

SUOMALACOMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
PATRICIA SUOMALA,

Complainants

v.

DOCKET NO. 13-SEM-00792

MASSACHUSETTS SOCIETY FOR
THE PREVENTION OF CRUELTY
TO ANIMALS, ANN MARIE MANNING,
and KATHLEEN COLLINS

Appearances: Andrew C. Novick, Esq., for Complainant
Matthew J. Frankel, Esq., and Aaron F. Nadich, Esq., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 27, 2013, Complainant, Patricia Suomala, filed a claim of discrimination against the Respondents, Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA), Ann Marie Manning and Kathleen Collins, alleging that her termination from the position of Director of Inpatient Services at Angell Memorial Hospital was an unlawful violation of M.G.L. c. 151B, ss. 4(4), (4A) and (5), and that Respondents were liable for retaliation, aiding and abetting discrimination and interfering with Complainant's employment rights. More specifically, Complainant alleged that she was terminated for reporting and documenting purported sexual harassment and urging the termination of the alleged harasser.

The Investigating Commissioner found probable cause to credit the allegations of retaliation and efforts at conciliation were unsuccessful. The matter came before me for a hearing on September 10-14, 2018, and the parties filed post-hearing briefs on November 15, 2018.

Having reviewed the record of the proceedings and the post-hearing submissions of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Complainant, Patricia Suomala, began working for Respondent MSPCA/Angell Animal Hospital in Boston as the Director of Client Services on August 4, 2008. (Tr. 122) Complainant is a Certified Veterinary Technician (CVT) who, prior to working for Respondent, worked at Tufts Animal Hospital for some fifteen years. While at Tufts, Complainant worked with Ann Marie Manning, a Doctor of Veterinary Medicine who later went to work at MSPCA/Angell Animal Hospital. (Tr. 793-794; 788- 789) After receiving her Master's Degree in Education in 2004, Complainant worked for the American Animal Hospital Association as a Veterinary Practice Consultant and accreditation examiner for veterinary hospitals, and for Novartis Animal Health, a global pharmaceutical company. (Tr. 91-100; 108) Complainant also holds the designation of Certified Veterinary Practice Manager. (CVPM) (Tr. 102-103)

2. Ann Marie Manning was the Chief of Staff at Angell Memorial Hospital when Complainant was hired to be the Director of Client Services. (Tr. 786) As Director of Client Services, Complainant managed approximately 70 employees and her starting salary was \$107,000. (Tr. 132; Ex. C-14) In this position, Complainant was one of several Service Directors who head-up the various departments at Respondent and report directly to Chief of Staff, Manning. (Tr. 799,

786, 790-791) In her first year on the job, Complainant proposed and implemented a number of initiatives, performed well, and was recognized for her good ideas and successful initiatives. (Tr. 123-131; 812-813)

3. Complainant became the Director of Inpatient Services at Angell on May 4, 2009, some nine months after commencing her employment, when another director abruptly resigned. This became a new position with oversight of all the veterinary technicians who were reorganized within one department. (Tr. 134, 137) Complainant suggested to Manning that she be considered for the job, as it was well-suited to her skill set and background of having been a CVT and a leader of technical teams. (Tr. 799-801; 808-809) In the new position, Complainant had significantly more responsibility. In addition to five direct reports, who were managers, she was indirectly responsible for approximately 140 employees. (Tr. 801)

4. At all times relevant to this matter, Respondent Kathleen Collins was the Vice President of Human Resources at Angell, and headed the Human Resources department. (Tr. 1094) On July 7, 2009, Kathleen Collins emailed Chief Medical Officer, Dr. Jen Holm, who was acting Chief of Staff at the time, recommending that Holm discuss with Manning (who was out on maternity leave) that Complainant be given a 3% annual raise on her anniversary date in August, an additional \$4,790 to bring her salary to \$115,000 and a 10% bonus of \$10,700 in recognition of "her incredible work this year." (Ex. C-18) Manning could not recall whether she approved these salary adjustments because she was out on leave at the time, but there is no dispute that they occurred. (Tr. 1021-1022)

5. Manning testified that 32 employees, including the Service Directors who comprised her senior management team, reported directly to her. Typically, she did not have time to complete annual performance evaluations for all these employees in a timely fashion. (Tr. 790-791; 802-03) So as not to punish employees for whom she did not complete evaluations, Manning typically budgeted for and approved a 3% increase each year for them. (Tr. 802-03, 804) Accordingly, pay raises were not necessarily dependent or based on good performance. (Tr. 1037, 1121) Complainant received 3% raises in three out of the four years of her employment.¹ (Tr. 802) Collins testified that Complainant was rewarded with a 10% bonus in 2009 for the work she did in her first year revamping the inpatient services, anesthesia and surgery departments. (Tr. 117-118) Manning acknowledged that Complainant's work in her first position as Director of Client Services had been exemplary, and that her move to a position of greater responsibility in May of 2009, with many more employees working in different departments supported the significant upward salary adjustment. (Tr. 812-813)

6. Manning testified that Complainant started off well in her new position, was a champion for the needs of the technical staff, and brought some really good ideas to the table. However, at some point Manning perceived that Complainant would cut corners when gathering information to support her requests and began to butt heads with Human Resources. (Tr. 813-814) Collins testified that the Human Resources Department ("HR") had undergone a long and comprehensive process to develop a compensation program that was internally equitable. (Tr. 1106-1107) As an advocate for raising technicians' salaries, Complainant often questioned or disagreed with the established compensation policies and practices, disrespected the functions of

¹ In 2011, only two Service Directors received raises, and Complainant was one of the six who did not receive a raise.

