

May 16, 2023

Darren Klein
dklein@k-plaw.com

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BY ELECTRONIC MAIL ONLY (bospositionstmts@state.ma.us)

Ms. Tania Taveras
Administrative Assistant
Commonwealth of Massachusetts
Commission Against Discrimination
One Ashburton Place, Room 601
Boston, MA 02108

Re: Briana Reder v. Town of Swampscott
MCAD Docket No. 23BEM00601
EEOC Charge No. 16C-2023-01010

Dear Ms. Taveras:

This office represents the Respondent Town of Swampscott (“Town” or “Respondent”) in the above-referenced matter. The following is the Town’s Position Statement in response to the above-referenced Complaint. Also enclosed are the Town’s Affirmative Defenses and Reservations of Rights, and Petition for Jury Trial.

In her Complaint, Complainant Briana Reder (“Complainant” or “Reder”) alleges that she was discriminated against on the basis of sex based upon questions she was asked during her interview for employment with the Town Police Department. Notably, Complainant was hired for the position. The Town categorically denies that it discriminated against Complainant in any way. For the reasons set forth below, the Respondent respectfully requests that the Commission issue a lack of probable cause finding and dismiss Complainant’s charges in their entirety.

I. **FACTUAL BACKGROUND**

A. Town of Swampscott

The Town of Swampscott is a coastal community in Essex County. The Town is governed by a five-member Select Board. The day to day affairs of the Town are managed by an appointed Town Administrator, Sean Fitzgerald. Mr. Fitzgerald has been the Town Administrator since 2017. The Town Administrator is the appointing authority for positions in the Town of Swampscott Police Department.

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B. Police Department Hiring Process

i. Implementation of New Hiring Procedures

The Swampscott Police Department was a member of the Massachusetts Civil Service system until it withdrew from the system in 2021. The Town and the Massachusetts Coalition of Police, Local 417 (the “Union”) agreed that a central purpose behind the withdrawal was to give the Town “greater flexibility” in making appointments to police officer positions, which in turn would enable it to increase the “diversity and inclusivity” within the Department. Memorandum of Agreement FY22, herein after Exhibit 1. The Town and the Union therefore agreed that subject to the approval of Town Meeting and the Massachusetts legislature, as required by law, the Police Department would be removed from Civil Service, and the Parties would subsequently negotiate standards and procedures to replace those in place under Civil Service, including those governing appointment of new police officers. Exhibit 1. Town Meeting voted in support of such withdrawal at its Annual Town Meeting in the spring of 2021, and the withdrawal became effective in October 2021.

In the political and social climate leading up to the Town’s withdrawal from Civil Service, police departments were under a heightened level of public scrutiny. Indeed, Interim Police Chief Dave Kurz and the Union President have separately acknowledged that police work has become an unpopular profession, and that police departments are having unusual difficulty recruiting. February 17, 2022, email from Kurz to Municipal Resources, Inc., hereinafter Exhibit 2; March 8, 2022, email thread, herein after Exhibit 3. The Town, and in particular Mr. Fitzgerald, felt it was appropriate to respond to that heightened scrutiny with its own high standards for incoming police officers. Fitzgerald Internal Investigation Interview notes, hereinafter Exhibit 4; see also <https://patch.com/massachusetts/swampscott/swampscott-civil-service-switch-leads-police-hiring-disconnect> (not looking to fill positions just to fill them, “we have an opportunity to fulfill some broader priorities”).

Pursuant to the new hiring process implemented by the Town with the agreement of the Union, individuals interested in employment with the Swampscott Police Department complete an application and are screened preliminarily by a Hiring Committee consisting of members of the public and Interim Police Chief Dave Kurz (“Interim Chief Kurz”). Thereafter, finalists for the position proceed to an interview with a three-person panel comprised of the Town Administrator, Chief of Police, and police captain.

ii. Interview Process Beginning February, 2022

In February, 2022, three applicants were advanced to the interview portion of the hiring process as finalists for police patrol officer positions. Fitzgerald Police Candidate Interview notes, hereinafter Exhibit 5. Complainant was the only female candidate, and the other two candidates were

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male. See Exhibit 5. The three candidates interviewed with the Mr. Fitzgerald as Town Administrator, Interim Chief Kurz, and Police Captain Joseph Kable, who is the former president and a current member of the Police Union. Exhibit 4. Mr. Fitzgerald prepared a list of questions to ask each candidate and printed them on a sheet of paper that he used to take notes during each interview. Exhibit 4. Mr. Fitzgerald has received extensive training from a variety of sources including Massachusetts Municipal Association training programs, monthly municipal manager trainings, and annual conferences, on human resource processes, interviewing employment candidates, and risk mitigation. Exhibit 4. When Mr. Fitzgerald prepares for an employment interview, he reviews the job description and a list of questions used for prior interviews, then updates the list as necessary. Exhibit 4. Mr. Fitzgerald has also supported and advanced training programs for Town staff and public safety staff focused on the prevention of sexual harassment.¹

Mr. Fitzgerald recited the interview questions verbatim as they appeared on his printed sheet. Exhibit 4. One question that he asked each candidate was “[i]f you could change one thing about yourself, what would it be and why?” Exhibit 4; Exhibit 5. Mr. Fitzgerald has used this question, in this form, in countless interviews for public safety positions prior to February, 2022. Exhibit 4. The purpose of this question was to assess each candidate’s self-awareness and mindfulness about self-improvement. Exhibit 4.

