COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT.

No. 2007-P-1093

Suffolk Superior Court No. SUCV-2002-05521

Brendunt Tilghman,
appellant-plaintiff,

v.

Massachusetts Medical Examiner's Office Et. Al.
appellees-Defendants.

on appeal from a summary judgment
of the suffolk superior court.

Brief of Appellant Brendunt Tilghman.

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2. Whether the record contains evidence that plaintiff's transfer to what appears to be a nonexistent position is sufficient to meet the adverse employment action standard within a plaintiff's prima facie case of illegal racial discrimination.

3. Where the motive or intent of employer's actions are in question summary judgment is improper as such depends on the credibility of the witnesses testifying as to their own states of mind.

STATEMENT OF THE CASE

The plaintiff, Brendut Tilghman is an African American male who brought a racial discrimination suit against his employer the Office of Chief Medical Examiner. Mr. Tilghman with more than 30 years of continuous service with the Office of Chief Medical Examiner alleges disparate treatment in his reassignment from his position as senior morgue technician with supervisory duties to a do nothing job with no supervisory duties at Logan Airport. Mr. Tilghman's allegations of disparate treatment are illuminated by comparing himself to a similarly situated person outside his protect class of African-American that of Defendant Dr. William Zane who is employed as an

Assistant Medical Examiner in the Office of the Chief Medical Examiner. Mr. Tilghman and Defendant Zane are comparable as they were involved in a workplace incident on March 13, 2001 that began with a confrontation between Defendant Zane and Mr. Tilghman's supervisory Mrs. Anglin. Initially both Mr. Tilghman and Defendant Zane were put on paid administrative level, however, thereafter treatment of Mr. Tilghman and Defendant Zane relative to the incident was undisputedly different. Mr. Tilghman's complaint alleges the difference in treatment is based illegally on his race. Defendants' filed a Motion for Summary Judgment and the Superior Court judge allowed the motion dismissing the plaintiff's matter. Mr. Tilghman now appeals the decision dismissing this claim of discrimination at summary judgment.

STATEMENT OF FACTS

The Office of Chief Medical Examiner ("OCME") is an agency within the Executive Office of Public Safety ("EOPS") and has its headquarters on Albany Street, Boston. Appendix p. 97 – Aff. Bolden ¶1) On March 13, 2001, Mrs. Anglin[1] was in her office at the OCME around 4:30 pm engaged in a telephone conversation with Attorney Jacqueline Faherty ("Atty. Faherty") the Assistant General Counsel in the EOPS. (Appendix pp. 148, 106 – Aff Anglin ¶3 and Aff. Faherty ¶2). While speaking on telephone with Atty. Faherty Defendant Dr. William Zane ("Def. Zane") an Assistant Medical Examiner[2] entered Mrs. Anglin's office without warning and began screaming at her to "leave the doctors alone." (Appendix pp. 88-89 and 106 – Dep. Zane pp. 83:18 – 84:5 and Aff. Faherty ¶2). Def. Zane then immediately terminated Mrs. Anglin's telephone conversation by abruptly pressing down the button on her telephone. (Appendix pp. 95 and 148 – Dep. Zane p. 121:22 – 122:6 and Aff. Anglin ¶3). Atty. Faherty overheard Def. Zane's

[1] Mrs. Anglin at the time was the Director of Administrative Services with 44 years and 10 month continuous service with the OCME. (Appendix p. 148 – Aff. Anglin ¶ 2)
[2] At this time Def. Zane is Acting Chief Medical Examiner appointed by Dr. Evans while he was out of town (Appendix p. 226 - Dep. Evans pp. 17:23-18:3).

ranting and raving before the telephone line was cut off. (Appendix p. 224 – Dep. Evans p.9:9-21). Due to the manner in which Mrs. Anglin's telephone call ended abruptly Atty. Faherty was very concerned and made efforts to determine what transpired. (Appendix p. 224 – Dep. Evans p.9:9-21). When Atty. Faherty was able to speak with Mrs. Anglin again, shortly afterwards, she was hysterical. (Appendix p. 106 – Aff. Faherty ¶ 2). Mrs. Anglin was greatly disturbed by Def. Zane's aggressive and inappropriate behavior while she was in the course of carrying out the duties of her position and she remained fearful of him after the incident. (Appendix p. 149 – Aff. Anglin ¶6). Upon attempting to leave the office an angry Def. Zane pushed and shoved Mrs. Anglin in an attempt to physically prevent her from leaving her office and get away from him. (Appendix p. 148 - Aff. Anglin ¶4). Mrs. Anglin filed a criminal complaint against Def. Zane stemming from the incident on March 13, 2001. (Appendix pp. 149 and 154 - Aff. Anglin ¶8 and Anglin Application for Complaint). A Clerk Magistrate of the Boston Municipal Court after hearing testimony on Mrs. Anglin's complaint found probable cause to issue a complaint for assault and battery against Def. Zane. (Appendix pp. 149 and 179 - Aff. Anglin ¶8 and Dep. Zane p. 89:1-5).

