

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JENNIFER SCHUBERT and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Complainants

Against

Docket No. 08 BEM 00490

DEPARTMENT OF CORRECTION
Respondents

Appearances: Bradford Louison, Esq., for Complainant Schubert
James F. Kavanaugh, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about February 29, 2008, Jennifer Schubert (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that Respondents “MassCor,” (a subsidiary of the Massachusetts Department of Correction), James Karr, Ken Arsenault, and Michael Walker engaged in discrimination on the basis of sex and retaliation in violation of M.G.L. c. 151B, section 4, paragraphs 1, 4, and 4A when they terminated Complainant from her probationary position as Industrial Instructor I on February 27, 2008.

The Investigating Commissioner issued a disposition December 29, 2009, finding

probable cause for claims of retaliation and termination based on sex but a lack of probable cause for a hostile work environment claim. In addition, the Investigating Commissioner dismissed James Karr and Kenneth Arsenault as individually-named Respondents. The case was certified for public hearing on December 15, 2011.

A public hearing was held on June 17, 18 and 25, 2013. The following individuals testified at the public hearing: the Complainant, Robert Goodwin, Candida Leonard, James Burke, Manuel Affonso, Louis Garneau, Michael Walker, Kenneth Arsenault, and James Karr.

At the close of Complainant's case, Respondent Walker submitted a Motion for Directed Verdict in regard to his involvement as an individually-named party. The motion was granted on June 20, 2013. The parties agreed on the last day of hearing that post-hearing briefs would address only issues related to liability and that briefs addressing damages would be submitted thereafter if liability were found in regard to the Department of Correction.

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. "MassCor" is a self-funded division of the Massachusetts Department of Correction ("Department") which manufactures a variety of products by inmates who attend classes to learn trades such as silk screening, upholstery, book binding, printing, mattress production, and metal fabrication. The "Director of Industries" of MassCor is James Karr. There are two supervisors who oversee MassCor operations within Northern and Southern Sectors of the Department of

- Correction. In 2008, Kenneth Arsenault was the Northern Sector Supervisor and Michael Walker was the Southern Sector Supervisor.
2. In 2008 MassCor employed 54 individuals of whom 18 were female and 36 were male. Respondent's Exhibit 13.
 3. Complainant Jennifer Schubert began working for the Massachusetts Department of Correction at MCI Norfolk in November of 2006 as a Word Processor I. As a Word Processor I, she received an Employee Performance Review System ("EPRS") evaluation for FY 07 (June 30, 2006 - July 1, 2007) which rated her overall performance as satisfactory. Complainant's Exhibit 1. The evaluation described Complainant as "adaptive," a "team player," "a pleasure to work with," and "very professional." Id.
 4. Complainant was promoted to the position of Industrial Instructor I at MCI Norfolk, effective October 14, 2007. Joint Exhibit 10. She was a probationary employee for the first six months of her employment. Joint Exhibit 10.
 5. Complainant attended a five-week Training Academy for Industrial Instructors beginning in October of 2007. She was assigned to the bindery shop on November 19, 2007.
 6. Aside from Complainant, there were ten other industrial instructors at MCI Norfolk in 2007-2008. Complainant and her immediate supervisor, Candida Leonard, were the only female industrial instructors at MCI Norfolk.
 7. In December of 2009, Complainant received an anonymous Christmas card at work which contained a handwritten note saying: "BUT ... CAN YA MAKE A RESOLUTION TO FINALLY STOP TALKING. MAN, YOU NEVER STOP . .

. . BLAH, BLAH, BLAH ESPECIALLY FIRST THING IN THE MORNING IN LOBBY. SHUT UP.” Joint Exhibit 11. Complainant reported the incident to Michael Walker who told her to file a report. Joint Exhibit 12. Complainant did so on December 21, 2007. The matter was investigated by the Inner Perimeter Security team at MCI Norfolk. Joint Exhibit 13. Correction Officer Donna Gratto issued a report dated January 22, 2008 which stated that there was insufficient evidence to determine who had written the anonymous Christmas card. Id.

