

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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DARCELL ROGERS and  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,

Complainants

Against

Docket No. 96-BEM-2622

MASSACHUSETTS DEPARTMENT  
OF CORRECTION,

Respondent

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Appearances: Nathaniel J. Dudley Esq., Maricia Woodham Esq., Stephene Parry Esq.,  
and Kevin Young Esq. for Complainant Darcell Rogers.  
Elizabeth Day Esq. and Carol A. Colby Esq. for Respondent.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 2, 1996, Complainant, Darcell Rogers, filed a complaint with the  
Massachusetts Commission Against Discrimination (“MCAD”) alleging that the

Massachusetts Department of Correction (“DOC”) unlawfully discriminated against him on the basis of race and color in violation of M.G.L.c.151B, sec. 4 and Title VII of the Civil Rights Act of 1964, as amended. Specifically, Complainant challenged a three-day suspension imposed on April 19, 1996 and alleged that he was threatened by a lieutenant with loss of “seniority perks.” Joint Exhibit 2. On April 8, 1997, the complaint was amended to add an allegation that a ten-day suspension, removal from a bid position, and an order precluding Complainant from re-bidding for the Housing Unit was racially-motivated. Joint Exhibit 3. On March 19, 1998, the complaint was amended again to include a charge of retaliation for having filed the previous MCAD complaints and a charge of unlawful discrimination in the terms and conditions of employment relating to a suspension with pay. Joint Exhibit 5. On October 6, 1998, the complaint was amended a third time to include a claim of constructive discharge in relation to Complainant’s May 4, 1998 resignation.

On December 31, 1999, the MCAD issued a probable cause finding. Joint Exhibit 7. The Commission found that there was probable cause to credit the allegations in Complaint No. 96-BEM-2622 with the exception of the allegation relating to the denial of bids. Joint Exhibit 7.

The case was brought to public hearing on June 13, 16, 18, 19, and 20; July 30 and 31; August 28; October 16; and December 1, 2003. At the commencement of the public hearing, the Hearing Officer limited witness testimony to the period between February 1990 and May 4, 1998, the time during which the Complainant was employed

by the DOC. Seventeen persons testified during the nine-day hearing. Seventy-three exhibits were admitted into evidence as joint exhibits. In addition, six exhibits were accepted into evidence as Complainant's exhibits and six exhibits were accepted as Respondent's exhibits. Counsel presented certain stipulated facts in their joint pre-trial memorandum. Those facts are incorporated into this decision. Counsel also submitted proposed findings of fact and rulings of law following the public hearing. To the extent the parties' proposed findings are not in accord with the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with my findings, such testimony is not credited. Based on all the credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. MIC-Cedar Junction, also known as MIC-Walpole ("Cedar Junction"), was built in the 1950's. It is located in Walpole, Massachusetts. It houses approximately 800 inmates. From its inception, through the course of Complainant's employment, it was the only level-six maximum security prison in Massachusetts.
2. Ronald Duval was the Superintendent of Cedar Junction from July 1991 to November 1997 and is currently Associate Commissioner of DOC. During Mr. Duval's tenure as Superintendent, Cedar Junction was staffed by about 450 employees, of which approximately 350 were corrections officers. The correction officers were assigned to three different shifts on a twenty-four hour basis. Superintendent Duval was succeeded by Superintendent John Marshall.
3. From 1990 to 1998, there were several major disturbances at Cedar Junction,

- including two homicides. Transcript Volume 4 at 631.
4. In July 1989, Complainant, an African-American male, applied for a position as a correction officer at Cedar Junction. Cedar Junction has a lower percentage of minority officers than prisons located inside the Greater Boston area. Transcript, Volume 10 at 1485-1466. Complainant was hired in February 1990 following a recruitment drive at the Chez-Vous Roller Rink in Mattapan, Massachusetts.
  5. Complainant attended a six-week training program off-site and one week of training at Cedar Junction on issues such as block operations, cell counts, use of restraints, rules and regulations, and report writing. Transcript, Volume 3 at 223.
  6. Complainant testified that during an initial tour of the facility, Captain McGonagle made a comment about the number of minority inmates versus the number of non-minority inmates. Complainant testified to use of the word “nigger” during his first few years of employment, particularly in the lunch room, but could not recall who used the term. He testified to an incident in which Dennis Diver, a white correction officer, hung up the phone in Complainant’s presence and uttered the phrase “goddamn nigger” with respect to the individual on the other end of the phone requesting visitation information. Complainant never drafted a written report to his DOC supervisors about these matters nor did he include an allegation about use of the racial slur in his complaints to the MCAD.
  7. On January 3, 1994, Correction Officer Jeffrey Cardin received a three-day suspension for making racial comments and showing disrespect to officers in charge. Complainant’s Exhibit 5; Transcript, Volume 5 at 781-783.

8. From the date of his appointment through October 1994, Complainant received no discipline as a correction officer. Prior to evaluation year 1994-1995, he received “meets” on all of his annual performance evaluations. In evaluation years 1994-1995 and 1995-1996, Complainant received annual ratings of “below” on his Employee Performance Review Form due to disciplinary infractions.
9. Complainant testified that some time in 1994-1995, he saw a poem posted on a bulletin board in the 9 Block Segregation Unit. Transcript, Volume 2 at 91, 95. Complainant took down the poem and showed it to several officers of color. Id. at 92. The poem dealt with illegal immigration and welfare abuse. Complainant’s Exhibit 1. Complainant showed the poem to his wife and eventually gave it to his attorney. Id. at 94. Complainant did not complain to any supervisors at Cedar Junction. Id. at 98; Volume 3 at 336. Officer Pedro Centeio testified that he also remembers seeing a poem, but doesn’t remember the circumstances. Transcript, Volume 3 at 483.
10. On the morning of October 18, 1994, an inmate was stabbed in the Essex 1 Housing Unit at Cedar Junction. The disturbance was cleared prior to the 3:00 p.m. to 11:00 p.m. shift. Complainant was assigned to conduct the 10:00 p.m. major count in the East Wing Segregation Unit, known as 9 Block. The East Wing Segregation Unit is a short term segregation unit housing protective custody inmates and inmates removed from the general prison population for serious rules infractions. Transcript, Volume 4 at 687. Complainant counted 26 inmates in the Unit but reported to the shift commander, Captain Steven Silva, that there were 27 inmates present. Complainant misrepresented the count at the direction of his

supervisor, Sergeant Keith Macomber, who is Caucasian. Joint Exhibit 13. Mr. Duval testified that correction officers are expected to follow their superior's orders unless the order is a clear-cut violation. Transcript, Volume 4 at 684. According to DOC Rule 11 (a), a correction officer "must see living, breathing flesh in taking all major inmate head counts." Joint Exhibit 13. DOC Rule 19 (b) provides that an officer must obey a direct order of a superior unless it is withdrawn or amended. Joint Exhibit 34.

11. Correction Officer John Doherty, who is Caucasian, was assigned to the Essex 1 Housing Unit. He also committed a miscount on October 18, 1994. Joint Exhibit 13. Unlike Complainant, Officer Doherty miscounted the number of inmates in his Unit by mistake.
12. At 10:40 p.m. on October 18, Sgt. Macomber called Captain Silva and corrected the inmate count in the East Wing Segregation Unit. Joint Exhibit 13. Captain Silva called for a new count to be conducted throughout the entire institution.
13. On October 24, 1994, Captain Silva conducted an investigatory hearing into the miscounts. He recommended that Complainant receive a verbal warning, that Officer Doherty receive a letter of reprimand, and that Sgt. Macomber receive a written reprimand. Joint Exhibit 13. On November 14, 1994, Superintendent Duval suspended Complainant and Officer Doherty for one working day and Sgt. Macomber for three working days. Superintendent Duval stated in his letter of suspension to Complainant that he failed to inform his "superior's superior" of a security breach. Joint Exhibit 13. None of the three officers had a prior disciplinary record at the time. On another occasion, Correction Officer

Christopher Gaboury also received a one-day suspension for making an incorrect count.

