

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

_____)	
MASSACHUSETTS COMMISSION)	
AGAINST DISCRIMINATION)	
AND)	
MILTON HERNANDEZ)	
Complainant)	
)	
v.)	MCAD Docket No. 95-13-2249
)	
MERRIMACK VALLEY AREA)	
TRANSPORTATION COMPANY AND)	
MERRIMACK VALLEY REGIONAL)	
TRANSIT AUTHORITY))	
))	
Respondents))	
))	
_____)	

APPEARANCES

Counsel for the Complainant
Wendy A. Cassidy
MCAD

Counsel for the Respondents
John P. Shyavitz
SHYAVITZ & SHYAVITZ

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 20, 1995, the Complainant, Milton Hernandez (“Hernandez”) filed a complaint with this Commission, against the Merrimack Valley Regional Transit Authority (“Authority”) and the Merrimack Valley Area Transportation Company (“Company”) alleging that the Respondents refused to rehire him as a bus operator due to his national origin (Puerto Rico) in violation of Massachusetts General Laws

Chapter 151B section 4(1). The Investigating Commissioner found probable cause to credit the allegations. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on May 9 and 10, 2002. The parties submitted proposed Findings of Fact and Rulings of Law on or about September 2, 2003, which I have considered along with careful review and examination 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. Milton Hernandez (“Complainant”) is a Hispanic person of Puerto Rican descent who currently resides in Puerto Rico. His native language is Spanish.
2. The Respondent Merrimack Valley Area Transportation Company (“Company”) is located at 85 Railroad Avenue, Haverhill, Massachusetts. The Company provides transportation services for all of the communities in the Merrimack Valley system. The Company employs more than six employees. I find that the Company is an employer within the definition of M.G. L. c.151B, section 1(5).
3. The Respondent Merrimack Valley Regional Transit Authority (“Authority”) is also located at 85 Railroad Avenue, Haverhill, Massachusetts. The Transit Authority employed only three employees during the time period relevant to his case: Administrator, Assistant Administrator and Secretary.
4. The Authority is established as a political subdivision of the Commonwealth pursuant to M.G. L. c. 161B and as approved by majority vote of the legislative body of the combination of cities and towns. The

affairs of an authority are managed by the administrator who is appointed by, and serves at the pleasure of, the advisory board of the authority. The Authority holds and manages the mass transportation facilities and equipment it acquires. The Authority entered into an agreement with the Company to provide transportation services. By statute, the agreement must include standards for such services. M.G.L. 161B, section 6. The Authority is prohibited from directly operating any mass transportation service. M.G.L. 161B, section 25.

5. The Authority and the Company had recurring interactions through supervisory meetings held by the Company. The respective offices were located approximately 30 feet apart in the same building, at 85 Railroad Avenue, Haverhill. At all times relevant to this hearing, Joseph Costanzo (“Costanzo”) was the Administrator of the Authority. He served as Administrator from May 1980 through the time of this public hearing. In his capacity of Administrator, Costanzo would periodically participate in supervisory meetings held by the Company. Costanzo provided daily feedback to the Company regarding policy issues. For service quality purposes, he also observed Company bus operators performing their duties. Costanzo provided feedback regarding this service to Company management.
6. Complainant was hired by the Company as a bus operator in June 1990, and was employed for three years until he voluntarily resigned from employment in March 1993 in order to move to Puerto Rico.
7. There were four management positions at the Company during the relevant time period: Training and Safety Manager, Operations Manager, Assistant General Manager, and General Manager.
8. Vincent Scarvaglieri (“Scarvaglieri”) worked for the Company for approximately fifteen years, from 1981 through 1996, when he was terminated from his employment. He was initially hired as a bus driver, and was promoted to dispatcher, route/road supervisor, operations manager, and then manager of safety and training.

