

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & THOMAS FLINT,
Complainants

v.

DOCKET NO. 09-BEM-03058

THE MASSACHUSETTS
TRIAL COURT,
Respondent

Appearances:

Michael L. Dash, Esq. for Thomas Flint
Anne-Marie Ofori-Acquaah, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 25, 2009, Thomas Flint filed a complaint with this Commission charging Respondent with terminating his employment on the basis of his age, race, and color and in retaliation for his having filed previous complaints of race discrimination with this Commission. The Investigating Commissioner dismissed his complaint for lack of probable cause. On appeal, the lack of probable cause finding as to Flint's age and retaliation claims were upheld. The finding was reversed as to the race and color claims, which are the sole claims before the Commission. Flint, who is African-American, specifically alleged that Respondent terminated his employment as a court officer because of his race and color and treated similarly situated Caucasian employees more leniently. A public hearing was held before me on June 3-7, 19, 24 and 26, 2013. After careful consideration of the entire record before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Thomas Flint, who is African-American, resides in Roslindale, MA. Complainant worked for the Massachusetts Trial Court as a court officer from June 19, 1989 until his termination on November 17, 2009. Throughout the course of his employment, Complainant was transferred to nearly every court in Suffolk and Norfolk Counties. (Testimony of Complainant; Testimony of Leslie Lewis)

2. Respondent Massachusetts Trial Court is an employer within the meaning of G.L. c. 151B§1(5). Court officers in the Trial Court are responsible for providing security for the public, jurors, parties, witnesses, attorneys, judges, court personnel and prisoners in the courtroom, and other designated areas of the courthouse. It is essential for court officers to work cooperatively with one another in order for the court room to function effectively. (Ex. R-16; Testimony of Complainant)

3. Complainant testified that he was proud and happy to be a court officer and to protect judges and juries. He stated that the court officers have become a “brotherhood.” During the course of his employment, Complainant occasionally received written praise from jurors and judges for his courtesy, competence and ability to act quickly in an emergency. (Ex. C-7)

4. Court officers report to an assistant chief court officer or a chief court officer, who in turn reports to a regional assistant director of security. There are five regional assistant directors of security who oversee the security operations in the courts by geographic area and report to the director of security. (Testimony of Leslie Lewis)

5. Leslie Lewis, who is African-American, has worked for Respondent since 1972. From 1972 to 1993, Lewis was a court officer. He has been the regional assistant director of security for Suffolk and Norfolk Counties since 1993. (Testimony of Leslie Lewis)

6. Thomas Connelly, who is white, has worked for Respondent since 1993. In 1998 he was appointed the deputy director of security. In October 2003 he became acting director of security and was made permanent director of security in 2008. His responsibilities include overall security and staffing of courthouses, protection and safety of prisoners, jurors and judges, training of court officers, first responder training, supervision of regional directors and supervision of chief court officers and assistant court officers. (Testimony of Connelly)

Complainant's employment and disciplinary history with the Trial Court

7. Complainant was first assigned to the Suffolk Superior Court where he worked for approximately seven years,¹ with the exception of a year at Boston Municipal Court. He also filled in at Roxbury District Court. He testified that the most important part of his job was to protect judge and juries, as well as all others present in the courthouse

8. On October 13, 1998, while assigned to Suffolk Superior Court, Complainant had a physical altercation with another court officer who is African-American. Several court officers intervened to separate Complainant and the other officer. As a result of this incident, after conducting a just cause hearing, Leslie Lewis issued Complainant a one-day suspension for "conduct unbecoming a trial court employee" and transferred him temporarily to Quincy District Court, while the other officer, who is still employed by Respondent, was transferred to Chelsea.

¹ The exact order and dates of Complainant's court assignments cannot accurately be determined from the testimony, which was confusing and conflicting, due to Complainant's lengthy work history and frequent reassignments. Some of Complainant's assignments were temporary, and while assigned to Dedham Court complex he worked both in the District and Superior Courts.

(Ex. R-1; R-10; Testimony of Lewis and Complainant) After his temporary transfer, Complainant was returned to Suffolk Superior Court.