8. Michael Walker testified that a few days after Complainant told him about the Christmas card, she entered his office and, along with his assistant Jeannine Guertin, began to examine paperwork in the office in order to compare handwriting on his correspondence to that on the Christmas card. Neither Complainant nor Guertin had been given permission by Walker to do so. Walker testified that he told Complainant that a lot of the paperwork was confidential and to leave it alone. I credit Walker’s testimony.
9. Clerk IV Jeannine Guertin was the administrative assistant to Southern Sector Supervisor Michael Walker. On December 19, 2007 and January 3, 2008, she filed incident reports accusing two male industrial instructors – David Paskell and Daniel O’Conner -- of harassing her and creating a hostile work environment. Joint Exhibit 18; Respondent’s Exhibit 16.
10. On January 8, 2008, Industries Director James Karr assigned Northern Sector Supervisor Kenneth Arsenault to investigate Guertin’s claims that, among other matters, David Paskell had attempted to instruct Guertin on how to perform her

job, arranged for a co-worker to “keep an eye” on her, asked Guertin if she thought that “Mike Walker walks on water,” interfered with her decision to have an inmate-clerk assist her with a computer program, looked for things “to report on her,” and made a comment about “spoon feed[ing] Mike [Walker] his lunch.” Joint Exhibit 18.¹ Arsenault was assigned to investigate Guertin’s claims because he did not work in the Southern Sector and could therefore be objective.

11. As part of his investigation into Guertin’s charges, Arsenault interviewed numerous industrial instructors, including James Burke and James Gilbode, on January 9 and 10, 2008. Both stated that they believed the reason why Guertin was being harassed was because she was performing duties that some industrial instructors believed belonged to them. Joint Exhibit 18.
12. Arsenault interviewed Southern Sector Supervisor Michael Walker on January 18, 2008. Walker told him that Paskell had been “crowding” Guertin and that Guertin had complained that Paskell was “monitoring” and “shadowing” her. Walker also told Arsenault that Paskell was a “negative influence,” was “uncooperative,” “lowered morale” and complained about MassCor operations. Joint Exhibit 18.
13. Arsenault interviewed Complainant on January 10, 2008 as part of the Guertin investigation. Joint Exhibit 18. According to Arsenault’s report, Complainant described Guertin as a “pawn in the middle of a union issue.” Joint Exhibit 18. Arsenault’s report quotes Complainant as saying that she overheard *either* Industrial Instructor David Paskell *or* Industrial Instructor Daniel O’Conner comment to Guertin, “Are you going to spoon feed him too?” but that

¹ The investigation also focused on allegations against Industrial Instructor Daniel O’Conner but these allegations are not discussed herein because they are not relevant to this case.

Complainant could not be sure which of the two individuals made the comment.

Joint Exhibit 18, p. 10.

14. Arsenault testified that he sat diagonally across a table from Complainant, approximately four to five feet away from her, and wrote notes on a notepad while interviewing Complainant. Arsenault stated that he takes precautions to protect his notes from being seen by those whom he interviews. Arsenault described Complainant as very agitated during her interview, reluctant to answer questions, and not forthcoming. According to Arsenault, Complainant said that she couldn't recall who made the "spoon feed" comment although she remembered that such a comment was made. After the interview, Arsenault typed up his notes and put them in his investigative report. Joint Exhibit 18. Arsenault destroyed his handwritten notes after typing the report.
15. Complainant testified that she told Arsenault that she had been present when the "spoon feed" comment was made to Guertin but didn't see who said it. According to Complainant, Arsenault nevertheless wrote in his notebook that she identified David Paskell as the speaker.
16. While employed as an Industrial Instructor I, Complainant was a member of Unit 4 of the Massachusetts Correction Officers Federated Union. Correction officers and industrial instructors are entitled, by contract, to have union representation at interviews. Arsenault testified that it is his practice not to inform interviewees that they are allowed to have union representation at investigatory interviews, but he permits such representation if they request it. Complainant did not initiate a request to have a union representative attend her interview.

17. After her January 10, 2008 interview with Arsenault, Complainant discussed with Union Steward Robert Goodwin her concerns that Arsenault had attributed to her the identification of David Paskell as the individual who made the “spoon-feeding” comment.
18. Complainant drafted an incident report dated January 11, 2008 in which she asserted that she did not know who made the “spoon-feeding” comment despite its being made in her presence, because she was not looking at the male industrial instructors as they spoke. Joint Exhibit 15. Complainant alleged in her incident report that her words “were being fraudulently written down,” that the interview was “one sided, bias [sic] and dishonest,” and that a union representative should have been present. Joint Exhibit 15 & 22.
19. Complainant testified that after filing her January 11, 2008 incident report, her supervisor, Michael Walker, became standoffish and snappy towards her.
20. On January 30, 2008, Complainant telephoned MassCor Director James Karr to complain about Michael Walker’s management style and to report that he was “micromanaging” her. Karr testified that this call violated the “chain of command” in a paramilitary organization such as the Department of Correction. He stated that Complainant should have initially raised her concerns with her immediate supervisor, Industrial Instructor Candida Leonard.
21. Karr telephoned Walker about Complainant’s allegations that Walker was “micromanaging” her, that he was prohibiting her from calling vendors, and that he was preventing her from faxing purchase orders.
22. Walker testified that it was his policy to collect purchase orders from all