9. Nick Promponas (“Promponas”) was the Company’s Assistant General Manager during the course of Complainant’s employment. Promponas had the authority to hire employees. Complainant testified that Promponas instructed Hispanic employees that they must speak English and not Spanish on Company time and on Company property and busses. Complainant also testified that Promponas often scolded him and other Spanish-speaking employees because they were speaking Spanish in the Company’s drivers’ lounge. Scarvaglieri corroborated Complainant’s testimony, stating that Promponas did not like when drivers spoke Spanish on company time and on company property. Scarvaglieri also testified that, despite Promponas’ preference, no one was disciplined for speaking Spanish.
10. Respondents’ witnesses testified that bus drivers have significant contact with the public and that it is necessary to be able to communicate with the public in a clear and intelligible manner.
11. In October 1991, Complainant was one of the Company’s select few employees who received an “Outstanding Employee Award” in recognition of his professional dedication, including a conscientious employee award and perfect attendance during fiscal year 1991.
12. Complainant received an award, dated August 22, 1992, in acknowledgement of his skills as an operator in the state “RODEO”, a driving competition.
13. Complainant decided to resign his position in March 1993 to move due to his allergies and to his preference, and that of his wife, to live in a warmer climate.
14. Shortly before he resigned, Complainant had a conversation with Scarvaglieri. Scarvaglieri agreed to issue a reference letter for Complainant (Exhibit 1), which indicated that Complainant was a good employee and that, “if at any time Mr. Hernandez decides to come back [to] the Merrimack Valley Area Transportation Company he will be very welcomed by us.” Scarvaglieri testified that he did not know how long

Complainant would be away or if Complainant would, in fact, be returning to the workplace.

15. Scarvaglieri testified that he showed the letter to Mr. Jablonski, his superior at that time, and that Jablonski said that letter “sounded good.” The letter was not copied to Jablonski or any other manager, nor was a copy placed in Complainant’s personnel file.
16. Complainant testified that he also had a conversation with Steven Myers (“Myers”), regarding eligibility to be rehired by the Company. Complainant understood that Myers was the General Manager in March 1993. Complainant testified that Meyers told him not to worry because, if he were a good employee, the Company would rehire him. Meyers subsequently gave Complainant a written employment reference. The reference does not specifically state that Complainant would be rehired. It verifies his dates of employment, his rate of pay, his clean driving record, and his proper presentation while in uniform (Exhibit 3).
17. Respondent had no written policy regarding the rehiring of employees after they left employment at the Company. Scarvaglieri testified that there was a “rumor” that the Company did not hire employees back into the same position they held before their separation from employment, but that he did not know if this was a policy. He believed that this practice was meant to be a “discouragement tool” to dissuade employees from leaving and avoid a revolving door. Representatives of the Company and the Authority testified that there was a generally known, unwritten policy that neither the Company nor the Authority hired employees back into the same position they held before their resignation.
18. Costanzo testified that he had held the position of Administrator of the Authority since May 1980. He testified that he was prohibited by statute from performing operations or service functions for the company. Costanzo was aware of the “no rehire to the same position” policy, which he testified was in existence when Boston Commuter Lines provided bus service in 1980.

19. Complainant testified that he did not know of any specific written or oral policies regarding the rehire process. He testified that he was aware of a “rumor” that the Company did not rehire its employees.
20. When Complainant left the Company, he moved to Florida, where he worked at Orlando International Airport as a ramp agent from June 1993 to July 1993. This was an assignment through a temporary placement agency. He then worked for BFI as a “drivers’ supervisor”, also through the temporary placement agency, from August 1993 to October 1993. He earned \$5.25 per hour. Complainant moved to Puerto Rico and obtained a position with Metromobile ACL Inc., also known as Metrobus, on June 20, 1994.
21. At the time Complainant decided to return to the Company in 1995, he was living in Puerto Rico and working for Metrobus, earning somewhere between \$5.00 and \$6.00 per hour.
22. Costanzo testified that he had a conversation in June 1995 with Complainant’s wife¹, Ms. Carmen Berrios. Ms. Berrios told Costanzo that she and her husband were moving back to the area (referring to Massachusetts). She stated that Complainant wanted to work and asked if the Company was hiring. Costanzo testified that he told her if Complainant sent him a resume, he would forward it to the Company. Costanzo testified that he agreed to forward the resume as a courtesy to Ms. Berrios, since she had worked as a secretary for the Authority. Costanzo testified that he spoke only with Ms. Berrios and not with the Complainant. I credit Costanzo’s testimony.
23. Complainant testified that he, along with his wife, spoke with Costanzo and that he viewed this telephone conversation as an interview. At his deposition, Complainant testified that he called Costanzo and asked for a job application. Complainant testified at this public hearing that Ms. Berrios called Costanzo. Complainant testified that Costanzo offered him

¹ At various points in the testimony, the parties referred to Ms. Berrios as Complainant’s wife and, alternately, his ex-wife.

a job over the phone. I do not credit Complainant's testimony in this regard.

