

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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Massachusetts Commission Against Discrimination and  
Jesus Lara,  
Complainant

v.

Docket No. 96-BEM-2400

Consolidated Service Corporation,  
Respondent

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APPEARANCES

Counsel for the Complainant  
Attorney Simon Dixon

Counsel for the Respondent  
Attorney Leslie Lockard

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

On August 22, 1996, Jesus Lara (“Complainant”) filed a Complaint with this Commission against Consolidated Service Corporation (“Respondent”) alleging that it discriminated against him because of his national origin and ancestry (Hispanic) in violation of M.G.L. c. 151B § 4 (1) and Title VII of the Civil Rights Act. Complainant further alleges that, as a result of his initiating a claim based on discrimination, the Respondent engaged in unlawful retaliation in violation of M.G.L. c 151B. The Commission investigated the matter. Probable cause was found to credit the allegations

of retaliation and the matter was certified for public hearing. A public hearing was held before the undersigned-hearing officer on April 1 and April 2, 2002.

Having reviewed the record in this matter, and 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. PROPOSED FINDINGS OF FACT**

1. The Respondent, hereinafter Consolidated Service Corporation (“Respondent”) is an employer within the meaning of M.G.L. c.151B. Respondent is in the business of providing maintenance personnel to perform cleaning and janitorial services to the facilities with which it contracts. One of the facilities with whom Respondent contracted in 1996 was the MBTA.
2. Complainant, Jesus Lara, (“Complainant”), a male, was born in the Dominican Republic. He emigrated to the United States in September 1986. He had little formal education, completing only the third grade.
3. Complainant was hired by the Respondent in 1989. He was assigned to the MBTA’s Bartlett Garage in 1990 where he worked seven days each week for a total of 40 regular hours plus 7 hours of overtime. Complainant earned approximately \$8.80 per hour.
4. During the relevant time period in 1996, Complainant was married and had three children living with him, ages 8, 6, and 2. He was also supporting two other children, ages 17 and 16. During the last year of his employment with the Respondent, Complainant and his family experienced financial problems, which

made it difficult for him to meet his child-support obligations and also resulted in the loss of the family Home.

5. As of June 4, 1996, Complainant was working at the Bartlett Street MBTA facility in Roxbury. His usual hours were 6:00 a.m. to 2:30 p.m. and he worked primarily alone on this shift. To effectuate his cleaning duties, Complainant needed to work around numerous MBTA mechanics and bus drivers who worked at the facility during the same hours. Complainant and many of the Respondent's employees on other shifts were frustrated from time to time when MBTA workers dirtied areas they had just cleaned.
6. Complainant testified that during his assignment to the Bartlett garage he got along with everybody with the exception of James McNamara ("McNamara"), an MBTA bus driver. According to Complainant, McNamara wrote racial epithets on walls, spit at, and waved his arms at the Complainant. Complainant testified that Mr. McNamara used the terms "Fucking Black", "Fucking Spic" and "Fucking Spanish". Complainant recounted that McNamara threatened to kill him and testified that this conduct began sometime in early 1996.
7. Complainant complained about McNamara's behavior to his supervisor Jose Baez ("Baez"). Baez was also from the Dominican Republic. Complainant testified that McNamara terrorized him but that Baez refused to assist him. Complainant testified that when he did complain, Baez implied that there were many individuals who could replace him since there were other Hispanics out there seeking jobs. Complainant testified that he showed Baez numerous instances of racial graffiti written by McNamara. In deposition, Complainant testified that he

showed one example of the graffiti to Baez, but wasn't sure what he showed him. I find Complainant's testimony in this regard to be inconsistent and not credible.

8. On June 4, 1996, the Respondent's Executive Vice President, Thomas Bond ("Bond"), received calls from two members of MBTA management requesting that Complainant be replaced at the MBTA Bartlett Street garage. They wanted to avoid a serious conflict between Complainant and McNamara. They told Bond that Complainant had a serious personality conflict with McNamara and that Complainant appeared to have personal problems, and was difficult to communicate with.
9. At the beginning of June 1996, Complainant's father died. Complainant's financial difficulties prevented him from paying for the funeral. Complainant felt ashamed that he could not afford to pay for his father's funeral. (See Brookside medical notes) He went to Santo Domingo on June 9, 1996 and returned June 23, 1996.
10. Upon Complainant's return from Santo Domingo, Baez told Complainant that he was being transferred to the Cabot garage, pursuant to the request of Mr. Bertolino of the MBTA. Complainant was informed that he would be working 35 hours per week, in contrast to his previous 40 hours plus overtime. Complainant testified that Baez did not tell him when he was to begin work at the Cabot garage.
11. Baez testified that when he transferred Complainant to the Cabot street garage, Complainant said he didn't want to go there and that he wanted to work by himself, rather than in a building with other employees. I credit Baez' testimony

