

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)	
AGAINST DISCRIMINATION and)	
CLAUDE SYLVESTRE)	
Complainant)	
)	
v.)	Docket No. 97-BEM-4600
)	
)	
THE FLATLEY COMPANY &)	
INTERNATIONAL INN, INC.)	
Respondents)	

Appearances:

Jon Stetkis, Esq., and Brian E. Blakeslee, Esq., for
Complainant
Richard L. Neumeier, Esq., for The Respondent Company
Charles M. Sabatt, Esq., for International Inn, Inc.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 28, 1997, Complainant Claude Sylvestre filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). Complainant charged The Flatley Company (hereafter: "Respondent") and International Inn, Inc. with discrimination based on his race, color and national origin and in retaliation for his participation in protected activity in violation of Massachusetts General Laws, Chapter 151B, §4, paragraphs 1, 4

and 4A.¹ Complainant alleged that Respondent discriminated against him when it discharged him on or about July 25, 1997. (Joint Exhibit No. 1).

Attempts to conciliate this matter were unsuccessful. On December 20, 2001, Investigating Commissioner Dorca I. Gomez certified this case for a public hearing.

I held a public hearing in this case on April 30, 2003. On June 17, 2003, Respondent filed its proposed findings of fact and conclusions of law with the Commission. On July 22, 2003, Complainant filed his post-hearing brief with the Commission, including his proposed findings of fact and conclusions of law.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

¹At the public hearing, I granted Complainant's motion to dismiss International Inn, Inc., as a party in this complaint.

II. Findings of Fact

1. Complainant Claude Sylvestre is a black male who was born in Haiti. Complainant's primary languages are French and Creole.

2. From October 5, 1995 until July 6, 1997, Complainant worked as a houseman at the Cape Codder Hotel (hereafter: the "Cape Codder") in Hyannis, Massachusetts. (Complainant's Exhibit No. 4). The Cape Codder has 260 guest rooms and is located approximately 10 minutes in driving time from Complainant's residence where he lived with his then spouse and their two children. Among his duties, Complainant picked up dirty laundry, gave clean linen to maids, cleaned bathrooms and vacuumed hallways. The Cape Codder cleaned its laundry offsite at a nearby Tara Sheraton Hotel and arranged for delivery of clean linens on a daily basis.

3. Complainant's regular hours of work at the Cape Codder were 7:00 a.m. to 3:00 p.m. and he worked approximately 48 to 60 hours per week. By July 6, 1997, Complainant's hourly pay rate was \$7.80. In July 1997, Complainant worked with three other housemen who were also Haitian: Severe Philogene, Adrian Joseph and Enoch Florestal. Florestal left the Cape Codder in October 1997 when Respondent cut his hours. Michael Sylvestre, Complainant's brother, also worked as a houseman at the Cape Codder on the 3:00 p.m. to 11:00 p.m. shift.

4. Complainant did not receive any oral or written warnings while he was employed at the Cape Codder.

5. During the time period relevant to this complaint, Respondent owned and operated the Cape Codder and was an employer within

the meaning of Massachusetts General Laws, Chapter 151B, §1, paragraph 5.²

6. On March 10, 1997, Respondent hired Eduardo Medeiros to work as the executive housekeeper at the Cape Codder. Among his duties, Medeiros oversaw the cleaning of all guest rooms and ensured that Cape Codder staff supplied clean towels and linens for each guest room. In July 1997, Medeiros directly supervised an assistant manager, the housekeeping supervisors and all housemen, including Complainant. Medeiros left the Cape Codder on September 9, 1997 when Starwood purchased Respondent's properties and eliminated his position. (Complainant's Exhibit No. 4).

7. Medeiros was born in Azores, Portugal, and became a naturalized United States citizen in 1996 or 1997. Medeiros earned a bachelor's degree in psychology from Eastern Connecticut State University.

8. In 1997, Robert J. Moran was Respondent's regional director of human resources and served as a liaison to the human resources directors who were located in 15 hotels then owned and/or operated by Respondent. During the time period relevant to this complaint, Moran's office was located in Respondent's corporate offices in Braintree, Massachusetts.

9. In July 1997, Theresa Bruno was the Cape Codder's human resource director and reported directly to Lois Trombley who was Respondent's General Manager. Bruno's primary duties at the Cape Codder included recruitment, handling employee relations

²Respondent sold the Cape Codder to Starwood Hotels in October 1997. (Complainant's Exhibit No. 4).

and managing employee benefits.

