

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEPHEN HURLEY,
LEONARD FORD,
and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,

Complainants

Against

Docket No. 98 BEM 3304/3305

CITY OF MELROSE,
POLICE DEPARTMENT,

Respondent

Appearances: Harold L. Lichten, Esq. for Complainants Hurley and Ford
Mark J. Ventola, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 19, 1998, Patrol Officers Stephen Hurley and Leonard Ford (“Complainants”), filed complaints of age discrimination with the Massachusetts Commission Against Discrimination (“Commission”) alleging that they were denied promotions to the position of Police Sergeant due to their age.

On November 30, 2001, the Investigating Commissioner found probable cause to credit Complainants' allegations. Conciliation efforts were unsuccessful and the matters were certified for a public hearing on May 9, 2002 and on July 8 2002, respectively. The Commission granted a joint motion of Complainants Hurley and Ford to consolidate their proceedings on September 23, 2002. A pre-hearing conference was held on February 10, 2003.

A public hearing took place on June 2, 3, and 4, 2003. By agreement of the parties, a stenographic transcript was adopted as the official record of the hearing. The parties introduced 26 joint exhibits. Complainants also introduced Complainants' Exhibits 1 and 1A and Respondent introduced Employer's Exhibits 1 – 3. Complainants submitted a Motion in Limine relating to whether there was a past practice with respect to promotions in the Melrose Police Department. The Motion in Limine was granted on the basis of a related arbitration decision ruling that there was no binding past practice requiring the Chief to make promotions to the position of Sergeant from an existing, but soon to expire, eligible list.

Counsel submitted proposed findings of fact and conclusions of law on or around November 14, 2003. To the extent the parties' proposed findings are not in accord with the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with my findings, such testimony is rejected. Based upon all relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

I. FINDINGS OF FACT

1. Complainants Steven Hurley (DOB 1/16/54) and Leonard Ford (DOB 6/21/52) took and passed a civil service exam for promotion to Melrose Police Sergeant in 1995. Both officers scored in the low 80's on the exam, placing them initially in positions four and five, respectively, on the civil service eligibility list. At the time they took the exam, Officer Hurley had 15 years on the Melrose Police Department and Officer Ford had 7 years on the Department. Neither had a disciplinary record.

2. In January 1997, Melrose Police Chief Frank Fiandaca was approached by several Patrol Officers including Officer Lyle, with a request that a new promotional examination for Sergeant be given in October 1997. Chief Fiandaca asked Patrol Officer Lyle, then forty-one years old, to determine how many Patrol Officers were in favor of having an exam and how many were opposed. Officer Lyle conducted an e-mail poll. Officers Hurley and Ford opposed the administration of a new exam. A majority of officers voted in favor of an examination. Chief Fiandaca decided not to conduct a new examination because the promotional list for Sergeant from the 1995 exam for Sergeant was still in effect.

3. In February 1998, Chief Fiandaca retired. Lt. Richard Smith, then 44 years old, was named Acting Chief by Mayor Patrick Guerriero. At that time, there were 13 Patrol Officers who did not take the 1995 examination for promotion to Sergeant because they were not eligible. The 1995 exam for Sergeant was due to expire on October 1, 1998.

The 13 patrol Officers who did not take the 1995 examination for promotion to Sergeant were eligible to take the next Sergeant's exam.

4. Acting Chief Smith announced at a February 2, 1998 roll call that he planned to call for a civil service Sergeant's exam to be given in October 1998. He also notified members of the Department about the October 1998 Sergeant's exam by e-mail on several occasions in February and March 1998. Notices were posted in the Department announcing that a Sergeant's exam would be given in October 1998. Despite some evidence to the contrary, Acting Chief Smith testified credibly that he promised to fill Patrol Officer vacancies as they came up but he did not promise to fill Sergeant vacancies if they occurred prior to the administration of the October 1998 Sergeant's exam. I do not credit the testimony of Officer Hurley that the Chief stated at a February 1998 roll call and on several occasions thereafter that he was going to fill promotional positions as they became available. Officer Hurley's testimony conflicts with his prior deposition testimony in which he did not recall the Chief saying anything about making promotions. Transcript Volume II at 165. Similarly, I do not credit Officer Ford's testimony about the Chief expressing an intention to fill Sergeant positions as they became available. Transcript Volume II at 77. I also do not credit the testimony of the current president of the police union, Patrol Officer John Slaney, that Acting Chief Smith stated at a February 1998 roll call that, "he wouldn't kill the list like the past chiefs had done" because there is no evidence of a past practice of killing lists. Transcript Volume I at 104-105.

