COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

OLGUINE CLAUDE and THE MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION,
Complainants

v. DOCKET NO. 00-BEM-2967

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION,
Respondent

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

I. PROCEDURAL HISTORY

On September 29, 2000, Complainant, Olguine Claude, filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against her employer, the Massachusetts Department of Mental Retardation ("Respondent"). In her complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of race, color, and national origin in violation of M.G.L. c. 151B, § 4(1), by denying her a promotion and by subjecting her to hostile work environment harassment.

On August 12, 2003, the Commission issued a probable cause finding with respect to Complainant's claims. On March 10, 2004, the Commission certified Complainant's claims for a public hearing. From October 18-20, 2004, the parties appeared before me for a public hearing in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I

have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

FINDINGS OF FACT

1. Complainant, Olguine Claude, is a black woman of Haitian national origin who has worked for Respondent as a "mental retardation worker I" ("MRW I") from August 15, 1997 to the present date. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, Department of Mental Retardation, is a division of the Commonwealth of Massachusetts Executive Office of Health and Human Services. Respondent maintains and operates a number of facilities and community programs throughout the Commonwealth that provide residential, medical, vocational, and rehabilitative services and support to persons or residents with mental retardation. Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. An MRW I is an entry-level position that typically receives direct supervision from MRW's with higher grades (e.g., MRW III or MRW IV) or residential supervisors. According to the position's job description, an MRW I is responsible for: working in a team setting and in group situations; maintaining a

positive attitude and interacting with co-workers and supervisors in a respectful, responsive and open manner; documenting, maintaining, and reviewing confidential individual records, including daily reports, log notes of behavior information and treatment of individuals, communication books, annual reviews, evaluations, and progress notes; and, dispensing, documenting, and securing medications. For the year 1997-1998, Complainant's supervisor gave her a "satisfactory" grade in her performance evaluation. For the year 2000-2001, Complainant's evaluation stated she met the requirements of her position.

4. MRW I's are required to work overtime if the direct care staff falls below the minimum necessary to meet the health and safety needs of the individuals in the home. Overtime situations usually arise as a result of employee absences. When an overtime situation arises, supervisors first attempt to find volunteers, but if voluntary overtime is not available, then supervisors assign staff to "mandatory" overtime on a rotating basis. Complainant acknowledged that her supervisors frequently assigned her and other staff to mandatory overtime.

5. On or about October 4, 1999, Complainant began her regularly assigned 11:00 p.m. to 7:00 a.m. shift at Respondent's home in Quincy. She testified that earlier that day, she had made a physical therapy appointment for the next morning. Toward the end of her shift, Complainant was told that she had to work mandatory overtime after her regular shift ended at 7:00 a.m. Complainant testified that she then asked Iva Francois, a Licensed Practical Nurse ("LPN") who worked at the Quincy home to work the overtime assignment so she could make her physical therapist appointment. Both Complainant and Francois

testified that LPN's and MRW I's occasionally substituted for each other. Francois acknowledged that she had agreed to work for Complainant on this occasion. I credit Complainant and Francois' testimony.

6. Complainant testified that on or about the next day, her supervisor, Paul Silva, approached her, pointed his finger in her face and said "I want to talk to you right now… I heard you refused to do OT." Complainant testified that during her conversation with Silva, Jennifer Stoebel approached them. Stoebel worked as an LPN in the Quincy house. According to Complainant, Stoebel told Silva that Complainant and Francois were speaking in their "freaking or fucking language" on the night in question. Complainant stated that Silva neither confronted, nor disciplined Stroebel about her disparaging remarks. Instead, Complainant claimed Silva verbally criticized her for speaking Haitian Creole in the work place. Silva gave a contrary version of his conversation with Complainant and Stoebel. In a memo dated October 13, 1999, Silva stated that Stoebel and Francois had informed him that Complainant had refused to work overtime due to her need to attend a doctor's appointment. With respect to Stoebel's purported use of profanity, Silva wrote that "Jennifer then told Olguine that she may have missed something she said, 'but that was because you were speaking another language other than English.' Olguine then became irate and stated that Jennifer was harassing her." Silva did not mention that that Stoebel had used profanity or uttered an ethnic slur. On October 13, 1999, Silva purportedly gave Complainant a formal warning for refusing to work the mandatory overtime. According to Silva's memo, when he gave Complainant

the written warning, Complainant refused to sign the document. Complainant claimed that Silva did not present her with the warning until "much later." Although I credit Complainant's testimony that Francois had agreed to work the overtime assignment on October 5, 1999, I decline to credit Complainant's testimony regarding her conversation with Silva or Stoebel's alleged derogatory comment.