Atty. Faherty promptly informed the Undersecretary in the EOPS, Michael Bolden ("Undersecretary Bolden") about the disturbing incident involving Def. Zane and Mrs. Anglin, along with the fact that the Mr. Brendunt Tilghman ("plaintiff" or "Mr. Tilghman" was currently at the work site and upset. (Appendix p. 106 - Aff. Faherty ¶3).

The plaintiff arrived at the Albany Street work site on his day off because he received a phone call from Elsa Ordenez, a secretary in the coroner's office, informing him that Def. Zane hit Mrs. Anglin. (Appendix p. 145 - Aff. Tilghman ¶7). The plaintiff arrived at the work site by 4:45 pm and remained with Mrs. Anglin until he escorted her from the building to her car. (Appendix pp. 148-149 - Aff. Anglin ¶4). By the time plaintiff arrived at the work site, Def. Zane had fled the building. (Appendix p. 106 - Aff. Faherty ¶3).

In the meantime Undersecretary Bolden traveled to the OCME on Albany Street upon hearing about the OCME incident from Atty. Faherty. (Appendix p. 98 - Aff. Bolden ¶2). After his arrival at the OCME on March 13, 2001 Undersecretary Bolden took the following actions: ordered that all locks be changed; ordered EOPS staff and State Police detectives attached to Suffolk County District Attorney's office to investigate the matter; directed a

State Police detective to escort the plaintiff out of the building; placed Mrs. Anglin, Def. Zane and plaintiff on paid administrative leave instructing them to stay away from the OCME until further notice. (Appendix p. 98 – Aff. Bolden ¶ 2).

As of March of 2001 the plaintiff held a management position supervising 8 - 10 technical day staff. (Appendix pp. 144 and 228 - Aff. Tilghman ¶1 and Dep. Evans p. 26:23-27: 6). Plaintiff was a long time employee in the OCME with over thirty years of unbroken service. (Appendix p. 144 - Tilghman Aff. ¶1). Mrs. Anglin as the Director of Administrative Services supervised the plaintiff's work over the past 13 years. (Appendix p. 149 – Aff. Anglin ¶7). Mrs. Anglin did not hear the plaintiff threaten any employee on March 13, 2001. (Appendix p.149 - Aff. Anglin ¶7). From the time the plaintiff arrived at the work site until he escorted Mrs. Anglin to her vehicle she did not hear him say he would kill Def. Zane or make any statement that could be construed as a threat. (Appendix p. 149 – Aff. Anglin ¶5).

In May of 2001 Dr. Joanne Richmond[3] told Mrs. Anglin that the doctors backed Def. Zane because they wanted to get rid of her, the plaintiff and Dr. Evans the Chief Medical Examiner. (Appendix p.149 - Aff. Anglin ¶9).

After receiving the report of the investigation from the State Police regarding the incident at the OCME Undersecretary Bolden directed that the report be submitted to the Suffolk County District Attorney's Office for a determination of whether criminal charges would be brought against anyone. (Appendix pp. 101-102 – Aff. Bolden ¶12). The Suffolk County District Attorney's Office concluded that the investigative report contained insufficient evidence to warrant a criminal prosecution. (Appendix pp. 101-102 – Aff. Bolden ¶ 12).

The plaintiff is of African-American decent. (Appendix p. 10 and 49 – Complaint ¶6 and Def. Statement Undisputed Facts ¶2). Def. Zane's race is white. (Appendix p.154 - Anglin Application for Complaint). There is no history of the plaintiff exhibiting threatening behavior or violence in the workplace or being threatening toward Def. Zane. (Appendix pp. 144, 149, 183, 215, 229 – Aff. Tilghman ¶2 and Aff. Anglin ¶7 and Dep. Zane p.106:9 -

[3] Dr. Richmond is an Assistant Medical Examiner who for a time was the acting Chief Medical Examiner. (Appendix p. 162 and Dep. Zane p. 23:19-22).

107:10 and Dep. Gottlieb p. 17:6 – 18:6 and Dep. Evans p. 31:24-32:9). Plaintiff denies he was ever threatening with staff or that he made threatening statements regarding Def. Zane when he arrived at the work site on March 13, 2001. (Appendix p. 145 – Aff. Tilghman ¶5).

Def. Zane received no discipline regarding the incident of March 13, 2001 at the OCME and returned to his position a Assistant Medical Examiner. (Appendix pp. 232,191, 106 – Dep. Evans p. 42:16- 24 and Dep. Zane p. 136:4-18 and Aff. Faherty ¶5). Def. Zane was required to attend anger management classes, received 4 months paid leave and thereafter resumed his normal duties as an Assistant Medical Examiner within the OCME in Boston. (Appendix pp. 228-229,190,106 - Dep. Evans p. 28:5-16 and Dep. Zane p. 132:22-133:3 and Aff. Faherty ¶5). The plaintiff was not offered anger management classes and the ability to return to his position as was Def. Zane. (Appendix pp. 228-229 - Dep. Evans p. 28:17-29:3).

