

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & LIZANDRO PORTES ABREU,
Complainants

v.

DOCKET NO. 05-SEM-01175

UNIVERSITY OF MASSACHUSETTS,
Respondent

Appearances:

William F. Green, Esquire, Commission Counsel
Jean M. Kelly, Esquire, for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 28, 2005, Lizandro Portes Abreu, a native of the Dominican Republic, filed a complaint with this Commission charging Respondent with discrimination on the basis of his national origin. The claim was amended on January 11, 2007 to include a claim of retaliation. The Investigating Commissioner issued a probable cause finding. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on December 11, 13, 14 and 15, 2009. After careful consideration of the entire record before me 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 Lizandro Portes Abreu (“Complainant”) was born in the Dominican Republic where he earned a masters degree in agronomy. Complainant came

to the United States in 2002. His native language is Spanish and his command of the English language is limited.¹

2. Respondent UMass Amherst operates student dining halls on campus that fall under its auxiliary services division. Respondent employs permanent employees “FTEs” or “01s” whose jobs included fringe benefits and union protections. Respondent also employs temporary employees or “03s” who are contractors who perform the same tasks as FTEs, but who receive no benefits or job protection. (T. 3, p. 170)

3. Contractors who are “03’s” work in the dining halls from September through May and must reapply for dining hall positions every September. (T. 1, 173-4) With respect to available permanent positions, Respondent posts a weekly yellow sheet for internal candidates, listing campus-wide job openings for which both FTEs and 03s are eligible to apply. (T. 1, 171-172)

4. Juan Martinez is a human resources interviewer in Respondent’s employment department. Martinez interviews job candidates and places them in ethnically diverse job pools based on their skills and sends the pools of qualified candidates to the appropriate departments. Martinez interviewed Complainant, who learned of a job opening from a friend, and referred him to the auxiliary services department. (T.4, p. 116-117)

5. In September 2003, Complainant was hired into the temporary position of pot washer at Worcester Dining Commons, a large dining hall located on the UMass Amherst campus, that is open from 7:00 a.m. to 11:00 p.m. and serves 7,000 students per day. (T. 1, p. 151; T. 2, p.124) The pot washer works in a small room adjacent to the kitchen and receives dirty pots from culinary workers for washing and return to the kitchen. After a

¹ An interpreter certified to interpret Spanish, Alice Bubello, translated for Complainant at the public hearing

few months in that position, Complainant was assigned to the position of culinary worker where he was responsible for preparing meals.

6. Donald Sabola has worked for Respondent since October 1985 and was head chef at Worcester Dining Commons at all times relevant to this matter. (T.1, p. 127-133)

Patrick Sullivan was one of three head cooks who worked for Sabola. Sabola, the head cook or the manager and co-workers trained Complainant and other culinary workers.

(T. 1, p. 31, 137-8)

7. Marc Morrisette has worked for Respondent since 1989 and managed the Worcester Dining Commons building at all times relevant to this matter. Morrisette supervised 75 employees and 150 students and was responsible for personnel matters, including hiring and firing. (T. 1, p.167-170)

8. Kevin Wissman is currently manager of human resources and organizational development for auxiliary services. In March 2005 Wissman was temporary HR manager in charge of payroll, union grievances, employee discipline issues and labor relations. (T. 4, p. 185)

9. Melissa Lumbis began working as a temporary culinary worker (03) on the 7:00 a.m. to 3:00 p.m. shift at Worcester Dining Commons in September 2003. (T.1, p. 28, 39) The morning shift included six to eight culinary workers, the chef and head cook and approximately four student workers. Lumbis testified that Complainant began work at 11:00 am and their shifts overlapped for 3 ½ hours. She testified that she spoke to Complainant occasionally while on breaks. (T. 1, 41-42) Lumbis was friendly with a student worker named Alicia who worked from 11:00 a.m. to 3:00 p.m. Lumbis and

Alicia occasionally socialized outside of work with other employees of the cafeteria including Kristen Moriarty, Pat Sullivan and Brett Felix. (T.1, p. 46)

10. Kristen Moriarty worked the 6:00 a.m. to 2:00 p.m. shift as a culinary worker at Worcester Dining Commons from September 2002 to September 2006. (T. 2, 11) Patrick Sullivan was her immediate supervisor. Although her shift overlapped with Complainant's, she testified that they did not work together regularly and engaged in small talk a couple of times a week. (T. 2, p. 12-14) Moriarty spoke no Spanish and there was a "language barrier" between her and Complainant. I credit her testimony.

