

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & MARK GRIFFIN,
Complainants

v.

DOCKET NO.01BEM2433

EASTERN CONTRACTORS AND
S & R CONSTRUCTION CO.,
Respondents

MCAD & CLARENCE LEFTWITCH,
Complainants

v.

DOCKET NO. 01BEM2434

EASTERN CONTRACTORS, INC.,
Respondent

Appearances:

Joseph Strumski, Esquire for Mark Griffin & Clarence Leftwitch
Edward J. Quinlan, Esquire for Eastern Contractors, Inc.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about August 27, 2001, Mark Griffin filed a complaint with this Commission charging Eastern Contractors, Inc. and S & R Construction Co., with discrimination on the basis of race and color. On or about August 27, 2001, Clarence Leftwitch filed a complaint with this Commission charging Respondent Eastern Contractors, Inc., with discrimination on the basis of race and color. Complainants later amended their complaints to include a charge of retaliatory termination. The investigating commissioner issued a probable cause determination. The complaints were

consolidated for public hearing. Attempts to conciliate the matters failed and the cases were certified for public hearing. A public hearing was held before me on January 8 and 9, 2008. Respondent S & R did not appear at the public hearing, and its default was entered into the record.¹ After careful consideration of the record in this matter, as well as the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Respondent Eastern Contractors, Inc. (“Eastern”) was the general contractor on a public project constructing school buildings at the William Greene and Spencer Borden Elementary Schools at two sites located at opposite ends of the city of Fall River, Massachusetts (“the project”). The project was commenced in 2001, and was “substantially completed” on January 4, 2003.

2. Eastern’s duties involved construction of the concrete footings and pouring concrete for the buildings’ foundations. Eastern’s President is Ramesh Motwane and its Vice president is Joseph Licciardi.²

3. Respondent S & R Construction Co. (“S & R”) was a sub-contractor to Eastern on the project. S & R’s duties involved excavating the project sites and installing utilities prior to construction. S & R’s owners are David and Rocco Izzo.

4. Complainant Clarence (“Kip”) Leftwitch is an African-American man who resides in New Bedford, Massachusetts. Leftwitch has been a construction worker for 29

¹ Counsel suggested at the public hearing that S & R may no longer be in business. However, the record contains no conclusive evidence of the company’s current status; thus, S & R is presumed to be a viable Respondent in the matters now before this Commission.

² Motwane and Licciardi attended the public hearing but did not testify.

years and was a member of the laborers union for 22 years, until 1997, when he obtained a “class B” operator’s license that permitted him to operate machinery.

5. In late June 2001, S &R briefly hired Leftwitch to operate a lull (forklift) on the project, but let him go after two days, when S & R learned he was not a member of the Rhode Island heavy operator’s union as required by S & R. Leftwitch was then immediately hired by Eastern on July 3, 2001 to perform the same task for Eastern at the recommendation of his long-time acquaintance, Tim Boudelay, a Supervisor for Eastern. Leftwitch testified that he accepted the prevailing wages of a laborer for driving the lull, although he should have received operator’s pay. Eastern terminated his employment on September 17, 2001.

6. Complainant Mark P. Griffin, Sr., an African-American man, resides in E. Wareham, Massachusetts. Griffin is currently employed as an installer of insulation. Griffin has performed construction work for 30 years and was, until 2004, a member of the laborers union. Griffin was hired by S & R as a laborer on the project in around July 2001 at the rate of \$20/hour. Griffin was assigned to either the Green School or the Borden School site, depending on where he was needed. His duties were to lay the groundwork for Eastern to pour the footings and the walls for the buildings and to perform various other laborer’s duties as assigned. Griffin usually reported to S & R Site Superintendent Mark Brito while at the Green School and to Louie Vicente while at the Borden School. Griffin was laid off on or about September 6, 2001.

7. Tim Boudelay³ was a supervisor for Eastern whom Leftwitch has known for many years from working on previous projects together. According to Michael Brito, Boudelay performed the same function as Paul Agiari, the site superintendent for Eastern

³ Boudelay did not testify at the public hearing

and Boudelay filled in for Agiiar, when Agiiar was off-site working on other projects.

Agiiar was Leftwitch's supervisor and Boudelay was Leftwitch's supervisor when Agiiar was off-site. I credit Brito's testimony.

8. In August 2001, Michael Brito, who worked for over 20 years in the construction business, was the site superintendent for S & R on the project. Brito's duties included general supervision of the construction sites, assignment of workers, determining staffing needs for the projects and hiring and firing of workers. Brito reported directly to S & R owners David and Rocco Izzo. As a site superintendent he had frequent interaction with laborers. He left the company in December 2001, while the project was still ongoing.

9. Brito testified that it was common for Eastern and S & R to borrow one another's workers and that laborers and operators of each company would do favors for one another, depending on the needs of the project. They all shared duties, as was common on construction projects. As Brito put it, "One hand washed the other and the project ran smoothly." Brito testified that although Louis Vicente was nominally responsible for the Borden school site, Brito spent a great deal of time going between the two sites and trouble-shooting at the Borden school site, in addition to supervising the Green site because Vicente was a "glorified laborer" who was being tried out as a foreman. Brito, who worked with Agiiar on a daily basis, described Agiiar as a crude loudmouth. I credit his testimony.

10. Brito testified that both Griffin and Leftwitch were good workers and he never had any problems with them. I credit his testimony.

11. Leftwitch testified that he performed the duties of lull operator full-time for Eastern until August 15, 2001. As a lull operator he conveyed forms and tools to carpenters and moved heavy items such as generators. On a typical day, Leftwitch would arrive at the site at 6:45 a.m., turn on the lull, sign in and drive to the trailer to load the carpenters' equipment on the lull and deliver it to their work area. For the first couple of weeks, he worked at the Green School site, and then was sent to the Borden School site where he performed the same duties until August 15. I credit his testimony.