In response to this question, Complainant replied that she wished she was shorter. Exhibit 4. Mr. Fitzgerald surmised that Complainant must not have heard the question correctly, and he clarified that it was not a question about physical attributes, but was intended to assess the employee’s mindfulness. Exhibit 4. Following that clarification, Complainant appeared to struggle with the question, so Mr. Fitzgerald moved on rather than dwelling on or pressing Complainant for a different answer. Exhibit 4.

After interviewing each of the three candidates, Mr. Fitzgerald determined that Complainant should be extended a conditional offer of employment, but he did not feel comfortable moving forward with either of the male candidates based on their interviews. February 17, 2022, mail from Fitzgerald to Kurz, hereinafter Exhibit 7. One male candidate was a recent college graduate and a [REDACTED], and Mr. Fitzgerald was concerned that this candidate’s interview responses focused too much on his [REDACTED] background and did not demonstrate applicability to the challenges in the field of law enforcement. Exhibit 7. Additionally, Mr. Fitzgerald was concerned that this candidate’s interview responses did not demonstrate the aptitude for leadership that he was seeking in a police officer at that point in time. Exhibit 7. Mr. Fitzgerald felt that the second male candidate gave some answers that were crass or superficial, and generally did not demonstrate the mindfulness that he was hoping to see in police officer candidates. Exhibit 7.

¹ Indeed, in the Fall of 2017, at the Town Administrator’s request, Town Counsel presented a training seminar to Town managerial employees on sexual harassment and unlawful discrimination. See Training Presentation and Organizing E-Mails, hereinafter Exhibit 6.

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Interim Chief Kurz spoke with Mr. Fitzgerald the day after the interviews about the candidates. Exhibit 4. He expressed displeasure with Mr. Fitzgerald's inclination to recommend only Complainant, and not the other two candidates. Exhibit 4. Interim Chief Kurz also told Mr. Fitzgerald that he thought he heard Mr. Fitzgerald ask Complainant what physical characteristic she would change about herself, which prompted Complainant's response of wishing she was shorter. Exhibit 4. Mr. Fitzgerald explained to Interim Chief Kurz that he did not, and would never, ask a candidate about physical characteristics, and further provided some of the reasons why he was concerned with moving forward with either of the two candidates other than Complainant. Exhibit 4; Exhibit 7. Mr. Fitzgerald initially spoke about this matter in person, and Mr. Fitzgerald followed up on that discussion in writing to Interim Chief Kurz. Exhibit 7. Interim Chief Kurz reviewed Mr. Fitzgerald's interview notes, which were written on the list of questions Mr. Fitzgerald printed and asked of each candidate. Fitzgerald Internal Investigation Follow-Up Interview notes, hereinafter Exhibit 8. After reviewing those notes, and after communicating with Mr. Fitzgerald, Interim Chief Kurz indicated that he may have misheard how the question about characteristics was posed to Complainant. Exhibit 8.

On or about February 21, 2022, Mr. Fitzgerald informed Complainant that she would be moving forward in the hiring process, including that she would receive a conditional offer of employment. Email thread regarding conditional offer, hereinafter Exhibit 9. The stated conditions were completion of the police officer medical exam and physical abilities test.² Exhibit 9. Complainant was also informed that her start date would coincide with the next available full-time police academy. Exhibit 9. Police academy training is required of anybody who is to be employed as a sworn police officer. Mr. Fitzgerald spoke to newly hired Police Chief Ruben Quesada, who had been hired in April, 2022, about determining an earlier start date and hiring Complainant full-time even before she completed the police academy in order to get her additional experience, and out of concern that she was a strong candidate and could receive and accept an offer from another department. See Exhibit 9. Indeed, she did begin with the Town in an administrative role prior to attending the academy, which began in the middle of July, 2022. Complainant went on to complete the academy and other conditions of her offer and was sworn in on or about February 6, 2023. See Complaint.

iii. Union's Objections to Hiring Process

Despite the Union's agreement to withdraw from the Civil Service System for the express purpose of increasing diversity within the Town's police force, the Union and Interim Chief Kurz has taken issue with the Town's focus on a more inclusive hiring procedures described above, and voiced that displeasure on many occasions. Shortly after receiving Mr. Fitzgerald's e-mail regarding the reasons for only moving forward with Complainant and not the other two candidates, Interim

² These are requirements promulgated by the Commonwealth that must be completed in order to gain entrance into the policy academy. Although the Town noted them as conditions to be satisfied for the offer of employment, they were not conditions created by the Town, but conditions required at the state level.

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Chief Kurz contacted Municipal Resources, Inc., the consulting firm assisting the Town with the establishment of its new hiring practices, to discuss his issues with this hiring cycle. Exhibit 2. Kurz identified Mr. Fitzgerald as the “lone hiring authority” and accordingly the sole individual asking questions at this interview stage. Exhibit 2. The Town Administrator, under the Town’s By-Laws and Charter is indeed the appointing authority. Kurz also opined that the interview with the Town Administrator, Chief, and Captain, was expected to be “a quick and easy formality[.]” Exhibit 2. Kurz’ primary concern was a question posed by Mr. Fitzgerald to Complainant about what physical characteristic she would change about herself. Exhibit 2. Kurz did not state the problematic question verbatim, but was only “paraphrasing[.]” Exhibit 2. Kurz also identified that he took issue with Mr. Fitzgerald’s apparent focus on “hiring protected classes,” e.g., solely hiring women and people of color and not appointing any of the white male candidates recommended by the Hiring Committee. Exhibit 2.