9. On August 23, 2000, in Suffolk Superior Court, Complainant had an argument with yet another African-American court officer. During that altercation, Complainant called the officer a “fucking pussy” and “nothing but a bitch, [who went] crying to the chief.” Complainant also said to him, “What you gonna do now, go get your gun? Go get your gun. I got something for you. I’m sick of you and your ... shit.” (Ex. R-2; R-11)

10. On September 10, 2000, Leslie Lewis wrote to Complainant, “On August 23, 2000 you threatened to do bodily harm to [the other officer] by fighting with him and your conduct was abusive and disorderly; you have shown an inability or unwillingness to work cooperatively with others and bumping against [the other officer] and using abusive language was not only unprofessional, it was conduct unbecoming of a Trial Court employee.” (Ex. R-2) As a result of this incident, Lewis temporarily reassigned Complainant to the Brockton District Court. Complainant subsequently returned to Suffolk Superior Court and was later transferred to the West Roxbury District Court.

11. Lewis testified that because of Complainant’s experience with juries, he temporarily assigned Complainant to run the jury pool at the Chelsea District Court, where juries sat only twice a week. While at Chelsea, Complainant told his supervisor, Chief Court Officer Judy Weiss, that his sole assignment was to work with juries and he refused to perform other duties she assigned to him on the days when juries did not sit. Weiss called Lewis to complain about Complainant’s insubordination. (Testimony of Complainant and Lewis)

12. Following discussions with Lewis and Len Alkins,² Complainant continued to work at the Chelsea District Court for two years and performed all the tasks Weiss assigned him.

13. In June 2004, while on temporary assignment to Roxbury District Court, Complainant was rude and disrespectful to Lewis during a telephone conversation about Complainant's work assignment. According to Lewis' testimony, which I credit, Complainant slammed the telephone down in the middle of their conversation.

14. In July 2004, subsequent to the conversation with Lewis, Complainant did not come to work for several days and did not call out. On July 7, 2004, Lewis wrote Complainant a letter terminating his employment because of his unexcused absences and noted Complainant's insubordination during their telephone conversation. (Ex. R-12; Testimony of Lewis)

15. Complainant apologized to Lewis for the disrespectful telephone call, and was permitted to return to work. Following a disciplinary hearing on July 16, 2004, Lewis reduced Complainant's termination to a five-day suspension for absence without authorization. Lewis warned Complainant that if his pattern of conduct continued, "more stringent disciplinary action will result and may give rise to dismissal from the employment of the Trial Court." (Ex. R-3; Testimony of Connelly and Lewis)

16. At some point subsequent to July of 2004, Lewis transferred Complainant to the East Boston Court. However, after Complainant had a disagreement in the courtroom with First Justice Mahoney, Judge Mahoney ordered Lewis to immediately transfer Complainant out of East Boston and Lewis did so. (Testimony of Lewis)

17. Complainant was transferred to the West Roxbury District Court, where the chief court officer is John Cahill. Complainant testified that while at West Roxbury he observed that a

² Alkins was not a court employee, but worked at the State House for then Senate President William Bulger, who was instrumental in helping Complainant to secure a position as a court officer. Complainant referred to Alkins as his "sponsor," who acted as a go-between between Complainant and Lewis.

white court officer was allowed to leave work early for the Red Sox opening day game, whereas black officers were required to work all day. Complainant testified that he was not interested in going to ball games. He stated that another white officer sold t-shirts and sang Irish songs in the lock-up and that white officers were permitted to smoke in the “chute” located near the prisoner’s cells, whereas black officers were not allowed to do so. He also claimed that a white officer was permitted to deal with family matters during the work day, whereas a black court officer dealing with a family illness was not permitted to take time off. Complainant stated that black officers had to cover the front door, a job that white officers did not like. Notwithstanding, Complainant was happy to fill in at the front door.

18. Leslie Lewis testified that he got along with Chief Court Officer Cahill and never heard any accounts of disparate treatment of the four African-American court officers in West Roxbury. He stated that the black court officer with illness in her family was never denied time off to attend to sick family members. I credit Lewis’ testimony.

19. On February 21, 2006, in West Roxbury, Complainant left the courtroom without notifying anyone or receiving relief, leaving an incarcerated prisoner unattended.

