COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and GEORGE PRICE,
Complainant

v. Docket No. 00-BEM-0262

H.T. BERRY COMPANY, INC.,
Respondent

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

Appearances: John G. H. Coster, Esq., for Complainant.
Sara M. Quinn, Esq., and Kevin F. Maguire, Esq., for Respondent.

I. PROCEDURAL HISTORY

On February 2, 2000, Complainant, George Price ("Complainant"), filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against his former employer, H.T. Berry Company, Inc. ("Respondent"). In his initial complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of disability in violation of G.L. c. 151B, §§ 4(16A). The Investigating Commissioner also construed the complaint to include an additional claim of unlawful retaliation in violation of G.L. c. 151B, § 4(4) and amended the complaint accordingly pursuant to 804 CMR 1.10(6).

On October 3, 2001, the Investigating Commissioner found probable cause to credit Complainant's allegations with respect to the retaliation claim, but issued a lack of probable cause decision with respect to the disability

discrimination claim. On September 23, 2002, the Commission certified the case for Public Hearing. A Public Hearing was held before me on July 28, 29 and 30, 2003, in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the Public 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. Complainant, George Price, currently resides in Stoughton, MA, and worked for Respondent as a truck driver almost continuously from 1990 to May 1999 and again from August 1999 to January 17, 2000. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, H.T. Berry Company, Inc., is a corporation with an office in Canton, MA. Respondent is engaged in the business of distributing plastic and paper products to institution, industrial, and food service accounts. Henry Berry ("Berry") started the company in 1964, served as the President of the company until 2001, and remains its Chief Executive Officer. Respondent employs approximately forty employees and is, therefore, an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. In 1990, Respondent hired Complainant as a “Class B” truck driver. Respondent laid Complainant off from work in 1991, but rehired him six months later. Complainant claimed that throughout his employment, Respondent generally expressed satisfaction with his work performance and he received regular wage increases.

4. Complainant testified that he had a long history of substance abuse that began in the mid 1970’s and reached its height in the mid 1980’s. He stated that he eventually started seeking treatment for his drug addiction and stopped using drugs in 1989. Complainant claimed that throughout his employment with Respondent, he told several individuals in the company about his substance abuse problem and addiction to cocaine, including Harry Berry and other supervisors and co-workers.

5. Respondent conducts random drug and alcohol tests on its truck drivers pursuant to regulations promulgated by the U.S. Department of Transportation (“DOT”). Respondent’s Manager and Payroll Supervisor, Jack Gerber, oversees the testing for the company. However, the drug and alcohol testing program is actually managed and implemented by Substance Abuse Management, Inc. (“SAMI”), a private corporation that specializes in the administration of such programs. For example, SAMI is responsible for identifying the employees being subjected to random tests and designating the appropriate facility to provide the tests.

6. Pursuant to § 382.215 of the DOT regulations, "No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances." In addition, the same section provides, "No employer having actual knowledge that a driver has tested positive for a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function." Safety-sensitive functions include driving a commercial motor vehicle. In addition, Respondent's Employee Handbook contains a "Substance Abuse" policy, which states: "No employee shall work, report to work or be present on company premises, in company vehicles or engage in company activities while under the influence of alcohol or controlled substances which significantly affects job safety…. Any violation of this substance abuse policy may result in disciplinary action, up to and including discharge." The Substance Abuse policy further provides, "Consistent with our fair employment policy, our company maintains a policy of non-discrimination and reasonable accommodation with respect to recovering addicts or alcoholics, those who are perceived as having a dependency and those having a medical history reflecting treatment for this condition."

7. In May 1999, Complainant tested positive for cocaine as a result of a random drug test. At the public hearing, Complainant admitted to using cocaine several days prior to the random drug test. After getting the results of the test, Berry immediately terminated Complainant. Complainant acknowledged that upon his termination, Respondent paid him for all of his accrued vacation and sick time, and he received the appropriate distribution from the company's 401k

and profit-sharing plans.

8. Complainant testified that he believed Respondent had engaged in unlawful discrimination on the basis of disability by terminating his employment and refusing to provide him with reasonable accommodation for his substance abuse problem as provided in the company's Substance Abuse policy.[1] In addition, he claimed that Respondent treated him differently from co-workers who were afforded reasonable accommodations for their alcoholism problems.[2] Berry testified that had Complainant come to him in advance of the drug test, he would have given him time off to seek treatment, but because he discovered Complainant had used drugs as a result of a drug test, he did not offer him drug counseling or a leave of absence. I credit Berry's testimony.

