COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and AMY SELLERS,
Complainants

v.

Docket Nos.: 08-SEM-02299

MASSACHUSETTS TRIAL COURT,
Respondent

Appearances: Tahirah Amatul-Wadud, Esq. for Complainants
Anne-Marie Ofori-Acquaah, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 8, 2008, Amy Sellers ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that the Massachusetts Trial Court discriminated against her on the basis of religion (Muslim) by denying her an accommodation and subjecting her to harassment. Complainant filed an amended complaint on July 1, 2011 charging retaliation based on allegations that after she filed her original complaint, she was told that she would be assigned to the Greenfield District Court, approximately 37.9 miles from her home; she was told that if she withdrew her complaint from the MCAD, several of her sick days would be restored; and she was told that her doctor's notes justifying her absences were insufficient.

A probable cause finding was issued by the Investigating Commissioner on December 8, 2011. The case was certified for a public hearing on August 6, 2013. A public hearing was conducted on March 20, 21, 24, and 25, 2014.

The following witnesses testified at the public hearing: Complainant, Masoom Bey, Maureen Perry, Dr. Veronica Navarrete-Vivero, Lester Bowen, Kenneth O'Connor, and Betty Schneider. The parties submitted forty-three (43) agreed-upon exhibits. Respondent submitted one (1) additional exhibit.

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 Amy Sellers ("Complainant") was hired as a court officer by the Respondent Massachusetts Trial Court in December of 2007. Joint Exhibit 1. At the time Complainant was hired, she lived in Springfield with her grandmother.
2. Upon her hire, Complainant was assigned to the juvenile court located at the Hampden Court Complex in Springfield. The Hampden Complex consists of two buildings separated by a courtyard. The district, probate, family and superior courts are all in one building and the juvenile and housing courts are in another building.
3. The duties of a court officer include protecting judges, jurors, prisoners, court personnel, witnesses, and the public; maintaining order in the courtroom and other areas of the courthouse; being responsible for the custody and control of prisoners and other persons in custody; responding to assaultive behavior; and subduing/apprehending escaping prisoners. Joint Exhibit 2.
4. Court officers are required to wear an approved uniform authorized in the Court Officer Manual which warns that the "wearing of rings, earrings, bracelets and other items may cause serious harm or injury to a court officer who is required to be able to subdue unruly person(s) and who may be required to use force...." Joint Exhibit 3.

5. At all relevant times, Kenneth O'Connor was the Chief Court Officer at the Hampden Court Complex. He reported to Edmond Tobin, Deputy Director of Security.
6. Chief Court Officer O'Connor testified that Complainant was a good employee and he had no concerns about her work.
7. In April of 2008, Complainant converted to the Muslim religion. She began to wear modest clothing and covered her hair in public.
8. On or about July 7, 2008, Complainant, while at work, began to wear a black head scarf wrapped around her head in such a way that her hair was covered but her neck and ears were exposed. She did not inform her supervisors about the head scarf and did not request a religious accommodation in regard to wearing the head scarf.
9. Complainant testified that she experienced two episodes of taunting in regard to her conversion to the Muslim religion. In one instance, a Christian court officer asked her why she left "the truth" and in another instance a maintenance worker called her "Obama's wife." Complainant acknowledged that she did not report these matters to her supervisors.
10. Complainant wore her head scarf to work for several days without repercussions. On July 9, 2008, Chief Court Officer O'Connor learned that Complainant was wearing a head scarf. He met with Complainant and learned that she had converted to the Muslim religion and was wearing the head scarf as a requirement of her religion. O'Connor informed Complainant that she needed permission to wear the head scarf. I do not credit Complainant's testimony on direct examination that she was told by O'Connor to remove her head scarf pending a resolution of the issue and was sent home because she refused.

This testimony is contradicted by Complainant's testimony on cross-examination and by her contemporaneous diary entries.

11. Chief Court Officer O'Connor spoke to Deputy Director Tobin about Complainant's head scarf. Tobin advised O'Conner to tell Complainant to request a religious accommodation. Joint Exhibit 4. O'Connor conveyed the instruction to Complainant. Joint Exhibit 43.

