COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
TIFFANY SCHILLACE,

Complainants

v. DOCKET NO. 12-NEM-01742

ENOS HOME OXYGEN THERAPY, INC.
and JON ENOS, as PRESIDENT of ENOS
HOME THERAPY, INC.

Respondents

Appearances: Richard E. Burke, Jr., for Complainant
Robert M. Novack and James W. Clarkin for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 12, 2012 and in a subsequent amendment to the complaint on July 3, 2012, Complainant, Tiffany Schillace, alleged that Respondents, Enos Home Energy Therapy, Inc. and the company's President, Jon Enos, retaliated against her in violation of G. L. c. 151B, s. 4(4), by giving her an unjustified final warning for on-the-job infractions and subsequently terminating her employment because her then fiancée and father of her two children, who also worked for Respondents, had filed an earlier complaint of retaliation against Respondents.

The Investigating Commissioner found Probable Cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified to hearing and

a public hearing was held before the undersigned Hearing Officer on April 21 and 22 and July 28 and 29, 2015 at the UMass School of Law in North Dartmouth, MA. The parties submitted post-hearing briefs. Having reviewed the record in this matter 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, Tiffany Schillace was hired as a Customer Service Representative (CRS) by Respondent, Enos Home Oxygen Therapy, Inc. on April 2, 2012. She was recommended for employment by her then- fiancée and father of her two children, Michael St. Martin, who worked for Respondent as a driver. Complainant lived with St. Martin from 2006 to December of 2012, and her close relationship with him was well known to management and co-workers at Respondent. Complainant, who was 22 years old at the time and had a high school education and two plus years of cosmetology school, but had no prior experience in the medical equipment field or insurance. She was a stay-at-home mother prior to working for Respondents. Complainant was hired to work part-time and worked approximately 15-25 hours per week. Her hours increased some as she worked longer and she was allowed to pick up time on Saturdays. She was a probationary employee who was subject to a 90-day evaluation.

2. Respondent Enos Home Oxygen Therapy, Inc. is a family owned medical supply business located in New Bedford, MA. Richard (Jon) Enos is the President of the company which was started by his grandfather. He was described as a hands-on owner.

3. Diane Desrosiers, a seven year employee of Respondents, was the store/showroom manager. She interviewed Complainant and conducted her first day orientation to the job. Colleen Cregan was Respondent's Customer Service Quality Assurance Manager and was hired

at approximately the same time as Complainant. Cregan was Complainant's immediate supervisor and she reported to Desrosiers. Jillian Jardine was Respondent's HR Generalist. Jardine was hired in May of 2012 by Jon Enos and reported directly to him.

4. The CSR position entailed interacting with customers and taking orders for medical supplies or products via telephone from individuals or institutional customers such as hospitals or nursing homes. Enos sold hundreds of different types of medical products. Calls for orders would be automatically routed to an available CSR who also had to determine and co-ordinate the proper insurance coverage, which could be complicated and difficult to learn. Complainant was told, and there was a general consensus, that the CSR functions could be complex. They involved acquiring detailed knowledge of different medical products, insurance and billing protocols, and the computer system, all of which could take several months to learn. Eight CSR's worked during the week and three CSR's worked on Saturday with the senior CSR stationed in the adjoining showroom.

5. Complainant testified that she had minimal formal training, and mostly learned on-the-job. Complainant's orientation consisted of Desrosiers showing her around the building, discussing multiple topics and giving her an employee handbook. Complainant spent some time sitting with and observing a senior CSR for a couple of days to learn the phone system and how to process an order, and thereafter was essentially on her own. I conclude that there were no formal training protocols for the CSR position. Complainant also had to learn the language of medical diagnoses. During her first few weeks of training, Complainant was allowed to put her phone on hold while she completed orders and to ask questions of more senior CSR's.

6. During her first two and one-half months of work, Complainant tried to learn as much as she could, asked a lot of questions, and enjoyed working at Respondent. Initially she had no assigned work station and sat in different work areas, and later shared a desk with another part-time employee. Complainant made some errors on orders, but there was testimony that this was not uncommon. Errors were tracked by the use of an "action sheet" devised by Cregan and were used primarily as a learning tool and not for disciplinary purposes. Complainant received no verbal reprimands or written warnings about her performance or her attitude prior to June 19, 2012. She was counseled on one occasion in May of 2012 for leaving for lunch without notifying anyone and taking an excessive lunch break. Jardine testified that Respondent did not consider this a disciplinary measure and merely reminded Complainant of the lunch policy.

