THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

VICTORIA NWACHUKWU &
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
Complainant

v.

Docket No. 98-BEM-1703

TOWARD INDEPENDENT LIVING &
LEARNING, INC.
Respondent

Appearances:

Simone Liebman, Esq., Commission Counsel, for Complainant
Maria E. DeLuzio, Esq., for Respondent Toward Independent Living & Learning, Inc.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 2, 1998, Complainant Victoria Nwachukwu filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged Respondent Toward Independent Living & Learning, Inc. (hereafter: Respondent) with discrimination based on her national origin (Nigerian) in violation of General Laws, Chapter 151B, §4, paragraph 1. Complainant alleged that Respondent discriminated against her when it discharged her on January 31, 1998. (Joint Exhibit No. 9).

Attempts to conciliate this matter were unsuccessful. On April 3, 2002, Investigating Commissioner Dorca I. Gomez certified this case for a public hearing. In her order, Commissioner Gomez certified the following issues for hearing: "(1) Whether Respondent terminated Complainant's employment on the basis of her race and/or color and national origin or in retaliation for complaining about disparate treatment in violation of G.L. c. 151B; (2) Whether Complainant's supervisor treated non-Caucasian employees worse than Caucasian employees; (3) Whether Complainant suffered damages as a result of the alleged acts of discrimination and if so, the amount of such damages."

On December 20, 2002, the Commission received Complainant's motion to amend her complaint to add a claim of disability discrimination, Complainant's memorandum of law and Respondent's opposition to Complainant's motion. On December 30, 2002, I granted Complainant's motion to amend her complaint to add a claim of disability discrimination. (Joint Exhibit No. 10).

I held a public hearing in this case on June 4-5 and 18, 2003. On September 17, 2003, Respondent filed a post-hearing memorandum of fact and law. Complainant filed her post-hearing brief on September 18, 2003.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings

and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

II. Findings of Fact

1. Complainant Victoria Nwachukwu is a black female who lives in Randolph, Massachusetts, with her husband, Lambert Nwachukwu, and two children who are 12 and 13 years old. In March 1983, Complainant immigrated to the United States from Nigeria where she was born.

2. In 1985, Complainant received an associate's degree in social science from Roxbury Community College. Complainant also received a bachelor's degree in criminal justice from North-eastern University and has a medical certification that enables her to administer medications.

3. Respondent is a private, non-profit corporation whose headquarters is located in Dedham, Massachusetts. Among its residential facilities, Respondent operates a 24-hour staffed house for adult women with mental retardation on Hall Street in Randolph, Massachusetts (hereafter: the "Randolph House"), under a contract with the Massachusetts Department of Mental Retardation (hereafter: the "DMR"). Respondent's staff provides assistance to Randolph House residents related their daily living activities and general help to enable them live independently in the community.

4. Respondent initially staffed the Randolph House facility with two overnight awake manager and/or one asleep night manager position. An awake night manager stays awake during the night to evacuate the residents in the event of an emergency, completes paperwork and cleans the facility. An asleep night manager sleeps during the night at the facility and helps the awake manager in the morning to get the residents up, gets them ready for their workday and helps them with breakfast and medications. The starting pay for an awake manager and an asleep manager is a "low" $9.00 and $8.00 an hour, respectively.

5. At all times relevant to the instant complaint, Respondent had approximately 300-400 employees. Respondent is an employer within the meaning of General Laws, Chapter 151B, §1, paragraph

6. Complainant worked as an awake night manager in the Randolph House from November 24, 1996 until January 31, 1998.[1] (Joint Exhibit Nos. 2 and 5). Complainant stayed overnight at the Randolph House and cared for three female residents. Complainant woke the residents each morning, helped them with their morning routines and transported one resident to her job. Complainant also cleaned Randolph House and completed paperwork. Complainant worked on Sunday through Wednesday nights and her work hours were 10:00 p.m. or 11:00 p.m. to 9:00 a.m. During the time period relevant to this complaint, Complainant lived approximately three minutes by car from the Randolph House and five or six minutes by foot.

7. Complainant worked with Margaret Whyte and Joanne Kuzborski and two case managers, Terri Rose and Pat Boumival. Rose is

[1]Complainant's last day of work at Randolph House was January 13, 1998.

black while Whyte, Kuzborski and Boumival are white. Whyte was the awake night manager who worked at Randolph House on the nights Complainant did not work.

8. When Respondent hired Complainant on November 20, 1996, her hourly rate of compensation was $8.89. On November 30, 1997, Respondent increased Complainant's hourly pay rate to $9.12. On December 19, 1997, Respondent increased Complainant's hourly pay rate to $9.39. (Joint Exhibit No. 11). Complainant worked a minimum of 40 hours each week at Respondent. (Joint Exhibit Nos. 5 and 12). Complainant also received medical, dental and life insurance benefits while employed at Respondent.

9. Deborah L. Morrissey worked at Respondent from 1984 through June or July 1998. During 1996 through 1998, Morrissey was the residence or house manager at Randolph House.[2] In her position, Morrissey directly supervised relief and permanent staff, including Complainant and Kuzborski. From 1996 to 1998, Morrissey worked on Saturday, Sunday, one weekday from 9:00 a.m. to 11:00 p.m. and an additional weekday from 12:00 noon to 11:00 p.m. While Morrissey worked at Respondent's headquarters, she filled in at Randolph House if she could not find coverage or there was no available relief staff. During the time period relevant to the instant complaint, Morrissey reported directly to Sonya Mariotti, Respondent's residential coordinator, who managed several houses including the Randolph House.

10. In 1996, Morrissey interviewed Complainant, conducted her reference checks and hired her after a discussion with Mariotti.

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[2]Morrissey resigned after she was suspended, pending an employment hearing under Respondent's grievance policy, for allegedly submitting receipts with inaccurate information.

Sweeney also participated in Complainant's interview and concurred in Morrissey's recommendation to hire Complainant.

11. During the course of Complainant's employment at Respondent, Morrissey held regular supervision meetings with Complainant to discuss work-related and client issues. Morrissey took notes and completed a supervision form each time she held a supervisory meeting with Complainant. Complainant testified that Morrissey required her to sign the supervision forms but sometimes did not allow her to read them before signing. I credit Complainant's testimony.

12. Christine A. Sweeney has worked at Respondent for almost 20 years. Since August 1, 1998, Sweeney has served as Respondent's director of human resources. From 1988 until August 1, 1998, Sweeney was Respondent's director of residential services and reported directly to Kevin Stock, Respondent's vice president of operations. Sweeney also supervised Respondent's managers and coordinators at its 27 residential facilities and directly supervised Morrissey when there was no coordinator responsible for the Randolph House. Sweeney has a bachelor's degree in social work.

13. Sweeney met with Morrissey weekly or every other week to review her files, supervision records, clinical services and Randolph House's finances. Sweeney completed supervision records each time she met with Morrissey. Sweeney occasionally saw Complainant during her visits to Randolph House for her supervision sessions with Morrissey.

14. Marian Reiff Cheevers[3] worked for Respondent from September 1981 to June 1998. From 1987 until June 1998, Reiff was Respondent's director of human resources and her office was located in Respondent's headquarters. Among her duties as human resources director, Reiff screened applicants for second interviews, conducted training and coordinated employee benefits, including eligibility under the Family Medical and Leave Act (FMLA). Reiff's job responsibilities did not include discharging employees unless she directly supervised them or it was a "group" termination.

15. At Reiff's request, Complainant served on Respondent's diversity committee and met with Reiff and the committee once or twice.

16. Joanne M. Kuzborski worked at Respondent from December 1995 through August 8 or 9, 1997 when Respondent terminated her for insubordination, inappropriate conduct with a client and failure to follow policies and procedures.[4] Kuzborski initially worked as a relief worker at a house in Weymouth, Massachusetts and at a privately owned house in Randolph, Massachusetts to which Respondent provided contract services.

17. At some point in 1996 or 1997, Respondent hired Kuzborski as a full-time case manager for the Randolph House. As part of her duties, Kuzborski helped the residents with their daily living activities and ensured that they took their prescribed medications. Kuzborski also cleaned the facility, drove the residents to appointments and shopped for food.

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[3]During the public hearing, Marian Reiff Cheevers was also referred to as "Marian Reiff."

