

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & HERBERT JOHNSON,
Complainants

v.

DOCKET NO. 04BEM03087

LOJEK COMPANY, INC., ALEX BANOW,
KENNY JENNINGS & CHRIS NICE
Respondents

MCAD & HERBERT JOHNSON,
Complainants

v.

DOCKET NO. 04BEM03126

LOJEK COMPANY, INC.,
Respondent

Appearances:

Kristin M. Merenda, Esquire for Herbert Johnson

Katherine D. Clark, Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 16, 2004, Complainant, Herbert Johnson, filed a complaint with this Commission charging Respondents Lojek Company, Inc., Alex Banow, Kenny Jennings and Chris Nice with discrimination on the basis of race and color and retaliatory transfer. On November 19, 2004, Complainant filed a second complaint charging Lojek Company, Inc. with retaliatory termination. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matters failed and the cases were certified for public hearing. A public hearing was held before me on May 20-21,

2008. After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Herbert Johnson, is African-American man and resides in Boston, Massachusetts.

2. Respondent, Lojek Company, is a small commercial and residential construction company with its office in Byfield, MA. William Lojek has been the CEO and sole owner of Respondent since 1985. Lojek has sole authority to terminate employees.

3. In the summer and fall of 2004, Respondent was the contractor for the Brookside Artist Lofts project (“Brookside”) located in the Jamaica Plain section of Boston. The Brookside project involved renovating three mill buildings and converting them to 24 units designed for artists. The job site encompassed nearly one half of a city block and consisted of a maze of buildings and one other building. (Banow testimony) During that same time period Respondent was the contractor for other projects, including the “Olympia Flowers” project on Washington Street in Boston.

4. After a telephone interview, Alex Banow, the Brookside Superintendent, hired Complainant as a laborer on June 30, 2004. His rate of pay was \$14.00 per hour and he was assigned to the Brookside project. Complainant’s work hours were 7:00 a.m. to 3:00 p.m. At the time of his hire, Complainant was told his performance would be reviewed in 60 days. (Ex. 2) Complainant’s last day of employment was November 19, 2004.

5. Alex Banow was the superintendent on the Brookside project and Ken Jennings assisted Banow and shared construction superintendent duties. Both Banow and Jennings were Complainant's supervisors and both are white. Jennings, who had worked for Lojek since September of 2003, directly supervised the laborers, carpenters and sub-contractors and was present at the Brookside site every day. Chris Nice, who is also white, and an experienced carpenter, was employed by Lojek Company and worked at the Brookside site during the summer of 2004, as well as at various other sites. Nice was friendly with Jennings with whom he often ate lunch on the Brookside site.

6. Respondent employed from four to ten employees at the Brookside site, including Complainant and carpenters Chris Nice, E.J. Ceaboyer (Caucasian) and Bobby Labbranch (African-American) and laborers Damaqqah Shaheed (African-American), who was hired on September 20, 2004 and Josh Castigliani (Caucasian) who worked in August 2004. In addition there were several subcontractors on the job site, including electricians, painters, cleaners, and plasterers.

7. Complainant testified that on July 8, 2004, he was present with Jennings and Nice outside of Unit 13 as they struggled to figure out how to attach a bracket to the wall, when Nice stated, "Let's just nigger-rig it." Nice and Jennings laughed at the remark and Nice then walked away. Complainant told Jennings that he did not find Nice's remark funny. Jennings put his hand on Complainant's back and said, "Let it roll off your back." I credit Complainant's testimony.¹

8. Nice testified that he "blurted out" the "nigger-rig it" remark while trying to mount the bracket, and acknowledged that the remark was inappropriate. At the public

¹ Complainant testified that he wrote down each incident on scraps of paper as they occurred and later transcribed them onto a document entitled "My Life with Lojek." (Ex. 6)

hearing Nice said he wasn't sure whether Jennings was there, however at his deposition, Nice testified that Jennings and Ceaboyer were present and that Jennings gave him a dirty look after he made the remark. Jennings denied being present and denied ever telling Complainant to let the racially charged remark "roll off his back." Jennings testified that on occasion he told Complainant to deal with Nice being a rough guy because Nice was generally grumpy, but that this was not in relation to any racially offensive remarks. I do not credit Jennings' denial that he told Complainant he had to deal with Nice's racially offensive remarks.

