COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD, KAREN CHASE and
LINDA EASON

Complainants

v.

Docket Nos. 12-BEM-02539
12-BEM-02540

CRESCENT YACHT CLUB and
JOHN MCCARTHY[1]

Respondents

Appearances: Janet Dutcher, Esq. for Complainants
Stephen Colella, Esq. for Crescent Yacht Club

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 28, 2012, Linda Eason and Karen Chase filed charges of sexual harassment and retaliation against Crescent Yacht Club and John McCarthy alleging that they were subjected to sexual comments and unwanted physical contact while employed by the Club and retaliated against when they complained. A probable cause finding was issued on April 30, 2014. Their cases were certified to a joint public hearing on April 15, 2015.

A public hearing was held on October 19 and 20, 2015. The parties submitted fifty-eight (58) joint exhibits. The following individuals testified: Karen Chase, Linda Eason, Brian Moriarty, John McCarthy, Deborah Flannigan, Robert Jusko, Nancy

[1] I hereby dismiss John McCarthy as a Respondent on the basis that the record does not establish that he was properly served with notice of the instant proceedings.

Pegnam, Mark Dion, and Ralph Garret. Following the public hearing, the parties jointly requested leave to substitute a transcript for the audio recording of the proceedings. The request was granted on April 4, 2016.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.[2]

II. FINDINGS OF FACT

1. Complainant Linda Eason was hired as a bartender at the Crescent Yacht Club in 2007, became assistant bar manager in January of 2008, and became a member of the Yacht Club in 2009.
2. As assistant bar manager, Eason worked approximately forty hours per week. Transcript I at 27. Eason's performance review for calendar year 2011 states that she had reliable attendance, was willing to do extra shifts, did a great job of opening and closing the bar, was knowledgeable, diligent, and attentive to all aspects of the job, was not afraid to take on extra work, kept the bar clean, let co-workers and the bar manager know what was going on, was a good listener, got along well with Club officers, was liked by many members, was always pleasant and diplomatic with difficult people, and had a good relationship with other bartenders. Joint Exhibit 12.
3. Complainant Karen Chase was hired as a "door person" at the Crescent Yacht Club in 2006 and became a member in 2008. Transcript I at 152. As door person, Chase carded people and made sure that non-members signed a guest

[2] In arriving at the findings of fact set forth herein, I have disregarded joint exhibits 14, 16, 17, 32, 33, 42, 43, 49, 50, 51, 52, 53 and 54 on the basis that they are hearsay statements from individuals whose absence from the public hearing was neither explained nor excused.

book. Transcript I at 153. She worked Friday nights only. Id. Up to the time of public hearing, Eason also had a full-time job working at Exeter Hospital. Transcript I at 179.

4. Crescent Yacht Club is located in Haverhill, MA on the Merrimack River. Transcript II at 6. The Club has a dock, picnic tables, and a building containing a bar and tables. It is operated by a Commodore, a five-member Executive Board, a bar manager, an assistant bar manager, and bartenders. Transcript I at 21. The Club has approximately one hundred fifty members.

5. John McCarthy is a member of the Yacht Club. He was also a member of the Yacht Club's Executive Board from 2010 until May of 2012. Transcript I at 29. In or around September of 2012, Complainants sent notice of the instant proceedings to McCarthy at the Yacht Club. A subsequent certified notice of public hearing dated August 24, 2015 was again sent to McCarthy at the Yacht Club. The notice of public hearing was accepted by assistant bar manager Sherry Sanborn. Transcript I at 32-34. McCarthy never responded to the charges, and did not appear for any investigatory proceedings in this matter prior to the public hearing. Transcript I at 32. According to McCarthy, he was not aware that Complainants Eason and Chase had filed charges of discrimination against him until two weeks prior to the public hearing. Transcript II at 52. McCarthy testified that after he resigned from the Executive Board in May of 2012, he did not go to the Yacht Club for three years. Transcript II at 51. I credit that McCarthy was not aware that he had been personally sued.

6. The Crescent Yacht Club Executive Board has overall authority over the Club, including the bar. Transcript II at 38. A Commodore oversees Club operations. Transcript II at 82.