7. On June 12, 2012, Complainant's fiancée, St. Martin, filed a complaint against Respondent, Enos Oxygen, at MCAD alleging he was subjected to sexual harassment and retaliation for having participated as a witness in the MCAD complaint of a friend and co-worker, Daniel Russo.[1] (Ex. 1) Respondents received St. Martin's complaint on June 15, 2012. Enos testified that prior to filing a complaint with MCAD, St. Martin had approached him stating that he knew about Russo's complaint and wanted nothing to do with it. In his complaint, St. Martin stated that Enos had approached him asking if he had participated in MCAD's investigation of Russo's complaint and St. Martin told him he was contacted as a witness.

8. Complainant alleged that on Friday, June 15, 2012, Enos came down to the customer service area, something he rarely did, and stood directly behind Complainant and stared at her for some 10-15 minutes in a manner that she felt was intimidating. She testified that she had no

[1] Russo and St. Martin's MCAD complaints were dismissed for failure to prosecute after they plead guilty to embezzling medical equipment from Enos and for computer crimes. Russo was terminated prior to Complainant and St. Martin resigned from Respondent in August of 2012 prior to their criminal activity being uncovered and charges being brought.

significant interaction with Enos prior to that incident, that neither one of them spoke to each other while he stood there, and she did not acknowledge his presence. While I find it strange that Complainant did not address Enos if he stood behind her staring for that long a period of time, I do believe that an incident did occur with Enos on that day that made her uncomfortable and that she likely exaggerated the amount of time he stood behind her. She was sufficiently upset to call St. Martin to tell him what happened. I do not completely discredit her allegation.

9. On Saturday June 16, 2012, Complainant was working with two other CSR's, Terry Giammalvo and Shauna Arujo. Giammalvo, the senior CSR was working in the showroom to service walk-in customers on that day and left the door to the show room open. Complainant alleges that she was instructed to sit at a different work station on that Saturday so that she could be viewed by a video camera. However, there was credible testimony that CSR's were often seated closer to the show room on Saturdays to assist the show room CSR with customers if the need arose. Complainant testified that she was unable to complete an order she had received early in the day for a walker to be sent to a hospital, which is considered a priority. She claimed she was unable to complete the order because she had not received a return call from the hospital with the necessary patient information. Complainant also informed Giammalvo about another order from the previous Thursday that she had not completed and that needed to go out on Monday. Giammalvo instructed her to complete that latter order and Giammalvo completed the order for delivery of the walker. On that Saturday, Giammalvo also observed Complainant and Arujo laughing, joking and socializing with two warehouse workers in the CSR area for approximately 20 minutes and she asked them to keep the noise down. Giammalvo testified that this behavior was "very disruptive and not appropriate." She reported the incident, including the behavior of the other three involved, to her supervisors Diane Desrosiers and Colleen Cregan,

because it was unprofessional and because Complainant's work orders had not been timely completed.

10. On Monday morning following the Saturday events, Enos reviewed the orders for delivery from the previous Saturday, which he stated was his custom, and he returned them to Cregan for any necessary corrections. Cregan prepared action sheets noting the need for corrections on certain orders Complainant had completed. (Ex. 10) Enos testified that he was uncertain if all the errors contained in the action sheets labeled Exhibit 10 occurred on the previous Saturday because Cregan generated and dated the action sheets.

11. On June 19, 2012, Complainant's next day of work, she was called into a conference room with Colleen Cregan and Jillian Jardine. Jardine presented her with a written warning and ten "action sheets" noting errors on her orders on June 16th. A number of the action sheets noted that they were reviewed by and sent back from Jon Enos. (Ex. 9A and 10) The warning noted Complainant's failure to complete two orders in a timely fashion on Saturday, June 16th, her socializing with other employees on that day for some twenty minutes, and the multiple errors found in her data entry paper work. The notice drafted by Jardine concluded that Complainant's probationary period was ending on July 2, 2012 and advised her that any additional performance issues would make her ineligible for permanent hire as a Customer Service Representative, and result in her termination. (Ex. 9A) No other employees were disciplined for socializing on June 16th.

