

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and WILLIAM STONE,
Complainants

v.

Docket No. 08 BEM 01534

PLYMOUTH COUNTY
SHERIFF'S DEPARTMENT and
BRIAN GILLEN,
Respondents

For Complainant Stone: Jeffrey M. Sankey, Esq.
For Respondent: Isabel N. Eonas, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 28, 2008, William Stone (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) against Respondents alleging retaliation pursuant to G.L. c. 151B, section 4(4). Complainant asserts that he was unjustly transferred to the night shift after testifying at an MCAD public hearing on behalf of a fellow correction officer.

On February 28, 2011, the Commission issued a Probable Cause Finding and subsequently certified the case to public hearing. A public hearing was held on March 25, 26, and April 11, 2013.

At the hearing, the following individuals testified: Complainant, Brian Gillen, Antone Moniz, Joseph McDonald, Michael Duggan, Paul Lawton, and Paul Chiano.

The parties submitted one (1) joint exhibit; Complainant submitted thirteen (13) additional exhibits and Respondent submitted eighteen (18) additional exhibits.

Based on all the relevant, credible evidence cited below and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant William Stone is an employee of Respondent Plymouth County Sheriff's Department. He has been employed there since 1983. During his approximately thirty years of employment, Complainant has held the ranks of Correction Officer, Lieutenant, Captain, and Assistant Deputy Superintendent. He has served in the assignment of Shift Commander since 1994 and currently serves as Night Shift Commander.
2. Respondent Plymouth County Sheriff's Department operates the Plymouth County House of Correction, a correctional facility housing inmates convicted of misdemeanors and those awaiting trial within Plymouth County. Since January of 2004, the Sheriff of Plymouth County has been Joseph D. McDonald, Jr.
3. From 1994 to 1996, Complainant served as a Shift Commander on the night shift (11 p.m. to 7:00 a.m.). In 1996, he transferred to the day shift (7:00 a.m. to 3:00 p.m.) where he worked for twelve years. As a Shift Commander on the day shift, Complainant was responsible for the overall daily operation and security of the shift, inmate movement, civilian staff, CERT (Correctional Emergency Response Team) officers who provide security in corridors and in the housing units and other personnel working on the day shift. They have fixed posts in specified locations.
4. At all relevant times, Respondent Brian Gillen has been the Superintendent of the

Plymouth County House of Correction. He reports directly to the “Special” Sheriff and indirectly to the Plymouth County Sheriff.

5. The facility’s Assistant Superintendent has been, at all relevant times, Antone Moniz, who reports directly to Superintendent Gillen. Moniz supervises Unit Team Managers throughout the facilities who, in turn, supervise Lieutenants.
6. Superintendent Gillen testified that in November of 2006, he began to have concerns about Complainant’s lax supervision of CERT officers. Gillen states that he raised his concerns at a November 22, 2006 meeting and instituted drills to improve the performance of CERT officers. According to minutes of the meeting, Gillen cautioned that CERT officers need to “stay on post.” Complainant’s Exhibit 4. At the time, Complainant was a Day Shift Commander. Nonetheless, Gillen testified that prior to 2007, Complainant was a good and hard worker.
7. Superintendent Gillen testified that he was also concerned about Complainant’s failure to report a derogatory remark by Correction Officer John Corbin about Special Sheriff Pudolsky. Complainant’s Exhibit 6, p. 4. Corbin allegedly said that the move of Program Director Chiano’s office out of the administration building, was “all Pudolsky -- Pudolsky runs the show up there,” was then cautioned by Chiano, “careful, Gerry is like a father to me,” to which Corbin said “... Pudolsky’s a saint, he walks on water, he’s a pickle.” Complainant’s Exhibit 6 at p. 7 (Chiano’s report dated March 7, 2007). According to Chiano’s public hearing testimony, Complainant was approximately two to three feet away when Corbin and Chiano had the exchange about Pudolsky. Various witnesses to the incident produced reports such as Unit Manager Michael Neri, ADS Stacy Slauson, Correction Officer Collins, Education Coordinator Cardillo-Backoff,

