

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and ALBERTO RODRIGUEZ,

Complainants

Docket No. 10 SEM 02257

v.

UPS GROUND FREIGHT,

Respondent

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Appearances: Maurice Cahillane, Esq. for Complainant  
Jennifer Corvo and Barry Waters, Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 3, 2010, Complainant Alberto Rodriguez filed a charge of employment discrimination against Respondent UPS Ground Freight. Complainant alleges that he was subjected to a hostile work environment due to his national origin (Puerto Rican) and race (Hispanic) and that he was terminated in retaliation for opposing discriminatory practices.

A probable cause finding was issued and the case was certified to public hearing on November 27, 2015.

A public hearing was held on October 25 and 28, 2016. The following witnesses testified at the hearing: Complainant, Complainant's wife Roseanna Rodriguez, Tamiko Moody, Donald Blais, Todd King, Michael Fox, Sid Martin, Rob Heroux, and Chelsey

Baillargeon. The parties presented joint exhibits 1-99 and A-F. Respondent presented an additional six (6) exhibits.

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

## II. FINDINGS OF FACT

1. Complainant was born in Puerto Rico. He worked for UPS Ground Freight as a dock worker/CDL driver from June 19, 2009 until July 28, 2010 in Respondent's Springfield, MA facility. Complainant's duties involved cleaning the dock area, cleaning trailers, loading and unloading freight, moving trailers around the yard, and making local pick-ups and deliveries. Transcript I at 25.
2. Respondent UPS Ground Freight operates under the name of UPS Freight. It transports freight both in and out of the United States. It has numerous facilities throughout the U.S.
3. Complainant's shift at UPS Ground Freight started between noon and 4:00 p.m. and ended between 8:00 p.m. and midnight. He received a minimum hourly pay rate of \$14.63 for dock work that did not involve operating a truck and more if he operated vehicles. His hourly rate increased to \$15.68 in September of 2009 and to \$16.72 in June of 2010. Joint Exhibit 56, pp. 33-34; Transcript I at 69-70, 87.
4. Complainant worked at Respondent's Service Center in Springfield, MA which contains a dispatch office, a break room, and a loading dock. His direct supervisor at UPS Ground Freight was Michael Fox.

5. Todd King was the Service Center Manager (“Terminal Manager”) for UPS Ground Freight in Springfield from 2006 until November of 2015. Transcript II at 211-212. King testified that Complainant split his time between the dock and the road. According to King, Complainant was eventually moved into a city driver position. Transcript I at 214-215.
6. King testified that when freight arrives at the Springfield facility, it is unloaded by a forklift. Trucks are then re-loaded for deliveries by drivers who also make pick-ups. Transcript II at 212-213. King described the work as a traditional “cross-dock operation” in which drivers back trailers into bay doors of the loading dock so that dock workers can access the trailers for loading and unloading freight. Transcript II at 213. According to King, employees at the Springfield facility include dock workers with CDL licenses, city drivers, line haul drivers, clerical staff, sales staff, dispatchers, mechanics, and supervisors. Transcript II at 214.
7. Complainant testified that Terminal Manager King constantly “shorted” his pay and referred to him as “Yo,” “Sloppy,” and once as “Mr. Wizard.” Transcript I at 41. King acknowledged that he used the word “Yo” but stated that he did so in order to get the attention of workers on the noisy freight dock. Transcript II at 221. There is no credible evidence that King constantly “shorted” Complainant’s pay. I do not credit Complainant’s testimony that King called Complainant disrespectful names.
8. Shortly after Complainant began to work at UPS Ground Freight, Complainant accused co-worker Rob Heroux of being disrespectful. Transcript II at 222, 243. Complainant drafted a letter dated July 23, 2009 which states that Heroux created a hostile work environment and humiliated him by disparaging the quality of his work. Joint Exhibit 3.

Complainant also accused Heroux of barking out orders to him in a demeaning way, yelling at him in front of other employees, criticizing his driving skills, commenting that he was being employed on a work-release program from jail, and yanking bills out of his hands. Joint Exhibit 3; Transcript I at 26-28, II at 242. According to Complainant, Operations Supervisor Michael Fox laughed at Heroux's actions. Transcript I at 29. Based on Complainant's demeanor at the public hearing and for reasons set forth below, I do not credit Complainant's assertions that he was racially harassed by Heroux.

