

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & JAMES P. MCGRATH

Complainants

v.

DOCKET NO. 07-SEM-03222

CITY OF WORCESTER, WORKFORCE
CENTRAL CAREER CENTER, AND
MICHAEL O'BRIEN, OFFICE OF THE
CITY MANAGER

Respondents

Appearances: James B. Stanton, Esq. for Complainant
David M. Moore, Esq. for Respondent

DECISION OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On November 30, 2007, Complainant, James P. McGrath filed a complaint with this Commission charging Respondents City of Worcester, Workforce Central Career Center, and Michael V. O'Brien as City Manager with unlawful retaliation against him in violation of M.G.L. c. 151B §4 (4) for his participating or assisting in a co-worker's national origin discrimination claim. The Investigating Commissioner issued a probable cause determination on July 9, 2009. Attempts to conciliate the matter failed and the case was certified for public hearing on April 14, 2010. A public hearing was

held before me on October 20, 2011 in the Commission's Springfield office. The parties submitted post-hearing briefs. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant, James P. McGrath, began working for the City of Worcester ("City") at the Workforce Central Career Center on or about August 31, 1992. In February of 2006, he worked in the position of Assessment Supervisor as a job developer/workshop coordinator at pay grade 37, step 6, with a salary of \$971.20 a week, and an annual salary of \$50,675.83. (McGrath testimony, Exhibit F)
2. At all times relevant to the complaint, Stephan Willand was the Director of the Career Center, Donald Anderson was the Assistant Director, reporting to Willard, and Kevin Crowley was the Complainant's immediate supervisor, reporting to Anderson. Carlene Campanale (then Carlene Bull), was the department's Financial Coordinator.
3. Complainant has had no history of discipline while working for Respondent and has had very good performance reviews. (McGrath testimony)
4. Complainant stated that he learned in 2005 that he was being paid at a lower rate than his co-workers and began efforts to obtain an increase in his pay. He spoke with his supervisor, Kevin Crowley, the Human Resources Department, and the Mayor at that time. (McGrath testimony)
5. A Request for Personnel-Proposed Promotion, ("RFP") dated February 2, 2006, was submitted for Complainant by his department head Willand. Willand requested to Human Resources that Complainant be promoted to Principal Staff Assistant at pay grade 40M step 8 as of March 1, 2006, noting that Complainant

had been at pay grade 37 since he was hired in 1992 and had not had a pay increment since August 31, 1998. (Exhibit E)

6. Willand gave the RFP to Ms. Campanale and she sent it to City Hall for further approvals. The RFP was not approved by the city manager, the assistant to the city manager, the equal opportunity director, or the personnel director. (Campanale testimony)
7. On or about February 24, 2006, Willand signed a subsequent RFP and requested the promotion of Complainant to the position of Principal Staff Assistant at pay grade 40M step 4. (Exhibit F)
8. The second RFP was approved and signed by the city manager, the assistant to the city manager, the equal opportunity director, and the personnel director. Complainant's salary in the new pay grade was \$1,009.20 a week and \$52, 658.61 annually, effective as of March 1, 2006. (Exhibits F and G).
9. Ms. Campanale testified that after the second RFP was approved, she met with Complainant and informed him that his salary would be increased to pay grade 40M step 5. She stated that she explained to Complainant that pay grade 40M had eight steps and that his salary would increase one step every year for three years when he would reach the top step.
10. Ms. Campanale testified that after her discussion with Complainant, she discovered that she had made an error and that the approved pay raise placed Complainant at step 4 and not step 5. She stated that she subsequently left him a voice mail message explaining her error and informing him that his new salary was at step 4. The Complainant did not respond to Ms. Campanale's voice mail. (Campanale testimony) I credit her testimony.
11. On or about August 30, 2006, a co-worker of Complainant's, Edward Gagne, filed a complaint with the Commission alleging retaliation for opposing discriminatory practices and for breach of agreement. (Exhibit H).

12. On October 1, 2006, Complainant signed an affidavit in support of Gagne's complaint. In the affidavit, Complainant stated that his own salary adjustment was to have gone from "\$48K to \$62K" but he acknowledged he did not know the precise step changes involved. He averred that shortly thereafter, the financial coordinator, Carlene Bull, informed him that he would get three pay grade increases over a three year period effective March 1, 2007. (McGrath testimony and Exhibit A). I find that Complainant was confused about how his salary increase would be implemented and in his affidavit confused his pay grade with annual step increases.
13. Willand testified that he was aware that Complainant had filed an affidavit in the Gagne case regarding Complainant's views on how his department is organized and structured. Complainant acknowledged that no one from the City ever made reference to the affidavit he filed in the Gagne case. (Willand and McGrath testimony and Exhibit A).
14. On or about October 23, 2006, a co-worker of Complainant's, Julio Villamil, filed a complaint with the Commission alleging discrimination based on race and veteran status. A particular allegation of the complaint stated: "On October 5, 2006, I was working at a job fair with a colleague, Jim McGrath. I happened to mention my concerns regarding my salary and we discussed the fact that I am making at least 10K a year less than another, non-Hispanic, Career Counselor whom does not even have a degree. He agreed that I indeed was being discriminated against." (Exhibit K).
15. Complainant stated that early in 2007 he was questioned by lawyers from a law firm hired by the City in respect to the affidavit that he had submitted in the Gagne and Villamil complaints. The affidavit Complainant submitted in the Gagne matter was later produced as evidence in the Villamil matter.

