

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & OLUKAYODE OLUWOLE,
Complainants

v.

DOCKET NO. 97-BEM-1432

BOSTON PUBLIC SCHOOLS,
Respondent

Appearances:

Maricia Woodham, Esquire, Christina N. Smith, Esquire,
and Kimberly A. Mottley, Esquire for Olukayode Oluwole
Robyn Andrea Porter, Esquire and Margaret H. Sanel,
Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 29, 1997, Olukayode Oluwole filed a complaint with this Commission alleging that he was subject to a racially hostile work environment in violation of M.G.L.c.151B§4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on April 14-17 and 25, 2003. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Olukayode Oluwole is a native of Nigeria who immigrated to the United States 23 years ago. He resides in Framingham, Massachusetts.

2. On September 8, 1988, Complainant was hired as a Technician in the Energy Division of Respondent's Department of Planning and Engineering. Throughout his employment with Respondent, Complainant has worked at the Campbell Resource Center, located in Dorchester, MA. On August 11, 1989, Complainant was promoted to the position of Senior Technician. In 1991, Complainant was promoted to the position of Specialist in the Energy Division of Planning and Engineering. Complainant's duties involved monitoring the energy use in school buildings. His duties included site visits to various schools.

3. Robert Roy, who is Caucasian, has been the Director of Respondent's Department of Planning and Engineering since 1991. Brian Chambers is Caucasian and has been the Energy Manager of Planning and Engineering since 1990. Chambers was Complainant's immediate supervisor throughout Complainant's employment at Respondent. Mary-Ellen Cafferty is Caucasian and has been

Respondent's Team Leader for Operations Support Services since 1996.

4. Janice Jackson is African American and was the Deputy Superintendent for Respondent in 1996 and 1997. Barbara Fields is African American and is the Senior Officer in Respondent's Office of Equity.

5. From April 1989 to November 1989, Complainant received anonymous telephone calls at the Energy Office telephone. The caller would say things such as, "nigger" and "Monkey, go back to Africa". When Respondent learned of the calls, it instructed Complainant to file an incident report with the Boston Police Department. A wiretap placed by the Boston Police department eventually lead to a determination that a co-worker of Complainant had made the telephone calls.

6. The co-worker was not disciplined for this behavior but was referred to the City's Comprehensive Assistance Program for Employees (CAPE), a program that provides therapy, addresses issues of alcohol and drug abuse and other problems employees face. The co-worker attended and completed the CAPE program and the anonymous

calls to Complainant stopped.¹ He continues to work at Respondent.

7. On or about September 30, 1996, Janice Jackson, Barbara Fields and Mary-Ellen Cafferty received identical anonymous letters. The original letter was addressed to Janice Jackson, with copies to Fields and Cafferty. The letter stated, in part:

"...I would like to speak with you...about the problems...in the Planning and Engineering Department...I feel that the Planning & Engineering Department is a perfect place for a racial war...Now I know why United States Postal Workers return to work with a ASSAULT WEAPON OR A HANDGUN...I've Purchased a Tech-9 and eight bullet clips... help me...before I shoot them all dead.

8. A week after these letters were received and after speaking with forensic experts and analyzing handwriting from personnel files, Respondent suspended the suspected perpetrator, planning and engineering department employee Kenneth Gethers, who is African American. Gethers was terminated on January 27, 1997 after a handwriting expert determined that it was highly probable that Gethers had addressed the envelopes (The letters themselves were typed).

¹ Evidence concerning the telephone calls was admitted for background purposes only, as it was ruled too remote in time to constitute part of a continuing violation.

9. In late February or early March 1997, several black employees in Planning and Engineering, including Complainant, Pierre Myrtil and Mark Waring, received anonymous hate mail at work. The letters included racial epithets such as "porch monkeys" "mother fucken niggers" and "spear chucckerrs". The letters included threats, such as "Ill pick the lock and flatten you tiers"; "I hate you I'm glad I got rid of one of you and now its your turn"; "chief walter[Complainant] cloud fuck you I own you you brought and paid fo I s placed my hands on yo you when I want to"; "another nigger bites the dust"; "I in the office and you don't know who I am"; "I know you and whre youaare ha ha ha," and "YOUR DEAD BANG".

