

TOWN OF WAREHAM, BOARD OF SEWER COMMISSIONERS AND GUILHERME DASILVA AND AFSCHÉ,  
MUP-2213, 2322 (12/31/76)

(60 Prohibited Practices By Employer)

62.1 discharge - absenteeism

62.5 discharge - insubordination

63.7 union activity and membership or nonmembership

63.2 filing a charge or testifying

Commissioners participating: James S. Cooper, Chairman; Madeline H. Miceli.

Appearances:

George F. McInerney, Esq.

- Representing the Town of Wareham  
Board of Sewer Commissioners

Daniel B. Kulak, Esq.

- Representing American Federation of  
State, County and Municipal Employees,  
Council 41 and Guilherme DaSilva

DECISION AND ORDER  
Statement of the Case

On April 2, 1975 a Complaint of Prohibited Practice was filed by Guilherme DaSilva (an individual) with the Labor Relations Commission (hereafter the Commission), alleging that practices prohibited by G.L. c.150E, §§10 (a) (1) and 10 (a) (4) had been committed by the Board of Sewer Commissioners of the Town of Wareham. On April 30, 1975 the American Federation of State, County and Municipal Employees, AFL-CIO (hereafter the Union) intervened on behalf of the complaining party. This case was docketed as Case No. MUP-2213. Subsequently, on August 15, 1975 the Union filed a second complaint with the Commission alleging that the Town of Wareham had engaged in practices prohibited by c.150E, §10 (a) (4) of the General Laws. The second case was docketed as Case No. MUP-2322.

Pursuant to its power under G.L. c.150E, §11, the Commission investigated the aforesaid two complaints, and on June 30, 1975 issued its own complaint of prohibited practice in Case No. MUP-2213. On November 10, 1975 the Commission issued its second complaint in Case No. MUP-2322. The Commission subsequently consolidated Case No. MUP-2213 and Case No. MUP-2322 for the purpose of decision. The Commission further ordered that the record previously taken in two other related cases (MUP-2114 and MCR-2092) be incorporated for our consideration in the cases sub judice.

Pursuant to notice a formal hearing was conducted at the offices of the Labor Relations Commission in Boston, on September 15, 1975 on Case No. MUP-2213. Garry Wooters, Esq. and Joellen Bogdasarian, Esq., duly designated Hearing Officers of the Commission, presided. On January 27, and February 11, 1976 Formal Hearings were conducted at the office of the Commission on Case No. MUP-2322 before Hearing Officer Robert B. McCormack, Esq. At the commencement of the hearing of Case No. MUP-2322, Hearing Officer McCormack, on behalf of the Commission, amended the Commission's complaint to allege violations of c.150E, §§10 (a) (1), 10 (a) (3) and 10 (a) (4).<sup>1</sup> Full opportunity to be heard, to

<sup>1</sup> The Commission's complaint had previously alleged a violation of §§10 (a) (1) and 10 (a) (3) of the law. The Commission's amendment enlarged the complaint to allege a further violation of §10 (a) (4). For the Hearing Officer's authority (cont'd.)



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examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties. After having heard and/or read all of the evidence adduced at the hearings we hereby make the following findings of fact and render the following opinion.

Findings of Fact

The DaSilva Case, MUP-2213:

Guilherme DaSilva was hired as a laborer on December 18, 1972 by the Board of Sewer Commissioners of the Town of Wareham. At the commencement of his employment the Sewer Commissioners were aware that DaSilva was not licensed to drive an automobile in Massachusetts.

Subsequently, DaSilva was requested by the employer to perform certain maintenance duties. When it was necessary for DaSilva to go to an outlying pumping station to perform those duties, a police cruiser was called to transport him there. Eventually the employer assisted DaSilva in obtaining a driver's license which permitted him to operate a vehicle during day time hours.

By April 1973 DaSilva performed full-time maintenance duties. Those duties required him to assure that the pumps, generators, and allied equipment installed in the six separate pumping stations throughout the Town were functioning properly.

Beginning in October or November 1973, certain laborers were assigned to work with DaSilva. The employer requested that DaSilva train them in the intricacies of maintenance work. DaSilva did so by demonstrating how pumps were disassembled and repaired. Thereafter DaSilva oversaw the work of the trainees as the latter attempted to perform alone. At other times they worked together in performing repairs and maintenance work. DaSilva testified, and we find, that a laborer-trainee worked with DaSilva almost every day, although at times he alone performed repairs at the pumping stations.<sup>2</sup>

In the previously decided case of Town of Wareham and AFSCME, 2 MLC 1547, 1551,<sup>3</sup> the Commission found that there were several incidents of union activity

<sup>1</sup> (cont'd.)

to amend the complaint see Article III, Section 5 of the Commission's Rules and Regulations.