Complainant was deposed in connection with the Villamil complaint on May 1, 2007. (Exhibit B)

16. Mr. Willand stated that he was aware that Complainant was a potential witness in the Villamil case. Complainant acknowledged that no one from the City ever referenced the fact that he had given a deposition in this case. (Willand and McGrath testimony)
17. Complainant testified that the first paycheck in which his next annual wage increase was to be included, effective March 1, 2007, reflected only about a 90 cent per hour increase rather than the larger amount he was expecting based on his understanding from the discussion with Ms. Campanale regarding his salary increase over a three year period. Complainant stated that he spoke with his supervisor, Crowley, about the amount of his raise, and that Crowley, like Complainant, thought he would advance in steps more quickly over three years. Complainant testified that Ms. Campenale explained his salary increase would take him from a from a grade 37, step 7 to a grade 40, step 8 in three years at an annual ending salary of \$62,857.80. I find that Complainant was mistaken about this conversation and that the request approved by the City was to raise him to a Grade 40 at Step 4 commencing in March 2006. Complainant testified that he also spoke with Anderson, who said that he would look into it. (McGrath testimony).
18. Anderson testified that he contacted Human Resources concerning Complainant's request, and Human Resources requested that Complainant put his salary concerns in writing. (Anderson testimony)
19. On March 26, 2007, Complainant wrote Anderson regarding his understanding of his salary increase, stating, "Last year it was agreed that within a three-year period my salary was to be adjusted to the final figure of \$62,857.80 ending on March 1, 2008. It was first proposed to be in one move to the \$62,857.00 and later

was readjusted to be spaced out over a three year time period.” He further wrote that there was never any mention of the salary adjustment being spread out over a five year time period. Anderson forwarded Complainant’s email to Human Resources. (Exhibit C)

20. Anderson testified that he contacted Human Resources regarding Complainant’s salary concern and was told that they were looking into the request. An email from Anderson to Complainant dated July 19, 2007 stated that he had just followed up with Human Resources which had prepared a draft response to Complainant which required review and sign-off by the Director who was on vacation through the next week. Anderson testified that he did not receive a subsequent response from Human Resources and did not know whether Complainant had received a response. (Anderson testimony and Exhibit C)
21. Complainant testified that he did not receive a response from Human Resources. (McGrath testimony)
22. Ms. Campanale testified that she processes payroll, and that step raises occur automatically in accordance with the City salary ordinance on the date of an employee’s hiring or promotion until the employee reaches the top step of a particular pay grade. She stated that in the 18 years she has been the financial coordinator she has processed numerous salary increases and promotions, and has never seen a salary increase implemented in the manner described by Complainant in which an employee moved to a higher grade would also jump over several steps to achieve the highest step in a shorter period of time. Ms. Campanale also testified that she did not enter into any such agreement with Complainant regarding his salary and there is no document approving any such agreement. I credit her testimony.

23. During Complainant's testimony at the Hearing and in his May 1, 2007 deposition taken in connection with the Villamil case, Complainant stated that he was "not a numbers person" and not good with numbers."
24. Campanale testified that Complainant's salary increased in accordance with the salary ordinance by one step on March 1, 2007 and each year thereafter until he reached the top step in March of 2010. (Campanale testimony).

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

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if he "has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, s.5]." While proximity in time

is a factor, "... the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew that Complainant participated or assisted in another employee's claim of discrimination and thereafter took some adverse action against the Complainant does not, by itself, establish causation, but may be a significant factor in establishing a causal relationship. "Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing or threatening to file, a discrimination complaint." Pardo v. General Hospital Corp., 446 Mass. 1, 21 (2006) quoting Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id.