7. In March of 2000, Complainant applied for a vacant MRW II position at the Quincy house. Complainant and another MRW I, Ellen Ross, applied for the position. Ross is white. John Randall, a Director of Residential Supports, and Laura Knight, a Residential Supervisor I, interviewed the candidates. According to both Randall and Knight, they asked each candidate the same series of six questions and then scored their answers using an identical interview questionnaire. Randall and Knight gave Complainant scores of "9" and "10", respectively, out of a possible 24 points. Ross received a score of "22" from each interviewer. According to Randall, Ross clearly conveyed during her interview that she had an understanding of the duties and responsibilities of the job. On the other hand, Randall claimed Complainant's answers gave him the impression that she needed additional training for the position. Knight similarly testified that Ross answered each question clearly, while Complainant failed to appropriately answer a couple of questions. In particular, both Randall and Knight stated that Complainant could not identify the role of an MRW II in the "ISP" process. An "individual service plan" or "ISP" describes the essential services and treatment provided to each resident. Randall also testified that in

accordance with common practice and procedure, they reviewed the personnel files for each candidate. Complainant's personnel file contained the October 23, 1999 formal letter of warning from Silva, while Ross's file did not contain any negative documentation. Randall testified that after the interviews, he and Knight decided to offer the position to Ross. I found Randall and Knight to be highly credible witnesses; and, therefore, I credit their entire testimony.

8. The minimum entrance requirements for the MRW II job required an applicant to have at least one year of experience providing direct care services; however, the job description also stated that education in a related field may be substituted for the required experience. Although Ross had slightly less than one year's experience providing direct care services, Randall testified that Ross had ample education and work experience to substitute for her lack of experience in direct care. Carolyn Perkins, who worked for Respondent as a Director and oversaw personnel actions, also claimed that Ross met the minimum entrance requirements for the job since Ross had worked for Respondent for eleven months, held the educational equivalency of a nurse's aide, and took two years worth of physical therapy classes. In addition, Perkins testified that pursuant to Article 14 of the applicable collective bargaining agreement, the first and most important criterion for a promotion is an applicant's ability to do the job. According to Perkins, under the contract, if one candidate is deemed to be better able to do the job, other factors, such as work history and seniority are not considered. I found Perkins and Knight to be highly credible witnesses; and, therefore, I credit their entire testimony.

9. Complainant believed that the relationship between her supervisor, Joanne Kascavitch, and Ross had an impact on Ross being offered the MRW II position. In particular, Complainant claimed that Kascavitch and Ross were friends and socialized outside of work. Complainant also stated that she saw both Kascavitch and Ross in the Quincy house while she was being interviewed. Although Complainant claimed that she saw Kascavitch in the kitchen and within earshot of the interview, both Randall and Knight testified credibly that they did not see Kascavitch during the interview. Kascavitch also testified credibly that she did not hear or witness the interviews, but she might have been in her office in the basement of the building at the time. Furthermore, I credited Randall's testimony that he purposefully avoided having each candidate in the house while the other was being interviewed. In addition, while several witnesses testified that they believed Kascavitch and Ross had a very friendly relationship, I credited Kascavitch's testimony that she neither socialized with Ross, nor drove Ross to work or to the interview. Lastly, and most importantly, regardless of whether Kascavitch was present during the interviews and notwithstanding the nature of her relationship with Ross, Complainant has provide no credible evidence that Kascavitch had any meaningful role in the hiring process for the MRW II position.

10. Kascavitch testified that after Respondent promoted Ross to the MRW II position, Complainant's work performance declined. Kascavitch believed that Complainant was angry with her for not getting the promotion. With respect to Complainant's work performance, Kascavitch claimed that in April 2000, she failed to perform her assigned job duties and acted in an insubordinate manner.

