

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
JOHN B. O'LEARY)
Complainant)
v.) Docket No. 97-BEM-0287
BERTUCCI'S RESTAURANT CORP.)
Respondent)

Appearances:

James M. Murray, Esq., for Complainant
Catherine M. Constanzo, Esq., and Christopher T. Vrontas,
Esq., for Bertucci's Restaurant Corporation

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 31, 1997, Complainant John O'Leary filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged Bertucci's Restaurant Corporation (hereafter: "Bertucci's" or "Respondent") with discrimination based on Complainant's age, national origin, race, color and sexual orientation in violation of Massachusetts General Laws, Chapter 151B, §4, paragraph 1. Complainant alleged that Bertucci's discriminated against him when it subjected him to

a hostile work environment based on numerous incidents of harassment from April 1996 through August 1996 and discharged him on August 6, 1996. (Complaint, dated January 31, 1997).

The Commission found no probable cause on Complainant's claims based on race, color and perceived sexual orientation. On December 26, 2001, Investigating Commissioner Walter J. Sullivan, Jr., certified this case for a public hearing on the remaining claims based on Complainant's national origin and age.

I held a public hearing in this case on April 9-10, 2003. On June 18, 2003, Complainant and Respondent filed their post-hearing proposed findings of fact and conclusions of law with the Commission.¹

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and

¹On June 20, 2003, Bertucci's filed transcripts of the public hearing with the Commission that it purportedly prepared from the tape recordings furnished by the Commission and cited to them in its post-hearing proposed findings of fact and rulings of law. I have not relied upon nor referred to these transcripts in preparing my decision and order. I remind the parties that, under the Commission's regulations, the official record for this decision includes only the tape recordings made by the Commission. See 804 CMR §1.21(9).

order.

II. Findings of Fact

1. Complainant John B. O'Leary lives in Medford, Massachusetts and is currently unemployed. Complainant was born on April 16, 1955 in County Carey, Republic of Ireland, and has lived in the United States since February 11, 1986. (Joint Stipulation No. 1). Complainant speaks Gaelic and English proficiently although he is most fluent in English.

2. Complainant graduated from high school in 1973 and took hotel management and general business courses at Cathalblougha College in Dublin, Ireland. While attending Cathalblougha College, Complainant worked for four years in hotel services at the Shelburne and Grachen Hotels. From 1977 until February 1994, Complainant held positions in Europe and the United States in hotel management, customer service, construction, sales, office temporary work, bicycle repair, telemarketing and pizza delivery. During this period, Complainant also worked intermittently as an independent painting contractor in the Allston-Brighton area.

3. From March 25, 1994 to August 6, 1996, Complainant worked for Bertucci's as a pizza delivery driver in its Copley Square restaurant (hereafter: the "Copley restaurant"), Store No. 9. The Copley restaurant is located at 39 Stanhope Street, Boston, Massachusetts. (Joint Stipulation No. 3). Complainant regularly worked Monday to Friday and occasionally on Saturday during the lunchtime and evening shifts. The lunch shift started between 10:00-11:00 a.m. when the delivery drivers arrived to help in the lunch preparation. Complainant's

delivery area included businesses in the Copley area such as the Copley Tower, John Hancock Tower and the Prudential Center. Complainant walked, used a bicycle or a moped to make his deliveries. (Joint Stipulation No. 11).

4. Complainant's hourly pay rate at Bertucci's in 1996 was \$6.50 plus tips and he worked 20-25 hours per week on average. (Complainant's Exhibit No. 11). Complainant testified that he averaged approximately \$400.00 per week, including tips, while working at the Copley restaurant.

5. On March 25, 1994, Complainant signed a written notice acknowledging that he received Bertucci's informational handbook that described its employment benefits, policies and procedures. Under Bertucci's policy, acts that may result in an employee's immediate termination included "insubordination, fighting with, threatening, intimidating or harassing other employees and/or customers, including sexual harassment." (Joint Stipulation No. 10; Respondent's Exhibit No. 11).

6. During his employment at the Copley restaurant, Complainant worked with three other delivery drivers: Alex (national origin is unknown, age 18 or 19), Harry (national origin is unknown, age 40²) and Louis Joseph (Haitian, age 55). Complainant also testified that all of the other delivery drivers were from other countries, including Haiti, Brazil and Morocco. During the time period relevant to this complaint, Complainant was the only Irish national employee who worked at the Copley restaurant.

7. At all times relevant to the instant complaint, Bertucci's

²The parties did not submit any evidence to establish Harry's or Alex's national origin.

was an employer within the meaning of Massachusetts General Laws, Chapter 151B, §1, paragraph 5.

8. When Complainant began working at the Copley restaurant, Craig Weiner, General Manager, was his direct supervisor. Complainant testified that he told Weiner that his father was a United States citizen when Weiner commented about his Irish accent.

9. In 1996, Gregory Saunders worked for Bertucci's as a district manager. Saunders was 50 years old when Bertucci discharged Complainant on August 6, 1996. (Joint Stipulation Nos. 8 and 12).

10. Dan Mangeon (national origin is unknown, age 26) worked at the Copley restaurant from September 6, 1994 to January 31, 1996 and was rehired on March 16, 1996. (Joint Stipulation No. 7). Mangeon was a customer service representative who supervised food deliveries and pickups.

11. On January 28, 1996, Christopher Kane began working as an assistant or shift manager at the Copley restaurant. (Joint Stipulation Nos. 5 and 9; Respondent's Exhibit No. 1).

12. From 1992 to 1997, Kevin Barry Kane worked for Respondent at three locations: the Amherst, West Roxbury, and Copley restaurants. Kevin Kane worked as the take-out coordinator at the Copley restaurant from May 25, 1996 through August 31, 1996. (Joint Stipulation No. 6). During 1996, Kevin Kane worked with Complainant approximately 30-35 hours each week on day and night shifts.

