

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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CLIFFORD MUFF and )  
MASSACHUSETTS COMMISSION )  
AGAINST DISCRIMINATION )  
Complainant )  
)  
v. ) No. 97-BEM-2850  
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THE STOP & SHOP )  
SUPERMARKET COMPANY, )  
Respondent )  

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Appearances:

Thomas J. Canavan, Esquire, for Complainant  
Julie C. McCarthy, Esquire, and Lisa Damon, Esquire, for  
Respondent Stop & Shop Supermarket Company

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about June 20, 1997, Complainant Clifford Muff filed a complaint with the Commission that charged Stop & Shop Supermarket Company (hereafter: "Respondent") with discrimination on the basis of his race and color (African-American) in violation of Massachusetts General Laws, Chapter 151B, §4. Complainant alleged that

Respondent unlawfully discharged him on or about January 9, 1997 rather than taking disciplinary action against a co-worker who allegedly verbally and physically abused him on December 29, 1996. (Complaint, dated June 20, 1997).

Attempts to conciliate this matter were unsuccessful. On September 11, 2002, Investigating Commissioner Walter J. Sullivan, Jr., certified this case for a public hearing.

I held a public hearing in this case on June 16-20, 2003. On October 3, 2003, Respondent filed its proposed findings of fact and conclusions of law with the Commission.<sup>1</sup>

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.

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<sup>1</sup>Complainant did not file his proposed findings of fact or conclusions of law as of the date of this decision.

## II. FINDINGS OF FACT

1. Complainant Clifford Muff, Jr., is an African-American male who lives in Brockton, Massachusetts. Complainant is married and has two children.
  
2. Complainant was born in Fort Wayne, Indiana, and grew up in Union Town, Alabama. Complainant graduated from Robert C. Hatch High School and studied for two years at Alabama State University. Complainant moved to Boston in 1982 or 1983.
  
3. In December 1996, Respondent operated a warehouse that was located in the Readville section of Boston, Massachusetts. The warehouse included administrative offices, a commissary, a dairy plant, and Respondent's produce, grocery and trans-shipping departments. The commissary was a manufacturing facility where employees cooked and processed various meats, prepared salads, cut and wrapped various cheeses for delivery to "delis" located in Respondent's grocery stores. The dairy plant was a fluid milk bottling facility that was connected to the commissary. In the trans-shipping department, Respondent's employees processed juices, candy, meats and assorted goods. The office for the trans-shipping department was located directly next to Respondent's loading docks.
  
4. During the time period relevant to this complaint, Respondent employed approximately 60 to 70 employees in the dairy plant, 90 to 110 employees in the commissary and 18 to 20 employees in the trans-shipping department. The commissary operated Monday through Friday with production

on first and second shifts. The dairy plant operated six days a week on a 24 hour schedule. In 1996, employees worked four 10-hour days each week in the trans-shipping department.

5. The workforce in the Readville facility was racially diverse, and included Caucasians, African-Americans, Hispanics and Cape Verdeans although the management staff was primarily white.

6. At all times relevant to the instant complaint, Respondent was an employer within the meaning of Massachusetts General Laws, Chapter 151B, §1, paragraph 5.

7. Complainant worked for Respondent from November 30, 1987 until January 13, 1997 when Respondent discharged him. When he was terminated, Complainant's hourly rate was \$12.15. (Complainant's Exhibit No. 1).

8. From November 30, 1987 until April 3, 1990, Complainant worked on the meat, salad and water lines in the commissary. In his commissary position, Complainant packaged meat in plastic wrapping and stacked bottles on pallets for shipment to Respondent's retail stores. (Complainant's Exhibit No. 1).

9. From April 4, 1990 until January 13, 1997, Complainant worked as a warehouse selector in the trans-shipping department.<sup>2</sup> (Complainant's Exhibit No. 1). Using a forklift loader, Complainant picked up juices that various

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<sup>2</sup>During various periods in 1992-1994, Complainant did not work and received workers' compensation benefits from Respondent. (Complainant's Exhibit No. 1).

drivers had unloaded from outside "over the road" trucks and deposited on the delivery platform. Complainant "selected" juices, placed them onto pallets and loaded them onto racks that included up to nine pallets of juice. Complainant then loaded the pallets onto trucks for delivery to various Stop & Shop stores. Complainant loaded the pallets onto the trucks after the dairy employees loaded their dairy products. (Complainant's Exhibit No. 2). The dairy plant and trans-shipping department maintained their own high and low forklifts.

10. During the last five years of his employment at Respondent, Complainant worked in the trans-shipping department on the midnight to 10:30 a.m. shift, four days per week (10 hours a day excluding lunch). He often worked two to four hours overtime per night. In the trans-shipping department, a second shift of ten workers reported for duty at 3:00 a.m. and a third shift of three workers reported for duty at 7:00 a.m.