5. In February 1998, some Patrol Officers began to study for the October 1998 Sergeant's exam.

6. In March 1998, Acting Chief Smith promoted Patrol Officer Mark DeCroteau to Sergeant and Sergeant Richard Morrissey to Lieutenant. Both of these promotions were in process when Smith was named Acting Chief. At the time of promotion, DeCroteau was 35 years old and Morrissey was 43 years old. Later in 1998, Chief Smith promoted Sergeant Daniel O'Neill to Lieutenant. At the time of promotion, O'Neill was 49 years old.

7. By March 18, 1998, Officer Hurley was the top person on the 1995 eligible list for promotion to Sergeant. Officer Ford was second on the list. Complainants did not sign up for the October, 1998 Sergeant's exam or begin to study because Sergeants Barrett and Kelley announced that they were going to retire prior to the October 1998 exam. Additionally, Officer Ford testified that he was unable to study because he was the primary caretaker of his wife who was ill with diabetes. Complainants expected to be promoted off the 1995 eligible list to fill the vacancies left by the anticipated retirements of Sergeants Barrett and Kelley. As a longstanding practice, the Town of Melrose does not bypass candidates on eligibility lists except in cases of serious discipline.

8. During the summer of 1998, Sergeants Barrett and Kelley retired. Chief Smith recommended to the Mayor that the City not fill their vacancies from the 1995 eligible

list for Sergeant but, rather, wait until after the results of the October 1998 exam to make promotions. Mayor Guerriero accepted this recommendation.

9. On July 1, 1998, Acting Chief Smith was appointed permanent Chief of the Melrose Police Department. At that time he applied for a leave from his Lieutenant's position. Joint Exhibit 24. His leave of absence was approved the first week of August 1998. It was made retroactive to July 1, 1998. Transcript Volume III at 38, 62.

10. On July 16, 1998, Chief Smith met with Officer Hurley and on July 17, 1998, Chief Smith met with Officer Ford. Chief Smith told Complainants that he had decided to leave the Sergeant positions vacant until a new list was established from the October, 1998 Sergeant's exam and promote people from that list. I credit the testimony of Chief Smith that he told Complainants that the reason for his decision was to give the "younger" or "newer" officers in the Department a chance to take the promotional exam. Transcript Volume III at 204. The "younger" or "newer" officers consisted of 13 Patrol Officers who had insufficient time in the Department to be eligible for the prior (1995) Sergeant's exam. As of 1998, 10 of these officers were in their 20's; 3 were in their 30's. Joint Exhibits 6 and 20.

11. During the Chief's meeting with Officer Ford, he discussed Officer Ford's contribution to the Department. He told Officer Ford that he was not the best officer in the Department but that he was "one of the best."

12. Not every Patrol Officer took promotional exams. Some of the senior Patrol Officers were not interested in taking a Sergeant's exam, either because they were satisfied with their current position or had previously taken the exam and failed. Transcript Volume II at 217.

13. Officer Ford and his wife went to see Mayor Guerriero in order to ask him to override Chief Smith's decision. Officer Ford explained to the Mayor that because of his wife's illness, it would be impossible for him to study for the next examination. Mayor Guerriero said he was going to stand behind Chief Smith's decision.

14. The Patrol Officer's union initiated a grievance on behalf of Officers Hurley and Ford, alleging that the failure to make promotions off the existing promotional list constituted a continuing violation of Articles 22 and 14 of the parties' contract. Joint Exhibits 19A and 19B. The grievance proceeded to arbitration where it was denied. Respondent's Exhibit 1.