10. Respondent turned the letters over to the Boston Police Department for investigation. In February 1997, Detective Ernesto "Tito" Whittington was assigned to investigate the letters.

11. Detective Whittington shipped the anonymous letters to the FBI laboratory in Quantico, Virginia for fingerprint, psychological, tool and dye machine impression and handwriting analyses. The letters were never analyzed or returned to Whittington and no one was prosecuted for

authoring the letters.² Whittington testified that he had not determined that Kenneth Gethers had authored the letters sent to Complainant and his co-workers because the handwriting on the envelopes was dissimilar to Gethers' handwriting.

12. On March 13, 1997, Respondent convened a meeting attended by Boston Public Schools Superintendent Paysant with all of the employees of the Planning and Engineering Department to discuss steps taken to investigate the letters and action to be taken to address the safety concerns of the employees.

13. As a result of the meeting, Respondent installed new locks on its vans, staggered employees' check-in times and assigned cellular phones to be used by employees, including Complainant, in the event of an emergency. On or about March 18, Sergeant Detective Johnston toured the Campbell Resource Center.

14. Throughout April, May and June 1997, Mary-Ellen Cafferty continued to meet with various Planning and

² Without Whittington's knowledge, A Suffolk County District Attorney requested the documents sent to Quantico be returned to her in connection with prosecuting Gethers on an unrelated domestic violence case, and thus they were never analyzed.

Engineering employees, including Complainant, to discuss ways of improving Planning and Engineering, including issues of racism, intimidation and retaliation.

15. Complainant filed his MCAD complaint on April 29, 1997.

16. On May 7, 1997, Detective Whittington requested that the Police investigation of the anonymous letters be inactivated because there was not enough evidence to initiate a criminal complaint against anyone.

17. In June 1997, another series of anonymous letters was sent to various Planning and Engineering employees. Respondent again referred these letters to the Boston Police Department for investigation.

18. On June 17, 1997 Respondent held a meeting with all employees of Planning and Engineering, including Complainant. During this meeting, Respondent's Superintendent denounced the letters and violence in the workplace. During the meeting, employees of Planning and Engineering, including Complainant, were updated on the status of the investigation and were instructed on how to

handle any future anonymous letters. During this meeting, the Boston Police stated that in their professional opinion, the work environment at Planning and Engineering was safe.

19. On June 26, 1997, Complainant requested, through his attorney, a paid leave of absence for an indefinite period of time. Respondent denied Complainant's request.

20. On June 30, 1997, Sergeant Detective Johnston again toured the Campbell Resource Center to suggest physical changes to improve security. Upon his recommendation, the doors of the Energy office and the Planning and Engineering Office were changed to continuous locking with a buzzer so that it was necessary to either use a key or be buzzed in. At approximately the same time, an additional school police officer was stationed at Campbell Resource Center to patrol the building and the parking area.

21. By July 1, 1997, Respondent had offered counseling to Complainant and other employees of Planning and Engineering who received anonymous letters. Complainant did not use the counseling services.

22. On July 1, 1997, Complainant made the following suggestions to Mary-Ellen Cafferty in writing: a) have a policy of no tolerance for racism and discrimination b) Apprehend, prosecute and terminate the person(s) involved; and c) Provide periodic office diversity education.

23. On July 3, 1997, Mary-Ellen Cafferty met with Complainant to discuss the issues surrounding the anonymous letters.

24. On August 13, 1997, Tony Pomella, a mechanical engineer and supervisor, approached Complainant in the parking lot of the Campbell Resource Center. According to Pomella, Complainant was wearing sandals and a t-shirt. He orally directed Complainant to dress in a more professional matter. Pomella testified that Complainant became angry, came right up to Pomella and yelled, "you give me that in writing".

