

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JUAN MARTINEZ
Complainants

v.

DOCKET NO. 07 SEM 02010

THE CITY OF SPRINGFIELD and
KATHLEEN LINGENBERG,
Respondents

For Complainant: John Connor, Esq.
For Respondent: Kathleen E. Sheehan, Esq.

DECISION OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On August 7, 2007, Complainant, Juan Martinez, filed a complaint with this Commission charging Respondents City of Springfield ("City"), Kathleen Lingenberg ("Lingenberg"), the Springfield Finance Control Board and three other individuals, with discrimination on the basis of race (Hispanic of Puerto Rican descent) and retaliation in violation of M.G.L. c. 151B §4 (1) and (4). The Investigating Commissioner issued a split disposition on September 30, 2009, finding probable cause on the claims of race and retaliation against the City of Springfield and Kathleen Lingenberg, and finding lack of probable cause as to the City of Springfield Finance Control Board, and three others. Attempts to conciliate the matter failed, and on April 14, 2010 the case was certified for public hearing. A public hearing was held before me on February 16 and 17, 2011, on June 16 and June 17, 2011, and on September 22, 2011 in the Commission's Springfield office.

Complainant's Motion in Limine was granted on February 16, 2011, excluding any reference to disciplinary actions taken against the Complainant after the denial of promotions that are the subject of Complainant's charge. The parties submitted post-hearing briefs. After careful consideration of the entire record 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, Juan Martinez, is a Hispanic individual of Puerto Rican/Hispanic descent. I observed him also to be a person of color. At all relevant times since April 11, 2004, Complainant was employed by the City in the Department of Code Enforcement-Housing Division as a Code Enforcement Inspector. The job of Code Enforcement Inspector is to enforce the state sanitary code. Complainant has math and computer college credits and is bilingual in Spanish and English. (Tr. III, pp. 4,5)
2. Kathleen Lingenberg was originally hired by the City in 1996 as the Director of Housing. Lingenberg began supervising the City's Code Enforcement Division in late 2005. The Code Enforcement Division had as its primary responsibility enforcement of the state sanitary code in the City. Lingenberg supervised Complainant and several other inspectors. (Tr. II, pp. 4, 7, 18)
3. From 2005-2007, the City was operating under the leadership of the Financial Control Board. The Board sought to implement a system to determine the number of inspections for code enforcement violations occurring at a particular property. Accordingly, the Code Enforcement Division instituted a system to track the number of inspections occurring at a particular property by giving inspectors PDAs (hand held computers) for use in the field to produce reports. (Tr. II, pp. 17-22)

4. At some point during the day of November 28, 2006, Lingenberg sent Complainant a memo titled "Voicemail", stating that since he "was unable to return [his] calls" during a period of "1.25 hours," he should immediately supply Lingenberg with his voicemail password. Complainant testified that Lingenberg already had all the inspectors' passwords. (Tr. III, p. 24, Exhibit KK)
5. Complainant testified that on November 28, 2006, at close to 4:30 pm, he was working at a desk next to Robert DeMuis, a Housing Inspector and Union Representative. Complainant testified that DeMuis was on the phone having a conversation relating to an inspection that Complainant had performed and he heard DeMuis giving incorrect information. Complainant stated that when DeMuis hung up, he seemed agitated, so Complainant said, "Why don't you let me talk to him?" and DeMuis responded, "What are you, some fucking superhero inspector?" at which time Carl Dietz, the Deputy Director of Housing, entered the room. (Tr. III, pp. 8, 9, Exhibit X)
6. Complainant testified that he got up, pushed his chair in, and said to Dietz, "You heard that, he swore at me," and left the office as it was the end of the day. (Tr. III, pp. 8-10)
7. Dietz testified that he was not present at the beginning of the confrontation and overheard noise but did not hear DeMuis's comment. (Tr. III, p. 9)
8. Complainant testified that, as a result of the incident, after leaving his office, he immediately went to speak with the City's Equal Opportunity Administrator, Daniel Hall, at the City Personnel Department. Hall stated that Complainant came to his office very upset following the incident with DeMuis and stated that he anticipated an investigation where he would not receive a fair outcome. Hall stated that he did not consider Complainant's outburst to be a formal complaint, but that Complainant formalized his complaint approximately a month or so later. (Tr. IV, pp.4-7)