9. Complainant testified that on August 6, 2004, he was in one of the units and commented to an electrician that he had seen a skunk walking through the site. There ensued a conversation about skunks and raccoons coming out of their habitat into the neighborhood. Nice, who had been working on some stairs nearby, came into the unit and commented, "Yeah, there are also a lot of two-legged coons in the 'hood." The electrician turned to Complainant and said, "What's up with that?" Complainant responded that Nice was "just ignorant." (Testimony of Complainant, ex. 6) I credit Complainant's testimony about this conversation. Nice denied making the "two-legged coon" remark, but I do not credit his testimony.

10. Complainant testified that Nice frequently called him "boy." On August 24, 2004, after setting up an air compressor and saws, Complainant forgot to plug in a saw. Nice yelled at him, "Hey, boy! Why don't you have the m-----f-----ing saw plugged in?" Complainant reported this incident to Banow; this was the first time he complained to Banow about Nice. Banow told Complainant he would look into it, but the remarks

continued. I credit Complainant's testimony. Banow denied that Complainant reported this incident to him, but I do not credit his denial.

11. Nice denied yelling "Hey, boy!" to Complainant. However, Nice, who is 51 years old, testified that he called younger employees "boy" in the context of praising or encouraging good work. He testified that on occasion he said to Complainant, "You've got it, man. Good boy. Good job." Nice testified that he never meant his words to hurt Complainant. Jennings testified that Nice would say "good boy" to younger employees, including him. I do not credit the testimony of Nice and Jennings that Nice called everyone "boy," when he was being praiseworthy.²

12. Complainant testified that on October 29, 2004, as he was sweeping up in one of the units, Nice suddenly approached him and accused him of smoking marijuana in the basement. Complainant denied the accusation, they exchanged words and Nice left the area. Gregory Phillips, who is African American and who worked for a sub-contractor, observed the confrontation from the loft of the unit where he was cleaning a sky light. Phillips testified that he did not notice any smoke or smell marijuana in the building. Nice testified that he smelled marijuana in the basement and knowing that Complainant had been there, made the accusation. Nice did not observe Phillips working above when he had the confrontation with Complainant and believed that no one else was present at the time.

13. Complainant told Jennings about the marijuana incident. Jennings told Complainant that he did not want to argue about it, and said, "You know how Chris is. You're going to have to find a way to get around it." Nice first told Jennings that he

² Even if true, Nice and Jennings should have known that addressing Complainant, an African American man, as "boy" was offensive.

observed Complainant smoking marijuana but then acknowledged that he did not actually see Complainant with marijuana. Jennings told him to let it pass. (Testimony of Nice and Jennings)

14. On October 27, 2004 Complainant, Jennings, Nice and Shaheed were on the main deck. When Jennings finished assigning their tasks for the following day, Shaheed walked away to break down the table saw and Nice said, “Shouldn’t he be saying “Yes, massa. No, massa.” Jennings heard the comment and just laughed it off. (Ex. 6)

15. Nice, Jennings and Banow all testified that Complainant had performance and attitude problems. They testified that Complainant was difficult to locate on the site and sometimes failed to complete tasks. They also asserted that Complainant thwarted their efforts to help him learn carpentry skills by just accusing them of singling him out, whenever they tried to teach him something. In addition Banow accused Complainant of trying to remove salvage copper cable from the site without permission, although Banow ultimately did allow Complainant to remove the cable. At the end of Complainant’s probationary period, Jennings talked with Lojek about Complainant’s performance and attitude problems. I credit their testimony about Complainant’s performance issues, but do not find this relevant to the claim of racial harassment, or ultimately Complainant’s termination.

16. On November 5, 2004, William Lojek, Respondent’s owner, conducted a performance review of Complainant. Lojek advised Complainant that he would not be getting a raise and that his probationary period would be extended because Complainant had left the site with salvage items, because he was difficult to locate on the site and because he was not getting along with others. (Testimony of Complainant and Lojek)

17. Complainant testified that on Monday November 8, 2004 he informed Banow about all the offensive remarks that Nice had made to him and Banow responded that he would look into it. Over the next several days, Complainant asked Banow if he reported his complaints to Lojek and Banow's response was that he hadn't gotten to it yet. Complainant testified that he then telephoned Will Lojek and told him everything that Nice and Jennings had done, including telling him to say, "Yes, sir, massa. No sir, massa." Will Lojek asked Complainant why he hadn't told Banow about the incidents and Complainant responded that he had told Banow. I credit Complainant's testimony.

