

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD & RAFAEL AVILES,  
Complainants

v.

DOCKET NO. 02-SEM-00523

F.L.ROBERTS & CO.,  
D/B/A JIFFY LUBE,  
Respondent

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Appearances:

Michael Malkovich, Esquire for Rafael Aviles  
Claire L. Thompson, Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January, 2002, Rafael Aviles, who is Puerto Rican, filed a complaint with this Commission charging Respondent with discrimination in employment on the basis of his national origin/ancestry. Complainant alleged that Respondent created a hostile work environment by subjecting him to ethnic slurs and ultimately terminated his employment on the basis of his national origin/ancestry. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on December 20 and 21, 2005 in Springfield, Massachusetts. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

1. Respondent F.L. Roberts, Inc. is a privately-owned company that operates several convenience stores, gas stations and car washes in the Springfield area. Steven and Seth Roberts are the company's owners. Richard Smith is Respondent's Vice President of Operations and reports to Steven Roberts. In 1999, Respondent acquired several local Jiffy Lube stores, including locations in Northampton and Hadley, in a franchise deal with Jiffy Lube International. In 2001, Respondent had approximately 500 employees.

2. Complainant Rafael Aviles is a Puerto Rican man who resides in Northampton, Massachusetts. On August 21, 2001, Complainant was hired by the Respondent F.L. Roberts, Inc. to work as a "hood tech" in Respondent's Jiffy Lube store in Northampton, MA. Complainant's supervisors were Dan Tolson, the store manager, who is Caucasian and Ken Hall the assistant store manager, who was African-American<sup>1</sup>.

3. Prior to working at Respondent's Northampton location, Complainant had worked at a Jiffy Lube located in Holyoke from 1998 to 2000 and was terminated from that position for tardiness. Complainant testified that when he applied for a position in Respondent's Northampton store he disclosed his prior termination to Tolson. Tolson advised Complainant he would need to obtain approval from Respondent's main office to hire him. After a few days, Tolson called Complainant to inform him his hire had been approved.

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<sup>1</sup> Hall died of cancer in 2002.

4. As a hood tech, Complainant serviced customers' automobiles by checking the fluids and insuring all fluid levels were adequate, including oil and windshield washer fluid. He also acted as a salesman, recommending additional services to customers.

5. Complainant testified that his position was intended to be full-time, but Ken Hall would often send him home when things were slow at the shop. Complainant testified that he requested overtime on numerous occasions, but his requests were denied, while other employees worked overtime.

6. Complainant described his relationship with Hall as "horrible". He stated that Hall was often ill-tempered, and would take it out on Complainant and his co-workers. Complainant testified that Hall frequently uttered offensive, ethnic slurs, such as calling him a "Puerto Rican spic" and telling him, "You act lazy; All you Puerto Ricans can't work." Hall also stereotyped Puerto Ricans as driving the same kind of cars and referred to Complainant as "hubcap thief." Complainant testified that Hall repeatedly made such remarks several times per week. I credit this testimony.

7. Complainant testified that he complained twice to Dan Tolson about frequently being sent home early, about needing more hours and about Hall constantly calling him offensive names. According to Complainant, Tolson told him not to worry about it. After each complaint, Hall's behavior would improve for a day and then he would resume his offensive comments. I credit this testimony.

8. According to Complainant, he also complained directly to Hall about the offensive remarks and Hall's response was, "If you don't like it, you can punch out and go home." I credit this testimony.

9. Complainant testified that Hall's conduct affected him on a daily basis, causing him to feel hurt, stressed and embarrassed in front of his co-workers and reluctant to come to work in the morning. I credit this testimony.

10. Complainant testified that in November 2001, the Northampton Jiffy Lube was burglarized. The day after the burglary, a co-worker, Andre Marrero, told Complainant that Hall was spreading a false rumor among the employees that Complainant was involved in the break-in. Complainant testified that he confronted Hall about the rumor and Hall told him he was going to obtain video from a security camera at a nearby Wal-Mart store that would reveal the identity of the burglar. Complainant testified that he heard nothing further about the break-in and there was no basis to support Hall's allegations that he was in any way involved. I credit this testimony.

11. Complainant testified that as a result of Hall's abusive treatment of him and his refusal to give Complainant sufficient hours, Complainant decided to request a transfer from the Northampton location. To this end, Complainant contacted Warren Spears, the manager of Respondent's Jiffy Lube located in Hadley, MA and requested a transfer to that store. Complainant had worked with Spears previously at an area nursing home, as well as at a Jiffy Lube in Holyoke. I credit this testimony.

