

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD & TERRENCE WARD,  
Complainants

v.

DOCKET NO. 00-BEM-3286

BOSTON CARMEN'S UNION  
LOCAL 589,  
Respondent

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Appearances:

Winston Kendall, Esquire for the Terrence Ward  
John F. McMahon, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 2, 2000, Terrence Ward filed a complaint with this Commission charging Respondent Boston Carmen's Union with discrimination on the basis of Race, Color, Disability and Retaliation in violation of M.G.L.c.151B§4. Attempts to conciliate the matter failed, and following a Certification Conference, the following issues were certified for public hearing: Whether Respondent discriminated against Complainant on the basis of race and color by failing to process Complainant's grievance reports dated June 14, 2000, July 27, 2000, August 22, 2000 and October 2, 2000; whether Respondent's failure to process the said reports was in retaliation for Complainant's having filed a previous complaint no. 99-BEM-0751 with this Commission; and whether Respondent aided and abetted Complainant's employer, the MBTA, in discriminating

against Complainant by failing to process/pursue the allegations contained in the said grievance reports.

A public hearing was held before me on October 4-8, 2004. 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 Terrence Ward is an African- American man who resides in Boston, Massachusetts. Since 1987, Complainant has worked for the Massachusetts Bay Transportation Authority (MBTA), as a bus operator. Complainant's "permanent position" is Bus Operator. Complainant is a member of the Respondent Boston Carmen's Union, Local 589.

2. Respondent Boston Carmen's Union Local 589 represents the MBTA's bus operators. James Lydon was president of Respondent from September 1996 until December 31, 2001 and was also a bus operator for Respondent for 23 years, until his retirement in July 2003. As union president, Lydon's duties were to oversee the union officials and shop stewards, handle payroll and budget matters, act as Chairman of the Negotiating Committee and Executive Board and enforce the rules and contract. The union exercised discretion in determining whether to file a grievance on behalf of a union member, based on its determination of the merits of the claim.

3. In late 1997, Complainant began a “stress-related” disability leave for which he received Workers’ Compensation benefits. Complainant did not return to work until 2001.<sup>1</sup> He was out of work for over three years.

4. Complainant testified that by 2000 his personal physician had cleared him to return to work at the MBTA and although he was willing to return to any position, his physician did not clear him to return to the position of bus operator.

5. Between June 1, 1997 and August 31, 2001, a percentage of new MBTA jobs were assigned by lottery to the general public while the remaining positions were posted internally. During this time period, the MBTA conducted the job lottery by placing job advertisements in area newspapers and other local media and agencies for applicants outside the MBTA to apply for jobs. Candidates for the lottery filed applications by mail and were randomly assigned lottery numbers. Current MBTA employees applying for a lottery position as opposed to an internally posted position would be assigned a random number and seniority would not be considered in determining their place. However, qualified employees applying for internal postings would be hired according to seniority.

6. The MBTA’s Department of Diversity is responsible for conducting internal investigations of employee complaints, including complaints of workplace discrimination.

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<sup>1</sup> Complainant claimed that his stress resulted from racial harassment by co-workers. These allegations are the subject of separate litigation between Complainant and the Carmen’s Union and are not before me.

7. While on leave, Complainant applied for a Track Laborer position through the MBTA's lottery process. On May 25, 2000, he was notified that he had been assigned a lottery number for the position of Track Laborer.

8. While Complainant was out on leave, Caucasian MBTA employees who had less seniority than he had, obtained Track Laborer positions through the internal bidding process. I find that that Caucasian employees Robert P. Mulvey, Michael R. Gallagher and Steven Gallagher all bid on internally posted Track Laborer positions in 1998 and 1999. All three were transferred to Track Laborer positions approximately a year before Complainant's grievance was filed in June 2000. Complainant did not bid on an internal posting for the position of Track Laborer.

9. On June 16, 2000, Complainant filed a grievance report with Respondent stating:

On 1-25-99 I filed a complaint with the office MCAD against the Authority for by passing me for the position of track laborer #7318. The authority instead hired on the outside. Just recently I was informed by Human Resources that I was on the waiting list after I entered the lottery. I wrote Human Resources a letter on 6-1-00 informing them that I was already an employee and that my seniority was being violated. The fact is the authority should of (sic) allowed me the opportunity first to this position as they did for other bus operators who also happen to be all white.