18. Banow testified that Complainant told him that he was being treated with disrespect and that Nice had harassed him because of his race and color. According to Banow, Complainant told him that he was told to say, "Yes, sir, Massa." and was called "boy," but he did not mention the "nigger-rig" comment. Banow confirmed that he told Complainant that they would look into the situation. Banow believed his conversation with Complainant took place on November 5, 2004, immediately before Complainant's review with Will Lojek. Banow stated that when Complainant made it clear that he was making a formal complaint, he and Lojek acted immediately.

19. Banow testified that prior to November 5, 2004, Complainant had complained to him about being spoken to gruffly and about poor treatment by sub-contractors. Banow also testified that Complainant told him that he was not going to work like "some kind of boy" and say "massa" and that he would not be "treated like a slave." Banow testified that he asked Complainant what made him feel that way and Complainant responded with general complaints about being required to perform tasks such as loading tools into sub-contractor vehicles at the end of the day, which Banow told

Complainant he did not have to do. Banow stated that he is sensitive to the issue of racial harassment because his daughter-in-law and grandchildren are black, and that he would have been pro-active if Complainant had made a direct accusation about racial comments prior to November 5, 2004. I do not credit Banow's denial that Complainant reported incidents of racial remarks to him prior to November 5, 2004.

20. Banow testified that he expected Complainant to raise the issue with Will Lojek at their evaluation meeting and that Will Lojek would then have raised the issue with Banow. Lojek testified that after Complainant's review, Banow informed him that Nice and Jennings were picking on Complainant because of his race. Lojek instructed Banow to talk to Nice and Jennings, as well the other African-American employees to determine whether they had been subjected to unfair treatment.

21. Banow met individually met with Jennings and inquired as to whether Complainant had been treated poorly by others, particularly Chris Nice. Jennings told Banow that he had not observed any racial incidents. (Testimony of Banow) Jennings testified that he told Banow he did not believe Nice had made racist remarks and that neither Shaheed nor Labranch, who were also African American, ever complained about being singled out because of their race and color. (Testimony of Jennings) I do not credit the testimony of Banow and Jennings that Jennings told Banow he never observed racial incidents at the workplace.

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22. Banow then met with Shaheed who told him that Nice was gruff with him and at first he thought Nice had a problem with his race, but after Labranch assured him that Nice was equally gruff to everyone, Shaheed got along with him. Banow also met with Labranch who said he had no problems with Nice. I credit Banow's testimony with

respect to his conversations with Shaheed and Labranch. Labranch, who has worked for Lojek for 11 years as a laborer and as a carpenter, testified that he never heard Nice make any racially offensive comments to anyone. Shaheed and Complainant had both complained to Labranch about not getting along with Nice and Labranch told them to complain to their supervisors. I credit Labranch's testimony that Shaheed and Complainant both complained to him about Nice.

23. Banow testified that when he asked Nice about the accusations, Nice was "surprised" and "baffled" and did not comprehend that he had done anything wrong.

24. Banow testified that after meeting with Jennings, Nice, Shaheed and Labranch, he could not substantiate Complainant's allegations and reported his conclusion to Will Lojek in a meeting on November 9, 2004. After meeting with Lojek, Banow told Complainant that he could not substantiate his allegations.

25. In response to Complainant's complaint, on November 10, 2004, Will Lojek held a meeting at the Brookside site of all company staff, including employees working at other sites and at the company's Byfield office. Following a previously scheduled safety meeting, Lojek directed the employees to open the company handbook and read along with him Respondent's anti-discrimination policy. The handbook stated that any employee found to have harassed anyone would be reprimanded or fired. After reading the policy, Lojek directed all of the employees, including Complainant, to sign a copy of the policy. Complainant reluctantly signed the policy.

26. Following the meeting Banow directed Complainant to report to the Olympia Flowers site the following day. Complainant testified that he believed the transfer was in retaliation for having complained about race discrimination and that despite Lojek's

written policy of reprimanding or firing a harasser, Complainant was the only person who suffered repercussions. He stated that he had “been through enough” and did not want “the next guy” to go through what he had endured.