12. Sixteen action sheets for Complainant dated from 6/12/12 to 6/21/12 were introduced in evidence as contained in her personnel file. Complainant received two of these action sheets on June 20 and 21 subsequent to receipt of the the June 19th disciplinary warning. One of these action sheets had a notation that it was returned from Enos. (Ex. 10) Complainant testified that

any action sheets she received prior to June 19th were not for disciplinary, but for instructional purposes. She had never received an action sheet that was reviewed by and returned from Enos prior to June 19, 2012, and any prior action sheets were not contained in her personnel file.

13. Colleen Cregan denied that she informed Enos of the events of June 12, 2012, and testified that she was not involved in the decision to discipline Complainant for the events of that day. Although she was present for the June 19th disciplinary meeting, she did not see the written warning to Complainant until after it was written by Jardine. Cregan had no role in investigating the incident or the decision to discipline Complainant with a written warning. This is contrary to Enos' testimony that Cregan was involved in the matter. Cregan testified that Enos, Diane Desrosiers and Jardine were the individuals involved and that Desrosiers told her about the June 16th events when she arrived at work the following Monday morning. The incident had already been reported to management when she arrived at work. I credit Cregan's testimony that she did not report the incident to Enos or Jardine and played no role in the decision to discipline Complainant. I also draw the reasonable inference that it was Desrosiers who reported the events to Jardine and or Enos.

14. Enos testified that he was made aware of the June 16, 2012 incident on the following Monday. He could not recall exactly when he was informed of Complainant's infractions or who informed him, but he watched the security video tape of the CSR room from the previous Saturday. He also could not recall when he reviewed the video tape or how he came to watch the tape, but believed it was after receiving the information about Complainant socializing on Saturday. In his prior deposition he testified that he viewed the tape on Monday June 19th, prior to the issuance of Complainant's written warning. I believe he viewed the tape and consulted with Jardine prior to the issuance of June 19th disciplinary warning to Complainant.

15. Complainant disputed the allegations in the written warning and submitted a lengthy rebuttal and explanation of the events of June 16th on the day following receipt of the warning. (Ex. 9B) She stated that she had completed all her orders on June 16th and had done some 15 orders. Complainant's testimony at the hearing contradicted her written rebuttal in some respects regarding the orders she had not completed and the reasons for not completing them and she generally did not accept responsibility for her actions. Her defense to "socializing" on work time was that three other employees were part of the discussion, none of whom were disciplined as she was. She blamed the errors she made on lack of experience and training and stated that as a new employee, she had many questions and made sure to run most work orders by a senior employee. Complainant testified that she drafted the rebuttal herself, but given the language of the document, including legal terms, this testimony is not credible. Enos and Jardine testified that they believed the rebuttal was not prepared by Complainant because that language was more sophisticated than any language she used and appeared to be professionally drafted. Enos testified that his belief that an attorney had written Complainant' rebuttal caused him to consult with the company's attorney. I draw the inference that Enos sought legal advice regarding termination of Complainant's employment.

16. On Saturday, June 30, 2012, Complainant was assigned to work with Shelly Frazier Stanton, the senior CRS on duty in the showroom. While Stanton was meeting with a job applicant in the showroom she heard loud and disruptive swearing and laughing coming from the customer service room. Stanton testified that she heard Complainant use the "f" word and went to the door to advise Complainant that she had someone with her in the showroom and Complainant's unprofessional language was overheard. Complainant apologized for her behavior and told Stanton she was unaware there was anyone in the showroom. Complainant

testified that she swore because she had hit her knee on the desk, but Stanton stated there was laughing and several profanities used by Complainant. I credit Stanton's testimony that Complainant behaved in an unprofessional manner on that day.

17. Stanton testified that she reported the incident to Colleen Cregan and was pretty sure Cregan asked her to prepare a statement. Cregan did not recall asking Stanton to "write-up" the incident. Cregan testified that the incident was reported to Diane Desrosiers and Desrosiers discussed the incident with her early Monday morning. She believed that Desrosiers reported the incident up the chain of command and probably instructed Stanton to "write it up." Stanton wrote up the incident and gave it to Jardine. (Ex. 14) I credit Cregan's testimony about her involvement in reporting this incident. Cregan could not recall Complainant ever being disruptive in a manner that would cause her to document the matter in writing.