Specifically, Kascavitch stated that Complainant had refused her request that she dress two male clients. Kascavitch testified that when she addressed Complainant regarding this matter, Complainant yelled at her and then dressed one of clients inappropriately in a bathing suit to go to work. Kascavitch also stated that Complainant refused to fill out the required paperwork before she left for the day, including medication counts and bowel movement data sheets. Kascavitch informed her supervisor, Jim Sperry, of Complainant's conduct in a memo dated May 9, 2000. I credited Kascavitch's testimony.

11. Complainant adamantly denied Kascavitch's accusations. To the contrary, Complainant claimed that Kascavitch had a bias against Haitian employees. In particular, Complainant claimed that Kascavitch frequently yelled at her, but never showed any anger or hostility toward Ross. However, Elizabeth Menardi, who is Haitian and also worked as an MRW I in the Quincy house, testified credibly that she did not witness Kascavitch exhibit any anger toward Complainant or Ross. Similarly, Marilyn Santori, who is likewise Haitian and worked at the Quincy house as an MRW II, testified that she did not witness Kascavitch yell at Complainant.[1] However, Santori claimed that Kascavitch once made a racially derogatory comment to her. Santori could not recall when Kascavitch made the remark. Carolyn Perkins recalled meeting with Santori about this matter. Perkins testified credibly that Santori mentioned that Kascavitch had been rude with her, but Perkins had no recollection of Santori

[1] Santori was also known by the name Marilyn St. Fleur and many of the witnesses referred to by that name. In order to maintain consistency with the parties' post-hearing briefs, she will be referred to herein as Marilyn Santori.

ever stating that Kascavitch had uttered a racial epithet. I decline to credit Complainant or Santori's testimony regarding their interactions with Kascavitch.

12. Kascavitch claimed that on May 13, 2000, Complainant again refused to complete medication counts and the nursing communication book. Moreover, she stated that on May 14, 2000, a nurse at the Quincy home, named April, informed her that Complainant had again refused to fill out necessary documentation. In addition, Kascavitch stated that on May 17, 2000, staff at different residences informed her that Complainant had made numerous negative comments about her to other employees. Complainant denied these accusations and believed that Kascavitch merely accepted April's version of the events because April and Kascavitch were friends and April is white. I credit Kascavitch's testimony as opposed to Complainant's testimony regarding these matters.

13. On May 20, 2000, Sperry notified Complainant that she was being transferred from the Quincy residence to the Canton residence due to her disruptive behavior. Kascavitch testified that just prior to the transfer, she and Sperry met with Complainant more than once to discuss Complainant's conduct. According to Kascavitch, Sperry decided to transfer Complainant due to her unacceptable interactions with her supervisors at the Quincy house, her refusal to complete assignments, and her calls to other homes to solicit complaints regarding Kascavitch. Complainant claimed that Sperry never gave her the opportunity to discuss these incidents with him before being transferred. She

also stated that she never saw Kascavitch's memos to Sperry. I credit Kascavitch's testimony with respect to the reasons for Complainant's transfer.

14. Complaint also alleged that Kascavitch forced her to work longer hours than other employees. However, Complainant could only recall one incident when this occurred. She also could not recall when this incident occurred or whether it occurred before or after she was denied the promotion. According to Complainant, Kascavitch had ordered her to go to a hospital to attend to a client after she finished her regular shift. Kascavitch testified that she recalled leaving a message for Complainant at her house to go to the hospital. According to Kascavitch, employees are often assigned to attend to clients when they are hospitalized, frequently on an overtime basis. Apparently, when Kascavitch assigned Complainant the mandatory overtime, she was unaware that Complainant had already agreed to work a voluntary overtime assignment at the Canton house at the same time she was supposed to be at the hospital. I credit Kascavitch's testimony. More importantly, Complainant has failed to produce any credible evidence that Kascavitch treated her differently from other employees on this one occasion.