12. Griffin worked as a laborer for S & R on the project. He did not operate machinery and his job often included digging with a shovel, pouring the footings and making sure the walls were shored, laying water and drainage pipe and excavating, all in order to lay the ground work for Eastern. Griffin testified that the employees of the contractors and sub-contractors worked side by side and he frequently interacted with the employees of Eastern. I credit his testimony.

13. Leftwitch testified that on the morning of August 14, 2001, he was at the Borden school, unloading tools to bring to the carpenters. Paul Agiiar was present and remarked to Eastern Foreman Danny Dennis⁴ in a laughing manner, "We still have this nigger working for us?" Leftwitch responded to Agiiar, "I don't know you. Don't talk like that again. I don't play those games." Dennis remarked, "You know how Paul is." Agiiar continued to talk to Dennis, while Leftwitch left the area in the lull and worked the rest of that day. I credit Leftwitch's testimony.

Deleted: ,

14. Leftwitch testified that the following day, August 15, 2001, Paul Agiiar approached him around 11:00 a.m. and told him he would need him for a job later. After

⁴ Leftwitch referred to the Foreman as Danny Davis. Based on all the circumstances, I find that Leftwitch was referring to Danny Dennis.

lunch, Agiir returned and instructed Leftwitch to take some brooms and shovels and go down the hill to meet a couple of workers from S & R at an area adjacent to the Borden school site in order to clean up some debris that had washed into the area from the Borden school after a water main break. I credit his testimony.

15. Griffin testified that the same day, Agiir told him that Mark Brito had given him permission to use Griffin for the rest of the day to clean up a flooded area adjacent to the Borden school site. I credit his testimony. In his sworn complaint, Griffin stated that Agiir told him, “you and that black guy go down...to clean up materials left in the road” According to his complaint, Griffin assumed Agiir was referring to Leftwitch as they were the only African-American workers at the site.

Deleted:

16. At around 1:30 that afternoon, Leftwitch met up at the flooded area with Griffin and another S & R employee named Carlos, who was operating a back hoe. Leftwitch and Griffin did not know one another prior to this day. The three workers proceeded to clean and shovel dirt and debris into the back hoe.

17. After about 90 minutes, Brito came by to check on Griffin and Carlos. At the time Agiir stood on a wall being constructed on a hill at Borden School site, along with several carpenters and other workers about 50 yards away from where Leftwitch, Griffin and Carlos were working. According to Leftwitch, Griffin and Brito, Agiir suddenly yelled down to Brito: “If you’re done with those fucking niggers, send them this way. I need their help.” I credit their testimony.

18. Brito then told Carlos to cut his machine off and remarked, “I know what I heard, but I want to see if he has [the nerve] to say it again.” Brito then asked Agiir to repeat what he had just said. Agiir stated “You heard me. When you get done with

those fucking niggers, send them this way.” Griffin, who had never met Agiiar before the incident, expressed his displeasure with Agiiar’s comments to Brito and told Leftwitch that he could not believe what had come out of Agiiar’s mouth. (Testimony of Griffin, Leftwitch and Brito) I credit their testimony.

19. According to Griffin, Brito remarked that he did not want to see what was going to happen next. Brito testified that he was embarrassed, did not know what to do and left the work site without taking any action. Leftwitch, Griffin and Carlos continued to work and by the time they had finished the clean-up, Agiiar had left the premises. The testimony of Leftwitch, Griffin and Brito regarding this incident was virtually identical and I credit their testimony.

20. Leftwitch testified that he believed that to tolerate Agiiar’s statements in silence would make him a target for others on the site who wanted to call him a “nigger,” and so he intended to confront Agiiar to his face. However, by the time they finished the job, Agiiar had left the site, and Leftwitch never spoke to Agiiar. I credit his testimony.

21. Leftwitch testified that when he arrived at work on August 16, the day after Agiiar’s comments, his lull was already running. When he asked Danny Dennis why his machine was on, Dennis responded, “You’re a laborer now.” When Leftwitch asked why he had been taken off the lull, Dennis just restated that Leftwitch was a laborer. For approximately the next week, Leftwitch performed the duties of a laborer at the Borden school until Davis transferred him back to the Green school. I credit his testimony.

22. Brito testified that after the incident with Agiiar, Leftwitch and possibly Griffin complained to him about Agiiar’s comments and told him Agiiar’s comments were not an isolated incident, but a regular occurrence. Brito testified that he may have

told Agiir that his remarks were “pretty ignorant,” but he took no further action. I credit his testimony.

23. Griffin testified that he was very upset about Agiir’s comments and at work the next day he told Eastern Foreman, Dan Dennis, who worked directly for Agiir that he was very upset and “did not appreciate” Agiir’s remarks. Dennis responded, “You’ve got to understand. That’s the way Paul is.” After work that day, Griffin called Leftwich and told him that he had gone to Dennis to try to have something done about Agiir and that Dennis had “brushed him off” as though nothing had ever happened with Agiir. I credit his testimony.

24. Griffin testified that on August 21, Dennis asked him on three occasions not to pursue the matter. On or about August 22, 2001, Dennis said to Griffin, “Yo, my nigger. I have friends in Dorchester and Roxbury,” then said he was “only joking.” Griffin responded that he was no longer going to tolerate such comments from anyone. Griffin then called Brito to try to report Dennis’ comment and to attempt to rectify the situation. Brito called back and told Griffin that he had talked to Dennis about the matter. Griffin testified that after this, Dennis and Agiir “pretty much left him alone.” (Testimony of Griffin; MCAD complaint of Griffin) I credit his testimony.

25. Griffin testified that he worked steadily for the next two weeks. He testified that during his employment with S & R he took only one day off because of a severe cold on September 3. I credit his testimony.