13. Kevin Kane is 29 years old and is Christopher Kane's brother.

Kevin Kane was born in Boston and grew up in Brookline. Their maternal and paternal grandparents came to the United States from Ireland and Kevin Kane was named after an Irish patriot—Kevin Barry. Kevin Kane visited Ireland as a child and attended the University of Limerick during 1994-1995 where he studied Irish history and politics. Kevin Kane also traveled to Ireland in 1998, 2001 and 2003 where he met a number of his friends.

14. Kevin Kane graduated from the University of Massachusetts in 1997 with a bachelor's of arts degree in political science. In August 2002, Kevin Kane received a masters' degree in business administration from Boston College.

15. When Bertucci's discharged Complainant on August 31, 1996, Kevin and Christopher Kane directly supervised him.

Complainant's Work History

16. Weiner recommended Complainant for promotion to a level II supervisor position (second rate delivery coordinator), effective December 17, 1994, with an hourly rate of \$7.00. (Complainant's Exhibit No. 6). This position required Complainant to work more closely with Mangeon to coordinate orders for pick-up and delivery, take more telephone calls from customers and perform more customer service. Complainant testified that he held this position for a few shifts, was replaced by Mangeon's friend and returned to delivering pizzas.

17. On December 18, 1994, Weiner completed an employee rating for Complainant. Weiner wrote, among other things, that Complainant "needs to embrace ideas from other employees as viable alternatives." Weiner also assigned Complainant a rating of "2"

on his customer service rating, indicating that he needed improvement. (Respondent's Exhibit No. 6). Complainant denied that Weiner discussed his performance ratings or his performance deficiencies with him. I do not credit Complainant's testimony.

18. On May 25, 1995, Weiner gave a written warning to Complainant for consistently harassing or arguing with other delivery drivers. (Respondent's Exhibit No. 7). Complainant disagreed with the warning and testified that the warning related to a single incident during which he attempted to organize the restaurant for lunch deliveries. I credit Weiner's written warning.

19. On January 7, 1996, William Gillespie replaced Weiner and began working as the General Manager at the Copley restaurant. (Joint Stipulation No. 4).³

20. Complainant testified that he did not like and objected to the following policies implemented by Gillespie: (1) Gillespie eliminated the practice at the Copley restaurant wherein the pizza delivery drivers pooled their tips at the end of the lunch shift; (2) after Gillespie stopped the practice of pooling tips, he assigned the primary responsibility of delivering promotional or free pizza deliveries in the Prudential Center to Complainant and did not rotate the responsibility among other delivery drivers; (3) in many instances, other drivers were allowed to take multiple deliveries because they had automobiles while Complainant used a moped.

21. Kevin Kane testified that Complainant was a very aggressive

³Saunders and Christopher Kane did not appear at the public hearing but submitted sworn affidavits that were admitted into the record without objection. (Respondent's Exhibit Nos. 1 and 12).

driver who arrived at the restaurant 15 minutes before the other delivery drivers to "position" himself so that he could get "big" rather than "small" pizza deliveries. Kevin Kane testified that Complainant generally stated his preference for "bigger" deliveries because he believed they meant "bigger" tips. The pizza orders were generally taken by the delivery drivers in order of their arrival at work. Kevin Kane also testified that he observed that Complainant was aggressive, standoffish and initiated arguments with him and the other delivery drivers over the order of larger, high tip deliveries and that the other delivery drivers would "back off" because they were not native English speakers. I credit Kane's testimony.

22. Kevin Kane testified that he frequently received complaints from delivery drivers about Complainant's behavior and occasionally received complaints from customers. Kane gave these complaints to the Copley restaurant manager. I credit Kane's testimony.

23. Complainant testified that he sometimes took telephone orders but the other delivery drivers did not because they did not speak fluent English. Complainant also testified that Weiner saw him take telephone orders and encouraged him to continue taking them.

24. Complainant testified that, on one occasion, he had a disagreement with Mangeon. Complainant believed that Mangeon was unhappy with him because Mangeon felt Complainant interfered with food deliveries by telling other delivery drivers when their orders were ready. Complainant testified that Mangeon was "very protective of his job and resented Complainant because of

his work habits. Complainant also testified that Mangeon knew he was an Irish national. I credit Complainant's testimony.

25. On Complainant's annual performance appraisal, dated March 1996, Christopher Kane wrote, "John does good work - needs to take instruction better! Needs to be more agreeable [with] management." (Respondent's Exhibit No. 8).

26. Complainant testified that he was injured on April 22, 1996 when he and Joseph had a disagreement about a delivery order. During their dispute, Joseph "tugged" the pizza delivery bag that Complainant had strapped onto his shoulder, injuring Complainant's shoulder and finger. Complainant testified that he reported the incident to Christopher Kane and Gillespie. He also filed an incident report with the Boston Police Department. (Complainant's Exhibit No. 7). There were no witnesses to this incident. I credit Complainant's testimony.

27. In his affidavit, Christopher Kane stated that he was "not aware of any incident in which a co-worker grabbed a bag out of [Complainant's] hands." (Respondent's Exhibit No. 1, paragraph 8).

28. On April 23, 1996, Complainant visited Dr. Kim Graham because of his injuries and she gave him a certificate for him to return to work on April 25, 1996. (Complainant's Exhibit No. 10).

29. When Complainant told Christopher Kane about his visit with Dr. Graham, Kane asked Complainant to bring in a doctor's note on April 23, 1996 but Complainant did not. On April 24, 1996, Christopher Kane gave a written performance warning to Complainant based on his failure to bring in a doctor's note on

April 23, 1996 without an explanation. (Complainant's Exhibit No. 9). Complainant did not sign the warning and testified that he did not learn about it before Respondent terminated him. I do not credit Complainant's testimony.

