

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARK WASHINGTON,
Complainant

v.

DOCKET NO. 97-BEM-2880

LAWYERS STATIONERY, INC.
Respondent

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

Appearances: Kevin S. Murphy, Esq. for Complainant
Michael C. McLaughlin, Esq. for Respondent

I. PROCEDURAL HISTORY

On August 14, 1997, Complainant, Mark Washington, filed a complaint against Respondent, Lawyers Stationery, Inc., charging Respondent with discrimination in his employment on account of his race. Specifically, Complainant alleged that Respondent allowed there to exist a racially hostile work environment and terminated his employment for alleged insubordination after he complained of racial harassment. The Investigating Commissioner found probable cause to credit the allegations of the Complaint and the matter was certified to Public Hearing on January 31, 2001. Conciliation efforts proved unsuccessful and a Public Hearing was held before the undersigned Hearing Officer on May 9 & 10 and June 19 & 20, 2002. The parties submitted post-hearing briefs in

September and November of 2002¹. Having reviewed the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Complainant, Mark Washington, is an African American male who at the time of the public hearing was 39 years of age and resided in New Bedford, Massachusetts.
2. Complainant grew up in the South End of Boston and graduated from Dorchester High School in 1984. He subsequently held a variety of jobs in building maintenance, package delivery, and manual labor.
3. Complainant testified that in 1992 he developed a problem with alcohol which essentially kept him out of the workforce. There was also evidence that in 1989 Complainant was found guilty or pleaded guilty to, a number of criminal offenses. These included armed robbery, assault with a dangerous weapon & assault and battery, lewd and lascivious behavior, disorderly conduct, armed robbery and assault and battery. Complainant served time in the Plymouth County House of Correction for these offenses. In 1993, Complainant was convicted of assault and battery, and of violation of a protective order issued in connection with his then girlfriend and his children. In November of 1995, Complainant was convicted of stalking, violation of a protective order and threatening to commit a crime. (R-5). Complainant claimed to have little memory of any of these criminal matters or his incarceration.

¹ Respondent's brief cites repeatedly to transcripts that are not the official record of these proceedings. Respondent rejected the proposal to have the stenographic record be the official record. Reference to these transcripts is therefore inappropriate as they are not the official record and Complainant had no access to them.

4. Complainant re-entered the workforce in 1994, when he was hired as a part-time delivery person by Respondent, Lawyers Stationery, Inc.
5. Respondent is an employer within the meaning of G.L. c. 151B. Respondent sells Stationery, paper products, and other office services to lawyers and law offices in the metropolitan Boston area. Its president and current owner is Susan Willis. From 1972 until May of 2001, its president and owner was David Willis, Susan Willis' husband. David Willis is currently Vice President of the company. Prior to 2001, Susan Willis was the corporate clerk.
6. In 1994, Respondent was located at 131 State Street. In October of 1995 Respondent moved to 101 Arch Street. At both locations, Respondent's operation consisted of a front room and sales floor, and a back room where delivery staff, composed primarily of people of color, worked under the supervision of Patrick Dore, who had been employed by Respondent for 15 years and was the delivery supervisor for 13 of those years.
7. During Susan Willis' tenure with Respondent, the company participated in a Boston Public Schools program for hiring inner city high school students and helping them to become exposed to the business community through working at Respondent. The participating high schools allowed students to work as delivery employees for half days at Respondent, either in the mornings or afternoons. The students on the morning shift typically worked from 8:30 a.m. until noon; the afternoon shift arrived at 12:30 p.m. Approximately 90% of the students who participated in this program were Black and Hispanic.
8. Complainant was hired by Respondent in the fall of 1994 to be a delivery person, working part-time in the mornings. Complainant worked with the aforementioned

students in the delivery area of Respondent. The job of these employees was to deliver the stock of Lawyers Stationery to its customers, particularly law firms in Boston, by foot. They would make deliveries primarily according to pre-assigned areas of the city and would fill out delivery sheets reflecting their deliveries for the day. Respondent did not hire full-time delivery employees.

