

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission	)	
Against Discrimination and	)	
Jean Tolly Voltaire	)	
	)	
Complainants	)	Docket No. 99-BPA-2452
	)	
Against	)	
	)	
Massachusetts Division of	)	
Employment and Training,	)	
JobNet Program	)	
	)	
Respondent	)	

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APPEARANCES

Michael A. Poulos  
Counsel for the Complainant

Robert K. Ganong  
Counsel for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 9, 1999, Complainant, Jean Tolly Voltaire, (hereinafter referred to as “Complainant”), filed a Complaint with this Commission charging Respondent, Massachusetts Division of Employment and Training’s JobNet Program (hereinafter referred to as “Respondent”), with discrimination against him based on race and color.

After an investigation by the Commission, the Investigating Commissioner issued a probable cause finding and on June 20, 2001, the case was certified for public hearing.

The following issues were certified: (1) Whether or not Respondent engaged in discrimination against Complainant on the basis of race, color and/or national origin by refusing Complainant access to JobNet services between April 27, 1998, and September 7, 1999, and (2) Whether Complainant suffered any emotional distress damages as a result of the alleged actions of any DET employee.

A public hearing was held before me on January 28, 2002. Following the hearing, the Respondent submitted proposed findings of fact and rulings of law, which I have considered, along with careful review and consideration of the entire record. To the extent that any of the proposed findings are not in accord with my findings and conclusions, they are rejected or are considered not relevant or material to the issues presented. To the extent that testimony of witnesses is not in accord with the findings, herein, such testimony was not credited.

Based upon all the credible evidence and the reasonable inferences drawn therefrom. I make the following findings of fact, conclusions of law, and order.

## II. FINDINGS OF FACT

1. Jean Tolly Voltaire (“Complainant”) is Black and a native of Haiti. The Complainant is well educated, possessing both a Bachelor’s and Master’s Degree (T1).
2. The Respondent, JobNet (“Respondent”) is a Career Center located at 210 South Street, Boston, MA. Massachusetts Division of Employment Security,

an agency of the Commonwealth, operates the Respondent, JobNet Program.  
(Joint Certification Memorandum)

3. Respondent offers comprehensive services to help jobseekers find work.  
These services are available to anyone seeking employment (T3)  
Respondent's staff is comprised of many different races and nationalities.  
(T3, Respondent's Ex. 4) The staff serves a very diverse clientele. (T1, T3)  
All JobNet staff have received diversity training (T3).
  
4. Complainant used Respondent's services on several occasions between April 27, 1998, and September 7, 1999. Complainant testified that he used Respondent's telephone primarily for following up correspondence to prospective employers. He testified the Respondent questioned him as to his telephone use and he believes that Respondent did not question other people utilizing those services. He stated that he had successfully faxed documents through Respondent but only after waiting long periods of time while the workers assisted other individuals. Either Beverly Mills or another staff person faxed these documents for him. (T3, T4) During his visits, Complainant also used the computer (T2, RX2). Complainant testified that he asked for computer help but was never given assistance. Complainant did not testify as to dates or times when he was allegedly not given assistance. Complainant testified that he did not complain to the supervisors at Respondent about these alleged difficulties.
  
5. Complainant testified that on one visit he had to wait about two hours to have a document faxed. (T1) Complainant did not testify to specifics about

this incident, including when it occurred and whom at Respondent he asked to help him. Complainant testified that he was able to have documents faxed for him at other times, but not without difficulties. (T3).

