

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JOHN LOEWY,

Complainants

Docket Nos. 11 BEM 03430

v.

ARIAD PHARMACEUTICALS, INC.,

Respondent

Appearances: J. Mark Dickison Esq. for Complainant
Gregory Manousos and Jonathan Persky Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 6, 2011, John Loewy filed a charge of race discrimination and retaliation against ARIAD Pharmaceuticals, Inc. alleging that he was unlawfully terminated for refusing to lower the performance rating of a black employee whom he supervised. A probable cause finding was issued on August 6, 2013. The case was certified to public hearing on October 15, 2014.

A public hearing was held on November 16, 17, 19, and 20, 2015. The parties submitted one hundred eight (108) joint exhibits. The following individuals testified: John Loewy, Joi Ann Lowey, Charles Jones, Timothy Clackson, Jo Norton, Harvey Berger, Stephanie Lustgarten, Katherine Arbour, Pierre Dodion,¹ and Frank Haluska.²

¹ Dodion testified by skype from Marseilles, France.

² Most of the individuals associated with Respondent have doctoral and/or medical degrees but for purposes of simplicity, their titles are omitted.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.³

II. FINDINGS OF FACT

1. Complainant John Loewy performs biostatistical analysis of clinical trials in the pharmaceutical industry. Transcript I at 42. After receiving his Ph.D and prior to working at ARIAD Pharmaceuticals, he worked for a cancer center affiliated with Procter and Gamble in New York, the Genetics Institute in Cambridge MA, and Alkermes.
2. Respondent ARIAD Pharmaceuticals is a Cambridge, MA company founded twenty-five years ago. It focuses on the development of drugs to treat various forms of cancer.
3. In 2005, ARIAD's then-Chief Medical Officer Camille Bedrosian hired Complainant as the company's Vice President of Biostatistics and Outcomes Research. Transcript III at 534. Complainant's responsibilities included the design and management of the phase three clinical trials for the development of Ridaforolimus, a cancer drug to treat sarcoma. Transcript I at 51, III at 543. Complainant supervised individuals performing data management, statistical programming, and biostatistical analysis. Complainant reported directly to Bedrosian until 2007.
4. During Complainant's employment by ARIAD Pharmaceuticals, Harvey Berger was the company's Chairman/CEO and Timothy Clackson was its Chief Scientific Officer. Transcript II at 360.

³ In arriving at the findings of fact set forth herein, I have disregarded exhibits which the parties designated as joint exhibits 14, 16, 17, 32, 33, 42, 43, 49, 50, 51, 52, 53 and 54 on the basis that they are hearsay statements from individuals whose absence from the public hearing was neither explained nor excused.

5. Complainant hired Charles Jones, who is African American, as head of Statistical Programming at the end of 2005. Transcript I at 53. Transcript I at 54, II at 295. Complainant rated Jones's performance every year between 2005 and 2011. He described Jones's performance from 2005 to 2007 as "stellar." Transcript I at 55, 61. Jones was promoted to Director of Statistical Programming in 2008. Transcript II at 306. Complainant formed a "very close relationship" with Jones. Transcript II at 260.
6. In June of 2007, ARIAD hired Pierre Dodion. Transcript I at 56. Dodion initially served as Senior Vice President of Clinical Research Oncology. He became Chief Medical Officer in 2008 at which time he began to function as Complainant's direct supervisor. Joint Exhibit 8; Transcript IV at 627-628.
7. In October of 2007, ARIAD hired Frank Haluska as Senior Medical Director. Transcript IV at 733-734. He was later promoted to Chief Medical Officer some time after Dodion vacated the position. Transcript I at 83, 215; IV at 692, 694-695, 734.
8. In 2007, Complainant hired Katherine Arbour as Director of Clinical Data Management. Transcript I at 57; IV at 670-672. Arbour described her function as designing case report forms to collect data from clinical trials and delivering the data to the statistical programming group. Transcript IV at 672-673. Prior to Arbour being hired, the company's data management function was performed outside the company by contract research organizations ("CROs") also referred to as "vendors." Transcript IV at 673. Complainant hired Arbour because he was looking for someone to interface with the CROs that were supplying data to ARIAD and she had experience working at a CRO. Transcript I at 59-60; IV at 673.

