

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
YVROSE CESAR,

Complainants

v.

DOCKET NOS. 13-BEM-02668
14-BEM-02491

DANVERS MANAGEMENT SYSTEMS, INC.
d/b/a HUNT NURSING and REHABILITATION
CENTER,

Respondent

Appearances: Justin M. Murphy, Esq., for Complainant
Diane M. DeGiacomo, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 4, 2013, Complainant filed a claim of discrimination based on her national origin (Haitian) and her race and color (black), against her then employer, Respondent Hunt Nursing and Rehabilitation Center. Complainant alleged that she was the subject of name calling and verbal abuse by numerous co-workers and that she complained to management but the conduct did not cease. On September 23, 2014, Complainant filed a complaint of retaliation against Respondent alleging that she was terminated from her employment as a result of her protected activity, i.e. complaining of discrimination. The Investigating Commissioner found probable cause to credit the allegations of the complaints and after conciliation was unsuccessful the matters were certified for public hearing. A hearing was held before the undersigned Hearing

Officer on February 27, 28 and March 1, 2018. The parties submitted post-hearing briefs on April 17, 2018. Having reviewed the record in this matter and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Yvrose Cesar, is a black female born in Haiti. Complainant worked as a Certified Nursing Assistant (CNA) for Respondent for over fourteen years from May 11, 2000, until July 7, 2014. (Complainant testimony)

2. Respondent, Danvers Management Systems, Inc., d/b/a Hunt Nursing and Rehabilitation Center is a wholly owned subsidiary of Berkshire Health Care Systems, Inc. Respondent operates as a non-profit nursing and rehabilitation facility in Danvers, MA and employees approximately 135 employees on three units. Units 1 and 3 are primarily long-term care and Unit 2 is generally short-term care. Complainant worked primarily on Unit 1.

3. Respondent's Director of Nursing from March 2013 through March 2016 was Colleen Burke. The Director of Nursing is responsible for the entire nursing staff, including CNA's. The Director of nursing worked days. (Burke testimony) Joanne Brown was Respondent's Human Resource manager from 2011 to 2015. (Brown testimony) Peter Roberts was Respondent's Administrator.¹ Laura Turco was the nursing supervisor who oversaw all three units on the 3pm to 11pm shift.

4. Certified nursing assistants at Respondent provide personal care for the residents of the facility and work in shifts of 7am-3pm, 3pm- 11pm, and 11pm-7am. (Brown testimony) On the 7am-3pm shift, each unit is generally staffed by a unit manager, two nurses and five CNA's. On the 3pm-11pm shift, each unit was staffed with two nurses, four CNA's and an evening

¹ Roberts was deceased as of the time of the hearing and did not testify.

supervisor who was in charge of all three units. (Turco testimony) The CNA workforce at Respondent was very diverse and included employees who were African-American, African, Haitian, Hispanic, Asian and White. (Brown testimony)

5. Complainant worked as a CNA on Tuesdays on the 3-11pm shift and worked double shifts on Sundays and Thursdays from 7am-3pm and 3pm-11pm. The two nurses on the 3-11pm shift were both black/Haitian. (Turco testimony) They did not testify in this matter. The Unit 1 manager on the 7am-3pm shift was RN Laurel Brye-MacMillan. She did not testify in this matter. Turco, the evening shift nursing supervisor from May 2013 to May 2015, was on duty the night of the incident that precipitated Complainant's termination. (Turco testimony)

6. Complainant had favorable performance reviews from 2009 through 2012. (Exs. 42&43) She was described by her then-supervisor Rachel Moffet, as an "excellent team player," who was "well respected by her peers." (Ex. 42) Moffet also noted that Complainant "always goes above and beyond for both her team and residents." (Ex. 43) Respondent's witnesses testified that throughout her 14-year tenure, Complainant was a very good employee—hard-working, reliable and committed to the patients. (Burke, Brown, Turco testimony) Complainant also formed good relationships with Respondent's residents and their families. (Id.) She was not known to refuse to follow a supervisor's orders or to be insubordinate, until the incident in 2014 that precipitated her termination. (Id.)

7. Beginning in December 2012 and continuing on and off throughout the last two years of her employment, Complainant made a number of complaints about her co-workers and how they were treating her. On December 6, 2012, Complainant made her first internal complaint to Human Resource Manager, Joanne Brown. Complainant alleged that for some period of time certain co-workers had been laughing at her, making fun of her, calling her "horse," and

“monkey,” and saying she has a “shit face,” and comes “from another planet.” At Brown’s, request, Complainant put her concerns in writing and gave Brown a list with the names of fifteen people she alleged were engaging in this behavior. (Jt. Ex. 1) Complainant wrote that she believed some of her colleagues wanted her fired, that she felt bullied and wanted the conduct to stop. (Complainant testimony, Brown testimony, Jt. Ex. 1) She testified that employees who exhibited this behavior were Hispanic, White, and Black African. This was the first complainant she made to management about inappropriate treatment by co-workers. Brown wrote that the basis for Complainant’s charges was that “staff were verbally harassing her and making faces at her. (Jt. Ex. 2) Brown testified that she did not consider Complainant’s allegations to be about racial discrimination and stated she was not aware that calling a black person “monkey” is considered a racial or ethnic slur. I did not find this assertion to be credible.

8. Brown testified that she could not identify all the 15 people on Complainant’s list. There were three individuals listed who were not Respondent’s employees and she asked Complainant for clarification, but Complainant could provide none. Between December 7th and 12th, Brown conducted interviews with ten Hunt employees, confronting them directly with the allegations, telling each that it had been reported to her that they were making hurtful comments about Complainant and asking them if this were true and if they made faces at Complainant. She also asked each employee if they had heard or witnessed others saying “bad things” about Complainant or making faces at her. Not surprisingly, all of the individuals denied the accusations and said they knew nothing of any such behavior. Brown determined that she could not substantiate Complainant’s claims. (Jt. Ex. 2, Brown testimony)

9. Some of the employees interviewed by Brown testified that Complainant was defensive and often falsely accused them of making fun of her or calling her ugly, when they were just smiling at her or saying hello. (Jt. Ex. 2, Brown testimony) Complainant testified that she gave Brown a revised list with the names of different employees, including white employees, who were bothering her, but that Brown did not interview these people. Complainant claimed that Peter Roberts, Respondent's Administrator made blatantly discriminatory statements to her face which she claimed to have reported to Brown. (Complainant testimony) Brown denied receiving a second list of names from Complainant, and I credit this testimony. I find that Complainant was either mistaken or confused about this, but I do not believe she intentionally lied about second list. I do not credit the allegations that Roberts made blatant discriminatory statements.