11. Alberto Burgos, who is Dominican, has been in the U.S. since 1987 and is the head store room keeper for Worcester Dining Commons. In this position he unloads all the supplies for Worcester Dining Commons, including work uniforms. Burgos reports directly to Morrisette. Burgos translated for Complainant on numerous occasions during Complainant's meetings with Morrisette. (T. 2, 65-72)

12. Socrate Lopez, who is Dominican, has been in the US in 2001 and hails from the same home town as Complainant. Lopez testified that he began working for Respondent as a pot washer in 2003. After working as an "03" contractor for a month, Lopez became a FTE. (T.2, 91) Lopez left the pot washing job and continues to work as a FTE for Respondent where he cleans student apartments, a position that pays better than his job at Worcester Dining Commons. (T. 2, p. 109) Lopez had no difficulties with Sabola or Morrisette. (T. 2, 106-107) I credit Lopez's testimony.

13. Complainant testified that his first supervisor in the kitchen provided him with a great deal of training but was not on the job for long when she was replaced by Donald Sabola. (T. 2, 127)

14. After working the 2003-2004 school year, Complainant was laid off in May 2004, as were all "03" workers, but he was not called back to work for the fall semester in 2004. He complained to Morrisette who told him he was not on the list of employees to be called back (T. 2, p.138) Complainant testified that Morrisette told him he would like to make him a permanent employee, but could not do so without Sabola's recommendation and Complainant had heard indirectly that Sabola did not want him to return for the 2004 school year. (T. 2, p. 136).

15. Complainant then contacted Juan Martinez, who called either Wissman or Morrisette on Complainant's behalf. (T. 2, p.141) Complainant testified that Martinez told him that Sabola had problems with Hispanic workers. Martinez denied ever telling Complainant that Sabola had problems with Hispanics and stated that he did not even know who Sabola was at the time. (T. 4, p.127-128) I credit Martinez' testimony that he did not tell Complainant that Sabola had problems with Hispanics.

16. After his conversation with Martinez, Complainant was called back to work in late September of 2004 as an 03 contractor but was only assigned to work 20 hours per week in the kitchen. (T 2, p.147) After asking Morrisette for more hours, Complainant was assigned to work an additional 20 hours per week in the receiving area with Alberto Burgos. (T.2, p.148) Complainant continued to work 20 hours per week in the kitchen and 20 hours per week in the receiving area until March 10, 2005. Burgos testified that Morrisette helped Complainant by assigning him more hours and assuring he remained

employed by Respondent.² (T.2, p.84) I credit Burgos's testimony that Morrisette was helpful to Complainant.

Allegations of Inadequate Training

17. Complainant testified that his "troubles began" when Sabola became his supervisor. (T. 2, p.129) Despite his requests to be cross-trained at all the stations, he was always assigned to either the grill or the fryer, while his co-workers rotated through various stations and performed different jobs every day. (T.2, p.131) At his deposition, Complainant testified that he never told Sabola he did not want to work at the grill. (T. 4, p.14) Socrate Lopez testified that he only saw Complainant working at the fryer or the grill. According to Melissa Lumbis, it was head cook Patrick Sullivan who mapped out each employee's location based on the day's menu and, that on occasion, she would be assigned to one station for an entire day. I credit her testimony. (T. 1, p. 43)

18. Complainant testified that after Sabola refused to rotate his station, he went to Marc Morrisette and, with Alberto Burgos acting as his interpreter, told Morrisette that he felt "trapped" in the kitchen. Morrisette told him that he would talk to Sabola about the matter. (T. 2, p.132-132) Complainant testified that after he talked to Morrisette, matters got worse. He testified that Sabola looked at him "like a dog" and did not talk to him. (T. 2, p. 134.)