7. Bar manager Nancy Pegnam testified that she has managed the Crescent Yacht Club bar for fourteen and one-half years and has been a Club member since 2002. Transcript II at 113. She hired Complainant Linda Eason as bartender at the Club and has known Eason for twenty-five years. Transcript II at 114. She and her husband sponsored Eason for Club membership. Transcript II at 115.

8. Yacht Club and former Executive Board member Brian Moriarty stated that Eason used "off-color" language like everybody else at the Club. Transcript II at 9. Bar Manager Nancy Pegnam testified that Eason joked, bantered, flirted with customers, and used profanity. According to Mark Dion (the Club's current Commodore), Eason, Chase, and others would "pinch each other's bums" as a form of greeting. Transcript II at 118, 148. According to John McCarthy, Dion and Pegnam, Eason sometimes referred to her breasts as "the girls." Transcript II at 29, 40, 115-117, 148. Dion testified that Eason would say, "the girls [were] looking … a little perky aren't they?" Transcript II at 148. Former Commodore Robert Jusko testified that every now and then Eason would "shake her boobs at you." Transcript II at 87. Executive Board Chair Deborah Flanagan described Eason's behavior at the bar as sometimes inappropriate such as when she swore and told sex jokes. Transcript II at 69-72. I credit this testimony.

9. In January of 2012, Pegnam changed Eason's work schedule from two nights and one day weekly to three days and one night weekly. Transcript II at 121. Eason was upset that her work schedule was changed to more daytime hours because it resulted in the loss of tips. Transcript II at 72-76; II at 120, 123. Pegnam testified that Eason's hours were changed because the Club needed an assistant bar manager on premises during daytime hours in order to receive deliveries. Transcript II at 121. According to Pegnam, Eason's demeanor changed after her schedule was altered and she would take days off without permission. Id. Pegnam testified that following the schedule change, some customers and other bartenders complained about Eason. Transcript II at 127.

10. On April 17, 2012 there was a monthly meeting of the Executive Board followed by a meeting open to all Club members. Transcript I at 37. At the Executive Board meeting there was a discussion about whether Eason could use Club facilities to host a party at which pocketbooks were made available for purchase. Had the party taken place, Eason would have received a commission based on the number of pocketbooks sold. Transcript I at 39. The Executive Board decided that Eason needed permission from the Club's general membership to hold the party because it was a profit-making activity. Transcript II at 12-13. Executive Board members Brian Moriarty and Deborah Flannigan testified that Eason was angry and upset at the Executive Board's response and felt that the Board was "picking" on her. Transcript II at 13, 60. Eason acknowledged that she thought the Executive Board's response to her request was unfair. Transcript I at 125.

11. Eason prepared a meal for members following the Club's April 17, 2012 meeting. She did so in her role as head of the entertainment committee. Transcript at 77. Eason states that when McCarthy approached her to give her a hug, she said, "Well, it's kind of hard to get a hug around that belly, John" and he responded by saying, "it's okay because I just want to fuck your tits." Transcript I at 37. According to Eason, McCarthy pressed his body against her as he made the statement. Transcript I at 116. According to McCarthy, Eason said in a joking manner that he couldn't "blank" her because his belly was in the way and he said "no, but I can 'blank' your boobs." Transcript II at 42. McCarthy acknowledged that Eason responded by saying, "John, I don't believe you said that." Transcript II at 43. I credit Eason's version of the incident over that of McCarthy's.

12. On April 21, 2012, the Club was conducting a charity event consisting of a "meat raffle" in which participants purchased raffle tickets to qualify for packages of meat. In her capacity as a Club member, Complainant Karen Chase sold a ticket to McCarthy. Transcript I at 165. According to Chase, McCarthy put the money for the ticket down her shirt and inside her bra, in response to which she told him to stop and pushed his hand away. Transcript I at 164. According to McCarthy, he put a dollar tip under the strap of her sun dress. Transcript II at 45. I credit Chase's version of the incident over McCarthy's.

13. Eason and Chase both testified that later on the night of April 21, 2012, McCarthy called them "nothing but old fucking biddies having hot flashes" after

they asked for the air conditioning to be turned on. Transcript I at 41, 185. I credit this assertion.

