

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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SCOTT DICKINSON,  
Complainant

v.

Docket No. 07 BEM 01924

UMASS MEMORIAL MEDICAL GROUP,  
Respondent  
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Appearances: Ronald E. Gregson, Esq., for Complainant  
Robert L. Kilroy, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 3, 2007, Scott Dickinson (“Complainant”) filed the instant complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging retaliation resulting from the filing of an earlier MCAD complaint on May 9, 2007 (07 BEM 01139). Complainant amended his August 3, 2007 complaint three days later to claim that the alleged acts of retaliation -- verbal ridicule, performance warnings, a three-day suspension, disproportionately heavy assignments, and the mishandling of grievances -- collectively resulted in his constructive discharge.

Complainant’s original complaint filed on May 9, 2007 asserted that the UMass Memorial Medical Group (“Respondent”) failed to accommodate his learning disabilities. That complaint was dismissed by the MCAD on December 22, 2008 based on a lack of probable cause. Respondent’s Exhibit 1; Stipulated Facts. The instant

complaint resulted in a probable cause finding on December 30, 2008 and a certification to public hearing on November 17, 2009, although the constructive discharge portion of the complaint was dismissed prior to public hearing.

A public hearing was conducted on July 12 and 13, 2010 and on October 1, 4, 8, 11 and 12, 2010. The parties introduced ninety-one (91) joint exhibits. Complainant introduced nine (9) additional exhibits and Respondent introduced eighteen (18) additional exhibits. The following individuals testified at the public hearing: Complainant, Mila Bajraktari, Dr. Charles Carl, Dr. Robert Finberg, Dr. Ellen Gravallese, Dr. Daniel Lasser, Dr. Dominic Nompleggi, Karen Pendergast, Jeanne Sampson, and Michele Streeter.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses and/or the parties' stipulated facts are not in accord with or are irrelevant to my findings, the testimony and facts are rejected.<sup>1</sup> Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant began employment with Respondent on or about December 5, 2005 as a division administrator in the Division of Gastroenterology of the Department of Medicine. Joint Exhibit 6. As a division administrator, Complainant was responsible for the financial, operational, and general business functions of the division, including responsibility for developing annual business plans, producing

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<sup>1</sup> In particular I decline to give weight to the testimony of Joan Lange on the basis that her testimony is not relevant to the issues in dispute.

- management information reports, overseeing billing activities, and supervising personnel. Joint Exhibit 7.
2. Complainant did not self-identify as an individual with a learning disability when hired and did not make any request for accommodations upon hire.
  3. Complainant's direct supervisor was Robert Elston-Pollock, a senior administrator in the Medicine Department.
  4. Prior to disclosing a disability and requesting accommodations, Complainant received memos from staff criticizing his work. E.g. Respondent's Exhibits 5-7, 18. Senior accountant Lynda Holmes expressed concern about Complainant's lack of understanding of "the basics." Joint Exhibits 9, 12. Complainant was counseled about his hours. Joint Exhibit 10. The Chief of the Division of Gastroenterology, Dr. Dominic Nompleggi, M.D., complained about Complainant's performance. Joint Exhibit 11; Respondent's Exhibits 10 & 18. On October 12, 2006, Elston-Pollock cancelled Complainant's scheduled attendance at a conference in Las Vegas because of continued performance difficulties. Joint Exhibit 14.
  5. On October 13, 2006, the day after Complainant received the email cancelling his participation in the Las Vegas conference, he met with Human Resources Generalist Jeanne Sampson and provided her with a copy of a January 22, 2001 letter which diagnosed him as having attention deficit disorder and dyslexia. Joint Exhibit 1; Transcript at 314-315. Complainant informed Sampson that he needed assistance in his job as a result of learning disabilities. Transcript at 15.