HR and did not respect Collins's expertise. (Tr. 1107-1108; 1121-1122) After initially viewing Complainant's job performance favorably, both Manning and Collins came to have an increasingly negative view of her based on what they perceived as inappropriate interactions and repeated conflicts with HR personnel.² (Tr. 813-818, 821, 1121-22.) Collins testified about an incident in 2011, which she memorialized in a memo to Complainant's personnel file, wherein Complainant engaged in a heated discussion with an HR representative and Collins was called in to resolve the dispute. Collins described Complainant's body language as defensive and demeaning. (Tr. 1130-1133; Ex. R-42)

7. Manning testified that in lieu of issuing formal discipline to Service Directors, her general practice was to provide counseling. (Tr. 831-32) Manning stated that over time she began to receive reports that Complainant's behavior, specifically her body language and tone of voice, was perceived as intimidating to other employees and often conveyed a message that she was angry. (Tr. 823-825) Mary Grace, Director of Client Services, testified that she had borne the brunt of some pretty negative comments from Complainant, and felt that she had been bullied by Complainant. (Tr. 1088) Manning regularly counseled Complainant during their weekly one-on-one meetings, and on several occasions, admonished Complainant that her body language and tone of voice were sending a negative message and that some employees felt bullied by her.³ (Tr. 461-64; 814-815, 822-25)

² Complainant admitted that she had frequent disagreements with HR throughout her tenure at the MSPCA, which often involved employee compensation decisions. (Tr. 143-44, 815-16)

³ There was testimony from several of Respondent's witnesses, and Complainant agreed, that she would frequently use body language- e.g., crossing her legs and arms and rolling her eyes – to show distaste or disagreement. (Tr. 461-63, 698, 815, 823-34, 837, 1064, 1087-88) This was consistent with my observations of Complainant's demeanor and comportment at the public hearing. Complainant admitted that Manning had asked her to avoid making negative facial expressions in meetings "more than once." (Tr. 461-63, 836-37)

8. In April of 2012, Complainant and Collins exchanged emails regarding an employee in Complainant's department who was considering changing roles. Complainant disagreed with HR's view as to what the employee's rate of pay and performance review date would be in the new position. (Ex. R-30) After receiving Complainant's initial email, Collins emailed Manning that she was "really starting to get offended" by Complainant. (Ex. R-31) Manning and Collins believed that Complainant's email communications to Collins were rude and disrespectful. (Tr. 818-819; 845, 1122-27) Manning testified that Complainant's disagreements regarding the pay structure and HR processes led her to be extremely frustrated and unhappy with HR. (Tr. 817-818) On April 23, 2012, Manning issued Complainant an oral warning – the only formal discipline Manning ever issued to a Service Director. (Tr. 829, 856; Ex. R-32)

9. In 2012, Manning hired an outside consultant, Horizon Veterinary Services ("Horizon") to work with Angell's support staff and Service Directors to improve client service. (Tr. 177-79) Following a meeting with Horizon in July of 2012, Director of Client Services Mary Grace informed Manning that Complainant had "thrown management under the bus" in front of the staff members at the meeting. (Tr. 860) Manning then communicated with Alyce D'Amato, the Horizon consultant who had run the meeting. D'Amato informed her that on the subject of client service, Complainant stated, "despite being part of leadership, I don't think things are ever going to change," and that "we cannot expect to make these changes without additional staffing." (Tr. 865; Ex. R-33) Complainant informed Manning that she made these comments in response to D'Amato's assertion that she had witnessed no good client service at Angell. (Tr. 181-183, 236) Manning felt that Complainant's comments were inappropriate and reflected poorly on management. (Tr. 868-869, 871) D'Amato also told Manning that Complainant rolled her eyes and, in response to a comment about "meeting basic employee needs," Complainant made a sarcastic comment about the

failure of the MSPCA's air conditioning system. (Tr. 868-870) Complainant testified that her off-the-cuff remark was a joke and that people in the meeting laughed. (Tr. 180) According to Manning, the air conditioning failure had occurred during a heat wave and that employees were suffering and making complaints. (Tr. 869) Manning thought Complainant's careless comment implied management was doing nothing to resolve the problem when Complainant knew that was not the case. When confronted by Manning, Complainant admitted her comment was inappropriate. (Tr. 868-70, 875; Ex. R-33)

10. Manning testified that Complainant's criticism of her management decisions in the presence of staff angered her, since she had specifically instructed the Service Directors, including Complainant, not to do this. (Tr. 832-34) On several occasions, Manning instructed Complainant not to question her management of the veterinary staff, including the Radiation Oncology Veterinarian. (Tr. 827-28, 900) According to Manning, it was perfectly acceptable to raise disagreements in private or in Service Director meetings, but it was not appropriate to undermine management's decisions in front of the staff. (Tr. 833) Manning spoke to Complainant privately about this issue again after the July Horizon meeting and raised it at a Service Director meeting on July 24, 2012.⁴ (Tr. 834; 874)

11. Complainant admitted to Manning that she had, in substance, made the comments D'Amato had reported.⁵ (Tr. 469-70; 869-870; Ex. R-33) Manning testified that she had suspected for a while that Complainant professed to agree with Manning's decisions but would then turn

⁴ Manning testified that she told the Service Directors, "when we make a decision in this room, you do not go out in front of the staff and dissent from what the management team is trying to do. . . you maintain your game face. You go out and you act like a Service Director and you support our decisions at this level." (Tr. 874)

⁵ Upon cross-examination, Complainant initially denied that she rolled her eyes or laughed at people's descriptions of customer service during that meeting (Tr. 470); however, when confronted with the admission in her deposition that she "could have rolled [her] eyes and laughed at people's descriptions" of what constituted good or bad customer service, Complainant admitted that she had, in fact, done so. (Tr. 470-71) Complainant also agreed that

around and undermine management by telling staff that she did not. (Tr. 876-877) Manning sent an email to D'Amato, conveying the details of her conversation with Complainant, and stating that D'Amato had confirmed her suspicion about Complainant's behavior. (Ex. R-33)