30. On April 25, 1996, Complainant gave his medical certificate to Christopher Kane when he returned to work. Complainant also called Bertucci's employee injury call-in line and reported the injuries he allegedly sustained because of Joseph's actions. (Complainant's Exhibit No. 8). Complainant testified that Joseph left the Copley restaurant "within a short period of time" after Complainant filed a police report.

31. On May 9, 1996, Gillespie issued a warning to Complainant for violating Bertucci's policy and making management decisions when he and another delivery driver told a third driver not to report to work, as scheduled, because they were able to handle the deliveries. Complainant refused to sign this warning. (Respondent's Exhibit No. 9).

Alleged Age or National Origin Based Statements

32. Complainant testified that he had a "pretty good" or a "very nice" working relationship with Weiner. Complainant also testified that Weiner never made a negative comment about his Irish accent or age.

33. Complainant testified that, beginning in the end of 1994, Mangeon sometimes mimicked Complainant's Irish accent when he took customer calls. Complainant testified that Mangeon told him that he had a "weird Irish accent."

34. Complainant testified that, sometime in 1995, Mangeon "really" laughed at him when Complainant told him that he remembered the music of the 1970s. Complainant also testified that Mangeon said that Complainant must be "really old" if he remembered listening to David Bowie in the 1970s. Complainant was 38 or 39 years old when Mangeon made this comment.

35. Complainant testified that Mangeon made another age-based comment in 1995 during a "general conversation" they had about Vietnam. During the conversation, Complainant told Mangeon that he did not come to the United States earlier because he could have been drafted to serve in the Vietnam War. Complainant testified that Mangeon then said, "Oh my God, this guy could have been in Vietnam."

36. Complainant testified that Mangeon physically threatened him several times when he said, "Let's take it outside." Complainant also testified that Mangeon once slapped him on the hand while he was printing out a credit card slip. Kevin Kane did not ever hear Mangeon mock or make fun of Complainant's accent nor did he see Mangeon slap Complainant on his hand. I do not credit Complainant's testimony.

37. Complainant testified that, sometime in March 1996, he had several conversations with Gillespie and other delivery drivers in the office about delivery procedures. On one occasion, Complainant testified that they discussed politics and Gillespie said, "well, isn't Ireland one of the most corrupt countries in the world." Complainant testified that Joseph and Harry, two delivery drivers, were in the office when Gillespie made the alleged "corruption" comment. Complainant did not discuss Gillespie's "corruption" comment with Joseph or Harry.

Christopher Kane denied that he heard Gillespie make a comment about Ireland "being the most corrupt country in the world."

38. Complainant testified that Gillespie called him a "crazy Irishman" three times between April 1996 and August 6, 1996. Complainant also testified that Gillespie mocked his Irish accent sometime in May 1996. Complainant did not recall complaining or objecting to Gillespie about his "crazy Irishman" statement. Complainant testified Gillespie called him a "crazy Irishman within an earshot" of Mangeon and Christopher Kane. I do not credit Complainant's testimony.

39. Complainant testified that he felt "pretty humiliated and dismissed" by the "crazy Irishman" comments and felt that he was working in a hostile work environment.

40. Complainant testified that Christopher Kane acknowledged that his ancestry was Irish and talked to him about how the Irish in Boston owned bars and worked in construction. Complainant also testified that Christopher Kane suggested, in March 1996, that Complainant should consider working in an Irish pub. When Complainant asked why he should do that, Christopher Kane told him, "well, isn't that the kind of - - the Irish do that kind of thing." Complainant considered Kane's statement to be a "stereotypical Irish comment" and a negative "put down" or a slur. I do not credit Complainant's testimony.

41. Complainant testified that Christopher Kane suggested to him, in April or May 1996, that he was probably an alcoholic. While discussing the delivery problems, Complainant testified that Kane asked him, "are you sure you don't have a drinking problem." In June or July 1996, Complainant also testified that

Christopher Kane asked him whether he was "on drugs."
Complainant never heard Christopher Kane refer to the national origin of any other drivers at the Copley restaurant or their use or abuse of alcohol. I do not credit Complainant's testimony.

42. Christopher Kane denied that he referred to Complainant as a "crazy Irishman, mocked his accent or made any reference to Complainant's alleged alcohol or drug abuse." Christopher Kane also denied that he made disparaging remarks about Ireland or Irish persons or that he overheard other workers mock or insult Complainant because he was Irish or was from Ireland. Christopher Kane also denied that he commented on Complainant's age and was not aware of any co-workers who made such comments.

43. Kevin Kane denied that he: (a) referred to Complainant's alcohol use or abuse or stated that he must be an alcohol user because he is Irish; (b) stated or implied that Complainant must be a drug user because he is Irish; (c) stated that Irish people are generally anti-Semitic; (4) stated that Irish women behaved badly or had loose morals; (5) told Complainant that he should work in a pub. Kevin Kane denied that he ever heard Christopher Kane call Complainant a "crazy Irishman" or insult, mock or make fun of Complainant in any way for being Irish. Kevin Kane also denied that he overheard any employee at the Copley restaurant make fun of or mock Complainant because he was Irish. Kevin Kane denied that any employee at Copley restaurant considered Complainant's age to be a problem or made fun of his age. I credit Kane's testimony.

44. Complainant testified that he complained to Saunders in April or May 1996 about Mangeon and age issues. Complainant testified

that Saunders suggested that Boston was a "college town" and that he might be better off by looking for work in the suburbs where there were older workers. Saunders denied that he suggested to Complainant that his age was a factor in any of Respondent's employment decisions. I do not credit Complainant's testimony.

45. On May 14, 1996, Complainant met with a Commission investigator to complain about Bertucci's alleged unfair and closed policy related to assignment of work shifts and deliveries. Complainant alleged that Bertucci discriminated against him based on his national origin, age and in retaliation for his participation in protected activity, e.g., he filed complaints with Bertucci's hotline. (Complainant's Exhibit No. 1).