15. In late July or early August 1998, Chief Smith and Sergeant James Fowlie met to discuss whether the Chief would promote Fowlie to the temporary Lieutenant's position created by Smith becoming the Chief on a permanent basis on July 1, 1998 and taking a leave of absence from his Lieutenant's position. Smith and Fowlie had joined the Melrose Police Department on the same day in 1981. Sergeant Fowlie was age 52 in 1998. He was at the top of the civil service list for Lieutenant at the time of the meeting

as a result of the Chief promoting two Sergeants to the position of Lieutenant in the first half of 1998: Sergeant Morrissey who was 43 or 44 years old at the time and Sergeant O'Neill who was 49 years old at the time. Transcript Volume III at 57 and 61. Chief Smith testified that he did not promote Sergeant Fowlie to the temporary Lieutenant's position, in part, because of "concerns" about Sergeant Fowlie's management skills and his leadership ability. Transcript Volume III at 63-64. Chief Smith testified that during the summer of 1998, he was of the opinion that Sergeant Fowlie "wasn't pulling in the same direction" and "wasn't on board with the Department, where we wanted to go." Id. at 64. Chief Smith testified credibly that he had heard the Department was the butt of many of Sergeant Fowlie's jokes at Anna Maria College where he taught in the criminal justice program. Transcript Volume III at 64.

16. During the July/August 1998 meeting between Chief Smith and Sergeant Fowlie, the Chief mentioned that there were many new faces in the Department and that the Department had changed quite a bit since they started. The Chief then commented that in the eyes of the newer recruits, both he and Sergeant Fowlie must be viewed as the "dinosaurs" of the Department. I do not credit Sergeant Fowlie's version of the incident to the extent it differs from the Chief's. The Chief also asked Sergeant Fowlie how many years he had until he would be eligible for retirement. He told Sergeant Fowlie that he would make a decision about Fowlie's promotion in September 1998.

17. In August 1998, the union filed a grievance about the City's failure to fill vacancies from the promotional list for Lieutenant. Sergeant Fowlie also filed a complaint with

the Massachusetts Commission Against Discrimination alleging age discrimination in regard to his failure to be promoted to Lieutenant. Joint Exhibit 11. As part of a settlement agreement, Sergeant Fowlie was promoted to temporary Lieutenant in the spring of 1999 and permanent Lieutenant in the summer of 1999, upon passage of City Ordinance Sec. 24-1, an amendment which added an additional Lieutenant's position to the Melrose Police Department. Joint Exhibit 3. The amendment stipulated that a fifth Lieutenant's position would be left unfilled and unfunded in order to permit a Police Chief, with the permanent civil service rank of Lieutenant, to return to that position upon resignation or termination as Chief. Joint Exhibit 22.

18. Sergeant Fowlie was described by Lieutenant Buker as "resentful" of Chief Smith. Transcript Volume II at 30. Lieutenant Buker testified that for years there had been tension between the Chief and Lieutenant Fowlie. Transcript Volume II at 47.

19. Officer Ford belatedly signed up for the October 1998 Sergeant's exam but failed. By the time he signed up, he only had three months to study. He testified that his preparation was also hindered by the fact that his wife is a brittle diabetic and is subject to extreme mood swings and even comas. Officer Hurley did not take the October 1998 Sergeant's exam.

20. In the fall of 1998, Chief Smith spoke to Chief Mahoney of the Woburn Police Department about Melrose Police Lieutenants not being willing to "pull together" with him. Transcript Volume III at 111 and 180. In the spring of 1998, all of the Melrose

Lieutenants were in their 40's and 50's. Transcript Volume III at 183. Chief Mahoney responded by saying that he had similar problems in Woburn when he became Chief which had taken him fifteen years to resolve. Transcript Volume III at 112. I credit the testimony of Lieutenant Buker that Chief Smith relayed the substance of this conversation to him, but I do not credit Lieutenant Buker's testimony that Chief Smith went on to say that he told Chief Mahoney he would look forward to the time when all the senior officers would retire, including Lieutenant Buker.¹ Transcript Volume II at 17; Volume III at 113. I also do not credit the statement attributed to Lieutenant Buker by Sergeant Fowlie that the Chief said he wanted to promote a younger person with whom he could work to the position of Lieutenant. Transcript Volume I at 131.

21. During 1999, a new eligible list for Sergeant was established from the October 1998 Sergeant's exam. Some veteran Patrol Officers took the exam and, in addition, thirteen Patrol Officers took the exam who were not eligible to take the previous Sergeant's exam. Joint Exhibit 6. Ten of the 13 officers were in their 20's in 1998; 3 were in their 30's. Joint Exhibit 20. Chief Smith made promotions to vacant Sergeant positions in September 1999, fourteen months after the retirements of Sergeants Barrett and Kelley. By that time, there were four Sergeant vacancies rather than two. The four individuals who received the highest scores on the civil service exam were promoted. Their names and ages at the time of promotion were as follows: Michael Lyle (age 42), Charles Byrne

¹At some point prior to his retirement, Lieutenant Buker had been the Patrol Commander of the Melrose Police Department. In that capacity he was second in command of the Department. Lieutenant Buker had been removed from the position by Chief Smith. Lieutenant Buker described his removal as "shocking." Transcript Volume II at 35. Lieutenant Buker was replaced in the position of Patrol Commander by Lieutenant O'Neill who is approximately one year older than Lieutenant Buker.

