

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and  
MARILDA COLON  
Complainants

v.

Docket NO. 09 BEM 03013

EAST BOSTON  
SAVINGS BANK,  
Respondent

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Appearances: Libby Fulgione, Esq. for Complainants  
Thomas A. Mullen, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 20, 2009, Marilda Colon (“Complainant”) filed charges of employment discrimination with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that her termination by Respondent was due to discrimination based on her Puerto Rican national origin. A probable cause finding was issued on May 22, 2012. The case was certified to public hearing on May 15, 2013.

A public hearing was held on January 6, 7, 8, and 27, 2014. The parties submitted thirty-seven (37) joint exhibits. Complainant submitted three additional exhibits and Respondent submitted one (1) additional exhibit.

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, who is of Puerto Rican national origin, began working at East Boston Saving Bank on October 23, 2000 as a teller at its Meridian branch office in East Boston, MA.
2. Respondent East Boston Savings Bank has multiple locations in Massachusetts. At the branch level, management teams consist of a branch manager, an assistant branch manager, and a teller-supervisor. Transcript II at 111-112.
3. After working for a few months at the Meridian branch office, Complainant was promoted to a sales and service representative. As a sales and service representative, Complainant opened customer accounts and helped customers with problems. She initially worked at the Meridian branch under branch manager Janice Reardon and assistant branch manager Rosa Dominguez.
4. Complainant's first annual performance review covered the period from October of 2000 to October of 2001. She had one absence during that year and no days tardy. Her second annual review (2001-2002) lists her as absent once and no days tardy. She is described as dependable, competent, and committed to her job. Her third annual review (2002-2003) lists her as absent three days and no days tardy. She is described as a great team player and as surpassing her annual sales goals. Transcript I at 63-64. Her fourth annual review (2003-2004) indicates that Complainant was absent five days due to the birth of her child. Transcript I at 65. It lists the following development goals: 1) improving sales and 2) attention to detail. Transcript I at 73. Complainant's 2005-2006 annual review lists Complainant as absent four days and no days tardy. Transcript I at 75.

5. Complainant testified that she received two achievement awards for excellent service at two different branch offices. Transcript III at 185.
6. Complainant testified that in order to take vacation days, employees have to fill out a printed form in advance, give the form to the branch manager, and have the vacation request approved. Transcript I at 69. She stated that personal days could be taken for unanticipated matters without pre-approval. Transcript I at 70.
7. In 2006, Complainant applied for a teller-supervisor position. Teller-supervisors have day-to-day responsibility for managing the teller line, scheduling tellers, making override decisions, distributing cash to tellers, computing daily balances, and supervising office personnel in the absence of branch managers and assistant branch managers. Transcript IV at 11.
8. In 2006, Complainant was promoted to teller-supervisor at the Everett branch office where she worked under branch manager Kelly McBride from 2006 to 2008 and assistant branch manager Andrea Torres from 2006 through May of 2009. Torres testified that Complainant was very dedicated, hard-working, honest, and reliable. Transcript III at 8, 16.
9. In March of 2007, after Complainant had been a teller-supervisor at the Everett branch for approximately six months, McBride gave her a six-month performance review. Transcript I at 76. Complainant had no absences or tardy arrivals for the period being reviewed and received an overall performance rating of 3.6 out of 5.0.
10. In November of 2007, Complainant received an end-of-the-year performance rating of 3.68 as a teller-supervisor. Transcript I at 80. McBride noted that Complainant rarely made errors, took responsibility for those she made, and corrected errors before

they caused a problem. Id. Complainant was only absent once in 2007 and was never tardy. Transcript I at 81. She was described by McBride as “dedicated,” a “team player,” and great at cross-training staff. Id.

11. McBride drafted Complainant’s 2008-2009 evaluation. Complainant was absent zero days and tardy zero days. She received a rating of 4.03. McBride described Complainant as a person who “always comes to the rescue when the branch needs coverage,” takes the initiative to work wherever needed, opens and closes the branch daily, is a “team player,” supports staff and managers in any way she can, and is the first person to volunteer for community events. Transcript I at 86-88. McBride described Complainant as “on the way to becoming a fantastic supervisor.” Transcript I at 87, 91. According to McBride, Complainant fostered staff development, took the initiative to work wherever needed, and could be trusted to make the “right decision” when McBride was absent. Transcript IV at 59, 152. McBride also commented that Complainant had improved her leadership skills. Transcript IV at 88.
12. Between 2000 and 2008, Complainant never received any discipline or warnings. Transcript I at 88-89. She always received scores of 95 or better from “secret shoppers” (i.e., bank employees posing as customers). Transcript I at 98.
13. Respondent’s Senior Vice President of Consumer and Business Banking Keith Armstrong testified that prior to a supervisory change in December of 2008, Complainant’s supervisors had always considered her to be the most responsible person in the bank. Transcript IV at 51.