14. Eason and Chase verbally reported the events of April 21, 2012 to then-Commodore Jusko. Transcript I at 38; II at 88, 96, 98. Eason asked to attend a May 1, 2012 meeting of the Executive Board. Transcript I at 43, 122-123, 166; Joint Exhibit 21. Eason's written request to attend the Executive Board meeting references "harassment and being singled out" but she also discussed the pocketbook party she wanted to host. Transcript II at 92; Joint Exhibit 21. According to Eason, McCarthy apologized to her at the meeting, but other individuals at the meeting "yelled at, screamed at, and told [her] to shut up." Transcript I at 45. The following Executive Board members attended the meeting: John McCarthy, Deborah Flanagan, Bernie Carroll, Brian Moriarty, and Tommy Barrett. Robert Jusko also attended in his role as Commodore. Transcript at 127. According to then-Executive Board Chair Deborah Flanagan and then-Commodore Jusko, Eason accepted McCarthy's apology and declined to bring a formal complaint against McCarthy. Transcript II at 67, 95-96.
15. Complainant Karen Chase did not attend the May 1, 2012 meeting but testified that later that night McCarthy said, "I was told that I owe you an apology [although] I don't know what for [and] I thought we were better friends than that." Transcript I at 167-168. According to McCarthy, he apologized at the suggestion of the Executive Board. Transcript II at 48.
16. On May 21, 2012, Chase met with Commodore Jusko and said that she wasn't satisfied with McCarthy's apology and that she couldn't understand why

McCarthy was permitted to remain on the Executive Board. Transcript I at 169, 193; II at 98. On or around May 29, 2012, McCarthy resigned from the Executive Board at the suggestion of Board members. Transcript I at 46, 50, 53; II at 18, 99-100. Chase testified that she thought he should have been "removed" from the Executive Board rather than be permitted to resign. Transcript I at 170, 194, 199-200. Eason testified that after McCarthy resigned from the Executive Board, he remained a Club member and his wife began to work at the Club as a bartender. Transcript I at 154-156.

17. According to the credible testimony of Complainant Chase, people would not talk to her or spoke to her with hostility after McCarthy resigned from the Executive Board. Chase testified credibly that Commodore Jusko no longer talked to her unless necessary for work. Transcript I at 170-171.

18. Complainant Eason testified that in June of 2012, she was shunned by people at a Club canoe race, was the subject of snickers while individuals at the Club simulated sex acts, and was told by a bar patron that, "we need some guys around here -- the girls are nothing but stupid douchebags." Transcript I at 56-57, 137. Eason states that when she took off a day during June of 2012 to have a three-day weekend, she was criticized for doing so because bar manager Nancy Pegnam had arranged to take the same time off. Transcript I at 58-59; II at 126. According to Board Chair Deborah Flanagan, the Executive Board was upset that Eason took unapproved vacation time during the same week that the bar manager was taking vacation. Transcript II at 72-76.

19. Eason testified that she went out on medical leave from August 1-17, 2012 because she was "overwhelmed by stress." Transcript I at 59, 75-76; Joint Exhibit 55. Nurse practitioner Anja Comeau prescribed for Eason Citalopram on August 1, 2012 and Xanax on August 17, 2012. Joint Exhibit 55.

20. After Eason returned from her medical leave in August of 2012, she looked at her personnel file in the Club's file cabinet. Eason testified that she told Bar Manager Nancy Pegnam prior to doing so and that Pegnam did not object, but I do not credit this testimony. Transcript I at 81; II at 138; Joint Exhibit 28.

21. When Eason returned to work on August 17, 2012, she asked for and received vacation time between August 28th and August 30th. Transcript I at 60-61; Joint Exhibit 27.

22. On September 14, 2012, bartender Kim Balamotis stopped working before her shift was over due to lack of business and sat at the bar talking to customers and having a drink. Eason testified that she told Balamotis to stop yelling obscenities after which Balamotis swore at and "pretty much" pushed her as Balamotis came behind the bar to get her belongings. Transcript I at 68; Joint Exhibits 32-35. According to the contemporaneous version of the incident that Balamotis relayed to bar manager Pegnam, Eason yelled at her (Balamotis) for using the "F" word while joking with a friend, intimidated Balamotis when she went behind the bar to get her belongings, and said nasty things about Balamotis. Transcript II at 131, 136; Joint Exhibit 35. I credit that Eason criticized the language used by Balamotis, that angry words were exchanged, and that the parties came into close proximity with each other when Balamotis

stepped behind the bar, but I do not credit that any pushing or actual contact occurred.

