

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and GYPSY ANN RODRIGUEZ,
Complainant

v.

DOCKET NO. 00230431

NATIONWIDE WAREHOUSE & STORAGE, LLC,
GREGORY DAVIS, and ANGEL RIVERA,
Respondents

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Michelle M. Begley, Esq., for Complainant
John Liebel, Esq., for Respondent

PROCEDURAL HISTORY

On July 1, 2000, Complainant Gypsy Ann Rodriguez (“Rodriguez” or “Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”) against her former employer, Nationwide Warehouse & Storage, LLC (“Nationwide Warehouse” or “Respondent”), and two supervisors employed by Respondent, Greg Davis (“Davis”) and Angel Rivera (“Rivera”). In her complaint, Rodriguez alleged that Respondents subjected her to unlawful hostile work environment sexual harassment, gender discrimination, and retaliation in violation of M.G.L. c. 151B, § 4.

On January 1, 2002, the Commission found probable cause to credit Complainant’s allegations of discrimination. On June 18, 2002, the Commission

certified the case for Public Hearing. A Public Hearing was held before me on October 15, 2002, in Springfield, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at hearing, and the stipulations of the parties. I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after the Public Hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Gypsy Ann Rodriguez, is a female who worked for Respondent at its West Springfield store from February 2, 1999, until her termination on June 6, 2000. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. The Respondent, Nationwide Warehouse & Storage, LLC, is a Georgia company that owns and operates a furniture store in West Springfield, MA. Respondent did not contest that at all relevant times, it employed more than ten employees at its West Springfield store. Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. Angel Rivera worked as the store manager of Respondent's West Springfield store at the time Complainant began working for Nationwide Warehouse. On January 19, 2000, Respondent promoted Rivera to District

Manager. Rivera testified that after becoming district manager, he supervised a number of stores for Respondent and claimed to have spent less than two days per week in the West Springfield store. Notwithstanding, I find that Rivera exercised supervisory authority over Complainant at all times pertinent hereto.

4. In December 1999, Respondent hired Gregory Davis as a sales associate at its West Springfield store. In April 2000, Respondent promoted Davis to the position of manager-in-training (“MIT”) and then, on May 31, 2000, promoted him to store manager. I find that Davis exercised supervisory authority over Complainant from April 2000 until her termination.

5. On February 2, 1999, Respondent hired Complainant for a clerical position. Rivera testified that he had some involvement in the initial decision to hire Complainant. On June 9, 1999, Rivera promoted Complainant to the position of sales associate. However, on July 9, 1999, she was demoted back to her clerical position for poor job performance. Complainant acknowledged that the demotion resulted from her poor sales figures and her inability to satisfactorily perform the sales job. Nine months later, in April 2000, Rivera again promoted Complainant to sales associate.

6. Upon being hired, Complainant received Respondent’s “Employee Rules and Regulations”, which provides: “Acts of sexual harassment and sexual discrimination are not permitted and will be investigated. Employees must report, as soon as practically possible, any such acts.” In addition, Complainant received an “Associates’ Handbook”, which included Respondent’s policy against

discrimination and sexual harassment. The sexual harassment policy contained the following language with respect to reporting:

All associates are responsible for helping to keep the company free of sexual harassment. Associates, who believe they have experienced or witnessed sexual harassment or retaliation, are requested to report it immediately to their District Manager, Regional Manager, Loss Prevention (1-800-448-7898), or to ALERTLINE (1-800-932-5378). Associates may make complaints in person, in writing or anonymously. If the alleged harasser is the associate's supervisor, the associate should contact that person's supervisor on the ALERTLINE.¹

7. Complainant testified that in September 1999, a co-worker, Louis Mulero, made an offensive comment when he called her a "fat bitch." In response, Rivera suspended Mulero for three days. Complainant has not raised this incident as part of her discrimination claims.

8. Complainant claimed that in April 2000, Davis began to repeatedly ask her out for dates, sometimes four or five times a day. Complainant stated that she typically responded to his advances by simply telling him "no." Davis would also regularly make profane comments out loud when she bent over, such as, "someone should top that ass", or "I would love to top that ass." According to Complainant, Davis' conduct made her feel uncomfortable. She testified that he continued to ask her out after he was promoted store manager in May 2000, but then stopped making these advances a few weeks later. Complainant stated that she complained about Davis' advances to Rivera and her immediate supervisor, Ric Cruz, telling them she was "being harassed." She claimed Rivera took no

¹ The sexual harassment policy contained in the Associates' Handbook and introduced into evidence by Respondent does not appear to be in compliance with M.G.L. c. 151B, § 3A. Specifically, the policy does not provide "the identity of the appropriate state and federal employment discrimination agencies, and directions on how to contact such agencies."

action, but Cruz called the company's "ALERTLINE", the "1-800" number listed in the company's sexual harassment policy. She was not aware if anything occurred as a result of Cruz's call. Complainant admitted that she never used the ALERTLINE to report or complain about any offensive conduct. Neither Cruz nor Davis testified at the Public Hearing. I credit Complainant's testimony.

