COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and GRISELDA CANTON,
Complainants

Docket No. 10 BEM 03156

v.

BIGA WHOLESALE, INC., BIGA BREADS, LTD.,
WILDFLOUR WEST PRODUCTS, INC.,
WILDFLOUR CATERING, INC.,
(collectively D/B/A BIGA BREADS),
DEANA MARTIN, AND KEITH MARTIN,
Respondents

Appearances: Constance A. Brown, Esq. for Complainant Canton, with Rule 3:03 Law Students Catherine Mullaley and Albert Aramayo

Michael W. Ford, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 26, 2010, Complainant Griselda Canton filed a charge of sexual harassment and retaliation against Biga Wholesale, Inc., Biga Breads, Ltd., Wildflour West Products, Inc. and Wildflour Catering, Inc. (collectively "Biga Breads") and against Deana Martin and Keith Martin, individually. Complainant alleges that she was subjected to sexual harassment by her supervisor Francisco Mendoza and, after she complained, was subjected to retaliation by company owners Deana and Keith Martin in violation of M.G.L. 151B, Section 4 (4), (4A), (5) and 16A.

A probable cause finding was issued on November 28, 2014. A public hearing was held on November 17, 18, 21 and 22, 2016. The following witnesses testified at the

hearing: Complainant, Audrey Richardson, Mark Chauppetta, Deana Martin, and Keith Martin. The parties presented five (5) joint exhibits. Complainant submitted an additional ten (10) exhibits and Respondents submitted an additional two (2) exhibits.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Griselda Canton worked at Biga Breads from May 2008 until April 2011.[1] Complainant worked primarily in the bread production department but at one time or another worked in all four entities owned and operated by her employers. Transcript II at 100. She earned $9.00 an hour for work in the bakery/production department, $10.00 an hour for work in the kitchen and $12.00 per hour for work in the event department. Complainant's Exhibit 3. Her shift generally began at 11:30 a.m. and ended at 7:30 p.m. Transcript III at 93. From the start of her employment through late-April 2009 and for various periods thereafter (late-November 2009 through mid-March 2010 and early-July through early-September 2010), Complainant worked approximately forty hours a week. Complainant's Exhibit 3.
2. Deana Martin and Keith Martin are husband and wife who served as corporate officers, owners, and operators of Biga Wholesale, Inc., Biga Breads, LTD., Wildflour Catering, Inc. and Wildflour West Products, Inc. The four entities were

[1]Pay records submitted into evidence only cover Complainant's employment from December 2008 through September 4, 2010, but according to the Charge of Discrimination and the parties' Stipulation of Undisputed Facts (Joint Exhibit 4), Complainant's employment lasted from May 2008 through April 2011.

organized as individual corporations but, with the exception of Biga Wholesale, Inc.[2] all were located at 50 Terminal Street, Charlestown, MA and did business collectively. The companies had a wholesale bread baking operation, a pastry department, a catering arm, and for a period of time operated cafes. Transcript II at 16. Biga Breads collectively employed between forty and fifty employees. Transcript II at 16. All facets if the business were dissolved on June 18, 2012 pursuant to bankruptcy proceedings. Stipulation of Undisputed Facts. Joint Exhibit 4. On November 16, 2016, the Bankruptcy Court determined that good cause existed to lift an automatic stay in connection with the MCAD proceeding provided that Complainant not seek to enforce any judgment or order of the MCAD against debtors without further order of the Bankruptcy Court. Joint Exhibit 5.

3. Deana Martin oversaw personnel issues for Biga Breads. Transcript II at 102; IV at 117-118. She testified that she was responsible for supervising Francisco Mendoza. Transcript II at 49.
4. Keith Martin ran the catering division and helped with the bread division. Transcript IV at 117. He was responsible for maintaining a video surveillance system at Biga Breads. Transcript IV at 140.
5. Francisco Mendoza[3] was an employee of Biga Breads who began as a driver and became the production manager for the wholesale bread operation. Transcript II at 18-19. He was Complainant's direct supervisor. Transcript II at 32, 160; Stipulation

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[2] Biga Wholesale, Inc. had its principal office in Milton, MA at the residence Deana and Keith Martin. Stipulation of Undisputed Facts. Joint Exhibit 4.

[3] Mendoza was not a party or witness in the instant proceedings. The parties presented conflicting information about whether Mendoza was married. I do not consider this matter to be relevant to the events at issue.

of Facts. Mendoza controlled Complainant's work schedule. Transcript II at 33. Deana Martin testified that he was a "perfect gentleman," reliable, responsive, and responsible. Transcript II at 105. According to Martin, Mendoza interacted well with employees. Martin states that Complainant's accusations constituted the first complaint. Id.

6. According to Complainant's credible testimony, Mendoza began to make "advances" to her after becoming her supervisor in 2009. Transcript II at 164-165. Mendoza's initial advances consisted of saying, "I like you [and] I want to take you out," "you look good [and] you are in my heart," and "I want to spend time alone with you." Transcript II at 164-165, 170. Mendoza would blow kisses to Complainant, make a heart shape with his hands, and touch his chest. Id. Mendoza's overtures, both words and gestures, were unwelcome to Complainant and made her feel uneasy at work. Transcript II at 170, III at 83. Complainant repeatedly told Mendoza that she was not interested in a relationship with him and would not date him. Transcript II at 165, 169-170.
7. In 2010, Mendoza's advances to Complainant started to intensify. Transcript II at 165, 170-171; III at 9. He pressured Complainant through telephone calls and texts to begin a "sentimental" relationship with him. Transcript II at 165, 169-171. Complainant defined a "sentimental" relationship as "dating" and, in the long term, having sexual relations. Transcript II at 169.
8. Mendoza called or texted Complainant when he knew she was leaving work for the night and tried to persuade her to accept rides home with him. Transcript III at 7, 9, 12. Complainant tried to convince him to stop calling her, texting her, and offering

her rides home. Transcript III at 8-9 & 12-13. She left work with co-workers or varied her route home in order to avoid him. Transcript III at 12-13. She told him that she had a boyfriend, but Mendoza said that he didn't care and that they could have a secret relationship. Transcript III at 17. Complainant testified credibly that she did not report Mendoza's harassment to anyone at Biga Breads because she didn't have confidence in or trust the Martins, because the Martins told employees to address complaints with their direct supervisors, and because she didn't speak enough English to communicate with the Martins. Transcript III at 13-14; IV at 51-52. Complainant's primary language is Spanish.