46. Complainant testified that he made a "lot" of complaints to Gillespie and Saunders about the comments related to his age, national origin and accent but no action was taken. Complainant did not recall meeting with Gillespie about his complaints. I do not credit Complainant's testimony.

Complainant's Calls to Bertucci's Hotline

47. Complainant called Bertucci's hotline several times between January 1995 and August 1996 in an attempt to resolve the complaints he had about the day-to-day operations at the Copley restaurant: January 25 and 27, May 4 and 25, October 27 and November 28, 1995; April 22, May 10 and 21, 1996. (Joint Stipulation No. 14; Respondent's Exhibit No. 2). I do not credit Complainant's testimony that he called the hotline, especially in May 1996, to report that Gillespie called him a

"crazy Irishman" or that Mangeon had mocked his Irish accent.

48. Bertucci's hotline staff recorded Complainant's complaints related to alleged unfair delivery procedures and assignments, coordination issues and problems he had with Joseph and other delivery drivers. Bertucci's hotline staff also recorded Bertucci's follow-up activities, including meetings between Complainant and various managers and supervisors. The hotline staff also distributed Complainant's hotline forms to Christopher Kane, Saunders and other managers or supervisors. (Respondent's Exhibit No. 2).

49. In response to his hotline complaints, Saunders talked to Complainant on February 2, 1995 and met with him on May 26, 1995 and May 3, 1996. Saunders also met with Complainant, Gillespie and Christopher Kane on June 4, 1996 to discuss his concerns about not receiving his fair share of deliveries.

50. Complainant testified that, in May 1996, Gillespie and Christopher Kane gave him "very negative" responses whenever he called the hotline. Complainant also testified that Christopher Kane harassed him for calling Respondent's hotline and that, on April 6, 1996, Kane told Complainant in front of other employees, "Hey, O'Leary, you called the hotline again." Christopher Kane denied that he "mocked, ridiculed or criticized" Complainant for using Bertucci's hotline. I do not credit Complainant's testimony.

51. Complainant testified that he met with Saunders in or around April or May 1996 and told him about Mangeon's alleged abuse or threats. Saunders allegedly stated that Boston was a "college-area" and that he might be better off finding work in the

suburbs. Complainant testified that Christopher Kane told him, in May 1996, that Bertucci's would not respond to his discrimination allegations. Complainant also testified that the hotline staff told him, in or about May 1996, not to complain anymore and that they did not want to talk to him. I do not credit Complainant's testimony.

52. Saunders recalled that he met with Complainant on various occasions in 1996 but denied that he "brought up" Complainant's age or ever suggested to him that his age was a factor in any of Bertucci's employment decisions. Saunders did not recall telling Complainant that he was having trouble getting along with his co-workers because he was older. (Respondent's Exhibit No. 12).

Incident on August 5, 1996

53. The Copley restaurant delivered pizzas to several Boston hotels and accepted payment by credit card although it occasionally accepted cash payments. For large deliveries ordered by a concierge, Kevin Kane testified that he expected the concierge to pay a tip directly to the delivery driver. In some instances, Kevin Kane gave the excess of the customer payment, if any, to the delivery driver after he or she first "cashed out" the bill for the food items. Kevin Kane also testified that, in 1996, the delivery drivers were supposed to report their tips, on a written form, to their managers or when they "cashed out."

54. On August 5, 1996, Kevin Kane took an order from a bellboy at the Copley Westin Hotel, 10 Huntington Avenue, Boston, Massachusetts, for delivery of 10 pizzas and other items to a

hotel guest in a conference room at approximately 12:15 p.m. (Joint Stipulation No. 14). The concierge at the Copley Westin Hotel frequently recommended Bertucci's to its guests and often placed orders with Bertucci's on their behalf.

55. Kevin Kane testified that the bellboy told him to direct the delivery driver to proceed to the concierge desk for a cash payment to cover the order and that the hotel would bill the guest directly. Kevin Kane also testified that the bellboy told him that this was a very important client for the hotel and he wanted to ensure that the order would be handled properly. Because of the size of the order, Kevin Kane discussed it with his manager to ensure that the restaurant could accommodate it during the lunch shift. I credit Kane's testimony.

56. Kevin Kane testified that he rang the slip up and placed it in the delivery queue. When Complainant asked Kevin Kane to make the delivery, Kane was concerned about whether Complainant could handle the order on his moped. Kevin Kane testified that he told Complainant how important this order was and directed him to go to the concierge or bell hop after delivery to collect cash for payment and not to collect payment from the hotel guest. Kevin Kane also testified that Complainant initially objected to this manner of payment because he believed the concierge was merely trying to steal the tip. Kevin Kane testified that he reiterated to Complainant that he had to go to the concierge to collect a cash payment for the order. I credit Kane's testimony.

57. Kevin Kane testified that if a customer wanted to pay for a telephone order by a credit card, he would write the credit card number on the top of the delivery slip, secure an authorization

from the customer and send the credit card slip and the delivery slip with the delivery driver to secure the customer's signature. Kevin Kane testified that the notation of "cash" on the delivery slip at issue in this case and the absence of a credit card number on the delivery slip indicated that the concierge had arranged for a cash payment. (Complainant's Exhibit No. 2). Kevin Kane testified that the Copley restaurant did not have corporate accounts with any hotels during the period relevant to this complaint. I credit Kane's testimony.

58. Complainant testified that Kevin Kane gave him a delivery slip for the order that specified a payment of \$224.60. Complainant also made handwritten notes on the slip, including a telephone number to reach the hotel guest, if needed. Complainant also testified that Kane told him to use a cart and deliver the pizzas directly to the hotel guest in conference room 3612 but did not give him any instructions regarding the manner of payment. I do not credit Complainant's testimony that Kevin Kane failed to give him instructions regarding the manner of payment for the order.