10. Complainant testified that he had a difficult working relationship with Medeiros. Complainant testified that Medeiros regularly yelled and screamed at him and acted like he always wanted to fight him. Complainant testified that he complained to Bruno about Medeiros' negative attitude and actions but he did not recall when he made his complaints. Complainant also testified that Bruno told him that she would talk to Medeiros but she never told him what actions she took regarding his complaints. Bruno denied that Complainant ever complained to her about Medeiros' behavior towards him. I do not credit Complainant's testimony regarding his alleged complaints to Bruno about Medeiros' attitude or conduct toward him.

11. Complainant testified that Medeiros referred to him and the other Haitian housemen as "you people." Florestal testified that he believed that Medeiros did not like the Haitian housemen because he "always" referred to them as "you people." Medeiros denied that he ever used racial epithets toward Complainant or any other Haitian employee at the Cape Codder. Medeiros also did not recall using the term, "you people" when referring to the Cape Codder housemen. I credit the testimony of Complainant and Florestal regarding Medeiros' references to "you people" when discussing the Haitian housemen.

12. Complainant testified that Medeiros once suggested to him that he had "better look for another job soon" because he was not "going to be working at the Cape Codder anymore." Complainant did not recall when Medeiros made the suggestion to him about looking for other employment. Medeiros denied that he made any threats to fire Complainant. I credit Medeiros'

testimony.

13. Medeiros did not have authority to terminate any Cape Codder employee. Medeiros could recommend a dismissal to Bruno who had the ultimate authority to discharge a Cape Codder employee.

Incident on July 6, 1997

14. Medeiros testified that July is a "very, very busy" month for guests and the Cape Codder is usually occupied to full capacity. Medeiros told the housemen, including Complainant, several times prior to July 6, 1997 that they had to work as a team and share their supplies so that "it would flow better throughout the day." Medeiros testified that linen shortage was an "issue" because it prevented the Cape Codder housekeepers from turning over rooms as quickly as the hotel required. I credit Medeiros' testimony.

15. The Cape Codder was very busy on Sunday, July 6, 1997, and there was an insufficient supply of clean bed linen for all rooms. Medeiros testified that the housekeeping supervisor told him that the housekeepers were unable to clean some of the guest rooms because the housemen had hoarded the linen. Medeiros testified that the housekeeping supervisor also told him that Complainant had "given her a hard time" and that he had refused to share pillows with other hotel staff. I credit Medeiros' testimony.

16. At approximately 2:00 p.m. on July 6, 1997, Medeiros met with Complainant in the housekeeping office/laundry room across from Medeiros' office to discuss the housekeeping supervisor's complaint about the linen distribution. Complainant testified

that Medeiros yelled and screamed at him about the linen distribution and accused him of not sharing clean pillowcases with the housekeepers. Complainant testified that Medeiros told him to "shut up, fucking black mother fucker Haitian" ("fbmf Haitian") when Complainant tried to explain that he had not kept more linen than any of the other employees. Complainant also testified that Medeiros told him that he was fired and to "punch [himself] out." Complainant also testified that Medeiros slapped or struck him on his face as Florestal walked through the office door. Complainant testified that he was very angry, depressed and scared immediately after Medeiros struck him. I do not credit Complainant's testimony that Medeiros called him "fbmf Haitian" but I credit his testimony that Medeiros struck him.

17. Medeiros reminded Complainant, during their meeting, that it was part of his job to share linen with his co-workers and told him that he was "free to leave" if he did not like his position. Medeiros did not recall raising his voice at Complainant who was about 10 feet away from him. Medeiros testified that Complainant became irate and accused Medeiros of firing him. During the meeting, Medeiros tried to tell Complainant that he did not fire him and had no authority to fire him. I credit Medeiros' testimony that he told Complainant he did not fire him.

18. Florestal worked at the Cape Codder on July 6, 1997. Florestal testified that he heard Complainant and Medeiros arguing loudly when he went into the housekeeping office. Florestal could see them because the door to the office was glass. Florestal was approximately 10 to 15 feet away from them and saw Medeiros raise his right hand and slap Complainant

across the face on his left cheek. Florestal also testified that he went into the office and said, "what happened" and "wait a minute." He testified that Medeiros told him that he was just trying to get Complainant's attention. Florestal testified that he told Medeiros, "I just saw you hit him" but Medeiros did not admit that he hit Complainant. Medeiros denied that Florestal asked him why he hit or struck Complainant. Florestal testified that Medeiros appeared very angry, frustrated and was sweating. Florestal did not hear Medeiros make any comments to Complainant during their altercation that were based on Complainant's race, color and/or national origin. I credit Florestal's testimony regarding his observations about the "argument" between Complainant and Medeiros on July 6, 1997.