6. Respondent asked Complainant for an updated assessment since the letter of diagnosis was five years old. Transcript at 16.
7. On October 16, 2006, Elston-Pollock informed Complainant that bonus calculations which Complainant computed for 2006 did not make sense. Respondent's Exhibit 8.
8. In November of 2006, Respondent received an updated assessment pertaining to Complainant's alleged learning deficits from psychiatrist Dr. Charles W. Carl, Jr. Joint Exhibit 18. Dr. Carl concurred with Complainant's previous diagnosis of attention deficit disorder and dyslexia. Id. Dr. Carl recommended the following accommodations: additional training, a large screen display calculator, a narrative or outline explaining complex spreadsheets, a reduction in noise and other distractions in Complainant's work environment, and weekly supervisory feedback to help him prioritize and clarify tasks and evaluate his job performance. Id.
9. On December 7, 2006, Respondent agreed to the recommendations suggested by Dr. Carl with the exception of providing multiple explanations for assigned work. Stipulated Facts.
10. Complainant's supervisor, Robert Elston-Pollock, arranged for Complainant to take two Excel classes in Connecticut which Complainant found helpful. Transcript at 321-322.
11. Elston-Pollock provided supervisory feedback in excess of once a week. Joint Exhibit 91. Dr. Nompleggi also met with Complainant every Tuesday to discuss

- matters such as the preparation of financial reports, budgets, profit and loss (“P&L”) statements, and various administrative issues. Transcript at 725.
12. On December 22, 2006, Elston-Pollock informed Complainant that a letter he wrote to a prospective employee made no sense. Respondent’s Exhibit 9.
  13. On February 22, 2007, Elston-Pollock sent an email to Complainant stating that a spreadsheet Complainant had submitted regarding FY07 incentive compensation plans was “all wrong.” Joint Exhibit 27.
  14. During February of 2007, Dr. Nompleggi received complaints concerning Complainant’s behavior towards subordinates. One complaint involved an incident in which Complainant ordered a file clerk to get into Complainant’s car and direct him to Millbury, MA where Complainant had been requested to bring sandwiches to a doctors’ meeting. Transcript at 730.
  15. HR representative Jeanne Sampson conducted an investigation into Complainant’s behavior towards his subordinates. The investigation revealed that Complainant told his subordinates that he had fired employees in the past and would have no problem doing so again, made subordinates feel threatened and intimidated, made negative comments to subordinates when stopping by their offices, created a negative atmosphere in which subordinates were afraid to speak up, and created an environment that resulted in subordinates seeking job opportunities elsewhere. Joint Exhibit 24.
  16. In February of 2007, Jeanne Sampson and Dr. Nompleggi met with Complainant and gave him a number of recommendations about how to better supervise subordinates, such as adopting a more positive attitude, showing appreciation and

- concern to employees, discontinuing negative comments, not responding to subordinates as if they were always wrong, assigning work in a respectful manner, and not retaliating for issues brought forward. Joint Exhibit 23; Transcript 731.
17. On May 3, 2007, Elston-Pollock gave Complainant an overall 2007 performance evaluation of “needs improvement.” Joint Exhibit 31. Part of the evaluation stated that, “There is [a] growing feeling amongst many in the Department, myself included, that you are overwhelmed by the duties of this position and have difficulty problem solving.” Joint Exhibit 31 (April 17, 2007 memo). Dr. Nompleggi did not support giving Complainant a raise, but Elston-Pollock recommended that Complainant receive a 2.5% pay increase. Transcript at 726; Joint Exhibit 32.
18. Complainant drafted a memo to Elston-Pollock disagreeing with the evaluation and complaining that his accommodations were not being met because weekly meetings were not taking place. Joint Exhibit 3 (May 3, 2007 memo).
19. On May 9, 2007, Complainant filed an MCAD complaint based on Respondent’s alleged failure to reasonably accommodate his learning disabilities and on retaliation for requesting accommodations. The MCAD determined that the complaint lacked probable cause. Respondent’s Exhibit 1.
20. In the spring and summer of 2007, the Department of Medicine reorganized. Division administrator and senior division administrator positions were eliminated and the positions of division supervisor and division manager were created. The supervisor position was to report to the manager position. Transcript at 323.