<sup>2</sup> This was disputed by the employer. David Smarowski, the Chairman of the Sewer Commissioners, testified that DaSilva had a helper only 10 to 15 percent of the time. Smarowski admitted that employees were assigned to DaSilva for training. However, upon cross-examination, Smarowski confessed that he had seen DaSilva on only two occasions, and that he (Smarowski) was employed in New Bedford during the hours when DaSilva would normally be working in Wareham. Smarowski professed that his knowledge was based upon reading certain weekly reports which are submitted by the sewer plant's chief operator. Those reports were not offered into evidence.

<sup>3</sup> The decision cited involved Case Nos. MCR-2092 and MUP-2114. MCR-2092 was a petition requesting the certification of AFSCME as the collective bargaining (cont'd.)



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in the sewer plant. The first effort was in August 1973 when a card drive on behalf of AFSCME was conducted. This drive failed for reasons which are unclear. On October 31, 1974 AFSCME undertook a second card drive. DaSilva actively assisted in the formation of the Union. Harrington, a union representative, met with DaSilva at the plant. Harrington gave DaSilva representation cards and instructed him to have the employees fill them out. Harrington further instructed DaSilva to deliver the cards to a certain police officer at the police station. At or about the same time Harrington asked DaSilva who was acting as shop steward. Upon reporting this question back to the employees DaSilva was elected shop steward. DaSilva gave a card to each employee of the department including one Richard Malleo.<sup>4</sup> DaSilva then collected the representation cards and brought them to the police station as instructed. Shortly thereafter, the Chairman of the Sewer Commissioners sent a message to DaSilva by way of his secretary, that there were not to be any union meetings during working hours.

In late November, 1975, DaSilva, Don Wilson, Malleo and two other employees had a meeting with the Board of Sewer Commissioners.<sup>5</sup> Although the details of the meeting are incomplete, it appears that the purpose of the meeting was to request recognition of the Union by the Employer. DaSilva had previously been elected as shop steward. At the meeting a conversation occurred concerning Malleo. The evidence is conflicting relative to the exact words used and the meaning which was intended. Smarowski, the Chairman of the Board of Sewer Commissioners, admits commenting that Malleo had been a shop steward for a group of municipal employees in New Bedford. Smarowski admittedly said, "You might ask him how the Union functions because he has had experience with the Union." Smarowski denied that he recommended Malleo for shop steward in place of DaSilva. By contrast, DaSilva testified that "the Chairman (said) Ricky Malleo would be a good man to be the shop steward because he has been in the Union before, he knows all about the Union...." Malleo subsequently told DaSilva to "go get the union man (presumably Harrington) to come down."

During January 1975, DaSilva was stopped by a police officer while driving in New Bedford. He was on his day off and was not in pursuit of his employer's business. As a result he lost his driver's license for 90 days beginning

3 (cont'd.)

representative for all non-professional employees at the Town of Wareham Sewer Department. MUP-2114 was a Complaint of Prohibited Practice protesting the discharge of one George Averill who had previously held the position of Chief Treatment Plant Operator. The Commission found that Averill's discharge was not discriminatorily motivated. The Commission further held that the charge in the case sub judice constitutes a blocking charge to the conduct of an election.

<sup>4</sup>Malleo had recently been hired as a Treatment Plant Operator. At the time of his hiring, the Board of Sewer Commissioners had already become disenchanted with the performance of Averill, the Chief Treatment Plant Operator. When Malleo accepted the job, there was a clear understanding between himself and the Sewer Commissioners that he would be promoted to Chief Treatment Plant Operator as soon as he was ready to assume that responsibility, and that Averill would be let go. Such occurred on or about November 21, 1975. Malleo was thereafter in charge of all Sewer Department employees, and was answerable only to the Sewer Commissioners.

<sup>5</sup>At this point Averill had not been terminated and Malleo had not been promoted to Chief Treatment Plant Operator.

END

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February 12, 1975. On February 13, 1975 DaSilva told the Sewer Commissioners that his license had been suspended, and he requested that Glen Clickner, a laborer who had previously worked with DaSilva, accompany him regularly during the period his license was suspended. They had previously used a pick up truck for transportation to the various job sites, and DaSilva wanted Clickner to do the driving. He also suggested to Smarowski that "for the men's safety...two guys (should) go to the station, it is dangerous when they go underground, if something happened, (and) someone isn't there they would be dead men."

On February 15, 1975 the Board of Sewer Commissioners held a meeting to discuss with DaSilva what they were going to do about his job. DaSilva repeated his request to have Clickner assigned to work with him and to do the driving. DaSilva was told that "this wouldn't be possible," and that he would have to work inside the plant as a laborer. The Commissioners also ordered DaSilva to go to the personnel board and see about his pay, since he was drawing sewer maintenance pay, and would no longer be performing that job. The Sewer Commissioners said that they would have a laborer go out and maintain the pumping stations. DaSilva then asked why it was impossible, as they had permitted a man to go with him before. DaSilva then left the meeting, remarking "I am going to Boston, I know people in Boston."<sup>6</sup> DaSilva telephoned the Sewer Commissioners ten to fifteen minutes later and complained that he couldn't see any reason why one of the CETA employees couldn't be assigned to work with him, since they were being paid by the Federal government. DaSilva was told that "the Sewer Commissioners did not have to assign a driver to take him back and forth, and that was it."

