

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and DONOVAN BLOOMFIELD,

Complainants

Docket No. 09 SEM 01116
10 SEM 01462

v.

MASSACHUSETTS
DEPARTMENT OF CORRECTION
And MARK MONTENERO,

Respondents

Appearances: Michael Levinson, Esq. for Complainant Bloomfield
James Kavanaugh, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 12, 2009, Complainant Donovan Bloomfield, a black Sergeant employed by the Massachusetts Department of Correction, filed charges of employment discrimination against the Department of Correction, Sgt. Mark Montenero, and Lt. Arthur Tibets (09 SEM 01116). Complainant alleges that he was: 1) subjected to a racially-hostile work environment based on race and color; 2) subjected to retaliation when moved from his assigned work area after complaining of racial harassment and detached with pay pending the results of a fitness-for-duty evaluation; and 3) subjected to employment discrimination based on disability, to wit: diabetes.¹ On or around June 11, 2010, Complainant filed a second charge of employment discrimination (10 SEM 01462)

¹ Complainant waived his disability claim and dismissed Lt. Arthur Tibets as a Respondent on the first day of hearing.

claiming that he was terminated on May 12, 2010 in retaliation for filing the
aforementioned charge of discrimination.²

Probable cause findings were issued and the cases were consolidated and certified
to public hearing on June 1, 2015.

A public hearing was held on June 13, 14, 16, 17 and 20, 2016; July 25 and 26,
2016; and September 29 and 30, 2016. The following witnesses testified at the hearing:
Donovan Bloomfield, Mark Montenero, Dante Price, Rolls-Jean Louis, Leisa Crawley,
Jeffrey Guerin, Donald Smith, Arthur Tibets, Joe Mathieu, Todd Smith, Jessica DeJesus,
Jeff Cardin, Emerson Fernandez, Jackie McGowan, Joseph Leano, Paul Duquette, Rowdy
Hough, Pamela Scanlan, Russell Favreau, and David Shaw. The parties submitted
seventeen (17) joint exhibits; Complainant submitted an additional fourteen (14) exhibits;
Respondents submitted an additional twenty-three (23) exhibits.

Based on all the credible evidence that I find to be relevant to the issues in dispute³
and based on the reasonable inferences drawn therefrom, I make the following findings
and conclusions.

II. FINDINGS OF FACT

1. Complainant Donovan Bloomfield (“Complainant”) is a self-described black
individual who was an employee of the Massachusetts Department of Correction from
September of 1983 until May 18, 2010.

² Complainant did not name either Montenero or Tibets as individual respondents in 10 SEM 01462.

³ Alleged incidents which I determined to be wholly irrelevant to the matters at issue are not included in the findings of fact. Omitted evidence pertains to disputes which do not involve Complainant and which did not occur near in time to the events at issue (e.g., allegations about Sgt. Montenero allegedly calling Correction Officer Russell Favreau a “rat” in 2005; allegations about the Union displaying dead mice in 2002; and allegations about the conflict between Sgt. Montenero and Lt. Crawley in 2013. Complainant’s Exhibits 3, 10 (pp. 77-7) & 11 (pp.5, 91).

2. Respondent Department of Correction (“Department” or “DOC”) is an agency of the Commonwealth of Massachusetts responsible for the care and custody of individuals sentenced to any of the facilities within the Commonwealth’s correctional system.
M.G.L. c. 124, section 1.
3. Complainant was assigned to the following facilities over the course of his career: MCI Gardner until 1987, the Central Transportation Unit for two years, MCI Gardner again where he was promoted to Sergeant, the Boston Pre-Release Center until 1990, MCI Shirley until 1994, the Central Transportation Unit again for three-plus years, MCI Shirley again, the Northeastern Correctional Center until approximately 2006, MCI Framingham until late 2007, and the Souza-Baranowski Correctional Center from December, 2007 until 2010.
4. Complainant claims to have been subjected to racial harassment beginning in 1990, when he maintains that a co-worker used the epithet “nigger” at work; in 2002, when he alleges that he and other black officers were labeled as “rats;” and in 2007, when he alleges that an inmate told him that other officers were calling him “dumb ass” and other pejorative terms and that the MCI Framingham Director of Security stuck a finger into his chest. Joint Exhibit 14. These matters were not included in Complainant’s charges of discrimination; they lie outside the three-hundred day statute of limitations set forth in M.G.L. c. 151B, section 5; most of the claims consist of uncorroborated hearsay about alleged events at institutions other than Souza-Baranowski; and some involve union disputes rather than DOC matters.

