THE COMMONWEATH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & ERIC GRZYCH,
Complainants

v. DOCKET NO. 08-SEM-00144

AMERICAN RECLAMATION CORP.
& VINCENT IULIANO,
Respondents

Appearances: John W. Davis, Esquire for Eric Grzych
Vincent Iuliano, pro se, for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 24, 2008, Eric Grzych filed a complaint with this Commission charging Respondent American Reclamation Corporation and its president Vincent Iuliano with discrimination on the basis of race and color and for discrimination based on disability and retaliation. The Investigating Commissioner issued a split decision, finding probable cause with respect to the race, color and retaliation claims and lack of probable cause with respect to the disability claim. Attempts to conciliate the matter failed and the claims of race/color and retaliation were certified to public hearing. A public hearing was held before me on June 23, 2010. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Eric Grzych ("Complainant") is a Caucasian man who resides in Holland, Massachusetts with his fiancée of three years, Keisha Murray and their nine-

month-old son. Murray is a black woman of Jamaican national origin. Complainant is currently employed as a heavy equipment operator. Complainant's relationship with Murray was common knowledge among Respondents' employees.

2. Respondent American Reclamation Corporation, ("AMREC") located in Charlton, Massachusetts, is a company that removed petroleum-contaminated soil from various sites. The company transported the soil by truck to its facility where it was chemically treated and transformed into a product which was used as cover for landfills. Respondent Vincent Iuliano is President of AMREC. Robert Tyler was the company's general manager and oversaw the day-to-day operation of the company. He reported to Iuliano. AMREC's facility consists of one office building, a steel garage and two storage sheds.

3. In January, 2006, Tyler hired Complainant to work as a truck driver for AMREC. In this position, Complainant would travel to various sites such as gas stations, where he would pick up contaminated soil and transport it to the AMREC facility for processing. His hours were 7:00 a.m. to 5:00 p.m., Monday through Friday. Complainant made $1,000.00 per week.

4. During the course of his employment at AMREC, Complainant would return to the office eight to sixteen times per day in order to weigh his truckload and receive a "scale ticket' that kept track of the amount of soil in the truck. Complainant saw Iuliano several times a day.

5. Complainant testified that whenever he was present in the office, Iuliano would often great him with comments such as, "How's the porch monkey life?" and "Hey, nigger lover." Iuliano constantly called him any one of the following: "porch

monkey lover," "nigger lover," "fat nigger," "pork chop," "piglet," and "fat, black nigger." In addition, Iuliano often referred to African Americans workers as "niggers" or "lazy niggers" and to Hispanic workers as "lazy spics." He called an African American temporary employee a "lazy mulignan," an Italian racial slur. I credit Complainant's testimony.

6. AMREC laid off all its employees sometime around October or November 2007 with the understanding that they would all be called back to work. Around the time of the lay off, Complainant contemplated withdrawing $2,000.00 from his company sponsored 401K plan. Iuliano instead offered to lend Complainant the money out his own pocket so Complainant could avoid the withdrawal penalties. Complainant agreed to begin paying back the loan at $100.00 per week after he was called back to work. Complainant did not pay the money back and Iuliano subsequently successfully sued him for the money.

7. Travis Serrine was Operations Manager at American Reclamation from approximately April 2004 to February 22, 2008. Serrine reported directly to the general manager, Tyler, and he was in the office several times per day. Serrine testified that it was common knowledge that Complainant was engaged to a black woman.

8. Serrine testified that, in his presence, Iuliano called Complainant a "nigger lover," "porch monkey lover," and remarked that Complainant was dating a "fat nigger." According to Serrine, Iuliano made such comments to Complainant approximately two to three times a week, either in the garage or the lunch room, whenever the employees were together. Serrine testified that Complainant's usual response to Iuliano was, "F--- you."

Serrine also testified that Iuliano used the term "spook" when referring to African-American vendors whom he dealt with on the telephone. I credit his testimony.

