

## INVESTIGATIVE DISPOSITION

Case Name: **G.L. c. 4 § 7(26)(c) - Privacy** v. City of New Bedford, Scott  
Downing  
MCAD Docket No.: 15NEM00428  
EEOC Docket No.: 16C-2015-00816  
No. of Employees: 25+  
Investigator: Sarah Biglow, Investigator  
Recommendation: **Probable Cause**

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### Introduction

On March 4, 2015, Complainant filed a charge against Respondents, alleging sexual harassment and retaliation, in violation of M.G.L. c.151B, section 4, paragraphs 4, 4A, 16A and Title VII of the Civil Rights Act of 1964.

### Complainant's Allegations

Complainant alleges as follows. Complainant identifies her sex as female. Complainant was hired by Respondent City of New Bedford in its Traffic Commission in October 2011 as a Clerk Typist. She was promoted to the position of Principal Clerk in July 2013. At all times Complainant was supervised by individual Respondent Scott Downing. Beginning in late 2012, Mr. Downing subjected her to sexual harassment. Initially, Mr. Downing would give her orders for things he wanted done in the office by whispering in Complainant's ear or speaking only a few inches from her face. Frequently throughout the end of 2012 and 2013, Mr. Downing would call Complainant into his office on the pretense of discussing work and would tell her about his weekend or prior night with his sexual partners. Mr. Downing would tell Complainant he wished to engage in sexual acts with her. Complainant rebuffed his advances and told him to stop making such statements but he told her that she owed her job to him and he could have her fired. Mr. Downing would also refuse to sign paperwork unless Complainant stood behind his desk to hand it to him. He would often hand them back and press the papers against her breasts.

In or about 2013, around the time Complainant was promoted to the position of Principal Clerk, Complainant went into the supply closet and when she turned around Mr. Downing grabbed her and kissed her. He put his hands up her shirt and grabbed her breasts, removing them from her bra. Complainant was able to remove herself from the situation but she was extremely upset. Throughout her employment, Complainant feared she would lose her job if she didn't give in to Mr. Downing's treatment of her. He would yell at her and point his finger angrily at her. He would make her stand in his office, waiting for him to acknowledge her and would yell at her if she tried to go back to her desk and return

later. In late 2013, Complainant attempted to transfer to another department, but Mr. Downing refused to let her transfer and threatened her husband's job with Respondent City of New Bedford as well. Complainant alleges she did not believe the Personnel department would assist her if she complained about Mr. Downing's behavior because they had not assisted another employee who had issues with Mr. Downing in the past.

In or around July 2014—shortly after Complainant was promoted to the position of Administrative Specialist—Mr. Downing would make sexual comments about how Complainant wrote with a pen, saying, “Oh, I love the way you hold that. I have something for you to hold. Do you want to see it?”—or words to that effect. Complainant declined his advance. Also around this time, Complainant approached Mr. Downing for a work related issue and he grabbed her hand and said, “You want to see what you do to me?” and forced her to rub his erect penis over his pants several times. Also in July 2014, when Complainant brought Mr. Downing papers for his signature, he attempted to grab her groin area when handing the papers back to him. Beginning in July 2014 and continuing until the end of Complainant's employment, Mr. Downing would grab her as she walked out of his office so her back was pressed against the front of his body and he would rub his erect penis on her through his clothing. While on a trip to resolve an issue at the Zeiterion Garage, Mr. Downing repeatedly rubbed his hand against Complainant's inner thigh. He would also put his hand Complainant's hip bone underneath her pants and tell her that it was his favorite part of a woman that it got him excited. Shortly after July 2014, Mr. Downing called Complainant into his office, took out his erect penis in his hand and said, “Let me put it in just once, you might like it”—or words to that effect.

On one occasion, when Mr. Downing asked Complainant about a DMV law for which she did not know the answer, he angrily threw the DMV rulebook at her and it hit her and knocked several items off her desk. Mr. Downing left the office and returned with an apology card for Complainant. In or about mid-2014, after Complainant had taken over the position of Administrative Specialist, Mr. Downing became frustrated with Complainant and yelled at Complainant, “If you f—ked up my f—king number then you can get the f—k out of my f—king office and pack your f—king s—t now”. Mr. Downing's behavior throughout the remainder of 2014 became increasingly angry and Mr. Downing would constantly use profanity when addressing Complainant. In January 2015, he chastised Complainant for taking phone calls from the Chief Financial Officer's office, even though the individual requested to speak with Complainant. On February 3, 2015, Mr. Downing again chastised Complainant in front of another employee for sending out a letter to another employee by email—despite Mr. Downing instructing Complainant to do so. Complainant filed a report on February 4, 2015 with Respondent's Personnel Office about her work environment and did not return to work.

