UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHELLE DIMANCHE, Plaintiff, v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, WILLIAM MCCLELLAN, STEPHANIE BRADE, SHERYL REGISTER, MAXINE BELL, FRED OLSON AND CHERYL ANDERSON, Defendants.	*	C.A. No.: 1:15-CV-10037-WGY

MS. DIMANCHE'S OPPOSITION TO THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY'S SUMMARY JUDGMENT MOTION

Plaintiff, Michelle Dimanche, hereby files her opposition to the summary judgment motion of the Massachusetts Bay Transportation Authority ("MBTA"). Briefly stated the motion should be denied because white superiors have discriminated against her because she is black and Haitian and in retaliation for her filing MCAD complaints as part of her effort to stop the discriminatory conduct.

INTRODUCTION

The MBTA seeks to avoid the fact that it discriminated against Ms. Dimanche by contending that essentially all of the underling complaints arose from black or African American females. What the MBTA omits is that all of the individuals who addressed the complaints and terminated her had been white. Many had engaged in discriminatory behavior before the termination, some of the individuals had been subject to MCAD actions initiated by Ms. Dimanche, which resulted in recovery for her, many of the

investigations as to her so-called "warnings" had missing or discarded data, which included at least one important witness statement, and the allegations submitted by the black and African American women had been without foundation and on which no one could base a termination decision. In addition, Ms. Dimanche received workers' compensation benefits for emotional distress emanating from racial harassment which had occurred in the past. The Workers' Compensation Administrative judge found that a MBTA witness had lied and that she had been subjected to racially discriminatory treatment.

Also important is that the MBTA's conduct demonstrates its discriminatory animus. An MBTA witness has testified in court and in his deposition that Michael Napoli, a white MBTA investigator, called him a nigger. The MBTA should discharge such an individual for such conduct. Mr. Napoli never even has been disciplined by his white superiors. Accordingly, the MBTA's arguments in this case lack any merit whatsoever.

UNDISPUTED FACTS

Ms. Dimanche is forty-three years old and is of Haitian descent. She is the single mother of three children who are very well behaved. She is quiet and overly respectful to others. She had worked at the MBTA as a driver for thirteen years prior to her termination. RSOUF, ¶ 1.

During her employment Ms. Dimanche had been subjected to racial discrimination. Unlike many other black or African American employees she initiated MCAD actions to cause the behavior to stop. She is a proud woman who does not feel

that an black or African American woman should be subjected to such treatment. The MBTA paid Ms. Dimanche amounts as to resolution of the MCAD actions. RSOUF, ¶ 3.

In 2010, the racial harassment became so bad that Ms. Dimanche needed to take a medical leave of absence to treat the resulting anxiety and emotional distress which she had suffered. The Workers Compensation justice agreed that Ms. Dimanche had been subjected to discriminatory harassment which entitled her to recovery. RSOUF, ¶ 40.

The MBTA now claims that it is as pure as virgin snow and that no discrimination ever occurred as to Ms. Dimanche. Respectfully, the MBTA's position simply is untruthful as had been its contentions in the workers compensation matter. The white workers at the MBTA had engaged in a retaliatory and discriminatory assault on Ms. Dimanche to the point where they terminated her. RSOUF, ¶ 3, 5.

The Available Evidence Demonstrates That Ms. Dimanche Did Not Close Doors on a Passenger in April 2012 and That This Issue Never Should Have Been One of the Three Warnings on Which the MBTA Could Have Relied to Terminate Her.

The MBTA contends that Ms. Dimanche had engaged in certain deficiencies over time which led to the issuance of "warnings." The accumulation of such warnings caused one in April 12, 2012 to be deemed final. No such ground to do so because one warning in April 2012, in addition to other warnings, had no basis and obviously had been without any foundation and discriminatory. RSOUF, ¶ 154-60.

What the MBTA fails to note is that it manufactured such contentions as to "deficiencies" only as a means to discharge her. For example, as to the April 2012 "incident," the MBTA alleges that a passenger had been injured by a door closing on her leg at the Riverside, Massachusetts stop. No statement from any such passenger exists or is offered by the MBTA. RSOUF, ¶ 155. At the Riverside stop on the day of the alleged

incident, Ms. Dimanche also had been operating the front trolley of a two car train. A separate operator, Perry Spencer, who is African American, drove the second car. He saw Ms. Dimanche's car proceed into the station, saw the passengers depart the train, and saw that no one had been touched by a door or injured, and that "nothing happened." RSOUF, ¶ 154, 156, 160. He filled out a statement which somehow disappeared. RSOUF, ¶ 154.

