COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and ANGEL GERALDINO,
Complainants

v. Docket No. 09-BEM-00097

MOBILE ALLIANCE LLC,
JOHN PANZINO, and
DANIEL TREITEL,
Respondents

Appearance: Wendy Cassidy, Esq. for Complainants

AMENDED DECISION OF THE HEARING OFFICER[1]

I. PROCEDURAL HISTORY

On January 14, 2009, Angel D. Geraldino, ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination charging that he was discriminated against in employment based on his race and color (black). Complainant asserts that he was falsely accused of stealing a cell phone at work and fired as a result of the accusation.

The MCAD issued a probable cause finding on April 23, 2009 and certified the case for public hearing on November 22, 2010. On April 13, 2011, the Investigating Commissioner granted Complainant's motion to include John Panzino and Daniel Treitel as individual respondents and to add two claims under G.L. c. 151B, section 4(4A). A public hearing was conducted on June 6, 2011. The named Respondents did not appear

[1] Section IV is amended to include the award of back pay and emotional distress damages as part of the Order.

at the public hearing and a default hearing was conducted as noted below. Complainant introduced five (5) exhibits into evidence. The following witnesses testified: Angel Geraldino, Ivan Aguinaga and Susan Yee.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions. To the extent the testimony of the witnesses is not in accord with or irrelevant to my findings, the testimony is rejected.

II. FINDINGS OF FACT

1. Complainant, Angel Geraldino is a black male from the Dominican Republic who came to the United States in 2004. He started working as a sales associate for The Mobile Alliance LLC d/b/a The Wireless Zone on November 17, 2008 at a kiosk located at the Square One Mall in Saugus, MA. According to Complainant, he was the only black individual who worked at the Wireless Zone kiosk in the Square One Mall.
2. The Mobile Alliance LLC d/b/a The Wireless Zone (Respondent "Mobile Alliance") was a franchisee of Verizon Inc. Respondent conducted its business in multiple locations in 2008 and employed more than six employees in total.
3. Respondent Mobile Alliance was owned by named-Respondents John Panzino and Daniel Treitel.[2]

[2] Respondents Panzino and Treitel failed to respond to any discovery demands and failed to appear at the public hearing. As a consequence, the hearing proceeded as a default hearing on the scheduled public hearing date. Respondents were subsequently notified that an entry of default had been entered them and that the parties had ten days from receipt of notice to petition the Commission to vacate the entry of default for "good cause" shown. Respondent John Panzino subsequently wrote to the Commission but his representations were not deemed to constitute "good cause" for removing the default and reopening the case.

4. According to Complainant, none of the store managers who worked at Respondent Mobile Alliance were black. Complainant testified that he was the only black employee.
5. Complainant began working for The Mobile Alliance on November 17, 2008. He earned $9.00 per hour plus commissions consisting of $235.00 per cell phone contract. According to Complainant, he sold five cell phone plans but never received commissions for the sales. Complainant also sold cell phones and accessories, opened and closed the store, and helped to keep the store "presentable." Complainant did not participate in inventory but observed others doing so and described them as "careless."
6. Complainant testified that cell phones were kept inside the kiosk and accessories were kept outside the kiosk. He was supposed to notify his manager if he saw shoplifters.
7. According to Complainant, he got along well with his co-workers. He described them as eager to help him and described his job as a "good situation."
8. Complainant's employment ended on December 15, 2008. Complainant testified that on December 14, 2008, a customer asked to see a particular cell phone. When Complainant went to remove it from its box, he noticed that the phone was missing. He brought the missing phone to the attention of his manager. Complainant subsequently received a call from another supervisor -- "Omar" -- who asked what had happened. Omar told Complainant that he had to speak to the owners about the missing phone. The next morning when Complainant went

to work, Omar informed him that he had spoken to Treitel who said, "someone has to go."

9. Complainant testified that he called Treitel to inquire about the situation and was told that until the missing phone "reappeared" Complainant couldn't come back to work. According to Complainant, Panzino then got on the phone, denied that the phone could have been taken by a supervisor, and said to "bring the fucking phone back or don't come back." Complainant testified that he did not steal the phone. I credit Complainant's testimony.
10. Following his discharge, Complainant received a paycheck from Respondents which bounced when he attempted to deposit it in the bank. Complainant testified that on December 22, 2008, he showed a copy of his bank statement (Complainant's Exhibit 1) and a copy of the check to Panzino who denied responsibility for the bounced check. Complainant incurred overdraft fees on 12/23/08 and on 1/2/09 as a result of the bounced check.
11. According to Complainant, when he went to the kiosk on December 22, 2008 in order to speak to Panzino, he saw two new white employees.
12. Complainant testified that he is a "people person" and that he cares what other people think of him. According to Complainant, he was really embarrassed to be accused of stealing and to be fired because he knew a lot of people at the Mall. He asserted that he had never before been accused of stealing and that he had never been fired from any other job. Complainant claimed that he had an active social life prior to being fired but that after his discharge he stopped going out. He described living in a basement apartment and feeling "totally isolated."