10. According to Brown, on December 28, 2012, Complainant informed her that things had improved and the behavior had stopped. Brown testified that she checked in with Complainant periodically to see how things were going, but Complainant denied that anyone from HR checked in with her. Complainant felt that Respondent did not believe her allegations. (Brown testimony, Complainant testimony)

11. Sometime in March 2013, an employee in the medical records department reported that she overheard another CNA, named Luz, refer to someone as "ugly." This was reported to Brown who was unable to verify that Luz was referring to Complainant, but Luz received a "Corrective Action Notice" from Director of Nursing Colleen Burke on April 22, 2013. The notice makes reference to up to five reported "incidents involving Luz calling other employees names, putting them down or insulting them in a disrespectful or malicious manner," and notes that she had been spoken to by the HR manager on three prior occasions regarding similar behavior in October, November and December of 2012. (Brown testimony, Joint Exs. 20 & 3)

Respondent issued Luz the verbal warning on April 22, 2013, as a result of this incident, and because of her history of disrespectful conduct to co-workers. (Jt. Ex. 3)

12. On April 25, 2013, three days after Respondent issued a verbal warning to Luz for calling someone ugly and for being disrespectful to co-workers, Brown asked Complainant to sign a statement to that effect that things were going pretty well, there had been no problems and that she would report any future problems to Brown. (Jt. Ex. 4) Complainant acknowledged signing the statement but said things had not really changed and that she signed the statement to appease Respondent.

13. In early April 2013, Complainant underwent cosmetic surgery to her nose for a nasal deformity. She claimed this was because her co-workers called her ugly, "shit face," and "monkey face." Complainant reported to her physician that she was happy with the results. (Complainant testimony, Leon Cesar testimony, Jt. Ex. 49) I do not find it credible that Complainant would have submitted to cosmetic surgery wholly because of co-workers' insults and believe it is more likely that she did so largely because of her own personal dissatisfaction with her appearance, although those feelings may have been exacerbated by co-workers' comments.

14. On May 2, 2013, Complainant registered a complaint with Brown about an African/black housekeeper who she claimed was looking at her funny, whispering and laughing at her because she was ugly. This housekeeper had been interviewed by Brown the previous December and he claimed that Complainant yelled at him for looking at her, when he was not doing so, and accused him of thinking she was ugly. He came to Brown's office independently on May 2, 2013 to state that Complainant had "freaked out" on him that day with similar accusations. He stated she was acting crazy and he felt the need to report her behavior. Brown

documented this incident. (Brown testimony, Ex. 2, Ex. 5) Brown did not testify that she followed up with Complainant after meeting with the housekeeper.

15. On May 6, 2013, Complainant complained to Brown that she had been assigned to work one-on-one with a resident and she thought it was because she was ugly and her co-workers did not want to work with her. (Brown testimony) Brown contacted Director of Nursing, Burke and they scheduled a meeting with Complainant for the following day May 7, 2013. Burke testified that a one-on-one assignment is not out of the ordinary and is done for safety reasons, as when a resident is at risk of falling or unaware of their limitations. Burke also testified that she always had pleasant interactions with Complainant and did not observe co-workers treat Complainant in a negative way. She also stated that the unit managers had never reported bad treatment of Complainant to her. (Burke testimony)

16. On May 7, 2013, Brown and Burke met with Complainant in Brown's office. According to Brown, Complainant stated that she was assigned to a one-on-one because she was ugly. Burke then discussed the important safety reasons for a one-on-one assignment and they discussed Complainant's feelings about being ugly. Complainant told them she had had cosmetic surgery on her nose for this reason. She alleged that co-workers were laughing at her and calling her ugly and calling her names and that they had no heart. Brown and Burke testified that they supported Complainant and told her Respondent had zero tolerance for negative treatment of employees. Burke recommended Complainant talk to her physician about how she feels about herself and described the conversation as "heart-breaking." I credit their testimony about this meeting but believe that Complainant was conveying that she viewed herself as ugly because she believed others thought that about her. Brown stated that Complainant did not then state the alleged perpetrators of this conduct. During this meeting,

Brown proposed a meeting of Unit 1 to engage the staff and Complainant thought this was a good idea.

17. As a follow-up to the May 7, 2013 meeting, within a week, Burke called a meeting of the Unit 1, 7-3 shift staff. The purpose of the meeting was to discuss mutual respect among the employees and that all employees should feel comfortable in their workplace. At the meeting some of Complainant's co-workers reassured her that she was liked and that she was pretty. For approximately 6 months thereafter, there were no further complaints to Brown by Complainant about improper treatment. (Brown testimony)

18. Complainant also alleged that some of her co-workers refused to work with her and refused to help her when she needed assistance with a patient. Fellow CNA Bob La Rossa testified that he worked with Complainant and witnessed certain other CNA's pick on her. He observed that Complainant would not sit with others in the break room because of how they looked at her and several times he heard other CNA's call her lazy, ugly, and said she looked like a monkey. He specifically mentioned two Hispanic CNA's named Luz and Marytsa. He overheard others say that she always complained about her assignments or was hiding because she wanted to avoid work. LaRossa stated that he reported this behavior to HR, the Director of Nursing and the Administrator, but was not clear about when made this report. Larossa also testified that Complainant worked hard and he sometimes helped her because other CNAs would not. He testified that Complainant never refused to care for a patient and was one of the most dependable CNAs. He surmised that co-workers may have harbored animosity toward her because she made relationships with the patients. (LaRossa testimony, Jt. Ex. 16 & 20) Brown denied that LaRossa ever reported CNAs harassing Complainant prior to his statements in October 2013 discussed below.