Any superior reviewing this incident would have relied primarily on Mr. Spencer's statement. Mr. Spencer had been the only individual who would have viewed what had occurred. The investigator, however, never even mentions Mr. Spencer. RSOUF, ¶¶ 154-156. This failure also is significant because the MBTA relies on statements of other witnesses as to other incidents as to other events concerning Ms. Dimanche but fails to address Mr. Spencer's statement at all. See infra pp. _.

Also important is that the MBTA claims that it had possessed a videotape of the April 2012 incident. That tape, however, no longer exists and is not submitted in support of the MBTA's position. The reason is that it did not show Ms. Dimanche driving the car which hit a passenger. The videotape showed a different individual wearing a baseball cap driving the relevant car. Ms. Dimanche does not wear a baseball cap at work. RSOUF, ¶ 156. Ms. Dimanche reviewed the video and saw that the driver had not been her. RSOUF, ¶ 156. The superior never included this information in the report. RSOUF, ¶¶ 154, 156.

This incident never should have caused a "final warning" to issue as to Ms. Dimanche. She simply never hit or injured anyone. The entire report had been fraudulent and manufactured. Ms. Dimanche refused to sign it. RSOUF, ¶ 158.

Accordingly, this incident should not have been included as one of three deficiencies which caused it to be deemed final. Thus, no final warning should have existed at the time of the January 2013 incident on which the MBTA relied to terminate her.

The January 5, 2012 Suspension Had Been Based on Facts as to Which No Employee Should Have Been Subjected to Discipline.

The MBTA states that Ms. Dimanche had been suspended on January 5, 2012 for five days because she committed four items requiring discipline. RSOUF, ¶¶ 170-73. The first concerns Ms. Dimanche making a complaint that Maxine Bell and Stephanie Anderson had made profane comments. Ms. Dimanche reported the comments to her supervisor, Fred Olson, who is white. Ms. Bell denied making the comment. Her friends also stated that no such comment had been made. RSOUF, ¶¶ 111-23.

Mr. Olson then stated that Ms. Dimanche's statement had been fabricated. He then contended that Ms. Dimanche had submitted a "false report." Initially, profanity is used regularly by all who work at the MBTA. To suggest that someone could be disciplined for suggesting that someone used profanity simply is impossible to understand. RSOUF, ¶ 118. In addition, people at the MBTA never are not disciplined for submitting a false record as to an individual using profanity. RSOUF, ¶ 118.[1]

The second incident involved Ms. Dimanche bringing to her trolley a cup of what a white inspector believed to be coffee. Respectfully, every operator at the MBTA brings coffee, soda, and even lunch on the trains. RSOUF, ¶ 172. Those actions simply are an accepted practice at the MBTA. Moreover, Ms. Dimanche had been brining water with

[1]How the MBTA even could address the statements of Ms. Register and her friends is difficult to understand when the MBTA had ignored and even discarded the statement of Mr. Spencer as to the April 2012 incident. RSOUF ¶¶ 154, 156, 160.

her to treat a throat condition which is evidenced by permanent swelling on her neck. RSOUF, ¶ 172.

The third incident concerned two customers allegedly complaining on December 8, 2011 about Ms. Dimanche not waiting for an elderly passenger. Respectfully, this incident never occurred. The MBTA contends that situation occurred at a quiet stop in Mattapan. Ms. Dimanche had visited that stop, boarded passengers, and departed. She did not leave any elderly person on the platform. No customers ever complained to her. RSOUF, ¶ 172. Accordingly, there is absolutely no evidence that Ms. Dimanche had been rude or unkind to any passenger which she had not.[2]

On January 3, 2012, Chief Inspector Corfy, who is white, indicated that car 3663 and not car 3694, which Ms. Dimanche operated, needed to move to a certain location at the Government Center station. Inspector Corfy never referred to the correct number of the car which Ms. Dimanche had been operating. Doing so is required. RSOUF, ¶ 172.