- and I find that Complainant was upset about the transfer to Cabot garage, because, among other factors, Complainant would be working regularly with others.
12. Upon being informed of the transfer, Complainant met with Bond on June 26, 1996 and submitted a copy of a letter dated May 6, 1996, which Complainant said he had given to someone at the MBTA. In this letter Complainant described incidents where an MBTA bus driver threw trash on the floor in areas Complainant had just cleaned. Complainant said the driver had thrown soap in the trash and had sworn at him. Complainant did not identify the driver or the driver's race nor did Complainant tell Bond that he viewed this as racial harassment.
  13. Complainant asked Bond to lay him off, rather than transfer him to the Cabot Street garage. Bond chose not to terminate Complainant's employment.
  14. Complainant then complained to his Union about the transfer. The Union was successful in increasing Complainant's hours from 35 to 40 hours. However, overtime was not available. Notwithstanding his dissatisfaction with this assignment, Complainant was instructed to work at the Cabot Complex during the summer of 1996.
  15. During his assignment to the Cabot Street garage, Complainant was asked to work with co-workers and occasionally to help cover the duties of employees who were on vacation. Complainant testified that he preferred to work alone.
  16. Complainant was assigned to work in several different buildings at the Cabot complex, which he found unsettling and testified that this work was "unstable."
  17. Complainant testified that the position at the Cabot complex did not afford him overtime, as his previous assignment had. I find that the change in Complainant's

assignment did result in the loss of overtime, which affected his ability to support his five children.

1. Complainant complained to Baez several times during the summer of 1996 about his work assignments at the Cabot complex. Complainant believed that his assignment to the Cabot garage and the change in his hours and job responsibilities was a betrayal by Baez. I find Complainant was angry with Baez and blamed him personally for the assignment.
2. Complainant separated from his wife during the summer of 1996. I find that this situation caused Complainant to experience emotional distress.
20. In August of 1996, Baez assigned Complainant to assist workers in the Signal Repair Building to cover some of the duties of Joe Pimental, another worker who had gone to the Dominican Republic to attend his mother's funeral. Complainant refused go to the Signal Repair Building to work with the other men.
21. On August 22, 1996, Complainant filed a complaint with the MCAD charging Respondent with discrimination based on national origin and ancestry.
22. Complainant and Baez had an argument on September 4, 1996. Complainant testified that he told Baez he considered being asked to help cover Pimental's duties was asking him to do the work of two men. Complainant testified that, during the argument, Baez stated, "no one files a complaint against my company. You're fired. You can do what you want because I know where you live." Complainant also testified that he did not become angry with Baez during the September 4th argument. I do not find Complainant's testimony as to Baez'

- statement in this regard credible. I further find that Complainant was angry with Baez.
23. Bond testified that Baez came to his office on September 4, directly after the argument with Complainant. Bond took notes of what Baez reported to him. Baez testified that Complainant “screamed” at him, swore at him and threatened him. When Baez told Complainant to leave he refused, stating that he wasn’t leaving and that Baez would have to throw him out. I find Bond’s testimony credible and supportive of Baez’ version of the September 4 argument.
  24. According to Bond, Baez did not mention Complainant’s MCAD complaint. Bond testified that he was unaware of the complaint on September 4, 1996.
  25. Complainant testified that, as a result of Baez’ alleged threat, he filed a complaint with the police. The police report is dated September 5, 1996, the day after the argument.
  26. Complainant went to his union for assistance in appealing what he believed to be an unjust termination. A union grievance hearing was held on September 6, 1996, where Ms. Carmen Vasquez (“Vasquez”) represented Complainant. Neither Vasquez nor Complainant mentioned the MCAD complaint at the September 6, 1996 grievance hearing.
  27. Following the grievance hearing, Vasquez called Bond several times on Complainant’s behalf in an effort to persuade Respondent to retain Complainant as an employee. I find that Vasquez was a zealous advocate on Complainant’s behalf. In these calls to Bond, Vasquez did not mention Complainant’s MCAD complaint.