20. On February 22, 2006, at a break during the impanelling of a jury at West Roxbury, a juror told Complainant that he knew one of the attorneys. When court resumed, First Justice Kathleen Coffey took up the matter at a sidebar, where she learned that others had already learned about the juror’s concern, a matter which Complainant should have kept confidential until the meeting with the judge. Judge Coffey believed that Complainant had revealed the juror’s concern to others in the courtroom prior to discussing the matter with her and she took issue with Complainant over this breach of protocol. Complainant began arguing with Judge Coffey, and asked if she was calling him a liar. After this incident, Judge Coffey called Leslie

Lewis and instructed him to immediately transfer Complainant from West Roxbury. (Ex. R-5; R-14; Testimony of Lewis and Complainant)

21. Following a disciplinary hearing conducted by Cahill, where Complainant was represented by union representative Larry Cargill, who is African-American, Complainant received a 20-day suspension for leaving an incarcerated prisoner unattended on February 21 and for unacceptable and inappropriate behavior toward Judge Coffey on February, 22, 2006, Cahill wrote, "If this pattern of conduct continues, more stringent disciplinary action will result and may lead to termination of your employment with the Massachusetts Trial Court." (Ex. R-5) As the acting director of security, Connelly was present at a grievance appeal of the suspension as a representative of management, but he did not participate.³

22. After the incident with Judge Coffey, Lewis transferred Complainant to the Dedham Court complex, which consisted of four courts, including Norfolk Superior Court and Dedham District Court. Paul Cheney was chief court officer for the complex and Patti Belloti was the assistant chief court officer. Complainant testified that during his time at Dedham, he was assigned to either the Norfolk Superior Court or the District Court.⁴

23. According to Complainant, while at Dedham, he observed white officers going to their children's sporting events and coming to work in flip-flops. He testified that one white officer was allowed to jog for two hours at lunchtime and another white officer who moonlighted as a bartender was allowed to come to work late without suffering any consequences. He stated that black officers were never late to work because they feared the consequences.

³ Complainant filed a complaint against Judge Coffey with the Judicial Conduct Commission which was dismissed. He filed a race discrimination complaint with this Commission regarding the issues with Judge Coffey (06-BEM-01864) which was dismissed for lack of probable cause.

⁴ The testimony is confusing as to whether certain events took place at Dedham District Court or Norfolk Superior Court. According to Complainant, he frequently went back and forth between the two courts.

24. While assigned to the Dedham District Court in April 2006, Complainant returned late from lunch and also allowed a prisoner in custody to leave the lock-up to speak to his attorney, in violation of protocol. Because of these actions, Chief Paul Cheney gave Complainant a written warning for insubordination, failure to accept a reasonable assignment and unauthorized absence. (Ex. R-4; Testimony of Lewis)

25. While assigned to Norfolk Superior Court, Complainant stated that no white officer wanted to work with him and that white officers seeking transfers to courts closer to their homes were assisted by union representatives, but the same union officers would never respond to such requests by him.

26. In July 2007, while assigned to the Dedham District Court, Complainant engaged in an argument with a coworker. He yelled that there was a racial conspiracy against him and called the coworker, “fat Bastard,” “pussy,” and “clown” and threatened to “kick his ass.” Following a disciplinary hearing in July 2007 regarding the argument, Complainant, who was represented by Larry Cargill, was suspended by Lewis for three days. Lewis wrote: “A repetition of this violation or any other offense will result in your termination of employment with the Trial Court.” (Ex. R-6; R-13) Complainant filed a race discrimination complaint with this Commission with respect to the three-day suspension and that complaint was dismissed for lack of probable cause. (07-BEM-02328)

27. In July 2007, at Dedham District Court, at the conclusion of a jury trial, several jurors remained in the courthouse with Complainant, who offered to show them a short video of himself performing a stand-up comedy routine. A juror and a court employee complained to Trial Court officials that the video contained inappropriate vulgar language. The Chief Justice of the Trial Court told Acting Director of Security Connelly that a juror wrote that she was forced

to watch a video containing vulgarity and asked Connolly to look into it. Connelly determined to conduct a hearing on the matter. (Testimony of Connelly and Complainant)

28. On September 27, 2007, following a just cause hearing regarding the video, where Complainant was represented by Larry Cargill, called no witnesses and did not offer the video, Connelly wrote Complainant a disciplinary letter stating, in part, “the showing of the video was inappropriate, unprofessional and egregious behavior and way beyond you [sic] scope of duties and responsibilities as a Trial Court Officer. This is the second time in less than four months you have been disciplined for conduct unbecoming a court officer. I want to in the strongest terms possible, inform you that any further improper behavior will result in you being terminated from your court officer position.” Connelly suspended Complainant for five days. (Ex. R-7)

Connelly testified that this was the first time that he had personally disciplined Complainant. However, Connelly testified credibly that because of Complainant’s lengthy disciplinary record, he had reached the “end point” with him and wanted him to understand that his job was in jeopardy.