9. Complainant began work for Respondent the week of October 17, 1994 at the rate of \$6.00 per hour. Complainant was living in Boston at the time. Sometime in 1995 Complainant moved to New Bedford, Massachusetts. He testified that he moved there to live with his girlfriend and be nearer to his children who he testified were ages 2, 3 and 5 years of age. Because he took the bus back and forth to New Bedford and had a long commute, Susan Willis agreed that he could come to work in the morning a little later than the other delivery employees and to stay a little later. By staying later, he acted to “bridge” the time between when the first shift ended and the second shift of delivery employees arrived at 12:30 p.m.
10. Complainant’s charge of a racially hostile work environment revolves primarily around the use of language by the other African American and Hispanic employees, most of whom were high school aged. He testified that they frequently called each other “nigger” and “dog” when addressing each other. He also claims that they told racial jokes, and used racially derogatory terms with each other in a joking manner which he referred to as “street talk.” He claims that being subjected to the use of this language on an almost daily basis, caused a racially hostile work environment for him. Complainant admitted at the hearing that no co-worker ever directed racial epithets or jokes at him. There was evidence that the Complainant used the work “nigger” in referring to himself.

He also admitted that having grown up in a disadvantaged neighborhood with racial minorities and having spent time in prison, he had had significant exposure to language of this sort from and amongst people of color. I do not credit Complainant's assertion that the use of racial language by the young people of color in the delivery room deeply offended him or made his work environment hostile.

11. Complainant also alleged at the hearing that approximately one year into his job at Respondent, his supervisor Patrick Dore began calling him "nigger," and making racial jokes in his presence. He did not make the assertion that Dore called him "nigger" in his complaint filed with the Commission. (C-5). In contrast to the evidence that racial language used by Complainant's co-workers of color was overheard by virtually everyone at Respondent, Complainant and others asserted that no other employee ever heard or witnessed such inappropriate comments by Dore. Dore also denied that he ever used any racial epithet toward Complainant and I credit his testimony. Dore is a very soft-spoken and timid man, an Irish immigrant, who had been orphaned and had a 4th grade education. He admitted that, at the time, he was an illegal alien, and that he was frightened of Complainant and of causing any disruptions in the workplace. He stated that Complainant frequently called him an "Irish bastard" and while this was a particularly stinging insult to him because he was an orphan, he did not complain to anyone in management about this because he tried to keep a low profile. At least two other of Respondent's witnesses testified that they had heard Complainant call Dore an "Irish bastard." Dore also testified that Complainant used the word "nigger" regularly in the workplace when speaking to other African –Americans and Hispanics. In fact Dore testified that it was a commonplace part of Complainant's language.

12. Dore and Susan Willis both testified that she would speak to the employees in the delivery area about inappropriate language, particularly their addressing each other in offensive racial terms, when she heard such language being used. Susan Willis and Dore both testified that she sternly scolded the delivery employees that such language was inappropriate, unprofessional, and that she would not tolerate it. David Willis also testified that he frequently heard the students address each other as “nigger” and often admonished them about the use of such language telling them it was not appropriate language in the delivery area or for any business. He said that he and his wife would always give the students the same lecture whenever they overheard language of this sort in the delivery room. He stated that although the students appeared to take his admonition seriously, there were always new students coming in and some seemed not to understand the import of this issue.

13. Dore testified quite frankly that on occasion he and Complainant did not always agree and sometimes had arguments about work. When asked how he would characterize his relationship with Complainant he stated that they “didn’t get on too well” because Complainant often came in late, was loud, and if Dore spoke to him about coming in late, Complainant always had excuses and if chastised, would swear at Dore in a joking manner. Dore testified that there were days when Complainant was obnoxious, loud and rude and would refuse to take deliveries to certain areas because they were farther away or the load was too heavy. He stated this happened more frequently when Complainant arrived to work late and the students had already left to make other deliveries. Dore felt intimidated by Complainant when he would argue about assignments. David Willis described Dore as a “very gentle” individual who was not prone to raising his voice. He

testified that he witnessed two altercations about assignments and stated the Complainant raised his voice and got up close to Dore in an intimidating fashion. Susan Willis also testified that she had witnessed Complainant being argumentative with Dore about his assignments.

