

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

FRANK JOSEY and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,

Complainants

Against

Docket No. 97-SEM-1030

CRYSTAL TRANSPORT, INC.
Respondent

Appearances: James P. Keane, Esq. for Complainant Josey
Dean Carnahan, Esq. for Respondent

DECISION OF THE HEARING OFFICER

PROCEDURAL HISTORY

On December 4, 1997, Frank Josey (“Complainant”), filed a complaint of discrimination with the Massachusetts Commission Against Discrimination (“Commission”), charging Crystal Transport, Inc. (“Respondent”) with retaliation in violation of M.G.L. c. 151B, sec. 4(4). The charge of discrimination results from Complainant’s contention that he was fired after filing a charge of racial harassment. The charge of racial harassment was dismissed by the Commission for lack of probable cause.

Efforts to conciliate the retaliation claim failed and the case was certified for submission to public hearing on April 5, 2002. A public hearing was held on October 22, 2002. Complainant submitted twelve (12) exhibits. Respondent submitted two (2) exhibits. The Complainant testified on his own behalf. Also testifying were Kevin Sheehan, Wayne Nutter, and Byragland McNaughton.

Counsel submitted proposed findings of fact and rulings of law on or around January 18, 2003. 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. The Complainant began working for Respondent as a bus driver in December 1995. He was hired to operate motor coaches.
2. Respondent Crystal Transport, Inc. is a bus company located in Brighton, MA. It has approximately seventy (70) employees. Linda Carroll is the president of Crystal Transport and Kevin Sheehan is the general manager.

3. Complainant filed a previous MCAD charge against Respondent in January 1997 arising out of an incident during which Complainant objected to the night dispatcher, David Gordon, making derogatory comments about another employee, Byragland McNaughton. According to Complainant, after he told the night manager to “take it easy on [McNaughton], the night manager said he, “could call him worse than that he could call him a nigger.” Charge of Discrimination, 01/02/97, Docket No. 97BEM0005. Complainant reported the incident to Respondent’s management. Gordon admitted to making the statement and apologized. Complainant’s charge of racial harassment was dismissed by the Commission for lack of probable cause on the basis that a single remark did not constitute a racially hostile work environment.
4. In January 1997, a client of Respondent, Putnam Investments, complained about Complainant starting to fall asleep at the wheel of a bus and about his attitude. Complainant’s Exhibit 8. Complainant was taken off Putnam trips.
5. In April 1997, claims were asserted against Respondent after Complainant struck a pedestrian in New York City. Respondent had to pay \$31,000.00 to settle the claim. In May 1997, Complainant hit a car. Respondent paid \$500.00 to the owner of the car to settle the claim. Respondent’s Exhibit 2.
6. Respondent contracted with Travelogs International to supply three luxury coach buses and drivers to transport a group of students from Turkey Hill Middle

School in Lunenburg, MA to Quebec City, departing on May 16, 1997 and returning on May 19, 1997. Respondent only had two luxury motor coaches in-house so it contracted out for a third luxury motor coach. The contracted bus did not show up so Respondent was forced to use an inferior, older bus from its Wellesley College route.

7. Complainant was the lead driver on the trip. Complainant's Exhibit 3. He had the most seniority driving luxury motor coaches for Respondent. Byrangland McNaughton was the second driver. Complainant's Exhibit 1. Wayne Nutter was the third driver. Nutter was pulled off a Wellesley College-Boston run to drive to Quebec City. Although Nutter had more seniority with Crystal Transport than did Complainant, Nutter was not designated lead driver because he drove primarily transit buses and because he was added to the trip at the last minute. Complainant testified that he was not the lead driver on the trip, but his denial was not credible.

8. On May 16, 1997, Complainant arrived at the school at 6:30 a.m., the designated pick-up time. Complainant's Exhibit 7. McNaughton arrived about three hours late, at approximately 9:30 a.m., because he confused the a.m. departure time for a p.m. departure time. He had to be awakened at home by dispatch. Nutter also arrived approximately three hours late because he was pulled off a Wellesley

College charter run at approximately 8:45 a.m. in order to fill in for a bus that did not show up.