9. In 2008, Complainant hired Stephanie Lustgarten as Senior Manager of Biostatistics. Transcript III at 601. Lustgarten testified that her experience being supervised by Complainant from 2008 to 2011 was “generally positive,” that they worked “very well together” and that their styles “complimented each other.” Transcript III at 607.
10. Arbour testified that in February of 2008, Complainant told her that he didn’t like her personality and didn’t like her approach to work although he thought she was a “good performer.” Transcript IV at 676-677. According to Arbour, Complainant sought to be copied on all of her e-mails, to participate in all of her decision-making, and to manage all interactions with CROs. Transcript IV at 677.
11. Complainant testified that by the end of 2008, he was experiencing “issues” with Arbour relating to her failure to address some of his priorities. Transcript I at 72. He testified that he was often “frustrated” in his dealings with her. Transcript II at 260.
12. Complainant testified that at one weekly staff meeting when he discussed his desire to hire a statistical programmer and asked participants to vote, women voted one way and men voted a different way which led him to say, jokingly, that they voted based on testosterone. Transcript I at 76. According to Arbour, Complainant said “the reason [female employees] would not take his side is that men have testosterone and the women don’t.” Transcript IV at 686. Arbour felt that the comment was directed at her. Id.
13. Arbour described herself as “psychologically battered” by Complainant and Jones. Transcript IV at 688. She testified that Complainant, at times, exhibited frustration in dealing with data management vendors which he expressed by bulging his eyes, becoming “foamy” at the mouth, gesturing with his hands, and pacing around the

floor. Transcript at IV at 681-682. Arbour testified that Jones was “mostly calm,” but on occasion, became upset, raised his voice, threw his pen across the room and, on one occasion, threw a chair. Transcript IV at 682-685.

14. Arbour testified that Complainant once told her that just because she was a powerful woman, she didn’t intimidate him. Transcript II at 259; IV at 690. Complainant acknowledged at the public hearing that he could have made the comment.
15. In December of 2008, Dodion met with Complainant and expressed dissatisfaction with Complainant’s performance and concern about Complainant’s dealing with the CRO Averion. Transcript I at 221; Joint Exhibit 8. Averion was hired to provide data management services for SUCCEED, a randomized placebo-controlled study of sarcoma patients. The study was to be the last clinical trial for the drug Ridaforolimus. Transcript I at 222, III at 549. According to Dodion’s summary of the meeting, he addressed Complainant’s lack of vision, his difficulties managing people, and his anxiety. Joint Exhibit 8. Complainant expressed concern that he was about to be fired. Id.
16. On January 22, 2009, Dodion documented his dissatisfaction about recent events involving Complainant’s management of Averion. Joint Exhibit 13.
17. On February 24, 2009, Complainant was put on a performance improvement plan. Transcript I at 77-78, 213-214; Joint Exhibit 20. The plan characterized Complainant’s performance as unsatisfactory, stated that failure to improve could result in immediate termination, and asserted that “immediate and sustained change” was expected. Joint Exhibit 20. The plan focused on Complainant’s issues involving strategic leadership, technical assessment of database quality, maintenance of realistic

goals, and adherence to corporate values. Transcript I at 213. The plan noted that strategic decisions should be documented, promptly communicated, and not be re-challenged at a later point. Joint Exhibit 20, p.2. The plan criticized Complainant for causing budget over-runs by failing to properly manage vendors. Id. The plan characterized Complainant's yelling and unprofessional conduct as "intimidation." Joint Exhibit 20, p. 3. The plan deemed Complainant's public criticism of the company and his failure to adhere to the company's recruiting process as unsupportive of management. Id. The plan criticized Complainant for failing to treat supervisees fairly and impartially and by failing to take action in response to a supervisee (Jones) throwing pencils, slamming chairs against walls, and yelling at peers. Id.