24. Complainant testified that he received a job application in the mail. He understood the form he completed to be an "official" application from the Company, though he believed he received it from Costanzo. Complainant identified an empty envelope postmarked June 30, 1995, which was addressed to Ms. Berrios with a return address of the Authority (Exhibit 5). Complainant testified that he received the application in this envelope. Ms. Berrios did not testify and there is no other evidence to indicate what might have been sent to her in the envelope. Costanzo testified that he personally did not send Complainant a job application, and that he did not know what, if anything, was sent to Ms. Berrios or Complainant by anyone else at the Authority.
25. On or about July 8, 1995, Complainant completed an employment application (Exhibit 4) with the assistance of Ms. Berrios. Complainant applied for a position as a bus driver. He was not responding to any specific posting or advertisement. He testified that he sent the application to Costanzo. Complainant did not submit Meyers' written reference letter with the application. Complainant believed that the Company already had this letter because he thought Meyers had put a copy in his personnel file.
26. After the application was filed, Complainant's wife, who speaks English, placed a call to Scarvaglieri on Complainant's behalf. Scarvaglieri was the Company's Safety and Training Manager at that time. Complainant believed that Scarvaglieri had the authority to rehire him. At the time of hearing, Complainant testified he did not know about a policy against rehire. However, in his deposition testimony, Complainant stated that Scarvaglieri told him about the policy. Scarvaglieri testified that he did not have the authority to hire and had only promised Complainant that he would recommend him for employment. Scarvaglieri told Complainant that he was working on it and "needed to speak to the right people."

Though Scarvaglieri made no promises, Complainant believed that Scarvaglieri had the authority to rehire him.

27. Complainant testified that he asked both Costanzo and Scarvaglieri if the academy (route training program for drivers) would be recruiting people during summer 1995. Both men indicated that the academy would probably be recruiting. Complainant did not ask them about other jobs within the Company.
28. Complainant testified that he had a phone conversation with the Company's General Manager, Joseph Varneke ("Varneke") in which he requested information and procedures regarding rehiring. Complainant testified that he told Varneke he had made the arrangements to return to the Company with Costanzo and that Costanzo would contact Varneke. Complainant felt that Varneke was acting "bothered" because Complainant was being insistent about the rehire. According to Complainant, Varneke stated he "could not take no Latinos." I do not credit Complainant's testimony in this regard. In 1995, eight out of the twenty-six employees were of Spanish-speaking descent. At the time of hearing, fifteen of the fifty-two Company employees were Hispanic or Spanish speaking. In 1995, the Company hired three individuals, one of whom was Hispanic.
29. Complainant and Scarvaglieri both testified that Larry Levitt ("Levitt"), who was born in the United States, was fired from his position as a bus operator with the Company and, at a subsequent date, was rehired as a dispatcher and not as a driver. The Respondent does not deny Levitt's rehire, but states he was rehired into a different position. The position of bus driver is a union position. The rank of dispatcher is non-union.
30. Karen Woodbury ("Woodbury"), whose national origin is the United States, voluntarily left her employment with the Company. Woodbury worked within a specialized program performing mobility supervision and training for handicapped individuals. Scarvaglieri testified that, after Woodbury left her employment with the Company, she was rehired.

Woodbury did not testify. Respondents' witnesses testified that Woodbury was not rehired into the same position.