15. Ron Sedoma worked for Respondent as a Residential Supervisor. Sedoma testified that when he first started supervising Complainant at the Canton home in August 2000, they had a good working relationship. However, he testified that as time went on, Complainant began exhibiting performance problems. Complainant likewise claimed that she and Sedoma had a good working relationship when he initially supervised her at the Canton house, but

their relationship changed after he began supervising her at the Quincy home. For example, on April 29, 2001, after Complainant transferred back to the Quincy home, Sedoma gave Complainant a written warning for being late. Sedoma stated that when he discussed this issue with Complainant, she became defensive and tried to blame others. Subsequently, Sedoma gave Complainant a written warning for giving a client the wrong medication. Sedoma stated that when he discussed this matter with Complainant, she again became very defensive and accused him of not liking her because of her color. At the public hearing, Complainant denied having done anything wrong on this occasion. On November 4, 2001, Sedoma gave Complainant another written warning for possible abuse of sick time. According to Sedoma, when he discussed the matter with Complainant, she similarly became defensive, brought up unrelated matters involving other staff, and accused him of picking on her. On January 6, 2002, Sedoma gave Complainant another warning for possible abuse of sick time. I credit Sedoma's testimony regarding Complainant's work performance.

16. Complainant claimed that she would have earned a $0.50 per hour raise had Respondent promoted her to the MRW II position. She further testified that she wanted to have a long career with Respondent and hoped to advance through Respondent's job classifications. According to Complainant, Respondent's failure to promote her for the MRW II position inhibited the advancement of a life-long career at Respondent and caused her emotional distress. Lastly she testified that the hostile work environment attributed to her supervisors has plagued her every working day.

III. CONCLUSIONS OF LAW

A. Failure to Promote

Massachusetts General Laws ch. 151B, § 4(1), provides that it shall be an unlawful practice for an employer because of the race, ethnicity, or national origin of any individual "to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." Complainant has alleged that Respondent engaged in unlawful discrimination when it did not promote her to the MRW II position and instead appointed a white applicant.

Where no direct evidence of discrimination exists, as in the present matter, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Lipchitz v. Raytheon Co., 434 Mass. 493, 503 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130, 137-138 (1976). Consequently, Complainant must first establish a prima facie case of discrimination. In order to establish a prima facie case in a failure to promote claim, Complainant must prove that: (1) she is a member of a protected class; (2) who was qualified for the position; (3) Respondent denied her the position, and; (4) Respondent awarded the job to someone not of her protected class. White v. Citizens Bank, 26 MDLR 221, 224 (2004); Alves v. Town of Freetown Police & Board of Selectmen, 18 MDLR 112 (1996); *see*, Puckett v. Commercial Aviation Services, 24 MDLR 77 (2002) (finding evidence

of race discrimination when persons outside of complainant's protected category were selected for promotional opportunities that were denied to complainant, a qualified candidate).

I find that Complainant has established a prima facie case of discrimination. First, Complainant is a member of a protected class because she is a black person of Haitian national origin. Complainant also met the minimum qualifications for the MRW II job based on her work experience as an MRW I. Lastly, it is uncontested that Respondent did not choose Complainant for the position and instead awarded the job to Ross, a white applicant.

Since Complainant has established a prima facie case of discrimination, Respondent must articulate a legitimate, non-discriminatory reason for its failure to promote Complainant. Respondent is required to "produce not only evidence of the reason for its action, but also underlying facts in support of that reason." Abramian, 432 Mass. at 116-117; Wheelock College, 371 Mass. at 136. Additionally, Respondent must "produce credible evidence that the reason or reasons advanced were the real reasons." Wheelock College, 371 Mass. at 138.

Here, Respondent has articulated legitimate, non-discriminatory reasons for promoting Ross instead of Complainant. Specifically, I credited Randall and Knight's testimony that during the interviews for the position, Ross answered each question clearly and convincingly and conveyed that she had a solid understanding of the duties of the job. On the other hand, Complainant failed to properly answer some of the same questions and left the impression that she needed more training for the job. As a result of the interview, Randall and

Knight gave Complainant scores of "9" and "10", respectively, out of a possible 24 points, while Ross received a score of "22" from each interviewer. I credited Randall's testimony that based on the interviews, he and Knight decided to offer the position to Ross.