28. On September 10, 1996, Bond met with another employee, Julio Soto (“Soto”), who worked at the Cabot garage, in order to discuss the events of September 4, 1996. Vasquez was also present. Bond asked Soto about the argument between Complainant and Baez. Soto recalled hearing Baez refer to a “demand” by Complainant. Soto did not recall hearing the men speak about the MCAD complaint during their encounter on September 4, 1996 nor did Soto indicate he believed Complainant was terminated because of an MCAD complaint.
29. Bond testified that he first became aware of the MCAD complaint a day or two after the September 10<sup>th</sup> grievance meeting. Bond testified that mail of significance is routinely date stamped when it is received. Notice of the MCAD complaint filed by Complainant and the envelope received by the Respondent is date stamped September 11, 1996.
30. Approximately one week after his termination, Bond offered Complainant another position with the company, working the third shift (overnight) at Northeastern University. Complainant did not accept this offer.
31. Sometime in August or September 1996, Complainant learned that his son had dropped out of school and had decided not to attend college. I find that this information caused Complainant to experience emotional distress.
1. Complainant was seen at the Brookside Mental Health Center on September 13, 1996. The intake notes indicate that Complainant exhibited “homicidality as noted by thoughts of killing ..... work supervisor.”
33. On or about October 5, 1996, Complainant’s psychiatrist issued a letter in response to Bond’s offer of re-employment to Complainant. The letter stated that

- Complainant should not be placed on an overnight work shift as it would be disruptive to his life and possibly cause another depressive episode (Respondent's Ex. 10) Following its receipt of the letter, Respondent made no other offers of employment to Complainant.
34. Continued homicidal ideation led to Complainant being involuntarily admitted to the Solomon Carter Mental Health Center from October 25 through October 28, 1996. The medical records specifically note an admission by Complainant during a nursing assessment reflecting that Complainant expressed a homicidal plan to "physically hurt boss". Another note reported that Complainant reports "having a difficult time with boss." A psychological assessment note dated October 28, 1996 states "patient says that threats occurred in situational and cultural context and that neither he nor his former boss took them seriously. In fact, former boss offered him another job afterwards."
35. Complainant received psychological treatment from September 1996 through March 1997.
36. In April 1997, Complainant formed his own business. On February 11, 1998, Complainant was involved in a car accident in which he injured his back, and became permanently disabled from the workforce. He was awarded social security disability benefits as of August 1, 1998, which he was receiving at the time of the hearing.

### **III. CONCLUSIONS OF LAW**

#### **RETALIATORY DISCHARGE**

M.G.L. ch.151B, sec. 4(4) prohibits employers from discharging, expelling or otherwise discriminating against a person who has opposed any practice prohibited by Chapter 151B or who has filed a complaint alleging a violation of Chapter 151B. In order to establish a prima facie case of retaliation, a Complainant must show that, (1) he was engaged in a protected activity; (2) that the employer was aware of the protected activity, (3) he subsequently was subject to an adverse employment action; and (4) evidence existed sufficient to establish a retaliatory motive or the adverse employment action followed the protected activity within such time as a retaliatory motive can be inferred.

Richards v. Bull HN Information Systems, Inc. 16 MDLR 108,1639 (1996).

To succeed on a claim of retaliation, “the plaintiff must prove that he reasonably and in good faith believed that the employer was engaged in wrongful discrimination, that he acted reasonably in response to his belief and that the employer’s desire to retaliate against him was a determinative factor in its decision to terminate his employment.” Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) quoting Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995).

Further, 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.” Kelly v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000).

The Complainant was in the employ of the Respondent and had filed a complaint with the MCAD on August 22, 1996 alleging discrimination, which allegedly occurred

when he worked at the MBTA Bartlett Garage, and came in the form of racial insults from one James McNamara, an MBTA bus driver (Findings of Fact # 5 & 6).

The Complainant alleges that he was discharged on September 4, 2003 in retaliation for filing this complaint. Complainant has attempted to show retaliation by stating that the Respondent was aware of his complaint and discharged for this reason. His complaint was initiated a mere 13 days prior to his altercation with Baez, which resulted in his termination. The Complainant has demonstrated that there was an adverse employment action following the protected activity within such close time proximity that a retaliatory motive could be inferred. When there is no direct evidence of retaliatory motive, the Commission follows the burden-shifting framework set forth in Wheelock College v. MCAD, 371 Mass. 130,136 (1976).

At this second stage of analysis, the Respondent assumes the burden of articulating some legitimate, nondiscriminatory reason for the action in question. Respondent contends that its decisions were legitimate.