21. Complainant applied for the position of division manager. He was evaluated by Elston-Pollock as not meeting the qualifications for the position based on his “lack of experience, difficulty managing faculty compensation plans and his still to be developed interpersonal skills.” Joint Exhibit 28. Elston-Pollock recommended Complainant for the position of division supervisor. Complainant transitioned into a division supervisor position in the summer of 2007. Transcript at 381. The position of division supervisor contained some of the same responsibilities as those of his former position of division administrator. Transcript at 323; Joint Exhibit 21.
22. On Thursday, July 11, 2007, Elston-Pollock requested that Complainant create a P&L statement for the Division of Rheumatology. Transcript at 336. Elston-Pollock stated sarcastically that “it would take [him] ten minutes but I’ll give you an hour.” Transcript at 357-338. Complainant emailed Elston-Pollock a draft of the requested statement at the end of the work day. Transcript at 338.
23. On the following day, Elston-Pollock emailed Complainant that the P&L looked wrong. Joint Exhibit 37. Elston-Pollock met with Complainant and said, “What the f--- is wrong with you?” Transcript at 340. Elston-Pollock told Complainant to close the door so he could yell at him but Complainant refused to close the door. Id. at 430-341; Stipulated Facts<sup>2</sup>; Joint Exhibit 51.
24. Complainant acknowledged at the public hearing that Elston-Pollock swore at him before as well as after he filed an MCAD complaint in May of 2007. Transcript at 430-431.

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<sup>2</sup> The Stipulated Facts state that the incident occurred on July 11, 2007 but more credible evidence places the incident on the following day.

25. Complainant contacted Jeanne Sampson on the afternoon of July 12, 2007 and complained that Elston-Pollock was retaliating against him for having filed a complaint with the MCAD. Transcript at 340.
26. Sampson met with Elston-Pollock on July 13, 2007 to discuss Complainant's accusation of retaliation. Elston-Pollock confirmed that he had given the P&L assignment to Complainant, had become frustrated about errors in Complainant's work product, and had told Complainant to shut the door so that people wouldn't hear him shouting, but he denied retaliating against Complainant. Joint Exhibit 47.
27. Sampson, Elston-Pollock, and Complainant met on July 17, 2007. At the meeting, Complainant defended his work and requested additional time to complete new tasks, sought more direction, and asked for supervisory meetings on a weekly basis. Joint Exhibit 42. Elston-Pollock expressed frustration with Complainant's errors and suggested moving Complainant to an area where he would be closer to Mila Bajraktari, the manager of the Division of Rheumatology. Id. Complainant claims that during the July 17, 2007 meeting, Elston-Pollock accused him of using his disability "as an excuse" and stated that "the accommodations don't say that I have to be nice to you." Complainant's Exhibit 9. Complainant testified that he made notes of Elston-Pollock's comments during the meeting, but Sampson and Elston-Pollock dispute that Complainant took any notes and deny that Elston-Pollock made the alleged statements. Joint Exhibit 60; Transcript at 68, 112. I credit the public hearing testimony of Jeanne Sampson

and the corroborating deposition testimony of Elston-Pollock<sup>3</sup> that the alleged statements were not made.

28. On July 18, 2007, Mila Bajraktari gave Complainant further instructions on how to complete the Rheumatology P&L. Transcript at 684; Joint Exhibit 68. Complainant submitted a revised P&L, but it still contained errors. Transcript at 684; Joint Exhibit 68. Complainant testified that the errors were caused by changes to the underlying budget that had occurred after he turned in his P&L, but Bajraktari disputed this explanation at the public hearing. Transcript at 685.
29. On July 19, 2007, Sampson sent Complainant a written response to his July 12, 2007 complaint of retaliation. Joint Exhibit 47. Sampson stated that Elston-Pollock could be abrupt in his management style but denied that his concerns about Complainant's work performance constituted retaliation. Id. Complainant took issue with Sampson's conclusion. Joint Exhibit 51. Sampson referred the matter to Dr. Finberg, Chairperson of the Department of Medicine. Sampson also recommended that Complainant be removed from Elston-Pollock's supervision and placed under Bajraktari's supervision. Transcript at 117.
30. Bajraktari met with Complainant on July 19, 2007 to go over errors in the Rheumatology P&L. Joint Exhibit 49. After the meeting she emailed Elston-Pollock that Complainant, "doesn't understand the budget, the faculty funding database reports, and he is very confused on how physicians funding support

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<sup>3</sup> Elston-Pollock failed to attend the public hearing in order to provide live testimony notwithstanding that: 1) he was subpoenaed to attend the public hearing, 2) day six of the public hearing was convened solely to accommodate his schedule, and 3) he informed Respondent's counsel twenty-four hours prior to his scheduled appearance that he would be present. At 7:56 a.m. on October 11, 2010, four minutes prior to the start of the public hearing, Elston-Pollock emailed Respondent's counsel the patently incredible statement that that he was "called back" to Qatar and was leaving on a 9:00 a.m. plane. In lieu of his live testimony, the parties presented pages 7-150 of Elston-Pollock's deposition.