11. Danny Collins was Complainant's direct supervisor in the trans-shipping department. Collins began his shift at 8:00 or 9:00 a.m. Depending on his shift, Complainant's foremen were Peter McGillick, Andrew Mulvey or Jim Lopes who reported for work at 3:00 a.m. Complainant reported to a supervisor in the dairy plant whenever there was no supervisor or foreman in the trans-shipping department—generally between 12:00 a.m. and 3:00 a.m.

12. During the time period relevant to the instant complaint, Teamsters Local No. 829, represented employees in the commissary and trans-shipping departments and

Teamsters Local No. 25 represented dairy employees. (Complainant's Exhibit No. 3). The collective bargaining agreement between the Stop & Shop Manufacturing Division and Local 829, effective January 22, 1995, did not include a progressive discipline policy or procedure. (Complainant's Exhibit No. 3).

13. Beginning in 1993 or 1994, Complainant served as a union steward for Local 829. When Respondent determined that overtime hours were required in the trans-shipping department, Complainant had to inform the workers in the trans-shipping department and arrange to meet the overtime call according to seniority. Employees also contacted Complainant if they had problems with management that were covered by the collective bargaining agreement and he contacted the business agents for Local 829 and filed grievances. In 1996 and 1997, Danny McLaughlin and Arthur Lazzaro were the business agents for Local No. 829.

14. From 1986 to 2000, Samuel Wolman worked for Respondent as a production manager in the commissary and as a manager in the dairy plant. In 1996, Respondent promoted Wolman to the position of director of manufacturing. In this position, Wolman directly supervised the manager of the dairy plant and the supervisor of the trans-shipping department. Wolman reported to Charlie Arbing, a vice president for Respondent.

15. From June 1995 to October 1997, Warren Richards worked as a personnel representative at the Readville facility. Richards recruited, interviewed candidates for bargaining unit clerical non-exempt positions and administered the

pre-placement testing process that included a physical examination, a drug test and a strength test. Richards was responsible for the dairy, commissary, a recycling center, a drug distribution center and the trans-shipping, produce and grocery departments. He also acted as a liaison between employees and other departments within Respondent on payroll and personnel matters. Richards reported to Paul Fleming. Richards was born in Jamaica and his father was a black Jamaican.

16. Edward DeVito has worked for Respondent since October 1986. Beginning in 1991, DeVito supervised approximately 100 employees in the dairy plant and reported directly to Wolman.

17. In 1996, Joseph Gagne worked in the dairy plant and reported directly to DeVito.

18. During 1996 and 1997, Arlindo Andrade worked in the commissary. Andrade last worked for Respondent in June 2000 as selector in the grocery warehouse. Andrade has not worked since June 2000 because of back problems. Andrade is Cape Verdean.

19. From 1986 to 1996, Timothy M. Bradshaw, an African-American, worked in the commissary and the trans-shipping and produce departments. Bradshaw last worked in the trans-shipping department with Complainant and Ernesto (Ernie) Diaz, another selector, on the midnight to 10:00 a.m. shift. Bradshaw also served as a union steward and an

assistant steward. Bradshaw left Respondent prior to December 29, 1996.<sup>3</sup>

20. During the time period relevant to the instant complaint, Ann Carota worked as a clerk in the trans-shipment department. Carota worked from 4:00 a.m. until her duties were completed. Carota set up sequenced delivery appointments with the outside over-the-road truck drivers and prepared a daily schedule with an assigned delivery time for each truck. Carota kept a three-ring binder in Collins' office that included a computer print-out of the scheduled appointments and the shipments in each delivery truck. Complainant and other selectors used the log binder to load trucks that arrived at the loading dock between midnight and 4:00 a.m.

21. From March 18, 1988 until July 1999, Anthony J. Martignetti worked as a machine operator in the dairy plant. Martignetti's last job in the dairy department was to operate a machine that packaged orange juice. Since his machine did not require a full daily production, Martignetti also served as a floater and performed miscellaneous duties, as assigned. Martignetti worked on the loading dock with Complainant almost every day and saw Complainant's interaction with other employees. Martignetti knew Bradshaw and interacted with DeVito, his direct supervisor, on a daily basis.

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<sup>3</sup>In 1992, the Commission dismissed Bradshaw's discrimination complaint filed against Respondent based on his race and disability.

Incident on December 29, 1996

22. During the summer and holidays, the trans-shipping department occasionally needed to "borrow" employees from the commissary to help with loading.<sup>4</sup> Once Collins determined that the trans-shipping department needed additional workers, he instructed Complainant to tell Jim Beggan, the commissary's shop steward, who then asked commissary employees to work overtime in the trans-shipping department in order of seniority.

23. Under Respondent's policy, workers who worked overtime in the trans-shipping department were expected to remain on the job until all loading was completed for the day. Respondent maintained this requirement because deliveries had to leave the Readville facility by a time certain each day to ensure that Respondent's grocery stores had sufficient products.