Approximately two weeks later, on March 2, 2022, the Union President e-mailed Mr. Fitzgerald to complain about his decision not to extend offers to the candidates other than Complainant. Exhibit 3. Citing a difficulty in hiring qualified candidates, the Union asked Mr. Fitzgerald to articulate specific standards that he felt were not met by the male candidates. Exhibit 3. The Union President did not make any reference to concerns with Complainant’s interview, but focused entirely on the Town’s decision not to move forward with the two male finalists. Exhibit 3.

Consistent with Interim Chief Kurz’ opinion that the interview involving the Town Administrator would be “a quick and easy formality,” the Swampscott Police Union appeared to hold a belief that the Town Administrator’s role in the hiring process was to simply approve of the finalists presented by the Hiring Committee, essentially “rubber stamping” their recommendations without any evaluation of his own. Specifically, the Union President has voiced frustration that the Town did not extend offers to candidates that they were “excited to present[.]” See March 14, 2022, Lynn Item Article, hereinafter Exhibit 10.

C. Complainant’s Internal Complaint

On or about July 27, 2022, almost 6 months after the interview, the Complainant filed a statement with Captain Kable, at his direction, documenting her account of her interview with Mr. Fitzgerald, Interim Chief Kurz, and Captain Kable on February 8, 2022. July 27, 2022, Memorandum from Complainant to Kable, hereinafter Exhibit 11. It is important to note that Captain Kable is a member of the Police Union, who was very upset that neither of the male finalists were hired by Mr. Fitzgerald. The Director of Human Resources subsequently informed Complainant that it would investigate the allegations included in her statement. A copy of this statement was forwarded to Mr. Fitzgerald. August 10, 2022, email from Fitzgerald to Complainant, hereinafter Exhibit 12. Mr. Fitzgerald subsequently e-mailed Complainant on August 10, 2022, copying the new permanent Police Chief Ruben Quesada. Exhibit 12. Specifically, Mr. Fitzgerald apologized that any part of the interview caused her to feel uncomfortable or upset. Exhibit 12. Mr. Fitzgerald reiterated

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that the question he posed to each candidate was what they would change about themselves and why, and explained that the reason for the question is to “elicit insight into each candidate’s self-awareness and growth mindset.” Exhibit 12. He also acknowledged that going forward, he should make it clearer from the outset that the question is not intended to refer to physical attributes. Exhibit 12. Complainant did not reply directly to Mr. Fitzgerald but later acknowledged receipt of the apology by e-mail to Chief Quesada. August 16, 2022, email thread between Complainant and Chief Quesada, hereinafter Exhibit 13.

Following Complainant’s submission of her statement, Captain Kable made comments to the Assistant Town Administrator and Chief Quesada on the subject of the Town Administrator’s employment status with the Town. On August 2, 2022, Captain Kable mentioned an action to “remove” the Town Administrator during a conversation with the individual serving as Assistant Town Administrator & Director of Human Resources. A week later, in a conversation with that individual and Police Chief Ruben Quesada, Captain Kable again referred to the complaint against the Town Administrator, stressing the importance of taking it seriously in order to “continue the momentum.” The timing and nature of the comments created the impression that Captain Kable was referring to orchestrated designs on removing the Town Administrator from his position.

D. Town Investigation

On or around August 17, 2022, the Town initiated an investigation into the interview of Complainant based on her July 27th statement. February 9, 2023, letter to Fitzgerald, hereinafter Exhibit 14. The Town maintains a Policy Against Harassment, and the purpose of the investigation was to determine whether the Town Administrator had violated that policy. Exhibit 14. Assistant Town Administrator and Director of Human Resources Pete Kane conducted the investigation with Select Board member Katie Phelan (collectively, “the Investigators”). Exhibit 14. They interviewed Interim Chief Kurz, Captain Kable, Mr. Fitzgerald, Complainant, and Benefits Coordinator.³ January 4, 2023, Investigation Report to Select Board, hereinafter Exhibit 15. The Investigators also reviewed a number of documents, including the Town’s Policy Against Harassment; texts between Complainant and a friend dated February 8, 2022; Complainant’s July 27th, 2022, statement to Captain Kable; e-mails amongst the Town Administrator, Complainant, and Chief Quesada regarding Mr. Fitzgerald’s apology; the Town Administrator’s interview questions and notes; e-mails between Mr. Fitzgerald and Chief Kurz on February 17, 2022; e-mails amongst the Union President, Town Administrator, Chief Kurz, and Captain Kable dated March 2 & 8, 2022; a February 17, 2022 e-mail from Chief Kurz to the MRI President; and February 15, 2022 e-mails between Chief Kurz and Hiring Committee members. Exhibit 15.

³ The interview with the Benefits Coordinator focused on Complainant’s conduct on the first day of her administrative role in July, 2022, and any interaction she may have had with Mr. Fitzgerald that day. The Benefits Coordinator did not recall Complainant saying anything to her about concerns with the hiring process, nor did the Benefits Coordinator have any first-hand observations of an interaction between Mr. Fitzgerald and Complainant that day.

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Although the incident prompting the investigation was Complainant's February 8, 2022, interview as summarized in her July 27th, 2022, statement to Captain Kable, Complainant raised several additional allegations that were incorporated into the investigation. Exhibit 14. Complainant alleged that on February 22, 2022, Mr. Fitzgerald called her to inform her that she would be moving forward in the hiring process but did not apologize for the February 8th interview. Exhibit 15. Complainant also alleged that during the week of July 18, 2022, the Town Administrator made inappropriately gendered remarks to her while she was completing employment paperwork at Town Hall. Exhibit 15. Finally, Complainant complained that Mr. Fitzgerald's written apology on August 10th, 2022, was inadequate. Exhibit 15.

