COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2018-713-F

THELMA DASILVA

vs.

CITY OF BOSTON, RICHARD WEIR, TOMMY CHANG and MAKEEBA MCCREARY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

On March 2, 2018, the plaintiff, Thelma DaSilva ("DaSilva"), a former employee at the City of Boston Public Schools ("BPS"), brought this action against BPS and its Director of Communications Richard Weir ("Weir"), Superintendent Tommy Chang ("Chang"), and his Chief of Staff, Makeeba McCreary ("McCreary"). She alleges that, among other conduct, she was terminated from the BPS Communications Department based on her gender and pregnancy status and in retaliation for complaining about the discrimination. The court has reviewed hundreds of factual assertions and conducted a two-hour hearing. The matter is before the court on all defendants' Motions for Summary Judgment. The court has reviewed hundreds of factual assertions and conducted a two-hour hearing. For the reasons that follow the motions are **ALLOWED** as to Count V but otherwise **DENIED**.

BACKGROUND

The court considers the summary judgment record in the light most favorable to DaSilva.

For approximately four years after DaSilva started her position with the Communications Department of the Boston Public Schools ("BPS"), her supervisors gave her positive performance evaluations. In April 2015, the City hired Weir as Director of Communications. At

the time of Weir's hire, DaSilva was pregnant and had shared the news with her office. DaSilva submitted a request for maternity leave to Weir.

Weir questioned DaSilva about her qualifications and insisted that DaSilva submit regular updates to him regarding her work. After she asked why she was the only Communications Department member subject to this requirement, in May 2015, Weir made the request to the whole team. Weir formally evaluated DaSilva's performance in June 2015 and rated her as insufficient in four categories. The evaluation rating prevented DaSilva from getting a raise in July.

On June 25, 2015, DaSilva filed a complaint with Office of Equity ("OOE"), the office in BPS responsible for investigating complaints of discrimination and retaliation. The complaint described Weir's behavior as hostile and biased towards her.

In late June 2015, Weir formed a committee to interview for the vacant Press Secretary position. Although the candidates would be interviewed prior to DaSilva's maternity leave, and she would be working closely with the new Press Secretary, Weir excluded her from the committee. He told her that her exclusion was due to her upcoming maternity leave and her filing of a complaint with OOE against him.

On July 1, 2015, Chang became Superintendent of BPS. Chang spoke frequently with Weir. Chang's new Chief of Staff, McCreary, also began her employment on or about July 1, 2015. McCreary had responsibility for the Communications Department and was Weir's direct supervisor. McCreary informed Weir about DaSilva's discrimination complaint against Weir.

In July 2015, another member of the Communications Department filed a complaint of discrimination against Weir with OOE. This complainant noted demeaning instances of anger directed towards women of color by Weir. That summer, Weir signed off on another employee's non-maternity medical leave but delayed signing off on DaSilva's maternity leave. On August 6,

shortly before DaSilva's leave began, Weir issued a corrected evaluation and rated DaSilva as "Meets Expectations" in all areas.

DaSilva returned from leave on December 28, 2015. Upon her return, her complaint to OOE was finally investigated. Rebecca Shuster, Assistant Superintendent of Equity, and Juna Pierre, Director of Compliance, investigated the allegations. Shuster kept Chang apprised of the progress of the investigation during regular meetings with him.

OOE found that there was "sufficient evidence to substantiate the allegations" against Weir for violating BPS's Nondiscrimination Policy on the basis of gender and of retaliation. The report concluded Weir inappropriately excluded Ms. DaSilva from participating in the Press Secretary interviews based on her planned maternity leave and her report to the OOE.

On March 30, 2016, Pierre shared the findings with DaSilva via letter. Though McCreary and Weir had discussed a promotion and salary increase for DaSilva with her in January, on April 1, 2016, McCreary emailed DaSilva to inform those possibilities were off the table. DaSilva believed the decision was made in retaliation for her complaint. Over the next few weeks, various administrative tasks were added to DaSilva's job duties.

In early June, McCreary told Shuster that she planned to terminate DaSilva and wanted to make sure the decision did not appear to be the result of bias. On June 13, 2016, McCreary told DaSilva that she was being terminated due to a reorganization of the department. DaSilva was the only person whose job in the department was eliminated. DaSilva was supposed to continue reporting to work until July 31, 2016 as she searched for another job within BPS.

On June 14, 2016, DaSilva reported to OOE that she believed that the elimination of her position was retaliation for her complaint of discrimination. On June 17, 2016, McCreary told DaSilva that she must leave the office immediately and stop reporting to work. BPS alleged DaSilva had shared confidential information with the news media. DaSilva continued to apply

for positions within BPS and was verbally offered a position but one day later it was retracted after input from Dr. Chang's office.

