

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and EDGAR GUERRA,
Complainant

v.

DOCKET NO. 98-SEM-0601

BERKSHIRE ARMORED CAR
SERVICES, INC., and ERIC REDER,
Respondents

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Hugh D. Heisler, Esq., for Complainant
Robert C. Sacco, Esq., for Respondent

PROCEDURAL HISTORY

On July 16, 1998, Complainant Edgar Guerra ("Guerra" or "Complainant") filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission") claiming that his former employer, Berkshire Armored Car, Inc. ("Berkshire" or "Respondent"), subjected him to unlawful discrimination on the basis of race and national origin in violation of M.G.L. c. 151B, § 4. In his complaint, Guerra also named Berkshire's President, Eric Reder ("Reder"), as an individual party-respondent.

On March 14, 2001, the Commission found probable cause to credit Complainant's allegations of discrimination. On July 22, 2002, the Commission certified the case for Public Hearing. A Public Hearing was held before me on September 12

and 13, 2002, in Springfield, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at hearing, and the stipulations of the parties. I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after the Public Hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. The Complainant, Edgar Guerra (“Guerra”), is a Hispanic person of Puerto Rican descent who presently resides in Springfield, MA. Guerra worked for Berkshire as a guard for approximately seven weeks, from December 4, 1997 to January 23, 1998. Guerra is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. The Respondent, Berkshire Armored Car Services, Inc. (“Berkshire”), is a Massachusetts corporation that operates an armored car trucking service. Berkshire maintained its headquarters in Pittsfield, MA, and operated a depot in Holyoke, MA. At all times relevant hereto, Berkshire employed approximately thirty individuals at the Holyoke depot. Berkshire is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. On December 4, 1997, Guerra began working at Berkshire. The manager of the Holyoke facility, Elizabeth Davis, and a manager from Pittsfield known as Sherry had interviewed Guerra for the position. As a new employee, Guerra was placed on

probationary status for a 90-day period effective upon the commencement of his employment. Only Davis and Assistant Manager, David Maylor, exercised supervisory authority over Complainant and assigned him jobs. Maylor is African-American. For his first three or four days, Guerra worked in the coin room at the Holyoke depot until a guard position opened up. Typically, Berkshire staffed its armored vehicles with a driver and a guard or “jumper.”¹ The jumper is responsible for assisting the driver and leaving the armored vehicle to go into a customer’s business to collect or drop-off money or valuables. At all times, Complainant worked as a guard or jumper when he rode in an armored vehicle for Berkshire.

4. All of Berkshire’s drivers and guards who testified at the Public Hearing acknowledged that security was critically important in the performance of their duties. Specifically, they all testified that the drivers and guards assigned to work together in an armored vehicle must work well together. In particular, co-workers needed to have trust in each other’s ability to protect and support each other in case of an attempted robbery or other difficulties. Even Guerra conceded that guards and drivers must trust each other and work comfortably together. Similarly, Robert Velez, who worked for Berkshire as a driver from December 1996 to January 1998, testified that it was critical for security reasons that the drivers and guards feel comfortable with each other. Like Guerra, Velez is Hispanic.

5. Guerra testified that shortly after he started his employment, he and another trainee, Todd Hasenjager, went on a training run with an experienced employee named

1 The parties and all the witnesses used the terms “guard” or “jumper” interchangeably.

² Wright and Hasenjager are Caucasian. Guerra stated that during the run, he was sitting in the back of the truck while Wright and Hasenjager sat in the cab. He claimed that Wright and Hasenjager made some jokes and then “blew some farts.” According to Guerra, after farting they put on the fan and said “let the Puerto Rican smell it in the back.” In addition, Guerra alleged that Wright drove the truck in a fast and wild manner, causing him to fall off the rear seat in the back of the truck. According to Guerra, the back seat in the vehicle did not contain a seatbelt. Both Wright and Hasenjager denied that any such event occurred. In addition, they both denied making any racially derogatory comments toward Guerra. Furthermore, Wright testified that on the day in question, they were riding in truck “No. 125”, which had a steel wall between the cargo area and the cab and thus did not have an opening for the passage of air between the cab and the back of the truck. I credit Guerra’s testimony that Wright and Hasenjager may have made a mildly offensive remark and engaged in boorish behavior, but I refuse to credit the remainder of his testimony.