[4]Kuzborski filed a grievance against Respondent based on her termination which she ultimately settled.

18. During the time period relevant to this complaint, Kevin M. Stock was Respondent's vice president of operations and his immediate supervisor was Dafna Krouck-Gordon, Respondent's president. Stock has worked at Respondent for 22 years. Stock has held his current position for six or seven years and oversees clinical, residential, day support and transportation services. From 1996 to 1998, Stock was the last step in Respondent's grievance procedure although an employee could also file a complaint or grievance directly with him.

<u>Complainant's Work Performance</u>

19. On March 23, 1997, Morrissey gave an "acceptable" rating to Complainant on all of her elements in her 3-month performance evaluation. Among her comments, Morrissey wrote that Complainant always arrived on time for work, addressed consumers in an appropriate tone of voice, dealt with anger and frustration well, treated consumers with dignity and was very patient. (Joint Exhibit No. 2).

20. Morrissey gave "acceptable" 6-month and 12-month performance evaluations to Complainant, dated October 5 and November 30, 1997, respectively. (Joint Exhibit Nos. 3 and 4). Complainant did not receive any performance warnings or disciplinary memoranda during her employment at Respondent.

21. Stock testified that Complainant was a "very good" and a "valuable" employee. Morrissey testified that Complainant was an "excellent" employee and that they had a "good" working relationship. Reiff testified that "everyone always spoke very highly of [Complainant] and her work performance." Sweeney

testified that Complainant's work was "very good" and that she was "pleased" with the quality of Complainant's work.

Complainant's Leave of Absence in 1997

22. In early July 1997, Complainant's parents were robbed and shot in London. Complainant's father died from his wounds and her mother was seriously injured.

23. After Complainant learned about her father's death, she told Respondent's staff and Randolph House residents that she had to travel to Nigeria because of her father's death. Complainant told Kuzborski, Morrissey, Boumival, Whyte and probably Rose that she intended to take a leave to attend her father's funeral. Complainant did not tell anyone at Respondent how much time she would require to attend her father's funeral.

24. Complainant took an approved leave of absence from July 2, 1997 to August 22, 1997 (51 days). (Stipulation of Fact). Complainant arrived in Nigeria on July 14, 1997 and left on August 14, 1997. During her leave, Respondent paid Complainant for her accrued vacation pay. (Joint Exhibit No. 11).

25. Complainant did not submit any paperwork to request her leave in 1997 and Respondent did not specify whether her leave was bereavement, FMLA or discretionary. Respondent did not contact Complainant, by telephone or in writing, during her 1997 leave to determine how long she expected or needed to be on leave.

26. Sweeney testified that she originally expected that Complainant would take a three- or four-week leave in 1997. On

August 4, 1997, Sweeney noted in Morrissey's supervision record that Respondent had not heard from Complainant for six weeks and that Morrissey should send a termination letter if she did not hear from Complainant by August 16, 1997. In her supervisor's notation, dated August 14, 1997, Sweeney wrote that that a termination letter was not necessary because Mr. Nwachukwu left a telephone message about a "Saturday or Sunday return" for Complainant.

27. When Complainant returned from Nigeria, she resumed her duties as an awake manager position at the Randolph House. (Joint Exhibit No. 8).

<u>Complainant's Leave of Absence in 1998</u>

28. On January 13, 1998, Complainant's husband came to Respondent's headquarters and told Complainant, who was attending a training session, that her mother had died from the gunshot wounds she sustained in the London robbery. Upon learning about her mother's death, Complainant "burst into tears," fell and was completely "wiped out." Complainant informed the training instructor that she had just learned of her mother's death and that she had to leave. Complainant testified that the instructor told her that she had to "finish the training or at least take the test." Complainant testified that the training instructor's statements upset her. I credit Complainant's testimony.

29. Complainant then told Mariotti about her mother's death and her belief that the training instructor wouldn't let her leave. Mariotti took Complainant and her husband to Sweeney's office where Complainant spoke with Sweeney for approximately two hours

while her husband sat next to her. Reiff and Mariotti also met with Complainant and Sweeney at various times during the two-hour meeting.

30. Complainant told Sweeney that her father was dead, her mother was now dead and that she had to go to Nigeria but she did not know how long it would take her. Complainant testified that Sweeney told her not to worry and that she should take all the time she needed to bury her mother. Complainant was distraught, distressed and "very, very troubled" during her meeting with Mariotti and Sweeney. Complainant told Mariotti and Sweeney that she was "distressed, "very disturbed" and was in "total chaos." Complainant also cried frequently and discussed her feelings about losing her mother. I credit Complainant's testimony.

31. Sweeney testified that Complainant cried, wrung her hands, paced and verbalized that she wanted to kill herself during the meeting while Sweeney tried to comfort and calm her down. Reiff testified that, when she came into Sweeney's office, she saw that Complainant was obviously distraught over her mother's death. Reiff also testified Complainant told her that "she didn't know what she was going to do" and that "she wanted to kill herself." Complainant denied that she made "any expressions about wanting to kill [herself]" on January 13, 1998. I credit the testimony of Sweeney and Reiff.

32. During their meeting with Complainant, Sweeney asked Reiff to set up grief counseling for Complainant because she was concerned that Complainant might have been "serious" about killing herself. Reiff then arranged a meeting for Complainant with a mental health therapist in Braintree on the following

morning. When Reiff returned to Sweeney's office with the appointment information, Sweeney testified that Complainant again stated that she "wanted to die" and that "she had no reason to live." Sweeney spent another 20 minutes talking with Complainant to ensure that she was committed to going to her appointment with the therapist. I credit Sweeney's testimony.

33. Sweeney believed Complainant was not "capable of doing any job" on January 13, 1998 because she felt Complainant was "mentally disabled."

34. Complainant told Sweeney that she was concerned about who was going to cover her shift because she felt that relief staff didn't like to work at Randolph House. Complainant told Sweeney that she would require a "long time" in Nigeria because she had to "bury both parents." Complainant testified that Sweeney then told her that she should "take her time." Complainant also testified that Sweeney told her that she was entitled to 12 weeks of FMLA leave and that Respondent would arrange "something" if she needed additional time because Complainant was a valuable employee. I do not credit Complainant's testimony about Sweeney's statement regarding her entitlement to FMLA leave.

35. Complainant testified that no one at Respondent told her that she had to contact Respondent during her leave of absence. Complainant also testified that Sweeney told her that they would be periodically checking on her and that she would "check back" with her before Complainant traveled to Africa. I do not credit Complainant's testimony.

36. Sweeney told Complainant, on January 13, 1998, that Respondent would approve a leave for her to attend her mother's funeral but did not specify the type or length of her approved leave. Sweeney also told Complainant that she needed to hear from her in a couple of days so that they could determine the type of leave Complainant needed. Reiff and Sweeney told Complainant to take time to figure out what she needed to do next and to then contact Respondent. Reiff also testified that Respondent needed to know the length of Complainant's leave so that it could accommodate Complainant's request, meet the needs of the Randolph House residents and satisfy DMR's staffing requirements. Sweeney and Mariotti escorted Complainant to the reception area where Sweeney again told Complainant that she wanted to hear from her in the next couple of days. I credit the testimony of Sweeney and Reiff.

37. When Sweeney did not hear from Complainant after January 13, 1998, she was concerned that Complainant might have been hospitalized because of her emotional state. Sweeney called Complainant at home on January 15, 16 and 17, 1998 and once during the week of January 19, 1998, but no one answered at Complainant's residence and there was no answering machine. I credit Sweeney's testimony.

38. Reiff called Complainant twice at her home but did not hear from her between January 13 and 26, 1998. Reiff also testified that Mariotti told her that she called Complainant on January 15, 16, 20 and 22, 1998 and that Morrissey told her that she called Complainant several times on January 14, 15 and 16, 1998 but they did not reach her. I credit Reiff's testimony.

39. Complainant testified that it takes two days for her to travel from Boston to Nigeria. Complainant arrived in Nigeria on February 4, 1998 and left Nigeria on February 18, 1998. While Complainant was in Nigeria, Respondent covered her position at the Randolph House with per diem staff and overtime.

40. On February 6, 1998, Complainant was hospitalized in Nigeria and treated for a "nervous break-down" and stress related to her mother's death. Complainant was also treated for enteric fever. (Respondent's Exhibit No. 2). Complainant testified that her hospitalization lasted at least one day but she could not recall whether it was more than one week.