9. Lingenberg testified that when she came to work the next morning, November 29, 2006, Dietz made her aware of the altercation between Complainant and DeMuis and she asked to speak with both of them. Lingenberg stated that her only understanding of the incident up to that point came from Dietz's telling her that Complainant was acting aggressively. (Tr. II, pp. 35-38)
10. Lingenberg testified that DeMuis came to her office and stated that he was wrong and never should have raised his voice to Complainant. She testified that she made the determination that DeMuis' use of profanity was unacceptable, and administered a verbal warning since this was his first incidence of inappropriate behavior in the workplace, and because he had come to her immediately and apologized for his part in the altercation. (Tr. II, pp. 40, 58,59)
11. Complainant testified that Lingenberg called him into her office the following day and accused him of being the aggressor without hearing his side of the story. (Tr. III, p. 10) I credit the Complainant's testimony.
12. Lingenberg testified that Complainant did not want to speak with her without someone representing him. She agreed to that and asked that he let her know when he wanted to meet. (Tr. IV, pp.18,19)
13. On November 29, 2006 Lingenberg sent Complainant a memo titled "Office Incident of 11/28/06" stating that she had scheduled a meeting with him on November 30, 2006 at 8:45 AM to discuss the incident. (Ex. JJ)
14. Lingenberg testified that she asked DeMuis to put the details of the incident in writing and to note who else may have overheard the altercation. DeMuis mentioned that Attorney Lisa DeSousa, in the adjoining office, may have overheard what happened. Lingenberg testified that she spoke to DeSousa who stated the only voice she had heard was Complainant's in a loud and aggressive tone. (Tr. IV pp. 18,19)

15. Lingenberg testified that she met very briefly with Complainant and his representative about a week later and that Complainant stated he felt there was a predetermined outcome and left. (Tr. IV pp.18-20)
16. The City's EEO Administrator, Hall, testified that he spoke with Lingenberg at some point about Complainant filing a complaint of discrimination with his office. This discussion did not immediately follow Complainant's filing of a formal complaint with Hall, but he stated it was "probably prior to the memorandum that was presented resulting in disciplinary action against" Complainant, dated February 5, 2007. (Tr. IV, pp. 5-10) Lingenberg stated that she first learned that Complainant had made a complaint of discrimination against her at the MCAD on or about November 28, 2007, but did not specify the exact date upon which she learned a complaint had been filed. (Tr. II pp. 33-39)
17. Complainant testified that after he filed the internal complaint with the EEO Administrator, "everything was a problem." (Tr. I)
18. Complainant was issued a verbal warning by Lingenberg on January 17, 2007 for his role in the November altercation. On February 5, 2007, Lingenberg wrote Complainant a memo "to document the verbal warning discussed on January 17, 2007." She wrote that she had completed her review of the office incident of "December 6, 2006," (although the incident occurred on November 28, 2006). In the memo, Lingenberg also referenced a complaint from an elderly woman who alleged that Complainant had verbally threatened her, as well as a December 5, 2006 call from a tenant who alleged that Complainant had been dismissive and insulting towards her. She wrote, "Combined, these actions demonstrate a pattern of unprofessional, disruptive behavior." Lingenberg stated that prior to writing the memo, she consulted with Hall and Human Resources and they assisted her in preparing the memo. Complainant refused to sign the written warning. (Tr. IV, pp. 21-24, Exhibit Z)

