

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & KATHLEEN ENGLEHART,
HEIDI A. BASSETT, SHERI A. SARMENTO &
MARK R. DUPHILY,
Complainants

v.

TOWN OF CARVER, TOWN OF
CARVER POLICE DEPARTMENT &
ARTHUR PARKER¹,
Respondents

DOCKET NOS.
06-BEM-02406
06-BEM-00672
06-BEM-02404
06-BEM-00674
06-BEM-00690

Appearances:

Paul A. Griffin, Esq. for the Complainants
Peter E. Montgomery, Esq. for the Respondents

AMENDED DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Complainants are current or former police officers for the Town of Carver. On March 21, 2006, Sheri Sarmento filed a complaint with this Commission charging Respondent Town of Carver Board of Selectmen, Town Administrator Richard LaFond, Chief of Police Arthur Parker and EMS Director Thomas Walsh with discrimination on the basis of sex, in violation of G.L.c.151B, sections 4(1) and 4(4A). The investigating commissioner found probable cause as to the claims against Chief Parker and the Town. The claims against LaFond and Walsh were dismissed for lack of probable cause. Sarmento alleges that Chief Parker created a hostile work

¹ Parker is not a named Respondent in the retaliation complaints of Sarmento (06-BEM-02404) and Duphily (06-BEM-02406), which are the only complaints where I rule in favor of Complainants. Therefore, all of the claims against Parker individually are hereby DISMISSED.

environment for her and failed to modify the female officers' bathroom and locker room facilities to make them comparable to those of the male officers.

On September 28, 2006, Sarmento filed a second charge alleging that the town failed to make her a permanent Sergeant in retaliation for filing her first MCAD claim, in violation of G.L. c151B, 4(4).

On March 21, 2006, Kathleen Englehart filed a complaint with this Commission charging Respondents Town of Carver, Board of Selectmen, LaFond and Parker with discrimination against her on the basis of sex, in violation of G.L.c.151B, sections 4(1) and 4(4A). The investigating commissioner found probable cause as to the claims against Chief Parker and the Town and dismissed the claims against LaFond. Englehart alleges that Chief Parker created a hostile work environment for her, refused to provide equal conditions in the women's bathroom, and required her to submit to an independent medical examination following an injury on duty whereas an injured male officer was not required to do so.

On March 22, 2006, Heidi Bassett filed a complaint with this Commission against Parker and the Town on the basis of sex, in violation of G.L.c.151B, sections 4(1) and 4(4A). Bassett alleges that Chief Parker created a sexually hostile work environment for her and refused to provide equal conditions in the women's bathroom. The investigating commissioner issued a probable cause determination.

On September 28, 2006, Mark Duphily filed a charge with this Commission alleging that the town failed to make him a permanent sergeant in retaliation for his engaging in the protected activity of assisting his co-workers with MCAD claims. The investigating commissioner issued a probable cause determination.

Attempts to conciliate the matters failed and the claims of all four Complainants were certified and consolidated for public hearing. A public hearing was held before me on May 13 and 15, 2014. After careful consideration of the entire record before me 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 Mark Duphily joined the Carver Police Department as a patrolman in November 2002. He became a provisional sergeant in April 2006 and a permanent sergeant in May 2007. (Tr. p. 24) Duphily was appointed Chief of the Carver Police Department on July 31, 2013 and was serving in that position at the time of the public hearing. (Tr. p. 23)

2. Complainant Kathleen Englehart became a police officer in 1987. She was hired by the Carver Police Department in 2001. In 2004 she was the department's court prosecutor and the Carver police union's president. Englehart retired because of a disability in 2008. She is married to David Zadok, who is a Carver police officer and was the union steward in 2004.

3. Complainant Heidi Bassett has been a police officer for 26 years. She joined the Carver Police Department in 2002. From 2004-2009, Bassett served as the Community Liaison/DARE Officer/ School Resource Officer. Englehart and Bassett shared an office.

4. Complainant Sheri Sarmiento joined the Carver Police Department as an officer in December 2002. She is currently the Administrative Sergeant, second in command to Chief Duphily.

5. David Zadok has been a police officer for the town of Carver since 1993. He has served as a uniformed officer, a detective and a police prosecutor and performed special investigations for police chiefs and for the board of selectmen. He had a good relationship with Richard LaFond, Carver's former town manager.

6. Respondent Arthur Parker was appointed the Town of Carver's Chief of Police on July 1, 2004 and served as chief until his retirement on March 31, 2010. He continued to serve as interim chief until June 30, 2010. Prior to his appointment as chief for Carver, Parker was chief of the Williamstown police for four and a half years and was employed by the Wellfleet police department for 22 years. (Tr. p. 188; 212-3)

7. Richard LaFond was Carver's town manager from 1996 until June 2013. (Tr. p. 222-3) At all times relevant to this matter, Carver's sexual harassment policy directed employees who wished to file complaints of sexual harassment to contact LaFond.