25. Complainant complained about this incident to Mary Ellen Cafferty and accused Pomella of acting aggressively.

26. As a result of Complainant's complaint, Roy instructed Pomella to draft a memorandum regarding the incident. The memorandum, from Pomella to Roy, dated August 13 1997, stated:

I have recently observed that Walter Oluwole appearance has been less than professional, for example he has been wearing T-shirts and sandals. At approximately 7:55 a.m. today, I took the opportunity to speak with Walter as I was leaving the Campbell Resource Center. He became immediately upset with me, turned and ran at me from 20 feet away, in a very aggressive manner he stood approximately 4 inches away from my face, yelling, "you give me that in writing" and "the last time you spoke to me, you said that I was reckless". I reiterated my oral warning that his appearance was unacceptable, and directed him to dress in a more professional manner. Walter's behavior during this discussion was unacceptable, and must not be tolerated. I defer to your judgment on what disciplinary action should be taken.

(Exh.J-27)

27. On August 15, Pomella, Chambers and Complainant met to discuss the matter. Following this meeting, Pomella wrote a second memorandum:

Walter Oluwole, Brian Chambers and I met this morning to discuss Walter's recent tendency to wear sandals during department work hours. I informed Walter that his footwear must be more appropriate in keeping with the professional image of this department, and must also meet safety requirements necessitated by the possibility of his entering potentially hazardous areas(mechanical rooms)during the course of the work day. Walter insisted repeatedly that I must give him a written Boston Public Schools policy outlining minimum "dress code" requirements. I instructed Walter that he must first follow the previous instructions, and his request for a written dress code policy must be submitted in writing. Walter finally agreed. I also informed Walter that his actions on the

morning of Wednesday August 13, 1997 when he confronted me in an aggressive manner was unprofessional and intolerable, and that I expected him to maintain a professional attitude towards myself, and his coworkers at all times. He began to insist that I was the aggressor, until I informed him that I did not care to argue the subject, and that it must never happen again. Walter appeared to be agreeable with this, and we ended the meeting at this time.

(Exh. J-28)

28. After remaining out of work from November 13, 1997 through November 21, 1997, Complainant notified Respondent in writing on Monday, November 24, 1997 that he was resigning effective December 15, 1997.

29. Robert Roy has been the facilities management director since 1991. He testified that the Planning and Engineering Department had at the time of the events in question an unwritten dress code that the employees wore shirts and ties during the school year, but were allowed to dress more casually in the summer when school was out of session. In the summer they could wear more casual clothing, but could not wear sandals or sneakers for safety reasons and could not wear undershirts or shorts. I credit his testimony.

III. CONCLUSIONS OF LAW

A. Racial Harassment

Complainant alleges that Respondent permitted a racially hostile work environment to exist by failing to take sufficient steps to stop the racial harassment occurring in the workplace. In order to succeed on a claim of racial harassment and hostile work environment, Complainant must establish that he is a member of a protected class, that he was the target of speech or conduct based on his membership in that class and that the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. He must establish that Respondent knew about the harassment and failed to take prompt and effective remedial action in response to that harassment. Salmon v. Costco Wholesale Corp., 21 MDLR 95(1999), Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111(1998); Richards v. Bull H.N.Information Systems, Inc., 16 MDLR 1639, 1669(1994). Respondent concedes that the offensive, anonymous letters created a hostile work environment for Complainant. However, Respondent argues that it is not liable for creating or allowing the hostile work environment to exist because it had did not know who was

responsible for the letters and it took prompt and effective remedial action to end the harassment. I concur.

There are several factors to be considered when evaluating an employer's response to a complaint of hostile work environment. Such factors may include the amount of time that elapses between the notice and remedial action, the options available to the employer, the possibility of having employee training sessions, discipline of the harassers, and whether or not the measures ended the harassment. Rainey v. Monsanto, 22 MDLR 303,310 (2000) (employer's response to anonymous racial harassment deemed prompt and effective).

In the instant case, when the first set of anonymous letters were sent to administrators in September 1996, Respondent filed a police report with the Boston Police Department, conducted an internal investigation to determine who wrote the letters, terminated the employment of Kenneth Gethers, the suspected author of the letter and obtained a restraining order against him and posted a police officer inside the Campbell Resource Center.

Within days after Complainant and his co-workers received anonymous letters in February or March 1997, Respondent referred the matter to the Boston Police

Department. Subsequently Respondent met repeatedly with employees regarding the status of the investigation and the action to be taken to address the safety concerns of the employees relative to the anonymous letters, and took measures to increase security for Complainant and his fellow Planning and Engineering employees.