19. Complainant filed a claim of race discrimination with the MCAD on October 4, 2013. The record does not suggest any then-recent workplace incident that precipitated the complaint. The complaint alleged that fourteen employees called Complainant names and made faces at her. Of those named in the MCAD complaint, eight were names not formerly given to Brown, and only four of the fourteen had been listed in the initial complaint to Brown. The complaint states generally that the conduct began in 2010, when some new co-workers arrived and that it became worse in 2011 and continued into 2013, but it does not refer to any specific incidents or any specific dates and times that the conduct occurred. It does reference the meeting that was held with her co-workers some six months earlier in the Spring of 2013 and states the bad treatment has not stopped. Respondent states that two individuals listed in the MCAD complaint could not be identified as employees of Respondent.

20. On October 10, 2013, Registered Nurse Laurel Byrne-MacMillan, the Unit 1 manager, documented that Complainant accused her of always making faces at her. Byrne-MacMillan replied she was merely smiling at Complainant. Complainant had previously asked Byrne-MacMillan why she gave an assignment to the “ugly one” [referring to herself] instead of one of the “beautiful people.” Byrne-MacMillan responded that the assignment was part of her job and had nothing to do with personal appearance. (Jt. Ex. 6)

21. On or about October 13, 2013, Rachel Moffet, the unit manager on the 7-3 shift, documented that Complainant told her she was not going to work “here in hell with evil people.” (Jt. Ex. 9) When Moffet asked Complainant who was evil, Complainant responded, “all of them-they won’t talk to me, they laugh at me, and they look at me. Sometimes they say they can’t look at me because I’m so ugly. They are all talking about me.” Complainant would not identify who she was referring to, but insisted on going home, and stated she didn’t care if she

was fired. (Jt. Ex. 9) Moffet waited with Complainant until her husband came and picked her up. Complainant's husband later called Moffet and complained that the CNAs were driving Complainant "crazy." Moffet expressed to him that she was very concerned about Complainant. According to Moffet, he told her that Complainant wanted to commit suicide and she told him to call 911 and get help immediately. Moffet reported that he called her back shortly thereafter and stated they were on route to the hospital. (Jt. Ex. 9) There is no record of Complainant visiting a hospital on that day in the medical documents received in evidence; however, Brown received a phone call from a nurse practitioner at Malden Family Hospital some three days later, on October 16, 2013, saying the Complainant was at the facility seeking a letter requested by her employer verifying that she was "not crazy," and stating that she was being bullied at work and that the weekend supervisor told her husband she is crazy. Brown informed the caller that no one at Respondent had requested such a letter. (Brown testimony, Jt. Ex. 17)

22. Complainant's written account of what occurred on October 13, 2013, was that she arrived at work on a Sunday morning and no one would talk to her. She stated that at various times that morning CNAs she identified as Luz, Marytsa, and Hannah, and another co-worker named Jeremy laughed at her. Complainant stated she got upset and developed a headache and had to leave work, telling her supervisor that she was leaving. She claims that she went to the hospital and that her blood sugar was measured at 400. (Jt. Ex. 8) Brown testified that she also spoke to Complainant's husband around the time of this incident and he told her that the CNAs were giving Complainant a hard time because they were jealous of her because she was a hard worker and the residents liked her. Mr. Cesar denied having any conversations with Respondent's employees. I do not credit his testimony and do not believe that Moffet would have fabricated a

written report of a conversation with Complainant's husband, particularly given that she was concerned about Complainant's mental state.

23. Brown looked into Complainant's allegations regarding the incident of October 13, 2013 and asked employees involved to document what had occurred. The CNAs identified by Complainant indicated they were discussing their weekend activities and laughing about their conversation when Complainant walked by them and gave them dirty looks. (Jt. Exs 18 & 19) Others who worked that shift reported they did not witness any inappropriate conduct. (Jt. Exs. 10-12) Complainant provided the names of three CNA's who purportedly witnessed the conduct. All three were interviewed by Administrator Peter Roberts on October 14th and he wrote a note that did not reflect any accounts of the incident, but all three interviewees denied having much interaction with Complainant. (Jt. Ex. 13).

24. On October 16, 2013 Brown and Burke met with Bob LaRossa at Complainant's suggestion. They discussed allegations that he had overheard Luz call Complainant "ugly," but he reported that the incident had occurred several months earlier. (Jt. Ex. 20) LaRossa spoke with Brown and they met with Brown and Burke regarding the above allegations twice in October 2013. (Jt. Ex. 16, 20, C-53) Brown's written account of La Rossa's conversations state that he recounted that the entire first floor crew, but three employees in particular, pick on Complainant, call her lazy, and that he overheard one co-worker call her ugly. LaRossa claims to have made a written statement on November 3, 2013, supportive of Complainant and stating she was a hard worker and that he thought it was mean and heartless the way others treated her. (Ex. C-53) Respondent denied requesting or receiving this written statement. LaRossa was fired on November 23, 2013 for dereliction of duties. He disagreed with the reasons given for his termination. Notwithstanding LaRossa's termination, I found his testimony about how

Complainant was treated by some of the CNAs to be largely credible. I do not believe that he fabricated this testimony because this employment was terminated. I believe he observed Complainant being treated badly, witnessed her crying and upset and sometimes offered to help her because other CNAs would not. However, I do not credit his testimony that he reported this conduct previously.

25. On October 16, 2013, Brown also interviewed CNAs Mary Cassedy and Samson Fleurant, both of whom Complainant claimed had witnessed the name-calling. According to Brown's note of the interview, Cassedy reported that other employees complained about Complainant's performance, that she didn't answer patient's call lights and that she sometimes could not be found on the floor. She denied hearing anyone call Complainant names, but admitted Complainant came to her on several occasions crying and stating that people were calling her names and laughing at her. (Jt. Ex. 14) According to Brown, Fleurant also denied ever hearing anyone harassing or calling Complainant names, but stated that she was always accusing others of laughing at her or thinking she is ugly and that she falsely accused him. (Jt. Ex. 15) At the hearing, Fleurant denied speaking to Brown on October 16th and telling her that Complainant had accused him of laughing at her. I do not credit this denial. It is unlikely that Brown would have fabricated this assertion. Her account is also consistent with what a number of other employees said about Complainant's accusations. (See Jt. Exs. 15 & 2) Fleurant also claimed that he witnessed a nurse named Moses and the Administrator Roberts making fun of Complainant and that he reported this to Turco, Burke and Brown. (Fleurant testimony) I do not credit this assertion. Fleurant's testimony was very general, vague on time frames, and sometimes contradictory. He made a number of conclusory statements that were not backed up by specific information.