41. Between January 13, 1998 and February 20, 1998, Complainant did not contact any manager or supervisor of Respondent to discuss the details of her leave.

Respondent's FMLA Letter

42. Sometime in January 1998, Stock and Reiff decided to send a FMLA letter to Complainant because they believed she may have had a potentially qualifying event, i.e., a serious health condition, and may be eligible for leave under the FMLA. When Stock decided to send Complainant a "FMLA" letter, he believed she was already on leave from Respondent.

43. On or about January 26, 1998, Reiff prepared and sent a standard form letter to Complainant notifying her that she was eligible for up to 12 continuous weeks of FMLA leave, beginning on January 15, 1998, because of her "serious health condition." The letter also informed Complainant that she would not be required to furnish a medical certificate. In the FMLA letter,

Reiff requested that Complainant call her to let her "know how long" Complainant intended to take a leave of absence. (Joint Exhibit No. 1). Reiff did not hear from Complainant or her husband in response to her FMLA letter.

44. Complainant received Respondent's FMLA letter before she traveled to Nigeria on or about February 2, 1998. Complainant only read the first page of the letter that indicated she was eligible for 12 weeks of FMLA leave and did not read the part of the letter that required her to call Respondent to inform her supervisors how long she would be on leave. Complainant did not read the remainder of the letter because she believed that Respondent had already approved her for 12 weeks of FMLA leave and that she would return to her awake manager position at Randolph House when she came back from Nigeria.

45. Stock did not recall any other employees who exercised their eligibility for FMLA leave within the two-year period prior to January 1998 or to whom Respondent sent a FMLA eligibility letter during such period.

Termination

46. Sweeney talked with Morrissey between January 13, 1998 and February 11, 1998 to confirm that Complainant was out on leave.

47. On February 11, 1998, Reiff, Stock and Sweeney decided to "administratively" terminate Complainant and fill her position with a full-time employee. Stock, Reiff and Sweeney decided to discharge Complainant because they believed she had abandoned her position as they did not know when or if she was returning to the Randolph House. Sweeney testified that they needed to

replace Complainant to ensure stability and consistency at the Randolph House by using permanent rather then temporary employees.

48. Stock did not attempt to contact Complainant after she took her leave on January 13, 1998 and before he decided to discharge her. Stock denied that he considered Complainant's mental "condition" on January 13, 1998 when he made his decision to discharge her. Stock also testified that he did not know of any reason why Complainant was not able to adequately perform her job duties when he discharged her for abandoning her position. I credit Stock's testimony.

49. During her employment at Respondent, Morrissey was directly involved in decisions to terminate several employees, including Kuzborski and another white manager. Stock did not consult Morrissey prior to terminating Complainant. Stock and Sweeney testified that Morrissey did not have any involvement in their decision to terminate Complainant. I credit the testimony of Stock and Sweeney.

50. On February 11, 1998, Reiff and Sweeney prepared and signed an employee termination form that shows Respondent discharged Complainant because she abandoned her position. (Respondent's Exhibit No. 1). Complainant's termination date was January 31, 1998 because Respondent credited Complainant with her accrued vacation and sick leave. (Joint Exhibit No. 5).

51. Reiff testified that it was Respondent's practice to give the original of the termination form to the affected employee and send a copy to payroll for processing. Reiff also testified that she sent a termination form to Complainant by certified

mail but did not recall receiving a signed return receipt from Complainant. I credit Reiff's testimony.

52. On February 11, 1998, Sweeney told Morrissey that she could begin recruiting for Complainant's replacement.

53. On February 13, 1998, Respondent hired Jennifer Melpignano, an overnight staff person at Respondent, to fill Complainant's awake manager position. Melpignano is white, American and does not have a disability or handicap.[5] According to its payroll report, dated June 12, 2003, Respondent issued a check to Melpignano on February 27, 1998. (Respondent's Exhibit No. 3).

54. On February 3, 1998, Morrissey signed a new employee authorization form regarding Melpignano's hire. (Complainant's Exhibit No. 1). Morrissey testified that Respondent's new employee authorization form is filled out after new employees are hired and before they work their first shifts. Morrissey did not recall when she signed Melpignano's new employee authorization form but does not believe that she would have signed it 10 days before Melpignano's hire. Reiff testified that it was her practice to require a house manager to interview an applicant prior to completing a new employee authorization form.

55. Melpignano and Reiff signed Melpignano's new employee form on February 13, 1998. The form noted a starting date of February 19, 1998. It also noted that Melpignano initially inquired about the position in January 1998. (Complainant's Exhibit No. 1). Reiff admitted that Melpignano "must have heard

[5]There is no evidence in the hearing record that Respondent "perceived" or "regarded" Melpignano as an "individual with a handicap."

about" the position from her sometime in January 1998. Reiff testified that Melpignano may have been in contact with her about Complainant's position in January 1998 and prior to Stock's decision to terminate Complainant.

56. Reiff testified that Complainant was the only employee of Respondent who was terminated within 30 days of receiving a FMLA letter.

57. When Complainant returned from Nigeria on February 18, 1998, she was ready, available and able to work at the Randolph House. On February 20 or 21, 1998, Complainant called the Randolph House to inform the staff that she had returned from Nigeria. Complainant spoke to Boumival who asked her why she was calling because she no longer worked for Respondent. Complainant asked to speak with the residents but Boumival declined.

58. Complainant immediately called Reiff who refused to take Complainant's call. Complainant also testified that she called Respondent's Dedham office over 12 times between February 20, 1998 and March 18, 1998 and left messages either with the receptionist or on Reiff's voice mail message machine. Complainant testified that she was desperate to speak with Reiff about her discharge and Respondent's failure to pay her daughter's dental bills. Reiff testified that she received at least one voice mail message from Complainant prior to speaking with her. I credit Complainant's testimony.

59. On March 18, 1998, Complainant reached Reiff who told her that Respondent had discharged her. Complainant then asked Reiff to send her "papers" confirming that she was fired. Reiff testified that Complainant seemed surprised when she told her

that Respondent had terminated her employment at the Randolph House. During this conversation, Reiff did not offer to rehire Complainant at the Randolph House.

60. Complainant received written notification of her discharge from Respondent sometime after she returned from Nigeria but she did not recall the specific date that she received it.

61. Complainant's husband testified that he did not receive a certified letter from Respondent or talk with a manager or supervisor of Respondent while Complainant was in Nigeria. I credit his testimony.

62. After her discharge from Respondent, Complainant applied for and was found eligible for unemployment insurance benefits. Complainant received $7,230.00 in unemployment benefits during 1998. (Joint Exhibit 15).

Reemployment "Offers"

63. Sometime in March 1998, Stock and Reiff decided to offer Complainant an awake night manager position at a facility located in Roslindale or Hyde Park, Massachusetts, at the same pay rate, seniority level and benefits status she had when Respondent terminated her. Reiff then talked to Complainant, by telephone, about an awake night manager position in Roslindale or Hyde Park but Complainant was not interested. Reiff did not discuss salary, seniority or a start date with Complainant for this position nor did she make a written "offer" to Complainant.

64. In or about March 1998, Stock offered, during an unemployment insurance hearing, to immediately rehire Complainant but he

did not describe a specific location, salary or benefits. Complainant treated Stock's job offer as a "passing comment" and declined it because she felt "it was too late" and Respondent had fired her for no reason.

65. In Respondent's position statement filed with the Commission, dated June 22, 1998, Stock wrote that Respondent was "still willing to rehire [Complainant] to a similar position with the same pay, benefits and seniority she had when she was terminated." (Joint Exhibit No. 8). Complainant received a copy of Stock's letter but did not reply because she felt it was not an offer.[6]

Racial Comments

66. Complainant testified that Morrissey told her, at an unspecified time, that she had asked Sweeney not to send her any "people" like Complainant and that she did not like to work with "people like [her]." Complainant believed that Morrissey's "you people" statement related to her color. Morrissey denied that she ever told anyone at Respondent that she did not want to hire or work with individuals who were not Caucasian. I credit Morrissey's testimony.