and Correction Officer David Prendergast. Complainant's Exhibit 6. With the exception of Neri, none of the witnesses heard the alleged "pickle" comment. Id. Complainant submitted a report on the day after the incident stating that he heard Corbin inquire about how Pudolsky "was doing" and heard Chiano respond, "[h]e's like a father to me" but that he did not hear more of the exchange. Complainant's Exhibit 6. Superintendent Gillen reviewed a video of the incident (without audio) and concluded that Complainant overheard the remark and failed to file a report. Superintendent Gillen testified that Complainant should have taken Corbin aside and done "something" rather than be "oblivious."

8. Complainant's Employee Performance Review System ("EPRS") evaluation for May of 2006 to May of 2007 rates Complainant as "above average" or "exceeds" in most categories and contains no below-average ratings. Complainant's Exhibit 7. A performance summary attached to the evaluation states that Complainant "demonstrates "natural leadership skills" and "faces problems with confidence."
9. Assistant Superintendent Moniz testified that he began having issues with Complainant in 2006 although he gave Complainant "above average" or "exceeds" in most categories of his May of 2006 to May of 2007 evaluation. Moniz acknowledged that Complainant's failure to supervise CERTs was a "one-time occurrence" in 2006-2007 but he testified that the failure to supervise became an ongoing problem in 2007-2008.
10. On May 17, 2007, Education Coordinator Connie Cardillo-Backoff drafted a memo to Program Director Paul Chiano about the allegedly condescending manner in which Complainant had addressed her in regard to a number of incidents involving the library bathroom. Respondent's Exhibit 11. According to Cardillo-Backoff's memo, officers

and security staff persisted in using the library bathroom after they were barred from doing so. Her memo claims that when she called this matter to Complainant's attention, he denied that the problem occurred on his 7-3 shift, stated that he had spoken to individuals about library bathroom issues, and predicted that "it should not be a problem again." On August 6, 2007, she wrote another memo about the library bathroom, stating that urine was over the toilet seat and floor. Respondent's Exhibit 12. Cardillo-Backoff claimed to have spoken to Complainant on numerous occasions without obtaining a resolution of the bathroom problem. I decline to credit these memoranda because they constitute unsubstantiated hearsay.

11. Program Director Paul Chiano testified at the public hearing that Complainant failed to resolve the bathroom problem. At Chiano's deposition, however, he said that Complainant had resolved the problem.
12. On or about August 15, 2007, Plymouth County Sheriff McDonald convened supervisory staff to announce that all security-related Assistant Deputy Superintendents/Shift Commanders would receive a \$10,000.00 pay increase. At the March 25, 2013 public hearing in this matter, Superintendent Gillen testified that Complainant adopted an "uncalled for" and "ungrateful" manner at the staff meeting in questioning whether the increase would be retroactive and, in so doing, put the Sheriff on the spot. Gillen previously signed an affidavit on July 2, 2008 in which he stated that Complainant had expressed displeasure at the meeting about the size of the salary increase but did not raise the issue of retroactivity.
13. On September 21, 2007, Education Coordinator Connie Cardillo-Backoff forwarded to Assistant Superintendent Moniz an email from one of her teachers who stated that she

had to wait six (6) minutes for her student/inmates to be checked out of the Library by a Correction Officer at the end of a 1:00 p.m. class. Respondent's Exhibit 2.

