

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD, BARON RODRIGUES &
WILLIAM CHIRIGOTIS,
Complainants

v.

DOCKET NOS: 98-BEM-2296
98-BEM-2299

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

Appearances:

Brian P. Fitzsimmons, Esquire for the Complainants
William D. Saltzman, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about July 10, 1998, Baron Rodrigues and William Chirigotis filed complaints with this Commission charging Respondent with discrimination on the basis of their religion, and with retaliation. The Investigating Commissioner issued probable cause determinations in both cases. Attempts to conciliate the matters failed and the Investigating Commissioner issued complaints for Certification to public hearing and consolidated the cases for hearing. A public hearing was held before me on March 25-27, 2002 and May 17, 2002. After careful consideration of the entire record and the post-hearing submissions of

the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Baron Rodrigues, a resident of Mattapoissett, Massachusetts, has been employed as a Correction Officer with Respondent Department of Correction since 1986. At the time of the public hearing, Rodrigues worked at the South Eastern Correctional Center ("SECC"), part of the Bridgewater Correctional Complex in Bridgewater, MA.

2. Complainant William Chirigotis resides in New Bedford, Massachusetts. Chirigotis worked as a Correction Officer for Respondent at the SECC for 14 years and resigned in December 2001. He currently works for Reliable Security.

3. At the time of the public hearing Respondent Department of Correction ("DOC") operated the Bridgewater Correctional Complex, consisting of several correctional facilities: Old Colony Correctional Center ("OCCC"), a medium security prison; Bridgewater State Hospital ("BSH"), a

maximum security psychiatric hospital; The Treatment Center ("TC"), a facility that houses civilly committed and sentenced sex offenders; the Addiction Center ("AC") a facility for persons civilly committed for alcohol and substance abuse treatment; the Boot Camp, which houses prisoners; and Southeastern Correctional Center ("SECC"), a medium security prison. (Rodrigues I:68-70). The Addiction Center is part of the physical structure of SECC. These correctional facilities operate 24 hours per day, and the Correction Officers work three shifts.

4. In 1986 when Rodrigues began working for DOC, the Bridgewater correctional facilities were organized differently. There was an organizational unit called the Massachusetts Correctional Institution-Bridgewater ("MCI-Bridgewater"). MCI-Bridgewater consisted of three facilities, Bridgewater State Hospital, the Treatment Center and the Addiction Center. Neither OCCC nor the Boot Camp existed at the time.

5. Rodrigues was originally assigned to Bridgewater State Hospital, and subsequently worked at the Addiction Center. The Addiction Center was taken over by SECC, but Rodrigues continued to work as an Addiction Center Officer

until 2001. Complainant and other employees of the Addiction Center could only bid on shifts in the Treatment Center and Bridgewater State Hospital until October 1998, when he could bid on SECC positions.

6. Correction Officers belong to unit four of the Massachusetts Correctional Officers Federal Union (MCOFU). Correction Officers secure permanent changes in their shifts and days off by bidding on available positions, which are posted on a periodic basis. Bidding is governed by the Collective Bargaining Agreement and jobs are awarded on the basis of seniority.

7. On April 5, 1995, MCOFU and the Department of Correction entered into an agreement regarding personal days, vacation days and "swaps". Swapping allows a Correction Officer to swap a shift with another Correction Officer for personal reasons. Under the agreement, there was no limitation on the number of swaps Correction Officers were allowed to make in any given month. Swapping did not affect a Correction Officer's overtime or seniority. With regard to swaps, the agreement states, in pertinent part:

1. All Unit 4 staff will be allowed to swap days off and/or shift assignment with the prior approval of the Shift Commander.
2. A written request will be submitted and signed by both parties involved.
3. All swaps must occur during the same pay period.
4. Swaps may be limited for two days only. Swapping of more than 2 consecutive days or portions of days shall not be allowed.
5. Swaps allowed one (1) rank up, one (1) rank down. These swaps are upon approval of the Shift Commander contingent upon the operational needs of the institution...

Swaps must be submitted (2) two days in advance.

(Exh.C-6)

8. James T. Walsh has worked at the Department of Correction for 21 years and was Superintendent of SECC from December 1997 to February 1999. In this position he was responsible for the facility's security, as well as for managing the budget, maintenance, hiring and discipline. Walsh was succeeded by Superintendent Paul Murphy, who was in turn succeeded by Superintendent Edward Ficco in September 1999.

9. In the chain of command at SECC, two deputy superintendents reported to Walsh. The Director of Security reported to the deputy superintendents. Five captains reported to the Director of Security, Unit Managers

reported to the captains, lieutenants reported to captains and Correction Officers reported to lieutenants.

10. Duane MacEachern has worked for the Department of Correction for 22 years and at the time of the Public Hearing was Director of Security for MCI Norfolk. MacEachern was Director of Security at SECC from April 1998 until March 2001.