19. Complainant and Morrisette met frequently regarding Complainant's complaints about his kitchen assignments. Morrisette testified that he supported and encouraged Complainant to perform more jobs. Morrisette told Complainant to look around the kitchen while he was stationed at the grill to see what other job could be done

² It is not clear from the record exactly what hours Complainant worked, except that he sometimes worked in receiving in the morning and in the kitchen in the afternoon.

and to take a more active role in running the kitchen. He personally taught Complainant how to prepare various foods, such as pasta. (T. 1, p. 177-179, 204) Complainant acknowledged that Morrisette supported him but denied that Morrisette showed him how to make certain dishes. I credit Morrisette's testimony that he supported and encouraged Complainant and that he personally taught Complainant to make certain dishes.

20. Sabola testified that Complainant occasionally complained to him about being permanently assigned to the grill. Sabola testified that employees' assignments were made based on the menu and the customers' demands and that between lunch and dinner, food production slowed and the kitchen used a basic menu utilizing more grilled food, fryer food and pizza. (T. 1, p. 138-9) I credit Sabola's testimony.

21. I do not credit Complainant's testimony that he was not permitted to perform a variety of jobs in the kitchen. Elsewhere in his testimony, he mentions that he was "cutting vegetables," making grilled cheese sandwiches, and making "lo mein."³ (T. 3, pp. 11-12, 19; T. 4, p.91)

22. Complainant testified that the first time he was "blamed for the failure of others" was when a supervisor asked him why there was no food out at the station. Complainant testified that he responded that Sabola told him to close the station. Sabola was present and became very angry with Complainant. (T.2, 162-3) Socrate Lopez corroborated Complainant's testimony regarding this incident and testified that subsequent to the incident, Complainant and Sabola were uncomfortable with each other. (T. 2, 107-109) I credit Lopez's testimony and find that relations between Complainant

³ Complainant's testimony regarding Respondent's failure to assign him to various stations was contradictory and vague as to time frames.

and Sabola were strained in part because of this incident where Complainant blamed Sabola for closing the station.⁴

Allegation of Inadequate Breaks

23. Complainant testified that from January 2005 to March 10, 2005 he was only allowed to take five breaks (T. 2, p.153) He acknowledged on cross-examination that he likely did not complain to Sabola about the lack of breaks. (T. 4, p. 21) Complainant's testimony regarding the issue of breaks was somewhat vague. He testified that he was able to take 80-85% of his breaks from September to December 2004; He also testified that he was only permitted to take three breaks in all of 2005; he also testified that from January to March 2005 he only took five breaks. (T.2, p. 151-153) Sabola testified that it was doubtful Complainant was given only a few breaks in one semester. Sabola stated that employees do not need permission to take breaks, but must let him know where they will be during breaks in case he needs them to work. (T.1 p.142) I credit Sabola's testimony. Lumbis testified that she was required to request breaks from head cook Pat Sullivan and stated that she worked without a break once or twice a week. I credit Lumbis's testimony.

24. During the 2004-2005 school year, Complainant sometimes worked in the receiving area in the morning and would then go to the kitchen to begin his shift at mid-day and immediately ask for a break. According to Socrate Lopez, Sabola frequently instructed Complainant take his break before coming upstairs to the Dining Commons because the kitchen was busy at mid-day and he was needed to work. (T. 2, p.108-10) Lopez testified that the dining room quieted down about 1:00 pm when the students left

⁴ As with much of the testimony in this case, the witnesses did not place this incident within a particular time period.

and employees often took breaks at that time. (T. 2, p.110-111). I credit Lopez's testimony. I do not credit Complainant's testimony that he was not allowed to take breaks when other employees were. I find that the practice of taking breaks was informal, and that employees took breaks as time permitted, but may not have been able to take a break every day. I also find that on days when Complainant worked in the stock room in the morning and then worked in the kitchen later the same day, he was instructed to take his break before coming to the dining room, but did not do so.⁵

Failure to Provide a Uniform

25. Culinary workers were required to wear uniforms that varied from year to year. Sets of uniforms were handed out at the beginning of the semester by Morrisette or Sabola. At one point the uniform consisted of a maroon polo shirt and black pants. (T.1, 37) Morrisette testified that he required the culinary workers to wear a white chef's jacket and black chef pants. (T.1, p. 183, 186)

26. Complainant testified that he that did not receive a uniform, however, he acknowledged on cross-examination that he never asked Sabola about a uniform. However, he acknowledged that once Sabola observed him without a uniform and sent him to the store room where he was able to find a uniform right away. (T 4, p. 14-20 Complainant also testified that he was finally given a uniform just prior to his termination, but by that time his supervisors "had already stepped on me 100 times." (T. 2, 160) Sabola testified that it was possible that Complainant did not always have a uniform because the uniform design changed frequently, sometimes causing shortages. Morrisette testified that Complainant was without a uniform for a period of time because

⁵ The record was unclear as to when Complainant worked in the kitchen and when he worked in the store room during the 2004-2005 school year.