9. MacDonald's restaurant in Newport, Vermont was on the most direct route to Quebec City. However, Complainant rerouted the buses to Wendy's restaurant in Lebanon, New Hampshire for lunch in order to receive ten (10) dollars from Wendy's for bringing a busload of customers. In order to travel to Wendy's, Complainant traveled on Route 89 to Lebanon, a detour of sixty (60) miles, which caused a delay of one hour. The other drivers also received ten (10) dollars each for bringing their customers to Wendy's, but they did not take part in the decision to go to Wendy's.

10. After lunch, Complainant had a problem with a brake locking. Nutter's bus stayed with Complainant's bus but Complainant directed McNaughton to continue on to Quebec City. Complainant's Exhibit 10. Complainant made an unscheduled stop in Derby, Vermont, causing another thirty (30) minute delay.

11. When the buses arrived in Quebec City, Complainant complained to "Patrick," the group leader, about the choice of hotel for the drivers. Complainant wanted to stay where the passengers were staying even though there was no bus parking available at that hotel and reservations had been made for the drivers at another hotel. Neither of the other drivers shared this concern.

12. On May 17, 1997, the buses were to be serviced prior to picking up the group at 1:00 p.m. At 1:00 p.m., all 119 travelers were waiting in the rain outside their hotel. Patrick called the drivers' phone. Complainant told Patrick that the buses were just leaving the service area and would arrive in fifteen minutes. The buses did not arrive in fifteen minutes. At about 1:25, the students walked to their next destination. Complainant's Exhibits 2 and 3. McNaughton testified credibly that he told Complainant to get the buses serviced earlier in the morning but that Complainant told him that they would not get paid to go early.
13. When Complainant left the garage where the buses were serviced, he took the lead. On the way to the hotel, Complainant became lost. He stopped in the middle of the street, gave a map to McNaughton, and told him to take the lead. The buses arrived at the hotel at approximately 1:45 p.m.
14. On May 19, 1997, on the way back to the United States, Nutter heard a noise in his bus. He informed Complainant. Complainant reported the noise to Respondent's office. Complainant insisted on swapping buses with Nutter in order to investigate the problem.
15. After the buses were exchanged, Complainant passed McNaughton on each descent but slowed on each incline, forcing McNaughton to slow down or pass him. Complainant's Exhibit 3. Respondent's driver's handbook cautions its drivers against passing other company buses. Nutter testified credibly that

drivers should stay in line in an orderly fashion to avoid frightening passengers and to engender faith that the drivers are working together.

16. When the buses arrived at the United States border, Nutter's bus stopped, was boarded by a Canadian customs official, and allowed to proceed. Complainant drove through the border without stopping. McNaughton's bus stopped and a custom's official boarded and said, "What does he think he's doing?" At a rest area approximately two miles down the road, two border patrol vehicles and a Vermont State Police Officer stopped Complainant. Complainant told them that he thought an official had waved him through customs.

17. Kevin Sheehan, Respondent's general manager, received letters of complaint from the school and from Travelogs. Respondent had to refund Travelogs \$2,500.00 of the \$7,500.00 fee that Travelogs paid Respondent. Sheehan questioned Complainant about the trip. Complainant denied complaining about the hotel assignment and blamed McNaughton for leaving the passengers in the rain. Sheehan requested written statements from all three drivers. After attending a June 10, 1997 investigative conference on Complainant's prior charge of discrimination, Complainant told Sheehan that Sheehan would never get the truth. Based on concerns that Complainant was lying about the trip, Sheehan fired him on June 17, 1997.