9. Complainant testified that after being terminated, he sought treatment for his drug addiction problem at his own expense. In the summer of 1999, he then contacted Gerber to inquire about returning to work at Respondent. According to Complainant, Gerber inquired if he was in a drug treatment program. Complainant claimed that told Gerber about being enrolled in a treatment program, and in response, Gerber said he would discuss his reemployment with Berry. Berry testified that after he discussed the matter with Gerber, he contacted SAMI to determine what would be required to allow Complainant to return to work. Berry claimed that SAMI told him that in order for Complainant to

[1] As stated above, the Commission issued a lack of probable cause finding with respect to Complainant's disability discrimination claim.

[2] Complainant failed to provide any credible evidence of disparate treatment and I specifically find that his testimony regarding this matter lacked credibility.

resume driving a commercial vehicle, he need to obtain a certificate verifying that he had attended a drug counseling program.

10. On August 3, 1999, Complainant met with Berry to discuss his possible reinstatement. Prior to the meeting, Complainant had obtained a certificate verifying his attendance at a drug counseling program. According to Complainant, Berry expressed “disappointment” about his use of drugs, but Berry then agreed to reemploy him as a “new” employee without seniority or any accrued vacation time, sick leave, or personnel days. Instead of being grateful to Berry for offering him another chance, Complainant objected to the terms of his rehiring because he believed these conditions constituted “punishment” for his drug addiction problems. Berry and Paul Maguire, however, testified that they were simply following the company’s long-standing company practice of rehiring a former employee as a new employee without seniority. Maguire, the company’s General Manager, had similarly been rehired by Berry and, like Complainant, started again as a new employee. Maguire and Berry told Complainant that every former employee who had ever been rehired started again as a new employee. In addition to the loss of vacation and seniority, Berry told Complainant that he would be assigned to a different route than the one he drove prior to the termination. Lastly, Berry insisted that Complainant take monthly follow-up drug tests at his own expense in addition to the company’s random tests. Although Berry claimed that SAMI recommended that Complainant be tested twenty-four times in the first year of reemployment and twelve times the second year, Berry decided on requiring that Complainant be only tested twelve

times during his first year back to work and six times the subsequent year.[3] Complainant agreed to these conditions and he resumed his employment with Respondent effective August 3, 1999. On or about August 18, 1999, Complainant signed a written statement that stated:

> It is agreed that George will submit to random drug testing once every month for next twelve months. (He will be responsible for payment of these tests). It is further agreed that he will submit to an additional twelve random tests over the following thirty six months for which the H.T. Berry Co. will pay for these tests.

11. Complainant claimed that he never informed his co-workers about his failed random drug test in May 1999. However, he testified that after he returned to work it became obvious to him that his co-workers knew the reason for his termination. Complainant also stated that co-workers and supervisors harassed him as a result of his of loss of seniority. Specifically, he stated his immediate supervisor, Fran Bilotas, and co-workers called him "low man." Complainant testified that he complained to Bilotas about these comments, but they continued. In addition, he claimed that a coworker, Delmo Fabrizio, regularly made jokes about his drug addiction problem.

12. Complainant testified that in October 1999, his co-workers played a practical joke on him by placing a baggie filled with white powder on his clipboard.[4] Complainant's clipboard, along with the clipboards of the other drivers, hung on a wall outside Bilotas' office. Complainant claimed that several

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[3] Sec. 382.605 of the DOT Regulations provides that a driver identified as needing assistance in resolving problems associated with controlled substance use shall be subjected to unannounced follow-up tests following the driver's return to duty. Sec. 382.605(c)(2)(ii) specifically provides, "The number and frequency of such follow-up testing shall be as directed by the substance abuse professional, and consist of ***at least*** six tests in the first 12 months following the driver's return to duty. (emphasis supplied).

[4] The substance was discovered to be ice melt.

co-workers saw the baggie on the clipboard and laughed. He testified that he reported the incident to Bilotas the following morning. He claimed that he told Bilotas that he found the joke very hurtful and these types of jokes had to stop. According to Complainant, Bilotas merely responded that he had not seen the clipboard.