Interim Chief Kurz was the first interview on September 8, 2022. Exhibit 15. He told interviewers that the exact words used by Mr. Fitzgerald in the question at issue on February 8th, 2022, were "what physical characteristics would you change about yourself." Kurz Internal Investigation Interview Notes, hereinafter Exhibit 16. Interim Chief Kurz acknowledged that he did not react to the question during the interview, but that he spoke to Mr. Fitzgerald after the fact. Exhibit 16. Mr. Fitzgerald at that time showed Interim Chief Kurz his notes and emphatically denied asking the question in the form alleged. Exhibit 16. Interim Chief Kurz later learned that Complainant had told a Swampscott Police Sergeant, supposedly in confidence, about the allegedly problematic question and that she felt uncomfortable. Exhibit 16. This Sergeant informed Captain Kable, who informed Interim Chief Kurz. Exhibit 16. Interim Chief Kurz also explained that he knew who Mr. Fitzgerald was prior to his arriving in Swampscott, but that he became frustrated and lost respect for Mr. Fitzgerald during his time working for the Town. Exhibit 16.

Captain Kable interviewed next on September 13, 2022. Kable Internal Investigation Interview Notes, hereinafter Exhibit 17. He was aware of the question at issue but did not recall the exact terminology used. Exhibit 17. In fact, Captain Kable told the Investigators that when Mr. Fitzgerald asked the question at issue, he was thinking over the answer to a previous question and "wasn't focused on the question at hand." Exhibit 17. He then believes he heard Complainant ask "do you mean physical?" to which Mr. Fitzgerald allegedly replied with something like "yeah, what would you change." Exhibit 17. Captain Kable also said that Complainant told him that she felt "diminished" after a second exchange with the Town Administrator in which he made remarks to the effect of "we're glad to have a woman." Exhibit 17. Captain Kable stated that he told Complainant to memorialize her concerns. Exhibit 17.

Mr. Fitzgerald was the third individual interviewed, and was also interviewed on September 13, 2022. Exhibit 4. This ended up being the first of two interviews with Mr. Fitzgerald for purposes of the investigation. See Exhibit 8. Mr. Fitzgerald explained his process for interview preparation, including how he selects and prepares questions. Exhibit 4. With respect to the question at issue, Mr. Fitzgerald asserted that he recalled reading the question to her exactly as printed on his interview notes: "if you could change one thing about yourself, what would it be and why?" Exhibit 4. Mr. Fitzgerald recalled Complainant providing a physical characteristic in response, prompting him to

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explain that he was not looking for a physical characteristic. Exhibit 4. He categorically denied asking the question as stated in Complainant's July 27th, 2022, statement, and further denied that he responded in the affirmative when asked whether he meant a physical characteristic. Exhibit 4. On the contrary, Mr. Fitzgerald stated that the question as stated in Complainant's statement was "offensive" and shocked him. Exhibit 4. Mr. Fitzgerald went on to describe his feelings that this entire matter has nothing to do with how Complainant was treated but is part of a scheme to undermine the Town's newly-developed hiring process and circumvent his authority to make final hiring decisions. Exhibit 4. Mr. Fitzgerald supported this explanation by stating that neither Interim Chief Kurz nor Captain Kable identified the question as problematic during or immediately after the interview. Exhibit 4. Further, Mr. Fitzgerald noted that Interim Chief Kurz and he communicated several times after the interview about Mr. Fitzgerald's decision not to move forward with the two white male candidates and only offer the Complainant a conditional offer, suggesting that issues with that decision were the true underlying factor behind this entire proceeding. Exhibit 4. Mr. Fitzgerald finally stated that aside from the July 27th statement from Complainant, the only other time he heard from her or interacted with her was earlier in July, when he expressed his excitement to have her as "part of the change."

Complainant was interviewed on September 29, 2022. Complainant Internal Investigation Interview Notes, hereinafter Exhibit 18. She provided her best recollection of what questions were asked of her, and responded that Mr. Fitzgerald "essentially asked if you could change a physical characteristic, what would it be and why." Exhibit 18. Complainant explained that in July of 2022, after she had started in an administrative role with the Department prior to attending the police academy, Captain Kable⁴, a member of the Police Union, called her up to his office and asked her to write a statement about the interview incident. Exhibit 18. Complainant identified that the Union President was present when this request was made. Exhibit 18.

During this investigation, Complainant for the first time identified three additional concerns with the Town Administrator. First, she explained that somebody from the police department, whom she did not identify, told her that Mr. Fitzgerald was going to call and apologize on February 22, 2022, and that she was annoyed when his call was purely about advancing the hiring process and did not address the interview in any respect. Exhibit 18. Next, she explained that in Town Hall, on her first day in her administrative role in July, 2022, Mr. Fitzgerald made comments to her about common masculine traits in law enforcement officers and how he was glad to have an officer who did not fit with that typical persona since she was hired. Exhibit 18. Complainant asserted that due to those comments, she felt that she was hired because of her sex, not because of her qualifications. Exhibit 18. Finally, Complainant complained about Mr. Fitzgerald's apology e-mail and read it verbatim, taking issue with the fact that he denied asking the question in the manner she alleged that he did. Exhibit 18.