9. According to Complainant, after Davis stopped making advances toward her, and presumably after she complained about his conduct, he began treating her in an angry and hostile manner. Specifically, she testified that he began calling her "stupid", and threatened to fire her when she came in late. On March 27, 2000, Davis gave Complainant a written warning for failing to come in on time. Complainant stated that when other coworkers arrived late for work, Davis did not take any action. I credit Complainant's testimony.

10. Complainant also stated that Rivera began to make sexually offensive comments to her at the beginning of 2000. Specifically, she testified that Rivera commented to her "You have a fat ass." She also stated that Rivera called her "George Forehead", and "Fatty-one donut." Complainant claimed that she told Rivera to stop, but he did not. I credit her testimony.

11. In addition, Complainant testified that both Rivera and Davis made offensive comments in her presence about the physical features of female customers. She claimed that when women entered the store with short skirts or shorts, Rivera would often say: "Look at the big ass on that girl", "she has a fine ass", "she is really packing", or "she has a fat ass." Complainant testified that

she found these remarks “disgusting.” According to Complainant, she complained to Rivera about these comments, but in response, he just laughed. Furthermore, she recalled Davis commenting out loud that a female customer “has a fine round ass.” Although Complainant did not complain to Rivera about Davis’ comment, she told Davis that his remark was “disgusting.” I credit Complainant’s testimony.

12. Complainant testified that she also found pornographic “Playboy” magazines in the ladies bathroom and in other locations in the store. She believed Davis had placed them in the bathroom. She told Cruz, Davis, and Rivera about the magazines, but she claimed they did nothing. Complainant also testified that she saw male employees take up a collection on almost a weekly basis to purchase the magazines. She stated that the male employees who purchased the magazines also solicited contributions from Rivera and Davis. Although she did not witness Rivera or Davis give them any money, she testified they never attempted to stop the collection. According to Complainant, the practice of buying and reading these magazines on the premises started before Davis started working at the store, and continued until her termination. I credit Complainant’s testimony.

13. Yanera Cartengo testified that she worked for Respondent at its West Springfield store for approximately one month during the summer of 1999. While working at the store, she regularly heard male employees make offensive comments on a daily basis about women, including: “She is very pretty,” she has a nice body”, and “you have a big ass.” Cartengo claimed that Rivera was

present in the store when the male employees made these comments. After Cartengo ceased working for Respondent, she continued to visit the store to see her boyfriend, Rick Cruz. Cartengo estimated that she visited the store approximately 20 days per month until May 2000. While visiting the store, she continued to hear male employees make offensive comments to females, such as: "You may not have enough tits." Cartengo also testified that she heard Rivera and Davis, as well as other male employees, make fun of Complainant. Specifically, she heard them call her "George Forehead" and remark that she "has a flat ass, but big tits." She claimed they made these remarks often, but not every day. Cartengo stated that she laughed when she first heard the jokes and remarks about Complainant, but she then noticed how Complainant reacted unhappily to the comments and "sometimes [they would] get to her." She testified that Complainant told her she did not like the remarks. I credit Cartengo's testimony.

14. Evelyn Rivera testified that she worked for Respondent at its West Springfield store as a clerk for two or three months beginning April 2000. She is also Complainant's cousin, but no relation to Angel Rivera. Evelyn stated that after she began working for Respondent, Davis asked her out for a date almost every day for a period of two weeks until she agreed to go out with him. She claimed she said, "yes", only so he would stop asking. She testified that she ultimately did not go out with him. In addition, Evelyn testified that Davis would remark to her, again on a daily basis, that "[You] are pretty", [You] have big tits and a big ass", and "[You] have a better body than Veronica or Josie." Veronica

and Josie are two female employees who also worked for Respondent. She stated that Davis only stopped making these comments after he found out she was pregnant. Evelyn Rivera testified that these remarks “made me feel wrong.” In addition, she claimed that after she refused to go out with Davis, he began to treat her in a rude and disrespectful manner. Specifically, she testified that Davis called her “stupid” and a “cow.” She stated that she quit working for Respondent due to her pregnancy and because she could not tolerate Davis’ disrespectful attitude.

15. Evelyn Rivera also testified that she heard Davis make offensive comments about Complainant, including remarks in Complainant’s presence. In particular, she claimed that Davis stated that “[Complainant] has a flat ass compared to Veronica, [but] she has a nice top.” She observed Complainant get upset and walk away after Davis made these remarks. Evelyn Rivera also heard Davis and other male employees make comments about female customers, such as: “[I] would like to top that ass”, or “[she] has a nice ass.” In addition, she witnessed the Playboy magazines in the ladies room, but did not see any employees collecting money to buy them. Evelyn Rivera also claimed that Davis acted arrogant, cocky and dictatorial toward female employees. I credit Evelyn Rivera’s entire testimony.