29. Lewis testified that following the incident with the video, he decided that Complainant had worn out his welcome in Dedham and transferred him to South Boston. Because Lewis had concerns about Complainant’s conduct, he first spoke about the transfer with South Boston Chief Court Officer Joseph Casey, who was familiar with Complainant’s reputation. Lewis advised Casey to accept Complainant’s transfer, to teach him and take things day by day. (Testimony of Lewis)

30. According to Lewis, Complainant did an “outstanding job” and could always be relied upon when he was “on his right path.”

Complainant's tenure at South Boston and termination

31. Sometime after the video incident in 2007, Complainant was assigned to the South Boston District Court, a small but busy court with one session in the courtroom on the first floor. Adjoining the courtroom, which is about 40 feet long, is a small room used by court officers as a locker room. (Ex. R-5; Testimony of Donohue) Complainant testified that he liked South Boston, where he "got to shine" and developed relationships with all three court officers. Judge Michael Bolden is the first justice of South Boston and Margaret Albertson is the clerk magistrate.

32. In 2009, three court officers worked in South Boston; Complainant, John Donohue and another officer. Donohue and the other officer are white. The court officers reported to Chief Court Officer Casey who reported directly to Leslie Lewis. The South Boston courthouse also employed an associate court officer, or "blue shirt," who was assigned permanently to the front entrance to the courthouse.

33. The court officers in South Boston did not have specific assignments. They decided among themselves where they would be assigned and what duties they would perform. This assignment by consensus required cooperation among the court officers. (Donohue testimony)

34. John Donohue was hired by Respondent in July 2006. He was assigned to South Boston prior to Complainant's transfer and had assumed the responsibility for submitting payroll paperwork to Lewis in Casey's absence. Lewis testified that Casey was authorized to make such an assignment, which is given to the brightest court officer, not the most senior. Complainant resented that Donohue had been given this assignment.

35. All of the court officers in South Boston were entitled to a one-hour lunch break between 12:00 p.m. and 2:00 p.m. Donohue took his lunch break from 12:00 to 1:00 while court

was in session. Complainant and the other officer regularly took their breaks from 1:00 p.m. to 2:00 p.m. when court was not in session. From 1:00 p.m. to 2:00 p.m., Donohue remained in the court room to perform any necessary court officer duties, such as prisoner lunch breaks, although he usually wasn't busy during that time. Complainant resented Donohue's lunch schedule because it effectively gave him a two-hour lunch break.

36. Until September 18, 2009, Donohue and Complainant had a friendly relationship.

37. On September 17, 2009, Donohue and the other officer both called in sick, leaving Complainant as the only court officer on duty. Although Chief Casey was also present, he was recovering from an accident and was wearing a neck brace and his movements were limited. It was a busy day and Complainant had to work until 6:30 p.m., causing him to miss an appointment for his step-daughter. Complainant believed that Donohue and the other officer were abusing their sick time and he resented them. According to Complainant, Casey told him to work a half day the next day to compensate for the extra time he put in.

38. On Friday, September 18, 2009, Complainant arrived at work at 9:30 a.m., an hour later than the usual reporting time. He testified that he had received permission from Casey to arrive late. He immediately told Donohue, in an aggressive tone, that he would relieve the assistant court officer at the front door at 1:00 p.m. and that he was leaving work at 3:30 p.m. He told Donohue that if he had any problems with this arrangement, to call Leslie Lewis. At 11:00 a.m., while court was in session, Complainant left the courthouse for 15 to 20 minutes. When he returned, he went to the back room and did not assist Donohue and the other court officer with any duties. (Testimony of Donohue)

39. Donohue believed that Complainant was not going to assist him and the other officer, and skipped his usual lunch so that the other officer would not be working alone. When court

recessed at approximately 11:30, Donohue went to the back room for a quick lunch.

Complainant then left the back room and entered the court room where he told an assistant clerk magistrate and an attorney about how he had been the only court officer on duty the day before and had to work late that evening.

40. Donohue overheard Complainant mention his and the other court officer's names and believed Complainant was making disparaging comments about him to others. He approached Complainant and asked to have a word with him in the back room.