DaSilva then reported to the sewer plant and was told by his supervisor (Malleo) to go down in the pumping room with the boys. A painting project was underway which was expected to consume about two and a half weeks. DaSilva did as directed. Also, as ordered, DaSilva informed the personnel board of his re-assignment. The personnel board reduced his pay to the amount received by a laborer.

On February 19, 1975 the Employer sent a letter to DaSilva stating that "the Sewer Commissioners unanimously agreed that for the good of the Department your employment will terminate on Wednesday, March 5, 1975." The Employer explained its action in the following testimony given upon direct examination of Chairman Smarowski:

Q. Tell us what happened?

A. The Board made a decision saying Mr. DaSilva no longer had a Massachusetts operators license, it would be in the best interest of the department to discharge him, (to) put somebody in the position who would have a driver's license.

Q. Were there any reasons other than the fact of the driving license?

<sup>6</sup> It is noted that the offices of the Union and the offices of this Commission are situated in Boston.

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A. That was the main reason, Sir.

Q. Let me ask you this, on whether you had determined to transfer him to the plant as a laborer.

A. Yes, Sir.

Q. What made you change your mind from Saturday to Tuesday night?

A. His phone call about ten minutes after he left the meeting, more or less demanded a driver.

Between February 19 and March 5, DaSilva met with the Sewer Commissioners and asked them to think about what they were doing. His plea was to no avail.

Lastly, it must be noted that Chairman Smarowski was a member of the Board of Sewer Commissioners when DaSilva was initially hired without a driver's license. The Employer never disciplined DaSilva for any reason during the tenure of his employment.

The Wilson Case, MUP-2322:

Donald K. Wilson had been employed as a laborer in the Wareham Sewer Department since August 12, 1974. He performed his work at the treatment plant under the direction of George Averill prior to the latter's discharge.

Sewer department employees in Wareham accumulate sick leave at a rate of 1 1/4 days per month, which amounts to a total of 15 sick leave days per year. From the commencement of his employment through June 23, 1975, Wilson took 12 days of sick leave.<sup>7</sup> He was not required to give a medical substantiation for those absences.

When the Union commenced its second card drive in late October, 1974, Wilson signed a representation card and talked to several sewer department employees about the Union.<sup>8</sup> On July 23, 1975, during the hearing of the Averill case, Wilson responded to a summons and testified on behalf of Averill.

On the morning of July 28, 1975, Wilson called his supervisor (Malleo) and informed him that he had to go to Massachusetts General Hospital in Boston to bring home his brother who had recently undergone heart surgery. Wilson received Malleo's consent. Approximately one and one half weeks earlier, Wilson had spoken

<sup>7</sup>Two days were taken in 1974. In 1975 he reported sick one day in January, five days in February, three days in April, and one day in May.

<sup>8</sup>Town of Wareham and AFSCME, 2 MLC 1547, Case No. MUP-2214 (1975).



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to Mr. Correia, a Sewer Commissioner, about the possibility that he might have to take some time off because of his brother's surgery. Correia had told him to note it on the time sheets as a vacation day so that Wilson would be paid for it.<sup>9</sup> When Wilson filled in his time sheet for the week ending August 2, 1975, he indicated that he had taken July 28 as a vacation day for the reason previously indicated, and that he took the following day, July 28, as a vacation day. He noted upon the time sheet that on the 29th he "stayed home due to physical and mental fatigue."

After Wilson submitted the time sheet, and subsequent to his testimony on Averill's behalf, Correia called him into the office and asked him to sign a second time sheet which contained no reason for his absence. The second time sheet which he was asked to sign did not credit his two day absence to vacation time, and docked him two days pay for the week. Wilson told Correia that he thought the proposed second time sheet was a false one and that he didn't want to sign it. Correia responded that "if you don't sign it, you're not going to get paid for the week." Wilson declined to sign. The following week Correia again called him into the office and asked him to sign the same time sheet. Wilson again declined, and he has not yet received any wages for that week.

On or about July 31, 1975, Wilson was called into a meeting of the Board of Sewer Commissioners. Chairman Smarowski and Commissioner Correia were present. The Commissioners told Wilson that they were planning to give him a letter on his poor attendance because he had taken too much sick time. The Commissioners also discussed the two days Wilson had taken on July 28 and 29 to bring his brother home from the hospital. At various times during the conversation Correia asked Wilson whether he "liked his job", and during the latter part of their conversation, Chairman Smarowski inquired of Wilson "what's bothering you?" Wilson responded that "a lot of things were bothering him." Upon Smarowski's invitation to "tell me about it", Wilson complained that he "couldn't understand why the people who worked for the CETA program were getting better working assignments, and getting priority, and (that he) was just kind of left behind more or less." The Commissioners told Wilson that work assignments were at the discretion of the Chief Treatment Plant Operator. Wilson was given a written warning concerning his "poor attendance": the warning indicated that Wilson would be immediately dismissed should there be no improvement in that regard. He was told to sign it to confirm its receipt, which he did. Wilson was upset about the letter and Smarowski concluded the meeting with the remark that if Wilson didn't like working there "there is no anchor and chain under your ass". Wilson left the meeting. We note that Wilson's job performance was not discussed at all during this meeting, and the only complaint concerned his attendance.