According to Complainant, he was forced to seek medical treatment from his primary care physician, Dr. May, who prescribed Celexa for depression. Complainant states that he stopped taking Celexa when he found another job.

13. Complainant testified that he began to look for another job within one or two days of his discharge and that over the course of the first six months of 2009, he applied for "lots" of jobs. He went to a career center in Lynn, MA and to a jobs' fair at the Marriott Hotel in Boston. Complainant found another job in August of 2009 driving a truck for J. P. Hunt where he earned $14.58 per hour. He did not receive unemployment compensation after he was discharged from Respondent Mobile Alliance.
14. Ivan Aguinaga testified that he is of Mexican ancestry and worked at the Mobile Alliance kiosk at the Square One Mall from 2007-2009. He was hired by Respondent John Panzino. Aguinaga described Respondent Panzino as Caucasian and Respondent Treitel as Caucasian/Korean. According to Aguinaga, in 2008 there were six to seven employees at the kiosk, two of whom were black sales associates, both named Angel, and a district manager named Fiesto Fias. Aguinaga testified that Fias was demoted and fired.
15. Aguinaga testified that there were occasions when employees did not get paid on time, and/or were paid with personal checks that bounced.
16. Aguinaga's job at Respondent Mobile Alliance included performing inventory and making sure that cell phones were counted. He described the inventory process as consisting of a comparison between serial numbers on a sheet of paper and those on cell phone boxes.

17. Aguinaga testified that he had, on occasion, worked the same shift as Complainant and found him to be a "motivated" salesperson who always made people laugh and always did his job.
18. According to Aguinaga, cell phones had gone missing prior to Complainant working at Respondent Mobile Alliance and went missing after Complainant was no longer employed there but that no one besides Complainant was fired.
19. Aguinaga stated that there was an alarm system in the kiosk and a security camera. He said it is possible to determine if a stolen cell phone is activated within three days of its being taken.
20. Mall manager Susan Yee testified that during the time when Respondents Panzino and Treitel were tenants of the Square One Mall, she had to "chase" them for rent. According to Yee, the Mall's security cameras pan the Square One Mall area. Yee testified that the cameras produce video footage of the Mall that is preserved for thirty days but that Respondents did not contact her in December of 2008 regarding the alleged theft of a cell phone.

III. CONCLUSIONS OF LAW

A. Disparate Treatment Race Discrimination

In order to prevail on a charge of discrimination in employment based on race and/or color under M.G.L. c. 151B, s. 4(1), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace" and played a

motivating part in the employment decision. Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) and at 670. Absent direct evidence, Complainant may establish a prima facie case of race discrimination by showing that he: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of his protected class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondents do so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondents' adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Complainant presented unrebutted testimony that he was a black employee of Respondent Mobile Alliance who performed his job in a satisfactory manner and was discharged after being falsely accused of stealing a cell phone. Complainant contrasts his

experience to that of non-black employees who continued to work for Respondent Mobile Alliance even though cell phones went missing on their watch.

Complainant's assertions are supported by former Mobile Alliance employee Ivan Aguinaga who described Complainant as a "motivated" salesperson who always did his job. Aguinaga confirmed that employees were paid with personal checks that, at times, bounced. He asserted that cell phones had gone missing prior to Complainant working for Respondent Mobile Alliance and after Complainant was fired, yet no one besides Complainant was fired for suspicion of theft. Although Aguinaga recalled that several black employees had worked for the franchise and asserted that a district manager, Fiesto Fias, had been demoted and fired, these recollections do not detract from the central claims in the case, to wit: that Complainant was the only employee fired for suspicion of theft even though there were other instances of missing phones and that following his termination, he was replaced by two Caucasian employees.

Aguinaga and Mall Manager Susan Yee testified that the Square One Mall had a security camera which produced video footage that Respondents could have reviewed in order to obtain information about the allegedly missing cell phone in December of 2008. Rather than explore this option, Respondents rushed to judgment in terminating Complainant. Respondent's failure to investigate the alleged theft – either by reviewing security video or by attempting to call the missing cell phone – supports Complainant's assertion that Respondents assumed he was responsible for taking the cell phone based on stereotypical views about his race.

Had Respondents Panzino and Treitel participated in the hearing rather than defaulted, they might have offered a legitimate, non-discriminatory reason for their

actions and produced evidence in support of such a reason. By not appearing, Respondents waived the opportunity to articulate a rationale for terminating Complainant that was unrelated to the alleged theft or to justify their suspicions that Complainant took a cell phone. As a result of Respondents' failure to participate in the adjudicatory process, Complainant's prima facie case stands unrebutted. In the absence of rebuttal evidence, Complainant is entitled to prevail.

B. Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) 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).

The period between Complainant's discharge on December 15, 2008 and the commencement of the public hearing on June 6, 2011 must be examined in regard to a claim for back pay damages. See Stephen v. SPS New England, Inc., 27 MDLR 249, 250 (2005) (lost back pay runs to the date of the public hearing); Williams v. New Bedford Free Public Library, 24 MDLR 171, 172 (2002) (same). Of that two and one-half year period, only the first eight months are relevant because Complainant found another job in August of 2009 at a higher hourly rate than that which he earned working for Respondents.

Regarding the first eight months after Complainant's termination from Respondent Mobile Alliance, there is unrebutted testimony that Complainant applied for "lots of jobs." He went to a career center in Lynn, MA and to a jobs' fair at the Marriott

Hotel in Boston. Complainant did not receive unemployment compensation after his discharge.

Had Complainant remained employed by Respondents, he would have been earning an hourly rate of $9.00 plus commissions. Commissions are too speculative to be determined but a $9.00 hourly rate is generally consistent with the $351.61 in wages set forth in Complainant's W-2 Wage and Tax Statement for 2008. Complainant's Exhibit 2. Based on a $9.00 hourly rate for the period between December 15, 2008 and August 1, 2009, I conclude that Complainant is entitled to a back pay award of $11,880.00.

As far as emotional distress damages are concerned, an award may be based on a Complainant's testimony concerning emotional distress provided it is causally-connected to the unlawful act of discrimination. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Factors to be considered are the nature, character, severity, and duration of the harm, and whether Complainant attempted to mitigate the harm. Id. Complainant testified that he is a "people person" and that he cares what other people think of him. According to Complainant, he was really embarrassed to be accused of stealing and to be fired because he knew a lot of people at the Mall. He asserted that he had never before been accused of stealing and that he had never been fired from any other job. He claimed that he had an active social life prior to being fired but that after his discharge he stopped going out. He described living in a basement apartment and feeling "totally isolated." According to Complainant, he was forced to seek medical treatment from his primary care physician, Dr. May, who prescribed Celexa for depression. Complainant claims that he stopped taking Celexa when he found another job. Based on the foregoing, but also in

consideration of the fact that Complainant only worked one month for Respondents, I conclude that Complainant is entitled to $ 10,000.00 in emotional distress damages.

C. Individual Liability

G.L. c. 151B, section 4(4A) provides for individual personal liability by making it unlawful for any person to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of any right granted or protected by this chapter." See Beaupre v. Cliff Smith & Assoc., 50 Mass. App. Ct. 480, 489 (2000) (recognizing that c. 151B provides for individual personal liability). In order to be individually liable for an award of damages, a named individual must have exercised authority on behalf of the employer, acted in deliberate disregard of the Complainant's rights, and displayed conduct which permits an inference of intent to discriminate. See Woodason v. Town of Norton, 25 MDLR 62 (2003) (where named respondents exercise authority to act on behalf of employer, and circumstantial evidence supports their deliberate disregard of complainant's rights, intent to discriminate may be inferred so as to permit individual liability).

The unrebutted evidence in this case establishes that the individually-named owners of the Mobile Alliance franchise, John Panzino and Daniel Treitel, made the decision to fire Complainant based on a suspicion of theft, even though they failed to investigate the theft and did not fire non-black employees when missing cell phones were involved. By treating Complainant in a disparate manner from non-black employees, the named Respondents acted in deliberate disregard of Complainant's right to be accorded the same consideration given to employees of other races and color.

Had Respondents Panzino and Treitel participated in the public hearing rather than defaulted on their legal responsibility to do so, they might have presented a defense to Complainant's prima facie case of discrimination. This was not the first time Respondents Panzino and Treitel ignored the MCAD process. The named Respondents declined to participate in the probable cause process, failed to respond to discovery demands, and ignored the MCAD certification and pre-hearing processes. After defaulting at the public hearing, Respondent Panzino notified the Commission that Respondent Mobile Alliance had closed, that he faced financial problems, and that he had not discriminated against Complainant. None of these matters constitute good cause for failing to attend the public hearing and, consequently, there is no basis to remove the entry of default.

Based on the foregoing, Respondents John Panzino and Daniel Treitel are jointly and severally liable for damages arising from their violations of c. 151B.

IV. ORDER

Respondents John Panzino and Daniel Treitel, individually and severally, are hereby ORDERED to:

(1) Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of $11,880.00 in back pay plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue; and

(2) Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of

$10,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

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

So ordered this 29th day of August, 2011

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Betty E. Waxman, Esq.
Hearing Officer