- impacts the operating budget, etc.... He is practically playing with the numbers to come-up with the final expected result – most importantly, he blamed me for his errors ... and this is unacceptable ....., please advise.” Joint Exhibit 49.
31. On July 24, 2007, Elston-Pollock, Sampson, and Bajraktari met with Complainant to discuss Complainant’s job performance. Complainant was informed that he would receive an initial written performance warning. Transcript at 122; Joint Exhibit 55. In the warning, Elston-Pollock cites Complainant’s errors in producing the Rheumatology P&L and suggests steps which Complainant should take to overcome his “performance gaps.” Joint Exhibit 55.
32. On August 2, 2007, Complainant filed a grievance concerning the initial performance warning. Joint Exhibit 57. The grievance asserts that Elston-Pollock did not provide the agreed-upon accommodations and that Elston-Pollock’s behavior adversely affected Complainant’s job performance. Complainant requested that the grievance be heard at Step 2 because Elston-Pollock was the Step 1 grievance officer. Transcript at 132.
33. On August 6, 2007, Dr. Finberg issued Complainant a second (“final”) written warning and a 3-day suspension for falsely accusing Elston-Pollock of saying on July 17, 2007 that “I think you are using your disability as an excuse” and “The accommodations don’t say I have to be nice to you.” Joint Exhibit 61; Stipulated Facts.
34. Complainant filed a second grievance on August 6, 2007 in response to his final written warning and 3-day suspension. Complainant asserted that the discipline

- was retaliatory for his good faith filing of a complaint (i.e., the May 9, 2007 MCAD complaint). Joint Exhibit 62.
35. Complainant filed a second complaint with the MCAD on August 3 & 6, 2007. The August 3, 2007 complaint: 1) alleges profanity and other mistreatment by Elston-Pollock, 2) asserts that during a July 17, 2007 meeting, Elston-Pollock accused him of using his disability “as an excuse,” 3) claims that accommodations were being denied to him, and 4) states that his initial written warning was retaliatory. The August 6, 2007 amendment to the second MCAD complaint alleges that the “Final Written Warning & Disciplinary Suspension” constitute an additional form of retaliation.
36. On August 14, 2007, Complainant met with Mila Bajraktari and Jeanne Sampson to go over a performance improvement plan. Transcript at 690; Joint Exhibit 64. Pursuant to the plan, Complainant was to communicate with Bajraktari daily to prioritize tasks and discuss open assignments. Joint Exhibit 64. Bajraktari testified that they met “very regularly.” Transcript at 695. Complainant objected to being assigned P&Ls for the divisions of dermatology, and infectious disease. As a result of his objection, the assignments were removed from his performance improvement plan. Transcript at 690; Joint Exhibit 64.
37. Complainant continued to make errors and to fail to turn in his assignments on time. Transcript at 695-698; Joint Exhibit 76; Respondent’s Exhibits 14.
38. On August 16, 2007, Dr. Finberg heard Complainant’s second grievance at Step 1 and denied it the following week. Joint Exhibits 62 & 67; Transcript at 520. Dr.

Finberg credited Sampson's assertion that Elston-Pollock did not make the statements attributed to him by Complainant.

39. On August 28, 2007, HR representative Michele Streeter presided as hearing officer at Step 2 of Complainant's first grievance. Joint Exhibits 57; 71.

Complainant asserted that he was not being accommodated with weekly meetings and that constant budgetary revisions were preventing him from producing accurate financial reports. Transcript at 275-276; 284; Joint Exhibit 73. Streeter denied the grievance at Step 2.

40. On September 13, 2007, Michele Streeter served as hearing officer at Step 2 of Complainant's second grievance. Joint Exhibit 79. Streeter weighed Complainant's credibility against Sampson's, found it lacking, and denied the grievance on September 19, 2007.

41. On September 21, 2007, Dr. Daniel Lasser served as hearing officer at Step 3 of Complainant's first grievance. Sampson was also in attendance. Dr. Lasser did not accept Complainant's explanation that lack of feedback and budgetary revisions prevented him from completing his assigned tasks in an acceptable manner. Dr. Lasser denied the grievance. Transcript at 774; Joint Exhibits 57, 83.