5. Respondent Mark Montenero was formerly employed by the Department, initially as a Correction Officer and subsequently as a Sergeant. He began his DOC employment in 1984 and voluntarily retired in 2013. Montenero, Day 4 at 1:29.
6. The disciplinary history of Sgt. Montenero spans 1985 to 2008. Complainant's Exhibit 11; Respondent's Exhibit 20. It contains a series of disciplines pertaining to Montenero losing his temper at civilians and co-workers and behaving in an insubordinate and rude manner to a variety of individuals (i.e., refusing to "blouse his boots, ignoring a direct order from a female supervisor, ripping an inmate's jeans, and failing to abide by a no-smoking policy). Aside from Complainant's charges, however, none of Montenero's disciplinary matters involved race-based conduct. Montenero's annual performance reviews are, for the most part, outstanding. Respondent's Exhibit 20. He received an overall "exceeds" evaluation for fiscal years 2007-2012 and an overall "meets" for fiscal year 2012-2013. Id. He is described by supervisors as: doing a "great job in a sensitive area," "effective, versatile, and reliable," an asset to the Department, exhibiting "professional, effective leadership" and, per his 2007-2008 annual performance review, having an "outstanding rapport with staff and inmates." Id.
7. Retired Correction Officer Dante Price offered testimony concerning racial epithets allegedly uttered by Montenero, but I decline to credit Price's testimony because Price left the Department under a cloud of threatened termination which he attempted to deny at public hearing and because Price stopped working for the Department in 2006, more than two years prior to the events at issue. Day 2 at 20:08.

8. Complainant received a five-day suspension on March 19, 2007 for bringing his cell phone and beeper into an institution in violation of governing security procedures and for being less than truthful about the incident when questioned.
9. Complainant alleges that he was subjected to derogatory racial remarks during a November 12, 2008 trip to Lemuel Shattuck Hospital from the Souza-Baranowski Correctional Center. The alleged incident took place while Sgt. Montenero was driving to the Hospital with Lt. Tibets as a front seat passenger and CO Mathieu and Complainant as back seat passengers. Complainant testified at the public hearing that Montenero was listening to a radio show that was making fun of newly-elected President Obama and while he listened, Montenero referred to President Obama as “coon” and said that he hoped “they” would “blow his [President Obama’s] fucking brains out.” Complainant’s testimony, Day 1 at 2:02:10. Complainant also testified that Montenero drove the vehicle in a reckless and jerking manner while listening to the show which made Complainant sick and caused him to hit his head against the front seat of the vehicle. According to Complainant, Montenero later that day told Mathieu as they prepared to leave the hospital, “you can take your coon [referring to Complainant] with you.” Day 1 at 2:04; Day 2 at 3:10. Mathieu denies that Montenero made this statement. Day 3 at 4:26. I do not credit Complainant’s testimony for the reasons stated below.
10. In a contemporaneous, handwritten report about the events of November 12, 2008, Complainant stated that the radio broadcasters made racially-derogatory comments without specifying the nature of the comments, and he accused Montenero of laughing in response. Joint Exhibit 5 at pp. 193-196. Complainant does not claim that

Montenero used the term “coon” or made other racially-derogatory statements in his handwritten report. The report accuses Montenero of speeding up and hitting the brakes while driving to the Hospital but does not mention that Montenero’s driving caused Complainant to hit his head. *Id.* According to an interview summary drafted several weeks later, however, Complainant said that the radio broadcasters used racial terms such as “coon” which Montenero laughed at and repeated and that Montenero stepped on the brakes whenever a racial comment was made which caused Complainant to hit his head on the back of the passenger seat. Joint Exhibit 5 at p. 171. In his charge of discrimination which Complainant filed at the MCAD May 12, 2009 (over six months after the alleged incident), Complainant added the allegation that Lt. Tibets uttered the epithet “coon” as did Montenero and the radio broadcasters. Complainant also alleged in his MCAD charge of discrimination that Montenero and Tibets both said that they couldn’t wait until President Obama was assassinated but at a subsequent November 13, 2014 deposition, Complainant denied that Tibets said anything offensive in the vehicle. The Department located a podcast of the radio show⁴ which does not contain racial slurs although it has a mocking and arguably disrespectful tone. Complainant’s Exhibit 13; Joint Exhibit 5, p. 169 (“Obama’s New Limo” podcast aired on FM radio WAAF 107.3). Based on the shifting and inconsistent nature of his testimony, I do not credit Complainant’s allegations regarding the events of November 12, 2008.