Plaintiff through his Attorney John Lee Diaz engaged in discussions with Undersecretary Bolden about returning to work. (Appendix p. 107 - Aff. Faherty ¶8). Dr. Evans also discussed the reassignment direct with Mr. Tilghman, which persuaded him to accept the reassignment and report to work on July 2, 2001. (Appendix pp. 231 and 108 - Dep.

Evans p. 40:5-17 and Aff. Faherty ¶ 9). When the plaintiff arrived at the designated time and place as proscribed by Dr. Evans he realized there was nothing to do and no space provided for him in which to do nothing. (Appendix p. 234 and 146 Dep. Evans p.50:3-22 and Aff. Tilghman ¶17). What Dr. Evans promised was not provided, and the plaintiff felt that despite the efforts of his own attorney he would never be fairly treated in returning to work at the OCME. (Appendix p. 146 - Aff. Tilghman ¶¶13, 17).

ARGUMENT

I. Whether the plaintiff's transfer to airport location, after office incident involving himself, Mildred Anglin and Dr. William Zane, created an unbearable work environment forcing the Plaintiff to quit his employment, therefore creating a constructive discharge of his employment?

Although an employee may say "I quit" or "I resign," constructive discharge in a legal sense is considered a firing because the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. *GTE Products Corp. v. Stewart*, 421 Mass. 22, 34 (1995); *Vesprini v. Shaw Indus.*, 221 F. Supp. 2d 44(D. Mass. 2002). The Massachusetts Appeals Court has discerned two lines of cases concerning constructive discharge, one that focuses on demotions and other loss of

authority or status in executive and managerial positions, and another that focuses on claims of intolerable working conditions. *Formato v. Protonex Techs. Corp.*, 22 Mass. L. Rep. 116 (Mass. Super. Ct. 2006) citing *Rubin v. Household Commercial Financial Serv.*, 51 Mass.App.Ct. 432, 441(2001). Courts have found constructive discharge where an employer effectively gave an employee's job to someone else, transferred the employee's responsibilities thereby leaving him without any authority, or reassigned the employee to a nonexistent job. *Id.*

In March of 2001 the plaintiff held a management position supervising 8 - 10 technical day staff. (Appendix pp. 144 and 228 - Aff. Tilghman ¶1 and Dep. Evans p. 26:23-27:6). A number of discussions took place involving Undersecretary Bolden, Atty. Faherty, Dr. Evans, and plaintiff's Atty. John Lee Diaz regarding whether the plaintiff could return to work. (Appendix p. 108 - Aff. Faherty ¶ 9). Finally on June 28, 2001 the plaintiff spoke directly with Dr. Evans and agreed to accept a transfer to Logan International Airport/Massport work site. (Appendix p. 108 - Aff. Faherty ¶ 9). The plaintiff's assignment to Logan International Airport/Massport was a complete disaster. (Appendix p. 234 - Dep. Evans p.50:3-22). The plaintiff's allegations in this matter are akin to that of

a managerial employee getting reassigned to a non-existent job.

On the question of constructive discharge the lower Court's opinion focused narrowly on an "intolerable working conditions" analysis and failed to address the more analogous fact pattern of "managerial employee stripped of authority or status."

Plaintiff's circumstances warrant a "loss of authority" analysis as to whether his transfer to Logan International Airport/Massport position amounted to a constructive discharge. Ruling as a matter of law removed the role of the fact finder to weigh the credibility of witnesses on the critical point of whether plaintiff was sent to a sham or non-existing position that would lead to him quitting on his own.

For constructive discharge, a plaintiff must show: 1) that an employer deliberately acted to create an intolerable work environment; and 2) actions were intended to force the employee to quit. *Davis v. Jenny Craig, Inc.*, 1998 Mass. Super. LEXIS 636, (Mass. Super. Ct. 1998) citing *Sims v. City of New London*, 738 F. Supp. 638, 647 (D.Conn. 1990). Constructive discharge occurs where an employee quits as a reasonable response to an employer-sanctioned adverse action officially changing his or her

employment status or situation, for example, a humiliating demotion, an extreme cut in pay, or a transfer to a position in which he or she would face unbearable working conditions. *Pennsylvania State Police v. Suders,* 542 U.S. 129, 134 (U.S. 2004).

A constructive discharge occurs when the employer's conduct effectively forces an employee to resign. *See Salvi v. Suffok County Sherriff's Dept.,* 67 Mass. App. Ct. 596, 606-607 (2006) citing *GTE Prods. Corp. v. Stewart,* 421 Mass. 22, 33-34, (1995); *Rubin v. Household Commercial Financial Servs., Inc.,* 51 Mass. App. Ct. 432, 439, (2001).