18. On July 2, 2012, which was one of her days off, Complainant went to the MCAD to file a complaint. She stated that she did this was because she had been disciplined for what she believed was a retaliatory reason, i.e., that her fiancée had engaged in protected activity of filing an MCAD complaint, and in anticipation of her employment being terminated.[2]

19. On July 3, 2012, Complainant reported to work and was called into a meeting with Enos, Jardine, and Cregan. She was given a letter terminating her employment and was given her 90 Day Performance Review. (Exs. 11& 12) The Performance Review had been completed by Cregan on July 2nd. Complainant was rated by Cregan in many categories as: "Sometimes meets Standards and Expectations, generally needs improvement," and in others she received a rating of: "Regularly Meets Expectations and Standards." She received the worst scores in the category of "Interpersonal Skills" with Cregan commenting: "Tiffany does not take criticism well, always makes a point of pointing fingers at others instead of taking suggestions and acting

[2] On July 3, 2012 Complainant amended her complaint to add a charge of retaliatory termination.

on them constructively." Cregan also noted that the percentage of Complainant's orders had not improved significantly in three months and she recommended: "Non-Continuation of Employment." (Ex. 11) The termination letter stated that Complainant's supervisor Cregan had decided she was ineligible for permanent hire based on performance and attitude and cited the recent infractions for which she had been disciplined. Complainant disputed her Performance Review and wrote on her termination letter that the allegations contained therein were fabricated and had all arisen within the prior two weeks. (Ex. 12)

20. Cregan testified that she had discussions with Diane Desrosiers and Jillian Jardine and they "convinced" her that Complainant's termination was appropriate. She stated that she would not have recommended Complainant's termination, but that discussions with Diane and Jillian caused her to change her mind. She testified that she and Diane Desrosiers worked on Complainant's Performance Review together because Cregan was relatively new to the company. Jon Enos testified that Complainant's termination was completely Cregan's decision, and that he acted solely based on Cregan's performance review, but I do not credit that testimony. Cregan testified in her deposition that she had discussions about Complainant with her supervisor Desrosiers and Enos, and that they were involved in the decision to terminate Complainant. I conclude based largely on Cregan's testimony that Diane Desrosiers, Jardine and Enos were the individuals who determined Complainant's employment should be terminated. Enos admitted that he was unhappy about St. Martin's complaint and preferred not to have Complainant working for the company, but added there are other employees he doesn't want working for the company.

21. Respondent claimed that Complainant was terminated because her percentage of the total orders had not improved. Her April 2012 percentage was 2.17, her May percentage was 2.97 and her June percentage was 4.95. The target for total orders for a part-time employee is 5%. Complainant was within .05% of this target by her third month when she was terminated. I do not credit the testimony that this was the reason for Complainant's termination.

22. Desrosiers and Cregan testified that Complainant's demeanor and attitude were poor, particularly in dealing with customers. Desrosiers testified that she strongly believed that Complainant should be terminated. She testified that she frequently observed Complainant away from her desk, walking around and socializing with the drivers. She had seen her storm out of the CSR room on several occasions. Cregan testified that Complainant was immature and likened her behavior to that of her teenage daughters. At the Hearing she testified that the decision to discontinue Complainant's employment was the right one, but stated she probably would have given Complainant more time to learn the job. Cregan also testified that, at times she observed that Complainant did not behave in a professional and mature manner and that she had difficulty accepting criticism and owning up to her errors. I credit their testimony that Complainant behaved in an unprofessional and immature manner and refused to accept constructive criticism and that these were factors in the recommendation that her employment not be continued beyond her probationary period.

23. At the Hearing, Enos was understandably furious at Complainant, St. Martin, and Russo, given that the latter two had plead guilty to a criminal enterprise to steal equipment from Enos' company and re-sell it on the internet. Although Complainant disavowed any knowledge of their activity, St. Martin created the web-site used to sell the equipment in her name. She testified that St. Martin loved to tinker and build things with spare parts and she believed

