

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

Massachusetts Commission Against
Discrimination and Rosa Silva,
Complainants

v.

DOCKET NO. 17 NEM 00192

Acushnet Co., Michelle Medeiros,
Richard Strozyk, Ronald Rouillard,
Dan Gendreau and Kenneth Riall,
Respondents

For the Complainants: Justin M. Murphy, Esq.
For the Respondents: Laurence J. Donoghue, Esq.

DECISION OF THE HEARING OFFICER

This case arises from, among other things, the termination of Rosa Silva’s employment by Acushnet Co. (“Acushnet”) in September 2016 (“termination”). On January 30, 2017, Silva filed a charge with the Commission against Acushnet. By order of the Investigating Commissioner, five individuals were added as respondents. On October 31, 2018, the Investigating Commissioner issued a probable cause finding. On August 29, 2019, the Investigating Commissioner certified the matter for a public hearing. I presided over the public hearing on May 2-6 and 19, 2022 by Zoom video conference due to the COVID-19 pandemic. Seventeen persons testified and there were fifty three joint exhibits.¹ The stenographic record is the official record. The parties filed post-hearing briefs. In this decision, unless stated otherwise, where testimony is cited, I find such testimony credible and reliable, and where an exhibit is cited, I find such exhibit reliable to the extent cited.

The claims for the public hearing were set forth in a Revised Supplement to the Certification Order issued on April 15, 2022. In summary, this decision addresses the following certified claims: Was Silva subjected to a hostile work environment based on her gender and/or age in violation of Massachusetts General Laws Chapter 151B (“M.G.L. c. 151B”)? Was the termination based on her gender and/or age in violation of M.G.L. c. 151B? Did Acushnet retaliate against Silva in violation of M.G.L. c. 151B? Are any/all of the individual respondents liable to Silva under M.G.L. c. 151B?

¹Two exhibits were submitted subsequent to May 19, 2022 by agreement of the parties and this hearing officer.

A. FINDINGS OF FACT

1. Acushnet manufactures and sells golf balls (“balls”). It has several manufacturing plants, including Ball Plant III in New Bedford, Massachusetts where employees manufacture balls under the Titleist and Pinnacle brand names. Silva became employed by Acushnet in 1983. In September 2016, Acushnet terminated Silva’s employment. At the time of the termination, Silva was 66 years old and worked at Ball Plant III as a pad print operator. Silva began working as a pad print operator around 2003. At all material times, Silva’s shift began at 11:00 P.M. and ended at 7:00 A.M. (Silva at 144, 201; Joint Exhibit (“JE”) 1; JE 5)
2. Michelle Medeiros became employed by Acushnet in 1996. In January 2014, Medeiros was promoted to the position of team leader on the finishing side. From January 2014 until the termination, she was Silva’s immediate supervisor. (JE 1; Silva at 201; Medeiros at 703)
3. At all material times, Richard Strozyk was a manufacturing manager in Ball Plant III and Medeiros’ immediate supervisor; Daniel Gendreau was Senior Director of Ball Plant III and Strozyk’s immediate supervisor; Ronald Rouillard was Director of Human Resources of Ball Plant III; and Kenneth Riall was Vice President of Human Resources. (JE 1; Riall at 1017)
4. To Acushnet, the quality of manufactured balls, including whether they had defects, such as being unstamped or having hairs or fibers imprinted on them, was of utmost importance, because balls it manufactured were used by professionals in tournaments. As example, an unstamped ball was a serious issue, because if the ball could not be identified, that could cause the disqualification of the player. (Gendreau at 1258-1259, 1308)

PERFORMANCE MANAGEMENT

5. Acushnet used a performance management database (“PMD”). A team leader would use the PMD to memorialize conversations with the employees (a/k/a associates) and infractions of policies by the employees. (Medeiros at 723; Rouillard at 1121-1122)
6. In the PMD’s Level of Discipline section, the following could be checked: counceled,² documentation, verbal warning, written warning, one day suspension, three day suspension, five day suspension, indefinite suspension and terminated. See e.g. JE 2 Although counceled and documentation were listed in the Level of Discipline section, they did not constitute discipline. A team leader often counseled an associate before requesting discipline and those interactions could be memorialized in the PMD as counceled and/or documentation. Discipline commenced at the verbal warning stage. (Rouillard at 1127-1129)
7. Rouillard’s approval was required if a team leader at Ball Plant III requested discipline. He would determine whether the request met the threshold for the requested level of discipline. If it did, he would approve the request and the team leader would issue the discipline to the associate. (Rouillard at 1126, 1131-1132)

²“Counceled” is the spelling used in the PMD documentation – as opposed to “counseled.” “Counceled” will be used in this decision when referring to such entries in the PMD.

8. Silva received discipline before Medeiros became her supervisor. Silva received a three day suspension for allegedly harassing a female employee. Silva received a written warning for not following quality procedures as her actions produced approximately 24,000 balls with minor shadows. (Silva at 203, 205, 207-209; JE 31)
9. Silva was written up for a quality issue by supervisor Rua and for a quality issue by supervisor Mydlack (Silva at 211-212). The record does not provide the timing of such events.
10. During the period in which Medeiros was Silva's immediate supervisor, four supervisors including Medeiros requested discipline, or entered non-disciplinary counceled/ documentation in the PMD, regarding Silva. In March 2015, Silva received a verbal warning at the request of Medeiros for non-use of "PPE". (JE 50) In October 2015, Silva received a written warning at the request of supervisor Randy Young who noted that Silva had been counseled six times on quality concerns. (JE 51) In March 2016, supervisor Jim Johnson spoke with Silva about two rejected lots and entered counceled and documentation in the PMD. (JE 17) In April 2016, supervisor Lee Hall entered documentation in the PMD as she observed Silva talking to another associate while Silva's inspection table was backed up. (JE 18) In April 2016, Medeiros entered counceled and documentation in the PMD as Silva was spending too much time talking with another associate while her machine had backed up. (JE 19) In May 2016, Medeiros reminded Silva that she is not to wear her lab coat outside of the pad print area and entered counceled and documentation in the PMD. (JE 20) In June 2016, at the request of Medeiros, Silva received a verbal warning for violation of the attendance policy. (JE 21; JE 31)
11. If Medeiros saw an employee not complying with company policy, then she would speak to the employee. During 2014-2016, some employees supervised by her had more non-disciplinary counceled and/or documentations in the PMD than others because Medeiros needed to speak to them on multiple occasions. Medeiros requested discipline for some employees more than others because those employees did not correct their behavior. (Medeiros at 849-851)
12. As of July 1, 2014, Medeiros supervised eight females and nine males. As of July 1, 2015, she supervised nine females and eleven males. As of July 1, 2016, she supervised nine females and ten males. (JE 44)
13. From January 2014 until August 2017, numerous employees supervised by Medeiros received non-disciplinary counceled and/or documentations. The four employees receiving the most were female, including Silva who had the highest number (33), and another female employee in her 60's who had the second highest (22). The greatest number of non-disciplinary counceled or documentations a male employee received was six (6). (JE 34; JE 53)
14. From January 2014 until August 2017, four employees supervised by Medeiros were terminated from their employment – three males and Silva. Of those four, only Silva was 50

years or older. (JE 34; JE 53) At material times, the vast majority of employees under Medeiros' supervision were 40 years or older. (JE 44)

15. From January 2014 until August 2017, fifteen employees supervised by Medeiros were subject to a verbal warning, written warning, one day suspension or a three day suspension. Regarding those fifteen employees: nine were males and six were females; fourteen were 40 years or older; six males and three females received a verbal warning with one female receiving two; one male and two females received a written warning; one male and four females received a one day suspension with one female receiving two; and one male and two females received a three day suspension with one female receiving two. (JE 34; JE 53)

PAD PRINT OPERATION

16. There are various steps in the finishing side including the following. The ball goes to the prime coat area which puts two coats of paint on it. Then, the ball goes into the pad print area where it gets a side stamp, a brand name stamp and a number stamp.³ After pad print, the ball goes to clear spray. Then, it goes to sample inspection which takes a 200 ball sample out of each tote that comes from clear spray, and if any defects are found, that work is held up and all balls inspected. (Medeiros at 703-706)
17. A pad print operator had various duties including: (a) dumping balls into the pad print machine; (b) working in the "kitchen"; (c) operating machines that print logos on the balls including changing ink cups and plates; and (d) inspecting printed balls to make sure they were correctly stamped. Regarding dumping duty, the operator usually received three totes on a dolly from the prime spray room. Each tote held 1,200 balls. The operator used a hoist to lift and dump the totes into the hopper which was part of the pad print machine. As for kitchen responsibilities, each operator was required to change ink cups and plates. A plate was made of steel and had the ball name or number engraved on it. Cups determined dimple pattern. (Medeiros 712-716, 718; JE 5)
18. The room in which the pad print machines were located was a "clean room." To enter a clean room, an employee needed to put on a lab coat and wear a hairnet. If a man had facial hair, he was required to wear a beard net. (Medeiros at 720, 748)