11. Correction Officer Rolls Jean-Louis testified about a conversation he had with Complainant about the radio incident. The conversation took place at least a year after

⁴ The podcast is dubbed “Obama’s New Limo.” It was originally aired on FM radio station WAAF 107.3. Joint Exhibit 5, p. 169. The podcast was transcribed for purposes of this hearing. Joint Exhibit 5.

the incident since Jean-Louis did not begin working for the DOC until late 2009/2010.

I decline to give weight to Jean-Louis's testimony because he only heard

Complainant's version of what transpired.

12. Complainant alleges that on January 6, 2009 at 2:26 p.m. he was subjected to an incident at Souza-Baranowski while dropping turning in his equipment in the facility's security closet and punching his time card. According a contemporaneous report that Complainant filed about the alleged matter, he was approached by Sgt. Montenero who was yelling and using obscenities, and attempting to block Complainant's advance. Joint Exhibit 5, p. 202; Respondent's Exhibits 11 & 13. During an investigatory interview on January 21, 2009, Complainant stated that Montenero, after punching out, made direct eye contact and called him a "fucking rat" and "piece of shit." Joint Exhibit 5, p 180-181. Sgt. David Shaw, who investigated the matter, determined that Complainant's allegations were not sustained. Joint Exhibits 5.
13. At the public hearing, Complainant added the claim that he was bumped by Montenero during the January 6, 2009 incident. Complainant's testimony, Day 2 at 2:46. Video footage of the time clock area and the main lobby area⁵ shows personnel punching out and exiting the facility. It does not reveal any confrontational exchange between Montenero and Complainant. Complainant identified Officers Fernandez, Smith, and Zieroff as witnesses to the confrontation, but these individuals uniformly refuted Complainant's allegations, as did others who were in the area at the time. Joint Exhibit 5, p. 181; Officer Fernandez testimony, Day 6 at 1:30; Officer Donald Smith testimony, Day 3 at 2:57, 3:02; Officer Zieroff testimony, Joint Exhibit 5 at p. 183; Sgt. Todd

⁵ There is no video footage of the security closet where correction officers return their equipment because there is no camera in the area.

Smith testimony, Day 4 at 53:00; Sgt. Cardin testimony, Day 5 at 15:00; Lt. Shaw testimony, Day 8 at 59:00. Sergeants Cardin and Smith testified that they did not hear any yelling coming from the security closet despite being in the adjacent time clock room when the alleged incident occurred. Smith testimony, Day 4 at 16:30; Cardin testimony, Day 5 at 28:00. Officer Fernandez was not at work on the day in question despite being named by Complainant as a witness. Fernandez testimony, Day 6 at 1:30; Respondent Exhibit 21. I do not credit Complainant's testimony about the January 6, 2009 incident.

14. On January 21, 2009, the Department issued a letter of reprimand to Complainant for refusing to acknowledge or speak to a supervisor and for being less than truthful during the resulting investigation. Respondent's Exhibit 15.
15. Complainant alleges that on March 9, 2009 at approximately 1:40 p.m., he was "verbally and physically abused" by Sgt. Montenero in the level 2-C corridor of Souza-Baranowski Correctional Center which caused him to be "in fear of his life." Joint Exhibit 6 at p. 25. Lt. David Shaw conducted a Category II investigation into the charges which resulted in a determination that the charges were unfounded. Joint Exhibit 6. Video surveillance (without audio) of the date, time, and location depicts Sergeants Jacqueline McGowan and Montenero standing in the level 2-C corridor when Complainant: walks by, enters a staff break room, exits the break room, heads down the north corridor, reverses direction, and walks down the south corridor. The video footage does not reveal any exchange of words or any physical contact between Montenero and Complainant. Joint Exhibits 16 & 17, 2:01 p.m. to 2:11 p.m. Sgt. McGowan and Officer Jessica Dejesus testified credibly that no confrontation took

place. McGowan testimony, Day 6 at 1:40; Shaw testimony, Day 8 at 1:20, Dejesus testimony, Day 4 at 59:00, 1:05. Based on the video footage, the credible testimony of McGowan and Dejesus, and the unpersuasive testimony by Complainant, I do not credit that the alleged incident occurred.