23. Pegnam took steps to fire Eason following the September 14, 2012 incident. Transcript II at 136-137.

24. Eason received a termination letter dated September 16, 2012 stating that she had caused "too much controversy" at the Club, had behaved unprofessionally, and had caused fellow employees not to want to work with her. Joint Exhibit 37.

25. Eason testified that prior to her termination, she was paid ten dollars an hour and worked around forty hours a week, earning about four hundred dollars weekly ($20,800 yearly) plus unspecified tips. Transcript I at 84.

26. On September 28, 2012, Eason and Chase filed charges of discrimination with the MCAD alleging sexual harassment and retaliation.

27. Eason continued to visit the Club as a member after being terminated as assistant bar manager. Transcript I at 82. Eason is allergic to peanuts. She noticed that the nuts were being served at the bar following her termination. They were presented in a witch decoration with a noose around its neck. Transcript I at 83. Pegnam testified that she saw the witch when she came back from her days off but didn't remove it for a "period of time." Transcript II at 133. Eason wrote to the Executive Board about the nuts, stating that they constituted an act of retaliation. Joint Exhibit 40. The Board responded that it had resumed serving nuts in response to requests by members and because Eason was no longer behind the bar. Transcript at 83; Joint Exhibits 41. Prior

to Eason becoming an employee of the bar, the Club had served peanuts. Transcript I at 101; II at 134. Pegnam testified that there are other members of the Club who are allergic to peanuts and that these patrons just stay away from peanuts in the bar area. Transcript II at 144.

28. Eason testified that after being terminated, she was not able to find a full-time job. She worked at the Knights of Columbus in Methuen for four to five months, beginning in or around October of 2012 where she earned about six hundred dollars a week. Transcript at 85-86. After she left the Knights of Columbus job, she worked at the Kingston Vets Club beginning in May of 2013, and she cleaned houses. Transcript I at 9-97. At the time of public hearing, she worked at Archie's Pub in Haverhill between thirteen and twenty-three hours per week and cleaned houses on a part-time basis. Transcript I at 113. Eason's income tax return for 2013 reports that she earned $13,118 in wages, salaries, and tips and that she received $4,004 in unemployment compensation. Her income tax return for 2014 reports that she earned $8,628 in wages, salaries, and tips and that she received $2,752 in unemployment compensation. Joint Exhibit 58.

29. Eason testified that she felt belittled by her experiences at the Crescent Yacht Club and that she lost her self-esteem. Transcript at 98. She states that she lost friends as well as her job. Transcript at 99. She began a therapeutic relationship with Physician Assistant Rosemary Smith in March of 2013 which continues four times a year for symptoms of not sleeping, high blood pressure, losing weight, and being distraught. Transcript I at 93. Eason is currently

prescribed 40 milligrams of Citalopram and 15 milligrams of Lorazepam. Transcript at 93.

30. Complainant Karen Chase continued to work as a "door person" after Eason was terminated. Chase testified that she felt nauseous and sweaty going to work following the McCarthy incident on April 21, 2012. According to Chase, in October of 2012 while she was working at the door on a Friday night, a female club member came up behind her, grabbed her buttocks, squeezed them, and made a "comment" to her. Joint Exhibit 6; Transcript I at 172. The Executive Board declined to take action because Chase did not identify the member by name even though Chase testified that she was willing to disclose the perpetrator. Joint Exhibit 7; Transcript I at 174. In her complaint of discrimination, Chase described another incident which took place in October of 2012 involving then-Commodore Jusko and others during which a female Club member asked to see "two dicks" and a male member said, "Can't do that – sexual harassment you know."