The Respondent argues that it was the Complainant's continuous objection to his reassignment and inability to work with others that led to the altercation with his supervisor, and ultimately, his termination on September 4, 1996. Thomas Bond, the Respondent's Executive Vice President held a grievance meeting on September 6, 1996 (Finding of Fact #26). Bond also met with Julio Soto on September 10, 1996 (Finding of Fact #28). Bond allowed Mr. Soto to relay his observations of the altercation between Baez and Complainant and I believe Bond expected Soto would provide information that would be helpful to Complainant's position. Since Soto did not provide any material facts that changed Respondent's assessment of the situation, Bond decided to affirm the

termination of Complainant. I find that Complainant generally disagreed with the transfer and chose not to acclimate to his new environment but rather took a negative approach thereby sabotaging his own success and future employment. Bond testified that it was the routine practice at the main office of Respondent to date stamp mail of significance on the day it was received. (Finding of Fact #29). I credit Bond's testimony and I find that he was not aware of the discrimination complaint until one or two days after the grievance hearing. I believe that the Respondent made its decision to terminate Complainant prior to its receipt of Complainant's charge of discrimination. Respondent has set forth legitimate non-discriminatory reasons, which induced it to make the decision to terminate Complainant.

Once an employer sets forth non-discriminatory reasons for its actions, the analysis moves to the third stage, where the employee must show that the basis of the employer's decision was unlawful discrimination. Abramian, quoting Blare, supra at 442-443,446. This may be accomplished by showing that the reasons advanced by the employer for making the adverse decisions are not true. In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's 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 Co., 434 Mass. 493 (Mass. 2000). Here the Complainant points to the short time period from which the MCAD complaint was filed and his termination. However, apart from the time element, Complainant has not convinced me that the Respondent's motives were discriminatory in nature. I conclude that the supervisor initiating his termination was not aware of the formal issuance of the complaint. I believe that the supervisor was only aware that there were problems between

the Complainant and another employee resulting in Complainant's transfer to a different work site.

I find that the events leading up to and including the termination of Complainant's employment did not involve his MCAD complaint. I find that his termination was based on work performance issues and does not relate to the charge of harassment, based on race, filed with this Commission. Complainant would have me believe that while engaging in a heated discussion with Baez regarding his schedule and covering shifts for another employee, Baez stated, "no one can issue a complaint against my company and get away with it" (Finding of Fact # 22). Further, Complainant claims that during this "heated discussion" he was not angry with Baez. I do not find his denial credible. The Complainant was clearly experiencing emotional distress from a variety of situations including, but not limited to, his financial struggles, his father's death, the separation from his wife, and his son's leaving school. Despite his denials, I find that Complainant was quite angry with Baez and blamed him for the transfer to the Cabot complex and possibly for all that was going wrong in his life. Although Complainant was engaged in an altercation with his supervisor when discharged, I find it was a result of his lack of support to the unit and his disobliging efforts to work with others. He was unwilling to help out his colleagues in need, but expected others to fill in the gaps when he was absent for similar reasons. I do credit Complainant's contention that he was not able to earn as much at the Cabot site as he had at the Bartlett garage. There were fewer opportunities for overtime. However, I find that the argument between Complainant and Baez on September 4, 1996 stemmed from Complainant's insubordinate behavior towards Baez. Complainant was upset at the assignment to Cabot; dissatisfied with the loss of overtime

hours; frustrated by working with others; confused by the assignment to work at numerous buildings; and resentful when ordered to assist with Pimental's duties. After the Respondent held a grievance hearing and met with someone it believed to be a witness for Complainant, it affirmed the termination. However, Respondent did offer re-employment to Complainant which would have placed him on an overnight shift at a different facility and I believe would have ostensibly addressed Complainant's upset at working at various buildings and covering shifts for co-workers. Complainant's treating mental health professional indicated that this overnight shift would not be in Complainant's interests and would potentially cause another depressive episode. I find this medical opinion does not negate Respondent's good faith efforts to re-employ Complainant and address his numerous workplace concerns.

I conclude that Respondent had legitimate, non-discriminatory reasons to make its decision to terminate the Complainant.

Based on the evidence presented, I believe that the MCAD complaint was not Respondent's motive in the decision to terminate the Complainant. I conclude that Complainant has not set forth sufficient credible evidence to support his allegations of retaliatory discharge.

Therefore, I find that there is no credible evidence that any of the decisions made by the Respondent's agents or employees concerning Complainant were motivated by the filing of the MCAD charge and thus the Complainant has failed to prove that he was subject to retaliation under M.G.L. c. 151.

FOR THE ABOVE STATED REASONS, I CONCLUDE THAT RESPONDENT DID NOT ENGAGE IN UNLAWFUL DISCRIMINATION IN VIOLATION OF MGL c. 151B.

**IV. ORDER**

On the basis of the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW and pursuant to the authority granted the Commission under Massachusetts General Laws, Chapter, 151B, section 5, it is hereby ordered that his matter is dismissed. This decision represents the final order of the Hearing Officer.

Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days and a Petition for Review within thirty (30) days of receipt of this Order.

SO ORDERED THIS 4<sup>th</sup> day of June, 2003

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HELENE HORN FIGMAN

HEARING OFFICER