16. On May 12, 2009, Complainant filed a charge of discrimination with the MCAD claiming that he was subjected to race discrimination, disability discrimination, and retaliation by Respondents Montenero, Tibets, and the DOC.
17. On July 10, 2009, Sgt. Montenero informed a DOC investigator that he had obtained a photograph of Complainant with his eyes closed while dressed in a Department uniform and carrying a firearm. Joint Exhibit 7. An investigation was conducted by Sgt. Rodney Hough on January 13, 2010 which included interviews of Complainant, Correction Officer Paul Duquette, and Correction Officer Joseph Leano about events on June 20, 2009. Joint Exhibit 7, p. 4. Sgt. Hough determined that there was just cause to support the allegation that Complainant was sleeping during a June 20, 2009 hospital detail at New England Medical Center. Joint Exhibit 7, p. 10/17. The detail involved transporting an inmate to the hospital and guarding him during his hospital stay. Three correctional officers were assigned to the task: Complainant, Officer Duquette, and Officer Leano. According to Officer Leano's testimony at the public hearing, he observed the back of Complainant's head bobbing back and forth, gave Complainant potato chips to keep him awake, and was asked by a nurse if Complainant were tired. Joint Exhibit 7. Officer Duquette testified at the public hearing that Complainant was sleeping during the hospital shift and that he kicked Complainant's chair numerous times to wake him up. Duquette testimony, Day 7 at 43:00.

18. Complainant was charged with sleeping on duty on June 20, 2009 and with being “less than truthful” when questioned about the allegation on January 13, 2010. Joint Exhibit 9. Labor Relations Advisor Susan Herz held a hearing on the charges. She cited evidence that Officer Leano had observed Complainant’s head “nodding” during the detail, that Complainant had fallen asleep in the van after leaving the hospital, and that Complainant had worked more than twenty hours at the time of the incident. Joint Exhibit 9, p. 8. Nonetheless, Herz concluded that there was insufficient credible evidence to support the charge that Complainant was asleep on duty on June 20, 2009. Joint Exhibit 9, p.8. Herz opined that even though Leano saw Complainant’s head nodding throughout the evening and despite the existence of a photograph which showed Complainant in uniform while appearing to sleep, these matters were not definitive because Leano could not see Complainant’s face and because there was no proof that the photograph was taken on June 20, 2009. Joint Exhibit 9, pp 8-9.
19. On September 1, 2009, Complainant received a one-day suspension and a last chance warning for dishonesty in regard to falsely reporting on January 6, 2009 that he was accosted by Sgt. Montenero in the front control lobby area of Souza-Baranowski Correctional Center. Joint Exhibit 11; Respondent’s Exhibit 1. In the disciplinary notice the Grievant was cautioned: “Please be advised that this is a last chance warning for filing of false reports and any future violations may result in disciplinary action being taken against you up to and including termination.” *Id.* The discipline was appealed to the Civil Service Commission where it was upheld. Respondent’s Exhibit 6.

20. By letter dated October 28, 2009, Complainant was advised that a pre-disciplinary hearing would be conducted to address allegations that he had filed a false report about being verbally and physically abused on March 9, 2009 and that he had been evasive and less than truthful during the DOC's investigation.
21. On May 18, 2010, Complainant was terminated by the Department for falsely reporting that he had been physically abused by Sgt. Montenero on March 9, 2009 and for being less than truthful when interviewed about allegations of sleeping during assignments. Joint Exhibit 10. Commissioner Harold Clarke arrived at these conclusions notwithstanding the prior determination by Labor Relations Advisor Herz that there was insufficient credible evidence of sleeping on duty. Joint Exhibits 9 & 10. Commissioner Clarke asserted that Complainant had engaged in an "ongoing pattern of dishonest and deceptive conduct while employed by the Department." Joint Exhibit 10.
22. Complainant grieved his termination. In an award dated April 26, 2011, Complainant's grievance was denied at arbitration. Respondent's Exhibit 16. The Arbitrator determined that Complainant was not credible.
23. At the MCAD public hearing, the Department presented evidence that from 2003 to June of 2016, it had terminated nine (9) employees for engaging in dishonest conduct such as submitting fraudulent medical documentation to justify absences. Respondent's Exhibit 23. Of the individuals terminated, five (5) had no prior discipline and all were white. Id.
24. Complainant currently performs security work at Ft. Devons and drives a limousine.