9. Complainant testified that she accepted a ride home from Mendoza a maximum of three times when it was too cold to ride her bike to work. Transcript III at 20-21, 85. Once she accepted a ride from Mendoza "around wintertime" because he said he wanted to talk to her. Transcript III at 21. She states that while she was in his car, Mendoza tried to kiss her in response to which she pushed him away and got out of the car. Transcript III at 21-22.

10. On March 5, 2010, Complainant was scheduled to work two consecutive shifts, first in production and then in packaging. Transcript III at 26, 28. When it was time to start the second shift, Mendoza called Complainant and asked that she call him. Transcript III at 27. She called him at 8:31 p.m. and inquired about going to the packaging area but he said it was not necessary. He told her to punch out and meet him downstairs so he could "explain something." Transcript III at 28-29. According to Complainant, she met him and got into his car, after which he offered to give her credit for working the packaging shift if she would go to his house for a "nice time"

which Complainant interpreted as having sexual relations. Transcript III at 29-30. Complainant refused and called her boyfriend on her cell phone fourteen times between 8:44 and 9:09 p.m. while she was in Mendoza's car. Complainant testified that she made multiple calls to her boyfriend because she was very nervous, she wanted her boyfriend to hear what was happening, she wanted Mendoza to see that she was talking to her boyfriend, and she wanted to tell her boyfriend that she was on her way home. Transcript III at 31-32; IV at 35-36. When Complainant failed to reach her boyfriend by phone, she asked Mendoza to stop the car at a gas station so she could get some water. Transcript III at 32. According to Complainant, she refused to get back inside the car until Mendoza agreed to take her home. Id. Complainant testified that Mendoza told her to calm down and took her home. Transcript III at 32-33.

11. According to Complainant's credible testimony, Mendoza reduced her hours and/or days of work after she rejected his advances and told her that in order to work additional hours she had to accept his proposition to have sexual relations with him. Transcript II at 165; III at 23-25. In her Charge of Discrimination, Complainant asserts that Mendoza reduced her work schedule from five days per week to four days per week in approximately mid-February 2010 and that after she rejected his advances in the car, he reduced her hours even more. Charge, paras. 14 & 18. Complainant's pay records support this assertion by establishing that between February 14 and March 3, 2010, her hours decreased to approximately 35 hours per week and beginning the week of March 7, 2010, her hours decreased to approximately 31 hours per week. Complainant's Exhibit 3.

12. Respondent Deana Martin attempted to explain Complainant's reduction in hours by asserting that Complainant didn't want to work on Sundays and could not be given another weekday shift until a more senior employee vacated the shift. Complainant's Exhibit 4, para. 14; Transcript IV at 108-109, 114. Respondents assert that Complainant was given another weekday shift when a more senior employee left the position but produced no employment records in support of this claim. Id. Complainant credibly denied the assertion. Transcript IV at 34.

13. Deana Martin also attempted to explain the reduction in Complainant's hours as stemming from production decreases in May through August due to college accounts going dormant during those months. Complainant's Exhibit 2, p. 1. However, Complainant's pay stubs do not show a May-August decrease in hours during either 2009 or 2010. Instead, pay stubs show that from May through August 2009, Complainant generally worked thirty-eight hours or more[4] and that in 2010, her hours decreased from February through June, but thereafter *increased* in July and August. Complainant's Exhibit 2 (September 15, 2010 e-mail at 4:54 PM) & 3; Transcript II at 126; III at 36-37, IV at 34.

14. In early July 2010, Complainant's work schedule reverted to an average of thirty-eight hours per week. Transcript III at 36-37; Complainant's Exhibit 3 (payroll records indicating an increase as of June 27, 2010). Complainant testified that Mendoza said he was giving her another day of work, after reducing her to four days for several months, in order to see if she "learned a lesson" which she interpreted to

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[4] Rather than a decrease from May to August of 2009, Complainant's hours dropped sporadically between late-April and late-June 2009 and were almost non-existent during the three-week period from October 18, 2009 through November 7, 2009.

mean having sexual relations with him. Transcript III at 25-26, 37. Complainant understood from Mendoza that he would take back the increase in hours if she didn't agree to cooperate with him. Transcript III at 37.

15. Between July 21, 2010 and August 24, 2010, Mendoza sent Complainant twenty-six (26) text messages. Joint Exhibit 3. His messages included the following: "I love your smile," "I will be waiting," "Where are you?" You, as always beautiful," "How is my queen," "I am jealous," "You, are beautiful," "You are precious," "See you at the exit," "Just one minute." Joint Exhibit 1.[5]

16. Complainant sent Mendoza three (3) text messages during July/August, 2010 period, all of which were in response to his texts and which rejected a romantic relationship with him. Joint Exhibits 1 & 3.