HEALTH SERVICES RETURN TO WORK FORM

19. In November 2014, Silva told Medeiros that she was having a foot problem and could not perform dumping duty. Medeiros relieved Silva of dumping duty that night. (Silva at 215, 218-219; Medeiros at 733-734; JE 40)
20. Silva asked Medeiros to be relieved from dumping duty in July 2015. Silva was having a foot issue, asked to be relieved from dumping duty that shift, and was excused by Medeiros from dumping duty that shift. Medeiros told Silva that she needed a doctor's note stating whether

³As an example, for a ball stamped Titleist 4 Pro Vix, the brand name is Titleist, the number is 4, and the type of Titleist ball is Pro Vix. (Medeiros at 716-718)

Silva had any restrictions relative to her work duties and gave Silva a blank form for her doctor to complete. (Medeiros at 736-738; Silva at 81, 218-220, 225-226, 229-230)

21. Silva contradicted Medeiros' testimony and testified that Medeiros did not excuse Silva from dumping duty on that shift in July 2015. (Silva at 77, 78) I reject Silva's testimony. I base this determination on Medeiros' credible testimony to the contrary and on contemporaneous documentation. See JE 41 (Medeiros wrote that Silva asked if someone else could dump so Medeiros “[h]ad Rosa work on a machine [as opposed to dump] for the night.”) Medeiros relieved Silva of dumping duty on that shift without Gendreau’s input. (Gendreau at 1247-1248, 1298)
22. A day after the July 2015 request by Silva to be excused from dumping duty, the team leader of a different shift, Jim Johnson, called Silva and told her not to go to work that day because she had to first bring the completed form from the doctor to Acushnet’s Health Services located in Fairhaven, Massachusetts. Silva told Johnson that Medeiros had told her to bring the completed form to Ball Plant III. (Silva at 233, 238-240) Silva complained to Strozyk, because she was upset about losing a day’s pay. (Silva at 246-247; Strozyk at 919-920) Strozyk told Silva that the form should have gone to Health Services. Silva told Strozyk that Medeiros had told her to bring it to Ball Plant III. Under company policy, an employee was required to give 24 hours’ notice to take a vacation day. (Silva at 247-248) Strozyk waived that provision, thus allowing Silva to take a vacation day. (Strozyk at 920-921)
23. I credit Medeiros’ testimony that she told Silva to bring the completed form to Health Services in Fairhaven. (Medeiros at 739-740) First, the Health Services Return to Work Form states it “contains Confidential Information which must only be returned to Acushnet Company Health Services Dept.” (underscore in original) (JE 29) Second, Silva admitted that every time she filled out that form or one that was similar, she took it, or had it sent or faxed, to Health Services. (Silva at 229) Third, Medeiros received training and was instructed that the employee needed to bring that form to Health Services and that she was not allowed to accept employee medical information. (Medeiros at 737, 739-741) Fourth, Medeiros was not alone when she told Silva where to return the form. (Medeiros at 862; JE 49) It is illogical that Medeiros would deviate from company policy in the presence of another. Fifth, a July 14, 2015 entry in a document entitled Supervisor/Team Leader Investigation Report reflects that Silva told Medeiros that the doctor was going to fax the restrictions, and Medeiros told Silva it had not been received, but Strozyk would track it down. (JE 41) If Medeiros had told Silva to bring the form back to Ball Plant III, there would have been no need to fax it. The reference to track it down is consistent with Strozyk having to contact Health Services which was at a different location.⁴

⁴Medeiros testified that team leader Johnson spoke to Silva to let her know that she could not work until the form was submitted to Health Services. Medeiros admitted that that testimony was contradictory to statements she made at her deposition. (Medeiros at 860-862) The form filled out by Silva’s doctor contained a stamp evidencing it was forwarded to Medeiros and Strozyk which seems inconsistent with Medeiros’ testimony that she could not see medical information. (JE 28) In making my determination that Medeiros instructed Silva to send the completed form

HAIRNET

24. Acushnet had a longstanding concern about hairs and fibers clinging onto and being imprinted upon the balls. (Medeiros at 749) To address that, Acushnet had a clean room environment in its finishing operations to prevent foreign materials from getting onto the balls. (Gendreau at 1249) Acushnet provided employees with disposable hair nets that came in three sizes. In the 2015-2016 timeframe, preventing hairs and fibers from getting onto the balls was of heightened importance. Management had tracked the number of defective balls and had detected a spike in the amount of hairs and fibers affixed to the balls. At a monthly safety meeting, Strozyk instructed the team leaders to make sure that the employees were wearing proper garb correctly, buttoning coats, wearing hair nets, etc. Medeiros recalled that the change in standards regarding hairnets and lab coats was addressed during a safety meeting that she believes occurred in January 2015. She recalled that management wanted team leaders to make sure everyone was wearing hair nets and lab coats properly. (Strozyk at 921-922; Gendreau at 1250; Medeiros at 753, 755-756; Silva at 89)
25. From 2014 to 2016, if an employee told Medeiros that a hairnet did not fit, Medeiros would go to the storage room to find the proper size for the employee. No employee ever complained to Medeiros that none of the hairnet sizes fit. (Medeiros at 754-755, 768) Medeiros' general practice relative to violation of hairnet protocol was the following. She was not focused on a single hair or two sticking out of a hairnet, but on "sort of a clump of hair ... or a large strand of hair." If she spoke to an employee about non-compliance of a hairnet, she would not memorialize it in the PMD the first time. If the non-compliance recurred, she would speak to the employee again. If the non-compliance reoccurred weeks or months later, she would not memorialize it in the PMD. However, if the non-compliance happened more frequently, then she would start to memorialize it in the PMD. Medeiros estimated that she did not request discipline regarding hairnet non-compliance until the fourth or fifth infraction. (Medeiros 757-760)
26. Silva understood that the pad print room was a clean room and that all employees entering had to wear a hairnet and a gown. Silva acknowledged that there were times when her hair would come out of her hairnet. Silva described having to fix her hair/hairnet frequently. (Silva at 85, 89, 254-255, 260-261) In January 2016, there were multiple times that Medeiros observed a "good section of hair" outside of Silva's hairnet and asked Silva to make sure that all of her hair was under her hairnet.⁵ At first, Medeiros spoke to Silva without memorializing the issue in the PMD. At some point, Medeiros began to memorialize in the PMD Silva's failure to properly use a hairnet. (Medeiros at 761, 764) Joint Exhibits 6-10 are PMD documents reflecting numerous discussions between Medeiros and Silva in January

to Health Services in Fairhaven, I have taken this evidence into account, but I rely on the weight of the contrary evidence which I have cited.

⁵I reject Medeiros' testimony (Medeiros at 892-893) that during those discussions Silva never mentioned that her hairnet was not properly fitting.

2016 regarding Silva's hairnet non-compliance. Medeiros checked counceled and documentation on each document. Subsequently, on or about January 20, 2016, Silva received a one day suspension relative to hairnet non-compliance. (JE 11) Medeiros requested a one day suspension, because Silva had received a verbal warning and a written warning within the past year and the next level of discipline was a one day suspension. (Medeiros at 762; JE 50; JE 51; JE 43) Silva ultimately acknowledged that Medeiros had repeatedly mentioned her hairnet usage before issuance of the one day suspension. (Silva at 258, 264-267)

27. Based on Findings of Fact 25-26, I find that Medeiros' request for discipline regarding Silva's non-compliance with hairnet protocol was consistent with Medeiros' general practice relative to hairnet protocol violations.
28. Medeiros addressed hairnet and beard net non-compliance with male employees, and I reject Silva's testimony to the contrary. (Silva at 90; JE 42)⁶