9. Serrine testified that even in a construction environment, Iuliano's comments were offensive and he carried things too far. According to Serrine, all of the employees felt uncomfortable and would become quiet when Iuliano made racist comments to Complainant. He testified that Complainant told his co-workers that he could not do anything about the situation because he needed the job.

10. Serrine testified that he and his co-workers were laid off and called back to work several times between November 2007 and 2008. Serrine was laid off for the last time on February 21 or 22, 2008. I credit Serrine's testimony in its entirety.

11. Sean Lyons worked at Respondent as a heavy equipment operator from November 2004 until he was laid off in February 2008. Lyons's job often involved loading Complainant's truck with contaminated soil at various work sites by means of a front-end loader. He worked with Complainant every day and they frequently ate lunch together in the AMREC lunch area. Lyons testified that whenever they were all present in the lunch area, Iuliano would call Complainant a "nigger lover," "fat," "lazy," and a "porch monkey lover." Lyons testified Iuliano appeared to target Complainant because Complainant was easily riled and would respond angrily to Iuliano's remarks by telling him to "go to hell." Lyons once heard Iuliano refer to an African-American temporary worker as a "dumb nigger," and also heard Iuliano use racist terms to describe other African American employees. I credit Lyons' testimony in its entirety.

12. David Delanski was employed as business manager for AMREC from December of 2003 until March of 2008 when the company effectively shut down its

operations. Delanski was in charge of the payroll and other employee benefits. He currently works three hours per week doing AMREC's books, in exchange for which Iuliano allows him to use the office computer to look for employment and perform other work related to his many community activities.

13. Delanski testified that he was not around the other employees much and has no direct knowledge of racist comments by Iuliano. Delanski testified, and company documents support, that Complainant listed Arelys Feliciano as his wife on AMREC's life and dental insurance policies. (Ex. R-1; R-2) I credit this testimony, which is supported by the company's records kept in the ordinary course of business. This evidence directly contradicts Complainant's testimony that he was never married and that Feliciano is a former girlfriend.

14. Complainant testified that he was not called back to work after the November 2007 lay off until on or about January 3, 2008. He testified that on January 10, 2008, Iuliano made another racist comment to him. On that day, Complainant told Iuliano that he had had enough and if Iuliano did not cease his racist comments, Complainant would report him for workplace harassment. The next morning, Iuliano told Complainant to get his "fucking keys" and to "get the fuck out." I do not credit Complainant's testimony that he threatened to report Iuliano or that Iuliano terminated him the following day. While Complainant's testimony with respect to his allegations of harassment was credible and corroborated, I found his testimony with respect to his termination to be vague and unconvincing. [1]

[1] Complainant demonstrated some dishonesty and irresponsibility with respect to certain aspects of his employment. There was evidence that he falsely stated on AMREC's insurance applications that he was married when he was not, that he failed to repay a loan from Iuliano who then sued him for return of the loaned money, and did not return uniforms and keys when his employment was terminated. I

15. Delanski testified that he believed Complainant had voluntarily given Robert Tyler his two weeks notice shortly after he was called back in January, although Delanski had no direct knowledge of this. Delanski testified that sometime in January 2008, he witnessed Tyler telling Complainant to leave the work place immediately and to not bother complying with his two weeks' notice. According to Delanski, the reason Complainant was asked to leave was because of his poor performance in the week or so since he had returned to work. I credit Delanski's testimony.

16. Delanski testified that after Complainant's termination, Tyler sent Complainant a letter asking him to return his uniforms and keys. When Complainant did not reply, Respondents sued him for the cost of the items. I credit this testimony.