14. In December of 2008, Joseph Todisco was hired as branch manager of the Everett branch after McBride resigned in order to join a family business. Transcript IV at 11-12. Andrea Torres had applied for the branch manager position but was not given the promotion. Transcript III at 10-11. Torres testified that at the first staff meeting conducted by Todisco, he informed staff that he was hired to “clean house.” Transcript III at 13. Branch employee Maria Ramos also recalls Todisco saying that he was going to clean house whereas Complainant and Keith Armstrong testified that Todisco talked about cleaning house at a prior bank where he had worked. Transcript III at 98; IV at 13. I credit Todisco’s statement as relayed by Torres and Ramos.
15. Over the course of her employment with Respondent, Complainant received between five and ten personal days per year as well as vacation days. By April of 2009, Complainant had accumulated 33.5 personal days in addition to her yearly allotment of vacation time. Transcript I at 67. In February of 2009, Complainant submitted a request and received approval to take vacation beginning on Monday, April 20, 2009 through Monday, April 27, 2009. Transcript I at 72. Complainant would have preferred to take an additional vacation day but was not permitted to do so because another employee, Liz Lumbana, was already scheduled to take vacation on April 28, 2009. The only other teller scheduled to work on April 28, 2009 was part-time teller Tyler Stuart. Transcript II at 72-75.
16. Complainant spent her vacation in Florida. She was able to fly standby because her father worked for an airline. Complainant planned to fly back to Boston on the evening of Monday, April 27, 2009 in order to return to work on Tuesday, April 28, 2009, but she was not able to secure a standby seat. Transcript II at 6, 11. According

to Complainant, she called assistant branch manager Andrea Torres and Joseph Todisco at 5:30 a.m. on the morning of Tuesday, April 28<sup>th</sup> to tell them that she wouldn't be at the office that day for her 7:15 a.m. shift. Transcript I at 102. Office procedures require employees to report unexpected absences at least thirty minutes prior to the start of their shift. Transcript III at 28. Complainant had once before missed a standby flight and called assistant branch manager Andrea Torres to report her absence. Transcript III at 30. Torres testified that no warning had been issued in regard to the prior absence because Complainant was always reliable and never late. Transcript III at 31.

17. Branch manager Todisco testified that he was upset with Complainant's absence on April 28, 2009 because he had explained before she left on vacation that she had to be back at work on April 28, 2009. Todisco stated that as a result of Complainant's failure to appear at work, he had to miss a manager's meeting in Peabody on the morning of April 28<sup>th</sup> and had to "shift some bodies around" in order to ensure coverage of the teller line during lunch. Transcript II at 76.
18. When Complainant arrived at the office on April 29, 2009, she received written documentation of a verbal warning from Todisco, who made the decision to impose discipline jointly with branch administrator Carol Simpson. Transcript I at 104, II at 77, 170; Joint Exhibit 13. The verbal warning was filled in by Todisco, including a section entitled "Employee's Reactions." Todisco wrote that Complainant would make sure that the issue did not happen again by scheduling an additional day off for travel. Transcript II at 130. Todisco asked Complainant to sign the written warning and stated that if she didn't, she could be fired. Id. at 106, 184.

19. Complainant refused to sign the warning even though it states that her signature merely signaled receipt of the document, not acquiescence to its terms. Complainant believed that she had followed bank procedures by calling in before her shift began and by using an accumulated personal day to cover her unexpected absence. Id. at 107, 115, 183, 190. Complainant testified that Todisco wouldn't listen to her when she tried to speak to him and that he addressed to her in an intimidating and sarcastic manner. Transcript I at 117, 187, 193-194.
20. Todisco testified that he tried to explain to Complainant that her absences needed to be pre-approved even though she had vacation/personal time available and that her signature on the counseling form didn't signify that she agreed with it. Transcript II at 80-82.
21. After their meeting, Complainant sent e-mails protesting her warning to: 1) Keith Armstrong; 2) "Ms. Rosen" in human resources, and 3) human resource director Eric Heath. Transcript II at 41-43; Joint Exhibit 32.
22. Respondent's progressive development and discipline policy set forth in its employee handbook does not state that employees are required to sign disciplinary warnings. Joint Exhibit 19; Transcript IV at 62.
23. One of Complainant's co-workers at the Everett branch was part-time teller Tyler Stuart (a Caucasian male). Stuart received a verbal warning for taking an unapproved day off on August 13, 2008 (which he did not sign), a verbal warning on April 21, 2009 for being repeatedly late to work on numerous occasions (which he did sign), and a written warning for being late to work on May 26, 2009 (which he did sign). Respondent's Exhibit 1; Transcript IV at 131-135. During the summer of 2009,

Stuart came to work late on multiple occasions, was disrespectful to Complainant, took excessive breaks, and used e-mail for personal matters. Transcript I at 129-131; II at 54, 196. Complainant and assistant branch manager Andrea Torres e-mailed Todisco to express their concerns about Stuart. Transcript II at 52. Todisco called Stuart in July of 2009 to tell him not to come back to work but during their telephone conversation, Stuart quit before he could be fired. Transcript II at 38-39, 168; IV at 135.

