

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MCDEE OKAFOR,
Complainants

v.

Docket No. 08 BEM 02654

THE SULLIVAN COMPANY
ET AL,

Respondents

Appearances: Jay Odunukwe, Esq. for Complainant
Kavita M. Goyal, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 16, 2008, McDee Okafor (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging Respondent Paul Sullivan and The Sullivan Company (“Respondents”) with race discrimination in violation of G.L.c.151B by subjecting him to differing terms and conditions of employment and terminating his employment relationship with the Respondent due to his race and color. Complainant charged that he was discriminatorily denied equal work hours, a pay increase and a performance evaluation due to his race and color. Complainant further alleged when he complained of such

mistreatment he was terminated from his employment.

On April 15, 2011, the Investigating Commissioner issued a split decision on Complainant's allegations. Probable cause was found against the Respondents on the question of disparate treatment in regards to the terms and conditions of employment. A lack of probable cause was found in regards to the allegations of discriminatory termination and retaliation. Conciliation efforts were unsuccessful, and a discovery order authorizing the parties to engage in discovery for a four (4) month period was issued on September 14, 2011. The matter was certified for public hearing on August 13, 2012. A pre-hearing conference was originally scheduled for November 29, 2012 but was rescheduled for January 18, 2013. Prior to the pre-hearing conference the Complainant filed a motion to continue the case in order to conduct discovery as Complainant had failed to submit discovery requests during the previously referenced discovery period. The motion as written was denied. As the sole issue to be determined by the hearing officer was the question of whether the Complainant was denied an annual review, a raise in pay and/or overtime hours due to his race and color, a limited discovery order was issued at the January 18, 2013 pre-hearing conference. The discovery order required the Respondent to submit to the Complainant :

- (a) Complainant's personnel file;
- (b) Dates of employment for the other 16 employees employed with Respondent during the relevant time period;
- (c) Dates of annual reviews of the other 16 employees employed with Respondent during the relevant time period;
- (d) Any information regarding any raises given to the other 16 employees during the relevant time period;

(e) Any proposed exhibits by Respondent.

The public hearing on the matter was scheduled for and held before me on August 20, and 21, 2013.¹ The Complainant and the Respondent(s) each testified on their own behalf. Respondent Owner Paul Sullivan testified on behalf of himself and the Sullivan Company. The parties submitted a total of thirty-one exhibits; one (1) joint exhibit, twenty-four (24) exhibits for Complainant and six (6) exhibits for Respondent. At the conclusion of the public hearing, the date for the submission of the each party's post hearing memorandum was set for October 11, 2013, with the parties having the opportunity to file a reply brief to the opposing party's initial memorandum by October 25, 2013. On October 10, 2013 the Complainant submitted a motion requesting an additional time frame of 30-45 days to submit the initial memorandum of law. On October 11, 2013 the Respondent submitted its post hearing memorandum. The Complainant's motion, as filed was not in compliance with 804 CMR 1.05(3). The motion as written, was denied with an order for new dates of submission issued by the Hearing Officer on October 18, 2013. The reasons for the denial as well as the new dates of submission of all memorandums, documents and motions are all specified in the Hearing Officer's order. The Complainant complied with the order and submitted his memorandum and a motion for sanctions against the Respondent within the time frame required by the order.

To the extent the testimony of the witnesses and the exhibits submitted are not in accord with my findings or are irrelevant to the question of disparate treatment in the terms and conditions of employment, they have not been considered. To the extent the parties' proposed findings are not in accord with or are irrelevant to the issue submitted and/or my subsequent

¹ At the time of the Hearing and until the end of January 2014, the undersigned served as a Chairman of the MCAD and was the Hearing Officer in this matter. By way of special designation by the current Chairman of the MCAD, the undersigned retained authority to issue this Hearing Officer decision.

findings, they are rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn there from, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant McDee Okafor is a black man who lives in Allston, MA. At the time he was hired for employment with Respondent (07/05/2006) Complainant had a Bachelor of Science Degree in Business Administration with a major in Marketing from the University of Massachusetts/Boston and Certificate of Professional Achievement in the Para-Legal program from Northeastern University. *(See Complainant's Exhibits 1 & 3)*
2. Complainant testified that he had finished the requirements for a degree in Masters of Architecture from Boston Architectural College in 2000. As the copy of his degree submitted by Complainant as an exhibit notes May 31, 2008 as the official graduation date, for the purposes of this controversy, that date shall be considered the official graduation date. *(See Complainant's Exh. 2)*
3. Complainant has a diverse work history. Prior to seeking employment with Respondent, Complainant had at various times in his life, driven cabs for a living, worked as a management trainee for T.J. Max, worked in an architectural design firm, worked as a Carpenter's apprentice and Carpenter, and worked as an installer for GutterMaxx. *(See Complainant's Exh. 4, also see testimony of McDee Okafor, Day 1 transcript pages 15-23)*
4. Respondent, The Sullivan Company was established by Respondent President/owner Paul Sullivan in 1988. Respondent company provides remodeling, construction and reconstruction services to individual and business customers. *(See testimony of Paul Sullivan, Day 2 transcript page 5.)*
5. Respondent The Sullivan Company employs individuals in field positions in carpentry, and

painting and in office positions in sales and administration. *See testimony of Paul Sullivan, Day 2 transcript page 10 .)*