## Respondents' Position

Respondents assert as follows. Respondent City of New Bedford is a municipality within the Commonwealth of Massachusetts which oversees several departments, including the Traffic Department. Individual Respondent Scott Downing is the Director of the Parking Department. Respondents deny Complainant's discrimination allegations. Complainant was hired in October 2011 as a Clerk Typist. In addition to Complainant and Mr. Downing, the department had two other employees: E.H., Account Clerk and G.B., Senior Account Clerk. In July 2013, Complainant was promoted to the position Principal Clerk Typist. Respondents characterized Complainant's work ethic as strong and she was rated as "Meets" or "Exceeds" in both of these positions.

Respondents deny that Mr. Downing subjected Complainant to the sexual harassment, including comments and physical encounters attributed to him in the Complainant's allegations. In February 2014, Respondent changed the way it handled the money received from municipal garages and parking meters by creating an enterprise fund. Given the complexity of handling two budgets, the position of Administrative Specialist was created. Mr. Downing recommended Complainant for the position and she was promoted effective July 21, 2014. Complainant was now the second-in-command of the department and oversaw both E.H. and G.B. This position was salaried and Complainant was no longer eligible for overtime pay if she worked in excess of 40 hours per week. Complainant requested that her pay be retroactive to July 1, 2014. Mr. Downing told Complainant he did not believe she was entitled to retroactive pay but he put in the request anyway. When it was denied, Complainant became angry at Mr. Downing.

In September and October 2014, Respondent City of New Bedford installed parking meters which accepted credit cards. These payments had to be divided between the general fund and the enterprise fund based on where the meters were located. In November 2014, G.B. resigned from her position and Mr. Downing noticed the department fell behind in many areas, including daily deposits and dividing the meter fees into the appropriate accounts. In December 2014, Mr. Downing moved E.D., Parking Supervisor to the position of Provisional Account Clerk in the hopes that having a third person in the office would help Complainant get caught up, but the department remained behind. Respondents assert that when Mr. Downing was out of the office, Complainant would become demeaning and controlling towards her subordinates. Additionally, because the budgets had not been properly prepared, Respondent City of New Bedford lacked the necessary funds to purchase equipment to handle the increased snowfall in January and February 2015. In January 2015, Mr. Downing learned from E.H. that Complainant had instructed the staff not to make daily cash deposits as required. Complainant also had difficulty performing financial analysis and working on budgets, as G.B. had been the one who had performed these tasks even though Complainant claimed credit. Respondents assert that Complainant's behavior towards her subordinates led to E.G. quitting in January 2015.

On February 3, 2015, Mr. Downing called Complainant to ask why a request to the Mayor's office for a fund transfer went to someone other than the Mayor. When Complainant returned to the office, she began arguing with Mr. Downing in front of a Police Officer Paul Pires. Officer Pires observed the beginning of the confrontation but then left as Mr. Downing's office was small. Ultimately, Complainant stated she was feeling unwell and had to leave the office. On February 4, 2015, Complainant made a complaint of non-sexual hostile work environment to the Personnel office. Not until February 9, 2015 did Complainant raise concerns about sexual harassment by Mr. Downing. At this time, Complainant went out on a medical leave of absence. Respondent City of New Bedford conducted a thorough investigation with an outside investigator and determined that while Mr. Downing on occasion used foul language, there was not enough evidence to corroborate Complainant's allegations. Sensitivity training was conducted for all employees in the Traffic Department. Respondent City of New Bedford communicated its finding to Complainant via letter on April 8, 2015 and inquired when and if Complainant wished to return to work. To date, Complainant has not returned to work.

#### Summary of Investigation and Analysis

##### *Sexual Harassment – Hostile Work Environment*

In order to establish a claim of unlawful sexual harassment, Complainant must establish that (1) she was the target of unwelcome speech or conduct of a sexual nature; (2) the speech or conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment; and (3) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action.