11. Baron Rodrigues, who was raised as a Roman Catholic, became a Baptist in 1997, after years of "not having a true heart faith." He stated that he was shown the scriptures and bible, was a sinner, repented and received Jesus Christ. Rodrigues testified that his conversion resulted in a dramatic change in his personality from angry and hostile to loving God and others. I credit his testimony.

12. Rodrigues testified that his duties as a Baptist are to serve and to love God and to love others. He is also required to attend church to hear and learn more of the scriptures and to use the word of God in his life. Rodrigues testified that every Sunday he attends Sunday school at 10:00 a.m. followed by an 11:00 a.m. service and

later returns to church for a service from 6:00 p.m. - 7:30 p.m. In addition to the Sunday services, Rodrigues' church conducts a men's prayer meeting on Saturdays and a prayer meeting and bible study on Wednesdays which he attends. I credit Rodrigues' testimony in this regard, and find that his beliefs are sincerely held, and require him to attend these various services.

13. At the time of his conversion, Rodrigues worked the day shift (7 a.m. to 3 p.m.) at SECC. His days off were Friday and Saturday.

14. William Chirigotis was raised in the Greek Orthodox faith, but became a Baptist on December 22, 1991 when he "received the lord as [his] personal savior." Chirigotis testified that as a member of the Baptist Church, he must remain always devoted to God, act as the spiritual leader of his home, and must be present in church when its doors are open. On Sundays, he attends Sunday school at 10:00 a.m., followed by a service at 11:00 a.m., and returns for an additional service from 6:00 p.m. to 8:00 p.m. Chirigotis' church also conducts a Thursday night service lasting 90 minutes.

15. On November 12, 1997, Rodrigues wrote a letter to then Superintendent John Marshall, stating, "I am sincerely requesting SECC to reasonably [sic] accommodate me with having Sundays off, because of my religious beliefs. I am a born again Christian and I belong to the Dartmouth Baptist Church. The terms of my employment, specifically my days off, are in conflict with my religious beliefs, my Sabbath. The current bidding system in place at this time has no remedy for my situation..." (Exh. C-2)

16. On February 9, 1998, Superintendent James Walsh, who had become SECC Superintendent in December, 1997, responded to Rodrigues' letter: "After careful review of all pertinent information relative to your request dated November 12, 1997 and my consultation with DOC Legal I am denying your request. If you have any questions regarding this issue please contact my office." (Exh. C-3)

17. Rodrigues stated that Walsh's letter deeply affected him spiritually, because he felt his job prevented him from worshipping the God he believed in. He stated that the matter weighed heavily on his mind. However he decided to remain in his employment, because the scriptures instruct to obey those in authority as well as to obey God.

18. After receiving the letter, Rodrigues met with Superintendent Walsh. After the meeting Rodrigues again wrote to Walsh on May 28, 1998 "... As of June 7, 1998, I will no longer be working on Sunday's[sic]. I will not go against my religious beliefs by working on Sunday's [sic]. In our earlier meeting, I discussed with you how strong my faith is and I believe the Holy Bible is the highest law of the world. I cannot obey the living God. Thank you for your understanding in this matter." (Exh. C-4) Complainant testified that, notwithstanding the letter, he continued to work on Sundays, yet felt stuck "between a rock and a hard place", wanting to "serve the God that had forgiven him" while working for an employer who refused to allow him to serve God.

19. On June 2, 1998, Walsh wrote to Rodrigues ..Please be advised, as stated in previous correspondence sent to you on February 9, 1998, I had denied your request due to your shift and days off being governed by seniority and the collective bargaining agreement. As such you have the option to utilize the bidding process at Southeastern Correctional Center. Again, you should check on available positions and bid on a position that will accommodate your needs. You can explore the availability of swapping by means of the swapping procedure used at Southeastern Correctional Center. If you have any concerns regarding this issue, I advise you to contact SECC's Director of Security, Duane MacEachern. (Exh. C-5)

20. Rodrigues testified that he was unable to use the bidding system to obtain different days off because under the collective bargaining agreement then in effect, he and other Addiction Center Correction Officers could not bid on SECC jobs.

21. Rodrigues testified that after receiving the June 2, 1998 letter from Superintendent Walsh, he secured a swap with a co-worker on two occasions in order to obtain Sundays off.

22. Shortly thereafter, the shift commander, Gentile informed him that Director of Security MacEachern had ordered him to deny Rodrigues' swap, because Correction Officers would no longer be permitted to swap more than once a month.

23. After Gentile had denied him the swap, Rodrigues went to MacEachern, and asked him why he could no longer swap on a regular basis. McEachern's only response was that Rodrigues could transfer out, quit or sue the Respondent. Rodrigues felt intimidated after the discussion with McEachern.