12. Complainant testified that he told Spears that he needed to work more hours and had tired of Hall's harassment and discriminatory treatment and Tolson's inadequate response to his complaints about Hall. He told Spears that Hall blamed him for the break-in at the Northampton location. I credit this testimony. Spears testified that Hadley was a busy location and he could provide Complainant with the hours he needed. After checking with Tolson, Spears arranged for Complainant come to work at the Hadley shop. Complainant began working in Hadley on or about November 23, 2001.

13. Complainant's job at Hadley was to greet customers and to sell them additional products and services. He testified that Spears told him he was doing a good job. I credit this testimony.

14. Complainant testified that on or around December 9, 2001 he visited the shop on his day off to say hello to his co-workers. On that day, Spears took him aside and informed him that Richard Smith had instructed him to terminate Complainant's employment, as Complainant's previous termination from the company should have precluded his rehire. Complainant told Spears that he needed the job, because the holidays were approaching. Spears told him he was sorry, but there was nothing he could do because they had made a mistake in re-hiring him. I credit this testimony.

15. Anthony Roldan, a friend of Complainant's, who did not work at Jiffy Lube, testified that he frequently visited Complainant and his co-workers at the Northampton location. Roldan testified that whenever he visited the Northampton location, he

observed that Ken Hall was grumpy, demanding and spoke forcefully to Complainant. Roldan stated that on several occasions, he overheard Hall make derogatory comments to Complainant, such as “no good spics” “Can’t get the Puerto Rican to work” and “Everybody is working except this little Puerto Rican.” According to Roldan, Complainant told him on a couple of occasions that he was getting “fed up” with the way Hall was treating him. I credit this testimony.

16. On cross-examination Roldan testified that there was a joking, kidding atmosphere at Jiffy Lube among the employees and acknowledged that Hall ejected him from the Jiffy Lube on more than one occasion because he did not work there and was interfering with Complainant’s work.

17. Manual Santiago, who is Puerto Rican, worked at Respondent’s Northampton location from October 29, 2001 until August 22, 2002. His employment overlapped with that of Complainant for approximately one month, prior to Complainant’s transferring to Hadley. Santiago testified that Ken Hall directed derogatory comments toward Hispanic workers several times a day and referred to the four or five Hispanic workers as “spics” and “Puerto Rican bitches” and commented that they “did not like to work” and liked to “live off other people”. Santiago testified that Hispanic workers were assigned undesirable tasks, such as working in “the pit” beneath cars being serviced. Santiago testified that the work environment was unfriendly but that he worked despite the atmosphere because he needed the job. I credit this testimony.

18. Santiago acknowledged that he knew Hall from a previous job and provided Hall's name as a reference on his application to Jiffy Lube. Santiago testified that he was terminated from his position for performance reasons. He acknowledged that, on occasion, Complainant referred to Hall as a "porch monkey."

19. Daniel Tolson was manager of the Northampton Jiffy Lube from 2000 to 2002. His duties were to hire and fire, maintain inventory, schedule work hours and ensure a harmonious working atmosphere. In addition to his managerial duties, Tolson also serviced cars. Tolson was required to maintain a low "labor percentage". A high labor percentage meant that the shop was paying too much for labor costs in relation to the amount of revenue it was earning. Tolson controlled the labor percentage through scheduling of employees. If on a given day, there were too many employees on the job, he would send home those employees who had been scheduled for shorter shifts. He testified that he never delegated the scheduling responsibility to Hall. However, on Tolson's day off, Hall was responsible for sending employees home when business was slow. I credit this testimony.

20. Tolson described Complainant as a very good worker who was generally assigned to "the hood" because of his rapport with customers and his sales skills. Tolson testified that other than coming in late a few times, Complainant was a very good employee and he was disappointed to lose him when Complainant transferred to Hadley. I credit his testimony.

21. Tolson denied that job assignments were based on the employees' ethnic background and stated that the majority of the staff was non-white, and consisted of Mr. Hall, an African-American, a Jamaican named Henry, two Caucasian brothers, and Complainant and Manny Santiago who are Puerto Rican. I credit his testimony and I find that there is insufficient evidence to establish that Complainant was assigned fewer hours on the basis of his national origin.

22. Tolson testified that he worked with Hall five days a week. Tolson testified that Hall was "grumpy" on occasion, but he never heard Hall make racist or offensive remarks. I credit this testimony. Tolson denied that Complainant ever complained to him about Hall. I do not credit this testimony.