It is the practice in Wareham to grant an employee a wage increment after one year of employment, if the employee has given good job performance during that period. In the middle or latter part of August 1975, Wilson became concerned because he had not received his raise. Prior to the date he testified for Averill (July 23, 1975) Wilson had received no complaints about his job performance, and was told that he had been doing a good job. Wilson asked Malleo several times

<sup>9</sup>We note this conversation occurred prior to June 23, 1974 when Wilson testified on Averill's behalf.

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whether he was going to get his raise. Malleo responded that he didn't know. Wilson then asked Malleo if he would find out about his raise; Malleo responded that he would try. A week or so later Malleo told Wilson that he "didn't think (he) was going to get it." The evidence indicates the last conversation was near the end of August, 1975.<sup>10</sup>

On August 15, 1975, the Union filed the charge of prohibited practice with the Labor Relations Commission on Wilson's behalf. The docket of the Commission reflects that on September 3, 1975, the Commission mailed a copy of that charge to the public employer, and notified the parties that an Informal Conference was to be conducted on September 15, 1975.

On or about September 3, 1975 Malleo had a conversation with Wilson concerning the latter's work performance.<sup>11</sup> Malleo gave Wilson a written performance rating at that time. In summary, the performance rating indicated that Wilson was adequate to good in the areas of job knowledge, quality of work, learning ability, adaptability and cooperation. It rated Wilson as being inconsistent or below average in job interest, volume of work, initiative, dependability, and personality. Finally, it noted under "attendance and punctuality" that Wilson was too frequently absent to be depended upon.<sup>12</sup> Wilson complained to Malleo that his rating was unfair, both as to content and because he was, to his knowledge, the first employee to be so rated.

Wilson made it known that he wanted a letter from the Board of Sewer Commissioners explaining why his annual wage increment was denied. Wilson wanted the letter so he might appeal the denial to the personnel board. Malleo told Wilson to report to a meeting of the Sewer Commissioners on the evening of September 10, 1975 and that the Commissioners would give Wilson the letter. Wilson was apprehensive about going to the meeting. Because of his apprehension, and because he didn't have an automobile, Wilson asked a friend to drive him to the meeting and to accompany him while he was there.

<sup>10</sup> At the hearing, Chairman Smarowski testified that Wilson was denied his merit rate increase solely on the basis of his poor attendance. There was no other reason for the denial.

<sup>11</sup> We note that this was the same day that the Commission mailed the charge of prohibited practice to the Public Employer. However, the Employer would not have received notice of Wilson's charge on September 3 due to the normal lapse of time required by the post office.

<sup>12</sup> At the hearing, Chairman Smarowski testified that they had begun using the new rating system approximately in June 1975. Under the new system an employee would be rated on the anniversary of his employment date. Wilson was either the first or second employee to be rated under the new procedure. As previously noted, Wilson began his employment on August 12 of the previous year.

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Upon arrival, the Secretary of the Board of Sewer Commissioners told Wilson to go into the room where Smarowski, Correia, and Malleo were seated, but told Wilson's friend that he would have to wait in the lobby. Once inside, Smarowski asked Wilson repeated questions about his attendance and performance. Wilson replied that he hadn't come to debate anything, but merely wanted a letter explaining the denial of his wage increment. Smarowski persisted in questioning Wilson, and at one point Correia interrupted Smarowski with a comment or question concerning Wilson's charge of prohibited practice on file with the Labor Relations Commission. Smarowski cautioned Correia not to raise that topic. Smarowski told Wilson that he would receive his letter and that he didn't "want to waste any more of (Wilson's) valuable time."

Wilson and Smarowski both rose, and Smarowski went out to the Secretary's office to ask her to type up the letter. Then both men walked through a nearby laboratory. They were in the laboratory only for several seconds. The evidence of what ensued in those several seconds is conflicting. Smarowski testified that Wilson said to him "Who the F--- do you think you are to hold up my raise?" Wilson testified that he didn't "recall" making such a statement. Wilson's version of the incident was that both walked into the laboratory, and Smarowski closed the door. Wilson was walking toward another exit door, and asked if Smarowski was finished with him. Smarowski said "yes", and about then Wilson opened the opposite exit door. Then, according to Wilson, Smarowski said "No, come back." Wilson replied "David, I don't want to talk about it. I just want to go home", and he went out into the hall. Smarowski then said, "Well, seeing what you just called me, you don't have to come in anymore". Wilson said, "David, what did I call you?" Smarowski replied, "You'll get a letter (of termination) in the morning." Wilson's friend was outside the exit door and essentially corroborated Wilson's version of the conversation. However the truth of what was said during the several seconds when both doors to the laboratory were closed remains in doubt, and no positive finding thereon can be made.