6. Complainant applied for a position with Respondent company in response to an advertisement. Upon reviewing Complainant's resume and educational history, Paul Sullivan asked Complainant why he wanted to work with Respondent company. Complainant stated he wanted the work experience in carpentry as he believed the greatest architects had prior hands-on experience in carpentry. *(See testimony of McDee Okafor, Day 1 transcript pages 27, 28)*
7. Respondent offered Complainant a starting salary of \$18.00 per hour citing Complainant's relative lack of experience in carpentry. Complainant stated the salary was not a primary concern as his goal was to attain experience in carpentry in order to assist him in the field of architecture. Complainant agreed to the salary and was hired by Respondent as of July 5, 2006. *(See testimony of McDee Okafor, Day 1 transcript pages 27,28, and 41; also See testimony of Paul Sullivan, Day 2 transcript page 16.)*
8. The Complainant worked in the field alongside other carpenters and painters. He was assigned to various carpentry projects throughout his employment with Respondent company. *(See testimony of McDee Okafor, Day 1 transcript pages 27,28, and 41; also See testimony of Paul Sullivan, Day 2 transcript page 18.)*
9. The Complainant's dates of employment with the Sullivan Company were July 5, 2006 to May 16, 2008.
10. During the time period Complainant was employed with the Sullivan Company, there were approximately fourteen (14) other employees assigned to the field as carpenters and/or painters. *(See Complainant's Exh. 6,)*

11. During the time the Complainant was employed with the Respondent, there were two (2) negative incidents reported to Sullivan related to Complainant's use of the company van. *(See testimony of McDee Okafor, Day 1 transcript pages 76-77,81-83; See testimony of Paul Sullivan, Day 2 transcript pages 21- 28 .)*
12. Complainant did not receive a suspension, written warning or any other form of discipline for either of the incidents.
13. During the time period Complainant was employed with the Sullivan Company, Respondent did not have a consistent practice of reviewing the performance of its employees on an annual basis. *(See testimony of Paul Sullivan, Day 2 transcript pages 80- 82 .)*
14. During the time period Complainant was employed with the Sullivan Company, three (3) of the employees assigned to the field received annual reviews. *(See Complainant's Exh. 22, 23, and 24; also See testimony of Paul Sullivan, Day 2 transcript page 53,)*
15. During the time period Complainant was employed with the Sullivan Company, two (2) of the employees assigned to the field received a salary increase. *(See Complainant's Exh. 11- 18; Respondent's Exh. 4, 5)*
16. During the time period the Complainant was employed with the Sullivan Company, some employees received an annual review but did not receive a salary increase. *(See Complainant's Exh. 11- 18, 22-24; Respondent's Exh. 4, 5)*
17. During the time period the Complainant was employed with the Sullivan Company, some employees received a salary increase without a prior annual review. *(See Complainant's Exh. 11- 18, 22-24; Respondent's Exh. 4, 5; also see testimony of Paul Sullivan, Day 2 transcript page 92)*
18. During the time frame in question there was no direct correlation between receipt of an

annual review and receipt of a pay raise at the Sullivan Company. (*See Complainant's Exh. 11- 18, 22-24; Respondent's Exh. 4, 5; also see testimony of Paul Sullivan, Day 2 transcript page 92*)

19. It is undisputed that during the time Complainant was employed with Respondent, Complainant never received an annual review or a salary increase.
20. It is undisputed that during the time Complainant was employed with Respondent he never requested an annual review or a salary increase. (*See testimony of McDee Okafor, Day 1 transcript pages 54 and 55.*)
21. It is undisputed that during the time frame the Complainant was employed with Respondent the only request Complainant made was for additional hours. (*See testimony of McDee Okafor, Day 1 transcript pages 54 and 55.*)
22. The hours that Complainant was assigned to the field varied from week to week from less than 20 hours to more than 40 hours, as did the hours of other employees in the field.
23. Complainant remained employed with Respondent until May 16, 2008.
24. On May 16, 2008 Complainant received a call from his Supervisor asking him why he had not reported to a job site. (*See testimony of McDee Okafor, Day 1 transcript pages 72 and 73.*)
25. Complainant called Respondent Paul Sullivan and stated he had not been informed of the assignment at the beginning of the week, nor had he been informed of any change in schedule. (*See testimony of McDee Okafor, Day 1 transcript pages 72 and 73.*)
26. Respondent Sullivan informed him that the change in assignments had been emailed to him earlier in the week. (*See testimony of Paul Sullivan, Day 2 transcript pages 61, 62,)*
27. The parties both testified the conversation between Complainant and Sullivan became

heated.