19. Hall conducted an investigation of the November 28, 2006 incident and issued his investigative report on April 6, 2007. Hall's report states that Complainant initially did not allege discrimination on November 28, 2006, but rather raised complaints that "were properly characterized as personal conflict within the department." Hall wrote that, subsequently, Complainant alleged in his formal internal complaint with the EEO Administrator that Lingenberg had shown blatant favoritism towards Dietz and DeMuis, who were both white males, and also alleged that he had been retaliated against for complaining about his work conditions. (Exhibit X)
20. Hall's report found, "there were really no witnesses to the extent of th[e] verbal confrontation and that when [Dietz] came and overheard the conversation ... the confrontation ended." His report further stated, "through my investigation, [I] could not discover any witnesses ... that Mr. Martinez was any more aggressive than Mr. DeMuis" and, "I thought it in the best interests of both parties that both should have received a mutual warning." (Tr. IV, pp. 5-10, Exhibits J and X) Hall's report stated that, based on his investigation, there was not sufficient evidence to support a claim for retaliation in violation of Chapter 151B. (Exhibit X)
21. Hall testified that he has not received any other complaints of race discrimination against Lingenberg from anyone in the department. (Tr. IV pp. 5-10)
22. Lingenberg stated that her staff, including all inspectors, was notified that they were not to engage in the use of personal phone calls with department issued cell phones except in very limited situations. A November 6, 2006 memo from Lingenberg to all inspectors on cell phone use states that use should be restricted to business calls with limited personal use. (Tr. II, pp. 115, 116, Exhibit LL)

23. On December 8, 2006, Lingenberg sent Complainant a memo questioning his cell phone usage. Lingenberg testified that she had become aware that Complainant had repeatedly called a fellow female employee using his cell phone. Complainant stated that he was not aware of anyone else who was questioned about their cell phone usage. (Tr. II pp. 73-79, Tr. III pp. 22-23, Exhibit LL)
24. On December 12, 2006, Lingenberg left a memo on Complainant's desk in which she stated as follows: "On 12/7/06 you called out sick from work leaving a message on the voicemail. You attended a social function that evening at a co-worker's home. This memo is to serve as notice of the sick leave policy in accordance with Article 19 of the Union Agreement (attached)." Complainant sent a memo of explanation to Lingenberg regarding his stopping briefly at the function. He testified that Lingenberg appeared to be directly contradicting her past practice regarding sick days. (Tr. IV p. 64, Exhibit EE)
25. On January 5, 2007, Dietz wrote Lingenberg a memo stating that Complainant had come to his office to complain about how he was being treated by DeMuisis. (Exhibit PP)
26. On January 12, 2007, Lingenberg wrote a memo to Complainant stating that he had not properly requested vacation time. Complainant testified he and other employees had always been able "to substitute sick days for vacation days" without ever being denied time off. (Tr. III pp. 31-33, Exhibit FF)
27. Lingenberg testified that she ran a "tight department" and this extended to the idea of using incentive days. She explained that she allowed an incentive day to reward employees who did not use sick days during a particular quarter and that her protocol did not allow substituting sick days for vacation days.
- Lingenberg testified that this was the reason she did not permit the Complainant to switch a vacation day for a sick day. (Tr. IV pp. 24-26) I credit her testimony.

28. On February 16, 2007, Lingenberg wrote to Complainant, regarding "PDA Utilization," stating that his percentage of PDA utilization the previous month was the lowest in the department. She had previously written a memo to him on August 24, 2006, regarding daily logs and his failure to conform to new office procedure. (Exhibits GG, II)
29. On March 8, 2007, Dietz wrote Lingenberg a memo in which he described an alleged altercation between himself, Complainant, and another worker, Kristen, about an inspection not done by Complainant. (Exhibit W)
30. On March 21, 2007, Lingenberg wrote a memo to Complainant regarding PDA Utilization and informing him that his percentage of PDA utilization the previous month was "far below the norm." Complainant testified that the PDA system did not work and he had told Lingenberg that the PDA system did not work and that, as a result, he had been completing all of his inspections on a manual basis. (Tr. III pp. 39-42, Exhibit HH)
31. On or about January 25, 2007, Complainant applied for a promotion to Zoning Inspector, also known as a "Zoning Officer." Five individuals were interviewed for the Zoning Inspector position in March 2007: Complainant, Gerald LaRose, Laurene Tourville, David Byrne, and Susan Rousseau. All except Complainant were Caucasian. (Exhibits A, O, P, Q, and R)
32. Steven Desilets, the City's Code Enforcement Commissioner, interviewed the Complainant for the Zoning Officer position. He stated that Complainant spent the majority of the interview complaining about what was going on in the department with Lingenberg and spoke for almost the whole interview, preventing Desilets from being able to ask questions. (Tr. I, pp 104-108) I credit Desilets' testimony.
- Complainant was not selected for the position of Zoning Inspector. The position was awarded to LaRose, a Caucasian male.