14. On November 7, 2007, Superintendent Gillen conducted a command staff meeting during which he stated that staff should stay on their assigned posts until relieved, remain in the spine of the institution rather than go into offices, conduct more pat searches, submit timely reports, finalize tapes, follow procedures when moving inmates out of units, complete use-of-force reports, secure evidence in lockers, obey the uniform policy, defer to supervisors in denying inmate leave, complete monthly body alarm testing, verify medication, take headcounts, pick up trash, document security checks, refrain from bringing food into the facility, use rubber totes to protect footwear, follow basic security procedures, turn off lights during daylight hours, and watch for depression during holidays. Respondent's Exhibit 1. These matters were addressed to nine (9) Captains, nineteen (19) Lieutenants and nine (9) Assistant Deputy Superintendents including Complainant. Id.
15. Complainant testified that CERT officers might be off their fixed posts for legitimate reasons such as relieving line officers or escorting inmates to designated locations. He stated that in response to concerns expressed about CERT coverage, he made sure that there was sufficient coverage in corridors.
16. In the latter part of 2007, an issue arose regarding the appropriate time to end afternoon classes. The education staff wanted dismissal time to be 2:40 p.m. whereas correction officers wanted class to end at 2:30 p.m. in order to have time to search and escort inmates back to their units prior to the 3:00 p.m. shift change. According to three emails from facility educators drafted between September of 2007 and December 21,

2007, correction officers failed to search inmates at the end of 2:00 p.m. classes, resulting in educators being left in classrooms with inmates until after the 3:00 p.m. shift change. Respondent's Exhibits 16-18.

17. Complainant testified that he wanted classes to end at 2:35 p.m. so that staff could pat-search inmates and escort them back to their units before 2:45 p.m. when a "stop movement" order occurred prior to the 3:00 p.m. shift change, but the education staff wanted classes to last longer. According to Assistant Superintendent Moniz, he supported the dismissal of classes at 2:35 p.m. in order to permit inmates to be escorted back to their units in a timely fashion.
18. In a memo drafted on January 26, 2008,¹ Assistant Superintendent Moniz communicated to both the 7-3 and 3-11 Shift Commanders that he was concerned about officers not being on their posts, their alleged attitudes towards education personnel, and the safety of civilians in classrooms. Respondent's Exhibit 3A. He attached two reports from Education Coordinator Cardillo-Backoff who maintained that after Complainant agreed to the dismissal of inmates from class at 2:40 p.m., he changed his mind on the basis that it was too close to shift change and thereafter permitted his CERT officers to interrupt teaching activities at 2:30 p.m. in order to escort inmates out of their classrooms. Respondent's Exhibits 3B & C. Cardillo-Backoff drafted another memorandum dated February 21, 2008 again claiming that classes were being broken up at 2:30 to 2:35 p.m. rather than 2:40 p.m. and asserting that from 2:30 p.m. onward, there were no CERT officers in the hallway to complete searches of inmates leaving classes. Respondent's Exhibit 15. I decline to credit these hearsay statements from

¹ Assistant Superintendent Antone Moniz testified credibly that the date on the memorandum – January 26, 2007 – is a typographical error and that the correct date should be January 26, 2008.

Cardillo-Backoff.

19. Program Director Paul Chiano testified that, on some occasions, officers went to classrooms too early and were disruptive and on other occasions went too late and kept teachers waiting. Chiano testified that he observed security personnel sitting in offices rather than at their assigned posts. I credit his testimony.
20. Chiano received a memorandum from Education Coordinator Cardillo-Backoff dated February 21, 2008 stating that she had rearranged the education schedule so that classes would thereafter be held between 1:40-2:30 p.m. and from 2:35-3:45 p.m. in order to eliminate the conflict between the dismissal time of classes and the institution's shift change at 3:00 p.m. She claimed that notwithstanding the change, CERT officers were still unavailable at 2:30 p.m. for class dismissal which made teachers late in getting to their next classes at 2:35 p.m. and which caused correction officers to send inmates back to their units in lieu of having them attend 2:35 p.m. classes. Respondent's Exhibit 15.²
21. Beginning on March 5, 2008, the MCAD held a public hearing in regard to a complaint of discrimination by Correction Officer Timothy Baker against the Plymouth County Sheriff's Department. Baker's complaint alleged gender discrimination and retaliation. Gillen was the supervisor accused of retaliation, in the form of a recommendation, based on advice from Unit Team Manager Michael Neri, that Baker not be re-appointed to Lieutenant following his complaint of sex discrimination. Complainant's Exhibit 1. At day two of Baker's MCAD public hearing (March 6, 2008), several members of the Sheriff's Department testified on behalf of Baker including Complainant, Unit Team

² Cardillo-Backoff was subsequently fired by the Sheriff's Office. At the time of her termination she reported to UTM Neri rather than Chiano. Chiano testified that she was removed from his supervision because she made an "untrue allegation" against him.