67. Complainant testified to the following incident regarding a Randolph House resident's use of derogatory language: after attending a funeral for Rose's son who looked "pure white," a Randolph House resident (hereafter: "resident DR") told Complainant that she thought Rose was a "nigger." The next morning at 9:00 a.m., Complainant told Morrissey what resident

[6] Stock also testified that he offered to rehire Complainant to an unspecified position during conciliation activities before the Commission.

DR said about Rose. Complainant also told Morrissey that resident DR's statement was not the "right thing . . . to say" and she suggested that they "work" with her. Complainant did not recall the specific date of this incident but believed that it occurred about the middle of her employment at Respondent and before she traveled to Nigeria immediately after her father's death. Complainant testified that this was the first time that resident DR used a "racially inappropriate" term with her.

68. Complainant also testified that Morrissey responded to her complaint by telling her: "What is there to work? There is nothing to work with her, but that's what everybody knows you (sic) blacks as." Complainant then told Morrissey that it was their role as care providers to "direct" or encourage resident DR to use appropriate words. Complainant testified that Morrissey replied by telling her, "I don't want to discuss that. Get over it." I do not credit Complainant's testimony.

69. Complainant testified that resident DR made another derogatory racial comment to her while she was driving resident DR to work. When Complainant told resident DR that they would be late because of traffic, resident DR said, "I don't know why all these people are on the road. All the niggers are on the road." Complainant responded by telling resident DR, "please, why are you using this word when I'm with you? Are you going to call me a nigger too?" Complainant testified that resident DR replied, "No, if you're a nigger, you must be a good one." Complainant did not recall the specific date of this incident but testified that it occurred in the middle of her employment at Respondent. I do not credit Complainant's testimony.

70. Complainant testified that, on the next morning, she told Morrissey about Rowell's second racial comment and Morrissey responded by telling her, "Get over it. That's what everyone knows you guys to be. Everybody knows you black people as niggers." Complainant testified that she was "almost crying" after Morrissey's response. Complainant also testified that this was the first time that Morrissey used a "racially inappropriate" term in her presence. I do not credit Complainant's testimony.

71. Complainant testified that resident DR made many other racial comments "here and there" and that she told Morrissey about them during her supervisory meetings with Morrissey. Complainant testified that Morrissey never wrote down her complaints about resident DR or took notes in her supervision records. She also testified that every time that she told Morrissey about resident DR's use of the term, "nigger," she always responded in the same manner by telling her to "get over it" and that it was what resident DR knew "blacks to be." I do not credit Complainant's testimony.

72. Morrissey testified that Complainant never complained to her about resident DR, or any other Randolph House resident, calling Complainant, a "nigger." Morrissey also denied that she referred to Complainant as a "nigger" while talking to Kuzborski or Complainant. Morrissey testified that she never heard resident DR use the word, "nigger." I credit Morrissey's testimony.

73. During the time period relevant to this complaint, Respondent maintained a log or "communications" book at Randolph House. The primary purpose of the communication log was to

ensure continuity of information sharing between the various shifts regarding Randolph House residents. Respondent expected shift workers to include information and observations regarding the residents' activities, medical or behavioral issues and any unanticipated incidents that may have occurred during a shift. Complainant testified that she wrote down information about the residents including behavioral or physical observations she wanted the next shift to know, e.g., a resident fell down, had diarrhea or a temperature.

74. Stock testified that he expected Respondent's employees would record information in the communications log about a resident's use of a racial epithet and contemporaneously report it to their direct supervisor. Stock testified that he expected Respondent's employees to take these actions because one of Respondent's primary tasks was to teach appropriate behavior to the residents so that they could live more independently in the community. Stock also testified that Respondent wanted to track this type of information because it was important for other staff members to know. I credit Stock's testimony.

75. Stock also testified that he expected Respondent's staff to address a situation where a resident referred to a worker with a racial epithet. The individuals responsible for determining Respondent's responses included the resident's case manager, residence or house manager, therapist and/or behavioral psychologist.

76. Stock also expected Respondent's employees to raise a complaint about a resident during a staff meeting if their immediate supervisor failed to address it or to raise it with a

program manager or director through Respondent’s grievance procedure. (Joint Exhibit No. 7).

77. Complainant believed Respondent’s communications book was not the appropriate place to record resident DR’s racial comments. Complainant expected that, once she told Morrissey about her observations, Morrissey would discuss them with resident DR’s case manager.

78. Kuzborski testified that she heard Morrissey use inappropriate racial language on a number of occasions beginning in January or February 1997, when Morrissey commented on Complainant’s use of disinfectant in Randolph House. Kuzborski testified that Morrissey said, “I’ve got to talk to [Complainant]. She’s going to asphyxiate us all. Doesn’t that nigger know she is going to kill us all with that stinking stuff.” Kuzborski also testified that she was so “shocked” and “taken aback” by Morrissey’s comment and that she did not know what to say. I do not credit Kuzborski’s testimony.

79. Kuzborski testified to another instance of Morrissey’s use of racially inappropriate language that occurred in the spring of 1997. Kuzborski testified that Morrissey was angry when Kuzborski told her that Complainant’s father and mother were shot in England. Kuzborski testified that Morrissey said, “Why are you calling and telling me this? This should be something that [Complainant] does directly to me. Doesn’t that nigger know the right way to do things and how things should be done here with me?” Kuzborski testified that she was again shocked by Morrissey’s statement. I do not credit Kuzborski’s testimony.

80. On December 30, 1997, a Christmas tree fell on Complainant while she was completing paperwork and she sustained several cuts and bruises that she treated with peroxide. In accordance with Respondent's policy, Complainant filled out an incident report and gave it to Morrissey during her supervisory meeting on the next morning. Complainant testified that Morrissey took her incident report, threw it into the trash and told her, "What is this? See why I hate to work with people like you. What is this? This is trash." Complainant testified that Morrissey also told her, ". . . by the way, in America, if a Christmas tree falls on you that means good luck. So, good luck." Complainant testified that she retrieved the incident report from the trash. I credit Complainant's testimony.

81. Kuzborski testified that Morrissey told her, "[Complainant] thinks she going to ruin my record. That nigger, doesn't she know—I told her it's good luck when a Christmas tree falls on you. She doesn't know anything about our customs." I do not credit Kuzborski's testimony.

82. Morrissey denied that she refused an incident report from Complainant or threw one into the trash. Morrissey also denied that she told Complainant that it is good luck if a Christmas tree falls on you. I credit Morrissey's testimony.

83. Complainant also testified that Morrissey refused to take another incident report from her after she fell down while picking up a Randolph House resident and threw it into the trash where Complainant retrieved it.[7] I do not credit Complainant's testimony. Complainant never called or contacted a manager or

[7] Complainant testified that she faxed a copy of both incident reports to her first Commission counsel and then threw both reports away.

supervisor about Morrissey's failure to accept her two incident reports.

84. Kuzborski testified that, on one occasion, she told resident DR that her nails looked good while Complainant was painting them. Resident DR replied, "Well, that's what niggers are good for. That's one of the things that they're good for." I do not credit Kuzborski's testimony.

85. Kuzborski testified that she told William LaRue, on an unspecified date while he was at the Randolph House, about the racial slurs used by resident DR and Morrissey and how offensive and upsetting it was to her. She felt that the problem was "rooted" with Morrissey. Kuzborski testified that LaRue told her that he would investigate and that the problem would be taken care of. I do not credit Kuzborski's testimony.

86. Kuzborski testified that, at some point between February and April 1997, she told Sweeney during her supervision meetings that resident DR used racial slurs when referring to Complainant on a regular basis. Kuzborski did not submit a complaint in writing about Morrissey's alleged use of racially inappropriate language. Kuzborski testified that she did not submit a written complaint because she was embarrassed to write down the word, "nigger" and wanted to address it orally. I do not credit Kuzborski's testimony.

87. Kuzborski testified that she sometimes reviewed Morrissey's supervision forms before she signed them. Kuzborski testified that she did not sign the supervision forms prepared by Morrissey if she did not agree with a written statement and that she sometimes inserted a written note on her supervision forms.

None of Kuzborski's supervision records showed that she made a complaint to Morrissey about resident DR's or Morrissey's use of racially inappropriate language about Complainant.