59. Complainant delivered the pizzas to Room 3612 where several persons were attending a meeting and he waited 10-15 minutes for the hotel guest who did not show up. (Joint Stipulation No. 20). Complainant returned to the Copley restaurant and called the hotel guest who then gave him an American Express card number for payment of the pizzas and told him to bring the slip to her in her hotel room for signature. The guest then gave Complainant her hotel room number. (Complainant's Exhibit No. 3). Complainant also testified that the guest did not complain about the delivery, did not seem upset in any manner and did not complain that he had harassed or intimidated her.

60. Complainant testified that he told Kevin Kane and Glasson Faria (sic), the on-duty manager, that he was returning to the Westin Hotel to obtain the customer's signature and that they did not object. I do not credit Complainant's testimony. Complainant walked back to the hotel, went to the customer's hotel room and obtained her signature on the receipt which included a \$40.00 tip. (Complainant's Exhibit No. 4). Complainant gave the slip to Kevin Kane when he returned to the restaurant and cashed out for the day.

61. Complainant testified that, in his experience in the food industry, it was customary for a customer to give a 10% tip on a large order.

62. After the delivery, Kevin Kane met with Complainant who told Kane that he went directly to the hotel guest because he believed the bellboy was trying to steal his tip by requiring him to get a cash payment from the concierge. Kevin Kane told Complainant that his action was unacceptable because he had told him to collect the payment from the bellboy and that it was an important delivery. Kevin Kane told Complainant that he planned to talk to "management" about his actions and failure to follow his instruction.

63. Kevin Kane testified that the Westin Hotel concierge called him later that afternoon to complain about the delivery. Kevin Kane testified that the concierge yelled and screamed at him for the first five minutes of the telephone call and threatened to never do business with Bertucci's again. Kevin Kane also testified that the concierge told him that the hotel guest was "very, very angry" because Complainant disrupted her meeting.

Kane told the concierge that it was a misunderstanding and offered free pizzas on his next order. I credit Kane's testimony.

64. Kevin Kane and the kitchen manager then went to the Westin Hotel and met with the hotel manager and concierge for approximately 45 minutes. The concierge reported to Kane that the hotel guest told him that Complainant had intimidated and harassed her when he went to her room and demanded payment although she told him that she had arranged payment through the hotel and did not want to use her personal credit card. Kevin Kane understood from the concierge that the hotel guest was angry because she had to pay for the delivery on her personal credit card. During the meeting, Kevin Kane apologized for Complainant's actions and offered gift certificates and free pizzas. Kane did not talk directly to the hotel guest. Once Kevin Kane finished his meeting, he reported the incident to Gillespie and Christopher Kane.

65. Complainant followed Kevin Kane to the Westin Hotel although he had completed his shift. Complainant returned to the conference room 3612 where he found the hotel guest. Complainant did not ask the hotel guest to immediately call Bertucci's management to resolve or clarify the issues regarding the pizza delivery and payment. I do not credit Complainant's testimony that the hotel guest gave him her business telephone number and offered to help him.

66. When Complainant reported for duty on August 6, 1996, he met with Christopher Kane and Gillespie who gave him a written warning regarding his failure to follow instructions on August 5, 1996. (Complainant's Exhibit No. 5). Complainant

refused to sign the written warning. They also discharged Complainant for allegedly harassing and intimidating the customer during his Westin Hotel delivery on the previous day and not following Kevin Kane's instructions to obtain payment from the bellboy. (Joint Stipulation No. 21; Respondent's Exhibit No. 1, paragraph 11).

67. Kevin Kane did not participate in the decision to terminate Complainant.

68. Bertucci's records show that, during the relevant time period, 4 of 10 (40%) delivery drivers at the Copley restaurant were 40 years of age or older. The records also show that 15 of 18 Massachusetts employees who were discharged for similar reasons to Complainant's termination were under age 40.⁴ (Complainant's Exhibit No. 11).

69. In 1996, Bertucci's paid Complainant \$4,008.87 in wages. (Respondent's Exhibit No. 4). Complainant did not report his tips to Bertucci's while working at the Copley restaurant.

Post-Termination Employment

70. After his termination, Complainant applied for and received unemployment insurance benefits for approximately six or seven months. Complainant did not submit any information regarding the amount of unemployment insurance benefits he received in 1996 and 1997.

71. From April 1996 to January 1997, Complainant worked as an on-

⁴Bertucci's records did not include information identifying the national origin of its employees, during the relevant time period. (Complainant's Exhibit No. 11).

call bellhop at the Holiday Inn in Government Center, Boston, Massachusetts, at a rate of \$7.00 per hour (not including tips). (Joint Stipulation No. 23). After his termination, Complainant testified that he remained "on-call" for Holiday Inn for a short period but worked almost no shifts because the hotel had full staffing.

72. Complainant applied for a position at Baldinis' Pizza restaurant in the Back Bay within a couple of months after his termination. Complainant testified that he had three different interviews, went to an employee orientation session but never received a starting date. Complainant did not call Baldinis to confirm a starting date.

73. Except for Baldinis, Complainant did not look for nor apply for positions in other food industry businesses, including pizza delivery restaurants, located in Bertucci's delivery region. Complainant testified that he was so devastated by what happened at the Copley restaurant that he did not want to travel into Boston to look for work.

74. In 1996, Complainant posted one resume on Monster.com, and unsuccessfully applied for positions at Alliance Security in Everett, Kelly's bicycle shop in Melrose and painting companies in Everett. Complainant also applied for work during the holiday season at the United States Postal Service.

75. From May 1997 to October 1997, Complainant worked as a salesperson for Network Plus. (Joint Stipulation No. 23; Respondent's Exhibit 5). Complainant worked approximately six hours each week and was paid \$6.00-\$10.00 an hour. During this period, Complainant also repaired and sold bicycles.

(Respondent's Exhibit No. 5).