12. On July 10, 2008, Complainant sought specific directions from the Trial Court setting forth the requirements for requesting a religious accommodation. Deputy Director Tobin told her over the phone that the Trial Court required her to produce a letter stating that she was Muslim and that wearing a head scarf was required by her religion. He said that she could wear her head scarf to work pending the Trial Court's response. On July 15, 2008, Tobin wrote to Complainant again stating that she had to make a written request for religious accommodation and specify that a head covering was mandated by observance of her religion. Joint Exhibit 4. Complainant submitted the request by letter dated July 16, 2008. Joint Exhibit 5.

13. On July 30, 2008, Complainant received a written denial from Deputy Director Tobin. Joint Exhibit 6. He cited safety reasons and gave as an example of safety concerns the possibility that a head scarf could be pulled down over her eyes during an altercation. Id.

14. Complainant filed a grievance on July 31, 2008 about the head covering issue. The Trial Court received the grievance on August 4, 2008. Joint Exhibit 7. Complainant testified that she was out of work for some days prior to filing the grievance, but Respondent's employment records indicate that she consistently worked during July of 2008. Joint Exhibit 36.

15. Complainant wore a head scarf to work up to and including Friday, August 1, 2008, when Chief O'Connor sent her home and placed her on paid administrative leave. Joint Exhibit 36. Per letter of August 1, 2008, he issued Complainant a written warning for insubordination in regard to Complainant's continuing to wear a head scarf after being informed on July 30, 2008 that her request for a religious accommodation was denied. Joint Exhibit 8.

16. On the same day that she was sent home (August 1st), Complainant modified her accommodation request to seek permission to wear a head covering that fit tightly to her head and could not unravel like a head scarf. Joint Exhibit 10.

17. On Monday, August 4, 2008, Complainant submitted a doctor's note stating that she would remain out of work for medical reasons from August 4-11, 2008. Joint Exhibit 9. She is listed in the Trial Court attendance calendar as being out of work on paid administrative leave on August 4 and 5, 2008 and on sick leave thereafter. Joint Exhibit 36.

18. A step three grievance hearing was held on August 5, 2008. Complainant attended the grievance hearing. Complainant testified that she was told by her union representative that the grant of a religious accommodation and the restoration of her sick days would be predicated upon her reassignment to Greenfield and the withdrawal of her MCAD complaint. I do not credit this testimony. I credit, instead, testimony of Chief Court Officer O'Conner that he never spoke to Complainant's union representative about the withdrawal of Complainant's MCAD complaint.

19. On August 6 and 7, 2008, Complainant called in sick and did not report to work. Joint Exhibit 36. Complainant testified that she felt too stressed, nervous, and nauseous to

perform her job. She began treating with clinical psychologist Dr. Veronica Navarrete-Vivero for anxiety and depression.

20. On Friday, August 8, 2008, Complainant remained home on sick leave. Joint Exhibit 36. She filed an MCAD complaint alleging religious discrimination based on the denial of a reasonable accommodation and harassment. On the same day that Complainant filed her MCAD complaint, Chief Court Officer O'Connor called Complainant at home to tell her that her grievance had been allowed and that she could wear her head covering to work beginning on Monday, August 11, 2008. Joint Exhibit 11. Complainant informed O'Connor that she planned on taking an indefinite leave from her job. O'Connor informed her that she had to provide a doctor's note to substantiate her need for an indefinite leave of absence. Joint Exhibit 11.

21. On August 11, 2008, Complainant's doctor faxed to Chief Court Officer O'Connor an illegible medical record and a note stating that Complainant would be out of work until further notice. Joint Exhibits 12 & 13. In response, O'Connor requested a signed and typewritten doctor's note containing a diagnosis and prognosis. Joint Exhibit 15.

22. By letter dated August 12, 2008, the Trial Court issued a formal decision allowing Complainant to wear the head covering that she had worn to the grievance hearing. Joint Exhibit 14. The decision stated that the Trial Court reserved the right to revisit the issue in the event of a security concern and to review future requests for accommodation on a case-by-case basis. Id.