12. On August 8, 2012, Manning and Collins approved a 3% raise for Complainant, bringing her salary to \$122,003.50, and on the same day, Complainant was granted approval to work a shortened work week to complete her dissertation on how to achieve better retention of veterinary technicians at MSPCA. Complainant's salary was pro-rated to reflect a four-day work week and lowered to \$109,000. (Ex. C-28; C-29)

13. On August 9, 2012, Manning went out on a leave of absence to deal with her mother's health issues. Prior to her leave, Manning arranged for an August 12th meeting of the Horizon Consulting group with the Service Directors. Since Manning was to be out on leave, she asked Patty Ewing, Director of Pathology Services, and Mary Grace to run that meeting. (Tr. 870-881) On September 5th or 6th, when Manning returned from her leave of absence, Grace informed her that the meeting "didn't go particularly well." (Tr. 890-891) Grace reported that during a discussion about the client service initiative, Complainant stated that improvement in client service was not possible because certain "toxic" technicians were "protected." (Tr. 893, 1086-88) When the other Service Directors expressed concern and inquired further, Complainant crossed her arms and refused to discuss the matter or answer their questions about what she meant. (Tr. 893, 1086-88) Manning also heard that Complainant stated in the Horizon Group meeting that Manning was not holding the veterinary staff accountable and specifically referenced Manning not disciplining the Radiation Oncology Veterinarian, for "mouthing off" at a meeting. (Tr. 894) Manning later

her statement could have conveyed that management was not trying hard enough to get the air conditioning fixed. (Tr. 467-68)

spoke with other Service Directors who confirmed Grace's account of Complainant's behavior at the meeting and told her the meeting was very tense. (Tr. 894-95) Manning, who had discussed her handling of the veterinary staff with Complainant on numerous occasions, was angry that Complainant spoke negatively about her in front of her direct reports and the consultant. Manning testified credibly that she considered Complainant's comments disrespectful and conveyed her view that she considered Manning an ineffectual leader. (Tr. 896-897)

14. On August 28, 2012, while Manning was on leave, Complainant was informed by Silvia Coviello, a Veterinary Technician Manager and one of her direct reports, that Coviello was afraid of the Radiation Therapy Technician (hereinafter referred to as the RTT) who worked in the Oncology Department and reported to Coviello. Coviello did not say why she was afraid of the RTT but Complainant had experienced a prior incident with him when she was his direct supervisor where he screamed at her and cornered her in her office. She urged Coviello to file a report with HR. (Tr. 194-195, 197-198, 201) The following day Coviello called out sick and Complainant documented her concerns to HR and met with Chief Medical Officer, Jen Holm, who was Acting Chief of Staff in Manning's absence, and HR representative Tricia Casey, to discuss Coviello's fear and how to prevent further such incidents. (Tr. 201)

15. On September 6, 2012, Coviello called Complainant, who was driving home, to report that she had just had another serious incident with the RTT and was very upset and frightened. Complainant advised her to lock herself in her office and Complainant immediately contacted HR. (Tr. 203) Collins and HR representative Tricia Casey immediately went to Coviello's office to assist her. (Tr. 204-205; Tr. 1138-1139) Collins testified that after assessing the situation, she instructed Casey and another Veterinary Technician Manager, Jocelyn Strassel, to escort the RTT off the property. She also instructed Coviello to write a report of the incident.

(Tr. 1138-1139) Strassel then sent out an email to Manning, Complainant, and several others that the RTT had been fired. (Ex. C-34)

16. Manning had just returned from leave, and that evening, while driving home, she received a “hysterical phone call” from the Radiation Oncologist Veterinarian who was crying because she had just seen the email that the RTT, with whom she worked closely, had been fired. (Tr. 898) She asked Manning if this were true and expressed concern that the RTT was the only employee who could operate the linear accelerator, a machine used to dispense radiation to animal patients with cancer. Manning had no idea what was going on and stated she would contact Collins. (Tr. 898-899.)

17. Manning phoned Collins to determine the circumstances surrounding the email stating the RTT was terminated. (Tr. 899) Collins informed her that the RTT had an argument with Coviello, was escorted off the premises, and was suspended pending an investigation, but had not been terminated. (Tr. 900) Collins testified there appeared to have been a miscommunication between Casey, the HR generalist, and Strassel, the Veterinary Technician Manager who sent the email regarding termination, as it was Respondent’s typical practice to conduct an investigation prior to termination. (Tr. 1143; 1145-1147) Manning sent a follow-up email clarifying that the RTT had not been terminated, but was suspended pending an investigation, and calling a meeting for the following day to discuss the matter. (Tr. 906; Ex.R-34) Manning testified that she did not hear from Complainant that night and would have expected some communication from Complainant on how to proceed since she was the Service Director responsible for the team that managed the RTT. (Tr. 906-907) That evening, Manning learned from Jen Holm that there had been a series of issues with the RTT and Manning requested that Holm send her documentation of the RTT’s issues from the preceding six months for her review before the meeting. (Tr. 914)

18. Manning reviewed Coviello's report of her September 6th interaction with the RTT. (Tr. 923) The report stated that after an unpleasant phone call between them, Coviello went to the RTT's office where she told him that she did not appreciate the way that he spoke to her on the phone. The RTT became upset, stating that "he could do without this job, that he wouldn't think twice about walking out of [the MSPCA], that he didn't 'give a fuck' and that it was no 'skin off [his] dick.'" He also stated that he was very stressed, had too much work to do, and didn't "give a fuck" if he got in trouble for his behavior. He then slammed his pager on the desk and turned and left the room. (Ex. R-3) Manning testified she found this conduct "unacceptable" stating "you don't talk to anybody like that, whether they're your supervisor or your colleague." (Tr. 923)

19. A meeting was held on September 7, 2012, to discuss the incident with the RTT. Manning, Collins, Holm, Complainant, Coviello, the two other Veterinary Technician Managers, Strassel and Berkeley O'Keefe, and the Veterinarian Oncologist, who came late, were in attendance. Manning was frustrated because she had asked for all documents from the previous six months regarding problems with the RTT and had received only documentation related to the preceding two-week time period. (Tr. 922, 924, 927) Manning testified that it was apparent the RTT was very frustrated and she wanted to understand why he had acted in such an extreme manner. There was nothing in his personnel file to indicate that his conduct had been an on-going problem, other than Complainant's recent report, and he had received no verbal or written warnings. (Tr. 928; 932-933) In response to Manning's concerns that the RTT may have been poorly managed, Complainant raised the issue of Manning's failure to discipline the Radiation Oncologist Veterinarian for purportedly acting out. Manning was floored by this, and felt that Complainant was deflecting criticism of her management team by accusing Manning of being an ineffectual leader in front of

other management employees. (Tr. 934) Manning's distress at Complainant's reference to her management of a veterinarian was evident from her testimony which I found credible.