14. Complainant alleged that Dore made racial jokes and asked if he could call the Complainant “nigger” and made an insensitive comment about O.J. Simpson. Dore testified that on one occasion he told a joke about a pair of gloves that he had purchased stating that the “ O.J. Simpson gloves are on sale.” He stated that he did not intend this joke to be racially insensitive or offensive, and I credit his assertion.
15. Complainant alleges that Dore called his attention to a card with a picture of a monkey with the following words handwritten on it: “ This is Mark at 5 years old. Hah, hah, hah.” (C-4) ² Complainant alleged that it was pinned to a bulletin board in the delivery area and that the reference was to him. Dore stated that this type of card was sold by Respondent and that he had seen such a card at Respondent and it may have been in the delivery area or it may have been up front in the sales area on a rack, but that he had never seen the card in question with the handwritten words on it. I credit his testimony that he never saw this particular card with the handwriting on it and did not show it to Complainant. Both David and Susan Willis also testified credibly that they had never seen this card with the handwriting on it, prior to it being produced by Complainant in the litigation of this matter.

² There was some suggestion that Complainant had written the offensive words on the card himself and although there is no evidence to prove this, I do note that the handwriting on the card appears to be quite similar to Complainant’s handwriting on his delivery sheets.

16. David Willis testified that approximately a year into his employment Complainant's behavior became more agitated and aggressive and he began to complain to Willis about assignment of deliveries. Willis also stated that a number of other employees complained to him that Complainant was always taking deliveries to the easier areas. At this time Willis began to have periodic meetings with Complainant to discuss Complainant's attitude toward his work and his supervisor. Willis denied that these meetings ever involved allegations of racist comments by Dore, racial harassment of Complainant, or the racial epithets used by the students. I credit Willis' testimony that Complainant did not complain to him of racial harassment by Dore or anyone else. Willis stated that Complainant would come in to his office extremely agitated about a delivery assignment and often end up discussing his family or private affairs.³
17. Complainant testified that had five children by different women and that although he did not have custody of his children he did attempt to be a good father. At some point Respondent received notice from the state authorities that Complainant was not complying with any child support obligations.⁴ As a result, Respondent was required to deduct up-front a certain portion of his weekly wages. Both Susan and David Willis occasionally loaned or advanced money to Complainant and he would pay it back in cash. David Willis testified that Complainant became very agitated over the child support order and he and his wife decided that in order to give Complainant some additional income, Respondent would transfer him to the printing department and begin training him to take over the printing operation. David Willis stated that since

³ For a period of time Complainant's then girlfriend and mother of two of his children sought restraining orders against him accusing him of being abusive. (R-2, R-3, R-4)

⁴ Susan Willis testified that she had no idea Complainant had more than one child and was dumbfounded to receive DOR's child support enforcement order.

Complainant had a flare for air -brush they thought he would enjoy the printing end of the business and the move would also get him away from his fellow employees in the delivery area with whom he was not getting along. Complainant was still required to assist with deliveries when needed, particularly if Respondent was short staffed in delivery or there was an emergency order.

18. Complainant worked in the printing department for over six months. David Willis testified that it was expensive to train Complainant and that Respondent was essentially making an investment in him by training him. I believe that given the investment they were making, the Willises had little to gain by terminating Complainant's employment and would not have done so without good reason.
19. Complainant worked in the printing department from February to August of 1997. The printing job was located in separate building from the delivery area and the store at 50 Franklin Street. Complainant continued to do deliveries when Respondent needed him to do so. On August 7, 1997 Complainant reported to work at 101 Arch Street. There was a delivery of 10 boxes that needed to be made and Complainant was asked to make this delivery. There is a dispute about what next ensued. Complainant alleges that because he had an important print job to complete, he asked Dore if they could split the delivery and Dore agreed he could take 5 boxes and a delivery employee would take the remaining 5 boxes. Dore could not recall the details of who agreed to take what or even if he had agreed to split the load. However, by mid-morning the second set of 5 boxes had not been delivered and Dore testified that he requested that Complainant deliver the 5 boxes and Complainant refused stating that his job was printing and he no longer did deliveries. Dore then asked David Willis to speak to Complainant about completing the