Mr. Tilghman does not challenge the fact that a transfer occurred or that his employer could transfer him to another location. What is challenged is the fact that he was persuaded to accept a transfer under specific conditions when in reality the transfer was a sham because the position assigned had no supervisory duties, no career growth, no workspace to perform work had he been given duties, and no one at the designated location with any idea why he was there. (Appendix pp. 233-234 - Dep. Evans pp. 48-50). The employer's ruse of getting the plaintiff, who worked his way up the career ladder in the OCME, with over 30 years of service, to agree to a transfer to a non-existing position so frustrated him that he felt he could

never achieve any satisfactory treatment in returning to full employment. (Appendix p. 146 - Aff. Tilghman ¶¶13, 17).

The Connecticut Supreme Court found that constructive discharge theory is applicable when the employer transfers or reassigns the employee to a nonexistent job. *See Hayes v. Resource Control, Inc.*, 170 Conn. 102, 104 (1976). The plaintiff's discrimination claim is analogous to *Hayes* and a finding that the employer is accountable for the constructive discharge of the employee and for setting up an unconscionable reassignment to a non-job.

II. Whether the record contains evidence that plaintiff's transfer to what appears to be a nonexistent position is sufficient to meet the adverse employment action standard within a plaintiff's prima facie case of illegal racial discrimination?

(A)

Neither the Massachusetts' anti-discrimination statute nor the analogous federal civil rights statute Title VII specifically define the parameters of an "adverse employment action" when applied to a disparate treatment case of discrimination. The case law in Massachusetts, while often referencing the standard, fails to provide any guidance as to a prescribed definition. The U. S. Supreme Court recently penned a common sense definition in

resolving an anti-retaliation claim under Title VII defining adverse employment action as "a materially adverse change in the terms and conditions of employment." *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405(2006).

Prior to the incident of March 13, 2001 the plaintiff's job duties as a senior technician included scheduling and assigning work to morgue technicians that worked with assistant medical examiners conducting autopsies. (Appendix pp. 223, 228, 230 - Dep. Evans pp. 8:2-7, 27:1-4, and 33:7-9). Transferring the plaintiff a senior morgue technician with managerial responsibilities over other morgue technicians to Logan International Airport/Massport with nothing more to do than watching planes land materially changed the terms and conditions of his work. After direct discussion with Dr. Evans on June 28, 2001 the plaintiff agreed to work at Logan Airport/Massport starting July 2, 2001. (Appendix p. 108 - Aff. Faherty ¶ 9). Dr. Evans, however, marginalizes these discussions with the plaintiff just prior to the July 2, 2001 assignment as very superficial. (Appendix p. 231 – Dep. Evans 40:5-20). The question for the Court is whether the transfer to Logan Airport/Massport was involuntarily,

thereby turning the transfer into an adverse employment action.

A review of the circumstances surrounding the plaintiff agreeing to show up for work at Logan Airport/Massport is required as it lies at the heart of his discrimination claim. In his complaint the plaintiff alleges his reassignment to Logan Airport/Massport was an adverse employment action. (Appendix p. 10 - Complaint ¶6). It is undisputed that the record before the Court establishes that the plaintiff agreed to return to work on July 2, 2001 at an alternate work site after being placed on paid administrative leave on March 13, 2001. However, the analysis should not stop there because the record also shows the transfer was a *complete disaster*, unrelated to anything caused by the plaintiff. (Appendix p. 234 - Dep. Evans p.50:10-12). Reassigning the plaintiff was a complete disaster because no one at the assigned location on July 2, 2001 knew anything about the arrangement Dr. Evans claimed he made. (Appendix p. 234 – Dep. Evans p.49:4-50:22). The plaintiff was devastated to discover on July 2, 2001 when he arrived ready, willing, and able for work that the promises and assurances made by Dr. Evans days earlier where empty and hollow when compared to the reality of what was provided. (Appendix p. 146 and 234 -

Aff. Tilghman ¶¶13, 17 and Dep. Evans pp. 49-50). Over the past 31 years the plaintiff worked out of the Albany street office of the OCME as a morgue technician with the last 13 years including responsibilities of supervising other morgue technicians who assist assistant medical examiners while they conduct autopsies. Placing him in a Logan Airport/Massport office with a view of the runway with nothing else to do is a humiliating and unbearable change in plaintiff's working conditions from his normal duties as a senior morgue technician with supervising responsibilities over staff technician assisting in morgue autopsies.

This record contains ample evidence that a reasonable jury could find that shunting the plaintiff off to Logan Airport/Massport, to an illusory position, even with his acquiesce would not be considered as a voluntary act on the part of the plaintiff. Additionally, there is evidence a reasonable jury could find that the employer's culpability for the deception in obtaining his acquiesce reasonably soured the plaintiff from accepting any situation other than reinstatement to his supervisory position of the technical day staff in the OCME.