14. Complainant, Correction Officer Doherty, and Sgt. Macomber appealed their suspensions to the Massachusetts Civil Service Commission. On July 17, 1996, the Civil Service Commission overturned the suspensions imposed on Complainant and Correction Officer Doherty and modified the three-day suspension imposed on Sgt. Macomber to a letter of reprimand. Joint Exhibit 13.
15. From 1991 to 1997, there was a mandatory restraint policy within the Segregation Unit at Cedar Junction which required that inmates be in handcuffs and leg irons (i.e., “full restraints”) when moving from one area to another. On May 16, 1995, while the institution was under a “lockdown” due to inmate violence, Complainant was ordered to obtain restraints from Correction Officer Edward Coury and, with Coury’s assistance, remove an inmate from the visiting room and transport him back to his cell. Complainant did not request assistance from Coury and walked the inmate through the Segregation Unit without the use of any security restraints. Complainant had in his possession cell and tier keys as he accompanied the inmate to his cell. Transcript, Volume 7 at 1087. Having possession of both cell and tier keys is against operational procedures because an inmate who obtained the keys could let inmates out of their cells and off the tier. Transcript, Volume 9 at 1360. Upon witnessing the event, Sgt. Macomber contacted the corridor lieutenant, who, in turn, contacted the shift commander, Captain Steven Silva. Joint Exhibit 14. Complainant was removed from the East Wing Segregation Unit and directed to wait in the lobby until Captain Silva

- received direction from his superiors. Transcript, Volume 9 at 1361-1362.
- Captain Silva assigned Complainant to one of the perimeter towers pending investigation and hearing. Id. Captain Silva held an investigatory hearing on May 24, 1995. Joint Exhibit 14. He recommended that Complainant be suspended for ten days and be removed from his bid position in the East Wing Segregation Unit. By letter dated June 15, 1995, Superintendent Duval suspended Complainant for five days for improper use of security restraints, for failing to use a second officer to assist in the escort of an inmate and for being less than truthful in his report. Joint Exhibit 14. Complainant was removed from his bid position. Id. The suspension was upheld on appeal. Id. and Transcript, Volume 2 at 69.
16. At the time Complainant received the five-day suspension, his prior one-day suspension imposed on November 14, 1994 was on appeal to the Civil Service Commission. The one-day suspension was overturned following imposition of the five-day suspension.
17. Complainant testified that during the time he worked at DOC, it was a common practice to escort inmates without restraints in the 9 Block Segregation Unit. Correction Officer Eddie Arroyo testified that during the time he was employed at Cedar Junction, the failure of correction officers to use restraints while escorting inmates was “done all the time.” Transcript, Volume 3 at 426. I do not credit this testimony.
18. The following white officers received reprimands for security violations.
- Correction Officer Timothy Bolton received a reprimand for not securing handcuffs tightly enough on an inmate on whom he applied restraints. Transcript,

Volume 7 at 1084-1086; Exhibit 38B. Correction Officer Richard Auger received a reprimand for failing to conduct a proper security inspection. Exhibit 38C.

Correction Officer Bernard Hicks received a letter of reprimand for neglecting to ensure that subordinates followed proper procedure for securing all doors except when in actual use. Transcript, Volume 5 at 836-838. Correction Officer Thomas Honner received a written reprimand in 1993 for losing a pair of leg irons in the West Segregation Unit and a one-day suspension in 1996 for failing to secure an inmate's cell door. Transcript, Volume 7 at 1049-1951 and 1088; Exhibit 38G.

Correction Officer Kevin Deschamps received a reprimand for allowing an inmate to ingest shower hooks at Brigham and Women's Hospital, a one-day suspension for allowing an inmate to leave the prison barber shop with a pair of barber shears in his back pocket, and a one-day suspension in relation to a set of leg irons being unaccounted for. Transcript, Volume 7 at 1051-1057. A memorandum from Captain MacEachern indicates that Deschamps was "less than truthful" when reporting the incident about the ingestion of shower hooks. Transcript, Volume 7 at 1098; Exhibit 38H. There were approximately three years between Deschamps's two suspensions. Transcript, Volume 7 at 1089. Joseph Cummings, Robert Easingwood, Richard Auger, and Ronald Bergeron received reprimands rather than suspensions after committing second security violations. Transcript, Volume 2 at 55; Volume 5 at 825-838; Exhibits 38A, 38C, and 38F.

19. Associate Commissioner Duval testified that in determining discipline, one of the factors he took into consideration was whether a correctional officer accepted responsibility for misconduct. Transcript, Volume 5 at 841. He acknowledged

that Complainant took accountability for his count infraction in 1994 and for his failure to use restraints in 1995. Transcript, Volume 5 at 842.

20. On February 1, 1996, Correction Officer Michael Normandin was assigned to the 11:00 p.m. to 7:00 a.m. shift in the Essex 1 Housing Unit. Officer Normandin relieved Complainant who worked the previous shift from 3:00 p.m. to 11:00 p.m. At approximately 11:00 p.m., Officer Normandin conducted his first rounds of the Unit and discovered that the rear door on the third tier was unlocked. Joint Exhibit 15. Officer Normandin notified the Inner Control Room of his discovery. The Control Room sent someone with keys to secure the rear door. Id. Officer Normandin documented his findings in an incident report. Id. On February 2, 1996, Captain Silva submitted a report stating that Complainant told him he had not checked the rear doors on his security rounds. Id.

21. An investigatory hearing was held on February 8, 1996 by Captain Edwin Doolin to determine why the rear door in the Essex 1 Housing Unit was left unsecured on February 1, 1996. Joint Exhibit 15. Eight employees were interviewed. The investigatory hearing established that two maintenance workers entered the Essex 1 Housing Unit from the rear door on the third tier on February 1, 1996 to fix a toilet in one of the cells. The maintenance workers failed to lock the rear door from the outside when they completed their work. Id. Complainant began his tour of duty as the maintenance workers were leaving. Complainant made eight security rounds during his tour of duty. He did not pull on the rear door during his rounds to make sure that it was locked. Complainant noted inaccurately in the Essex 1 log book that everything was secure and accounted for

- after each round. Id. Complainant changed his version of the incident after admitting to Captain Silva on February 2, 1996 that he had not made a check of the rear door.
22. Captain Doolin recommended that the maintenance workers both receive letters of reprimand for failing to secure the rear door on the third tier. He based their level of discipline on the fact that they did not have previous discipline for “related” matters. Captain Doolin recommended that Complainant receive a suspension of five days or more (i.e., a Commissioner’s hearing) for failing to discover that the rear door on the third floor was not secured and in consideration of his prior discipline. Superintendent Duval accepted the recommendations regarding the maintenance workers but imposed a three-day suspension on Complainant. Joint Exhibit 15; Transcript, Volume 4 at 692-693. Complainant’s suspension was upheld by the Civil Service Commission. Joint Exhibit 15.
23. Complainant testified that he was occasionally late and would keep a written record of the dates on which he was late. Transcript, Volume 2 at 77. He acknowledged being warned about lateness. Transcript, Volume 2 at 77 and Volume 3 at 295. Approximately one month after the rear door incident, on May 21, 1996, Captain Doolin presented Complainant with a written warning about habitual tardiness. Joint Exhibit 16. Complainant contested one of the days on which Captain Doolin accused him of being late by obtaining a copy of his time card to show he was not tardy on the day in question. Joint Exhibits 16 and 68. Captain Doolin reviewed the time card and ripped up the written warning. Complainant retrieved the ripped up warning from the trash can and kept it.