23. Complainant did not return to work for five months after her requested accommodation was granted. She continued to use sick leave until it was exhausted and then remained out of work on unpaid leave. Joint Exhibit 36.

24. In a fax transmission of August 27, 2008, Dr. Lawrence Bernstein sent Chief Court Officer O'Connor an unsigned note stating that Complainant "may not return to work/school until further notice." Joint Exhibit 16. O'Connor responded by informing Complainant that the note was insufficient to substantiate her need for an indefinite leave. Joint Exhibit 17.

25. On August 28, 2008, Dr. Bernstein submitted another note stating that Complainant had a diagnosis of anxiety and depression and that he could not determine a return to work date. Joint Exhibit 18.

26. Complainant exhausted her accrued sick leave on September 17, 2008. Joint Exhibit 36.

27. On September 16, 2008, Complainant applied for FMLA leave citing "various stressors and placement of a child guardianship." Joint Exhibit 19. In support of her FMLA request, Complainant submitted a letter dated September 20, 2008 from Dr. Navarrete-Vivero stating that she was unable to work due to extreme emotional distress. Joint Exhibit 20.

28. Complainant's request for twelve weeks of FMLA leave was granted per letter dated September 29, 2008. Joint Exhibit 22. The leave began on October 16, 2008 and expired on January 11, 2009. Joint Exhibit 23.

29. Complainant married in November of 2008 and moved to Agawam with her spouse. She assumed guardianship of a younger sibling around the time of her marriage. The sibling resided with Complainant and her spouse for a period of time beginning in the summer of 2008.

30. On January 9, 2009, Dr. Navarrete-Vivero wrote a "To Whom It May Concern" letter stating that Complainant's work environment needed to be "as stress free as possible." Joint Exhibit 24.

31. Complainant returned to work on or around January 14, 2009. Joint Exhibits 36, 41, 42. Complainant alleges that after she returned to work, she was reassigned on numerous occasions to Greenfield, which is approximately thirty-seven miles from her then-home. Complainant was unable to remember the dates of the alleged Greenfield assignments but asserts that she was assigned there for "weeks" or "about a month" during the January/February of 2009 period. She testified that her shift ended in Greenfield at 4:30 p.m. and that she had a forty-five minute commute back home. She claims that she drove herself to Greenfield during the first week of her alleged transfer and then carpooled with Court Officer Lester Bowen. I do not credit Complainant's testimony about being assigned to Greenfield.

32. Lester Bowen testified (telephonically) that Complainant worked briefly in Greenfield, but he does not recall when. According to Bowen, they drove together a couple of times. Bowen stated that he typically left his home in Springfield between 7:15 to 7:30 a.m. to travel to Greenfield and that he returned home around 5:10 to 5:30 p.m. I credit his testimony.

33. Complainant did not mention any references to working in Greenfield in the diary she maintained about work; she did not seek travel reimbursement for driving to Greenfield; and she remained out of work on sick, vacation, or other leave for approximately one-third of the days she claims to have been assigned to Greenfield. Joint Exhibits 36; 40-43. Documentary evidence establishes that Complainant signed in and out of the Trial

Court's Springfield office on the same days she claims to have carpooled with Lester Bowen to Greenfield and that her sign-in and sign-out times in Springfield are incompatible with Bowen's in Greenfield.[1] According to Respondent's daily accountability sheets, Springfield Court Officer Ronald Newton was the only court officer assigned to Greenfield during the relevant time period. Joint Exhibit 42. Greenfield's Chief Court Officer Betty Schneider testified that Complainant did not work in Greenfield between January and March of 2009.

34. Springfield Chief Court Officer O'Connor testified credibly that he never assigned Complainant to work in Greenfield at any time following her return from FMLA leave in 2009 although he did assign her to work in Greenfield on two to three occasions in 2008. According to O'Connor, a Springfield officer assigned to Greenfield on a temporary basis would not sign in at Springfield before traveling to Greenfield unless the officer did not know that he/she was being re-assigned.

35. Complainant submitted two letters to the Trial Court dated March 13, 2009. The first was a request for an unpaid leave of absence for the period from March 30, 2009 to May 30, 2009. Joint Exhibits 28, 31. The second was a resignation letter with an end date of March 27, 2009. Joint Exhibit 29. Complainant left the Trial Court's employ at the end of March of 2009.