26. Dan Dennis did not testify at the public hearing but in a signed, unsworn statement dated October 9, 2001, acknowledged that Griffin complained to him about Agiir’s remarks, and that he responded that Agiir had a “big mouth” and was only

kidding and not to take him seriously. He also told Griffin that he had friends in Roxbury, but denied using the word “nigger.” (Exh. 45) I assign no weight to his unsworn statement and to the extent that it contradicts the credible testimony of Mark Griffin, I do not credit his statement.

27. Agiiar did not testify at the public hearing. In a signed, unsworn statement dated October 11, 2001, he stated he remarked twice to Leftwitch, “Get up here, you nigger” on August 15, but that this remark was made “in fun” and was not meant to embarrass Leftwitch and was part of a “daily dialog” between him and Leftwitch. He stated that Leftwitch called him “stupid Portigue” and “white trash.” (Exh. 44) Leftwitch denied ever calling Agiiar names, denied they ever had a joking relationship and stated that he had always tried to stay away from Agiiar. I credit Leftwitch’s testimony. I assign no evidentiary weight to Agiiar’s unsworn statement, and to the extent that it contradicts the credible testimony of the Complainants and Brito, I do not credit his statement.

28. Upon returning to work at the Green school site after the incident with Agiiar, Leftwitch observed that an employee named Randy was operating the lull. When he asked Tim Boudelay why Randy was operating the lull, Boudelay responded that he was told only that Leftwitch was to perform laborer’s duties and not operate the lull. This concerned Leftwitch because he had signed for the lull, it was registered under his license and he feared he would be held responsible if anything went wrong with the lull. I credit his testimony.

29. Leftwitch testified that prior to the incident with Agiiar all the workers talked and ate lunch together, however, when he returned to the Green school after the incident,

workers stopped talking him and everyone kept to themselves. He stated it was “as though I had the plague.” He stated that Tim Boudelay was the only one who talked to him. I credit his testimony.

30. Leftwitch testified that after working for another week or two at the Green school site he took two or three days off with the permission of Boudelay. He stated that he had become aggravated, anxious and concerned about his health because of the incidents at work. Leftwitch was concerned about exacerbating his pre-existing high blood pressure and feared he would suffer a stroke. Leftwitch stated that although he “couldn’t take it any more,” he had to go to work to support his family. I credit his testimony that the incident with Agiir and subsequent events distressed and angered him to the point of concern for his health.

31. Leftwitch testified that during one of his days off he saw his physician, who, for the first time in 20 years, increased the dose of the blood pressure medication he was taking. I credit his testimony.

32. In late August, Leftwitch called Griffin and told him he was going to file a discrimination complaint. Griffin agreed to accompany him and the following day, they consulted with Donald Gomes, an acquaintance of Leftwitch who was an official of New Bedford’s civil rights agency. After telling Gomes about their work situation, Gomes provided them with the documents for filing MCAD complaints. Thereafter, each filed separate complaints which were received by this Commission on or about August 27, 2001.

33. On the morning of September 6, 2001, while at the work site compacting a wall, Griffin observed Agiir talking to S & R owner Rocco Izzo. Immediately

thereafter, Izzo approached Foreman Louis Vicente and the two briefly spoke while they looked over at Griffin. Early that afternoon, Vicente approached Griffin and said, "I have to lay you off." When Griffin asked why, Vicente responded, "I have no reason." Griffin stated that at the time of his lay-off, S& R still had work available and other laborers remained on the job. He was very angry about his termination and worried about taking care of his family because he had lost his income. I credit his testimony.

34. Griffin stated that when he picked up his checks 10 days later, he again asked why he had been laid off but was given no reason. I credit his testimony.

35. Brito testified that S & R did not consult him regarding the decision to terminate Griffin's employment, which was very unusual because Brito normally hired and fired employees, but was never told why Griffin was let go. Brito stated that Griffin was a good worker and that he would not have let him go. I credit his testimony.

36. Leftwitch testified that on September 17, 2001, after completing his work for the day, Boudelay took him aside and told him that he had to let him go. When Leftwitch asked why, Boudelay would not make eye contact and responded that Leftwitch had refused overtime the night before and was "not a team player." When Leftwitch protested that Boudelay had not asked him to work overtime, Boudelay responded, "I hired you, right? Read between the lines, Kip. That's all I can say." Leftwitch took his lunch and left the work site. Leftwitch testified that at the time of his termination the project was on-going with carpenters still erecting walls at the Borden and Green Schools. I credit his testimony.

37. Leftwitch and Griffin each testified that shortly after Leftwitch's lay off, Eastern owner Joe Licciardi called them and urged them to drop their MCAD complaints

and offered to meet over dinner and have Agiiar apologize. In addition Griffin testified that one of S & R's owners also asked him to drop his complaint. Both Complainants refused to meet with Respondents' owners. I credit their testimony.

Leftwitch Damages

38. Leftwitch testified that despite efforts to find work, including going to former employers and previous job sites, and even stopping people on the street to ask about work, he was unable to find work until April 2002. I credit his testimony that he had great difficulty finding work after he was let go from Eastern.