33. Desilets stated that he hired LaRose due to his educational and sales background. He stated Zoning Inspectors deal with businesses and require greater interpersonal skills and their work differs from housing inspectors. (Tr. I, pp. 104-108)
34. LaRose's cover letter indicated that "my engineering background, experience in construction projects, as well as my current job of selling industrial equipment are good supplements to the type of experience you are looking for." (Ex. A1)
35. Desilets testified that Complainant had applied for the job as Zoning Officer prior to March of 2007, and had been offered the position but refused it because of where he would have to sit. In Desilets's September 25, 2007 affidavit, he stated that he had offered Complainant a position as the Zoning Inspector in the Building Department but Complainant refused the position. Desilets stated that Complainant had been offered the Zoning Officer position in part because he was bilingual. (Tr. I, pp. 177-183, Exhibit S) I credit his testimony.
36. Desilets stated that he consulted with Lingenberg about Complainant prior to making his selection and he learned that Complainant was having issues with time and performance. He also stated that he considered it a negative that Complainant refused to interpret Spanish without getting paid for it. (Tr. I, pp. 184,185)
37. Lingenberg stated that Desilets contacted her about Complainant and she informed him that there had not been any significant improvement in Complainant's performance. (Tr. II, p. 71)
38. Desilets stated that a Zoning Inspector/Zoning Officer has different duties and jobs from a Housing Code Enforcement Inspector. He testified that although there are similar processes between the two, the position of Zoning Officer is a more detail oriented position than Code Enforcement Inspector. Desilets testified that the state sanitary code enforced by the Code Enforcement Inspectors is very visual: an inspector can go out in the field and look to make

the determination of whether or not there has been a violation of the state sanitary code, but that a Zoning Inspector/Zoning Officer needs to understand more complex issues. Desilets testified that the major responsibilities of the Zoning Officer include interpreting regulations for special permits, interpreting the state zoning ordinances and city zoning ordinances, working with Building Inspectors on projects for zoning review, as well as dealing with businesses coming into the city, and providing direction to business owners if they need a special permit or variances. (Tr. I, pp. 121-125, 148-155). I credit his testimony.

39. Desilets also testified that the Complainant was not selected because of his past issues in the workplace, personality conflicts in the office and his educational background. (Tr.I at 52) I credit Desilets testimony.

40. Complainant stated that the processes and procedures are the same for Zoning Inspectors and Housing Code Enforcement Inspectors, with the only real difference being the actual regulations utilized by the inspectors. He testified that as part of his job as a Housing Code Enforcement Inspector, he had knowledge of, used, and referred to the zoning laws. (Tr. III pp. 6-7, 59-61). I credit Complainant's testimony.

41. On or about September 25, 2007, Desilets signed an affidavit stating, "In March 2007, Juan Martinez was not selected as a Zoning Officer in the Building Department because the candidate who was selected [La Rose] was more qualified for the position with a degree in education and outstanding computer skills." On or about March 6, 2008, Desilets signed a second affidavit, again under oath, in which he amended his statement as follows: "In March 2007, Juan Martinez was not selected as a Zoning Officer in the Building Department because the candidate who was selected [La Rose] was more qualified for the position with a degree in engineering and outstanding computer skills." (Exhibit S and T). I do not find the

contents of or discrepancy in these affidavits to be probative of race discrimination or retaliation.