76. Complainant testified that he contacted the Internal Revenue Service and searched for his tax returns for 1996 through 1997 at his home but was unable to locate them. Complainant testified that he did not file tax returns in 1998 and 1999 because he did not have sufficient income.⁵

77. Complainant testified that he used his savings of approximately \$60,000 to pay his living expenses, including rent, and to sustain himself from 1996 until 2000. During this period, Complainant did not work except for a "little" dog walking and house sitting.

78. Complainant testified that he was devastated when Bertucci's discharged him and he was unable to sleep on August 6, 1996. Complainant also testified that he felt violated, "totally" humiliated" or abused and wrongfully fired. Complainant testified that he also felt violated by being called a "crazy Irishman," "the negative stereotypes of Irishness in terms of drinking" and when he was threatened and "assaulted" by Mangeon. Complainant testified that he felt violated when Mangeon denied his promotion by Weiner.

79. Complainant testified that he regularly consulted with a psychiatrist for two years after his discharge from Bertucci's. (Respondent's Exhibit No. 5). Complainant did not produce any records of such treatment and I do not credit his testimony.

⁵Complainant stipulated that his back wage claims are limited to 1996 to 2000.

III. CONCLUSIONS OF LAW

A. Complainant's Termination on August 6, 1996

Massachusetts General Laws, Chapter 151B, §§4(1) and (1B), makes it unlawful to discriminate in employment based on an individual's national origin and/or age. Chapter 151B protects individuals who are forty years or older when the alleged discrimination occurred. See e.g., Hurley, Ford & Massachusetts Commission Against Discrimination v. Melrose Police Department, 27 MDLR 7 (2005); General Laws, Chapter 151B, §1(8). In this case, Complainant alleges that Bertucci's terminated him on August 6, 1996 because of his national origin and age.

In the absence of direct evidence of an unlawful motive based on Complainant's national origin and/or age, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).⁶ See also Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001) (Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation).

⁶Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000) (direct evidence is evidence that "if believed, results in an inescapable, or least highly probable inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991). As discussed herein, I find that Complainant did not produce credible direct evidence to establish Bertucci's discriminatory bias based on his national origin and/or age.

To establish a prima facie case of discrimination based on his national origin and/or age, Complainant must show by credible evidence that (1) he is a member of a protected class based on his national origin and/or age, i.e., that he was an Irish national and/or 40 years or older at the time of his termination on August 6, 1996; (2) he was capably performing his duties and responsibilities as a delivery driver when Bertucci's terminated him; (3) he was replaced by someone who was not an Irish national and/or is substantially younger, i.e., by someone at least five years younger, or he presented credible evidence that his discharge occurred under circumstances that would raise a reasonable inference of unlawful discrimination based on his national origin and/or age. See e.g., Knight v. Avon Products, 433 Mass. 413, 420-21 (2003), quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-312 (1996); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Stephan and Massachusetts Commission Against Discrimination v. SPS New England, Inc., 26 MDLR 332 (2004).

Complainant has shown, by credible evidence, that he is a member of a protected class based on his national origin because he is an Irish national. Complainant has also proved that he is a member of a protected group based on his age because he was 41 years old when Bertucci's discharged him from his delivery driver position at the Copley restaurant. Lee v. President & Fellows of Harvard College, 60 Mass. App. Ct. 836 (2004). However, Complainant has not shown, by credible evidence, that he was meeting Bertucci's legitimate and reasonable work expectations when it discharged him, i.e., that he was adequately performing his delivery driver duties on August 6,

1996. See Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003).

I fully credit Kevin Kane's testimony that he unequivocally instructed Complainant to secure a cash payment for the pizza delivery on August 5, 1996 from Copley Westin Hotel's concierge or bell desk rather than the hotel guest, as specified by the concierge. I find that Complainant's testimony regarding the circumstances of his delivery and collection of payment directly from the hotel guest is entirely not credible, is inconsistent with the order slip prepared by Kane and is contrary to Bertucci's practice and reasonable expectation for handling orders placed by concierges for their hotel guests. There is no dispute that Complainant collected a credit card payment from the hotel guest, directly contrary to Kane's instructions, because he believed the concierge would "steal" the tip for his delivery services. I also find that Complainant's willful failure to follow Kane's clear instructions jeopardized Bertucci's ongoing business relationship with the Westin hotel and was sufficiently serious, by itself, to warrant termination.⁷

I next find that Complainant's utter disregard of Kevin Kane's instructions on August 5, 1996 was not an isolated incident but was part of his pattern of engaging in disruptive behavior with his co-workers and refusing to follow management instructions. Prior to Complainant's termination, Bertucci's

⁷I reject Complainant's contention that Bertucci's management should have further investigated this incident by directly contacting the hotel guest to verify what transpired on August 5, 1996. There is no need for Bertucci's to contact the hotel guest because Complainant admitted that he obtained a credit card payment directly from the hotel guest contrary to the hotel's directions to Kane and Kane's instructions to him. Under the circumstances of this case, I find that it was reasonable for Bertucci's to rely on the representations of the hotel, its customer, relating to the hotel guest's complaint about Complainant's request for payment and the impact of his conduct on the hotel's business relationship with its guest.

managers and supervisors issued three written warnings to him about his unsatisfactory work performance: (1) May 25, 1995--Complainant constantly harassed and argued with delivery drivers; (2) April 25, 1996--Complainant failed to bring in a doctor's note without explanation; (3) May 9, 1996--Complainant made a management decision when he directed another driver not to report to work.⁸ (Respondent's Exhibit Nos. 7 and 9; Complainant's Exhibit No. 9). In addition, Weiner and Christopher Kane generally noted in Complainant's 1995 and 1996 performance evaluations that Complainant needed to improve his "flexibility and employee relations." I also find that Kevin Kane's credible testimony about Complainant's ongoing work performance issues, including repeated complaints from customers and other delivery drivers, is entirely consistent with the performance and workplace issues identified in Bertucci's documented written warnings to Complainant in 1995-1996.