18. Complainant received unemployment compensation following his termination from Respondent, which he collected while working for a subsequent employer and which he failed to report on his 1997 tax return. Complainant's Exhibit 11. Complainant was hired by Entertainment Tours on June 24, 1997, one week after being fired, at \$9.00 per hour. Complainant failed to list this employment in his interrogatory responses. He began working forty hours per week at Coca Cola Company in August 18, 1997 at \$14.00 per hour, and then for Mini Coach in October 1997 at \$10.25 or \$10.50 per hour. Complainant testified that he could not remember if his employment at Entertainment Tours was full or part-time and how long it was between his job at Entertainment Tours and at Coca Cola.

III. CONCLUSIONS OF LAW

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).

If Complainant establishes a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-retaliatory reason for the alleged conduct. *See* Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2002); Abramian, 432 Mass. at 116-118. If

Respondent meets this burden, Complainant must then show by a preponderance of evidence that the proffered reason is not, in fact the real reason for the conduct at issue, i.e., it is a pretext. Id.; see also Mole v. University of Massachusetts, Mass. App. Ct. (Doc. No. 00-P-735, May 8, 2003. If the fact finder determines that one or more of the reasons is false, “it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind.” Lipchitz v. Raytheon Company, 434 Mass. 493, 501 (2001).

Protected activity must be based on a reasonable and good faith belief that the conduct complained of constitutes unlawful discrimination. See Clark County School District v. Breeden, 532 U.S. 286 (2001). Complaints may consist of internal complaints as well as formal charges of discrimination as long as they are sufficient to put the employer on notice of possible unlawful conduct. See e.g. Auborg American Drug Stores, 21 MDLR 238, 242 (1999) (Commission has found liability for unlawful retaliation when an employee complained about discrimination, but did not file a formal discrimination charge). See also Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208 (2000) (oral and written statements to management that oppose practices forbidden under chapter 151B constitute protected activity); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (same). On the other hand, complaints that do not mention discrimination may not be sufficient to satisfy the notice requirement. See Rosman v. Schepps, 24 MDLR 350 (2002) (general gripes with no specific references to discriminatory acts do not constitute protected activity); Russell v. Hill Education Centers, Inc., 23 MDLR 91, 95 (2001) (reporting that co-worker behaved

rudely and asked Complainant for date did not put employer on notice of possible unlawful conduct).

Applying the principles regarding retaliation claims to the facts at hand, there is sufficient credible evidence to establish a prima facie case of retaliation. Complainant filed a formal charge of discrimination with the Commission alleging that a co-worker used the term “nigger” in relation to a fellow employee. Although the case was ultimately dismissed for lack of probable cause, the charge does not lack the element of reasonableness which is a necessary prerequisite for protected activity. Compare MCAD’s Sexual Harassment in the Workplace Guidelines, Section IX. A. (Retaliation) (2002) (specifying that complainant need not prevail on sexual harassment claim to prove a retaliation claim). Approximately one week after the Commission held an investigative conference on the matter, Complainant was terminated. This sequence of events permits an inference of retaliation.

In response to Complainant’s prima facie case, Respondent has articulated and produced credible evidence to support a host of legitimate, non-retaliatory reasons for discharging Complainant. It accuses Complainant of rerouting the three buses of Turkey Hill students and their chaperones to Lebanon, New Hampshire in order to make a ten dollar tip; making an unscheduled stop in Derby, Vermont; complaining to chaperones about the choice of accommodations for the bus drivers; failing to service the buses in a timely manner which resulted in the failure to transport children from one stop to another; engaging in excessive lane changing on the trip home; failing to stop at customs on the

Canada/U.S. border; and telling Sheehan that he would never get the truth about the incident. Despite Complainant's denials and explanations, the credible testimony of witnesses Sheehan, Nutter and McNaughten support the conclusion that Respondent's reasons constituted a legitimate basis for Complainant's discharge. Complainant's misconduct on the Canadian trip cost Respondent \$2,500.00 in fees. This loss followed on the heels of two prior accidents involving Complainant which were also costly to Respondent. Complainant has failed to prove that these reasons are a pretext for unlawful retaliation. Accordingly, the complaint must be dismissed.

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.

SO ORDERED this 22nd day of January , 2004.

Betty E. Waxman
Hearing Officer