23. Tolson testified that in 2002, he quit his position at Jiffy Lube because he was unhappy with his salary. Tolson currently works for Interstate Mobil in Ludlow, Massachusetts, a company that is not affiliated with Respondent.

24. Warren Spears began working for Jiffy Lube in around 1999. Spears was the General Manager at the Hadley store at all times relevant to this matter. Spears' duties were to oversee the entire facility, to insure that the orders were properly made, to make sure the employees were performing their responsibilities and ensure the cars were serviced in a timely manner.

25. Spears knew Complainant prior to 2001 because they had once worked together at a nursing facility. In addition, Complainant had filled in at the Hadley store on a few occasions prior to his transfer. Spears testified that on these occasions, Complainant told him that he did not get along with Ken Hall. According to Spears, in the fall of 2001, Complainant approached him seeking a transfer to Hadley because he was not receiving enough hours at Northampton. Spears was short-staffed at the time and able to give Complainant more hours than he worked at Northampton. After discussing the matter with Tolson, who told him Complainant was very good with customers, Spears arranged for Complainant's transfer to the Hadley store. I credit this testimony.

26. Spears testified that he focused on Complainant's strengths and assigned him to talk to customers as much as possible. Complainant's job at Hadley was to greet customers and to sell them additional products and services. He stated that Complainant performed his job well and was a very good salesman. I credit his testimony.

27. Spears testified that Complainant's job performance during the first week or so was good, but thereafter, Complainant's began to come in late on occasion and tended to talk too long to customers. This required others to fill in for him when he did not follow through on servicing automobiles. Spears testified that he spoke to Complainant on one occasion about making sure that vehicles were serviced in a timely manner. I do not credit Spears' testimony that Complainant's performance deteriorated after the first week or so.

28. Spears testified that during Complainant's tenure at Hadley, Respondent had a policy prohibiting employees from using cell phones while on the job. Spears stated that Assistant Manager Brian Fuller told him that he had spoken to Complainant twice about using his cell phone at work. According to Spears, Fuller told him that that Complainant sometimes failed to finish what he had started and that Complainant's enthusiasm for the job had begun to wane. I give little weight to this testimony, as it constitutes totem-pole hearsay and Fuller did not testify at the public hearing.

29. On or about December 11, 2001, employees of the Hadley Jiffy Lube participated in a training session given by an outside consultant from Power, Inc., who was hired by Respondent to train staff regarding presentation of products to customers. The training was conducted after hours at the Hadley store. Mr. Spears' supervisor, vice president of operations Richard Smith was present during part of the training session.

30. Spears testified that Complainant's cell phone rang during the training session and he stepped away from the group to take the call. Spears testified that he and Fuller were both "very shocked" to hear the cell phone and were embarrassed because this was Smith's first visit to the store. Spears feared this would reflect badly on their performance as managers. I do not credit Spears' testimony in this regard. Complainant acknowledged answering his cell phone during this training session. Complainant testified that this was the first time he had brought a cell phone to work and he answered an emergency call that his daughter was sick. He told his supervisors that he had to

leave. They told him it was fine and not to worry about it. I credit Complainant's testimony.

31. Spears testified that he told Complainant that he was being terminated primarily for impermissible cell phone use, as well as for his poor job performance. In an affidavit later signed by Spears on July 19, 2003, he stated that Complainant was "ultimately terminated for poor job performance including: poor attendance, late arrivals, and his overall attitude." The affidavit did not mention the use of a cell phone. I do not credit Spears' testimony.

32. During the latter part of 2001, the Respondent was in a period of transition after having taken over several Jiffy Lube locations from Jiffy Lube International. At the time of Complainant's termination there was no official policy regarding progressive discipline and employees other than Complainant were terminated without prior warning.

33. Spears testified that he tended to be lenient in terms of discipline and would be more likely to give someone a verbal warning before giving them a written warning. He testified that the company was in a state of transition at the time of Complainant's termination and he sometimes used Jiffy Lube International's progressive disciplinary forms when disciplining employees, but he did not do so in this instance. I credit this testimony.

34. At the public hearing, I observed Spears to be quite ill at ease and uncomfortable while testifying. I find that Spears did not make the decision to terminate

Complainant's employment, but rather was instructed by his superiors to so state.

35. John Borgatti has worked for Respondent for 20 years, beginning as a car wash manager. After various promotions, in October 2001, he was appointed to the newly created position of Director of Human Resources. In this position, Borgatti deals with a number of issues including worker's compensation, administrative duties, health and dental benefits, 401K, pension, profit-sharing, discrimination, and training.