18. In February of 2009, at or around the same time that Complainant was placed on the performance improvement plan, his responsibility for managing Averion was transferred to Arbour, his responsibility for managing Arbour was permanently removed, and his responsibility for supervising Jones was temporarily transferred to Pierre Dodion until the latter part of 2009 when his performance improvement plan was lifted. Transcript I at 214-215, 225, II at 313.
19. Jones testified that he never threw a chair or a pencil at a department meeting, never engaged in bullying behavior, and never behaved in an unprofessional manner. Transcript II at 311-312. Lustgarten testified that she did not observe Jones engage in such behaviors during the numerous meetings she attended with him and Arbour. Transcript III at 611.
20. According to Jones, he was never counseled about his behavior prior to November of 2010. Transcript II at 315-319. According to Jones, he worked with Arbour up

through 2010 “all the time” and was “very, very professional and very, very cautious with [her] all the time.” Transcript II at 325.

21. Complainant’s performance improvement plan was lifted in September of 2009 and around that time, Jones returned to Complainant’s supervision. Transcript IV at 692. Arbour continued to report to others – Pierre Dodion, Ross Pettit, and Frank Haluska.
22. Complainant received a bonus for 2009 consisting of \$59,000 and 27,000 restricted stock units. Transcript I at 85.
23. In late 2009/early 2010, Merck Pharmaceutical Company sought to buy the rights to Ridaforolimus from ARIAD. ARIAD entered into an agreement with MERCK to transfer the rights to the drug in May of 2010. Transcript I at 86-87; II at 364. The transfer of files was to be completed by November of 2010. Transcript I at 88.
24. As a result of the transfer of the rights to Ridaforolimus, ARIAD instituted two rounds of layoffs in May/June and in September of 2010. Transcript I at 89, 102; II at 256-257.
25. Complainant contacted recruiters to look for other jobs. He was recruited to work at Alexion Pharmaceuticals by Camile Bedrosian who had gone to work there as Senior Vice President and Chief Medical Officer. Transcript I at 90. The compensation proposal that Complainant was offered by Alexion was greater than his compensation package at ARIAD but working for Alexion would have required that he spend some days working in Connecticut. Transcript II at 246. Complainant did not accept the offer.
26. In May of 2010, Complainant was offered an eighteen-month contract renewal by Respondent. Transcript I at 89-91; Joint Exhibit 38. At the time, Complainant still

had six or seven months to run on his previous contract so the renewal netted him an additional year of contractual employment. Transcript III at 546. Complainant sought reassurance about his job security from CEO Berger. Transcript II at 245. According to Complainant, Berger said he had “come back amazingly” after a “fall” and that the company wanted him to continue being on the ARIAD team. Transcript I at 92. According to Berger, he decided to offer Complainant a new contract because work on Ridaforolimus hadn’t been completed and terminating Complainant would have compromised the company’s ability to meet its obligations to Merck. Transcript III at 544. Berger credibly denied that he told Complainant that there were no concerns with his performance and that he was on a “clean slate.” Transcript III at 545.

27. Complainant decided to stay at ARIAD. Transcript I at 93. He signed an agreement providing for employment from May of 2010 to December 31, 2011 at a salary of \$241,000, a car allowance, long-term disability, life, and health insurance, 401 (k) matching contributions, an annual bonus, stock options, and stock.
28. After Complainant’s contract renewal, there was a re-organization in June of 2010 in which Timothy Clackson became President of Research and Development while retaining the title of Chief Scientific Officer. Complainant began to report directly to Clackson rather than Pierre Dodion who became Senior Vice President of Corporate Development. Transcript I at 218, III at 584, IV at 628. Frank Haluska became Chief Medical Officer and also began to report directly to Clackson. Transcript I at 101, 215-216; II at 362-363, 366-367. Arbour’s data management team was assigned to Haluska whereas Jones’s statistical programming team and Lustgarden’s biostatistics team reported to Complainant. Transcript I at 104, 113, 116.