Ms. Dimanche also could not comply with the request in any event because Mr. Corfy had failed to activate the switch which would have permitted Ms. Dimanche to take the track requested Mr. Corfy made the error as to this incident, not Ms. Dimanche. RSOUF, ¶ 172. Accordingly, Mr. Corfy simply is being untruthful. Thus, the entire January 2012 complaint had been unfounded as to which the white MBTA superior had been aware.

[2]Also important to note is that the MBTA reviews numerous customer complaints. It does not act on many of the complaints. For some reason, the MBTA contends that elected to investigate Ms. Dimanche when no such grounds justify such an investigation ever existed. RSOUF, ¶ 154.

The January 25, 2013 Investigation Is Based on Lies
Which Are Apparent in the "Witness" Statements and Is Grounded
in an Investigation Poisoned By Those Who Had Engaged in
Discriminatory Conduct Against Ms. Dimanche.

As grounds for her termination, the MBTA then contended that Ms. Dimanche approached Ms. Gilberthe Pierre-Millien on January 25, 2013 at the Riverside office, grabbed a route book from Ms. Pierre-Millen's hands, and then engaged in an argument where each exchanged words. The MBTA then alleges that Ms. Dimanche and Ms. Pierre-Millen exited the office to the Riverside lobby where Ms. Pierre-Millen claims Ms. Dimanche spat at her. RSOUF, ¶¶ 5-24.

The problem with this scenario is that the witness statements do not support the story. The MBTA employees simply failed to make their lies consistent. Initially, Ms. Pierre-Millen's and Ms. Dimanche's statements are consistent. Ms. Pierre-Millen stated that she had been writing down her delay time when Ms. Dimanche entered the office. Ms. Dimanche stated the same as well. RSOUF, ¶ 5. Because Ms. Pierre-Millen had been writing down her delay time she could not have been holding the book. She needed to have been leaning over a desk to write down her delay time. The book needed to be on the desk.

Ms. Dimanche also had indicated in her statement that she said excuse me to Ms. Pierre-Millen before approaching and picking up the book. Ms. Pierre-Millen also says that Ms. Dimanche said excuse me when she picked up the book.[3] Ms. Dimanche obviously did no as a matter of courtesy. RSOUF, ¶¶ 5, 7, 9-24. Ms. Pierre-Millen also states that Ms. Dimanche said that she did not see Ms. Pierre-Millen using the book as to

[3] Ms. Pierre-Millen also is Haitian. She may be referring to Ms. Dimanche saying "excuse me."

writing her delay time. Ms. Dimanche stated the same when she indicated that she did not see Ms. Pierre-Millen using the book. RSOUF, ¶¶ 5, 7, 9-24.

Ms. Pierre-Millen, and not Ms. Dimanche, then began a verbal exchange. RSOUF, ¶¶ 5, 7, 9-24. Ms. Pierre-Millen admitted that she then stated that she asked Ms. Dimanche what was her problem. Ms. Dimanche states that Ms. Pierre-Millen posed such a question but said to Ms. Dimanche "what is your fucking problem." RSOUF, ¶ 11.

Even more confusing is that James Civil offers a statement that he and Ms. Pierre-Millen had been having a casual conversation apparently after the alleged verbal altercation in the office between Ms. Dimanche and Ms. Pierre-Millen had begun. What is impossible to understand is that how such a conversation could occur when, as Ms. Pierre-Millien indicates in her statement that the argument continued as Ms. Dimanche and Ms. Pierre-Millen proceeded from the office into the lobby where it continued. No time existed for Mr. Civil to sit down and have a conversation with Ms. Pierre-Millen. His statement simply is contrived. RSOUF, ¶ 5.

Thereafter, the MBTA contends that Ms. Dimanche spat at Ms. Pierre-Millen. No witness ever saw who spat. Ms. Dimanche had denied spitting at Ms. Pierre-Millen. What is important to note is that Karen Roche, on the MBTA motorwoman, submitted a statement indicating that she viewed a "verbal altercation" between Ms. Dimanche and Ms. Pierre-Millien in the lobby. She offers no averment as to anyone spitting, which she easily could have seen. RSOUF, ¶ 23.