- instructors in order to obtain approval for funding and to send out the purchase orders himself. He noted that instructors were free to call vendors for prices, availability, and delivery information.²
23. Complainant testified that on January 30, 2008, Walker asked her to come to his office to discuss her concerns about his management style. According to Complainant, Walker led her to his office where Industrial Instructor James Burke and Administrative Assistant Jeannine Guertin were present. Complainant claims that Walker initiated a discussion with her in front of Burke and Guertin. According to Complainant, Walker said, “Maybe I have to talk to you differently” to which she responded, “Maybe you should talk to me like a human being.” Complainant described herself as crying and Walker as “smug” with his arms folded. I do not credit this testimony.
24. Complainant states that she subsequently called Walker to say that it was “extremely unprofessional” to have this conversation in front of Guertin and James Burke.
25. According to Walker, it was Complainant who entered his office and initiated a conversation about his management style in the presence of Guertin and James Burke. Walker testified that Complainant accused him of micromanaging her, became emotional and “teary-eyed,” and “talked over him.” Walker testified that he “couldn’t get a word in edgewise.” Walker denied that Complainant asked to speak to him in private or that she requested Burke and Guertin to leave the room.
26. James Burke testified that while he was having lunch in Walker’s office,

² Notwithstanding Walker’s stated policy, the Employee Performance Review form for industrial instructors lists “Inventory Control & Ordering” as Duty 4 and includes “reordering” as part of the second performance criterion under Duty 4.

Complainant entered and began addressing Walker in an emotional manner. Burke described Complainant as speaking in a loud voice, appearing upset, and crying. Burke recalls that Complainant used the term “micro-manage” and that she said that she wanted to do things that Walker would not permit. According to Burke, Walker listened to Complainant and then said, “We can’t converse if you won’t let me get my part in.” Burke described the communication as more of a one-sided argument than a conversation because Complainant did most of the talking and Walker tried unsuccessfully to respond to her. Burke denied that Complainant asked to speak to Walker privately, although Burke acknowledged that she told Guertin that the conversation wasn’t her business when Guertin attempted to “speak up.” I credit the version of the conversation presented by Burke and Walker over that presented by Complainant.

27. Complainant wrote a second incident report on February 1, 2008 which states that Walker was “speaking to [her] in a rude manner, was confrontational, and was micro-managing [her] till [she] suffocated,” and wouldn’t allow her to fax inventory reports to suppliers. Joint Exhibit 16.
28. Director Karr testified that he considered Complainant’s February 1, 2008 Incident Report to be an example of Complainant’s penchant for escalating issues and creating conflict.
29. At or around the same day that Complainant submitted her February 1, 2008 incident report, Southern Sector Supervisor Walker was asked by Industrial Instructor Louis Garneau if he could continue to arrive at work at approximately 7:00 a.m., even though it was prior to the start of his 7:45 a.m. shift, in order to

prepare his classroom to receive inmates. Garneau said that he had been informed by Complainant that all the industrial instructors were going to punch in together at 7:45 a.m. because of a memo which said that they couldn't leave work until 3:45 p.m. I credit Garneau's testimony.

30. Complainant denied that she told coworker Louis Garneau to wait until 7:45 a.m. in order to punch in. According to Complainant, she said that she was going to "hang back" in order to "adhere" to their 7:45 a.m. start time and to wait for Leonard but that she "never told anyone anything about not punching in." I do not credit Complainant's testimony.

31. On another occasion, Complainant told Walker that she and Industrial Instructor Manuel Affonso didn't appreciate being "reprimanded" in regard to Affonso relieving her in the bindery shop while she stored tools in the tool crib. Walker denied reprimanding either Complainant or Affonso. According to Walker, he only informed Complainant and Affonso that they initiated the tool-return process too early. Walker testified that he called Affonso to assure him that he was not being reprimanded. According to Walker, Affonso didn't know what Walker was talking about and laughed at the suggestion that he was upset. Affonso corroborated that he has never been reprimanded. I credit the testimony of Walker and Affonso over that of Complainant.