6. Complainant testified that his difficulties with the Respondent culminated on September 7, 1999. On that date, Complainant visited JobNet, arriving there at approximately 8:17 a.m. (T1, CX 2). The Resource Room opens for business on Tuesdays at 8:30 a.m. (RX 3).
7. Upon his arrival, the Complainant completed a fax cover sheet, and brought the cover sheet and a four-page document to Ms. Beverly Mills (“Mills”) to be faxed. (T1, CX2) Mills is an employee of the Respondent. She works in the resource room as a coordinator/librarian along with other staff. Mills assists job seekers needing assistance in using the resources available in the resource room. Mills is African-American.
8. The document Complainant wished to fax was written entirely in French. (CX 2). The Complainant testified that it was a writing sample he was submitting to the Haitian Observateur newspaper in response to a job ad he had heard on the radio. (T1). He was applying for a position as a news reporter. The document was to be faxed to the New York City office of the Haitian Observateur.
9. After receiving the document, Mills proceeded to walk to the fax machine. (T4). Mills testified that on her way to the fax machine, she reviewed the

document to see if it was job search related. (T4). She testified that she had taken some courses in French and had some understanding of the written language, although she could not speak or read fluently. As a result, she was able to understand a few words in the document. (T4).

10. Based on her review of the document written in French, Ms. Mills concluded that the document was political in nature and not job search related. (T4) She then returned the document to the Complainant and told him that she could not fax it for him because it was not job search related. (T1, T4).

Complainant testified he did not have the newspaper ad for the position with him to show Ms. Mills that the document was job search related. However, Complainant further testified that users of Respondent's services usually did not have the advertisements with them, as sometimes the jobs sought were on the Internet or were referrals from friends.

11. Complainant testified that he became quite upset when Mills told him she would not fax the document. Mills' testimony corroborates Complainant's upset. (T4). Complainant asked to speak with Mills' supervisor. (T4). Mills told him that he could speak with Kent Wampler ("Wampler"). Kent Wampler is a Learning Organization Specialist who has worked for Respondent since March 1997. (T4). He is responsible for designing and delivering programs for job seekers (T4). He also assists in faxing documents for job seekers (T4).

12. Complainant spoke with Wampler and told him that Mills would not fax the document for him because she had determined the document was not job search related. (T4)
  
13. Wampler testified that he recalled Complainant's document was very long and written in French.<sup>1</sup> (RX.7, T4). Complainant told him that the document was an example of his work and that he wanted to send it to a prospective employer. Wampler testified that he thought that it was unusual to fax, rather than mail, a writing sample, because faxed documents do not reflect well on the writer's work. (T5). Wampler observed that the Complainant was upset at the refusal to fax his document. Wampler testified that due to Complainant's obvious distress and insistence that the document was a writing sample, he told Complainant that he would fax the document. (T4, T5). Wampler further testified that he did not want to see the situation escalate.
  
14. Wampler testified that he did fax the document, although it took three attempts. On his first attempt, the transmission did not go through and Wampler assumed it was the wrong fax number. Wampler testified that Complainant changed the fax number on the cover sheet. He testified that he

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<sup>1</sup> Respondent submitted a sworn statement by Wampler, dated November 19, 1999, regarding his actions on September 7, 1999 in which he recalled that Complainant's document was 10 – 12 pages in length and that he used good faith efforts to send the document by facsimile.

attempted to send the document a second time and he again brought the document back to Complainant reporting that the transmission did not go through. It is Wampler's recollection that the Complainant again changed the fax number. Although there is no recording of a successful transmission on the fax transaction report for September 7, 1999, nor is there a record of whom the intended recipient was, or where the fax was transmitted, Wampler testified that he believed the third attempt was successful. (T5)

15. The Complainant was upset and angry throughout the whole process involving the faxing of the document (T5). According to Wampler, the Complainant said words to the effect of "she'll get hers". (T5) Wampler understood this comment as referring to Mills.
16. Based upon his belief that his document had not been faxed, the Complainant went to Kinkos and successfully faxed his writing sample to the Haitian Observateur at approximately 8:51 A.M. on September 7, 1999. (CX 5)
17. Rosemary Alexander ("Alexander") is the Respondent's Executive Director and has overall responsibilities for operations. (T3) In addition, Ms. Alexander conducts a training session on Managing Workforce Diversity for the Commonwealth of Massachusetts, Tier II Program and is certified by the Massachusetts Commission Against Discrimination to deliver training on diversity. (T3). Ms. Alexander is African-American. She testified that Respondent retains an electronically recorded printout of all center visits.