20. At the September 7th meeting, Complainant was vociferous in urging that the RTT be fired and insisted that his actions were sexual harassment. There was considerable disagreement about whether his actions, however inappropriate and offensive, constituted sexual harassment. Collins disagreed with Complainant's interpretation of his conduct. (Tr. 935-936; 1155) There was no evidence that the RTT had ever engaged in conduct of a sexual nature and Coviello testified that she viewed the RTT's behavior as inappropriate and harassment, but not necessarily sexual harassment. (Tr. 716-717; 745) Manning testified that they had a long conversation about this issue stating, "Patty brought up sexual harassment and then we had to go down that rabbit hole for half an hour." Ultimately they were getting nowhere in the discussion and Manning deferred to Collins. (Tr. 935-936) Manning testified that Complainant repeatedly attempted to "take over" the meeting, arguing that the prior six months had "no bearing on what happened on September 6th" and that the discussion should focus on RTT's conduct on that day. Manning finally had to tell Complainant, "[T]his is my meeting. I'm running this meeting. I asked to start six months before this incident. That's where we're starting. Stop interrupting me." (Tr. 929)

21. Complainant testified that she and the others at the meeting agreed the RTT's conduct was sexual harassment and wanted him fired, but Collins and Manning seemed not to share that view. ⁶ (Tr. 220; 506-07, 693, 774) Complainant testified that they questioned Coviello about

⁶ No witness had ever observed the RTT engage in sexual conduct, ask for sexual favors, flirt with anyone, physically touch anyone or threaten to do so. None had ever heard him use offensive names or slurs, proposition anyone, or use sexist terms. (Tr. 500-01, 704-05, 905-906, 1089-90, 1141) At the hearing, Complainant insisted that the RTT grabbed or shook his "junk" at Coviello, but Coviello specifically testified that the RTT never "touched himself [or] touched or grabbed his genitals in front of [her]," and she did not recall saying that he had done so at the September 7th meeting. (Tr. 690, 705) The allegation does not appear in any accounts of the incident written directly after the event by Coviello

why she feared the RTT.⁷ (Tr. 221) Coviello testified that she also had the impression Collins was not in favor of firing the RTT. (Tr. 693; 728-729) Both Manning and Collins agreed that the RTT's behavior was profane and inappropriate, but they had questions about whether his misconduct was sexual harassment or serious enough to warrant termination. (Tr. 923; 1212; 1263; 935) Manning also testified that the RTT's conduct could be considered insubordination, an offense that would merit termination. (Tr. 935)

22. Manning was concerned that the RTT was the only employee who could operate the linear accelerator, a machine that dispenses radiation to animal patients who are scheduled for treatments on a set schedule. (Tr. 939-940) She asked the group if there was a plan to continue the radiation therapy program in the RTT's absence and her query was met with silence. (Tr. 937) Complainant's response was, "just tell me what you want us to do." (Tr. 513, 937) This was particularly frustrating to Manning because she believed that, as the Service Director responsible for the RTT position, Complainant should have had some ideas regarding finding a replacement, and she was angry at Complainant for not taking control of the situation. (Tr. 939, 942) Manning directed the group to "find someone to run" the linear accelerator and, to that end, assigned Complainant and others specific tasks in seeking a replacement. (Tr. 937-38, 944) At the conclusion of the meeting, Collins informed the group that HR would deal with all further issues regarding the RTT. Manning left the meeting believing they were in agreement that it was unlikely the RTT would return to work there. (Tr. 513-14, 936-937)

and Complainant. Despite Complainant's assertion, there is no evidence that this occurred or that Coviello ever said as much. I found Complainant's insistence to the contrary to be entirely disingenuous.

⁷ While Complainant testified that Manning and Collins "taunted" Coviello, and seemed to belittle her fear of the RTT, (Tr. 221, 508), Coviello testified that no one at the meeting mocked her or made fun of her. (Tr. 729)

23. That same evening, Manning, Complainant and others participated in an email exchange regarding the search for a replacement for the RTT. In that exchange, Manning was informed that MSPCA was waiting to hear about someone who could operate the linear accelerator on a per diem basis until a regular full-time employee could be found. (Tr. 518-19; Ex. R-21) That same night, Manning exchanged emails with Chief Medical Officer Holm in which Manning stated that the Radiation Oncologist Veterinarian “wants to keep [the RTT] and will be angry as she grieves his loss...” (Ex. R-37) Although no final decision on termination had been announced at the meeting on September 7th, these emails strongly suggest that Manning had decided to terminate the RTT’s employment. (Tr. 954)

24. The following Monday, September 10, 2012, a per diem employee started working at the MSPCA running the linear accelerator. (Tr. 516, 951) Complainant came in to work on that Monday, which was to be her day off, to assist with starting up the linear accelerator. (Tr. 224-225)

25. The RTT’s employment was terminated effective September 11, 2012. (Tr. 514) He never returned to Angell after being escorted off the premises on September 6, 2012. (Tr. 723)