27. Jennings denied that the transfer was retaliatory. He testified that in consultation with Will Lojek and Steve Gribok, lead man at Olympia Flowers, it was determined that due to a need for laborers at Olympia Flowers, Complainant would be sent to that location purely because of job needs. Will Lojek testified that he did not know the particulars of Complainant’s transfer, but that the Olympia Flowers site was a mess and that Respondent needed help at the site in order to tear out a floor. Banow testified that they were winding down portions of the job at the Brookside site and stepping up the work at Olympia Flowers. I do not entirely credit the testimony of Jennings, Banow and Lojek that Complainant’s transfer was due solely to the company’s job needs. I find that the decision to transfer Complainant was made in part to separate him from the Brookside worksite. However, I do credit Respondent’s assertion that there was an increased need for workers at the Olympia Flowers site, as evidenced by the fact that carpenter Bobby Labranch had been transferred there and Chris Nice was transferred there the week after Complainant.

28. On November 11, 2004 Complainant began working at the Olympia Flowers site under the direction of Steve Gribok. Complainant was performing the same tasks at Olympia Flowers as he had at Brookside and suffered no other adverse job consequences.

29. On November 16, 2004 Complainant filed his first MCAD complaint, after telling Gribok he was going to a doctor’s appointment. The following day, Gribok asked him why he had not reported to work after his doctor’s appointment. Complainant told

Gribok that he had filed a claim with the MCAD. Prior to this, Complainant had no problems with Gribok. I credit Complainant's testimony that he told Gribok on November 17 that he had filed an MCAD complaint the day before.

30. On Friday November 19, 2004 Chris Nice was transferred to Olympia Flowers because Respondent needed an experienced carpenter to repair the floor. (Testimony of Nice)

31. Complainant testified that on the morning of November 19, he observed Gribok and Nice talking and that they stopped talking when they saw Complainant. Nice testified that he saw Complainant only briefly that day and had little communication with him. Nice denied talking to Gribok about Complainant.

32. Complainant testified that on the morning of November 19, as he pulled out the air compressor, tools fell out of the tool belt. The next thing he knew, Gribok accused him of dumping his tools into the work box, snatched the tools out of his hand and the two began to argue. Complainant told Gribok he was going to call Will Lojek and left the site to use the telephone at Project Place located near by. He could not get through to Lojek and returned to the work site. He testified that Gribok told him to wait because Banow was on his way to the site. I credit this testimony.

33. Nice observed the altercation between Complainant and Gribok. According to Nice, Gribok yelled at Complainant about spilling the tools and Complainant responded, "I don't have to take this anymore," and left the site. Nice later saw Complainant talking with Banow but did not hear their conversation. Labranch testified that he observed the argument between Complainant and Gribok and observed

Complainant leave the site and later return. I credit the testimony of Nice and Labranch regarding this incident.

34. Banow testified that Gribok called him around 7:15 that morning to report that Complainant had stormed off the work site after an argument over the tools. Banow immediately left for Olympia Flowers, calling Will Lojek en route in order to discuss the matter and determine their next actions. Banow told Lojek that Complainant may have quit, but they determined that if Complainant returned to the site it would mean that he had left the work site without permission which was a “serious violation.” I credit this testimony.

35. Will Lojek testified that after learning that Complainant had left the worksite he was concerned about a potentially violent situation.³ He told Banow to separate the parties and instruct Complainant to remain off the job site until after a cooling off period. He further instructed Banow to tell Complainant to call him at the office to discuss the matter, after which he would decide whether to let him back on the site.

36. Complainant testified that he returned to the site and Banow pulled up and asked him if he was having a bad day and taking it out on everyone. Complainant responded that he was the “lowest man on the totem pole” and that they would not be at this point if Banow had done his job in the first place and “not swept things under the rug” and “played the buddy system.” He testified that Banow responded that since Complainant had problems with all the supervisors and liked to go over people’s heads, he was terminated until further notice. Complainant filed a second MCAD complaint alleging retaliatory termination the same day.

³ Lojek testified credibly that he had a heightened concern about workplace violence after having taken an OSHA course on the subject.

37. Banow testified that when he arrived at the Olympia Flowers site, Complainant was outside the site. Banow brought Gribok over so that each could explain his side of the story. Both acknowledged that they were angry, were having a bad day and had a difference of opinion. Banow told Complainant that for his safety and the safety of other employees he was not allowed back on the site until he called Will Lojek to explain his position. Banow denied terminating Complainant's employment and testified that at the time of the discussion he did not know that Complainant had filed an MCAD complaint. I do not credit his testimony that he did not know that Complainant had filed an MCAD complaint. I otherwise credit his testimony that he told Complainant he would have to talk to Lojek before being permitted to return to work. I find Banow's version of this conversation more credible because Complainant called Lojek the following day.