This record indicates which customer came to the center and the date and time that the membership card was swiped. She testified that there are two ways to record entries, which include swiping the card or registering a visit by hand if an individual has forgotten to bring the card. Prior to using a computer, the consumer must sign a log. Alexander indicated that the Department of Labor is strict about this documentation.

18. Alexander testified that Haitian is not designated as an individual category for identification of consumers. Some Haitian clientele check off 'Other' and some check off 'African-American'. Alexander could not testify as to what percentage of users of the Respondent's facility is Haitian.
19. The Respondent claims that Complainant subsequently returned to use additional services later that day, however the electronic log shows no record his return. Alexander testified that a jobseeker would not have to swipe his card again if his card had been swiped earlier that day. (T4) Complainant testified that he did not return to Respondent that day although the Computer Sign-In Sheet shows that the Complainant signed in to use a computer at 10:50 A.M. on September 7, 1999. (RX 6).
20. The Complainant testified that the events of September 7, 1999 made him sad and affected his sleep habits. (T2) He testified that he lost ten pounds but he did not seek medical attention. He testified that he could not conduct his daily activities and felt depressed for six to seven months following the

incident. I do not find the Complainant's testimony regarding the number of months he was depressed credible.

### III. CONCLUSIONS OF LAW

M.G.L. c. 272, §98 prohibits discrimination in a place of public accommodation on the basis of race, color or national origin. The Commission is authorized to enforce the public accommodation statute, pursuant to M.G.L. c. 151B, sec. 5. In determining whether there has been a violation of the public accommodation statute, the Commission utilizes an analysis similar to the burden shifting standard adopted in Wheelock College v. MCAD, 371 Mass. 130 (1976). See, Cummings v. Safeguard Security and Galleria Mall, 24 MDLR 174 (2002). In order to establish a prima facie case of discrimination in a place of public accommodation, the Complainant must show that (1) he is a member of a protected class under the statute, (2) that he was denied access to or restricted in the use of (3) a place of public accommodation. Stropicky v. Nathanson, 19 MDLR 39 (1997); Cummings, supra, at 175.

As a native of Haiti, the Complainant is a member of a protected class by virtue of his race, color, and national origin. Further, Complainant testified credibly that he was denied access to, or restricted in the use of, Respondent's facsimile services. He was denied the right to fax an employment related document based on the unwarranted assumption by one of the Respondent's employees that the document was political in nature. Respondent's facility is a place where decisions based on discriminatory animus should not be anticipated in light of the fact that Respondent has had diversity training.

Complainant's situation is demonstrative of the type of profiling that is meant to be discouraged and abated by such training.

In assessing whether the Complainant has proven a prima facie case of discrimination, I must weigh two decidedly different versions of the September 7, 1999, incident. I find that the Complainant has set forth a prima facie case of national origin discrimination where he is Haitian, was subjected to an adverse action, and that he suffered damages. Complainant asserts that Respondent treated him differently and restricted his use of the facsimile machine because of his national origin, Haitian. The fact that his document was in French, his native language, is the crux of this discrimination charge in that the Respondent's staff was not fluent in French, yet made decisions based on the content of the Complainant's document. Mills, the employee who first denied Complainant the use of facsimile services, testified that she refused only because she believed the document was not job search related. While she might be sincere in that belief, I find that Mills arrived at that belief and made certain assumptions regarding the document because of Complainant's national origin.

Respondent would have me find that it has a consistent policy of refusing to fax documents that are not job search related. However, the Respondent's staff later decided to fax Complainant's document because he was upset at the initial refusal. The Complainant was not confrontational or angry, but was very upset and offended by the difficulty he underwent to fax a writing sample to procure employment. Although, Wampler testified that he did fax the document, no proof of fax transmittal exists. Without a computer generated transmission sheet or some other form of documentation denoting a successful transmission of Complainant's document, I conclude that Complainant's document was not sent to the Haitian newspaper until Complainant went

to a private service where he faxed the document. (CX.5) At no point did the Respondent set forth any tangible evidence to demonstrate that the document in question was in fact successfully transmitted.