41. When they got to the back room, Donohue told Complainant that he did not appreciate Complainant denigrating him to other people and told Complainant to go home because it appeared he did not want to work. Complainant suggested Donohue wanted him to leave so that Donohue could then report him to his superiors for unauthorized leave. A heated argument ensued between Complainant and Donohue during which Complainant called Donohue a "racist," a "punk bitch," a "fucking pussy," and a "piece of shit." He accused Donohue and the other officer of calling in sick with malicious intent toward him because he was black.

(Testimony of Donohue)

42. When Donohue tried to defend the other officer's use of sick time, Complainant stated, "Fuck [him], fuck his wife and fuck his kids." According to Donohue, Complainant stood two or three feet away from the seated Donohue with his finger in Donohue's face. Donohue felt physically threatened and was worried because Complainant told him that he was "protected" and that Donohue would be the "first to go." Donohue did not attempt to leave the room because Complainant was in his way and he feared that they would come to blows. (Testimony of

Donohue.) I credit Donohue's testimony because it is entirely consistent with Complainant's past conduct both at South Boston and at other courts.⁵

43. Complainant left the room, called Chief Casey at home and told him to "come in and remedy the problem." Casey told Complainant to take the rest of the day off and to discuss the matter with him the following Monday. Complainant then returned to the back room, collected his belongings and left for the day.

44. The same afternoon, Casey called Donohue, who informed Casey about the argument with Complainant.

45. Donohue and Complainant did not know who was present in the courtroom during their argument. The court session was about to resume when Complainant went to call Casey. Judge Bolden was not yet on the bench, but Clerk Magistrate Albertson was in the court room.

46. When he got home that day, Donohue wrote a letter to Casey detailing the incident with Complainant. He stated that Complainant accused him of "not doing his job, conspiring against him, giving him orders, not being attentive, playing favorites and being racist." "Some of [Complainant's] comments were accompanied by the words, "I'm black. You are white." Donohue wrote that Complainant had had numerous prior conflicts with court staff, stating: "Although his work ethic is solid, his erratic behavior is becoming a threat to the security of the court and hinders our abilities to perform our duties." (Testimony of Donohue; Ex-C-1)

47. Donohue testified credibly that he wrote the report because he believed Complainant's hostility needed to be addressed. He no longer felt comfortable working with Complainant in a small courtroom where teamwork was important, and he was concerned that

⁵ Donohue testified credibly that Complainant was involved in earlier arguments at South Boston. Donohue once observed a probation officer intervene in a shouting match between Complainant and a police officer over court procedure. On another occasion Complainant tried to provoke a fight with a prisoner in custody.

Complainant would not “have his back” in case of a prisoner altercation or other disturbance requiring court officer intervention. (Testimony of Donohue)

48. On Monday, September 21, 2009, Complainant informed Leslie Lewis about his altercation with Donohue. (Testimony of Lewis) After this conversation and before talking with Donohue, Lewis believed that the incident could be resolved by his talking to Complainant and Donohue and he told Complainant it was just a personality conflict. (Testimony of Lewis)

49. On Monday, September 21, 2009, Donohue gave copies of his statement to Casey and Complainant. That same day Complainant responded in writing to Donohue’s statement. In his statement, Complainant denied pointing his finger at Donohue and wrote that Donohue’s written statement contained “some very hurtful statements and actions that are completely untrue.” However, the main thrust of Complainant’s statement related to his complaints about his coworkers’ absence the day before the argument. He wrote that Donohue and the other officer wanted him out of South Boston because he had complained to the judge and Casey about their “complacency” about security and other work-related matters. Complainant wrote that Donohue was trying to make a name for himself by making Complainant the “villain” and he asked Lewis, to whom he cc’d the letter, to keep a close eye on the court officers in South Boston Court. (Ex. C-3)

50. Chief Casey called Lewis about the matter and Lewis went to the South Boston Court sometime during the week of September 21, 2009 where he met with Casey, Donohue, the other officer and possibly Complainant. (Testimony of Lewis)

51. Lewis testified that after talking with Donohue, the other officer and Casey and reading Donohue’s statement, he realized that the matter was more serious than he had initially thought and he observed that the offensive language that Complainant had used toward Donohue

was similar to language Complainant had used in previous altercations, which caused him to view Complainant's statement with skepticism.