88. Stock testified that no one complained to him about Morrissey's use of racially inappropriate language or that she treated non-Caucasian employees differently than Caucasian employees. Reiff testified that neither Complainant nor Kuzborski complained to her about a Randolph House resident and/or Morrissey using "racially inappropriate language." Reiff also testified that she never heard a Randolph House resident and/or Morrissey using "racially inappropriate language." I credit the testimony of Stock and Reiff.

89. Sweeney testified that no one, including Kuzborski, ever told her that a Randolph House resident and/or Morrissey had used epithets directed at Complainant or referring to Complainant. I credit Sweeney's testimony.

90. Stock testified that, prior to Complainant's termination, he did not know that Complainant had complained to Morrissey about any incidents of racial epithets. Stock also testified that, prior to Complainant's termination, he never heard that Morrissey or any resident had referred to Complainant or anyone else with a racial epithet. I credit Stock's testimony.

Disparate Employment Terms and Conditions

91. When the Randolph House opened in the early 1990s, it had four residents and maintained a minimum ratio of one awake manager for every two residents as required by DMR staffing requirements. In June 1998, the DMR authorized Respondent to

convert one awake night manager position at the Randolph House to an asleep night manager position because the residents had become more independent and had demonstrated their ability to safely evacuate with less assistance. (Joint Exhibit No. 12). In June 1998, Respondent changed the awake night manager job titles, including Melpignano's, to asleep manager positions at Randolph House and reduced their hourly rate to reflect their lesser job duties. (Joint Exhibit No. 13).

92. Complainant testified that Morrissey told her that Whyte was earning $8.00 an hour and was allowed to sleep on-the-job. Complainant also testified that Morrissey periodically asked her whether she wanted take a pay cut to $8.00 an hour and sleep on-the-job. Complainant believed that Whyte was earning more than she was.

93. Morrissey did not recall whether she asked Complainant to change her job from an awake manager position to an asleep manager position or take a pay cut related to a change in position. Morrissey did not have authority to unilaterally change Complainant's position or pay rates.

94. Respondent hired Whyte on June 15, 1990 at an hourly rate of $7.69. Over the next eight years, Whyte received salary increases on each of her annual performance evaluations, resulting in an hourly rate of $10.20 by December 5, 1997. (Joint Exhibit No. 11).

95. For an unspecified time period beginning in September 1997, Morrissey allowed Whyte to sleep during her shift as an awake manager. Morrissey authorized this accommodation based on medical documentation related to Whyte's diabetes. In his

letter to the Commission, dated September 16, 1998, Stock wrote that Morrissey's grant of an accommodation to Whyte violated Respondent's policy and DMR's requirements. (Joint Exhibit No. 13).

Grievance

96. Stock testified that, in 1998, Respondent's director of human resources met with new employees to review policies and procedures, give them an employee handbook and receive their signed written acknowledgements. At some point, Respondent described the grievance procedure on the reverse side of its disciplinary memorandum that it gives to employees.

97. Stock testified that all Respondent employees signed written forms acknowledging that they have received an employment handbook that includes Respondent's grievance procedure. He also testified that Respondent's progressive disciplinary procedure may include an employment hearing, depending on the circumstances. Stock testified that Respondent's grievance procedure usually was invoked at the final stage of its progressive disciplinary policy.

98. Stock testified that Respondent defined a "no show/no call" as a situation where an employee fails to show up for an assigned shift or training. In 1998, Respondent's disciplinary policy mandated an immediate suspension for a "no show/no call" employee, pending a hearing under Respondent's grievance procedure. (Joint Exhibit No. 6). Under Respondent's policy, the purpose of an employment hearing was to give the employees an opportunity to explain why they did not show up or call in. Sweeney did not consider Complainant to be a "no show/no call"

employee after January 13, 1998 because Respondent never had a date certain on which it expected Complainant to return to work.

99. On May 5, 1998, Respondent issued an employee disciplinary memorandum to Morrissey that included a handwritten note informing Morrissey of "an immediate suspension pending an employment hearing to determine employment continuation."

100. Respondent never gave Complainant an employee disciplinary memorandum nor did she have an opportunity to be heard at an employment hearing. Complainant was also never given the opportunity to grieve Respondent's termination decision. When Complainant called in on March 18, 1998, Reiff did not notify her of an opportunity for an employment hearing or to present her side of the case.

101. Sweeney testified that Respondent gave one employee (African-American, no disability) an opportunity to grieve a no show/no call termination and he was ultimately reinstated.

102. In January 1998, Respondent's policy defined a leave of absence as a "voluntary absence from work for more than 30 days but less than 12 months. Respondent's policy provided that approval of leave was at the discretion of the employee's supervisor, subject to final approval from Respondent's director of human resources. The written leave of absence policy did not require employees to inform Respondent, in advance, of the length of their leaves. (Joint Exhibit No. 7).

103. Stock testified that there were many instances where Respondent approved leaves for employees of less than 30 days.

Morrissey testified that she understood that employees were required to put their leave requests into writing for approval.

104. In 1996-1998, Respondent's policy provided for two days' paid bereavement leave to employees. (Joint Exhibit 7). Respondent did not provide paid bereavement leave to Complainant for either of her leaves of absence related to her parents' deaths.

105. There were four full time employees and four "on call" relief employees at the Randolph House during the time period relevant to this complaint: four black and four white employees. (Joint Exhibit No. 12).

106. Complainant testified that she "loved" working at Randolph House and was "really depressed" and "really, really disturbed" when Respondent discharged her for what she felt was no reason. Complainant testified that she had frequent headaches for more than six months after her discharge from Respondent. Complainant also testified that her mother's death also caused her "great distress" and her headaches were related, in part, to the death of her parents.

107. Complainant testified that she couldn't sleep in her bed and was "almost living" in her living room. Complainant testified that she felt as if she didn't have "anybody" after her parents' death and her discharge from Respondent.

108. Complainant's husband described his wife as heartbroken and angry. Complainant's husband testified that Complainant did not eat or sleep, complained of headaches and was "really, really very spiritually, socially down" for about six (6) months after

her termination. He also testified that Complainant still expresses anger at her discharge and compares her current jobs with her position at Respondent where she had the flexibility to drop off and pick up their children.

109. In 1998 and 1999, Complainant worked for the South Norfolk County Association of Retarded Citizens (SNCARC), Inc, in Needham, Massachusetts. SNCARC cares for clients of the Massachusetts Department of Mental Retardation. Complainant worked two days each week from 8:00 a.m. to 4:00 p.m. Complainant left her employment at the SNCARC after two months because it required a 30- to 45-minute commute.

110. Complainant's salary at SNCARC was approximately $22,000 and that she received medical and dental benefits. Complainant reported $4,018.71 and $375.24 in income from SNCARC during 1998 and 1999, respectively. (Joint Exhibit No. 14).

111. In 1998, Complainant also worked in a Christmas seasonal position at the U.S. Postal Service where she reported $960.40 in income. (Joint Exhibit No. 14).

112. In 1999, Complainant worked for Lifeworks, Inc., at a residential facility in Westwood, Massachusetts. Complainant's commute to this position was 30-45 minutes by car and she resigned from this position because of her commute.

113. Complainant's pay rate increased when she moved from SNCARC to Lifeworks, Inc, and she was offered health and dental insurance. Complainant reported $12,961.45 in income from Lifeworks, Inc., during 1999. (Joint Exhibit No. 14).

114. In 1999, Complainant worked as a house manager for Human Service Options in Walpole, Massachusetts. Complainant testified that it took her 1½ hours to commute to this position. After three months, Complainant resigned from her position because of the commuting distance. Complainant reported $2,617.93 in income from Human Services Options, Inc. in 1999. (Joint Exhibit No. 14).

115. In 1999 and 2000, Complainant worked for as an assistant program director for Bay Cove Human Services, Boston, Massachusetts. Complainant testified that she did not receive health benefits at Bay Cove that were as generous as those she received at Respondent. Complainant left her Bay Cove position to take care of her children and because she felt it was too long of a daily commute. Complainant reported $6,346.04 and $4,741.83 in income from Bay Cove Human Resources in 1999 and 2000, respectively. (Joint Exhibit No. 14).

116. Complainant has not worked since she left her Bay Cove position.[8] Complainant did not make any efforts to obtain work from 2001 to the date of the public hearing because she decided to stay home and take care of her children.