(age 28), Barry Campbell (age 46), and Paul Norton (age 35). Transcript Volume II at 123-124. Charles Byrne was originally hired in 1996, Paul Norton was hired in 1995, and Michael Lyle was hired in approximately 1987. Transcript, Volume I at 109 and Volume II at 135-136. Barry Campbell was described by Officer Ford as “best friends” with the Chief. Transcript Volume II at 136.

22. In 1998 and 1999, Chief Smith appointed Officers Ross and Roy to the Melrose Police Department. At the time when Officer Ross was appointed, he was 50 years old and at the time when Officer Roy was appointed, he was in his late 40’s. Because Officer Roy’s father died in the line of duty as a police officer, Officer Roy had a preference which placed him at the top of the eligible list for Patrol Officer. Officer Ross had a veteran’s preference which resulted in his placement on the eligible list for Patrol Officer ahead of non-veterans. Officer Ross had been bypassed on a previous certification by former Chief Fiandaca. Officer Ross filed a civil service appeal. The civil service appeal was withdrawn after he was appointed as a Patrol Officer. Respondent’s Exhibit 3.

23. Following the October 1998 Sergeant’s exam, the Melrose Police Department participated in an October 2000 Sergeant’s exam and an October 2002 Sergeant’s exam. Transcript Volume 111 at 106. Chief Smith used a list of candidates certified from the October 2000 Sergeant’s exam to promote Officers Jonathan Goc (then 32 years old) and Joshua Crowley (then 27 years old) to Sergeant in the fall of 2002, just before the 2002 test was given. Officer Mackey (then 30 years old) was promoted to Sergeant in December 2002, just after the 2002 Sergeant’s exam was given. Id. The examination

scores of Officers Goc and Crowley were 79 and the score of Officer Mackey was 75. Transcript Volume III at 222-223; Joint Exhibit 6. None of the three officers promoted to Sergeant in 2002 was hired before 1996. Transcript Volume III at 212. Chief Smith testified that the promotions were necessitated by staff shortages in the supervisory ranks due to an early retirement incentive program. He distinguished the situation in the fall of 2002 from the situation in the fall of 1998 on the basis that the Department in 2002 was on a regular exam cycle and that a fiscal crisis was looming.

24. Officer Hurley testified that when he learned he would not be promoted, he felt like he was “run over by a steam roller.” Transcript Volume II at 152. He testified that the refusal to promote him affected his work performance. He gave up seeking a promotion. Chief Smith corroborated that after Officer Hurley was notified that he was not going to be promoted, “there was a period of time that, you know, he basically wasn’t doing very well.” Transcript Volume III at 96. His wife, Katherine Hurley, from whom he is now separated but was still living with him at the time of the incident, testified that Officer Hurley became withdrawn and distraught in a way he had never been before. Transcript Volume I at 159-161.

25. Officer Ford testified that when he first met with Chief Smith about not being promoted, he was “afraid to say anything” because he was “so choked up.” Transcript Volume II at 82. Officer Ford described himself as “devastated” by the decision. Id. Chief Smith corroborated that Officer Ford went through a “lull.” Transcript Volume III

at 99. Officer Ford's wife, Marie Ford, testified that she had never seen him so upset before. Transcript Volume I at 164.

26. There is a 17% differential between a Patrol Officer's salary and a Sergeant's salary, including a calculation of overtime. Transcript Volume II at 88. In the years between 1998 and 2002, Officer Ford's annual pay averaged \$62,714.12. Officer Hurley's annual pay averaged \$52,931.93. Complainants' Exhibit 1.

II. CONCLUSIONS OF LAW

A. Discrimination

Pursuant to M.G. L. c. 151B, sec. 4 (1B), it is unlawful to discriminate in employment on the basis of age. The statute protects persons age forty and over. M.G.L. c.151B, sec. 1(8). Complainants allege that Respondent discriminated against them on the basis of age by failing to promote them to the position of Sergeant in the summer of 1998 when Officer Ford was 46 years old and Officer Hurley was 44 years old.