24. During the summer of 2009, Andrea Torres was transferred to Respondent's Central Square branch in East Boston, and Jennifer Russo (a Caucasian female) who was assistant branch manager in Central Square was transferred to the Everett branch. Transcript II at 56, 71. The Central Square East Boston office is a much busier office than the Everett branch office. Transcript II at 136. According to Todisco, the transfer decision was made by senior management based on Torres being a "better fit" at the Central Square office than Russo because of the large Hispanic population in Central Square area and the fact that Russo did not speak Spanish. Transcript II at 71; IV at 18-20. After Torres transferred to the Central Square East Boston office, she worked under branch manager Janice Woodman. Transcript IV at 22. Woodman subsequently applied for promotion to regional manager which she did not receive because of her perceived weakness in developing the skills of her two assistant managers -- Andrea Torres and Rosa Dominguez. Transcript IV at 23.
25. Complainant testified that Russo, as Everett assistant branch manager, tended to remain inside her private office whereas Torres had done "everything" to support staff and provide customer service. Transcript I at 132. Complainant testified that



she tried to transfer out of the Everett branch once Torres left. Transcript I at 133.

Complainant spoke to human resource employee Anne Lyon about a possible transfer to the Lynn branch office where she believed that a teller-supervisor was going to become available. Transcript I at 161.

26. At an upper-level managers' meeting in mid-August, 2009, the issue of non-passbook withdrawals from passbook savings accounts was addressed. Transcript II at 147-148. Prior to that meeting, overrides for non-passbook withdrawals were made by teller-supervisors without branch or assistant branch manager approval; after the managers' meeting, approval of the branch or assistant branch manager was required and staffs were no longer allowed to process rebates of overdraft fees for each other. Transcript II at 97, 148.
27. Todisco informed his branch office of the new policies at an August 12, 2009 staff meeting and warned employees that non-compliance could result in disciplinary action. Joint Exhibit 15; Transcript II at 97.
28. On August 31, 2009, Todisco e-mailed Complainant a written warning arising out of events which took place several months earlier, on June 16, 2009, but which came to his attention in August of 2009. At the time of the June 16<sup>th</sup> events, Complainant was alone in the Everett branch office except for "floating" teller Nicole Mustacchio. Transcript I at 135-137; IV at 82. Nicole Mustacchio requested that Complainant permit her an "override" to make a withdrawal of \$60.00 from a passbook savings account even though Mustacchio did not produce the account passbook. Transcript I at 138. A withdrawal from a passbook saving account normally requires a passbook to be presented unless an override is granted. Complainant testified that she

authorized the override because she thought, albeit mistakenly, that the computer screen listed Nicole as the account holder. In fact, the account was held by Nicole's mother Lisa as custodian for the benefit of Nicole's sister, Gina. Transcript II at 17-18; II at 85-86; Joint Exhibit 9.

29. Prior to sending notice of Complainant's written warning to the bank's human resources department, Todisco asked Complainant if she wanted to add anything to the employee's comment section. Joint Exhibit 24. Complainant declined to add any commentary and refused to sign the written warning because: 1) she thought that Todisco was just looking for an excuse to fire her; 2) she had already appealed to human resource director Eric Heath and vice president Keith Armstrong; and 3) she believed that two other employees -- Roxanna Lemus and Jillian DeMars -- had also authorized overrides for Nicole Mustacchio in the absence of passbooks and were not disciplined. Transcript I at 138-139, 142, 197, 205-206; Transcript II at 20, 22-23 23.
30. According to vice president Keith Armstrong, Lemus and DeMars permitted Nicole Mustacchio to make withdrawals from a different account on which she was the account beneficiary and for which she had presented a passbook. Transcript IV at 29, 68, 73<sup>1</sup>; Joint Exhibit 9 & 10. Armstrong explained that Lemus and DeMars did not receive the same discipline as Complainant because, at the time that they allowed the withdrawals, the bank's computer screens failed to make clear that Nicole Mustacchio was the account beneficiary (not the account holder) and was not authorized to

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<sup>1</sup> Lemus and DeMars permitted twelve withdrawals in total, amounting to \$594.00. Volume IV at 73 incorrectly states that the amount is \$494.00.

withdraw funds. Transcript IV at 30, 68.<sup>2</sup> Lemus, who is Hispanic, was subsequently promoted to assistant branch manager in Lynn. Transcript IV at 31.