16. Angel Rivera claimed that he had no employment issues with Complainant before he became district manager. In addition, he testified that he neither made nor heard any other employee make any comment of a sexual nature. He further testified that he never made an offensive comment directly to a customer, but he

may have called co-workers some non-sexual offensive names, such as, “Fatty wants a donut”, and “George Formanhead.” Rivera stated that sometime in the Spring 2000, he discovered Playboy magazines in the back of the store near the loading dock. He claimed he then told the employees not to bring them in the store. Rivera testified that he never received any complaints from employees about the magazines. He also acknowledged that Davis had a dictatorial management style and could be rude and loud-mouthed, but he never received any complaints from Complainant about Davis.

17. Ismael Lebron testified that he worked as a delivery driver for “National Enterprises” from approximately February 1998 until he was hired by Respondent in May 2000 as a sales associate. While working for National Enterprises, he delivered furniture almost exclusively on behalf of Respondent and worked at the West Springfield store. Consequently, he worked with and knew Rivera, Davis, Complainant, and the other supervisors and employees. Lebron testified that he never heard any person make any remarks of a sexual nature toward Complainant, female customers, or anyone else. In particular, he denied hearing Rivera make any sexually offensive remarks. However, he admitted that Davis could be rude and blunt. He also acknowledged that he and the owner of National Enterprises, Charles Yates, had Playboy magazines in the delivery trucks, but denied seeing or placing any such magazines in the store. Lebron claimed that neither Rivera nor Davis participated in the reading or dissemination of the magazines.

18. Complainant claimed that in May 2000, Respondent discriminated against her on the basis of gender when it failed to promote her to the position of MIT, and instead promoted a male employee, Ismael Lebron. She also claimed that Respondent did not promote her to the MIT position in retaliation for her complaints. She testified that Lebron had no previous sales or management experience and she had better qualifications, experience, and more seniority. According to Complainant, she asked both Davis and Rivera why she did not receive the promotion. She claimed that Davis told her Lebron was more qualified, and Rivera responded that he would consider her for a promotion when she was ready. From the record, it appears Complainant likewise had no managerial experience and her sales experience was limited to her work as a sales associate for Respondent.

19. Lebron testified that in 1999 and 2000, while working as a delivery driver, Rivera regularly approached him about taking a sales job. In May 2000, Lebron eventually accepted a sales associate position with Respondent. Lebron testified that prior to taking the sales position, he familiarized himself with Respondent's policies and procedures, and participated in sales meetings. According to Rivera, after taking the job, Lebron met all his sales goals and outperformed Complainant. Rivera testified that he promoted Lebron to the MIT position in June 2000 based on his superior sales, educational background, and general job performance. Although Lebron had no managerial experience, he had completed three years of college, had previously worked in childcare, and participated in a "cultural awareness program." I credit Rivera and Lebron's

testimony with respect to these particular matters.

20. On June 6, 2000, Complainant arrived late for work because she had to bring her daughter to her first day at school. She testified that she previously informed Rivera about this matter, and he said “fine.” However, when she showed up for work, Davis began yelling at her for failing to call in and threatening to fire her if it happened again. She then got in an argument with Davis about being late. Lebron corroborated Complainant’s testimony regarding her interaction with Davis and further claimed that Davis acted rudely toward her. Rivera also acknowledged that he had previously assented to her coming in late.

21. Later that same day, Complainant had an altercation with Lebron. According to Lebron, he had previously asked Complainant to do “price reviews”, which involves pricing the merchandise in the store. He claimed that sales people frequently perform this task, but Complainant had refused to do the work and she “threw them back at me.” Lebron testified that after Complainant refused his request, he called Rivera and informed him about her refusal to do the work. Lebron stated Rivera then told him to “do what you think is right.” Rivera corroborated Lebron’s testimony. Both Lebron and Rivera testified that they never discussed or suggested that Complainant be terminated. At the end of the day, Lebron took Complainant aside and told her that he was writing her up for failing to “tag” the furniture. Complainant insisted that Lebron had no basis to discipline her and acted unfairly, since he had never told her to price the merchandise. She acknowledged that she then got very angry and distraught, and began to use profanity. Lebron claimed that unlike Complainant, he did not

raise his voice. Rivera testified that he arrived at the store in time to see and overhear the commotion. Both Lebron and Rivera claimed that Complainant was screaming. Rivera then interjected himself in the discussion. Complainant admitted that she then got “hyper”, angry, and upset to the point where she could not calm down. According to Complainant, Rivera told her “either you calm down or you’re fired”, and, with respect to the discipline, “if you don’t like the rules, get out.” Complainant claimed she responded by telling Rivera, “I don’t like the rules”; whereupon, he stated, “you’re fired, you’re fucking fired.” However, Rivera testified that he did not raise his voice or use profanity with Complainant. He also claimed that he tried to calm her down, but she would not do so. Rivera testified that she said, “If you want to fucking fire me, then fucking fire me.” In response, he claimed that he simply told her she was fired. Lebron corroborated Rivera’s version of these events. I credit Rivera and Lebron’s testimony regarding the events of June 6, 2000.