38. Banow testified that leaving the job site without permission was not allowed and that even if Complainant had not quit, he had left without permission. However, Banow acknowledged that Lojek Company had no written policy prohibiting employees from leaving the job site without permission.

39. Will Lojek testified that he received Complainant's first MCAD complaint on November 19, 2004, but not until after the telephone conversation with Banow. He testified that he turned the complaint over to his lawyer, did not question Nice about the contents of the complaint and did not learn about the "nigger-rig" comment until preparing for his deposition. I do not credit Lojek's testimony that he did not read the complaint at the time it was received. I otherwise credit this testimony, although I find it more likely than not that he knew about the MCAD complaint from Gribok.

40. On Saturday, November 20, 2004, Complainant placed a collect call to Lojek's office telephone number to talk with Will Lojek, as he had been instructed to do by Banow the day before. Will Lojek picked up the phone but refused to accept the charges and therefore had no discussion with Complainant to clarify whether he was in fact terminated. Lojek testified that he was passing through his office when the telephone rang and did not accept the charges because he was not prepared to discuss the matter with Complainant. I do not credit Will Lojek's testimony that did not answer the call because he was not prepared to discuss the matter with Complainant, but rather because he considered Complainant terminated and did not want to speak with him.

41. In Respondent's position statement to the MCAD, signed by Nice on January 5, 2005, Nice denied making any racially offensive remarks. Nice testified that Banow never told him about Complainant's internal discrimination complaint and he did not recall whether Jennings ever told him. Nice met with Will Lojek regarding Complainant and told him he made the "nigger- rig it" remark. Nice did not recall when he told Lojek and believed it may have been after he left the company. Nice denied ever making the "massa" or "two-legged coons" remarks. I do not credit his testimony and I believe that he made all of the racist remarks alleged by Complainant.

42. Complainant testified that after his termination he fell into a deep depression. He testified he withdrew from everybody and felt "useless" and "betrayed." His family complains to this day that he doesn't spend time with the children, is no longer a part of his family and spends too much time in his room. I credit his testimony.

43. Complainant testified because of his termination right before the holidays, he could not buy his children the Christmas presents they had asked for and because he

prides himself on being a man of his word, he could not look his children in the eyes. I credit Complainant's testimony that he suffered such embarrassment and humiliation for not being able to provide for and keep promises to his family.

44. Complainant testified that he felt ostracized and abandoned. He testified that in addition to being talked about and looked down upon at the job, he was further victimized by his job being taken away through no fault of his own. Complainant testified that he tried to show Nice that all black people are not bad by assisting him with his tools but Nice would not let up. He felt betrayed, when his supervisors did not support him, particularly when Jennings sat there and let it happen, laughed it off and said, "You know how Chris is." I credit his testimony.

45. Complainant testified that his fiancé and his pastor urged him to seek help because they "saw a problem with him that he did not see." Complainant commenced treatment at Boston Medical Center on February 8, 2005, where he discussed with social workers and psychiatrists what was troubling him, such as having been looked down on by his co-workers and having his job taken away.

46. Complainant's medical records from Boston Medical Center indicate that Complainant first sought therapy at Boston Medical Center on February 8, 2005. On that day he reported to a social worker that his fiancé and pastor urged him to seek help because he had been barricading himself in his room, felt useless and ineffective, had lost his appetite and energy and was having increasing conflicts with his fiancé. (Ex. 4)

47. Complainant's medical records initially discussed a diagnosis of depression. On January 13, 2006, the diagnosis of paranoid schizophrenia first appears in the records (Ex. 4)

48. Complainant began receiving disability benefits under the Supplemental Security Income (SSI) program in 2006. Complainant testified that he had previously received SSI from 1993 until 2003 when he voluntarily stopped his benefits, but he does not know what his diagnosis was at the time he received earlier benefits.

49. Complainant testified that after his termination he looked for work on Massachusetts Avenue and Harrison Avenue by going to every construction site but was unsuccessful because most of the work required membership in a union. However, he testified in his deposition that he did not apply for a job until eight months after his termination and stated that he gave up looking for work in the summer of 2006. He did not apply for any laborer jobs that were advertized in the Boston Globe in 2005. Complainant has not worked since leaving Lojek Company.