36. In March 2002, Borgatti learned of Complainant's MCAD complaint. He testified that he investigated the allegations by talking with Richard Smith, Warren Spears, Dan Tolson, and Ken Hall, who was by then out on medical leave. After interviewing these employees, Borgatti determined that the claim was meritless.

37. Borgatti testified that in connection with the investigation of the complaint, he asked Hall about a break-in at the Northampton Jiffy Lube and Hall responded that an employee implicated Complainant in the break-in. However, Borgatti stated that the break-in was not central to his investigation and he did not focus on it. Borgatti believed that Hall told Tolson about the break-in, but Borgatti did not recall speaking to Tolson about the break-in as it was not a priority for him. I credit Borgatti's testimony that he discussed the break-in with Hall. However, I find it incredible that Borgatti would not have focused on the break-in as a possible motive for terminating Complainant's employment.

38. Respondent offered into evidence two “Payroll Change Notices”, one signed by Spears and the other purportedly signed by Bryan Fuller, the assistant manager at Hadley. The payroll change notice signed by Spears stated that Complainant was discharged “...due to poor performance (lack of initiative, and neglect of duties, cell phone use.)” The notice is dated 12/12/01 at the top and 12/12/02 at the bottom. The payroll change notice purportedly signed by Fuller states that Complainant was discharged for “Violation of Company policy-using cell phone while on the job” This notice is dated 12/12/01 at the top and 12-11-02 at the bottom.

39. Respondent presented evidence of three other employees whose employment was terminated for excessive telephone use. Two of the employees were calling “900” numbers which were toll calls that were charged to the Respondent. The third employee was discharged for using his telephone eight times a day and disrupting his work. (tr. 20-26,101-110, 10/21/05)

40. Complainant testified that while situated at the Northampton location under Hall, it was “sickening” to wake up each morning knowing that he had to go to work to support his family, but also knowing he would be called names and be embarrassed for the whole day, and told to perform tasks that actually all the employees should be sharing. Complainant testified that he couldn’t concentrate on the customers because of the stress and aggravation caused by Hall’s conduct. He testified that it was tiring and embarrassing. I credit his testimony.

41. Complainant testified that following his termination, he was left in severe financial situation, was behind in bills, and unable to buy Christmas presents for his daughter. He testified that he had difficulty obtaining immediate employment because of the Christmas holiday. Complainant testified that during the period of his unemployment, he and his girlfriend were evicted from their apartment and split up as a result of his financial problems.

42. At the time of his termination, Complainant was earning \$8.00 per hour and worked 32 hours per week for a total of \$256.00 per week. ( $\$8.00/\text{hr} \times 32 \text{ hrs} = \$256.00$ )

43. After his termination, Complainant worked as a snow -plow operator for Pioneer Landscaping working approximately three days for \$200 per day for a total of \$600.00. In April 2002, Complainant obtained employment at a local Wal-Mart where he earned \$8.50 per hour.

### III. CONCLUSIONS OF LAW

#### A. Hostile Work Environment

Massachusetts General Laws Chapter 151B, Section 4(1) makes it an unlawful practice for an employer to hire, to discharge from employment or to discriminate against an individual in compensation or in the terms, conditions or privileges of employment because of the individual's race, color or national origin. Harassment in the workplace based on race, color and national origin constitute forms of discrimination under c. 151B.

See, Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), Richards v. Honeywell Bull, 16 MDLR 1639, 1669 (1993); Dalessio v. Seagate Technology, 18 MDLR 117(1996). When the harassment has the effect of creating a discriminatory work environment, the Commission has held that it per se affects the terms and conditions of employment. Richards v. Honeywell Bull, *supra*.

In order to prevail on a claim of race, color and national origin harassment, Complainant must demonstrate that (1) unwelcome comments, jokes, or other verbal or physical conduct of an offensive nature were made in the workplace; (2) such conduct had the effect of creating an intimidating, hostile or offensive working environment or unreasonably interfered with an individual's work performance; and (3) the employer knew or should have known of the conduct and failed to take remedial action. Dalessio v. Seagate Technology, Inc., *supra*. (1996); Duplessis v. Training & Development Corp., 835 F.Supp. 671, 677 (D.Me. 1993); Wheatley v. AT&T, 418 Mass. 394, 397 (1994).