39. I find that Leftwitch is entitled to lost wages from the time of his termination, until such time as the projects on which he was working were substantially completed, in January of 2003. Leftwitch earned \$25.11 per hour while working at Eastern. Had he remained employed by Eastern for the remainder of 2001 he would have earned an additional \$15,066.00. (25.11x40 hrs/wk x 15 wks). For the remainder of 2001, Leftwitch received \$9,120.00 in unemployment compensation. Thus Leftwitch's lost wages for 2001 total \$5,946.00 (\$15,066.00-\$9,120.00). If he had continued to be employed by Eastern in 2002, Leftwitch would have earned \$52,228.00 for that year. (25.11x40 hrs/wk x 52 wks). In 2002 his gross income was \$37,960.00 from work, plus unemployment compensation of \$2,146.00 for a total \$40,106.00. Thus his lost wages for 2002 are \$12,122.00 (\$52,228.00-\$40,106.00) (Exh. 55, 63 and 64). I find that Leftwitch is entitled to an award of back pay in the amount of \$18,062.00 for the years 2001 and 2002. (\$5,946.00 +12,122.00) (Exh. 55, 63 and 64)

40. Susan Gomes lived with Leftwitch from 1994 to 2002. In 2001 they resided in a two family home in New Bedford. They had a son together who currently resides

with Gomes. She testified that prior to the incidents at Eastern, Leftwitch was very happy-go-lucky, enjoyed outdoor sports such as hunting and was very excited about having a baby. She testified that he was a good father who spent a lot of time with their son and would take him to the park and on day trips. Gomes stated that prior to the incident with Agiir and losing his job, they were able to keep up with bills. I credit her testimony.

41. Gomes testified that after his termination, Leftwitch became moody and withdrawn, kept to himself and would “tighten up” when she attempted to discuss matters with him. She stated that she couldn’t get him to open up, that he became less patient and less active with his son and did not want to go out and do things. As a result of his depression she and Leftwitch argued more frequently after the incident, particularly as financial issues arose. She stated that as an interracial couple they had never experienced overt acts of racism. According to Gomes, she and Leftwitch ended their relationship in March or April 2002. I credit her testimony that Leftwitch’s distress adversely affected their relationship and his relationship with his son and changed his personality.

Griffin Damages

42. Griffin would have earned \$13,200 per year at S & R ($\$20.25 / \text{hr} \times 40 \text{ hrs} \times 16.5 \text{ wks}$) had he remained working at S & R until the end of 2001.⁵ For the remainder of 2001, Griffin earned \$13,095.00 from Burrage, \$410.00 from Atlantic Lining and he received \$2,048.00 in unemployment benefits for a total of \$ 24,710.95

43. If Griffin had continued working for S & R throughout 2002, he would have earned \$41,600 ($\$20/\text{hr} \times 40 \text{ hrs}/\text{we} \times 52 \text{ wks}$) In 2002, Griffin earned \$17,970.21 from

⁵ The testimony concerning Griffin’s wages was somewhat imprecise and there was no documentation of his earnings admitted into evidence. He testified that he earned around \$20.00 per hour, which Respondent did not contest; therefore lost wages were based on that figure.

Burrage until it went out of business. He then collected \$4,020.00 in unemployment benefits for a total of \$21,990.32. Thus Griffin's lost wages for 2002 are \$19,609.68 (\$41,600-\$21,990.32) (Exhibits 69-74; exhibit 76) Griffin testified that his name was listed at the union hall as available for work, but, with the exception of a ten-day job for Atlantic Lining, he was never called for a job again after the incidents at Respondents' worksites. He believed that the union wanted nothing to do with the matter and he has since resigned from his position on the union's executive board and given up his union membership. I find that Griffin is entitled to lost wages in the amount of \$19,609.68 from the time of his termination, until such time as the projects on which he was working were substantially completed, in January of 2003.

44. Griffin testified that because of his experiences with Respondents, "I watch what I say now." He also stated that he is leery of being around other people, particularly of "certain colors." Griffin testified that after the incident he would not permit his children to watch videos portraying black people in a negative way, and he has been unable to watch such videos or programs, because it is too painful. I credit his testimony that Agiir's abusive treatment and the Respondents' subsequent retaliation caused him great emotional pain and make it difficult for him to face how being a person of color is portrayed negatively in certain entertainment media.

45. Griffin testified that he carried a lot of anger because of the incidents at the work sites and that he took his anger out on his family. He stated that his anger and distress adversely affected his relationship with one of his sons to the point where their relationship began to break down. His distress also adversely impacted his relationship with his wife, who had been working part-time, but after his lay off, was required to

obtain full time work. He testified that the incident “put him deep in the hole and he is still struggling because of it.” I credit his testimony that his emotional distress was exacerbated by the financial stresses of being out of work for some time.

46. Theresa Vicente Griffin has been married to Griffin since 1997. They have no children together but have three step-children between them. Ms. Griffin testified that prior to the incident at Respondents, Mr. Griffin always made the family laugh and they always did things together with the kids and acted like newlyweds even after years of marriage. Ms. Griffin testified that prior to the incidents her husband was the coach of several mixed-race basketball teams in Wareham. She stated that they had never had any problems being persons of color and that racism had never affected any part of their lives. Prior to these events she had worked part time and Mr. Griffin was the bread winner.

47. Ms. Griffin testified that after his termination, Mr. Griffin became very angry, and was shocked and in disbelief that such incidents could happen. He did not talk much about it, but they argued frequently about their children, and relations between Mr. Griffin and her teenage son became very strained. She stated that some of the strain was related to Griffin’s difficulty dealing with the fact that her son’s girlfriend was Caucasian, a fact that made him much less comfortable, because he had just suffered such blatant racism. She testified that at one point she and Mr. Griffin separated for short while because of his ongoing problems with her son. Ms. Griffin testified that in 2002 they had financial difficulties and consolidated their bills. She stated that as time went by Griffin has improved, and they are more financially secure, but he is not the same man that he was before the incidents at Respondents’ worksites. I credit her testimony that Griffin’s

distress from incidents at work and losing his job deeply affected their family life together and caused great strain on their relationships.

III. CONCLUSIONS OF LAW

A. CLARENCE LEFTWITCH

1. Racial Harassment

Leftwitch claims that Eastern violated M.G.L. c.151B, §4, by discriminating against him in the terms, conditions, or privileges of employment in that he was subjected to a racially hostile work environment by virtue of offensive racial epithets from his supervisor. In order to establish a claim of racial harassment, Leftwitch 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 Leftwitch, or that Eastern 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 Leftwitch met his burden of proof on each element of his claim.