26. On October 18, 2013 Complainant met with her primary care physician regarding “emotional disturbances.” She reported that she had been bullied at work for three years by co-workers, who said she was crazy, that she looks like a monkey or a horse, that co-workers laugh at her and say they will get her fired and that she comes from another planet. She also reported that she had been crying a lot at work and suffering from headaches. Her physician recommended counseling/therapy and noted that a psychiatric evaluation of Complainant was warranted. (see Jt. Ex. 50) During an October 25, 2013 doctor’s visit, her physician noted that although Complainant appeared stressed and depressed about her work environment, her claims of co-worker bullying because she is ugly seemed a bit “far-fetched” and could be possibly due to “psychosis,” but that Complainant declined a psychiatric referral. (Id.)

27. Complainant offered into evidence 15 pages of handwritten notes that she made citing the names of twelve co-workers with whom she had unspecified negative interactions from October 2013 to January 2014. The notes included the exact dates and times, to the minute, of when co-workers purportedly laughed at her or made fun of her, and there are frequently multiple entries for the same co-worker at different times on the same day. (Ex. C-51) Complainant claims she gave these lists to Brown, but Brown testified she had never seen them before the public hearing and I credit Brown’s testimony. I do not find these lists to be reliable indicators of what transpired between Complainant and her co-workers and find that they are exaggerated, and that Complainant could not possibly have been recording the multitude infractions by the minute while simultaneously performing her duties of caring for patients in a very busy work environment.

28. In November 2013, Complainant initiated a conversation with Brown telling Brown she needed to leave work. Brown and Respondent's Administrator Peter Roberts met with her and Brown memorialized their discussion in a note. (Jt. Ex. 21) According to Brown's notation, Complainant told them that co-workers would not talk to her, and had been looking at her and laughing because they think she is ugly. When asked who the perpetrators were, Complainant responded that it was everyone and that she was not crazy. They asked what they could do to help Complainant, and she said they should fire her. (Jt. Ex. 21) They told Complainant they would follow up with Colleen Burke.

29. Despite Complainant's purported hand-written record of alleged co-worker misconduct occurring from October 2013 to January 2014, there appears to have been no further reported incidents to management until May of 2014, a period of some six months. On May 22, 2014, during a meeting with Burke and Brown, Complainant asked to be fired again. Burke made a notation of that meeting in which she reported Complainant again stating that her co-workers laughed at her and thought she was ugly. (Jt. Ex. 22) She also expressed concern that Burke and Brown had not addressed her previous complaints and informed them that she had an attorney. Burke told Complainant that she was a very good CNA and that they had no reason to fire her. See id. Complainant was offered the opportunity to leave work for the day, but she chose to continue working. (Burke testimony) Complainant also requested that her schedule be changed from Thursdays to Wednesdays so that she would not have to work with a certain nurse who she claimed made faces at her. Brown could not accommodate the schedule shift at that time but when an opening came up she offered to move Complainant to another unit but Complainant rejected the offer and chose to remain working on Unit 1. (Testimony of Burke and Brown)

30. On July 1, 2014, the event that precipitated Complainant's termination occurred. On that day, Complainant was scheduled to work the 3:00pm to 11:00 pm shift. Complainant typically worked that shift with four other CNAs. The resident assignment sheets were prepared weekly by the head CNA and the nurse who was the Unit Manager on the 7:00am to 3:00pm shift. The assignment sheet could be changed from time to time as residents came and went. Complainant testified that on the evening of July 1st she was assigned to patients who required extensive care, and that her co-worker, a CNA named Princess had an assignment list comprised of mostly minimum care residents, those who can perform more care for themselves. The LPN nurse supervisor for the shift, Laura Turco, testified that she believed the initial shift assignments were evenly distributed. Absent more information about the status of residents, this remains a disputed fact.

31. Complainant testified that she overheard Princess state that she did not intend to care for a particularly difficult patient assigned to her that evening. Complainant also witnessed Princess speaking to the nurse supervisor, Turco, but did not hear what was said. There was credible testimony that sometimes CNAs have refused to care for a patient and Turco testified she knew that CNAs sometimes arranged among themselves to switch patients if they did not want to care for a particular patient. However both Burke and Turco testified that they were not aware of CNA outright refusing a supervisor's order to care for a resident. Turco testified that she spent one-third of her time on Complainant's unit and took time getting to know the staff, the residents, and their families and that she had ample opportunities to observe staff interactions. Turco also testified that she was unaware of any interpersonal conflicts between Complainant and other employees and had no knowledge of Complainant's charges that other CNAs were making fun of her or refusing to work with her. This assertion is difficult to believe given what

seems to have been common knowledge of Complainant's allegations against her co-workers. Since Turco was the 3-11 Unit Manager on duty most nights Complainant worked, if Turco were not feigning her ignorance of Complainant's allegations, her lack of information causes me to question how well she knew the staff and what was happening on the unit. Turco also testified that she had been called to the Unit previously on occasion because Complainant had refused to perform a simple task related to patient care, but she observed Complainant generally to be a good CNA who was good with the patients. (Turco testimony) I find credible Turco's assertion that she was unaware of the discrimination complaint and had no knowledge that she had ever been the subject of Complainant's charges.

32. According to Turco, on July 1, 2014, after the 3-11 shift began, the patient in question requested that his assigned CNA, Princess, not provide care for him and that it was not unusual for this particular patient to refuse care from certain CNAs. Turco testified it is within a resident's rights to refuse treatment by a particular CNA and that Respondent cannot force a resident to be cared for by a CNA he does not want. Turco confirmed with the resident that he refused to be cared for by Princess and she asked Complainant to take him on as part of her assignment for the shift, because Complainant was assigned fewer residents than the other CNAs. (Turco testimony, Jt. Ex. 23) The resident in question had never refused care from Complainant and Complainant testified that she had a good rapport with him. However, Complainant testified that he was a difficult resident and heavy to lift and that it required two CNA's to lift him in and out of bed with a Hoyer lift. Complainant testified that her co-workers sometimes refused to assist her with this resident. I credit this testimony.