Transcript, Volume 3 at 298.

24. On June 7, 1996, Lt. John Brodbeck attempted to enter the Essex 1 Housing Unit at 9:05 p.m. The Complainant was assigned to this Unit during that shift. He did not respond to Lt. Brodbeck's attempt to enter the Unit. Investigatory Hearing, Joint Exhibit 17. Approximately ten minutes later, Lt. Brodbeck attempted to enter Essex 1 a second time and was again unsuccessful. Id. Lt. Brodbeck proceeded to the gallery that overlooks all of the east wing units. While in the gallery, Lt. Brodbeck observed the Complainant speaking with the inmate in cell 19 for five minutes before returning to the first floor where he spoke to the inmate in cell 3. Id. Complainant's hands and arms were inside the cell, resting against the bars. Report of Magistrate Fletcher, Joint Exhibit 17. Lt. Brodbeck left the gallery at 9:30 p.m. and returned at 9:50 p.m. Investigatory Hearing, Joint Exhibit 17. The Complainant was still speaking to the inmate in cell 3 and continued to do so for ten more minutes until a nurse entered the Unit. While Complainant conversed with the inmates, inmate runners were not secure in their cells. Complainant was responsible for supervising the inmate runners on their cleaning assignments. Report of Magistrate Fletcher, Joint Exhibit 17. East Wing Corridor Sergeant Gariepy and Lt. Brodbeck had previously spoken to Complainant about spending too much time conversing with inmates. I do not credit Complainant's testimony that Lt. Brodbeck, who is white, accused Complainant of being friendly with inmates because he knew them "off the fucking street." Transcript, Volume 2 at 143.
25. During the 10:00 p.m. major count on June 7, 1996, Lt. Brodbeck watched

Complainant escort a nurse to all three tiers. Complainant did not pull on any of the cell or rear doors or the emergency release panels in the Unit. At 10:25 p.m., Lt. Brodbeck confronted Complainant about talking to inmates, not supervising inmate runners, and not properly conducting a major count at 10:00 p.m. Report of Magistrate Fletcher, Joint Exhibit 17. Complainant stated that he had checked the doors at 9:30 p.m. He was not authorized to take such action prior to 10:00 p.m. Investigatory Hearing, Joint Exhibit 17. At approximately 10:50 p.m., Sgt. Gariepy noticed that Complainant was again standing in front of cell 3 talking to the inmate. Id. The Complainant moved away from the cell when he saw Sgt. Gariepy. Id. Sgt. Gariepy reported this matter to Lt. Brodbeck the following day. Id.

26. A hearing was conducted by Captain Doolin on June 24, 1996 into Complainant's conduct on June 7, 1996. Investigatory Hearing, Joint Exhibit 17. Captain Doolin recommended that a Commissioner's hearing be scheduled to consider appropriate discipline of more than five days and that Complainant be removed from his bid position of correction officer on the 3:00 p.m. to 11:00 p.m. shift in the Essex I Housing Unit. Id. Complainant was assigned to work in the tower between June 8, 1996 and December 4, 1996. Joint Exhibit 3.
27. A Commissioner's hearing was held on October 23, 1996, several weeks after Complainant's initial charge of discrimination against DOC was filed at the MCAD on October 2, 1996. On November 8, 1996, Complainant was informed that the charges against him were sustained and that he was suspended for ten days (January 2, 1997 through January 15, 1997). On December 4, 1996,

- Complainant was formally removed from his bid position in the Essex 1 House Unit. Joint Exhibits 3 and 17. He was assigned to the tower for six months and not allowed to re-bid into an inmate housing unit for one year. Stipulated Facts #18 and Joint Exhibit 3. Complainant appealed the ten-day suspension to the Civil Service Commission which denied the appeal. Joint Exhibit 17.
28. Some of Complainant's fellow workers were aware of the MCAD complaint, but I do not credit Complainant's testimony that Sergeant Yuele and Sergeant Monte called him a "rat" and a "whistle-blower." Transcript, Volume 2 at 146.
29. On April 8, 1997, Complainant amended his MCAD complaint to include the ten-day suspension and removal from his bid position as additional examples of allegedly discriminatory treatment. Joint Exhibit 3.
30. Complainant was a "no call, no show" for work on October 31, 1997, for which he received a letter of reprimand. Joint Exhibit 18. At an investigatory hearing into his conduct, Complainant stated that on the morning of October 31, his wife threatened to divorce him and left him without transportation. Complainant became inebriated and passed out.
31. Complainant testified that on the morning of November 13, 1997, he argued with his wife and stormed out of the house without his keys. Transcript, Volume 2 at 158. When he returned home from his 3:00 p.m. to 11:00 p.m. shift, Complainant's door was locked. His wife had gone to her mother's house and was not home. Id. Complainant testified that he went to house of a friend -- Gloria Dorsley -- for the night. Id. at 159. Complainant testified that his wife still didn't answer the phone on Friday, November 14, 1997, so he made arrangements

to stay at Ms. Dorsley's house again on Friday night. According to Complainant, around 10:30 p.m. on Friday night, a "friend" of Ms. Dorsley asked if Complainant would "tak[e] an individual to his aunt's house." Id. at 160. Complainant testified that he, Ms. Dorsley, and the individual he was transporting proceeded to Columbus Avenue where the individual got out to go to his aunt's house and Complainant and Ms. Dorsley remained in the car talking about ten minutes. Complainant further testified that two plainclothes detectives tapped harshly on the car window, "screaming and hollering [to] "get out the car." Id. at 161. I do not credit Complainant's version of these events.

32. The plainclothes detectives were Boston police officers who took Complainant to a church for purposes of identification. The police action was in response to a call that the Boston Police Department received at approximately 11:20 p.m. on Friday, November 14, 1997, from the Grace and Hope Mission Church at 1900 Columbus Avenue. The call was from a nun, Dr. Estelle Clasing, who reported that two prison guards were attempting to solicit money from her. Joint Exhibit 19. Dr. Clasing reported that she had received a phone call from a man who identified himself as "John Hardin" who said he was a correction officer and needed money due to car problems. Transcript, Volume 7 at 1137. The Boston police officers observed William Murphy exiting the front of the church and going towards a car on Columbus Avenue occupied by the Complainant. Both men were detained. Complainant denied knowing Mr. Murphy and said he was going for gas. Transcript, Volume 7 at 1137. Dr. Clasing identified both Murphy and Complainant as the individuals she saw outside of the church. Transcript,

Volume 2 at 161; Volume 7 at 1138. The Boston police officers arrested Murphy and Complainant. Complainant was charged with “larceny by pretense,” “begging” and “receiving alms.” Joint Exhibit 29. At the time of his arrest, Complainant was wearing his DOC uniform.