6. Guerra further testified that on the same ride, Hasenjager pointed out an African-American man who was standing near a drop and commented that “one of these days, I am going to shoot the hell out of him.” According to Guerra, Hasenjager mentioned that the man was at the bus stop every time they stopped at that location. He also claimed that Hasenjager commented that he did not like the way the man was dressed. Guerra claimed he responded to Hasenjager’s remark by saying the man was not doing anything wrong. I credit Guerra’s testimony that Hasenjager made these comments. However, Guerra admitted that an individual standing at the same location every day

2 Although the date of this incident was never substantiated, it likely occurred in December 1997.

7. Guerra testified that while riding with Wright on another occasion, Wright stated that Berkshire had problems with Puerto Ricans and Blacks stealing from the company. According to Guerra, Wright told him "If you ever stole, I will do something about it." Guerra testified that he took this comment as a threat. He responded by telling Wright that he was a Catholic and would not steal. Wright denied ever threatening Guerra or making any such comments. Davis and Maylor testified that Wright is an experienced driver and a good worker. Moreover, aside from Complainant, all of the witnesses at the Public Hearing testified that they never heard Wright make any racially derogatory or discriminatory remarks. In particular, Robert Velez described Wright as being a gentleman at all times when they worked together. As mentioned above, Velez is Hispanic. I credit Davis, Maylor, and Velez's testimony regarding this matter.

8. On January 21, 1998, Guerra worked with a driver named Dan Mastrianni. While returning from a run in Connecticut, Mastrianni apparently drove the armored truck to and then stopped at his brother-in-law's house. Guerra reported this incident directly to Berkshire's President, Eric Reder. As a result of this incident, Berkshire terminated Mastrianni's employment. Guerra claimed that this event instigated the creation of a racially and ethnically hostile work environment.

9. In early December 1997, a similar incident occurred involving a Hispanic driver

named Rafael Calderon. Berkshire fired Calderon after a co-worker named Wayne Doyle reported to Reder that Calderon had allowed a family member in an armored vehicle in violation of company policies. While some of Doyle's co-workers apparently resented Doyle for reporting Calderon directly to the President of the company, Berkshire's drivers all agreed that Doyle was a good employee who performed his duties in a professional manner. Even individuals who did not get along with Doyle, such as Robert Velez, testified that Doyle competently and professionally performed his job.

10. Guerra claimed that the day after the Mastrianni incident, he worked with Todd Hasenjager. According to Guerra, Hasenjager told him he did not want to work with him. Guerra further testified that Hasenjager told him he would "beat him down." In addition, Guerra stated that Hasenjager told him he should be careful while at work because Mastrianni knows the route. Although Hasenjager recalled telling Davis that he did not want to work with Guerra because he did not trust him, he had no recollection of any such interaction with Guerra. I do not credit Guerra's testimony for the following reasons. First, Guerra's testimony regarding this incident is inconsistent with his prior testimony that he had "no problems" with Hasenjager after they had previously worked together and Hasenjager made the allegedly racist comments about the African-American man. Second, upon review of Guerra's scheduled work assignments during the period of January 21–25, 1998, I find it highly unlikely that Guerra worked with Hasenjager on this occasion. Specifically, the parties stipulated that on January 21, 1998, Guerra rode with Mastrianni and the incident occurred that resulted in Mastrianni being fired. The parties also have not disputed that the next day, January 22, 1998,

Guerra worked with Carl Wright. On January 23, 1998, Guerra rode with Tony Foster and worked at Berkshire for the last time. Consequently, it appears from this time line that it would have been impossible for Guerra to have worked with Hasenjager at any time after the Mastrianni incident.

11. On January 22, 1998, Berkshire assigned Guerra to work with Carl Wright.

Guerra testified that shortly after they left the Holyoke depot in their assigned armored vehicle, Wright told him he was “messed up” and wrong for reporting Mastrianni.