(Exh. C-1)

10. James Lydon testified that he received but did not process Complainant's grievance of June 16, 2000 because of his belief that it had no merit. Lydon knew that

Complainant's seniority had no bearing on his application for a track laborer position via the lottery process. I credit his testimony.

11. On July 27, 2000, Complainant filed a grievance report with Respondent stating:

"...Once again, [the Department of] Diversity has failed to investigate my complaint of discrimination and retaliation on the part of the Authority. The Authority has bypassed me on the track laborer's position failing to allow me the same opportunity to apply or bid on the position as did four of my white counterparts. Because the Authority failed to inform me of the position and continues to bar me from service, I missed the system-wide bid by no fault of my own.

(Exh.C-2)

12. Complainant testified that he was unaware of Respondent's internal bidding process. I do not credit his testimony in this regard. Complainant has filed numerous union grievances, as well as several MCAD complaints and has demonstrated therefore that he is quite knowledgeable about the MBTA's policies and practices. I find that he was aware of the MBTA's practice of internally posting job openings.

13. James Lydon testified that he did not process Complainant's July 27, 2000 grievance because it had no merit. I credit his testimony.

14. On August 22, 2000, Complainant filed a grievance report with Respondent stating:

The MBTA continues to bar me from getting a back to work physical. On July 10 2000 I received a call by Joe Cattil Quincy supr. Who told me that Sabrina Miles from the law department requested him to schedule me a back to work physical. On July 20<sup>th</sup> my Dr. Karen Victor faxed the clinic with all the medical documentation. Disqualifying me from operating a bus + avoiding fumes. But could wk light duty. On 7/31/00 I called the clinic and spoke to Peggy Shue and later Pauline Zuckerman. They needed more information. On 8/22 I spoke to Kate Devaney Health Occupational Services who was

very rude and abrasive. She told me I did not qualify to take a physical unless it was through the Workers Comp. Dept. Phone call #2:00 PM. This is clearly a violation of the collective bargaining agreement.

(Exh. C-4).

15. James Lydon testified that he did not process this grievance because the Respondent had no power to force the MBTA to conduct a physical examination. Lydon testified that during his tenure at the MBTA, employees who were out of work and receiving Workers' Compensation were required to contact the Workers' Compensation office in order to schedule a physical examination. Lydon testified that he knew from reading the August 22 grievance that Complainant had already been advised to go through the worker's compensation department to schedule a physical examination and that there was nothing more Respondent could do about the situation. I credit this testimony.

16. Lydon testified that Complainant had informed him while Complainant was out on leave that he wanted to obtain a physical examination specifically qualifying him for the position of Track Laborer. Lydon testified that Respondent had no authority to ask the MBTA for a physical examination tailored to a specific position. The MBTA required Complainant, whose permanent position was "bus operator," to obtain a physical examination to determine if he could return to the position of bus operator, and if not, to determine other positions for which he was qualified. I credit this testimony.

17. On October 2, 2000, Complainant filed a grievance report with Respondent

that stated:

On June 26, 2000 I wrote a letter of request to Diane Wong asking her to investigate my complaints along with a grievance dated 6/14/00. The Office of Diversity has ignored my complaints until 8-29-00 only after I filed a complaint against them with Mass Commission. The office of Diversity once again failed to comply as outlined in the internal complaint procedure giving them 14 days to investigate. They waited two months before they began. My request today is that the union take my case to arbitration in order to dispute my legal right to continue employment at the MBTA. The Authority has once again violated the collective bargaining agreement by not giving reason why I am not employed. The Authority continues to bar me from employment and advancement. This is clearly retaliation.

(Exh. C-5)

18. James Lydon testified that the Respondent did not process this grievance because it had no merit. Lydon testified that he did not contact the Office of Diversity on behalf of Complainant with respect to this grievance. He stated that in the past he had made numerous attempts to contact the Office of Diversity on matters related to other MBTA employees, but had been rebuffed by the Office of Diversity, which refused to discuss with him matters regarding MBTA employees, citing privacy concerns. I credit this testimony.