31. Nicole Mustacchio was terminated from the branch office where she worked after bank vice president Armstrong learned that she had, on multiple occasions, withdrawn money from custodial accounts in contravention to bank rules. *Id.* at 90; IV at 30.
32. In the fall of 2009, four overdraft fees of \$30 each had accumulated on a joint account that Complainant held with her mother. On or around September 21, 2009, Complainant asked Everett assistant branch manager Jennifer Russo for a rebate of the overdraft fees. Transcript II at 26. Russo declined to grant the rebate and advised Complainant to speak to Everett branch manager Todisco. Rather than confer with Todisco, Complainant spoke to her former assistant branch manager, Andrea Torres, who was then assistant branch manager at the Central Square branch office in East Boston. Transcript I at 147; II at 26. Torres advised Complainant to speak with Todisco, but Complainant declined to pursue the matter with him. Transcript I at 148. According to Complainant, she told her mother that she couldn't do anything more. Transcript I at 148. Complainant's mother subsequently called Torres and obtained the rebates. Transcript I at 149; II at 30-31; III at 43. Complainant's mother knew Torres from Torres's former assignment at the Everett branch. Transcript II at 150. Torres testified that she felt comfortable processing the transaction because she

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<sup>2</sup> Armstrong did not explain why Lemus and DeMars were unable to determine from the passbook itself that Nicole Mustacchio was not authorized to withdraw funds. Unlike Lemus and DeMars, Complainant was disciplined for failing to look up the account title and for failing to check the signature on the account. Joint Exhibit 14.

was dealing with a customer, not an employee. Transcript III at 44. Neither Torres nor Complainant was disciplined for the incident.

33. Respondent's vice president Keith Armstrong testified that no discipline was imposed on Andrea Torres because she had discretion to refund overdraft fees to non-employee customers such as Complainant's mother. Transcript IV at 83. However, in regard to Complainant, Armstrong testified that she had pursued a rebate of overdraft fees as an "end run" around bank procedure. Transcript IV at 42-43, 84. Todisco testified that Complainant also violated bank policy by asking Torres for the rebate because Complainant did not, at the time, report to Torres. Transcript II at 178.
34. Around the same time that Complainant sought the overdraft rebates, a "post no debit" computer message popped up on an account belonging to a regular bank customer. Transcript I at 150. Another computer screen explained that the "post no debit" message was due to a "blank ATM envelope deposit." Transcript I at 150-151, 155. A "post no debit" message is a signal to bank employees that they are not to allow a customer to withdraw funds until approval is given by the branch bank from which the warning originated, in this case the Revere branch. Transcript II at 24; II at 91; IV at 33, 110. Complainant testified that when the customer appeared at the Everett branch seeking to make the withdrawal, she (Complainant) called teller-supervisor "Vincenza" at the Revere branch office for clarification, was told that the "post no debit" message was due to the customer having made an ATM deposit without enclosing a check, that "Vincenza" had the check in her possession, and that "everything [was] fine." Transcript I at 152-155, 157, 159. Complainant testified

that she asked the customer to return to the bank to redeposit the money and that she overrode the “post no debit” message in order to allow him to make a withdrawal.

Transcript I at 154-155.

35. Revere teller-supervisor Vincenza Spinazzola testified that she has no memory of Complainant calling her about a “post no debit” message in 2009. Transcript III at 166-167. Spinazzola’s branch manager, Karen Gallo, testified that she spoke to Complainant about the “post no debit” incident soon after it occurred and described Complainant as “nonchalant” about the matter. Transcript III at 147-148. Complainant denied speaking to Gallo about the incident. Transcript II at 25.
36. Vice president Keith Armstrong testified that a “post no debit” message was placed on the customer’s account because of multiple ATM transactions involving empty envelopes, but Armstrong acknowledged that on the day in question, the customer returned to the bank in order to prevent his account from being overdrawn. Transcript IV at 33, 35-36. Even so, Armstrong opined that Complainant should not have ignored the “post no debit” warning. Transcript IV at 34-35.
37. A teller-supervisor has the right to cash a check for a bank customer for up to a thousand dollars even if such action puts the customer’s account “into the red.” Transcript IV at 50; Joint Exhibit 34.
38. Complainant was not disciplined for either the overdraft rebate or the “post no debit” incidents because discussions were already proceeding about a possible demotion of Complainant into a non-supervisory position and/or her termination. Transcript II at 93-96, 102; Transcript IV at 122-123.

39. Complainant met with branch administrator Carol Simpson on October 22, 2009 about a transfer to the Lynn branch. Transcript I at 185; Joint Exhibits 10 & 26. Although Complainant had previously inquired about a transfer to Lynn into a teller-supervisor position, the October 22, 2009 meeting focused on a senior teller position in Lynn, i.e., a demotion. Joint Exhibit 26; Transcript II at 101. At the time of the meeting, Complainant had already received two written warnings. Transcript I at 162. Simpson said that in order to transfer to Lynn, Complainant would have to sign the two warnings. Transcript I at 162-163. Complainant testified in a contradictory manner about her willingness to sign the warnings (Transcript I at 163; II at 35). Simpson drafted a memo on October 23, 2009 to bank officials Heath, Armstrong, and Todisco stating that Complainant had indicated she *would* sign the warnings in order to secure a transfer. Joint Exhibit 26. Simpson's October 23, 2009 memo references Complainant being a potential "asset" in Lynn and Simpson's desire to move forward on Complainant's transfer. Joint Exhibit 26.
40. After Complainant's October 22, 2009 meeting, Todisco attempted to get Complainant to sign the two warnings. Transcript I at 164. Complainant once more refused to sign. Transcript I at 165. Complainant acknowledged at the public hearing that she was offered the senior teller position in Lynn predicated on her signing the warnings and that she refused to sign them. Transcript III at 192-193. She stated that she would have accepted a demotion but not one predicated on signing the warnings. Transcript III at 194.
41. According to vice president Keith Armstrong, another bank employee, Bill Frazier, was fired for refusing to sign a written warning. Transcript IV at 44-46, 115-116.