DISCUSSION

Summary judgment shall be granted when all material facts have been established and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Miller* v. *Mooney*, 431 Mass. 57, 60 (2000). The moving party has the burden of affirmatively demonstrating the absence of a genuine issue of material fact on every relevant issue. *Sullivan* v. *Liberty Mut. Ins. Co.*, 444 Mass. 34, 39 (2005). Defendants may satisfy this burden by demonstrating that the plaintiff "has no reasonable expectation of proving an essential element of the case at trial." *Id.* (citation omitted). Applying this standard, and for the reasons explained below, the Court concludes that numerous genuine issues of material fact prevent summary judgment on Counts I-IV, but that the defendants are entitled to summary judgment on Count V. See *Sullivan*, 444 Mass. at 38 ("[S]ummary judgment is disfavored in discrimination cases based on disparate treatment because the question of the employer's state of mind (discriminatory motive) is 'elusive and rarely is established by other than circumstantial evidence.'").

A. Count I: Discrimination (G. L. c. 151B, §§ 4(1)) against BPS

Because DaSilva lacks any direct evidence to support her discrimination claim, at the summary judgment stage, the court follows the three-stage burden-shifting analysis articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) to determine whether the claim is subject to summary disposition. See also *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 680-681 (2016). In the first stage, DaSilva has the burden to show a prima facie case of discrimination. *Blare*, 419 Mass. at 441. This means that DaSilva must point to evidence that she: (1) is a member of a class protected by G. L. c. 151B; (2) performed her job at an acceptable level; and (3) was terminated or subject to an adverse employment action. *Bulwer*, 473 Mass. at

681. DaSilva's burden at this stage is not onerous. *Sullivan*, 444 Mass. at 40. She must merely produce evidence that BPS's termination decision, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors." *Id.* (citations omitted).

If DaSilva establishes a prima facie case, the burden of production shifts in the second stage to BPS to "articulat[e] a legitimate, nondiscriminatory reason for its decision." *Blare* v. *Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 441-442 (1995) (employer must produce credible evidence to show that reason advanced for decision was real reason). If BPS satisfies its burden, the burden of production shifts back in the third stage to DaSilva to produce evidence that BPS's "articulated justification is not true but a pretext." *Id.* at 443. Because Massachusetts is a pretext only jurisdiction, DaSilva may survive summary judgment by producing evidence that BPS's facially proper reasons given for its action against her were not the real reasons for that action, "even if that evidence does not show directly that the true reasons were, in fact, discriminatory." *Verdrager* v. *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC*, 474 Mass. 382, 397 (2016); accord *Bulwer*, 473 Mass. at 681-682.

The court concludes that DaSilva has shown a prima facie case of discrimination. There is no dispute that she is a member of a protected class (female and pregnant) and that she was terminated. Additionally, DaSilva has produced evidence that she received positive performance evaluations for four years until Weir was hired. A jury could infer from this evidence that DaSilva was performing her job at an acceptable level.

With respect to the next stage, DaSilva does not dispute that BPS has advanced a non-discriminatory reason for her dismissal: poor performance and leaking information to the news media. The court thus turns to whether DaSilva has produced evidence that BPS's articulated reason for her termination was pretext. The court concludes that DaSilva has satisfied her burden at the third stage.

Up until 2015, DaSilva had been performing, at a minimum, satisfactorily. Even though BPS did not terminate DaSilva immediately after her poor performance reviews, a jury could still infer that BPS was looking for a way to terminate or force out DaSilva. As stated earlier, at this stage, DaSilva only has to show that BPS's facially proper reason given for its action against her was not the real reason for that action, even if that evidence does not show directly that the true reason was, in fact, discriminatory. *Verdrager*, 474 Mass. at 397. Thus, the court denies the motions for summary judgment as to Count I.

B. Count II: Retaliation (G. L. c. 151B, § 4(4)) against all defendants

Section 4(4) of G. L. c. 151B forbids any person or employer from discharging, expelling or otherwise discriminating "against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint ..." against alleged discriminatory conduct. G. L. c. 151B, § 4(4). To survive summary judgment on a claim of retaliation, an employee must produce evidence from which a jury could infer four elements. First, there must be evidence that the employee "reasonably and in good faith believed that the employer was engaged in wrongful discrimination." *Pardo* v. *General Hosp. Corp.*, 446 Mass. 1, 21 (2006). Second, there must be evidence that the employee "acted reasonably in response to that belief," through reasonable acts meant "to protest or oppose ... discrimination," i.e., the protected activity. *Verdrager*, 474 Mass. at 405 (quotations and citations omitted). Third, there must be evidence that the employer took adverse action against the employee. *Id.* at 405-406. Finally, there must be evidence that the adverse action was a response to the employee's protected activity, i.e., forbidden motive. *Id.* at 406.