According to Guerra, Wright then stated that if Guerra ever did that to him, he would blow his head off. He also claimed that Wright then took out his pistol and pointed it at

Guerra’s head. Guerra testified that he then asked Wright to drive him back to the

depot, which he did. He further claimed that when they arrived at the depot, Wright got out of the truck, threw his lunchbox down, and then said he did not want to work with a

“Puerto Rican, Spic, rat.” Guerra claimed David Maylor overheard Wright’s slur. Guerra stated that he then informed Maylor how Wright had threatened him and brandished his

gun.

12. Wright denied making any threatening remarks or pulling out his weapon. To the contrary, Wright claimed that Guerra initiated the discussion about Mastrianni by asking

him if he had “heard about a guy getting fired.” Wright further testified that up until this time, he had no knowledge about the incident with Mastrianni. Moreover, he claimed

that Guerra told him that if he made any mistakes, Guerra would get fired. According to Wright, Guerra then took out his gun and started playing with it; whereupon, Wright

immediately turned the truck around and returned to the depot. He claimed that he

came back to the depot because he did not trust Guerra and did not want to work with

him. Wright testified that after they returned to the depot, he told Maylor that he would no longer work with Guerra. I credit Wright's testimony.

13. Maylor testified that when Guerra and Wright came back to the depot, Guerra told him that Wright had pointed his gun at him. However, Maylor claimed that Guerra did not mention anything about Wright using racial names. Maylor also denied that he heard Wright make any racial or ethnic slurs or any comment about Guerra being a "rat" or "snitch." Maylor claimed that he then asked Wright about the incident and Wright adamantly denied pulling the gun on Guerra. Maylor asked both Wright and Guerra to write up reports of the incident. Maylor then assigned himself to work with Wright to finish the run. He told Guerra to remain at the depot until Liz Davis appeared. Maylor testified that he believed Wright's version of the incident since Wright had been with the company for a long time, had a good reputation as a worker and an individual, had no prior problems with any individuals or minorities, and no one either heard him make any racial comments or complained about any such racial comments in the past. Maylor also indicated that Wright had previously worked with other Hispanic co-workers and no one had ever indicated that Wright was racist in any way. I credit Maylor's testimony.

14. After arriving at work on January 22, 1998, Davis instructed Guerra to work in the coin room for the remainder of the day to calm down. Davis then investigated the incident and talked to both Wright and Guerra. She indicated that after speaking with them, similarly to Maylor, she believed Wright's version of the events as opposed to Guerra's. She testified that Wright was a mild low-key type of person and she believed he would not have done what Guerra had alleged. Furthermore, she had never

previously received any complaints from other employees regarding Wright's conduct.

15. Tony Foster is an African-American male who worked as a driver at Berkshire from January 1996 through May 1999. Foster testified that all of the 15 to 20 drivers and guards at the Holyoke Depot got along well. He also claimed that he was neither aware of any racial bias at Berkshire nor cognizant of anyone making any racial comments. With respect to the incident in which Doyle reported Calderon for allowing others to ride in the vehicle, Foster testified that he believed Doyle did the right thing. However, Foster acknowledged that both he and other co-workers were concerned that Doyle should have complained to Liz Davis as opposed to going directly to the owner of the company. I credit Foster's testimony.

16. On Friday, January 23, 1998, Foster drove an armored vehicle with Guerra. According to Foster, this was the only time he and Guerra had worked together. He stated that they talked about the Mastrianni incident and Guerra appeared "shook up." Foster also claimed that Guerra expressed concern that people would look at him differently because, similarly to Doyle, he had reported Mastrianni to the President of the company instead of going to Liz Davis. Foster testified that Guerra told him he might quit. He also stated that he and Guerra discussed the confrontation the previous day with Wright, but Guerra never mentioned anything about Wright pulling a gun. Foster responded by telling him that he should "hold off" and not quit. Upon their return to the depot, Foster claimed that Guerra approached him and Davis and said, "I quit." Guerra then turned in his uniform and handed Davis his shirt and a bag. I credit Foster's entire testimony.