MANAGEMENT INVOLVEMENT RELATIVE TO HAIRNET

29. Rouillard's approval was necessary relative to Medeiros' request for the one day suspension of Silva for non-compliance of hairnet protocol. Rouillard testified that he considered it mandatory to issue the one day suspension. Subsequently, he testified that he could have exercised discretion, but didn't, because Medeiros had counseled Silva several times regarding hairnet non-compliance, and while other associates found a way to comply, Silva did not. (Rouillard at 1172-1173, 1178-1179)
30. In January 2016, Silva had discussions with management regarding Medeiros and hairnet usage. These discussions are described in Findings of Fact 31-34.
31. Before the one day suspension, Silva complained to Strozyk that Medeiros kept talking about Silva's non-compliant hairnet even though Medeiros had never mentioned it before. Strozyk told Silva that if she needed a special hairnet that she should buy it and the company would reimburse her. Silva never took Strozyk up on his offer. (Silva at 93-94, 271-273; Strozyk at 922-923)
32. Silva told Rouillard that the hairnets did not fit and that Medeiros had never talked to her about hairnets in the prior two and a half years. (Silva at 269-271) Silva expressed that she felt singled out or targeted by Medeiros. Rouillard told Silva that he would discuss the issue with Gendreau, and when he did, he learned that Silva had already spoken to Gendreau about the issue. (Rouillard at 1133-1134, 1164-1165)
33. Silva told Gendreau that Medeiros was targeting Silva and that there were others that did not wear hairnets properly whom Medeiros did not address. She told Gendreau that Medeiros

⁶In March 2015 and in April 2015, Medeiros entered counceled and documentation in the PMD regarding Mr. Feiteira's beard net. In April 2015, she entered documentation in the PMD regarding Mr. Neves' beard net. In March 2015, she entered counceled and documentation in the PMD regarding Mr. Soares' hairnet. In October 2015, she entered counceled and documentation in the PMD regarding Soares' beard net. Subsequently, in October 2015, as a result of his failure to adhere to Medeiros' instructions relative to beard net usage, Soares received a written warning. In February 2016, Medeiros entered counceled in the PMD regarding Mr. Ramos' beard net usage. (JE 42)

was targeting her because Gendreau had told Medeiros to relieve Silva of dumping duties in July 2015. Gendreau told Silva that he never told Medeiros that. I credit Gendreau's testimony that he did not tell Medeiros to relieve Silva of dumping duties in July 2015. (Gendreau at 1247-1248, 1250-1251, 1298)

34. On January 29, 2016, there was a meeting between Silva, Gendreau and Rouillard during which Silva reiterated that she felt singled out, the hairnets did not fit, other employees were not wearing their hairnets properly, and while Medeiros was on "top of her" for everything, the men could do anything without repercussion. Gendreau and Rouillard shared the results of research they had performed in advance of the meeting and told Silva that they found nothing to suggest that Medeiros was singling Silva out.⁷ They told Silva that Medeiros had been tolerant of her hairnet non-compliance as Medeiros had counseled her several times before requesting the one day suspension. Gendreau asked Silva whether she had followed up on Strozyk's reimbursement offer, and Silva admitted she had not. Gendreau and Rouillard offered to meet with Silva and Medeiros, but Silva declined. Silva was informed that the suspension would stand. Silva talked about other issues which Gendreau described as conflict with other associates,⁸ and with managers and team leaders who had held Silva accountable. Gendreau cautioned Silva that if she did not follow Medeiros' instructions, "it's going to end badly [and] I don't want to see you lose your job." (JE 12; JE 13; Gendreau at 1252-1255, 1302; Silva at 98, 100, 102-103; Rouillard at 1135-1136)
35. Medeiros believes that she spoke to Silva a couple of times about her hairnet usage after the one day suspension. (Medeiros at 765-766) A PMD document in February 2016 notes that Medeiros spoke with Silva about her hairnet. (JE 14) In light of that document, I do not credit Silva's testimony that after the one day suspension, Medeiros never talked to Silva about the hairnet. (Silva at 105)

UNSTAMPED BALLS

36. In late August 2016, during a shift, Silva became aware that some balls produced by her machine were not stamped. Silva stopped the machine. Silva and a co-worker looked through the balls and found ten unstamped balls which Silva put aside. Silva believed that they had identified all the unstamped balls. Silva did not notify Medeiros or notify the quality department ("quality") of the creation of the unstamped balls. (Silva at 278-279, 282-283)

⁷In preparation for the January 29, 2016 meeting, Rouillard investigated whether there was any differential treatment between male and female employees relative to hairnet usage because Silva had said she was singled out. Rouillard reviewed Medeiros' record of counseling and documentations regarding men versus women. Rouillard looked at warnings across Medeiros' shift with regards to clean room protocol and hairnets. (Rouillard at 1135, 167-1168, 1174, 1176) Gendreau reviewed the PMD and saw no indication that Medeiros was singling out Silva. Gendreau did not look at the information with a focus on age or gender. (Gendreau at 1251-1252)

⁸Silva had an ongoing dispute with a male co-worker and wrongly accused him of sabotaging a machine she was operating. (JE 2; JE 3; JE 16)

37. Subsequently, inspectors found an unstamped ball which was delivered to Strozyk. The ball did not include a stamp of the brand name on two sides, nor the number stamp on two sides, nor the side stamp reflecting the type of ball. The inspection found three unstamped balls and determined that it was Silva's machine that had generated those balls. (Strozyk at 926-929; Medeiros at 717-718, 778)
38. But for the original unstamped ball having been held because of a "bad buff," it would have been extremely unlikely that the three unstamped balls would have been identified before being sent to the customers. (Strozyk at 930-931; Medeiros at 780)
39. Strozyk told team leader Johnson to tell Medeiros to find out from Silva what had happened. Medeiros talked to Silva and then relayed to Strozyk that Silva had a number of unstamped balls, tried to find them, believed all unstamped balls were found, and did not notify quality or Medeiros. (Strozyk at 931-933; Medeiros at 781-782) When Medeiros asked Silva why she did not notify Medeiros, Silva responded that she had taken care of it and that it wasn't a big deal. Medeiros considered it to be a very big deal. Medeiros was disheartened that Silva did not appear to understand the seriousness of the production of unstamped balls and the failure to notify team leader or quality of the discovery of unstamped balls. (Medeiros at 785, 870)
40. Medeiros believes that she and Strozyk jointly decided to request a three day suspension for Silva relative to the unstamped balls, (Medeiros at 788), although Strozyk testified it was more his idea. (Strozyk at 985) At the time, Medeiros was not aware that Silva had complained about the hairnet suspension to Gendreau and Rouillard. (Medeiros at 887) The logic for requesting a three day suspension for the unstamped balls was that Silva had already received a one day suspension for hairnet non-compliance, and the next level of discipline would have been a three day suspension. (Medeiros at 868; Strozyk at 936) Medeiros admits that there was no prior incident of Silva failing to notify team leaders for a problem with her machine and acknowledges that she did not consider mitigating circumstances. (Medeiros at 868-869) From Strozyk's perspective, unstamped balls had a significant impact on Acushnet's operation and was a major defect so operators needed to report if they found an unstamped ball. (Strozyk at 933)
41. Strozyk discussed the requested three day suspension with Rouillard, who approved a three day suspension. Strozyk talked with the director of quality who was very concerned about unstamped balls reaching customers. (Strozyk at 936, 985-987) In approving the requested discipline, Rouillard examined what caused the unstamped balls and learned that Silva had failed to turn on a feature of her machine. Rouillard examined Silva's response and learned that Silva had tried to find the unstamped balls, but did not find them all, and had failed to contact the team leader or quality. Rouillard determined that the request met the threshold for a three day suspension, because Silva had a prior one day suspension for the hairnet infractions. (Rouillard at 1137-1139, 1184-1185)