Alleged Hostile Work Environment

Englehart and Bassett

8. Kathleen Englehart and Heidi Bassett testified that on two occasions in late 2004 or early 2005, Parker entered their office and told them that he had made a conjugal visit to his wife and she had done his laundry. (Tr. p. 93-4) Bassett held up her hand and said, "TMI, chief." (Tr. p. 113) Parker did not know what "TMI" meant and Bassett told him, "Too much information." (Tr. p. 113)

9. Parker acknowledged that on one occasion he commented to Englehart and Bassett about a conjugal visit with his wife. However, he stated that after Bassett admonished him with the expression "TMI," he never mentioned the matter again. He denied saying his wife did his laundry. (Tr. p.165-6)

10. In December 2004 or January 2005, in the course of a discussion with Englehart and Bassett, Bassett told Parker that he had a good memory. Parker responded that he "had a memory like an elephant but a small trunk." Bassett and Englehart took the words "small trunk" to be a reference to Parker's penis size. (Tr. p. 93-5; 114) I credit their testimony.

11. Parker testified that he had used the expression before and may have made the remark to Bassett and Englehart, but stated “small trunk” was a reference to his nose. He acknowledged that he made no reference to his nose in his position statement and it was not until his deposition that he stated that the “small trunk” was a reference to his nose. (Tr. p. 167-171)

12. Englehart and Bassett stated that on several occasions, Parker commented on their private discussions, leading them to believe that Parker was monitoring their office. (Tr. p. 114-6)

13. As a result of Parker’s comments, Englehart and Bassett changed their daily routine. If Parker was in his office with the door open, they would avoid the bathroom they usually used that was near Parker’s office. (Tr. p. 95, 114-6)

14. Englehart injured her back at work in February 2005 and was on leave until June 2006. In May 2005, Parker ordered Englehart to undergo an independent medical examination (IME). Englehart testified that because this was her first injury she felt the chief was acting prematurely by ordering an IME and that a male officer who was out on injured leave had never been sent to an IME. (Tr. p. 123-125) Parker testified that he asked Englehart to undergo an IME because he had been receiving insufficient information from her physician, who simply wrote on a prescription pad that Complainant would be out for a period of time, without further explanation, whereas the male officer who was on leave had provided updated, detailed medical documentation of his injury. (Tr. p. 208-212; Exh. C-10) I credit Parker’s testimony.

15. While Englehart was on leave, in September 2006, Parker accused Englehart of failing to timely take an on-line test which she had just completed. (Tr. p. 125-6)

16. Englehart testified that the chief's treatment of her with regard to her injured leave in 2005 caused her to develop insomnia, high blood pressure and anxiety for which she was prescribed Xanax.² (Tr. p. 129-30)

17. Bassett testified that in February 2005, Parker called her into his office and berated her for not informing him about a DARE fundraiser that she had previously discussed with her administrative sergeant³ and had publicized in the local newspaper. (Tr. p.98-99; Bassett complaint)

18. Bassett testified that in April 2005, after receiving her administrative sergeant's approval, she attended a selectmen's meeting to discuss arranging a fund-raising spaghetti supper for the DARE program. Prior to the meeting, while at the copier, Parker asked Bassett where she was going, and when she explained he turned "beet red" and yelled at her because he had not been informed about the fundraiser. Bassett explained that she had received permission from her supervisor. Bassett was unaware at the time that Zadok witnessed this incident from his office near the copier and complained about it to the selectmen. A few days later, Parker apologized to Bassett for yelling at her. (Tr. p. 100-102; Bassett complaint) Parker acknowledged having confrontations with Bassett over DARE fundraising matters because of his concerns about the propriety of the police department's involvement in outside fundraising. (Tr. p. 214-5)

19. In January 2006, Bassett arranged for the Plymouth County Sheriff's K-9 to unit conduct a drug sweep of the high school. Several K-9 officers were present at the police department preparing to leave to perform the search, when Complainant went to Parker's office in order to introduce him to the K-9 officers. Parker became angry and yelled at her because he had not

²Englehart returned from her injury leave in June 2006 and worked for six months before going out on leave again. She claimed that Parker then forced her to retire. However, Englehart acknowledged that she was physically unable to work after going out on her second leave. (Tr. p. 135-6)

³ Bassett testified that Parker instructed police officers to follow the chain of command, which she understood to mean that she was to receive approval for events from her immediate superior, the administrative sergeant. (Tr.p.97)

been informed that the search had been scheduled. Bassett explained that she had already received permission from her administrative sergeant. Parker said he would take the matter up with the sergeant. When Bassett left Parker's office the K-9 officers were in the vicinity and had heard Parker yelling and commented to her about the matter. Bassett was horrified and felt embarrassed and belittled in the presence of her peers. (Tr. p. 101-3) I credit her testimony.