Frazier was a Caucasian facilities manager with the bank who was charged with spreading a false rumor that several members of senior management were being terminated. When Frazier was presented with a written warning, he denied that he had spread the rumor and refused to sign the warning. Id. According to human resource director Eric Heath, Frazier was fired both for lying and for refusing to sign the written warning. Transcript IV at 118.

42. At the end of the day on November 15, 2009, Complainant was terminated based on the recommendation of branch manager Joseph Todisco. Joint Exhibit 11.

Complainant's termination was not preceded by a final warning, development plan, or suspension. Transcript II at 173-174. Heath testified that the termination decision was made based on a conclusion that Complainant was not ready for supervisory responsibility. Transcript IV at 122-123. Heath testified that the events which led to Complainant's termination in 2009 hadn't yet "emerged" in 2007 and 2008 when Complainant received excellent evaluations from then-branch manager Kelly McBride and that McBride's complimentary descriptions of Complainant in prior evaluations were "wishful thinking." Transcript at 153-155.

43. Following Complainant's termination, Everett branch employee Maria Ramos voluntarily quit. Ramos had a long commuting distance from Cape Cod to Everett and found employment on the Cape. Transcript I at 68. She testified that she quit because she felt that she was "next" after Andrea Torres was transferred and Complainant was fired. Transcript III at 111, 121.

44. Complainant was replaced by Brian Martins, a Caucasian male, as teller-supervisor. Transcript II at 55, 65. Following the selection of Martins, the Everett branch

management team consisted of three Caucasian individuals. Transcript II at 127.

Martins thereafter experienced performance problems and was required to choose between a sixty/ninety-day “development plan” or a demotion. Transcript IV at 16-17; Joint Exhibit 19. He took a demotion.

45. In December of 2009, Everett assistant branch manager Jennifer Russo was late in returning from a vacation as a result of her Sunday night flight being cancelled due to inclement weather. She was forced to return on the first flight out of Washington DC on Monday morning. Transcript III at 129-131. Russo landed in Boston at 8:00 a.m., went home to “freshen up,” showed up for work a couple of hours late, skipped lunch, and closed up the office. Id. at 130. During the period between her plane being cancelled and a new flight being secured, Russo made multiple telephone calls to Todisco in order to apprise him of her situation. Id. at 131-132. Russo was not disciplined for the incident.

46. Todisco was fired from his position as Everett branch manager in or around June of 2010. Complainant’s Exhibit 2. Branch administrator Carol Simpson called for his termination based on insubordination and customer complaints. Transcript IV at 54. The following written reasons were given for dismissal: “grave concern about his communication style, his management ability, and his general attitude. ... [being] arrogant and rude.”

47. During years 2007 through 2009, the bank had no Hispanic senior officials or branch managers. Transcript IV at 164; Complainant’s Exhibit 3. In 2009, there were fifty-two employees in the bank’s top two categories of executives and only two were Hispanic. Transcript IV at 168; Complainant’s Exhibit 3.



48. Complainant testified that she was very sad to lose her job and that looking for alternate employment caused her anxiety and made her feel “stressed out.” Transcript III at 174, 182. Complainant felt like her world was “coming apart” and that she “couldn’t do anything.” Transcript III at 184. Complainant unsuccessfully attempted to find another job in Massachusetts for a four-month period after her termination.
49. Complainant was forced to relocate to Florida in February of 2010 in order to move in with her parents. Id.; III at 201. The move made her unhappy because of the loss of her independence. Transcript III at 178. She incurred \$2,200 in moving costs. Transcript I at 171. Complainant attempted to find employment in Florida by applying for jobs online as well as by filling out applications. She estimates that she applied for over a hundred jobs and received three to five interviews. Transcript III at 190. Complainant applied for positions at banks, credit unions, schools, hospitals, car rental agencies, electric companies, and a trucking company. Transcript III at 192, 202-203. In 2013, she obtained employment at CRF Trucking in Florida. Id. at 203.
50. Between 2010 and 2012, Complainant received no income aside from unemployment benefits, at the rate of \$474.00 weekly. Transcript I at 171-177. Although Complainant re-commenced working in 2013, she still receives no benefits and no health insurance. Transcript I at 178; III at 186.
51. The parties stipulate that Complainant incurred a total of \$95,328.38 in lost income following her termination in November of 2009 based on the following schedule of yearly lost wages (offset by unemployment insurance and new employment): 1) \$4,233.60 in 2009; 2) \$12,249.80 in 2010; 3) \$23,757.82 in 2011; 4) \$36,691.80 in 2012; and 5) \$18,395.38 in 2013.

