

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & DENI GOLDMAN,
Complainants

v.

DOCKET NO. 09-NEM-02783

TOWN OF SEEKONK &
MICHAEL CARROLL,
Respondents

Appearances:

Simone R. Liebman, Esquire and Mairead C. Blue, Esquire, Commission Counsel
William M. Zall, Esquire and Anne C. Rosenberg, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 21, 2009, Complainant Deni Goldman filed a complaint with this Commission alleging that Respondents discriminated against her on the basis of gender and retaliation. The Investigating Commissioner found probable cause with respect to the retaliation claim and dismissed the gender claims. Therefore, the sole claim before this Commission is the retaliation claim. Attempts to conciliate the case failed and the matter was certified for public hearing. A public hearing was held before me on June 9, 11-13 and August 27, 2014. After careful consideration of the evidence before me 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 Deni Goldman resides in Randolph, Massachusetts. Since March 2014, Complainant has been employed as head of communications for Four Paws International, a non-profit animal protection organization. Tr. I, p. 38-40.

2. Complainant has a Bachelor of Arts degree in Communications and earned a Massachusetts animal control officer certification in 2005. Tr. I, 29-30. She received a reserved intermittent police certification in 2005 and has attended the Massachusetts Statewide Emergency Telecommunications Academy and numerous training courses sponsored by the Animal Rescue League and others. Tr. I, p. 34- 37.

3. Respondent Michael Carroll was the Executive Secretary for the town of Randolph from January 2006 until October 2007. He was employed as the Town Manager for the Town of Seekonk from January 2008 until June 11, 2011. Tr. II, 148, 167.

4. Respondent Town of Seekonk is a municipality located in Bristol County, MA.

Complainant's Employment with the Town of Randolph

5. Complainant was employed by the Town of Randolph as the Assistant Animal Control Officer ("AACO") from October 2004 through the summer of 2006. Tr. I, 40-41. In that part-time position, Complainant reported to the Animal Control Officer ("ACO"), who in turn reported to the town's Executive Secretary. When Michael Carroll became Executive Secretary in January 2006, the ACO began reporting to him.

6. Complainant was on call from 4:00 p.m. to 8:00 a.m. Monday through Friday and from 4:00 p.m. Friday to 8:00 a.m. Monday. She was paid for 15 hours per week. The town's

police dispatcher would contact her when a call required ACO assistance. In addition to her AACO job, Complainant worked as a morning crossing guard and was an on-call matron for the Randolph police department.

7. Concurrent with her employment for the Town of Randolph, Complainant worked as an AACO for the Town of Stoughton every other Saturday and Sunday from 7:00 a.m. to 1:00 p.m. Tr. I, p. 47. Complainant's office was located within the shelter run by the Town of Stoughton. Tr. I, p. 48.

8. Complainant testified that she got along well with her supervisor in Randolph until after his return from a medical leave, when he became bullying and intimidating and contacted her at all hours of the night for trivial matters. Tr. I, p. 57-8.

9. On January 20, 2006, after Carroll became Randolph's Executive Secretary, he met with Complainant and her supervisor to attempt to iron out their differences. Complainant later spoke to Randolph's human resources director about issues with her supervisor. Shortly thereafter, Complainant overheard her supervisor loudly telling police officers in the dispatch area that the only reason the human resources director was helping Complainant was because "he's fucking her." Tr. I, p. 60-61.

10. Complainant testified that she believed that she was being sexually harassed by her supervisor. She hired a lawyer who sent Carroll a letter on May 8, 2006, stating that Complainant was alleging sexual harassment and demanding that Randolph hire an investigator to look into the matter. Tr. I., p. 63-4; Ex. C-1; Ex. J-2.

11. Complainant left work due to a workers' compensation injury on March 24, 2006.

12. Carroll referred Complainant's lawyer's letters to town counsel, who recommended hiring an investigator to inquire into her allegations. Tr. III, p. 102; 112-3. Carroll hired an

investigator and spoke to him approximately five times between May 16, 2006 and July 6, 2006. Tr. III, p. 117-118. On July 6, 2006, the investigator issued a report which he sent directly to Carroll. The investigator concluded that Complainant had some behavioral issues and that her supervisor lacked supervisory skills. He also concluded that the supervisor's statement regarding the human resources director was inappropriate, but was insufficient, in and of itself to constitute sexual harassment. Tr. III, p. 121-122; Jt. Ex. 10. The report recommended that Complainant's supervisor be suspended for a day and should apologize to Complainant and the human resources director, but Carroll did not agree with the recommendation of suspension and instead placed him on probationary status because he did not want to punish the supervisor. Tr. I, p. 156; III, p. 126,131-3. The supervisor never apologized to Complainant.