26. On September 11, 2012, the MSPCA Service Directors attended a regularly-scheduled meeting with a leadership consulting firm known as the BODA Group. (Tr. 476-77) At this meeting, Grace and Ewing who had run the August Horizon meeting in Manning’s absence, stated that Complainant left them with the impression at that meeting that she was not on board with the customer service initiative. (Tr. 477) Complainant denied this, stating that there had not been any conflict in August and that she was on board. (Tr. 237-238; 478, 962) Grace believed that Complainant was “doing an about-face” and changing her position dramatically from what had occurred in the August Horizon meeting. (Tr. 478) Manning and Grace were astonished by what

they perceived as Complainant's disingenuous recounting of the August Horizon meeting. (Tr. 961-62, 1091) Manning was particularly "floored" because, based on reports from people she trusted that the earlier meetings had gone poorly due to Complainant's behavior, she felt Complainant was now lying directly to her, her teammates, and the BODA consultants about her behavior in August. (Tr. 962)

27. Complainant testified that she cried at this meeting because she felt as though Ewing and Grace were attacking her from all sides. She stated that Manning had to leave the meeting at some point because she, too, was upset and crying. (Tr. 482-483) Manning testified that the meeting was very emotional and then Complainant brought up the RTT disciplinary issue and Manning's handling of the Sept. 7th meeting, which were unrelated to the BODA discussion. Collins had to admonish Complainant to cease discussing matters that involved confidential personnel information. Manning was so upset at Complainant for again questioning her leadership that she left the room and had to be coaxed back in by the consultant. Holm expressed concern that Manning might not return from her leave and Manning expressed concern that Holm was thinking of leaving the MSPCA. Manning reassured Holm that she still wanted her on the team, but was unable to give Complainant the same assurance. Manning left that meeting feeling that she could no longer work with Complainant and that one of them had to go. (Tr. 962-965) Collins testified that it was patently clear from that meeting that there was a problem between Complainant and Manning and that Manning was uncharacteristically upset. (TR. 1217-1218) Manning discussed with her husband that evening that she no was no longer able to trust Complainant. She testified that she felt Complainant was repeatedly dissembling the facts, telling Manning she was a great boss and that she liked working with her, and then turning around and telling others that Manning was essentially an ineffectual leader. (Tr. 965-966) The following day, Manning sent Collins an

email stating that she was considering asking for Complainant's resignation or terminating her employment and listed the reasons why. (Tr. 965-966; Ex. R-38) Collins assisted Manning in preparing a summary of her concerns. (Tr.1221)

28. On September 13, 2012, Manning and Collins met with Complainant. (Tr. 971-72) Manning stated that she was unhappy with Complainant's attitude and performance and was considering asking for her resignation or terminating her employment. (Tr. 972) She stated that Complainant repeatedly undermined her leadership, publicly challenged her handling of the veterinary staff, failed to show appropriate support for the client service initiatives, and misrepresented the air conditioning situation by insinuating management did not care about the staff. (Tr. 972) Complainant apologized, admitted she had "acted like a 12-year-old," and asked to be put out on a final warning with a coaching plan. (Tr. 247; 974) Manning responded that she was sorry, but that she no longer trusted Complainant to be a member of her team. (Tr. 974) Collins stated that Complainant's employment was suspended pending an investigation and that Complainant would be contacted regarding the status of her employment. (Tr. 976) Complainant did not raise the issue of alleged sexual harassment by the RTT or retaliation during this meeting. (Tr. 974)

29. Over the next several days, Collins interviewed several Service Directors and Holm about their recollection of Complainant's behavior in the Horizon meetings and to confirm their understanding of Manning's directive not to question her handling of the veterinary staff and management decisions. (Tr. 1232, 1280; Ex. R-51) The Service Directors' feedback was consistent with Manning's impression of Complainant's behavior. Holm stated that she was "[f]loored that [Complainant] said anything about [the Veterinary Oncologist]" and "[i]t was understood that [Manning] clearly indicated that her decisions should not be questioned." (Ex. R-51) None of the

Service Directors – including Holm⁸ who had a close relationship with Complainant– opposed Manning’s decision to terminate Complainant’s employment. (Tr. 1228)

30. After meeting with all of the Service Directors, Collins attempted to contact Complainant on September 18, 2012, but Complainant did not respond to her phone call. Collins sent two further emails that day asking Complainant to call her back. Collins testified that Complainant did not return her calls but sent an email to her apologizing for missing her call and asking what Collins needed to tell her.⁹ (Tr. 497-99; 1296-1297; Ex. R-18) On September 20, 2012, Collins emailed Complainant to notify her that her employment was terminated. (Ex. R-19) Manning testified that she was done with Complainant and it was unlikely at that point that Complainant could have said or done anything to change her mind. (Tr. 980)

31. After Complainant’s suspension, Manning came across several emails showing that Complainant had been applying for a number of other jobs over the last few months. (Tr. 976; Ex. R-39)

32. The evidence demonstrates that in July and August of 2012, Complainant was applying for other jobs and exploring the possibility of teaching. During that time Complainant prepared resumes and cover letters for at least seven different jobs.¹⁰ (Tr. 396-97) One position for

⁸ Complainant testified that Holm was her mentor. (Tr. 481) After Complainant’s suspension on September 13, 2012, Holm told Complainant that she felt that the Service Directors did not support Complainant and that Complainant “didn’t have any friends in the Service Directors.” (Tr.409) Manning specifically recalled Collins reporting that Holms said Complainant had “sunk her own ship,” and could not believe Complainant brought up the issue of Manning’s management of the Veterinary Oncologist in the September 7th meeting. (Tr. 980)

⁹ Complainant testified that she spoke with Collins telling her she did not feel comfortable speaking to her alone and was going to wait to speak to her lawyer. Complainant sought counsel shortly after her suspension. (Tr. 249)