24. On July 1, 1998, Rodrigues wrote a letter to Commissioner of Correction Michael T. Maloney concerning the change in swap policy:

I am prompted to write this letter because of information I received yesterday from my superior concerning my desire to exercise the swapping policy that has been allowed in our institution since 04/05/95...Sir, last August I experienced a conversion of religious beliefs and have become very actively involved in my local Baptist Church with my family...Since my conversion, I have only been successful twice in obtaining permission to utilize the swapping procedure previously established at our institution. On June 29...Duane MacEachern...informed me that he had spoken to the superintendent and their stand on the matter was that I would be denied swapping privileges due to their concern of it becoming a weekly habit and that it would create a precedence for others to misuse the swapping procedure on a continuous basis...Your're[sic] intervention in this matter is greatly appreciated. (Exh. C-7)

He then filed a complaint with the MCAD.

25. William Chirigotis testified that after graduating from Bible College 1995, he wrote to SECC's then superintendent Marshall: "Sir, I am submitting this request that requires your urgent attention. Please consider the following information: I recently graduated from a four year Theological Institute which qualifies me to become an ordained Pastor. I have strong religious convictions and beliefs about worshipping on Sundays. My current work schedule conflicts with my being able to worship on Sundays. Please consider this request to change my work

schedule, so that I can have Sunday's as one of my non-working days. This will give me the freedom to worship as I believe." (Exh. C-11).

26. By letter dated November 12, 1996, Marshall responded: "...your shift and days off at this facility are governed by seniority and the collective bargaining agreement, therefore, you have the option to utilize the bidding process at Southeastern Correctional Center...I suggested you take the opportunity to check on the available positions and bid on a position that will provide you with the shift and days off that will most likely meet your needs..." (Exh. C-12)."

27. Chirigotis testified that after receiving Marshall's letter he transferred to the 11:00 p.m.-7:00 a.m. shift for a period of two years, while attending the New England Baptist Church in Bridgewater. He testified that although this schedule allowed him to attend church on Sunday and Wednesday evening, it had become difficult for him to drive his family to church after working all night. To better accommodate his family, he became a member of a church closer to home, the Graces Baptist Church in New Bedford.

28. Chirigotis testified that even after switching churches, he could not adjust to the night shift and returned to the day shift, but no longer had Sundays off.

29. After returning to the day shift, Chirigotis wrote to Superintendent James Walsh:

As you know, I'm very deeply convicted in my heart about worshiping on Sunday as I am a Christian and live by the principles found in the Holy Bible. In the New Testament there is a verse in the book of Hebrews that commands Christians, "Not to forsake the assembling of ourselves together". I must not disobey my Lord any longer by not going to my church on Sunday's, or any time that services are held. On the 7th of June 1998, which is a Sunday, I will no longer compromise my true convictions. Thank you Mr. Walsh, for your understanding in this matter and come what may, you will continue to have my utmost respect...

(Exh. C-13)

30. Chirigotis testified that in response to the letter he was told to take Sundays off by using swaps. He testified that thereafter, he switched once or twice with Correction Officer Tim Harrington, who worked a double shift on Sunday in return for Chirigotis working a double shift on Monday. He testified that Harrington was willing to continue swapping with him because Harrington played soccer on Mondays.

31. Rodrigues testified that when Walsh changed the swap policy, the other Correction Officers blamed him and Chirigotis for the change in the policy and ostracized him. This was particularly upsetting to Rodrigues because of the importance of camaraderie among Correction Officers. He stated that in a prison setting, a Correction Officer needed to feel confident that his fellow officers supported him, but Rodrigues no longer had their support. I credit this testimony.

32. Rodrigues testified that it was difficult to describe the feeling of walking around in the prison knowing he might not be protected by other officers and of being separated from his peers, some of whom made wisecracks about his religion and wrote offensive graffiti on the walls. I credit this testimony.

33. Rodrigues testified that many officers referred to him as "Jesus Freak" and would make remarks such as "Satan rules" and "Why don't you come back to the dark side?" I credit this testimony.

34. Rodrigues testified that Correction Officers customarily assembled in the roll call room at the start of

each shift and he and Chirigotis would customarily sit against the wall. Rodrigues testified that following the change in the swap policy, someone wrote in large letters the words "Satan's Corner" and the numbers "666" with arrows pointing down to the seats where he and Chirigotis sat. Rodrigues described this graffiti as "mocking". He stated that despite his complaints, the graffiti was not removed for almost a year. He stated that eventually he and Chirigotis moved away from that area and stood during roll call. I credit this testimony.

35. Rodrigues discussed religion with fellow officers. He testified that on one occasion a supervisor, Sergeant Zemittis, called him over and told him to stop talking about God. On another occasion, Zemittis said to Complainant, "My motto is 'EGO'. Do you know what that means?" When Rodrigues responded that he did not know, Zemittis laughed and said it meant, "edging God out." I credit this testimony.

36. Rodrigues also testified that a unit manager, Ellie Claudius once pulled him into a stairwell in the presence of other officers and said to him, "I'd better not be hearing about you talking about God. You keep that at

home. Just do your job. People are offended when you talk about God." He testified that he found this incident offensive and that he felt belittled and intimidated. I credit this testimony.