42. When Medeiros told Silva that she was going to be suspended for three days, Silva responded “three days? One for each ball when people make thousands of balls and didn't get suspend” and further told Medeiros that she was not going to accept it. (Silva at 114-115, 284)
43. Silva discussed the issue with Strozyk and contends that during that discussion he put his hand on her nose and screamed at her. (Silva at 117, 120) I do not credit Silva’s claim. I credit Strozyk’s testimony that he told Silva that the unstamped balls was a very big deal and that she should have notified quality or the team leader. I credit Strozyk’s testimony that he did not touch Silva. Strozyk acknowledged that he talks with his hands and that could be taken as wagging his finger. He doesn’t recall raising his voice during the meeting and believes they were equally loud. (Strozyk at 934-935)
44. Silva then talked to Rouillard telling him that if nothing was done that she was going to get a lawyer. (Silva at 120, 290) Silva again told Rouillard that she was being singled out and targeted by Medeiros. Rouillard told Silva that he would discuss the issue with Gendreau. He followed up with Gendreau and Strozyk. (JE 23; Rouillard at 1182)
45. Gendreau and Silva had a conversation about the three day suspension. Silva talked about the unstamped balls and noted that Medeiros had suspended Silva relative to the hairnet. (Silva at 122, 124, 125, 290) Silva told Gendreau that she did everything that she could to find the unstamped balls. Gendreau asked Silva if she notified quality or Medeiros and believes that Silva responded that Medeiros did not need to know about the unstamped balls. (Gendreau at 1257-1258)
46. To Gendreau, it was clear that at a minimum, Silva should have notified her team leader, and preferably, also quality of the discovery of unstamped balls. There was a known practice of notification upon discovery of unstamped balls, however, that practice was not written down as a procedure in the operators’ manual. Based on Silva being a long-term associate, her efforts to find the unstamped balls, and the absence of a written procedure regarding notification of discovery of unstamped balls, Gendreau decided to rescind the suspension and have Silva work with Strozyk to develop a written procedure regarding notification of unstamped balls that would become part of the operators’ manual.
47. Gendreau told Silva that the rescission of the suspension was not an indictment of Medeiros, who he determined did her job correctly. He told Silva that he wanted to use her working with Strozyk as a turning point in her employment so she could continue to work at Acushnet. (Gendreau at 1260-1261, 1311)
48. To Gendreau, the most significant part of the unstamped balls incident was the lack of notification because that could have put Acushnet’s business at risk. He communicated his decision to rescind the suspension to Rouillard and Strozyk. (Gendreau at 1262-1264) Gendreau expressed to Strozyk that in the absence of a written procedure stating that an operator must notify a team leader of an unstamped ball, he felt that Silva just didn’t realize that she was supposed to notify Medeiros. Gendreau also expressed to Strozyk that he wanted Strozyk to work with Silva to create a written procedure of notification regarding unstamped

- balls and hoped that by engaging Silva in that process, it would instill the importance of quality procedures and “help her be more successful going forward.” (Strozyk at 937-938)
49. Based on my observations of Gendreau, who I found to be highly credible, and Findings of Fact 46-48, I find that Gendreau was trying to help Silva reverse the negative direction in which Silva's work experience at Acushnet was headed, and genuinely tried to assist her in learning to comply with company policies.
50. Silva then had a meeting with Strozyk. Strozyk told Silva that they were to write a paragraph that would become written procedure that states what to do when an unstamped ball occurs. Silva said she understood. (Strozyk at 941; Silva at 294-295)
51. In light of Findings of Fact 46-50, I do not credit Silva's statement in her charge that Strozyk harassed her by asking her to come to his office and write down the following - “Whatever problem you have, if you think its small problem, report to your supervisor.” (JE 49)

SLEEPING IN THE MECHANICS' AREA

52. The events leading to Silva's termination occurred during the morning of September 13, 2016. During her final break of the shift, Silva was in the mechanics' area, (Silva at 144-145), which is part of the production floor. (Medeiros at 813)
53. Medeiros noticed Silva sitting in a chair at a desk in the mechanics' area with her hands down by her sides on her thighs and her head tilted down. When Medeiros began to step towards her, Silva lifted her head and rubbed her eyes. Medeiros assumed that Silva was sitting for a moment and continued with her work. A couple of minutes later, Medeiros saw Silva sitting in the chair at the desk with her head down and eyes closed. Medeiros asked team leader, Roxeanne Pelletier, to check if Silva was sleeping. As Medeiros and Pelletier walked by the mechanics' area, Silva sat up and her eyes were open, so Medeiros again assumed that Silva was not sleeping. (Medeiros at 816, 818-20) Scott Sturtevant, who worked in the spray room, reported to Medeiros, and had a good relationship with Silva, (Sturtevant at 1085-1087; 1097-98), then walked over to Medeiros and Pelletier. (Medeiros at 821)
54. Sturtevant credibly testified that he was within about ten feet from Silva and observed Silva (albeit for seconds) sitting in a chair in the mechanics' area with her eyes closed, her head tilted down and still. He did not notice anything in her hand. When he heard Medeiros and Pelletier having a conversation about Silva, Sturtevant joined saying “oh, she's asleep right now. She's out like a light I believe was my words.” (Sturtevant at 1088-1091, 1108)
55. When Sturtevant told Medeiros that Silva was asleep, Medeiros then walked over to the mechanics' area with Pelletier and observed Silva sitting in the chair with her head down and eyes closed. Pelletier and Medeiros walked to within three feet of Silva and stood there for ten seconds without any response from Silva. Medeiros spoke Silva's name. Silva lifted her head and said that she was not sleeping. Medeiros told Silva that she could not sleep there. Silva responded that she was not sleeping and was just resting her eyes. Medeiros asked Silva

to come to her office. (Medeiros at 826-828). Pelletier told Silva she believed that Silva was sleeping. (Silva at 152)

56. I find that Silva was sleeping in the chair in the mechanics' area for an unknown period during the morning of September 13, 2016. First, I reject Silva's version of events. She testified that while sitting in the chair, she was writing a grocery list which she later showed to Gendreau during a meeting with Gendreau and Strozyk. She further testified that she was rubbing her eyes because she just got cats and had allergies. (Silva at 149-152, 159, 332-333, 337) Neither Medeiros nor Sturtevant observed anything in Silva's hand when she was sitting in the chair. (Medeiros at 832; Sturtevant at 1089) Neither Gendreau nor Strozyk recalls Silva showing Gendreau a grocery list. (Strozyk at 1000; Gendreau at 1318) The allergies claim is self-serving and not credible. Second, Medeiros and Sturtevant each credibly testified to observing Silva sleeping, and Pelletier told Silva that she believed Silva was sleeping. In making this finding, I have taken into account that Sturtevant reported to Medeiros at that time, and was her friend. (Medeiros at 881)

INSUBORDINATION

57. When Medeiros again asked Silva to come to her office in the morning of September 13, 2016, Silva began yelling that she was not going to talk to her, that she wanted to speak to Gendreau, and that Medeiros was trying to get her fired. Silva walked to her machine and told Medeiros that she did not trust her -- referencing suspensions for the three balls and the hairnet. Medeiros responded that the three day suspension had been rescinded and told her to stop yelling and come to her office. Silva continued to yell that she did not trust Medeiros and would not go to her office. Silva was concerned that Medeiros would accuse Silva of doing something in the office. While Pelletier stayed with Silva, Medeiros went to call Strozyk. (Silva at 155, 159, 173-174; Medeiros at 830-833)
58. Medeiros called Strozyk and told him that she had found Silva asleep on the production floor, that Pelletier agreed that Silva was asleep, and that Silva did not want to leave the floor. Strozyk told Medeiros to shut Silva's machine off and have Silva leave the floor. Five minutes later, Medeiros called Strozyk again stating that Silva was still operating her machine and would still not leave the floor. Strozyk decided not to have Silva forcibly removed. Medeiros told Strozyk over the phone that Silva did not trust Medeiros, but did not tell him the reason, and did not tell him that Silva had told Medeiros that Silva felt threatened by Medeiros. When Strozyk arrived at work, Medeiros told him that Silva still would not leave the floor. Strozyk asked Medeiros to bring Silva to his office. When Medeiros told Silva that Strozyk wanted to speak to Silva, Silva screamed at Medeiros and said that she was not talking to them and would only talk to Gendreau, because they were trying to get her fired. Medeiros relayed this to Strozyk who then himself asked Silva to shut the machine down and come with him. Silva, who was upset and crying, told him that she wanted to talk to Gendreau and believed that Strozyk and Medeiros were trying to get her fired. Strozyk

asked Silva ten times to shut the machine down before she did. Strozyk decided to have Silva take a drug test which she did.⁹ Strozyk believed that there was reasonable suspicion to test -- specifically, that it was not normal for someone who has been on third shift for a long period to fall asleep and Silva's belligerent unwillingness to shut the machine down. (Strozyk at 949-955, 957-958; Medeiros at 834-836; 838-840; Silva at 160)

PROCESS LEADING TO THE TERMINATION

59. When Gendreau arrived at work in the morning of September 13, 2016, he had a brief conversation with Silva and Strozyk. Later that day, he followed up with Strozyk. (Gendreau at 1264-1267; Strozyk at 962; Silva at 166-167) He asked Strozyk to conduct an investigation, prepare a memorandum and include a recommendation. (Gendreau at 1321)
60. Strozyk conducted an investigation which included talking to Medeiros and Pelletier (but not obtaining their written statements) and collecting information from the PMD. Strozyk did not speak with Silva, as the primary reason for his recommendation was insubordination of which he had firsthand knowledge. Nor did Strozyk speak to Sturtevant or any operators. (Strozyk's at 964-965, 999, 1002-1004)
61. Strozyk prepared a memorandum dated September 14, 2016 that included the following: Silva recently received a one day suspension; had 17 notations in the PMD for various safety, working relationships, and quality related concerns; the prior week she was counseled on quality for not reporting multiple unstamped balls;¹⁰ and her sleeping on the production floor and multiple events of insubordination led to a termination recommendation. (JE 26)
62. Gendreau, Rouillard and Riall reviewed the memorandum. Gendreau and Riall had a discussion with Strozyk regarding it.¹¹ (Gendreau at 1268-1269; Riall at 1030)
63. Rouillard described the process leading to the termination as input from Strozyk with Rouillard, Riall and Gendreau making the decision in collaboration. (Rouillard at 1149-1151, 1164) I credit that testimony. It is corroborated by Gendreau's testimony. (Gendreau at 1268-1269) Riall testified that he was aware of the decision but not involved in it. (Riall 1032) I do not credit his contention, and I find that Riall was involved in the decision in light of Rouillard's and Gendreau's credible testimony. Riall admits that he was persuaded by the memorandum and discussions that termination was appropriate. (Riall at 1033, 1053) Medeiros provided information relative to the September 13, 2016 incidents but was not involved in the termination decision. (Medeiros at 841-842)

⁹There is no evidence in the record that Silva was found to be under the influence of anything as a result of the test.