(B)

Massachusetts courts have analyzed plaintiff's discrimination case in accordance with the so-called three-stage order of proof set forth in McDonnell Douglas Corp. v. Green for Title VII cases of discrimination. *See Blare v. Husky Injection Molding Sys. Boston Inc.*, 419 Mass. 437, 440-441(1995). Under the McDonnell Douglas v. Green evidentiary paradigm a plaintiff must show in the first stage that he is a member of a protected class, different from a comparator, who was not a member of his protected class, but who is otherwise similarly situated. *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 129 (1997). A comparator's circumstances need only be substantially similar to those of the plaintiff in all relevant aspects concerning the adverse employment decision. *Id.* Once the plaintiff has met a relatively light burden, of establishing a prima facie case of discrimination, a presumption of discrimination arises and the onus is then shifted to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823 (1st Cir.1991). The burden shifts to the employer to proffer credible evidence to show that the reason for an adverse employment action was for a non-discriminatory reason. *Wheelock College v. MCAD*, 371 Mass. 130, 138 (1976). If

the employer produces such a justification, the presumption of discrimination vanishes and the burden shifts back to the plaintiff to show that the employer's alleged justification is merely pretext for discrimination. *Greenberg v. Union Camp*, 48 F.3d 22, 26(1st Cir. 1995). To prevail, an employee must prove four elements of: 1) membership in a protected class, 2) harm, 3) discriminatory animus, and 4) causation in a G. L. 151B claim of discrimination. *Trustees of Health and Hospital of the City of Boston, Inc. v. MCAD & others,* 2007 Mass. LEXIS 586(Mass. 2007) *citing Sullivan v. Liberty Mut. Ins. Co.,* 444 Mass. 34, 39 (2005); *Lipchitz v. Raytheon Co.,* 434 Mass. 493, 502 (2001).

After the plaintiff's tangential involvement in a workplace incident that mainly involved a physical altercation between his supervisor Mrs. Anglin and an Assistant Medical Examiner Def. Zane he alleges that his employer based on his race arranged for a sham transfer to a non-existing position at Logan International Airport/Massport resulting in his constructive discharge. (Appendix pp. 10-11 - Complaint ¶¶ 6-7). Evidence of discriminatory animus in the employer's response toward him after the incident of March 13, 2001 comes from the undisputed difference in treatment of plaintiff an African-

American male compared to Def. Zane a white male outside of plaintiff's protected class.[4] (Appendix p. 10, 49 and 154 – Complaint ¶6 and Def. Statement Undisputed Facts ¶2 and Anglin Application for Complaint).

As a basis for trying to explain away the difference in treatment and as a suggested legitimate non-discriminatory purpose for taking adverse employment action, the defendants' present an affidavit of Undersecretary Bolden that outlines his belief that the plaintiff's actions on March 13, 2001 were "qualitatively

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[4] Differences in treatment included: 1) Def. Zane allowed to attend anger management class that was not offered to Mr. Tilghman. (Appendix pp. 228-229 Dep. Evans p. 28:17-29:3);
2) Def. Zane has a temporary reassignment to Cape Cod were he worked before and is then returned to OCME at Albany Street, with full duties. (Appendix p. 106 - Aff. Faherty ¶5);
3) Mr. Tilghman is required to return to a remote location on July 2, 2001 and no real position, duties or work space assigned. (Appendix p. 234 - Dep. Evans pp. 49-50);
4) Def. Zane receives no discipline for March 13, 2001 incident. (Appendix p. 177 - Dep. Zane p. 80:13-18);
5) Def. Zane given paid leave from March 14th – mid August before starting a temporary assignment on Cape Cod. (Appendix pp. 228-229,190,106 - Dep. Evans p. 28:5-16 and Dep. Zane p. 132:22-133:3 and Aff. Faherty ¶5)
6) Def. Zane states during investigation not fearful Mr. Tilghman would kill him. (Appendix. p. 101 – Aff. Bolden ¶9) however, Mrs. Anglin reports to Undersecretary Bolden she remains fearful of Def. Zane. (Appendix p. 149 – Aff. Anglin ¶6);
7) Def. Zane files false criminal complaint against Mr. Tilghman that conflicts with his statements to investigators that he is not fearful of Mr. Tilghman and his deposition testimony that he had no conflict with him. (Appendix. pp. 101,152, 181 – Aff. Bolden ¶9 and Zane Application for Complaint and Dep. Zane p.96:17-21).

different" from that of Def. Zane. (Appendix pp. 102-103 - Aff. Bolden ¶15). Undersecretary Bolden's conclusions as set forth in his affidavit are based wholly on various hearsay statements that are contradicted with other evidence within the record and lack the indicia of reliability, veracity and credibility. As such, the defendants' proffered reliance on conclusions that are so lacking in reliability, veracity and credibility as a legitimate non-discriminatory basis for adverse employment action against the plaintiff amount to pretext covering up unlawful discrimination.

A plaintiff demonstrates pretext by producing evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 171 (1st Cir. 1998).

