

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

FREDRICK TOWNES,
Complainant

v.

DOCKET NOS. 01-BEM-1663
01-BEM-10839
02-BEM-03328

CompUSA INC.,
Respondent

Appearances:

Frank J. Kautz, Esquire for the Complainant
Alida Bogran-Acosta, Esquire and
Barbara A. O'Donnell, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 19, 2001, Complainant, Fredrick B. Townes, filed a complaint against Respondent, CompUSA Inc., alleging that he had been subjected to a racially hostile work environment, and treated adversely in the terms and conditions of employment on the basis of his race and color. On December 11, 2001, Complainant filed a second complaint against Respondent, alleging retaliation and on August 19, 2002, he filed a third complaint alleging further race discrimination and retaliation. The complaints were consolidated and on July 21, 2004, the Investigating Commissioner issued a finding of probable cause as to all three complaints.

Attempts to conciliate these matters failed, and the cases were certified for public hearing. A hearing was held before me on September 19 and 20, 2006. After careful consideration of the entire record and the post-hearing submission of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Complainant, Fredrick Townes, is an African-American man residing in Brookline, Massachusetts. Complainant was employed by Respondent, CompUSA Inc., from February 22, 2000 to June 18, 2002.

2. Respondent CompUSA Inc. employs more than six persons and is an employer within the meaning of G.L. c. 151B, § 1.

3. Complainant was hired by Respondent on February 22, 2000 to work in its Cambridge, Massachusetts store as a full-time software sales associate. In June of 2000, Complainant was promoted to the position of software/accessories supervisor. (I: 26; C-2). At the time of his hire, the store's operations manager was Mike Kohli and the general manager was Ken Gauthier.

4. Complainant acknowledged that in September 2000 his superiors recommended him for suspension because of tardiness, although there was no evidence that he was actually suspended at that time. (I:104)

5. In January of 2001, Complainant was promoted to the position of inventory control coordinator and his wages were increased to \$11.00 per hour. (I: 28; C-3).

6. In May 2001, at his request, the Complainant was transferred to the position of front end coordinator, or head cashier. In this position, Complainant reported to Nham Dam, the front end manager, who is of Vietnamese ancestry. (I: 32; C-4). Nham Dam reported to Mike Kohli, who in turn reported to Gauthier.

7. On May 31, 2001, prior to filing his first MCAD complaint, Complainant was issued an "employee counseling form" stating that he had previously been counseled

about his tardiness and warning him that further incidents of tardiness could result in written warnings or termination. (Exh.C-5)

8. On June 4, 2001, Jim Pellegrine replaced Ken Gauthier as the General Manager of Respondent's Cambridge store. (II: 5). According to the credible testimony of Pellegrine, he did not review any personnel files or discuss employees and did not know anything about Complainant before his arrival at the Cambridge store. (II: 6-7).

9. Prior to his transfer to the Cambridge store, Pellegrine had worked for Respondent for a number of years in various managerial positions. (II: 4-5). Pellegrine testified that he determined that the front end operations of the Cambridge store were sloppy, with missing paperwork, deposit slips, and checks. (II: 7). Pellegrine testified that Dam told him that Complainant's organizational skills and paperwork were substandard. Pellegrine acknowledged that the problems were not solely because of Complainant. (II: 8) I credit his testimony.

10. On June 17, 2001, Complainant failed to complete a deposit slip. Pellegrine testified that on the following day, at his instruction, Complainant had to re-do the deposit slip three times before it was properly completed. (I: 38).

11. On June 19, 2001, Complainant filed his first complaint with the Commission, alleging that he had been subjected to a racially hostile work environment. In his complaint he alleged that Operations Manager Mike Kohli called him "Buckwheat" "tulip" and "buttercup." His complaint further alleged that he had not been selected as "Employee of the Month" and that Ken Gauthier, who had been transferred out of the store two weeks earlier, had reneged on an agreement to pay Complainant a \$1,000 reward for uncovering theft.

12. Complainant testified that the “Buckwheat” remarks occurred “a couple of times”¹ but he did not state when, or in what situation, or how often. He stated that for him this term evoked the “time of slavery and the Ku Klux Klan” and made him feel powerless, angry and sad that such terms were used. I credit this testimony.

13. Complainant testified that he told warehouse manager Daniel McPhee, with whom he shared an office, about the remarks by Kohli, but he did not report any incident of name-calling to Gauthier, Pelligrene, the store’s human resources specialist or Ellen Macfarlane, Respondent’s regional human resources manager. (I: 92-96).