III CONCLUSIONS OF LAW

A. Harassment Based On Race

In order to prove harassment based on race, Complainant must establish that: 1) he is a member of a protected class; 2) he was the target of speech or conduct based on his membership in that class; 3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and 4) the harassment was carried out by a supervisor or by a non-supervisor under circumstances in which the Respondent knew or should have known of the harassment and failed to take prompt remedial action. See College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987) (employer liable for discrimination committed by those on whom it confers authority and by non-supervisors where employer is notified and fails to take adequate remedial steps); Lattimore v. Polaroid Corp., 99 F.3rd 456, 463 (1st Cir. 1996) (charge of hostile environment harassment may be brought in race discrimination context); Clifton v. Massachusetts Bay Transportation Authority, 62 Mass. App. Ct. 164, 169 (2004) (same).

A complainant must show that the workplace is “pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization [that] poses a formidable barrier to full participation . . . in the workplace.” Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 532 (2001). A hostile work environment involves conduct that is objectively and subjectively offensive, conduct that is deemed hostile by a reasonable person, and conduct that the victim personally experiences as hostile. See Cuddyer, 434 Mass at 532; Ramsdell v. Western Mass. Bus Lines, 415 Mass. 673, 677-78, n. 3. (1993). A hostile work environment is more egregious than mere teasing or occasional, offhand comments. See Clark County School District v. Breeden, 532 U.S. 268, 270-271 (2001) (teasing, offhand

comments, and isolated incidents, unless extremely serious, are insufficient to satisfy a hostile work environment standard).

Complainant makes numerous allegations about matters that fall well outside the statute of limitations. Untimely charges extend all the back to 1990; some involve union issues and conflicts over work assignments that are unrelated to racial hostility whereas others involve claims of racial hostility on the job but consist of uncorroborated hearsay. I decline to consider these matters because they are stale, they pertain to institutions other than Souza Baranowski, they are predicated solely on hearsay, and they were not included in the MCAD charges of discrimination. Such events have no reasonable relationship to Complainant's 2008-2009 allegations against Sgt. Montenero. See Cuddyer v. Stop and Shop Supermarkets Co., 434 Mass. 521, 533 (Mass. 2001) (concluding that it is appropriate to consider events that take place outside of statute of limitations only where disparate incidents show pattern of mistreatment).

Regarding charges deemed to be timely, Complainant paints an elaborate scenario of racial abuse during a November 12, 2008 trip to Lemuel Shattuck Hospital. Complainant testified that Sgt. Montenero, who was driving to the Hospital, uttered racial slurs including "coon" in response to a radio show making fun of newly-elected President Obama and that Montenero said that he hoped "they" would "blow his [President Obama's] fucking brains out." Complainant also claimed that Montenero drove the vehicle in a reckless manner which caused Complainant to hit his head on the back of the front passenger seat. According to Complainant, Montenero and Tibets thereafter stood in the hallway of the hospital calling Complainant a rat and making racial comments.

The above claims were denied by all the occupants in the vehicle except Complainant. The allegation that Sgt. Montenero deliberately drove in a reckless manner is implausible as an example of racial animus because the other occupants of the car would have experienced the same driving conditions. Had Montenero driven recklessly and slammed his foot on the brakes, he would have endangered himself and his two white passengers as well as Complainant. It makes no sense that such actions would have functioned as a hostile gesture directed at Complainant.