The MBTA inspector, however, stated that Ms. Dimanche admitted in a subsequent interview with him as to spitting at Ms. Pierre-Millen. Ms. Dimanche denies

that she ever made any such statement. The white investigator then relied on that so-called "statement" of Ms. Dimanche as a ground to terminate her. Ms. Pierre-Millen received no discipline whatsoever. RSOUF, ¶¶ 34-40.

Also appalling is that the MBTA police called security and asked it to pick up Ms. Dimanche and bring her back to the Riverside station. They then located Ms. Dimanche, who had been completing her route as planned, placed her in the backseat of a squad car, and drove her back to the station. RSOUF, ¶ 33. Ms. Dimanche indicated to the police that she did not spit at Ms. Pierre-Millien. Ms. Dimanche told them to check the spit to verify. They never did. RSOUF, ¶ 33.

Also important to note is that Ms. Pierre-Millen is a very difficult employee. She had acted inappropriately and aggressively toward Ms. Dimanche in the past. RSOUF, ¶ 8. In fact, in January 2012, Ms. Dimanche had filed a complaint as to Ms. Pierre-Millen attacking Ms. Dimanche verbally. The MBTA ignored the complaint. The MBTA also failed even to reference the complaint in its investigation. RSOUF, ¶ 8.

In addition, white workers had fought on many occasions and never had been subjected to discipline. One male worker hit a woman and had not been subjected to discipline. RSOUF, ¶ 35. Ms. Dimanche and Ms. Davis, a former MBTA employee, had seen fist fights between white employees. None ever had been disciplined. RSOUF, ¶ 35. Accordingly, there had been no reason whatsoever to discharge Ms. Dimanche for a verbal argument with Ms. Pierre-Millien.

The conduct of whites simply is tolerated on the Green Line and no discipline is imposed. White inspectors had beat a man on a train mercilessly for no reason. White supervisors pressure black female employees into having sex under the threat that they

could lose their jobs. Statements of black witnesses are lost as to investigations. Profanity as to minorities is uttered in the open. The black employees simply need to tolerate this behavior to keep their positions and to be promoted. The discriminatory environment simply is appalling. RSOUF, ¶¶ 5, 22, 35, 37, 40-41, 44-45, 154, 156, 160, 172.

Other Acts of Discrimination

Ms. Dimanche had been subjected to other discriminatory behavior in the past. For example, Joe Napoli, a white inspector, had called Ms. Dimanche a nigger on several occasions in checking on the day of Ms. Dimanche's discipline in February 2013. RSOUF, ¶ 5. That behavior is consistent with other behavior he had exhibited in the part as to at least one other African American worker, Perry Spencer. Mr. Napoli had called Mr. Spencer a mulie, which is the Italian word for nigger. RSOUF, ¶ 5.

White inspectors and supervisors yelled at Ms. Dimanche and called her a black bitch, cuckoo, dumb, and other names. Mr. Foster repeatedly gave her the finger. RSOUF, ¶ 5. White MBTA inspectors also disobeyed an MBTA directive and told Ms. Dimance to park trains in a distant lot where a sexual assault had occurred. RSOUF, ¶ 5.

White superiors, such as William McClellan, who is the director of the Green Line, had stated that he would get that "black bitch" (Ms. Dimanche) fired. Mr. McClellan signed the paper as to her termination. RSOUF, ¶ 5.

ARGUMENT

1. MBTA Has Failed to Satisfy the Summary Judgment Standard.

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

of law." Fed. R. Civ. P. 56(a). The non-moving party must set forth specific facts showing there is a genuine issue for trial. Barbour v. Dynamics Research Corp., 63 F.3d 32, 37 (1st Cir. 1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The Court is "obliged to view the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor." LeBlanc v. Great American Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993). For a factual dispute to be "genuine," the "evidence relevant to the issue, viewed in the light most flattering to the party opposing the motion, must be sufficiently open-ended to permit a rational fact finder to resolve the issue in favor of either side." Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 711, 737 (1st Cir. 1995) (citation omitted). In the present case, genuine issues of material fact exist as to whether Ms. Dimanche had been subjected to racial discrimination.