As an African-American, Complainant Leftwitch is a member of a protected class who was targeted specifically on account of his race by his supervisor Paul Agiir, who,

on two consecutive days referred to him as a “nigger,” at the worksite and in the presence of other employees. On the first occasion Agiiar laughingly remarked to Foreman Danny Dennis, in reference to Leftwitch, and in his presence, “We still have this nigger working for us?” When Leftwitch objected to the offensive racial epithet, Dennis dismissively remarked that that was just Agiiar’s way. The following day, Agiiar removed Leftwitch from the lull and assigned him to laborer’s work, along with Griffin, the only other African-American at the site, and subsequently proclaimed, in direct reference to Complainants, and in the presence of numerous co-workers, “If you’re done with those fucking niggers, send them this way. I need their help.” I conclude that these egregious and abusive incidents made Leftwitch the target of hateful and discriminatory speech based solely on membership in a protected class, and that such language in the workplace creates a racially hostile work environment and constitutes race discrimination.

I further conclude that Agiiar’s speech and conduct were sufficiently severe and pervasive to alter the terms and conditions of Leftwitch's employment and created 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). Eastern does not dispute that the incidents occurred, but argues that they do not rise to the level of racial harassment and were part of a “joking” relationship between Leftwitch and Agiiar. Respondent presented

no evidence of a light-hearted or joking relationship and Leftwitch forcefully denied that such a relationship existed. Moreover, as the Supreme Judicial Court made clear in

Gnerre, and a long line of other cases, 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.

Formatted: No underline

Gnerre, *supra*, at 507. As courts have long-noted, the word “nigger” is a particularly inflammatory and offensive word. “Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment, than the use of an unambiguously racial epithet such as “nigger” by a supervisor. (internal quotes and citations omitted) Rodgers v. Western-Southern Life Ins. Co., 12 F3d. 668, 675 (7th Cir. 1993); Bailey v. Binyon, 583 F. Supp. 923, 927(N.D.Ill. 1984) (“The use of the word ‘nigger’ automatically separates the person addressed from every non-black person; this is discrimination per se”) Given the circumstances of this case, where Leftwitch’s supervisor referred to him as a “nigger” in his presence and subsequently referred to Leftwitch and Griffin as “fucking niggers” in a particularly cruel and demeaning manner by shouting out the words in the presence of several workers, such conduct without a doubt created a hostile work environment for Leftwitch. The comments caused Leftwitch to suffer so much distress that he feared he would have a stroke. His distress also exacerbated his pre-existing hypertension, caused him to take time off work, and made him fearful that not challenging Agiir would result in other laborers on the site engaging in similarly abusive behavior. Paul Agiir’s position as a supervisory employee of Eastern makes Eastern vicariously for his behavior under G.L. c. 151B4 (1); College-Town, *supra*, at 162.

Formatted: No underline

Formatted: No underline

Formatted: No underline

2. Retaliation

Leftwitch has alleged that Eastern demoted him and fired him in retaliation for his having engaged in protected activity by complaining internally about racially offensive comments and filing a complaint of discrimination with this Commission.

In order to establish a prima facie case of retaliation, Leftwitch must show that he engaged in a protected activity, that Eastern was aware of the protected activity, that Eastern 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. 972 (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 Agiir and his subsequent MCAD complaint are both protected activity. Fluet v. Complainant v. Harvard University, et al., MDLR 2001. 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 a causal connection between Leftwitch's protesting Agiir's calling him a "nigger" on August 14, and Agiir and Eastern's subsequent actions against Leftwitch, including re-assigning him to laborer's duties, subjecting him to further racist slurs in a particularly cruel and humiliating manner, ultimately removing him from the lull altogether, and finally terminating his employment. I believe that Agiir was angry at having been challenged by Leftwitch and contrived to have Leftwitch and Griffin work together on the clean-up project as part of a plan to publicly humiliate them in front of their fellow workers. I conclude that Agiir's adverse actions directed at Leftwitch were in retaliation for Leftwitch's opposing

Agiar's remarks on August 14.⁶ As Agiar was as supervisory employee of Eastern, Eastern is vicariously liable for his conduct. Therefore I conclude that Eastern has engaged in unlawful retaliation against Leftwitch in violation of M.G.L.c.151B §4(4).

I further conclude that there is a causal connection between his filing a formal complaint of discrimination and the termination of Leftwitch's employment. Leftwitch filed a complaint with this commission on or about August 27, 2001. The Commission sent the complaint to Respondents on or about September 5, and Leftwitch's employment was terminated on September 17. It is reasonable to draw the inference that Eastern received the MCAD complaint on or before September 17 when it terminated Leftwitch's employment. I conclude that Leftwitch has established a prima facie case of unlawful retaliatory termination. In its post-hearing brief, Eastern cited Leftwitch's purported "irregular attendance" and the company's reduced need for laborers as demonstrated by its "certified payroll reports" as its legitimate, non-discriminatory reasons for terminating his employment. However, Eastern called no witnesses in this matter; and in the absence of testimony explaining or supporting any of its defenses based on payroll documents, they are of little evidentiary value. Even a cursory review of the payroll records reveals obvious errors, for example, Leftwitch is listed as "Caucasian." In fact, the only testimony regarding the certified payroll records was offered by Brito, who stated that the certified reports did not necessarily reflect actual hours worked by the companies' employees, as employees, himself included, were sometimes paid in cash "under the table." Thus, I conclude that Eastern has failed to produce credible evidence of legitimate, non-discriminatory reasons for terminating Leftwitch's employment.

⁶ Although the change in his job duties did not result in decrease in pay, I conclude that the change in his duties constituted a material and adverse change in the terms and conditions of Leftwitch's employment, as he took obvious pride in his work as a lull operator and protested when his assignment changed.