17. Contrary to Foster's testimony, Guerra stated that upon his return from the run on January 23, he approached Davis and asked why he had not been put on the schedule of drivers and guards for the following week. Each Friday, Davis prepares and posts the following week's work schedule. Guerra testified that Davis said she did not put Guerra's name on the schedule because no other drivers wanted to work with him. Specifically, he claimed that Davis told him he needed to work with several drivers, but "Carl, Wayne and Todd" would not work with him. Davis corroborated this testimony. According to Guerra, Davis never mentioned anything about working in the coin room. He testified that Davis then told him "you're all set", which he construed to mean that he had lost his job. According to Guerra, Davis never said that he was "fired" or any other similar words to that effect.

18. Similar to Foster's testimony, Davis claimed that Guerra approached her and Foster and said, "I quit." She testified that moments before Guerra approached them, Foster had mentioned to her that Guerra might quit. According to Davis, after Guerra told them he was quitting, he asked her why he had been removed from the schedule and she responded that other drivers did not want to work with him. She stated that when she took Guerra off the schedule, she intended to put him in the coin room temporarily until she could figure out how to handle the situation. Moreover, Davis claimed that she took Guerra off the schedule because Guerra continued to have difficulties at work. Although Davis admitted that Wayne Doyle remained on the work schedule after he similarly reported a co-worker (Calderon) for violating work rules, unlike Guerra, Doyle was not a probationary employee and nobody questioned Doyle's work performance. Davis subsequently filled out a termination/separation form that

indicated Guerra had quit. (Exhibit 9). Subsequently, Berkshire hired Larry Bunn to replace Guerra. Bunn is an African-American man with extensive experience in security work. I credit Davis' testimony. Moreover, based on Foster and Davis's testimony, I find that Guerra voluntarily quit his employment.

19. Davis also testified that prior to January 23, 1998, she had received at least two complaints from different guards regarding Guerra's performance, including complaints that Guerra had taken his gun out of his holster while out on runs and had incessantly talked on his cell phone. Davis testified that after receiving these complaints, she spoke with Guerra and warned him that such acts were unacceptable. According to Davis, Guerra promised not to do it again; consequently, she decided not to officially write up a report of these incidents. Davis did not recall the names of the drivers who complained. However, Hasenjager admitted that he complained to Davis that Guerra fell asleep on the runs, held his gun in a playful manner, and showed a general unwillingness to learn the job. Furthermore, Rafael Molina, a driver who worked with Guerra, testified that he noticed that Guerra failed to pay attention while out on the route and used his cell phone so much that it became a safety issue. As a result, Molina reported to Davis that he did feel safe working with Guerra. Molina is Hispanic. I credit Davis, Hasenjager, and Molina's testimony.

20. Aside from the incident with Wright on January 22, Davis stated that Guerra never complained of co-workers making racial or ethnic comments. Moreover, she testified that she neither heard nor was aware of any driver, including the drivers that refused to work with Guerra, making any racist comments. I credit Davis' testimony.

21. With respect to the work environment at Berkshire during the period of Guerra's employment, Robert Velez stated that he heard a co-worker, Wayne Doyle, make various racial jokes in the guard area of the depot. Velez further stated that he heard Wayne Doyle use the term "Spic" and state that he did not want to work with Puerto Ricans. Velez claimed that as a result of these comments, he complained to his supervisors that he did not feel comfortable working with Doyle. However, Velez conceded that that when he did work with Doyle, Doyle acted in a professional and competent manner. In addition, Velez admitted that Doyle never made any racial comments while they worked together. Velez also admitted that aside from these remarks, he did not like Doyle. Moreover, Velez stated that despite Doyle's racial comments in the depot, he did not consider the workplace to be a racially hostile work environment. Lastly, he acknowledged that as far as he knew, Berkshire had not engaged in any racially motivated actions against him.³

22. Contrary to Velez's testimony, Guerra stated that he never heard Doyle make any racial comments. In addition, Guerra testified that prior to January 21, 1998, Berkshire did not maintain a hostile work environment. He also testified that prior to