¹⁰ In July and August of 2012, Complainant applied for the following positions: (i) Director of Extended Campus Programs and Professional Studies at Fitchburg State University, (Tr. 390; Ex.R-6); (ii) Dean of Animal Sciences at Becker College, (Tr. 391; R-7; R-8; R-9); (iii) LEEP Center Director and Association Dean at Clark University, (Tr. 391-92; R-11); (iv) Director of Campus Activities and Leadership Development at Becker College, (Tr. 392; R-10); and (v) Strategic Account Manager for Animal Health New England at Pfizer, (Tr. 392, R-13.) In August of 2012,

which she prepared a resume and cover letter was a “Veterinary Assisting Chapter 74 Teacher” at Worcester Public Schools (“WPS”), a position she secured following her employment with the MSPCA. (Tr. 396, 444-45; Ex. R-17) The cover letter for the WPS position referenced her late mother, who had been a teacher there for over 20 years and stated, “I am motivated to apply because I believe that I can contribute passionately to teaching the next generation of animal science learners,” (Ex. R-6; R-13; R-17; Tr. 449-450)

33. Complainant repeatedly insisted that she was not seeking other employment, did not want to leave the MSPCA, and feigned interest in the jobs merely to discern her value in the marketplace to assist with her salary negotiations with Manning at MSPCA.¹¹ (Tr. 399, 400, 420-424) I find this testimony so patently ridiculous as to be unworthy of any credence. Several email exchanges between Complainant and Holm establish that Holm helped to revise Complainant’s application materials, suggested potential jobs to her and provided information about jobs for which Complainant had expressed unequivocal interest.¹² (Tr. 428-31, 440; Ex.R-5; R-14; R-12; R-15; R-16) Complainant could not explain why Holm, who was the Chief Medical Officer, would have

Complainant also prepared a cover letter and resume for a position as a Veterinary Tech Practice Coordinator at Tufts at Tech. (Tr. 395; R-15)

¹¹ Complainant admitted that during her employment, she had never negotiated her salary with Manning. (Tr. 403-04) Moreover, since these positions were not comparable to her position at MSPCA/Angell, the salaries would have been of little value in negotiating her salary at Respondent. Manning confirmed that “salary information” for unrelated jobs would have been irrelevant to Complainant’s salary at MSPCA. (Tr. 806-807, 985) In fact, Complainant never confirmed the actual salaries for these positions and never discussed this issue with Manning. (Tr. 400, 405, 410; 416-417; 423-424; 426-428)

¹² On July 6, 2012, Complainant sent Holm an email asking how much a Tufts Tech practice manager position would pay, to which Holm responded, “I figured this was coming.” (Tr. 406-07; R-5) Holm responded the estimated salary was \$60,000 to \$70,000 – and Complainant emailed Holm on August 21, 2012, that she was “seriously considering” this position. (Tr. 409, 435-37; R5; R-15) On July 9, 2012, Complainant emailed Holm a job posting for a “position [she was] interested in” (Director of Extended Campus and Professional Studies at Fitchburg State), and Holm responded, “Love it! This sounds like the right next step for you!” (Tr. 411; R-6) On August 17, 2012, Complainant emailed Holm, asking if “going to work for [Pfizer] is a step backward” and asking if Holm knew the person at Pfizer with whom Complainant had discussed a potential job opportunity...” (Tr. 428-31; R-12) Complainant had previously applied to Pfizer and withdrawn her application. (R-12) On Aug. 17th, Complainant inquired of Pfizer if the position was still available. (R-13) That same day, Holm sent Complainant a job posting for a position as an Outside Sales Assistant which required experience in the veterinary industry. (R-14)

spent precious time helping her search for jobs she had no interest in. (Tr. 435-436; 442) These emails and her actions can only lead to the inescapable conclusion that Complainant was dissatisfied with her job at Respondent, and was seeking to leave and to take her career in a new direction.¹³

34. Following Complainant's termination from the MSPCA, she applied to nine jobs over the course of a few weeks. (Tr. 522; Ex. R-22) Complainant turned down an offer from the VCA Animal Hospital in South Weymouth believing the commute would be too long. (Ex. R-22; Tr. 523-524, 526, 534) On October 10, 2012, Complainant applied for the WPS position, and was offered the job, at a starting salary of \$74,613, in late October or early November. She immediately accepted the offer. (Tr. 522-523, 536; C-38) Complainant did not seek full-time employment with any other employer after she received the WPS job offer. (Tr. 537, 539) She began her employment with WPS on January 2, 2013, and has worked there ever since. She testified she has no plan to leave the WPS job. (Tr. 522, 539)

III. CONCLUSIONS OF LAW

General Laws c. 151B s. 4(4) makes it an unlawful practice to discharge any person who has opposed unlawful practices forbidden by the statute. This section essentially prohibits retaliation against an individual who has protested discriminatory conduct. 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).

¹³ Manning testified that Holm told her as early as July that Complainant was actively seeking employment elsewhere because she was unhappy at the MSPCA. (Tr. 978)

In order to establish a *prima facie* case of retaliation, Complainant must establish by credible evidence that (1) she engaged in protected activity; (2) she subsequently suffered an adverse employment action; and (3) the adverse employment action was causally linked to the protected activity. Mole v. Univ. of Mass., 442 Mass. 582, 591-92 (2004) If Complainant establishes a *prima facie* case of retaliation, the burden shifts to Respondents to show legitimate, non-retaliatory reasons for their termination of Complainant. Mole, 442 Mass. at 591. Finally, if Respondents meet their burden, Complainant must prove by a preponderance of the evidence that the Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001).

The first element of a *prima facie* retaliation case requires Complainant to prove that she engaged in protected activity within the meaning of Chapter 151B. Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable belief that unlawful discrimination has occurred. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003) citing Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley, *supra*. To prevail on a retaliation claim, Complainant must demonstrate that she had a reasonable and good faith belief that the actions she was protesting were discriminatory, that she acted reasonably in response to that belief, and that the employer's motive to retaliate against her was a determinative factor in the employer's decision to terminate her employment. Abramian v. President & Fellows of Harvard College, et al., 432 Mass. 107, 121 (2000)

Complainant claims she engaged in protected activity by reporting what she viewed as "sexual harassment" by the RTT and insisting that his employment should be terminated for this conduct. Respondents assert that she did not engage in protected activity, because the RTT's conduct, albeit inappropriate and intimidating, constituted only general bad acts, was not based

on sex and did not constitute “verbal or physical conduct of a sexual nature.” Therefore, Respondents assert that Complainant did not demonstrate that her belief regarding the unlawfulness of the RTT’s was objectively reasonable.