13. Complainant never returned to work for the Town of Randolph following her workers' compensation injury on March 24, 2006, although a physician approved her return to work. She was instructed to return to work on July 31, 2006 and refused to do so. Tr. I, p. 69; Jt. Ex-8; 9, 29; Ex. C-1. She was subsequently terminated from her employment with the Town of Randolph for abandoning her position.

14. In the meantime, Complainant had applied for the ACO position in the Town of Hull, and on July 10, 2006, she was appointed to that position and began working on July 17, 2006. Ex. R-s; Tr. II, p. 30. Tr.I, p.72.

15. On July 21, 2006, Complainant filed a sexual harassment claim with this Commission against the Town of Randolph and her former supervisor. Carroll was aware of Complainant's claim against the Town, discussed the claim with the Chair of the Board of Selectmen and communicated with town counsel about the matter. Tr. III, p. 85-86. Carroll signed the town's position statement. Tr. III, p. 147-53. When the case was resolved he went

before the Board of Selectmen and recommended that the town approve the settlement recommended by town counsel. Tr. I, p. 62-3; 69 Tr. III, p. 156.

16. Carroll testified that he had a role in managing, receiving, and reviewing documents related to legal cases against the Town of Randolph. Tr. III, 80. He maintained an excel spreadsheet of all the legal claims against the town and would refer claims to counsel or the board of selectmen. Tr. III, 83.

Seekonk Position

17. In 2009, Seekonk employed a full-time ACO and a part-time AACO. The ACO reported directly to Carroll, who was then Seekonk's Town Manager. Tr. II, 153.

18. Carroll testified that the ACO had the duties of a dog officer and was also responsible for managing the town's low kill shelter that was supported by a large, active non-profit volunteer organization called Save-A-Pet, which ran an adoption program. The ACO cared for the shelter animals and ensured that they were fed, groomed and living in clean conditions. Tr. II, 154-5. Save-A-Pet volunteers assisted in running the animal shelter and the ACO assigned them work schedules and tasks. Tr. I, p. 154-5.

19. In April 2009, the positions of ACO and AACO in the Town of Seekonk became vacant. Carroll was responsible for identifying and selecting candidates for approval by the Board of Selectman, which was the appointing authority. Tr. II, 157. Carroll first posted the positions internally, but after receiving no internal candidates, he advertised in a local newspaper. Tr. II, p. 160. He received over 30 applications for the two positions. Tr. II, 169.

20. The internal posting for the ACO position stated only that; "Duties will include but will not be limited to enforcing all town bylaws and Massachusetts General Laws pertaining to dogs, cats and in some cases other animals and to perform the duties of dog officer as described

in Chapter 140.” Jt. Ex. 1. The posting and advertisement were sparse and did not state a requirement or preference for local candidates or management experience.

21. In 2009, Complainant’s position as ACO for the Town of Hull had been reduced to part-time. She saw a posting for the positions of ACO and AACO for the town of Seekonk. Tr. I, p. 70-71. The posting indicated that resumes should be sent to the town administrator. Complainant was interested only in the ACO position. Tr. I, p. 73.

22. Complainant testified that at the time, she did not realize the Seekonk’s Town Manager was the same Michael Carroll who had served as executive secretary for the Town of Randolph when she worked there and only learned later that he was the same person. I do not credit her testimony in this regard and I find that she recognized Carroll as the former executive secretary of Randolph.

23. On May 12, 2009, Complainant sent an application and cover letter to Carroll. (Ex. J-12) Tr. I, p. 74. Tr. III, 193. After sending her resume, Complainant contacted Carroll’s assistant, Anne Rodgers, a number of times to inquire about the status of her application. Tr. I, p. 78-9.

24. On May 26, 2009, Complainant sent Carroll an email reiterating her interest in the position of ACO. Tr. I, p. 78; Jt. Ex. 5.

25. Complainant testified that it occurred to her that she might not have been called for an interview because Carroll was holding her experience at Randolph against her. She then created a resume and cover letter for a fictitious person, “Jenny Gorfinkel,” which she also submitted to Carroll by email on May 26. Tr. I, p.79-80. “Gorfinkel” had fewer qualifications than Complainant. Tr. I, p. 80. Complainant gave as Gorfinkel’s contact information a telephone number from a cell phone that she possessed at the time.

26. Complainant testified that Rodgers called the cell phone and left a voicemail for “Jenny Gorfinkel” inviting her for an interview on June 15, 2009. This voicemail message caused Complainant to believe she was not called for an interview because of her action against the Town of Randolph.