delivery because it was a rush job and there were no other delivery employees available at mid-day. At approximately 12:30 p.m. near the end of Complainant's shift, Dore and David Willis went to the 50 Franklin Street location to tell Complainant to deliver the remaining boxes. Complainant testified that because he caught a 1:00 p.m. bus from South Station to New Bedford, and had to be back home to pick up one of his daughters from her school bus, he could not do the delivery. According to Complainant, he repeatedly told David Willis that he could not do the delivery due these time constraints. According to Willis, Complainant gave no reason for refusing to do the delivery other than to state that it was not his job. Willis said that Complainant raised his voice and got close to him in an intimidating fashion, prompting Willis to tell him to calm down. After a few minutes Complainant walked out at which time Willis told him if he left, his job would be in jeopardy. Willis testified that he said to Complainant words to the effect of "if you leave this building, I assume you are quitting your job." He said Complainant left the building and he went back to his office. According to Willis, Complainant came to his office about 20 minutes later asking why he had been fired and Willis said "gross insubordination." Complainant then left his office and Willis next heard from him when the complaint was filed at the MCAD. Willis stated that this was the first time Complainant had ever raised the issue of racial harassment at Respondent. I found that Willis' version of these events was more credible than Complainant's whose credibility on a number of issues throughout the proceeding was sorely tested.

20. Complainant does not appear to have had any gainful employment since his termination from Respondent. He testified that earns some money from air-brush painting, but that this is a nominal amount.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B prohibits discrimination in employment on account of race. This includes termination of employment and discrimination in the terms, conditions, and privileges of employment for reasons related to race. The gravamen of Complainant's charge is that he was subjected to a racially hostile work environment by his fellow minority employees and by his supervisor, and that he was terminated on account of his race and in retaliation for having complained to the owner of Respondent about this hostile work environment. In order to prevail on a claim of racial harassment, Complainant must establish that (1) he is a member of a protected class; (2) he was the target of speech or conduct based on membership in that class; (3) the speech or conduct was sufficiently pervasive or severe to alter the terms and conditions of his employment and create an abusive working environment; (4) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action. See Beldo v. University of Massachusetts, 20 MDLR 105 (1998); Richards v. Bull H. N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Div. of Interco v. MCAD, 400 Mass 156, 162 (1987).

Complainant in this case is a member of a protected class. He claims to have been the target of speech and conduct that was racially offensive and intended to harass him on account of his race. Complainant asserts and the evidence suggests that the young African American and Hispanic students who worked in the delivery area with him frequently called each other racially offensive terms such as "nigger" and "dog" and

often joked with each other in a racial manner. Complainant admitted that these comments were never directed at him, but claimed that he was subjected to a racially hostile work environment by virtue of having to hear these comments. While it is perfectly understandable that anyone's sensibilities might be offended by such language, regardless of one's race, I do not believe that this behavior deeply offended Complainant or made his work environment hostile. There was evidence that Complainant used such language himself, referred to himself by the word "nigger," and had been in environments where the use of such language among his peers was accepted as part of the common lexicon. The Complainant claimed to have been more traumatized by the work environment at Respondent than he was by serving two years in prison or being restrained from seeing his children, an assertion that was wholly unworthy of credence.

There was credible testimony that the owners of Respondent were aware of the language used by students in the delivery area and had, in fact, heard it themselves. They testified that even in the absence of any complaints, they conveyed their intolerance of this inappropriate racial language in the delivery area and ordered it to cease, whenever they heard it. Both Susan and David Willis testified credibly that this behavior was not condoned in the work place and that they sternly lectured the students about how unprofessional and unacceptable it was. They also testified that there were new students coming into the delivery area every semester and that some of the students appeared not to understand the gravity of this issue. But more importantly, as it relates to Complainant's charge, the Willises denied that Complainant ever complained about this language to them, never stated that he was offended by it, and generally never made any claim that he felt subjected to a racially hostile work environment by Dore or anyone

else. They did admit that Complainant complained frequently about his assignments and had disagreements with Dore about the work, but never had reason to believe that this was on account of his race.