Undersecretary Bolden's affidavit and opinion regarding a qualitative difference between the plaintiff and Def. Zane relies completely on references to an investigative report that is not a part of the record in this matter. (Appendix pp. 97 - 103 - Aff. Bolden,

Generally). Furthermore, Bolden's affidavit states he has no personal knowledge of the underlying facts he summaries. (Appendix p. 99 – Aff. Bolden ¶5). His claim to have no personal knowledge runs counter to his statement in the same affidavit that he immediately went to the location after receiving word from Atty. Faherty of the altercation. (Appendix p. 99 – Aff. Bolden ¶2 and ¶6). As the Undersecretary of EOPS Michael Bolden maintained a supervisory role over the OCME and when on site shortly after the incident he would have direct knowledge of events, having access to witnesses with fresh recollections of what had just transpired.[5] His affidavit also recounts several specific actions he personally ordered when he arrived; placing Tilghman, Anglin and Zane on administrative leave with pay, requiring that they not return to work for a cooling off period, instructing the State Police to conduct an investigation, changing the locks and having Tilghman escorted from the building.

[5] The record reflects the altercation between Mrs. Anglin and Def. Zane occurred at approximately 4:30 pm (Appendix p. 148 Aff. Anglin ¶3); Tilghman was on site by 4:45 pm after being notified Def. Zane hit Mrs. Anglin (Appendix pp. 148-149 – Aff. Anglin ¶4); Bolden was immediately notified of the incident by Atty. Faherty and immediately went to the site from his office at One Ashburton place (Appendix pp. 106, 98 - Aff. Faherty ¶3 and Aff. Bolden ¶2); witnesses claim Tilghman did not calm down for over an hour (Appendix p. 100 – Aff. Bolden ¶8).

(Appendix p. 98 – Aff. Bolden ¶2). Furthermore, in his affidavit Undersecretary Bolden states, about the reports not in evidence:

> "I believe them to be substantially true because I knew that the investigation had been conducted by the State Police in a thorough, professional and impartial manner. . . I regard the investigation report as having been reliable, and I relied on it," (Appendix p. 99 – Aff. Bolden ¶5)

Bolden's affidavit fails to identify what information the affiant possessed, other than having access to the report that would lead him or anyone else to reasonably conclude that the investigation he requested was thorough, professional and completed in an impartial manner. His conclusions of reliability in the report and investigation are further questionable when compared and contrasted with other evidence in the record of this matter:

1) The information summarized by him about the threat of plaintiff is contradicted by statements in the affidavits of Mrs. Anglin (Appendix pp. 148-150), Tilghman (Appendix pp. 144-147), and deposition testimony, Dep. Gottlieb p. 17:6 – 18:6 (Appendix p. 215), Dep. Zane p. 106:9 – 107:10 (Appendix p. 183) and Dep. Evans p. 31:24-32:9 (Appendix p. 229);

2) No corroborating evidence to support a contention that the plaintiff prior to March 13, 2001 was threatening with staff. The record does contain evidence of just the opposite: no history of past threatening behavior. (Appendix pp. 144, 149, 183, 215 229 – Aff. Tilghman ¶2 and Aff. Anglin ¶7 and Dep. Zane p. 106:9 - 107:10 Dep. Gottlieb p. 17:6 – 18:6 and Dep. Evans p. 31:24-32:9). Furthermore, Def. Zane reports to investigators that he was not fearful of plaintiff. (Appendix. p. 101 – Aff. Bolden ¶9). Lack of any prior complaint after 13 years as a supervisor places prior claims of threatening behavior in question as well as clouds current interpretations that the plaintiff was threatening towards Def. Zane on March 13, 2001.

3) The Court is in the dark about the witnesses and statements in the investigative report that could support reliability such as an ability to see hear and observe the events in question, and whether the witnesses had any prior conflicts with Mr. Tilghman.

4) The investigation report includes information from Def. Zane whose own creditability is in question[6] in

[6] Def. Zane acknowledges the state is probing whether he lied on renewal application of his medical license and that

this matter due partly to knowingly filing a false criminal application against Mr. Tilghman despite openly acknowledging he was not in fear of him. (Appendix. pp. 101,152, 181 – Aff. Bolden ¶9 and Zane Application for Complaint and Dep. Zane p.96:17-21).

5) Despite a claim that the investigation report was thorough, professional and impartial, Bolden's summary of it does not include even one comment regarding the critical point of the originating event that Def. Zane physically assaulted Mrs. Anglin on March 13, 2001.

6) Bolden's affidavit remains questionably silent as to his own personal knowledge of the events.

7) In direct contradiction to the affidavit statement that he has no personal knowledge of the summary of the event Undersecretary Bolden states in ¶ 7 "Mr. Tilghman told another employee that he 'doesn't travel alone,' I was informed of statement. . . [a]t my direction and upon request, Tilghman surrendered a 12 gauge shotgun he owned to State Police Lt.

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at least three other administrators in OCME filed complaint against him related to his behavior. (Appendix pp. 189-190, 207-208 – Dep. Zane pp. 128:16 – 133:3 and Newspaper Reports on Def. Zane).

Edith Platt." which is a statement of fact that constitutes this personal knowledge of the event in question.