20. Parker acknowledged that he was upset with Bassett because he was not told about the drug sweep in advance. As chief, he was ultimately responsible for the outcome of the operation. He denied yelling at Bassett and stated that their conversation took place a distance from the K-9 unit. (Tr. p. 215-16) Parker stated that he later learned that there were many matters about which the administrative sergeant did not inform him.

21. Bassett testified that her interactions with the chief caused her insomnia, anxiety, heartburn, headaches and diarrhea. (Tr. p. 107) I credit her testimony.

Sarmento

22. In July 2004, Parker and Sarmento were present at a town event called Old Home Day, when a woman with a large tattoo on her leg passed by. Parker commented to Sarmento, "Why would a woman get a tattoo?" Sarmento responded that she had tattoos and Parker did not respond. (Tr. p. 64) I credit her testimony. Parker testified that he observed a woman with a large tattoo on her leg and he wondered aloud why anyone would get a tattoo and did not specifically reference women. (Tr. p.171-172)

23. Sarmento testified that in January 2005, she was eating a donut in the dispatch area. Parker walked in, looked her up and down and said "You need to watch your weight." (Tr. p. 65) Duphily was present and heard Parker's remarks. (Tr. p. 29-30) Sarmento testified she was

angry, upset and humiliated that Parker would make such a remark to her in the presence of her co-workers.

24. Sarmiento testified that days later, in January 2005, as she ate her dinner in the dispatch area, Parker pointed to two pizza boxes that were in the area, and asked Sarmiento, “Are those yours, too?” Parker’s comment made her angry. (Tr. p. 65-6)

25. Parker denied making any remarks to Sarmiento about her weight. He recalled only one incident when Sarmiento was at the communications room desk and upon observing a pizza box and a box of donuts, he remarked in a joking, self-deprecating manner that if she ate doughnuts and pizza she would end up looking like he did. He did not recall Duphily being present when he made this comment. (Tr. p. 173-74)

26. In or around January 1, 2005, Parker received a complaint from a reporter who observed two off-duty Carver police officers at a Plymouth restaurant call a female restaurant worker a “cunt.” Sarmiento testified that Parker assigned her as a union representative to the two officers in a subsequent inquiry. Parker testified that he used the word “cunt” when talking to the two officers about the matter in Sarmiento’s presence in her capacity as their union representative.⁴ (Tr. p. 176).

27. Sarmiento testified that on or about January 23, 2006, a year after the restaurant incident, Parker stood in the doorway of her office discussing the case of Neil Entwistle who had recently killed his wife and nine month old daughter.⁵ Parker stated to Sarmiento “I can understand how somebody could kill their wife but not their child.” (Tr. p. 67) Sarmiento testified that Parker’s

⁴ Sarmiento testified that one of the officers involved later told her that while discussing the incident with him, Parker made the shape of a diamond with his hands and said “when you have one of these you kick it under the table.” The officer said, “What’s that, Chief?” and Parker responded, “A cunt.” This comment was not made to Sarmiento or in her presence. (Tr. p. 69-70) Parker testified that he may have made the shape with his hands but did not recall making the statement to the officer. (Tr. p. 177)

⁵ The Entwistle case dominated the local news during this time period and was of particular interest to Carver police because Entwistle stole the murder weapon from a cabinet in his father-in-law’s Carver home.

comments were insensitive and rude. Parker acknowledged making this remark to Sarmento. (Tr. p.175-6)

28. Englehart testified that after Parker's second comment about conjugal visits she told her husband, David Zadok, about the comments and understood that Zadok was going to speak with town manager LaFond about the chief's comments. Sarmento testified that she also complained to Zadok about Parker's remarks. (Tr. p. 71)

29. Zadok testified that the three female officers complained to him about Parker. Bassett complained about Parker's comments about his wife's weekend visits and about his "small trunk" comment. He did not specify what the others complained about. Zadok stated that he was talking to [the town lawyer, David Jenkins] on the phone about other issues and brought up to him there were issues regarding the chief's treatment of the female officers. Zadok never asked Jenkins for a meeting regarding the purported sexually offensive remarks by Parker and I do not credit Zadok's testimony that he raised the issue specifically with Jenkins. (Tr. p. 145-6)

30. Zadok stated that he also brought up the female officers' complaints about Parker to LaFond an estimated five times during 2005. (Tr. p. 19) I do not credit Zadok's testimony that he raised these matters with La Fond on numerous occasions.