13. Complainant claimed that despite his complaints to Bilotas, his co-workers continued to refer to him as "low man." In response, on November 1, 1999, Complainant wrote a letter to Berry, which stated:

> After much thought, I realize how important my vacations and seniority are to me to spend those weeks with my little girl is invaluable to me. I feel the consequence you called for is too severe. Therefore, I ask respectfully that my vacations and seniority be reinstated.
>
> Also, I expect by this time that Fran has made you fully aware of the harassment towards me (pranks made in poor judgment and statements that are demeaning). It needs to stop. I think it is a matter more serious than some of my fellow workers understand. Thank you.

14. Berry testified credibly that before he read Complainant's letter, he had no prior knowledge of his complaints of harassment. Later in the afternoon of November 1, Berry met with Bilotas to discuss Complainant's letter. Berry testified that he then met with the truck drivers and warehouse employees. He claimed that he warned the employees if any further incidents occurred, the person or persons responsible would be fired. Berry also met with members of the office staff and gave them the same warning. Berry summarized his response to Complainant's complaint in a memorandum dated November 2, 1999. At the end of the memo, Berry wrote that he "intends to meet with George to discuss his future with the Company and [he] intends to consult with legal

counsel to make certain we are complying with the letter of the law concerning these matters." Berry claimed that wanted to meet with Complainant "to discuss his future with the company" because Complainant continued to object to the terms of his reemployment that he agreed to in August. I credit Berry's testimony.

15. On November 8, 1999, Berry, along with Maguire and Bilotas, met with Complainant. At this meeting, Berry asked Complainant how he was being harassed, and he responded by describing the incident involving the baggie on his clipboard. Complainant also stated that he believed Delmo Fabrizio played the prank.[5] Complainant further testified that he verbally told Bilotas about the harassment in the presence of Fabrizio and Bill Kennerson.[6] At the meeting, Bilotas denied being aware of the incident until he read Complainant's letter of November 1. Berry then informed Complainant of his meeting with the drivers. According to Berry, Complainant indicated that he was satisfied with his actions. They then discussed the second issue in Complainant's letter, namely, the loss seniority and vacations. According to Berry, he questioned Complainant regarding the terms of their agreement when he was rehired in August. He also reminded Complainant that upon his discharge in May, the company had paid him for all his earned vacation time and sick days, and his share from the company's 401K plan. Complainant replied that he was unhappy about losing his seniority and vacation time and he believed the loss of these benefits was unfair.

[5] Berry stated that they questioned Fabrizio about this incident in the afternoon of August 8, and Fabrizio admitted to placing the baggie on Complainant's clipboard.

[6] According to a memo of the incident prepared by Berry, both Fabrizio and Kennerson were questioned about Complainant's conversation with Bilotas, and both denied hearing any such discussion.

In response, Berry told Complainant that he had two options, either accept the terms under which he was rehired, or resign from the company. In response, Complainant complained that other employees had kidded him about being "low man" on the seniority list and he considered it embarrassing and harassment. Berry informed him that he would again meet with the drivers and warehousemen regarding the teasing. I credit Berry's testimony.

16. On August 8, 1999, Berry prepared a warning that he had placed in Complainant's personnel file. The warning stated that Complainant's co-workers had complained that Complainant was using the company's Nextel radio to harass them and "intimidating them by challenging them to wrestling matches." Berry testified that Complainant had been challenging co-workers to wrestling matches for some time and Complainant had even jokingly challenged him to a match. Berry admitted, however, that he had never previously warned Complainant about the inappropriateness of this conduct. Berry claimed that upon the advice of counsel, he began documenting complaints by co-workers against Complainant since Complainant had made complaints against them. I credit Berry's testimony. In addition, although I credited Complainant's testimony that Berry never showed him a copy of the warning, Complainant failed to establish that this warning affected his employment, constituted an adverse employment action, or played a factor in the termination of his employment in January.

17. Berry claimed that on November 9, 1999, in response to Complainant's complaint about being called "low man", he again met with the employees and

told them that he would not tolerate such behavior and if it continued, those responsible would be fired. According to Berry, he later met with Complainant to inform him of his second meeting with the employees, and Complainant again expressed satisfaction with Berry's response. With respect to Complainant's continued complaints regarding his loss of seniority and accrued benefits, Berry presented him with a written agreement that reiterated the terms Complainant had agreed to upon being rehired. The written agreement specified Complainant's two options, either "continue his employment with the conditions set forth on his rehiring on August 3rd" or resign within 48 hours. Berry testified that he drafted the agreement in part because Complainant was continually nagging Gerber about this issue. Berry then granted Complainant's request for additional time to consider the alternatives. In a memorandum Berry wrote regarding this meeting, he indicated that Complainant "could take the rest of the week" to consider the alternatives, "but we expected an answer by Monday, November 15." I credit Berry's testimony. Complainant testified that he then contacted an attorney and the Commission about filing a discrimination claim.