17. Mendoza called Complainant's cell phone sixty-two times between January 8, 2010 and September 2, 2010, with the heaviest call volume taking place in August of 2010. Joint Exhibit 2. Complainant did not pick up all of the calls, allowing more than half to go straight to her voicemail. Id.[6] Complainant made fourteen calls to Mendoza during the eight-month period, generally in response to Mendoza's calls. Id. According to Complainant, she sometimes answered Mendoza's calls because he was

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[5] Complainant saved the above messages and they were transcribed by Attorney Richardson. Transcript I at 57. Other text messages on Complainant's phone were either automatically deleted due to insufficient memory or were affirmatively deleted by Complainant. Transcript I at 56-57, 107-108; III at 87-88; IV at 70-77. Data and text messages usage is displayed in Pacific time whereas voice calls are in local time. Transcript IV at 62-63; Complainant's Exhibit 9 & 10.

[6] Calls on T-Mobile bills of one (1) minute indicate that the call went to voicemail but no voice message was left. Calls on T-Mobile bills of two (2) minutes reflect that the call went to voicemail and a voice message was left. Complainant's Exhibit 7 at 3;Transcript III at 31. Thus, calls lasting one (1) or two (2) minutes reflect that the call was not answered.

her supervisor, but she told him that she wasn't interested in "any kind of relation with him" and tried to convince him to stop calling her. Transcript III at 9; IV at 8.

18. On August 2, 2010, Mendoza called/texted Complainant nine times in the afternoon before she called him back. Her return call lasted nineteen minutes. Joint Exhibit 2 at 3. Complainant told Mendoza in this call, as in others, that she didn't want to have a relationship with him. Transcript IV at 7-8. Her subsequent text to him dated August 24, 2010 states, "I am sorry but I am not able to and I do not want to but I already see you do not understand." Joint Exhibit 1 at 2.

19. Complainant testified that on or about August 27, 2010, she arrived at work at approximately 11:00 a.m. and entered an elevator to go to the bakery department and found Mendoza inside the elevator. Transcript III at 38-39, 42. According to Complainant, the elevator incident could have been August 27th or "another day" because she wasn't certain of the exact date. Transcript IV at 16-17. Complainant testified credibly that she was not carrying coffee at the time of the incident. Complainant asserts that she had never before had a problem with Mendoza inside an elevator, but on this occasion, after the elevator door closed, Mendoza hugged and kissed her. Transcript III at 40. Complainant pushed him away and pressed the elevator button in order to open the door. Id. Complainant then took another elevator to her work area. Id.

20. According to Keith Martin, he subsequently viewed a surveillance video of Complainant exiting from an elevator on August 27, 2010 at 11:20 a.m. with a cup of coffee in her hand and with a normal demeanor. Transcript IV at 112. The video came from his wife who located it based on Attorney Richardson's estimation of the

day and time on which the incident occurred. Transcript III at 41-42; IV at 129-130[7]; Complaint of Discrimination (para. 21).[8] Keith Martin acknowledged that the video clip he reviewed could have shown Complainant exiting from a different elevator and/or at a different time from the one in which Mendoza allegedly hugged and kissed Complainant. Transcript IV at 127, 132-133. I decline to credit Keith Martin's testimony about Complainant's demeanor on the video clip because there is no way to ascertain if he reviewed video footage showing Complainant exiting from an elevator immediately after the alleged incident.

21. During August of 2010, Mendoza pressured Complainant to meet him at the end of work on the facility's stairs. Transcript III at 37-38. Complainant initially refused but agreed when he said he would not bother her anymore if she did and because she wanted to tell him not to "blackmail" her by reducing her hours or cutting her days. Transcript III at 37-38, 50. They met on the third floor stairwell where Mendoza said that he wanted to go to the restroom with Complainant to have sexual intercourse. Id. Complainant responded by saying that he was crazy and that she would never go anywhere with him whereupon he grabbed her hand and put it on his erect genitals. Transcript III at 50. Complainant describes herself as "very desperate," decided that she would never be alone with him again, and left. Transcript III at 51.

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[7] Keith Martin testified in a contradictory fashion that the video was sent to his wife from Complainant's counsel and/or that he didn't know where it came from. Transcript IV at 134, 136. I conclude that he was unaware of how his wife obtained the video.

[8] Deana. Martin testified that she sent the video to the MCAD while the matter was under investigation, but the video has not been located and the parties were unable to provide a copy at the public hearing. Transcript III at 42-49.

22. After August 2010, Complainant refused to be alone with Mendoza. Transcript III at 52.

23. On or about September 2, 2010, Mendoza attempted to move Complainant to an evening shift in the packing department. Charge of Discrimination, para. 22; Transcript III at 55-56. Complainant became very upset and threatened to report him to the Martins after which the plan was retracted. Id. According to Deana Martin, Respondents sought to move Complainant and another employee from the day shift in the production department to the night shift in the packing department due to a conflict between two other, more senior employees who no longer wanted to work together in the hand-forming room. Transcript II at 128-129. Complainant's Exhibit 4, para 22. According to Deana Martin, Complainant responded to the proposed change by screaming and swearing at Mendoza. Id. Deana Martin states that the proposed schedule change was retracted after an "amicable resolution was struck with the two arguing ... employees." Id. Martin produced no employment records supporting her assertion that the situation resulted from a dispute between two employees in the hand-forming room who each had seven years seniority.