III. CONCLUSIONS OF LAW

A. Discrimination Based on Race, National Origin and/or Color

General Laws, Chapter 151B, §4, paragraph one, prohibits discrimination in the hiring and firing of employees based on

[8] Complainant stipulated that her claim for back wages covered the period from her discharge from Respondent until she decided to stay home and take care of her children after her employment ended at Bay Cove Human Services.

their race, national origin and/or color. In the absence of direct evidence of an unlawful motive based on Complainant's race, national origin and/or color, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).[9] See also Sullivan v. Liberty Mutual Insurance Co., ___ Mass. ___ (2005); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001)(Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation); Abramian v. President & Fellows of Harvard College, 432 Mass. 104 (2000); Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

To establish a prima facie case of discrimination based on her race, national origin and/or color, Complainant must prove by a preponderance of credible evidence that (1) she is a member of a protected class based on her race, national origin and/or color; (2) she was adequately or capably performing the duties of her awake manager position in February 1998; (3) Respondent discharged her and/or subjected her to an adverse employment action; (4) she was replaced by someone not of her protected class(es) or was discharged under circumstances that give rise to a reasonable inference of unlawful discrimination based on

[9]Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"'); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

her race, national origin and/or color. Abramian, 432 Mass. 107, 116-118 (2002); Massachusetts Commission Against Discrimination & Lewis v. Boston Public Health Commission, 25 MDLR 353 (2003); Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003).

Complainant has produced sufficient credible evidence to establish a prima facie case of a discriminatory termination based on her race, national origin and/or color. As a black Nigerian, Complainant is a member of a protected group(s) under Chapter 151B based on her race, color and national origin. The credible evidence in the hearing record also showed that Complainant was an excellent employee and successfully performed her awake manager duties at the Randolph House until she took an approved leave on January 13, 1998. Finally, Respondent discharged Complainant on or about February 11, 1998[10] and replaced her with a white, American employee on or about February 13, 1998. Accordingly, I conclude that Complainant established a prima facie case of a discriminatory discharge and created a rebuttable presumption of employment discrimination based on her race, national origin and/or color. See e.g., Massachusetts Commission Against Discrimination & Lewis v. Boston Public Health Commission, supra.

Once Complainant establishes a prima facie case of unlawful discrimination based on her race, national origin and/or color, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason(s) for her discharge. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, 432 Mass. at 116-118. If Respondent meets its burden

[10]Complainant's last day of actual work at the Randolph House was on January 13, 1998.

of production, Complainant must then show by a preponderance of the evidence in the record that Respondent's proffered reason(s) was not the real reason for her discharge and that Respondent acted with a discriminatory intent, motive or state of mind based on her race, national origin and/or color. See Lipchitz, 434 Mass. at 504; Blare v. Husky, 419 Mass. 437, 443 (1995). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Respondent] for making the adverse decision is false." Lipchitz, supra. Complainant retains the ultimate burden of proving that her termination was the result of a discriminatory animus based on her race, national origin and/or color. Id.; Abramian, 432 Mass. at 117.

Respondent's articulated reason for terminating Complainant on February 11, 1998 is that it believed Complainant abandoned her awake manager position when she failed to contact a manager or supervisor for almost one month after she last worked at the Randolph House. I credit Sweeney's testimony that she asked Complainant, on January 13, 1998, to contact her within two days so that she could determine the type and length of Complainant's requested leave. I also credit the testimony of Sweeney and Reiff that they called Complainant several times during the following two weeks at her home but she did not contact them before Reiff mailed a FMLA eligibility letter, dated January 26, 1998, to her. (Joint Exhibit No. 1). In addition, Complainant admitted that she received Reiff's letter before she traveled to Nigeria on or about February 2, 1998 but did not call Reiff or any manager or supervisor of Respondent to discuss her leave, as requested in the letter, because she erroneously believed that Respondent's management had already granted her a 12-week leave. Finally, I credit the testimony of Stock, Reiff and Sweeney that

they discharged Complainant on February 11, 1998 because they felt she had abandoned her position since she failed to contact them or respond to their messages after January 13, 1998. (Respondent's Exhibit No. 1). I conclude, therefore, that Respondent has met its burden of articulating a legitimate, non-discriminatory reason for Complainant's discharge on February 11, 1998.

Complainant contends that her discharge was motivated by Respondent's discriminatory animus or motive based on her race, color and/or national origin as shown, in part, by its knowledge of and failure to address Morrissey's and resident DR's alleged racial comments during 1997-1998.[11] Complainant's contention is unpersuasive and is not supported by the totality of credible evidence in the hearing record. I reject, in its entirety, Kuzborski's testimony that resident DR and Morrissey made racial and/or derogatory comments about Complainant during January 1997 through May 1997 and that she complained to LaRue and Sweeney regarding such comments. Kuzborski's testimony is vague, inconsistent, contrary to the other credible evidence in the record and clearly shows that she had a bias against Morrissey and Respondent, her former employer. Complainant produced no documentation to support her contention that she complained to Morrissey about resident DR's alleged racial comments and that Morrissey failed to take appropriate corrective action. Based on Complainant's and Stock's unrebutted testimony regarding the purpose and use of Respondent's daily communications logs, I conclude that Complainant and/or Kuzborski would have timely reported such comments in Respondent's communications logs or

[11] Since I do not credit the testimony of Complainant or Kuzborski regarding these alleged racial comments, I have not addressed whether Complainant has established a prima facie case of harassment based on her race, color or national origin.

supervision records had resident DR made them.[12] Finally, I credit the testimony of Stock and Sweeney that no employees, including Complainant and Kuzborski, complained to them about resident DR's alleged use of racially inappropriate language.

I also do not credit Complainant's testimony that Morrissey used racial epithets and made derogatory statements based on her race during 1997. To the contrary, Complainant testified that she "loved working" at Randolph House and she did not produce any credible witnesses or documents to corroborate her testimony, including no notes in Respondent's daily communications log or her weekly supervision records. Morrissey credibly denied using racial epithets or making derogatory statements about Complainant. I also credit the testimony of Stock and Sweeney that no employees, including Complainant and Kuzborski, complained to them about Morrissey's alleged use of racially inappropriate language.

Complainant's contention that Morrissey had a discriminatory animus is also unsupported by the unrebutted evidence in the record that shows Morrissey consistently acted favorably toward Complainant while she worked at the Randolph House. Morrissey hired Complainant in November 1996 and gave her three positive performance appraisals in 1997 that resulted in three salary increases. The record shows that Complainant's last salary increase was effective on December 19, 1997, less than 30 days before Complainant began her second leave on January 13, 1998. (Joint Exhibit Nos. 2-5 and 11-12). More

[12]Even if Complainant established that she timely told Respondent's management about resident DR's racially offensive comments, Respondent would not be liable for a hostile environment created by resident DR's actions if it showed that it took measured and reasonable steps to alleviate resident DR's conduct including counseling her and offering to move Complainant to another facility. See e.g., Handy v. North End Community Health Center, 21 MDLR 37 (1999).

importantly, Complainant failed to prove that Morrissey participated in or was involved in any manner in Respondent's decision to discharge her. See e.g., Mole v. University of Massachusetts et. al., 441 Mass. 582, 598 (2004)(despite a retaliatory or discriminatory animus on the part of a supervisor who recommends some adverse action be taken against an employee, a third person's independent decision to take an adverse action breaks the casual connection between the supervisor's retaliatory animus and the adverse action); Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003)(a employment decision may still be unlawful if a discriminatory animus was a "material and important ingredient" in the decision-making calculus). Morrissey's alleged comments, even if made, would be more properly characterized as "stray remarks" made by an employee who was not a decision-maker in this complaint. Wynn & Wynn, 431 Mass. at 667 (stray remarks in the workplace include statements by persons without the power to make employment decisions, and statements made by decision-makers unrelated to the decisional process); Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., supra.

I find unpersuasive Complainant's contention that Respondent acted with a discriminatory animus as shown by its alleged departure from prior policy and practice when it gave another of its employee's (African-American, no disability) an opportunity to grieve a "no show/no call" termination and ultimately reinstated him. Complainant's comparison to this "no show/no call" employee is misplaced because Respondent's "no show/no call" policy does not cover Complainant, on its face, since she never gave Respondent a date certain on which she

expected to return to Randolph House after her second leave, despite her supervisors' multiple requests that she do so. See Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122 (1997)(Complainant must identify other employees who are similarly situated "in terms of performance, qualifications and conduct, without such differing or mitigating circumstances that would distinguish their situations").