Complainant alleges that his supervisor in the Hadley office, Ken Hall, created a hostile work environment for him by making offensive comments about Puerto Ricans and uttering ethnic slurs on a continuous basis. Such conduct was pervasive, continuous, unwelcome and offensive to Complainant. Complainant also alleges that Hall did not assign him adequate hours and relegated him to less desirable tasks in the Northampton Jiffy Lube. Finally, the evidence suggests that Hall accused Complainant of participating in a break-in at the Northampton location and spread rumors to that effect. Complainant transferred to Respondent's Hadley store in large part because of Hall's conduct.

I conclude that Complainant has established a prima facie case of harassment on the basis of national origin. Complainant testified credibly that Hall's conduct was offensive and humiliating to him, and was the major reason he sought a transfer from the Northampton to the Hadley Jiffy Lube. I conclude that this conduct was pervasive, as it happened on a daily basis. Further, Hall's conduct sufficiently interfered with Complainant's enjoyment of his workplace that he hated coming to work and sought a transfer to another location. Since Hall was a managerial employee, Respondent is strictly liable for Hall's conduct. Collegetown, Div. of Interco v. MCAD, 400 Mass. 156 (1987). Further, Complainant testified that he complained about Hall's conduct to Hall's supervisor, Tolson, who failed to take steps to ensure that the conduct ceased. Respondent allowed a hostile work environment to continue unabated after being placed on notice of the offensive conduct.

#### B. TERMINATION

Complainant alleges that Respondent terminated him because of his national origin in violation of M.G.L.c.151B§4. In order to establish a prima facie case of discriminatory termination, Complainant must show that (1) he was a member of a protected class (2) that he performed his job at an acceptable level (3) that he was terminated and (4) his employer sought to fill his position by hiring another individual not of his protected class. Abramian v. President & Fellows of Harvard College, 432 Mass 107 (2000); Once the complainant has established a prima facie case of race discrimination, the burden of production shifts to the employer to articulate legitimate, non-discriminatory reasons for its action, and to produce credible evidence of the

underlying facts in support of that reason. id., at p.116-7. In an indirect evidence case, if more than one of the employer's reasons is false, the fact finder may, but need not, infer that the employer is covering up a discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493 (2001).

I conclude that Complainant has established a prima facie case of national origin/ancestry discrimination. Complainant, who is of Puerto Rican national origin, had been performing his job satisfactorily for several months before his termination, as acknowledged by his managers at Northampton and at Hadley. In less than three weeks, Complainant was summarily terminated from the Hadley store.

Respondent has articulated several legitimate, non-discriminatory reasons for terminating Complainant's employment, including a poor work performance and repeated use of a cell phone during working hours.

Respondent's supervisor, Warren Spears, testified that he alone made the decision to terminate Complainant's employment, primarily because of his use of a cell phone during a training session. However, Spears' affidavit, signed July 19<sup>th</sup>, 2002, stated that Complainant was "...terminated for poor job performance, including: poor attendance, late arrivals, and his overall attitude." The affidavit makes no mention of cell phone use. Respondent offered into evidence two "Payroll Change Notices", one signed by Spears and the other purportedly signed by Bryan Fuller, the assistant manager at Hadley. The payroll change notice signed by Spears stated that Complainant was discharged "...due to poor performance (lack of initiative, and neglect of duties, cell phone use)". The notice is dated 12/12/01 at the top and 12/12/02 at the bottom. The payroll change notice purportedly signed by Fuller states that Complainant was discharged for "Violation of

Company policy-using cell phone while on the job”. This notice is dated 12/12/01 at the top and 12-11-02 at the bottom.<sup>2</sup> I did not find credible Spears’ testimony that Complainant’s work quality declined after “a few” weeks and the record was unclear as to how many days he actually worked at Hadley. Spears’ testimony was inconsistent on this point, and since Complainant only worked at the Hadley Jiffy Lube over a 19 day period, the inconsistencies in the testimony and various documents suggest that poor performance was an after-the-fact justification for terminating Complainant’s employment. Furthermore, I observed Spears to be ill at ease and uncomfortable during his testimony. I draw the inference that his discomfort resulted from having been instructed by his superiors to state that he alone terminated Complainant for reasons that were untrue.

I did not find credible Spears’ testimony that he, alone, made the decision to terminate Complainant’s employment. Spears described himself as a lenient boss who was likely to give employees a second chance. I infer that Spears was instructed to terminate Complainant’s employment by Respondent’s vice president, Richard Smith and to tell Complainant, falsely, that his termination was because Respondent should never have re-hired him due to his prior termination. Further, I find incredible Respondent’s articulated reason of cell phone use as a reason for terminating Complainant’s employment. I conclude that Complainant’s use of the cell phone during the training simply provided Respondent with an additional pretext for terminating his employment.