24. On December 7, 1996, Kraft posted a notice outside of the trans-shipping office. The notice informed all trans-shipping employees that they were required to "stay to select" until the deliveries for western Massachusetts and the "city load ups" were completed. (Complainant's Exhibit No. 7). Respondent posted the notice to address prior problems with overtime workers who refused to remain in the trans-shipping department until all loading was fully completed.

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<sup>4</sup>The trans-shipping department did not seek dairy employees to work overtime because they were in a different union local.

25. A few days prior to December 29, 1996, Beggan asked Andrade if he was interested in working overtime in the trans-shipping department on December 29, 1996.<sup>5</sup> Andrade testified that he initially declined Beggan's offer because he had no experience working in the trans-shipping department and did not know how to perform the selector's job duties. At Beggan's request, Diaz agreed to train Andrade regarding a selector's job duties and Andrade then accepted the overtime assignment for December 29, 1996. Andrade testified that Beggan told him to report for overtime work in the trans-shipping department at 2:00 a.m. on December 29, 1996, and to work for 10 hours. Andrade testified that he reported for work in the trans-shipping department at 1:00 a.m. on December 29th. I credit Andrade's testimony.

26. On December 28, 1996, Complainant reported for overtime work at 10:30 p.m. After arriving at work, Complainant became ill with a sore throat and went to Milton Hospital for treatment. Milton Hospital is located approximately 15-20 minutes from the Readville facility. Complainant arrived at the emergency room at 12:54 a.m. and the hospital discharged him at 1:35 a.m. on December 29, 1996. (Complainant's Exhibit No. 8).

27. When Complainant returned from Milton Hospital shortly before 2:00 a.m., he saw Diaz and Andrade working in trans-shipping department. Aside from Complainant, they were the only workers in the trans-shipping department at that time. Complainant approached Diaz and asked him if Andrade knew

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<sup>5</sup>I credit Wolman's testimony that the Christmas holiday week was the highest volume period for Respondent.

that he needed to "stay to finish" until the work was finished. Diaz told Complainant to ask Andrade directly if he knew about the work completion rule. Complainant repeated his question to Andrade who told him that Beggan had instructed him to work for 10 hours—from 2:00 a.m. to noon. Andrade testified that Complainant then told him that, "Jim Beggan doesn't know mother-fucking shit," and that Andrade should go home immediately if he was not going to "stay to finish" the work. Andrade replied by telling Complainant that he was planning to stay and work for 10 hours, as instructed by Beggan. I credit Andrade's testimony.

28. Complainant then told Andrade that, if he did not want to stay until the work was completed, he should leave the trans-shipping department and go home before the rest of the workers arrived later in the shift. Complainant testified that he was concerned that when employees with more seniority came on, they would be angry to see Andrade, who had little seniority, leave before the senior union employees left. Complainant also testified that Andrade started "getting loud," swore at him and called him a "nigger." I do not credit Complainant's testimony.

29. Complainant did not have the authority to send Andrade home on December 29, 1996.

30. After his initial meeting with Andrade and Diaz, Complainant walked away and Diaz continued to train Andrade. Complainant then returned and told Diaz to stop training Andrade. Complainant twice referred to Andrade when he told Diaz that he should not "teach this nigger how

to select." Andrade replied by asking Complainant, "What (sic) are you call(ing) a nigger?" Andrade also told Complainant that he should "look in the mirror." I credit Andrade's testimony that he did not call Complainant a "nigger."

31. I do not credit Complainant's testimony that Andrade became loud and started to swear at him during their second meeting. I also do not credit Complainant's testimony that Andrade called him a "nigger" two or three times during their second altercation and threatened to kill him.

32. After the altercation, Complainant found Steven Gosine, the dairy manager, brought him over to Andrade and Diaz, and told Gosine what Andrade had allegedly said to him. Complainant asked Gosine to remove Andrade from the area, but Gosine replied that he had no authority because he worked in the dairy department. Complainant testified that Gosine also told him that he had to report the incident to a commissary supervisor who did not report to work until 6:30 or 7:00 a.m. After talking with Gosine, Complainant returned to unloading trucks.

33. After the second exchange between Complainant and Andrade, Diaz acceded to Complainant's order and stopped training Andrade on how to select juice. Diaz resumed his training activities when Andrade told him that he intended to stay in the trans-shipping department for ten hours even if Diaz refused to train him.

34. When Diaz resumed training Andrade, Complainant returned a third time and began to argue with Andrade.

Complainant told Andrade to "get out" and "go home."  
Complainant also told Andrade, "Come outside. We're (sic) going to kick your ass." Andrade told Complainant that he did not want to fight him and that he would not fight on "company" time. Diaz interceded and told Complainant to stop arguing with Andrade. Complainant then left their area.