Complainant contends that Respondent's reason for Complainant's discharge, i.e., that she abandoned her position, is "simply not believable or true." Complainant asserts that it is "inconceivable" for Respondent to conclude that she had abandoned her position when it discharged her only 16 days after it informed her that she was eligible for up to 12 weeks of FMLA leave.[13] Complainant also contends that Respondent's articulated reason is undercut by the fact that, in July 1997, it granted 51 consecutive days of leave to Complainant after her father's death without requesting that she notify her managers or supervisors about the length of her leave and there was no provision in Respondent's handbook that required an employee to contact Respondent during an approved leave.

Given the circumstances related to Complainant's 51 day leave of absence in July-August 1997 wherein Complainant did not

[13]Complainant contends that additional evidence of Respondent's discriminatory animus is shown when Morrissey signed Melpignano's new employee form on February 3, 1998, although Respondent did not decide to discharge Complainant until February 11, 1998 . While Morrissey may have improperly signed Melpignano's new employee form on February 3, 1998, such evidence is insufficient, by itself, to establish that Morrissey's action **was** motivated by a discriminatory animus based on Complainant's race, color and/or national origin, especially where Sweeney credibly testified that she authorized Morrissey to recruit for Complainant's replacement on February 11, 1998. There is also no evidence in the hearing record that Stock, Sweeny, or Reiff knew about Morrissey's signature on February 3, 1998 or that it influenced their decision to discharge Complainant on February 11, 1998. See Massachusetts Commission Against Discrimination & Poore v. Town of Harwich High School, et. al., 26 MDLR 270 (2004); Tavares-Merritt & Massachusetts Commission Against Discrimination v. Massachusetts Department of Corrections, 25 MDLR 390 (2003); DeBiase v. Massachusetts Transportation Authority, 22 MDLR 271 (2000).

inform Respondent of her return date and Complainant's emotional state on January 13, 1998, I conclude that it was reasonable for Sweeney and Reiff to ask Complainant, orally and in writing, to contact Respondent's management prior to traveling to Nigeria in January 1998 to clarify the expected length of her leave. I credit the testimony of Sweeney, Reiff and Morrissey that they made several unsuccessful attempts to contact Complainant before she traveled to Nigeria so that Respondent could determine her leave requirements to ensure that her leave would not be open-ended, as it was in 1997, and to enable Respondent's staff to make appropriate staffing decisions for the Randolph House based on their discussion with Complainant. I also conclude that the timing of Respondent's FMLA letter, by itself, does not support a finding of a discriminatory motive because Respondent was obligated to send it to fulfill its notice requirements under the FMLA based on Complainant's condition on her final day of work. Finally, the unrebutted evidence in the record shows that Respondent discharged Complainant on February 11, 1998, or 29 days after her last contact with Reiff or any other manager or supervisor. While Complainant may have had a misunderstanding about whether her leave was open-ended or the need to contact Respondent's staff prior to leaving for Nigeria, such misunderstanding, under the facts of this case, is not sufficient to establish that Respondent had a discriminatory animus when it discharged Complainant on February 11, 1998.

Based on the totality of credible evidence in the record, I conclude that Respondent discharged Complainant on February 11, 1998 because it reasonably believed that Complainant had abandoned her position when she failed to contact her supervisors before she traveled to Nigeria to attend her mother's funeral, or anytime thereafter, despite their prior oral and

written requests. I also conclude that Complainant has not shown, by credible evidence, that Respondent was motivated by a discriminatory animus based on her race, color and/or national origin when it discharged her. See Lipchitz, supra.

B. Discrimination Based on Complainant's Handicap

General Laws, Chapter 151B, §4, paragraph 16, makes it unlawful for an employer to discharge or otherwise discriminate against qualified handicapped persons who are capable of performing the essential functions of their jobs with a reasonable accommodation. A "qualified handicapped person" is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with a reasonable accommodation to his or her handicap. See General Laws, Chapter 151B, §4(16); Massachusetts Commission Against Discrimination Guidelines on Employment Discrimination on the Basis of Handicap," Section II., Definitions (1998)(hereafter: "MCAD Handicap Guidelines").

Under General Laws, Chapter 151B, a "handicapped person" is defined as one who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of having such impairment; or (c) is regarded as having such impairment." Dahill v. Boston Police Department, 434 Mass. 233, 244 & n.13 (2001)(a complainant may qualify under one or more of the statutory definitions and the three prongs are to be assessed independently). See also G.L. c. 151B, §§1(17) and (19); MCAD Handicap Guidelines, Definitions. Major life activities include but are not limited to "caring for oneself,

performing manual tasks, walking seeing, hearing, speaking, breathing, learning and working." General Laws, Chapter 151B, §1(20). The Commission's guidelines also define "major life activities" to include "sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others." MCAD Handicap Guidelines, Definitions. The phrase "substantially limits" means that the impairment prohibits or significantly restricts an individual's ability to perform a major life activity compared to the ability of an average person to perform that activity. MCAD Handicap Guidelines at §11A(6). See Kuhn v. The Kimball Companies, et. al., 23 MDLR 331 (2001); Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686 (1996)(a temporary disability in which plaintiff recovered in one month without residual disability is not a qualifying handicap under Chapter 151B).

To establish a prima facie case of handicap discrimination under the shifting-burden framework described above, Complainant must prove by a preponderance of credible evidence that (1) she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment or was regarded or perceived by Respondent as having such impairment; (2) she is qualified to perform the essential functions of her awake manager position with or without a reasonable accommodation; (3) Respondent discharged her and/or subjected her to an adverse employment action(s); (4) she was replaced by someone not of her protected class or was discharged under circumstances that give rise to a reasonable inference of unlawful discrimination based on her perceived handicap. Abramian v. President & Fellows of Harvard College, supra. at 116-118; Massachusetts Commission Against Discrimination & Welch v. The Trans-Lease Group, 26 MDLR 247 (October 12, 2004).

Not all physical or mental impairments constitute a "handicap" within the meaning of Chapter 151B. City of New Bedford v. Massachusetts Commission Against Discrimination, 440 Mass. 450, 462-463 (2003). To establish that she is "handicapped" within the meaning of Chapter 151B, Complainant must produce credible evidence to show that: (1) her condition, actual or perceived, constitutes a mental or physical impairment, (2) the curtailed life activity constitutes a major life activity and (3) the impairment substantially limits a major life activity. City of New Bedford, 440 Mass. at 462.

To satisfy the first element of her prima facie case that Respondent regarded or perceived her to be a "handicapped person" within the meaning of Chapter 151B, Complainant must show that Respondent perceived her mental or physical condition as one that "substantially limits one or more of [her] major life activities," just as an actual physical or mental impairment must substantially limit one or more life activities. City of New Bedford, 440 Mass. at 462 (an employer's perception that an employee is unable to perform only one aspect of his job is not sufficient to establish that his perceived impairment had a "substantial limitation" on the major life activity of "working"); Wareing and Massachusetts Commission Against Discrimination v. New Bedford School Department, 26 MDLR 242 (2004)(no evidence that the complainant was substantially limited or was perceived to be substantially limited in the major life activity of "working"). Under the Supreme Judicial Court's analytical framework, it is insufficient for Complainant to merely submit evidence of a medical diagnosis of an impairment. City of New Bedford, 440 Mass. at 462, citing Carroll v. Xerox Corp., 294 F.3d 236 (1st Cir. 2001), quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198

(2002)(complainants seeking protection under Chapter 151B must offer evidence that "the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.")

Complainant alleges that Respondent discharged her because it regarded or perceived her as having a mental handicap based on her conduct or behavior on January 13, 1998. Complainant contends that Sweeney, one of the decision-makers regarding her discharge, had a discriminatory animus because she believed Complainant was suicidal on January 13, 1998 and that she required immediate assistance from a mental health therapist or counselor. See e.g., Peters v. Baldwin Union Free School District, Board of Education, 320 F.3d 164 (2nd Cir. 2003)("a mental illness that impels one to suicide can be viewed as a paradigmatic instance of inability to care for oneself"). Complainant also contends that additional evidence of Sweeney's discriminatory animus is found in her testimony that Complainant was "mentally disabled" on January 13, 1998 and her belief that Complainant might have been hospitalized for her emotional or mental state during January 1998 when Respondent's supervisors were unable to contact her. Complainant asserts that Sweeney's perception that she was suicidal is essentially tantamount to a perception that she was unable to care for herself beginning on January 13, 1998. Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 871 (2d Cir. 1998)("the ability to care for oneself encompasses normal activities of daily living: including feeding oneself, driving, grooming, and cleaning [one's] home).