¹⁰While I agree with Silva that the associated PMD entry, Joint Exhibit 22, does not reference Silva being counseled for failure to notify, I give this little weight in light of the ample evidence that management spoke to Silva about her failure to notify relative to the unstamped balls.

¹¹The evidence was unclear as to whether Rouillard had a discussion with Strozyk regarding the memorandum.

64. To Rouillard, there were two very serious violations - sleeping in the work area and insubordination - each of which by itself would have resulted in a minimum of a three day suspension, but combined, supported termination as the best course of action. (Rouillard at 1151-1152) Rouillard did not speak with Silva, because he did not believe that he would obtain new information. (Rouillard at 1189-1191)
65. To Gendreau, the significant factor was the insubordination, and he believed that the situation “played out all the way back from January [2016] when I told her, Rosa, if this continues where you don’t listen to your team leader, you’re going to lose your job....” (Gendreau at 1270, 1317)
66. On September 15, 2016, Rouillard asked Silva to come to Ball Plant III. Rouillard and Gendreau informed Silva of the termination. (Rouillard at 1153; Gendreau at 1267)
67. Acushnet’s progressive discipline policy identifies six groups of offenses. Disciplinary action for a Group 5 offense can range from a three day suspension for such a 1st offense, up to and including termination based on the nature of the behavior, circumstances, and previous disciplinary actions on record. Group 5 offenses include “insubordination or refusal to work on assigned job except in the case where an associate believes such job assignment to be unsafe or unhealthy beyond the normal hazard inherent in the job.” (JE 43) I reject, as not credible, any contention that the “unsafe or unhealthy” exception applied to Silva’s behavior. I credit Rouillard’s testimony that requesting that Silva leave the production floor was not an unsafe request, and that in light of Silva’s state, it would have been unsafe to leave her on the floor. (Rouillard at 1193-1194)
68. I find that the termination was consistent with Acushnet’s progressive discipline policy as Silva’s conduct included insubordination – a Group 5 offense – which pursuant to the policy, could result in termination of employment. (JE 43)
69. Silva’s position was filled by a male under 40 years old. (JE 5)

SUBSEQUENT INVESTIGATION

70. On September 13, 2016, Jessica Torabi (Silva’s daughter) went to Ball Plant III and spoke to Rouillard. Torabi testified that Rouillard said “I don’t think your mom is going to be working here anymore.” (Torabi at 403-406 409) I reject Torabi’s testimony of this alleged statement. I credit the following testimony and rationale of Rouillard. When asked whether he told Torabi that he didn’t think that Silva would be working there, Rouillard answered “[n]o, I did not. The incident was less than two hours old at that point. We hadn't even had a chance to discuss it at length as a leadership team. There was no way that I would make a comment like that at that point in the investigation.” (Rouillard at 1148)
71. On September 13, 2016, after speaking with Rouillard, Torabi had a meeting with Riall, who was Rouillard’s superior. Torabi testified that during that meeting, Riall stated “I have a mother like you have a mother and when they get older, they can be more difficult to manage.” (Torabi at 417) Riall testified that during that meeting, Torabi said she recognized that her mother could be difficult, so he said “I’ve got a mother. She can be difficult, too. So

I understand how difficult it was to manage her.” When subsequently questioned, Riall consistently testified. I credit Riall’s version. Although I believe Riall has tried to distance himself from the termination, I find Riall was trying to be sympathetic and did not mention Silva’s age or the words “old” or “older.” Prior to September 13, 2016, Riall had never met or spoken to Silva, and it is unlikely he would have formed any opinion relative to her age. (Riall at 1021, 1026, 1063) Further, I discredit Torabi’s testimony as to this alleged statement based on her demeanor at public hearing, which reflected a passionate and highly protective posture toward her mother.

72. On October 5, 2016, Riall had a meeting with Torabi, which was attended by Bill Frye, who was Gendreau’s superior. (Riall at 1036; JE 30) Torabi stated that she had received phone calls from current associates regarding Silva. (Torabi at 431-432, 436) Torabi sent an email on October 9, 2016 to Frye with the associates’ names. Riall and Frye then conducted interviews of those associates and summarized their investigation. (Riall at 1038-1040; JE 30) After their investigation was completed, they told Gendreau and Rouillard that there was no information gleaned from the interviews that would cause them to do anything differently than terminate Silva’s employment. Frye or Riall notified Torabi that the investigation was concluded and that the termination would stand. (Riall at 1042-1044; Torabi 443)

ALLEGED TEXT MESSAGE

73. Torabi testified that during her September 13, 2016 meeting with Riall, she relayed to him that Silva had told her that an Acushnet employee had told Silva that there was a text message from Medeiros to Acushnet employee, John Charbonneau, that allegedly said “I’m going to get rid of [Silva] the way I got rid of Albert Silvera.” (Torabi at 415-416) Riall testified that it was during the meeting on October 5, 2016 when he first heard about an alleged text message. (Riall at 1038, 1050-1051, 1055) I credit Riall’s version. There is no mention of a text message as of the September 2016 timeframe in the documentation. In contrast, Joint Exhibit 30 - which memorializes the investigation of Frye and Riall in response to information provided by Torabi in October 2016 - references the alleged text message. See JE 30
74. On October 12, 2016, Frye and Riall interviewed Medeiros. She denied having sent any text message to Charbonneau. (JE 30) On October 13, 2016, Frye and Riall interviewed Charbonneau who denied the existence of the text message. (Riall at 1041-1042)
75. In contrast, Charbonneau testified that Medeiros had texted him sometime in 2015 or 2016 saying “something to the effect of ‘I just got Al Silvera¹² and Rosa Silva is next’”, and showed the text message to co-worker, Adelaide Nunes. (Charbonneau at 1208, 1210, 1219) Charbonneau testified that when Riall and Frye asked him about an alleged text message, he untruthfully denied its existence. (Charbonneau at 1211-1212, 1216-1217, 1222-1223) Charbonneau stated that he only testified at the public hearing because he believed it was

¹²Silvera was a male employee whose employment at Acushnet was terminated. (Charbonneau at 1220).

important to Silva's health and that he did not tell Frye and Riall of the text message, because he did not want to get involved and had various things happening in his life including a significant medical diagnosis. (Charbonneau at 1211, 1214)

76. I do not credit Charbonneau's testimony that he received such a text message from Medeiros, and I find that Silva has failed to prove that Medeiros sent a text message to Charbonneau about Silva.¹³ First, Charbonneau is admittedly biased in favor of Silva and testified "Rosa and I are like family" and that he would do basically anything for Silva. (Charbonneau at 1225, 1234). Second, Charbonneau testified that when he received the text, "I showed Adelaide [Nunes] and we talked about it." When asked whether he was a hundred percent sure that he showed it to her, Charbonneau answered "Yes. I believe so." (Charbonneau at 1210) Adeline Nunes did not testify. However, the record contains contemporaneous documentation regarding an interview that Frye and Riall conducted of Adeline Nunes. On October 13, 2016, they interviewed Adeline Nunes and asked if she had firsthand knowledge of text messages sent to Charbonneau. Adeline Nunes stated she "had not seen the emails/texts but was merely sharing with [Torabi] the things that she had heard. [Riall] confirm[ed] with her that she had no firsthand knowledge of the text messages allegedly sent. She confirmed." (JE 30) Third, Charbonneau's testimony concerning the timing of the text (sometime in 2015 or 2016) and the content of the text (something to the effect of) are quite vague. Fourth, Charbonneau testified that he deleted the text message at some point, and that he was aware of Silva's termination when he was interviewed by Frye and Riall. (Charbonneau at 1210, 1216, 1223) Notwithstanding Charbonneau's health issue during the period when he was interviewed by Frye and Riall, it is not credible that Charbonneau would not have attempted to help someone who was like family and for whom he would basically do anything by revealing the text message to Frye and Riall. Similarly, it is not credible that he would have deleted such a text.¹⁴