Respondent had allowed him to take old parts that would otherwise be discarded. While Complainant might have had reason to suspect otherwise, there is no evidence that she played an active role in any theft from Respondent. She was not charged with any criminal activity. More importantly, at the time of Complainant's termination, Enos knew nothing about this criminal enterprise and did not uncover the wrong-doing until the Fall of 2012, after Russo and Complainant had been terminated and St. Martin had resigned from the company. It is clear that none of the three were terminated from Respondent for this reason. Enos admitted that he was angry with Russo around the time of events in this case because Russo had been involved in a romantic relationship with Enos' sister who was married and working for the company. I draw the reasonable inference that this matter had apparently caused considerable friction within the company. Complainant was overheard stating on the day of her termination that "it was all Dan's f—g fault." (referring to Russo)

24. Complainant earned $10.00 per hour while working some 20-25 hours per week at Respondent. She remained unemployed until May of 2013, approximately 10 months. Her lost wages for that period of time were approximately $8000. She did not receive unemployment benefits. For a period of time that she was unemployed, Complainant received welfare benefits of $500/month and food stamps, but she was uncertain of the dates. St. Martin resigned from Respondent in August of 2012 and Complainant ceased living with him in December of 2012. It is reasonable to draw the inference that Complainant would have qualified for public assistance for her children sometime after August of 2012 and likely continued to receive benefits while she had no income, a period of approximately eight months. I find that she received approximately $4000 in public assistance.

25. Complainant testified that she suffered great emotional distress after her termination, could not eat or sleep, was anxious and frightened, did not want to get out of bed and could not care for her two small children. According to Complainant, the stress of her termination was a primary factor in her break-up with St. Martin, but I did not find this to be credible. Complainant testified that she had sought psychiatric treatment on several occasions prior to her employment at Respondent. In October of 2012, New Bedford law enforcement officers raided her and St. Martin's home with search warrants looking for St. Martin, threatened to arrest her if she did not cooperate, and seized their computer and cameras. St. Martin was arrested and taken away in handcuffs on that occasion. He was later charged and plead guilty to embezzling medical equipment and computer crimes. Complainant's claim that these events and the subsequent criminal charges against St. Martin did not significantly contribute to her emotional distress was simply not credible. She also denied that the break-up with St. Martin, the father of her two young children, and her fiancée since 2006, caused her psychological distress despite her having lived with him for several years. This assertion was not credible. Put more simply, Complainant strenuously denied that any of these traumatic events contributed significantly to her emotional distress and attributed her distress solely to her termination from a job she had held for only three months. While I believe that Complainant suffered significant stress during the months following her termination, particularly after St. Martin lost his job and was arrested, I conclude that her distress was largely attributable to other factors, including the termination of her relationship with St. Martin. I conclude that any distress she suffered as a result of her termination from Respondent was *de minimus*.

III. CONCLUSIONS OF LAW

Complainant alleges that she was the victim of retaliation prohibited by G.L. c. 151B, s. 4(4) because of her close association with an individual who engaged in the protected activity of filing a claim of discrimination at the MCAD. Complainant asserts that she has standing to bring a complaint in this matter because of her close association with her fiancée St. Martin, although she, herself, had not engaged in the protected activity. Respondent argues that Complainant is not entitled to the protections of the statute, because she was not the victim of discrimination and she did not engage in protected activity.

The U.S. Supreme Court has interpreted the retaliation provisions of Title VII expansively in ruling that an individual may bring a Title VII retaliation claim if she has an interest arguably sought to be protected by the statute, even if the individual did not engage in protected activity. Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011). In Thompson, the employer was found to have violated the anti-retaliation provision of Title VII by firing the fiancée of an employee who complained of discrimination. In Burlington N. & S.F.R. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 (2006), the Supreme Court held that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct. The Court in Burlington held that Title VII's anti-retaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.*, at 68, 126 S.Ct. 2405. Where the employee falls within the zone of interest sought to be protected by the statute, she is protected from reprisal, although she is a third party who did not initially engage in the protected activity. The Court found that a close family member who is the subject of an adverse action will almost always meet the Burlington "zone of interest" standard. Thompson, supra. at 870.

Applying the Burlington test to the facts at issue here, it is reasonable to conclude that Complainant, Schillace falls within the zone of interests protected by the statute. Here the reasonable inference can be drawn that Complainant is "not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming [St. Martin]." Since Complainant was injured by this unlawful act, she is a person aggrieved and has standing to sue. *Id.* at 870.