33. Complainant told Boston Police Officer John Doris that he had just gotten off work. Transcript, Volume 7 at 1140. However, Complainant did not work on November 14, 1997. Joint Exhibit 1; Stipulated Facts 1. While in custody, Complainant informed Officer Doris that he was employed by the DOC at the Longwood Treatment Center. Transcript, Volume 7 at 1141. While Officer Doris was on the phone with an individual at the Longwood Treatment Center, Complainant admitted that he worked at Cedar Junction. Transcript, Volume 7 at 1141. Subsequently at the station, Murphy stated that he and Complainant were at a crack house, doing crack cocaine and concocted a scheme to get money. Transcript, Volume 7 at 1142. According to Officer Doris, Complainant appeared to be under the influence of a controlled substance on the evening of November 14, 1997 based on his observations that Complainant was sweating on a cold night and his eyes were pinpoints. Transcript Volume 7 at 1142-1143. I credit Officer Doris’s version of the arrest.
34. At a Magistrate’s hearing held on December 17, 1997, Complainant’s criminal case was continued for six months with the proviso that it would be dismissed if Complainant remained out of trouble. Transcript, Volume 7 at 1146.
35. Superintendent Duval directed Lt. McGuinness to investigate the circumstances surrounding Complainant’s arrest. Lt. McGuinness interviewed Complainant on

- November 20, 1997. After the interview, Lt. McGuiness relayed the information to then-Superintendent Duval. Superintendent Duval detached Complainant with pay and full benefits, effective November 21, 1997, pending the outcome of the investigation. Joint Exhibit 25; Transcript Volume 6 at 878-879.
36. During the approximately five months that the matter was being investigated, Lt. McGuiness contacted the Officer Doris to obtain copies of the police reports and the Officer's account of the arrest, obtained information about the Magistrate's hearing, ordered Complainant to appear for a second interview which Complainant initially refused to obey, talked to Complainant's attorney, drafted his report, and attended to other matters. Joint Exhibit 26; Transcript, Volume 6 at 881-905. Prior to January 15, 1998, Complainant refused to meet with Lt. McGuiness and told Lt. McGuiness to stop harassing him and not to call him. Joint Exhibit 25. Complainant told Lt. McGuiness that he was going to sue. Id. However on January 15, 1998, Complainant, accompanied by Sgt. Cox, met with Lt. McGuiness.
37. Of the nine other investigatory reports that Lt. McGuiness prepared from 1990 to 1997, none took longer to investigate and prepare than one month and six days, except for one report involving charges of embezzlement. Transcript, Volume 6 at 975-976.
38. The decision to "detach" an employee pending the outcome of an investigation is a discretionary determination made by the Superintendent on a case-by-case basis. Transcript, Volume 5 at 777. Factors which Superintendent Duval took into consideration in deciding whether to detach an employee include the seriousness

of the allegations, whether the matter was being investigated by outside sources, how the investigation affected an officer's ability to do his/her job, whether the investigation would be compromised by having the officer working at the same time, and the staffing levels at the affected institution. Transcript, Volume 5 at 775-776. He testified that he detached Complainant with pay because of the pending criminal charges, the fact that Complainant had been arrested while wearing a DOC uniform close to midnight when he hadn't been on duty for nearly two days, the fact that Complainant was in the company of an ex-felon in an area known to have drug activity, and the fact that Complainant lied to law enforcement authorities about where he worked. Transcript, Volume 5 at 777. Superintendent Duval testified that he did not have knowledge of Complainant's MCAD charges when he made the decision to detach Complainant. Transcript, Volume 5 at 780 and Volume 7 at 1081-1082. I credit Superintendent Duval's testimony that he did not have knowledge of Complainant's MCAD charges when he made the decision to detach Complainant.

39. During the period of his detachment, Complainant testified that he received a copy of a seniority list from fellow Correction Officer Pedro Centeio. Transcript, Volume 2 at 172-173. The list is dated 5/21/97. Complainant's Exhibit 2. It was posted on a bulletin board in the common area of the West Wing of the 10 Block Segregation Unit. The name "Rogers, D." was crossed out on the list and the word "Fired" was handwritten next to it. Complainant's Exhibit 2; Transcript, Volume 2 at 173-176. I credit Complainant's testimony. It is corroborated by the testimony of Officer Centeio. Transcript, Volume 3 at 484.

40. Complainant testified credibly that during the period of his detachment, he also received from Correction Officer Centeio a document entitled “Applicaton [sic] For Kid Status” which was being circulated around the institution. Complainant’s Exhibit 3; Transcript, Volume 2 at 180-186. Complainant’s testimony is corroborated by Officer Centeio who testified that he found the document, made a copy, and called Complainant about it. Transcript, Volume 3 at 485. “Kid status” is a joking term used by staff to denote an employee believed to be friendly with or related to and receiving preferential treatment from someone in management. Transcript, Volume 3 at 420. The application refers to the status as “elite” and indicates that selection depends on residence, OUI arrests, construction skills and hunting and fishing. Complainant’s Exhibit 3. Complainant testified that he found the document offensive because the document referred to places of residence where African-American correction officers generally do not live, referred to construction skills that African-Americans generally do not have, and referred to recreational activities that African-Americans generally do not engage in. Transcript, Volume 2 at 185.
41. The Superintendent has discretion to appoint employees to specialized positions that constitute seven percent of the workforce. These positions are known as “superintendent picks.” Transcript, Volume 4 at 645. Superintendent Duval testified that he filled these positions based on recommendations from supervisors and shift commanders. Transcript, Volume 4 at 646. The filling of superintendent pick positions is reviewed by the DOC Office of Affirmative Action on a quarterly basis. Transcript, Volume 10 at 1487-1488.

42. On March 19, 1998, while Complainant was on detachment with pay, he amended his complaint at the MCAD to include a claim of retaliation based on his detachment following his arrest.
43. By the time Lt. McGuiness finalized his report on April 13, 1998, Superintendent Duval had been replaced at Cedar Junction by Superintendent Marshall. On April 13, 1998, Superintendent John Marshall requested a Commissioner's hearing based on the results of the McGuiness investigation and the fact that Complainant's conduct involved a criminal matter. Joint Exhibit 31. Superintendent Marshall estimated that the incident would have resulted in suspension of between one and three days had the matter proceeded to hearing. Transcript, Volume 7 at 1123.
44. By letter dated April 14, 1998, Superintendent Marshall instructed Complainant to report for duty on April 19, 1998. Complainant submitted a letter from his treating physician dated April 29, 1998 excusing him from work from April 19, 1998 through May 2, 1998. Stipulated Fact #38.
45. Complainant did not report for duty or attend the Commissioner's hearing. He resigned on May 4, 1998. Complainant subsequently amended his MCAD complaint to claim constructive discharge. Director of Security Steven Fairley, a minority officer, testified that the day Complainant resigned, he said that he was moving to South Carolina to take a job there. Transcript, Volume 9 at 1413. I do not credit Director Fairley's testimony about Complainant relocating to South Carolina in 1998.
46. At the time Complainant resigned from his position as correction officer, he was

earning approximately \$49,000.00. Transcript, Volume 2 at 208. He withdrew \$26,000.00 from his retirement account. In mid-June 1998, Complainant found employment working as a community specialist for ABCD, a nonprofit organization that helps low income families. Complainant testified that the first year he worked for ABCD, he earned approximately \$18,000.00 and that in the next two years he earned in the low and mid-twenties. Transcript, Volume 2 at 202-203. In 1998, Complainant's income was \$27,615.00. Transcript, Volume 2 at 210. During the time Complainant was at ABCD, he also worked with juvenile offenders for one year on a part-time basis on weekends and holidays.