29. Clackson testified that from June of 2010 to late August of 2010, he observed that the three groups previously under the leadership of Complainant – statistical programming, biostatistics, and data management – were unable to communicate effectively and had to be brought together through a new committee -- the data integration group -- under the leadership of Haluska. Transcript II at 372-373, 376, 389-390. Clackson testified that the new committee was formed because of Complainant's inability to manage and nurture collaboration among individuals, in general, and Jones and Arbour in particular. Transcript II at 373-374, 378, 387, 388. Clackson declined to put Complainant on another performance improvement plan because it was "too soon" into Clackson's tenure to take this step and because it had already been tried. Transcript II at 380.
30. In late September 2010, as a result of the second round of personnel reductions at ARIAD, Complainant's department lost programmers, a statistician, and an administrative assistant. Transcript I at 105. Clackson testified that he didn't select Complainant for layoff at that time because Complainant was still needed in the transition of Ridaforolimus to Merck but that it was becoming increasingly clear that Complainant had issues with managerial and executive skills. Transcript II at 381-383. Clackson e-mailed CEO Berger on September 19, 2010 that "[s]ome peers ... (such as Pierre) observe that ... we have perhaps a one-time chance to reshape the group from the top," but that he felt such a step was too extreme at that time and opted instead to vigilantly oversee and assess Complainant's performance. Joint Exhibit 46.

31. By late fall/early winter of 2010, Complainant's department had completed its portion of "deliverables" for the transition of Ridaforolimus to Merck. Transcript II at 247; III at 550. Ongoing dialogue pertaining to the transfer lasted for a period of time thereafter. Transcript II at 248. Following the transfer of Ridaforolimus to Merck, Complainant worked on smaller phase-one clinical trials of a leukemia drug and on other matters. Transcript I at 113, II at 324; III at 551. According to CEO Berger, the company's statistical and programming needs declined at that time. Transcript III at 552.
32. On November 3, 2010, a telephone conference took place which resulted in Arbour filing a complaint against Jones for bullying behavior and harassment. Transcript II at 327. The telephone conference was with Medidata, a CRO performing contractual work for ARIAD and included ARIAD employees Jones, Arbour, and Lustgarten. According to Arbour, Jones wanted her to tell Medidata that ARIAD objected to the format of a standard model database that Medidata had provided ARIAD for free and he wanted her to insist that Medidata change the database without charge. Transcript IV at 697-698. Arbour testified that she refused to do so which led to Jones to comment that, "You don't belong at ARIAD." Transcript IV at 698. According to Lustgarten, Jones said, "You [Arbour] should not be in this position." Joint Exhibit 51; Transcript III at 612-613. According to Jones, he said that Arbour should not be dealing with Medidata because they were not all on the "same page" and "it's not going to work for the company." Transcript II at 328; Joint Exhibits 50, 56. I credit that Jones told Arbour either that she did not belong at Ariad or that she did not belong in her position.

33. Jones was questioned by human resource and legal representatives about the Medidata telephone conference. According to Jones, he was later told by HR Director Jo Norton that he had been exonerated. Transcript II at 332, 335-336. An undated memo about the November 3, 2010 incident written by Norton states that there was no conclusive evidence of a policy breach or harassment but that the incident indicated a “clear difference in style between Ms. Arbour and Mr. Jones when dealing with third party consultants.” Joint Exhibit 64. Norton testified that neither Arbor nor Jones was more culpable than the other but that there was an “ongoing management conflict.” Transcript III at 492. Norton also testified that Complainant had failed to manage the situation between Jones and Arbour. Transcript III at 493. Clackson testified that the incident exemplified the “unproductive drama” between the statistical management and data programming groups. Transcript II at 399.
34. In December of 2010, Complainant reviewed the performances of Jones and Lustgarten for 2010 and gave them scores of 4.5 out of 5. Transcript I at 127-129; Joint Exhibit 69. Complainant characterized Jones as “particularly effective” in his role as a member of the data integration team but acknowledged that Jones was still struggling with the teamwork aspect of his job. Transcript I at 133, II at 263; Joint Exhibit 70.
35. In an e-mail dated December 22, 2010, Clackson expressed concern that the scores for Lustgarten and Jones were “skewed on the high side” and that Complainant did not adequately address Jones’s interactions with data management. Transcript I at 136; Joint Exhibit 75. Clackson testified that Jones was a technically-competent programmer but had significant “interactional” issues such as an unwillingness to

work with members of the data management group. Transcript II at 403-404. An undated memo in Jones's personnel file from Clackson to CEO Berger references Jones's inability to work effectively with data management personnel, his personal animosity towards Arbour, his inefficient interactions with outside vendors, his ignoring of human resource procedures for hiring, and the changing research and development requirements of the organization. Joint Exhibit 95.