Manager Ann Marie Kelly Norton, and Assistant Deputy Superintendent Michael Duggan. A number of senior personnel at the Sheriff's office testified on behalf of the Sheriff, including Superintendent Gillen and Michael Neri.

22. Complainant testified at the Baker public hearing that Baker was a "very good Lieutenant working under my shift" who was "confident," "showed initiative," and "completed his tasks." Complainant also testified, in response to a question about the reputation of Michael Neri, that "subordinate staff, they're not crazy about Mike Neri ... he's unliked" and subordinates, "didn't think he was fair or trustworthy."

Complainant conceded that Neri had a reputation for being a difficult supervisor, for being "nitpicky," for "holding subordinates to a high standard," and a reputation for dishonesty, although Complainant stated that he did not personally find him to be dishonest. Complainant's Exhibit 10.

23. Unit Team Manager Norton testified at the Baker public hearing that the management style of Michael Neri was "tough" and "demanding," that he was a "stickler," and that he held people "accountable," but she also described Neri as "fair" and stated that she did not know him to be untruthful. Respondent's Exhibit 5.

24. Assistant Deputy Superintendent Michael Duggan testified at the Baker public hearing that Timothy Baker did a "good, thorough job" and that he (Duggan) had faith and confidence in Baker. Duggan described Michael Neri as not well-liked, as having a reputation for being unfair and for "going after people." Respondent's Exhibit 7.

According to Duggan's testimony at the Baker public hearing, Neri had a reputation for being a "stickler" and "demanding," for "hold[ing] people accountable" and for being harsh but that Duggan didn't think Neri was untruthful. Id. At the time Duggan

testified on behalf of Baker, Duggan was in charge of Inner Perimeter Security and worked the day shift. Previously, in 2004, he was re-assigned by Superintendent Gillen from the day shift to the overnight shift. Respondent's Exhibit 6. Duggan remained on the night shift for approximately a year and then moved to the position he presently occupies. He was not re-assigned from his Inner Perimeter Security position after testifying at the Baker public hearing.

25. Complainant and Duggan were forced to use vacation or compensatory time to testify at the MCAD public hearing even though they were subpoenaed to attend. Complainant's Exhibit 10. Norton could not remember how she was reimbursed for her testimony. Complainant was subsequently compensated for the time he took off from work in order to testify at the MCAD after the issue was grieved.
26. Respondent's Director of Human Resources, Paul Lawton, testified that he attended the entire public hearing in the Baker case and prepared a summary of what he heard at the request of Sheriff's Department General Counsel Patrick Lee.
27. Despite his personal involvement in the Baker litigation as the supervisor who was directly accused of retaliation, Superintendent Gillen states that he was unaware that Complainant had testified on March 6, 2008 at the Baker hearing and that he (Gillen) never discussed the case with Paul Lawton.³ Gillen claims that it was not until he was sued for retaliation by Complainant that he learned that Complainant had testified on behalf of Baker and that it was not until the current public hearing that he learned what Complainant had said at Baker's public hearing. I do not credit Superintendent Gillen's testimony in this regard.

³ The MCAD ultimately issued a decision in favor of Baker on his charge of retaliation against the Sheriff's Department but did not do so until March of 2009, after the events at issue in this matter.