I conclude that reasonable persons could disagree and, in this case, individuals did disagree, about whether the conduct complained of constituted sexual harassment. Regardless of whether the RTT’s actions met the legal definition of sexual harassment, Complainant claims to have harbored a sincere and reasonable belief that the actions she was protesting were discriminatory and constituted sexual harassment. The evidence is undisputed that the conduct did not involve requests for sexual favors or sexual propositions, and was not quid pro quo harassment. However, the egregious and profane nature of the RTT’s language, the reference to his “dick,” his arguably violent actions, and his extreme angry manner, were intimidating and threatening to Coviello. I conclude that such conduct would likely not have engendered the same fearful reaction in a male supervisor. Given the circumstances, the conduct could reasonably be viewed as constituting hostile work environment gender-based, harassment.¹⁴

Sex discrimination includes harassment in the workplace that is gender based, but not necessarily sexual in nature. See Dinsmore & Ford v. Home Security, Inc. 19 MDLR 4 (1997); Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541 (1995). Conduct that may not comport with the strict legal definition of “sexual harassment,” but that involves intimidating or threatening behavior infused with sexually profane language directed at a female employee, is not uncommonly perceived and characterized by lay persons as “sexual harassment.” It is also

¹⁴ A hostile work environment is one that is “pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and] poses a formidable barrier to the full participation of an individual in the workplace.” Cuddy v. Stop & Shop Supermarket Co., 434 Mass. 521, 532 (2001) The conduct alleged must be “sufficiently severe and pervasive to interfere with a “reasonable person’s work performance.”

not unusual that claims pled as “sexual harassment” are often more in the nature of gender-based hostile work environment claims. Sexual harassment has also traditionally been viewed as a form of gender based discrimination, which suggests how the concepts might have come to be viewed as compatible or interchangeable.

While reasonable persons might disagree as to whether the conduct complained of was sufficient to create a hostile work environment because it was an isolated incident, there was evidence that Coviello had recently reported to Complainant that she feared the RTT and was upset enough to call in sick after a previous encounter with him. One could reasonably conclude that the RTT’s behavior was sufficiently threatening as to have interfered with her work performance. Given these facts and the widely accepted notions surrounding the term “sexual harassment,” I conclude that Complainant’s belief that she was protesting discriminatory conduct was objectively reasonable and that she engaged in protected activity when she protested the RTT’s conduct as sexual harassment and insisted his employment be terminated.¹⁵

Complainant was subjected to an adverse employment action close upon the heels of her engaging in protected activity. Within a week or so after lodging her protestations about the RTT’s conduct, Complainant’s employment with the MSPCA was terminated. She alleges that the termination was motivated by retaliation for her raising the issue of sexual harassment and for insisting that the RTT’s employment be immediately terminated. Proximity in time from the employee’s protected activity to the employer’s adverse action can clearly be a factor in establishing an inference of a causal connection. Mole v. Univ. of Mass., supra, at 592. For

¹⁵ The fact that Complainant may have later sought to bolster her retaliation claim by insisting that the RTT “shook his junk” at Coviello, an assertion I found entirely disingenuous, unsupported by the evidence, and likely fabricated, does not change my view that she was sincere in her initial protestations of the RTT’s conduct as a discriminatory.

purposes of establishing a *prima facie* case, I conclude that the timing of the adverse action in this case is sufficient to raise the inference that there was a connection between Complainant's protected activity and her termination.

Once Complainant establishes a *prima facie* case of retaliation, the burden shifts to Respondents to articulate legitimate, non-retaliatory, reasons for her termination. Respondents advanced evidence, particularly the credible testimony of Manning, as corroborated by Collins and others, that Complainant's termination was for legitimate reasons related to her attitude and behavior over a period of time, but particularly during the summer months of 2012. This behavior related largely to: her actions in meetings and interactions with HR that were perceived as undermining upper-management, particularly Manning, with subordinate staff; her criticism of Manning's management; her disputes with HR over policies and practices and manifest disrespect of Collins; her defensive and negative attitude in meetings with consultants and staff, often manifested by body language that sent a negative message to other employees; and, her abdicating responsibility for developing a plan to replace the RTT. The evidence shows that in 2012, Manning counseled Complainant verbally for a number of interrelated, escalating issues, to no avail. Ultimately, Complainant's conduct over the course of several months, which Manning viewed as a betrayal bordering on insubordination, coupled with refusal to accept responsibility for her behavior, caused Manning to lose trust in Complainant.

While Manning did not deny that she was angered by Complainant's behavior at the September 7, 2012 meeting about the RTT, she testified credibly that she was not angered by Complainant labeling the RTT's conduct as sexual harassment and understood the serious nature of the RTT's conduct, and that it would likely result in his termination. If she indicated any frustration with the lengthy discussion surrounding the issue of sexual harassment, it was largely from concern

that, regardless of what label one attached to the conduct, there was no plan to continue providing crucial, time-sensitive treatment to animals receiving radiation therapy. She admitted that any hesitation she displayed regarding immediate termination of the RTT arose from a genuine concern about the lack of personnel able to operate the linear accelerator and how quickly a replacement could be found. She was floored that Complainant, who was responsible for technicians in the department, had no plan for doing so and was not pro-active in making any suggestions. Nonetheless, Manning left the September 7th meeting having concluded that the RTT's conduct was serious enough to merit termination and Respondents acted swiftly to do so.