22. Complainant testified that after her termination, she became depressed and suicidal. In particular, she stated that she became very distraught because she needed a job to support her family. At the time, she lived alone with her two-year-old son and four-year-old daughter. Additionally, she claimed that she lost her ability to function, could not eat or sleep, and lost thirty to forty pounds. She also stated that she experienced nightmares. Her mother then moved in with her to assist her with the children, particularly when she went looking for work. Complainant remained unemployed for four months. While unemployed, Complainant began receiving emergency assistance to help pay the rent, which

made her feel degraded. She stated that she went on a lot of job interviews and eventually obtained work, at a higher salary, at the “Children’s Place,” a store at the Holyoke Mall. At the time of her termination, Complainant earned \$7.74 per hour from Respondent and she estimated incurring \$7,000 in lost wages during her four months of unemployment.

23. According to Complainant, she obtained counseling services from August 2000 to October 2000 at the “Brightside for Families and Children”, an outpatient service provided by the Sisters of Providence Behavioral Health Care. She had never previously sought or received therapy. Her medical records reveal that she initially sought therapy for “history of physical and sexual abuse” and “recent episode of sexual harassment at work.” Complainant was diagnosed as suffering from sleep deprivation, depression, and acute anxiety. She was prescribed Zoloft for her anxiety and depression, but stopped taking it after 4-5 months, claiming it had not helped her. Complainant was also prescribed a medication to help with her sleeping disorder and nightmares, but she did not take this medicine because it made her feel sick. The medical notes reveal that during her therapy, she “processed the intense feelings she has toward her former employer who sexually harassed her. These tap into other abuses in her life.” As of October 2000, presumably after she started working at her new job, Complainant had “minimal attendance at therapy due to work schedule.” However, medical notes dated February 8, 2001, indicated that Complainant still had “intensified” complaints of generalized anxiety and depression since the sexual harassment experience at work and subsequent lawsuit. I credit Complainant’s testimony

with respect to her emotional distress damages.

III. CONCLUSIONS OF LAW

A. SEXUAL HARASSMENT

Massachusetts General Laws, c. 151B, § 4(16A) prohibits sexual harassment in employment. Complainant has alleged that Respondents engaged in unlawful sexual harassment by creating a hostile work environment within the meaning of § 1(18)(b), which includes “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when... (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. M.G.L. c. 151B, § 1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987).

In order to establish a case of hostile work environment sexual harassment, Complainant must establish by a preponderance of the evidence that (a) she was subjected to unwelcome verbal or physical conduct of a sexual nature; (b) the words or acts were sufficiently severe or pervasive to alter her conditions of employment and create an abusive working environment; and, (c) the harassment was carried out by an employee with a supervisory relationship to Complainant, or Respondent knew or should have known of the harassment and failed to take prompt remedial action. College-Town, 400 Mass. at 162.

I find that Complainant has established that Respondents engaged in unlawful sexual harassment. First, Complainant proved she was subjected to

unwelcome conduct; meaning conduct that she subjectively found to be hostile and abusive. College-Town, 400 Mass. at 162; Ramsdell v. Western Mass. Bus Lines, 415 Mass. 672, 677 (1993); see Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (“if the victim does not subjectively perceive the environment to be abusive, the conduct had not actually altered the conditions of the victim’s employment”). Specifically, I credited Complainant’s testimony that in April 2000, Davis began to repeatedly ask her out for dates, sometimes four or five times a day. She stated credibly that she rejected his advances and his constant requests made her feel uncomfortable. Moreover, I credited her testimony that she complained about Davis’ advances to Rivera and Cruz, telling them she was “being harassed.”

In addition, Complainant testified credibly that Davis regularly made profane comments out loud when she bent over, such as, “someone should top that ass”, or “I would love to top that ass.” Complainant also stated that Rivera began to make sexually offensive comments to her in the early part of 2000. For example, she testified credibly that Rivera commented, “You have a fat ass.” Furthermore, I credited her testimony that she complained directly to Rivera about his own conduct. I also find that Davis and Rivera’s verbal conduct was based on Complainant’s gender and their remarks were sexual in nature.

Moreover, Complainant testified that both Rivera and Davis made offensive gender based comments in her presence about female customers. She claimed that when women entered the store with short skirts or shorts, Rivera would often say, “Look at the big ass on that girl”, “she has a fine ass”,

“she is really packing”, or “she has a fat ass.” She also recalled Davis commenting that a female customer “has a fine round ass.” I credited her testimony that she found these remarks “disgusting.” In addition, Complainant testified that she found pornographic “Playboy” magazines in the ladies bathroom and in other locations in the store. She stated that she found these magazines objectionable and she complained about them to Rivera, Davis, and Cruz. She also stated that she saw male employees take up a collection on almost a weekly basis to purchase the magazines.