31. Scarvaglieri testified that he was surprised when he was informed that there was a policy of no rehire to the same position. He had heard of this "policy" but believed it was only a rumor. However, he testified that in the 15 years he worked for the Company, he was not aware of any employee who resigned and was later re-hired to the same position. Scarvaglieri was terminated from the Company in 1996 and he subsequently filed a charge of discrimination. He testified that his claim "did not go anywhere."
32. Michael F. Blondin testified that he is currently employed by the Company as the General Manager and has been in that position since July 1998. With regard to the communication between the Company and the Authority, he testified that the Authority interacts with the Company with regard to policy. Prior to his employment with the Company, he worked at Connecticut Transit and Worcester Regional Transit. Blondin testified that he is familiar with the "no rehire to the same position" policy. He attributes the need for this policy to morale and safety issues. He further testified that, even when the Company needed drivers, they would not consider former employees who had worked as drivers. Blondin testified that this is not an unusual policy in the industry and that Worcester Regional Transit had the same policy when he worked there.
33. When the Company did not rehire the Complainant, he remained in Puerto Rico and continued working at Metro Mobile/ACL Motorbus where he earned \$6.80 per hour. At that time, bus operators at the Respondent Company were paid \$12.05 per hour and were eligible for medical insurance, uniforms, paid holidays, sick days and monetary bonuses for perfect attendance and record of no accidents.²
34. Complainant testified that he left Metro Mobile in November 1977 because another company, H.L. Courier offered him a position. He worked

² There is no evidence that Complainant attempted to obtain comparable employment in the United States after the Company's refusal to rehire him.

for H.L. Courier for approximately two years until he became disabled. Complainant is a diabetic and has suffered from a degenerative nerve disease since 1995. In 1999, he applied for and received Social Security Disability.

35. Complainant was deposed on October 22, 1999. Commission counsel, Joseph L. Edwards, Jr., and a Spanish interpreter, Patricia Lee, were present. At the deposition, Attorney Edwards offered Complainant the option of answering the questions in either English or Spanish. At the public hearing, Complainant testified that he had difficulty understanding and answering the questions at his deposition. He testified that he did not understand much of what was going on at his deposition and that he didn't realize that he could answer the questions in Spanish. However, during the initial portion of the deposition, Complainant asked if he could speak to the interpreter and did converse with her, asking her some questions in Spanish.

III. CONCLUSIONS OF LAW

A. Jurisdiction

Respondent Merrimack Valley Regional Transit Authority contends the Commission lacks jurisdiction over Complainant's claim because Respondent Authority is not allowed by statute to directly operate any mass transportation service. The Authority argues that it did not supervise Complainant or issue salary to him, nor did it have a sufficient number of employees to be an "employer" within the meaning of G.L. c. 151B. "The term 'employer' does not include any employer with fewer than six persons in his employ." G.L. c.151B, section 1, paragraph 5. It is undisputed that Respondent Authority employed three people.

Complainant presented evidence that the Authority and the Company shared related business interests and had recurring interactions through supervisory meetings held by the Company. The respective offices were located

approximately 30 feet apart in the same building at 85 Railroad Avenue, Haverhill.

Separate entities can, in the aggregate, constitute an employer, thereby bringing either or both within the coverage of G.L. c. 151B. The Commission's cases have referred to such entities as either "joint" employers, see e.g., Robinson v. FM Management, Inc., 10 MDLR 57, 58 (1997), Stanley v. The Gillette Company, 2 MDLR 1203, 1205 – 1207 (1980); or a "single" employer, see e.g., Robinson, 19 MDLR 1601, 1617 (1993). The term "joint" employer appears to be used more frequently where the basis for aggregating the entities is that each has an employment relationship with the individual in question pursuant to common law criteria. See Comey v. Hill, 387 Mass. 11, 15 (1982). The essence of the common law inquiry is the degree of control each entity exercises over the individual. See e.g., Commonwealth v. Savage, 31 Mass. App. Ct. 714 (1991). If more than one entity controls an individual in the workplace sufficiently that it can be said they are in a common law employer-employee relationship, then each is said to be a "joint" employer and may be liable for a statutory violation. Robinson, 19 MDLR at 58; Stanley, 2 MDLR at 1205-1207. The Authority did not have day-to-day control over the Complainant when he was actively employed in the workplace. He was hired by the Company and his managers and supervisors worked for the Company. He received his paychecks and his reviews from the Company. When he voluntarily left his employment with the Company, it was his immediate supervisor whom he asked for a reference letter. The evidence shows that the Authority did not exert sufficient control over the Complainant to constitute a "joint employer" relationship.