Lastly, this same report relied on so heavily by Undersecretary Bolden was submitted to the Suffolk County District Attorney's office for possible prosecution for criminal acts and the District Attorney from review of the same report concluded the evidence did not warrant criminal prosecution of plaintiff or anyone else in the incident. (Appendix p. 101-102 – Aff. Bolden ¶12). There is unsupportable evidence in the record for EOPS Undersecretary Bolden to reasonably draw a qualitative distinction between the alleged words of plaintiff and the allegations asserted by Mrs. Anglin of physical assault engaged in by Def. Zane.

(C)

Membership in the protected class aside, a comparator's circumstances need not be identical to those of the complainant. A comparator's circumstances need only be substantially similar to those of the complainant "in all relevant aspects" concerning the adverse employment decision. *Matthews* v. *Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 129, (1997), quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir.1989). "The

test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.... Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." *Trustees of Health and Hospital of the City of Boston, Inc. v. MCAD & others,* 2007 Mass. LEXIS 586(Mass. 2007) citing *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 19 (1st Cir.1989).

The plaintiff and Def. Zane are similarly situated in that they both worked under the supervision of the Chief Medical Examiner Dr. Evans in the OCME, and they were both involved in an office disturbance on March 13, 2001, despite the fact that the plaintiff was tangentially involved by showing up at work on his day off after the physical altercation between Def. Zane and Mrs. Anglin, and after the Def. Zane had quickly left the scene. The plaintiff and Def. Zane are similarly situated in all relevant aspects pertaining to the incident of March 13, 2001 at the OCME. *Trustees of Health and Hospital of the City of Boston, Inc. v. MCAD & others,* 2007 Mass. LEXIS 586(Mass. 2007) (different job titles and different responsibilities not dispositive for comparing co-worker

outside protection class in disparate treatment case of discrimination).

The defendants, by way of attempting to create a distinction between Mr. Tilghman and Def. Zane, make the claim that Def. Zane continues to be in fear of Tilghman. (Appendix p. 103 – Aff. Bolden ¶15). This distinction, however, is in direct conflict with statements made by Def. Zane to investigators that he was not fearful of Mr. Tilghman. (Appendix pp. 101-102 – Aff. Bolden ¶9). In stark contrast Mrs. Anglin reported on March 14, 2001 to Undersecretary Bolden that she remained in fear of Def. Zane (Appendix p. 149 – Aff. Anglin ¶6) and a Clerk Magistrate of the Boston Municipal Court after hearing testimony, found probable cause to issue a complaint against Def. Zane (Appendix pp. 149 and 179 - Aff. Anglin ¶8 and Dep. Zane p. 89:1-5), however, Zane received no real punishment for his actions. (Appendix p. 177 - Dep. Zane p. 80:13-18). Undersecretary Bolden without any legitimate justification, rhythm, or reason reaches a conclusion that Mr. Tilghman's words speak louder than Def. Zane's actions.

The Supreme Judicial Court has recognized the difficulties involved in using the *McDonnell Douglas* analysis in jury instructions, and recommended that trial judges formulate instructions to "focus the jury's

attention on the ultimate issues of harm, discriminatory animus and causation." *Lipchitz v. Raytheon*, 434 Mass. 493, 508 (2001).

In a indirect evidence case as this, if the factfinder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive, or state of mind. That inference, combined with the evidence adduced to meet the employee's burden of proof under the first stage of McDonnell Douglas, permits the fact finder to conclude that the employee has satisfied the ultimate burden of proving that the decision was made "because of" the unlawful discrimination, as Mass. Gen. Laws ch. 151B, § 4(1) requires. *Lipchitz v. Raytheon Co.*, 434 Mass. 493(2001).

There are undisputable differences in treatment after the incident of March 13, 2001 between Mr. Tilghman and Def. Zane who are comparators related to the incident of March 13, 2001. (See Footnote No. 4 above – documented different treatment). Def. Zane is white and outside the plaintiff's protective class of African-American. (Appendix p. 10, 49 and 154 – Complaint ¶6 and Def. Statement Undisputed Facts ¶2 and Anglin Application for Complaint). While plaintiff is forced into a non-existing

position Def. Zane receives no measurable discipline and after a few months off with pay resumes his normal career path. (Appendix pp. 232,191, 106 – Dep. Evans p. 42:16- 24 and Dep. Zane p. 136:4-18 and Aff. Faherty ¶5). The question for the Court becomes for what legitimate reason did employer treat the similarly situated employees differently? It is the plaintiff's contention that unlawful discrimination explains the difference in treatment between himself and Def. Zane. *Smith College v. Massachusetts Comm'n Against Discrimination*, 376 Mass. 221, 228 (1978)("the most probative means of establishing that the plaintiff's termination was a pretext for racial discrimination is to demonstrate that similarly situated [non-suspect class members] were treated differently").

A plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 147-148 (2000); *Lipchitz v. Raytheon Co.*, 434 Mass. 493 (2001).

III. Where the motive or intent of employer's actions are in question summary judgment is improper as such depends on the credibility of the witnesses testifying as to their own states of mind.