24. In or about September 2010, Complainant hired Attorney Audrey Richardson, Senior Attorney at Greater Boston Legal Services, to represent her. Transcript III at 58-59. On September 9, 2010, Attorney Richardson called Deana Martin claiming that Mendoza had manipulated Complainant's schedule in retaliation for her objection to having a non-work relationship with him. Transcript II at 35. Richardson provided Martin with a typed transcription of some of the text messages sent by Mendoza to Complainant. Transcript II at 36-37; Joint Exhibit 1. Martin responded by asking for

outgoing texts from Complainant to Mendoza, for Complainant's complete cell phone records for March through August of 2010, for a history of the cell phone numbers belonging to Complainant and her boyfriend going back one year, and for call records belonging to Complainant's boyfriend. Transcript II at 37-38; Complainant's Exhibit 2 (September 17, 2010 e-mail from D. Martin). Martin stated that she was "looking for Ms. Canton's call habits with her boyfriend." Complainant's Exhibit 2 (September 20, 2010 e-mail from D. Martin). Martin stated that if Complainant did not provide the three text messages from Mendoza that, according to Complainant, had been automatically deleted from her cell phone due to insufficient cell phone memory, Martin would disregard all of the text messages from Mendoza to Complainant. Id. Martin did not ask Mendoza for any text messages on his phone.

25. Deana Martin testified at the public hearing that her husband told her on the evening of September 9, 2010 that Complainant was flirtatious and had flirted with him. The accusation was credibly denied by Complainant. Transcript I at 77; II at 111; IV at 117 *et seq*. Keith Martin did not testify at the public hearing that Complainant flirted with him at work. I do not credit the allegations that Complainant flirted with Keith Martin at work.

26. On September 10, 2010, Deana Martin spoke to Mendoza about his interactions with Complainant. According to Deana Martin, Mendoza said there had been some form of consensual relationship between himself and Complainant but did not specify whether it was sexual. Transcript II at 112. According to Deana Martin, she told Mendoza that his behavior was inappropriate and unacceptable. Transcript II at113-114. Nonetheless, Martin did not suspend or transfer Mendoza, reduce his pay,

change his schedule, remove him as a supervisor or place him on administrative leave. Transcript II at 46-47. Mendoza continued to supervise Complainant and control her schedule. Transcript II at 48.

27. Deana Martin wrote an e-mail to Attorney Richardson on September 15, 2010 stating that Mendoza and Complainant had been in a consensual relationship for approximately a year; that Complainant was told by Mendoza that she might have to work one night shift per week due to a dispute involving other employees with greater seniority; and that the schedules of all employees had to be cut by one day per week due to decreases in production from May through August resulting from college accounts going dormant over the summer. Complainant's Exhibit 2 (September 15, 2010 e-mail at 4:53 PM); Transcript II at 44. Deana Martin's e-mail offered Complainant alternative employment in the pastry shop or catering kitchen in the same Chelsea building, neither of which was under Mendoza's supervision (but without specifying whether such work involved the same number of hours or whether it was during a daytime shift). Alternatively, Deana Martin offered Complainant a job as a "customer service rep" in a different location (Milton or Arlington) or the option of a paid leave from work while her claims were investigated. Complainant's Exhibit 2, pp 1 & 5 (e-mails of September 15, 2010 at 4:54 PM and September 17, 2010 at 11:02 AM). Complainant rejected all the offers. Transcript IV 14-15.

28. Complainant declined to transfer out of the Charlestown location even though she was uncomfortable and fearful around Mendoza because it would substantially increase her commute. She declined the other proposals because she didn't want to "send the message" that she was scared and intimidated during the investigation, and

she didn't think she should have to "flee the place" because she hadn't done anything wrong. Transcript II at 76, 119; IV at 53. Mendoza remained as Complainant's supervisor and began to deny her vacation requests. Transcript III at 61-62.

29. Deana Martin declined to interview Complainant in regard to the charge of sexual harassment on the basis that Complainant had flirted with her husband. Transcript II at 52-53. Deana Martin's letter to Attorney Rchardson on September 15, 2010 referenced Complainant's alleged "history of initiating sexual relationships with male supervisors" including her husband and the company's executive chef. Complainant's Exhibit 2. There is no evidentiary support for any such relationships. Transcript II at 45-46, 52-53, 111; Complainant's Exhibit 4, para. 28. Deana Martin admitted that she asked her husband about a rumor that Complainant was having an affair with the executive chef and was told that the relationship was a friendship that was not sexual. Transcript II at 45-46. The flirting accusation about Keith Martin was not corroborated by him during his testimony at the public hearing. Transcript IV at 117 *et seq.*

30. Deana Martin testified that she gave Mendoza a written warning but the alleged warning is nowhere mentioned in Respondents' position statement, was not produced during the MCAD investigatory process, and was not produced at the public hearing. Transcript II at 47, 66, 69-70; Complainant's Exhibit 4.[9] Martin also testified that she

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[9] Deana Martin asserted at the public hearing that her comment to Mendoza that his behavior towards Complainant was inappropriate and unacceptable was "basically" a verbal warning. Transcript II at 113-114. I do not accept this characterization. There is no credible evidence that a verbal warning was ever imposed on Mendoza.

placed Mendoza on a three-month probationary period beginning in September of 2010, but that claim is inconsistent with the assertion in Respondent's position statement that Mendoza *will* be placed on a three-month probationary period. Transcript II at 65. I conclude that no such warning and probationary period were ever imposed.

31. Deana Martin testified at the public hearing that she issued a sexual harassment policy in multiple languages in late October/early November of 2010 which she required all employees to sign. Transcript II at 53-54. No such policy was produced at the public hearing. According to Deana Martin, her records are "locked up in a former facility" and therefore inaccessible. Transcript II at 53. I do not credit this explanation because Martin acknowledged having access to business computers.