The following day Wilson received two letters, both of which were dated September 10, 1975. The first letter read:

Dear Mr. Wilson:

The Board of Sewer Commissioners unanimously voted to deny your increment for the following reason:

Poor attendance.

Very truly yours,  
BOARD OF SEWER COMMISSIONERS

David S. Smarowski  
Chairman





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The second letter read:

Dear Mr. Wilson:

The Board of Sewer Commissioners unanimously voted your immediate dismissal from the employ of the Town of Wareham.

Reasons being, insubordination and use of profanity to the Chairman of the Board.

Very truly yours,  
BOARD OF SEWER COMMISSIONERS

David S. Smarowski  
Chairman

John M. Correia,  
Clerk

After his termination Wilson applied to the Division of Employment Security for unemployment compensation. On October 28, 1975 the Division notified Wilson that he was disqualified from receiving benefits for an eight week period. The following reason was given: "You were discharged because of deliberate refusal without good reason, to answer your employer's questions. Such discharge is subject to disqualification." As a result of his notice of disqualification, Wilson requested a hearing before the Division. The Employer did not appear at the hearing. For that reason, the Review Examiner reversed the Division's prior determination, and restored Wilson's benefit credit.

Finally, it must be noted that between July 31, 1975 (the day Wilson was warned about poor attendance) and the date of his termination, Wilson had taken only one day of sick leave and no vacation time. At the date of his termination Wilson had two and one quarter sick days to his credit, and three and five-sixths days of vacation credit. The Employer admitted knowledge of the fact that Wilson had signed a representation card, that he had testified before the Labor Relations Commission and that he had filed the charge of prohibited practice which led to our issuance of the complaint in the instant case.

Opinion

The Commission has consistently held that discriminatory treatment of employees motivated in whole or in part by their lawful participation in Union or other protected concerted activities, violates Chapter 150E, §510 (a) (1) and 10 (a) (3) of the General Laws. City of Boston, Department of Health and Hospitals, MUP-2235, 3 MLC (1976); Town of Dennis, 3 MLC 1014 (1976); Ronald J. Murphy, 1 MLC 1271 (1975). The burden of establishing a violation of Chapter 150E by a preponderance of the evidence rests with the complaining party,<sup>13</sup> and may be

<sup>13</sup>Article III, Section 4 of the Commission's Rules and Regulations provides, in pertinent part: "The party filing this Complaint shall have the burden of proving the allegations in the formal complaint by a preponderance of the evidence."

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satisfied by circumstantial evidence and the reasonable inferences that may be drawn therefrom. Town of Dennis, supra; Town of Sharon, 2 MLC 1205 (1975). Once the complaining party has established prima facie the existence of an unlawful discrimination - typically by the presence of diverse circumstantial factors - then the burden of proof shifts to the employer to provide an adequate non-discriminatory explanation for its conduct, "since proof of motivation is most accessible to him." Town of Dennis, supra; Town of Sharon, supra; NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967); Black Hawk Corporation v. NLRB, 431 F.2d 900, 902 (4th Cir. 1970). Conversely, failure by the complaining party to establish a prima facie case avoids the necessity for Commission inquiry into the adequacy of the employer's non-discriminatory explanation. Town of Dennis, supra; Blasingame Well Service, 174 NLRB 1126, 1130 (1969).

If an employee establishes a prima facie case, and the employer fails to rebut that case by a preponderance of the evidence, the Commission will find the Employer in violation of the Law. When an Employer has been found to violate individual rights guaranteed by G.L. c.150E, §§10 (a) (1) and 10 (a) (3) by demoting, suspending or terminating the employment of individuals for engaging in protected concerted activity, it is the responsibility of the Labor Relations Commission to remedy that violation by ordering affirmative relief, including reinstatement with backpay. Town of Dennis, supra; Town of Tewksbury, 2 MLC 1158 (1975); Crimson Cafe, Inc., d/b/a Cronin's Restaurant, UP-2201 (1973); St. Elizabeth's Hospital v. Labor Relations Commission, 321 N.E.2d 837 (1974); Town of Townsend v. Labor Relations Commission, 319 N.E.2d 916.

The Employer's motivation is essentially a question of fact. The factual determination is to be made on the basis of all the evidence - direct and circumstantial - including such factors as evidence of anti-union bias, triviality of reasons, visibility of the alleged discriminatees in their support of the Union or in their participation in other protected activity, employer attitude, timing, and inconsistent or shifting reasons advanced by the Employer to justify its actions. Mount Wachusett Community College, 1 MLC 1496 (1975), and supporting cases cited therein. Ordinarily, when some form of discriminatory action has been taken by an employer, several if not all of the above factors and circumstances are present. See for example, Mt. Wachusett Community College, supra; St. Elizabeth's Hospital v. Labor Relations Commission, supra.