32. At some point between February 1 and 4, 2008, Director James Karr assigned Kenneth Arsenault to gather information about Complainant's employment history as an Industrial Instructor I. Arsenault drafted a written memorandum dated February 4, 2008 in which he addressed Complainant's charge that he

(Arsenault) had treated her in a fraudulent manner, that she had violated his instructions about confidentiality by notifying her Union Steward about her investigatory interview, that she had violated the chain of command by complaining to Director Karr about Walker, that she had inappropriately accused Walker of micromanaging and being rude to her, and that she had told coworker Affonso that he shouldn't punch in before 7:45 a.m. Joint Exhibit 17. Arsenault concluded that Complainant's conduct had been unprofessional, that she had failed to exercise patience and discretion, that she had fostered discontent, lowered morale, and displayed a lack of respect towards superiors. Arsenault requested Complainant's termination in his February 4, 2008 memo to Karr. Id.

33. Following the drafting of Arsenault's February 4, 2008 memo to Director Karr, Arsenault issued a report on the Guertin investigation on February 12, 2008. Joint Exhibit 18. Arsenault found that Guertin's allegations against David Paskell were sustained, and that Paskell should be terminated from his position as a probationary Industrial Instructor I. Joint Exhibit 18.

34. Complainant attended a mid-year review of her job performance on February 19, 2008 conducted by Michael Walker and Candida Leonard. The annual EPRS review document is divided into three parts: part A ("Performance Planning") is completed at the start of the fiscal year on or around July 1); part B ("Progress Review") is completed mid-year around December; and part C ("Annual Review") is completed at the end of the fiscal year in June. According to Director Karr, the EPRS evaluation form does not focus on workplace relationships but only on job skills such as maintaining the security of tools,

maintaining quality, satisfying deadlines, and providing training to inmates. Karr testified that EPRS evaluations are “rarely” negative.

35. Candida Leonard, in her role as Complainant’s immediate supervisor, filled out Complainant’s interim EPRS evaluation in early February of 2008. It was the first such evaluation Leonard had ever done. Leonard testified that she gave Complainant a “very good” evaluation consisting of some “exceeds” ratings and nothing lower than “meets” ratings. Leonard mistakenly filled out the entire evaluation for the period from July 1, 2007 through June 30, 2008 rather than just the interim period from July 1, 2007 through February of 2008. She also mistakenly included comments about Complainant’s co-worker James Gilbeau. Leonard’s supervisor Michael Walker asked Leonard to revise the interim EPRS form and produce a corrected copy which Leonard did. Leonard gave Walker a corrected version of the interim EPRS. According to Walker, the corrected version, like the original one, contained nothing lower than satisfactory ratings. Walker and Complainant signed the revised EPRS form. Walker testified that he did not change any of the ratings given by Leonard to Complainant. According to Walker, after Complainant’s termination, he placed Complainant’s revised EPRS form in the Department’s Human Resource Division mailbox but failed to retain a copy and the revised EPRS form has since become lost. Walker testified that his usual practice is to make copies of EPRS forms and keep those copies when he sends the original documents to the Department’s Human Resource Division.
36. Director Karr signed a letter dated February 21, 2008 stating that Complainant was being terminated, effective immediately. Joint Exhibit 19

37. On February 27, 2008, Complainant was instructed to attend a meeting with James Karr and other supervisors. According to Complainant, she expressed reluctance about attending the meeting without union representation but was told that the issue of representation could be addressed at the outset of the meeting. Instead, when Complainant arrived, Director Karr handed her a letter of dismissal. Walker corroborated that Complainant asked him about union representation prior to the February 27, 2008 meeting and that he told her if she felt uncomfortable at the meeting she could ask for representation. According to Walker, when they arrived at the meeting, Karr said she was going to be terminated. The reasons for termination were “unprofessional behavior and conduct from January 10, 2008 through February 1, 2008” in violation of Department of Correction Rules 6(a-d), 12(a), and 19(c & d). Joint Exhibit 22. The termination was based on the February 4, 2008 report submitted by Kenneth Arsenault to Director of Industries James Karr. Id.
38. On April 7, 2008, Complainant received an informal appeal hearing by Labor Relations Advisor Joseph Santoro regarding her probationary termination. Joint Exhibit 22. Complainant and Kenneth Arsenault testified . Id. Present at the hearing were Complainant, Complainant’s attorney Valerie McCormack Supervisor Kenneth Arsenault, Supervisor Michael Walker, and Human Resource representative Andrew McAleer. Id.
39. On May 28, 2008, Labor Relations Advisor Santoro issued a memorandum to Commissioner Harold Clarke in which he recommended affirming the probationary termination of Complainant. Santoro determined that Complainant

failed to deal tactfully with others, failed to maintain harmonious working relationships with others, and failed to exercise discretion in handling confidential information. He recommended that Complainant be allowed to return to her previous civil service position of Word Processing Officer I. Joint Exhibit 22.