50. Complainant job history reflects a very sporadic work record. He earned only \$5,000.00 in 2003 and did not report any income at all in 2002. (Ex. 8)

51. Complainant testified that the information provided to the Social Security Administration in connection with his application for disability benefits that he had never held a job for more than six months was incorrect. However, he was able to identify only one employer, U-Call/We-Hall for whom he had worked for longer than six months. He testified that he worked for U-Call/We-Haul for 12 to 13 months, but in his answers to interrogatories he stated he did no know how long he worked for that company. (Ex. 7)

III. CONCLUSIONS OF LAW

A. Racial Harassment

In his first complaint, Complainant claims that Respondent violated M.G.L. c.151B, §4(1), by discriminating against him in the terms, conditions, or privileges of

employment by subjecting him to a racially hostile work environment and by transferring him after he complained to his supervisor about racial harassment. In order to establish a claim of racial harassment, Complainant must establish that he was a member of a protected class; that he was the target of speech or conduct based on his membership in that class; that the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and that the harassment was carried out by an employee with a supervisory relationship to Complainant or that Respondent knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511-1515 (11th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355, 1358-1359 (11th Cir. 1982); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). I conclude Complainant met his burden of proof on each element of his claim.

As an African-American, Complainant is a member of a protected class who was targeted specifically for harassment in the workplace on account of his race by Christopher Nice who repeatedly called him “boy,” used the term “nigger-rig,” in Complainant’s presence, referred to African-Americans as “two-legged coons” and remarked that African Americans should address supervisors as, “Yes sir, massa.” I conclude that these abusive and egregious racial remarks and references were targeted at Complainant, and they constituted hateful and discriminatory speech based solely on his

membership in a protected class. As discussed below, this language created a racially hostile work environment for Complainant and constitutes race discrimination.

I conclude that Nice's speech and conduct were sufficiently severe and pervasive to alter the terms and conditions of Complainant's employment and create an abusive and hostile working environment. In determining whether speech or conduct creates a hostile work environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Harris v. International Paper Co., 765 F.Supp. at 1512-16 and notes 11 and 12; see Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988) (sexual harassment in housing). There is no "numerosity test" in determining what constitutes harassment; the more offensive the comments the fewer incidents of harassment may be required to demonstrate the objective reasonableness of the claim. Gnerre, supra. at 507. Where Nice used the term "nigger-rig" in Complainant's presence, referred to him as a "two-legged coon" and "boy" and commented that the African American workers should show deference to white supervisors by saying, "yes, massa, no, massa," his conduct was sufficiently pervasive and egregious to create a hostile work environment for Complainant. Complainant complained to his supervisors, who failed to take prompt remedial action to punish the wrong-doer or to otherwise ensure that the conduct ceased.

I conclude that Lojek Company is liable for Nice's conduct, because the company's high level managers were on notice of the conduct. Both Jennings and Banow, who were construction site supervisors, were on notice of the racially hostile

work environment to which Complainant was subjected and failed to take steps to remedy the situation. Their knowledge of the racially harassing conduct and failure to act may be imputed to the company because of their positions in the company. Therefore Lojek Company is liable for the failure of its managers to take any steps to remedy such conduct. To fail to take any action once on notice of the hostile work environment violates c. 151B s. §4(1). Modern Continental/Obayashi v. Massachusetts Commission Against Discrimination, 445 Mass. 96 (2005). As the court in Modern Continental stated, “An employer who passively tolerates the creation of a hostile work environment implicitly ratifies the perpetrator’s misconduct and thereby encourages the perpetrator to persist in such misconduct.” Id at 105. Because of Jennings’ and Banow’s failure to immediately address Nice’s conduct, the employer can reasonably be said to have passively tolerated such conduct.

I therefore conclude that Lojek Company engaged in unlawful discrimination on the basis of race and color in violation of M.G.L.c.151B §4(1).

B. Individual Liability for Racial Harassment

1. Christopher Nice

Complainant named Nice as an individual in his complaint of discrimination. Since the individuals named in this complaint are not the employer and thus not covered by G.L. c. 151B s.4 (1), individual liability must be predicated upon alternative sections of the statute which prohibit any person from retaliating, aiding and abetting discrimination, or threatening, intimidating, coercing or interfering with an individual's rights. See Hudson v. Pembroke/ Hanover Elks Lodge, et al. MDLR (2002) (Full Commission found individual liable for retaliation.) Pursuant to G.L. c. 151B, s. 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 race and color. Such rights extend to protecting employees from unlawful racial or sexual harassment. The Commission has long recognized and Courts have imposed individual liability under G.L. c. 151B. Beaupre v. Cliff Smith & Associates, 50 Mass.App.Ct. 480, 491 (2000), Erewa v. Reis, 20 MDLR 36, 38 (1998) see, e.g., Riggs v. Town of Oak Bluffs, 23 MDLR 306, 311 (2001)