### III. CONCLUSIONS OF LAW

#### A. Disparate Treatment

In order to prevail on a charge of disparate treatment employment discrimination based on national origin under M.G.L. c. 151B, s. 4(1), Complainant may establish a prima facie case by circumstantial evidence<sup>3</sup> showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s). See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665-666 n.22 (2000) (prima case established where protected class member applies for position, is not selected, and employer seeks or fills position with similarly-qualified individual); Blare v. Husky, 419 Mass. 437, 441 (1995). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as “not onerous,” requiring only that a qualified individual establish circumstances “which give rise to an inference of unlawful discrimination.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky, 419 Mass. 437 (1995).

Sufficient circumstances to support a prima facie case exist in this case insofar as Complainant was a nine-year bank employee of Puerto Rican national origin who was highly-regarded by her supervisors until Joseph Todisco took over as branch manager in Everett. During her first six years of employment, Complainant was twice promoted,

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<sup>3</sup> Complainant did not proffer direct evidence of discrimination. Thus, a direct evidence analysis is not employed. See Wynn & Wynn, P.C. v MCAD, 431Mass. 655, 665 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as resulting in the “inescapable, or at least highly probable” inference of discrimination).

first from teller to sales and service representative and subsequently to teller-supervisor and was the recipient of two achievement awards for excellent service. She received no discipline or warnings between 2000 and 2008, her “secret shopper” scores were superior, and her performance reviews between 2001 and 2009 rate her as outstanding in attendance. Complainant was commended in writing for being dependable, competent, committed to her job, and a great team player. In her final performance review for 2008-2009, Complainant was described as an employee who “always comes to the rescue when the branch needs coverage,” takes the initiative to work wherever needed, supports staff and managers in any way she can, and was “on her way to becoming a fantastic supervisor.” Andrea Torres who was Complainant’s assistant branch manager from 2006 through May of 2009 testified that Complainant was dedicated, hard-working, honest, and reliable. Bank vice president Keith Armstrong testified that Complainant was considered to be the most responsible person at the bank prior to Todisco becoming her supervisor in December of 2008. The aforementioned descriptions establish Complainant’s credentials as a satisfactory bank employee, notwithstanding her termination for cause in November of 2009, and, thus, satisfy the first two prongs of the prima facie case.

Regarding the third prong of the prima facie case, i.e., suffering an adverse employment action, the record indicates that after working under Todisco for less than a year, Complainant was terminated despite receiving no discipline whatsoever from 2000 through December of 2008. Her termination was based on alleged misconduct leading to two warnings, two other incidents which allegedly violated bank protocols but did not give rise to discipline, and her refusal to sign the two warnings.

The fourth prong of the prima facie case is established by the fact that Complainant was the only employee terminated by Todisco. Complainant's termination sets her apart from Caucasian bank teller Tyler Stuart who received multiple warnings for unreliable attendance, failed to sign one of his warnings, and was tardy or absent on numerous occasions during the summer of 2009 but was permitted to continue working until he quit.

Since the foregoing circumstances support a prima facie case of discrimination based on national origin, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 238 (1976). If Respondent does so, Complainant, at stage three, must persuade the fact-finder by a preponderance of evidence that Respondent's articulated reasons were not the real ones but a cover-up for discrimination. See Wynn & Wynn v. MCAD, 431 Mass. at 666 *citing* Abramian, 432 Mass. at 117-118; Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). The determination that a reason is false permits, but does not require, the trier of fact to infer discriminatory animus. See Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Abramian v. President & Fellows of Harvard College, 402 Mass. 107 (2000) (third step of circumstantial method of proof may be satisfied by proof that one or more of the reasons advanced by the employer is false leading to inference of discriminatory animus).

At stage two, Respondent proffers multiple reasons for disciplining and ultimately terminating Complainant: returning late from a Florida vacation in April of 2009;

granting an override to permit floating teller Nicole Mustacchio to make a withdrawal from a passbook saving account even though Mustacchio was not listed on the account as a custodian or beneficiary; attempting to make an “end run” around the bank’s policy of discouraging employees from obtaining rebates of overdraft fees; allowing a customer to withdraw funds without approval from the branch bank which posted a “post no debit” computer message on the customer’s account; and refusing to sign two disciplinary warnings. These reasons are sufficient to satisfy Respondent’s stage two burden of articulating and producing credible evidence to support legitimate, nondiscriminatory reasons for removing Complainant.

At stage three, Complainant offers a rebuttal to Respondent’s concerns by showing that Respondent’s professed reasons for termination were not genuine but, rather, a cover-up for discrimination. Based on the reasons set forth below, I conclude that Complainant has succeeded in sustaining her stage three burden.