42. During a meeting on September 26, 2007, Complainant told Mila Bajraktari that he was unable to complete several projects because he had difficulty creating spreadsheets, working with Excel formulas, and working on new arithmetical problems but that he could use spreadsheets, Excel formats, and familiar forms by entering information in Lotus files. Respondent's Exhibit 14. According to

Bajraktari, the tasks that Complainant said he could perform were “data entry” tasks. Id.

43. On October 10, 2007, Dr. Lasser served as hearing officer at Step 3 of Complainant’s second grievance. Karen Pendergast was also in attendance. Respondent’s Exhibit 2. Complainant submitted notes which he allegedly took at the July 17, 2007 meeting with Robert Elston-Pollock and Jeanne Sampson. Dr. Lasser testified that he asked why the notes had not been produced before and Complainant responded that he had not produced them earlier because of concerns about retaliation. Transcript at 779. Dr. Lasser denied the grievance on the basis that Sampson’s denial that Elston-Pollock made the comments attributed to him by Complainant was more credible than the Grievant’s accusation. Transcript at 780-781.

44. Complainant claims back pay for eight sick days in July and August of 2007 as part of his emotional distress award. He asserts that the days off were necessary due to stress resulting from alleged retaliatory conduct on the part of Respondent. The sick days had the effect of giving Complainant seven consecutive long weekends. Respondent’s Exhibit 12.

45. On October 9, 2007, Complainant submitted a letter of resignation.

### III. CONCLUSIONS OF LAW

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 of retaliation, Complainant must demonstrate that he/she: (1) engaged in a protected activity; (2) Respondent was aware of the protected activity; (3) Respondent subjected Complainant 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). 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, 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).

Simply because Respondent knows of a discrimination claim and thereafter takes 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 Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117 (2000). 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. Id. at 118. Even if the trier of fact finds that the reason for the adverse employment action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent.

Turning to whether Complainant satisfied the elements of a prima facie case, I conclude that there was protected activity of which Respondent was aware consisting of Complainant's requests for accommodations, the assertion that his accommodations were not being addressed, and the filing of a May of 2007 MCAD complaint alleging the failure by Respondent to accommodate his disability. See Guazzaloca v. C.F. MotorFreight, 25 MDLR 200 (2003) (protected activity may consist of internal complaints as well as formal charges of discrimination). Although the May of 2007 MCAD complaint was found to lack probable cause and Complainant's internal

complaints were rejected by Respondent's HR Department, for the purposes of this analysis it may be presumed that Complainant pursued his complaints of discrimination in good faith. See Clark County School District v. Breeden, 432 U.S. 286 (2001) (cause of action for retaliation applies to practices that an employee could reasonably believe are unlawful as well as those that are actually unlawful).

Following the protected activity cited above, there is evidence of adverse employment action being taken against Complainant. For instance, after Complainant engaged in protected activity, his professional competency was ridiculed by supervisor Robert Elston-Pollock, he was subjected to profane invective by Elston-Pollock, his application for a division manager position was rejected, he received two performance warnings and a three-day disciplinary suspension, and both of his grievances were rejected at all stages of review. These actions are significant adverse occurrences that are more substantial than isolated or offhand comments. Contrast Candelere v. Vanson Leathers, Inc., 24 MDLR 228, 230 (2002) (occasional comments and isolated incidents are insufficient adverse action).

While Complainant's protected activity and the adverse employment actions directed against him are intertwined in a temporal sense, the evidence does not establish that the protected activity led to or caused the adverse action. Complainant was subjected to adverse employment action before as well as after he engaged in protected activity. For instance, on October 12, 2006, Elston-Pollock informed Complainant that his participation in a Las Vegas conference was being cancelled because of unsatisfactory job performance. This action took place prior to Complainant notifying Respondent of his learning disabilities and his need for accommodations. The conclusion I draw from

this sequence of events is that Complainant sought to deflect criticism away from his problematic job performance by relying on a five-year old diagnosis of learning disabilities which he had never previously mentioned to his employer. See Mole v University of Massachusetts, 442 Mass. 582 (2004) (where adverse employment action predates the employer's knowledge of protected activity, it is not permissible to draw the inference of retaliation).