28. Sheriff McDonald testified that he was kept informed of the Baker public hearing, received updates on its progress, and was informed about which senior officers participated in the public hearing as witnesses. The Sheriff stated that he does not remember being told about Complainant's testimony in the Baker case but recalls that Paul Lawton reported back on "how things were going."
29. Superintendent Gillen testified that in March of 2008, he observed at least one inmate in the main corridor of the correctional facility but no CERT officers in sight. Gillen states that he escorted the inmate to a CERT officer whom he located and later spoke to Complainant and the Day Shift Captain about the lack of supervision. Gillen described Complainant's reaction as "detached."
30. According to Complainant, after Gillen spoke to him about the lack of CERT supervision in March of 2008, he took appropriate action by speaking to the CERT officers involved.
31. Superintendent Gillen testified that he recommended to Sheriff McDonald that the assignments of the Day and Night Shift Commanders be switched based on his perception that Complainant had become "detached" and the Night Shift Commander was more pro-active and communicative than Complainant. Gillen also justified Complainant's transfer to the night shift on the basis that it involved no civilian employees, less inmate movement, and half as many CERT officers as the day shift. Gillen claims that he made the recommendation because he was disappointed with Complainant's performance as Day Shift Commander, believed that Complainant "wanted" a change, viewed Complainant as "burnt out" on the day shift, and thought Complainant would be a "better fit" for the night shift. Gillen does not recall if he

made the recommendation to transfer Complainant before or after the Baker public hearing. According to Assistant Superintendent Moniz, Superintendent Gillen did not discuss the transfer with him prior to its implementation even though he was Complainant's direct supervisor.

32. Sheriff McDonald implemented Complainant's reassignment to the Night Shift based entirely upon Gillen's recommendation. He testified that he did so based on rationales that the night shift would involve less inmate movement, fewer concerns about CERT teams, and would allow Complainant to "recharge his batteries."
33. On May 1, 2008, Gillen informed Complainant that he was being re-assigned to the night shift, effective May 22, 2008.
34. Complainant acknowledged that he was interested in leaving his Shift Commander assignment because it's a "burn-out" job but denies that he sought a reassignment to the overnight shift. Complainant's Exhibit 12. Complainant testified that he was very upset over being transferred to the night shift because it was a "huge" disruption to his life. He described the day shift as better for family life, better for his social life, better for maintaining a normal schedule, better for regular sleep, and better for exercising. After his transfer to the night shift, Complainant stopped exercising and gained weight. He described the reassignment as humiliating and like a "slap in the face." He testified that he received cards from people expressing sympathy about the move. He felt like he was demoted even though he sustained no loss in pay or benefits. Prior to his transfer to the night shift in May of 2008, Complainant had worked days for twelve years.
35. After being informed that he was being re-assigned to the night shift, Complainant

unsuccessfully sought to speak to the Sheriff.

36. Complainant began working on the night shift on May 22, 2008. On May 28, 2008, he filed a retaliation complaint with the MCAD.

37. In November of 2008, Assistant Superintendent Moniz provided Complainant with an Employee Performance Review System (“EPRS”) evaluation for the May of 2007 to May of 2008 period. Complainants’ Exhibits 8 & 9. The evaluation is approximately six-months late. It rates Complainant as generally “above average,” grants him an “exceeds” in “situational awareness,” and assigns him a single “below average” rating in the subcategory of “reliability of results” within the general category of “dependability.” Complaint’s Exhibit 9. The evaluation does not refer to Complainant’s transfer to the night shift six months earlier. The evaluation initially gave Complainant a second below average rating in “response to supervision” (another subcategory of “dependability”) on the basis that Complainant had not followed the proper chain of command in reporting an allegation about the possible intoxication of a staff member, but this rating was crossed after Complainant objected to its inclusion pre-dating the evaluation period. Complainant’s Exhibit 8. In the evaluation, Moniz commented that CERT officers failed to maintain their assigned posts which caused teachers to become concerned about their safety and noted that Complainant had expressed “a need for a change” during the May of 2007 to May of 2008 evaluation period. Complainants’ Exhibits 8 & 9.