31. Chase sought treatment from Dr. Paul Friedrichs, MD for symptoms of anxiety and depression beginning in January of 2013, attended counseling sessions at Health Watch EAP beginning on February 13, 2013, and went to Seacoast Mental Health Center in Exeter, New Hampshire for twelve therapy sessions between May of 2013 and January 28, 2014. Joint Exhibit 56; Transcript I at 175. Chase was prescribed Clonazepam for anxiety. Transcript I at 176. Seacoast Mental Health Center notes report that Chase experienced the following symptoms following the April 21, 2012 meat raffle incident:

sweating, pounding heart, nausea, tight chest, shaking, anxiety, trouble breathing, insomnia, sadness, isolation, shame, nightmares, low self-esteem, change in appetite, and poor concentration and memory. Joint Exhibit 56.

32. On April 19, 2013, Chase took a leave of absence from her position as door person at the Club and did not return. Transcript I at 156, 175.

33. Chase testified that her experience working for Respondent caused her to lose self-esteem and trust. Transcript I at 178. She states that she has never returned to the Club since quitting her job. According to Chase, she thought she had friends at the Club but they treated her as the "bad guy" when she stuck up for herself. Transcript I at 176.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

In order to establish a hostile work environment, Complainant must prove by credible evidence that: (1) she was subjected to sexually-demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; and (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment. See MCAD Sexual Harassment in the Workplace Guidelines ("Guidelines"), II. C. (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993); College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987). Comments that are very threatening or conduct that involves physical contact might create an abusive work environment after one incident. See Gnerre v MCAD, 402 Mass 502 (1988) (addressing sexual harassment in a landlord-tenant relationship). The number of incidents necessary to establish harassment is

inversely proportional to the offensiveness of the comments. See Gnerre, 402 Mass at 508.

Regarding Complainant Linda Eason's claim of sexual harassment, the evidence establishes that she was subjected to several incidents so severe as to alter the conditions of her employment and create an abusive work environment. See Sweeney v. K-Mart Corp., 21 MDLR 79 (1999) (incident involving an unwelcome kiss and hug constituted conduct so severe as to create a hostile work environment). The primary incident involves Executive Board member John McCarthy pressing his body against her and saying, in response to the observation that his belly made hugging difficult, "it's okay because I just want to fuck your tits." This incident was followed several days later by McCarthy calling Eason and Chase "nothing but old fucking biddies having hot flashes." While the second comment conveyed gender, rather than sexual, hostility, together the actions and words of McCarthy in April of 2012 established an objectively-hostile work environment based on sex.

In addition to constituting objective harassment, the words and actions at issue must also be experienced as subjectively unwelcome. The standard is a personal one, based on Complainant's own reaction to the harassing conduct. See Couture v. Central Oil Co.,12 MDLR 1401, 1421 (1990) (characterizing the subjective component of sexual harassment as ... "in the eye of the beholder."); Ramsdell v.Western Bus Lines, Inc., 415 Mass. at 678-679.

The Club argues that since Eason herself engaged in sexual banter, she could not have been subjectively offended by McCarthy's conduct. This argument deserves consideration but is ultimately unconvincing. Eason's reaction to McCarthy pressing his

body against her and his comment about "fucking her tits" was one of genuine shock and dismay. Rather than brush off McCarthy's behavior, Eason immediately responded by saying, "John, I don't believe you said that." She subsequently reported the incident to the Commodore and thereafter asked to attend a May 1, 2012 meeting of the Executive Board to discuss "harassment" among other matters. These efforts to hold McCarthy accountable reveal that Eason was sincerely offended by his behavior. Contrast Gilman v. Instructional Systems, Inc. 22 MDLR 237 (2000) (Complainant's failure to report harassment during a meeting about her performance evaluation supported a determination that the alleged conduct was not sufficiently severe or pervasive to alter working conditions). Eason did not waiver in her efforts to protest the behavior directed against her even though she incurred the hostility and resentment of her colleagues, her supervisors, and Club members.

Eason's own banter as a bartender may have been bawdy, but there is no evidence that it mirrored McCarthy's in being hostile, offensive, and disrespectful or that it involved unwelcome bodily contact. Eason's employee evaluation for 2011 noted that she was pleasant and diplomatic with difficult people and that she had a good relationship with other bartenders and Club officers. These qualities distinguish Eason's language and off-color jokes from McCarthy's demeaning conduct. Eason's words and actions appear to be within Club norms as evidenced by the fact that they led to nothing but praise from her supervisor prior to April of 2012. Accordingly, I conclude that Eason's flirtatious manner and sexual repartee did not prevent her from being subjectively offended by the hostile and degrading treatment she experienced at the hands of John McCarthy.