I found Respondent’s witnesses not entirely credible and find their stated reasons for terminating Complainant’s employment to be false. From this and the evidence of

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<sup>2</sup> The fact that two supervisors wrote the wrong year at the bottom of separately signed forms was not explained.

Hall's discriminatory bias, I draw the inference that Respondent is covering up a discriminatory intent, motive or state of mind. Lipchitz, supra. I conclude that Respondent's concern about Complainant's possible involvement in a break-in to be the motivating factor in terminating his employment and that Respondent learned of this allegation from Ken Hall, who demonstrated a bias against Complainant because of his Puerto Rican national ancestry. I believe that Spears was instructed to terminate Complainant for this reason and that given the source of the rumor, that this was discriminatory.

I conclude that, under the circumstances of this case, Respondent may be held liable for Hall's prejudice, where Hall provided unsubstantiated information to Respondent that Complainant had broken into the Jiffy Lube, and Respondent then acted upon that information without conducting an independent investigation of the allegations, or at the very least, asking Complainant about his version of events. In this case, Respondent relied exclusively on information from the biased subordinate, whose suppositions caused Respondent to unlawfully terminate Complainant's employment. See, EEOC v. BCI Coca-Cola Bottling Company of Los Angeles, \_\_\_ F.3d \_\_\_, 2006 WL 1545501 (10th Cir.) (June 7, 2006).

For the reasons stated above, I conclude that Respondent engaged in unlawful discrimination on the basis of national origin when it terminated Complainant.

#### IV. DAMAGES

##### A. Lost Wages

Complainant is entitled to compensation for lost wages resulting from his unlawful termination. Complainant earned approximately \$256.00 per week while employed by Respondent. He was out of work for a period of approximately 16 weeks, except for intermittent work as a snow plow driver for which he was paid \$600.00. Therefore I conclude that Complainant is entitled to lost wages in the amount of \$3,496.00 [(\$256.00x16) - \$600.00.]

##### B. Emotional Distress

The Commission is authorized to award damages for emotional distress resulting from unlawful discrimination. Stonehill College v. Massachusetts Comm'n Against Discrimination 441 Mass. 549 (2004) Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303(1976); Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Ct. 172(1985). Such emotional distress damages should be fair and reasonable, and proportionate to the distress suffered. Stonehill, supra, at 576. Some of the factors to be considered are; the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has suffered and reasonably expects to suffer and whether the complainant has attempted to mitigate the harm. Id. The Complainant must show a sufficient causal connection between the Respondent's unlawful act and the Complainant's emotional distress. Id.

I conclude that Complainant suffered emotional distress as a result of Respondent's unlawful discrimination against him. Complainant testified that while working under Ken Hall at the Northampton location, it was "sickening" to wake up every morning knowing he had to go to work to support a family, but knowing that he would be called names and feel embarrassed throughout each day, and be told to perform tasks that all of the employees should be doing. Complainant testified that he was unable to concentrate on his customers because he was "stressed out". In addition, Complainant testified that he felt "aggravated" and it was "tiring" and "embarrassing" to work under Hall's supervision. Complainant further testified that he had to forgo Christmas presents and got behind in his bills as a result of having been terminated shortly before the Christmas holiday. I did not believe that Respondent's conduct caused the break-up of Complainant's relationship with his girlfriend or his eviction, for which he offered no evidence other than his testimony.

. I conclude that Complainant suffered from emotional distress as a result both of Hall's harassment and I conclude that an award of damages in the amount of \$20,000.00 is appropriate to compensate him for his distress.

#### V. ORDER

For the reasons stated above, Respondent is hereby ordered;

1. To cease and desist discriminating on the basis of national origin.
2. To pay to Rafael Aviles the sum of \$20,000.00 for emotional distress, plus interest at the statutory rate of 12% per annum from the date of the filing of his complaint until this order is reduced to a judgment and post-judgment interest begins to accrue.

3. To pay to Rafael Aviles the sum of \$3,496.00 for lost wages, plus interest at the statutory rate of 12% per annum from the date of the filing of his complaint until this order is reduced to a judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If any Respondent fails to comply with the terms of this Order within the time period allotted, Complainant shall notify the Clerk of the Commission.

This order 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 31<sup>st</sup> day of August, 2006.

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JUDITH E. KAPLAN,  
Hearing Officer