28. During the conversation Mr. Sullivan stated he did not like Mr. Okafor's tone of voice. (*See testimony of McDee Okafor, Day 1 transcript pages 74; See testimony of Paul Sullivan, Day 2 transcript pages 62-63.*)
29. After the phone call ended, Sullivan called Mr. Okafor back, told him "I cannot have an employee talking to me like that" and informed Mr. Okafor that he was "letting him go" (*See testimony of McDee Okafor, Day 1 transcript pages 74,17*)
30. It is undisputed that during one of the two conversations Mr. Okafor demanded a performance review. Neither party offered any testimony or evidence that Mr. Okafor ever expressed a belief he did not receive a performance review due to his protected class status.

III. CONCLUSIONS OF LAW

Disparate Treatment Race Discrimination

In the case before the Commission, probable cause was established only in regards to the issue of whether the Complainant experienced disparate treatment in the terms and conditions of employment. In order to prevail on a charge of discrimination in employment based on race and/or color under M.G.L. c. 151B, s. 4(1), Complainant may establish a prima facie case by showing that he: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of his protected class. See *Lipchitz v. Raytheon Company*, 434 Mass. 493 (2001); *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); *Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000). The

Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as “not onerous,” requiring only that a qualified individual establish circumstances “which give rise to an inference of unlawful discrimination.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Complainant has satisfied the first prong in that he has established his membership in a protected class, Complainant has also established to the satisfaction of this hearing officer that he performed his duties in a satisfactory manner. Though Respondent may point to the two driving related incidents as evidence of poor work performance, the evidence and testimony presented indicate the Respondent did not discipline the Complainant for either incident. Indeed, though Respondent Paul Sullivan testified the incidents were a factor in the decision to terminate Mr. Okafor's employment, Respondent's termination decision came approximately one year after the last incident occurred. At no time did the Respondent indicate that he contemplated terminating the Complainant for the alleged traffic infractions prior to May 16, 2008.²

The Complainant cannot however establish a prima facie case of disparate treatment in the workplace based on his protected class. The Complainant has not established disparate treatment based on his race regarding work hours offered, annual reviews issued or pay raises offered. The Complainant has not established disparate treatment based on his race with respect to work hours offered. The evidence and testimony at the Hearing demonstrated that inconsistent hours were the rule rather than the exception for all of the employees at the Sullivan Company. Evidence showed that job assignments and hours for the majority of the employees varied from week to week. The Company often attempted to buttress employee's schedules with additional last minute and holiday assignments. Indeed as the Complainant pointed out, the Respondent's

² The claim of discriminatory termination is not before me as it was dismissed by the Investigating Commissioner.

practice of giving employees holiday and other extra assignments caused the Company to go afoul of the Fair Labor Standards Act's overtime provisions. The Complainant also failed to establish disparate treatment on account of his race in regards to the issuing of an annual review. The Complainant testified to his belief that the majority of employees had received an annual review, however he did not offer the testimony of a single witness, affidavit of any employee or any other document to prove his allegations. The fact finder must rely on the evidence and testimony in the record which clearly shows that during the time frame the Complainant was in the Respondent's employ only three (3) of the employees assigned to the field as either carpenters or painters were given any form of a performance review. Not one of the three employees that received a review received two (2) reviews during the nearly two (2) year time period, so no employee received an annual review.

The Complainant has not established disparate treatment based on his race with respect to employees being offered a raise in salary. As was with the allegation regarding annual reviews, the Complainant testified to his belief that the majority of employees had received a raise; however again, he did not offer the testimony of a single witness, any employee's affidavit or any other document to prove his allegations. The evidence submitted by Respondent shows that in the time period the Complainant was employed with the Respondent (07/05/2006-05/16/2008) only two (2) employees received a raise in salary.

While the Complainant was able to make a prima facie showing that he was paid at a lower rate than other carpenters employed by Respondent who were not in his protected class, the evidence established that Respondents had a non-discriminatory reason for the discrepancy in pay. Complainant testified that Respondent Sullivan offered him a starting salary of \$18.00 per hour because of his relative lack of experience in carpentry, and that he told Sullivan that

salary was not a primary concern as his goal was to attain carpentry experience in order to assist him in the field of architecture. Complainant agreed to the salary offered and was subsequently hired by Respondent effective July 5, 2006. (*See testimony of McDee Okafor, Day 1 transcript pages 27,28, and 41; also See testimony of Paul Sullivan, Day 2 transcript page 16.*). Prior to the instant complaint he never complained thereafter to Respondent Sullivan about his salary being discriminatory.

Given the evidence presented I conclude that:

(1) Complainant, McDee Okafor was not treated in a disparate manner on the basis of his protected class status.

(2) Respondent's business practices and decisions with respect to annual reviews and salary increases do not evidence any form of discriminatory animus.

(3) Respondent had a legitimate non-discriminatory reason for offering Complainant a lower salary as a carpenter based on his lack of experience as a carpenter.

(4) Complainant has failed to show pretext in regards to Respondents' reasons for paying him a lower salary than other carpenters. The Complainant has not established any disparate treatment in the terms and conditions of employment based on his membership in a protected class. I therefore conclude that Respondent(s) did not engage in any act in violation of G.L. c. 151B s. 4(1) and determine that this matter shall be dismissed.

V. ORDER

For the reasons stated above, the complaint in this matter 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 17th day of September, 2014.

Julian T. Tynes, Esq.,
Hearing Officer