Complainant alleged she was subjected to sexual comments and unwelcome touching from 2012 until her termination in February 2015 by a manager, including having her breasts fondled and her groin area grabbed on two different occasions.

Respondents denied that Complainant was subjected to sexual harassment. Respondents assert that Complainant never raised any concerns until February 2015 and Respondent provided a copy of its 32-page investigative report, conducted by a neutral third party which determined that Complainant had not been subjected to sexual harassment. However, taking the Complainant's allegations as true, they are sufficiently severe and pervasive to establish a sexually hostile work environment. The parties do not dispute that Mr. Downing was at all times relevant to the charge, Complainant's supervisor. Supervisors are held strictly liable for their alleged sexual harassment. Whether the allegations occurred as alleged are material issues in dispute, better suited for determination by a fact finder. Therefore, a finding of probable cause is recommended.

### Retaliation

To establish a prima facie case for retaliation, Complainant must show 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. If Complainant establishes the prima facie case, Respondent may show that legitimate, nondiscriminatory reasons exist for the adverse action. If Respondent succeeds in offering such reasons, Complainant must then show that Respondent's reasons are pretextual.

Complainant alleged she engaged in protected activity throughout her employment by rebutting Mr. Downing's advances, most recently in July 2014. Complainant also filed a formal complaint with Respondent's Personnel Office in February 2015. Complainant alleged she was denied a transfer and her work was unfairly scrutinized from November 2014 through the time she went out of work in February 2015.

Respondent denied that Complainant engaged in protected activity prior to February 2015. Even assuming Complainant had engaged in protected activity, Respondent denied that it retaliated against Complainant. Respondent asserted that Complainant's performance began to falter beginning in November 2014 when one of her subordinates resigned and Complainant instructed her remaining employees to stop making daily money deposits. However, Respondent has presented insufficient evidence to show that this was Complainant's fault. In her rebuttal, Complainant asserted that Mr. Downing instructed her to focus on catching up on unprocessed mail at that time, rather than deposits. The parties are also in dispute as to the Complainant's competency in her position. The parties agree that prior to July 2014, Mr. Downing rated Complainant as either "Meets Expectations" or "Exceeds Expectations". Complainant was not given a review for her Administrative Specialist position. While Respondent asserted that Complainant was spoken to about the failures of the office, Respondent has not produced contemporaneous evidence of such concerns. Whether Respondent's concerns about Complainant's performance were legitimate or premised on Complainant's alleged rebuffing of Mr. Downing's sexual advances is a material issue in dispute, better suited for determination by a fact finder. Therefore, a finding of probable cause is recommended.

### Constructive Discharge

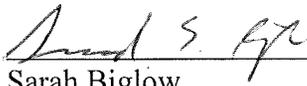
In order to establish a prima facie case of constructive discharge, Complainant must show that her working conditions were so intolerable due to a discriminatory animus that a reasonable person in her position would have been compelled to resign. Complainant must further establish that she exhausted all reasonable alternatives prior to leaving her employment. Whether Complainant was subjected to a working environment so intolerable that she felt she had no choice but to resign is a material issue in dispute better suited for determination by a fact finder. Therefore a finding of probable cause is recommended.

Individual Liability

Individual liability requires that the person named either engaged in discriminatory harassment, or had the authority or duty to act on behalf of the employer and acted in deliberate disregard of the Complainant's rights allowing the inference of intent to discriminate. The parties do not dispute that Mr. Downing was a manager and had the authority to act on behalf of Respondent. Whether Mr. Downing engaged in the alleged sexual harassment is a material issue in dispute. Therefore, a finding of probable cause is recommended.

Conclusion

A finding of Probable Cause is recommended against City of New Bedford and Scott Downing for sexual harassment and retaliation.

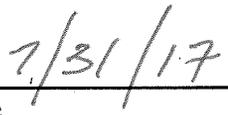
  
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Sarah Biglow  
Investigator

  
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Karen Erickson  
Enforcement Advisor

Disposition

Pursuant to section 5 of M.G.L. c. 151B of the Massachusetts General Laws, and in conformity with the foregoing findings, I have this day determined that **Probable Cause** exists for crediting the allegations of the complaint against Respondent(s). Pursuant to Section 5 of M.G.L. c. 151B, the parties will be afforded an opportunity to participate in a conciliation conference at the Commission.

  
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Sunila Thomas-George  
Investigating Commissioner

  
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Date