18. On November 15, 1999, Complainant signed the memorandum dated November 9. He claimed that he signed the memo only after Bilotas told him he could not work that day unless he signed it. Complainant testified that after he "unwillingly" signed the memo, "I started to share with everybody my intentions of going to the MCAD, not everybody, but certain people." He claimed he told a number of co-workers, including Eric Wolfe, Bill Kennerson, Mike Juliano, Del Fabrizio, and Brian Senior, that he had contacted an attorney and intended to file

a claim with the Commission. However, Complainant acknowledged that in his complaint filed at the Commission on February 2, 2000, he never mentioned that he discussed his intentions of filing a claim with anyone at Respondent. When asked on cross-examination why he didn't mention such discussions in his complaint, Complainant testified he had a "block." Although Complainant stated he believed Mike Juliano was possibly part of "management" because he "worked inside the office", I find that Complainant has failed to establish that any of the persons identified above exercised supervisory authority over him.

19. At all relevant times, Bill Kennerson worked for Respondent as a mechanic and spare driver. Kennerson testified that after Respondent rehired Complainant, he complained to him about not having his accrued seniority, vacation, and sick time. Kennerson further claimed that Complainant said he was going "to pursue legal matters to get his seniority and benefits back." However, Kennerson did not corroborate Complainant's testimony that he specifically told him he was going to file a claim at the Commission. I credit Kennerson's testimony.

20. At all relevant times, Dana Belviy worked at Respondent as a dispatcher and truck driver. Contrary to Complainant's testimony, Belviy likewise specifically denied that Complainant ever told him he was going to file a complaint at the Commission. According to Belviy, Complainant also never mentioned anything about being unhappy or dissatisfied with his loss of seniority or benefits.

21. On January 12, 2000, Bilotas informed Complainant that he had to take both a drug test and an alcohol test. Although Complainant did not express any objection to the drug test, he claimed that he did not understand why the company was insisting on him taking an alcohol test. He testified that he asked Bilotas for an explanation, but Bilotas never responded. According to Complainant, several days later he again spoke to Bilotas and reiterated his concern that the alcohol test was unjustified and discriminatory. He claimed that Bilotas simply responded that the Company could send him for any test they felt like. Gerber testified that Respondent sent Complainant for an alcohol test on January 12 because it had "reasonable suspicion" that he had consumed alcohol.[7] Gerber claimed that the company suspected Complainant had "maybe" taken alcohol since someone observed Complainant's vehicle outside a restaurant that served alcohol and "knowing his background" of drug abuse. Gerber admitted that Respondent had never previously required an employee to take a "reasonable suspicion" test. Gerber further acknowledged that Respondent had no other basis for concluding that Complainant had an alcohol problem. DOT regulations regarding alcohol testing provide that before an employee may be required to submit to a test based on "reasonable suspicion", there must be "specific, contemporaneous, articulable, observations concerning the appearance, behavior, speech or body odors of the driver." Gerber admitted that Complainant's speech, body odor, appearance or behavior did not indicate that he had consumed alcohol.

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[7] Although Gerber acknowledged that the Respondent sent Complainant for an alcohol test based on "reasonable suspicion", the test paperwork indicated that the test was designated as a "random" test. Gerber testified credibly that he did not know why the test was mislabeled.

22. Complainant testified that in the days following the alcohol test, he asked Gerber if he could see the paperwork for the test. According to Complainant, in response to his request, Gerber became flustered and refused to let him see the paperwork, claiming he had to first check with Berry.

23. Complainant claimed that on January 14, 2000, Maguire told him that Berry was becoming upset with him about his constant complaints regarding his loss of his vacation time and seniority. According to Complainant, Maguire also stated that Berry had heard Complainant was going to the Commission. Maguire denied making these statements. In addition, Maguire testified he had no knowledge at this time about Complainant filing a complaint at the Commission and had never discussed this issue with Berry. Rather, Maguire claimed that Complainant only repeatedly complained to him and Berry about his loss of seniority. I credit Maguire's testimony.