Respondent ran out of his size. (T. 1, 183)⁶ Lopez testified credibly that Complainant was without a uniform for about a month. (T.2, p.89) I credit Morrisette's and Sabola's testimony that Respondent ran out of uniforms and Complainant was without a uniform briefly. I find it incredible that Complainant worked for long periods of time without a uniform and I find that Complainant was not intentionally left without a uniform.

Allegations of Inappropriate Conduct by Complainant and Termination

28. Melissa Lumbis and Kristy Moriarty testified that "low key" sexual banter was common among the culinary workers and that among the kitchen staff, the word "practice" had come to mean sexual intercourse. (T.1, p.92) Complainant acknowledged that he joked with Lumbis and Moriarty and that when he arrived at work each day, they asked him whether he had "practiced" the night before, and he would say yes, he "practiced" every day. (T.4, p.25-30; Complainant's MCAD complaint.)

29. Complainant testified that sometime around March 7, 2005, as he was cutting vegetables he observed Lumbis and Alicia several yards away eating ice cream cones. Complainant approached them and said to Lumbis, in English, "You are eating ice cream good," meaning to say that they were eating a delicious ice cream. (T. 3, p.12) He testified that Lumbis laughed and said she had not eaten breakfast. (T.3, p. 15) Complainant did not speak to Alicia and returned to the grill. (T.3, p.16) Lumbis testified that Complainant approached her and said, "I can tell you "practice" a lot by the way you eat your ice cream." (T.1, 48-49) He then told Lumbis that Alicia needed more "practice" and could "practice" with him. (T. 1, p.49) Lumbis relayed the conversation to Alicia, who brushed off the remark. I credit Lumbis' version of events.

⁶ Complainant's testimony regarding the uniform was confusing and contradictory. He variously testified that he did not have a uniform for part of 2003, 2004 and 2005. (T.2, p.159) He also claimed that Sabola once took him off the job because he did not have a uniform. (T. 2, p. 161)

30. Lumbis testified that about 15 minutes later, Complainant asked Lumbis whether Alicia would give him a blow job in exchange for a bag of weed. (T.1, 54-56) Lumbis believed the comment was a serious solicitation for sex and more serious than the usual level of bantering and this made her a little uncomfortable (T. 1, p.93). She relayed the remark to Alicia because she thought Alicia should know about it. She testified that Alicia was upset and left the kitchen. (T. 1, p. 60) Lumbis did not report the incident to management. I credit Lumbis' testimony, however, I find that this incident took place on March 10, 2005, several days after the ice cream incident, which is consistent with the testimony of the other witnesses.

31. Complainant denied making any sexually charged remarks to Lumbis or Alicia on March 10, 2005. I credit his testimony to the extent that he made no comments directly to Alicia on that day, but I otherwise do not credit his testimony

32. Morrisette testified that on the afternoon of March 10, 2005, Sabola told him Alicia had left work crying and that Lumbis had informed Sabola that Complainant had asked Alicia if she would give him a blow job in exchange for a bag of weed. (T. 1, p. 191) Morrisette, who had seen Alicia leaving work earlier, was surprised that Complainant would have made such a statement and instructed Sabola to send Lumbis to his office.⁸ (T.1, 196-7)

33. Lumbis came to Morrisette's office and told him about the remarks Complainant had made. Morrisette could not believe what was happening and asked Lumbis to leave and asked Complainant come to his office. (T.1, p. 199)

⁸ Sabola's testimony differed somewhat in that he recalled bringing Alicia into Morrisette's office after she complained to him about remarks someone made to her.