⁴ It should be noted that Captain Kable was not selected for the Interim Police Chief or subsequently for the permanent Police Chief position even though he was the highest-ranking internal police officer when the former Police Chief retired. Instead, the Town hired Chief Quesada, who was an external candidate.

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Mr. Fitzgerald's second interview took place on October 6, 2022. Exhibit 8. The follow-up interview was called so that Mr. Fitzgerald could respond to the three new allegations that Complainant raised during her interview. With respect to the interaction in July when her administrative role began, Mr. Fitzgerald acknowledged that he may have pointed out that she was the first woman hired as a police officer in Town in seventeen years, but denied making any references to masculinity or femininity in policing. Exhibit 8. With respect to the call to Complainant on February 22, 2022, Mr. Fitzgerald explained his intent was to convey the good news that she was moving forward in the hiring process, but that he had no plans to apologize during that call, because he did not ask the question for which the apology was apparently sought. Exhibit 8. Mr. Fitzgerald reiterated that Complainant, Captain Kable, and Interim Chief Kurz misheard or misunderstood the question. Exhibit 8. Corroborating that, Mr. Fitzgerald explained that after Interim Chief Kurz reviewed Mr. Fitzgerald's notes, Kurz recognized that he may have "inferred" the use of the word "physical" in the question. Exhibit 8. Prior to receiving Complainant's statement on July 27th, he did not believe there was anything to apologize for, until he learned that she may have improperly inferred that the question was about physical characteristics. Exhibit 8. His apology was therefore not for asking an allegedly improper question, but was for the situation causing discomfort due to lack of clarity in that question. Exhibit 8.

The Investigators concluded their investigation and prepared a memorandum to the Select Board regarding their findings. Exhibit 15. With respect to the February 8th interview question, the Investigators noted that Complainant and Interim Chief Kurz presented different recollections of the question asked, while the Town Administrator recalled reading the question verbatim from a list he produced for the investigation, and Captain Kable simply did not remember what was asked, or even hearing the question and only hearing the response. Exhibit 15. The Investigators also credited the Town Administrator's interview preparation and printed list of questions as supporting his version of events, while crediting Complainant's text to a friend as corroborating her version. Exhibit 15. Ultimately, the Investigators decided that the weight of the evidence on this issue tended against a finding that the Town Administrator asked a question about physicality, but supported a finding that he failed to correct a misunderstanding. Exhibit 15. Critically, the Investigators also noted several facts that would support a finding that there was bias against the Town Administrator, not by Complainant, but by other witnesses that might underlie their role in this matter. Exhibit 15. Specifically, the Investigators identified the following facts:

- Chief Kurz has stated that he does not respect the Town Administrator. Additionally, in emails to [MRI President] and the Hiring Committee, Chief Kurz has expressed his dissatisfaction with Town Administrator Fitzgerald's assessment of candidates and his strategies for achieving diversity within the Department. The Select Board may want to consider whether Chief Kurz has a motive to undermine Town Administrator Fitzgerald's oversight of the application process.

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- Captain Kable [a member of the Police Union who was not hired as Police Chief] has on previous occasions communicated his wish to remove the Town Administrator from his position and has openly expressed some animosity toward the Town Administrator.
- Officer Reder prepared her written report concerning the Town Administrator at the behest of her supervisor, Captain Kable.

Exhibit 15.

With respect to the call on February 22, 2022, the Investigators concluded that even with undisputed facts underlying the allegations, “there is no basis for concluding the exchange violates any Town Policy.” Exhibit 15. With respect to the allegation of inappropriate comments by the Town Administrator on July 18th, 2022, the Investigators found that both Complainant’s and the Town Administrator’s accounts were rather vague, and therefore there was insufficient information to support a finding that the Town’s anti-harassment policy had been violated. Exhibit 15. Finally, the Investigators concluded that although Complainant’s complaint that Mr. Fitzgerald’s apology was inadequate, neither alleged inadequacy nor any actual comment contained within the apology amounted to a violation of Town Policy. Exhibit 15.

By letters dated February 9, 2023, the Investigators informed Complainant and the Town Administrator that on the information available, measured against a preponderance of the evidence standard, there was no violation of the Town’s Policy Against Harassment. Exhibit 14; February 9, 2023 Letter to Complainant, hereinafter Exhibit 19. Complainant subsequently filed the present Complaint with the MCAD citing a February 9, 2023, violation date.

II. LEGAL ARGUMENT

The Complainant in this matter has alleged that she was subjected to discrimination on the basis of sex based on essentially two incidents between her and the Town Administrator *en route* to her eventual appointment as a Swampscott Police Officer. The scope of this actual complaint bears repeating, not only because the facts do not support a finding that Complainant was actually subjected to any discrimination as defined by state or federal law, but also because the broader context from which this case arose suggest ulterior motives by some of Complainant’s colleagues that have nothing to do with her appointment or alleged treatment prior thereto. Reviewing the allegations of the Complaint on their face, and separately against the backdrop of the Union’s clear issues with Mr. Fitzgerald, it is clear that there has not been any discrimination against Complainant, and this matter should be dismissed.

A complainant asserting unlawful discriminatory treatment bears the burden of proving that the employer intentionally discriminated against her based upon her status as a member of a protected class. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 12 (1998); Brunner v.