27. The message purporting to be Rodger’s voicemail was played at the public hearing and was completely unintelligible.¹ Complainant’s testimony regarding the purported voice mail message from Rodgers was not credible and I believe that she fabricated the voice mail message.

28. Anne Rodgers listened to the purported voice mail message at the public hearing and denied that it was her voice on the recording. Tr. V., p. 120-128. Rodgers recalled Complainant calling her several times. She did not remember whether she called applicants for interviews, because she was out sick for much of the month of June, 2009.

29. Carroll testified that while reviewing the applications, he recognized Complainant’s name. He recalled that Complainant had worked as the AACO in Randolph, and that her supervisor repeatedly complained to him about her poor attendance and poor treatment of the ACO’s van. He stated that he did not remember that Complainant had filed an internal complaint and an MCAD complaint alleging sexual harassment with the Town of Randolph. Tr. II, 170. I do not credit his testimony on the latter issue. I find it highly improbable that Carroll would selectively remember that Complainant had performance issues and yet not remember her internal complaint of discrimination, the subsequent investigation which he arranged for, the MCAD complaint, and his communications with the Board of Selectmen about the claim and its resolution, given his significant involvement in the process.

¹ Complainant claimed that she saved the voicemail, which she repeatedly transferred from cell phone to cell phone and then to a recording device, causing its quality to degrade. During the course of her testimony the details of her attempts to preserve the voicemail shifted and changed. Tr. I, p. 132-34, Tr. II, 122-124. I find it highly implausible that Complainant would not take care to preserve the message that she believed central to her claim and I find that she fabricated the voicemail message.

Hiring process

30. Carroll set up a two-step process for hiring the ACO and AACO. He conducted an initial screening, along with two town employees selected by him: Det. Donald Bricault of the Seekonk police department, who was familiar with the police department's involvement in animal issues and Jan Parker, the town clerk and a founding member of Save-A-Pet.

31. Carroll testified that Rodgers collected the resumes and made copies for him, Parker and Bricault. Tr. II., p. 173. Carroll instructed Parker and Bricault to identify five or six candidates to interview. He testified that any candidate chosen by at least two of the three screeners would be invited for an interview. The three screeners would then select finalists who would be interviewed by a second set of interviewers chosen by Carroll. Tr. II, p. 158. 32.

32. Carroll testified that he was seeking a candidate for ACO who had experience with adoption programs, caring for shelter animals and dealing with the public and Save-A-Pet. He also sought a candidate with management experience who could manage a budget, keep programs running and be responsible for results. Tr. II, p. 163. 31.

33. Carroll stated that Complainant was objectively more qualified than the successful candidate, Sharonlynn Hall, because of her previous experience as an ACO and her ACOAM certification. Based on her resume alone, he would have placed her on his short list of candidates, had it not been for her performance problems in Randolph. Tr. III, p. 195-7; 221-2.

34. Jan Parker testified that she was looking for someone who had managerial and animal handling skills and was a local resident. Parker provided Carroll with the resumes of applicants she thought qualified for the positions. She selected Complainant as one of her

candidates because of her significant law enforcement experience and her previous experience as an ACO. Tr. IV., p. 54-5; 59-60.

35. Bricault provided Carroll with a written list of five applicants he recommended for interviews in order of their ranking. Bricault ranked Sharonlynn Hall first and a candidate from Attleboro third. His list did not include Complainant.² Tr. II, p. 176-7; Ex. R-6.

36. Carroll testified that he told Parker and Bricault that Complainant had performance and attendance issues in the past, but did not tell them that she had brought a sexual harassment claim against the Town of Randolph. Parker testified that Carroll did not tell her to remove Complainant from her list and she did not do so. Tr. II, p. 175-6; Tr. IV, p. 61.

Complainant's qualifications

37. Complainant had three years' experience as the Hull ACO. She had also worked as an AACO for Randolph and Stoughton for many years. Complainant received the Animal Control Officers Association of Massachusetts ("ACOAM") certification in 2005. Tr. I, p. 31; Tr. III., pp. 5-6. In 2008, she received the 2008 Massachusetts Animal Control Officer of the Year Award. Tr. I., p.74. Complainant was also a certified animal control inspector and completed a course at the basic reserve/intermittent police academy.