2. Ms. Dimanche Has Set Forth a Prima Facie Case.

To establish a prima facie case for race discrimination under 42 U.S.C. § 1981 and Mass. Gen. Laws Ch. 151B, a plaintiff need only offer circumstantial evidence suggesting: (i) she is a member of a protected class, (ii) she was qualified for the employment she held, (iii) she suffered an adverse employment action, and (iv) there must be some evidence of a causal connection between membership in the protected class and the adverse employment action. Bhatti v. Trustees of Boston Univ., 659 F.3d 64, 70-71 (1st Cir. 2011). The showing which a plaintiff must make to establish a prima facie case is "small," "not onerous," and easily made." Briddell v. Saint-Gobain Abrasives, Inc., 2007 U.S. Dist. LEXIS 26829 * 18 (D. Mass. March 30, 2007). If the plaintiff demonstrates a prima facie case, the defendant must articulate a legitimate

nondiscriminatory reasons for termination. If the defendant articulates such a reason, the plaintiff must demonstrate that the reason is a pretext and that he had been treated adversely because of his race. Briddell, 2007 U.S. Dist. LEXIS *16-18.

In the present case, Ms. Dimanche, a black Haitian woman, is a member of protected class. She indisputably had been satisfactory employee because she had served as a motorman for thirteen years. She also suffered adverse employment events through loss of her position and harassment by fellow employees based on her race. See infra, pp. 15-16. Race discrimination also caused those adverse situations to arise based on conduct of MBTA employees, a pattern of lies, comparator conduct, and lack of foundation for the alleged events. See infra pp. 16-20. Accordingly, Ms. Dimanche has set forth a prima facie case.

3. MBTA's Alleged Justification Is Pretextual.

To establish that the employer's reason is a pretext, the burden shifts back to the employee to show that the employer's proffered reason is a "'a cover-up' for a 'discriminatory decision.'" Briddell, 2007 U.S Dist. LEXIS 21-22 (citing Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 6 (1st Cir. 2000)). The employee must demonstrate both that the articulated reason is "a pretext and that the true reason is discriminatory." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000). When considering evidence of pretext, the Court must keep in mind that "courts should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent." See id.

Disparate treatment evidence is one of "[t]he most probative means of establishing that the plaintiff's termination was a pretext for discrimination." Matthews

v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997). See also Pagano v. Frank, 983 F.2d 343, 348 (1st Cir. 1993). To make a showing of disparate treatment, plaintiff must point to another person, similarly situated to him in all relevant respects, "who was 'treated' differently by the employer." Conward v. Cambridge School Comm., 171 F.3d 12, 20 (1st Cir. 1999). "The comparison cases need not be perfect replicas." Rodriquez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 21 (1st Cir. 1999). Rather, plaintiff must show that the comparison employees "have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Id. The test is "whether a 'prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." Id. (quoting Dartmouth Review v. Dartmouth College, 889 F.2d 13, 9 (1st Cir. 1989)).

Evidence of a company's general atmosphere of discrimination also may be considered along with any other evidence bearing on motive in deciding whether a plaintiff has met [his] burden of showing that the defendants' reasons are pretexts." Santiago-Ramos, 217 F.3d at 55 (emphasis in original). A plaintiff also can "establish pretext by showing 'weaknesses, implausibility's, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons' such that a fact finder could 'infer that the employer did not act for the asserted nondiscriminatory reasons.' Id. at 56.

The evidence demonstrates that white comparators had engaged in similar conduct as to which no discipline ever resulted. White individuals engaged in fist fights and physical altercations as to which no discipline ever had resulted. Ms. Dimanche,

however, had been terminated only because she had a verbal argument with another worker in which the MBTA alleged that a worker had spat but did not hit anyone. Initially, the basis for the contention is far fetched and implausible in that no one should be disciplined, never mind terminated, for such a verbal action especially where people swear at each other on a continuing basis.

In addition, no evidence whatsoever exists that Ms. Dimanche spat at Ms. Pierre-Millien. In fact the inspector, Mr. Timmons, misrepresented that Ms. Dimanche had spat at Ms. Pierre-Millien. Ms. Dimanche denies ever making any such statement and denies vehemently that she spat. Even more important is that Ms. Pierre-Millien had not been disciplined in any way for her participation while Ms. Dimanche had been terminated.

As to the January 2012 "warning," MBTA workers had a known and obvious practice of carrying drinks and food on to trolleys. Mr. Dimanche, however, had been disciplined for carrying a cup of water. No basis whatsoever existed for that warning.