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Stone & Webster Eng'g Corp., 413 Mass. 698, 699 (1992); McKenzie v. Brigham & Women's Hospital, 405 Mass. 432, 434 (1989); Smith College v. Massachusetts Commission Against Discrimination, 371 Mass. 130, 138-39 (1978). In the absence of direct evidence of discrimination, such as in the present case, the complainant must prove her case using the three-staged inferential method of proof articulated by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and subsequently adopted by the Massachusetts Supreme Judicial Court in Wheelock College v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).

Under the three-step analysis, the employee must first prove a *prima facie* case of discrimination. If the employee is able to do that, the employer then needs to rebut the *prima facie* case by showing that it had a legitimate, non-discriminatory business reason for taking the action that is being contested. Once the employer has successfully rebutted the employee's case, the employee must prove that the employer's stated reasons for taking the adverse action are not true, or are pretextual. See Mathews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 127 (1997); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 440 (1995); Wheelock College, supra. Even with the tri-partite burden shifting analysis however, the "[c]omplainant has the burden of proving discriminatory motive in all complaints alleging discriminatory treatment." SanMartino v. Clark University, 17 MDLR 1121, 1125 (February 23, 1995) (citing Wheelock College, supra).

A. The Majority of Complainant's Allegations were not Timely Filed

The statute of limitations for the filing of a discrimination complaint with the MCAD and the EEOC is 300 days from the date the alleged discrimination took place. The Complaint was filed March 14, 2023, with an alleged violation date of February 9, 2023. Based on the allegations presented by Complainant, the alleged discrimination suffered was the Town's conclusion that the Town Administrator did not violate any Town policy, including its Anti-Harassment Policy. 300 days prior to March 14, 2023, was May 18, 2022. Allegations of events occurring prior to May 18, 2022, therefore, should be considered time-barred and not subject to review in determining whether the Town engaged in discrimination on the basis of sex against Complainant. Specifically, Complainant alleged that the Town Administrator's question about what physical characteristic she would change about herself occurred on February 8, 2022, and that he failed to apologize for doing so when Complainant expected him to on February 22, 2022. To the extent Complainant would allege this constitutes discrimination on the basis of sex, the allegation should be denied as time-barred. Accordingly, the only timely allegations of discrimination on the basis of sex would be the alleged comments made to Complainant on or around July 18th, the allegedly inadequate apology on August 10th, and the Town's findings that the Town Administrator did not violate any Town Policy as communicated on February 9th, 2023.

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B. Complainant Has Not Stated A *Prima Facie* Case of Gender Discrimination

In order to establish a *prima facie* case of gender discrimination, Reder must demonstrate that: (1) she is a member of the protected class; (2) she is qualified and performed her job adequately; (3) she was subject to adverse treatment; and (4) she was treated differently from other employees similarly situated, but not members of the protected class. See, e.g., Knight v. Avon Products, Inc., 438 Mass. 413, 420 (2003) (outlining *prima facie* case); see also Frank Dalessio v. Seagate Technology, Inc., 18 MDLR 117 (1996). Notwithstanding the Town's position that some of Complainant's allegations were filed untimely, they do not support a *prima facie* case of discrimination.

i. Mr. Fitzgerald Did Not Engage in the Discriminatory Conduct Alleged

While there is a dispute about how the question regarding "change" was phrased, there is no dispute that Complainant provided a physical characteristic in her answer, while neither of the other candidates did. Complainant's response, however, does not necessitate the conclusion that the question was posed to her differently than other candidates, or that it even called for a physical characteristic. Mr. Fitzgerald, Complainant, Interim Chief Kurz, and Captain Kable were the only four people present when the question at issue was spoken. Mr. Fitzgerald has conducted a number of employment interviews in his time as a municipal official and has received training about conducting interviews. He has asked candidates for employment what they would change about themselves without issue, using precisely the same form that he used for the police officer interviews in February 2022. He did not, on the singular occasion of interviewing Complainant on February 8, 2022, deviate from that question, particularly to ask about her physical characteristics, and deviation that in his own words would be "terribly unfair and wrong." The three other individuals present for this interview would challenge Mr. Fitzgerald's account of what question he asked, but each of these challenges presents flaws.

First, the credibility of the accounts of Interim Chief Kurz, Captain Kable, and Complainant, are undermined whether by each individual's own words or by conflict with other similar accounts. Captain Kable, by his own admission, did not remember hearing the question that was asked, and indeed admitted that he was focused on a previous answer rather than the question. His perspective accordingly cannot be relied on for any purpose when it comes to assessing what was or was not asked on February 8th, 2022. Interim Chief Kurz and Complainant, both of whom steadfastly recall the word "physical" being used in the question, have reproduced the question in a number of varying ways, creating doubt as to the reliability of their memories. Interim Chief Kurz stated to the Investigators on September 8, 2022, seven (7) months after the interview took place, that the "exact" wording of the allegedly improper question was "what physical characteristics would you change about yourself." Less than two weeks after the interview, however, when Interim Chief Kurz reported the question to the MRI president, he was only "paraphrasing" rather than providing the exact text. Despite being so sure this is the question he heard, Kurz also acknowledged that after

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reviewing Mr. Fitzgerald's printed questions and handwritten notes, that he may have misheard the question when it was asked. Indeed, Kurz did not take notes of Complainant's, nor any candidate's, interviews, and has no independent basis to corroborate his recollection. Complainant, unlike Interim Chief Kurz' "exact" recollection of the form of the question, alleged in her statement that the question included the preface "if you could change" and the supplemental aspect "and why." While Complainant and Interim Chief Kurz would seem to allege that the Town Administrator asked about physical characteristics, their accounts of the incident do not match and lack any form of corroboration. The Town Administrator, however, can corroborate his form of the question by relying on actual documentation of the questions that he asked each candidate, supported by years of training and interview experience, and time spent selecting questions and preparing for interviews.