33. Complainant refused to accept the resident as part of her assignment and stated that she

would go home, because she did not believe it was fair to give her the resident. Turco then removed another patient from Complainant's list, but Complainant still refused to accept the new assignment. Turco conferred with the Director of Nursing Burke as to how to resolve the matter. Burke approved a re-assignment of the resident to Complainant and advised Turco to instruct Complainant to accept the assignment or leave. Complainant repeated that she was unwilling to accept the assignment and testified that she was ordered to go home. It is clear she was given the choice of accepting care of the resident or leaving the worksite. (Jt. Ex. 23)

34. Turco requested intervention from the charge nurse on Unit 3, who came to Unit 1 to discuss the matter with Complainant. Both repeatedly told Complainant that if she refused to accept the assignment she would have to leave the workplace. Complainant decided to leave, walked off her shift, and proceeded to the ground floor, where she had a discussion about what had happened with two other CNAs who were serving dinner to residents. Turco and the Unit 3 charge nurse found her there and advised her that she needed to leave the building. Complainant stated that she had punched out and was leaving. According to Turco, Complainant stated that no one at Respondent liked her and that she had an attorney. (Jt. Ex. 23) Complainant testified that she refused to care for the resident in question and went home because she believed her co-worker Princess had refused to care for the resident and Complainant felt she was unfairly targeted by Turco because two other CNAs could have been given the assignment. Given the credible testimony that other CNAs sometimes refused to help Complainant, she may have had legitimate reasons for refusing to accept a difficult resident on the evening in question, but it does not appear that she articulated them to Turco.

35. On July 2, 2014, Respondent's Administrator, Peter Roberts advised Laura Turco that Complainant was to be suspended pending an investigation into the events of the previous evening. Complainant was advised of her suspension in a phone call on July 2nd from RN Gina Ferragamo and Laura Turco and was informed that Colleen Brown would be in touch with her when the investigation was completed. (Jt. Exs. 27; 39)

36. Respondent's investigation consisted of Respondent collecting written statements from witnesses to the events of July 1st. (See Jt. Ex. 23-28) It does not appear that anyone conducting the investigation spoke to Complainant to obtain her story as to what occurred on the evening in question. No one asked her why she had refused to care for a patient, despite testimony from Respondent's supervisors that this was uncharacteristic of her. Burke testified that others may have spoken to Complainant during the course of the investigation. According to Brown, Burke conducted the investigation and Brown was not involved. Neither contacted the Complainant. Complainant did submit a written statement concerning the incident to her attorney on July 2, 2014, but there is no evidence that this statement was provided to Respondent. (Ex. C-52)

37. Complainant was terminated for insubordination, "an intentional failure to or refusal to carry out a work assignment when ordered to do so." This was a violation of Berkshire Healthcare Systems, Inc. Standards on Conduct (Jt. Ex. 31, 32 38) The minimum discipline for such a violation was suspension or termination. (Jt. Ex. 32) Both Burke and Brown testified that the corporate office of Respondent and corporate HR would have been involved in the decision to terminate. Brown testified that the decision was made by Roberts and executive management outside the facility. Turco had no involvement in the decision to terminate Complainant. Complainant was advised of her termination on July 7, 2014 in a telephone call from

Brown, Burke, and Roberts. Upon being informed of the decision, she was told by Brown she could submit a rebuttal in writing, but this was after the decision had been made. (Testimony of Burke, Brown and Complainant, Jt. Ex. 31) Burke testified that she recalled another CNA who was terminated for refusing to care for a patient, and Respondent submitted evidence that between 2011 and 2016, nine employees of varying ethnicity and race, in addition to Complainant, were terminated for insubordination. (Jt. Ex. 33) Complainant filed a second complaint at MCAD in September 2014 alleging that her termination was retaliation for complaining about discrimination in the workplace.

38. Complainant testified that she suffered from emotional distress during the last two or so years of her employment and after her termination. Her husband also testified about the distress she experienced. He stated that she would come home from work crying, sad, and depressed and stated that no one wanted to work with her or to assist her. They both testified that Complainant stopped socializing and going to church. They also claimed that she underwent cosmetic surgery on her nose to improve her self-esteem because of the harassment by co-workers, an assertion that I find somewhat dubious. Mr. Cesar testified that their relationship and family life deteriorated. Complainant testified that she did not have the mental capacity to work for a few months, but that as soon as she felt mentally capable, she returned to work.

39. Since her termination, Complainant has not applied to any nursing homes for a full-time position as a CNA. She testified that there were numerous opportunities for her to work as a CNA in the area and admitted that nursing homes were always looking for CNAs, so it would not have been difficult to find comparable work. Complainant continued to work as a per diem CNA for another employer, but stated that because she worked per diem, she was called only when there were available hours. Although she did seek full-time work after four to five months, she

testified that she chose to work in a lower paid, lower stress position providing in-home care. Complainant lost wages from 2014 through 2015 which may have been largely due to her choosing not to seek a job as an institutional CNA. She also testified that she was unable to work and stayed at home for four to five months because of her mental state and inability to function. In 2014 she earned \$18,092 in the six months she worked for Respondent. Complainant appears to have mitigated her losses in 2016 and 2017. (Jt. Exs. 44-48)

III. CONCLUSIONS OF LAW

A. Discrimination/Hostile Work Environment

General Laws chapter 151B s. 4(1) makes it an unlawful practice to discriminate in employment based upon race and national origin. Discrimination in employment includes harassment that results in a hostile work environment based on one's race and national origin. Beldo v. University of Massachusetts, 20 MDLR 105 (1998); Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994).

In order to prevail on her claim of harassment Complainant must establish that she is (1) a member of a protected class based on her race and national origin; (2) that she was the target of speech or conduct based on membership in those classes; (3) that the speech or conduct was sufficiently pervasive or severe to alter the terms and conditions of her employment and create an abusive work environment, and (4) that the harassment was carried out by an employee with a supervisory relationship or Respondent knew or should have known of the harassment and failed to take prompt remedial action. See College Town Div. of Interco v. MCAD, 400 Mass. 156, 162 (1987)

Complainant is a black female of Haitian national origin. She claims that she was the target of harassing speech and conduct based on her race and national origin, i.e. co-workers and some supervisors called her ugly, “shit face,” and “monkey face,” laughed at her, and refused to assist her. She further alleges that the conduct and speech occurred with sufficient frequency as to be very upsetting to her and to create a hostile and abusive work environment. Finally, she asserts that some of the perpetrators were supervisors, including the Respondent’s administrator, and that she made a complaint to human resources about the conduct and management failed to remedy the harassment. At the initial stage of proof, Complainant has established a prima facie case of discrimination based on harassment.