Respondent next argues that Eason pursued her complaint against McCarthy in response to being denied Executive Board permission to hold a pocketbook party on Club premises, not because she was angry about McCarthy's behavior. While it is true that Eason resented the Board's response to her party request, the reality is that Eason was upset by both matters. The fact that she resented the Executive Board's stance on her party proposal does not prevent Eason from also believing that she was the victim of harassment.

Eason's efforts to address the harassment she experienced at the Yacht Club elicited an apology from McCarthy and forced his eventual resignation from the Executive Board, albeit not his expulsion from the Club. While these outcomes demonstrate some accountability, they are insufficient to absolve the Club of responsibility for the actions of an Executive Board member on Club premises that were directed at a Club employee. See Myrick v. GTE Main St. Inc., 73 F. Supp. 2d 94, 98 (D. Mass. 1999) (noting that Massachusetts law does not recognize an affirmative defense which permits an employer to avoid liability for the discriminatory acts of a supervisor if the employer acknowledges the discrimination, ends it, and takes steps to ensure that it will not recur). Under Massachusetts law, where the perpetrator of sexual/gender harassment is a supervisor rather than a co-worker, the employer is vicariously liable for the actions of the supervisor. See College-Town, Div. of Interco Inc. v. MCAD, 400 Mass. 156, 165-166 (1987).

The fact that McCarthy harassed Eason when she was off duty as bar manager does not negate their employee/supervisor relationship. McCarthy, at all relevant times, served as an Executive Board member. Eason, at all relevant times, juggled two roles

simultaneously at the Club -- that of member and full-time assistant bar manager. In light of these roles, the Club must be held accountable for all of McCarthy's conduct directed at Eason on Club premises. Regardless of which hat Eason was wearing, when McCarthy pressed himself against her and uttered his offensive remarks, his words and conduct created a hostile work environment. See College Town, 400 Mass at 166.

Turning to Complainant Karen Chase, the credible evidence establishes that on April 21, 2012, she was collecting money during a Club charity event when John McCarthy reached inside her shirt and put money under her bra strap. Chase responded by telling him to stop and pushed his hand away. Later that night, McCarthy called Chase and Eason, "nothing but old fucking biddies having hot flashes." Another incident occurred in October of 2012 involving a female club member coming up behind Chase while she worked as a door person, grabbing her buttocks, and squeezing them. Chase did not identify the member in reporting the incident but credibly testified that she would have done so had the Executive Board asked her. A third incident took place the same month in which a female Club member at the bar asked to see, "two dicks" and a male Club member said, "Can't do that – sexual harassment you know." Chase named Commodore Jusko as one of the individuals involved in the third incident yet no investigation was commenced.

The conduct to which Chase was subjected involved unwanted, intimate touching. and hostile, gender-based language. These matters were sufficiently severe to constitute harassment. See Sweeney v. K-Mart Corp., 21 MDLR 79 (1999). Although McCarthy reached inside Chase's shirt during an event in which Chase participated as a Club member rather than as a door person, that circumstance does not invalidate their

employee/supervisor relationship. McCarthy was an Executive Board member and Chase an employee of the Club in April of 2012 when the meat raffle occurred even if Chase participated in the activity as a volunteer. The remaining incidents took place while Chase functioned as door person. Based on the foregoing, Chase has established a hostile work environment based on sex.

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) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her 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 Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for its 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). 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 a motivating cause of the adverse employment action. Id.

In regard to whether Complainant Eason satisfied the elements of a prima facie case, it is noteworthy that she reported the events of April 21, 2012 to the Commodore and attended the next Executive Board meeting to discuss her self-described issues of "harassment and being singled out." Eason declined to bring a formal complaint against McCarthy, but her verbal complaint, her written request to attend the Executive Board meeting, and her attendance at the meeting all constitute protected activity. See Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999) (recognizing as protected activity an employee's complaint about unlawful discrimination which did not rise to the level of

a formal charge); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (protected activity consists of informal expressions of discrimination as well as formal ones).