Second, Complainant's account can be explained in a number of ways, including most simply a mishearing or misunderstanding of the question asked by Mr. Fitzgerald. Indeed, that was Mr. Fitzgerald's initial assumption when Complainant provided a physical characteristic, that Complainant did not hear or understand the question, and he therefore clarified that he specifically was not looking for a physical characteristic. Despite that clarification, Complainant appeared to struggle with providing a new answer, prompting Mr. Fitzgerald to move on. It is reasonable to infer that once Complainant became uncomfortable with a question where she thought she was being asked to comment on her physical characteristics, that discomfort continue to affect Complainant even after having the intent of the question clarified. Similarly, it would be reasonable to infer that after being told that her answer was not in line with what the Town was looking for, Complainant may have been embarrassed or frustrated with her misunderstanding of the question. There are ultimately a number of reasonable explanations by which it can simultaneously be true that Mr. Fitzgerald did not ask for Complainant to comment on her physical characteristics while Complainant was uncomfortable during the interview, and even that she believed she was expected to answer with a physical characteristic. That subjective belief, however, does not compel a conclusion that Mr. Fitzgerald indeed asked for a physical characteristic. Rather, the combination of Mr. Fitzgerald's notes, experience conducting interviews, and familiarity with this question about what a candidate would change, more reasonably supports the conclusion that he did not ask Complainant about a physical characteristic, and that Complainant simply misunderstood what she was being asked.

Third, as noted by the Investigators, Interim Chief Kurz and Captain Kable had a reasonably identifiable motive to accuse the Town Administrator of some wrongdoing. The timeline of events reveals that Interim Chief Kurz only first raised concerns with the Town Administrator after learning that Mr. Fitzgerald was not inclined to move forward with the other two of the three candidates recommended by the Hiring Committee that included Kurz himself. Indeed, Kurz acknowledged that he has lost respect for Mr. Fitzgerald, further supporting that his frustration could easily underlie a mistaken recollection of events at Mr. Fitzgerald's expense. Complainant's statement regarding the interview question did not come about until July 27th, five months after the interview took place, over a week after her employment with the Town formally began, and only at the direction of

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Captain Kable. Within two weeks of Complainant's filing the statement requested by Captain Kable, the Captain was making comments to other Town officials urging continued action against the Town Administrator. These facts, taken together, suggest bias or even invidious designs against the Town Administrator on the basis of an employment disagreement having nothing to do with Complainant's status or concerns. To that end, their contributions towards corroborating Complainant's allegations are dubious and indeed unreliable.

Taking all these facts together, as the Investigators did in reaching their recommended findings, the weight of the evidence supports a conclusion that the Town Administrator did not ask Complainant about physical characteristics as alleged.

ii. Complainant was not subjected to Adverse Treatment as defined by law

The Town does not contest that Complainant satisfies the first two elements of the *prima facie* case, as she is a woman, and her qualifications for the position are supported by the fact that the Town indeed hired her as a police officer. Complainant cannot, however, meet the third element that she was subjected to adverse treatment, even taking all of her allegations as true.

Ostensibly, Complainant's allegations of sex discrimination are the interview question asked of her on February 8th, the comments allegedly made to her about women in law enforcement on July 18th, and based on the violation date listed on the Complaint, the Town finding that the Town Administrator did not violate the Town's Policy Against Harassment. The Town does not concede that Mr. Fitzgerald asked Complainant about physical characteristics in her interview, nor does it concede that he spoke to her about physical traits at Town Hall when she was completing employment paperwork. Nevertheless, none of those allegations, if true, amount to adverse treatment of Complainant.⁵ On the contrary, Complainant was the only candidate hired of the three interviewed. The allegedly improper question was just one of several questions that did not give rise to any concern. There is no allegation that this allegedly improper question was granted any more weight than the rest of the questions presented, or that it had any effect on the outcome of the interview. Complainant has, at most, alleged that she was subjected to one different interview question from her male counterparts. She cannot, however, establish how that single difference amounted to adverse treatment by an employer that ultimately hired her, and only her, helped her to get experience even before attending the academy, and by all accounts regards her as a good employee and valuable piece of the Town's efforts to ensure the Swampscott Police Department keeps faith with the efforts to ensure the hiring process is diverse, equitable, and inclusive.

⁵ Although Complainant has not made any allegations of harassment or hostile work environment, the Town feels compelled to point out that the alleged question to Complainant and comments to her at Town Hall would not amount to a hostile work environment as defined by law. This is consistent with the findings of the Town's internal investigation.