Rather than condemning Complainant for seeking the RTT's termination, Manning faulted Complainant's attempt to deflect any criticism of her subordinates' management of the RTT, by criticizing Manning's discipline of a veterinarian. Manning deemed this conduct to be another glaring example of Complainant's persistent criticism of her management decisions. I credit Manning's testimony that Complainant's comments about Manning's refusal to discipline a veterinarian, made in the presence of other staff, greatly upset her. It was this sort of persistent conduct by Complainant that ultimately led Manning to conclude she could no longer trust Complainant as a member of her management team. While her frustration with Complainant's behavior had been growing for some time, it was not until the September 12th BODA meeting with the Service Directors where Complainant refused to acknowledge her disturbing conduct in a prior meeting and criticized Manning again, that Manning came to the realization that she and Complainant could no longer work together. Manning's very credible testimony regarding her frustration with Complainant for challenging her management style and undermining her decisions made it unmistakably clear that Manning had reached the end of her rope with Complainant, and felt there was no recourse but to end the employment relationship.

Once Respondent has articulated legitimate, non-discriminatory reasons for its adverse employment decision, Complainant must prove that the reasons are a pretext for discrimination and that Respondents acted with discriminatory intent, motive or state of mind. Lipchitz, supra, at 504. While Complainant met her *prima facie* burden for engaging in protected activity, for the reasons stated below, she failed ultimately to prove the requisite causal connection between the asserted protected activity and her termination; and failed to rebut the credible evidence that Respondents terminated her employment for legitimate, non-retaliatory reasons.

Complainant points to fact that she repeatedly received annual raises, including one just a month prior to her termination, and argues that the raises and salary adjustments she received are a testament to her history of excellent performance. Manning and Collins agreed that the salary adjustment and bonus Complainant received after her first year on the job and upon her promotion to Director of Inpatient Services were merited. Respondents agreed that Complainant performed very well as Director of Client Services and initially as Director of Inpatient Services. However, the evidence suggests the raises Complainant received thereafter were the norm and largely consistent with what other Service Directors received. Manning testified credibly that as a general rule, she was unable to complete formal evaluations of her Service Directors and, as a matter of practice, budgeted 3% raises for them. This is what occurred in August of 2012 prior to her month-long leave. I do not accept the proposition that the 3% salary increase Complainant received in August of 2012 was indicative of Manning's satisfaction with her performance at that time.

Complainant also asserts that Manning's failure to formally discipline her for poor attitude or behavior suggests that Manning's dissatisfaction with her conduct was exaggerated or even fabricated to cover up a retaliatory motive. However, Manning's credible testimony

undercuts any such assertion. While Manning freely admitted that Complainant performed well in her first few years at the MSPCA, she testified credibly that Complainant's behavior became problematic over time and that behavioral issues came to a head in the summer of 2012. The fact that this time period coincided with Complainant's concerted effort to find other employment, leads me to conclude that Complainant was dissatisfied with her job at the MSPCA, recognized there were problems and despite her protestations to the contrary, understood that her time there was likely short-lived.

Complainant also asserts that the behavior at issue was insignificant, and in one case a mere joke, certainly not warranting termination, but at worst, a final warning and a coaching plan. While acknowledging that some discipline was warranted, Complainant does not concede that she acted in a manner to undermine management or that her behavior fomented dissention. She claims that her actions were supportive of her subordinates and meant to ensure better treatment of veterinary technicians, and argues that the severity of the punishment was so inconsistent with her behavior as to be proof of pretext for retaliation.

However, Complainant admitted that she had a long-standing difficult relationship with HR and a history of disputing issues with HR employees. Collins testified that she had felt disrespected by Complainant for some time and that Complainant's disputes with HR were an ongoing issue. Complainant admitted to Manning, when confronted with her behavior, that she had acted like a child. The fact that Complainant did not have the support of other Service Directors including her mentor Jen Holm, is also telling. Manning concluded that after counseling Complainant about her behavior for some time, to no avail, she felt strongly that Complainant was unwilling, or unable to modify her behavior to conform to Manning's expectations and directives. The evidence suggests that it was Manning's dissatisfaction with

Complainant's behavior over time and not Complainant's protected activity that led Manning to conclude she could no longer trust Complainant as a member of her senior leadership team and resulted in her termination. I am not persuaded that Manning acted with retaliatory motive or intent.

Finally, Complainant argues the proximity in time from the September meeting where she engaged in protected activity to her termination, some one week later, is proof of retaliatory motive. The evidence does not support Complainant's assertion. While proximity in time may be sufficient to establish a presumption of causation at the *prima facie* stage, to ultimately prove a causal connection, Complainant must show that absent her protected activity, Respondents would not have taken adverse action against her. Lipchitz, 434 Mass at 505. In the end, "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, 663 n.11 (1996). The fact that an employer is aware of an employee's protected activity and subsequently takes adverse action against the employee does not, in and of itself, establish causation, otherwise a disgruntled employee whose performance merits termination could ward off an adverse employment decision by protesting discrimination or threatening to file a complaint. See Mole, 442 Mass. at 592.

Even considering the proximity in time, Complainant has not persuaded me by a preponderance of credible evidence that Respondents' stated legitimate, non-retaliatory reasons for her termination are a pretext for retaliation. Complainant presented no evidence at the public hearing to rebut Respondents' legitimate non-retaliatory reasons for her termination, but rather relied on her own subjective impressions of her performance, and the temporal proximity of her termination. In short, Complainant has not proved by a preponderance of the evidence that Respondents' articulated reasons for their actions were a pretext for retaliation. See Lipchitz, 434

Mass. at 501. Accordingly, Complainant has failed to show that Respondents engaged in retaliatory termination violating chapter 151B § 4(4).

IV. ORDER

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

So Ordered this 12th day of February, 2019.

A handwritten signature in cursive script, appearing to read "Eugenia M. Guastaferrri".

Eugenia M. Guastaferrri
Hearing Officer