Complainant's attempt to establish a prima facie case of retaliation is also undermined by the fact that Elston-Pollock appears to have been insensitive in his treatment of other employees as well as Complainant. Complainant admitted that Elston-Pollock was an "equal opportunity jerk" and generally treated his subordinates poorly. Transcript at 428. When viewed in this context, Elston-Pollock's alleged comments to Complainant that: 1) "you're using your disability as an excuse," 2) "I don't have to be nice to you" and 3) "what the F--- is the matter with you?" are not evidence of retaliation but of general boorishness. See Faragher v. Boca Raton, 534 U.S. 775, 788 (1998) (Title VII filters out complaints involving sporadic use of abusive language and teasing); Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 619 (1996) (concluding that G.L. c. 151B does not mandate "clean language" in the workplace).

In any event, Complainant's accusation that Elston-Pollock made insulting, disability-related comments at a meeting on July 17, 2007 was credibly denied by Jeanne Sampson who attended the meeting. Sampson testified that Elston-Pollock did not utter the statements attributed to him by Complainant and that Complainant did not take any notes during the meeting. Complainant received a three-day suspension for falsely accusing Elston-Pollock of making derogatory comments at the July 17, 2007 meeting.

Although Complainant grieved the discipline, he did not produce notes which he allegedly took at the July 17<sup>th</sup> meeting until Step three of the grievance process. Complainant maintains that it was not his responsibility to proffer the notes during Steps one and two, arguing instead that the grievance hearing officers had the duty to ferret them out, but I find this argument to be wholly unconvincing.

Apart from Elston-Pollock's conduct, Complainant focuses on a Rheumatology P&L assignment in July of 2007 as evidence of retaliation. That assignment, however, was consistent with the duties of a division administrator position which Complainant was performing at the time he received the assignment. The assignment was also consistent with the duties of a division supervisor position to which he was subsequently assigned. Transcript at 48-49, 700-701; Joint Exhibits 21, 49, & 91. Because the Rheumatology P&L was a job-related task, the assignment fails to establish retaliation on the part of Respondent.

Even if a prima facie case of retaliation were established, Respondent has met its burden at stage two by articulating legitimate, nondiscriminatory reasons for its actions supported by credible evidence, to wit: Complainant's inadequate job performance and behavioral problems. According to Respondent, it was Complainant's job-related shortcomings which caused Elston-Pollock to become exasperated with Complainant and which resulted in Complainant's reduced responsibilities, performance warnings, and three-day suspension.

At stage three, the burden shifts back to Complainant to establish that job-related deficiencies were not the real reason for the adverse actions but, rather, a pretext for discrimination. In attempting to do so, Complainant blames his difficulties at work on a

failure to accommodate his disabilities. However, the credible evidence in this case indicates that Respondent agreed to most of the accommodations requested by Complainant and by his health care professionals. Elston-Pollock provided supervisory feedback to Complainant in excess of once a week. Dr. Nompleggi met with Complainant every Tuesday. Complainant was allowed to take extra computer courses to augment his training. The sole accommodation requested by Complainant which Respondent refused to implement was the provision of multiple explanations for individual work assignments. In sum, the evidence does not support Complainant's contention that his deficiencies resulted from Respondent's failure to provide reasonable accommodations or that he was the victim of retaliation for pursuing reasonable accommodations, filing grievances, or bringing MCAD complaints.

Rather than proving disability discrimination and retaliation, the evidence establishes that Complainant compromised his employment relationship with his supervisors and peers by performing in a substandard manner and by displaying inadequate interpersonal skills. Respondent cited numerous instances of Complainant making inaccurate bonus calculations, drafting letters which made no sense, and producing spreadsheets that were "all wrong." Although Complainant felt abused by his superiors, he treated those reporting to him in an imperious and peremptory manner. Complainant's employment relationship with Respondent was not successful, but the lack of success stemmed from legitimate job-related matters pertaining to his performance and not due to retaliatory animus on the part of Respondent. For the aforesaid reasons, I conclude that Respondent's actions were not a violation of G.L. c. 151B.

IV. ORDER

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

So ordered this 14th day of March, 2011.

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Betty E. Waxman, Hearing Officer