³ Although Velez testified that Berkshire, to his knowledge, did not act in a discriminatory manner toward him, he suggested that Berkshire might have treated him unfairly or in a disparate manner. Specifically, he testified that Berkshire had assigned him to be in charge of the run referred to as the Connecticut North run. At some point in late 1997, the number of stops on that run had increased and Berkshire decided to split the run. Simultaneous with that request, Velez asked Berkshire to accommodate his pursuit of a career as a police officer by allowing him to leave work earlier so he could attend the police academy in the early evening hours. Although Velez claimed to be the most experienced driver on the Connecticut North run, Berkshire assigned Wayne Doyle to take charge of the Connecticut North run after the run was split in two. According to Velez, Berkshire never accommodated his request to leave early. In addition, he claimed that Berkshire assigned him to the longer of the two Connecticut North routes, which effectively precluded him from attending the police academy. Velez admitted, however, that from Berkshire's business perspective, it made sense for it to assign him to the longer run since he had the most knowledge about the stops along the run. Although I credit Velez's testimony, I refuse to draw an inference that this evidence is indicative of any racial or ethnic discrimination. In addition, I find that this evidence is neither relevant to Complainant's specific allegations of harassment, nor supportive of Complainant's general allegation that Berkshire maintained a racially or ethnically hostile work environment.

January 21, he liked working for Berkshire and felt comfortable working with the personnel at the Holyoke depot. Lastly, he claimed he had no problem and got along with his co-workers, including those who allegedly made racial remarks.

III. CONCLUSIONS OF LAW

M.G.L. c. 151, § 4(1) prohibits discrimination in the terms and conditions of employment based upon race and color. In this case, Complainant has alleged, first, that Berkshire effectively terminated his employment in a disparate manner based on his status as a non-white person of Hispanic origin; and, second, that Berkshire subjected him to racially and ethnically hostile work environment.

A. DISCRIMINATION – DISPARATE TREATMENT

Pursuant to M.G.L. c. 151B, § 4(1), an employer may not refuse to hire, employ or to discharge from employment an individual based on race, color, or national origin unless based upon a bona fide occupational qualification. In the absence of any direct evidence of discrimination, as in this case, Complainant may establish a prima facie case of discrimination through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130, 134–136 (1976). Consequently, in order to establish a prima facie case of discrimination, Complainant must establish that (1) he is a member of a protected class; (2) he was adequately performing the essential duties of his job; (3) that some adverse employment action occurred; and (4) that a similarly situated person not of the protected class, was not treated in a like manner. Lipchitz v. Raytheon Co., 434 Mass. 493, 503 (2001); Abramian v. President and Fellows of

Harvard College, 432 Mass. 104, 116 (2000), Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441 (1995), Manon v. Rosewood Nursing and Rehabilitation Center, 24 MDLR 281, 282 (2002), Williams v. New Bedford Free Public Library, 18 MDLR 123 (1996).

I conclude that Guerra has failed to establish a prima facie case of discrimination with respect to his separation of employment. Although Guerra is a member of a protected group by virtue of his status as a non-white Hispanic male, he has not met any of the other criteria necessary to establish a prima facie case. As an initial matter, it must be emphasized that Guerra was a new employee on “probationary” status who had only worked at Berkshire for approximately seven weeks. In this light, I credited Davis’ testimony that after Guerra started working for Respondent, she had legitimate concerns about his work performance after receiving complaints from both Hispanic and non-Hispanic co-workers that Guerra had played with his gun in an unsafe manner, talked too much on his cell phone, and failed to be attentive in his duties. In response to these complaints, Davis testified credibly that she warned Guerra that she considered this conduct unacceptable; and, in response, Guerra promised not to do it again. Consequently, when Davis subsequently received another complaint that Guerra again, on January 22, 1998, played with his gun in an unsafe manner, she clearly would have been justified in taking corrective action against Guerra based upon his past transgressions and probationary status.

