to write reports about assignments that were inappropriate for female officers, rather than take her at her word, Maynard would send a Sergeant out to investigate the area and her allegations, something she claimed he had never done before. In August of 2005 Complainant was assigned to take a crew in a van with defective and missing equipment and an expired inspection sticker. (Ex. C-3) On October 24, 2005, Complainant filed an incident report stating that the female bathroom facilities at the Reading DPW where she had been assigned with her crew were locked, and after waiting until over an hour and half for the facilities to be opened, she had no recourse but to return to Concord with her crew. As part of that report Complainant noted that Lt. Maynard instructed the Sergeant on duty not to accept or sign off on incident reports from her any longer, and to contact him anytime Complainant wrote a report. (Ex. C-2) Complainant testified that no other officers were treated in this manner.

19. Sgt. Leo Avila was the Shift Commander on the 7a.m. to 3p.m. shift in 2005. Both Complainant and Avila testified that Lt. Maynard instructed Avila that anytime Complainant was working, Avila was to assign her to a DPW highway crew outside the institution and to not assign her to work in-house. Avila testified that these were the least desirable assignments, that there were often complaints about them. In his judgment as shift commander, there were certain places female officers should not be assigned. Avila told Maynard that he did not agree with his directive, and that as shift commander, he had the discretion to assign staff to positions where

they were best utilized. Avila believed that Complainant was the best person for the control room post, and when Maynard would say, "I want Pam out," he'd tell Maynard that as shift commander he had the choice. I credit Avila's testimony.

20. From July 1, 2005 until the Fall of 2007 when Lt. Maynard retired and Superintendent Saba and Deputy Superintendent Notice went to other institutions, Maynard refused to allow Complainant to be assigned to a post inside the facility if he were working and told Sgt. Avila, "If I'm here, she's out." From January of 2006 until the fall of 2007, Complainant was assigned to the Chelsea DPW for almost every shift. Sgt. Avila confirmed that she was assigned to the Chelsea crew for almost a year and Maynard testified that he viewed Chelsea as a less than desirable assignment. Sgt. Avila also testified that colleagues would often approach him and ask why Maynard treated Complainant so badly, because it was apparent that he treated her differently than others. Lt. Lennon described the relationship between Maynard and Complainant as strained.

21. In the Fall of 2005, Complainant's husband, William Scanlan, filed a charge of discrimination against the Department of Correction. His allegations arose out of his employment at the Concord Farm while Saba was the Superintendent. Superintendent Saba was involved in the investigation of these charges and the Department filed a position statement in the Fall of 2005. In late November of 2005 after the DOC filed its position statement with the MCAD, Superintendent Saba sent an email to Lt. Lennon ordering him to "monitor CO Scanlan to see if she is pat-searching her crew on a regular basis, not only am I hearing that she isn't, but I am hearing contraband is flowing through the crews. Please keep this to yourself, as I do not want it out just yet." (Ex. C-8)

22. On December 1, 2005, Complainant was working her usual day shift and at approximately 7:50 a.m. she was in the gym preparing to take a work crew out. She was approached by Lt. Lennon who told she was going to have to start searching the inmates on her crew before they left the institution. There were 10 male officers present and Complainant responded that it was the practice for male officers present to pat-frisk the male inmates prior to their leaving the facility. Complainant had never before been asked to pat-frisk a male inmate on the facility premises.⁴ Retired Lt. Harms testified that she also had never been required to pat-frisk a male inmate at the institution and understood the practice to be that whenever male officers were present, they were to pat-frisk male inmates. Sgt. Avila and Complainant's husband also testified that they understood the policy to be clear that female officers would not pat-frisk male inmates if a male officer were available to do so. I credit their testimony and find that this was the accepted practice at the Concord Farm.

23. The OUS crew post orders mandate that inmates assigned to an OUS crew be pat-searched prior to leaving Concord Farm in the morning and at any other time "in the field" when they enter the Department transportation vehicle. A pat-search is an over the clothing search that includes touching the groin area to discern that an inmate is not concealing any unauthorized item or contraband on his person. All inmates are trained to perform pat-searches and the department's policy regarding pat-searches does not provide for any gender restriction regarding who can perform said searches. Complainant testified that she conducted pat-searches in the field, if she were the only DOC officer present. Inmates are also subject to strip searches upon returning to the facility, to ensure that they are not bringing contraband into the facility, however only male officers would perform strip searches on male inmates.

⁴ Complainant acknowledged that she was required to pat-frisk inmates when she was the only officer present and that she routinely did so outside the institution if there were no male officers available to do so.