To this end, I credit Complainant's version of the events. I find that Mills' understanding of the French language is limited to recognition of several words. Further, based on such limited knowledge of the language of the Complainant's document, I find that she made unwarranted assumptions about the subject matter and content of the document. I find that Mills saw that the document was in French and that it contained political verbiage and, thus, she assumed that the document was a political statement because of Complainant's national origin. She did not afford him the opportunity to translate or explain the nature of his letter, which was, in fact, a four-page writing sample. I conclude that her decision not to fax the document was arbitrary and motivated by discrimination.

Although Mills referred Complainant to Wampler, who testified that Complainant was indeed emotionally upset that Mills refused to send his writing sample, the Complainant ultimately was unable to confirm that his document was faxed by the Respondent's facility. Moreover, Respondent's facsimile machine transmission sheet for that day does not corroborate Wampler's testimony that he faxed the Complainant's document. There is no evidence before me that the Complainant's document was faxed to the Haitian Observateur by anyone at the Respondent's facility. I find that Wampler failed to make a good faith effort to fax the document despite said assertion in his November 1999 affidavit. There is no record of this fax on the facsimile log nor is there a record on the transmission verification sheet. Accordingly, I find that Complainant was forced to go to a private service to effectuate the transmittal of the document. Since the

Complainant has established a prima facie case by demonstrating that he was denied access to a public accommodation, the Respondent has the burden of articulating legitimate, non-discriminatory reasons for its actions and the underlying facts to support these reasons. Wheelock, at 130, 136.

The Respondent has argued that it has a policy of denying services to anyone using the facility's accommodations for non-job related purposes. However, the Respondent also asserts that Wampler did attempt to fax the Complainant's document despite his belief that one does not usually fax a writing sample. The Respondent did not set forth any further explanation of its practices regarding assessment of whether a writing sample is job related. Accordingly, I find that the Respondent has not articulated any credible non-discriminatory reasons for its refusal of services to the Complainant. Respondent's position is that it did not refuse the Complainant service because it ultimately faxed the Complainant's document as requested. However, there exists no tangible proof of the document being successfully transmitted. Therefore, I find that the Respondent refused to fax the Complainant's document for discriminatory reasons.

For the above stated reasons, I conclude that Respondent engaged in unlawful discrimination in violation of M.G.L. c. 272, §92A and 98.

#### IV. REMEDY

Upon finding a violation of M.G.L. c. 272 sec. 92A and 98 the Commission may award damages for emotional distress resulting from Respondent's unlawful conduct.

I credit Complainant's testimony that the Respondent's refusal to fax his document, one written in his native language, was extremely upsetting to him at the time. I credit

Complainant's testimony that Respondent's actions caused him to be upset and made him sad. However, I note that he was able to return to the same site where the discriminatory practice took place, later that morning, to use the Respondent's computers. Thus I question Complainant's assertion that he was so upset that it interfered with his daily activities for six to seven months and I do not find this long term upset to be credible. I am persuaded that Complainant suffered some emotional distress on the date of the incident and is entitled to an award of \$3,500.

V. ORDER

For the reasons stated above, Respondent is hereby ordered to pay to Complainant the sum of \$3,500 with interest thereon at the rate of 12% per annum from the date the complaint was filed until payment is made. Payment shall be made within 45 days of the date of receipt of this decision.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainant is instructed to please notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer in this matter. Pursuant to 804 CMR 1.23, any party aggrieved by this order 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 thirty days of receipt of this order.

SO ORDERED THIS 10th DAY OF APRIL, 2003

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HELENE HORN FIGMAN  
HEARING OFFICER