The facts surrounding the termination of DaSilva and Wilson are examined in light of the above-stated law and procedure. We first consider the factor of discriminatory motive. To sustain a violation, there must be a showing by preponderance of the evidence that a discharge or other disciplinary measure is motivated by anti-union considerations. If this burden of proof is not sustained, no violation may be found. Although the intent of the Employer to encourage or discourage union membership or activity must exist, specific proof of intent is not required where the employer's conduct inherently results in unlawful discrimination. Employer's are held accountable for the direct and foreseeable consequences of their activities. NLRB v. Great Dane Trailers, Inc., supra; Radio Officers Union v. NLRB, 347 U.S. 17 (1954); Ace Foods Inc., 192 NLRB 180 (1971); Industrial Fabricating, Inc., 119 NLRB 162 (1957). The United States Supreme Court has ruled that if an employer's discrimination is "inherently destructive"



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of important employee rights, an unfair practice can be found even without proof of anti-union motivation, and even if the employer proves he was motivated by business reasons. *NLRB v. Great Dane Trailers, Inc.*, *supra*. DaSilva's individual rights to form, join and assist an employee organization and to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, are protected by G.L. 150E, §2. Those rights are basic, and constitute the very foundation upon which the remainder of the labor law structure is fabricated. Further, DaSilva's discharge deprived the employees and the Union of their duly elected steward and their principal organizer. That DaSilva's discharge was "inherently destructive" of those basic rights is plain, and requires no further elaboration or proof of specific intent.

Wilson was not a dominant figure in the Union's organizational campaign as was DaSilva. Evidence of his Union activity is limited to a showing that he signed a representation card and "spoke to" other employees, some of whom were themselves organizers. However limited his organizational efforts, Wilson did participate in the union campaign, and his greatest contribution was to give information and testimony to the Labor Relations Commission in the Averill case. His right to do so without fear of discharge or other discrimination is protected by G.L. c.150E, §10 (a) (4). The Public Employer's action in discharging Wilson inherently discriminates against him, and others who might desire to follow his example, in the exercise of that important employee right. However, in the case of Wilson, direct evidence of anti-union motivation is flagrant. The Commission considered the Public Employer's treatment of Wilson before and after his testimony on July 23, 1975. Prior to that testimony Wilson had not been criticized for either his attendance or work performance. Note that Wilson mentioned to Commissioner Correia about a week and one half before his testimony that he would be needing some time off to attend to his ailing brother. Correia's response to Wilson was that he should take the time as a vacation day so that he might be paid. Five days after Wilson testified, he forthrightly took two days vacation for that purpose. When Wilson submitted his time sheet at the end of the week, Correia reversed his attitude to the extent that Wilson was not only docked for his two "vacation days", but also for the rest of the week. The Public Employer offered no evidence to explain this abrupt reversal of position. Moreover, eight days after Wilson's testimony, he was given a written warning for his absenteeism, which had not been in question before. The Labor Relations Commission mailed notice of Wilson's charge of prohibited practice to the public employer on September 3, 1975. It is reasonable to conclude that it was delivered to the Public Employer shortly thereafter. Correia made mention of it during the questioning of Wilson on September 10, 1975, before being silenced by Chairman Smarowski. The decision to discharge Wilson was made that evening. We submit that the timing of the Employer's actions must support an inference of improper motivation on the part of the Public Employer.

We now look at the factor of visibility of the alleged discriminatees in their support of the Union or in their participation in other protected activity. DaSilva actively solicited cards from each employee, including Malleo who was later to become Chief Treatment Plant Operator and Supervisor for all the Sewer Department Employees. Employer awareness of DaSilva's activity is demonstrated by the Chairman's Smarowski's warning, communicated through the secretary, that



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he was not to have Union meetings during working hours. After being elected steward, DaSilva participated in a meeting held with the Sewer Commissioners in late November 1974, where the request for recognition was made. Chairman Smarowski admitted knowledge that Wilson had signed a representation card, had testified at the hearing before the Labor Relations Commission, and had filed his charge of prohibited practice. Indeed there is no evidence of any effort made by the employees to keep their Union activity hidden from the eyes of the Employer.