It is also noteworthy that Complainant's accusations about what transpired on November 12, 2008 morphed, over time, from his traveling companions laughing at an FM radio program of questionable taste to lurid statements of racial hostility and dangerous car maneuvers. Complainant's original report to the DOC about the ride to Lemuel Shattuck Hospital did not accuse Montenero of making racially-derogatory comments, nor did it accuse Montenero of driving in a manner to cause Complainant to hit his head. Those matters were not raised until weeks later when Complainant underwent a Departmental interview about the incident. The accusations expanded yet again in a subsequent MCAD filing in 2009 which included charges that Montenero used the epithet "coon" during the car ride and that Tibet and Montenero both said that they couldn't wait until President Obama was assassinated. At a November 13, 2014 deposition, one of those claims was retracted when Complainant denied that Tibets said anything offensive in the vehicle.

The ever-shifting nature of the above accusations undermines their credibility as does a transcript of the radio segment at issue. While the transcript indicates that the broadcast adopted a mocking and disrespectful tone towards President-elect Obama, it does not contain racial slurs. The difference between the actual content of the radio broadcast and that alleged

by Complainant at the public hearing is so stark as to undermine Complainant's entire testimony about what took place that day.

Turning to the alleged events of January 6, 2009 and March 9, 2009, Complainant's allegations about what transpired on those dates have also shifted over time from yelling to blocking to bumping. In particular, Complainant's inconsistent and unpersuasive testimony about the events of January 6, 2009 pales against the credible and consistent denials of other witnesses. Complainant asserts that the January 6, 2009 confrontation was witnessed by Officers Fernandez, Donald Smith and Zieroff, but all three officers denied seeing anything out of the ordinary. Officer Fernandez noted that he was not even working on the day in question. Other individuals in the time clock room during the alleged incident such as Sgt. Cardin and Sgt. Todd Smith denied seeing any confrontation or hearing any yelling coming from the security closet. Video footage of the outer control room and time clock room on January 6, 2009 reveals no interaction between Sgt. Montenero and Complainant.

Turning to alleged events of March 9, 2009, video footage likewise fails to show any interaction between Sgt. Montenero and Complainant. Other individuals working in the Level 2-C corridor on the day and shift in question – Sgt. McGowan and Officer Dejesus – testified credibly that they neither observed nor heard any confrontation between Montenero and Complainant.

Based on the foregoing, I find that the allegations of a hostile work environment are not sustained.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. 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).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case of retaliation by demonstrating that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 582, 591-592 (2004); Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Complainant engaged in protected activity when he drafted an internal report on November 12, 2008 claiming that he was subjected to a racially-hostile work environment during the Lemuel Shattuck Hospital assignment and on May 12, 2009 when he filed a charge of discrimination with the MCAD claiming that he was subjected to race discrimination, disability discrimination, and retaliation by the DOC, Montenero, and Tibets.

A claim of discrimination need not prevail in order to give rise to a viable retaliation complaint, but the claim cannot constitute a fabricated charge of harassment. See Clark County School District v. Breeden, 532 U.S. 268, 270-271 (2001) (claims constitute protected activity if made in good faith even if they don't prevail). The claims in this case, while ultimately unsuccessful, are not so outlandish as to negate a claim of protected activity. See Guazzaloca v. C F. Motorfreight, 25 MDLR 200, 204 (2003) *citng* Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994). The gulf between an unsubstantiated claim of racial harassment and a fabricated claim of mistreatment may be narrow, but the derisive tone of the November 12, 2008 radio broadcast about President Obama is sufficient to bridge the gap. The disrespectful tenor of the radio broadcast was possibly greeted by laughter or other form of affirmation by Montenero, a reaction sufficient to cause resentment by Complainant but not culpability for racial harassment by Montenero. Thus, while there is no credible evidence of racial harassment, what transpired in the car may have aggravated Complainant to such an extent that he genuinely believed racial slurs were uttered by the radio hosts and adopted by his driving companion(s). Since several of the individuals involved were DOC supervisors, whatever transpired in the car must be imputed to the Department. See College-Town, Division of Interco, Inc. v MCAD, 400 Mass 156, 165 (1987) (employer is vicariously liable under G.L. c. 151B, section 4 for conduct of its supervisors).