After engaging in the protected activity cited above, Eason credibly asserts that she was shunned at the Club and was the subject of snickers while people simulated sex acts. When she took a day off from work, she was criticized for doing so although previously she had been allowed flexibility in regard to her schedule and lauded for her reliable attendance. These matters culminated in September of 2012 when Bar Manager Pegnam took steps to terminate Eason despite having evaluated Eason's performance at the beginning of 2012 as reliable, diligent, attentive, and diplomatic. Such a rapid turnaround in the perception of Eason's capabilities following the protected activity of April and May of 2012 satisfies the elements of a prima facie case. This conclusion is supported by the Yacht Club's stated reason for terminating Eason, to wit: she caused "too much controversy." I interpret this reason as a veiled reference to her charge of harassment. Additional support for the retaliation claim is demonstrated by the Club's re-introduction of peanuts as a bar snack following Eason's termination. The peanuts, which were previously eliminated in deference to Eason's peanut allergy, were displayed along with a witch sporting a noose around its neck. Bar Manager Pegnam acknowledged that she didn't remove the witch "for a period of time" after she first noticed it.

At stage two, the Club argues that it had legitimate reasons for terminating Eason consisting of her allegedly unprofessional behavior and her penchant for causing fellow employees not to want to work with her. One example cited by Respondent involves an

incident in mid-September of 2012 during which Eason and another bartender, Kim Balamotis, argued about Balamotis's conduct at the bar. There is disagreement about what transpired, but I credit that Eason criticized Balamotis's language, that they exchanged angry words, and that they came into close contact but did not touch when Balamotis went behind the bar to gather her belongings. Neither these circumstances nor the rest of Eason's conduct as assistant bar manager support the charge that she behaved "unprofessionally" or that other employees had legitimate reasons for not wanting to work with her. Accordingly, the Club has failed to rebut Chase's prima facie case of retaliation.

Turning to the retaliation claim of Complainant Karen Chase, the credible evidence establishes that she, too, verbally reported the events of April 21, 2012 to then-Commodore Jusko. She met with Jusko a month later to register her dissatisfaction with McCarthy's apology and she subsequently voiced dissatisfaction that McCarthy was allowed to resign from the Executive Board rather than be "removed." These actions constitute protected activity.

Following Chase's protected activity, Club members refused to talk to her, treated her with hostility, and taunted her for reporting harassment and for seeking the resignation of McCarthy as an Executive Board member. Chase testified credibly that she quit her job as door person because people whom she considered to be friends treated her as the "bad guy" when she stuck up for herself.

Notwithstanding the deterioration in her working conditions, I conclude that the circumstances do not satisfy the requirements for establishing a case of retaliation. Chase continued to work as door person until she chose to quit her job approximately a year

later. During the intervening year, her schedule was not altered and her pay was not reduced. The fact that Club members became less friendly than they were previously no doubt made her job less pleasurable, but such a change is not a sufficient basis upon which to state a legal claim of retaliation. See Ruffino v. State Street Bank & Trust Co., 908 F. Supp. 1019, 1044 (D. Mass. 1995) (not all actions perceived to be unpleasant by an employee constitute adverse employment actions); Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997) (defining adverse employment action as a change in objective terms and conditions of employment, not just diminution in social interactions); MacCormack v. Boston Edison, 423 Mass. 652, 663 (1996) (same).

IV. REMEDIES AND DAMAGES

Back Pay Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct consequence of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

I conclude that Complainant Linda Eason is entitled to back pay damages for the period of time between her termination on September 16, 2012 and the date of this decision consisting of what she earned at Crescent Yacht Club and what she earned elsewhere. Complainant's lost income is based on a reported yearly salary of $20,800.00 at the Yacht Club -- $ 400.00 in weekly pay. I decline to award back pay damages for lost tips because Complainant did not specify in her testimony or in her tax returns the amount of tips that she earned.

Eason testified that after being fired by Respondent, she worked as a bartender at the Knights of Columbus in Methuen beginning in or around October of 2012 where she earned $600.00 per week, as a bartender at the Kingston Vets Club beginning in May of 2013, and subsequently at Archie's Pub in Haverhill. Eason's income tax return for 2013 reports gross income of $17,233.00 (including unemployment compensation); her income tax return for 2014 indicates gross income of $12,980.00. Complainant did not present income tax returns or other evidence of income for either 2012 or 2015. Based on the foregoing, I conclude that she lost $3,678.00 in income for 2013 and $12,980.00 in income for 2014.