9. Complainant drafted a letter dated September 29, 2009 accusing dock worker Donald Blais of calling him names like "Wappo," "Burrito," and "Spanish-speaking MF." Transcript I at 36-37, II at 226, 249, 301; Joint Exhibit 5. Blais, who had worked for Respondent for approximately ten years, denied the accusations. Transcript II at 226; 267-268, 272. Based on Complainant's demeanor at the public hearing and for reasons set forth below, I do not credit Complainant's assertions about Blais.
10. As a result of Complainant's accusations of harassment, Terminal Manager King told Operations Supervisor Fox to hold a dock meeting to advise dock employees to be professional and not to joke around. Transcript II at 302.
11. Respondent maintains a hotline manned by an external vendor to receive employee complaints. The vendor takes calls and generates reports. Once a report is made, it is distributed to a Human Resource representative employed by Respondent for investigative purposes. Transcript II at 189. Complainant placed a call to the hotline on or around October 19, 2009 to report that he was being harassed. Transcript I at 40.
12. Heroux and Blais participated in a conference call with an individual from Human Resources about Complainant's accusations. Transcript II at 296-297. The Human

Resource representative who handled the call was Robert Mason. The outcome of the internal investigation was a determination that the complaint was unsubstantiated.

Transcript II at 194.

13. Terminal Manager King described Heroux as a very good employee but standoffish, difficult to deal with, and sometimes impolite. Transcript II at 223. According to Complainant's co-worker Donald Blais, Complainant and Heroux had a horrible relationship and "tortured" each other. Transcript II at 274.
14. Operations Supervisor Fox described Complainant as a decent worker but one who argued with others and was sometimes intimidating. Transcript II at 307.
15. On April 12, 2010, three eye witnesses -- Michael Fox, Donald Blais, and Chris Wheeler -- maintained that Complainant dropped a trailer in the dock yard. Joint Exhibits 20, 25 & 26; Transcript II at 230-231, 278. Blais testified that he was at an adjacent door in the yard when the incident occurred. Transcript II at 279, 289-290. He testified that he watched the trailer drop, heard a loud bang as it hit the ground, and observed damage to the trailer resulting from the fall. Transcript II at 278, 288; Joint Exhibit 26. Fox also testified that he witnessed Complainant drop the trailer from where he was standing two doors away. Transcript II at 304-305, 326; Joint Exhibit 20. According to Fox, after the trailer hit the ground, its landing gear was bent and there were gouges in the pavement. Transcript II at 305-306; Joint Exhibit 20. I credit the testimony of Blais and Fox.
16. Complainant testified that he "dragged" the trailer but did not drop it. Transcript I at 46. I do not credit this testimony because it is inconsistent with the credible testimony of the individuals who witnessed the incident.

17. Complainant was initially terminated for lying about the dropped trailer. Transcript II at 252. He grieved the termination and was eventually reinstated but with no back pay for the three-month period he was out of work. Transcript II at 232-233; Joint Exhibit 24.
18. Following Complainant's reinstatement, he filed Union grievances against Blais and Wheeler for allegedly calling him racially-hostile names and for engaging in other allegedly discriminatory acts. Blais testified that he and Wheeler were exonerated at an initial Union hearing and the matter was thereafter dismissed after Complainant appealed but failed to show up at a second-step grievance hearing. Transcript II at 269, 280-281.
19. Michael Fox testified that following the dropped-trailer incident, he felt threatened by Complainant. According to Fox, Complainant followed him home from work on one occasion and on another occasion drove in front of Fox's car yelling and making hostile gestures. Transcript II at 234, 307-308. I credit Fox based on the convincing nature of his testimony and his sincere demeanor at the public hearing.
20. Complainant was terminated for engaging in threatening and intimidating behavior during an incident on July 22, 2010. Transcript I at 61; II at 266. On that date, Complainant threw a banana peel on the ground of the dock. Operations Supervisor Fox repeatedly told him to pick up the banana peel. Transcript II at 310; Joint Exhibit 32. Because of noise in the dock area, Fox raised his voice the third time he told Complainant to pick up the banana peel. Transcript II at 315. According to Fox, Complainant began to yell at him. After Fox went to the dispatch room, Complainant approached the dispatch room window, threw paperwork through the window, yelled, "You're not gonna talk to me like that" . . . "if you do, there will be problems/issues," and then entered the dispatch office to continue to yell at Fox. Transcript II at 236, 311; Joint Exhibit 32.