Following Complainant's protected activity in the form of his November, 2008 filing with the Department and his May, 2009 charge of discrimination with the Commission, Complainant received a one-day suspension and Last Chance Agreement in September of 2009 for falsely reporting that he was accosted by Montenero on January 6, 2009 and was

thereafter terminated in May of 2010. The suspension, the last chance agreement, and termination constitute adverse actions because they are material changes in compensation and conditions of employment. See Gu & Santoro v. Boston Police Department, 312 F.3d 6 (1st Ci5r, 2002) (Complainant must lose something “of consequence” such salary, a job grade, a promotion, or receive a negative job evaluation); Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997) (adverse employment actions include changes in terms and conditions of employment which materially disadvantage or threaten to disadvantage the complaining individual).

Notwithstanding the existence of adverse actions following protected activity, the sequence of events does not support a retaliation claim. Focusing on the most significant elements of the case – Complainant’s MCAD charge and his subsequent termination – a span of one year separates the two matters. Such a period of time is too long to support an inference of causation under the circumstances of this case. See Mole v. University of Massachusetts, 442 Mass. 82 (2004) *citing* Clark County School District v. Breeden, 532 U.S. 268, 273 (2001) (temporal proximity must be “very close” to establish a prima facie case of retaliation). In addition to the protracted period of time between Complainant’s protected activity and the DOC’s adverse actions, credible evidence establishes that the penalties imposed on Complainant were valid, job-related responses to misconduct, not punishments for complaining about discrimination. See Part III A, supra. Complainant’s baseless charges resulted in voluminous, time-consuming investigations. After extensive research, Complainant was found to have made false claims of ill-treatment by co-workers and to have neglected his duties while resting, if not sleeping, on the job. Since the discipline

in this case was supported by just cause, Complainant fails to establish a causal connection between his protected activity and subsequent adverse action.

Notwithstanding the foregoing, Complainant argues that his level of discipline – termination -- was disproportionate to that imposed on other employees. According to Complainant, these disparities serve as evidence of retaliation. See *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 129 (Mass. 1997) (discriminatory motive can be inferred from differences in treatment of similarly-situated employees of different races). Such a contention merits consideration where Complainant, a twenty-six year plus employee, was terminated for acting in bad faith by filing a false report of verbal and physical abuse at the hands of another officer and for being less than truthful in regard to allegations of sleeping on duty. Nonetheless, comparator evidence establishes that the Department has treated other employees in like manner for behaving dishonestly under similar, albeit not identical, circumstances. Between 2003 and the public hearing, the Department terminated nine (9) other employees for engaging in dishonest conduct such as submitting fraudulent medical documentation to justify absences. Of the individuals terminated, five (5) had no prior discipline and all were white. Complainant seeks to distinguish these cases as involving more serious misconduct, but the falsifications in those cases mirror Complainant's own lack of truthfulness. Based on these comparators, it appears that Complainant's termination falls within the DOC's disciplinary norms, especially considering that Complainant was involved in multiple incidents involving dishonesty.

Rather than compare himself to the nine (9) terminated individuals put forward by the Department, Complainant focuses on Sgt. Montenero as a comparator. During the course of his three-decade career at the DOC, Montenero compiled a lengthy disciplinary record due to

numerous staff conflicts, intemperate behavior, and acts of insubordination. Complainant emphasizes that despite repeated infractions, Montenero, was not terminated. According to Complainant, the discrepancy between his own harsh treatment and the leniency granted to Montenero can only be explained by Respondent's retaliatory motivation to rid itself of an employee who engaged in protected activity.

Complainant accurately depicts Sgt. Montenero as a correction officer with an egregious personnel record, but it is noteworthy that none of his disciplinary matters involved untruthfulness, fraud, or sleeping on duty. Thus, his situation does not mirror Complainant's as do the nine officers described above. See Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994) (comparators are employees who commit offenses of comparable seriousness). The fact that white employees engaging in untruthful conduct were terminated despite the absence of any protected activity on their part undercuts the contention that retaliatory animus was responsible for Complainant's harsh treatment.

For all the above reasons, I conclude that Complainant's charges of discrimination, both internally and at the Commission, were not causally-connected to Complainant's protected activity. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); compare University of Texas Southwestern Medical Center v. Nassar, 570 U.S. (2013) (imposing a "but for" causation standard in Title VII retaliation claims). Instead, Complainant was disciplined for making false claims of misconduct against fellow employees and for lying about sleeping on duty.

IV. ORDER

The complaint is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full

Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 13th day of February, 2017.



Betty E. Waxman, Esq.,
Hearing Officer