TESTIMONY OF CURRENT FEMALE WORKERS OF ACUSHNET

77. Three current female employees of Acushnet testified on behalf of Silva. Andrea Andrade has worked there 18 years. (Andrade at 644) Carol Sullivan has worked there 36 years. (Sullivan at 621) Darlene Nunes ("D. Nunes") has worked there 38 years. (Nunes at 571)
78. Prior to the termination, D. Nunes did not complain to management about Medeiros and did not know of any complaints by females to management about Medeiros. (D. Nunes at 586) When asked as to 2014-2016, who told her they made complaints about Medeiros to

¹³An exhibit references a potential second text message from Medeiros. I do not find that such a second text message ever existed for lack of evidence. (JE 30)

¹⁴In rejecting Charbonneau's testimony that such a text message was sent to him by Medeiros, and in finding that Silva has failed to prove that Medeiros sent such a text message, I have taken into account the following which I find insufficient to alter these findings. First, I recognize Charbonneau was testifying that he lied to management in October 2016 which presumably his employer would not look favorably upon. Second, Medeiros did not testify in rebuttal of Charbonneau's testimony. Third, in response to being told about an alleged text message, Silva confronted Medeiros. (Silva at 110-111) Medeiros' testimony as to the confrontation was evasive. (Medeiros at 894)

- management, Sullivan testified “I don’t recall them making complaints to management” but D. Nunes did complain. (Sullivan at 625-626) Sullivan could not identify any employees besides D. Nunes who complained about Medeiros in 2014-2016. (Sullivan at 631-632)
79. Andrade testified that Medeiros looked down upon the female employees. (Andrade at 673) I find this testimony unreliable and do not credit it, because Andrade failed to provide any basis for her generalized statement which was based on supposition.
80. Andrade testified that in 2014-2016 two employees named “Lisa” and “Maria” told Andrade that they made complaints to management about Medeiros. I find this testimony unreliable and do not credit it as Lisa and Maria did not testify, Andrade did not know the last names of Lisa or Marie, and Silva did not produce any written complaint by Lisa or Marie about Medeiros to management. (Andrade at 667-670)
81. Andrade and D. Nunes testified that they saw Medeiros walking by male employees who didn’t have their beard net on or had hair exposed and did not speak to them. (Andrade at 672; D. Nunes at 580) I find unreliable and do not credit their testimony. Neither Andrade nor D. Nunes identified the male employees or provided any evidence that Medeiros noticed these unnamed males’ improper hairnet or beard net usage. Their testimony is contrary to the entries in the PMD by Medeiros regarding male employees’ improper usage of hairnets or beard nets. (JE 42) I found Medeiros credible when she testified that if she saw an employee not complying with policy, she would speak to the employee. (Medeiros at 849-851)
82. D. Nunes testified that if a male employee was reading a magazine or newspaper, Medeiros would pass by, but if it was a female employee, Medeiros would comment. (D. Nunes at 583-584) I find unreliable and do not credit this testimony. D. Nunes did not identify the male employees or the female employees. D. Nunes did not provide any evidence that Medeiros noticed such behavior.
83. At one point in 2014-2016, Silva and Medeiros were talking. After their conversation ended, Medeiros walked by Andrade and was shaking her head and rolling her eyes and said “I can’t stand that woman.” (Andrade at 663-664) I infer Silva was “that woman.” I credit Andrade’s testimony that Medeiros expressed her dislike of Silva.

B. LEGAL ANALYSIS

HOSTILE WORK ENVIRONMENT (GENDER AND/OR AGE)

To prevail on a claim of hostile work environment, Silva must prove that: (1) she is a member of a protected class; 2) she was the target of speech or conduct based on membership in the class; 3) the harassment was sufficiently severe or pervasive to alter the terms or conditions of employment and create an abusive working environment; and 4) the harassment was carried out by a supervisor or by an employee in a situation where the employer knew or should have known of the harassment and failed to take prompt remedial action. The harassment must be objectively and subjectively offensive. Dahms v. Cognex Corp., 455 Mass. 190, 205 (2009); Patricia A. Copenrath v. Michael S. Casey, 28 MDLR 119, 122 (2006)

Silva's allegations of a hostile work environment based on age and/or gender are as follows. In July 2015, Medeiros refused Silva's request to be relieved from dumping duties ("Denying Relief from Dumping"). In July 2015, Medeiros erroneously told Silva to bring the completed return to work form to Ball Plant III causing Silva to miss a shift ("Return to Work Form"). In January 2016, Medeiros pestered and had Silva suspended for having a piece of hair sticking out of the hairnet while male employees faced no consequences for same ("Hairnet Harassment").¹⁵ Medeiros sent a text message effectively stating that Medeiros was going to get Silva fired ("Text Message"). In August 2016, Silva received a three day suspension for making three bad balls even though employees made thousands and received no discipline ("Three Day Suspension"). After Gendreau rescinded that suspension, Strozyk harassed Silva by asking her to come to his office and write certain language ("Writing with Strozyk"). On September 13, 2016, Medeiros wrongfully accused Silva of sleeping in the mechanics' area ("Lying about Sleeping"). Silva was asked to take a drug test ("Drug Test"). After reporting targeted harassment in January 2016, Acushnet failed to take prompt remedial action ("Failure by Management").

The facts reflect that Silva has failed to prove a hostile work environment claim by age and/or gender. With respect to *Denying Relief from Dumping*, Medeiros excused Silva from dumping duty upon request in July 2015. With respect to the *Return to Work Form*, Medeiros properly told Silva to return the form to Health Services, and Strozyk waived policy to allow Silva to take a vacation day to avoid missing pay. With respect to *Hairnet Harassment*, Silva frequently had hair sticking out of her hairnet causing Medeiros to have numerous conversations with Silva in January 2016 about her non-compliance with hairnet protocol. Medeiros acted consistently with her general practice relative to hairnet non-compliance when addressing Silva's non-compliance. Medeiros requested discipline only after numerous conversations with Silva. Medeiros requested a one day suspension, because Silva had already received a verbal warning and a written warning. Medeiros addressed hairnet/beard net improper usage with male employees. (JE 42)

With respect to the *Text Message*, Silva failed to prove its existence. With respect to the *Three Day Suspension*, although unstamped balls were of utmost concern to Acushnet, Silva failed to notify Medeiros or quality despite the known requirement to do so when she discovered unstamped balls. While the suspension was ultimately rescinded, requesting a three day suspension was consistent with the next level of discipline since Silva had previously received a one day suspension. With respect to the *Writing with Strozyk*, that meeting was an effort by management to work with Silva to create a written procedure regarding unstamped balls and in

¹⁵Any incidents in July 2015 and January 2016 would have occurred more than 300 days before the filing of the charge with the Commission on January 30, 2017. Respondents did not raise the issue of timeliness of claims before me. Silva's post-hearing brief hints at a continuing violation claim. (Complainants Post-Hearing Brief at p. 31) (Silva "termination on September 15, 2016 was the last event in a continuing pattern of harassment, disparate treatment and retaliation that was continuous from on or about July 2015.") I shall assume *arguendo* all claims are timely.

furtherance of her learning to adhere to quality protocols in advancement of her continued employment.

With respect to *Lying about Sleeping*, Silva was sleeping in the mechanics' area. With respect to *Drug Test*, Strozyk believed there was reasonable suspicion for drug testing given Silva's behavior. With respect to *Failure by Management*, after Silva reported in January 2016 being targeted or singled out, Rouillard and Gendreau conducted research, met with Silva regarding the hairnet issue, and offered to have a meeting with Silva and Medeiros, but Silva declined – just as Silva had declined Strozyk's offer to have her purchase hairnets that Acushnet would reimburse. Management did not abandon Silva relative to the unstamped balls incident as Gendreau rescinded that suspension as detailed above.