38. Complainant had management experience as Hull ACO, and in previous positions. Tr. II, p. 114-116; 132-133, 138-139.

39. Complainant performed volunteer work as a member of the board of directors of ACOAM; was a representative to the Massachusetts Department of Conservation and Recreation and the Department of Public Health; was a volunteer on the MEMA Animal Response Team; a member of the South Shore Round Table on Domestic Violence and a member of the Hingham/Hull Rotary Club. She was also a presenter to the MSPCA Brockton Youth Seminar

² Bricault did not testify at the public hearing.

and a volunteer for the Massachusetts Special Olympics; she created the SABER alert program, which acted as an Amber alert system for pets. Tr. II, p. 117-119; Jt. Ex. 12. She sat on the State of Massachusetts Animal Response Team and attended conferences sponsored by the National Animal Control Association, and the local New England Federations of Animal Control. Tr. I, p. 38; Jt. Ex. 12. She also served on the ACOs' Association and wrote the ACOAM newsletter. Tr. I, pp. 75-76. Jt. Ex. 12.

Candidates Interviewed

40. Carroll testified that he selected six applicants to interview who had been chosen by at least two out of three screeners. They interviewed on June 16, 2009 for both the ACO and the AACO positions simultaneously. Two of the six interviewees had ACO experience and three were ACOAM certified. Tr. II, p. 178-80. Complainant was not selected to be interviewed.

41. Sharonlyne Hall, the successful candidate for ACO, was a lifelong resident of Seekonk. She had worked for a Seekonk animal hospital for 16 years, during 11 of which she was the office manager and head technician. Hall oversaw the day-to-day operations, employee scheduling, the interviewing and qualifying of new hires, training technicians, conducting performance appraisals, purchasing and invoicing, maintenance of supplies and equipment and handling customer complaints. Tr. IV., p. 82-4; Jt. Ex. 13. Hall's technician duties included triage and assessment of emergencies, intake and examination preparation, animal control and restraint during examinations, surgery preparation and assistance, administering anesthesia and vaccines, drawing blood, inserting catheters and administering fluids, following animal controls and using traps, dealing with rabies suspects, and handling feral cats and caution dogs. Tr. IV., pp. 84-5; Jt. Ex. 13.

42. Prior to working at the animal hospital, Hall worked at an animal clinic and on a horse farm. Tr. IV, p. 85-6; Jt. Ex. 13. Hall had experience rehabilitating and fostering animals and placing them in new homes. She had worked with local animal control officers and various volunteers for animal services. Tr. IV., p. 99, 101, 109, 110, 112. Hall was not ACOAM certified and she had not worked as an ACO or AACO. Tr. II, p. 179, 186 Tr. III, p. 219-20; 234-235. Tr. IV., p. 97, 109, 110.

43. The successful candidate for AACO was a resident of Attleboro, a neighboring town, with a Bachelor of Science degree in environmental science with an emphasis on wildlife, a diploma in animal science, multiple state and federal licenses and more than twenty years of experience in combined animal and wildlife care and rehabilitation. Jt. Ex. 33; Tr. II, p. 188-89, Tr. III, p. 239. She was employed by the City of Attleboro as a zoo caretaker and head zookeeper. She was not ACOAAM certified and had not previously worked as an ACO or AACO. She applied only for the AAOC position. Tr. II, pp. 179; 189; Tr. III, p. 208, 234-5; Jt. Ex.

44. Another finalist resided in a neighboring town and was employed as an ACO for three years and was ACOAM certified. This candidate had been employed as an EMT and in safety dispatch positions, and applied only for the ACO position. Jt. Ex. 21; Tr. III, pp. 212-213.

45. Another finalist lived in a neighboring town and had been a veterinary assistant in an animal hospital for several years and had experience as an auxiliary police officer. Jt. Ex. 14, Tr. II, p.189; Tr. III, pp. 210-235. This finalist was not ACOAM certified and had not worked as an ACO or AACO. Jt. Ex. 14; Tr. II, p.189; Tr. III, pp. 210-235. Carroll testified that because he was referred by a member of the Board of Selectmen, he was automatically granted a "courtesy" interview. Tr. II, pp. 187-88; Tr. III, pp, 211, 233.

46. Another finalist lived in central Massachusetts, had three years of experience as a veterinary technologist and two years of volunteer experience with many animal and wildlife assistance organizations. This finalist was a certified veterinary technologist, a registered laboratory animal technician and was ACOAM certified, but had not worked as an ACO. Tr. III, p.234, Jt. Ex. 15.

47. Another finalist lived in Centerville and was working as an AACO on Cape Cod and was ACOAM certified. Jt. Ex. 24; Tr. III, p. 211-212, 234.