Next we must examine the reasons given by the Public Employer to justify the discharges. Are the reasons trivial in nature, or, as in the Averill case, are they supported by evidence of sound business practice? Sound business reasons for a discharge tend to substantiate the Employer's case and are accorded considerable weight in our consideration of whether the Employer has satisfactorily rebutted the Union's *prima facie* showing. Conversely, trivial or inconsistent and shifting reasons have the opposite effect. DaSilva's performance was not put in issue by the Employer. The evidence at the hearing taken as a whole indicated to us that DaSilva was a responsible, hard-working employee, who joined the Sewer Department as a laborer and rose through the ranks to the position of a maintenance man and an instructor of less skilled employees. The sole reason given by the employer for his demotion to laborers rank was that DaSilva had lost his driver's license for ninety days. Although the evidence was conflicting we find that prior to the suspension of DaSilva's license, DaSilva was accompanied by a laborer most of the time. While we agree that the Public Employer was not obligated to provide DaSilva with a chauffeur during working hours, we cannot but wonder why no attempt at accommodation was even considered, especially in view of the prior practice of providing him with a helper most of the time. The Employer also ordered DaSilva to report to the personnel board that he had been demoted, so that his salary might be lowered accordingly. Further evidence suggests that Correia called the personnel board and told them of DaSilva's demotion. This action by the Employer is susceptible to one of two conclusions: either the Employer was motivated by a zealous concern for municipal economy, or it was motivated by a desire to discourage DaSilva's pro-union efforts. On consideration of the entire record in this matter, we are persuaded that the conduct of the employer in discharging DaSilva was improperly motivated.

On February 15, 1975, the Board met with DaSilva, at which time it was decided to demote him. When he learned of the decision to demote him, DaSilva stated that he "knew people in Boston" and that he was "going to Boston". With that, DaSilva left the meeting. Ten or fifteen minutes later, DaSilva called the Commissioners' office, reiterated his dismay at the decision to demote, and, according to the testimony of Chairman Smarowski, "more or less demanded a driver." Following these two incidents<sup>14</sup> the Board reconsidered its decision, and decided to fire DaSilva. The Public Employer admits that it was because of these two incidents that it decided to terminate DaSilva, but asserts that such action was justified, as DaSilva's conduct amounted to insubordination. We disagree.

<sup>14</sup>The meeting was February 15, 1975. DaSilva's letter of termination is dated February 17, 1975.



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The plain inference to be drawn from DaSilva's references to Boston was that he intended to protest the decision to demote him, either through the assistance of the union or the Labor Relations Commission,<sup>15</sup> both of whom are located in Boston. Such activity is protected by section 2 of the Law. See, e.g. Town of Halifax, 1 MLC 1486 (1975). Because DaSilva indicated that he might resort to these lawful procedures to protest his demotion he was discharged. Such motivation is plainly improper.

The employer also contends that the subsequent conduct of DaSilva, in telephoning the Commissioners and "demanding" a driver constituted sufficient reason for his discharge. The contention must be rejected for two reasons. Even if the telephone conversation would have been an adequate reason to fire DaSilva, it is already tainted by unlawful motivation as discussed above. Where at least part of the reason for an action is retaliation because of protected activity, it is not a defense that a legitimate reason for the action also exists. City of Boston, MUP-2135, 3 MLC 1101, 1113 (1976). St. Elizabeth Hospital, 1975 Mass. Adv. Sh. at 71, 86 LRRM 2422 (App. Ct. 1975). We believe the record in this case is clear, that DaSilva's statements at the meeting, which we find to be protected, constituted at least part of the reason for the decision to terminate, rather than demote.

In addition, we are not persuaded that the telephone conversation is a sufficient reason for discharge of an employee. While it is not the role of the Commission to substitute its judgment for that of the employer, where the reason offered for an action seems frivolous or insubstantial, it may lead to an inference that the "real" or "true" motive is other than the offered reason. Mount Wachusett Community College, 1 MLC 1496 (1975).

We believe that this is such a case. Even accepting Chairman Smarowski's version of the telephone conversation, we conclude that it would not justify the discharge of an employee with DaSilva's record and length of service. Having so concluded, there remains only the statements that he would go to Boston to justify the action taken against DaSilva.

Since the Employer's defense of insubordination fails, and since DaSilva was in part discharged upon his stated intention of pursuing redress of his grievances, we firmly conclude that DaSilva was demoted and subsequently discharged because of his efforts to form, join, and assist an employee organization, because of his having engaged in lawful, concerted activity for the purpose of collective bargaining and other mutual aid or protection, and because he had chosen to be represented by an employee organization. Thus we find that the Public Employer violated G.L. c.150E, §§10 (a) (1), 10 (a) (3) and 10 (a) (4). We further conclude that the Public Employer's action in discharging DaSilva interfered with the formation of an Employee Organization in further violation of §10 (a) (2).

<sup>15</sup> There is no evidence to suggest that DaSilva immediately pursued either remedy. He personally filed his charge of prohibited practice with this Commission on April 2, 1975. Counsel for the Union filed an appearance on DaSilva's behalf on April 16, 1975.