Even if Complainant had proved that he was adequately performing his job duties when Bertucci's terminated him, which he did not, he failed to establish that Bertucci's replaced him with a less qualified person not of his national origin and/or a less qualified younger person. Complainant also failed to establish, by credible evidence, that Bertucci's treated him differently than other similarly situated non-Irish and/or younger delivery drivers when it discharged him for his failure to follow Kevin Kane's instructions on August 5, 1996. Finally, Complainant did not produce any comparative evidence to establish that Bertucci's failed to take disciplinary actions, including termination, against non-Irish or younger employees

⁸Complainant repeatedly testified that Weiner did not make any comments based on his national origin and/or age. Accordingly, I fully credit Weiner's warning and observations in 1994-1995 about Complainant's continuing need to improve his customer service and relationship with his co-workers.

who committed similar infractions. See Massachusetts Commission Against Discrimination & Kampion v. Cisco Systems, Inc., 25 MDLR 464 (2003)(the complainant failed to show that her employer treated her differently from similarly situated younger male employees), affirmed by Full Commission, 26 MDLR 43 (March 4, 2004). To the contrary, Bertucci's undisputed evidence shows that 15 of 18 (83%) Massachusetts employees who were terminated for similar reasons as Complainant's discharge were under age 40.⁹ (Respondent's Exhibit No. 11). For the above reasons, I conclude that Complainant did not establish a prima facie case of discrimination based on his national origin and age in violation of Massachusetts General Laws, Chapter 151B, §4(1) and (1B) when Bertucci's discharged him on August 6, 1996 because of his failure to follow instructions.

Assuming arguendo that Complainant has established a prima facie case of discrimination based on his national origin and age, the burden shifts to Bertucci's to produce credible evidence of legitimate non-discriminatory reasons for its actions. See Abramian, 432 Mass. at 116-117; Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665 (2000). If Bertucci's meets its burden of production, Complainant must show by a preponderance of the evidence that Bertucci's "acted with a discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Bertucci's] for making the adverse decision is false." Lipchitz, 434 Mass. at 504. Complainant retains the ultimate burden of proving that Bertucci's adverse employment

⁹Bertucci's did not identify the national origin of these employees.

action, i.e., his termination, was the result of an unlawful animus based on Complainant's national origin and age. Id.; Abramian, 432 Mass. 117.

I conclude that Bertucci's has met its burden of producing a legitimate, nondiscriminatory reason for terminating Complainant on August 6, 1996. Complainant's deliberate failure to comply with Kevin Kane's unambiguous payment instructions certainly constitutes a legitimate, nondiscriminatory reason for his termination. See Massachusetts Commission Against Discrimination & Molloy v. Cook & Co., 24 MDLR 325 (2002) (age discrimination claim failed because the complainant's insubordinate conduct was a legitimate, nondiscriminatory reason for her termination). Bertucci's also established, by credible evidence, that Complainant consistently failed to meet its reasonable workplace expectations during 1995-1996, including his refusal to comply with its rules and his strained working relationship with his co-workers, despite Bertucci's warnings and an opportunity to correct his workplace behavior. I also find that Complainant engaged in his improper conduct knowing that it violated Bertucci's workplace policy. Massachusetts Commission Against Discrimination & Noils v. Adolph Bauer, Inc., 26 MDLR 63 (2004).

Complainant also failed to produce any credible evidence to establish that Bertucci's supervisors were motivated by a discriminatory animus based on his national origin and age when they terminated him on August 6, 1996. Based on Complainant's demeanor and manner of testifying, I do not find credible his testimony that he was subjected to repeated national origin and age-based comments by his supervisors and coworkers from 1995 until his termination in 1996. Based on the totality of the

evidence in the hearing record, I am also not persuaded that Bertucci's workers made comments in 1995 to 1996 evincing a discriminatory bias based on Complainant's national origin and/or age.

I do not credit Complainant's testimony that Mangeon sometimes mimicked his Irish accent beginning in 1994. In addition, Mangeon's alleged comment about Complainant being "really old" if he listened to music in the 1970s or that he could have been drafted to serve in Vietnam are insufficient, by themselves, to establish an age-based bias. I find that Mangeon's comments, even if made, were innocuous, not related to Complainant's work and were made in response to topics that Complainant raised. These comments are more properly characterized as "stray remarks" made by a person who is not a decision-maker in this complaint and is not the kind of evidence that is "suggestive of an impermissible bias." See e.g., Wynn & Wynn, 431 Mass. at 667 (stray remarks in the workplace include statements by persons without the power to make employment decisions, and statements made by decision-makers unrelated to the decisional process); Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., *supra*. Finally, Complainant failed to establish that Mangeon's alleged age-based comments were made when Complainant was 40 years or older or that Mangeon even knew of Complainant's age.

I also do not credit Complainant's testimony that Saunders referred to Complainant's age during a meeting in April or May 1996 or stated that Complainant may not be suited to working at the Copley restaurant because of his age. I conclude that Saunders' alleged comment is also, at best, a "stray remark,"

made by a Bertucci's employee who did not participate in or have any role regarding Complainant's discharge. Wynn & Wynn, supra.

Finally, I do not credit Complainant's testimony that Kevin Kane, Christopher Kane and/or Gillespie made disparaging remarks about Ireland or Irish persons or that Gillespie called Complainant a "crazy Irishman" three times between April and August 1996. Kevin Kane vigorously and credibly denied making any comments about Complainant or overhearing comments made by other Bertucci's employees, including Christopher Kane, based on his national origin or age. I also conclude from the totality of evidence in the record that Complainant would have reported such comments, had they occurred, during his multiple calls to Bertucci's hotline in 1994 through 1996 or to the Commission's investigator in May 1996 when he repeatedly pressed his claims that Bertucci's had "unfair" assignment and/or delivery procedures. To the contrary, Complainant did not mention a single instance of alleged discriminatory comments based on his national origin and/or age during his calls to Bertucci's hotline. (Respondent's Exhibit No. 2).