Complainant functioned as a youth counselor at a residential housing unit (Northeastern Family Institute), earning \$12.00 per hour. Transcript, Volume 2 at 203-204. Complainant left ABCD in May 2002 and began to work at McKinley Vocational High School as a guidance counselor on February 6, 2002.

Complainant earned \$15.00 per hour. He resigned June 1, 2003 in order to relocate to Atlanta, Georgia.

47. During the time Ronald Duval was Superintendent at Cedar Junction, fifty-four employees were arrested. Of the fifty-four employees who were arrested, six were detached with pay and one was placed on unpaid leave. Transcript, Volume 7 at 1038-1039. Twelve of the fifty-four were not white. Joint Exhibit 33. Of the seven detached or placed on leave, three were minorities including Complainant. Transcript, Volume 7 at 1038-1039. The charges against the officers detached (with and without pay) include OUI and possession of cocaine, driving with a suspended license and unreported court appearances while on Industrial Accident

- leave, indecent assault, possession of Class B substance, conspiracy and failure to report OUI arrest, and embezzlement. Id. at 1039-1044. The charges against some of the white officers whom Superintendent Duval did not to detach with pay include assault and battery on a police officer, breaking and entering, and insurance fraud. Id. at 1045-1047.
48. Between 1991 and 1997, seventeen officers were removed from bid positions due to disciplinary action. Joint Exhibit 67. Thirteen were non-minority officers, and four were minority officers. Transcript, Volume 5 at 786. Five officers resigned from their bid positions due to disciplinary action, one of whom was a minority employee. Joint Exhibit 67.
49. Correction Officer Eddie Arroyo, who is Puerto Rican, testified about his employment experience at Cedar Junction where he worked from 1988 to 1992 and 1995 to 2003. He testified that he felt as if he were “walking on eggshells every single minute because you were scrutinized all the time” but did not recall ever hearing staff make derogatory statements about African-Americans. Transcript, Volume 3 at 436. Correction Officer Arroyo was detached with pay in October 1995 when he was arrested. He has been suspended “many” times. Transcript, Volume 3 at 446-447. Mr. Arroyo filed an MCAD complaint in 1998 which was dismissed for lack of probable cause. Id. at 448. He was charged with sexually harassing inmates at Cedar Junction. Id. at 449. Mr. Arroyo filed a second MCAD complaint alleging retaliation in response to his participation in this case. Id. at 449-450.
50. Correction Officer Pedro Centeio, who is Cape Verdian, started working for

DOC in 1989. He worked at Cedar Junction from 1989 to 2001. He testified that he transferred to the Bridgewater facility in order to have a shorter commuting distance and because of the “treatment” he received at Cedar Junction.

Transcript, Volume 3 at 457. In describing his treatment at Cedar Junction, Officer Centeio testified that Captain Duane McEachern once told him to put on his tie but that other officers came to work without being fully clothed in their uniforms and nothing was said to them. Officer Centeio testified that on another occasion, Captain McEachern threw away a slice of pizza that Officer Centeio procured for an inmate-worker. *Id.* at 460. Officer Centeio testified that while he was working in the tower, he received harassing phone calls in which an unidentified caller would refer to him as an “NAACP bitch.” Officer Centeio claims that he taped one of the phone calls and the tape was given to Lt. McGuinness who didn’t return the tape or take action about it. Officer Centeio also testified that an unnamed individual told him that supervisors Steven Ayala and Steven Silva referred to Officer John Dean as a “monkey ass” who was going to be fired if he was late one more time. I credit Officer Centeio’s testimony with the exception of his allegations about the harassing phone calls and about supervisors Ayala and Silva.

51. Former Correction Officer Efrain Vargas worked for the DOC for almost four years between 1995 and 1999. Mr. Vargas is Hispanic. After leaving DOC, he became a police officer with the Brockton Police Department. While he was employed at DOC, Mr. Vargas worked the same shift and in the same location as Complainant. He testified that some DOC employees received harsher treatment

than others for the same infractions, but did not identify the individuals or the incidents. Transcript, Volume 4 at 535 and 561. Mr. Vargas testified that he didn't feel well-liked at DOC or feel that he was treated fairly. Id. at 539. He testified that Sergeant Dayton told him that he was "kind of different" and that he should "go with the system" and "relax." Id. at 542 and 567. He testified that he was criticized for speaking Spanish to inmates. Id. at 549. He testified that Captain Doolin asked for his National Guard schedule every time he had weekend National Guard duty. Mr. Vargas testified that Captain Doolin ordered him to provide military orders when he was assigned weekend National Guard duty even though he had already given Captain Doolin a copy of his yearly National Guard schedule and there were no military orders to provide. Id. at 556. I credit Mr. Vargas's testimony. Mr. Vargas's disciplinary record with DOC includes a reprimand in February 1997 for opening a cell door without placing an inmate in restraints, a one-day suspension, and a reprimand. Id. at 569.

52. Robert Furtado was an assistant grievance coordinator and field representative for the Massachusetts Correction Officers Federated Union ("MCOFU") between 1990 and 1998. Prior to his employment with MCOFU, Mr. Furtado was a correction officer and sergeant at Cedar Junction. He testified that he represented both minority and white officers in regard to disciplinary matters arising at Cedar Junction from 1990-1998. He estimates that he has participated in 9,000 grievance hearings. Transcript, Volume 5 at 737. Mr. Furtado testified that during the 1990-1998 period, minority correction officers received harsher discipline than white officers, although he could not recall if Superintendent

Duval took race into consideration when determining discipline. Transcript, Volume 5 at 730-731 and 748. At a prior deposition in this matter, Mr. Furtado stated that he couldn't answer whether DOC applied its rules, orders and penalties evenhandedly and without discrimination but that officers of color were disciplined more harshly than white officers. Id. at 739 and 752-753. Mr. Furtado also stated at his deposition that the DOC pursued all disciplinary violations in the same manner, that discipline was imposed "quite often" for excessive fraternization, and that it was imposed on white correction officers as well as officers of color. Id. at 739-740, 744.

53. Gregory Cox retired from the DOC in 2003 as deputy superintendent at the Shattuck Correctional Unit. He is African American and was vice president and president of the Mass. Minority Correction Officers Association. Mr. Cox was a sergeant for twenty years and worked at Cedar Junction from 1996 to 2001 as a sergeant. Mr. Cox was a member of MCOFU from 1989 to 2001 and was chief steward for the Union. Mr. Cox testified that one day he found on his desk a picture of pygmies in a row with gigantic genitals. Transcript, Volume 9 at 1271. Mr. Cox described the environment at Cedar Junction between 1996-1998 as lacking in camaraderie between the white officers and the officers of color. Id. at 1305.<sup>1</sup>

54. Mr. Cox testified that on one occasion in the cafeteria, a white correction officer said, "what do you think I'm a nigger?" Transcript, Volume 9 at 1269. This

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<sup>1</sup> Mr. Cox testified about another incident involving a conversation which he had with Caucasian Officer Dennis Diver. The conversation referenced the infamous murder by dragging in Jasper, Texas on June 7, 1998 and thus occurred after May 4, 1998, in violation of the Hearing Officer's directive limiting witness testimony to the period of Complainant's employment by the DOC.

incident was also described by Officer Centeio who testified that he overheard Correction Officer Billy Cabral tell Captain John Jones that, “you people are treating me like Centeio . . . you’re treating me like a nigger.” Transcript, Volume 3 at 463. I do not find either of these versions of the incident to be as accurate as the contents of a contemporaneous incident report filed by Officer Centeio on March 4, 1997 in which he quoted Officer Cabral as yelling, “what the fuck do you guys think I am a black guy - you are treating me like Centeio.” Respondent’s Exhibit 5. Deputy Silva testified that on the day following the incident, a decision was made to suspend Officer Cabral for one day without pay. Respondent’s Exhibit 6. The letter of suspension charges Officer Cabral with ranting and raving about the shortage of pizza for lunch in a loud and profane way, but does not mention Officer Cabral referring to Officer Centeio’s race. Respondent’s Exhibit 6. According to Mr. Cox, the incident caused “shock waves [to] go through the whole institution.” Transcript, Volume 9 at 1296-1297.