Silva is a woman over the age of 40 who incurred adverse employment actions. But the previous three paragraphs demonstrate the lack of merit of the contentions underlying Silva's claims of a hostile work environment. The facts reflect that the actions, and non-disciplinary counseling/documentations, and the disciplines she complains of were not based on her gender and/or age, and were not sufficiently severe or pervasive to alter the terms or conditions of employment and create an abusive working environment. Rather, the facts depict an employee, who was failing to comply with company standards, and who did not avail herself of management's efforts to help her improve her job performance. Because Silva has failed to prove her hostile work environment claims, the hostile work environment claim based on age and the hostile work environment claim based on gender are dismissed.

DISPARATE TREATMENT (GENDER AND/OR AGE) AS TO TERMINATION

To prevail on a gender and/or age based disparate treatment claim, Silva must demonstrate the following: she is a member of a protected class; she was subject to an adverse employment action; Acushnet bore discriminatory animus in taking that action; and the discriminatory animus was the reason for the action. Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016); Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001) Where a complainant seeks to prove disparate treatment through indirect evidence, the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is utilized.¹⁶

The four elements of a prima facie case of gender discrimination by termination¹⁷ are: (1) membership in protected group; (2) performance of the job at a satisfactory level; (3) termination from employment; and (4) employer's continued efforts to fill the position or hiring of

¹⁶Silva bears the burden of establishing a prima facie case. If Silva is successful, unlawful discrimination is presumed. Acushnet must then articulate a legitimate, nondiscriminatory reason for the challenged action and produce supporting credible evidence. If Acushnet meets its burden of production, the presumption vanishes and the burden returns to Silva to prove pretext. Silva bears the burden of persuasion on the ultimate issue of discrimination. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 127–28 (1997)

¹⁷The disparate treatment claims certified for public hearing regard only the termination. At the beginning of the hearing, counsel expressed their agreement over the certified claims. (Transcript at pp. 15-17)

a member of an unprotected group with the same or lesser qualifications. Boston Public Health Commission v. Massachusetts Commission Against Discrimination, 67 Mass. App. Ct. 404, 407–08 (2006) The prima facie elements for age discrimination by termination differ only in that the fourth element requires Silva to show that she was replaced by a person at least five years younger or present other evidence that the termination occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. See Knight v. Avon Prod. Inc., 438 Mass. 413, 420-25 (2003)

Silva has established a prima facie case of disparate treatment by gender and has established a prima facie case of disparate treatment by age. As to gender, Silva is female and had been working for Acushnet for over thirty years. Her employment was terminated, and Acushnet filled the position with a male who I infer could not have had the same experience as Silva (given his relatively youthful age). As to age, Silva was in her 60's, had been working for Acushnet for over thirty years and was terminated. Her position was filled by a person under the age of 40 years old.

Acushnet has met its burden of production of articulating a non-discriminatory reason for the termination with credible supporting evidence: Silva's poor job performance - including repeated failure to comply with hairnet protocol; creating unstamped balls and failure to notify team leader and quality; sleeping in the mechanics' area; and insubordination.

The final inquiry is whether Silva has proven pretext. She has not.

First, the facts reflect numerous examples of Silva's job-related deficiencies. Silva had an ongoing dispute with a male co-worker that included Silva wrongfully accusing that worker of sabotaging a machine. Silva was suspended for allegedly harassing a female employee. Five supervisors including Medeiros took non-disciplinary action or requested discipline against Silva relative to quality issues. Silva did not listen to Medeiros' instruction to bring the completed return to work form to Health Services in July 2015. Silva did not listen to Medeiros' instructions to comply with the hairnet protocol in January 2016. Silva did not heed Gendreau's advice in January 2016 to listen to her team leader. Silva's action created unstamped balls in August 2016. Silva failed to notify her team leader or quality who could have performed a more comprehensive search for the unstamped balls. Shortly after narrowly avoiding a three day suspension, Silva fell asleep in the mechanics' area. Then, she repeatedly flouted Medeiros' and Strozyk's instructions to leave the production floor. Silva's concern that Medeiros and/or Strozyk would wrongfully accuse her of something if she went to their offices does not excuse her insubordination and highly unprofessional behavior.

Second, the facts do not reflect discriminatory animus by Acushnet management. Strozyk waived policy to avoid Silva losing a day's pay in July 2015. In January 2016, Strozyk offered Silva a way to resolve the hairnet issue with his reimbursement proposal. Regarding the hairnet, in January 2016, Rouillard and Gendreau each had two meetings with Silva, and listened to

Silva's concerns of being targeted or singled out, and conducted research to determine if there was an issue. They offered to have a meeting with Medeiros and Silva, but Silva declined. Regarding the unstamped balls, Gendreau rescinded the three day suspension. Gendreau with Strozyk's implementation attempted to engage Silva in a process to highlight the importance of adherence to quality protocols to help her future employment.

Third, I recognize that by some point, Medeiros did not like Silva, but I do not believe this was based on Silva's gender or age. At some point in 2014-2016, Andrade overheard Medeiros say she "can't stand that woman [Silva]."¹⁸ But the facts do not reflect discriminatory animus by Medeiros towards Silva. Medeiros relieved Silva of dumping duty upon request in November 2014 and in July 2015. Medeiros properly told Silva where to return the health form in July 2015. In January 2016, Medeiros did not request a one day suspension relative to the hairnet non-compliance until she had repeatedly discussed the issue with Silva, with no change on Silva's part. Medeiros acted consistently with her general practice relative to hairnet non-compliance when addressing Silva's non-compliance. Medeiros requested a one day suspension, because Silva had already received a verbal warning and a written warning. Medeiros was not the driving force relative to the response to the unstamped balls/failure to notify incident. Strozyk was.¹⁹ As to the September 13, 2016 events, Medeiros was not the only person who observed Silva sleeping – Pelletier and Sturtevant also so observed – and Silva undisputedly repeatedly refused to leave the production floor when asked by Medeiros and then by Strozyk on September 13, 2016.²⁰

Fourth, data relative to discipline and non-disciplinary counceled/documentations for employees supervised by Medeiros was provided, but it does not support Silva's effort to prove pretext. The respective data does not include: (a) information relative to the underlying incidents such as type of infraction; (b) whether there were mitigating circumstances, (c) how many times, if at all, Medeiros spoke to such employee before entering the interaction in the PMD or requesting discipline; (d) whether the employee had a prior disciplinary record; (e) whether the prior disciplinary record was within the past 12 months;²¹ and (f) whether the employee had a prior record of non-disciplinary counseling or documentation. Silva seeks to prove pretext through non-

¹⁸There was not enough information provided regarding this incident to infer that this was regarding gender. I treat the reference to "woman" merely to mean that the subject of the statement, Silva, was a woman.

¹⁹Although Rouillard deleted the document memorializing the three day suspension and such documentation would generally state the cause for discipline, (Rouillard at 1183; Gendreau at 1304-1305), the record does not support Silva's argument that Respondents are trying to downplay Medeiros' role relative to the three day suspension.

²⁰The evidence reflects an employee whose workplace conduct and failure to meet standards created significant challenges for her team leader. Before the unstamped balls incident and incidents of September 13, 2016, Medeiros had entered in the PMD 32 counceled and/or documentations regarding Silva.

²¹Warnings remained in effect for 12 months of active service from the date of issuance. (JE 43)

disciplinary actions and discipline of other employees supervised by Medeiros, but without this information, the data presented is not helpful.

Further, as to the discipline data, the data involves insufficient sample sizes precluding one from drawing inferences of statistical significance. Only four employees were terminated. Only three employees received a written warning. Only five employees received a one day suspension. Only three employees received a three day suspension.

Further, as to age, the demographics of persons supervised by Medeiros were greatly weighted towards persons forty years or older. One would expect the vast majority of persons who received discipline to similarly be in that category.

Putting aside insufficient sample size, I agree with Respondents that if Medeiros or any Respondent was biased against older and/or female employees, one would expect this to be reflected in data of the most serious form of discipline -- termination. But Silva was the only female employee supervised by Medeiros during the period covered by the data whose employment was terminated (as opposed to three male employees) and was the only employee supervised by Medeiros during that period whose employment was terminated who was fifty years or older. (JE 34)

Fifth, in the post-hearing brief, Silva argues that Medeiros' treatment of Mr. Soares and Silva relative to hairnet/beard net non-compliance evidences gender-based differential treatment because while Medeiros spoke to both about non-compliance, Soares received a warning while Silva received a suspension. This attempted comparison is not useful, because the record does not indicate whether Soares had received a verbal warning and/or written warning in the respective prior twelve months as Silva had. In any event, a comparison suggests that Medeiros sought discipline more rapidly when addressing Soares than Silva relative to hairnet/beard net non-compliance. (Compare JE 42 with JE 6-11)

Sixth, three current female employees testified in an effort to show differential treatment by gender. However, that testimony was replete with unreliable speculation regarding Medeiros and gender treatment. Seventh, I have not uncovered any inconsistencies or contradictions relative to Acushnet's proffered reason for the termination. Eighth, there is no evidence that Acushnet deviated from its discipline policy. Silva's insubordination, by itself, allowed for termination of employment under the employee manual.