The Massachusetts Supreme Judicial Court has likewise adopted an expansive view of the protections of c. 151B in the context of "associational discrimination." Flagg v. Alimed, Inc., 466 Mass. 23 (2013). In Flagg, The SJC affirmed the Commission's longstanding and consistent interpretation of G.L. c. 151B in the context of employment discrimination. See Grzych v. American Reclamation Corp., et al. 37 MDLR 19 (2015). The holding in Flagg is supported by long-standing precedent recognizing that G.L. c. 151B is to be liberally construed for the accomplishment of its purposes. See Psy-Ed Corp. , et al.v. Klein, et al., 459 Mass. 697 (2011) (reaffirming liberal construction of c. 151B to further statute's broad remedial purpose and adopting an expansive view of retaliation) "The term 'associational discrimination' refers to a claim that a plaintiff, although not a member of a protected class himself or herself, is the victim of discriminatory animus directed toward a third person who *is* a member of the protected class and with whom the plaintiff associates." Flagg, supra. at 27 [citations omitted] The SJC recognized that the language of the statute is meant to be read broadly in light of its remedial purpose and that the "concept of associational discrimination also furthers the more general purposes of "a wide ranging law," that seeks to remove "artificial, arbitrary, and unnecessary barriers to full participation in the workplace that are based on discrimination." Id. at 30 [citations omitted]

The SJC in Flagg also noted that G.L. c. 151B grants standing to seek relief to *any* person claiming to be aggrieved by an unlawful practice. Id., *Citing* Lopez v. Commonwealth, 463 Mass. 696, 707 (2012). The SJC held that this statutory language along with similar language in a cognate provision of Title VII, "offers strong support for the conclusion that c. 151B's protections against workplace discrimination were intended to cover all those adversely affected, whether or not they are the direct target of the proscribed discriminatory animus." Flagg, supra. at 30-31. Consistent with broad remedial purposes of c. 151B, as with Title VII, an individual who is retaliated against by virtue of a close personal association with a member of a protected class[3] has standing to bring a claim under G.L. c. 151B and is afforded the statute's protections and remedies. Consistent with this precedent, I conclude that Complainant's claim of retaliation because of her fiancée's protected activity is not barred, that she is an aggrieved person pursuant to c. 151B s. 5, and that she has standing to bring a claim of retaliation.

I turn to the merits of Complainant's retaliation complaint. Complainant may establish a *prima facie* case of retaliation by proving that (1) she, or a close associate, engaged in protected activity; (2) her employer was aware of the protected activity; (3) she subsequently suffered an adverse employment action; and (4) the adverse employment action followed her protected activity within such time as retaliatory motive can be inferred. Since the causal link between protected activity and the adverse employment action is not always explicit, a causal connection may be inferred where the timing of events makes such an inference reasonable.

I conclude that Complainant has established a *prima facie* case of retaliation. She was the victim of an adverse employment action that occurred immediately after her fiancée filed a

[3] An individual who engages in protected activity under the statute falls within the definition of protected class member. Notwithstanding, in addition to retaliation, St. Martin also alleged sex discrimination and sexual harassment in his complaint.

complaint of retaliation with the MCAD. Upon receipt of the St. Martin's complaint, Respondent commenced written discipline against Complainant within a matter of days which led to her termination some two weeks later.

Once Complainant has established a prima facie case, the burden of production falls to Respondent to articulate a legitimate non-retaliatory reason for the adverse employment action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). As part of its burden of production, Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986).

Respondent asserts that Complainant's termination was solely the result of her unacceptable behavior in the workplace that resulted in written discipline, her lagging productivity and errors, and her lack of professionalism. They assert that it was merely a coincidence that her 90 day review followed close on the heels of St. Martin's complaint, and that her employment would not have been continued for performance reasons alone. There was ample testimony from supervisors and colleagues that Complainant's attitude, behavior and performance were lacking in some respects as reflected in the 90 day evaluation by Cregan and Desrosiers. I conclude that Respondent has articulated a legitimate non-discriminatory reason for its action that is supported by some credible evidence.