35. Shortly thereafter, Complainant again returned to the trans-shipping department and confronted Andrade who was then working alone. Andrade testified that Complainant came towards him with his hands in his coat pocket and said, "I told you to go home. I don't want you here." Andrade told Complainant, "Why don't you get out of here? Let me do my job." Andrade testified that Complainant moved very close to him and came within six inches of his face. When Complainant began to take his hands out of his pocket, Andrade testified that he grabbed and pushed Complainant because he was concerned that Complainant had a knife or gun. Complainant fell, got up and went into the trans-shipping office to make a telephone call while Andrade continued to work. I credit Andrade's testimony.

36. Shortly thereafter, Complainant circulated among the trans-shipping employees who had reported to work at 3:00 a.m. to sign them up for overtime that was scheduled for the following week. Complainant began to argue again with Andrade and told him that he intended to "kick his ass" at Meadow Road—an off-site location. Andrade testified that Complainant then pushed a box of orange juice toward him and he pushed it back to Complainant who kicked it. Andrade also testified that he called Diaz and asked him to

tell Complainant to leave because he was nervous. I credit Andrade's testimony.

37. I do not credit Complainant's testimony that Andrade swore at him, called him a "nigger" and threatened to kill him during their final altercation. I also do not credit Complainant's testimony that Andrade threw a 96-ounce box of juice at him on two separate occasions during their altercation.

38. After the final altercation, Complainant went downstairs and again looked for Gosine. Complainant told Mulvey about the first incident with Andrade and that he was going to leave. Complainant then called the dairy office and left a message for the dairy supervisor that he was going home because Andrade had called him a "nigger" and had thrown juice at him. Complainant changed his clothes, punched out between 4:00 and 5 a.m. and went home. Complainant was not scheduled to work on the following day.

39. About 3:00 a.m., Diaz told Andrade that Complainant had gone home. Andrade testified that he left the trans-shipment department before he completed his 10 hour shift because he was "sick to his stomach" and was afraid of Complainant after Complainant's threat to fight him on Meadow Road. I credit Andrade's testimony.

#### Respondent's Investigation

40. Richards and Wolman first learned of the December 29<sup>th</sup> incident shortly after it occurred. Richards reported the incident to Fleming and met with Wolman concerning

Complainant's telephone message. Wolman and Richards decided to investigate the incident because of the allegations of racial slurs and threats of violence. They immediately suspended Complainant and Andrade and began their investigation.

41. During their investigation, Richards and Wolman interviewed Complainant and Andrade about the incidents on December 29th. At Wolman's request, Complainant also gave them a written statement, dated January 8, 1997, that described his version of the December 29<sup>th</sup> incident. (Complainant's Exhibit No. 15). Andrade did not give a written statement to Richards or Wolman regarding the altercations on December 29th.

42. Shortly after December 29th, Richards also interviewed Diaz as part of the investigation. Richards testified that Diaz told him that Andrade did not start the fight with Complainant and that he never heard Andrade call Complainant a "nigger" on December 29th.<sup>6</sup> Richards testified that Diaz also told him that he would not discuss what happened with any other employee and would not testify at a hearing. Richards testified that Diaz told him that he "wanted to stay out of it" and that he "just wanted nothing to do with it." Richards also testified that he informed Fleming and Wolman about Diaz's account of the December 29 incident and advised them that it was

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<sup>6</sup>Contrary to his statement to Wolman, Diaz testified, as a union witness, at Complainant's arbitration hearing. Diaz testified that he remembered that Andrade called Complainant a "nigger" twice during their initial altercation. (Respondent's Exhibit No. 1, pages 10-11). I note, however, that the arbitrator did not credit Diaz's testimony that Complainant was the "innocent party." I also believe Richards testimony, as did the arbitrator, regarding what Diaz told him immediately after the incident; specifically that Andrade did not use the term, "nigger" and did not instigate the incidents on December 29th. (Respondent's Exhibit No. 1, pages 27-28).

consistent with Andrade's version. I credit Richards' testimony.

43. Richards recommended to Wolman that he terminate Complainant based on his actions on December 29th. Richards testified that he believed Complainant "incited and inflamed" the incidents on December 29th and that he had no reason to disbelieve Andrade's account based on the information that Diaz gave him. Richards testified that he also based his discharge recommendation on his knowledge of three separate incidents or altercation during the prior 12-15 months that involved Complainant's inappropriate conduct or behavior with other employees, including James Lopes, Nellie Gomes and Mike McCormick. I credit Richards' testimony.

44. Richards testified that, in early 1996, he learned about a confrontation between Complainant and Lopes during which Lopes claimed that Complainant deliberately broke his radio. Complainant told Richards that he did not deliberately break Lopes' radio and offered to pay 50% of the replacement cost. Richards did not issue a disciplinary Form 191 to Complainant concerning this incident.