37. Rodrigues testified that on another occasion, while returning from an authorized break, the unit manager stopped him in the middle of the prison yard and asked what he was doing there. He responded that he was on break and she responded, "Since when do you get a break?" Does your Sergeant know where you are?" She then called his Sergeant, who confirmed that Rodrigues was on break. This exchange occurred in the presence of inmates and staff and made Rodrigues feel belittled.

38. Rodrigues testified that following his complaint he was assigned to a post known as "the tower" for the next four years. Rodrigues described this as a "punishment" post because the Correction Officer assigned to this post was required to remain in the tower for the entire eight-hour shift and had little contact with others.

39. Rodrigues testified that after being assigned to the tower he began receiving three to five harassing

telephone calls per day. The telephone in the tower could only be accessed from inside the institution. The anonymous caller would say things such as: "Jesus Freak", "Satan Rules", or make disgusting noises, and then hang up. In addition to the telephone calls, graffiti was written in the tower, such as "Satan loves to hit Christians in the buttocks" and "Hell's gonna be better because there's no Christians". He complained to MacEachern about the calls, but MacEachern told him he couldn't do anything about it. The graffiti remained in the tower for a period of six months. I credit this testimony.

40. Rodrigues testified that in August 2000, he was posted in the tower, while hundreds of inmates loudly played basketball in the yard below. Rodrigues testified that he was watching for contraband in the yard, and was focusing on a particular area of the yard, when he looked down to see MacEachern and another captain yelling, "Didn't you hear me? Didn't you see us? Look at the razor wire. It's hanging down." This incident resulted in a written reprimand against Rodrigues.

41. Rodrigues stated that on numerous occasions MacEachern would say to him "Hey, Baron, I was in church

Sunday with my family. I had a good time. Too bad you could not go to church." I credit this testimony.

42. After having been assigned to the tower from 1997 to 2001, Rodrigues was re-assigned to the "ball field trap" from August 2001 to October 2001. Rodrigues testified that while assigned to the ball field trap he continued to receive offensive telephone calls. During this time period he was suspended for two days for failing to monitor the inmates but the suspension was rescinded after an appeal. Rodrigues was then assigned to "D ward". After a medical leave unrelated to this matter, he returned to work in November 2001 and was assigned to the tower as a light duty position.

43. Rodrigues, (whose nickname among co-workers is "B-Rod") found offensive graffiti about his faith at various posts such as "B Rod 3:16". He heard catcalls such as, "Jesus Freak". Rodrigues testified that he had "lost that bond" with his co-workers and felt ostracized. He stated that others were intimidated from being friends with him. He stated that prior to the change in swaps policy he and others would hold interdenominational prayer meetings

before roll call, however, after the change, only he and Chirigotis attended the meetings. I credit this testimony.

44. Rodrigues testified that he discussed these matters with his wife and his pastor, and prayed about it. He would go to work and no one liked him. He was separated from others. Rodrigues stated that in America people had the right to live and love God. People of all religions come here and are supposed to respect one another's beliefs. However he stated that because his faith was ridiculed he felt like a "nobody" felt "low" and as if he had "inmate status". I credit this testimony.

45. Rodrigues testified that he complained to Captains about the harassing telephone calls, and complained to Lieutenant Goldrick about graffiti. I credit this testimony.

46. Rodrigues testified that prior to swapping Sundays, he occasionally used vacation days or personal days to obtain a Sunday off. Rodrigues was not aware of any 11-7 shifts that he could have bid on, but he did not want to work the 11-7 shift.

47. Delbert Howard, a Correction Officer worked with Complainant at SECC and at one point worked in the 3-11 shift at the ball field trap relieving Rodrigues. Howard testified that on one occasion, in approximately March 2001, he arrived at work 30 minutes early during a snowstorm to relieve Rodrigues, and observed that Rodrigues received numerous phone calls. After Rodrigues had answered numerous phone calls, Howard began to answer the phone. Howard testified that he heard numerous racial slurs and negative statements regarding Rodrigues' religion, for example, "You think you're better than us because of your religion" "You're nothing but a black nigger." "You're no good. Why don't you suck my private parts." I credit this testimony.

48. Howard wrote a letter to then superintendent Ficco about the offensive calls coming to Rodrigues in the ball field trap. He testified that other Correction Officers pressured him because of his support of Rodrigues, and began calling Howard in the trap as well. He testified that he and Rodrigues had made the trap nice and it was being destroyed, with slurs, such as "nigger" written on the desk. Howard tried to clean the area so that Complainant wouldn't see the offensive graffiti. Howard

testified that he transferred out of SECC to Old Colony because he was receiving "a lot of heat" from other officers about supporting Rodrigues. I credit this testimony.

49. Lieutenant Steven Goldrick has worked for the Respondent for 26 years, and has been at SECC 16 years. Goldrick vaguely recalled a conversation regarding graffiti in the tower. He recalled the words "Devil lives here" etched in a desk or doorframe while Complainant was assigned to the tower.