Ms. Dimanche also had been disciplined for submitting a "false statement" as to an employee uttering a profane comment. Such a contention is difficult to understand because profanity is regularly used at work. More important is that no employee ever is disciplined to submitting a false statement especially as to the use of profanity.

Ms. Dimanche also became disciplined by a white inspector for not following his direction even though he failed to communicate the correct car number designation to Ms. Dimanche and most important failed to activate the switch which would have permitted Ms. Dimanche's car to take the so-called desired route. Any witness could have relayed that information as to the switch yet no statements had been obtained.

The MBTA claims that Ms. Dimanche had an altercation with Sheryl Anderson as to when an overtime shift would begin. The MBTA, however, had paid Ms. Dimanche for the time she invested as to appear for the shift. The MBTA also disciplined Ms. Register for being unclear as to her direction.

Ms. Dimanche also never had been rude to any passengers as to the desire of an elderly patient to board a train in Mattapan. No witness statements exist. The only witness Ms. Dimanche who claims that the incident never happened.

The foregoing is supported by the evidence of discriminatory conduct occurring repeatedly at the MBTA. A worker's compensation judge found that an MBTA witness had lied as to her contention that he had not engaged in discrimination as to Ms. Dimanche. White supervisors pressure black women into engaging in sex to keep their jobs. White workers are not disciplined for having fist fights. In fact, the MBTA permitted white inspectors to mercilessly beat a man for no reason. The MBTA also allows white workers to call black people niggers and black bitches and receive no discipline whatsoever. In fact, the MBTA fails even to investigate whether such comments even had been uttered.

The conduct of white supervisors not only is discriminatory but never should occur in any work environment. The use of the term "nigger" should be automatic grounds for termination. Calling a woman a "black bitch" or contending that a black woman engages in "voodoo" is a clear insult to an individual based on the color of her skin and also should constitute grounds for termination.

Contending that a black workers made a statement in an interview when it never occurred simply is outrageous especially when it then is relied upon to discharge her. A

white supervisor stating that he will discharge a "black bitch" simply is wrong especially where that individual now is the director of the Green Line.

Moreover, other acts of discrimination as to Ms. Dimanche also had been outrageous. By telling Ms. Dimanche to park cars alone at the Riverside yard after the MBTA had precluded such activities following a sexual assault in that area had been outrageous. It had occurred only to put her in a position for such an attack. Constantly ridiculing Ms. Dimanche on the radio and otherwise had been appalling. Monitoring her behavior only as a means to trump up charges on which the MBTA hoped to rely as grounds for discipline and ultimately termination clearly is discriminatory.

4. Ms. Dimanche Suffered Adverse Employment Action.

Ms. Dimanche suffered adverse employment action in at least two ways: (1) she lost her position; and (2) she needed to tolerate harassment by fellow employees. Loss of position as the result of discrimination constitutes adverse employment action. Mahoe v. Operating Engineers Local Union No. 3, 2013 U.S. Dist. LEXIS 139912 * 12-13 (D. Hawaii Sept. 27, 2013); Chuang v. Univ. of Cal. Davis Bd. Of Trustees, 225 F.3d 1115, 1126 (9th Cir. 2000). See also Gu v. Boston Police Dep't, 312 F.3d 6, 14-15 (1st Cir. 2002) (adverse employment action where there is change in terms and conditions of employment).

5. Ms. Dimanche Has Needed to Tolerate Racial Harassment By Fellow Employees.

Ms. Dimanche's mistreatment is an obvious indicator that he has needed to tolerate racial harassment by the MBTA. As noted above, this conduct has continued for years. The treatment concerns not only her termination but the work environment as well. Being called a nigger, black bitch, and other derogatory terms is a clear indication

as to racial discrimination. Green v. Harvard Vanguard, Mass. App. C. _, _ ( ). The constant ridicule and mistreatment b white superiors had been egregious. Accordingly, Ms. Dimanche had been subject to a hostile work environment.