45. Based on their investigation, Wolman and Richards concluded that the incidents on December 29th were not racially motivated although they were serious incidents. They believed Complainant's conduct and actions warranted his discharge because they involved intimidation, threats of physical violence against Andrade and his improper interference with Andrade's work performance. Wolman also

testified that he did not believe Complainant's version that Andrade was the aggressor on December 29th. Wolman denied that he discharged Complainant to "relieve racial tension," as alleged by Complainant. I credit Wolman's testimony.

46. In making his decision to discharge Complainant, Wolman testified that he knew about and considered additional incidents that involved Complainant's alleged intimidation of or threats during 1995 and 1996. These incidents included the following: (1) during the investigation, Wolman learned from Collins that Nancy Ryan, a clerk who worked in the trans-shipping department, was upset and had a confrontation with Complainant when he told her that she could not talk to the male employees in the trans-shipping department; (2) sometime in 1996, Wolman learned about an incident during which Complainant refused to return the scheduling log book to Carota despite three requests, stood over her and held the log book over her head and out of her reach. While Complainant did not threaten Carota and she was not physically injured during their altercation, I credit Carota's testimony that Complainant taunted her to the point where she called Respondent's security office for assistance. Wolman directed Complainant to stay out of the trans-shipping office and Respondent agreed to place a photocopy of the log book sheet outside the trans-shipping office for the selectors to use; (3) during the investigation, Wolman also learned from DeVito that he had multiple arguments and incidents with Complainant over a period of years and that Complainant had threatened and intimidated him while he worked on the dairy dock loading trucks.

47. During Wolman's investigation, DeVito also told him that other employees in the dairy department, including Victor Medina, Gary Gagne, Muchael Flossi and Gordon Robbins, had complained to him, in his capacity as a supervisor, about Complainant's intimidation and verbal threats in 1995-1996.<sup>7</sup> DeVito also testified that he told Wolman that Medina refused to work near Complainant because of the number of arguments they had on the delivery dock. I credit DeVito's testimony.

48. Gagne testified that he told DeVito, in 1995 or 1996, that Complainant had abruptly snapped off the battery cable and cut power to a forklift that he was driving. Gagne testified that when he told Complainant, "what the hell are you doing," Complainant responded by telling him, "I run Trans-shipping. If you don't like it, I can take care of it with my boys, or we're going to go down Meadow Road and settle this. I know where you hang around." Gagne also testified that Complainant gestured in his coat pocket as he made these comments, as if he had a weapon. I credit Gagne's testimony.

49. Complainant denied threatening Gagne and denied that he had a dispute with him about equipment. Complainant also denied threatening Medina and Robbins with a gun or knife, and denied threatening to shoot them or telling them that

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<sup>7</sup>At the arbitration hearing, Robbins testified that Complainant confronted him when he told him to load certain dollies with products. When Robbins refused, he testified that Complainant told him that "you are going to do it" and that "my boys will take care of you." (Respondent's Exhibit No. 1, pages 14-15). Medina testified, at the arbitration hearing, that Complainant confronted him in 1995-1996 about certain load bars that he asserted belonged to him. After Medina reported the incident to a supervisor, he testified that Complainant pointed a finger at him and said, "I'm going to meet you at Meadow Street and I am going to bring my gun." (Respondent's Exhibit No. 1, pages 13-14).

he would meet them at "Meadow Road." I do not credit Complainant's denials.

50. Wolman did not investigate the incidents reported by Ryan or DeVito prior to his decision to discharge Complainant.<sup>8</sup>

51. Wolman testified that he knew about the incident between Lopes and Complainant involving Lopes' radio prior to December 29th.

52. Wolman testified that he knew, prior to December 29th, about two written complaints filed against Complainant by two outside truck drivers in 1995. In one complaint, dated November 13, 1995, a trucker called Respondent's security office after Complainant allegedly threatened him with physical harm. The trucker also claimed that Complainant had previously threatened him. Complainant denied that he threatened the truck driver and testified that the driver had threatened him. Complainant also testified that he believed the driver had a personal relationship with Carota and received favorable treatment regarding scheduling. Wolman testified that he discussed this incident with Collins and Ohansesan, the security manager for the facility. (Respondent's Exhibit No. 2). After this incident, Respondent arranged for the outside driver to be barred from Respondent's load dock. I do not credit Complainant's testimony.

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<sup>8</sup>I do not credit Martignetti's testimony that DeVito repeatedly referred to Complainant and Bradshaw as a "nigger"

53. In a second written complaint, dated December 13, 1995, another outside driver alleged that Complainant ordered him to leave, followed him outside with a shovel and that he turned to see Complainant swing the shovel at him. (Respondent's Exhibit No. 3). Complainant testified that the driver always backed his truck into the delivery dock even when he arrived earlier than his appointment time. Complainant also testified that he once called security when the driver began yelling and swearing at him when he asked the driver to move his truck out of the delivery bay. Wolman testified that he discussed this incident with Collins. I do not credit Complainant's testimony.