14. Daniel McPhee signed an undated statement which read that he had heard Kohli use the term “Buckwheat” toward various people but could not remember the term having been directed at anyone in particular. (Exh. C-1) McPhee gave the statement to Complainant. However, the statement bears the MCAD’s date stamp indicating it was filed with this Commission on July 3, 2001, presumably by Complainant.

15. Daniel McPhee, who is Caucasian, testified that he worked with Complainant for several months in the Cambridge location. He stated that he wrote the above statement under pressure by Complainant, who repeatedly asked him to document Kohli’s remarks. McPhee testified that his written statement was purposely vague because he could not confirm that Kohli directed the term “Buckwheat” at Complainant, although he acknowledged hearing Kohli use the term “Buckwheat” with various

¹ Q. What type of comments did he make to you?

A. “Buckwheat,” “tulip,” “buttercup”

Q. Now, some of those comments you had a problem with, but did not make a complaint about.

A. Yes.

Q. And what would those comments have been?

A. “Buttercup” and “Tulip”

Q. And why didn’t you complain about those?

A. They were homosexual terms. I’m not gay, so it didn’t bother me.

Q. But the term “Buckwheat did?

A. Yes.

employees, regardless of their race. McPhee also stated that Complainant was a poor employee. (I: 19-20) I credit his testimony.

16. McPhee testified that after writing the statement at Complainant's insistence, he realized that the statement might be used to support a claim by Complainant against Respondent. Therefore, he informed the manager on duty, whose name he did not remember, about his having written the statement at Complainant's request. I credit his testimony.

17. Complainant testified that Gauthier had promised him \$1,000.00 if he caught anyone stealing from the store. According to Complainant, he subsequently caught an employee copying software and reported this to Gauthier, but did not receive \$1,000.00. Pellegrine testified that he was unaware of any theft deterrence program instituted by Gauthier. (II: 19). I credit Complainant's testimony that he reported the copying of software theft to Gauthier; However, I do not credit his testimony that Gauthier promised him \$1,000.00 for his actions. I credit Pellegrine's testimony that he was unaware of any such agreement with Gauthier.

18. Ellen Macfarlane, Respondent's regional human resources manager, testified that upon receiving Complainant's first complaint, she interviewed Complainant and Pellegrine as part of an investigation in an attempt to resolve the issues raised by him. She testified that she also met with Kohli, who denied having made any racial or derogatory comments. McFarlane testified that, other than Complainant's MCAD charge, she had never received any complaints, internal or otherwise, about any conduct by Kohli. I credit her testimony.

19. Macfarlane testified that Respondent had a \$100.00 (not \$1,000.00) reward program for employees who caught shoplifters, provided the shoplifter was arrested. (II: 74-75). She stated that while Complainant claimed a co-worker had wrongfully duplicated software, the employee was not arrested; therefore, Complainant was not eligible for the reward. (II: 75). I credit her testimony.

20. Macfarlane and Pellegrine testified that Complainant would not have been eligible for the Employee of the Month, given his write-ups for tardiness and poor performance. (II: 20, 70-71). According to Macfarlane, prior recipients of this recognition included members of diverse racial and ethnic backgrounds. (II: 74) I credit their testimony.

21. Between the filing of his first complaint on June 19, 2001 and the filing of his second complaint on December 11, 2001, Complainant received several written notices regarding performance issues.

22. On June 20, 2001, Complainant was issued a "Performance Improvement Plan" or "PIP" addressing his shortcomings as front end coordinator and placing him on thirty days' probation. (I: 38-39; C-6). The PIP stated that if his performance did not improve, Complainant's employment could be terminated. (C-6). Pellegrine testified that he was not aware of the Complainant's MCAD charge at the time he issued these disciplinary measures. (II:16). I credit his testimony that he was not aware of the MCAD complaint when he issued the PIP.

23. On July 2, 2001, Complainant was issued a Performance Improvement Plan addressing problems resulting from incorrect office cash count on Friday, June 29, 2001 and Saturday, June 30, 2001; a missing check on Saturday, June 30, 2001 (later found

mixed in with gift certificates); and an incorrect accounting of a deposit on Monday, July 2, 2001. This Performance Improvement Plan discussed Complainant's demonstrated his lack of competence as a Front End Coordinator and resulted in his demotion to Cashier, accompanied by a \$1.00 per hour reduction in pay. (Exh. C-8, C-9) Complainant was replaced as front end coordinator by an African-American woman. (II:17).