Vanera Cartengo and Evelyn Rivera corroborated Complainant’s testimony regarding the hostile nature of Respondent’s workplace and Complainant’s visible displeasure after being subjected to the offensive remarks. Cartengo testified credibly that she regularly heard male employees make offensive comments on a daily basis about women’s buttocks or figure, including: “She is very pretty,” she has a nice body”, “you have a big ass”, and “you may not have enough tits.” She also testified that she heard Rivera and Davis, as well as other male employees, make fun of Complainant by calling her “George Forehead”, and remarking that Complainant “has a flat ass, but big tits.” Cartengo claimed they made these remarks often, but not every day. Moreover, she testified credibly that she witnessed Complainant get upset in response to these comments.

Evelyn Rivera likewise testified that she heard Davis make offensive comments about Complainant, including remarks made in Complainant’s presence. In particular, she claimed that Davis made comments about

Complainant's body, such as "she has a flat ass compared to Veronica, [but] she has a nice top." She also observed Complainant get upset and walk away after Davis made these remarks. Furthermore, Evelyn Rivera stated that Davis repeatedly asked her out for a date for a period of two weeks until she agreed to go out with him. She claimed she said, "yes", only so he would stop asking. Additionally, Evelyn Rivera testified that Davis would remark to her, again on a daily basis, that "[You] are pretty", [you] have big tits and a big ass", and "[you] have a better body than Veronica or Josie." She stated that Davis only stopped making these comments after he found out she was pregnant. Based on credible testimony of Complainant, Cartengo, and Evelyn Rivera, I conclude that Respondent's supervisors and managers subjected Complainant to unwelcome verbal or physical conduct of a sexual nature and Complainant considered this conduct unwelcome and abusive.

Second, Complainant established that the unwelcome advances and remarks rose to the level of severe and pervasive conduct. In determining whether a work environment is sufficiently hostile or abusive "all of the circumstances [must be looked at], including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating (or a mere offensive utterance), and whether it unreasonably interferes with an employee's work performance." Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998), William v. Karl Storz Endovision, 24 MDLR 91, 107 (2002).

In this case, I find that Respondent's conduct was sufficiently severe and pervasive so as to alter Complainant's conditions of employment. Specifically,

Davis made persistent unwelcome advances, sometimes four or five times a day over a period of several weeks. Moreover, both Davis and Rivera made numerous debasing and derogatory remarks about Complainant and other women. Rivera also tolerated offensive comments made by other male co-workers toward Complainant and other women. Considering that both Rivera and Davis exercised supervisory authority over Complainant, I believe their conduct created a particularly abusive, intimidating, humiliating, and sexually offensive work environment.

Lastly, the persons who perpetrated the harassment, namely Rivera and Davis, had a supervisory relationship to Complainant. It is not contested that Rivera exercised supervisory authority over Complainant at all times relevant to this case. I also credited Complainant's testimony that Davis continued to make advances after he was promoted to store manager. Furthermore, Respondent knew of the ongoing harassment as a result of Complainant's complaints to Rivera and Cruz. Respondent had argued that Complainant failed to satisfy this criterion since she neither notified the company of the harassment by utilizing the ALERTLINE, nor complained to Rivera about Davis' conduct. Even if this were true, I find the argument to be without merit. The discrimination prohibited by G.L. c. 151B contemplates a work environment pervaded by abuse and harassment that poses "a formidable barrier to the full participation of an individual in the workplace." College-Town, 400 Mass at 162; see, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1987) (hostile work environment occurs where offensive conduct is so pervasive that it alters conditions of complainant's

employment and creates a barrier to full participation in the workplace). As in this case, sexual harassment can result from an inherent imbalance of power in the workplace and an abuse of that power by a superior resulting in a hostile environment for the subordinate, regardless of the sex of either. In College-Town, the court addressed the issue of strict liability for a supervisor's creation of a hostile work environment, holding that the employer was liable for the acts of its supervisory personnel. The court held that "the Legislature intended that an employer... be liable for discrimination committed by those on whom it confers authority without "additional notice requirement." 400 Mass. at 164-165, n. 5. Consequently, Respondent, National Warehouse, is strictly liable for Rivera and Davis's sexual harassment notwithstanding whether Complainant reported their conduct.

Complainant has, therefore, established that Respondents engaged in unlawful hostile work environment sexual harassment in violation of M.G.L. c. 151B, § 4(16A).

B. SEX DISCRIMINATION

Massachusetts General Laws, c. 151B, § 4(1), makes it an unlawful practice for an employer to discriminate against an individual on the basis of sex with respect to compensation or the terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification. Here, Complainant has alleged that Respondent discriminated against her on the basis

of sex when it failed to promote her to the manager-in-training (“MIT”) position and instead promoted a male co-worker, Ismael Lebron.

In absence of any direct evidence of discrimination, as in this case, Complainant may establish a prima facie case of discrimination through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). Therefore, in order to establish a prima facie case of discrimination in promotional opportunities, Complainant must demonstrate that (1) she is a member of a protected class; (2) she applied for a promotion and was qualified for the job she was seeking, (3) she was not promoted; and, (4) she was treated differently from other similarly situated persons not of her protected class. Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000), Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437 (1995). Once Complainant establishes a prima facie case of discrimination, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its action. Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). If Respondent presents a credible reason for its actions, then Complainant must show that Respondent’s proffered reason is a pretext for unlawful discrimination. Abramian, 432 Mass. at 116.