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Similarly, none of Complainant's other allegations even arguably constitute adverse treatment. On February 22, she was expecting an apology from the Town Administrator, but at that point, he had not been made aware that there was anything to apologize for. By that time, he and Interim Chief Kurz had disagreed about the question that was asked, but nobody had informed him that Complainant had any sort of issue with how the interview progressed. The absence of an apology where the Town Administrator had not been made aware of any sort of grievance cannot be viewed as adverse treatment. Similarly, to the extent that the Town Administrator made remarks about Complainant's unique position as a woman on the police force, referring to the fact that she was the first woman hired to such a position in over a decade and a half is simply a statement of fact. This one conversation, standing alone and without any consequence, cannot be said to constitute adverse treatment. Rather, it could be fairly viewed as an excited conversation between a Town official, who holds no day-to-day supervisory authority over the employee, and a newly-hired employee positioned to contribute to the community. It bears repeating that at the time of this conversation, there had been no communication to the Town Administrator, by Complainant or otherwise, that Complainant was in any way uncomfortable with the Town Administrator's communications towards her. Indeed, once the Town Administrator learned that he may have had some role in her discomfort, he responded immediately to apologize and dispel any concerns. This response took the form of his August 10th, 2022, e-mail to Complainant, which she alleged was inadequate. Her complaint of inadequacy, however, is clearly derived from a disagreement about what took place at her interview on February 8th, 2022. The Town Administrator has routinely disputed asking Complainant about what physical characteristics she would change, and his apology email was consistent with that position. An apology email, based on the facts that the Town Administrator believed to be true, cannot be said to constitute adverse treatment just because his beliefs did not align with Complainant's.

Finally, the results of the Town's investigation cannot be said to constitute adverse treatment. Notably, Complainant prepared a statement for, and addressed to, Captain Kable, at his direction. She did not file an internal complaint with Human Resources, nor does she allege to have done so. Nevertheless, the Town took it upon itself to investigate the allegations contained in the statement, and further to investigate the additional concerns that Complainant raised once the investigation was underway. Indeed, the Investigators' findings did not even discredit Complainant, but simply acknowledged that the weight of the totality of the evidence did not support any findings of policy violations. There was no consequence, negative or otherwise, associated with the conclusion of the investigation and findings that no policy violation occurred. At most, the findings amount to an unfavorable result for Complainant, Interim Chief Kurz, Captain Kable, and the Swampscott Police Union, but not adverse treatment of her.

iii. Complainant's Internal Investigation was Handled Like Other Internal Investigations

To the extent that Complainant is indeed alleging that the Town's investigation constituted an adverse employment action by yielding findings that the Town Administrator did not violate the

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Town's Policy Against Harassment, Complainant cannot establish the fourth element of the *prima facie* case. There is no evidence that the Town male employees have previously filed complaints leading to internal investigations and that those investigations were handled differently. The Town does not concede that investigation findings unfavorable to the employee constitute adverse treatment of the complaining employee. In any event, even if it were, Complainant has not made any allegations, nor can she provide any evidence, that the Town handled this investigation any differently than other investigations into complaints brought by male employees.

C. The Respondent has Legitimate, Non-Discriminatory Reasons for its Allegedly Discriminatory Actions, and Complainant has Offered Nothing to Show Pretext

Once again, the Town categorically denies that it engaged in any of the allegedly discriminatory conduct cited by Complainant. With respect to the allegations that the Town Administrator asked about physical characteristics, it simply denies that this ever happened, and cannot therefore fabricate an explanation for a question that the Town Administrator himself has stated would be offensive or unfair. The non-discriminatory basis for asking a question about change in the first place is, as the Town Administrator has repeatedly acknowledged, to gauge the self-awareness and growth mindset of employment candidates. That is and has been the motivation behind the Town Administrator's use of this question in several employment interviews.

With respect to the findings of the investigation, if the Commission nevertheless finds that the Complainant was indeed subjected to adverse treatment by the unfavorable outcome and lack of findings, the Town's legitimate, non-discriminatory reasons for its findings are plainly set forth in the comprehensive Investigation Report prepared by the Investigators for the Select Board. The Investigators conducted a fair, objective, and independent investigation where they took the accounts of interviewees on their face, and simply decided that on balance, the evidence did not support any policy violations. There is nothing in Complainant's Complaint to suggest that the conduct of this investigation was pretextual.⁶

D. The Timing of Complainant's Complaint and the Union's Conduct in the Interim are Suspect and Undermine the Integrity of the Complaint

The Union's and Town's withdrawal from the Massachusetts Civil Service system includes an express indication to increase diversity within the Town's police ranks. Nevertheless, in the time following the February 8th interview with Complainant, Mr. Fitzgerald received only a wavering indication of concern from Interim Chief Kurz regarding the question that was asked of Complainant. The Town subsequently received documentation of Complainant's own concerns in July of 2022, five months after she received the only condition offer of employment issued to any of the candidates interviewed in February, and explicitly at the direction of Captain Kable. Indeed, the

⁶ Indeed, it is not even clear that Complainant intended to object to the results of the investigation as a basis for discrimination, but to the extent she did, there is not enough evidence to support such a finding.

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Town received substantially more concern over the fact that Mr. Fitzgerald had decided not to offer employment to the two white male candidates interviewed at the same time as the Complainant. The Union made its objections clear about Mr. Fitzgerald's decision not to advance these candidates, but has not taken any sort of action against the Town Administrator for his decision, in tacit recognition that his decision was a valid exercise of authority, and there was no actionably basis to challenge it. What has instead taken place is the advancement of an internal complaint at the direction of Complainant's colleagues and, following notice that the facts did not support that any Town policy had been violated, advancement of a new complaint to this agency on the same facts.

III. CONCLUSION

As was the case in the Town's investigation, the balance of information here does not support a finding that Complainant was subjected to discrimination on the basis of sex as defined under the law. The evidence at most suggests a misunderstanding by a candidate that made her feel uncomfortable, and efforts by her future colleagues to take advantage of an opportunity to embarrass a public official in retaliation for his validly exercising authority in a manner they did not find agreeable. This case lacks merit, and should be dismissed.

Very truly yours,



Darren R. Klein

DRK/JC1/lmk

Enc.

cc: Town Administrator
Human Resources
Ms. Briana Reder