Regarding Complainant’s verbal warning for returning late from vacation, it is noteworthy that the discipline was imposed on Complainant notwithstanding her reputation as the most responsible person in the bank, a dedicated and reliable employee, a person with an outstanding attendance record, and one who always came to the rescue of others. At the time the warning was imposed, Complainant had accrued a substantial amount of unused personal time to be used for unanticipated absences and unexpected circumstances. To be sure, Complainant could have left Florida a day earlier in order to minimize potential flight disruptions caused by flying standby, but the same rationale applies to Everett assistant manager Jennifer Russo. She, too, could have arranged to travel home a day early in order to minimize the possibility of a flight disruption caused

by winter weather. Yet, the bank imposed no discipline, no loss of time, and no loss of pay on Russo who missed a morning at work due to a cancelled flight.

Turning to Complainant's discipline for allowing floating teller Nicole Mustacchio to withdraw funds from an account on which she was not listed as a beneficiary, Complainant acknowledged that she mistakenly confused Nicole with her sister Gina, the actual account beneficiary. For making this inadvertent error, Complainant received a written warning whereas bank employees Lemus and DeMars received less or no discipline for allowing Nicole Mustacchio to withdraw significantly more funds from a different custodial account on which she was not authorized to make withdrawals. Bank vice president Armstrong's rationale for treating Lemus and DeMars more leniently -- that in their cases the bank's computer screens did not make clear who was authorized to withdraw funds -- fails to explain why the passbook presented to Lemus and DeMars did not identify the individual(s) authorized to make withdrawals or why the bank's computer screens did not provide sufficient information from which to implement bank policy.

Two subsequent matters for which Complainant was not disciplined but which Respondent cites in support of termination involve Complainant: 1) asking her former assistant branch manager for a rebate of overdraft fees and 2) permitting a regular bank customer to make a \$400.00 withdrawal despite a "post no debit" notification on his account. The former issue constitutes a mere inquiry to which then-East Boston assistant branch manager Andrea Torres was free to -- and did -- respond negatively. In light of the poor relationship between Complainant and Todisco, it is understandable that Complainant went to Torres for a favor rather than to Todisco. That Complainant's

mother subsequently asked Torres the same question and that Torres granted the rebates without any negative repercussions underscore the harmless nature of Complainant's inquiry.

The second matter pertains to the assertion that Complainant violated bank rules by permitting a customer to make a \$400.00 withdrawal despite the lack of appropriate clearance to waive a "post no debit" notification on his account. Given the passage of time and conflicting versions of the incident, the evidence is unclear as to whether Complainant received clearance from Revere branch personnel to authorize the withdrawal. Complainant testified that she called teller-supervisor "Vincenza" at the Revere branch office for clarification, was told that the "post no debit" message was due to the customer having made an ATM deposit without enclosing a check, that "Vincenza" had the check in her possession, and that "everything [was] fine." I decline to credit the totality of Complainant's version since Revere teller-supervisor Vincenza Spinazzola has no memory of the incident, Spinazzola's branch manager Karen Gallo provides a conflicting account, and Complainant fails to explain why Spinazzola would have had the customer's check in her possession. Nonetheless, Complainant's assertion that she asked the customer to return to the Revere branch to redeposit his money is corroborated by the testimony of Keith Armstrong who acknowledged that the customer returned to the bank in order to prevent his account from being overdrawn.

Even though there is no dispute that the customer returned to the Revere branch to resolve the "post no debit" issue, Armstrong maintains that Complainant nevertheless committed a serious deviation from the bank's "post no debit" policy in permitting the withdrawal. I find such an assertion to be unpersuasive given a teller-supervisor's

authority to cash a check for a bank customer in an amount up to a thousand dollars even if it puts the customer's account "into the red." Complainant's action involved an account withdrawal rather than the cashing of a check, but permitting the withdrawal was consistent with the spirit, if not the letter, of the check-cashing policy.

The final reason for termination is Complainant's refusal to sign her disciplinary warnings. According to bank personnel such refusal was unprecedented, but this assertion is contradicted by the fact that former bank employee Tyler Stuart had an unsigned warning in his personnel file for the same conduct that resulted in Complainant's verbal warning – missing a day of work without an approved absence. Unlike Complainant's situation, no negative consequences attached to Stuart's failure to sign.

Rather than focus on Stuart's unsigned warning, Respondent compares Complainant's situation to that of bank employee Bill Frazier who was allegedly fired for refusing to sign a disciplinary warning. However, Frazier refused to sign because he denied that he had engaged in the behavior that was the subject of the warning. In Complainant's case, her refusal to sign was a principled stand against the perceived injustice of her discipline rather than a denial of the conduct which formed the basis for discipline. Rather than constituting insubordination or a denial of factual claims, Complainant's refusal to sign her warnings reflects frustration at: 1) being denied a personal day to cover an unexpected absence after years of filling in for absent co-workers; 2) being disciplined for making an account error when other employees were not disciplined for making similar errors on related accounts; and 3) being deprived the



same leniency extended towards branch employee Tyler Stuart, whose repeated absences and late arrivals were tolerated prior to discipline being imposed.