34. Before discussing the matter with Complainant, Morrisette called Kevin Wissman who advised him that if Complainant acknowledged making the remarks, to “get him out of the building.” (T. 1, p. 207-209) Morrisette testified that, at the time, he believed that Complainant had made the remarks directly to Alicia and did not know that the remarks had been made to Lumbis acting as an intermediary. I credit Morrisette’s testimony.

35. Wissman corroborated the telephone conversation with Morrisette. Wissman testified that he advised Morrisette to question Complainant in the presence of a witness and if Complainant admitted to the comments, Morrisette would have no choice but to terminate Complainant’s employment. (T.1, p.187-188) Wissman testified that at the time, there were incidents of molestation and abduction of women occurring on Respondent’s campus, resulting in an initiative to protect the security of students called “Students First.” In keeping with this initiative, it was Respondent’s practice to be very protective of student employees, who were younger and deemed to be more naïve than non-student employees. Since Alicia was a student employee, consistent with the initiative, Respondent believed it was important to take swift action against Complainant if he had indeed engaged in sexual harassment of a student worker. (T. 4, p. 190) I credit Wissman’s testimony.

36. Morrisette testified that he asked Complainant whether he had asked Alicia to give him a blow job in exchange for weed. He testified that in response, Complainant laughed, and did not deny making the remark, but said he did not mean anything by it. (T. 1, p. 201-202, 217) Morrisette testified that he did not believe Complainant needed a translator at this meeting because he talked to him quite frequently without a translator

and Complainant understood him. In accordance with Wissman's advice, Morrisette and Sabola then escorted Complainant out of the building. I credit Morrisette's testimony. Morrisette testified that he never fired Complainant, but just told him to take his things and not return to work unless he was called back to work. (T. 1, p.216) Morrisette stated that it was up to human resources to conduct an investigation, but he ultimately signed a document stating that Complainant was terminated. I find that for all practical purposes, Morrisette terminated Complainant's employment on March 10, 2005 and that his assertion to the contrary is merely semantic.

37. Complainant testified that on March 10, 2005, he arrived at work at 1:00 p.m. and had no discussions with Lumbis or Alicia. At some point, Sabola called him into Morrisette's office and Morrisette asked him in English if he had spoken to Lumbis and he said that he had. (T.3, p. 25-6) Complainant testified that he did not understand what Morrisette said to him after that, and Morrisette did not offer to provide a translator for him. He testified that Morrisette and Sabola appeared angry and Sabola spoke in a loud voice. (T.3, p. 32-33) Sabola used hand gestures indicating he should leave the office and said to Complainant, in Spanish, "No mas. Just go, go. No mas." Complainant stood up and Sabola and Morrisette escorted him out. (T. 3, p.33) I do not credit Complainant's version of events. I believe he understood what Morrisette and Sabola said to him and I find that he acknowledged making the remarks attributed to him.

38. Lumbis testified that after she was called into Morrisette's office she was asked to write a statement. (Ex. C-2) Her first statement implied that Complainant had spoken directly to Alicia and not through Lumbis. Lumbis was later asked to write a

second statement clarifying that Complainant had made no remarks directly to Alicia. I credit her testimony.

39. Morrisette spoke again to Wissman after Complainant had been escorted out of the building and told him that Complainant had not denied the allegations and had shrugged them off as a joke (T.4, p.189-90) Alicia came in to talk to Morrisette about the matter several days later, but he did not take a statement from her. According to Morrisette, she did not want anything to do with the matter and stated she did not want anyone to get fired over it. (T. 1, p. 213-15) I credit Morrisette's testimony.

40. Morrisette testified that prior to this incident, Complainant had never complained about being treated differently because he was Dominican, although he acknowledged the possibility that Complainant told him he was not being cross-trained because of his national origin. Morrisette stated that if Complainant made such an allegation this would have been more reason for Morrisette to ensure that Complainant was receiving cross-training. (T. 1, p. 238-9) I credit his testimony.

41. Shortly after his termination, Complainant met with Kevin Wissman to discuss the matter. Wissman referred him to Mary Wardwell of the ombudsman office. Wardwell met with Morrisette and wrote Complainant several e-mails explaining the reasons for his termination. (T.3, p. 43-46) (Ex.4)

42. Complainant also met with Martinez, who referred him to Gloria Ortiz in Respondent's office of Equal Opportunity and Diversity. (T. 4, p. 125-129) Martinez testified that Complainant never complained to him about discrimination. (T. 4, p.127) I credit Martinez's testimony.