55. Director of Special Operations Steven Ayala, who was Director of Security at Cedar Junction during part of Complainant’s employment at the facility, acknowledged that he heard racial slurs uttered by staff at Cedar Junction between 1990 and 1998, but he denied that the use of racial slurs was prevalent during this period. Transcript, Volume 9 at 1334-1335. I credit his testimony.

56. Deputy Superintendent Silva, who was Director of Security at Cedar Junction following Mr. Ayala, testified that he “never” heard the word “nigger” or other racial slurs uttered by staff members. Transcript, Volume 9 at 1368-1369. I do not credit this testimony.

57. The current Director of Security at Cedar Junction, Steven Fairley was a sergeant, lieutenant, and captain when Complainant worked there. Director Fairley, a minority officer, testified that during his career at Cedar Junction he never heard staff members use racial slurs. I do not credit this testimony.
58. Mr. Cox testified that between 1996 and 1998 when both he and the Complainant worked at Cedar Junction, there were three to four officers of color who felt that they were being targeted by white managers or individuals in a supervisory position: Eddie Arroyo, Pedro Centeio, Darcell Rogers (the Complainant), and possibly an individual named Givens. Transcript, Volume 9 at 1267. However, when asked if he was aware of instances of white officials actually targeting officers of color, Mr. Cox said he could not “pinpoint” such targeting. Transcript, Volume 9 at 1267. Mr. Cox cited the 1997 firing of a probationary African-American correction officer, John Dean, as widening the gap between the white officers and the officers of color. Mr. Cox also testified about an incident involving Director of Security Ayala and minority Officer Dennis Perry who was hired by DOC on October 4, 1998.<sup>2</sup>
59. Mr. Silva became Director of Security at Cedar Junction after Steven Ayala. He testified that Complainant had problems performing his duties, giving attention to details, reporting to work in a timely fashion and maintaining security. Transcript, Volume 9 at 1354. The current Director of Security, Steven Fairley, is a minority officer who testified that Complainant was assigned to his shift in 1998. Transcript, Volume 9 at 1431. Director Fairley described

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<sup>2</sup> The incident involving Officer Perry and Mr. Ayala occurred after May 4, 1998 and, thus is outside the scope of witness testimony allowed by the Hearing Officer.

Complainant as a “knucklehead” who had the potential to be a good officer but had difficulty maintaining a professional distance from the inmates. Transcript, Volume 9 at 1419.

### III. CONCLUSIONS OF LAW

#### A. Racial Discrimination

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and/or color. In order to prevail on a claim of racial discrimination, absent direct evidence, a Complainant must show that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified person(s) not of his protected class were not treated in a like manner. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000).

If Complainant successfully establishes a prima facie case, the burden then shifts to the second stage of proof in which the Respondent must articulate a legitimate, nondiscriminatory reason for its action. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas corp. v. Green, 411 U.S. 792 (1973). If the Respondent asserts such a reason, Complainant bears the burden to persuade the fact-finder, by a fair preponderance of the evidence, that the Respondent’s articulated justification is not the real reason, but a pretext that permits a finding of unlawful discrimination. See Abramian, 432 Mass. at 117-118. Complainant

must ultimately prove by a preponderance of the evidence that the Respondent was motivated by discriminatory animus. See Lipchitz v. Raytheon, 434 Mass. 493 (2001). Complainant may meet this burden of proof by circumstantial evidence such as the inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the employer is false. Id. at 504.

Complainant bases his claims of disparate treatment on a three-day suspension in April 1996 for a security violation, a ten-day suspension in November 1996, transfer to the tower, removal from a bid position, and an order precluding Complainant from re-bidding for one year into the Housing Unit. Complainant asserts that the amount of discipline which he received was harsher than the disciplinary action received by white officers alleged to have committed similar violations. See Charge of Discrimination and Amendment to Charge of Discrimination dated October 8, 1997. Joint Exhibits 2 and 3.

The undisputed evidence in the record shows that Complainant satisfies two elements of the prima facie test for disparate treatment based on race. Complainant is African-American and thus, a member of a protected class. Complainant was subjected to adverse employment actions in the form of a three-day suspension, a ten-day suspension, removal from his bid position and an order precluding him from rebidding into the Housing Unit for one year. However, Complainant has not shown that he was performing his position in a satisfactory manner during those times and that similarly-situated person(s) not of the protected class were not treated in a like manner.

I arrive at this conclusion having reviewed Complainant's history of discipline on its own merits and in comparison to the discipline imposed on white correction officers for similar infractions. As an independent body of discipline, the infractions committed by Complainant grew more frequent and more serious from late 1994 until 1997. Prior to late 1994, Complainant worked as a correction officer for almost five years without incident. He received satisfactory employee evaluations. The fact that Complainant was able to succeed at his job during this period under many of the same supervisors who ran the institution between 1994 and 1997 belies the notion that discriminatory forces barred his success at the DOC.

The discipline which Complainant claims to be discriminatory was imposed in 1996. It consists of a three-day suspension for failing to ascertain whether a rear door on tier three was locked and a ten-day suspension and removal from a bid assignment on a housing unit for excessive fraternizing with inmates. Complainant points to the fact that numerous white officers received reprimands for security violations while he received more severe discipline. This type of comparison merits examination but ultimately provides limited insight into the operations of Cedar Junction because discipline must be evaluated in the context of an officer's disciplinary history, the facts and circumstances of the misconduct, the DOC's knowledge of the misconduct, and the officer's accountability. Complainant's examples of disparate treatment do not establish a pattern or practice of discrimination since minority officers such as Efrain Vargas received reprimands for security violations and white officers such as Richard Auger and Stephen Tessier received five, fifteen, and thirty-day suspensions for security lapses. Correction

Officer Mark Cristian, who is Caucasian and had no prior discipline, received a one-day suspension for being a “no call-no show” whereas Complainant received only a written reprimand for the same misconduct. Transcript, Volume 5 at 782. Robert Furtado, an official of the correction officers’ union between 1990 and 1998, testified that minority correction officers received harsher discipline than white officers during that period, but Mr. Furtado’s prior deposition testimony does not support this claim.

The record also fails to support Complainant’s contention that the removal of officers from bid positions was race-based. Between 1991 and 1997, seventeen correction officers were removed from their bid positions as a result of disciplinary action. Of the seventeen officers removed, only four were minorities. Complainant admitted in his testimony that removing an officer from a bid position in conjunction with discipline was a common practice, applied equally to minority and non-minority officers.