24. Berry testified that in December 1999, he and Maguire discussed the poor financial situation stemming from Respondent's newly acquired business located in Bangor, ME. According to both Berry and Maguire, they recognized that the Bangor office was a "losing proposition" and the company would need to cut expenses somewhere else to make up for the loss. They both claimed that Maguire recommended the company could cut expenses in the warehouse and trucking department in Canton, since that facility was overstaffed. In addition to the cost of maintaining the Bangor office, Berry testified that the company was experiencing a cyclical drop in sales. Berry claimed that the company historically experienced a decline in sales during the months of December and January. I

credit Berry and Maguire's testimony.

25. On January 17, 2000, Complainant met with Berry and Bilotas. At this meeting, Berry told Complainant that he was being fired effective immediately, because the company did not have enough work for him. According to Complainant, Berry told him that he was offended by Complainant's complaints about his loss of seniority and vacation pay as well as his assertions of harassment. In addition, Complainant claimed that Berry expressed being upset as a result of his complaints about the alcohol test. Berry, however, testified that in addition to telling Complainant that it did not have enough work for him, he told him that he considered Complainant's general poor attitude regarding his seniority status as well as his less than exemplary personnel file. Although Berry admitted that he did not look at Complainant's personnel file prior to making the decision to terminate his employment, he claimed that Complainant had seven "Employee Warning Reports" in his personnel file, dating from 1991 to 1998, more than any other employee. Complainant did not rebut Berry's testimony that he had received more warning notices than any other employee. Berry also stated that at the time he decided to terminate Complainant, he had no knowledge that Complainant intended to file a complaint with the Commission. Furthermore, Berry denied that he had any concern or knowledge that Complainant might contact an attorney or file a discrimination claim. I credit Berry's testimony.

26. Berry and Maguire testified that Complainant's position at Respondent remained unfilled for five months. They eventually filled the position after

27. At the time of his termination, Complainant was earning $15.50 per hour, plus time and one-half for overtime. Complainant testified that after being fired, he remained unemployed until January 2003. Complainant testified that during his three year period of unemployment, he only applied for three jobs and did not go on any job interviews. For 2000, he claimed to have earned only $1,501.57. For 2001 and 2002, he claimed to have no earned income. He estimated that he lost approximately $34,000 to $38,000 each year from 2000 through 2002. Complainant stated that in January 2003, he started his own business installing tile. He estimated that from January through July 2003, he earned approximately $8,000.00

28. Upon his termination, Complainant also lost the benefit of belonging to Respondent's health insurance, pension, and profit sharing plans. In addition, Complainant claimed that after he lost his job, he had to move back home and live with his parents. He testified that as a result of the termination, he was unable to support himself or pay child support. He further stated that the termination made him fell "degraded" and "helpless", and caused him to lose his self-esteem. Complainant claimed that he felt he had little hope of obtaining

another job since she could not use Respondent as a reference.

III. CONCLUSIONS OF LAW

Complainant has alleged that Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4). 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), *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995). M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under c. 151B or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B. Kelley, 22 MDLR at 215, *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997).

In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent knew he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the

retaliators, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); *see*, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

I find that Complainant has established a *prima facie* case of retaliation. As an initial matter, however, I did not find Complainant's testimony credible with respect to his statements to numerous co-workers that he threatened to file a claim with the Commission. In particular, Complainant failed to produce a single witness at the Public Hearing that corroborated his testimony. Moreover, all of the witnesses that did testify at the Hearing denied hearing him make any such

statement. Additionally, I credited Berry and Maguire's testimony that they had no knowledge of these assertions at the time Respondent terminated Complainant's employment.

I also do not believe that his constant complaints about his seniority and vacation pay constituted protected activity. Complainant clearly expressed his displeasure and frustration regarding his seniority status to Gerber, Bilotas, Berry, and Maguire, but he did not provide any testimony that his complaints alleged or implied that the company discriminated against him on the basis of his history of drug abuse. Although Complainant may have believed that the company was discriminating against him on the basis of his drug addiction problems, and "punishing" him for the failed drug test, I am convinced that Respondent merely subjected him to the same terms and conditions it applied to every former employee who was rehired. More importantly, I do not believe that Complainant framed his complaints regarding his seniority status as discriminatory or unlawful. Rather, I find that Complainant's complaints were mere expressions of his dissatisfaction with the terms and conditions of his re-employment. For example, in Complainant's letter to Berry dated November 1, 1999, he wrote, "After much thought, I realize how important my vacations and seniority are to me to spend those weeks with my little girls to invaluable to me. I feel the consequence you called for is too severe. Therefore, I ask respectfully that my vacations and seniority be reinstated."