24. Macfarlane testified that Complainant's first MCAD complaint had not been received by Respondent at the time of Complainant's demotion. (II: 16, 60). The MCAD mailed the complaint to a CompUSA store in Dallas, Texas (R-7), and it was then routed to the corporate office, which in turn routed it to Macfarlane. (II: 60-62) (R-6).

Macfarlane testified that she received the charge on July 5, 2001, three days after Complainant's PIP and demotion had taken place. (II: 62). Macfarlane informed Pellegrine of the charge at that time. (II: 63-64). I credit her testimony that the complaint was not received by her until after Complainant had been demoted.

25. Following his demotion, Complainant committed several additional infractions. On August 1, 2001, Complainant reported to work an hour late without having called-in in advance. (C-11). This infraction prompted a review of his time records which revealed that he was late "3/4 of the time." This resulted in the issuance of another PIP(C-11). Complainant admitted only to being late "a few times." I find that Complainant was late more often than not and that Respondent's time records are a more accurate account of his tardiness.

26. On September 25, 2001, Complainant was issued another PIP for tardiness. (C-12). During the second half of the month of September he was late eight times. (R-5) Complainant signed the PIP without noting any objection. (II: 26-27; C-12)

27. On September 27, 2001, Complainant erroneously rang in a cash register transaction for \$1,409.99 that should have been \$104.99. (II: 28-30) Instead of reporting the error to his supervisor, as he should have done, the Complainant used an override code that he had used as front end coordinator to process the sale. The discrepancy, a store credit of over \$1,300, was later discovered by the night shift supervisor. (C-13). Complainant received another PIP for this incident. (*Id.*)

28. On October 4, 2001, Complainant was issued a written warning for using his personal computer during work hours. (I: 31-33; C-14). Complainant refused to sign the warning. (II: 33).

29. EEO-1 records for July 2001 show that the Cambridge store's workforce is diverse, including African-Americans at various levels of administration areas: retail, security and technical management. (R-9)

30. In November of 2001, Respondent's Cambridge store closed. Complainant had the option of either resigning with severance pay or transferring to another CompUSA store. (I: 136) Complainant elected to transfer to Respondent's Brighton location, into the position of merchandiser at the same rate of pay. (I: 136). (C-15). (II: 96).

31. Mike Kohli did not transfer to the Brighton store. (I: 139)The General Manager of the Brighton store was Gregory Caughman, who is African-American. (I: 99, 13739).

32. According to EEO-1 statistics as of July 2001, the Brighton store employed a staff composed of over 57% of minority officials and managers, 33.33% of minority professionals, and over 70% of minority technicians. (R-10)

33. On December 11, 2001, Complainant filed his second MCAD complaint alleging that Respondent had improperly disciplined him and demoted him from head cashier while at the Cambridge location.

34. On January 22, 2002, Complainant was assigned to the Brighton store's entrance as a "greeter," responsible for greeting customers entering the store. In addition, he was responsible for placing a date sticker on merchandise returned by customers by means of a "date gun." (*Id.*) However, rather than place the date stickers on merchandise as directed, Complainant used the date gun to plaster the store's entrance with stickers. (I: 108). Consequently, he was issued a PIP for defacing company property. (I: 140; C-16). Complainant testified that his actions were "foolish" and a "mistake." (I: 108).

35. On March 17, 2002, Complainant was issued another PIP for alleging that Pellegrine made disparaging remarks about him and then refusing to cooperate in an investigation about his allegations. When called in by Caughman, who sought to follow up on the Complainant's allegations, Complainant declined to provide further information. (C-17).

36. Complainant filed a third MCAD complaint on August 19, 2002, claiming he had resigned "due to continued harassment and retaliation resulting from [his] two previous complaints." He cited two events as instances of harassment; being sent home to retrieve his company-issued name badge; and, being denied a request for a day off on June 18, 2002.

37. Complainant testified that on one occasion he left his name badge at home, and a supervisor named John, whose last name he could not remember, sent him home to retrieve his badge. He testified that on a previous occasion when he had forgotten his

badge, he was able to borrow a badge from the human resources room and return it at the end of the day. I credit this testimony.

38. In the course of his employment at the Brighton store, Respondent granted Complainant several requests for time off. (R-2). According to Complainant, a two-week advance notice was normally required. (I: 68).

39. Complainant testified that on Friday June 15, 2002, he had asked sales manager Jon Helgason for time off the next week. (I: 67). Helgason directed the Complainant to talk to Mr. Caughman the following Monday. (I:67)

40. On Monday, June 18, 2002, Complainant asked Helgason if he could leave early that day and take the following day off, but Helgason turned him down. (II: 146-147). Helgason testified that he was responsible for ensuring the store was properly staffed; therefore he did not generally grant requests for time off once the schedule was made, absent a good reason that would justify the absence to Caughman. (II-146). I credit Helgason's testimony.