19. After this incident, Complainant immediately went to the Cape Codder's front office to find an on-duty manager or supervisor where he met Gerry Brown who worked in the gift shop. When Brown asked Complainant what happened, he told her that Medeiros had just slapped him, called him "names" and had fired him. Brown told Complainant that there were no managers or supervisors on site. Brown also told Complainant to return the next morning when Bruno or Lois Trombley would be in the office but Complainant told her that he was returning to the housekeeping department to see Medeiros. (Respondent's Exhibit No. 3).

20. Medeiros testified that Brown called him about 10 minutes after Complainant left his office and she told him that Complainant said he was returning to the housekeeping office. Medeiros did not recall Brown telling him that Complainant alleged that Medeiros had struck or hit him. Brown reported that Medeiros told her that he had instructed Complainant to

calm down and leave for the day or Medeiros would suspend him. (Respondent's Exhibit No. 3).

21. After talking to Brown, Complainant returned to the housekeeping department and met with Medeiros for a second time. Medeiros testified that Complainant was "still pretty upset" and kept telling him that he had no authority to fire Complainant. Medeiros then told Complainant or attempted to reassure him that he was not fired. Medeiros also testified that he attempted to calm things down by apologizing to Complainant for his "misunderstanding" about being fired and for the entire incident being "blown out of proportion." Complainant told Medeiros that he had "nothing to say" to him and that he planned to talk to Bruno or Trombley on the next day. I credit Medeiros' testimony.

22. Medeiros testified that, during his second meeting with Complainant, he raised his hand in front of Complainant's field of vision and clicked his fingers to get his attention and his eye contact and get him to talk in a normal tone. Medeiros testified that he was "nowhere near" Complainant's face and never came into physical contact with Complainant. Medeiros also denied that he struck Complainant during their two meetings on July 6, 1997 or touched any part of his face or body. I do not credit Medeiros' testimony regarding the absence of physical contact during his altercation with Complainant. (Respondent's Exhibit No. 2).

23. Complainant did not "punch out" on July 6, 1997 as directed by Medeiros although it was the Cape Codder's policy that he "punch in" when he arrived at work and "punch out" when he finished his work. Complainant testified that he did not "punch

out" because he did not want to fire himself. I credit Complainant's testimony.

24. While Complainant waited outside the Cape Codder for his wife to pick him up, he testified that he was "really upset" and "was like shaking, everything." After Complainant's wife picked him up, Complainant went directly to the Barnstable Police Department where he met with an investigating police officer who advised him to file a criminal complaint in Barnstable District Court. In her police report, the investigating police officer wrote that Complainant told her that, during their argument, Medeiros, "pushed his check (sic) with his index finger," and said, "I don't want you working here anymore, you're fired, get out, MFBH." (Respondent's Exhibit No. 1).

25. Complainant testified that when he returned home from the police station, he was angry, upset and continued to shake. Complainant claimed that he was crying and could not speak to his wife. Complainant also testified that he was depressed and worried about his lack of health insurance, especially since his wife had a disability.

26. Bruno first learned about the incident between Complainant and Medeiros when she received Brown's undated memorandum regarding her conversation with Complainant on July 6, 1997. Bruno then talked to Brown, by telephone. (Respondent's Exhibit No. 3). Bruno also met with Medeiros alone on July 7, 1997 to discuss the incident. Trombley instructed Bruno to convene a meeting between Medeiros and Complainant to investigate the incident and determine what happened.

27. At Bruno's request, Medeiros prepared a written "summation"

that described his version of the incident on July 6, 1997 and gave it to Bruno before her meeting with Complainant on July 7, 1997. (Respondent's Exhibit No. 2).

28. On July 7, 1997, Complainant and his wife met with Bruno and Medeiros in her office. During the meeting, Complainant told Bruno that he had an argument with Medeiros who yelled at him, called him names, slapped him and fired him. Complainant also testified that he told Bruno that Florestal witnessed the incident. Bruno told Complainant that Medeiros had not fired him on July 6, 1998. (Respondent's Exhibit No. 4).

29. Bruno testified that Complainant told her that Medeiros was very upset, called him a "fbmf Haitian," grabbed his chin and squeezed it. Bruno also testified that Complainant told her that there were no witnesses to the incident. Complainant denied telling Bruno that Medeiros had grabbed him in the face or that he "touched him by rubbing his index finger against his mouth." I credit Bruno's testimony.

30. Medeiros did not speak during the meeting and Bruno did not ask him any questions. The meeting lasted approximately 10-15 minutes. Complainant testified that, at the conclusion of the meeting, Bruno told him that she "didn't think that [the incident] happened." I do not credit Complainant's testimony.

31. Bruno testified that she had not reached any conclusions by the end of the day on July 7, 1997 because she had not completed her investigation. Bruno told Complainant that she would continue her investigation and planned to meet with Brown and other witnesses, if any. Bruno also set up another meeting with Complainant on July 8, 1997. Bruno told Complainant that she

and Medeiros would probably attend the next meeting and they wanted to discuss his job performance related to the linen distribution issue. Bruno also asked Complainant to bring an interpreter because he did not speak English well.