As more anonymous letters were received, Respondent denounced the letters and continued to keep Complainant and other Planning and Engineering employees apprised of the status of the investigation and the action to be taken. Respondent continued to add security measures as recommended by law enforcement.

As examples of Respondent's inadequate response, Complainant argues that his request on July 1, 1997 for the adoption of a "zero-tolerance" policy for discrimination was not implemented by Respondent until the following month and that his request that Respondent implement diversity education did not happen until after his resignation.

Complainant further contends that Respondent's failure to employ experts on workplace violence and forensic psychology or handwriting, as it had done previously, and Respondent's failure to discipline or terminate the anonymous author of the letters are further examples of Respondent's failure to take adequate steps to investigate

the incidents. He alleges that these letters were not treated as seriously as the letters sent to administrators.

Complainant's belief that Respondent's response was inadequate is not the relevant standard for determining the adequacy of the response. "[E]ven taking pains to view events from the victim's perspective, the chief measure of the adequacy of an employer's response is not the victim's own personal sense of justice...but, rather whether the behavior that gave rise to the complaint has ceased and does not threaten to reoccur." Saad v. Stanley Street Treatment and Resources, Inc. 1994 WL846911 (D. Mass 1994); May 20, 1994)(citing Ellison v. Brady, 924 F. 2d 872, 878 (9th cir. 1991)(remedy should be reasonably calculated to end the harassment and proportionate to the offense). See also Harley v. Costco Wholesale Corp., 21 MDLR 87,93(1999), Sarin v. Raytheon Co., 905 F. Supp. 49, 53 (D. Mass. 1995) (prompt responses, warnings and interview of all but one potential witness sufficient; employer who has acted reasonably and in good faith cannot be liable.)

Complainant remained upset about what he viewed as the inadequacy of Respondent's response to his receipt of racist phone calls many years before when the co-worker who made the calls was not disciplined. I believe that Complainant's deeply held feelings about the earlier phone

calls led him to view with cynicism Respondent's response to the letters. However, the earlier incidents are not before the Commission here and the record in this matter does not support Complainant's claim that the Respondent's response to the letters was inadequate. Given the difficulty of dealing with an anonymous source and the mix-up resulting in the FBI's not analyzing the letters, I conclude that Respondent's measures were more than adequate.

B. Retaliation

Complainant alleges that the memoranda written by Anthony Pomella regarding Complainant's dress were in retaliation for his having filed a complaint of discrimination three months before. In order to establish a prima facie case of retaliation, Complainant must show that (1) he engaged in protected activity (2) that the employer was aware of the protected activity (3) that he subsequently was subjected to 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." Parker v. Univ.of Mass Dartmouth, 23 MDLR 57,59(2001)(quoting Richards v. Bull HN Info. Sys.,

Inc., 16 MDLR 108(1994)). Once Complainant has established a prima facie case of retaliation, the burden of production then shifts to Respondent to articulate a legitimate, non-discriminatory reason for the adverse action. Wheelock College v. MCAD, 371 Mass. 130, 138(1976). Once Respondent articulates a legitimate, non-discriminatory reason for its action, the burden shifts back to the Complainant to establish by a preponderance of the evidence that Respondent's proffered reason for the adverse employment action was a pretext for discrimination.

Complainant has failed to establish a prima facie case of retaliation. While the confrontation with Pomella occurred within months after Complainant's filing a complaint of discrimination, I credited Pomella's version of events regarding the August 13 confrontation. Complainant's response to Pomella's admonition about wearing casual clothes was inappropriate. Nonetheless, Complainant was not threatened with discipline or subjected to adverse action. See, Kifle v. Kinney Systems, 25 MDLR 252 (2003)(No retaliation when Complainant written up for resting feet on desk when not disciplined nor threatened with any disciplinary action and suffered no tangible adverse employment action.) I therefore conclude that Respondent did not engage in unlawful retaliation.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal with the full commission within 10 days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 20th day of January, 2004.

JUDITH E. KAPLAN,
Hearing Officer