32. Deana Martin hired private investigator Mark Chauppetta to conduct interviews regarding Complainant's charge of discrimination. Martin did so over the objection of Attorney Richardson who, on October 6, 2010, forwarded to Martin an e-mail from MCAD Training Director Rebecca Schuster stating that "it is very important that the investigator ... have a specific background in discrimination law and workplace investigations" and attached a list of graduates of the MCAD's two-day course on how to conduct discrimination complaint investigations. Complainant's Exhibit 2 (attachment K, pp. 13- 14). Chauppetta is not a graduate of the MCAD's training course. He said that "not a lot" of discrimination cases come across his desk and has only a "vague idea" of MCAD cases. Transcript I at 25-27. Between late October and early December 2010, Chauppetta interviewed Complainant and several other employees but not Mendoza. Complainant's Exhibit 1; Transcript II at 71-74. Rather

than characterize the witnesses he interviewed as credible or not credible, Chauppetta stated that they were not "damaging." Complainant's Exhibit 1, p. 5. Chauppetta's report was not delivered to Deana Martin until December 27, 2010. Complainant's Exhibit 1.

33. Complainant was laid off in April 2011. Transcript III at 64; IV at 25. She was told that Respondents did have enough work. Transcript III at 65.

34. Deana Martin testified that fifteen to twenty employees (roughly forty to fifty per cent of Respondents' work force) were laid off at the same time as Complainant due to the loss of a significant amount of business from Trader Joe's, but the layoffs of approximately half of the company's work force did not occur until mid-May 2011. Transcript IV at 103-104. According to Martin, everyone had to stay through May 11, 2011 in order to fill outstanding work orders. Id.

35. After her layoff, Complainant didn't have enough money to pay her personal expenses such as rent and to help her family. Transcript II at 66. Complainant felt depressed because she had reported Mendoza to the Martins and they had supported him rather than her. Transcript III at 67. She was angry that the Martins accused her of flirting with Mendoza, Keith Martin, and others. Transcript III at 68. Complainant described herself as disillusioned, fearful, nervous, and panicky when she saw someone that reminded her of Mendoza Transcript III at 69, 71. Complainant testified that she had recurring nightmares about Mendoza accosting her. Transcript III at 73. Prior to being laid off, Complainant was afraid to enter and leave work on her own because of Mendoza so she sometimes had co-workers accompany her in and out of the building. Transcript III at 70.

36. Complainant testified that as a result of her experience with Mendoza, she doesn't trust men. Transcript III at 78. Complainant doesn't like to go out by herself anymore. Id. She stopped going to the gym where there are men. Transcript III at 78-80. Complainant testified that while she worked for Respondents, she had frequent nightmares about Mendoza chasing, her accosting her, and locking her in a dark room. Transcript III at 73. According to Complainant the nightmares still happen occasionally. Transcript III at 74. Complainant did not see a therapist because she didn't want to talk about her experience. Transcript III at 80; IV at 27, 56. She didn't seek any medication for her symptoms because she doesn't believe she had an illness.

37. Complainant did not look for work until June or July of 2011 because she was afraid of obtaining another job with a male boss who would behave like Mendoza and because she was depressed. Transcript III at 68; IV at 20, 55. Complainant began to work for D'Angelo's in July of 2011, initially working twenty hours a week and quickly moving to a full-time schedule. She earned $8.00 per hour between July of 2011 and July of 2012. Between July of 2012 and 2013, she earned $9.00 per hour. She subsequently dropped to a part-time schedule after she became pregnant and stopped working for D'Angelo's after giving birth in January of 2016 but wants to return because she likes her bosses. Transcript III at 76; IV at 23-24.

38. Respondents moved their operations from 50 Terminal Street to 200 Terminal Street in Charlestown in January of 2012. In June of 2012, Respondents moved to Providence, Rhode Island. Transcript II at 88-89. Deana Martin testified that Biga Wholesale continued in operation through the move to 200 Terminal Street but once

it relocated, it went out of business and was followed by a successor corporation called Baked & Served New England. Transcript II at 94. Complainant's pay stubs from Respondents indicate that she earned $11,158.89 in total wages in 2008 and $24,535.38 in 2009. Complainant's Exhibit 3; Chalk B. Complainant did not save her pay stubs for the last four months of 2010 but her pay stubs through September 10, 2010 show that she earned $11, 362.50 for that period. Complainant estimates that her total earnings for 2010 were $22,882.50 assuming she worked forty hours per week at $9.00 per hour for the last sixteen weeks of 2010. After 2010, Complainant's income tax returns report the following earnings in wages, tips, and other compensation: $7,013.16 in 2011; $15,544.62 in 2012; $16,462.29 in 2013; $12,195.98 in 2014; and $11,390.00 in 2015. Complainant's Exhibit 5; Chalk B.

III CONCLUSIONS OF LAW

A. Amendment of Complaint

At the outset of the hearing Complainant moved that the complaint be amended to incorporate evidence establishing continued acts of sexual harassment, retaliation, and aiding and abetting which took place after the filing of the complaint on November 26, 2010, including her discharge in April of 2011. The Commission has, in the past, permitted a complaint to be amended in order to conform to facts adduced at the public hearing. See Riggs v. Town of Oak Bluffs, 23 MDLR 306, 311 (2001) *aff'd.* 25 MDLR 348 (2003) (Full Commission); Abrams v. Paddington's Place, 26 MDLR 149 (2005) (Full Commission). Such action is appropriate in this case where there is no prejudice to Respondents as the amendment pertains to matters which arise out of the subject matter of the original complaint and which were within the appropriate scope of the MCAD's

investigation. See Pelletier v. Town of Somerset, 458 Mass. 504, 506 (2010) (acts of discrimination that the MCAD investigation could reasonably be expected to uncover establish the scope of a subsequent hearing); Carter v. Commissioner of Correction, 43 Mass. App. Ct. 212, 218 (federal authority permits plaintiff to bring a retaliation claim to court, even if not previously included in an administrative complaint, where claim arises out of a charge previously filed with the agency).

B. Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment is defined as "[s]exual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made explicitly or implicitly a term or condition of employment or as a basis for employment decisions ...." M.G.L. ch. 151B, section 1(18) (a); Ramsdell v. Western Massachusetts Bus Lines, 415 Mass. 673, 677 (1993). To establish a prima facie case of discrimination by quid pro quo harassment, complainant must demonstrate that: a) she is a member of a protected class; b) she was subject to unwelcome sexual conduct; c) the tangible terms or conditions of her employment were then adversely changed; and d) the change was causally-connected to her rejection of the sexual advances. See Gilman v. Instructional Systems, Inc., 22 MDLR 237 (2000); Socarides v. Camp Edwards Troop Welfare Council, Inc., 21 MDLR 173 (1999).

Complainant was subject to unwelcome sexual advances by her supervisor, Francisco Mendoza, who pressured her through telephone calls, texts, and communications at work to engage in a sexual relationship with him. Respondents argue that the relationship between Mendoza and Complainant was consensual, but the credible

evidence indicates otherwise. Mendoza called or texted Complainant to express his feelings for her and to say that he wanted to take her out. He made inappropriate gestures at work such as blowing kisses towards Complainant, grabbing and kissing her when they were outside the range of video cameras, and forcing her hand to touch his genitals. Mendoza frequently communicated with Complainant as she was leaving work for the night and tried to persuade her to ride home with him.

Despite a relentless campaign to win over Complainant which lasted approximately two years, Complainant repeatedly told Mendoza that he should stop pursuing her, that she was not attracted to him, that she had a boyfriend, and that she would not "date him."

In response to Complainant's rejection, Mendoza exercised his authority as her supervisor to reduce her hours, threaten to transfer her to an evening shift, and endeavor, albeit unsuccessfully, to condition the return of a full-time work schedule on Complainant's acquiescence to a sexual relationship. Mendoza told Complainant that in order to work additional hours she had to accept his proposition to have sexual relations with him. These facts are sufficient to set forth a prima facie case of quid pro quo sexual harassment.

Once Complainant establishes such a case, the burden of proof shifts to Respondents to articulate a legitimate, non-discriminatory reason for the adverse employment action supported by credible evidence. See Shanley v. Pub 106, Inc. 22 MDLR 333, 336 (2001). Respondent Deana Martin attributed the reduction in hours and proposed shift transfer to the evening shift to Complainant not wanting to work on Sundays, to college accounts going dormant over the summer, and to disagreements

between co-workers who needed to be separated. Martin's explanations, however, were not corroborated by any documentary evidence such as shift rosters during the periods in question or by work orders showing a reduction of client demand during summer months. Martin's explanations were also credibly denied by Complainant who testified convincingly that she did not seek Sundays off in order to attend church. Contrary to Martin's contention that a decrease in work orders over the summer necessitated a reduction in Complainant's hours, Complainant provided pay stubs establishing that she worked full-time during July and August of 2009 and 2010.

Rather than establish legitimate reasons for Respondents actions, the evidence shows that the adverse changes in the terms and conditions of Complainant's employment were attributable to her rejection of Mendoza's sexual advances. See Avila v. J & S Restaurant Enterprises Inc (sexual favors proposed in exchange for job security); Hinojosa v. Durkee, 19 MDLR 14, 16 (1997). Although Complainant subsequently regained most of the hours previously taken away from her, I credit her explanation that Mendoza gave her back a fifth day of work, after reducing her to four days for several months, in order to see if she "learned a lesson." It was Complainant's understanding, reasonable under the circumstances, that she faced a loss of the hours if she didn't agree to a sexual relationship with Mendoza.

Based on the foregoing, Complainant has made out a case of quid pro quo sexual harassment.

C. Hostile Work Environment Sexual Harassment

In order to establish a "hostile work environment" sexual harassment claim, Complainant must prove by credible evidence that: (1) she was subjected to conduct of a

sexual nature; (2) the conduct was unwelcome; (3) the conduct had the effect of creating an intimidating, hostile, humiliating or sexually offensive work environment; and (4) the conduct was sufficiently severe or pervasive as to interfere with Complainant's work performance or alter the conditions of employment. See MCAD Sexual Harassment in the Workplace Guidelines, II.C. (2002) ("Sexual Harassment Guidelines").

Sexual harassment must be objectively and subjectively offensive. See Sexual Harassment Guidelines II.C.3; Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993). The objective standard means that the evidence of sexual harassment must be considered from the perspective "of a reasonable person in the plaintiff's position." Id. at 678. The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker's performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) *citing* Harris v. Forklift Systems, Inc., 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000).

The subjective standard of sexual harassment means that an employee must personally experience the behavior as unwelcome. An employee who does not personally experience the behavior to be intimidating, humiliating or offensive is not a victim within the meaning of the law, even if other individuals might consider the same behavior to be hostile. See MCAD Sexual Harassment in the Workplace Guidelines, II. C. 3 (2002); Ramsdell v.Western Bus Lines, Inc., 415 Mass. at 678-679.