42. With an annual salary of about \$48,000 per year, a Zoning Inspector, in 2007, made almost \$8,000 more than a Housing Code Enforcement Inspector. (Exhibit I)
43. In May or June of 2007, Complainant applied for the open Senior Code Enforcement Inspector position in the Housing Division. Other candidates for the position were David Cotter, Bruce Lincoln, DeMuis and Louis Colon. (Exhibits N and V)
44. Each of the candidates for the position was interviewed by Lingenberg, with Dietz present. Applicants were asked to respond to the same agreed upon questions and to take a computer test. Both the interview questions and the computer test were relevant to the skills required in the position. (Tr. II, p. 25, Exhibits N and V)
45. Lingenberg stated that the qualities she was seeking for the position were good leadership skills, someone who was respected by their colleagues and co-workers and who viewed themselves as problem solvers and who colleagues could turn to, and who had the ability to interact positively with the public and to behave in a calm manner to de-escalate situations. Lingenberg testified that she did not consider seniority. (Tr. II, pp. 25-27). I credit her testimony.
46. Lingenberg recommended Cotter for the Senior Code Enforcement Inspector to the City's Financial Control Board. The Financial Control Board awarded the Senior Code Enforcement Inspector position to Cotter, a Caucasian. Cotter had been hired as a Housing Inspector in the City's Code Enforcement Housing Division in 1997. His highest level of education was a high school diploma. (Exhibit M)
47. Lingenberg testified Cotter was more qualified for the position as he was well respected by his co-workers, was viewed as someone who was approachable and available and able to

negotiate differences in opinions among inspectors. He was very responsive to the changes within the department and had a positive approach to difficult changes in the workplace.

(Tr. II, pp. 29, 66, 67) I credit her testimony.

48. Lingenberg stated that she did not recommend Complainant for the position because he had "a history of behavioral problems, attendance issues, and resistance to any of the changes that needed to occur within the department." She testified that her rationale for not selecting Complainant was his inability to work cooperatively with management and coworkers and the fact that he exhibited negativity to nearly every change in the office that had been put forward. (Tr. II, pp. 29-31)
49. Bruce Lincoln, a white male with more experience in the Code Enforcement Department than Complainant and who had worked for the City since 1992, was also not selected for the position as a Senior Code enforcement inspector. (Tr. II, p. 88, Exhibit BB)
50. Complainant, LaRose, and Cotter did not possess college degrees although the zoning positions in question called for graduation from a four year college or university. (Exhibits F and G)
51. Cotter testified that Complainant is an excellent inspector and that he has never had a problem with him. LaRose and DeSilets also testified that they did not have problems working with Complainant and were not aware of any problems he had dealing with the public but DeSilets also testified that Complainant would often bully others. (Tr. I, pp. 61-62, 85-92, 236-237)
52. Complainant testified that, on at least one occasion, when he spoke to a coworker in Spanish, Lingenberg walked by and said "English, English" and added "I mean it." Complainant understood those comments to mean that Lingenberg did not want him to

speak Spanish in the office although Respondents relied upon him to translate for clients who did not speak English. (Tr. III, pp. 46-47, 52-53)

53. Yvette Cruz, who is Hispanic, testified that Lingenberg on more than one occasion, "would walk by and say, 'English, English, English'" when Hispanic employees were speaking Spanish. Cruz also testified she had witnessed Lingenberg treating Hispanics differently than non-Hispanic employees. (Tr. V pp. 6, 10-11) I do not credit Cruz's testimony because she was unable to articulate any specific incident details to support her conclusory statements. Cruz also presented as a disgruntled employee and she did not appear forthright while testifying.

III. CONCLUSIONS OF LAW

RACE DISCRIMINATION

Complainant may establish a prima facie case of race discrimination by showing that he: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of his protected class. See Lipchitz v. Raytheon Co., 434 Mass. 493(2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of prima facie case vary depending on facts). See also Douglas v. J.C. Penney Co., 474 F.3d 10, 14 (1st Cir. 2007) (indicating that the burden of establishing a prima facie case of race discrimination is "not onerous").

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for their actions. See Abramian, 432 Mass. at 116-17. If Respondents do so, Complainant, at stage three, must show by a preponderance of evidence that

Respondents' articulated reason was not the real one but a cover-up for a discriminatory motive.

See Knigh t v. Avon Prods., 438 Mass. 413, 420 n.4 (2003); Lipchitz, 434 Mass. at 504.