The term "single" employer is used more frequently where the basis for aggregating the entities is that they are interrelated in various ways, such that each is said to have the same employment relationships as the other. This inquiry considers the degree of interrelation in the operation of the entities in such areas as management, work location, financial matters and control over labor relations. No single isolated factor is dispositive. Keeling v. Wilfert Brothers Realty Co., 22 MDLR 201 (2000). Complainant presented evidence that the Respondents - the

Authority and the Company - acted as a single employer. Multiple business entities may be considered a single employer for purposes of joint and several liability when there is joint control over critical business issues. Langone v C. Walsh, Inc., 864 F. Supp. 233.

In this case, I find that the operations of the Company and the Authority meet the test for “single employer” adopted by the Commission. See Keeling, at 204. Though by statute the Authority cannot “operate” mass transportation, it is clear that the two organizations worked together on matters of policy critical to the functioning of the Company. Joseph Costanzo, the administrator of the Authority, observed bus drivers of the Company and relayed his observations to the Company. The Authority administrator would communicate regularly with managers at Company meetings, and would communicate the Authority’s needs regarding ridership count and other surveys. The Authority met with the Company to monitor the quality of transportation service provided. These business entities were located in the same building, not even 30 feet apart, and shared a conference room. The companies were interrelated in terms of management, location, and financial matters. Based on the evidence on record, I conclude that both entities shall be viewed as a single employer for purposes of Complainant’s claims of discrimination.

B. Failure to Hire

Massachusetts General Laws, Chapter 151B section 4(1) prohibits discrimination in employment including refusal to hire an individual on account of national origin. In order to establish a claim of discrimination under a disparate treatment theory, the Complainant may rely on the inferential model of proof, with the three-part burden shifting analysis. Wheelock College v. MCAD, 371 Mass. 130, 134-136 (1976).

In the first stage of proof the Complainant must establish a prima facie case. He may do so by showing (1) he is a member of a protected class; (2) that he was qualified to perform the duties of the job at issue; (3) that some adverse

employment action occurred; and (4) he was treated differently from other similarly situated persons not of his protected class. Bingham v. Lynn Sand & Stone Co., 25 MDLR 123,129 (2003); Jones v. Glowacki, 23 MDLR 296,297 (2001).

Complainant in this case has alleged that the Respondent refused to rehire him based on his status as a Hispanic person of Puerto Rican origin. I conclude that Complainant has established a prima facie case of discrimination. He is a member of a protected group by virtue of his status as a Hispanic male born in Puerto Rico. He was qualified to perform the duties of a bus operator and, prior to his voluntary quit, had been adequately performing the essential duties of his job. Despite his attempts to return to his position, pursuant to phone conversations and an application, he was not hired. The evidence demonstrates that at least two White applicants, born in the United States, were hired by the company in 1995.

Once the Complainant has established a prima facie case, at the second stage of analysis the Respondent assumes the burden of articulating some legitimate, nondiscriminatory reason for the action in question. Respondent Company asserts that it has a long-standing policy that it does not rehire employees into the same position in order to dissuade turnover and maintain a stable workforce.

Numerous examples were set forth of individuals who left the Company, voluntarily or involuntarily, and were rehired into different positions. Respondent has argued that it has a policy of rehiring former employees only if the individuals applied for a position other than the one they held prior to separation from employment. Respondent's policy was applied to Levitt, a White employee who had been a bus driver with the Company and who had been terminated shortly after Complainant's initial hire. When Levitt applied to the Company for rehire, he applied for the position of dispatcher and he was hired as a dispatcher. Though bus operators hold union positions, dispatchers are not members of the union. Levitt returned to the company as a non-union employee.

Respondent contends that its decision was legitimate. The Respondent has presented persuasive evidence that the policy is a common one in the industry and

is based upon a legitimate business reason of preventing excessive turnover by dissuading employees from coming and going as they please and attempting to avoid a revolving door environment. Complainant's own witness Scarvaglieri, who was clearly sympathetic to the Complainant's position, testified that although he was not aware of a written policy prohibiting rehire, he was also unaware of any employees who were rehired into the same position at the Company.