III. CONCLUSIONS OF LAW

B. 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). In the absence of direct evidence of a retaliatory motive, the MCAD must follow the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). *See also* Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655 (2000).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and (4) a causal connection exists 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). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. *See* 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).

Once a prima facie case is established, the burden shifts to Respondents at the second stage of proof to articulate a legitimate, non-retaliatory reason for their action(s) supported by credible evidence. *See* 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 Respondents succeed in doing so, 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 retaliation. *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 Respondents are covering up a retaliatory motive which is the determinative cause of the adverse employment action. *Id.*

Applying the aforementioned elements to the matter at hand, there can be no doubt that Complainant participated in protected activity when he testified at Correction Officer Timothy Baker's public hearing at the MCAD on March 6, 2008. Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if she "has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, sec.5]." There is also significant credible evidence from which to infer that Superintendent Gillen and Sheriff McDonald were aware that Complainant had engaged in this protected activity based on Paul Lawton's reports of the MCAD proceeding.

Turning to the third element of the prima facie case, the credible evidence establishes that Complainant suffered an adverse employment action following his testimony when he was re-assigned from his position as Day Shift Commander to Night Shift

Commander. The reassignment of duties can constitute retaliatory discrimination even if unaccompanied by a demotion. See Colaiacomo v. Mass. Department of Environment Protection, 29 MDLR 19 (2007) (reassignment to job with same wages and benefits but with reduced field opportunities and career advancement opportunities constituted adverse employment action); Farricy v. Suffolk County Sheriff's Department, 22 MDLR 27 (Full Commission, March 31, 2000) (threat to transfer Complainant constituted unlawful retaliatory conduct prohibited by C. 151B). In this case, Complainant's reassignment to the overnight shift was more than a minor alteration of his working conditions. The reassignment disrupted his family and social activities and impacted his health. It upended sleep patterns that Complainant had formed over the previous twelve years of working on the day shift and was viewed by many as a *de facto* demotion. The impact of the reassignment extended not just to Complainant but to others who would be dissuaded from supporting a co-worker's claim of discrimination in the future under the threat of similar retribution.

The fourth and final element of a prima facie case requires evidence of a causal connection between the protected activity at issue and the subsequent adverse employment action. Respondents dispute the existence of a causal link based on Superintendent Gillen's professed ignorance of Complainant's testimony at the Baker hearing. According to Gillen, he was not only ignorant of the content of Complainant's testimony, he was unaware that Complainant had participated in the Baker proceeding. Such assertions, if credible, would rebut a causal connection between the Complainant's protected activity and the adverse action which followed, but I do not find the Superintendent's professed ignorance to be credible.

There is substantial and credible evidence that Superintendent Gillen knew, prior to reassigning Complainant to the overnight shift, that Complainant had testified on behalf of Baker. Complainant informed Gillen's secretary, on the day of the Baker hearing, that he was leaving his post as Day Shift Commander in order to testify at the MCAD. Complainant's testimony was observed by Paul Lawton, who attended the Baker hearing as a representative of the Sheriff's Department and who reported his observations to the Sheriff's General Counsel Patrick Lee. It strains credulity that Superintendent Gillen, accused of discrimination and retaliation by Correction Officer Baker, remained ignorant of the adverse testimony by Complainant Stone. Complainant did not describe Superintendent Gillen in unflattering terms, but his negative description of Michael Neri was adverse to Gillen's interests in the case because it was Neri who recommended that Gillen not reappoint Baker as Lieutenant. I deem it probable that Gillen was kept abreast of the Baker hearing by Paul Lawton just as Sheriff McDonald was, by his own admission, kept informed.