I find that Complainant has failed to establish a prima facie case of gender discrimination. Although she is a member of a protected class by virtue of her status as a woman, she has not shown that she was qualified for the MIT position. At the time Respondent promoted Lebron, Complainant had only worked as a sales associate for approximately one month. She has not

presented sufficient credible evidence that she satisfactorily performed the job of sales associate, especially considering her inability to handle the sales job a year earlier, when she was demoted. Since Complainant has failed to establish that she could satisfactorily perform the job of sales associate, she has clearly not demonstrated that she was qualified for a managerial position. Furthermore, she has not established that she was treated differently with respect to promotional opportunities than other similarly situated males employees. To the contrary, Rivera twice promoted Complainant to the position of sales associate, most recently in April 2000.

Moreover, assuming *arguendo* that Complainant presented a *prima facie* case of sex discrimination, Respondent has provided credible non-discriminatory reasons for its decision to promote Lebron. Although Complainant technically had more seniority as an “employee”, Lebron had worked for many years as an independent contractor delivering furniture for Respondent. Rivera also testified credibly that Lebron met all his sales goals and outperformed Complainant as a sales associate. In addition, Lebron testified credibly that prior to taking the sales position, he familiarized himself with Respondent’s policies and procedures and participated in sales meetings. Furthermore, I credited Rivera’s testimony that he promoted Lebron based on his superior sales, educational background, and general job performance. Lastly, Complainant has not presented any credible evidence that Rivera’s reasons for promoting Lebron were pretextual. Consequently, Complainant has failed to establish that Respondent engaged in unlawful gender discrimination.

C. RETALIATION

Complainant has also alleged that Respondents engaged in unlawful retaliation in violation of M.G.L. c. 151B, §§ 4(4) and (4A). Specifically, she claimed that Respondents retaliated against her on three separate occasions. First, when Davis disciplined her for being tardy on May 27, 2000; second, when Rivera failed to promote her to the MIT position; and, third, when Rivera terminated her employment.

Retaliation is a separate claim from discrimination, “motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelly, 22 MDLR at 25, *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995). M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel or otherwise discriminate against any person because she has opposed any practices forbidden under c. 151B or because she has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B. Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997); see, Sexual Harassment Guidelines, at 25-28. In addition, § 4(4A) makes it unlawful “for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter. These sections comprise chapter 151B’s prohibition against retaliation.

Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000),
citing Bain v. Springfield, 424 Mass. 758, 765 (1997).

In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) she engaged in protected activity; (2) Respondents knew she had engaged in protected activity; (3) Respondents subjected her to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelly, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for their actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondents meet this burden, then Complainant must show by a preponderance of the evidence that Respondents acted with retaliatory intent, motive, or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); see, Abramian, 432 Mass 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, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondents’ adverse actions were the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

As a threshold matter, I found that Complainant engaged in protected activity by virtue of her complaints to Rivera about his own as well Davis’ conduct. Complainant also complained to her immediate supervisor, Ric Cruz, about Davis’ persistent unwelcome advances. National Warehouse, thus, knew she had engaged in protected activity. Rivera and Davis also subjected Complainant to numerous adverse employment actions. Specifically, Davis disciplined her for being late, and Rivera failed to promote her to the MIT position and then terminated her employment. The issue of whether Complainant can establish a casual connection between the protected activity and the identified adverse actions, as well as the merits of any legitimate defense put forth by Respondents, shall be analyzed separately.

1. Corrective Action Notice

I believe Complainant has established a casual connection between her complaints about Davis’ advances and the corrective action notice he issued to her on May 27, 2000. As described above, Complainant testified credibly that she repeatedly rejected Davis’ numerous advances. She also claimed that he continued to make these advances after he became a store manager in May 2000. I credited Complainant’s testimony that she complained about Davis’

advances to Rivera and her immediate supervisor, Rick Cruz, telling them she was “being harassed.” According to Complainant, Rivera took no action, but Cruz called the company’s “ALERTLINE.” Thereafter, Davis began to treat her in an angry and hostile manner, calling her “stupid.” When he issued her the written warning for coming in late on May 27, he also threatened to fire her if it happened again. I find that the close proximity in time between her complaints and the issuance of the corrective action notice raised an inference that her protected activity was causally related to the adverse action.

Having established a prima facie case of retaliation, Respondents must articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for the issuance of the corrective action notice. Respondents have failed to meet this burden. First, Davis did not testify at the public hearing. Thus, Respondents failed to offer any credible testimony to rebut Complainant’s credible testimony regarding Davis’ conduct. Second, neither Rivera, nor any other witness, provided any credible legitimate justification for the issuance of the written warning. Even if Respondents could provide some legitimate reason for this action, I credited Complainant’s testimony, as well as the testimony from other witnesses, that employees regularly came in late without receiving similar disciplinary action. Consequently, I conclude that National Warehouse and Davis engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4) and (4A), when Davis wrongfully disciplined Complainant on May 27, 2000.