Scarvaglieri acknowledged that he knew of an "unwritten" policy not to rehire employees into their prior positions and that this was meant to avoid a revolving door. Though Scarvaglieri denied any animosity towards the Company, he himself had brought a legal claim against the Company at one time. Costanzo, Administrator of the Authority, also testified as to the existence of a Company policy against rehiring into the same position. Michael Blondin, current General Manager of the Company, testified credibly that he is familiar with the "no rehire to the same position" policy. This is a common policy in the industry, and not unique to Respondent. I conclude that Respondent has articulated a legitimate, nondiscriminatory reason for its action.

Respondents have met their burden of production and Complainant must prove by a preponderance of the evidence that Respondents acted with discriminatory intent, motive or state of mind. Complainant may do this by showing that the reason given was not the real reason. Complainant testified that, during the course of his employment, Promponas remarked that he did not want the bus operators speaking Spanish while on Company property. I do not view this issue as persuasive or relevant to the issues of discriminatory intent, motive or state of mind at the time of Complainant's application, for two reasons. First, Respondent has offered a legitimate, non-discriminatory reason for Promponas' directive regarding speaking English, which was the safety and comfort of the customers, as well as the other employees. Second, there was no evidence that Complainant suffered any adverse terms and conditions of employment on account of this directive. Promponas made the statement prior to Complainant's voluntary separation from the company. Complainant did not complain to Respondents about Promponas' statements at that time, nor did Complainant

demonstrate that the comments affected the terms and conditions of his employment.

I find that Complainant made many illogical suppositions about the rehiring process. He argued that Scarvaglieri had the authority to rehire him, though Scarvaglieri never made that representation. I find that Scarvaglieri merely promised to speak with the managers. Complainant also alleged that Costanzo interviewed him and guaranteed him a position. I find that at no time did Costanzo promise Complainant or his wife that the Company would rehire Complainant. I conclude that someone from the Authority sent, or caused to be sent, a job application to Complainant as a favor to Complainant's wife. There were no promises or guarantees made to Complainant.

I found much of Complainant's testimony lacked credibility. When he was challenged at the time of hearing with his inconsistent testimony from his deposition, he claimed that he did not understand the questions at the time of his deposition. Commission counsel, Attorney Joseph L. Edwards, Jr., was present with Complainant at the deposition. At the time, Complainant also had the services of a translator. I conclude that Complainant was afforded every reasonable opportunity to enable his understanding of the deposition questions. I find it suspect that Complainant raised this issue at the public hearing and I refuse to discount Complainant's deposition answers.

Similarly, I conclude that if Complainant did not understand Scarvaglieri when he said he would speak with other managers at the Company, Complainant would have asked his wife, who served as his translator when necessary, for clarification. I do not credit Complainant's testimony with respect to alleged promises made by Costanzo and Scarvaglieri about rehiring him.

The Respondent hired at least one Hispanic individual in 1995. There is no credible or substantial evidence supporting Complainant's allegation that the Company did not want to hire more Latino employees.

The issue of whether Respondents' policy exhibits sound business judgment is not before me. Certainly, rehiring an excellent employee like Complainant would have saved Respondent training costs. The issue is whether

the practice is motivated by a legitimate and non-discriminatory reason. I find that it is. Respondent allegedly enacted this policy to dissuade employees from leaving the company. I conclude that, under Respondent's policy, if Complainant had applied for a position other than bus operator, Respondent would have rehired him. Based on the foregoing, Complainant has failed to establish by a preponderance of evidence that Respondents' reasons for not rehiring him were pretextual. Accordingly, the Complaint is dismissed.

III. ORDER

Based upon the foregoing, it is hereby ordered that the Complaint be dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may, pursuant to the Commission's Rules of Procedure at 804 CMR 1.16(1) appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal with the Clerk of the Commission within ten (10) days of receipt of this Order, and a Petition for Review within thirty (30) days of receipt of this Order.

SO ORDERED this 13th day of August, 2004

HELENE HORN FIGMAN
Hearing Officer