Based on the totality of evidence at the public hearing, I conclude that Complainant has not shown that Respondent

perceived or regarded her as having a mental condition or impairment that "substantially limit(ed)" one or more of her major life activities within the meaning of General Laws, Chapter 151B, §1(17) when it discharged her on February 11, 1998. While Respondent expressed reasonable concerns about Complainant's suicidal ideation on January 13, 1998, there is no evidence that it had any ongoing concerns about Complainant's ability to work at Randolph House or to care for herself. There is also no evidence in the record that Respondent regarded Complainant's suicidal ideation on January 13, 1998 as other than a short-term, temporary condition arising out of Complainant's grief over her mother's death, albeit a condition that might require immediate attention from a mental health counselor.[14] I also note that Respondent did not receive any information from Complainant, during the four-week period after January 13, 1998, that could have changed its initial impression of Complainant's mental health condition and its potential impact, if any, on her major life activities. See Stephan and Massachusetts Commission Against Discrimination v. SPS New England, Inc., 26 MDLR 332 (2004); Kuhn v. The Kimball Companies, et. al., supra. In addition, Respondent made repeated requests of Complainant, prior to February 11, 1998, to contact a supervisor or manager so that it could agree upon a date when Complainant expected to return to her awake manager position at Randolph House. It is simply illogical to conclude, on the instant record, that Respondent was actively seeking to confirm a date for Complainant to return to her job duties at Randolph House while simultaneously regarding her as substantially limited in one or major life activities, i.e., she

[14]When Complainant returned from Nigeria on February 18, 1998, I find that she held herself out to Respondent in February 1998 as being available to return to her awake manager position on a full-time basis without any restrictions on her major life activities.

was unable to work or care for herself.[15] Accordingly, I conclude that Complainant did not establish a prima facie case of handicap discrimination because she failed to prove that Respondent perceived her as "substantially limited" in one or more of her major life activities when it discharged her on February 11, 1998. See City of New Bedford, supra.; Wareing, supra.

C. Retaliation Claim[16]

Complainant contends that Respondent discharged her on February 11, 1998 in retaliation for her informal complaints about racial epithets directed by Morrissey and/or resident DR against her. In addition, Complainant contends that she was treated differently by Morrissey, after such complaints, regarding her job title and pay.

Massachusetts General Laws, Chapter 151B, §4, paragraph four, prohibits an employer from retaliating against an employee who has participated in protected activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." See Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208, 215 (2000), citing Bain v. Springfield, 424 Mass. 758, 765 (1997). In addition, Chapter 151B, §4, paragraph 4(A) makes it unlawful

[15] While Complainant was hospitalized for a nervous breakdown while she was in Nigeria, there was no evidence that Respondent knew about Complainant's hospitalization or condition prior to February 11, 1998.

[16] While Complainant did not address her retaliation claim in her post-hearing brief, I will analyze it as described in Commissioner Gomez's certification order, dated April 3, 2002.

"[f]or 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." Retaliation is a separate and independent claim of discrimination, "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful [employment] practice." See Pontremoli v. Spaulding Rehabilitation Hospital, 51 Mass. App. Ct. 622, 625 (2001); Abramian v. President & Fellows of Harvard, supra.; Fountas v. Medford Public Schools, 22 MDLR 264 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

The Commission and courts broadly interpret Chapter 151B's anti-retaliation provision to apply to both informal and formal actions opposing unlawful employment practices. See e.g., Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999). The anti-retaliation provision applies to instances where an individual participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). "Participation" includes a formal action such as filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. Massachusetts Commission Against Discrimination & Ramos v. New World Security Associates, Inc., 26 MDLR 173 (2004). The anti-retaliation provision also covers a variety of pre-charge and non-charge conduct, including instances where a complainant has orally "opposed" an unlawful employment practice or action under Chapter 151B (the "opposition" clause). The statutory protection against employer

retaliation extends, therefore, to "informal voicing of complaints" alleging discrimination. Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990) For example, the Commission has found liability for unlawful retaliation when an employee complained about unlawful discrimination, but did not file a formal discrimination charge. Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999).

To establish a prima facie case of unlawful retaliation in the absence of direct evidence of a retaliatory motive, as in this case, Complainant must show by credible evidence that: (1) she participated in protected activity; (2) Respondent knew about Complainant's participation in protected activity prior to discharging her and/or allegedly reducing her job title and pay; (3) Respondent suffered an adverse employment action(s) after she participated in protected activity, i.e., Respondent discharged Complainant and/or reduced her job title and pay; (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and Respondent's adverse employment actions. See Wareing and Massachusetts Commission Against Discrimination v. New Bedford School Department, supra.; Hudson v. Pembroke/Hanover Elks Lodge, et. al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Since a link between protected activity and the adverse employment action(s) at issue is not always explicit, the Commission can infer "a causal connection where the timing of events makes an inference reasonable." See Ritchie v. Department of State Police, 60 Mass. App. Ct. 599 (2004) ("close

temporal proximity between the protected activity and the adverse employment action permits an inference of the casual nexus necessary for a finding of retaliation"); Kealy v. City of Lowell, Department of Public Schools, 21 MDLR 19 (1998), citing Cimino v. BLH Electronics, Inc., 5 MDLR 1263, 1287 (1983) (finding retaliation where the discharge occurred within 15 months after the protected activity); Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 1144-1145 (1995)(termination taken within six weeks of participation in protected activity); Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976).

I conclude that Complainant has not established a prima facie case of retaliation based on her discharge on February 11, 1998. As discussed above, I do not credit Complainant's testimony that she complained to Morrissey about her alleged racial epithets or that of resident DR. Even if Complainant had established that she complained to Morrissey, which she did not, Complainant produced no credible evidence to show that Stock, Sweeney and/or Reiff knew about or had reason to know about her complaints prior to their decision to discharge her in February 1998 or that Morrissey participated in the discharge decision. See Mole v. University of Massachusetts et. al., supra.; Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, supra.

Complainant also contends that Morrissey retaliated against her when she repeatedly attempted to persuade Complainant to change her awake manager position to an asleep manager position with a corresponding reduction in pay. Complainant has not established a prima facie case of retaliatory discrimination based on these allegations for the following reasons. First,

there is no dispute in the record that Morrissey did not have the authority to unilaterally change Complainant's position to an asleep manager position with a pay reduction. While the DMR approved Respondent's conversion of the awake manager positions, such conversions did not occur until June 1998. Second, Complainant also failed to produce any evidence that Respondent "demoted" her pay or that it treated similarly situated employees, not of her protected groups, more favorably in terms of their salary. I conclude that the differential in White's hourly rate is likely attributable to Whyte's seniority based on her eight years of employment at Respondent compared to Complainant's tenure of less than two years. Accordingly, I conclude that Complainant has failed to establish, by credible evidence, a prima facie case of unlawful retaliation based on her participation in protected activity.

Based on my findings and analysis, I conclude that Respondent discharged Complainant because it reasonably believed that she had abandoned her position at the Randolph House and not because of her race, color, national origin and/or participation in prior protected activity. I also conclude that Respondent did not violate Massachusetts General Laws, Chapter 151B, §§1 and 4, when it discharged Complainant on February 11, 1998.[17]

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[17]Given my findings and conclusions, I do not reach the issue if whether Respondent made an unconditional job offer to Complainant in March and June 1998. See Massachusetts Commission Against Discrimination & White v. Citizens Bank, 26 MDLR 221 (2004); Massachusetts Commission Against Discrimination & Girouard v. Bekiro Corporation d/b/a Burger King of Bunker Hill, et. al., 26 MDLR 224 (2004); Fiske v. R.P. Liquor, Inc. d/b/a Sidelines Sports Bar & Pub, 16 MDLR 1042 (1994).

IV. ORDER

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

SO ORDERED this 2nd day of June, 2005.

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KENNETH B. GROOMS
Hearing Officer