41. Complainant then went to see Caughman to request the time off. (I: 67). He told Caughman that he had a doctor's appointment, but refused to provide any details. (I:67) Caughman rejected Complainant's request and instructed him to "go back to work." (I: 69). Complainant testified that he told Caughman that he was going to take the day off anyway. (I: 146). (I: 69, 145) Complainant later provided evidence of a doctor's appointment that was scheduled for Wednesday, June 20, 2002. (C-20). Complainant later acknowledged that he had requested the wrong day off. (I: 150).

42. Shortly thereafter, Caughman paged Helgason and asked him to find Complainant, who was not at his assigned work station. (II: 147). Helgason found

Complainant in the rear of the store, walking from the HR Specialist's office towards a conference room. (II: 148) Complainant went in the room and shut the door. (II: 148). Helgason testified raised his voice so as to be heard through the closed door and twice asked Complainant to get back to work. (II: 148).

43. According to Helgason, Complainant opened the conference room door and stormed towards him with hands in fists by his side, forcing Helgason to take a step back. (II: 149, 152). Complainant admitted to having "responded loudly" to Helgason. (I: 147). Helgason reported the incident to Caughman. (II: 149). I credit Helgason's testimony.

44. Complainant claimed to have been in the software area on the sales floor when Helgason began yelling at him. (I: 148). He testified that Helgason followed him through the store and continued to yell at him, using profanity once they were in the back of the store. (I: 148). (II:148) I do not credit his testimony.

45. Shortly after the exchange with Helgason, Caughman met with the Complainant to discuss his conduct and suspended him. (I:70). The same day, Complainant resigned from Respondent. (I: 71; *C-21*).

46. Following his resignation, Complainant filed his third MCAD complaint. In this complaint, in addition to the two instances of alleged harassment, Complainant claimed that Respondent discriminated against him by not paying him his unused vacation time. At the hearing, Complainant charged that Respondent's initial challenge to his unemployment claim and failure to provide him with a W-2 Earnings Statement for calendar 2002 by the end of January were further evidence of discrimination and/or retaliation. (I: 75-80, 81-82).

47. Respondent, which outsourced unemployment compensation claims and did not directly handle their processing. It subsequently withdrew the challenge to Complainant's approved claim of unemployment benefits. Complainant offered no evidence to show that the delayed receipt of his W-2 was on account of his race/color or his pending claims.

48. Respondent acknowledged a delay in paying the Complainant his unused vacation time. I find that Macfarlane learned that the Complainant had not been paid when Caughman forwarded to her a letter from the Massachusetts Attorney General's Office. (*R-12*). Upon receipt of the letter, Macfarlane promptly investigated the issue and made arrangements to make the payment. (*R-11, R-12*).

III. CONCLUSIONS OF LAW

A. Race Discrimination

To make out a claim of race discrimination, a complainant is required to establish that he (1) is a member of a protected class; (2) was performing his job adequately; and (3) was subjected to an adverse employment action; (4) while similarly situated persons not in his protected class were treated differently. Ihemdi v. Caremark, Inc., 20 MDLR 114, 117 (1998); see also, Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001)

Because Complainant cannot establish the four requisite elements of the prima facie case of disparate treatment, his claim must fail. While Complainant is a member of a protected class, as an African-American, "[m]embership in a protected class without more is insufficient" to establish unlawful employment discrimination. Weber v. Community Teamwork Inc. 434 Mass. 761, 778 (2001).

Complainant has failed to establish that he was satisfactorily performing his duties. He was the recipient of numerous PIPs due to his failing performance. During the course of his employment Complainant was issued numerous disciplinary notices for conduct he admits engaging in.

In support of his claim, Complainant asserts, without any support, that other individuals not of his protected class were not written up for similar infractions. As a matter of law, this assertion is insufficient to meet the requisite burden. Sereni v. Star Sportswear Manufacturing Corp., 24 Mass. App. Ct. 428, 433 (1987) (“Expressions of belief ... do not rise to the level of knowledge required ... and a judge does not have to accept an assertion of belief as an assertion of the truth of the fact believed.”).

Complainant presented no evidence whatsoever that other individuals not of his protected class were treated any differently than he was.

Respondent legitimately disciplined Complainant for inadequate performance, poor attendance and inappropriate conduct. Complainant, who admitted to the underlying conduct reflected in the disciplinary notices, does not support his claim that the discipline was pretextual, or that his race or color was a motivating factor in Respondent’s action.