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The imposition of individual liability for prohibited hostile work environment racial harassment is consistent with the expressed provisions of G.L. c. 151B, s. 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, s. 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 above, Nice was the perpetrator of numerous racially offensive comments to Complainant, over a period of several months, engaging in conduct that was intentional and made with the intent to abuse and harass Complainant. His behavior was sufficiently severe and pervasive so as to alter the conditions of Complainant's work environment. Given these circumstances, I find that Nice "interfered" with the exercise and enjoyment

of Complainant's right to be free of racial harassment in the workplace in violation of G.L. c. 151B sec.4 (4A) and I find him individually liable for that conduct.

2. Kenneth Jennings and Alex Banow

Jennings, who was Complainant's direct supervisor, witnessed Nice's offensive comments and when Complainant protested to him, he shrugged off the behavior and told Complainant to let it roll off his back. Banow also ignored Complainant's protests on at least one occasion, allowing Nice's conduct to continue. Lastly, both Jennings and Banow were construction supervisors at the work site and exercised supervisory authority over Complainant and other employees. As such, they had a duty to act to ensure that the unlawful harassment ceased and their failure to do so was in deliberate disregard of Complainant's rights. School Committee of Norton v. Massachusetts Commission Against Discrimination & another. 63 Mass. App. Ct. 839 (2005) Given these circumstances, I conclude that both Jennings and Banow "interfered" with the exercise and enjoyment of Complainant's right to be free of racial harassment in the workplace and they are individually liable for their failure to report the conduct or to take any steps to remedy such conduct in violation of G.L. c. 151B, s.4 (4A). Accordingly, both Jennings and Banow are individually liable for violation of G.L. c. 151B, s.4 (4A).

C. Complainant's Transfer

Complainant has alleged that Respondent transferred him and fired him in retaliation for his having engaged in protected activity when he complained internally about racially offensive comments and filed a complaint of discrimination with this Commission. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected

activity, that Respondent subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003). 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. 72 (1973) ; Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence of a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent 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 Respondent's adverse action was the result of retaliatory animus. Id.; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." Complainant's oral complaint to Banow on or about November 5, 2004 is a protected activity. Fluet v. Complainant v. Harvard University, et al, MDLR 2001. One week later, Respondent

transferred Complainant to another worksite. While proximity in time is a factor, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). That Respondent knew of a discrimination claim and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation.

I conclude that the credible evidence establishes some causal connection between Complainant's protesting Nice's comments on or around November 8, 2004 and Respondent's transferring him to the Olympia Flowers site on November 11, 2004. However, while I believe that Complainant was transferred in part to separate him from the Brookside site, I conclude that the transfer was not punitive in nature and that it was legitimately related to increased work needs at Olympia. This is supported by the fact that Bobby Labranch was sent to work at Olympia Flowers prior to Complainant and that Chris Nice was sent there the following week. Moreover, Complainant performed the same duties at Olympia Flowers that he had performed at the Jamaica Plain site and there was no evidence that the conditions at Olympia Flowers were adverse to him, prior to the argument with Gribok that precipitated his termination. Therefore I conclude that Respondents did not engage in unlawful retaliation in violation of M.G.L.c.151B §4(4) when they transferred Complainant

D. Retaliatory Termination

Complainant alleges that Lojek Company terminated his employment in retaliation for his having complained internally of racial harassment and for filing a

complaint with the MCAD. Complainant alleges that Banow told him on November 19, 2004 that he was terminated until further notice. Banow denied terminating Complainant and testified that on November 19 that he told Complainant not to return to the worksite until he called Will Lojek to discuss the matter. While I credited Banow's version of the November 19th conversation, I nonetheless conclude that Complainant was effectively discharged the following day, November 20 when he called Will Lojek in order to reclaim his job, as instructed, and Lojek refused to take his call. I did not find credible Lojek's explanation that he refused Complainant's call because he was not ready to discuss the matter, but find it more likely that he refused to take the call because he considered Complainant terminated and intended to send that message. I conclude that by refusing to discuss the matter any further with Complainant, Lojek signaled to Complainant that he was no longer employed and that this was Lojek's intent. I further conclude that there is a causal connection between Complainant's filing an internal complaint of discrimination and his filing of an MCAD complaint and his termination. Respondent received Complainant's first MCAD complaint on November 19, 2004 (and may have know about it days earlier through Gribok) and terminated Complainant's employment the following day. Moreover, Lojek's stated reason for not accepting Complainant's phone call was not credible. I conclude that Complainant has established that Lojek Company was motivated by retaliatory animus when it terminated his employment, in violation of M.G.L.c.151B sec. 4(4).