52. Donohue told Lewis that he did not trust Complainant and could no longer work with him and wanted a transfer for himself or Complainant. (Testimony of Donohue)

53. Approximately two weeks after the incident, having heard nothing about a transfer and unhappy with having to continue to work with Complainant, Donohue contacted the union executive board about the incident. (Testimony of Donohue)

54. Director of Security Connelly was unaware of the incident until the union president David Abbott called him seeking some action on Donohue's request for a transfer. After learning of the incident Connelly told Lewis he was going to handle the matter and he directed Lewis to send Complainant a notice of disciplinary hearing.

55. Connelly spoke to Lewis and Casey for additional information. Casey provided him with the written statements of Donohue and Complainant on October 8 or 9, 2009.

56. On October 9, 2009, Casey told Complainant that Connolly was scheduling a disciplinary hearing in connection with the incident between him and Donohue.

57. On October 15, 2009, on Connelly's instructions, Lewis notified Complainant in writing that a hearing would take place on October 20, 2009 to determine whether there was just cause to terminate Complainant's employment for the incident between him and Donohue on September 18, his inability or unwillingness to work cooperatively with his fellow workers and insubordination and conduct that tended to bring the Trial Court into disrepute. The letter stated that Complainant had the right to be present at the hearing and to be represented by the person of his choice. (Ex.R-8) Complainant testified that he understood that he could bring witnesses to the hearing. (Testimony of Complainant)

58. On October 16, 2009, Complainant faxed a copy of Donohue's statement to Larry Cargill, his union representative. Complainant did not fax a copy of his own written statement to Cargill until October 19, 2009, according to Complainant's contemporaneous notes. (Ex. C-6)

59. The hearing was held at the South Boston District Court on October 20, 2009. Connelly was the hearing officer. The hearing was informal and no one was sworn. Lewis, Casey, Complainant and Cargill were present. Donohue was called as a witness by Connelly who questioned him about the incident. Cargill then questioned Donohue. After he finished testifying, Donohue left the hearing room. Complainant asked Connelly to call the judge and he declined to do so, but stated that Complainant and his union representative could call witnesses, including the judge. Complainant acknowledged that Connelly gave him the opportunity to call witnesses to respond to the charges against him. At the hearing, Complainant raised an issue about "black people" and Casey informed Connelly that he had resolved that issue.⁶ (Testimony of Connelly and Complainant)

60. Connelly determined that Donohue had no motive to lie and was credible and that the words Complainant was alleged to have used were the same words he had used in past disagreements with other officers. Connelly did not consider transferring Complainant once again to another court because he determined that Complainant had engaged in a continuing pattern of misbehavior and was unequivocally on notice by Connelly's previous warning that he would be given no more chances if his behavior continued. (Testimony of Connelly) I credit his testimony.

⁶ On October 6, 2009, Complainant wrote to Casey that he was offended when he heard an "acquaintance of Casey and [the other officer]" tell Casey and others that "blacks stabbed him up." Complainant said to the man, "You mean 'black *people*.'" The man, who was not a court employee, apologized to Complainant. Complainant sought Casey's assurances that such comments would not be tolerated. (Ex. C-2)

61. Cargill testified at the public hearing that he wanted to call Judge Bolden as a character witness for Complainant. However, Cargill never spoke to Judge Bolden or Clerk Magistrate Albertson about the matter, nor did he call them as witnesses. Complainant and Cargill “stipulated” at the time of the hearing that because none of Complainant’s potential witnesses overheard the confrontation, there was no need to call witnesses on Complainant’s behalf.⁷ (Testimony of Cargill)

62. Following the hearing, Connolly decided to terminate Complainant’s employment, considering his lengthy disciplinary record. On November 17, 2009, Connelly wrote to Complainant, “I credit Court Officer Donohue’s version of the incident. Officer Donohue has never had a problem with you until this incident. He has no motive and nothing to gain by this. I discredit your version of the incident where you deny using any profanity and inappropriate comments towards Officers Donohue and [the other court officer].” He further stated, “...you have been given multiple opportunities to correct your unacceptable behavior. However you continue to be uncooperative and irresponsible in your court officer duties. Your behavior will not be allowed to continue and will not be tolerated.” Connelly terminated Complainant’s employment effective immediately. (Ex. C-4; Testimony of Connelly)

63. During the relevant time period, African-Americans comprised approximately 16-17% of the total court officer workforce of 770, and minorities comprised approximately 25% of court officer personnel. (Testimony of Connelly)

64. From October 2003, when Connelly became acting director of security until November 2009, he terminated nine white officers and two black officers, including Complainant. (Testimony of Connelly)

⁷ Albertson testified credibly at the public hearing that she had never had problems with Complainant and learned of his termination from courthouse employees and had no first-hand knowledge of the incident between Complainant and Donohue.