19. On May 18, 2001, Margaret LaPaglia, who is Caucasian, filed a union grievance. LaPaglia was a temporarily disqualified Bus Operator who applied for the position of Car Cleaner on August 14, 2000. On January 12, 2001, the position was instead offered to Joseph Pecci, a bus operator with less seniority than LaPaglia. In late February 2001, LaPaglia learned that she did not get the job and in May 2001, learned that Pecci had been awarded the job. LaPaglia filed a grievance and Respondent pursued

the grievance to arbitration. LaPaglia lost the grievance because she had not been cleared to return to work at the time of her application. (Exh. C-6)

20. Lydon testified that for many years the Respondent took the position that employees, such as Complainant, who were “disqualified” from their permanent positions, were not allowed to bid on other MBTA jobs. Respondent subsequently reversed its position on this issue and in around October 2000 entered into an agreement with the MBTA that would allow temporarily disqualified employees to bid on other MBTA positions. Lydon testified that Respondent pursued LaPaglia’s grievance to arbitration because her grievance was filed subsequent to the Respondent’s agreement with the MBTA allowing temporarily disqualified employees to bid on permanent positions. The union now believed it could prevail on such a claim at arbitration. I credit Lydon’s testimony.

21. Lydon testified that he communicated the Respondent’s change of position to its membership during the next monthly union meeting following the agreement with the MBTA. I credit his testimony.

22. Complainant has filed numerous grievances since October 2, 2000 concerning his seniority and pay rate. Respondent has pursued these grievances to arbitration. Lydon testified that the union pursued Complainant’s subsequent grievances because they were legitimate. I credit Lydon’s testimony.

### III. CONCLUSIONS OF LAW

M.G.L. c. 151B, s. 4(2) provides that it shall be unlawful for a labor organization to exclude full membership rights to any individual or to discriminate in any way against any of its members on the basis of race. Complainant has alleged that Respondents unlawfully discriminated against him on the basis of race and color by failing to represent him in his disputes with his employer. Specifically, Complainant has alleged that the Union failed to process four grievances filed in the year 2000.

In the absence of any direct evidence of discrimination, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Wheelock College v. MCAD, 371 Mass 130, 136 (1976). In order to establish a prima facie case of discrimination on the basis of race, Complainant must show that (1) he is a member of a protected class; (2) that he was eligible to receive the services from the union that he requested; (3) that the union subjected him to adverse treatment; and, (4) that he was treated differently from similarly situated persons not of the protected class. Abramian v. President and Fellows of Harvard College; 432 Mass. 104, 116 (2000); Blare v. Husky Injection Molding Systems Boston, Inc.; 419 Mass 437, 441 (1995), Wheelock College, 371 Mass. at 134-136; Massachusetts Commission Against Discrimination and Rufus Cheeks v. Massachusetts Correction Officers Federated Union, et al, 27 MDLR 30 (2005).

I conclude that Complainant has failed to establish a prima facie case of disparate treatment discrimination. Although Complainant is a member of a protected group by virtue of his race and color, African-American, he has not established that that he was

subject to adverse treatment by the union or that he was treated differently from similarly situated persons not of his protected class. With respect to his grievance reports in June and July 2000, Complainant identified three comparators, Robert Mulvey, Michael Gallagher and Steven Gallagher, all Caucasians with less seniority than Complainant who were transferred into Track Laborer positions. However, the evidence showed that these candidates submitted bids to the MBTA for internally posted Track Laborer positions, and that their transfers occurred at least a year before Complainant filed his first grievance of 2000. The evidence further shows that Complainant did not bid for a posted position of Track Laborer in 2000, but instead applied for a position through the MBTA's job lottery, which was open to the public and not affected by seniority. Therefore I conclude that with respect to his grievance reports of June and July 2000, Complainant did not establish a prima facie case of discrimination because the three comparators were not similarly situated to Complainant. Complainant failed to offer any other evidence that would raise an inference of discrimination with respect to the Respondent's conduct on these occasions.