Once Respondent has met its burden to articulate a non-discriminatory reason for its action, Complainant must prove by a preponderance of the evidence that the reason is a pretext for retaliation. I conclude that Complainant has met that burden for the following reasons. First, the evidence that Complainant was not meeting productivity standards is specious. Her production with respect to number of orders processed had been improving every month and she

worked fewer hours than any other employee. She had received some action sheets noting her errors on orders but these were for instructional purposes only and were not disciplinary in nature. All the witnesses testified that there was a significant learning curve and it could take more than six months to learn the basics. Prior to St. Martin filing his complaint, Complainant had not been disciplined for any performance or behavioral issues. Subsequent to Respondent's receipt of St. Martin's complaint she was written up within days for two behavioral issues in the workplace, one for socializing with other employees and failing to complete an order, and one for swearing in the workplace when a third party was present in the next room. Neither of these disciplinary proceedings was initiated by her supervisor, Colleen Cregan, who despite Complainant's short-comings, would not have terminated her employment. Contrary to Respondent's assertions, Cregan did not make the decisions to discipline Complainant and admitted that she was convinced by others who were much closer to Enos in evaluating Complainant for her 90 day review. Cregan was a very credible witness and she stated she likely would have given Complainant more time to improve and grow in the job.

It is clear that the decision to terminate Complainant was driven by Enos who was angry and upset that St. Martin had filed discrimination /retaliation complaint. Enos testified that after receiving St. Martin's complaint, he did not wish to employ Complainant any longer. I also believe that he stared at Complainant in an intimidating fashion because he was angry at St. Martin. Enos testified that St. Martin told him he wanted nothing to do with Russo's complaint, but later stated in his MCAD complaint that he was a witness in support of Russo's complaint.

Enos' testimony about the decision to discipline and terminate Complainant was not credible. Enos could not recall who reported Complainant's behavior to him, denied being involved in the decision to discipline or to fire her, and could not recall when or how he came to

watch the Customer Service Room video tape. I conclude that, contrary to his testimony, Enos was involved in all major decisions at the company and that he and Jardine and Desrosiers were instrumental in the decision to discipline Complainant. Enos sought legal advice after Complainant submitted a rebuttal to the first written discipline which he believed may have been drafted by an attorney, suggesting that he fully intended to terminate Complainant's employment. More importantly, I conclude that Enos made the decision to terminate Complainant's employment out of retaliatory animus. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). Given all of the above, I conclude that the reasons articulated by Respondent, even if some are true, were a pretext for the real reason, which was retaliation, in violation of G.L. c. 151B s. 4(4).

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. *See* Stonehill College v. MCAD, 441 Mass 549 (2004).

Complainant is entitled to lost wages for the period of time she was unemployed, a period of approximately ten months. She testified that she sought other employment unsuccessfully during this period. Had she continued to work for Respondent, she would have earned some $8000 in those ten months. For some period of time, she also received some public assistance which I have determined to be after St. Martin lost his income for a period of at least eight months. The amount of public assistance she received during this time was approximately

$4000, plus the undetermined value of any food stamps she received. I conclude that she is entitled to lost wages from Respondent in the amount of $4000.

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 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, supra. at 576. 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.

Complainant claims that she suffered emotional distress mostly resulting from her termination from Respondent. She denied that any of the subsequent events in her life including St. Martin's resignation from Respondent in August of 2012, the raid of her apartment by police and St. Martin's arrest in October of 2012, and her break-up with him in December of 2012, caused her significant emotional distress. This assertion is simply not credible. Nor is her assertion that her termination caused the relationship with St. Martin to end. It is clear that these other significant events contributed to, and likely were, the cause of most of the emotional distress Complainant suffered at that time, and must be considered in assessing her claim. Complainant had also sought counseling prior to events that occurred with Respondent at various times in her life. These factors lead me to conclude that any distress suffered as a direct result of Complainant's termination from Respondent was *de minimus.* I do believe Complainant was angry and upset about the discipline she received and the termination of her employment which

she believed were ill-intentioned and retaliatory. She testified that she lost sleep and couldn't eat after her termination. I conclude that she is entitled to an award of $5,000 for emotional distress resulting from her termination.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law Respondent is hereby Ordered:

1) To cease and desist from any acts of retaliation.
2) To pay to Complainant, Tiffany Schillace, the sum of $4,000 in damages for lost wages, 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 until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
3) To pay to Complainant, Tiffany Schillace, the sum of $5,000 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 until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission 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 for attorney's fees.

So Ordered this 30th day of December, 2015.

Eugenia M. Guastaferri
Hearing Officer