Alleged Disparate Treatment of Black Officers

65. In September 2011, a white court officer was arrested for raping three female prisoners in Brooks Courthouse. He was placed on administrative leave with pay. When a criminal complaint issued in December 2011, he was placed on leave without pay. When he pled guilty to the charges he was terminated. (Testimony of Connelly)

66. Another white court officer in Superior Court was alleged to have sexually harassed a female probation officer. He was reassigned and suspended for five days in settlement with the union of the complaint of sexual harassment. He had previously been given a written warning for improperly using the court's name on his cell phone account. This officer recently received a three-week suspension for a domestic violence charge even though the charge was dismissed. (Testimony of Connelly)

67. Another white court officer was arrested in 2011 and arraigned for larceny and drug possession while on medical leave. He was placed on pre-trial probation for the larceny charge and the drug possession charges were dismissed. Although a disciplinary hearing was scheduled, he never returned to work because he filed for and received disability retirement for a back injury. (Testimony of Connelly)

68. A black court officer was involved in an incident with two court officers and two violent prisoners in lock-up that resulted in some injuries and culminated in an investigation by local and federal law enforcement. The officer was placed on a nine-month leave with pay during the investigation. The federal authorities found that no rights were violated and the officer was not disciplined.

69. A female black court officer claimed that a chief court officer assaulted her. The charges were not substantiated and no charges were brought against the alleged assailant. The

officer went out on stress leave, continues to receive worker's compensation and has not returned to work. She was not terminated and is still considered an employee of the trial court.

70. Another white court officer received a five-day suspension for using profanity toward a female assistant district attorney. (Testimony of Connelly)

71. Another black court officer voluntarily resigned from employment and changed careers and was not terminated by Respondent as alleged in Complainant's sworn MCAD complaint.

72. A black associate court officer resigned from employment and was not terminated by Connelly as alleged by Complainant in his sworn MCAD complaint.

73. Another black court officer cited in Complainant's MCAD complaint is still employed by the Respondent and was not terminated as alleged in the complaint.

74. A Cape Verdean court officer was terminated following a state police investigation for having an inappropriate relationship with a prisoner in her custody. Her termination was upheld by an arbitrator and by a court on appeal. She also filed an MCAD complaint which was dismissed.

75. Another Cape Verdean court officer filed an MCAD complaint against Connelly after Connelly asked him if he could not speak English. The complaint was dismissed for lack of probable cause.

76. Complainant alleged that commendations he received throughout his employment were absent from his personnel file. Connelly testified that personnel files were sometimes kept in the fiscal office or could be located in the court where a court officer was employed or could also be in Connelly's possession. He stated that court officers move from location to location and their files don't always follow them. He stated that the court kept poor records and new

personnel procedures were recently implemented requiring that notes, including commendations, to be kept in personnel files. (Testimony of Connelly; Ex. R-21)

77. Connelly testified credibly that it was important for court officers to work together cooperatively, to communicate with one another and to “have each other’s backs” in order to ensure the safety of court personnel and the public in the event of any emergency. He testified that Complainant’s inability to get along with coworkers and his long history of fighting with coworkers jeopardized the safety of the courtroom.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and color. Absent direct evidence of discrimination, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified persons not of his protected class were not treated in a like manner in circumstances that give rise to an inference of race and color discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Matthews v. Ocean Spray Cranberries, Inc., 326 Mass. 122, 129 (1997). Complainant contends that Respondent unlawfully terminated his employment without due process, that similarly situated white court officers received lesser discipline for comparable acts and that African-American court officers were generally treated more harshly than white court officers.

Complainant, who is African-American, is a member of a protected class by virtue of his race and color. However, I conclude that Complainant has failed to establish that he was adequately performing his job at the time of his termination. Throughout his employment,

Complainant engaged in repeated inappropriate conduct that included numerous arguments with coworkers, supervisors and judges, failure to appear for work without calling, showing an offensive personal video to jurors, and generally being insubordinate to superiors. Complainant was disciplined on numerous occasions including lengthy suspensions, one as long as 20 days. He was repeatedly warned that his job was in jeopardy and that any further incident could result in his termination. His employment was ultimately terminated as a result of an altercation with a coworker. The ability of a court officer to cooperate and get along with coworkers and to follow orders and abide by the directives of superiors to ensure an orderly, safe and calm atmosphere in the courthouse are, by all accounts, essential functions of the job. I find that Complainant's behavior was unprofessional, inappropriate and he failed to respect and abide by these essential requirements of the job. Hence, he has not proven that he was performing adequately and, given his inability to prove this element of his prima facie case, the inquiry could end here.