B. Retaliation

Complainant has alleged that he was subjected to retaliation after filing complaints with this Commission. He asserts that Respondent warned him of poor job performance, refused to approve his request for time off, and ultimately suspended his employment. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected

activity and that Respondent subjected him to an adverse action and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003).

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). That Respondent knew of a discrimination claim and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation.

The sequence and timing of events in the present case do not support an inference of retaliation. Complainant's performance problems began long before he filed his original complaint in June 2001. Where Complainant's performance problems and Respondent's concerns with these problems predate Respondent's knowledge that he engaged in protected activity, I decline to draw the inference that subsequent actions, taken after Respondent learned of his complaint, were motivated by retaliation; Prader v. Leading Edge Prods., Inc., 39 Mass.App.Ct. 616, 617-18(1996)(employee filed after receiving back pay award claimed retaliation; summary judgment for employer based on prior performance evaluation which, "although in general favorable to the plaintiff, stated that the plaintiff needed improvement" in various categories) Here, there is undisputed evidence that Complainant had job performance and tardiness problems prior to Respondent's awareness of his discrimination

charge. Respondent took some action to address these problems and its concerns prior to receiving notice of Complainant's charge of discrimination. Respondent's actions subsequent to the filing of the charge were merely a continuation of measures, already begun, to improve Complainant's performance. The record evidence does not support an inference that Complainant's discrimination complaint motivated the various employment decisions of which he now complains, such as; warning him of job performance issues, refusing to allow him to take time off, sending him home for an identification tag and ultimately suspending him. Mole v. University of Massachusetts, et al., 442 Mass. 582(2004). Complainant's request for time off was denied by the store's manager; however, Complainant refused to return to work thereafter and he was suspended from employment. For the reasons stated above, I conclude that Respondent did not engage in unlawful retaliation, and I further conclude that this claim must be dismissed.

III. Racial Harassment

Complainant claims that Respondent violated M.G.L.c.151B§4 by creating a racially hostile work environment because Mike Kohli called him "Buckwheat." In order to prevail on such a claim, Complainant must establish that he was a member of a protected class, that he was the target of speech or conduct based on his membership in that class, that the speech or conduct was sufficiently severe or pervasive to alter his conditions of employment and create an abusive working environment, and that the harassment was carried out by an employee with a supervisory relations to Complainant, or that Respondent knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998),

citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511-1515 (11th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355, 1358-1359 (11th Cir. 1982); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

Complainant is a member of a protected class based on his race and color. There was testimony that Kohli referred to a number of employees as “Buckwheat”, regardless of race. While recognizing that the term “Buckwheat,” which I take to be a reference to an African-American character in the “Our Gang” movies of the 1930’s, is surely offensive, particularly to African-Americans, the record in this matter is completely devoid of any evidence regarding the circumstances and timing of remarks, if any, by Kohli toward Complainant (see fn. 1). While the Commission does not condone the use of such terms in the workplace, in this case there is insufficient evidence to support a finding that the speech or conduct was sufficiently severe or pervasive as to alter Complainant's conditions of employment and create an abusive working environment. There is no evidence as to how often, when, or even where it occurred. Therefore I conclude that Respondent did not engage in unlawful racial harassment in violation of M.G.L.c. 151B.

D. Constructive Discharge

To succeed in a claim of constructive discharge, Complainant must show that his working conditions were so intolerable that a reasonable person in his position would have been forced to resign. Fluet v. Harvard University, 23 MDLR 145, 164 (2001); see also Holt v. Minuteman Flames Minor Hockey Assoc., 22 MDLR 373 (2000). He must

also establish that he exhausted all reasonable alternatives to leaving his employment.

Fluet, citing Klekotka v. Carlin Combustion Technology, 21 MDLR 72 (1999); Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226 (1992).

Complainant quit his employment because he disagreed with Respondent's decision not to grant his request to take a day off. Upset at the denial of his request, Complainant engaged in insubordinate conduct that resulted in his suspension on June 18, 2002. That same day Complainant resigned. He did not seek alternatives to leaving his employment and did not demonstrate that his working conditions were so intolerable as to compel his resignation. His separation was voluntary.

For the reasons stated above, I conclude that Respondent did not engage in unlawful discrimination and that the complaints in this matter shall be dismissed.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that the complaints in this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, THIS 23rd DAY OF JANUARY, 2007.

JUDITH E. KAPLAN,
Hearing Officer