17. Complainant testified that he was offended and embarrassed by Iuliano's racist remarks and often left the lunch area without finishing his meal in order to avoid Iuliano's comments. He stated that objecting to Iuliano's offensive comments only made matters worse, as Iuliano singled him out for further abuse, once Iuliano realized that he was bothered by the remarks. Complainant testified that he dreaded coming to work every day and could not sleep at night knowing he had to deal with Iuliano's offensive comments in the work place. He testified he suffered from elevated blood pressure and gained 35 pounds during his employment at AMREC, and attributed this to the stress created by Iuliano's abusive behavior. He testified that working in a tough, dusty, dirty environment was made even more difficult by the offensive remarks. Complainant teared up as he testified about the pain of having to listen to racist references to his fiancée. I credit his testimony.

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nonetheless find Complainant credible with respect to the gravamen of his harassment claim and note that Respondents did not deny that the racial harassment occurred.

III. CONCLUSIONS OF LAW

A. Racial Harassment

Complainant claims that Respondents violated M.G.L. c.151B, §4(1 and 4), by discriminating against him in the terms, conditions, or privileges of employment. He alleges that Respondents subjected him to a racially hostile work environment, resulting from the continuous and pervasive offensive racial epithets uttered by the company's president, Iuliano.

In order to establish a claim of racial harassment, Complainant must establish that he was a member of a protected class; that he was the target of speech or conduct based on his membership in that class; that the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and that the harassment was carried out by an employee with a supervisory relationship to Complainant, or that Respondents knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511-1515 (11th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355, 1358-1359 (11th Cir. 1982); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). I conclude Complainant met his burden of proof on each element of his claim.

Race is a protected class. Complainant, who is Caucasian, has standing to file a claim of racial harassment, and can prove injury by virtue of his association with his fiancée, Keisha Murray, a black Jamaican woman; See, Romano & Hussey v. Lowell Paper Box

Co., 4 MDLR 1087 (1982)(complainant had standing where her complaint alleged discrimination on the basis of her husband's religion); Papa v. Pelosi and Paulo, 18 MDLR 174(1996)(Full Comm'n upheld hearing officer's finding of liability for racial discrimination where Respondent landlords denied housing to Complainant who was white, because of her son's race (black); Parr v. Woodmen of the World Life Insurance, 791 F.2d 888 (11th Cir. 1986) (Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race); Tetro v.Elliot Popham Pontiac, 173 F.3d 988 (6th Cir. 1999) (white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child)

Complainant was targeted for racial harassment by Iuliano because of his relationship with Murray. On numerous occasions in the workplace, in the presence of other employees, Iuliano repeatedly referred to Complainant as a "nigger-lover," and "porch monkey-lover." Notwithstanding Complainant's angry protestations, telling Iuliano to "go to hell," or worse, Iuliano continued to direct racist and offensive comments at Complainant virtually every time he saw him. I conclude that Iuliano's abusive behavior made Complainant the target of hateful and discriminatory speech based solely on his protected class, and that such language created a racially hostile work environment for Complainant that constitutes race discrimination.

I further conclude that Iuliano's speech and conduct were sufficiently severe and pervasive to alter the terms and conditions of Complainant's employment and create an abusive and hostile working environment. In determining whether speech or conduct

creates a hostile work environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Harris v. International Paper Co., 765 F.Supp. at 1512-16 and notes 11 and 12; see Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988)(sexual harassment in housing).

Respondents do not dispute that the incidents Complainant alleges occurred and. Iuliano did not deny that he made the comments[2] but attempted to demonstrate that he treated Complainant kindly by lending him money. However this does not somehow negate his abusive treatment of Complainant based on race. Where the company president repeatedly called Complainant a “nigger-lover,” “porch monkey lover,” “fat black nigger,” and other egregious comments, in his presence and in front of other employees, in a particularly cruel and demeaning manner that disturbed many employees, such conduct clearly created a hostile work environment for Complainant

The comments distressed Complainant to the point that he dreaded going to work in the morning, lost sleep, and was often unable to finish his lunch because of Iuliano’s remarks. I conclude that Iuliano’s comments were sufficiently severe and pervasive to alter Complainant's conditions of employment and create an abusive working environment. Iuliano’s position as the president of AMREC makes AMREC vicariously for his behavior under G.L. c. 151B4 (1); College-Town, supra, at 162. I conclude that Respondent AMREC is liable for unlawful discrimination on the basis of race and color in violation of M.G.L.c. 151B 4(1) .