However, even assuming that Complainant were adequately performing his job, Complainant has failed to establish the fourth prong of his prima facie case; that similarly situated coworkers not in his protected class were treated differently than he. At the public hearing, Complainant was given wide latitude to support his allegations that African-American court officers were disciplined more harshly than white court officers and that white officers were granted more privileges than black officers. However, the evidence does not support Complainant's allegations regarding disparate discipline of white and African-American officers. Complainant offered vague and unsubstantiated testimony regarding white court officers who were allowed to take time off for personal matters, a benefit not extended to African-American officers. The evidence does not support these vague allegations. Additionally, Respondent refuted Complainant's claims that Connelly terminated several African-American and Cape

Verdean court officers. The evidence established that African-Americans and Cape Verdeans whom Complainant claimed had been terminated by Respondent had not been terminated. Similarly, white court officers whom Complainant claimed were treated less harshly than he were shown to have been disciplined.

Assuming, *arguendo*, that Complainant has established a prima facie case, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its decision. Abramian, supra, at 116-7. Here, Respondent has presented legitimate, non-discriminatory reasons for terminating Complainant's employment; that is, that Complainant's lengthy disciplinary record, involving arguing with coworkers, judges and supervisors, and numerous suspensions and warnings that his job was in jeopardy. All of Respondent's reasons justified Respondent's terminating Complainant's employment.

If Respondent meets this burden, Complainant must prove by a preponderance of the evidence that these reasons are a pretext and that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz at 501; Abramian, at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz at 501. Complainant retains the ultimate burden of proving that Respondents' adverse action was the result of discriminatory animus. Abramian at 117.

As evidence of pretext and discriminatory animus, Complainant alleged that letters of commendation he received from court personnel over the years were absent from his personnel file, suggesting that the letters were purposely omitted. Complainant submitted copies of such letters that were apparently in his possession. Connelly testified credibly that personnel files were maintained at the Trial Court's administrative offices; however, because court officers

transferred frequently either on bids or for disciplinary reasons, letters of commendation could also be kept by the chief court officer at any court where Complainant had worked. Connelly stated that Respondent was notorious for poor record keeping and had recently revised its rules regarding personnel files to require them to contain commendations. I do not find this shows pretext or intent to discriminate.

Complainant's central argument regarding pretext, however, appears to be that he was not accorded due process at the hearing presided over by Connelly that resulted in his termination. Complainant initially claimed that Connelly would not permit him to call witnesses at the hearing. However Complainant acknowledged at the public hearing before this commission that he and his union representative agreed not to call witnesses, as no one else appeared to have heard his argument with Donohue. Complainant also acknowledged that Connelly told him that he was free to call the judge as a witness but Complainant declined to do so.

There was no evidence that Respondent's actions were a pretext for discrimination or based on discriminatory animus. The overwhelming and uncontroverted evidence was that Complainant was given an extraordinary number of chances to conform to the rules of his job, yet he repeatedly flouted the rules by fighting with coworkers and superiors. On a number of occasions, Complainant was transferred in lieu of discipline and he was suspended when termination would have been justified. Connelly testified credibly that he terminated Complainant's employment because of his repeated infractions of the code of conduct expected of a court officer, his lengthy disciplinary record and the altercation with a coworker that ensued after a final warning. The evidence supports the conclusion that Complainant repeatedly demonstrated hostility and belligerence toward coworkers indicative of an unwillingness to get

along in a job where working in harmony is critical to the safety of the courthouse environment he was charged with protecting.

Given the evidence before me, I am not persuaded that Respondent acted out of unlawful motives and conclude that Respondent's termination of Complainant's employment was not based on his race and color and did not violate M.G.L. c.151B ¶(4).

IV. ORDER

For the reasons stated above, I hereby order that the complaint in this matter be dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review with the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 3rd day of April, 2014

JUDITH E. KAPLAN
Hearing Officer