Based on the totality of the evidence, Silva has failed to prove pretext, and thus has failed to prove the discriminatory animus and causation elements of her claims for disparate treatment by age and/or gender relative to the termination. Such claims are dismissed.

RETALIATION CLAIMS

To prevail on a retaliation claim, Silva must prove four elements: (a) Silva reasonably and in good faith believed that Acushnet was engaged in wrongful discrimination; (b) Silva acted reasonably in response to that belief through acts meant to protest or oppose such discrimination (protected conduct); (c) Acushnet took adverse action against Silva; and (d) the adverse action was in response to the protected conduct (forbidden motive). Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405–06 (2016) The last element - forbidden motive - may be proven using a burden-shifting paradigm similar to the one set forth in McDonnell Douglas Corporation.²²

Silva's retaliation theory is based on claims that: (1) in January 2016, Medeiros targeted her over the hairnet and requested a one day suspension, because Silva had previously complained about Medeiros relative to the July 2015 health form incident and/or request to be relieved from dumping duty in July 2015 ("Hairnet Retaliation"); (2) Medeiros and Strozyk retaliated against Silva by seeking a three day suspension for a trivial error regarding three unstamped balls, because Silva had complained relative to the July 2015 issues and the January 2016 one day suspension ("Unstamped Balls Retaliation"); (3) in September 2016, Medeiros and Strozyk retaliated against Silva by falsely accusing Silva of sleeping in the mechanics' area and unfairly depicting Silva as insubordinate resulting in Silva's termination, because Silva's complaint had resulted in the rescission of the three day suspension ("Termination Retaliation"). I shall address each retaliation claim individually and then as a single omnibus retaliation claim.

Hairnet Retaliation

As to the Hairnet Retaliation claim, Silva has failed to prove the first element of a retaliation claim – that she reasonably and in good faith believed that Medeiros (or Acushnet) engaged in wrongful discrimination. Silva's allegation that Medeiros had erroneously told Silva to bring the return to work form to Ball Plant III does not raise an issue of alleged discrimination. Regarding the alleged refusal of Medeiros to relieve Silva from dumping duties, Silva did not present any evidence that she believed that the alleged refusal related to disability or other discrimination. Because Silva failed to prove the first element of a retaliation claim, the Hairnet Retaliation claim is dismissed for that reason alone.

For completeness, I shall assume *arguendo* that Silva proved the first element of a retaliation claim as to the Hairnet Retaliation claim and proceed to the next elements. Silva has proven the

²²At the prima facie stage, Silva must show that: she engaged in protected conduct; Acushnet was aware of that; she suffered adverse employment action; and there was a causal connection between the protected conduct and the adverse action. If Silva meets that burden, Acushnet must articulate a legitimate, non-retaliatory reason for the adverse action with credible supporting evidence. If it does, Silva must prove pretext which would allow one to infer retaliatory motivation. Verdrager, 474 Mass. at 406

second and third elements of a retaliation claim. Silva acted reasonably by complaining to management in July 2015. Acushnet took adverse action by suspending Silva in January 2016.

But, regarding the final element as to the Hairnet Retaliation claim - forbidden motive - Silva has failed to establish a prima facie case, because she has failed to establish a causal connection between the protected conduct (complaining to management) and the adverse action (one day suspension). Too much time had passed from the July 2015 complaint to management to the January 2016 one day suspension to infer causation. Compare Mole v. University of Massachusetts, 442 Mass. 582, 592 (2004) For this additional reason, the Hairnet Retaliation claim is dismissed.

Unstamped Balls Retaliation

Silva has proven the first three elements of a retaliation claim as to the Unstamped Balls Retaliation. Silva's complaints to management, starting in January 2016 that she was being singled out or targeted by Medeiros as compared to male employees evidences that Silva reasonably and in good faith believed that Medeiros (or Acushnet) was engaged in wrongful discrimination. Silva acted reasonably in response by complaining to management. Acushnet took an adverse action against Silva (three day suspension).

But, regarding the final element as to the Unstamped Balls Retaliation claim - forbidden motive - Silva has failed to establish a prima facie case. Silva has failed to prove a causal connection between the protected conduct (complaints to management) and the adverse action (three day suspension). Too much time had passed from the July 2015 and/or January 2016 complaints to the three day suspension to infer causation. Compare Mole v. University of Massachusetts, 442 Mass. 582, 592 (2004) The Unstamped Balls Retaliation claim is dismissed.

Termination Retaliation

Silva has proven the first three elements of a retaliation claim as to the Termination Retaliation claim. Upon notification of the three day suspension, Silva again told Rouillard that she was being singled out and targeted by Medeiros which evidences Silva continued to reasonably and in good faith believe that Medeiros (or Acushnet) was engaged in wrongful discrimination. Silva acted reasonably in response by complaining to management. Acushnet took adverse action against Silva by terminating her employment.

Regarding the final element as to the Termination Retaliation claim - forbidden motive - Silva has established a prima facie case. She engaged in protected conduct by complaining to management. Acushnet was aware of her complaint. Acushnet terminated her employment. I infer a causal connection between the protected conduct and the adverse action as the termination occurred within a short period after Silva's complaint regarding the three day suspension.

I next address Acushnet's burden of production. Acushnet has articulated with credible evidentiary support a non-retaliatory reason for the termination: Silva's poor job performance - including repeated failure to comply with hairnet protocols; creating unstamped balls and failure to notify team leader and quality; sleeping in the mechanics' area; and insubordination.

I next address pretext. The reasoning for determining that Silva failed to prove pretext in the Disparate Treatment section applies equally to the Termination Retaliation claim. (See supra at pp. 20-22) Without a showing of pretext, Silva has failed to prove forbidden motive, and the Termination Retaliation claim is dismissed.

Omnibus Claim of Retaliation

I now treat the three retaliation claims as a single claim of retaliation. Silva has established the first three elements of a retaliation claim. Silva's complaints to management starting in January 2016 that Medeiros singled out or targeted her evidences that Silva reasonably and in good faith believed that Medeiros (or Acushnet) was engaged in wrongful discrimination. Silva acted reasonably in response by complaining to management. Acushnet took adverse actions against Silva by temporarily suspending her for three days and then terminating her employment.

Regarding forbidden motive, I utilize the burden-shifting framework applied to the individual retaliation claims. The reasoning for determining that Silva has established a prima facie case as to the Termination Retaliation claim applies equally to this single retaliation claim. (See supra at p. 24)

I next address Acushnet's burden of production. Acushnet articulated with credible evidentiary support a non-retaliatory reason for the adverse events: lack of proper job performance, including unstamped balls and failure to notify team leader and quality; and sleeping in the mechanics' area and insubordination.

I next address pretext. The reasoning for determining that Silva failed to prove pretext in the Disparate Treatment section applies equally to this single retaliation claim. (See supra at pp. 20-22) Without a showing of pretext, Silva has failed to prove forbidden motive, and the omnibus single claim of retaliation is dismissed.

INDIVIDUAL LIABILITY

Chapter 151B, Section 4 authorizes imposition of individual liability. Section 4(4) makes it unlawful for any person to discriminate against any person because she has opposed any practices forbidden under c. 151B. Section 4(4A) makes it unlawful for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right

granted or protected by c. 151B. Section 4(5) makes it unlawful for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under c. 151B or to attempt to do so.

The facts demonstrate that Silva has failed to prove that any individual Respondent: discriminated against her because she opposed any practices forbidden under c. 151B; coerced, intimidated, threatened, or interfered with Silva's exercise or enjoyment of any right granted or protected by c. 151B; and/or aided, abetted, incited, compelled or coerced the doing of any of the acts forbidden under c. 151B or to attempted to do so. The claims against the individual Respondents are dismissed.

C. ORDER

For the reasons detailed above, and pursuant to the authority granted under M.G.L. c.151B, §5, *I dismiss all the claims in this case.*

D. NOTICE OF APPEAL

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 with the Clerk of the Commission within 10 days of receipt of this decision and submit a Petition for Review within 30 days of receipt of this Decision. 804 CMR 1.23 (2020)

So ordered this 7th day of November, 2022



Jason Barshak
Senior Hearing Officer