According to Fox, he told Complainant to go home, but Complainant kept yelling. Fox called the police and reported the incident to Terminal Manager Todd King. Transcript II at 237, 311; Joint Exhibit 32. I credit Fox's version of what transpired based on the convincing nature of his testimony and his sincere demeanor at the public hearing.

Complainant's Union, Teamsters Local 404, took the matter to arbitration which resulted in a decision upholding Complainant's termination. Transcript I at 75.

21. Billing Clerk Chelsey Baillargeon heard the altercation between Complainant and Fox and became scared. Transcript II at 332. She testified that Complainant approached Fox while pointing and yelling at him and that Fox backed up in response to Complainant's approach. Transcript II at 333. I credit Baillargeon based on the convincing nature of her testimony and her sincere demeanor at the public hearing.
22. Robert Davis, who was in the break room during the incident, reported to Terminal Manager Todd King that Complainant behaved in an extremely threatening and intimidating manner and appeared to be out of control. Transcript II at 239-240. Davis refused to provide a written statement to the Union because he was afraid of retaliation from Complainant. Transcript II at 265, 269, 271; Joint Exhibit 33.
23. According to Complainant, he was falsely accused by Fox of dropping a banana peel on the ground, had his time card unreasonably withheld by Fox, and was told by Fox that, "this isn't a ghetto." Transcript I at 53-57. I do not credit Complainant's assertion about Fox based on the unconvincing nature of Complainant's testimony, the convincing nature of Fox's testimony refuting the accusations against him, and for reasons set forth below.
24. Complainant's wife claimed that she overheard the interaction between her husband and Fox on Complainant's cell phone through a Bluetooth connection. She testified that she

heard her husband say, "I'm only only here to get my time card to punch out" in response to an individual yelling at him to "get out." Transcript I at 158. I do not credit the version of the incident described by Complainant's wife. Her testimony bears a striking and suspicious similarity to her description of an incident at Complainant's prior employer, Roadway Express, which she likewise claimed to have overheard via Complainant's cell phone and which she characterized as Hispanic discrimination directed at her husband. Although Roadway Express deemed Complainant to be responsible for the altercation and terminated him for cause, the dismissal led to a lawsuit by Complainant that was resolved by Complainant receiving a \$10,000 settlement. Transcript II at 281-283.

25. Complainant stated on his application for employment at UPS Ground Freight that he was laid off by Roadway Express rather than terminated for cause. Transcript I at 96-98, 100-101. During a deposition in the present case, Complainant denied that he had filed a lawsuit against Roadway Express, even though he had, in fact, filed such a lawsuit and received a settlement. Transcript I at 72-73, 146. Complainant claimed that the reason he denied the existence of the Roadway Express lawsuit was that the settlement agreement contained a confidentiality clause. Transcript I at 73.<sup>1</sup> I do not credit this explanation as a rational or sincere reason for denying, under oath, that he had filed the prior lawsuit. I deem Complainant's lack of veracity at his deposition to taint his general credibility in regard to the matters at issue in this proceeding.

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<sup>1</sup> After conferring with his attorney during the deposition and being shown a copy of the Roadway lawsuit, Complainant acknowledged that he had filed a lawsuit against Roadway Express. Transcript I at 153.



### III CONCLUSIONS OF LAW

#### Harassment Based On Race

In order to prove harassment based on race and/or national origin, 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.3<sup>rd</sup> 456, 463 (1<sup>st</sup> Cir. 1996) (charge of hostile environment harassment may be brought in race discrimination context).

There is no dispute that Complainant is Hispanic and of Puerto Rican national origin. In support of a prima facie case, he claims that Terminal Manager King called him “Yo,” “Sloppy,” and “Mr. Wizard;” that co-worker Rob Herous said he didn’t do any work, accused him of being unable to load trailers, yelled at him in front of other employees, criticized his driving skills, and commented that he was being employed on a work-release program from jail; and that dock worker Donald Blais called him names like “Wappo,” “Burrito,” and “Spanish-speaking MF.” According to Complainant, supervisors were aware of the alleged harassment by co-workers as a result of Complainant reporting it on the Company’s hotline and in grievances. Complainant maintains that supervisory knowledge of

the alleged harassment is also evidenced by Operations Supervisor Michael Fox holding a dock meeting and telling dock employees to be professional and not to joke around.