36. On January 21, 2011, Clackson informed Complainant that Lustgarten's 2010 evaluation was being lowered to 4.0 and that he wanted to discuss Jones's performance rating. Joint Exhibit 82; Transcript I at 144. Clackson and Complainant had a face-to-face discussion the same day at which Clackson criticized the manner in which Complainant evaluated Jones's management capabilities and asserted that Jones lacked management skill. Transcript I at 144-145, 151; II at 254-255. Complainant responded by e-mailing Clackson examples to justify giving Jones a rating of 4.5. Transcript I at 147-149; Joint Exhibit 87.
37. At a subsequent meeting, Clackson said that Jones's 2010 job performance rating should be 2.5. Complainant responded that it would look "bad" to lower Jones's rating without data-driven evidence because Jones is African-American. Transcript I at 151-152; II at 252, 410. According to Complainant, Clackson gave him an "icy cold" smile and calmly thanked him for his input. Transcript I at 153. According to Clackson, the remark was the "kind of slightly quirky comment that Complainant could sometimes make." Transcript II at 411. Clackson denied that it made him angry or that he responded with a cold stare. *Id.* He testified that he did not mention the

comment to anyone else in the organization. Transcript II at 428. I credit this assertion.

38. Complainant met with HR Director Norton after learning of Clackson's proposed score for Jones. Norton said that she agreed with Clackson's score. Transcript I at 156. Complainant testified that he informed Norton of his comment about why it would look bad to lower Jones's score without having proper documentation. Transcript I at 157-158.
39. Clackson sought opinions about Complainant's performance from several highly-ranked individuals at the company, including Pierre Dodion. In an e-mail of January 30, 2011, Dodion praised Complainant's performance from a technical perspective and stated that his leadership and management style had improved as compared to 2008/2009. Joint Exhibit 85. Clackson testified that he did not believe this evaluation was "completely accurate" because Dodion had minimal exposure to the "day-to-day issues" pertaining to Complainant and because Dodion tended to see the "positive side." Transcript II at 461-462.
40. The final analysis of the SUCCEED trials was completed in January of 2011. Transcript III at 555. According to CEO Berger, he waited until the completion of the trials before taking action in regard to Complainant. Transcript III at 594.
41. On February 10, 2011, Complainant e-mailed Clackson with a revised performance review in which he lowered Jones's rating to 4.0. Joint Exhibit 93. On the same date, Clackson e-mailed Complainant telling him that the 2010 performance ratings for the biostatistics group could be released but not the ratings for the statistical programming group.

42. On February 14, 2011, senior level management met to discuss the job status of Complainant and Jones. Transcript II at 423, III at 564. The decision was made to terminate their employment. CEO Berger testified that he thought it made sense to terminate both Complainant and Jones at the same time so that Clackson could rebuild the department with people who had a “vendor mentality” and who cooperated with other groups. Transcript III at 567. According to Berger and Norton, there was no discussion about Jones’s race. Transcript III at 498, 521, 567.
43. Berger testified that Complainant’s termination was not due to a lack of technical expertise but due to his difficulties managing subordinates and the fact that members of Complainant’s department did not function together effectively or work well with other departments in the company. Transcript III at 540-542, 556, 559, 593-594. Clackson testified that Complainant was terminated due to unresolved performance issues, the inability to have his team function in a fully-integrated manner without needing senior management to oversee the process, and the evolution of the company’s needs. Transcript II at 430, 448-449. I credit the testimony of Berger and Clackson about the reasons for terminating Complainant.
44. On February 17, 2011, Complainant was asked to attend a meeting by HR Director Norton. Transcript I at 166. When Complainant arrived, Clackson terminated his employment. Transcript I at 167, II at 423. Complainant asked if he were being terminated for cause and was told that he was not. Id. Complainant was presented with a separation agreement providing for six months of severance pay. Transcript I at 168-169. Complainant was escorted to his office to collect his belongings. On the same date that Complainant was fired, Jones was also terminated.