The credible evidence in this case establishes that Mendoza began to subject Complainant to conduct of a sexual nature soon after becoming her supervisor. His

initial advances consisted of words and gestures designed to communicate his attraction to her. Mendoza pressured Complainant through telephone calls and texts to engage in a sexual relationship. He continually called and texted Complainant at work to try to persuade her to accept rides home with him. During one of the few rides that Complainant accepted, Mendoza tried to kiss her. On another, he tried to coerce her to go to his house. In the stairwell at work, he told Complainant that he wanted to go to the restroom to have sexual relations with her and put her hand on his erect genitals. On yet another occasion when Mendoza found himself alone with Complainant in an elevator at work, he hugged and kissed her against her will. Altogether, Mendoza's conduct consisted of a two-year barrage of unwanted sexual aggression in the workplace that was both severe and pervasive.

By any standard, Mendoza's conduct crossed the boundaries of a professional relationship and was objectively offensive. Complainant made clear to Mendoza that she did not want a sexual relationship with him and that she did not reciprocate his feelings. She refused on all but three occasions to accept a ride home from him. That Mendoza's conduct was subjectively offensive and unwelcome to Complainant is made clear by the fact that she repeatedly told him that she would not date him, she would not have a sexual relationship with him, and that she had a boyfriend. Complainant credibly testified that she tried to convince Mendoza to stop calling her, to stop texting her, and to stop offering her rides home. She seldom responded to Mendoza's numerous phone calls between January and September of 2010, allowing more than half to go straight to voicemail. In order to avoid rides from Mendoza, Complainant left work with co-workers or varied her route home.

There are, to be sure, three occasions when Complainant accepted rides from Mendoza and at least one occasion when she agreed to meet him in a stairwell, but these occasions pale in comparison to Complainant's attempts to avoid interactions with Mendoza. I attach no significance to the rides and the stairwell incident other than a desire on Complainant's part not to unduly antagonize her supervisor. The three rides home from work took place in the winter when it was too cold for Complainant to ride her bike and served as an opportunity for Complainant to tell Mendoza to stop pursuing a personal relationship with her. The fact that Complainant called her boyfriend fourteen times on the last occasion when she rode home with Mendoza, had him stop at a gas station on the pretext of getting water, and refused to get back in the car until he agreed to take her home attests to the genuine nature of Complainant's fear. I do not interpret either the three rides or the stairwell incident as evidence that Complainant welcomed Mendoza's sexual advances. Rather, I consider them as exceptions to Complainant's unremitting rejections of Mendoza's overtures. They in no way undermine the hostile, humiliating, and sexually-offensive work environment to which Complainant was subjected.

D. Retaliation

Complainant alleges that as a result of objecting to Mendoza's conduct, verbally and in her MCAD complaint, her work hours were cut, she was threatened with a move to the night shift, and she was ultimately fired. These allegations constitute retaliation, defined by Chapter 151B, sec. 4 (4) as opposition to practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful

practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case by demonstrating that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

The evidence establishes that in early September 2010, Complainant hired an attorney to contact Deana Martin about her sexual harassment claims. The communication between her attorney and Deana Martin establishes both protected activity by Complainant and awareness of the activity on the part of Respondents. Approximately seven months later, in April of 2011, Complainant was laid off.

Respondents maintain that Complainant's layoff was caused by a lack of business due to a cancellation of work orders by Trader Joe's which necessitated the termination

of fifteen to twenty employees, roughly forty to fifty per cent of the workforce. Martin acknowledged, however, that Trader Joe's did not inform her about the cancellation of the work orders until April 21, 2011 and it wasn't until mid-May 2011 that the loss of Trader Joe's business resulted in a reduction in production. Until that time, the company needed to maintain staffing in order to fill outstanding work orders. Under these circumstances, Complainant's termination cannot be attributed to a loss of business. I conclude that Respondents' explanation for Complainant's dismissal is pretextual and that a causal connection exists between her protected activity and the adverse employment action.

E. Individual Liability

The foregoing conclusions that Complainant was subjected to sexual harassment and to retaliation renders the Employer, Biga Breads, liable for damages. See College-Twon, Division of Interco, Inc. v. MCAD, 400 Mass 156, 165 (1987) (Employer vicariously liable where supervisor creates a sexually-harassing work environment). As well, Complainant seeks to hold Deana and Keith Martin individually liable for acts of retaliation under G.L.c.151B, sections 4(4), 4(4A), and 4(5).

There is no evidence that Keith Martin had substantial involvement in matters pertaining to Complainant. On the other hand, the evidence establishes a deliberate and blatant disregard of Complainant's rights by Deana Martin, who supervised Mendoza and functioned as the company's personnel officer.

After learning about Complainant's allegations of sexual harassment from Attorney Richardson, Deana Martin mischaracterized the actions as a consensual relationship based on unfounded rumors about Complainant. Martin erected procedural

barriers to a fair investigation by making onerous demands for text records and cell phone records from Complainant and her boyfriend which had little or no relevance to the charges against Mendoza. Martin fixated on Complainant's failure to provide the content of three text messages from Mendoza which, according to Complainant, were automatically deleted from her phone due to insufficient memory. By contrast, Martin failed to seek from Mendoza any e-mails or text messages from Complainant even though such material might have buttressed Mendoza's position that the relationship was consensual. Martin interpreted Complainant's missing texts as undermining her accusations against Mendoza whereas Martin ignored Mendoza's failure to produce any inappropriate communications from Complainant.

In response to Complainant's charges of sexual harassment, Deana Martin proposed to move Complainant out of her job – a move that would have involved inconvenience and potential loss of income to her -- rather than disrupt Mendoza's schedule. Martin purports to have given Mendoza a warning and placed him on three-months of probation, but it appears that no real discipline was ever imposed. There is no credible evidence of a warning and the so-called probationary period consisted merely of an admonition that Mendoza would be "susceptible to disciplinary action if there are any substantiated reports of inappropriate communications with any female employees." Such admonition does no more than state the obvious consequences of inappropriate conduct applicable to all employees.