DaSilva complained in her responses to Weir's evaluations that BPS was discriminating against her. Her complaints are protected activity. See *Green* v. *Harvard Vanguard Med. Assocs., Inc.*, 79 Mass. App. Ct. 1, 14 (2011), citing *Clifton* v. *Massachusetts Bay Transp. Authy.*,

445 Mass. 611, 613-617 (2005). Shortly thereafter, BPS terminated her. A jury could infer, based on the above-referenced history between her and BPS and its agents, that BPS (among other adverse actions) terminated her because of her complaints of discrimination. See *Mole* v. *University of Mass.*, 442 Mass. 582, 595 (2004) (where adverse employment action follows close on heels of protected activity, causal relationship may be inferred); but see *MacCormack* v. *Boston Edison Co.*, 423 Mass. 652, 662 n.11 (1996) ("The mere fact that one event followed another is not sufficient to make out a causal link."). Thus, the court denies BPS's motion for summary judgment as to Count II.

With respect to the liability of the individual defendants for retaliation, the court leaves to a factfinder to determine whether each can be held liable for retaliation. There is evidence that each one of them played a part in the events leading up to DaSilva's termination. While the evidence against Chang in particular is thin and circumstantial, it is enough to proceed beyond the summary judgment stage. It can be inferred that Chang knew about DaSilva's protected complaints of discrimination because DaSilva alleged discrimination in response to the evaluations which lead to her termination and his office prevent her from obtaining another position.

C. Counts III & IV: interference (G. L. c. 151B, § 4(4A) against all defendants and aiding and abetting (G. L. c. 151B, § 4(5)) against McCreary and Chang

DaSilva brings separate claims for liability under two provisions: G. L. c. 151B, §4 (4A) and G. L. c. 151B, §4 (5). See *Verdrager*, 474 Mass. at 396 (individuals, whether supervisors, fellow employees, or third parties, may be held liable by provisions in G. L. c. 151B, §§ 4(4A) and (5)). General Laws c. 151B, §4 (4A) makes it unlawful for

> any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

As the term is used in G. L. c. 151B, § 4(4A), "interfere" "is appropriately considered with, and interpreted in light of, the words 'coerce,' 'intimidate,' and 'threaten' that precede it, and that each implies some form of intentional conduct." *Lopez* v. *Commonwealth*, 463 Mass. 696, 708 (2012).

General Laws c. 151B, § 4(5) makes it unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so." To prevail on an aiding and abetting claim under § 4 (5), a plaintiff must show "(1) that the defendant committed a wholly individual and distinct wrong ... separate and distinct from the claim in main; (2) that the aider or abetter shared an intent to discriminate not unlike that of the alleged principal offender; and (3) that the aider or abetter knew of his or her supporting role in an enterprise designed to deprive [the plaintiff] of a right guaranteed him or her under G. L. c. 151B." *Lopez*, 463 Mass. at 713.

For essentially the same reasons as discussed in the retaliation section above, the claims as brought under G. L. c. 151B, § 4(4A), remains as to all defendants. See *Pontremoli* v. *Spaulding Rehab. Hosp.*, 51 Mass. App. Ct. 622, 625 (2001) (claim based on violation of G. L. c. 151B, §4(4A) is commonly called "retaliation claim," although statute does not use that term); *Thomas O'Connor Constructors, Inc.* v. *MCAD*, 72 Mass. App. Ct. 549, 557 n. 11 (2008) (Sections 4(4) and 4(4A) essentially proscribe retaliation against those who exercise their rights under G.L. c. 151B and against those who assist or advocate for them). Similarly, there is sufficient (if limited) evidence for a jury to find that McCreary and Chang intentionally aided in the termination and denial of a promotion and other employment stemming from Weir's discriminatory actions against DaSilva based on her protected status and activity.

D. Count V (common law tortious interference) against Chang and McCreary

Lastly, the remaining common law tortious interference counts are precluded by the exclusivity provision in Section 151B. See *Verdrager*, 474 Mass. at 415, citing *Green* v. *Wyman–Gordon Co.*, 422 Mass. 551, 558 (1996). Accordingly, Count V must be dismissed as to all parties.

CONCLUSION

This court (Brieger, J.) had previously concluded there was sufficient evidence to find that this suit is not time-barred.[1] Upon further review, the court determines there is no basis to disturb this finding.

Moreover, summary judgment remains "a disfavored remedy in the context of discrimination cases ... because the ultimate issue of discriminatory intent is a factual question." *Bulwer*, 473 Mass. at 689. "Where, as here, the required inferences are reasonable, it is not for a court to decide on the basis of briefs and transcripts whether they are correct, but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses." *Verdrager*, 474 Mass. at 404. Consequently, given that there are numerous questions of material fact in dispute, summary judgment is not justified in this case.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that summary judgment is denied as to Counts I, II, III and IV and Count V is dismissed as to all parties.

[1] "Based upon a review of the complaint, the court agrees with DaSilva that her complaint alleges sufficient discriminatory conduct by BPS or its employees after August 26, 2015 – in particular Weir's alleged discrimination after DaSilva returned from maternity leave – so as to trigger the continuing violation doctrine, thereby extending the time within which she may file a statutory discrimination claim." (Paper #15, Page 6.)

Anthony M. Campo
Justice of the Superior Court

Dated: April 2, 2021