48. The first group of candidates was interviewed by Carroll, Parker and Bricault. Following the interviews, they discussed the candidates and narrowed the choice to three finalists; Sharonlynn Hall, the candidate from Attleboro and the veterinary assistant/auxiliary police officer. None of the three finalists had ACO or AACO experience and none was ACOAM certified.

Second Interviews

49. The names of the three finalists were forwarded to the second set of interviewers, one of whom was the ACO in a neighboring town and, Robert Richardson, then a member of the Seekonk board of selectmen. Tr. II, p. 182, 3. Carroll was present and took notes at the second round of interviews but did not participate in the interviews.

50. Robert Richardson has lived in Seekonk for most of his life. He is currently the chairman of the town's finance committee. In 2009, he was a member of the board of selectmen. The board recommended him to conduct the interviews because his sister was president of Save-A-Pet and involved with animal control, and because of his experience caring for numerous animals. Tr. V., 37-8.

51. Richardson testified that he sought a candidate who was local and had a connection to the community and who would be more likely remain in the job. He also sought someone who could handle the day-to-day operation of the shelter and could deal with workers and customers, adoptions and the board of selectmen. ACO experience was not important for him because the successful candidate could become certified after being hired. Tr. V, p. 39. 51; Tr. V., p. 41.

52. Richardson knew Hall because he grew up with her husband and their children played sports together. He had been to Hall's home and had observed the numerous animals she has adopted. In addition he brought several of his pets for treatment at the animal hospital where Hall worked. Tr. V., p. 39.

53. Richardson and the other screener chose Hall as the ACO and the candidate from Attleboro as the AACO. Carroll referred Hall and the other candidate to the board of selectmen which approved their hire. The appointments were made on July 8, 2009. Tr. II, p. 199, 200.

54. On August 12, 2009, Complainant wrote to the chairman of the board of selectmen and to Carroll stating that she had not been interviewed despite her qualifications, that she was not selected for an interview because of her experience in Randolph and that she intended to file a lawsuit. Tr. II, p. 199. Jt. Ex. 25.

55. Complainant testified that she was devastated and "beside herself" when she did not get an interview in Seekonk. She was in shock and was surprised. She could not believe that a community would retaliate against her and punish her, given how much she had done in her career and how passionate she was about helping people and pets. She felt depressed and lost. At first she cried every day and her primary care physician prescribed a sleep medication. Tr. I, 110; 103-4. She became withdrawn, did not want to go out, stopped going to the gym and had

trouble sleeping. She discussed the matter with her mother and friends Emanuel Maciel and Denise Whitfield. She stated that the feelings of sadness and depression lasted until she was became a full-time animal control officer in 2011. She stated that her experiences in Randolph and Seekonk are inextricably bound. Tr. I., p. 107-8.

56. Complainant testified that she did not seek medical assistance for her emotional distress after she learned that Respondents were not going to offer her an interview. She frequently took Ambien, Benadryl or melatonin to treat her insomnia. Complainant testified that she has been taking Ambien since 2005 or 2006 to deal with anxiety issues, some of which related to difficulties with her boyfriend and her mother's illness. I credit Complainant's testimony regarding her emotional distress and while I believe that she was upset at not being interviewed for the position and because she believed this was retaliatory, I find that some of her anxiety and insomnia and other symptoms were caused by sources unrelated to Respondents' retaliation and I am not convinced that her emotional distress continued until she obtained full-time work.

57. Manny Maciel, who is the long time Animal Control Director for the City of New Bedford, testified that he has known Complainant since 2008, when they worked together on the board of the ACOAM. Maciel and Complainant are work friends through the board. They are not close personal friends and did not socialize outside of ACOAM Board meetings and events. Tr. I, p. 104, Tr. III, p. 24-5; 35; Tr. III., p. 44.

58. Maciel testified that Complainant told him that she had applied for the Seekonk ACO position, which she saw as an opportunity to grow. She told him that she thought she would be a good fit for Seekonk and was excited about the opportunity to work in a town with a kennel that cared about the quality of life of its animals. Complainant was distraught about not receiving an

interview for the position and she was no longer the happy person that the ACOAM board knew and she seemed emotional at ACOAM board meetings for a couple of months after the decision was made. Tr. III, p. 24-29, 54-55, 60, 67-9. I credit his testimony.

59. Denise Whitfield is the Safe Plan Advocate for the Hingham District Court. She met Complainant in 2007 when Complainant was the ACO for the Town of Hull. She and Goldman often saw each other at Hingham District Court and served on groups together, including some that involved animal safety projects. Tr. V, 4-5, 11-13.