Therefore, I conclude that Leftwitch has established an un rebutted, prima facie case of unlawful retaliation. I conclude that Eastern terminated Leftwitch's employment in retaliation for his protected activities, in violation of M.G.L.c.151B§4(4).

B. MARK GRIFFIN

1. S & R's Liability for Racial Harassment by Eastern Employees

Griffin claims that his employer, S & R violated M.G.L. c.151B, §4(1), by discriminating against him in the terms, conditions, or privileges of employment because of the racially hostile work environment created by supervisory employees of Eastern. As stated above, in order to establish a claim of racial harassment, Griffin 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 Griffin, or that S & R knew or should have known of the harassment and failed to take prompt remedial action. [cites omitted]

Although Agiir was not employed by S & R, I conclude that S & R knew or should have known of the racially hostile work environment to which its employee Griffin was subjected and is liable for its failure to take any steps to remedy such. 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). I conclude Griffin met his burden of proof on each element of his claim.

As an African-American, Griffin is a member of a protected class. When Eastern site supervisor Paul Agiier referred to him and Leftwitch as “fucking niggers” in the presence of numerous co-workers, Agiier made him the target of speech or conduct based on his race and color. I conclude that Agiier’s conduct toward Griffin created a hostile work environment for Griffin, who stood in disbelief at Agiier’s words. Griffin’s supervisor, Mike Brito, the site supervisor for S & R, who reported directly to the company’s owners, heard the comments, asked them to be repeated, said he was shocked by them, and immediately left the site, without taking any further action. As a supervisor of S & R who witnessed the discriminatory conduct, Brito had an obligation to act. As the site supervisor for S & R, his failure to act in the face of such blatant discrimination directed at one of S & R’s employees, binds his employer. “An employer may be held liable for failing to respond reasonably to acts of [sexual] harassment of which it is aware or reasonably should be aware, even though the harassing acts are perpetrated by someone who is not an agent or employee of the employer.” *Id.* at pp.108-110. I conclude that Brito’s failure to take any steps to address such blatant racial harassment triggered liability on the part of S & R, and that S & R is vicariously liable for Brito’s inaction.

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 Brito’s failure to immediately address Agiier’s conduct, in the days following the incident, his employer passively tolerated such conduct.

Brito did not act until sometime after Griffin complained about Danny Dennis addressing him as “my nigger.” Only after Griffin complained to Brito about the actions of Dennis, did Brito finally speak to Dennis and his conduct ceased.

I conclude that the conduct of Dennis, who was also a supervisor and a foreman for Eastern, exacerbated the racially hostile work environment to which Griffin was subjected and that such environment altered the conditions of Griffin’s employment. I further conclude that because it was on notice of these actions, S & R is liable for failing to remedy the hostile work 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." [citations omitted] As noted above, at III.A (1), the word “nigger” is a particularly inflammatory and offensive word. The racial epithets directed at Griffin caused him to be distressed and made him determined not to tolerate any further racist remarks in the workplace. However, at some later time when Griffin complained to Brito, S & R’s site supervisor, Brito did speak to both Agiir and Dennis about their conduct. However, there is no evidence that Brito notified the principals of S & R, that his actions were ratified by the principals of S & R, or that they took their responsibility to ensure that their employee not be subjected to such a hostile work environment seriously. Rather than take steps to protect Griffin, S & R made the decision to terminate his employment, thereby retaliating against him for having complained. Therefore, I conclude that S & R is liable for failing to take adequate steps to remedy the racially hostile work environment.

2. Retaliatory Termination by S & R

Griffin alleges that S & R fired him in retaliation for having complained internally about racially offensive comments and for filing a complaint of discrimination with this Commission.

In order to establish a prima facie case of retaliation, Griffin must show that he engaged in a protected activity, that S & R was aware of the protected activity, that S & R subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. [citations omitted] In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). [citations omitted] Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. [citations omitted] 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. [citations omitted] 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." [citations omitted] However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. Id., [citations omitted] (See III, A(2) above.)

Formatted: No underline

I conclude that the credible evidence establishes a causal connection between Griffin's termination and his confronting Dennis, his complaint to Brito, and his filing a complaint of discrimination at this Commission. Griffin complained to Eastern foreman Danny Dennis about Agiari's comments on August 15th. Thereafter he complained to Brito about Dennis and ultimately, he filed a complaint with this Commission on or about August 27, 2001. Griffin's employment was terminated without explanation on September 6, by Louis Vicente within hours after Griffin observed Agiari speaking with S & R's owner Rocco Izzo. Moreover, there was testimony that it was very unusual for Vicente to terminate an employee, as Brito usually hired and fired S & R's workers. I draw the inference from the circumstances surrounding Griffin's termination that S & R terminated his employment in retaliation for his having complained of discrimination internally and for having filed a complaint with this Commission. Since S & R defaulted at the public hearing and therefore did not articulate any legitimate, non-discriminatory reasons for terminating Griffin's employment, Griffin has established an un rebutted prima facie case of retaliatory termination. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. I conclude that S & R's termination of Griffin's employment constitutes unlawful retaliation, in violation of M.G.L.c.151B§4(4).

3. Liability of Eastern for the Conduct of Its Supervisors Against Griffin

M.G.L. c. 151B protects and grants individuals the right to work in an environment free of unlawful harassment. Section 4(4A) makes it unlawful "for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or

enjoyment of any such right granted or protected by this chapter." See, Fluet v. Harvard University, 23 MDLR 145, 165-166 (2001); Berardi v. Medical Weight Loss Center, Inc. 23 MDLR 5, 11-12 (2001); Erewa v. Reis, 20 MDLR 36, 40 (1998). The Commission has imposed liability against corporations, as well as individuals under §4(4A) See, Fluet, 23 MDLR at 165-166, and cases cited therein. See also, Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass App.Ct.549 (2008)

Formatted: Underline

In this case, Griffin was subjected to egregious racial epithets by Eastern's Site Superintendent Agiir, in a particularly demeaning manner in the workplace in the presence of numerous co-workers and supervisors. On the day of the offensive comments, Agiir had "borrowed" Griffin in order to perform laborer's work for Eastern. At the time of the events in question, Griffin was under the direction and supervision of Agiir. When Griffin later complained to Eastern foreman, Danny Dennis, Dennis compounded the situation by using the same offensive language toward Griffin and brushing off Agiir's comments as "joking." He also urged Griffin not to pursue the matter.