54. Wolman testified that the two written complaints were placed in Complainant's personnel file but that Respondent did not take any action against Complainant because these were "one-person-swore-against-another" incidents. Wolman testified that Respondent took no action concerning these two complaints because it could not corroborate them.

55. On or about January 13, 1997, Complainant met with Harvey, Wolman, Collins, Richards, McLaughlin and Lazzaro. Andrade did not attend this meeting. During the meeting, Respondent told Complainant that he was terminated because he instigated the incident with Andrade on December 29, 1996. McLaughlin filed a motion to take the matter to arbitration.

56. Respondent discharged Complainant on or about January 13, 1997. (Complainant's Exhibit No. 1). After Complainant's termination, Wolman and Richards reinstated Andrade.

57. After Complainant's discharge, Local 829 filed a grievance on his behalf. The grievance proceeded to arbitration and an arbitrator held a hearing on July 1, August 28 and September 17, 1997 and January 30, February 23 and March 30, 1998.<sup>9</sup> Following the hearing, the arbitrator denied Local 829's grievance and ruled that Respondent discharged Complainant for just cause. (Respondent's Exhibit No. 1).

58. Wolman testified that, prior to Complainant's discharge, he terminated four employees for fighting, threats and/or intimidation: Mike Spry (Caucasian)--striking another employee in the trans-shipping department; Carlos Perez (Cape Verdean) and Martino Deniz (Portuguese)--crashing their cars into each other; Pericles Tavares (Cape Verdean)--sexual harassment.

#### Respondent's EEO and Anti-harassment Policy

59. At all times relevant to the instant complaint, Respondent maintained an EEO and anti-harassment policy that prohibited, among other things, harassment based on race and color. Respondent's EEO and anti-harassment policy also set out the procedures for filing or reporting a complaint. (Respondent's Exhibit No. 4).

60. Wolman testified that Respondent posted its EEO policy statement in its common areas and break rooms. Richards

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<sup>9</sup>Both parties were represented by attorneys at the arbitration hearing and submitted documentary evidence. In addition, 15 witnesses testified at the hearing. (Respondent's Exhibit No. 1).

testified that Respondent distributed its anti-discrimination and sexual harassment policy to all new employees in their new hire package and in training. Richards testified that he met with each shift in 1995 and 1996 and reviewed the EEO and anti-harassment policy with all shift employees. (Respondent's Exhibit No. 4). Wolman also testified that Respondent conducted annual training for supervisors and employees on all shifts regarding its anti-discrimination and sexual harassment policy. I credit their testimony.

61. Wolman testified that in 1993, Complainant and Bradshaw complained to Gabrielle Pineau, a personnel representative for Respondent, that they were not being assigned overtime because of their race. Respondent reviewed the employee time cards for the relevant period. Respondent determined that Complainant was eligible for overtime on four days but that the union stewards allocated the overtime in the trans-shipping department and it was not a management responsibility. It also determined that Bradshaw was not eligible during the period because he was unavailable because of restrictions due to industrial accidents. Wolman discussed the issue with Pineau who prepared a memorandum, dated March 8, 1993. (Respondent's Exhibit No. 5).

62. On March 8, 1993, Wolman met with Complainant, Pineau Collins, Lazzaro and Dixon from Local 829, to discuss Respondent's concern that Complainant had made a frivolous discrimination accusation against Collins. On March 3, 1993, Collins observed Complainant and Diaz returning 15 minutes late from lunch. When Collins asked them where they had been, Complainant responded, "What? Are you

picking on the blacks and Puerto Ricans now?" At the meeting, Complainant said he was "kidding around" and apologized to Collins. (Respondent's Exhibit No. 6).

#### Complainant's Disciplinary Record

63. During the time period relevant to this complaint, Respondent used a "Form 191" for multiple reasons, such as to document a change in an employee's grade or pay. Warren testified that Respondent's supervisors sometimes used a Form 191 as the initial step in its disciplinary process for an employee's violation. DeVito testified that supervisors regularly issued Form 191s in cases of absenteeism and tardiness. I credit the testimony of Warren and DeVito.

64. On April 12, 1988, Donna Harris, a dairy supervisor, counseled Complainant and two other employees about being on the roof of a building which was "off limits" according to Harris. Harris gave Complainant a "Form 191" for this incident. (Complainant's Exhibit No. 4).

65. On March 24, 1993, Collins counseled Complainant and gave him a Form 191 for failing "to supply manpower for Sat 3-20-93" and failing to follow correct procedures." (Complainant's Exhibit No. 5).

66. On December 3, 1993, Collins counseled Complainant and gave him a Form 191 because of his absenteeism. (Complainant's Exhibit No. 6).