24. When Complainant was informed that she would have to begin pat-searching male inmates at the facility for the first time ever, she asked Lt. Lennon if she could confirm the policy with her union, because this was a new requirement, she did not believe that it was in conformance with past practice, and she did not know of any other female officer asked to do it. Complainant testified that she kept asking Lt. Lennon if there was a change in policy, and he was “in her face,” and she was frightened. When he persisted, despite her asking about a change in policy, she stated, “do what you have to do, send me home,” whereupon, Lennon ordered her to “go home.” Complainant proceeded to leave the institution but was called back in and was ordered to write an incident report. She was told to stay in the office until someone came to talk to her. She remained there alone for the rest of her shift. No one came to talk to her and at the end of her shift when she went home.

25. Complainant notified the DOC in her incident report that she believed Lennon’s request that she pat-frisk the male inmates in the gym in the presence of other male inmates and the male officers, was part of pattern of harassment and intimidation directed at her by Lt. Maynard. (Ex. C-6) Complainant testified that it was embarrassing and humiliating to the inmates for a female officer to be required to frisk them in the presence of other inmates and male officers in a non-emergency situation. It was also embarrassing and humiliating to her. I credit her testimony that to require her to do this was highly inappropriate. In her report, Complainant denied that she disobeyed a direct order, but merely sought the opportunity to clarify her obligation with her union.

26. Deputy Superintendent Notice was assigned by Superintendent Saba to investigate this incident. Complainant was the only person interviewed by him. She was asked why she refused a direct order to pat-frisk her inmates. (Ex. R-8) Complainant informed him that the inmates for

her crew were routinely pat-frisked by the male officers present and that this was the past practice, and that they had already been frisked. She also denied that the inmates for her crew were not being pat-frisked prior to leaving the facility. There was no evidence regarding why Saba came to state in an email that the inmates in Complainant's crew were not being frisked or that this assertion was indeed true. Saba could not recall who told him this or when he was told. Notice later denied that Complainant had advised him that the inmates had already been searched on December 1, but a review of his report to Superintendent Saba establishes that Complainant's representative at the disciplinary hearing advised him the inmates had been searched and gave him the names of the officers who had searched the inmates. (Ex. R-8)

27. On December 21, 2005, Complainant was notified that she was suspended for five days without pay for refusing a direct order from Lt. Lennon to pat-frisk inmates on December 1, 2005. Complainant's allegations raised in her December 1, 2005 report that she believed this to be part of a pattern of harassment and intimidation were not acknowledged, investigated, or otherwise addressed by either the Superintendent or Deputy Superintendent.

28. Complainant appealed her five day suspension to the Civil Service Commission which ruled that the DOC did not have just cause to discipline her. Prior to the Civil Service Hearing, Lt. Lennon gave Complainant the email he had received from Supt. Saba requesting that he monitor Complainant and to keep it quiet. Lt. Lennon told Complainant that he hoped it would help her. The Civil Service Commission found that requiring the Complainant to pat-frisk inmates under the circumstances, was a deliberate breach of a long-established practice and was not based on emergency or necessity but was done to create an opportunity to target and provoke Complainant. By that ruling dated July 23, 2009, Complainant's suspension was reversed and she was restored to her position without any loss of pay or benefits. (Ex. C-9)

29. There was no evidence that any inmates were discovered to be bringing contraband out of the institution at the time. Superintendent Saba never stated if someone reported this to him or how he came to be concerned that “contraband was flowing through the crews,” as stated in his email to Lt. Lennon. He testified that his greatest concern was that “money” (cash) could be flowing out of the institution, but admitted that it was unlikely this could be detected by a pat-frisk. There is no evidence of any complaints about Complainant not performing her job duties.

30. Complainant testified that she suffered physically and mentally from the stress of the harassment she endured for a number of years. She stated that having to report repeatedly to undesirable, and sometimes inappropriate, assignments for over two years and being asked to pat-frisk male inmates at the institution, caused her great anxiety, embarrassment, and humiliation. She perceived herself to be the victim of gender harassment and retaliation, and came to believe this was a vendetta from the top down, leaving her with no recourse to remedy the hostile work environment to which she was subjected. She suffered from migraine headaches, sleepless nights, bouts of sadness and not wanting to leave her home. She treated with a chiropractor to relieve the tension and stress she experienced in her neck and back. (Ex. C-10) Complainant’s husband testified that she often would get up in the middle of the night and sit with the lights off, staring out the window with tears streaming down her face. He testified that they wanted to have a second child but that the stress from the harassment at work led them to grow apart and that their marriage suffered, causing them to put off having a second child. Complainant was short with her husband and observed that her behavior had a negative impact on her son and this upset her greatly. She began to self-medicate by drinking alcohol and was no longer a happy person. Both Complainant and her husband testified that he encouraged her to

attend counseling with him and their son but Complainant felt she had to deal with the emotional trauma herself.