6. MBTA's Conduct Caused the Discrimination to Occur

In proving causation, the conscious intention of MBTA to discriminate is irrelevant and unneeded. Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-59 (1st Cir. 1999). As the court in Thomas held:

> The ultimate question is whether the employee has been treated disparately "because of race." This is so regardless of whether the employer consciously intended to base [its conduct] on race, or simply did so because of unthinking stereotypes or bias.

Thomas, 183 F.3d at 58-59. See also Robinson v. Polaroid Corp., 732 F.2d 1010, 1015 (1st Cir. 1984) (noting that plaintiffs in a disparate treatment case can challenge "subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white managers"); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 179 (1st Cir. 1978) (permitting a challenge to a decision process in which "bias may often be unconscious and unexpressed"), vacated on other grounds, 439 U.S. 24, 24 (1978), aff'd after remand, 604 F.2d 106, 114 (1st Cir. 1979) (noting again that discrimination includes "the practice, whether conscious or unconscious of subjecting [minorities] to higher standards of evaluation than are applied to [white employees."]); Rodriquez-Cueruos v. Wal-Mart Stores, Inc., 181 F.3d 15, 19 (1st Cir. 1999) (same).

In the present case, more than sufficient evidence exits indicating that the discriminatory conduct caused the warnings to issue to Ms. Dimanche and caused her

termination. In any event the evidence need not be so clear in a case such as the present in any event.[4]

7. Mass. Gen. Laws Ch. 151B Requires Only that a Disputed Issue of Fact Exist as to Whether One of the MBTA's Proferred Reasons for Termination Is False.

Under Massachusetts law, a plaintiff need only demonstrate that a disputed issue of fact exists as to whether one or more of the employer's reasons for termination is false. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 98 (2009). Evidence needed to create such a disputed issue includes a statement by a decision maker, or an individual who could advise a decision maker indicating that individuals in plaintiff's category had been targeted for termination. Woodman v. Haemonetics Corp. 51 F.3d 1087, 1094-95 (1st Cir. 1995); Revira-Rodriguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 27 (1st Cir. 2001); Shorette v. Rite Aid, 155 F.3d 8, 13 (1st Cir. 1998). See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000); Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986) (questionable issues show pretext); Hallquest v. Local 276, 843 F.2d 18, 24 (1st Cir. 1988) (reason may lack evidence); Diaz v. Jiten Hotel Mgt., 762 F. Supp.2d 319, 339 (D. Mass. (2011) (decision by decision maker or one who influences decision maker).

Pretext can be shown by such weaknesses, implausibility's, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons. Gomez-González v. Rural Opportunities, Inc., 626 F.3d 654, 662-63 (1st Cir. 2010).

[4] Racial discrimination claims are not subject to any grievance procedure. Jenkins v. United Airlines, Inc., 1995 U.S. Dist. LEXIS 14902 * 3-4 (D. Mass. 1995). Accordingly, the Collective Bargaining Agreement has no relevance to ms. Dimanche.

Questionable reasons for the termination also infer lack of credence and create an issue of fact as to whether the grounds had been pretextual. Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 65 (1st Cir. 1986).

As noted above, numerous weakness implausibility's and inconsistencies exist as to the MBTA's contention. In addition, many of the contentions are incorrect and evidence has been lost, discarded or destroyed. Accordingly, the MBTA's contentions are pretextual.

8. The Statute of Limitations Does Not Bar Ms. Dimanche's Claims

The continuing violation doctrine, which is an equitable exception to the limitations period, is applicable when a discriminatory practice has been occurring on an ongoing basis. Megwinoff v. Vizcaya, 233 F.3d 73, 75-76 (1st Cir. 2000); Thornton v. United Parcel Service, Inc., 587 F.3d 27, 33-34 (1st Cir. 2009). Ms. Dimanche has alleged discrimination as to her termination comments and other discriminatory actions which occurred within the three year period preceding the filing of her complaint. In addition, the evidence indicates that the discrimination had been ongoing for years. Accordingly, all actions may be considered.

CONCLUSION

For the reasons set forth above, Defendant's motion should be denied.

MICHELLE DIMANCHE,

By her attorney,

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Dated: July 25, 2016

CERTIFICATE OF SERVICE

I, Christopher J. Trombetta, do hereby certify that on July 25, 2016 a copy of the foregoing document has been served via electronic mail on opposing counsel in this action.

/s/ Christopher J. Trombetta
Christopher J. Trombetta