Applying the prohibitions of s. 4(4A) to the case at hand, I conclude that Agiir and Dennis interfered with Griffin in the exercise of his right to be free from harassment in his workplace based on his race and color in violation of M.G.L. c. 151B, s. 4(4A). Because these were the actions of Eastern's site supervisors and foreman, I conclude that Eastern is vicariously liable for their actions. See, College-Town, Division of Interco, Inc. v. MCAD, 400 Mass.156, 164-166 (1987); Thomas O'Connor Constructors, Inc. v. MCAD, supra. (Site Superintendent of Contractor who calls African American employee of sub-contractor "nigger" on four occasions has created a hostile work environment for

sub-contractor's employee) Not only did Agiiar and Dennis hold supervisory positions with Eastern on the project, at the time Agiiar made the remarks at issue, Griffin was clearly working under Agiiar's supervision.

The facts in O'Connor are similar to the facts of this case in many respects. In that case, Aldridge, the African-American employee of a sub-contractor, was racially harassed by a supervisory employee of O'Connor Constructors, the general contractor. The Appeals Court held that because O'Connor knew of the racial harassment but did not take adequate steps to stop the harassment, it was vicariously liable for the acts of its supervisor under s. 4(4A). The Appeals Court did not reach the issue of whether a contractor could be found vicariously liable for the supervisor's conduct under s. 4(4A) where it had no actual notice of the conduct, expressing concern that the application of vicarious liability to a claim under 4(4A) would "render an employer strictly and immediately liable for discrimination directed at non-employees that it had no opportunity to control," Id. at p.559⁷

Deleted: id

The instant case, however, differs factually from O'Connor in one crucial aspect. While the complainant in O'Connor, never worked under the direction and control of the harasser, in this case, there was evidence that Eastern and S & R shared employees on a regular basis in a cooperative effort, in Brito's words, "one hand washed the other" to get the project completed. Moreover, there was testimony that Agiiar had "borrowed" Griffin for the afternoon to perform clean-up work for Eastern and that Griffin was working under the direction and supervision of Agiiar at the time Agiiar spewed his racist remarks. Thus in the present case, Eastern had direct control over the terms and

⁷ Judge Rubin concurred in the judgment and dissented in part, stating that, "the ordinary rule of vicarious liability articulated under College-Town applies under §4(4A)" and "O'Connor's supervisor's actions gave rise to liability under §4(4A) prior to its failures of investigation and remediation." Id. at p. 565

conditions of Griffin's employment at the time of the incidents in question. As stated above, I believe that Agiir deliberately set up a situation with Griffin and Leftwitch whereby he sought to publically humiliate and abuse them in retaliation for Leftwitch having challenged his racist remarks on the previous day. Therefore, I conclude that given these facts, Eastern is vicariously liable for the acts of its supervisors under s. 4 (4A) because of its supervisors unlawful interference with Griffin in the exercise or enjoyment of his employment rights. College-Town, Division of Interco, Inc. v. M.C.A.D., 400 Mass. 156 (1986)

There was evidence that Eastern further interfered with Griffin's employment rights to be free from unlawful retaliation by instructing S & R to terminate Griffin's employment. Griffin testified credibly and without contradiction that on the day he witnessed Agiir speaking with S & R owner, Rocco Izzo, his employment was terminated. There is a reasonable inference to be drawn that Agiir had some part to play in the termination of Griffin from S & R. As with Leftwitch, Eastern attempted to establish through the "certified payroll records" that Griffin did not work steadily during his employment with S & R and that his spotty work record was the reason for his termination. As stated above, Eastern introduced no evidence to authenticate or support the accuracy of these payroll records. Griffin insisted that he had only missed one day of work during his employment with S & R, and Brito stated that payroll records might under-represent the hours worked as employees were sometimes paid in cash. Therefore, I conclude that Eastern failed to establish evidence of a non-discriminatory reason for Griffin's termination, and I draw the reasonable inference from all of the credible evidence that his employment was terminated because Agiir complained to S & R that

Griffin had made internal complaints of discrimination and/or had filed an MCAD complaint.⁸

Therefore, I conclude that Eastern engaged in unlawful conduct in violation of M.G.L. c. 151B, s. 4(4A), by the actions of its supervisor interfering with Griffin's right to a work environment free of racial harassment and by causing his employment to be terminated.

I conclude that Respondents Eastern Contractors, Inc. and S & R Construction, Inc. are jointly and severally liable to Mark Griffin, Sr. for their acts of discrimination and retaliation against him.

IV. REMEDY

Pursuant to M.G.L.c.151B s. 5, the Commission is authorized to grant remedies in order to make the Complainants whole. This includes an award of damages to Complainants for lost wages and emotional distress suffered as a direct and probable consequence of his 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).

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)

⁸ Eastern introduced into evidence an MCAD cover letter date-stamped received by Eastern on September 17, 2001 as proof that it did not receive Griffin’s complaint until well after his termination. However, absent testimony regarding Eastern’s practice with respect to receipt of mail, I find this document does not substantiate that the complaint sent by the MCAD was not received by Eastern until the date indicated by the date-stamp.

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.