31. Complainant contemplated taking the sergeant's exam during that time, but opted not to take the exam because she was under so much stress. She testified that prior to the summer of 2005, she loved her job at the DOC but after July of 2005 she didn't want to go to work. Given her long career and unblemished record with no discipline, having to face a five day suspension that Complainant knew was unwarranted was difficult to bear. She testified that even though she was vindicated when the Civil Service Commission ultimately reversed the discipline, she still had to bear the stress of the appeal, testifying before the Commission, and waiting a number of years for the decision that exonerated her. She stated that her situation is much better now that Lt. Maynard and Superintendent Saba have left the facility. I found Complainant's testimony and that of her husband to be extremely compelling and credible and I believe that she suffered a great deal of emotional distress.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4 (4) prohibits retaliation against an employee who has engaged in activity protected by the statute.⁵ The Commission has interpreted protected activity to include pre-charge and non-charge complaints of discrimination in addition to formal complaints filed with the Commission. *Auborg v. American Drug Stores*, 21 MDLR 238, 242 (1999) The statutory protection against discrimination also extends to the "informal voicing of complaints" alleging discrimination. *Proudy v. Trustees of Deerfield Academy*, 19 MDLR 83, 88 (1997) Retaliation is "motivated, at least in part, by a distinct intent to punish or

⁵ Section 4(4) makes it unlawful for any person, employer...to discharge expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

rid the workplace of someone who complains about an unlawful practice.” *Ruffino v. State Street Bank and Trust Company*, 908 F. Supp. 1019, 1040 (D. Mass. 1995)

In order to establish a *prima facie* case of discrimination based on retaliation, Complainant must establish by credible evidence that: (1) she participated in activity protected by the statute; (2) she was subjected to an adverse employment action; (3) Respondents were aware of the protected activity prior to taking the adverse action; and (4) a causal connection exists between Complainant’s participation in prior protected activity and the adverse employment actions taken by Respondents. *See Morris v. Boston Edison Company*, 924 F. Supp. 65, 68-69 (D. Mass. 1996); *Kelley v. Plymouth County Sheriff’s Dept.*, 22 MDLR 208, 215 (2000). A causal connection may be inferred where the timing of events makes such an inference reasonable. *Kealy v. City of Lowell Dept. of Public School*, 21 MDLR 19, 24 (1999).

I conclude that Complainant engaged in protected activity when she filed a complaint against Lt. Maynard on July 1, 2005, reporting that she believed she was being harassed on account of her gender and stating that Lt. Maynard was subjecting her to a hostile work environment. There is some suggestion that Maynard’s actions on July 1, 2005 were motivated by issues having to do with Complainant’s husband and the desire to punish her because of her association with him. Regardless of Maynard’s motive prior to Complainant’s July 1, 2005 complaint, once she claimed that she was being targeted and subjected to a hostile work environment on account of her gender, she engaged in protected activity. Any adverse conduct occurring after her July 1, 2005 complaint may be deemed retaliation for protected activity.⁶ While I conclude that while Maynard’s actions on July 1, 2005, may have been motivated, in part, by issues relating to Complainant’s husband, Maynard thereafter acted in a manner that was

⁶ Even if one could argue, that there was a continuing dual motive for Maynard’s conduct, I find that retaliation for Complainant’s charge of harassment was the primary motive for his actions after her July 1, 2005 charge.

clearly intended to intimidate Complainant and to create an adverse and hostile work environment for her as a female correction officer. Complainant has proved the requisite causal connection between her report of gender harassment and Maynard's subsequent adverse conduct.

Complainant has persuaded me that she had a good faith belief that Maynard targeted her for harassment knowing that as a one of only two female correction officers in the entire facility, she would be particularly susceptible to punitive assignments and would experience greater intimidation and fear as a result of his actions. Complainant's report of harassment placed Respondent on notice that she believed she was being targeted for adverse treatment on account of her gender. At the very least, Respondent perceived that Complainant was reporting sexual harassment on July 1, 2005. (Ex. R-4) Respondent found no grounds to discipline Maynard, stating that Complainant did not use the "buzz words" related to sexual harassment or a hostile work environment. This facile outcome completely ignored the fact that Complainant's allegations raised issues of adverse treatment related to her gender.