50. Goldrick testified that graffiti is "rampant" in the SECC, a building that is over 100 years old and due to be closed because of its poor condition. He testified that he called the maintenance department a couple of times to remove graffiti from the tower, but that the removal of graffiti is not a high priority in the SECC with its numerous maintenance problems, including leaking roofs, broken plumbing and rotting floors.

51. Goldrick testified that he observed Rodrigues receive calls either in the tower or the trap. He answered the telephone on one occasion, "Tower. Goldrick." and the

caller hung up. Goldrick informed his shift commander about the calls. He also placed a telephone in the tower with a "Caller ID" display, but it was incompatible with the internal telephone system and did not display the origin of the calls.

52. Goldrick testified that he did not consider telling Correction Officers at roll call to cease making harassing telephone calls to Rodrigues because that would "put the heat on him...that would further incite the troops that were harassing him to continue and upgrade the harassment because they would know they were getting to him."

53. Goldrick testified that Rodrigues spoke frequently to him and to others about religious matters and that these conversations were sometimes annoying and made it difficult to converse with Rodrigues about prison business. According to Goldrick, Rodrigues also spoke to inmates about religious matters, which was a rules violation. I credit Goldrick's testimony in its entirety.

54. Captain Paula Zwicker has been employed by Respondent for 30 years and has been a Captain for five

years. At the time of the swap controversy, she worked the 3-11 shift at SECC. Zwicker testified that Rodrigues had swapped with Correction Officers on her shift, until MacEachern instructed her to no longer approve Rodrigues' swaps. She warned MacEachern that the managers would be in trouble for denying swaps to Rodrigues, but despite her misgivings she followed MacEachern's instructions because she was ordered to do so. Zwicker testified that during this time she continued to approve swaps for other Correction Officers. I credit her testimony to the extent that she was told not to approve swaps for Complainants. However, I do not credit her testimony that she continued to approve swaps for others exceeding one swap per month.

55. Chirigotis testified that after Walsh limited the swaps to once a month, he was unable to obtain a Sunday off, and each time he approached a captain, his request for a swap was denied. I credit this testimony.

56. Chirigotis testified that as he entered a meeting subsequent to the change in swap policy, Sergeant Sweeney said, "Here's the troublemaker now. We can't swap because of him." I credit this testimony.

57. Chirigotis testified that in the roll call room someone had placed a large sign on the wall that said "Satan's Corner. 666". Arrows were drawn on the wall pointing down to the seats where he and Rodrigues customarily sat. I credit this testimony.

58. Chirigotis testified that after the change in swaps policy he began to receive crank calls, was called names such as "Jesus Freak" and was ostracized by co-workers. I credit this testimony. He was assigned to the tower for five years, and later assigned to either "eyeball watch" or the central gate. He described, "eyeball watch" as an undesirable assignment requiring him to watch an individual in the detox unit who was mentally unstable for an entire shift.

59. Chirigotis testified that he was told not to discuss religion by his Captain and the Director of Security, who told him they heard he was "going on and on" about God and to leave people alone. I credit this testimony.

60. Chirigotis testified that as a result of the treatment he sought counseling from his pastor and from

Respondent's stress unit. Chirigotis testified that he lost sleep and felt like he was fighting a losing battle. He testified that he was constantly stressed out, tired and depressed. He testified that he was depressed about not going to church on Sundays and not acting as his family's spiritual leader and that his wife had to take his place as spiritual leader. I credit this testimony.

61. Chirigotis resigned from the Department of Correction on December 19, 2001 after being accused of conspiring with an inmate's girlfriend to smuggle cigarettes into the prison.

62. James Walsh testified that in 1997 while he was Superintendent at the Treatment Center, prior to becoming superintendent at SECC, when the swap agreement went into effect, he limited swaps to once a month and he continued this practice after becoming Superintendent at SECC. Walsh asserted that he limited swaps to once a month during his tenure because of the administrative hardship involved in changing cards and logs. Some employees complained they did not get paid, while others mistakenly got overtime pay when they were on a swap. While I credit Walsh's testimony to the extent that "swaps" may have caused some

administrative errors, I find that Walsh exaggerated the extent of these problems in order to support his position.

63. Walsh testified that when he became superintendent at SECC, the captains told him there were problems with the swap process. He cited an example of one captain denying a swap request, while another captain would unknowingly approve the same swap. Walsh denied instructing the shift commanders never to give swaps to the Complainants, or to treat them differently from other officers. I do not credit this testimony. I find that Walsh limited the swaps to once monthly in order to prevent Complainants from obtaining every Sunday off, and out of concern that Correction Officers would abuse the swap system.

64. Walsh testified that when an employee who was experiencing a family hardship such as divorce or domestic violence, came to him with a request for a temporary scheduling change to arrange for child care or some other reason, he would contact representatives of MCOFU and inform them that he intended to temporarily change the employee's days off, typically for a six week period. Walsh testified that he could not offer employees a permanent

change in schedule because it would circumvent the Collective Bargaining Agreement.