67. In 1996, Respondent paid \$33,308.00 in wages to Complainant. (Respondent's Exhibit No. 9). In 1997, Respondent's hourly pension contribution was \$2.06 for up to 40 hours. (Stipulation).

68. Based on records provided by the Internal Revenue Service, Complainant earned the following in wages during 1997 through 2002: 1997--\$8,175.00; 1998--\$28,106.00; 1999--\$37,325.00; 2000--\$43,440.00; 2001--\$41,990.00; 2002--\$44,569.36. (Complainant's Exhibit Nos. 12 and 13).

69. Complainant testified that he felt "bad" after his discharge and cried all night immediately after his termination. Complainant also testified that he lost weight, didn't sleep "good" and postponed his marriage until August 2001. Complainant also testified that he developed an ulcer after his discharge but did not submit any medical documentation regarding this condition.

70. After his termination, Complainant testified that he looked for jobs in the newspaper and filled out various applications. Complainant testified that he worked in a security position at Unico Security for three months and earned approximately \$7.00 an hour. Complainant then worked as a forklift driver at Coca Cola for three months and earned \$10.00 an hour. Complainant maintained a written record of his job search efforts. (Complainant's Exhibit No. 10).

71. After working at Unico and Coca Cola, Complainant received unemployment insurance benefits for approximately six months. When his unemployment benefits ran out,

Complainant worked for the next two years at various security companies, including Unico Security, Northeast security, Charles River Park and Massachusetts College of Art. In these positions, Complainant's hourly pay rate ranged from \$7.25 to \$9.90.

72. Complainant is a full-time school police officer for the City of Boston and has been assigned to the Phyllis Wheatly Middle School in Roxbury, Massachusetts, since June 28, 1999. Complainant's hourly pay rate is \$16.33 and he receives health, life insurance and retirement benefits. Since October 1998, Complainant also has also worked part-time as a building manager for the New England Board of Higher Education in Boston, Massachusetts. Complainant's current hourly pay rate at the New England Board of Higher Education is \$15.66 an hour and he receives dental benefits. (Complainant's Exhibit No. 9).

73. In the fall of 1999, Respondent closed the trans-shipping department and eliminated all positions. The selectors in the trans-shipping department were eligible to apply for the selector positions in the produce or grocery departments but had to meet the same criteria as external candidates. The application process for the selector position included a standard application, a background check, work experience, and a physical examination and a strength test.

74. Complainant never took the strength test administered by Milton Hospital to qualify for a selector position in the produce or grocery departments.

### III. CONCLUSIONS OF LAW

#### A. Discrimination Based on Race and/or Color

General Laws, Chapter 151B, §4, paragraph one, prohibits discrimination in the hiring and firing of employees based on their race, national origin and/or color. In the absence of direct evidence of an unlawful motive based on Complainant's race, national origin and/or color, 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).<sup>10</sup> 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).

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

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<sup>10</sup>Complainant 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).

preponderance of credible evidence that (1) he is a member of a protected class based on his race and/or color; (2) he was adequately or capably performing the duties of his position in December 1996; (3) Respondent discharged him 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 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).

As an African American, Complainant is a member of a protected group under Chapter 151B based on his race and color. Complainant has also established that Respondent subjected him to an adverse employment action when it discharged him on January 13, 1997. I also find that Complainant has shown by sufficient credible evidence that he was generally meeting Respondent's legitimate and reasonable work expectations when it discharged him on January 13, 1997, i.e., that he was adequately performing his selector duties prior to December 29, 1996. See Massachusetts Commission Against Discrimination & O'Leary v. Bertucci's Restaurant Corp., 27 MDLR 116 (2005); Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003).

I find, however, that Complainant has failed to show that Respondent treated similarly situated non-African American employees differently or more favorably regarding

the imposition of discipline. First, Complainant did not identify other employees to whom he is similarly situated "in terms of performance qualifications and conduct, without such differentiating or mitigating circumstances that would distinguish their situations." Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994), cert. denied, 514 U.S. 1108 (1995), quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6<sup>th</sup> Cir. 1992); Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122 (1997); Glover v. Boston Fire Department, 22 MDLR 95 (2000). Second, I reject Complainant's bare assertion that Andrade was similarly situated to him on and before December 29, 1996. As discussed herein, I credit Andrade's testimony that that he did not threaten, intimidate or direct racial slurs at Complainant on December 29, 1996. In addition, I find that, unlike Complainant, there is no evidence in the record that Andrade had a history or pattern of complaints by coworkers or outside truck drivers that he verbally or physically threatened or intimidated them.<sup>11</sup> Third, the uncontroverted comparative information in the record established that Wolman terminated 4 employees not of Complainant's protected groups for threats, intimidation and/or fighting.<sup>12</sup> Accordingly, I find that Complainant has failed to produce sufficient credible evidence from which I draw a reasonable inference that Respondent did not discipline non-African American employees as harshly for

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<sup>11</sup>I summarily reject Complainant's contention that Wolman improperly considered the incidents involving his co-workers and the over the road drivers because Respondent did not issue any Form 191s for such incidents. They certainly establish a pattern of complaints against Complainant based on allegations of intimidation, harassment and physical and verbal threats. In addition, I find that Complainant's conduct and actions on December 29, 1996 were sufficient, standing alone, to constitute sufficient grounds for his termination.