Complainant's grievance report of August 22, 2000 claims that the MBTA prevented him from obtaining a back to work physical. Respondent argues that it did not process this grievance because it had no merit. Lydon testified credibly that Respondent had no authority regarding scheduling physicals examinations with the MBTA and that Complainant appeared to have been pursuing the matter through the MBTA's workers' compensation department, which was the proper way to proceed in such matters. Complainant has failed to establish a prima facie case of race discrimination with respect to his grievance reports of August 22, 2000, as he offered no evidence that he was treated

differently from others not of his protected class. Moreover, he did not refute Lydon's testimony that the Respondent had no control over the process.

With respect to Complainant's grievance report of October 2, 2000, he claimed that the MBTA's Department of Diversity failed to investigate his complaint of discrimination and retaliation by the MBTA for refusing to allow him to bid on Track Laborer positions. However, there was no evidence that Respondent declined to process this grievance on account of Complainant's race and color. Lydon testified credibly that Respondent did not pursue the grievance because it concerned a complaint about the Department of Diversity, over which Respondent had no authority. Further there was no evidence that Respondent had pursued grievances against the MBTA involving complaints before the Department of Diversity. Additionally, in this grievance report, Complainant asked Respondent to grieve the MBTA's refusal to put him back on the job. However, there was no evidence that either the MBTA or Respondent was required to notify employees who were out on leave about internal job postings. Complainant alleges that Respondent's decision to pursue the grievance of Margaret LaPaglia to arbitration is evidence that he was treated differently on account of his race. I disagree. I conclude that LaPaglia was not similarly situated to Complainant as LaPaglia bid on an internally posted position, whereas Complainant did not. Moreover, LaPaglia's complaint was filed after Respondent and the MBTA changed their positions with regard to whether temporarily disqualified employees could bid on other positions. Therefore, Complainant has failed to establish a prima facie case of discrimination on the basis of race and color with respect to this grievance.

Even if I were to find that Respondents failed to zealously investigate or represent Complainant at Union grievances, Complainant offered no evidence at all that Respondent handled his matters any differently from the manner in which it handled the cases of union members not in his protected class. As previously addressed by the Commission in McIlvaine v. Local 1547 Amalgamated Transit Union and Timothy Sullivan, 21 MDLR 255, 257 (1999), the mere failure of a union to exercise more vigorous efforts on behalf of a member "may not be laudable", but it does not, standing alone, indicate that a union engaged in unlawful discrimination.

Complainant has also alleged that Respondent's failure to pursue his grievances that are the subject of this complaint was in retaliation for Complainant's having filed a previous MCAD complaint against Respondent. M.G.L. c. 151B, s. 4(4) makes it unlawful "for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under [c. 151B] or because he has filed a complaint, testified, or assisted in any proceeding under [c. 151B, s. 5]." 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." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), quoting, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

Similar to the race discrimination claim addressed above, in the absence of any direct evidence of retaliatory motive, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116

(2000); Wynn & Wynn v. MCAD, 431 Mass 665, 665-666 (2000); Wheelock College v. MCAD, 371 Mass 130, 136 (1976). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent knew he had engaged in protected activity; (3) Respondent subjected him to adverse treatment; and, (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelley, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

I find that Complainant has failed to establish a prima facie case of retaliation against Respondent. Complainant has failed to introduce any evidence of a causal connection between Respondent's actions and the filing of his complaints with the Commission.

Complainant has also alleged that Respondent violated Section 4(5) which provides that it shall be an unlawful practice, "For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or attempt to do so."

Additionally, Complainant failed to introduce any evidence that Respondent participated in, aided, abetted or incited the various alleged acts of harassment and retaliation purportedly committed by the MBTA. Complainant has failed to introduce any evidence that Respondent knew of discriminatory conduct by the MBTA and refused to assist Complainant in addressing these concerns. Complainant has, therefore, failed to prove that Respondent engaged in unlawful conduct in violation of M.G.L. c. 151B, s.4 (5).

IV. ORDER

For the reasons stated above, I hereby order the complaint in this matter be dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a notice of appeal within ten days of receipt of this order and a petition for review within 30 days of receipt of this order.

SO ORDERED, this 12th day of July 2005.

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JUDITH E. KAPLAN,  
Hearing Officer