Respondent acknowledges that Complainant came forward with a complaint about her treatment in the workplace for the first time in December of 2012. Respondent’s Human Resources director asked Complainant to put her concerns in writing and to identify those employees who were perpetrating the harassment. Complainant provided a list with the names of fifteen people of varying races and ethnicities who were allegedly harassing and bullying her, two of whom Respondent was unable to identify.² While Brown asserted that she did not understand Complainant’s complaint to be about race, I did not find this assertion to be credible given the nature of the insults Complainant was alleging.

Nonetheless, given the information that Brown was provided, she immediately conducted interviews with all the parties she could identify questioning them about whether they had engaged in any harassing or inappropriate behavior towards Complainant, or had witnessed or heard others doing so. Given the direct nature of Brown’s inquiry, it is not surprising that all those interviewed denied engaging in any such conduct. However, some of those interviewed

² Complainant alleges that she subsequently gave Brown a second list with the names of more white perpetrators, but Brown denied ever seeing such list and I credit Brown’s testimony in this regard.

indicated that Complainant had a problem and that she often falsely accused them of making fun of her or calling her ugly when they were merely smiling at her or saying hello. From the information received, Brown concluded that Complainant's charges could not be substantiated. Brown testified that she followed up with Complainant later that month and Complainant assured her that things were better. Complainant denied that Brown followed-up with her or that the situation improved, but the fact that she did not lodge another complaint until May of 2013 suggests that the situation had improved. In the interim, Respondent became aware of a CNA referring to an unknown employee as ugly, and that CNA received a corrective action notice and a verbal warning in late April of 2013. The fact that the corrective action notice references up to five reported incidents of this CNA calling other employees names or insulting them in a disrespectful manner coupled with the testimony of LaRossa that he witnessed similar behavior and communicated this to Respondent, demonstrates that Respondent was on notice of at least one CNA who was engaging in the type of behavior Complainant was raising. Although it is somewhat disconcerting that only three days after issuing the verbal warning to this CNA, Brown asked Complainant to sign a statement that things were better and the problems had ceased, Complainant signed the statement, and Respondent relied on the representation.

In May 2013, Complainant made two more similar complaints to Brown alleging that a black/African housekeeper and other unidentified co-workers looked at her funny and laughed at her because she was ugly. The housekeeper who was the subject of one charge came to Brown independently to indicate that Complainant had "freaked out" on him for doing nothing. These complaints caused Brown and Burke to have some concerns about Complainant's self-image and they encouraged her to follow-up with her physician to discuss this issue. Burke also convened a Unit 1 meeting to discuss mutual respect and Complainant's concerns. Burke testified that the

meeting went well and co-workers reassured Complainant that she was liked and not ugly. After that meeting, no further complaints ensued for approximately six months. It is not clear if any further incident precipitated Complainant's filing an MCAD complaint in October 2103. This complaint named fourteen people as harassers of Complainant, eight of whom were not named in the 2012 complaint to Human Resources, and two of whom could not be identified by Respondent as employees. The complaint states that the harassment began in 2010, some two years before Complainant first went to Human Resources with her concerns.

Sometime in the week or so after filing her MCAD complaint, Complainant accused a nurse supervisor of always making faces at her and told the unit manager that she did not want to continue working in "hell with evil people." She complained that no one would talk to her, they all laughed at her, and thought she was ugly. Complainant asked to leave the workplace and was permitted to do so. The unit manager later heard from Complainant's husband that the CNAs were driving her crazy and that she was suicidal, and the manager encouraged Complainant's husband to seek immediate medical assistance. Respondent investigated Complainant's allegations that co-workers were laughing at her, but was unable to corroborate the allegations. In November of 2013, Complainant repeated similar allegations to Brown and Roberts that "everyone" was laughing and looking at her because she was ugly and that they should fire her. Complainant did not report any further incidents from November 2013 to May of 2014 when she again made similar allegations of co-worker bullying and harassment and asked to be fired. Complainant did not testify about any further issues with co-workers prior to the events of July 1, 2014 that precipitated her termination.

I conclude that Respondent's response to Complainant's repeated allegations was reasonable given the information Complainant provided and its numerous prompt attempts to

substantiate the alleged incidents of co-worker misconduct. Respondent attempted to determine if the allegations had any merit and, on a number of occasions, questioned all the individuals Complainant named as perpetrators. Although Respondent's investigation was superficial and should have encompassed more than merely inquiring if employees had participated in or witnessed inappropriate conduct, its attempts to uncover any abusive behavior were responsive and prompt. Respondent also convened a unit meeting to discuss mutual respect and treating co-workers professionally during which Complainant's co-workers reached out to her and reassured her she was liked and beautiful. Brown and Burke were sympathetic to Complainant's charges, appeared to treat her claims seriously and did not exhibit any hostility toward Complainant. As time passed, Complainant's allegations with respect to harassment expanded to include more and more perpetrators and included allegations that "everyone" was laughing at her. Complainant testified that, at one point, everyone on her unit was calling her "monkey face," every time they saw her. These charges were sufficiently exaggerated and wide-ranging as to be less worthy of credence. While Complainant's MCAD complaint asserted the harassment began in 2010, her first complaint to human resources was not made until December 2012. That Complainant would have delayed two years in reporting what she characterized as extreme bullying also tends to detract from the veracity of her allegations.