32. Bruno took notes of her meetings with Complainant, Medeiros, Florestal and Brown and the other employees she talked to on July 7, 1997. (Respondent's Exhibit No. 4). Bruno also prepared a memorandum, dated July 7, 1997, to memorialize her notes about her meeting with Complainant and Medeiros. (Respondent's Exhibit No. 4).

33. On July 7, 1997, Bruno and Trombley called Moran to tell him about Complainant's allegations. Moran told them that he wanted to investigate Complainant's allegations as soon as possible and asked them to arrange a date with Complainant for his interview. Bruno spoke with Moran later on July 7, 1997 and told him what she had learned from her meeting with Complainant and Medeiros. Bruno typed her notes and gave them to Moran prior to his meetings on July 10, 1997.

34. Later on July 7, 1997, Complainant called Bruno and told her that he could not meet in the morning on July 8, 1997 but indicated his availability to meet later along with his attorney. Bruno told Complainant that he would be meeting with Moran and Trombley. Bruno encouraged Complainant not to bring an attorney because she wanted an opportunity to resolve the issue. (Respondent's Exhibit No. 4).

35. On July 10, 1997, Moran met with Trombley at the Cape Codder to inform her that he was "on the property" and was starting his investigation. Moran and Bruno then jointly interviewed Brown,

Medeiros, Florestal and Paul. Moran took notes of their interviews but Respondent discarded them. Bruno did not recall interviewing Philogene or Joseph.

36. Florestal testified that he told Bruno that he saw Medeiros hit Complainant. Florestal also testified that Bruno told him to "tell the truth, don't lie" and that he shouldn't lie for Complainant. Bruno did not ask him to sign a written statement. I credit Florestal's testimony.

37. Moran and Bruno testified that Florestal told them that he heard loud voices and knew that there was an altercation but that "he had not seen anything." Bruno denied accusing Florestal of not telling the truth, admonishing him not lie for Complainant and saying she did not believe him. Moran testified that Paul said he also heard loud voices but did not see what happened between Complainant and Medeiros. Moran also testified that Paul told him that he was unable to tell him what was said during the altercation.

38. Moran testified that Medeiros denied that he struck Complainant or had any physical contact with him. Moran also testified that Medeiros told him that there were no witnesses to the incident.

39. On July 10, 1997, Moran and Trombley met with Complainant, his wife and his brother-in-law, John Murphy, who is an attorney, at the Cape Codder. Complainant testified that Murphy attended the meeting as his translator because he spoke French but was not serving as his attorney. The meeting lasted approximately 30 to 60 minutes.

40. Complainant testified that he told Moran and Trombley that Medeiros slapped him, called him derogatory names and fired him on July 6, 1997. Moran testified that Complainant told him that he was very upset because Medeiros had screamed at him, put his index finger up close to his face and told him to be quiet. Moran testified that Complainant was unable to give him the names of any witnesses who saw Medeiros touch him. I credit Moran's testimony.

41. During the meeting, Complainant told Moran that he wanted Medeiros fired but Moran refused. Complainant testified that when he told Moran that he did not want to remain in the housekeeping department, Moran offered him two options: work at another Respondent hotel in Braintree, Massachusetts, or file for unemployment insurance benefits. Complainant testified that he declined the transfer to the Braintree hotel because he did not have a car and he felt that Respondent was "punishing" him for Medeiros' actions while not "punishing" Medeiros. Complainant also testified that he asked Moran to transfer him to the Cape Cod Tara Sheraton Hotel but Moran told him that there were no suitable openings at the hotel.

42. Moran denied that he offered to transfer Complainant to a Braintree hotel. Moran testified that he asked Complainant whether he wanted to transfer to the Cape Codder's kitchen or banquet housekeeping functions or whether he wanted to collect unemployment insurance benefits. Murphy told Moran that Complainant would respond to Moran within seven days. On July 10, 1997, Moran prepared a memorandum to his file to document his meeting with Complainant. (Complainant's Exhibit No. 4). I credit Moran's testimony.

43. Bruno did not attend the meeting on July 10, 1997. While Bruno understood that her role in the investigation had ended as of July 10, 1997, she discussed the results of her preliminary investigation activities with Moran. Bruno also understood that Moran and Trombley intended to complete the investigation.

44. Moran did not believe Complainant's allegations and testified that he found no evidence, based on his investigation, to corroborate Complainant's allegation that Medeiros assaulted him on July 6, 1997. Respondent did not take any disciplinary action against Medeiros for his actions on July 6, 1997.