A. Clarence Leftwitch

1. Emotional Distress

Based on Leftwitch’s credible testimony, and that of his former girlfriend Susan Gomes, I am persuaded that Leftwitch suffered emotional distress as a result of Eastern’s unlawful conduct. Leftwitch testified credibly that after Agiir’s racist remarks, he became anxious and fearful that he would have a stroke due to increased high blood pressure and that he was prescribed a higher dosage of his blood pressure medication after these incidents. He also testified that he was fearful that not standing up to Agiir, would encourage other workers to engage in similar offensive behavior. Leftwitch also stated that after returning to the Green school after the incidents of discrimination, he was shunned by all his co-workers except Tim Boudelay, felt as though he had the plague and couldn’t take it any more, but needed to work to support his family. Susan Gomes testified credibly that prior to the incidents at Eastern, Leftwitch was very happy-go-lucky and enjoyed outdoor sports such as hunting. She stated that Leftwitch was very excited about having a baby and was a good father who spent time with their son, taking him to the park and on day trips. Gomes testified that after his termination, Leftwitch

was moody and withdrawn and would “tighten up” and was short-tempered, kept to himself and did not go out. After his termination Leftwitch was not as active and patient with his son as before. According to Gomes, prior to the incidents at Eastern, she and Leftwitch had not experienced racism as an interracial couple.

Thus I conclude that the racial harassment Leftwitch suffered as well as his termination from Eastern were the sources of extreme emotional distress that continued for some time and affected his relationships with his girlfriend and son. Leftwitch was humiliated and embarrassed in front of co-workers, and was demoted and demeaned and lost his job because he complained about being taunted with racial epithets in the work place. I conclude that Leftwitch is entitled to an award of in the amount of \$100,000.00 to compensate him for the emotional distress he endured as the result of Eastern’s unlawful conduct.

2. Back Pay

I conclude that Leftwitch is entitled to lost wages from the time of his termination until the projects were substantially completed in January, 2003. I conclude that Leftwitch is entitled to an award of back pay in the amount of \$18,062.00 (Finding of Fact No. 40).

B. Mark Griffin

1. Emotional Distress

Based on Griffin’s credible testimony, and that of his wife Theresa Griffin, I am persuaded that Griffin suffered emotional distress as a result of Eastern’s and S & R’s unlawful conduct. Griffin testified that because of his experiences with Respondents he watches what he says and is leery of being around people of “certain colors.” Griffin

testified that he would not permit his children to watch videos portraying African-Americans in a negative way. He was unable to watch such videos, and continues to have problems watching such programs. Griffin testified that he carried a lot of anger because of the incidents and he took his anger out on his family. He stated that it adversely affected his relationship with one of his sons to the point where they did not get along. It also affected his relationship with his wife, who had been working part-time and after his lay off was required to obtain full time work. He testified that the incident “put him deep in the hole and he is still struggling because of it.” Theresa Griffin testified that prior to the incident at Respondents, Mr. Griffin always made the family laugh and they always did things together with the kids and acted like newlyweds even after years of marriage. Ms. Griffin testified that prior to the incidents her husband was the coach of several mixed-race basketball teams in Wareham and they had never had any problems with racism. Ms Griffin testified that after his termination, Mr. Griffin became very angry, was shocked and in disbelief that such harassment could have occurred, but did not talk much about it. They argued more frequently about their children and that relations between Mr. Griffin and her teenage son became very strained, in part due to the fact that his girlfriend was Caucasian and he now felt more distrust towards white people. Ms. Griffin testified that in 2002 they had financial difficulties and consolidated their bills and it was not until she obtained full time work, that matters improved financially. She stated that as time went by Griffin has improved, but he is not the same man as he was before the incidents at Respondents worksite.

I conclude that the racial harassment Griffin suffered as well as his termination from S & R were the sources of extreme emotional distress that continued for some time

and affected his relationships with his wife and family. Griffin was subjected to public humiliation and degradation in the workplace and was fired because he complained about being the target of racial slurs and invective in the workplace. Therefore I conclude that Griffin is entitled to an award of in the amount of \$100,000.00 to compensate him for the emotional distress he endured as a direct result of Respondents' unlawful conduct.

2. Back Pay

I conclude that Mark Griffin is entitled to a back pay award of \$19,609.68 to compensate him for the wages he would have earned had he remained at S & R until the project was substantially completed. (Findings of Fact no. 43 and 44)

VI. ORDER

Based upon the 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 Eastern Contractors, Inc. and S & R Construction Co. immediately cease and desist from discriminating on the basis of race, color and retaliation
- 2) Respondent Eastern Contractors, Inc. pay to Clarence Leftwitch the sum of \$100,000.00 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 Eastern Contractors, Inc. pay to Clarence Leftwitch the sum of \$18,062.00 in lost wages 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.
- 4) Respondents Eastern and S & R pay to Mark Griffin, Sr. the sum of \$100,000.00 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.
- 5) Respondents Eastern Contractors and S & R Construction Co. pay to Mark Griffin, Sr. the sum of \$19,609.68 in lost wages 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.

6) Respondents Eastern Contractors, Inc. and S & R Construction Co. shall conduct basic annual training sessions on unlawful discrimination, harassment and retaliation for all employees, managers, and supervisors employed by Respondents. With respect to such training:

- a. Each training session for employees must be at least three (3) hours in length; and each training session for managers and supervisors must be at least six (6) hours in

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

b. Within thirty (30) days of the receipt of this decision, Respondents 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 Respondents' selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.

c. At least one month prior to the training date, Respondents 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, Respondents will provide the Commission representative with unfettered access to the training sessions.

d. Within one month after the completion of the training, Respondents 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 Respondents' businesses are sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondents' businesses (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 Respondents as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of Respondents' governing boards (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 Respondents, or previously employed by Respondents as a manager or supervisor; or,

iv. Respondents continue to retain an interest in the successor entity.

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

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 8th day of October, 2008.

JUDITH E. KAPLAN,
Hearing Officer