2. Failure to Promote.

I find that Complainant has failed to establish a casual connection between her complaints of harassment and Rivera's decision to promote Lebron to the MIT position in June 2000. The fact that Rivera promoted Complainant to sales associate in April 2000, after she had complained to him about his own conduct, undercuts her contention that she did not receive the promotion as a result of Rivera's retaliatory animus. Moreover, even if she could establish a prima facie case of retaliation, Respondents have articulated and produced credible evidence to support a legitimate, nondiscriminatory reason for promoting Lebron. Specifically, as described above, I credited Rivera's testimony that Lebron outperformed Complainant as a sales associate and, thus, he promoted Lebron based on his superior sales, educational background, and general job performance. Lastly, Complainant has not produced any credible evidence that the reasons articulated by Rivera for promoting Lebron were false.

3. Termination

I likewise find that Complainant has failed to establish a causal connection between her protected activity and her termination. With respect to this matter, I credited Rivera and Lebron's testimony that on Complainant's last day, June 6, 2000, she wrongfully failed to carry-out Lebron's instructions then became overly emotional, angry, and insubordinate when Lebron discussed this matter with her. I also credited Rivera's testimony that he tried to calm her down, but she refused and began to use profanity. Complainant admitted that she became "hyper" and practically out-of-control. Therefore, I find that Rivera terminated her

employment as a result of her highly insubordinate behavior and not as the result of any retaliatory or nefarious motive. In other words, Respondents have articulated and produced credible evidence to support a legitimate, nondiscriminatory reason for its termination of her employment. Moreover, Complainant has not provided credible evidence that the reasons Rivera articulated for terminating her employment were false. Complainant has, therefore, failed to establish that Respondents engaged in unlawful retaliation when Rivera terminated her employment.

D. INDIVIDUAL LIABILITY

In her complaint, Complainant also named both Greg Davis and Angel Rivera as individual Respondents. The Commission has long recognized and imposed individual liability under G.L. c. 151B. Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480, 491 (2000); see, e.g., Deeter v. Bravo's Pizzeria and Restaurant, 23 MDLR 167, 170 (2001) (individual respondent jointly and severally liable with employer where he supervised complainant's work, owned part of business, and engaged in particularly odious and loathsome unwelcome verbal and physical conduct), Tunstall v. Acticell H'W Cosmetic, 22 MDLR 284, 287-289 (2000) (corporation's president and owner who made unwelcome sexual advances to employee deemed individually liable even where the corporation was not liable), Rafferty v. Keyland Corp., 22 MDLR 125, 127 (2000) (president and owner of employer corporation who made persistent verbal and physical sexual overtures to employee held personally liable for hostile work environment sexual harassment along with vicariously liable corporation), Hope

v. San-Ran, Inc., 8 MDLR 1195, 1210-1211 (1986) (supervisor who perpetrated sexual harassment and manager who failed to act on employee's complaint held jointly and severally liable for their separate acts of aiding and abetting); *compare*, Rushford v. Bravo's Pizzeria, 23 MDLR 171, 175 (2001) (supervisor not individually liable where he did not exercise supervisory authority over complainant and conduct, although offensive, was not particularly egregious or heinous).

Pursuant to G.L. c. 151B, § 4(4A), it is unlawful for "any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter..." Among the rights protected by G.L. c. 151B is equal treatment in the terms and conditions of employment regardless of sex and it is well settled that these rights extend to protect employees against unlawful sexual harassment. Tunstall, 22 MDLR at 287-289. The Commission's imposition of individual liability under the statute for prohibited hostile work environment sexual harassment is consistent with the expressed provisions of G.L. c. 151B, § 9, which provides in pertinent part: "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof..." See, Bournewood Hospital v. MCAD, 358 N.E.2d 235, 242-243 (1976) (this provision mandates the liberal construction of the statute to accomplish its remedial purposes). In addition, G.L. c. 151B, § 4(5) provides that it is unlawful for "any person, whether an employer or employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [G.L. c. 151B] or to attempt to do so."

As described in detail above, I concluded that Davis engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4A), when Davis wrongfully disciplined Complainant on May 27, 2000. In addition, I found that Davis made numerous unwelcome advances to Complainant, sometimes four or five times a day, over a period of several weeks. Moreover, both Davis and Rivera engaged in unwelcome verbal conduct based on Complainant's gender and their behavior was sufficiently severe and pervasive so as to alter the conditions of her work environment. Rivera also ignored Complainant's protests and complaints, allowing both his own and Davis' conduct to continue unabated. Lastly, both Rivera and Davis exercised supervisory authority over Complainant, and as a result, I found their conduct to be particularly abusive, intimidating, humiliating, and hostile. Under these circumstances, I find that both Davis and Rivera "interfered" with the exercise and enjoyment of her right to be free of sexual harassment in the workplace by subjecting her to a hostile work environment and thereby violating G.L. c. 151B, §4(4A). Accordingly, both Davis and Rivera shall be held individually and jointly liable with Respondent, Nationwide Warehouse, for the unlawful sexual harassment established under the facts of this case.