45. On July 14, 1997, Complainant visited Barry Conant, M.D., his primary care physician. During his visit, Complainant told Dr. Conant that Medeiros struck him and directed slurs at him. Complainant testified that he complained to Dr. Conant about feeling stress, unhappiness, sadness and not thinking clearly. According to his treatment notes, Dr. Conant prescribed Zantac, which Complainant had previously used for his sadness. (Complainant's Exhibit No. 3).

46. On July 22, 1997, Bruno sent a letter to Complainant, at Moran's request, because Complainant had not contacted Respondent as he and Murphy had promised during their meeting on July 10, 1997 and had not returned to work. In her letter, Bruno wrote that Moran and Trombley had not heard from Complainant and that they would treat him as a "voluntary resignation" unless he contacted "them" by July 25, 1997. (Complainant's Exhibit No. 1). Moran testified that he recommended a three-day reply time for Complainant because it was consistent with Respondent's policy to treat an employee's "no show" after three days as a voluntary resignation.

47. On July 23, 1997, Complainant returned to Dr. Conant and requested medication to reduce his stress and make him less agitated or anxious. Complainant told Dr. Conant that he was stressed, agitated, frustrated, worried and "unhappy all of the time." Complainant was also concerned about his wife and his ability to provide for his family. Dr. Conant discontinued Complainant's Zantac medication and prescribed Prelosec. Complainant testified that Dr. Conant also referred him to two counselors on Cape Cod. (Complainant's Exhibit No. 3).

48. Complainant received Bruno's letter on July 25, 1997 and responded by letter, dated August 1, 1997. In his letter, Complainant stated that he did not resign his position and believed Medeiros had fired him on July 6, 1997. Complainant also wrote that he was afraid of Medeiros and did not want to return to his houseman's position or any other Cape Codder position where he would be working with Medeiros. (Complainant's Exhibit No. 2). Complainant did not receive a response, in writing or orally, to his letter from any Respondent or Cape Codder employee.

49. Moran read Complainant's letter, dated August 1, 1997, but did not reply. Moran testified that he treated Complainant's letter as a resignation under Respondent's "no-show" policy. (Respondent's Exhibit No. 4).

50. On July 25, 1997, Bruno prepared and signed a termination of employment form for Complainant that indicated he had resigned, i.e., that he had abandoned his job. (Respondent's Exhibit No. 5).

51. On November 6, 1997, Complainant filed a criminal complaint

for assault and battery against Medeiros in the Barnstable District Court. (Complainant's Exhibit No. 5). After a trial, a jury returned a not guilty verdict on all charges.

52. Complainant and his wife separated in February 1998 and they were divorced on March 1, 2001.

53. Complainant returned to Dr. Conant on December 29, 1998. Complainant testified that he returned to Dr. Conant because of the "break up" with his wife. Complainant also told Dr. Conant that he had emotional problems--he was crying and experiencing "rage." (Complainant's Exhibit No. 3).

54. Complainant next visited Dr. Conant on January 4, 1999. He told Dr. Conant that he was separated from his wife because of his "increased anger" and that she had obtained a restraining order against him. In his notes, Dr. Conant also reported that Complainant had threatened suicide twice. (Complainant's Exhibit No. 3).

55. On July 19, 1999, Dr. Conant referred Complainant to Robert Alexander, PhD, for counseling related to Complainant's "situational anxiety." (Complainant's Exhibit No. 3). Complainant testified that he met with Dr. Alexander.

56. Complainant testified that he had not received counseling for any emotional problems prior to his altercation with Medeiros. Complainant also testified that his marriage was "awesome" prior to his altercation with Medeiros.

57. Complainant worked at the International Inn while he worked at the Cape Codder. Complainant applied for work at Star Market

and K-Mart after he leaving the Cape Codder but did not obtain a position. Complainant worked in the housekeeping department at the Cape Cod Hospital from November 10, 1997 until an unspecified date. Complainant worked over 80 hours a week at the Cape Cod Hospital and his pay rate was \$10.50 an hour.

58. Since 1999, Complainant has worked as a certified nursing assistant at the Mayflower Place. Complainant did not submit any evidence regarding his pay rate or hours of work at the Mayflower Place.

59. Complainant testified that he felt insecure, afraid and uncomfortable when he saw Medeiros in the hearing room.

60. Bruno testified that all managers had anti-discrimination training. Respondent's handbook stated that Respondent is committed to a positive workplace that is free from discrimination. Respondent's employment guidebook provided, in part, that employees are encouraged to talk to their supervisor, their executive vice president or Mr. Flatley, the owner, if they felt that Respondent's employment opportunity policy was not being applied properly. (Respondent's Exhibit No. 4).