[2] Iuliano elected not to testify at the public hearing.

1. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B§4(4A) if they "interfere with a Complainant's right to be free from discrimination in the workplace. In order to prove interference with a protected right, Complainant must show that Iuliano had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant's rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant's exercise of rights. Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

The evidence establishes the requisite intent to discriminate that would permit one to find Iuliano individually liable for unlawful discrimination. He was the president of AMREC. He made highly offensive and racially derogatory remarks to Complainant on a regular basis. The evidence firmly established Iuliano's discriminatory motive and intentional interference with Complainant's rights under G.L.c. 151B. I conclude that Iuliano engaged in unlawful discrimination against Complainant, who is Caucasian, on the basis of race and color because of his association with a black Jamaican woman, in violation of M.G.L.c.151B§4(4A), and is individually liable for unlawful discrimination in this matter. I conclude that Respondents are jointly and severally liable for unlawful discrimination on the basis of race and color.

B. Retaliation

Complainant has alleged that his employment was terminated after he informed Iuliano that he planned to report him for harassment if he did not stop making racially

offensive comments. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000).

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "…the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). I did not credit Complainant's testimony that he threatened to report Iuliano for discrimination or that he was terminated for doing so; I conclude that Complainant voluntarily left his employment. Thus, I conclude that Complainant did not engage in protected activity and that he failed to establish a prima facie case of retaliation.

Therefore, I conclude that Respondents are not liable for unlawful retaliation, in violation of M.G.L.c.151B§4(4) and Complainant's claim of retaliation shall be dismissed as against both Respondents.

IV. DAMAGES

A. Emotional Distress

Pursuant to M.G.L.c.151B s. 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainants for emotional distress suffered as a direct and probable consequence of his racial harassment by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College vs. Massachusetts Commission Against Discrimination, at al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. at 576.

Based on Complainant's credible testimony, I am persuaded that he suffered emotional distress as a result of Respondents' unlawful conduct. Complainant testified that he was offended and embarrassed by Iuliano's remarks and often left the lunch area without finishing his meal in order to avoid Iuliano's comments. Complainant's

objections to Iuliano's offensive comments only made matters worse, as Iuliano singled Complainant out after realizing that his remarks bothered him. Complainant dreaded coming to work every day and could not sleep at night knowing he had to deal with Iuliano's offensive comments in the workplace. He suffered from elevated blood pressure and gained 35 pounds during his employment at AMREC. He testified that working the tough dusty, dirty environment was made more difficult by having to tolerate Iuliano's offensive comments. Complainant became tearful when he testified about having to hear the offensive comments referring to his fiancée. Despite the comments, Complainant did not leave his job because he needed the $1,000.00 per week salary.

Thus I conclude that the racial harassment Complainant suffered was the source of extreme emotional distress. I conclude that Complainant is entitled to an award of in the amount of $50,000.00 to compensate him for the emotional distress he endured as the result of Respondents' unlawful conduct.

B. Civil Penalty

M.G.L.c.151B§5 states, in part, "if, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice." Having found that Respondents have engaged in a discriminatory practice and, given the direct evidence of discriminatory animus based on associational discrimination, I conclude that a civil penalty in the amount of $10,000.00 is warranted.

V. ORDER

For the reasons stated above, it is hereby ordered:

1. That Respondents cease and desist from any further acts of discrimination on the basis of race and color.

2. That Respondents pay to Complainant Eric Grzych the sum of $50,000.00 in damages for emotional distress, 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.

3. That Respondents pay to the Commonwealth a civil penalty in the amount of $10,000.00.

Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 22nd day of December

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JUDITH E. KAPLAN
Hearing Officer