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

Complainant has established a prima facie case of race discrimination. He is Hispanic from Puerto Rico and a person of color, and, hence, a member of a protected class. He was performing his position in a satisfactory manner as evidenced by the testimony of Cotter, LaRose, and Desilets.

Complainant asserts that he suffered race discrimination when he was singled out for punishment for an altercation with a coworker in November of 2006 and that he received a formal written warning while his coworker did not. He suggests that this was disparate treatment based on his race and that his supervisor presumed that he had initiated the altercation. However, given the information Lingenberg received about the altercation and the fact that there was evidence that Complainant had some history of behavioral issues in the workplace, Lingenberg's actions were not unreasonable. Although the EEO Report regarding the investigation of this incident filed by Daniel Hall suggests that both the Complainant and DeMusis should have been equally disciplined, he also concluded that the discipline was not motivated by discrimination. I concur that this this incident is not sufficient to prove discriminatory animus based on Complainant's race. It is clear from the testimony that both the Complainant and DeMusis were involved in a heated exchange and that only DeMusis went to management expressing remorse for the incident and apologized for his part. It is clear from testimony that the Complainant stormed off, did not offer an apology and did not express any remorse for the incident. Hence, Respondent has articulated a legitimate non-discriminatory reason for the disparate treatment and Complainant has not demonstrated that this reason was a pretext for race discrimination. Complainant has failed to persuade me that the disparate discipline from this incident was racially motivated.

Complainant further claims that he was not selected for two other positions because of race discrimination. Respondents asserted that Complainant, a Code Enforcement Inspector, was not selected for the Zoning Officer position based on legitimate non-discriminatory reasons. Desilets, the City's Code Enforcement Commissioner who interviewed the Complainant for the Zoning Officer position, stated that Complainant spent the majority of the interview complaining about his supervisor and other issues in the Code Enforcement Division and spoke for almost the whole interview, preventing Desilets from being able to ask questions. Desilets stated that he hired LaRose because of his educational and sales background. He stated Zoning Inspectors deal with businesses and require good interpersonal skills and that the job differs from that of housing inspectors. LaRose's cover letter indicated that he had an engineering background, had experience in construction projects, and that his current job was selling industrial equipment, which he believed supplemented the experience required for the job.

Desilets also testified credibly that the positions of Sanitary Code Inspector and Zoning Officer were quite different and that the latter required knowledge of the Zoning Code, skill in dealing with businesses coming into the City, ability to interpret regulations for special permits, and to interpret the state zoning ordinances and city zoning ordinances, and to provide direction to a business owners needing special permits or zoning variances. He maintained that enforcing the state sanitary code is less complicated and relies on visual inspection and a more or less straightforward determination of whether or not the code is being violated. He maintained that the job of Zoning Inspector requires greater knowledge and the ability to navigate more complex issues. Moreover, Desilets stated that the Complainant had once been offered the Zoning Officer prior to March 2007 but had turned it down for reasons related to where his office space would be located. Although Desilets' testimony that Complainant was previously offered a job as a Zoning Officer is evidence that Complainant was minimally qualified for the position, I credit further

testimony from Desilets that Complainant's unsatisfactory interview, the fact that he had less experience than the candidate chosen and the fact that he had previously turned down the job for spurious reasons all contributed to the decision not to hire him for the Zoning Officer position.

With regard to the Senior Code Enforcement Officer position, Lingenberg stated that she was less concerned about the applicants' experience because the qualities she was looking for were more personal qualities such as good leadership skills, good problem solving skills, respect from and accessibility to colleagues and co-workers, the ability to interact positively with the public and the ability to de-escalate and resolve difficult situations. Lingenberg testified Cotter was more qualified for the position because he was well respected by his co-workers and was viewed as someone who was accessible and able to negotiate divergent opinions among inspectors. She also testified that Cotter was very responsive to the changes within the department and remained positive in the face of some difficult changes. I find Respondents have articulated legitimate reasons for Complainant's non-selection for the two positions.