31. On or about January 25, 2006, Sarmento and Zadok encountered LaFond as they were leaving a contentious selectmen's meeting regarding an unrelated union grievance. Zadok asked LaFond to acknowledge in Sarmento's presence that Zadok had previously asked him to address Parker's alleged harassment of the female officers and LaFond responded affirmatively, but he told Zadok that he would only discuss the matter with Parker in attendance. (Tr. p. 73)

32. Englehart, Bassett and Sarmento testified that after learning that LaFond would not meet with them without Parker present, they decided to file complaints with MCAD.

33. LaFond denied ever hearing about harassment complaints from the female officers until after the town received their MCAD complaints and he denied telling Zadok that he would not meet with the female officers unless Parker were present. (Tr. p. 224-25) I do not credit his testimony that Zadok never mentioned the issue to LaFond. However, I find that Zadok did not repeatedly seek out LaFond on this issue.

34. On March 21, 2006, Englehart filed her MCAD complaint alleging that Chief Parker created a hostile work environment for her and that the women's bathroom facilities were not equal to those of the male officers.

35. On March 21, 2006, Sarmento filed her first complaint with the MCAD alleging that Chief Parker created a hostile work environment for her and refused to provide equal conditions in the women's bathroom. Duphily was identified in Sarmento's complaint as a witness to Chief Parker's comments about Sarmento eating donuts and gaining weight. (Tr. p. 29-30)

36. On March 22, 2006, Heidi Bassett filed an MCAD complaint alleging that Chief Parker created a hostile work environment and refused to provide equal conditions in the women's bathroom.

37. Zadok acknowledged that in 2005 or 2006, Parker yelled at him on two occasions and another male officer complained that Parker had yelled at him. (Tr. p. 148-51)

38. After receiving the female officers' MCAD complaints, the town retained an outside attorney to investigate the female officers' claims against Parker. Englehart, Sarmento and Bassett refused to cooperate with the investigation on the advice of their prior counsel that the attorney conducting the investigation was working for the town and would issue a biased report. (Tr. p. 79-80)

39. On or about May 1, 2006, upon receiving a directive from LaFond, Duphily met with the attorney investigating the claims and told her about Parker's comment to Sarmiento about getting fat, as well as two comments Parker made to him in 2005 about female runners in their tight shorts and about a female EMT who was "built like a brick shithouse." (Tr. p. 30-31, 40) Parker acknowledged making the two latter remarks to Duphily. (Tr. p. 172)

40. The investigating attorney's report, which was not offered into evidence, recommended sexual harassment training for the department and for Chief Parker. Parker stated that within a month after the report was issued on June 9, 2006, LaFond talked to him for about 15 minutes regarding several comments he made that were considered to be inappropriate in the workplace. (Tr. p. 178)

Alleged Retaliatory Failure to Promote Duphily and Sarmiento

41. In July 2004, there were two vacancies for the position of sergeant in the Carver Police Department, resulting from the disciplinary suspensions of two sergeants whose cases were on appeal to the Civil Service Commission.

42. On July 14, 2004, Chief Parker issued a memorandum stating that the department would seek two acting sergeants to temporarily fill the vacancies, until the suspended sergeants' appeals had been exhausted or until a permanent list was provided by the Civil Service Commission.

(Exh. C-1)

43. On August 19, 2004, Parker selected Duphily and Sarmiento for the provisional sergeant positions. (Exh. C-1)

44. A promotional exam was given by the Civil Service Commission in October 2005. Sarmiento and Duphily took the exam.

45. On March 24, 2006, the Civil Service Commission published a list of eligible candidates based on the written promotional exam given the previous October. Duphily ranked first on the list and Sarmento ranked second. The town had 21 days from the time the list was certified to make appointments. Based on Parker's previous correspondence, Duphily and Sarmento believed that they would be promoted to permanent sergeant positions when the list was published and were aware they could be demoted to patrol officer in the future if one or both of the disciplined sergeants were to be reinstated. (Tr. p. 32-25, 63)

46. On April 12, 2006, at Parker's recommendation, the chairman of the Board of Selectmen wrote to the Civil Service Commission stating that the town wished to wait until the disciplined Sergeants' cases were fully resolved before making any permanent appointments and that they did not intend to make appointments from the list. (Exh.C-1) Parker acknowledged that this was a different position from the one he had taken in previous correspondence. (Tr. p. 31-32) The town did not act on the promotions in a timely manner and the certification of the list became invalid.⁶

47. Parker testified that he believed he had received the MCAD complaints of Englehart, Sarmento and Bassett at the time he made the recommendation not to make permanent appointments. (Tr. p. 189-90)

48. Parker testified that an HRD employee advised him if he permanently appointed Duphily and Sarmento in April 2006, the two terminated sergeants would have cause to sue the town if the Civil Service Commission ordered them reinstated and for this reason he chose not to make Duphily and Sarmento permanent sergeants. (Tr. p.188) I do not credit his testimony.