The recommendation was adopted by Commissioner Clarke.

III. CONCLUSIONS OF LAW

A. Gender Discrimination

Where, as here, there is an absence of direct evidence of forbidden bias, Complainant may attempt to establish a prima facie case of disparate treatment employment discrimination on the basis of indirect evidence which shows that Complainant: (1) is a member of a protected class; (2) was performing satisfactorily; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not in her protected class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts). If Complainant succeeds in establishing a prima facie case of discrimination, the burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate

burden of proving that Respondents' adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Applying the prima facie requirements to the facts of this case, Complainant is entitled to protected status based on her gender as a result of being only one of two female industrial instructors at MIC Norfolk. Complainant was a competent employee, as evidenced by her satisfactory interim employment evaluation in February of 2008. Director Karr discounted the significance of this evaluation by testifying that EPRS reviews are "rarely" negative, but no evidence – statistical or otherwise – was presented to support this assertion. Complainant suffered an adverse employment action when she was fired during her probationary period.

Notwithstanding the foregoing, Complainant fails to satisfy the elements of a prima facie case because she cannot show that she was treated differently from similarly-situated male colleagues. See Furnco Constr. Corp. V. Waters, 438 U.S. 567, 577 (1978) (central focus of inquiry is whether employer treats protected class member less favorably than others); Molloy v. Blanchard, 115 F. 3d 86, 91 (1st Cir. 1997) (prima facie case requires showing that female police officers received harsher suspensions than male police officers). Just as Complainant was dismissed during her probationary period, so was David Paskell, another Industrial Instructor I who was terminated in early 2008 in response to charges that he harassed and created a hostile work environment for Administrative Assistant Jeannine Guertin. Among the specific allegations against Paskell were claims that he engaged in paternalistic and gender-stereotypical behavior such as telling Guertin how to do her job, trying to prevent her soliciting computer assistance from an inmate clerk, arranging for a male industrial instructor to "keep an

eye” on her, asking her if supervisor Michael Walker “walked on water” and asking her if she intended to “spoon feed” Walker. By terminating Paskell during his probationary period, the Department demonstrated that it was vigilant about addressing claims of gender animus and that it treated similarly-situated, qualified person(s) not in Complainant’s protected class in the same manner that it treated her.

Complainant attempts to downplay the significance of Paskell’s termination by pointing to the majority of industrial instructors who were not terminated during their probationary periods. Undeniably, a majority of male instructors continued to be employed at MCI Norfolk in February of 2008 while Complainant was not. However, it is David Paskell, more so than other male industrial instructors at MCI Norfolk, who is the appropriate comparator in this case. Paskell, like Complainant, was a probationary industrial instructor at MCI Norfolk, was the subject of charges involving inappropriate conduct, and was investigated by Supervisor Kenneth Arsenault. He is, thus, a similarly-situated comparator whose termination took place at virtually the same time as Complainant’s.

Even if Complainant were to establish a prima facie case of gender discrimination, Respondent, at stage two, provides non-discriminatory reasons for Complainant’s termination. The non-discriminatory reasons include Complainant voicing intemperate and unsupported accusations of fraud, bias, and dishonesty against Supervisor Arsenault, violating MassCor’s chain of command, complaining about being micromanaged by Supervisor Walker after just several months on the job, attempting to discourage co-worker Louis Garneau from arriving at work early, and telling coworker Manuel Affonso that he had been reprimanded when he wasn’t. These matters, all

supported by credible evidence, convincingly buttress Respondent's characterization of Complainant as a fomenter of discord.

Since Respondent has satisfied its burden at stage two, Complainant must show by a preponderance of evidence that notwithstanding Respondent's job-related reasons for termination, discriminatory animus was present and that the gender-neutral reasons articulated by Respondent were not the primary reasons for Respondent's action. See Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass 729 (2003) (where discriminatory and nondiscriminatory reasons coexist, a decision is unlawful if discriminatory animus was "material and important ingredient").