43. Complainant met with Ortiz immediately after meeting with Martinez. Complainant testified that he told Ortiz that he was fired for trumped-up reasons. Ortiz told him that she would investigate, but only with respect to his termination and not the other allegations of discrimination because she did not have time to do so as she was leaving her position with Respondent. (T.3, p. 53-56)

41. Alicia sent Gloria Ortiz an email dated May 16, 2005 in connection with Ortiz's investigation. In the email Alicia wrote that Lumbis told her that Complainant said Alicia needed lessons eating ice cream. The next time she worked, Complainant kept looking over at her and saying things to Lumbis such as, "Can you give her my number?" Lumbis relayed Complainant's remarks to Alicia, and this made her uncomfortable and she decided to leave work early. She asked Lumbis if Complainant had said anything else about her and Lumbis responded that Complainant had just offered her a \$100 for a blow job. According to Alicia's email, she was disgusted and outraged and reported the incident immediately to Sabola, who instructed her to report the incident to Morrisette. (Ex. C-4)

42. Ortiz met again with Complainant and provided him a letter dated July 20, 2005 recommending he be reinstated to his job because he did not have the benefit of an investigation and would not have been terminated if the matter had been investigated. (Ex.C-4) In addition Ortiz ordered sexual harassment training for all employees of auxiliary services. (Ex. C-4)

43. In around August 2005, Complainant met with Gloria Ortiz and other human resources managers. (T 3, p. 65;T. 4, p. 130-131) At the meeting, Respondent offered Complainant another 03 position that would not require him to work with Sabola and

Morrisette, and which included an offer of some of back pay. Complainant rejected the offer because he wanted a permanent position and payment of all of his lost wages. (T. 3, p. 60)

III. CONCLUSIONS OF LAW

A. Discrimination

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and national origin. Absent direct evidence of discrimination, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified persons not of his protected class were not treated in a like manner in circumstances that give rise to an inference of race and national origin discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Matthews v. Ocean Spray Cranberries, Inc., 326 Mass. 122, 129 (1997). Complainant contends that Respondent discriminated against him in the terms and conditions of his employment by failing to cross-train him on various jobs within the kitchen, failing to provide him with a uniform and failing to make him a permanent employee.

As a native of the Dominican Republic, Complainant is a member of a protected class on the basis of his national origin. Complainant performed his job in the kitchen at an acceptable level. Complainant contends that similarly situated persons not of his protected class were cross-trained on various stations in the kitchen while Complainant was required to remain at the fryer and the grill. Complainant further alleges that

Respondent refused to provide him with a uniform, notwithstanding that Respondent had uniforms available. He also alleges that employees who worked for Respondent for a shorter time than he were made permanent employees, while he remained a temporary employee. I conclude that Complainant has failed to establish a prima facie case of disparate treatment with respect to the above allegations. Complainant's testimony about alleged disparate treatment was, for the most part, vague and contradictory. He presented no credible evidence that he was treated differently from similarly situated employees not of his protected class. Complainant testified that he only worked the grill and the fryer, yet throughout his testimony he referred to performing other tasks such as cutting vegetables, making sandwiches and making lo mein. In addition, witnesses testified credibly that the assignment of culinary workers was based on the needs of the dining hall and varied based on the time of day. Moreover, there was evidence that the head cook, and not Sabola, assigned the workers to their stations on a daily basis. While there was some evidence that Sabola and Complainant may have developed a poor working relationship after Complainant blamed Sabola, in the presence of a supervisor, for closing a station in the kitchen, this incident does not appear to be related in anyway to Complainant's national origin. Moreover, building manager Marc Morrisette testified credibly that he responded to Complainant's complaints about cross-training by encouraging him to learn all he could about the workings of the kitchen and going so far as to personally train Complainant regarding certain aspects of working in the kitchen.