E. Summary

I conclude that Respondent Lojek Company engaged in unlawful discrimination on the basis of race and color in violation of M.G.L.c.151B §4(1) and unlawful retaliation

in violation of MGL c. 151B sec. 4(4). I conclude that Respondents Christopher Nice, Kenneth Jennings and Alex Banow are liable for interfering with Complainant rights to be free of a discriminatory workplace in violation of M.G.L. c. 151B § 4(4A), and I find them jointly and severally liable with Lojek Company for unlawful racial harassment in the workplace.

I further conclude that Respondent Lojek Company is liable for unlawful retaliatory termination in violation of M.G.L. c. 151 B sec. 4(4). However, I do not find Banow liable for retaliation and the retaliation claim against Alex Banow is hereby dismissed.

IV. REMEDY

Pursuant to M.G.L.c.151B s. 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his unlawful treatment and retaliatory termination by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether

the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, at al. 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on Complainant’s credible testimony, I am persuaded that Complainant suffered emotional distress as a result of Respondents’ unlawful racial harassment and retaliatory termination. Complainant testified credibly that after his termination, he withdrew from his family, stopped communicating and socializing with his family, and frequently stayed alone in his room. He was very disturbed and humiliated that he could not buy his children the Christmas presents he had promised them. After several months of feeling ostracized and depressed, Complainant sought counseling at the urging of his girlfriend and pastor. The counseling records indicate that in these counseling sessions Complainant focused on the treatment at work and the termination from his job as the sources of his emotional upset. He stated that he felt betrayed and upset that his supervisors did not stand up for him at the workplace and instead laughed off the racially offensive comments.

Complainant’s medical records demonstrate that his mental health deteriorated and he was ultimately diagnosed with paranoid schizophrenia in January 2006. Respondents argue that there is no causal connection between Respondents’ unlawful conduct and the emotional distress for which he sought treatment at Boston Medical

Center because Complainant received Supplemental Security Income Disability⁴ for a period of years prior to his employment at Lojek Company. While it may be more difficult in these circumstances to determine precisely to what extent Complainant's emotional distress after his termination resulted from prior mental illness, I note that there is no medical evidence that Complainant suffered from paranoid schizophrenia during his employment or in the immediate aftermath. Complainant testified that prior to working at Lojek Company he had not taken medication or attended counseling since 1993, some ten years previous. It is also not unlikely that Complainant's depression and upset at enduring racial harassment and being terminated after complaining could have contributed to his deteriorating mental state over time. I conclude that the racial harassment Complainant endured at work and his termination from Respondent were indeed renewed sources of the emotional distress and depression he suffered thereafter, and which continued for some time. This distress affected his relationships with his girlfriend and children and contributed to his isolation from family members, causing him to stay alone in the house for days at a time. I conclude that Complainant is entitled to emotional distress in the amount of \$50,000.00 to compensate him for his emotional distress.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). There is no dispute

⁴ Contrary to Respondents' assertion, Complainant was not diagnosed with obsessive-compulsive disorder according to the medical records in evidence. The records state: "R/O[rule out] obsessive compulsive disorder."

that Complainant did not seek work for several months after his termination, and after a brief period of time looking for work, began receiving Supplemental Security Income Disability benefits in 2006. Given Complainant's spotty work record, his failure to seek employment and his subsequent receipt of disability benefits, I conclude that Complainant did not actively seek employment and failed to mitigate his damages. I therefore conclude that Complainant is not entitled to back pay because of his failure to actively seek work and mitigate his damages.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondents immediately cease and desist from discriminating on the basis of race, color and retaliation.
2. Respondents pay to Complainant the amount of \$50,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.
3. Respondent Lojek Company shall conduct basic annual training sessions on unlawful discrimination, harassment and retaliation for all managers and supervisors employed by Respondent. With respect to such training:

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

b. Within 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 discrimination 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 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 business is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's business (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.

For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

Payment shall be made within 60 days of receipt of this order.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 16th day of April, 2009.

JUDITH E. KAPLAN,
Hearing Officer