Once Gillen's professed ignorance of Complainant's testimony is rejected, a causal link may be inferred between Complainant's testimony and his subsequent reassignment to the overnight shift. The sequence of events -- less than a two-month separation between Complainant's March 6, 2008 testimony and his May 1, 2008 notice of transfer -- lends support to the causal link. See Mole v. University of Massachusetts, 442 Mass. 582 (2004) (evidence of retaliation may be inferred from the timing of relevant events); Ritchie v. Department of State Police, 60 Mass. App. Ct. 599 (2004) (temporal proximity between protected activity and adverse employment action permits inference of a causal connection.); Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 1144-45 (1995)

(termination within six weeks of participation in protected activity is evidence of causal connection). Accordingly, Complainant has made out a prima facie case of retaliation.

Notwithstanding the existence of a prima facie case, Respondents may dispel the inference of retaliation by presenting credible evidence of legitimate performance-based reasons for Complainant's reassignment. In this regard, Superintendent Gillen claims to have harbored concerns about Complainant's performance as Day Shift Commander beginning in 2006. Gillen points to a 2006 memorandum addressing the lax supervision of CERT officers as evidence of performance issues pre-dating Complainant's March 6, 2008 testimony in the Baker matter. Such concern is not persuasive, however, in light of the 2006 memorandum not being directed at Complainant; in light of Gillen's testimony that prior to 2007, Complainant was a good and hard worker; and in light of Gillen's co-signing Complainant's May, 2007 job evaluation in which Complainant is described as having "natural leadership skills" and receives numerous ratings of "above average" and "exceeds."

A variety of matters which took place in 2007 are similarly unpersuasive as reasons for Complainant's reassignment in May of 2008. For instance, Superintendent Gillen testified about Complainant's failure to report a derogatory remark allegedly made by Correction Officer John Corbin about Special Sheriff Pudolsky, but there is no credible evidence that Complainant overheard the Corbin remark or that Gillen expressed any concern until after the Baker hearing about Complainant's failure to report the remark. Another unpersuasive reason for reassignment focuses on the allegedly ungracious manner in which Complainant responded to the Sheriff's announcement of a salary increase. Superintendent Gillen testified that Complainant

was rude in questioning whether the salary increase would be retroactive but Gillen failed to explain the relationship between this alleged breach of etiquette and reassignment to the overnight shift.

Respondents also proffered considerable evidence about staff educators being dissatisfied over the condition of a library bathroom and about the appropriate release time for afternoon classes. An email exchange in 2007 indicates that educators favored a 2:40 p.m. release time in order to maximize classroom time whereas Complainant favored a 2:35 p.m. release time in order to maximize the opportunity for security activities. The memos evince a difference of opinion about who was responsible for fouling the bathroom and how much time was needed to secure the facility prior to the 3:00 p.m. shift change, but they do not show that the Superintendent was dissatisfied with Complainant's handling of these matters. The teachers' concerns, moreover, consist chiefly of hearsay communications by former Educator Coordinator Constance Cardillo-Backoff who did not testify at Complainant's public hearing, who according to Program Director Paul Chiano, made false statements about him which caused her to be removed from his supervision, and who was ultimately fired by the Sheriff's Department. I decline to credit her allegations for their truth and do not consider them a convincing basis for Superintendent Gillen's reassignment of Complainant the following year in May of 2008.

Both sides agree that in March of 2008, Superintendent Gillen observed at least one inmate in the main corridor of the facility without any CERT officers in sight. Gillen described Complainant's reaction as "detached" whereas the Complainant testified that after Gillen spoke to him about the incident, he took appropriate action.

Regardless of how Complainant responded, a single incident involving a lack of supervision by CERT officers in March of 2008 is insufficient to constitute the primary reason Complainant's reassignment in May of 2008. Instead, the evidence points to Complainant's protected activity in testifying at the Baker hearing as the reason for his reassignment. See Lipchitz v. Raytheon Company, 434 Mass. 493, 504-505, n. 17 (2001); Wynn v. Wynn P.C. v. MCAD, 431 Mass. 655 (2000).