A prima facie case of disparate treatment can be based on either direct evidence or by circumstantial evidence. Complainants contend that there is direct evidence of disparate treatment discrimination based on comments by Chief Smith that he wanted to refrain from making promotions in 1998 in order to give the "younger" or "newer" officers a chance to take the promotional exam for Sergeant. Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. Massachusetts

Commission Against Discrimination, 431 Mass. 655, 665 (2000). In a direct evidence case, the Complainant does not have to adhere to the three-stage burden shifting paradigm because there is no need for an inference. Rather, Complainants must prove by a preponderance of evidence that a proscribed factor played a significant role in the challenged employment decision. See Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass. 729, 735 (2003) *citing* Lipchitz v. Raytheon Co., 434 Mass. 493, 506 n.19 (2001) (where discriminatory and nondiscriminatory hiring motives are both present, decision is unlawful if discriminatory animus is a “material and important ingredient”); Wynn & Wynn, 431 Mass. at 665-667.

The Chief acknowledges that he wanted to delay the Sergeant promotions at issue in this case to open up the field of eligible candidates. He admits that he referred to the additional 13 officers who would be eligible to take the 1998 Sergeant’s exam as either “younger” or “newer.” In addition, there is undisputed evidence that Chief Smith referred to himself and Sergeant Fowlie as “dinosaurs” in the eyes of the newer recruits in the Department and that he asked Sergeant Fowlie when he was going to retire during a conversation in which Sergeant Fowlie expressed interest in being promoted to Lieutenant.

The comments of Chief Smith constitute direct evidence of age discrimination. See Wynn & Wynn v. MCAD, 431 Mass. 655 (2000); Rolanti v. Boston Edison Corp., 33 Mass. App. 516, 521 (1992). The most egregious comment consists of Chief Smith’s statement that he wanted to give the “younger” or “newer” officers in the Department a

chance to take the Sergeant's exam and be promoted from that list. Since most of the "new" recruits hired between 1995 and 1998 were under thirty years old and all were under forty, there is virtually no distinction between "younger" and "newer" officers. While it is true that the Chief could not determine which Patrol Officers would actually take the Sergeant's exam and who would score the highest, Chief Smith could, nonetheless, ensure that numerous candidates substantially younger and less experienced than Complainants would be able to compete for the Sergeant vacancies. The Chief's admission that he sought to achieve this result gives voice to a discriminatory animus based on age.

Chief Smith also referred to himself and Sergeant Fowlie as "dinosaurs" during a conversation in which he inquired about Sergeant Fowlie's plans for retirement. The parties may quibble about the precise connotation of the term, but nobody would suggest that it embodies qualities of vigor and relevance. Any reasonable person would consider the term to be a derogatory reference to being "over the hill." To be sure, the Chief also referred to himself as a "dinosaur" and did not mention Complainants in the conversation, but use of the term at all is further evidence that the Chief harbored age-based concerns.

Apart from direct evidence of discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case, Complainants must show

that: 1) they are members of a protected class; 2) they were adequately performing the duties of the job at issue; 3) they were subject to adverse treatment; and 4) they were treated differently from other employees who are substantially younger. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts); Knight v. Avon Products, Inc., 438 Mass. 413 (2003) (where plaintiff has been terminated and replaced by another person, the replacement must be at least 5 years younger in order to establish a prima facie claim of age discrimination without other evidence of unlawful age discrimination).

Complainants are members of a protected class by virtue of their age in 1998 – 46 years old in the case of Officer Ford and 44 years old in the case of Officer Hurley. By all accounts they were adequately performing the duties of their job as Patrol Officers. Neither had a disciplinary record. Both occupied positions of responsibility within the Department. Chief Smith referred to Officer Ford as “one of the best” officers on the force. During the summer of 1998, Complainants were the first and second candidates on a 1995 civil service eligible list for promotion to Sergeant. Instead of making promotions from that eligible list when two vacancies arose in the summer of 1998, the Chief exercised his option to call for a new exam and to delay filling the Sargeant vacancies until he received the exam results. The question is whether Complainants were treated differently from other employees in the Department when the Chief took these actions.