Martin undertook the inquiry into Complainant's allegations with a "blame the victim" mentality arising from unfounded characterizations of Complainant as a "flirt" and Mendoza as a "perfect gentleman." She accepted at face value Mendoza's claim that

his relationship with Complainant was consensual. Martin relied on unsupported innuendo to challenge Complainant's credibility and to disparage her character. She declined to interview Complainant based on the nonsensical reason that Complainant had allegedly flirted with her husband. There is no evidence supporting such a claim but even if it were true, it would not have prevented Martin from speaking with Complainant at the request of Complainant's counsel.

Deana Martin's investigation into Complainant's allegations was devoid of adequate and impartial steps to examine the matter. Martin made onerous demands to review irrelevant phone records and text messages belonging to Complainant and her boyfriend but did not ask Mendoza for any phone records or text messages. Martin allowed the interview process to drag out for three months. Rather than hire an investigator with a background in discrimination matters to explore Complainant's allegations, Martin hired a private investigator untutored in discrimination law. The investigator failed to interview Mendoza based on the unconvincing reason that Deana Martin had already interviewed Mendoza and believed him. The investigator characterized the employees he did interview as not "damaging." Such an assessment makes clear that his role was to shore up evidence against Complainant, not to undertake an impartial investigation on behalf of Deana Martin. When the investigator nevertheless concluded that Complainant was likely to be credible, Martin still declined to remove Mendoza from his supervisory role over Complainant.

I infer from these matters an intent to discriminate on the part of Deana Martin who acted in deliberate disregard of Complainant's rights. Martin's actions are sufficiently egregious to subject her to individually liability. See Woodason v. Town of

Norton School Committee, 25 MDLR 62, 64 (2003) (Full Commission) (individual liability where person who has authority to act on behalf of employer actions shows intent to discriminate by acting in deliberate disregard of Complainant's rights).

F. Lost Wages and Benefits

Chapter 151B provides for monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. See Stonehill College v. MCAD, 441 Mass. 549, 586-587 (2004) *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976).

Complainant was out of work between mid-April of 2011 and July of 2011. During that period, she did not look for work. When she started working for D'Angelo's in July of 2011, she initially worked twenty hours a week but quickly moved to forty hours a week. Complainant earned $8.00 per hour between July of 2011 and July of 2012 and $9.00 between July of 2012 and July of 2013. She subsequently dropped to a part-time schedule after she became pregnant and stopped working for D'Angelo's after giving birth in January of 2016.

Complainant's pay stubs from Respondents indicate that she earned $24,535.38 in 2009 and $11, 362.50 from January through September 10, 2010. Complainant estimates that her total earnings for 2010 were $22,882.50 based on a forty hour work week during the last sixteen weeks of 2010. In 2011, Complainant earned $7,013.16; in 2012, she earned $15,544.62; in 2013, she earned $16,462.29; in 2014, she earned $12,195.98; and in 2015, she earned $11,390.00.

Based on Complainant's reasonable estimation that she earned $22,882.50 in 2011 ($1,907 per month), that she abstained from looking for another job for

approximately two months after being terminated by Respondents, and that after she began working at D'Angelo's in July of 2011, where she earned the income set forth above, I conclude that her back pay damages are $47,992.00.

G. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See id. at 576; Buckley Nursing Home, 20 Mass. App. Ct. at 182-183. Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 Mass. at 576.

Complainant testified with great sincerity that for a period of time after being victimized by Mendoza, she had recurring nightmares about his chasing her, accosting her, and locking her in a dark room. According to Complainant the nightmares still happen occasionally. Complainant became depressed and angry after reporting Mendoza to the Martins and finding out that they supported him and that they accused her of

flirting with Mendoza, Keith Martin, and others. She was afraid to enter and leave work on her own because of Mendoza. Complainant describes herself as disillusioned, fearful, and nervous around men who remind her of Mendoza. As a result of her experience with Mendoza, Complainant no longer trusts men and her interactions with men are more limited than they were previously. She stopped going to a gym where there are men and stopped going out in public by herself.

Complainant describes herself as depressed after losing her job in July of 2011 and for that reason, was incapable of looking for another job for several months. Although depressed, she did not see a therapist because she didn't want to talk about her experience. She didn't seek any medication for her symptoms because she doesn't believe she had an illness.

After her layoff, Complainant incurred the stress of not having enough money to pay her personal expenses or to help her family.

The foregoing description depicts Complainant as a victim of sexual harassment who was forced to experience her workplace as an unsafe and frightening environment. Complainant's attempts to address the situation were stonewalled by Deana Martin who hired an untrained investigator to conduct employee interviews, provided unwavering support to Mendoza despite e-mails evidencing his harassment of Complainant, permitted Mendoza to remain as a supervisor pending investigation, required Complainant to vacate her assignment in order to remove herself from Mendoza's proximity, and ultimately fired Complainant a month before laying off numerous other employees. These circumstances establish that Complainant suffered emotional distress from both a

sexually-hostile work environment and from retaliation for speaking out against her treatment.

Based on the foregoing, I conclude that Complainant is entitled to $125,000 in emotional distress damages.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondents Biga Breads and Deana Martin are ordered to:

(1) Pay Complainant Griselda Canton, within sixty (60) days of receipt of this decision, the sum of $ 47,992 in back pay damages plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(2) pay Complainant Griselda Canton, within sixty (60) days of receipt of this decision, the sum of $125,000 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

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

IV. ORDER

So ordered this 2nd day of May, 2017.

Betty E. Waxman, Esq.,
Hearing Officer