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent discharged him on July 25, 1997 because of his race, color and national origin and in retaliation for his participation in protected activity, i.e., his oral complaint to Respondent that Medeiros directed a derogatory racial comment at him and slapped him on July 6,

1997.³ Massachusetts General Laws, Chapter 151B, §4, paragraph one, provides that it shall be an unlawful practice for an employer, because of an individual's race, color or national origin, to "refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or terms, conditions or privileges of employment, unless based on a bona fide occupational qualification."

Massachusetts General Laws, Chapter 151B, §4, paragraph four, prohibits an employer from retaliating against an employee who has participated in protected activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." See Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208, 215 (2000), citing Bain v. Springfield, 424 Mass. 758, 765 (1997). In addition, Chapter 151B, §4, paragraph 4(A) makes it unlawful "[f]or 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." Retaliation is a separate and independent claim of discrimination, "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful [employment] practice." See Pontremoli v. Spaulding

³I do not credit Complainant's testimony that Medeiros fired him during their altercation on July 6, 1997.

Rehabilitation Hospital, 51 Mass. App. Ct. 622, 625 (2001); Abramian v. President & Fellows of Harvard, supra.; Fountas v. Medford Public Schools, 22 MDLR 264 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of an unlawful motive based on Complainant's race, color, national origin or retaliation for participation in prior protected activity, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).⁴ See also Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001)(Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation); Abramian v. President & Fellows of Harvard College, 432 Mass. 104 (2000); Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

A. Discrimination Based on Race, National Origin and/or Color

To establish a prima facie case of discrimination based on his race, national origin and/or color, Complainant must prove

⁴Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

by a preponderance of credible evidence that (1) he is a member of a protected class(es) based on his race, national origin and/or color; (2) he was adequately or capably performing the duties of his houseman position on July 25, 1997; (3) Respondent discharged him on July 25, 1997 and/or subjected him to an adverse employment action; (4) he was replaced by someone not of his protected class(es) or was discharged under circumstances that give rise to a reasonable inference of unlawful discrimination based on his race, national origin and/or color. Abramian, 432 Mass. 107, 116-118 (2002); Massachusetts Commission Against Discrimination & Lewis v. Boston Public Health Commission, 25 MDLR 353 (2003); Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003).

If Complainant establishes a prima facie case of unlawful discrimination based on his race, color and/or national origin, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason(s) for his discharge. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, 432 Mass. at 116-118. If Respondent meets its burden of production, Complainant must then show by a preponderance of the evidence in the record that Respondent's proffered reason(s) was not the real reason for his discharge and that Respondent acted with a discriminatory intent, motive or state of mind based on his race, color and/or national origin. See Lipchitz, 434 Mass. at 504; Blare v. Husky, 419 Mass. 437, 443 (1995). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Respondent] for making the adverse decision is false." Lipchitz, supra. Complainant retains the ultimate burden of proving that his discharge was the result of a discriminatory

animus based on his race, color and/or national origin. Id.; Abramian, 432 Mass. at 117.

Based on the totality of evidence in the record, I find that Complainant has met three elements of his prima facie case for an unlawful termination. As a black Haitian, Complainant is a member of a protected class(es) under Chapter 151B based on his race, color and national origin. The credible evidence in the hearing record also established that Complainant was a satisfactory employee who adequately performed his houseman duties at the Cape Codder until his altercation with Medeiros on July 6, 1997. Finally, it is undisputed that Respondent discharged Complainant when he failed to contact Moran or Trombley by July 25, 1997, as requested by Bruno.

However, Complainant did not produce any evidence to show that Respondent replaced him with an individual who was not of Complainant's protected class(es) or that it discharged him under circumstances that give rise to an inference of unlawful discrimination based on his race, color and/or national origin. Abramian, 432 Mass. at 116. In addition, Complainant did not allege or prove that Bruno made any comments that evinced a discriminatory animus based on his race, color and/or national origin. I find that Medeiros' alleged references to Complainant and the Haitian houseman as "you people" are ambiguous, at best, and are insufficient in the absence of additional evidence of derogatory comments, to establish an unlawful discriminatory animus. See Adams v. Mount St. Vincent Nursing Home, 19 MDLR 123 (1997). I also do not credit Complainant's testimony that he complained to Bruno about Medeiros' alleged negative actions and/or derogatory comments prior to July 6, 1997.