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The Public Employer argued that there was no intent to discharge Wilson prior to his alleged remarks to Smarowski when the two men were alone together in the laboratory, and that Wilson's discharge was for his alleged cursing and insubordinate conduct.<sup>16</sup> We earlier noted that the evidence concerning such a remark was conflicting and precluded a specific finding. Even if we were to accept the Employer's version of the disputed conversation, we do not believe that such a remark, standing alone, justifies so severe a penalty as discharge. The NLRB rejected a contention that the discharge of an employee for name calling and profanity at a meeting of employees was lawful, where it was shown that the employer was largely responsible for creating an atmosphere of tension and emotion. Webster Clothes, Inc. d/b/a Webster's Men's Wear, 222 NLRB 195 (1976). Here we believe that the Employer's actions in questioning Wilson at that meeting, not to mention its prior actions created such an atmosphere. Further, we surmise that Smarowski previously condoned the use of such free-wheeling language by his remark to Wilson that "there was no chain and anchor under his ass". The Employer never explained the sudden reversal of Correia's action with regard to Wilson's vacation time immediately following his testimony before this Commission, and the Employer's subsequent written warning to Wilson for his poor attendance which had been previously overlooked.

Further, we note that the Public Employer did not attribute Wilson's alleged remark as a reason for dismissal given to the Division of Employment Security. There the only allegation was DaSilva's failure to answer the Employer's questions. Such an inconsistent or varying reason is further evidence supporting the employees charge of discrimination. Based upon the evidence as a whole, we conclude that Wilson was given a written warning, was denied a wage increment, and was discharged in violation of G.L. c.150E, §§10 (a) (1) and 10 (a) (4) because he gave information and testimony to the Labor Relations Commission. In so doing we have not overlooked our finding that the denial of Wilson's wage increment came pursuant to an evaluation about the time of the anniversary of his employment. We believe that in light of the Employer's conduct in prior instances, the evaluation itself may be considered tainted, and the Sewer Commission's consideration of that evaluation less than objective.

ORDER

Wherefore, on the basis of the foregoing, it is hereby ordered pursuant to c.150E, §11 of the General Laws, that the Town of Wareham and its Board of Sewer Commissioners shall take the following affirmative action which the Commission finds will effectuate the policies of the law:

1. Offer Guilherme DaSilva immediate and full reinstatement to his former position as maintenance man without prejudice to his seniority rights or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of his termination, by payment to him of a sum equal to that which he would normally have earned from March 5, 1975 to the date of the Employer's offer of reinstatement, less net earnings during such period, with

<sup>16</sup>Our prior definition of "insubordinate" would likewise apply here.



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back pay computed on a quarterly basis plus interest at the rate of six percent per annum.

2. Offer Donald K. Wilson immediate and full reinstatement to his former position as laborer without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of his termination, by payment to him of a sum equal to that which he would normally have earned from September 10, 1975 to the date of the Employer's offer of reinstatement, less net earnings during such period, with back pay computed on a quarterly basis plus interest at a rate of six percent per annum. Computation of Wilson's back pay shall include the wage increment due upon the anniversary of his employment, and shall be calculated as if that wage increment had been seasonably approved.
3. Pay Donald K. Wilson 5 days wages for the week ending August 2, 1975, plus interest thereon at the rate of 6 percent per annum, computed quarterly.
4. Preserve and, upon request, make available to the Commission or its agents for examination and copying, all payroll records, time cards, personnel records and reports, and all other records necessary to determine the amount of back pay due under the terms of this order.
5. Post the attached notice in a conspicuous place in the Wareham Sewer Department for thirty days commencing not later than ten days after receipt of this decision.
6. Notify the Commission, in writing, within ten days of the service of this Decision and Order, of the steps taken to comply therewith.

James S. Cooper, Chairman

Madeline H. Miceli, Commissioner

NOTICE TO EMPLOYEES  
POSTED PURSUANT TO AN ORDER OF THE  
MASSACHUSETTS LABOR RELATIONS COMMISSION

Chapter 150E of the General Laws of Massachusetts gives all employees these rights:

- To engage in self-organization;
- To form, join and assist employee organizations;
- To bargain collectively through a representative of their own choosing;
- To engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion;



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To sign or file an affidavit, petition, or complaint or give any information or testimony to the Labor Relations Commission, or to choose to be represented by an Employee Organization;

To refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive represented as provided in Section 12 of the Law.

WE WILL NOT DO ANYTHING WHICH INTERFERES WITH THESE RIGHTS. MORE SPECIFICALLY,

WE WILL NOT, by discharge or any other like or related means, discriminate against any of our employees because they are active on behalf of, are members of, or sympathize with the American Federation of State, County and Municipal Employees, Council 41 or any other employee organization.

WE WILL offer Guilherme DaSilva and Donald K. Wilson full and immediate reinstatement to their former or substantially equivalent position of employment with us, without loss of seniority or other rights, privileges and benefits, and will pay to them all moneys lost as a result of their termination.

All our employees are reminded that they are free to exercise all of the above rights, or to refrain therefrom, freely and without interference by us.

TOWN OF WAREHAM  
BOARD OF SEWER COMMISSIONERS

DATE: \_\_\_\_\_

By: \_\_\_\_\_  
CHAIRMAN, Board of Sewer Commissioners

\_\_\_\_\_  
MEMBER, Board of Sewer Commissioners

\_\_\_\_\_  
MEMBER, Board of Sewer Commissioners