Complainant is assisted in this endeavor by the gender hostility conveyed in the anonymous Christmas card sent to her at work in December of 2006, the gender hostility directed at co-worker Guertin, Complainant's receipt of a satisfactory-or-better job evaluation *after* Arsenault recommended her termination, the unexplained disappearance of the job evaluation, Karr's unconvincing attempt to downplay the significance of the job evaluation as addressing only technical matters, and Arsenault's dual role as subject and investigator of Complainant's fraud charge. The question is whether, notwithstanding these concerns, gender issues played a "material and important" role in Complainant's termination.

In assessing what role, if any, gender animus played in regard to Complainant's termination, the actions and motives of Kenneth Arsenault must be examined. Credible evidence establishes that Arsenault was genuinely and validly offended that Complainant accused him of fraud, bias, and dishonesty in regard to his investigation of David Paskell. The memorandum of February 4, 2008 in which he recommends Complainant's

termination acknowledges his resentment at being falsely accused of fraud. It is this accusation which appears to have been a predominant reason for Complainant's termination.

Aside from the understandable indignation of Arsenault in response to being falsely accused by Complainant of fraud, his simultaneous recommendation that Paskell be dismissed during his probationary period provides additional support for the conclusion that Arsenault's actions were not motivated by gender bias. If Arsenault harbored gender bias in regard to Complainant, he would likely have been more tolerant of the gender bias displayed by Paskell. Instead, Arsenault's recommendation that Paskell be terminated indicates a zero-tolerance for actions that could be construed as gender bias or harassment.

B. Retaliation

Chapter 151B, sections 4(4) and 4(4A) prohibit retaliation against persons who have opposed practices forbidden under Chapter 151B. 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 under Chapter 151B, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected 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, *supra* at 215.

Under M.G.L. c. 151B, 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).

Complainant engaged in protected activity when she filed an incident report about Kenneth Arsenault on January 11, 2008 accusing him of fraudulently writing down her words; characterizing her interview with him as “one sided, bias [sic] and dishonest;” and asserting that union representation should have been present. Such accusations constitute protected activity because they arise out of Complainant’s interview by Arsenault about the alleged harassment of a female co-worker. Although the alleged harassment of the female co-worker was not explicitly deemed sexual or gender-based in nature, the investigation focused on whether the female co-worker had been subjected to a hostile work environment, whether efforts were made by male employees to limit her autonomy, and whether she was subjected to gender-demeaning questions about her relationship with her male supervisor, i.e., did she “spoon-fed” him or think he “walked on water.” Under these circumstances, the investigation must be deemed to constitute an inquiry into gender animus. Since Complainant’s incident report challenges the manner in which the investigation was conducted, the report is entitled to status as protected activity. See Crawford v. Metropolitan Government of Nashville and Davidson County 555 U. S. 271

(2009) (the protection against retaliation extends to employees who answer questions about discriminatory activity in an employer's internal investigation). The fact that Arsenault recommended Complainant's termination three weeks after she drafted the incident report accusing him of fraud indicates a possible causal connection between the protected activity and the adverse employment action. Complainant, thus, has succeeded in setting forth a prima facie case.

Notwithstanding the fact that Complainant had established a prima facie case, Respondent presents non-discriminatory reasons for its action supported by credible evidence. See Gill v. Task Construction, 24 MDLR 277 (2002) (once Complainant establishes a prima facie case of retaliation, burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action). The asserted reasons involve a host of incidents in which Complainant is portrayed as behaving in an argumentative and accusatory manner towards her supervisors. Such conduct is described by Complainant's supervisors as "stirring the pot."

In support of the asserted reasons for dismissal, there is credible evidence that on multiple occasions in early 2008 Complainant caused unnecessary turmoil and behaved unprofessionally. There is, to be sure, no clear explanation as to why Complainant was considered "adaptive," a "team player," "a pleasure to work with," and "very professional" in her prior word processing position but over-wrought and disagreeable as an Industrial Instructor I in early 2008. This discrepancy raises a red flag as to the validity of Complainant's termination. In the final analysis, however, such concern fails to carry the day. The credible evidence in the record paints a picture of Complainant as

an individual whose comportment did not mesh well with the demands of a paramilitary organization. At the time that her supervisors recognized this fact, Complainant was still a probationary employee. As a probationary employee, she could be terminated without the constraints of progressive discipline and without a full-blown adjudicatory hearing. I conclude that this was the primary reason for Complainant's dismissal in February of 2008 and that retaliation was neither a motivating nor substantial factor.

V. ORDER

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 1st day of October, 2013.

Betty E. Waxman, Esq.,
Hearing Officer