After weighing all the evidence and evaluating the credibility of the witnesses, I conclude that it was Complainant's testimony on behalf of Timothy Baker, not the failure to ensure proper supervision of inmates, which resulted in his being reassigned to the overnight shift. Thus, Respondents have failed to articulate a legitimate, non-retaliatory reason for their action supported by credible evidence. See 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). I arrive at this conclusion based on evidence that the so-called concern about unescorted inmates was a one-time occurrence, that Complainant received an outstanding evaluation for this period of time, and that his subsequent evaluation also rated him as a generally above-average supervisor. Lending support to my conclusion is the fact that Superintendent Gillen did not discuss his plan to reassign Complainant with Assistant Superintendent Moniz even though Moniz was Complainant's immediate supervisor. Had the plan been a legitimate response to operational problems, it stands to reason that Superintendent Gillen would have informed Moniz prior to taking such action. I am also influenced by the specious rationale that Gillen was acting in conformity with Complainant's own wishes. Although Complainant had expressed an interest in leaving his Shift Commander assignment, no one would

confuse such a statement with a desire to transfer to the overnight shift, since the latter involved a significant disruption to his sleep patterns, his family life, and overall well-being.

Respondents make the fair point that in addition to Complainant testifying on behalf of Timothy Baker in March of 2008, Assistant Deputy Superintendent Michael Duggan and Unit Team Manager Norton also did so without experiencing negative consequences. Duggan, like Complainant, not only spoke favorably about Baker, he also described Michael Neri in harsh and negative terms. Respondents point to the lack of retaliation against Duggan as evidence that the reassignment of Complainant to the night shift was unrelated to his testimony in the Baker case. While this point has merit, not every protected activity results in retribution, otherwise retaliation would be a transparent offense. More often than not, retaliatory conduct consists of a complex blend of protected activity, disappointed expectations, and misguided notions of loyalty. Complainant argues that such was the case here, given his prior friendship with Superintendent Gillen and the fact that he, unlike Duggan, had not previously been assigned to the overnight shift.

IV. REMEDIES AND DAMAGES

A. Affirmative Relief

Pursuant to G.L.c.151B, sec. 5, the Commission has the authority to issue orders for affirmative relief, including reinstatement. I conclude that the findings of fact set forth in this decision merit such action and that Complainant is entitled to reinstatement to his former assignment as Day Shift Commander.

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) damages for lost wages and benefits; and 2) damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Complainant has suffered no loss of income but has testified convincingly about his emotional distress. An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004).

Complainant testified that he was very upset over being transferred to the night shift because it was a “huge” disruption to his life. He described the day shift as better for family life, better for his social life, better for maintaining a normal schedule, better for regular sleep, and better for exercising. After his transfer to the night shift, Complainant stopped exercising and gained weight. He described the reassignment as humiliating and like a “slap in the face.” He testified that he received cards from people expressing sympathy about the move. He felt like he was demoted even though he sustained no loss in pay or benefits. Prior to his transfer to the night shift in May of 2008, Complainant had worked days for twelve years.

After weighing all the factors contributing to Complainant's emotional distress, I conclude that Complainant is entitled to \$ 75,000.00 in emotional distress caused by Respondent's retaliatory actions.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

- (1) Cease and desist from all acts of retaliation;
- (2) Reinstate Complainant to the position of Day Shift Commander.
- (3) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$75,000.00 in emotional distress damages.

Complainant shall receive the sums outlined above within sixty (60) days of receipt of this decision plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

- (4) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Plymouth County Sheriff's Department supervisors and managers. Such training shall focus on all aspects of discrimination. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission

has the right to send a representative to observe the training session.

Following the training session, Respondent shall send to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any supervisors and administrators who fail to attend the original training and for new supervisors and administrators who are hired or promoted after the date of the initial training session. The repeat training session shall be conducted within one year of the first session. Following the second training session, Respondent shall send to the Commission, the names of persons who attended the training.

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

So ordered this 15th day of August, 2013.

Betty E. Waxman, Esq.,
Hearing Officer