Complainant further charged that his work environment was made racially hostile by his supervisor who he alleged called him racial epithets, told him offensive racial jokes and called his attention to a card with a picture of a monkey and a reference to Complainant written on it. I do not believe that Complainant's supervisor made any inappropriate racial comments to Complainant, nor do I believe that he was responsible for the introduction of the card into the workplace or for calling Complainant's attention to it. Mr. Dore denied all of these allegations and I found him to be a credible witness. In direct contrast to Complainant's allegations, Dore testified that Complainant was the one who addressed ethnic slurs toward him, on the frequent occasions when Complainant was unhappy with his assignments or was reprimanded by Dore for coming to work late. Dore admitted making a joke about O.J. Simpson gloves, but even if Complainant found this joke offensive, I do not believe that this was sufficient to create a hostile work environment. It has been held that "casual, sporadic comments, without more, are insufficient to constitute racial harassment." Strothers v. Mass. Department of Corrections, 21 MDLR 115, 118 (1999).

Lastly, Complainant asserts that he was terminated from his employment on account of his race and in retaliation for having complained about Dore's unlawful behavior towards him. He claimed that the final straw was when he attempted to show David Willis the card with the monkey picture on it, Willis stated he was tired of all the complaining and ordered Complainant out of his office. Complainant's assertion that

Respondent then fabricated a charge of insubordination as a reason for terminating his employment is simply not credible. Nor can any reasonable inference to be drawn from the evidence that Complainant was fired in retaliation for raising the issue of racial harassment.

Pursuant to G.L. c. 151B s. 4(4), which specifically prohibits retaliation, it is unlawful for any person or any employer “to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter, or because he has filed a complaint, testified, or assisted in any proceeding under section five.” In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondents were aware of that activity, and that he was subsequently subjected to an adverse employment action and, absent other evidence establishing retaliatory intent, the adverse action followed the protected activity within such time that retaliatory intent can be inferred. See Cimino v. BTU Electronics, 18 MDLR 197 (1996). Such a showing cannot be made in this case, because contrary to Complainant’s assertions, I do not believe that he complained to Respondents about a racially hostile work environment or racist comments and behavior by Dore. While he may have complained repeatedly about his work assignments, this is not protected activity for purposes of G.L. c. 151B.

Even if Complainant had been successful in establishing that his termination was somehow related to his complaints of racial harassment, Respondent articulated a legitimate non-discriminatory reason for terminating Complainant that was supported by credible evidence. Wheelock College v. MCAD, 371 Mass. 130 (1976); Blare v. Huskey, 419 Mass. 437 (1995). Respondent asserted that he was terminated for insubordination

when he refused a direct order from David Willis to deliver certain packages, became aggressive and argumentative with Willis and stormed out of the building. Complainant understood that his job was on the line when he walked out. While Respondent's insistence that Complainant complete an assignment near the end of his shift may seem unreasonable or unfair, there is no evidence that it was discriminatory. It is significant to note that "chapter 151B protects people from unlawful discrimination. It does not protect against all instances of arbitrary action or from poor managerial judgment." Wheelock College v MCAD, *supra*. at 137.

In the final instance Complainant must prove that the actions he complains of were a pretext for discrimination, or otherwise, were done with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001). It is not enough for Complainant to show that the reason offered for Respondent's actions may be false; he must prove that the reason was advanced to hide a discriminatory animus. Id. at 501. In light of the fact that Respondent was an employer that took extraordinary steps to hire, train and mentor employees of color, that it did the same with Complainant, adjusting his schedule and advancing him salary when needed, promoting him to the printing operation, and investing significant time and money to train him, Complainant is unable to prove that his termination was a pretext for race discrimination or retaliation for having complained about a hostile work environment.

IV. ORDER

For the reasons stated above, the Complaint in this matter is hereby Dismissed. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten (10) days of receipt of this order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this order.

So Ordered this 5th day of May, 2003

Eugenia M. Guastaferr
Hearing Officer