Complainant also failed to produce a single witness to corroborate any of the alleged derogatory or stereotypical comments based on his national origin or age despite the fact that several of them allegedly took place in the presence of Complainant's coworkers. Finally, the workforce profile at the Copley restaurant during the relevant time period undercuts Complainant's assertion that Bertucci's acted with an age-based discriminatory intent. The evidence showed that 4 of 10 (10%) of the delivery drivers at the Copley restaurant were 40 years of age or older. (Complainant's Exhibit No. 11). Stephan and Massachusetts Commission Against Discrimination, supra.

(evidence showed that employer retained or hired other employees who were older than Complainant).

As discussed above, Complainant has not persuaded me that Bertucci's reasons for terminating him were a pretext for unlawful discrimination based on his national origin and/or age. I conclude, therefore, that Bertucci's did not engage in unlawful discrimination based on Complainant's national origin and/or age when it discharged him on August 6, 1996.

B. Hostile Work Environment

Complainant contends that Bertucci's discriminated against him when it subjected him to a hostile work environment based on his national origin and age during April 1996 through May 1996. Massachusetts General Laws, Chapter 151B, §§4(1) and (1B), prohibit workplace harassment or a hostile work environment based on an employee's national origin and/or age. See e.g., Abramian v. President & Fellows of Harvard College, supra.; Cavanaugh v. Town of Agawam, 21 MDLR 106 (1999).

The standard for analyzing a hostile work environment claim based on national origin and/or age is analogous to that of a hostile work environment sexual harassment claim. Consentini v. Peter Pan Bus Lines, 22 MDLR 354 (2000); Cavanaugh v. Town of Agawam, supra. To state a claim of hostile work environment based on his national origin and/or age, Complainant must show that: (1) he is a member of a protected class based on his national origin and/or age; (2) he was subjected to unwelcome verbal or physical conduct based on his national origin and/or age; (3) the unwelcome conduct was subjectively and objectively

offensive; (4) the unwelcome conduct was sufficiently severe or pervasive that it altered the conditions of Complainant's employment and created an abusive work environment; (5) the harassment was carried out by a Bertucci's employee with a supervisory relationship to Complainant or Bertucci's knew or should have known of the harassment and failed to take prompt remedial action. Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208 (2000); Beldo v. University of Massachusetts, 20 MDLR 111 (1998). Complainant must also show that his work environment was pervaded by harassment or abuse based on his national origin or age that posed a barrier to his full participation in Bertucci's workplace. College-Town Division of Interco v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 162 (1987).

A hostile work environment occurs when the unwelcome or offensive conduct is so pervasive that it creates a barrier to Complainant's full and untrammelled participation in the workplace. See Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678 (1993); College-Town, Division of Interco v. Massachusetts Commission of Discrimination, 400 Mass. 156, 162 (1987). The determination of whether a work environment is hostile requires a factual inquiry into all of the circumstances, including the frequency of the unwelcome conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with a complainant's job performance. Massachusetts Against Discrimination & Rodriguez v. Nationwide Warehouse & Storage, et. al., 25 MDLR 233 (2003). The appropriate standard to be applied in hostile work environment cases is that of a reasonable person from the protected group of which Complainant is a member. Andrade v. Stop & Shop Supermarket, Inc., 23 MDLR 213 (2001).

While Complainant satisfies the first element of his prima facie case because he is an Irish national and was over 40 years old during the time period of the alleged harassment, he has not proved the remaining elements of his hostile work environment claim based on his national origin and/or age. First, Complainant's testimony regarding the alleged biased comments made by Bertucci's employees or supervisors is simply not credible and is unsupported by any other evidence in the hearing record. Second, Complainant acknowledged that some of the alleged age-based commentary took place before he reached age 40. As discussed above, the intent of some of the alleged comments, particularly those attributable to Mangeon, Saunders and the Kane brothers, is vague or ambiguous, at best. The comments could have been joking and harmless and are insufficient to establish a hostile work environment based on Complainant's age and/or national origin. Even if I find that Gillespie described Complainant as a "crazy Irishman" on three instances between April 1996 and August 6, 1996, which I do not, I conclude that these comments are insufficient, by themselves, to establish a hostile work environment.

Complainant produced no evidence to establish that the alleged unwelcome comments were so severe or pervasive that they created an abusive work environment for him at the Copley restaurant. While Complainant filed multiple complaints with the hotline to express his ongoing dissatisfaction with Bertucci's order and delivery procedures, I conclude that he never complained to Bertucci's management, Bertucci's hotline or the Commission investigator about alleged commentary by Bertucci's employees based on his age and/or national origin. Accordingly, I conclude that Complainant failed to produce

credible evidence to establish that Bertucci's employees subjected him to acts or comments, taken individually or together, that rose to a level of harassment so severe or pervasive as to constitute an abusive or hostile work environment for him at the Copley restaurant based on his national origin and/or age.

Based on the above findings, I also conclude that Complainant has not proved that his work environment was "so pervaded by harassment or abuse with the resulting intimidation, humiliation and stigmatization," that it made his employment at the Copley restaurant less desirable to a reasonable person in his position. See Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 531, 532 (2001); Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, (2001). I conclude that the conduct cited by Complainant is not sufficient to create an objectively hostile or abusive work environment based on his national origin and/age. See e.g., Clark County School District v. Breeden, 532 U.S. 268 (2001)("simple teasing, off-hand comments, and isolated incidents unless extremely serious will not amount to discriminatory changes in terms and conditions of employment"); Horzesky v. R&M Construction Co., 15 MDLR 1171 (1993)(casual comments or accidental or sporadic conversations are insufficient to constitute a pervasive, hostile work environment). Accordingly, I conclude that Complainant has not established a prima facie case of a hostile work environment based on his national origin and/or age.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the complaint is hereby dismissed. This decision constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 20th day of May, 2005.

Kenneth B. Grooms
Hearing Officer