Secondly, I find that Guerra voluntarily resigned from his employment on January 23, 1998. Although Guerra contends that Berkshire effectively terminated his employment when Davis took his name off the work schedule for the following week, I

credit Davis and Foster's testimony that Guerra walked up to Davis after completing his run with Foster and said, "I quit." Moreover, Foster acknowledged that earlier in the day, prior to Guerra knowing about next week's schedule, Guerra had mentioned he considered quitting as a result of the Mastrianni incident and his run-in with Wright from the previous day. In addition, I credited Davis' testimony that she had no intention of firing Guerra; rather, she planned to place him in the coin room temporarily because she had legitimate concerns regarding his work performance and drivers, both Hispanic and non-Hispanic, refused to work with him.

Even assuming, *arguendo*, that Guerra did not voluntarily resign, he has not established that a similarly situated person not of his protected class, was not treated in a like manner. As evidence of disparate treatment, Guerra contrasts the manner in which Berkshire treated him after he reported Mastrianni for violating work rules, and the manner in which it dealt with Wayne Doyle, a non-Hispanic co-worker, after Doyle similarly reported a Hispanic employee. Although co-workers appeared to express a reluctance to work with either Guerra or Doyle in retribution for reporting a co-worker to the President of the Company, Guerra emphasizes that Berkshire only took him off the work schedule, and allowed Doyle to continue to go out on runs. I find this argument completely without merit since the particular circumstances of each case are clearly not similar. First, Guerra was a newly hired probationary employee. More importantly, I credited Davis' testimony that she took Guerra off the work schedule for a variety of reasons, including her concerns about his work performance. On the other hand, all of the witnesses at the Public Hearing testified that Doyle was an experienced, highly

professional, and competent employee. Therefore, Guerra cannot establish that a similarly situated person not of his protected class, was not treated in a like manner.

Lastly, to the extent Guerra is arguing, by implication, that he was constructively discharged, he has clearly not established that the conditions under which he worked were so intolerable that a reasonable person would have felt compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 35 (1995); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997); Said v. Northeast Security, 18 MDLR 255 (1996); Jorge v. Silver City Dodge, 15 MDLR 1518, 1532 (1993), *aff'd.*, Silver City Dodge v. MCAD, Bristol Superior Court No. 96-00293 (Tierney, J., May 1999); Norman v. Andover Country Club, 15 MDLR 1394 (1993). Under this theory, a mere act of discrimination, even one involving humiliating and disparate treatment, does not compel a finding of constructive discharge. Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1241 (1992). Guerra admitted that prior to January 21, 1998, only four days prior to his termination, he liked working at the Holyoke depot. In addition, he claimed that he got along with his co-workers, including those who had allegedly made racial remarks. In fact, other than being taken off the schedule on January 23 and receiving a warning from Davis regarding his work performance, Berkshire never subjected him to any adverse work conditions or disciplinary action. Consequently, under these circumstances, Guerra cannot establish that he was constructively discharged.

B. HOSTILE WORK ENVIRONMENT

In order to establish a prima facie case of a hostile work environment based on race or ethnicity, Guerra must establish by a preponderance of the evidence that (a) he

was subject to racially or ethnically based unwelcome verbal or physical conduct; (b) the words or acts were sufficiently severe or pervasive to alter his conditions of employment and create an abusive working environment; and (c) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action.

College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); *see also*, Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001); Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521 (2001) (a hostile work environment is pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, that poses a formidable barrier to the full participation of an individual in the workplace).

I conclude that Guerra has failed to establish a prima facie case of hostile work environment harassment. First, I found his testimony lacked sufficient credibility with respect to many of the alleged incidents of harassment. For example, I refused to credit Complainant's testimony that while working with Hasenjager the day after the Mastrianni incident, Hasenjager told him he did not want to work with him and would "beat him down." I also refused to credit Guerra's testimony regarding the incident with Wright on January 22, 1998. Although Guerra claimed that Wright threatened him, took out his pistol and pointed it at his head, and then said in the presence of others that he would not work with a Puerto Rican, Spic, rat", I accepted Wright and Maylor's testimony that this incident never occurred. In addition, I credited Wright's testimony that he only turned the truck around and headed back to the depot after Guerra started playing with his gun. As described above, other employees, including Hispanic co-workers, had testified credibly that they previously complained to Davis about Guerra having played

with his gun in an unsafe manner.