While I find that Medeiros "slapped" Complainant or had physical contact with him during their altercation on July 6, 1997, I do not credit Complainant's testimony that Medeiros referred to him with a derogatory racial or ethnic slur. Rather, I fully credit Forestal's testimony that he saw and/or overheard the altercation and did not hear Medeiros make any comments to Complainant that were based on his race, color and/or national origin.⁵ Even if Medeiros had directed a racial slur toward Complainant on July 6, 1997, which I do not find, Complainant did not prove that Medeiros participated in or was involved in any manner in Respondent's decision to discharge him. See e.g., Mole v. University of Massachusetts et. al., 441 Mass. 582, 598 (2004)(despite a retaliatory or discriminatory animus on the part of a supervisor who recommends some adverse action be taken against an employee, a third person's independent decision to take an adverse action breaks the casual connection between the supervisor's retaliatory animus and the adverse action); Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003)(an employment decision may still be unlawful if a discriminatory animus was a "material and important ingredient" in the decision-making calculus). Medeiros' comment, if made, is more properly characterized as a "stray remark" made by an employee who was not a decision-maker in this complaint. Wynn & Wynn, 431 Mass. at 667 (stray remarks

⁵Given my finding that Medeiros did not direct a derogatory racial or ethnic slur toward Complainant, I also conclude that Complainant did not establish that Respondent subjected him to a hostile work environment based on his race, color and/or national origin. See Rogers & Massachusetts Commission Against Discrimination, ___ MDLR ___ (2005)(while staff occasionally used racially derogatory language an offensive racial imagery, such practices were not sufficiently frequent or widespread to constitute a racially hostile work environment as a matter of law; Scionti v. Eures Dining Services, 23 MDLR 234 (2001)(isolated, sporadic events do not create an abusive workplace).

in the workplace include statements by persons without the power to make employment decisions, and statements made by decision-makers unrelated to the decisional process); Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., supra.

Finally, the workforce profile at the Cape Codder during the relevant time period undercuts Complainant's assertion that Respondent acted with a discriminatory intent based on race, color or national origin. There was no dispute that all of the houseman who worked at the Cape Codder were Haitian, including Complainant's brother. Stephan and Massachusetts Commission Against Discrimination, supra. (evidence showed that employer retained or hired other employees who were older than Complainant). In addition, Complainant did not submit any evidence to show that Respondent treated other houseman differently because of their race, color and/or national origin regarding the terms and condition of their employment. For the reasons discussed above, I conclude that Complainant has not established a prima facie case of a discriminatory discharge based on his race, color and/or national origin. See e.g., Massachusetts Commission Against Discrimination & Lewis v. Boston Public Health Commission, supra.

Assuming arguendo that Complainant established a prima facie case of a discriminatory discharge based on his race, color and/or national origin, I conclude that Respondent has produced a legitimate, non-discriminatory reason for Complainant's termination. I find that Respondent discharged Complainant because he violated its "no show" policy when he failed to contact Respondent within three days upon his receipt

of Bruno's letter, dated July 22, 1997. (Complainant's Exhibit No. 1).

As discussed herein, I also find that Complainant did not produce any evidence to establish that Respondent's proffered reason was not the real reason for his discharge and that Respondent acted with a discriminatory intent, motive or state of mind based on his race, color and/or national origin. There is no dispute in the record that Complainant received Bruno's letter and failed to timely respond. There is also no evidence that Respondent treated other "no show" employees, not of Complainant's protected classes, differently regarding their failure to contact Respondent, as in Complainant's case. In addition, I credited Moran's testimony that, prior to Complainant's discharge, he offered Complainant an alternative position at Respondent that did not require him to work with Medeiros, which position Complainant summarily rejected.

B. Retaliation Claim

The Commission and courts broadly interpret Chapter 151B's anti-retaliation provision to apply to both informal and formal actions opposing unlawful employment practices. See e.g., Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999). The anti-retaliation provision applies to instances where an individual participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). "Participation" includes a formal action such as filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. Massachusetts Commission Against Discrimination & Ramos v. New World Security Associates, Inc., 26 MDLR 173 (2004). The anti-retaliation provision also covers

a variety of pre-charge and non-charge conduct, including instances where a complainant has orally "opposed" an unlawful employment practice or action under Chapter 151B (the "opposition" clause). See Clark County School District v. Breeden, 532 U.S. 286 (2001)(complaints may consist of internal complaints or formal charges of discrimination). The statutory protection against employer retaliation extends, therefore, to "informal voicing of complaints" alleging discrimination. Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990). For example, the Commission has found liability for unlawful retaliation when an employee complained about unlawful discrimination, but did not file a formal discrimination charge. Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999). To be sufficient, the oral complaint must be sufficiently detailed to put an employer on notice of possible unlawful conduct. Massachusetts Commission Against Discrimination & Donovan-Rizzo v. Delta Air Lines, 25 MDLR 284 (2003); Rosmen v. Schepps, 24 MDLR 350 (2002).