There is some credible evidence that Complainant experienced occasional negative interactions with some fellow employees and that she genuinely believed some co-workers did not like her. Her perception that everyone was against her may have been clouded by the unkind acts of a few employees. The evidence suggests that there was at least one co-worker who was disciplined for name-calling and disrespecting co-workers. While Respondent might have taken harsher action against this employee, I decline to conclude that the discipline exacted was so

inappropriate as to constitute furthering a hostile work environment against Complainant or aiding and abetting discrimination.³

That there were certain cliques of employees that Complainant did not belong to, is undeniable; however, a number of individuals she identified as perpetrators were also black, from Haiti and other countries, and some claimed that Complainant's repeated false accusations made them uncomfortable around her. I find it likely that Complainant's allegations were based on a kernel of truth, but over time, her complaints became so exaggerated as to seem incredulous. It is not unreasonable to conclude that Brown and Burke came to harbor some legitimate concerns about Complainant's mental health.⁴ Complainant seemed to have little appreciation of how exaggerated her claims became. Given the nature of her complaints, Respondent was challenged to arrive at any firm conclusion about the existence of continuous and pervasive harassment and to implement a remedy. Respondent was unable to substantiate the allegations of co-worker harassment which were wide-ranging and sometimes devoid of specific content. Finally, there does not seem to be any reliable evidence to tie Complainant's claims of harassment to her national origin. In the end Complainant did not demonstrate that Respondent is liable for perpetrating discrimination or for failing to remedy a hostile work environment based on her race and national origin.

B. Retaliation/Termination

Complainant alleges that Respondent's termination of her employment in July of 2014 was in retaliation for her having filed complaints of discrimination.

³ Had Complainant's charges been confined to Luz rather than a plethora of other individuals, including, at times, all her co-workers, I might have reached a different conclusion. In fact, Complainant's charges did not particularly single out Luz for any specific incident.

⁴ There was no suggestion that Complainant's performance in the care of residents deteriorated for reasons related to her mental health.

Chapter 151B, sec. 4 (4) makes it an unlawful practice to retaliate against an individual who opposes practices prohibited by 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 cases where there is no direct evidence of a retaliation, the Commission utilizes 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). Complainant must first 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).

Protected activity includes both internal complaints of discrimination or unlawful harassment as well as formal charges of discrimination. Complainant must demonstrate that she harbored a reasonable and good faith belief that unlawful discrimination has occurred. *See* Guazzaloca v. C.F. Motorfreight, 25 MDLR 200 (2003) *citing* Trent v. Valley Electric Assn., Inc., 41 F.3d 524, 526 (9th Cir. 1994); Santiago v. Trel Lloyd and Lupi’s Enterprises, Inc., 66 F. Supp. 2d 282 (1999); Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208 (2000).

The evidence suggests that Complainant had a good faith belief that she was being subjected to harassment based on her race and national origin. She made numerous complaints

to Human Resources and supervisors about this issue, and however exaggerated such complaints may have been, Respondent was on notice of the fact that Complainant perceived there was a problem. Respondent asserts that Complainant did not engage in protected activity because she never indicated explicitly that her Complaints of harassment were related to her race and national origin, and never used the word discrimination to describe what was occurring.

As to Complainant's national origin, I am inclined to agree with the assertion that Respondent cannot be deemed to have been on notice that Complainant was raising the issue of discrimination based on her national origin. It's not entirely clear that Respondent inquired as to why Complainant believed she was subjected to hostility from co-workers, but she frequently stated that it was because co-workers thought she was ugly. As to Complainant's race, her allegations that she was subjected to slurs such as "monkey face," "shit face," and "horse face" are sufficient to call into question the issue of her race. I conclude that Respondent can reasonably be deemed to have been on notice that such comments related to her race. I did not find Respondent's assertions to the contrary to be credible. In addition to filing internal complaints of discrimination, in October 2013, Complainant filed a formal complaint of discrimination with this Commission. I thus conclude that Complainant engaged in protected activity and that Respondent was on notice of her complaint, and that it related to her race.

Complainant's termination for refusing to accept an assignment to a particularly difficult patient was an adverse employment action. The final hurdle to establish a prima facie case is for Complainant to demonstrate that there is a causal connection between her complaints and her termination. The fact that Complainant filed a formal complaint of discrimination some eight months earlier and continued to assert allegations of bullying and harassment up to a few months prior to her termination is sufficient to establish causation for purposes of a prima facie case.

Once Complainant has established a prima facie case, at the second stage of proof, Respondent must articulate a legitimate non-discriminatory reason for its action supported by some credible evidence. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). Respondent asserts that the refusal by a CNA to care for a resident assigned to them constitutes insubordination and is grounds for dismissal pursuant to Respondent's Standards of Conduct. Respondent also claims that because the refusal involved patient care and was a dereliction of duty, it was a more serious offense. There is no dispute that Complainant refused the assignment of a resident to her care on the evening of July 1, 2014 and that she was given the option to accept the assignment or leave the workplace. Complainant asserts that she had legitimate reasons for questioning and declining the assignment and alleges she was told to go home. However, it is clear from the testimony and statements of the supervisors present that Complainant was given a choice and she chose to leave. Respondent states that after an investigation, the decision was made to terminate Complainant's employment. The articulated reason for the termination is sufficient to fulfill Respondents' evidentiary burden of production at stage two of the analysis.

At stage three, the burden of persuasion remains with Complainant to convince the fact-finder, by a preponderance of the evidence, that the articulated justifications are not the real reasons but a pretext for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001); Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655, 666 (2000). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is covering up a retaliatory rationale which is a motivating cause of the

adverse employment action. Id. For the following reasons, I conclude that Complainant has met her burden of proof that the reason given for her termination was a pretext for retaliation for her having filed numerous complaints of a hostile work environment.

To begin with, Complainant was a long-term employee of Respondent with a history of excellent work as a CNA. She related very well to patients and their families and delivered good care. A number of Respondent's witnesses testified to the fact that Complainant was particularly helpful with difficult residents who sometimes refused to be cared for by other CNAs. Her supervisors respected her work. There was also no evidence that Complainant's performance, particularly with respect to caring for patients, had deteriorated as a result of her complaints of harassment. In the years subsequent to her termination, Complainant continued to be successfully employed as a CNA and home health aide.

Respondent was on notice since at least December 2012 that Complainant was unhappy and was experiencing some difficulties with fellow employees that she attributed to bullying and harassment. It was not a stretch to conclude that her complaints were, at least in part, about her race. Complainant continued to articulate that she was not valued by her co-workers and suffered stress for what she perceived as workplace bullying and discrimination. Her frustration, regardless of whether it was exaggerated or justified, caused her to file an MCAD complaint in October of 2013 alleging discrimination based on race and national origin.

Respondent argues that Complainant's termination in July of 2014, some eight months later, was too far removed in time from the filing of her complaint to be viewed as retaliation. While proximity in time may be a factor in establishing a causal connection, Respondent points out that "the mere fact that one event followed another is not sufficient to make out a causal link." See MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996) *citing* Prader v.