⁶ Although the union challenged the town's decision, they subsequently withdrew their appeal upon learning that the chief did not violate civil service law by declining to act on the list.

49. Sarmento was made a temporary sergeant on October 10, 2006 and was demoted to patrol officer on March 7, 2010 when one of the sergeants won his appeal and returned to work. (Tr. p. 60-61) Sarmento was ultimately promoted to permanent sergeant on October 17, 2010 by Parker's successor, Chief Miksch.

50. Sarmento stated that she would have received her first step increase five years after becoming permanent sergeant. But because she was not made a permanent sergeant in April 2006, she remains at step one, nine years after becoming sergeant, not including the ten months when she was demoted. (Tr. p. 62-3) I credit her testimony.

51. Sarmento testified credibly that she was very upset, sad, angry and depressed upon learning that she would not be made a permanent sergeant in April 2006 after studying for the test and spending money to take the test. She suffered from insomnia and started to grind her teeth.

52. Duphily testified credibly that there are three step raises for police department sergeants. Although he received step-one sergeant pay while a provisional sergeant, his time spent as provisional sergeant did not count toward the second or third step raises. (Tr. p. 38) He testified that had he and Sarmento been appointed as permanent sergeants, they would have retained their rights for 10 years and not have had to re-take the civil service test. He stated that he remained at the first step longer than he should have and this affected his income and the timing of his step increases. A step increase was approximately \$2,000.

53. Duphily stated that while he is Chief now he has taken a leave of absence from his sergeant's position and if he stepped down as Chief he could return to the civil service rank of sergeant and his starting date at permanent sergeant would continue to affect his pay. (Tr. p. 35)

54. Duphily testified credibly that he suffered from insomnia and was concerned over the financial loss and the uncertainty of the position of provisional sergeant. He was concerned about disciplining patrol officers as a sergeant and then having return to patrol officer. His concerns affected his ability to do his job and his confidence. (Tr. 32-33, 37-8)

55. Duphily was ultimately promoted to permanent sergeant in May 2007. (Tr. pp. 56-57) The parties stipulated that Duphily received an increase from a Step 1 to a Step 2 sergeant on July 1, 2012. (Tr. p. 157)

56. Parker acknowledged that this was not the first promotional list he ever called for and he was aware that officers who are promoted while appeals are pending may be later demoted but they nonetheless retain their appointment dates, which affects their seniority and pay grades. (Tr. p. 188-189)

Bathroom Facilities

57. On October 2, 2005, Zadok wrote the chief on behalf of the female officers that the female locker-room and the lavatory were not equal to the male facilities. The sinks in the women's restrooms did not have continuous running hot-water faucets, which made it difficult for the female officers to effectively clean up after touching patients or arrestees during booking. In addition, the women's locker room had no shower and had a toilet that had no separate stall. The men's restroom, which was separate from the men's locker room, contained a shower, a toilet with a stall and two urinals. (Tr. p. 50-51; Exh.C-3)

58. Parker arranged to have the faucets fixed to allow for the continual flow of hot water. He noted that each female locker room door had a lock to secure privacy and there were two

adjacent bathrooms exclusively for females, each with locks on the door to secure their privacy and thus it was unnecessary to create separate stalls for the toilet in the locker room.

59. Parker informed Zadok that the town's building and grounds superintendent had advised him that there was no "no way" a shower could be installed in either female locker room and instead Parker proposed installing a deadbolt lock on the men's bathroom so that female officers could use the shower. There is another bathroom near the dispatch area that anyone could use if someone were taking a shower in the men's lavatory. (Tr. p. 219) As of the date of the public hearing, there was no separate shower in the women's lavatory.