I conclude that Complainants were treated differently from other Patrol Officers who sought promotion to Sergeant. Prior to Complainants rising to the first and second positions on the 1995 eligible list, Respondent promoted Patrol Officer Mark DeCroteau

to Sergeant from the 1995 eligibility list. DeCroteau's promotion took place in March 1998 when he was 35 years old. There is a 7 year age gap between DeCroteau and Complainant Hurley; there is a 9 year age gap between DeCroteau and Complainant Ford. See Knight v. Avon Products, Inc., 38 Mass. 413 (2003) (prima facie case requires 5 year age gap between Complainant and younger replacement). Just four months later, Chief Smith declined to use the same list to promote Complainants. The fact that DeCroteau's promotion was "in process" when Smith was named Acting Chief, does not alter the different outcomes. Respondent was the same entity in both instances.

Several months after Complainants were denied promotion, a new civil service promotional exam for Sergeant was administered in October 1998. Along with some senior Patrol Officers, thirteen new recruits took the 1998 exam. All of the new officers were hired in 1995 or later; all were under forty years old and most were under thirty. There is no evidence that the Chief refrained from making promotions to fill vacancies in the position of Sergeant which occurred during the life of the 1998 exam list. Subsequently, in 2002, Chief Smith promoted three Patrol Officers to Sergeant who were between the ages of 27 and 32. The Chief made these promotions from an eligible list of candidates who took an October 2000 Sergeant's exam. Unlike the situation involving Complainants, these promotions were not delayed in order to consider the results of a 2002 Sergeant's exam which was administered immediately after two of the promotions and immediately prior to the third one. These facts establish a prima facie case of disparate treatment based on age under the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext. See Blare, 419 Mass. at 444-445. Complainants may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

Respondent has failed to articulate legitimate, nondiscriminatory reasons, supported by credible evidence, to rebut the examples of disparate treatment. See Blare, 419 Mass. at 441-442. First, Respondent asserts that the Chief did not refrain from promoting Complainants based on an expectation of selecting younger Sergeants from the 1998 exam because the Department had no control over who would score highest on the 1998 exam. There is some truth to this assertion, as illustrated by the fact that two of

the top four candidates who were promoted to Sergeant as a result of their performance on the 1998 exam were in their forties. Nonetheless, it is also true that given the Department's history of not bypassing candidates on promotional certifications, the Chief's only real discretion in making selections was in deciding whether to make promotions off an existing civil service list or to delay promotions until the establishment of a new list. Younger candidates had a significantly better chance of appearing at the top of the eligibility list from the 1998 exam than they did on lists generated from the 1995 exam because the 1998 exam was open to the Department's 13 new recruits, all in their 20's and 30's. Indeed, all of the top 9 individuals who took and passed the 1998 Sergeant's exam, with the exception of Patrol Officers Lyle and Campbell, were in their 20's or early 30's. Joint Exhibit 20. These officers had significantly less on-the-job experience than Complainants.

Respondent also claims that the decision to delay filling the Sergeant positions was purportedly made in the interests of fairness to all members of the Department. Yet, no one in the Department ever asked to Chief to refrain from making promotions off the 1995 eligibility list. The fact that a majority of Patrol Officers expressed approval of a Sergeant's exam being given in 1997 when polled by Patrol Officer Lyle is a separate matter from the Chief's decision to refrain from making promotions off an existing promotional list. In fact, the Patrol Officer's union filed a grievance alleging that the failure to make promotions off the existing promotional list constituted a continuing violation of the parties' contract. Although the grievance was denied, the union's action indicates that it did not consider the Department's action to be fair to its members. The

delay in filling the Sergeant positions additionally caused the Department's supervisory ranks to become depleted. During the fourteen months that the Chief left the positions unfilled, the number of Sergeants on the force decreased from a maximum of nine to six.

As another rationale for refusing to fill the Sergeant vacancies by promoting Complainants in 1998, Chief Smith testified about a lack of shared goals and objectives on the part of the Department's Lieutenants. Even if this were the case, Complainants were Patrol Officers at the time they sought promotion. There is no evidence to support the assumption that the problems Chief Smith allegedly experienced with his Lieutenants had any applicability to Complainants. Based on the evidence in the record, Complainants shared age, not rank or behavior, with the Lieutenants about whom the Chief complained. In this respect, the case is distinguishable from Hazen Paper Co. V. Biggins, 507 U.S. 604 (1993) (finding that age was not a factor in an employment decision even though the motivating factor was correlated with age).