<sup>12</sup>There is no evidence in the record that these employees received the benefit of progressive discipline prior to their discharge.

infractions similar to Complainant's. See Glover, Id. I conclude, therefore, that Complainant has not established a prima facie case of a discriminatory discharge based on his race and/or color.

Assuming arguendo that Complainant established a prima facie case of unlawful discrimination based on his race and color, 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 and/or color. 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 termination was the result of a discriminatory animus based on his race and/or color. Id.; Abramian, 432 Mass. at 117.

I find that Respondent articulated a legitimate non-discriminatory reason for terminating Complainant on January 13, 1997. I conclude that Respondent has produced ample credible evidence to establish that it discharged Complainant on January 13, 1997, because it determined, in good faith, that he verbally and physically intimidated

Andrade, directed racial slurs at him and unreasonably interfered with his work performance on December 29, 1996. I fully credit Andrade's testimony that Complainant attempted to verbally and physically intimidate him, subjected him to racial slurs and improperly interfered with his ability to satisfactorily perform his selector duties on December 29, 1996. I also credit Andrade's testimony that Complainant was the "aggressor" regarding the multiple incidents on December 29th. I conclude that Complainant exceeded his authority as union steward when he repeatedly directed Andrade to leave the trans-shipping department and go home before he completed his 10 hour shift.

I further find that Complainant's testimony regarding the incidents on December 29th is wholly not credible and is unreasonable based on the totality of the evidence in the hearing record. It is simply illogical, on the facts in this case, to conclude that Andrade, who was not an employee in the trans-shipping department, would threaten to kill Complainant, call him racial slurs and precipitate a fight while on a one-day overtime assignment. The evidence established that Andrade had no difficulty working with Diaz and Complainant produced no evidence to establish that Andrade had a history of instigating fights with co-workers whom he did not know. In contrast, the record showed that Complainant was involved in multiple incidents in 1995 and 1996 with long distance truck drivers and employees in the trans-shipping departments who claimed that he threatened and intimidated them. It is also illogical that Complainant would have returned to "confront" Andrade at least three or four times and tell

him to go home after Andrade allegedly directed racial slurs at him, swore at him and threatened to kill him. Complainant offered no reasonable explanation or justification for his repeated confrontations with Andrade, especially since his orders to Andrade to go home and his demand that Diaz cease training Andrade clearly exceeded his duties and responsibilities as a union steward.

I fully credit Wolman's testimony that he believed Andrade's statement, as corroborated by Diaz's statement provided during Respondent's investigation, and reasonably concluded that Complainant was the aggressor who attempted to verbally and physically intimidate Andrade several times on December 29th. I also credit Wolman's testimony that he believed Andrade's version of the confrontations on December 29th because it was consistent with Complainant's work history at Respondent in 1995-1996 that included numerous complaints by his co-workers and outside truckers concerning his aggressive and belligerent behavior, intimidation and verbal and physical threats of violence. I conclude, therefore, that Respondent has met its burden of articulating a legitimate, non-discriminatory reason for Complainant's discharge on January 13, 1997.

Finally, Complainant contends that Respondent chose to discharge him rather than "get rid of the racial tension" at the Readville facility. Complainant's contention is unpersuasive and is not supported by the totality of credible evidence in the hearing record. First, Complainant did not produce credible evidence to establish that there was "racial tension" at the Readville facility or that Wolman was motivated by such "tension" when he made

his decision to discharge Complainant. Even if I were to find that various employees made racial comments in the Readville facility, which I do not, Complainant has not produced evidence to establish that such comments were sufficiently pervasive or repetitive to constitute a racially abusive and hostile work environment for Complainant.<sup>13</sup> Accordingly, I conclude that Complainant has not shown, by credible evidence, that Respondent was motivated by a discriminatory animus based on his race and color when it discharged him. See Lipchitz, supra.

#### IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the complaint is hereby dismissed. This 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.

SO ORDERED this 3rd day of October, 2005.

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KENNETH B. GROOMS, Hearing Officer

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<sup>13</sup>If made, these comments are more properly characterized as “stray remarks” made by a person who is not a decision-maker in this complaint and is not the kind of evidence that is “suggestive of an impermissible bias.” See e.g., Wynn & Wynn, 431 Mass. at 667 (stray remarks 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.