Although I did credit Complainant's testimony with respect to other isolated comments allegedly made by his co-workers, Complainant has failed to prove that these remarks were sufficiently severe or pervasive so as to alter the conditions of his employment and create an abusive working environment. In determining whether a work environment is sufficiently hostile or abusive, "all of the circumstances [must be looked at], including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating (or a mere offensive utterance), and whether it unreasonably interferes with an employee's work performance." Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998).

It is also important to note that M.G.L. c. 151B is not a clean language statute. Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 619-620 (1996), *citing*, Scott v. Sears, Roebuck & Co., 798 F. 2d 210, 213, n. 2 (7th Cir. 1986), *quoting*, Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) ("Title VII is not a clean language act..."). The Commission has consistently held that "casual comments or accidental or sporadic conversations are insufficient to constitute a pervasive, hostile environment" and only if the demeaning comments are "sufficiently continuous and pervasive" will they constitute an unlawful discriminatory practice. Horzesky v. R&M Construction Co., 15 MDLR 1171, 1176 (1993). In addition, "stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision-makers unrelated to the decisional process itself do not suffice to satisfy the plaintiffs threshold burden in these cases." Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 667 (2000). Moreover, by analogy, the Supreme Court has instructed with respect to Title

VII, the federal anti-discrimination statute, that a "mere utterance of an . . . epithet which engenders offensive feelings in an employee, does not sufficiently affect the conditions of employment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, *quoting*, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

Here, I believe the racial or ethnic derogatory remarks made by Guerra's co-workers did not sufficiently alter the conditions of his employment or create a hostile work environment. These remarks include Guerra's testimony that Wright and Hasenjager once farted and then said, "let the Puerto Rican smell it in the back." In addition, Hasenjager commented about wanting to "shoot the hell out of" a poorly dressed African-American male who was standing near a stop on a route. Lastly, Wright once stated that Berkshire had problems with Puerto Ricans and blacks stealing from the company and then remarked to Guerra, "If you ever stole, I will do something about it." I note that all of these comments were made prior to January 21, 1998. Guerra acknowledged that prior to that date, he liked working for Berkshire, felt comfortable working at the Holyoke Depot, and got along with his co-workers, including those who allegedly made the racial remarks. He also testified that a hostile work environment only became evident on January 21, 1998, after the incident with Mastrianni, when he believed he would be subject to retribution from his co-workers for reporting Mastrianni to the President of the company.

Finally, even if we assume that Guerra's co-workers made all of the alleged offensive comments and these comments were sufficiently severe and pervasive, Guerra has still failed to establish that Berkshire knew or should have known about the harassment. Although Guerra testified that he complained to Davis and Maylor about

some of these incidents, I credited Davis and Maylor's testimony that they never received any reports from Guerra about co-workers making offensive remarks or racial slurs. In addition, Guerra's testimony that he complained to his supervisors about the comments seems inconsistent with his statements that prior to January 21, 1998, he liked working for Berkshire, felt comfortable working at the Holyoke Depot, and got along with all his co-workers.

In summary, Guerra failed to establish that Berkshire's employees made sufficiently severe or pervasive racial or ethnic-based unwelcome remarks. I also refused to credit Guerra's testimony with respect to many of the alleged incidents of offensive conduct. Moreover, with respect to remarks that might have been made, these comments from his co-workers constituted no more than sparse and stray remarks and utterances. Lastly, Guerra failed to establish that his supervisors knew or should have known about the alleged offensive conduct. Consequently, Complainant has failed to establish a prima facie case of hostile work environment harassment.

C. INDIVIDUAL LIABILITY

Although Guerra named Eric Reder as an individual Respondent, he has not submitted any credible evidence that Reder was involved in any pertinent aspect of his employment. In fact, Reder's only involvement in this matter appears to be his receipt of complaints from Doyle and Guerra, respectively, regarding co-workers who violated serious company rules. Absent any credible evidence that Reder participated in any decision regarding Guerra's employment, Guerra's claim against Reder shall be dismissed.

IV. ORDER

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

So Ordered this 18th day of April, 2003.

EDWARD R. MITNICK
Hearing Officer