60. Englehart testified that the female officers did not agree that a deadbolt on the men's room shower would resolve the problem and that a separate shower for the women should be installed. She stated that she had no need for a shower in her position as court prosecutor, but she may have needed a shower when transporting a prisoner. She testified that the women's locker room was not as private as the men's locker room and that the chief could look right into the women's locker room. (Tr. p. 130-31)

61. Dughily testified that he has only taken one shower at the station since being hired by the Carver police department in 2002. (Tr. p. 50)

62. Sarmiento did not testify regarding the shower or locker room issue.

63. Bassett stated that the women's locker room was wide open with no partition between the toilet and sink. She testified that she was not seeking any emotional distress damages because of the lack of shower in the female bathroom. (Tr. p. 106-7)

III. CONCLUSIONS OF LAW

A. Hostile Work Environment

G.L. c. 151B, s. 4 (1) prohibits discrimination in the workplace on the basis of sex. Sexual harassment is a form of sex discrimination actionable under G.L. s. 4 (1) and (16). See Collegetown, Division of Interco, Inc. v. MCAD, 400 Mass.156 (1987). Discrimination on account of ones gender also includes harassment in the workplace that is gender based but is not necessarily sexual in nature. Dinsmore & Ford v. Home Security, Inc., 19 MDLR 4 (1997); Baldelli v. Town of Southborough Police Department,17 MDLR 1541 (1995) In order to prove a cause of action for hostile work environment harassment based on gender, Complainants must demonstrate that the workplace is pervaded by offensive and unwelcome conduct directed at, or adversely affecting, females and that such conduct poses a formidable barrier to full participation in the workplace, effectively interfering with their ability to perform the job. Baldelli, supra; Ramsdell v. Western Massachusetts Bus Lines, Inc., 13 MDLR 1087 (1991) (standard for hostile work environment sexual harassment) Racial harassment cases have adopted the same standard. Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); Beldo v. U. Mass Boston, 20 MDLR 105, 111 (1998). The unwelcome conduct must be both subjectively and objectively offensive. See College-Town supra. at 162; Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678 (1993). The objective standard of sexually unwelcome conduct considers the evidence from the perspective of a reasonable person in the plaintiff's position. The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker's performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) citing Harris

v. Forklift Systems, Inc., 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000). The subjective standard of sexual harassment requires that the employee to whom the conduct is directed personally experiences the behavior to be unwelcome. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component of sexual harassment as "in the eye of the beholder.") Since Parker was a supervisor, Respondent Town of Carver would be liable for any conduct by him that is deemed to be discriminatory. College-town, supra.

G.L. Ch. 151B § 5 requires that complaints be filed within 300 days of an alleged act of discrimination. An exception to this rule exists where the Complainant proves that the conduct constitutes a continuing violation. Cuddyer v. The Stop & Shop Supermarket Company, 434 Mass. 521 (2001); Couture v. Central Oil Company, 12 MDLR 1401, 1419 (1990).

For actions that occur 300 days prior to the filing of a complaint to be actionable, there must be at least one incident of discriminatory conduct within the statute of limitations period which substantially relates to, or arises from, earlier discriminatory conduct and anchors the related incidents, thereby rendering the entirety of the claim timely. See Cuddyer, supra. at 531-532; 804 C. M.R. §1.10(2)

1. Englehart

I conclude that Englehart's allegations of hostile work environment sexual harassment/gender harassment are untimely. Englehart testified to three incidents of alleged harassment that occurred not later than January 2005. She filed her complaint on March 21, 2006, more than 300 days after the last alleged incident of harassment. There is no incident within the 300 day statute of limitations that substantially relates to, or arises from, the earlier

comments and therefore Englehart's claim of hostile work environment must be dismissed as untimely.

Even assuming that the comments were timely, I conclude that the three comments Parker made to Englehart regarding a conjugal visit with his wife, and about his having a long memory and a short trunk, though inappropriate, were isolated and were not sufficiently severe and pervasive so as to humiliate, threaten, or interfere with her ability to perform her job or compromise her full participation in the workplace. "A few isolated remarks over a period of time" are generally insufficient to meet the pervasiveness standard. Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 619-20 (1996). Chapter 151B is not a clean language statute and does prohibit all use of profane or offensive language. Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 214 (2000); Prader, supra, at 619-20 (1996). Moreover, the evidence does not support Englehart's claim of gender discrimination based on disparate treatment arising from Parker's requirement that she obtain an independent medical examination, while a male officer was not required to do so. Rather, the evidence supports Respondents' assertion that Englehart submitted vague notes from her physicians stating only that she could not work for a certain period of time. Parker testified credibly that in contrast, the male officer in question kept the department apprised of his condition with detailed medical documentation. Englehart did not establish that Parker's assertion was a pretext for unlawful discrimination and her claims are hereby dismissed.

2. Bassett

Bassett bases her hostile work environment sexual and gender harassment claims on Parker's conjugal visit and "short trunk" remarks, as well as two incidents that occurred in February and April of 2005 when Parker yelled at Bassett for failing to inform him about plans

for two DARE fundraising events and one incident in January 2006 when Parker berated her for not informing him about a planned drug search at the high school that she had arranged with the Plymouth County K-9 unit.