60. Whitfield testified that in 2007, Complainant was easygoing, confident, well-liked, caring and compassionate. Prior to 2009, Complainant and Whitfield spoke, texted and emailed frequently. Whitfield was aware that Complainant was seeking a full-time animal control position in 2009. She testified that when Complainant learned she had been passed over for an interview, she would call her late at night and was distraught. Complainant began to have trouble sleeping and she sounded defeated and often cried. She stopped eating and developed stomach problems, stopped taking care of herself and looked pale and drawn. She withdrew and did not answer her phone calls, text message and emails for several months and visited her less frequently. Tr. V, p. 7-11; 31-33. I credit her testimony.

III. CONCLUSIONS OF LAW

Pursuant to M.G.L.c.151B§4(4), it is unlawful for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five. Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged 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]."

Complainant alleges that Respondents unlawfully retaliated against her by declining to consider her application for the position of ACO position in Seekonk and ultimately failing to hire her because of her participation in the protected activity of filing internal and MCAD complaints of sexual harassment with the Town of Randolph. There are two separate issues involved in this claim that must be resolved; whether Complainant was chilled in her right to be interviewed and considered for a job in retaliation for having engaged in protected activity at a prior and employer and whether Respondents' hiring decision ultimately would have been different if she had been under consideration.

In order to establish a claim of unlawful retaliation, Complainant must establish that she engaged in a protected activity, that Respondents were aware of the protected activity, that Respondents subjected her to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41 (2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000).

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of

mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

While previously employed by the Town of Randolph, Complainant complained internally about alleged sexual harassment and filed an MCAD complaint alleging sexual harassment by her then supervisor. This was protected activity within the meaning of the statute. At the time of the protected activity, Respondent Carroll was the executive secretary in Randolph. In that capacity, Carroll met with Complainant and her supervisor to attempt to resolve their differences. He hired an investigator to look into her allegations and was interviewed by the investigator regarding her internal complaint. He knew of the Complainant's subsequent MCAD complaint and was involved in the approval of a settlement of that claim.

Carroll subsequently left his position in Randolph and became Seekonk's Town Manager, a position he held at the time of Complainant's application for employment as Seekonk's Animal Control Officer. Respondents contend that they were not aware of Complainant's protected activity. I do not credit this assertion.

Carroll claimed that at the time of Complainant's application for the ACO position in Seekonk, he had forgotten that she had filed an internal complaint and an MCAD complaint against the Town of Randolph, despite having recognized Complainant's name and recalling that Complainant had performance problems at Randolph. In view of his significant participation in the process of handling Complainant's charge in Randolph, Carroll's testimony that he did not

remember her filing a claim of discrimination, is patently incredible. I conclude that he was fully aware of Complainant's prior protected activity.

It is axiomatic that if Complainant were not considered for an interview, she could not be considered as a finalist. Thus the issue of whether she was chilled in her right to be interviewed requires an analysis of the first level of the screening process.

As part of the two-step process for hiring the ACO and AACO designed by Carroll, he conducted an initial screening, along with two town employees selected by him. Carroll instructed the two other members of the initial screening group, Parker and Bricault, to identify five or six candidates to interview. Any candidate chosen by at least two of the three screeners would be invited for an interview. Jan Parker selected Complainant as one of her candidates because of her significant law enforcement experience and her previous experience as an ACO. Bricault, who did not testify at the public hearing, did not include Complainant in his list of five candidates.³ Carroll told Parker and Bricault that Complainant had performance and attendance issues in the past, but did not tell them that she had brought a sexual harassment claim against the Town of Randolph. Carroll believed that Complainant was "on paper" the superior candidate based on her relevant experience and licensure but did not select her to be interviewed. Complainant was not considered for an interview despite her obvious qualifications for the position, because two out of the three members of the committee did not select her to be interviewed. Therefore, I conclude that Complainant has established a prima facie case of unlawful retaliation in her non-selection to be interviewed.

Respondents assert that Complainant was not under consideration for the ACO job because of her past performance at the town of Randolph. Carroll testified that he did not select

³ Respondents would have me draw the inference that local residency was a prerequisite for Bricault based on his list of five candidates, who all resided in Seekonk and adjacent towns. I decline to draw such an inference solely from a list of names.

Complainant because of her past performance problems. Respondents also assert that an applicant's residence in Seekonk or vicinity was a factor in its consideration and, conversely, ACOAM certification was not. Thus, Respondents have articulated legitimate non-discriminatory reasons for failing to consider Complainant for an interview.