Maynard remained Complainant's supervisor after the events of July 1, 2005 and thereafter continued to treat her adversely in terms of assignments. He denied Complainant her regular assignment inside the institution, and whenever he was on duty, assigned her strictly to road assignments supervising work crews. He knew that these assignments were less desirable, that the facilities were sometimes not appropriate for female officers and female officers were not assigned to those posts for precisely that reason. There was credible testimony that the one or two female correction officers at the Concord Farm were rarely assigned to escort outside work crews and only in those situations where there was an emergency or no male correction officer available. Sgt. Avila confirmed that Maynard ordered him to assign Complainant to work outside the institution whenever Maynard was present. He stated that it was obvious to all the

corrections officers that Maynard was specifically targeting Complainant for adverse action and undesirable assignments and that many officers asked him why Maynard treated Complainant differently. Complainant was frequently given less desirable assignments outside the institution for a period of over two years until Maynard retired. Maynard also encouraged and or ordered other senior officers to assign Complainant to posts outside the institution, and advised other correction officers that if they swapped assignments with Complainant they would suffer adverse consequences.

I conclude that Maynard's assignment of Complainant to outside work crews was a departure from her routine assignment and a significant divergence from the past practice regarding female officers. Given how widespread the knowledge of this adverse treatment was, it is fair to conclude that his continued punitive actions against Complainant were directly or tacitly condoned by his superiors, the Superintendent and Deputy Superintendent.

Respondent failed to articulate a legitimate non-discriminatory reason for its actions other than to state that Complainant had not articulated a valid claim for harassment against Lt. Maynard and that all posts and assignments were routinely rotated with no officer having a permanent assignment within the institution. I find that given that lack of reasonable explanation for the divergence from past practice, there is sufficient evidence that the motive for Maynard's actions was to punish Complainant for having filed a charge of harassment against him.

Moreover, after Complainant's husband filed a formal complaint of discrimination at this Commission in the Fall of 2005, Complainant was subjected to further adverse treatment which was clearly retaliatory. The Superintendent's email to Lt. Lennon advising him to monitor Complainant in the pat-frisking of her work crews is direct evidence of retaliatory intent. Even though Complainant was not the charging party before the Commission, her claim of retaliation

for protected activity by her husband is cognizable. *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) (Supreme court recognized and allowed a retaliation claim where the plaintiff, did not engage in protected activity, but one closely associated with the plaintiff did, causing the plaintiff to be fired) Recognition of such a claim was based on premise that one might be dissuaded from engaging in protected activity and their rights chilled if they knew someone closely associated with them would be punished by their activity. Retaliation against Complainant falls within the zone of interest theory established by the Supreme Court which concluded that an individual may bring a retaliation claim if he or she has an interest arguably sought to be protected by the statute. *See Id.* Given that Complainant and her husband were both employed by the DOC, she was particularly susceptible to retaliation for his protected activity, and indeed was subjected to retaliation.

Not long after Respondent was required to file a position statement in response to the MCAD complaint filed by Complainant's husband, Superintendent Saba targeted Complainant for further adverse treatment when he sent an email to Lt. Lennon advising him to monitor Complainant and to check on whether Complainant was pat-searching her crews prior to leaving the facility. In addition to the fact that said email may be considered direct evidence of retaliatory motive, there is a sufficient temporal connection between the two events from which one could reasonably draw the inference of a causal connection.

I also find that requiring Complainant to pat-frisk male inmates in the institution was an adverse action. Complainant testified credibly that she had never been required to pat-frisk her crews upon leaving the institution and that this task was always performed by male officers on the scene. Moreover, there was ample evidence that by accepted long-standing practice, female correction officers were never called upon to pat-frisk inmates if male correction officers were

available to do so. Complainant stated that it was embarrassing for the inmates and uncomfortable for her to have to perform a pat-frisk of male inmates in the presence of male correction officers and other inmates. I credited Complainant's testimony in this regard. Prior to this trumped-up suggestion that Complainant was not properly performing her duties, Complainant had a stellar career at the Concord Farm with no history of complaints or discipline leveled against her. Complainant was formally disciplined with a five-day suspension when she protested Lt. Lennon's admonition that she would be required to pat-frisk crews leaving the institution and sought to obtain an opinion from her union representative. She was charged with insubordination for refusing to obey a direct order. This punishment was ultimately overturned by the Civil Service Commission and Complainant was vindicated after a lengthy appeal.