Respondent next argues that the Chief could not have acted with discriminatory animus because he hired two Patrol Officers over 40 years old, promoted a Lieutenant at 49 years old, and promoted two Sergeants at 42 and 46 years old. These selections are noteworthy, but none are similar to Complainants' situation. The two candidates seeking employment as Patrol Officers had statutory preferences which ensured their placement at the top of any civil service list on which they appeared. The two candidates who sought promotion to Sergeant were also at the top of the new eligible list in 1999. Finally, Respondent supports its actions in 1998-1999 by contrasting that time frame to

the fall of 2002, when a regular exam cycle had been instituted and the City faced looming financial difficulties. However, the implementation of regular exams following the failure to promote Complainants benefited the Department's thirteen newest and youngest Patrol Officers who gained additional opportunities to take promotional exams. As far as looming financial difficulties are concerned, such a prediction is a mere assertion, supported by hindsight, but lacking evidentiary support.

In sum, Respondent has failed to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The City offers a host of explanations for the Chief's decision to refrain from promoting Complainants, but none are convincing apart from avoiding the selection of two officers who are significantly older than a majority of officers eligible to take the subsequent exam. These circumstances indicate that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Together with the direct evidence of discrimination cited above, the Department's promotional history demonstrates that the failure to promote Complainants to Sergeant was due to impermissible age-based considerations.

A. Damages

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. c. 151B and to render the injured

Complainant whole. Remedies include damages for lost wages and benefits and for emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town v MCAD, 400 Mass. 156, 169 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Insofar as lost wages are concerned, Complainants lost a seventeen percent salary differential between a Patrol Officer's salary and a Sergeant's salary (including a calculation of overtime). Transcript Volume II at 88. In the years between 1998 and 2002, Officer Ford's annual pay averaged \$62,714.12. Officer Hurley's annual pay averaged \$52,931.93. Complainants' Exhibit 1. Based on these calculations, Officer Ford lost \$42,645.60 in back pay as a result of not being promoted off the eligibility list from the 1995 Sergeant's exam. Officer Hurley lost \$35,993.72 in back pay as a result of not being promoted off the eligibility list from the 1995 sergeant's exam. I decline to extend the lost pay differential beyond the fall of 2002 because Complainants had adequate notice of the 2000 exam and could have taken it had they chosen to do so. During the fall of 2002, the results of the 2000 Sergeant's exam were certified to the City of Melrose and two Patrol Officers were promoted off the eligibility list. These promotions are an appropriate point at which to terminate a back pay award

Turning to the issue of emotional distress damages, Complainants' entitlement to an award of damages does not need to be based on expert testimony; it can be based solely on the Complainants testimony as to the cause of their distress. See Stonehill

College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation, while not necessary to sustain an award for emotional distress, is beneficial. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Officer Ford testified that when he first met with Chief Smith about not being promoted, he was “afraid to say anything” because he was “so choked up.” Transcript Volume II at 82. Officer Ford described himself as “devastated” by the decision. Id. Chief Smith corroborated that Officer Ford went through a “lull.” Transcript Volume III at 99. Officer Ford’s wife, Marie Ford, testified that she had never seen him so upset before. Transcript Volume I at 164.

Officer Hurley testified that when he learned he would not be promoted, he felt like he was “run over by a steam roller.” Transcript Volume II at 152. He testified that the refusal to promote him affected his work performance. He gave up seeking a promotion. Chief Smith corroborated that after Officer Hurley was notified that he was not going to be promoted, “there was a period of time that, you know, he basically wasn’t doing very well.” Transcript Volume III at 96. His wife, Katherine Hurley, from whom he is now separated but was still living with him at the time of the incident, testified that

Officer Hurley became withdrawn and distraught in a way he had never been before.
Transcript Volume I at 159-161.

Based on the testimony of Complainants, their spouses, and Chief Smith, I award \$50,000.00 in emotional distress damages to Officer Ford and \$50,000.00 to Officer Hurley.

III. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.ch. 151B, sec. 5, Respondent is ordered to immediately cease and desist from further acts of discrimination. Respondent shall pay Complainants, within sixty (60) days of receipt of this decision:

- (1) a sum in lost wages consisting of \$42,645.60 to Officer Ford and \$35,993.72 to Officer Hurley.
- (2) The sum of \$50,000.00 in damages for emotional distress to Officer Ford and the sum of \$50,000.00 in damages for emotional distress to Officer Hurley.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 14th day of January, 2005.

BETTY E. WAXMAN
Hearing Officer