Respondent argues that warnings must be signed as proof that discipline has been received and acknowledged, but bank officials could have written on the bottom of Complainant's warnings that she received the documents, read them, and refused to sign. The fact that the bank's employee handbook nowhere requires warnings to be signed undercuts Respondent's argument that such signatures are mandatory. According to Respondent, Complainant's refusal to sign her warnings was the primary reason why she was terminated because her refusal signified a lack of accountability. Yet, Complainant's copious correspondence to bank officials regarding her warnings underscores how seriously she took these matters.

Since Respondent interpreted Complainant's alleged misconduct as proof that she could not handle supervisory responsibility, it is puzzling that the bank declined to demote her to a position with less supervisory authority. Respondent asserts that it refrained from demoting Complainant on the basis that the bank does not favor involuntary demotion as a personnel tool. However, Respondent required Complainant's Caucasian successor to accept a sixty/ninety day development plan or a demotion after concerns arose over his performance. Such action belies Respondent's opposition to using demotion as a disciplinary tool.

The foregoing circumstances depict a once-valued employee whose career was derailed after Todisco became her branch manager. Complainant did not suddenly become insubordinate or incompetent but, rather, was suddenly perceived to be unsatisfactory by a new supervisor who was, himself, fired for insubordination, poor

customer relations, arrogance, and rudeness. Todisco's reasons for dissatisfaction with Complainant, when closely examined, appear to be patently unfair. He interpreted every situation in the light most unfavorable to Complainant, even though Caucasian employees who engaged in similar behavior did not experience the same consequences.

Todisco's treatment of Complainant contributed to a demographic shift at the Everett branch office from a racially-diverse group of managers in 2008 to a uniformly-Caucasian group by the beginning of 2010. The newly-constituted Caucasian group, in turn, mirrored the bank's 2009 executive staff which consisted of an overwhelmingly Caucasian group of executives. At that time, only two of fifty-two senior and mid-level managers were Hispanic.

The findings set forth above constitute persuasive evidence that Respondent's articulated reasons for terminating Complainant were not the real ones but a cover-up for discrimination based on national origin. I therefore conclude that Complainant has prevailed on her charge of disparate treatment employment discrimination based on national origin under M.G.L. c. 151B, s. 4(1).

#### B. Lost Wages

The parties stipulate that Complainant incurred a total of \$95,328.38 in lost income following her termination in November of 2009 based on the following schedule of yearly lost wages (offset by unemployment insurance and new employment): 1) \$4,233.60 in 2009; 2) \$12,249.80 in 2010; 3) \$23,757.82 in 2011; 4) \$36,691.80 in 2012; and 5) \$18,395.38 in 2013. I conclude that these losses, plus an additional \$2,200.00 in moving costs, were incurred through no fault of her own.

Complainant testified convincingly that she made sustained efforts to find alternate employment but was not successful until she obtained employment at CFR Trucking in Florida in 2013. Complainant applied for positions, first in Massachusetts and then in Florida at banks, credit unions, schools, hospitals, car rental agencies, electric companies, and a trucking company. She applied for jobs online as well as by going to banks and others places in order to fill out applications. Complainant asserts that she applied for over a hundred jobs, but only received three to five interviews. Respondent disputes her efforts by claiming that such a sustained effort should have resulted in greater success, but this conclusory statement does not fulfill the employer's burden to introduce evidence of mitigation. See J.C. Hillary's v. MCAD, 29 Mass. App. Ct 204, 208 (1989).

**C. Emotional Distress Damages**

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, 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 v. MCAD, 441 Mass. 549, 576 (2004). 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 Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass.

App. Ct. 172, 182-183 (1988). 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 at 576.

Complainant testified that she was very sad to have lost her job and that looking for alternate employment caused her anxiety and made her feel “stressed out.” Complainant felt like her world was “coming apart” and that she “couldn’t do anything.” Complainant was forced to relocate to Florida in February of 2010 in order to move in with her parents. The move made her unhappy because of the upheaval caused and the loss of her independence. I conclude that being out of work for more than three years after the demise of a promising career in banking, being forced to move to a different state, and having to move in with her parents after maintaining an independent household were factors which weighed heavily on Complainant’s emotional well-being. Based on the foregoing, I conclude that Complainant is entitled to \$50,000.00 in emotional distress damages.

#### IV. ORDER

In accordance with 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,

Respondent is ordered to:

- (1) Cease and desist from all acts of discrimination;
- (2) Pay Complainant \$97,528.38 in lost income and out-of-pocket costs with interest at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or

until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(3) Pay Complainant the sum of \$50,000.00 in emotional distress damages with interest at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(4) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's managers and supervisors. Such training shall focus on discrimination based on race, color and national origin. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training.

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

So ordered this 9th day of October, 2014.

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Betty E. Waxman, Esq.,  
Hearing Officer