In cases where motive, intent, or other state of mind questions are at issue, summary judgment is often inappropriate." *Flesner v. Technical Communications Corp. & Others*, 410 Mass. 805 (1991) citing *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989) ("the generally accepted rule is that the 'granting of summary judgment in a case where a party's state of mind . . . constitutes an essential element of the cause of action' is disfavored"), quoting *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 86 (1984). Moreover, in cases involving motive, intent or state of mind, "much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances, the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." *Flesner v. Technical Communications Corp. & Others*, 410 Mass. 805 (1991) citing *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1971).

The Court is not permitted to weigh credibility in ruling on a motion for summary judgment. Further, in cases involving claims of employment discrimination, a defendant

employer faces a heavy burden if it seeks to obtain summary judgment because the question of the employer's state of mind (discriminatory motive) is "elusive and rarely is established by other than circumstantial evidence," requiring the jury to weigh the conflicting explanations for the adverse decision. *Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 38 (2005).*

During a cooling off period Def. Zane is allowed to attend anger management and resumes his normal responsibilities as if nothing transpired on March 13, 2001. (Appendix pp. 228-229,190,106 - Dep. Evans p. 28:5-16 and Dep. Zane p. 132:22-133:3 and Aff. Faherty ¶5). The plaintiff on the other hand is sent to remote location where no one at the site has any knowledge of him, where he was no work, and no place to do nothing without any prospects of growth. (Appendix p. 234 and 146 Dep. Evans p.50:3-22 and Aff. Tilghman ¶17).

Mrs. Anglin's allegations of physical assault against Def. Zane where above the normal level of chaos in the openly disclosed dysfunctional operational problems of the OCME. (Appendix p. 167-168 – Dep. Zane p. 43:17 – 44:1). Beyond the pale of chaos was Def. Zane's filing an application for complaint against Mr. Tilghman with whom he acknowledged having no conflict. (Appendix. pp. 101,152,

181 – Aff. Bolden ¶9 and Zane Application for Complaint and Dep. Zane p.96:17-21). The plaintiff's complaint alleged that Def. Zane without a legitimate reason, with an attempt to mis-use the judicial process to his advantage, swore out a complaint against him. (Appendix p. 10 – Complaint ¶7). The filing of false criminal charges constituted an "adverse employment action" because such an act causes "harm to future employment prospects." *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996). Additionally, the plaintiff alleges that the OCME in an attempt to remove him from the workplace because of race used a ruse, false statements and empty promises in order to obtain his consent to a transfer and return to work on July 2, 2001. (Appendix p. 10 – Complaint ¶6). When the reality of the situation was that there was no assignment, no work space, no career opportunity – no job. (Appendix p. 234 and 146 Dep. Evans p.50:3-22 and Aff. Tilghman ¶17). Furthermore, the record includes various incidents of conflict among witnesses as to what actually took transpired at the OCME when the plaintiff arrived at the work site. The lower court judge fails to account for these conflicts in the record which create a question of fact for the jury. Credibility questions are for the

trier of fact to resolve. *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 509-510(1997).

As this case involves the motive, intent or state of mind, of the decision makers in effort to get the plaintiff to return to work on July 2, 2001 and the actions of Def. Zane swearing out false criminal complaint much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances, a jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." *Flesner v. Technical Communications Corp. & Others*, 410 Mass. 805 (1991). The Court is not permitted to weigh credibility in ruling on a motion for summary judgment. Further, in cases involving claims of employment discrimination, a defendant employer faces a heavy burden if it seeks to obtain summary judgment because the question of the employer's state of mind (discriminatory motive) is "elusive and rarely is established by other than circumstantial evidence," requiring the jury to weigh the conflicting explanations for the adverse decision. *Sullivan v. Liberty Mutual Ins. Co.*, 444 Mass. 34, 38 (2005). When the plaintiff can point to specific facts detailed in affidavits and depositions--that is, names, dates, incidents, and supporting testimony-

-giving rise to an inference of discriminatory animus, the dispute must be subjected to the factfinding process. *Lipsett v. University of Puerto Rico*, 864 F.2d 881(1st Cir. 1988).

CONCLUSION

For the foregoing reason, the plaintiff respectfully requests that the Summary Judgment order in favor of the Defendants be reversed and as the record contains sufficient evidence of a genuine dispute of material facts this matter should be set for a trial on the merits in the Superior Court.

Certificate of Compliance Mass. R. A. P.

I, Neil Osborne, counsel for plaintiff affirm and certify that the foregoing brief complies with the rules of court that pertain to filing of briefs, including but not limited to Mass. R. A. P. 16(a)(6) (pertinent to finding or memorandum of decision); Mass. R. A. P. 16(e)(references to the record); Mass. R. A. P. 16(f)(reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h)(length of briefs); Mass. R. A. P. 18(appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers)

_____ _____
Neil Osborne, (BBO# 567674) Date

CERTIFICATE OF SERVICE

I, Neil Osborne, counsel for appellant/plaintiff, hereby certify that two

(2) copies of the Appellant's Brief and Appendix were served on the following parties on August 24, 2007 by in hand delivery:

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