Since Respondent has met its of burden of articulating legitimate, non-discriminatory reasons for its actions, Complainant must now show by a preponderance of the evidence that Respondent's decision was the product of discrimination based on Complainant's membership in a protected group. Abramian, 432 Mass. at 116-118. Because proof of unlawful discrimination can rarely be established by direct evidence, Complainant may prove that Respondent's discriminatory animus was the determinative cause by establishing that one or more of Respondent's stated non-discriminatory reasons were false, or not the real reasons for its action. Lipchitz, 434 Mass. at 499, 504-505; *see,* Abramian, 432 Mass. at 118 (finding by jury that at least one of the reasons advanced by defendant was false, in addition to proof of *prima facie* case, sufficient to permit inference that real reason for defendant's action was discrimination). Notwithstanding, Complainant retains the ultimate burden of proving that Respondent's failure to promote her to the MRW II position was the result of discriminatory animus. Lipchitz, 434 Mass at 504; Abramian, 432 Mass at 117.

Complainant has failed to meet this burden. First, Complainant has failed to establish that Respondent's articulated reasons for not promoting her were false. To the contrary, as stated above, I found Randall and Knight to be highly

persuasive and credible witnesses. Complainant has also failed to produce any credible evidence that Respondent's articulated reasons were not the real reasons for its decision. Although I credited Complainant and Francoise's testimony that Silva may have inappropriately issued Complainant a written warning in October 1999, I do not believe this warning played a significant factor in Randall and Knight's decision to promote Ross. Even if the warning had not been in Complainant's personnel file at that time, Randall and Knight would still have promoted Ross as a result of her far superior interview. Moreover, although Complainant had more years of service, I credited Randall, Knight, and Perkins' testimony that they legitimately substituted Ross' educational experience for her lack of experience on the job. I also credited Perkins' testimony that despite Complainant's seniority, the provisions of the collective bargaining agreement provided that the chief criterion for promotion is the applicant's ability to do the job and when one candidate is deemed to be better able to do the job, as in this case, other factors such as work history and seniority are not considered. Finally, Complainant has failed to produce any credible evidence that Randall and Knight's decision was tainted by discriminatory animus. In particular, Complainant failed to substantiate that Kascavitch had a bias against her as a result of her protected status or that Kascavitch had any meaningful role in the hiring decision. Complainant has, therefore, failed to establish that Respondent engaged in unlawful discrimination as a result of its decision to promote Ross to the MRW II position.

B. Hostile Work Environment Harassment

Complainant also alleged that her supervisors created a discriminatory hostile work environment in violation of M.G.L. c. 151B, § 4(1). In order to establish a prima facie case of hostile work environment harassment, Complainant must establish by a preponderance of the evidence that (a) she was subject to unwelcome verbal or physical conduct based on her membership in a protected class; (b) the words or acts were sufficiently severe or pervasive to alter her conditions of employment and create an abusive working environment; and, (c) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action. Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001); College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Beldo v. University of Massachusetts, 20 MDLR 105, 111 (1998); *see also*, Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521 (2001) (a hostile work environment is pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, that poses a formidable barrier to the full participation of an individual in the workplace).

Complainant has failed to provide any credible evidence that she was subjected to verbal or physical conduct based on her race, color, or national origin and, thus, she has failed to establish that Respondent engaged in unlawful hostile work environment harassment. In particular, I found Complainant's testimony with respect to the alleged incidents of harassment lacked credibility. For example, I declined to credit Complainant's testimony that another employee

made a disparaging ethnic remark in Silva's presence regarding Complainant having spoken Creole. I also declined to credit Complainant's statements that Kascavitch yelled at her but not at a similarly situated white employee. In addition, although Silva may have wrongfully reprimanded Complainant about refusing mandatory overtime, Complainant has failed to introduce any credible evidence that he issued the reprimand as a result of Complainant's protected status. Moreover, Kascavitch testified credibly that Complainant was transferred as a result of her poor work performance and her hostility toward her supervisors after she did not receive the promotion. Lastly, I credited Sedoma's testimony with respect to Complainant's numerous work performance problems in 2001-2002. Consequently, Complainant has failed to establish that Respondent's supervisors or employees subjected her to verbal or physical conduct based on her race, color, or national origin.

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 19th day of May, 2005.

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Edward R. Mitnick,
Hearing Officer