I conclude that while residency may have been a desirable factor in selecting a candidate, local residency was not a bar to consideration in the first level of screening, as two of the six candidates for the first interview lived farther from Seekonk than did Complainant. Although some of the six candidates did not have ACOAM certification, it was expected that the successful candidate would obtain certification after being hired. While I conclude that Respondents' articulated reason that Complainant's past performance was of some consideration in not selecting her for an interview in the first screening, given Carroll's extensive involvement in her complaints against the Town of Randolph, I conclude that Complainant's prior protected activity was also a significant consideration. I conclude that Respondents had "mixed-motives" for failing to select Complainant for an interview. Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. I conclude that Carroll acted with retaliatory animus, and had he not done so, he and Parker would have chosen her for an interview. This is based on Carroll's testimony that any candidate selected for an interview by two out of three initial screeners would have been interviewed. Carroll did tell the other committee members about Complainant's past performance and I find that his disclosing this information was motivated by retaliatory intent. Whether Parker and Bricault knew of the protected activity or not, Carroll's retaliatory motives likely influenced Bricault's decision not to interview her. Tuli v. Brigham & Women's Hospital, Inc., 566 F. Supp.2d, 32, 50 (D. Mass.

2008) (where the employee “concealed relevant information from the decision makers” and was able to influence their decision, the committee members need not have been personally motivated by discriminatory intent for the process to be discriminatory and the employer held liable.”); Cariglia v. Hertz Equipment Rental Corp., 363 F. 3d. 77, 86 (1st Cir. 2004)

Once the Complainant carries her initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" absent the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299. Respondents have failed to persuade me that they would have interviewed Complainant, but for her poor performance at her previous position. While Complainant may have had some minor difficulties with her supervisor in Randolph related to the van and her schedule, I conclude that Carroll’s consideration of her protected activity in the form of internal and MCAD complaints of sexual harassment, was the primary reasons for Respondents’ failing to consider her for an interview. I conclude that Respondents’ consideration of Complainant’s protected activity chilled her opportunity to participate in the job selection process and ultimately precluded her from being considered for the position. Exclusion from the selection process based on unlawful considerations could have a chilling effect on other potential job applicants who seek to exercise of their rights under M.G.L.c. 151B. I conclude that Respondents’ retaliatory reason for refusing to interview and consider Complainant for employment constitutes a violation of M.G.L.c.151B, sec. 4(4) regardless of whether she would have ultimately been hired. See, Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) (retaliatory dissemination of a

negative employment reference violated Title VII, even if the negative reference did not affect the prospective employer's decision not to hire the subject of the retaliatory action). In Hashimoto, the court concluded that the chilling effect on other employees of a supervisor's negative job reference for a former employee who had filed a discrimination complaint constituted retaliation within the meaning of the statute because there is "... little question that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by discriminatory intent." Id., at 678. The court also held that it was "beside the point that [her former supervisor's] negative job reference was not the reason [plaintiff] did not get the job with the Army," and that because "the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer's decision not to hire the victim of the discriminatory action." Id. at 678. I conclude that the reasoning of the court in Hashimoto is sound, and therefore Respondents' chilling of the Complainant's opportunity to participate in the hiring process and be considered as a candidate violated M.G.L. c. 151B, sec. 4(4).

Failure to hire Complainant

As stated above, Complainant has established a prima facie case of retaliatory failure to hire. The issue then becomes whether it is more likely than not that Respondents would have hired Complainant, had she been in consideration for the ACO position. The names of the three finalists were forwarded to the second set of interviewers, one of whom was the ACO in a neighboring town, who did not testify at the public hearing, and Robert Richardson, then a member of the Seekonk board of selectmen and currently the chairman of the town's finance committee. Carroll was present and took notes at the second round of interviews but did not

participate in the interviews. The ACO and Richardson never saw Complainant's resume and thus they were prevented from considering her application for employment.

Richardson has lived in Seekonk for most of his life. The board recommended him to conduct the interviews because his sister was president of Save-A-Pet and involved with animal control and because of his experience caring for numerous animals.

Richardson testified that he sought a candidate who was local and had a connection to the community and who would be more likely remain in the job. He also sought someone who could handle the day-to-day operation of the shelter and could deal with workers and customers, adoptions and the board of selectmen. ACO experience was not important for him because the successful candidate could become certified after being hired. Richardson knew Hall because he grew up with her husband and their children played sports together. He had been to Hall's home and had observed the numerous animals she has adopted. In addition he brought several of his pets for treatment at the animal hospital where Hall worked. Richardson and the other screener chose Hall as the ACO and Christianson as the AACO. Carroll referred Hall and Christianson to the board of selectmen which approved their hire. The appointments were made on July 8, 2009.