In regard to Complainant Karen Chase, I conclude that she is not entitled to back pay damages for her claim of sexual/gender harassment because she voluntarily quit her job at the Yacht Club. She neither alleges nor establishes that she was constructively discharged. See GTE Products Corp. v. Stewart, (constructive discharge requires proof that working conditions are so intolerable that a reasonable person would have felt compelled to resign). To be sure, her eventual decision to quit her job was motivated by the fact that people would not talk to her or spoke to her with hostility after John McCarthy resigned from the Executive Board, but such conditions do not establish that conditions were so intolerable that no reasonable person would have been able to tolerate them. GTE Products Corp., 421 Mass. at 35 (adverse working conditions must be "unusually aggravated" or amount to a "continuous pattern" in order to constitute a constructive discharge).

Emotional Distress Damages

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 Eason testified sincerely and credibly that she felt belittled by sexual and gender harassment at the hands of John McCarthy and experienced genuine anguish as a result of her retaliatory termination. The latter led to the loss of her self-esteem, her means of support, and her friends.

While Eason's participation in off-color bantering and sexually-charged joking at the Club mitigates some of the emotional distress she claims to have suffered, it does not altogether extinguish her claim. I take this position on the basis that Eason engaged in sexual banter of a good natured, non-threatening nature. McCarthy's words and conduct, on the other hand, were aggressive, combative, and involved unwanted physical contact. Eason's dismay at being harassed in this manner caused her to protest McCarthy's conduct. That protest, in turn, led to her being shunned by people at a Club, being criticized for taking vacation days, being snickered at while individuals at the Club simulated sex acts, being called (along with Chase) a "stupid douchebag," and ultimately being fired.

Eason went out on medical leave August 1-17, 2012 because she was overwhelmed by stress. She continues to attend therapy and take medication to address symptoms of not sleeping, high blood pressure, and weight loss.

Based on the foregoing, I conclude that Complainant is entitled to $10,000.00 in emotional distress damages.

In regard to Complainant Karen Chase, I conclude that her dissatisfaction with McCarthy's apology and his resignation from the Executive Board stemmed from genuine outrage over his harassing conduct. Chase testified convincingly about feeling nauseous and sweaty going to work after her abusive treatment by McCarthy and after being shunned by other Club members. Her experience working for Respondent caused Chase to lose self-esteem and trust. She states that she has never returned to the Club since quitting her job. According to Chase, she thought she had friends at the Club but they treated her as the "bad guy" when she stuck up for herself.

Chase sought treatment from Dr. Paul Friedrichs, MD for symptoms of anxiety and depression beginning in January of 2013, attended counseling sessions at Health Watch EAP beginning on February 13, 2013, and went to Seacoast Mental Health Center in Exeter, New Hampshire for twelve therapy sessions between May of 2013 and January 28, 2014. Chase was prescribed Clonazepam for anxiety. Seacoast Mental Health Center reports that Chase experienced the following symptoms after the meat raffle incident: sweating, pounding heart, nausea, tight chest, shaking, anxiety, trouble breathing, insomnia, sadness, isolation, shame, nightmares, low self-esteem, change in appetite, and poor concentration and memory.

Based on the foregoing, I conclude that Complainant Chase is entitled to $7,000.00 in emotional distress damages.

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) Pay Complainant Linda Eason, within sixty (60) days of receipt of this decision, the sum of $16,658.00 in back pay damages 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;

(2) pay Complainant Linda Eason, within sixty (60) days of receipt of this decision, the sum of $10,000.00 in emotional distress damages, 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;

(3) Pay Complainant Karen Chase, within sixty (60) days of receipt of this decision, the sum of $7,000.00 in emotional distress damages, 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) Within one hundred twenty (120) days of the receipt of this decision, Respondent shall conduct a training session for supervisors and managers employed by the Crescent Yacht Club in regard to sex 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. 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.

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 19th day of May, 2016.

Betty E. Waxman, Esq.,
Hearing Officer