Leading Edge Prods. Inc., 39 Mass. App. Ct. 616, 617 (1996). In this case, I find it significant that Complainant continued to raise the issue of co-worker and supervisor harassment after filing her MCAD complaint, and as late as May 2014, she requested a schedule change which Respondent was unable to accommodate.

Respondent asserts that it conducted an investigation following Complainant's refusal to accept an assignment and resulting suspension. The investigation consisted of gathering written statements from persons who were present on the evening in question who were involved in, or observed, the incident. Complainant was not contacted or interviewed in person by Burke or Brown to obtain her side of the story. She was not asked to explain her behavior, nor was she asked to give a written statement during the investigation. Given the recent history of repeated complaints of a hostile work environment, I conclude that Respondent had some obligation prior to termination, to engage Complainant in a discussion about her reasons for refusing an assignment, something she had never done before. This did not occur. There was a tendency of the part of Respondent's managers to deflect responsibility for the investigation. According to Brown, she was not involved, and Burke conducted the investigation. Burke testified that others may have spoken to Complainant, but she did not. It is clear to me that no one spoke to Complainant.

Complainant was informed of her termination in a telephone conversation with Burke, Brown and Roberts. During that phone conversation, she was told she could submit a statement but by then, her termination was a fait accompli. The record is somewhat unclear as to who actually made the decision to terminate Complainant's employment. Brown and Burke both testified that Respondent's corporate office and corporate human resources would have been involved in the decision to terminate. Brown testified that the decision was made by Roberts,

who is deceased, and executive management outside the facility. I conclude from their testimony that the decision was likely made by individuals in executive management outside the facility, in concert with Roberts, and that these individuals were aware of Complainant's discrimination complaints.

Despite the claim that Complainant's refusal to accept an assignment was an act of "insubordination," there was credible testimony from a number of employees that CNA's were known to decline assignments without suffering the consequence of termination or other disciplinary repercussion. It was also a common practice for CNA's to switch assignments. Given that Complainant had never declined an assignment previously, had no history of serious discipline or performance issues, and claims to have had a rational reason for refusing the assignment, a less harsh punishment, including suspension, would have been available to Respondent. Given these facts, her termination by telephone with no discussion and no opportunity for her to provide an explanation, was particularly draconian. I conclude that Respondent's decision not to impose a lesser sanction was because it was anxious to rid itself of an employee whose discrimination complaints had become a vexing and costly annoyance that it was no longer willing to tolerate.⁵

In short, Complainant was a long term employee with a solid work history. Despite her purported difficulties with fellow employees, Complainant was able to continue performing her duties. Complainant has persuaded me that her repeated complaints caused Respondent's management consternation and frustration. They were difficult to substantiate and address, and required defending. Her ultimate refusal to accept an assignment provided a convenient reason to terminate her employment and to "rid the workplace of someone who complains of unlawful

⁵ To the extent Respondent may have been motivated by concerns about Complainant's mental health, this was not articulated as a reason for the termination.

practices.” See, Ruffino, supra. I conclude that but for her complaints, her refusal to accept an assignment would not have resulted in termination and any punishment for her infraction would have been less draconian. Complainant has met her burden of proof by persuading me that Respondents’ alleged reasons for terminating her employment are a pretext for unlawful retaliation.

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. See Stonehill College v. MCAD, 441 Mass 549 (2004).

With respect to lost wages, I have concluded that Complainant did not sufficiently mitigate her damages by seeking work as a CNA. Complainant had lost income for the years 2014 and 2015, although it is not clear if she continued to work her second job as a CNA, as she had in prior years, in addition to work she performed as a home health aide. There was evidence that comparable work as a CNA in her area would have been available had Complainant sought such work, but Complainant chose instead to work in a less lucrative and less stressful environment as a home health aide. She also claimed that she did not work for a period of four to five months because she was too distressed and I credit this testimony. Given these circumstances, I conclude that she is entitled to back pay for a brief period of time in 2014 when she was sufficiently distressed about her termination as to be unable to seek full time work. Since she earned approximately \$18,000 from Respondent in 2014 for six months of work, I find that she is entitled to lost wages in the amount of \$12,000 for four months she was unable to work full time due to her emotional distress. Once Complainant was able to work full-time, she

had an obligation to mitigate her damages by seeking work that paid wages comparable to what she was earning at Respondent.

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in awarding such damages are the nature and character of the alleged harm, the severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. Id. at 576. Such awards must rest on substantial evidence that the distress is causally connected to the act of discrimination or retaliation. See DeRoche v. MCAD, 447 Mass 1, 8 (2006) It is apparent that Complainant suffered from some mental health problems that her physician characterized as “possible psychosis,” in conjunction with his recommending a psychiatric evaluation, which she declined. It is difficult to determine to what extent her mental distress was related to, or caused by, events that actually occurred in the workplace, but it is clear that the distress she experienced while employed was not proportionate to any harm she was subjected to at work. Notwithstanding this conclusion, I find that Complainant did suffer emotional duress of short-term duration as a result of her termination which I have determined was retaliatory. To the extent some of the distress she claims pre-existed her termination and is of undiagnosed origin, I am constrained to grant a diminished award of damages that is commensurate to the harm caused by her termination. Much of the testimony about her distress surrounds issues of racial harassment she alleges occurred in the workplace for which I have determined Respondent bears no liability. Given these circumstances I conclude that Complainant is entitled to a *de minimus* award of damages in the amount of \$15,000 for the distress caused by her termination.

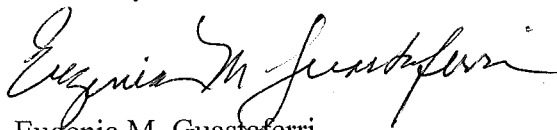
V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered:

- 1) To cease and desist from any acts of retaliation directed at employees who engage in protected activity;
- 2) To pay to Complainant, Yvrose Cesar, the sum of \$12,000 in damages for back pay with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue.
- 3) To pay to Complainant, Yvrose Cesar, the sum of \$15,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. 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. Pursuant to § 5 of G.L. c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 22nd day of June, 2018.


Eugenia M. Guastaferrri
Hearing Officer