I conclude that Bassett's allegations of hostile work environment sexual harassment/gender harassment are also untimely. Bassett testified to three incidents of alleged sexual/gender harassment that occurred no later than January 2005. She filed her complaint on March 21, 2006, more than 300 days after the last alleged incident of harassment. Parker's yelling at Bassett on three occasions for not informing him of events that she had planned may not have been justified, but neither was it sexual in nature or gender based harassment. Parker yelled at both male and female employees and clearly was disposed by temperament to angry reactions.⁷ The only incident Bassett complained of that occurred within the 300 day statute of limitations was an occasion in January 2006 when Parker yelled at Bassett. There was no evidence that this incident substantially relates to, or arises out of the earlier sexual comments. Therefore Bassett's claim of hostile work environment sexual harassment and gender harassment are hereby dismissed as untimely.

Even if her claims were considered to be timely, as concluded above, the comments are not sufficiently severe and pervasive so as to constitute sexual or gender harassment. Therefore, Bassett's claims are hereby dismissed.

3. Sarmiento

Sarmiento's allegations of hostile work environment sexual harassment or gender harassment include conduct that took place in July 2004, when Parker commented negatively to Sarmiento about women getting tattooed. In January 2005, he told her she needed to watch her

⁷ There was testimony that Parker yelled at Zadok on at least two occasions and that another male officer complained to Zadok about Parker's yelling at him.

weight and pointed to two pizza boxes and asked if they belonged to her. In 2005, Parker used the word “cunt” in her presence in the context of a disciplinary meeting where Sarmento was acting as the union representative for two officers accused of using the word toward a restaurant employee.⁸ All of these incidents took place more than 300 days before Complainant filed her first complaint with this commission except for Parker’s comment on or about January 23, 2006 about the Neil Entwistle murders of his wife and nine month old daughter. While one might certainly find the sentiment expressed offensive, (that one could understand why a husband might kill his wife) I conclude that a reasonable person in Sarmento’s position would not consider this comment an expression of discriminatory animus toward women in the workplace or that it interfered with her ability to perform her job. I conclude that his comment was not an anchoring event that brings the earlier incidents of gender or sexual harassment within the statute of limitations. I therefore conclude that Sarmento’s complaint of hostile work environment based on gender is untimely and is hereby dismissed for lack of jurisdiction.

As with the claims of Bassett and Englehart, even if I were to determine that the claims of gender and sexual harassment were timely, I conclude that they are not sufficiently severe and pervasive to support a claim of hostile work environment discrimination based on gender. Sarmento’s claims of gender and sexual harassment are hereby dismissed.

B. Retaliatory Failure to Promote Duphily and Sarmento to Permanent Sergeant Positions

Massachusetts General Laws c. 151B, s. 4(4) makes it unlawful for any person, employer labor organization or employment agency to discharge, expel or otherwise discriminate against

⁸ Sarmento testified that one of the officers involved later told her while Parker was discussing the incident with him, Parker made the shape of a diamond with his hands and said that when you have a cunt you kick it under the table. This comment was not made about Sarmento or in her presence (Tr. p. 69-70). Parker testified that he may have made the shape with his hands but did not recall making the statement to the officer. (Tr. p.177-178) While the comment is certainly offensive, I do not believe that hearing about the comment after the fact created a hostile work environment for Sarmento.

any person because he has opposed any practices forbidden under c. 151B or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B.

Retaliation is a separate claim of 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). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001).

In order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) s/ he engaged in protected activity; (2) Respondent was aware s/he had engaged in protected activity; (3) Respondent subjected her/him to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the perpetrator of the retaliation, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Sarmiento engaged in protected activity by filing an MCAD complaint in March 2006. Parker was aware of the complaint and subsequently determined not to promote Sarmiento to the position of permanent sergeant, reversing a previous determination that he would make permanent appointments when the list was certified. Parker's decision not to make Sarmiento a permanent sergeant was adverse to her financially, because her future step and pay increases

were dependent upon the date she became permanent sergeant and she lost an indeterminate amount of money based on the pay differential.

Duphily engaged in protected activity when he agreed to assist Sarmento in her initial MCAD complaint. Like Sarmento, the failure to make Duphily a permanent sergeant caused him financial losses. The timing of Parker's decision, coming right after Sarmento filed her first discrimination complaint, naming Duphily as a witness, is strong evidence of retaliatory motive.

I did not credit Parker's testimony that his decision was based on his belief that the sergeants whose suspensions were still on appeal would have cause to sue the department if their positions were restored and Parker had made permanent replacements. I also did not credit Parker's testimony that he was unaware of the extent of the monetary loss to Sarmento and Duphily resulting from not appointing them to permanent positions. I find it implausible, given Parker's many decades of experience as a police officer and chief, that he would be unaware of the repercussions of his actions. I conclude that Duphily and Sarmento have established sufficient proof of unlawful retaliation by Respondents Town of Carver, Town of Carver Police Department in violation of M.G.L.c.151B §4(4).