With respect to the complaint that Respondent refused to provide him with a uniform, Complainant's testimony was likewise vague and contradictory. Complainant testified that he that did not receive the required uniform, however, he acknowledged

never asking Sabola for a uniform. On one occasion, when Sabola saw Complainant without a uniform, he sent him to the store room where Complainant found a uniform the same day. Socrate Lopez observed that Complainant worked without a uniform for a one month period and Morrisette testified that Complainant was without a uniform for a period of time because Respondent ran out of his size. I conclude that there is no credible evidence that Complainant was purposely denied a uniform or treated differently in this regard because of his national origin.

Complainant testified that Respondent did not make him a permanent employee because of his national origin and that employees who had been working at Respondent for a shorter period of time than he was were made permanent employees. However, he identified no such employees. On the other hand, two of Complainant's Dominican co-workers, Socrate Lopez and Alberto Burgos, were both made permanent employees, undermining Complainant's claim in this regard. I therefore conclude that Complainant has failed to establish a prima facie case of discrimination in the terms and conditions of his employment on the basis of national origin, because he failed to show he was subjected to adverse treatment and because he failed to prove that any similarly situated co-workers not in his protected class were treated differently than he was.

B. Retaliation

Complainant has alleged that Respondent treated him differently and terminated his employment in retaliation for his having engaged in the protected activity of complaining internally about disparate treatment. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected him to an

adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003)

In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 72 (1973) ; Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence of a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." In this case, Complainant made numerous internal complaints to the building manager regarding the failure to provide him with breaks, the failure to cross-train him on the various stations in the kitchen, failure to provide him with a uniform and failure to convert him to a

permanent employee. While Complainant's testimony was vague as to whether his complaints to Morrisette were of disparate treatment based on his national origin, Morrisette testified that it was "possible" that Complainant had complained about disparate treatment with respect to his training. I therefore find that Complainant engaged in protected activity. Fluet v. Complainant v. Harvard University, et al, MDLR 2001. However, the fact that Respondent was aware of some allegations of discriminatory treatment, and thereafter took some adverse action against the complainant does not, by itself, establish causation. Timing may be a significant factor in establishing causation, and while proximity in time from the complaint to the adverse action is a factor to consider, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). There is no evidence of a causal connection between the Complainant's complaints and his termination. However, assuming that Complainant has established a prima facie case of retaliation, because he was terminated after complaining of disparate treatment, the burden of production shifts to Respondent to articulate and produce credible evidence of a legitimate, nondiscriminatory reason for its actions.

I find that Respondent articulated a legitimate, nondiscriminatory reason for Complainant's termination; that it received a complainant of egregious sexual comments involving a student employee and that Complainant acknowledged making these extremely sexually offensive comments, and that for reasons related to student safety and security, Respondent deemed this a terminable offense.

While Complainant's termination came immediately upon his admission of having made the offensive comments, there is no credible evidence that the termination, however swift, was pretextual or was motivated by retaliatory animus. Morrisette believed that Complainant admitted to making the sexually offensive remarks and was instructed by human resources to "get him out of the building." Even if I were to conclude that Complainant's termination was unduly harsh under the circumstances, "it is not the [Commission's] job to determine whether Respondent made a rational decision, but to ensure it does not mask discriminatory animus." Sullivan v. Liberty Mutual, 444 Mass. 34, 56 (2005); *see also* Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992) ("Courts may not sit as super personnel departments, assessing the merits - or even the rationality - of employers' nondiscriminatory business decisions"). While Complainant argued that Respondent's reasons were retaliatory, there is insufficient credible evidence to support a conclusion that the reasons Respondent articulated for its actions were not the real reasons for the termination, or that Respondent was motivated by the intent to retaliate. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001).

The facts and circumstances do not indicate that Respondent's decision to terminate Complainant, even if seemingly harsh or unfair, was motivated by retaliatory animus. I conclude that there is no evidence that Complainant's termination was in retaliation for his having raised the issue of disparate treatment based on national origin. Respondent determined that the nature of Complainant's inappropriate sexual comments and propositions involving a student employee merited termination. The severity of

Complainant's conduct and Respondent's heightened responsibility to ensure the safety and security of its students were valid, non-discriminatory considerations.

Therefore, I conclude that Respondent did not engage in unlawful discrimination or retaliation and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 1st day of December 2010.

JUDITH E. KAPLAN,
Hearing Officer