65. Walsh testified that in contrast, Rodrigues' request for Sundays off was impermissible because it would result in a permanent swap that would run afoul of the Collective Bargaining Agreement. I do not credit his testimony in this regard. There was evidence that the union, in fact challenged Walsh's policy of limiting the swaps to once a month, with the DOC asserting that it was management's prerogative. Walsh instead suggested that Rodrigues utilize the bidding process to bid on other shifts and days off. According to Walsh, both Complainants could bid for shifts at other facilities at that time.

66. Walsh denied that the tower was a "punishment post" and stated that it is an important post because it's in the outer perimeter and is an armed position.

67. Duane MacEachern testified that in 1998, Superintendent Walsh instructed him to limit swaps to once a month and only for events such as Christenings, graduations and the like. Thereafter, MacEachern

instructed the captains orally that they were to approve only one swap per month and only for legitimate reasons. He denied instructing the captains to deny Complainants' requests in particular. He also denied instructing Zwicker not to permit Complainants any swaps. I credit his testimony to the extent that he did not instruct the captains specifically to deny swaps to Complainants only.

68. MacEachern testified that after hearing Rodrigues telling someone over the radio that he would no longer answer his phone, he asked the shift commander, Coucher to find out why Rodrigues had said that. MacEachern learned from Lt. Goldrick that Rodrigues was receiving harassing phone calls. In order to trace the calls, they moved a telephone that displayed Caller I. D. into the tower, but the Caller I. D. did not work in the tower because the service was not the same. In addition, Coucher spoke to several officers, including a known prankster, who denied making the calls.

69. MacEachern stated that he would investigate complaints of harassment. He stated that he received no specific complaints about graffiti and that he did not notice graffiti in the roll call room or in the ball field

tower. He stated that graffiti would be painted over, and if harassing, he would investigate. He stated that there was no easy way to find out who wrote graffiti.

70. MacEachern testified that officer Howard, who worked the 3-11 shift, complained when first assigned to ball field trap post, that the trap was "a dump". They cleaned it up.

71. MacEachern testified that he discussed religion with Rodrigues but denied taunting him about going to church on Sunday. I do not credit his testimony.

72. MacEachern issued a formal letter of reprimand to Rodrigues after he left his post for 90 minutes. He stated that Rodrigues created discontent among employees by neglecting his duties and spent a lot of time speaking with an inmate. There was evidence that employees have received similar reprimands.

73. MacEachern also issued a discipline report to the Superintendent with regard to an August 4 incident in the ball field when he was making the rounds and saw Rodrigues rocking back and forth in a chair in the tower. He tried

to shake the fence to get Rodrigues' attention. MacEachern testified that he called up to Rodrigues five times, until Rodrigues responded. MacEachern testified that it was important for the officer in the tower, a critical post, to pay attention to watch for escapes, fights, stabbing and drugs. I credit this testimony.

74. On May 12, 1999, Chirigotis was disciplined for making loud snoring noises over the radio. MacEachern testified that broadcasting this sort of inappropriate sounds jeopardizes safety of other officers because it could mean that another officer calling for help at the same time would not be heard. Others were disciplined for the same thing. I credit this testimony.

75. Chirigotis was also disciplined for "dry firing" a firearm in the trap.

76. Captain Daniel Callas, Jr. has worked at SECC for 19 years and has been a Captain since 1995. In 1998 Callas was Complainants' shift commander on the 7-3 shift. Callas testified that during this time period, Correction Officers would come to him with a swap sheet and he would either approve or deny the swap.

77. Callas testified that in June 1998, he only handled a "handful" of swaps. He testified that at that time he received an oral order from MacEachern that swaps were to be used no more than once a month, for special occasions only, and Correction Officers were to use personal or vacation days before requesting swaps. He denied being ordered not to approve Complainants' swaps. He testified that Zwicker did not tell him that she had been told to deny swaps to Complainants. I credit this testimony.

78. Callas testified that he heard others discussing harassing phone calls but no one complained directly to him. He recalled that Unit Manager, Ellie Claudius, once told one of the Complainants to stop preaching to inmates and just do their jobs.

79. Callas testified that Chirigotis told him he could not work on the central gate. He spoke to the superintendent and thereafter Chirigotis was no longer required to work at the central gate.

80. Callas testified that he once found Chirigotis in the ball field tower with several Bibles. He told Chirigotis to put the Bibles away and not to bring them to the tower. Callas testified that he did this because Chirigotis could not do his job of observing inmates if he were reading in the tower.