Here, Complainant engaged in protected activity on October 1, 2006, and May 1, 2007 by signing an affidavit in support of a co-worker's complaint of discrimination

before the Commission and by testifying in a deposition in support of another co-worker's Commission complaint. Respondents were aware of Complainant's protected activity. Complainant alleged that Respondents subjected him to an adverse employment action because he did not receive the salary increase he believed was agreed upon with Respondents in 2006, and because during the time period he engaged in protected activity, Human Resources failed to respond to his inquiries concerning his salary adjustment. However Complainant has failed to produce any evidence that the request to raise him to a Grade 40 at Step 4 which was approved by the City was altered in any way after he engaged in protected activity. He claims that he was subjected to an adverse action by Respondent, because he did not get the raise he believed he was entitled to, but this claim is based solely on his misunderstanding of the how his step increases were to be implemented. There is no evidence of any agreement with Respondent to increase his salary, as he alleged, over a shorter period of time than is normally governed by the City's salary ordinance and its routine application. Ms. Campanale testified credibly that any deviation from the salary ordinance must be in writing and that she was aware of no such approved agreement. She did admit that she initially erred in explaining Complainant's raise to him, but notified Complainant of her error and gave him the correct information shortly thereafter, and received no response from him. Complainant admitted that he was not a numbers person, and his initial understanding that he was to receive a \$10,000 raise in one year, by-passing 4 annual step increases clearly demonstrates that he was mistaken in his belief as to how his raise and step increases were to be implemented. Given the lack of any evidence to support Complainant's allegation that he was entitled to larger salary increases over a shorter period of time, he suffered no adverse job action and he has not established a prima facie case of retaliation.

Assuming arguendo, that Complainant made out a prima facie case of retaliation, based solely on his allegations, Respondents articulated a legitimate reason

for their actions. Respondents contend that Complainant's raise was implemented in accordance with the request approved by the City in the spring of 2206, following routine policy and practice pursuant to the City salary ordinance. They also assert that Complainant had no agreement with the City to deviate from the salary ordinance and to by-pass automatic annual step increases thereby raising him to the highest step in a shorter period of time. Ms. Campanale testified that step raises are pre-determined and progress automatically in accordance with the city salary ordinance on the date of an employee's hiring or promotion until the employee reaches the top step of a particular pay grade. She also testified that in the 18 years she has been the financial coordinator, processing numerous salary increases and promotions, she has never encountered a salary increase implemented in the manner described by Complainant. Ms. Campanale testified that, contrary to Complainant's testimony, she did not enter into any agreement with him regarding his salary, nor would she have the authority to do so. I found Ms. Campanale to be a very credible witness. Further, Respondents maintained that Complainant did receive annual step raises in accordance with his approved promotion to a higher pay grade and the Respondents' salary ordinance from March 1, 2007 through 2010. Respondent met its burden at stage two by articulating legitimate, nondiscriminatory reasons for its actions supported by credible evidence.

At stage three, the burden shifts back to Complainant to establish that Respondents' reasons for its action were not the real reasons but, rather, a pretext for discrimination. As evidence of pretext, Complainant argues that the five month period during which Human Resources failed to respond to his inquiries coincided with the time period he was being questioned in the Villamil case and was shortly after he submitted an affidavit in the Gagne case. He maintains that the fact that HR was non-responsive to his inquiries for a period of time points to pretext for discrimination. While Complainant's protected activity appeared to have some temporal connection to the timing of his annual wage increase and his inquiries regarding said raise, the

evidence does not establish pretext for discrimination. There is insufficient evidence that Respondent's legitimate non-discriminatory explanation for how it implemented Complainant's prior approved raise in the routine fashion prescribed by the City salary ordinance was a pretext for discrimination.

Rather, the evidence supports Ms. Campanale's credible testimony that his salary increase was implemented in accordance with the City's approved pay grade and step and the City's salary ordinance, with no intent to deprive Complainant of some prior agreed upon amount. I find that Complainant was confused and uninformed about how the step increases in the salary ordinance were implemented and did not choose to discuss this or clarify his understanding of the step increases with Ms. Campanale when she called him to explain she had made an error in her calculations and that he was approved to be at Step 4 of his Grade 40 position. Furthermore, Respondents made no reference to Complainant's protected activity, nor did they attempt to dissuade him from assisting his co-workers and there is no evidence that his rate of pay or step increases were altered as a result of his protected activity. Complainant's promotion to a Grade 40 position at Step 4 was approved by the City in the spring of 2006 prior to his protected activity. The fact that his salary increase did not take effect until after he had engaged in protected activity does not change this fact. Finally, Complainant did in fact receive annual salary increases to which he was entitled from March 1, 2007 through March of 2010 in accordance with the city's salary ordinance.

In sum, Complainant has not met his burden of showing that he was subjected to any adverse action on account of his participation in protected activity and has failed to establish a claim against Respondents for unlawful retaliation in violation of G.L. c. 151B.

IV. ORDER

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

So ordered this 10TH day of January
2013.

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Sunila Thomas-George
Hearing Commissioner