45. Because of the termination decisions, Respondent did not complete the 2010 evaluations of either Complainant or Jones. Transcript II at 416.
46. After the transfer of Ridaforolimus to Merck, Respondent did not re-fill the positions formerly occupied by Jones and Complainant for at least a year. Transcript II at 421-422, 432. Lustgarten became the senior person in the statistical group and Arbour continued to direct the data management function. Transcript II at 433-434.
47. At the time of his termination, Complainant earned \$8,923 biweekly in salary plus benefits. He looked for other employment by reaching out to individuals, sending out resumes, and using recruitment services. Transcript I at 180-181. After being unsuccessful in obtaining full-time employment, Complainant began to work as a statistical consultant, earning income on a contract basis but without benefits. Transcript I at 183.
48. In or around February of 2012 – a little over a year after Complainant was terminated - Respondent appointed Ron Knickerbocker to the position formerly held by Complainant. Transcript III at 569. According to CEO Berger, the statistical programming department began to run smoothly after Complainant's departure and has become a collaborative entity that supports the whole company. Both Arbour and Lustgarten have been promoted to Senior Director positions and continue to have successful careers with the company. Transcript III at 569-570, 600; IV at 672.

III CONCLUSIONS OF LAW

B. Retaliation

Complainant alleges that his termination constituted an adverse employment action in retaliation for his refusal to lower Jones's performance review score which, in turn,

would have made it easier for Respondent to terminate Jones without the outward appearance of racial discrimination. For the reasons set forth below, the allegation is not persuasive.

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of direct evidence of a retaliatory motive, the MCAD must follow the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655 (2000).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory 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 Respondents succeed in doing so, 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 for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondents are covering up a retaliatory rationale which is a motivating cause of the adverse employment action. Id.

Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable and good faith belief that unlawful discrimination has occurred. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003) *citing* Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000). The underlying charge of discrimination, as long as it is made in good faith, need not succeed in order to give rise to a viable retaliation complaint. See Guazzaloca, 25 MDLR at 204.

In this case, Complainant cites as protected activity: 1) telling Clackson that it could look "bad" to give Jones, an African American, a rating of 2.5 without data-driven evidence and 2) subsequently resisting Clackson's instruction to give Jones a lower job performance rating. Respondent maintains that Complainant's words and deeds are

insufficient to constitute protected activity since they were not based on any credible evidence of racial prejudice and were ignored by management.

I conclude that Complainant's words and deeds are entitled to consideration as protected activity. Complainant was, by all accounts, genuinely troubled by the negative evaluation of Jones's performance by Clackson. Given Jones's technical expertise, given Jones's involvement in the successful trials of Ridaforolimus, and given Jones's prior positive performance reviews, it was not unreasonable for Complainant to question Clackson's motive for assigning Jones a performance rating of 2.5 in 2010. That Complainant framed his opposition to suspected race discrimination in a non-confrontational manner (merely stating that a score of 2.5 could look "bad") does not detract from the validity of his protected activity. See Crawford v. Metropolitan Government of Nashville and Davidson City, 555 U.S. 271 (2009) (protected activity found where employee did not initiate a complaint of sexual harassment but only answered questions during an internal investigation); Auborg v. American Drug Stores, 21 MDLR 238 (1999) (protected activity found where employee raised issue of race discrimination during telephone conversations and through informal complaints). Such restraint is to be expected when a subordinate communicates with a superior in a company.

Turning to the other elements of a prima facie case, there is no dispute that Respondent was aware that Complainant opposed the company's treatment of Jones and that Complainant was subjected to an adverse employment action when he was subsequently fired. Thus, the sole remaining matter open to question is whether a causal connection existed between the protected activity and the adverse employment action. A

preponderance of the credible evidence in this matter establishes that there was no such causal connection.