Respondents assert that even if Complainant had been under consideration, she would not have been hired because past employment as an ACO or AACO was not required of the successful candidate, as demonstrated by the fact that several of the finalists did not have ACO or AACO experience. Respondents also assert that the ACO's living in or near the town of Seekonk was a strong factor in consideration of the successful candidate. Richardson, who served on the final selection panel, testified that he was looking for someone local with management experience and who was involved with organizations like Save-A-Pet and he was not concerned about ACO certification, as the successful applicants could become certified after

their hire. The successful candidate, Hall, had significant experience working with and fostering animals, had managed an animal hospital's office, and was a resident of Seekonk. She had the type of experience and connections to the local animal rescue community that the committee believed would stand her in good stead to work well within the town where there was an active non-profit organization that lent significant support to the town's no kill shelter and adoption program. Hall was selected over other candidates with ACO experience and certification. I conclude that Respondents have articulated legitimate, non-discriminatory reasons why they would have selected someone other than Complainant for the position of animal control officer.

Once Respondent has articulated legitimate, non-discriminatory reasons for its actions, Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. Id.; Abramian, 432 Mass at 117.

Complainant asserts that Respondents' articulated legitimate, non-discriminatory reasons for not selecting her for the ACO position are ex post facto criteria and are therefore pretextual; she alleges that, absent retaliatory animus, she would have gotten the job because she was the most qualified candidate

Complainant asserts that there was no written requirement that the ACO be a resident of Seekonk or have management experience and that many prior town positions had been filled by non-residents, including the prior ACO. Complainant claims that the articulated criteria for the

ultimate selection would not have disqualified her for the ACO position, because of her willingness to relocate for the position and her objectively superior qualifications which included involvement with animal organizations, her certifications and management experience. Moreover, two of the six candidates selected for the first interview did not live in close proximity to Seekonk. She argues that because of Carroll's retaliatory failure to consider her application, Richardson and the other screening committee member, were precluded from ever considering her qualifications. Notwithstanding, I conclude that the absence of a written local residency preference or a preference for management experience does not contradict Respondents' assertion that these factors enhanced a candidate's desirability, that they considered these factors and that they are legitimate, non-discriminatory reasons for choosing the successful candidate.

I am not convinced that Respondents' reasons for hiring Hall were false or fabricated merely as justification for why Complainant would not have been chosen, even if her application had been under consideration. While Complainant's experience was different from Hall's, it cannot be said that Complainant was more qualified than Hall. Hall had demonstrated experience working with animals and managing a veterinarian's office, factors that were important to Respondents. The fact that she lived locally and had strong connections to the animal protection and rescue community was also significant. Moreover, Respondents considered factors other than experience. One candidate was granted two interviews largely as a courtesy because he was referred by a selectman, demonstrating that political considerations may have also been a factor in the selection process. Given all of the above, Complainant has not persuaded me that Respondent's reasons for choosing the successful candidate were a pretext for unlawful retaliation or that she would have been awarded the position of ACO, had she been a candidate.

IV. REMEDY

Pursuant to M.G.L. c.151B s. 5, the Commission is authorized to grant remedies to make the Complainant whole. This can include an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of Respondents' unlawful conduct. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997). Since I have concluded that Complainant has not proven that she would have been hired for the ACO position, even if her candidacy had been considered, I decline to award her damages for lost wages.

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. at 576.

I conclude that Complainant was upset and depressed at having been unlawfully prevented from being considered for a job and she suffered from insomnia and anxiety and became withdrawn for a period of time. Changes in her demeanor and her withdrawal were

observed by two of her friends. While Complainant also had other sources of stress in her life at that time, including issues with her boyfriend and the illness of her mother, I conclude that the distress of not being considered for the ACO position because she had engaged in protected activity contributed significantly to her distress. Thus I conclude that Complainant is entitled to an award of damages for emotional distress in the amount of \$25,000.00.

B. Civil Penalty

Massachusetts General laws, Chapter 151B, §5 states, in part, "If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice."

Having found that Respondents are liable for unlawful retaliation in violation of G.L.c.151B §4(4), I conclude that a civil penalty against Respondents in the amount of \$5,000 is warranted.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

- 1) Respondents immediately cease and desist from unlawful retaliation.
- 2) Respondents pay to Complainant, Deni M. Goldman, the sum of \$25,000.00 for emotional distress damages, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- 3) Respondents pay to the Commonwealth of Massachusetts the sum of \$5,000 as a civil penalty.

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review with the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 7th day of July, 2015.


JUDITH E. KAPLAN
Hearing Officer