As evidence of pretext for racial discrimination, Complainant points to the two affidavits signed by Desilets, and the discrepancies concerning La Rose's qualifications based on his having a degree in education versus a degree in engineering. I do not find the discrepancy in these affidavits to be probative of race discrimination or retaliation.

Complainant also points out that he was subjected to disparate discipline after the altercation with DeMuis, which Lingenberg referenced as being on December 6th, when the incident actually occurred on November 28th. I do not find the error probative of any discriminatory intent.

On December 8, 2006, Lingenberg sent Complainant a memo regarding his cell phone usage. Complainant asserted that he was not aware of anyone else who was questioned about their cell phone usage and that this is also evidence of disparate treatment. However, Lingenberg

asserted a valid reason for her inquiry, which was learning about Complainant's repeated private cell phone conversations with a female employee. Complainant did not demonstrate that this was not the real reason for Lingenberg's admonition to him.

On December 12, 2006, Lingenberg left a memo on Complainant's desk concerning his misuse of sick time and, on January 12, 2007, wrote a memo to Complainant indicating that he had not properly requested vacation time. On February 16, and March 21, 2007, Lingenberg wrote memos to Complainant regarding his utilization of the "PDA" system. Although Complainant contends that these were examples of disparate treatment, he did not produce evidence that Respondent's actions were not legitimately undertaken, or that the reasons were a pretext for race discrimination.

Complainant also contends that Dietz's January 5, 2007 memo to Lingenberg recounting Complainant's complaint to Dietz about the incident with DeMuis, as well as a March 8, 2007 memo Dietz wrote to Lingenberg recounting an alleged "altercation" between himself, Complainant, and another employee, were racially motivated. Complainant did not produce evidence to support this claim. I conclude that Dietz's documenting of issues involving Complainant to Lingenberg were valid work related communications generated in the normal course of business and were not motivated by racial animus towards Complainant.

RETALIATION

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County

Sheriff's Department, 22 MDLR 208, 215 (2000), quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

To prove a prima facie case for retaliation, Complainant must demonstrate that he: (1) engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if he "has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, s.5]." While proximity in time is a factor, "... the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew of a discrimination claim and thereafter took some adverse action against the Complainant does not, by itself, establish causation, but it may be a significant factor in establishing a causal relationship. "Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing or threatening to file, a discrimination complaint." Pardo v. General Hospital Corp., 446 Mass. 1, 21 (2006) quoting Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) citing McDonnell Douglas

Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Id.

Here, Complainant alleges that Respondents retaliated against him after he complained to Hall about disparate treatment resulting from the November 28, 2006 incident. He argues that after filing a complaint, he was disciplined more harshly than DeMuisis for the November 28 altercation, that he received numerous warnings about his performance, cell phone use, use of his PDA, and his sick leave time. He also argues that he was not selected for the two promotional positions. He further alleges that Lingenberg began subjecting him to increased scrutiny regarding minor performance issues.

Complainant engaged in protected activity on November 28, 2006, when he spoke with the City's Equal Opportunity Administrator, Hall, although he did not formalize his complaint until approximately a month later. Lingenberg testified that she had a number of conversations with Hall following the November 28th incident and learning that Complainant had filed a complaint. Although the exact date of her becoming aware of Complainant's protected activity was not established, it appeared to be prior to Lingenberg's February 5, 2007 written warning to Complainant. Hall also testified that he specifically informed Lingenberg that Complainant had filed a complaint of discrimination. Complainant suffered adverse employment actions in that thereafter, Lingenberg subjected him to discipline for the November 2006 incident and admonished him on a number of occasions for performance related issues such as cell phone and

PDA use and misuse of sick time . He argued that he was subjected to this increased scrutiny by Lingenberg and Dietz following the filing of his complaint. Finally Complaint applied and was not selected for two positions that he considered promotional opportunities. Complainant has alleged a sufficient causal connection between the protected activity and the adverse actions as there is a temporal relationship between Complainant's late 2006 complaint to Hall and the warnings about his performance that followed this and his non-selection for positions in early to mid- 2007. Accordingly, Complainant has established a prima facie case of retaliation.

The burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. As stated above, Respondents articulated legitimate non-discriminatory reasons for not selecting Complainant for the Zoning Inspector/Officer and Senior Code Enforcement Inspector positions. These reasons are legitimate non-retaliatory reasons.

In addition, Respondents point to the Hall investigative report and assert that the original allegations made to Hall on November 28, 2006 do not include allegations of race or national origin discrimination, instead they merely accuse Respondents of being incompetent and showing favoritism. Also, the investigative report itself concludes that there is not sufficient evidence to support a claim for retaliation. Furthermore, Complainant did not produce any evidence that the altercations and/incidents with coworkers were false or did not occur. Complainant merely claims that documenting these incidents is retaliatory.

Complainant also testified that he was retaliated against when he was not selected for the promotional opportunity in March 2007 of Zoning Inspector and in June of 2007 for the Senior Code Enforcement Inspector in the Housing Division. Complainant contends that he was retaliated against for having filed an internal EEO complaint with Hall regarding the November 2006 incident. Complainant was interviewed for but was not selected for two positions in which two,

Caucasian coworkers were chosen: LaRose for the Zoning Inspector position in March of 2007, and Cotter for the Senior Code Enforcement position in June of 2007.

Respondent's selection of two Caucasian men for the promotional opportunities does not establish retaliatory conduct because Complainant is unable to show that he was more qualified than the other successful candidate. This is furthered by testimony evidence given by DeSilets that he did not select Complainant because of his history of workplace problems, complaints about his unprofessional conduct, personality conflicts he had with other coworkers and his lack of educational background.

Finally, Complainant argued that neither LaRose nor Cotter possessed college degrees as was required by the postings for the positions they were selected to by Respondents. Complainant also does not possess a college degree. I do not find this to be persuasive evidence of pretext for a claim of retaliation.

Although Complainant contends that Lingenberg questioned him on December 8, 2006, regarding his cell phone usage, something she did not do to anyone else, Lingenberg asserted a valid reason for her inquiry which Complainant failed to show was pretextual. Further, on December 12, 2006, Lingenberg left a memo on Complainant's desk involving sick time and, on January 12, 2007 Lingenberg wrote a memo to Complainant in which she appeared to indicate that he had not properly requested vacation time. Although Complainant testified that prior to his November 28th complaint, he and other employees had always been able "to substitute sick days for vacation days" without ever being denied, Lingenberg explained her policy was not to allow employees to substitute sick days for vacation days but to allow employees the opportunity to earn an incentive day if they took no sick time in a quarter. Again, Complainant failed to show that Lingenberg's explanation was pretextual.

Similarly, on February 16, and March 21, 2007, Lingenberg wrote memos to Complainant regarding his utilization of the newly acquired "PDA" system. There was no evidence introduced by Complainant that the contents of the memo were not true or that Lingenberg's actions were a pretext for retaliation . Further, evidence indicated that she had sent a similar memo to Complainant, on August 24, 2006, prior to his protected activity. I conclude that the above actions were genuinely work related and undertaken for legitimate non-retaliatory reasons. Complainant has not shown produced any evidence to contradict Lingenberg's reasons or to demonstrate that they were a pretext for retaliation .

On January 5, 2007, Dietz wrote Lingenberg a memo in which he described a complaint Complainant had directed to him regarding abusive treatment by DeMuisis. On March 8, 2007, Dietz wrote Lingenberg another memo in which he described an alleged "altercation" between himself, Complainant, and another employee. I find that the documentation of these incidents do not demonstrate evidence of retaliation but instead are indicative of a manager's duty to respond to incidents that occur with employees. Also, Complaint has not shown any evidence that incidents involving similarly situated employees who exhibited unprofessional conduct were not documented.

In sum, Complainant has not met his burden of showing a causal relationship between his protected activity and his non-selection for the two positions. Nor has he shown he was subjected to increased scrutiny because of complaining to Hall.

Based on the above, I conclude that Complainant has not met his burden to prove race discrimination or retaliation and find Respondents did not violate G.L. c. 151B.

IV. ORDER

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

So ordered this 30th day of May, 2014.

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Sunila Thomas-George
Hearing Commissioner