In the absence of evidence to support the Superintendent's assertion that contraband was flowing out of the institution or that Complainant was not properly performing her duties, it is clear that the Superintendent's motive was retaliation. The Superintendent further admitted that any attempts by inmates to conceal money on their persons in order to purchase contraband on the outside would unlikely have been uncovered by a pat-frisk. I conclude that the reasons that were purported to justify the directive to monitor Complainant's performance and require her to pat-frisk inmates were a pretext for retaliation. Ultimately there is sufficient evidence to reasonably conclude that the adverse actions taken against Complainant after July 1, 2005 including undesirable assignments for over two years and her suspension in the Fall of 2005, constitute retaliation in violation of G.L. c. 151B, §4 (4) for which Complainant is entitled to a remedy.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole, and to ensure compliance with the anti-discrimination statute. G.L.c. 151B s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). The Commission may award monetary damages for, among other things, lost compensation and benefits, lost future earnings, and emotional distress suffered as a direct and probable consequence of the unlawful discrimination. The Commission is also authorized to issue cease and desist orders, award other affirmative, non-monetary relief, and assess civil penalties against a Respondent.

Complainant was made whole for her lost wages by the decision of the Civil Service Commission issued in July of 2009. However she is entitled to damages for the emotional distress she suffered as a result of Respondent's unlawful conduct.

An award of damages for emotional distress must be based on substantial evidence that the distress is causally-connected to the unlawful acts of discrimination. Such awards must be fair and reasonable and proportionate to the harm suffered. Factors to consider are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Id. at 576*.

Complainant testified credibly that she suffered both physically and emotionally from the stress of harassment she endured at work. She testified credibly that as one of only two or three female officers at the Concord Farm, she suffered disproportionately from the conduct of her superiors that was intended to intimidate, frighten, embarrass and humiliate her and that she experienced all of these emotions. Her routine assignment, which by all accounts suited her well and served the needs of the facility, was altered for a period of over two years. Complainant incurred her first ever discipline for questioning a change in a long-standing practice involving

pat-frisking inmates which was directed at her and intended to make her uncomfortable and vulnerable in the presence of inmates and her co-workers. Dealing with the punitive wrath of her superiors caused her to suffer migraine headaches, back and neck problems, sleepless nights and difficulties in her relationship with her husband and son. She had bouts of depression when she did not want to go to work or leave her home. Prior to the harassment she had loved her job and was proud of her stellar record. Once the harassment began, she put off decisions to move forward in both her personal and professional life, such as delaying having a second child and opting not to advance her career by deciding not to take the sergeant's exam. I found Complainant to be a very sincere and credible witness. Complainant's husband also testified compellingly about how her emotional suffering impacted their family. Based on the credible testimony I conclude that Complainant is entitled to damages for emotional distress in the amount of \$50,000.

The Commission is also authorized to assess civil penalties in circumstances where the discriminatory conduct is knowing and willful, deliberate and/or egregious. In this case, Complainant's superiors either condoned or were directly involved in the retaliatory conduct. They failed to conduct adequate investigations of Complainant's charges, thereby tacitly or otherwise allowing the conduct to continue. In my view, the Respondent's conduct merits a civil penalty in the amount of \$10,000.

V. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law the Respondent is hereby ordered to:

- (1) Cease and desist from all acts of retaliation for protected activity, particularly as to Complainant, who remains employed at the Concord Farm.
- (2) Conduct its internal investigations of charges of discrimination and retaliation in compliance with departmental policy and report its findings to the Department's Office of Affirmative Action.
- (3) Pay to the Complainant, Pamela Scanlan, the amount of \$50,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to court judgment and post judgment interest begins to accrue.
- (4) Pay to the Commonwealth of Massachusetts a civil penalty in the amount of \$10,000.
- (5) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's Superintendent's, Deputy Superintendents, and other senior managers including Lieutenants and Captains who exercise authority with regards to internal investigations and discipline for complaints of discrimination and retaliation. Such training shall focus on issues related to retaliatory conduct directed at employees who charges of discrimination or retaliation. Respondent shall utilize a trainer provided by or certified by the Massachusetts Commission Against Discrimination. The trainer shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date, and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any administrators or senior officers

who fail to attend the original training and for new supervisors and administrators who are hired or promoted after the date of the initial training session. The repeat training session shall be conducted within one year of the first session. Following the second training session, Respondent shall send to the Commission, the names of persons who attended the training.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. 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. Pursuant to § 5 of c. 151B, Complainant may file a Petition of attorney's fees.

So Ordered this 19th day of March, 2013.

Eugenia M. Guastaferr
Hearing Officer