C. Unequal Bathroom Facilities

M.G.L.c.151B§4(1) prohibits an employer from discriminating against an employee in the terms and conditions of employment on the basis of gender. In order to establish a prima facie case of gender discrimination, Complainants must show that they are members of a protected class, that they were subjected to adverse treatment and that similarly situated persons not of their protected class were treated differently. Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). Complainants have established the first prong of their prima facie case by virtue of

their gender, female. They also established that they were adequately performing their jobs. Throughout the female officers' employment with the Carver police department the women's bathrooms and locker room had no dedicated shower. The women and men had separate locker rooms and the women had additional private bathrooms. Parker offered as a solution to install a deadbolt lock on the door of the men's room that contained a shower. The installation of a deadbolt lock would essentially create privacy for whoever took a shower; while the shower is located in a men's lavatory, there was another bathroom near the dispatch area that could be used if someone were taking a shower in the men's lavatory. Given the evidence before me that Duphily used the shower only once in 12 years on the force; that Englehart had no need to use the shower on a regular basis; the lack of evidence regarding how the lack of a shower adversely affected the female officers; and the fact that the men's room could be locked if a female officer needed to take a shower, essentially rendering the facility a unisex bathroom, I conclude that installing a lock on the shower room door rather than install a separate shower in the women's locker room did not constitute disparate treatment on the basis of gender. Moreover, there is a dearth of evidence that the women's locker room, which contained a lock, was less private than the men's locker room and the facts do not support a claim of gender discrimination. The Complainants' disparate treatment claims with respect to the bathroom and locker room are hereby dismissed.

IV. REMEDY

Pursuant to M.G.L. c.151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing

Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

I conclude that Duphily is entitled to emotional distress as a result of unlawful retaliation by Respondents Town of Carver, Town of Carver Police Department. Duphily testified credibly that he lost sleep and was upset about the uncertainty of being placed in the provisional sergeant position which affected his ability to work. He also testified that he was concerned about the financial loss involved in not having been made a permanent sergeant in 2006, which would have been the date to which his step increases were tied. I conclude that Duphily is entitled to \$10,000.00 in damages for emotional distress.

I conclude that Sarmiento is entitled to emotional distress damages resulting from unlawful retaliation by Respondents Town of Carver, Town of Carver Police Department. Sarmiento testified credibly that she was very upset, sad, angry and depressed upon learning that

she would not be made a permanent sergeant in April 2006 after studying for the test and paying to take the test. She suffered from insomnia and started to grind her teeth. I conclude that Sarmento is entitled to \$10,000.00 in damages for emotional distress.

B. Lost Wages

I conclude that Duphily and Sarmento are each entitled to be compensated for the wages they lost by not having been promoted to permanent sergeant positions in April 2006. They are also entitled to have their permanent appointment dates for the sergeant position amended to a date no later than 15 days after the certification of the civil service list for sergeants in March 2006.

V. ORDER

1. Respondents Town of Carver, Town of Carver Police Department shall cease and desist from engaging in any retaliatory conduct in violation of M.G.L.c. 151B, sec. 4(4).

2. Respondents Town of Carver, Town of Carver Police Department shall pay to Complainant Mark Duphily the sum of \$10,000.00 for emotional distress damages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3. Respondents Town of Carver, Town of Carver Police Department shall pay to Complainant Sheri Sarmento the sum of \$10,000.00 for emotional distress damages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4. Respondents Town of Carver, Town of Carver Police Department shall request of the Massachusetts Civil Service Commission to amend the seniority date or permanent appointment dates for sergeant of Mark Duphily and Sheri Sarmento to a date no later than 15 days after the certification of the list in March 2006 and shall consider the amended appointment dates as the controlling date for all attendant benefits, including seniority and pay grade.

5. Respondents Town of Carver, Town of Carver Police Department shall, after conferring with counsel for Duphily in order to determine the exact amount of lost wages, pay Mark Duphily for wages lost as a result of Respondents' retaliatory failure to make him permanent sergeant in 2006 with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

6. Respondents Town of Carver, Town of Carver Police Department shall, after conferring with counsel for Sarmento in order to determine the exact amount of lost wages, pay Sheri Sarmento for wages lost as a result of Respondents' failure to make her a permanent sergeant in 2006, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order. Complainant may also file a petition for attorney's fees and costs.

SO ORDERED, this 20th day of January, 2015

JUDITH E. KAPLAN
Hearing Officer