36. Complainant earned a Master's Degree in in clinical psychology in May of 2009.

37. In 2010, the Trial Court revised its court officer uniform policy to permit the wearing of headgear for legitimate religious reasons. Respondent's Exhibit 1.

---

[1] Complainant signed into work at Springfield between 7:46 and 8:30 a.m. and signed out around 4:40 p.m. during January/February of 2009. These times are approximately the same times that Bowen signed in and out at Greenfield. Joint Exhibits 40 and 41.

III. CONCLUSIONS OF LAW

Religious Discrimination Claim

G. L. c. 151B section 4(1) prohibits religious discrimination in the terms and conditions of employment. To establish a prima facie case of religious discrimination, Complainant must show: (1) she has a sincerely-held religious belief that conflicts with a job requirement; (2) she informed Respondent of the conflict; and (3) Respondent refused to accommodate her sincerely-held belief. If Complainant proves her prima facie case, Respondent must then establish that it offered a reasonable accommodation or that the requested accommodation would have resulted in an undue hardship. Both economic and non-economic costs can pose an undue hardship. See New York and Mass. Motor Serv. Inc. v. MCAD, 401 Mass. 566, 576 (1988).

Complainant satisfies the elements of a prima facie case by establishing that she is a practicing Muslim for whom the wearing of a head covering constitutes a sincerely-held religious belief. Complainant communicated to her employer on July 9, 2008 that she had converted to the Muslim religion and sought to wear a head scarf at work. She requested an accommodation that would allow her to do so by letter dated July 16, 2008. Director Tobin's July 30, 2008 denial of the request, the subsequent order to remove her head scarf pending resolution of her grievance, the order sending Complainant home with pay on August 1, 2008 for continuing to wear her head scarf to work, and the imposition of a written warning for insubordination all constitute facets of Respondent's refusal, albeit short-lived, to accommodate Complainant's sincerely-held religious beliefs.

At stage two, Respondent must show that it offered a reasonable accommodation or that it legitimately refused to offer such an accommodation in order to avoid undue hardship.

Respondent maintains that it pursued the former option, offering Complainant a reasonable accommodation following her grievance hearing on August 5, 2008. According to Respondent, just three days later, on Friday, August 8, 2008, Chief Court Officer O'Connor called Complainant at home to tell her that her grievance had been allowed and that she could wear a head covering to work beginning on Monday, August 11, 2008. Little more than three weeks elapsed between Complainant's July 16, 2008 request for a religious accommodation and the granting of her request on August 8, 2008. Only eight days elapsed between the Trial Court's order that Complainant remove her head covering or go home on paid leave and its reversal of that order in conjunction with the granting of a religious accommodation.

Rather than evincing a lack of good faith, the evidence establishes that Respondent made a sincere effort to accommodate Complainant's religious beliefs with the maintenance of a safe and secure workplace. Although the Trial Court initially determined that Complainant's head scarf created safety and security concerns, it subsequently permitted her to wear a different head covering which did not unravel. There is no dispute that the Trial Court took several weeks to explore the issue and expected Complainant to comply with its uniform policy between July 30, 2008, when it initially denied her request, and August 8, 2008, when it informed Complainant that her grievance had been allowed. However, a nine-day deliberation period does not constitute undue delay. During the interim, Complainant sustained no loss of income. Although a warning for insubordination was placed in her personnel record, it was based on a policy that was subsequently reversed. Respondent thereafter granted Complainant a five-month leave of absence. These are not the actions of a hostile employer bearing discriminatory animus towards an employee based on her religion.

Respondent's reservation of the right to revisit the dress code issue in the event of a future security breach and of the right to review future requests on a case-by-case basis likewise fail to establish discriminatory intent but, rather, constitute thoughtful steps in reconciling the parties' competing concerns. The fact that the Trial Court revised its uniform policy in 2010 to permit the wearing of head coverings for legitimate religious reasons is further evidence of Respondent's lack of discriminatory animus.