Complainant’s examples also fail to take account of Complainant’s prior disciplinary history when assessing the severity of the discipline. By the time Complainant received a three-day suspension in April 1996 for failing to check a rear door, he had already received a one-day suspension in 1994 for making an improper count (not overturned by the Civil Service Commission until July 17, 1996) and a five-day suspension in 1995 for improperly escorting an inmate back to his cell. The 1994 and 1995 incidents, not raised in his charges to the MCAD, provide a context in which to evaluate the claim of disparate treatment discrimination even though they are time-barred for purposes of relief and were not included in Complainant’s charges. See Cuddyer v.

Stop & Shop Supermarket Co., 434 Mass. 521, 541 (2001) (no relief available for incidents occurring outside the limitations period where a reasonable person in his position would have acted sooner to raise his claims). See also Lopilato v. Boston Public Schools, \_\_\_ MDLR \_\_\_ (2004); Klaus v. Amherst Fire Department, 22 MDLR 164, 168 (2000) *citing* Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F. 2d 396, 402 (1<sup>st</sup> Cir. 1990). Complainant's disciplinary history shows that he did not incur multiple-day suspensions as a first-time offender. By the time he received a three-day suspension in 1996, Complainant had already been disciplined twice before. Principles of progressive discipline permit greater penalties in such circumstances than in the case of first-time offenders.

What the record amply demonstrates is that Complainant was not adequately performing his job duties as a correction officer at the time he filed his charges of discrimination. On February 1, 1996, Complainant did not pull on the rear door during his security rounds to make sure that it was locked. On June 7, 1996, Lt. Brodbeck observed the Complainant speaking with inmates in their cells for extended periods while inmate "runners" under his supervision were not secure in their cells. Such conversations are known to be a ploy by inmates to distract correction officers from supervising a Unit. While one conversation took place, Lt. Brodbeck observed Complainant's hands and arms inside a cell, resting against the bars. During the 10:00 p.m. major count on June 7, 1996, Complainant failed to pull on any of the cell or rear doors or the emergency release panels in the Unit. Prior to the 1996 infractions, Complainant violated procedures in 1995 by escorting an inmate without any restraints, without securing the assistance of a

second officer and by carrying both cell and tier keys during the escort. Because the inmate was not in restraints, he could have grabbed Complainant, taken both the cell and tier keys, let all the inmates in the Unit out of their cells, and taken Complainant hostage. In 1994, Complainant knowingly submitted a false inmate count, albeit on the instruction of Sgt. Macomber. These incidents support Respondent's position that Complainant was not performing his responsibilities in a satisfactory manner. Accordingly, he does not satisfy the elements of a prima facie case of disparate treatment based on race.

Even assuming that Complainant satisfied the requirements of a prima facie case, Respondent has articulated a legitimate, non-discriminatory reason for discipline, i.e., Complainant's failure to adhere to security procedures and maintain an appropriate distance with inmates. Once Respondent articulates a legitimate, non-discriminatory reason for its employment action, Complainant must prove by a preponderance of the evidence that Respondent's reason for its action was a pretext. While Complainant attempted to demonstrate pretext by showing that white employees with similar work records were treated more favorably, the sum total of the evidence does not support this contention.

#### B. Retaliation

Complainant alleges that as a result of filing two complaints with the MCAD in 1996 and 1997, Respondent retaliated against him by placing him on an extended administrative leave with pay pending the results of a Departmental investigation into criminal charges against him. Joint Exhibit 5. In support of this claim, Complainant

points to the relatively few instances of other correction officers being placed on administrative leave pending the outcome of criminal charges.

Retaliation claims arise under M.G.L. c. 151B, sec. 4 (4) which provides that an employer may not discriminate against any person because he has opposed any practice forbidden under c. 151B or because he has filed a complaint, testified at, or assisted in any proceeding alleging a violation of c. 151B. In addition, sec. 4(4A) makes it unlawful for any person to coerce, intimidate, threaten or interfere with another person for exercising any right under the chapter or for providing assistance or encouragement in the exercise of any right protected by this chapter. These sections comprise chapter 151B's prohibition against retaliation. See Bain v. Springfield, 424 Mass. 758, 765 (1997). Retaliation is a separate claim from discrimination, "motivated, at least, in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) *citing* Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, 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. MCAD, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000). In order to establish a prima facie case of discrimination based on retaliation, Complainant

must establish by credible evidence that: (1) he participated in protected activity; (2) he suffered an adverse employment action after his participation; (3) Respondent knew about Complainant's participation in the protected activity prior to taking the adverse employment action; and (4) a causal connection can be inferred between Complainant's activity and the adverse employment action. See Ruffino v. State Street Bank and Trust Co., 908 F. Supp. at 1044; Hudson v. Pembroke/Hanover Elks, 22 MDLR 45 (2000) *citing* Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

There is no dispute that Complainant's two charges of discrimination, filed with the MCAD in 1996 and 1997, constitute protected activity. See Clark County School District v. Breeden, 532 U.S. 286 (2001) (complaints may consist of internal complaints or formal charges of discrimination). Complainant suffered an adverse employment action following the filing of MCAD charges in the sense that he was placed on administrative leave for five months during which he was paid but not permitted to work at Cedar Junction. Although the administrative leave did not impose financial hardship on Complainant, his separation from employment negatively impacted his employment status, promotional opportunities, and his emotional state. See Noviello v. City of Boston, No. 04-1719, 1<sup>st</sup> Cir., February 16, 2005 (recognizing adverse employment action where there was no discharge, demotion, or reduction in pay). Respondent had institutional knowledge of Complainant's 1996 and 1997 MCAD complaints prior to placing Complainant on administrative leave even though Superintendent Duval testified that he was personally unaware of the MCAD charges when he made the decision to

detach Complainant. The question remains as to whether a causal connection can be inferred between Complainant's charges of discrimination in 1996 and 1997 and the decision to initially place and subsequently leave Complainant on a detachment with pay status for five months following his November 1997 arrest.

In determining whether a causal connection exists between the charges of discrimination and the administrative leave, it is necessary to examine the circumstances of Complainant's arrest. At the time of his arrest, Complainant was wearing his DOC uniform, although he had not been on duty for two days. He lied to police about where he worked. The individual arrested along with Complainant was an ex-inmate who told police that he and Complainant were at a crack house, using crack cocaine, and concocted a scheme to get money. According to the arresting police officer, Complainant appeared to be under the influence of a controlled substance on the evening of November 14, 1997. Based on these circumstances, I conclude that Respondent had cause to detach Complainant with pay pending the outcome of an internal DOC investigation.

Complainant relies on the fact that only seven of fifty-four employees arrested during Superintendent Duval's tenure were removed from Cedar Junction pending investigation and that he, alone, in this group filed MCAD charges. These circumstances do not prove that Complainant was the victim of discrimination. The record of detachments at Cedar Junction under Superintendent Duval's tenure indicates that some correction officers who were charged with serious misconduct were not placed on administrative leave whereas others charged with less serious misconduct were placed on leave. A white male employee was detached for seven months prior to any personnel

action being taken by the Department. Exhibit 33. The lack of any discernable pattern undermines Complainant's charges of retaliation and disparate treatment. Moreover, the circumstances of Complainant's arrest, together with the charges, were sufficiently serious to justify the detachment in his case.