81. Edward Ficco, who became Superintendent of SECC in September 1999, did not limit the number of swaps per month.

III. CONCLUSIONS OF LAW

A. Religious Accommodation

Under M.G.L. c.151B, S. 4(1A), Respondent is required to provide a reasonable accommodation to Complainant's sincerely held religious beliefs or practices. Estabrook v. MBTA, 23 MDLR 125 (2001); Said v. Northeast Security, Inc., 22 MDLR 315 (2000). Specifically, the statute prohibits employers from "imposing upon an individual . . . any terms or conditions of employment, compliance with which would require such individual to violate, or forego the practice of, his creed or religion . . . including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or holy day and the employer

shall make reasonable accommodation to the religious needs of such individual." The statute places the burden of proof as to the required practice of his religion on the employee and defines "reasonable accommodation" as that which will "not cause undue hardship in the conduct of the employer's business." M.G.L. c.151B, s. 4(1A).

In order to establish a prima facie case of failure to accommodate his religious practices, Complainants must show that they had a sincerely held religious belief that required them to refrain from or abide by a certain practice, that they informed Respondent of their belief, but that Respondent refused to accommodate their practice. Estabrook v. MBTA, 23 MDLR 125 (2001) citing Manganaro v. Eastern Container Corp., 10 MDLR 1173 (1988); New York and Massachusetts Motor Service, Inc. v. MCAD & another, [401 Mass. 566](#) (1988).

Rodrigues testified credibly and without contradiction that he is a practicing member of the Baptist faith, and that his beliefs require him to attend church services on Sundays. I find that Rodrigues has established that his beliefs are sincerely held. Further, the change in swap policy prevented Rodrigues from practicing his faith as he wished. I also find that Chirigotis has established a prima facie case. He, too, testified

credibly and without contradiction that he became a Baptist in 1991 and had sincerely held beliefs that required him to attend church on Sundays.

Once Complainants have established a prima facie case, Respondent then must show that it could not accommodate Complainants' needs without undue hardship to Respondent's business. "Undue hardship" includes when "the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence." M.G.L. c.151B, Section 4(1A).

In reviewing an employer's claim of undue hardship, the Commission must inquire into the nature and operations of the employer's business to ascertain whether any of the conditions that might constitute undue hardship are present, and whether the employer could have exercised its managerial discretion in such a way that the employee's religious obligations could have been reasonably accommodated. New York and Massachusetts Motor Service, Inc. v. MCAD & another, 401 Mass. at 576. At the very least, the employer is required to make more than a negligible effort at attempting to discuss possible solutions to the employee's problem. TWA v. Hardison, 432 U.S. 63 (1977).

Respondent contends that it would have been an undue hardship to accommodate Complainants' need for time off to observe the Sabbath by permitting Complainant to swap each Sunday. For the reasons stated below, I do not agree.

Superintendent James Walsh claimed that he limited swaps to once a month because of the administrative problems created by the swaps procedure and he contended that "captains were complaining about approving shifts that other Captains had declined." However, the evidence did not support this assertion. Rather, shift commander Daniel Callas testified that he only approved a "handful" of swaps during the month of June before the directive to limit swaps to once a month. I believe that Walsh's directive to limit the swaps was targeted at Complainants, who had only recently begun to swap Sundays following Walsh's suggestion. There was evidence that Walsh and MacEachern were concerned that Complainants' use of swaps would result in abuse of the system by others, but there was no evidence that this had occurred in the past when unlimited swaps were the rule.

I am not convinced that Respondent would have experienced undue hardship by allowing Complainants to swap for each Sunday off. There was evidence that the swaps did not result in any expense to Respondent, did not require

the payment of overtime and did not require Respondent to hire additional employees. I do not find credible the assertion that administrative problems would result from Complainants' seeking to swap more frequently than once a month. I also do not accept the proposition that an administrative SNAFU constitutes an undue burden.

Walsh testified that he permitted employees with "hardships" to temporarily change schedules, but that he did not consider Complainants' religious obligations to be as serious an issue. It is clear that Respondent refused to even attempt a good faith effort to accommodate Complainants, or to assist them in achieving an accommodation. I found Walsh's assertion that permitting Complainants' swaps would run afoul of the Collective Bargaining Agreement disingenuous, since the Union actually challenged the limitations on swapping when management asserted its prerogative to limit the number of swaps.

Walsh's suggestion that Complainants bid for another shift to obtain Sundays off was not a reasonable accommodation. First, there was no evidence that bids were available that could have accommodated either Complainants schedule at the time in question. Further, given that swapping was a reasonable accommodation, even if such bids to another shift were available, there is no reason that

Complainants, who having secured coveted day shift positions by dint of their seniority, should have been required to give up this earned benefit merely because of their religious beliefs. Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994) (requiring an employee to use all of his or her vacation entitlement is not a reasonable accommodation).

Therefore, I find that Respondent unreasonably failed to accommodate Complainants' request for time off to observe the Sabbath in accordance with their beliefs as Baptists. Respondent violated M.G.L. c.151B, s. 4(1A) when it refused to permit Complainants unlimited Sunday swaps.