Turning to alleged acts of harassment, Complainant recounted only two instances in which co-workers made remarks that touched on her religious practice. In one instance an employee allegedly asked her why she turned away from the "truth" and in another instance an employer referred to her as "Obama's wife." These comments were not reported to a supervisor. Accordingly, Respondent is not liable for their utterance. See College Town Division of Interco, Inc. v. MCAD, 400 Mass. 156 (1987) (employer liable for discrimination committed by those on whom it confers authority and by non-supervisors where employer is notified and fails to take adequate remedial steps). The remarks, moreover, fail to constitute severe or pervasive activity which rendered the workplace a hostile environment. Complainant, by all accounts, enjoyed support from supervisors who thought she did a fine job. Such circumstances do not support a viable claim of harassment.

Retaliation Claim

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 the 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 Respondent succeeds 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 Respondent is covering up a retaliatory motive which is a motivating cause of the adverse employment action. Id.[2]

There are multiple instances of Complainant engaging in protected activity, the first one being a written request for a religious accommodation per letter dated July 16, 2008. See Wright v. CompUSA, Inc. 352 F.3d 472 (1st Cir. 2003) (making an accommodation request alone is sufficient to constitute protected activity). Complainant thereafter filed a grievance on July 31, 2008 over the denial of the right to wear a head covering to work. Following the filing of the grievance, Complainant, on August 8, 2008, filed a charge of discrimination with the MCAD alleging religious discrimination based on the denial of a reasonable accommodation and harassment. All of these matters constitute various forms of protected activity of which Respondent was aware.

Complainant maintains that after engaging in the above-described protected activity in the summer of 2008, she returned to work on January 12, 2009 and was subjected to adverse action. According to Complainant's public hearing testimony she was transferred to Greenfield approximately thirty-seven miles away from her home. Complainant was unable to remember the dates of the alleged transfers, but asserted that they took place on numerous occasions, amounting to approximately one month in total, during the January/February of 2009 period. She claims that she drove herself to Greenfield during the first week of her alleged transfer and then carpooled with Court Officer Lester Bowen.

[2] In using a "motivating cause" standard, Massachusetts interprets Chapter 151B retaliation claims more differently than does the Supreme Court which interprets Title VII retaliation claims to require proof that the desire to retaliate is the "but-for cause" of a challenged employment action. See University of Texas Southwestern Medical Center v. Nassar, 570 U.S. __, 133 S. Ct. 978 (2013).

I do not believe that Complainant was assigned to Greenfield in retaliation for challenging the Trial Court's uniform policy because her claim is not corroborated by Lester Bowen, the officer whom she claims drove her to Greenfield on most of the days she allegedly traveled there in 2009. Complainant, moreover, signed in and out of the Springfield office when she claims to have been at Greenfield; she arrived and departed from the Springfield office at times that were incompatible with driving to Greenfield with Bowen; she did not seek travel reimbursement for driving to Greenfield on the days when she allegedly drove herself there; and she was absent from work for much of the time that she claims she was assigned to Greenfield. Documentary evidence provides support for Respondent's assertion that Springfield Court Officer Ronald Newton, not Complainant was transferred to Greenfield during the relevant time period. It is also noteworthy that Complainant's 2011 amended complaint only charges that Respondent *threatened* to send her to Greenfield District Court, not that she actually went there. The omission of any reference to actually working in Greenfield supports the conclusion that no such assignment occurred.

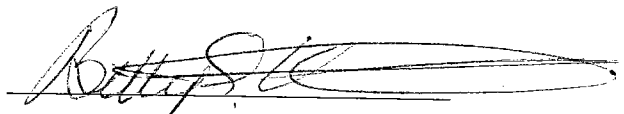
The amended charge of discrimination also states that Respondent offered to return sick time to Complainant provided that she agreed to withdraw her MCAD case. It is questionable whether such an offer, even if made, constitutes retaliation. I any event, credible evidence indicates that no such offer was ever made.

Based on the foregoing, the record fails to support the claim that Complainant was subjected to retaliation for pursuing a religious accommodation.

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 1st day of December, 2014.



Betty E. Waxman, Esq.,
Hearing Officer