The above matters, if proven, would establish a prima facie case of harassment, but Complainant was not a credible witness and, hence, fails to present a prima facie case. In assessing Complainant's credibility, it is noteworthy that: 1) Complainant charged a fellow employee at a prior job with Hispanic discrimination that was supported by the same improbable type of evidence presented here, to wit: the incident being overheard by his wife who was listening on his cell phone; 2) Complainant falsely denied under oath during a deposition in this case that he had filed a lawsuit against his prior employer for discrimination which resulted in a settlement; and 3) Complainant falsely denied that he dropped a trailer in the Company's yard and that he verbally attacked Michael Fox in regard to the "banana peel" incident even though these matters were witnessed by numerous individuals whose testimony about the events was credible.

Each of the foregoing matters casts a doubt on Complainant's credibility. Moreover, the assertion that his wife twice overheard events over his cell phone supporting claims of discrimination against two separate employers is so farfetched as to be wholly implausible. Likewise, the claim that a confidentiality provision in a settlement agreement required Complainant to lie under oath about not having filed a discrimination suit against Roadway Express is nothing more than a spurious attempt to withhold appropriate and relevant information that could raise questions about his motives in this matter. Finally, the testimony of numerous individuals who credibly described Complainant as dropping a trailer in the Company's yard and characterized Complainant as verbally attacking Fox after being told to

pick up a banana peel was more sincere and convincing than Complainant's self-serving denials.

Turning to the allegations against Terminal Manager King. I conclude that he did not refer to Complainant as "Sloppy" or "Mr. Wizard" and that he used the term "Yo" generically to get the attention of employees in the workplace, regardless of race or national origin. I also decline to credit the contention that co-worker Rob Heroux's behavior towards Complainant was racially harassing. While Heroux may have criticized Complainant for improperly loading trailers, criticized Complainant's driving skills, and barked out orders to Complainant, there is no evidence that these actions were motivated by racial animus. They are consistent with numerous descriptions of Heroux as a difficult individual who has contentious relations with co-workers regardless of race. Other allegations, admittedly racial in content, such as Heroux describing Complainant as employed on a work-release program from jail or Donald Blais calling Complainant names like "Wappo," "Burrito," and "Spanish-speaking MF" were credibly denied and are not believable.

In sum, Complainant's unconvincing demeanor at public hearing, his evasions about past matters regarding his employment history, the contrived circumstances relative to his wife's status as a witness, and the plethora of credible witnesses testifying against him all undermine Complainant's allegations of harassment. Having rejected the evidence of harassment based on race and/or national origin, I conclude that Complainant has failed to make out a prima facie case of discrimination. Even if claims were sufficient to satisfy a prima facie standard, Respondent has succeeded in rebutting the allegations at stage two with evidence of legitimate non-discriminatory reasons for the adverse job actions taken against Complainant.

### 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. 82 (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 on July 23, 2009 when he drafted a letter accusing Heroux of creating a hostile work environment; on September 29, 2009 when he accused Donald Blais of calling him names like “Wappo,” “Burrito,” and “Spanish-speaking

MF;” on or around October 19, 2009 when he placed a call to Respondent’s hotline to report that he was being harassed; and following his reinstatement in 2010 when he filed grievances against Blais and Wheeler for allegedly calling him racially-hostile names. Whether or not these communications constitute protected activity is questionable since I conclude that the factual underpinnings of the claims are, for the most part, fabricated and non-existent. See Guazzaloca v. C.F. Motorfreight et al., 25 MDLR 200, 204 (no protected activity where accusations of discriminatory treatment were not made in good faith but, rather, were fabricated charges).

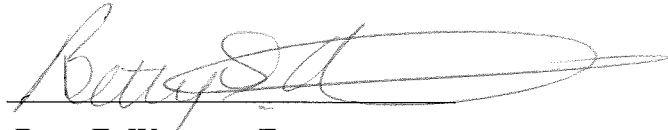
A determination about the existence of protected activity need not be resolved, however, because credible evidence in the record establishes that Complainant’s two terminations by UPS Ground Freight -- the initial one which was converted to a three-month suspension and the second one which resulted in Complainant’s separation from the company -- are not causally-related to any such protected activity. Rather, Respondent has established by credible evidence that Complainant’s terminations were causally-related to his lying about dropping a trailer in the Company’s yard and engaging in threatening and intimidating behavior after being told to pick up a banana peel that he dropped on July 22, 2010. Complainant has failed to prove that these reasons were a pretext for unlawful discrimination.

#### 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 7th day of March, 2017.

A handwritten signature in cursive script, appearing to read "Betty E. Waxman", written over a horizontal line.

Betty E. Waxman, Esq.,  
Hearing Officer