IV. REMEDY

M.G.L. c. 151B, § 5 authorizes the Commission to fashion remedies to make Complainants whole. College-Town v. MCAD, 400 Mass. 156, 168-169 (1987). Since Complainant neither established that Respondent terminated her employment in retaliation for her complaints, nor argued that she was

constructively discharged, she is not entitled to lost wages.

However, Complainant is entitled to monetary damages in compensation for the emotional distress she suffered as a direct and probable result of Respondents' unlawful sexual harassment and retaliation. Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985). Complainant provided sincere and moving testimony regarding the effect of the unlawful harassment on her emotional well-being, claiming she became depressed and suicidal. In particular, she stated that she became very distraught because she needed a job to support her family. At the time, she lived alone with her two-year-old son and four-year-old daughter. Additionally, she testified that she lost her ability to function, could not eat or sleep, and lost thirty to forty pounds. She also stated that she experienced nightmares. Her mother then moved in with her to assist her in taking care of the children. Complainant remained unemployed for four months.

She obtained regular counseling services from August 2000 to October 2000 at the "Brightside for Families and Children", an outpatient service provided by the Sisters of Providence Behavioral Health Care. She had never previously sought or received therapy. Her medical records revealed that she initially sought therapy for "history of physical and sexual abuse" and "recent episode of sexual harassment at work." Complainant was diagnosed as suffering from sleep deprivation, depression, and acute anxiety. She was prescribed Zoloft for her anxiety and depression, and medication to help with her sleeping disorder and nightmares. The medical notes reveal that during her therapy, she

“processed the intense feelings she has toward her former employer who sexually harassed her. These tap into other abuses in her life.” As of October 2000, presumably after she started working at her new job, Complainant had “minimal attendance at therapy due to work schedule.” However, as of February 8, 2001, Complainant was still noted to have “intensified” complaints of generalized anxiety and depression since the sexual harassment experience at work and subsequent lawsuit.

I believe a considerable amount of her emotional distress was related to her termination, for which she is not entitled to compensation since she failed to establish that Respondent fired her in retaliation for her complaints. In addition, some of her emotional distress was likely related in part to her prior history of physical and sexual abuse. However, it is not unusual for a complainant to suffer distress caused by factors separate and apart from the discriminatory act. Rosati v. Town of Warren Bd. of Health, 19 MDLR 34, 38 (1997); Fiske v. R.P. Liquor, Inc., 16 MDLR 1042, 1057 (1994); Norman v. Andover Country Club, 15 MDLR 1394, 1422 (1993). Moreover, the presence of other significant stressors in a complainant’s life does not absolve a respondent from liability for the distress caused by its actions. Franklin Publishing Co., Inc. v. MCAD, 25 Mass. App. Ct. 974, 975 (1988); Fiske, 16 MDLR at 1957. A finding of discrimination alone permits the inference of emotional distress as a normal adjunct of discrimination. Samuelson v. Sungard Financial Systems, Inc. 20 MDLR 49, 52 (1998).

In this case, I believe the sexual harassment she experienced in Respondent’s workplace greatly exacerbated the anxiety and depression related

to her previous trauma. Consequently, I conclude that Complainant is entitled to an award of \$45,000.00 in damages in compensation for the emotional distress she suffered as a direct and probable consequence of Respondents unlawful conduct.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

1. Respondents, Nationwide Warehouse, Greg Davis, and Angel Rivera, shall pay Complainant, Gypsy Ann Rodriguez, within sixty (60) days of receipt of this decision, the sum of \$45,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
2. Respondent, National Warehouse, shall disseminate, within thirty (30) days of receipt of this decision, a policy on sexual harassment in accordance with the provisions of M.G.L. c. 151B, § 3A.
3. Respondent, National Warehouse, shall conduct basic annual training sessions on sexual harassment for all employees, managers, and supervisors employed by Respondent and working at its store located in West Springfield, Massachusetts. With respect to such training:
 - a. Each training session for employees must be at least three (3) hours in length; and each training session for managers and

supervisors must be at least six (6) hours in length. All managers, supervisors, and employees, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next five (5) years, for all new supervisors, managers, and employees who were hired or promoted after the date of the initial training session.

- b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified sexual harassment prevention-training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
- c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.

- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.
- e. In the event that Respondent's agency is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's agency (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:
 - i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;
 - ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;
 - iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,

- iv. Respondent continues to retain an interest in the successor entity.
 - f. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.
- 4. The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainant is instructed to immediately notify the Clerk of the Commission.

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 27th day of June, 2003.

EDWARD R. MITNICK,
Hearing Officer