B. Harassment

Massachusetts General Laws Chapter 151B, Section 4(1) makes it an unlawful practice for an employer to hire, to discharge from employment or to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of the individual's race, religious creed or national origin. Harassment in the workplace based on race, national origin and religion constitute forms of discrimination under c. 151B. See Richards v. Honeywell Bull, 16 MDLR 1639, 1669 (1993);

Dalessio v. Seagate Technology, 18 MDLR 117(1996). When the harassment has the effect of creating a discriminatory work environment, the Commission has held that it per se affects the terms and conditions of employment. Richards v. Honeywell Bull, supra.

In order to prevail on a claim of religious harassment, Complainants must demonstrate that (1) unwelcome comments, jokes, or other verbal or physical conduct of religious nature were made in the workplace; (2) such conduct had the effect of creating an intimidating, hostile or offensive working environment or unreasonably interfered with an individual's work performance; and (3) the employer knew or should have known of the conduct and failed to take remedial action. Dalessio v. Seagate Technology. Inc., supra. (1996); Duplessis v. Training & Development Corp., 835 F.Supp. 671, 677 (D.Me. 1993); Wheatley v. AT&T, 418 Mass. 394, 397 (1994).

The record demonstrates that Complainants' co-workers and supervisors engaged in verbal comments and wrote graffiti derogatory to Complainants' religion, which was pervasive, hostile and intimidating to Complainants and caused them to complain to supervisors on several occasions. Comments such as "Jesus Freak" and written graffiti in the roll call room, such as "Satan's Corner"

created a hostile work environment for Complainants in which they felt ostracized and intimidated. Rodrigues, in particular endured countless offensive telephone calls. Despite numerous complaints to supervisors about all of the events described herein, Respondent did not take sufficient steps to protect Complainants from this abusive environment. Instead supervisors either brushed off the complaints or, as Lieutenant Goldrick testified, he did not order co-workers to cease this behavior because of his concern that it would make the behavior worse. Based upon all of the above, I conclude that Complainants were subjected to a hostile work environment on the basis of their religion.

C. Retaliation

In order to establish a prima facie case of retaliation, Complainants must show: (1) that they engaged in a protected activity, (2) that they subsequently suffered adverse action, and (3) that the adverse action followed the protected activity within such a period of time that a retaliatory motive could be inferred. Lanza v. Town of Southboro, 6 MDLR 1425, 1449 (1984). Complainants testified that after filing a complaint with MCAD they were subsequently assigned to "punishment posts" such as the tower and "eyeball watch". However, without more than

Complainants' testimony in this regard, I am not convinced that the assignments to particular posts were retaliatory. There was no evidence in the record regarding how posts were assigned, and no corroboration from other Correction Officers regarding which posts were considered more or less desirable than others. Further, there was evidence that the Department of Correction routinely disciplined Correction Officers for similar infractions and there is no evidence that the discipline meted out to Complainants subsequent to filing their complaint was any worse than that received by their co-workers. Therefore, I conclude that Respondent did not engage in unlawful retaliation in violation of M.G.L. ch. 151B.

IV. REMEDY

Upon a finding of unlawful discrimination the Commission is authorized to order remedies that will effectuate the purposes of the statute and make the Complainant whole. M.G.L.c.151B, §5. This includes an award of damages for emotional distress suffered as a direct and probable consequence of Respondent's unlawful discrimination. Bournewood Hospital, Inc. v. Massachusetts Commission Against Discrimination, 371 Mass. 303, 315-317 (1976); Buckley Nursing Home, Inc. v. Massachusetts

Commission Against Discrimination, 20 Mass. App. Ct. 172, 183 (1985).

I find Complainant Baron Rodrigues' testimony regarding the emotional distress he suffered to be credible. He testified credibly about his feelings of worthlessness as the result of being ostracized by fellow Correction Officers and taunted about his religious faith. I find that he is entitled to an award of fifty thousand dollars (\$50,000.00) as compensation for the distress caused by Respondent's unlawful conduct.

I find Complainant Chirigotis's testimony regarding the emotional distress he suffered to be credible. Chirigotis testified that he lost sleep and felt like he was fighting a losing battle. He testified that he was constantly stressed out, tired and depressed. I find that he is entitled to an award of thirty-five thousand dollars (\$35,000.00) as compensation for the distress caused by Respondent's unlawful conduct.

V. ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, and pursuant to the authority granted to the Commission under M.G.L. c. 151B §5, it is hereby ordered that:

(1) Respondent pay Complainant Baron Rodrigues the sum of \$50,000.00 in damages for emotional distress within sixty days of receipt of this decision.

(2) Respondent pay Complainant William Chirigotis the sum of \$35,000.00 in damages for emotional distress within sixty days of receipt of this order.

(3) Respondent immediately cease and desist from further acts of religious discrimination.

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, please 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 this Commission within ten days of receipt of this Order and a Petition for Review within thirty days of receipt of this order.

SO ORDERED this 27th day of June, 2003.

JUDITH E. KAPLAN
Hearing Officer