Notwithstanding, I find that Complainant did engage in protected activity by virtue of his letter to Berry dated November 1, 1999, when he complained that

co-workers were harassing him on the basis of his history of drug addiction. Berry also acknowledged that Complainant told him on November 8, 1999, about the incident in which co-workers left a baggie filled with white powder on his clipboard, an obvious reference to his history of drug and cocaine problems. In addition, I credited Complainant's testimony that after Respondent subjected him to a "reasonable suspicion" alcohol test on January 12, 2000, he complained to Bilotas and Gerber that the test was "unjust." Gerber admitted that Respondent did subject Complainant to the alcohol test based on its knowledge that he had history of drug problems. I find that Complainant's objection to the alcohol test should be construed as an allegation of discrimination based on his possible status as a disabled person.

Further, on January 17, 2000, shortly after Complainant complained to Respondent about the harassment and discrimination, Respondent subjected him to an adverse employment action when it terminated his employment. I find the short period of time between his complaints of harassment and discrimination and his termination raises a reasonable inference that a casual connection existed between Complainant's protected activity and the adverse employment action. Consequently, under these circumstances, Complainant has established a *prima face* case of retaliation.

Respondent now has the burden of production to show that it had a legitimate, non-retaliatory reason for terminating Complainant's employment. I find that Respondent has met this burden. I credited Berry and Maguire's testimony regarding Respondent's business dealings and the company's need to

cut costs in January 2000. Specifically, they testified credibly that its facility in Bangor, ME was losing money. In response, Maguire recommended that the company reduce expenses by cutting the number of personnel in the warehouse and trucking department at the Canton facility. In addition to the cost of maintaining the Bangor office, Berry testified credibly that the company was experiencing a customary cyclical drop in sales. While Berry testified that he did not review Complainant's personnel file before deciding to fire him, I credited Berry's testimony that he reasonably believed that Complainant had more "Employee Warning Reports" in his personnel file than any other employee. In addition, Berry testified credibly that he considered Complainant's general poor attitude regarding his seniority status.

Complainant must now establish that Respondent terminated his employment as a result of retaliatory intent, motive, or state of mind. I find that Complainant has failed to meet his burden. In particular, he has failed to establish that Respondent's reasons for the termination were false or not the real reasons for its action. Although Complainant argued that Respondent's corporate tax returns showed the company had a very profitable year in 1999, as stated above, I credit Berry and Maguire's testimony that by December 1999, Respondent had a legitimate need to cut expenses because the Bangor facility was losing money. I also credited Berry's testimony that he decided to lay off a truck driver after Maguire recommended reducing the number of personnel in the trucking and warehouse department in the Canton facility. Respondent also did not hire another truck driver or person to fill Complainant's position for a period of

five months. The company then hired an additional Class A truck driver after it had obtained a new lucrative contract.

In response to Berry's testimony that he considered Complainant's numerous warnings contained in his personnel file, Complainant argued that Respondent could not reasonably rely on such warnings since they all occurred prior to his being rehired in August 1999. However, Complainant did not rebut Berry's testimony that he had received more Employee Warning Reports than any other employee and, therefore, I credited Berry's testimony regarding Complainant's work performance.

Lastly, Complainant does not dispute that he regularly nagged his supervisors about his loss of seniority. As stated above, I did not find any connection between his complaints regarding his seniority status and his possible status as a disabled person. Rather, I believe his complaints constituted mere expressions of his dissatisfaction with the terms and conditions of his reemployment. In addition, I credited Berry and Maguire's testimony that they informed Complainant that every time it rehired a former employee, the individual started as a new employee for seniority purposes. Under these circumstances, especially where Berry likely and understandably believed that Complainant should have instead expressed gratitude to him for giving him another chance, I find it reasonable that Berry would view Complainant's complaints about his seniority status as evidence of a "poor attitude." Consequently, Complainant has failed to establish that Respondent's articulated non-discriminatory reasons for terminating his employment were false or not the real reasons for its actions.

Complainant has, therefore, failed to establish that Respondent engaged in unlawful retaliation under M.G.L. c. 151B, § 4(4).

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 9th day of April, 2004.

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EDWARD R. MITNICK
Hearing Officer