Rather than protected activity leading to termination, the evidence indicates that the primary motive for Complainant's termination was Respondent's dissatisfaction over non-technical aspects of Complainant's performance. It was Respondent's concern about deficiencies in Complainant's managerial and supervisory skills which led to the severing of the parties' employment relationship. As early as December of 2008, Pierre Dodion met with Complainant to address Respondent's concerns related to Complainant's lack of vision, difficulties managing people, and the anxiety he displayed at work. In February of 2009, Complainant was put on a job improvement plan in conjunction with his performance being deemed unsatisfactory. The plan criticized Complainant for causing budget over-runs, yelling, failing to treat supervisees fairly and impartially, and failing to address the misconduct of those under his direction. At the same time, Complainant lost supervisory responsibility over Jones and Arbour.

Complainant discounts the above setbacks by pointing out that he was subsequently removed from his performance improvement plan, given a bonus, and offered an eighteen-month contract extension. He cites these matters as evidence that prior performance issues were resolved by mid-2010. There is, to be sure, some evidence of improved performance, but Complainant presents an exaggerated picture of his rehabilitation at the company. The view that Complainant's performance problems were resolved by May of 2010 is credibly contradicted by CEO Berger who denied telling Complainant that he had a "clean slate" following removal from the performance plan and the signing of a new contract. It is also contradicted by evidence that Arbour

continued to report to others in the company and that a new committee -- the data integration group -- had to be formed to facilitate communication among statistics, programming, and data management personnel. That Complainant, himself, lacked confidence in his job security is evidenced by the fact that in late-2010, he contacted recruiters to look for other jobs. The foregoing circumstances demonstrate that there was ongoing dissatisfaction with Complainant's ability to function in a supervisory capacity at ARIAD and to nurture collaboration among his supervisees.

Clackson testified credibly that by September of 2010, he was becoming increasingly aware of problems with Complainant's managerial and executive skills. In an e-mail to Berger he raised -- albeit obliquely -- the possibility of Complainant's dismissal ("we have perhaps a one-time chance to reshape the group from the top..."). Although Clackson concluded that such a step was too extreme at that time given the incomplete status of the Ridaforolimus transfer, the contemplated "reshaping" of personnel indicates that Complainant's dismissal was on the table prior to any protected activity taking place. ARIAD's delay in implementing the "reshaping" attests to the company's operational needs, not to retaliation.

What finally tipped the balance against Complainant's continued employment was not his comment about Jones's race but the following factors: 1) Complainant's continuing inability to control Jones's behavior; 2) the completion of "deliverables" for the transition of Ridaforolimus to Merck, and 3) the declining need for statistical and programming personnel.

In regard to the continuing inability to control Jones's behavior, Respondents cites a November 3, 2010 telephone meeting during which Jones told Arbour that she did not

belong at or in her position at ARIAD. Although Human Resource Director Jo Norton determined that Jones had not violated company policy or engaged in harassment, Norton determined that there was an ongoing conflict between Jones and Arbour which Complainant failed to manage. Clackson, too, characterized the incident as an example of the “unproductive drama” that Complainant failed to control. Rather than acknowledge and control the drama, Complainant sought to reward Jones with a 2010 rating of 4.5 on the basis of his technical expertise.

Along with having concerns about Complainant’s performance, the company faced a change in its personnel needs at the time it decided to terminate Complainant’s employment. By February of 2011, the Ridaforolimus transfer had been accomplished. Complainant’s role -- crucial during the phase three trials of Ridaforolimus -- was no longer essential. The layoff of Complainant resulted in a savings in personnel costs since his position was not refilled for over a year. Complainant’s departure, moreover, was not an isolated event. By the time that Complainant left, the company had already instituted two rounds of layoffs. Complainant’s termination, therefore, was a continuation of the company’s downsizing initiative, not an isolated response to a comment about race.

Apart from cost savings, I credit CEO Berger’s rationale that rather than maintain the status quo, he sought to rebuild ARIAD’s data collection department with people who had a “vendor mentality” and who cooperated with each other. The evidence indicates that after the departure of Complainant and Jones, the statistical programming department began to run smoothly thereby supporting the validity of the decision to terminate their employment.

In sum, the decision to terminate Complainant was not in retaliation for warning the company about potential race discrimination, but because the company sought to improve vendor relations, personnel relations, and data integration.

IV. ORDER

The case is hereby dismissed. 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 20th day of June, 2016.



Betty E. Waxman, Esq.,
Hearing Officer