Complainant contends that Respondent discharged him on July 25, 1997 in retaliation for his informal complaint about Medeiros' alleged racial slur directed at him and slapping him in the face. To establish a prima facie case of unlawful retaliation in the absence of direct evidence of a retaliatory motive, as in this case, Complainant must show by credible evidence that: (1) he participated in protected activity; (2) Respondent knew about Complainant's participation in protected activity prior to discharging him; (3) Respondent subjected

Complainant to an adverse employment action(s)⁶ after he participated in protected activity; (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and Respondent's adverse employment action(s). Mole v. University of Massachusetts et. al., supra.; Hudson v. Pembroke/ Hanover Elks Lodge, et. al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995). To qualify for protection under Chapter 151B, the manner in which an employee "opposes" an allegedly discriminatory act or practice must also be reasonable. Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp 318 (D. Mass. 1976).

As discussed above, the first element of Complainant's prima facie case based on unlawful retaliation requires him to establish by credible evidence that he participated in a protected activity within the meaning of Chapter 151B, i.e., that he "opposed" an unlawful employment practice when he orally complained to Bruno about Medeiros' alleged racial slur and physical contact. To satisfy this element, Complainant is not required to ultimately prove his allegation that Medeiros harassed him or unlawfully discriminated against him based on his race, color and/or national origin. Under Commission guidelines and decisions, Complainant may prevail on his retaliation claim even though he has failed to prove his underlying claim of unlawful discharge, as discussed

⁶Complainant must show, as part of his prima facie case, that he suffered an adverse employment action after his oral complaint. This element requires a showing that Respondent took "something of consequence" from Complainant such as a reduction in salary and/or grade or a change in objective terms and conditions of employment that "materially disadvantage[d]" or threaten[ed] to disadvantage Complainant. See e.g., Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997)(a threat to "get rid of" a complainant is retaliatory under Chapter 151B but behaving coldly and conveying hostile body language is not); MacCormack v. Boston Edison, 423 Mass. 652, 663 (1996)(a change in work assignments is not retaliatory).

above. Abramian v. President & Fellows of Harvard College, supra.; Bain v. Springfield, 424 Mass. 758, 765 (1997); Massachusetts Commission Against Discrimination, Neumann and Patryn v. Red Rocks Pizza and Rizos, 25 MDLR 261 (2003); Commission's Sexual Harassment in the Workplace Guidelines, Section IX.A. (2002)(a complainant "need not prevail on a sexual harassment claim to prove a retaliation claim"). However, Complainant must prove that he "reasonably and in good faith" believed that Respondent was] engaged in unlawful discrimination and that [he] acted reasonably in response to [his] belief." Massachusetts Commission Against Discrimination & O'Brien v. City of Lynn School Department & Mazareas, ___ MDLR ___ (2005).

I conclude that Complainant failed to establish a prima facie case of unlawful retaliation in this matter. I conclude that Complainant's internal complaint made against Medeiros after the incident on July 6, 1997 did not constitute "protected conduct" as no reasonable person under the circumstances would believe that Medeiros' conduct constituted unlawful discrimination based on Complainant's race, color and/or national origin.⁷ Massachusetts Commission Against Discrimination & O'Brien, supra.; Massachusetts Commission Against Discrimination & Tinkham v. The Flatley Company, et. al., ___ MDLR ___ (2004)(an internal sexual harassment complaint did not constitute "protected conduct" where the complainant entirely fabricated his allegations). As discussed above, I concluded that Medeiros did not direct a derogatory comment or remark at Complainant during their altercation. In addition, Complainant did not produce any witnesses to corroborate his

⁷I note also that Complainant's return to the housekeeping office after taking to Brown to meet with Medeiros a second time is inconsistent with his contention that he reasonably believed that Medeiros' earlier actions established a hostile work environment.

allegation regarding a racial or ethnic slur although it is unlikely, based on his testimony, that other employees would not have seen or overheard the incident at issue.⁸ To the contrary, Complainant's co-worker credibly testified that he did not see or hear Medeiros make any comments based on Complainant's race, color or national origin during their confrontation. I further conclude that Complainant did not possess a good-faith belief that Medeiros engaged in unlawful discrimination based on his race, color or national origin, but instead conclude that he filed his complaint based on his apparent interpersonal conflict with Medeiros. While Medeiros' conduct was inappropriate and unprofessional, there is no credible evidence that the altercation with Complainant resulted from Medeiros' discriminatory conduct, animus or motivation. I therefore conclude that Complainant's complaint did not constitute protected activity and conclude that Respondent did not engage in unlawful retaliation.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby order that the complaint in this matter be dismissed. This decision constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition of Review with the Full Commission within thirty (30) days of receipt of this Order.

⁸ I also find that Respondent conducted a timely and thorough investigation and reasonably concluded that Medeiros did not direct a derogatory racial remark to Complainant.

SO ORDERED this 2nd day of September 2005.

KENNETH B. GROOMS

Hearing Officer