Turning to the Complainant's contention that the five-month duration of the detachment was retaliatory, the claim is troubling but ultimately unpersuasive. Complainant raises a significant point in noting that of the nine other investigatory reports that Lt. McGuiness prepared from 1990 to 1997, none took longer to investigate and prepare than one month and six days, except for one report involving charges of embezzlement which took seven months. On the other hand, the steps undertaken by Lt. McGuiness prior to completing his report on Complainant's arrest were numerous and to some extent outside of his control. During the approximately five months that the matter was being investigated, Lt. McGuiness contacted the arresting police officer to obtain copies of the police reports and the officer's account of the arrest, obtained information about the magistrate's hearing, talked to Complainant's attorney, ordered Complainant to appear for a second interview, drafted his report, and attended to other matters. Complainant delayed resolution of his situation by telling Lt. McGuiness, prior to January 15, 1998, to stop harassing him and not to call him, although after that point he did meet with Lt. McGuiness accompanied by Sgt. Cox. All of these steps took time and the fact that the investigation was protracted does not mean that it was retaliatory. See McCormack v. Boston Edison, 423 Mass. 652 (1996) (mere fact that one event follows another is not sufficient to make out a causal link).

In sum, the evidence does not demonstrate a causal connection between Complainant's activity and his administrative leave in violation of M.G.L. c. 151B, sec. 4(4).

C. Constructive Discharge

Complainant alleges in his Motion to Amend Charge of Discrimination dated October 6, 1998 that he was forced to resign because of a racially hostile work environment which included "false charges, lengthy disciplinary proceedings, and adverse personnel actions." In order to establish constructive discharge, a complainant must prove that his working conditions were so intolerable that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995) (constructive discharge in sexual harassment context); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997) (same); Said v. Northeast Security 18 MDLR 255, 259 (1996) (constructive discharge in racial discrimination context). See generally MCAD Sexual Harassment in the Workplace Guidelines, VIII - Constructive Discharge. Constructive discharge can occur even if the employer does not act with the specific intent of forcing the complainant to resign. See Langford v. Department of Employment and Training, 17 MDLR 1043, 1063 (1995), aff'd, 18 MDLR 36 (1996) (Full Comm'n). A claim of constructive discharge under chapter 151B does not arise, however, when the complainant resigns due to general dissatisfaction with the workplace or as a result of other conduct that does not violate chapter 151B. See GTE Products, 421 Mass. at 35 (citations omitted).

In order to satisfy a racially hostile work environment claim, Complainant must show that: 1) he was subjected to conduct of a racial nature; 2) the conduct of a racial nature was unwelcome; 3) the conduct of a racial nature had the purpose or effect of creating an intimidating, hostile, humiliating or racially offensive work environment; and 4) the conduct was sufficiently severe and pervasive as to unreasonably interfere with his work performance or altered the terms and conditions of his employment. See Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass. 673, 678-679 (1993); Scionti v. Eurest Dining Service, 23 MDLR 234 (2001); Thomas v. King Arthur's Motel and Lounge, Inc., 24 MDLR 66 (2002). Whether an environment is "hostile" or "abusive" can only be determined by looking at all of the circumstances, including the frequency of the offensive conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it interferes with the employee's work performance. See Scionti v. Eurest Dining Services, 23 MDLR at 240 *citing Harris v. Forklift Systems, Inc.*, 510 U.S.17 (1993).

No single description of the atmosphere at Cedar Junction emerges from the testimony of the witnesses. Retired Deputy Superintendent Gregory Cox, an African American officer, who was assigned to Cedar Junction from 1996 to 2001 as a sergeant, described the environment at the facility between 1996-1998 as lacking in camaraderie between the white officers and the officers of color. Mr. Cox testified about several incidents in which graphic and insulting racial language and imagery were used. Officer Centeio testified that he was chided about not wearing his tie when other officers were

permitted to work without being fully clothed in their uniforms. Former Officer Efrain Vargas testified he was harassed with repeated and unnecessary demands for documentation every time he had weekend National Guard duty. Complainant maintained at the public hearing that the term “nigger” was used at Cedar Junction while he worked there. Steven Ayala, a former Director of Security at Cedar Junction, acknowledged that racial slurs were uttered occasionally by some members of the staff between 1990 and 1998.

In contrast to the incriminating evidence presented about race relations, Steven Silva, who was Director of Security at Cedar Junction following Mr. Ayala, testified that he “never” heard the word “nigger” or other racial slurs uttered by the staff. The current Director of Security at Cedar Junction, Steven Fairley, a minority officer, also testified that he never heard staff members use racial slurs. Correction Officer Eddie Arroyo, who is Puerto Rican, did not recall ever hearing derogatory statements made about African-Americans. Retired Deputy Superintendent Cox, who is African American, testified that he could not “pinpoint” any instances of white officers targeting officers of color. There is no evidence in the record that Complainant, while employed at Cedar Junction, ever complained about racial epithets. He did not mention the use of epithets in his MCAD complaints.

Apart from the evidence cited above, a substantial portion of the background evidence is not directly relevant to a hostile work environment claim. For instance, the fact that a seniority list had Complainant’s name crossed out and the word “Fired”

written does not support a claim of discrimination because there is no evidence about who wrote the word or why. A poem about welfare cheats and a document about “kid status” which spoofs the special treatment of certain presumably white correction officers shed little or no light on the racial atmosphere at Cedar Junction.

I conclude that that the staff of Cedar Junction occasionally used racially derogatory language and offensive racial imagery during the time that Complainant worked there but that these practices were not sufficiently frequent or widespread to constitute a racially hostile work environment as a matter of law. See Scionti V. Eurest Dining Services, 23 MDLR 234 (2001) (isolated, sporadic events do not create an abusive workplace). The evidence of a hostile work environment is not sufficient to support the charge.

There is also insufficient evidence to support Complainant’s contention that he was forced to resign as a result of the racial atmosphere at Cedar Junction. There is no credible evidence that hostility or harassment would have been directed at Complainant by co-workers or supervisors upon his return to duty. At the time Complainant was recalled from his administrative leave, Superintendent Duval had been replaced at Cedar Junction by Superintendent Marshall. The new Superintendent had worked at Cedar Junction for the first three years of Complainant’s employment and Complainant never had any problems working for him. Steven Fairley, an African American Captain, would have been Complainant’s shift commander. While Complainant faced a Commissioner’s hearing upon his return, Superintendent Marshall estimated that the incident addressed in

the McGuiness investigation would have resulted in a suspension of between one and three days had the matter proceeded to hearing. Such an estimate appears to be self-serving in light of the five-month investigation which preceded the hearing and Complainant, no doubt, viewed his chances for promotion as dismal in light of his disciplinary record, but these circumstances cannot be construed as intolerable. Complainant could have requested a transfer to another facility had he sought a fresh start.

Complainant must have felt frustrated and pessimistic about his job prospects at Cedar Junction in order to resign from his \$49,000.00 a year job with DOC, withdraw \$26,000.00 from his retirement account, and take a position with a non-profit organization for \$18,000.00 per year. He did not take a job in another state despite Steven Fairley's testimony that Complainant said he intended to do so. While these facts support the claim that the working conditions at Cedar Junction had become intolerable to Complainant, they do not support the contention that the working conditions were objectively intolerable between 1990 and May 4, 1998. See Scionti v. Eurest Dining Services, 23 MDLR 234 (2001) (allegation of racially hostile work environment resolved by focusing on whether reasonable African American female in Complainant's shoes would have felt compelled to resign). Complainant may have felt profound dissatisfaction with his working conditions, but the conditions were not so egregious that a reasonable person would have felt compelled to resign.

IV. ORDER

Pursuant to the authority granted to the Commission under Massachusetts General Laws, chapter 151B, sec. 5, the complaint is dismissed.

Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 15<sup>th</sup> day of April, 2005.

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Betty E. Waxman, Hearing Officer