

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & CHARLES WIGGINS,
Complainants

v.

DOCKET NO. 15-SEM-01606

LAND AIR EXPRESS,
Respondent

Appearances: Marshall T. Moriarty, Esquire for Charles Wiggins

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about June 25, 2015, Complainant Charles Wiggins filed a complaint with this Commission charging Land Air Express with discrimination in employment on the basis of race and color and retaliation.¹ The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, the case was certified for public hearing. Hearing notices were sent to the parties via certified mail, return receipt requested. A public hearing was held before me on October 23, 2018 at the Commission's Springfield office. Respondent did not appear and its default was entered on the record and the hearing proceeded as a default hearing pursuant to 804 CMR 1.21 (8) (b). A notice of default was sent to Respondent's addresses in Springfield, MA and Williston, VT via certified mail, return receipt requested. The default notices were received and the receipts were signed and returned to the Commission. Respondents did not file a timely appeal seeking to remove the default. Based on the credible,

¹ There was no evidence of retaliation and therefore that claim is dismissed.

undisputed evidence in the record, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Charles Wiggins is a black man who resides in W. Springfield, MA. Complainant has driven trucks since age 15. In 2009 he was hired by Respondent as a Class A delivery truck driver for its Springfield terminal at the rate of \$18.75 per hour plus overtime. Complainant estimated that he earned over \$60,000 per year with overtime. He drove throughout New England and parts of Canada. Complainant's employment was terminated on June 23, 2015.

2. Respondent Land Air Express is a full service shipping company that operates throughout the United States and Canada. Don Hemmingway, who is Caucasian, was the manager of the Springfield terminal and was Complainant's direct supervisor.

3. Of the approximately 23 drivers employed at the Springfield location, there were three black and two Hispanic employees. One of the black employees was Complainant's nephew, who quit in 2015 because, according to Complainant he couldn't tolerate Hemmingway's racially offensive conduct.

4. Complainant testified that Hemmingway "had it in" for him from the very beginning. He testified credibly that throughout his employment, Hemmingway used the "n-word" several times a week, was a "loose cannon," and that he tried not to upset him. Complainant asserted there were times he left work crying because of Hemmingway's use of the n-word.

5. On one occasion in May 2015, in Hemmingway's office, Hemmingway accused Complainant of tail-gating Hemmingway's wife's car while driving his truck in Connecticut. When Complainant responded that he did not know Hemmingway's wife, Hemmingway jumped

up and said, "Are you calling my wife a liar? Get your black ass out of here." Complainant testified that he thought Hemmingway was going to hit him, when another truck driver, Omar, stepped in and pushed Hemmingway back. Complainant then said to Hemmingway "If you are firing me, give me a pink slip." Hemmingway instead handed Complainant a bill of lading, indicating that Complainant was to continue working.

6. Complainant testified that in 2015 Hemmingway told him that, "No black son-of-a-bitch is going to tell me how to run my terminal."

7. Complainant drove a rented Cadillac, which he usually parked across the street from the terminal. However, on one occasion in 2015 when he parked it at the terminal, Hemmingway remarked that his own father had a Cadillac of the same color. Complainant responded that Hemmingway lived in Wilbraham and thus could afford to buy a Cadillac, while Complainant was only renting his car. Hemmingway responded, "How does a n----- afford a Cadillac when you don't have a job?" Complainant took this statement as another threat to fire him. Hemmingway also stated that "Ricans" and n-----s who need jobs in order to pay for Cadillacs had to follow his directions or else be terminated.

8. On another occasion in 2015, Hemmingway said to Complainant "Charles [meaning Complainant] is black and black and stupid go together." According to Complainant, Hemmingway fired the Jamaican employees, did not hide his contempt for them and stated that he was glad he got rid of the "damn Jamaicans."

9. Once Hemmingway learned that Complainant had not finished school he repeatedly called Complainant "illiterate" and "ignorant" and said he was lucky to have a job.

10. As Complainant related the incidents involving Hemmingway, he cried and was so overcome with emotion, that he required a break in order to be able resume testifying.

11. On one occasion in 2015 Complainant was unable to complete his deliveries because of the late hour and he returned some freight to the terminal which was added to another driver's load for the following morning. When that driver, who was white, saw Complainant the next day he said to Complainant, "Charlie, you can't do your work?" He then thrust a stack of delivery papers hard into Complainant's chest. Complainant stated the driver treated him "like a little kid" and he turned to Hemmingway, who observed this incident and said "Donny, did you see that?" Hemmingway did not say a word and did nothing. Complainant testified credibly that he felt denigrated by the driver's actions and Hemmingway's failure to address the matter. He stated that a real supervisor would have sent the driver home on the spot.

12. Complainant testified that on or about June 22, 2015, while backing up his truck in Colchester, Ct., he accidentally drove over a spike that was on his blind side, puncturing his fuel tank. Complainant retrieved a shovel and a barrel, dug a trench and poured the fuel into a drum to minimize the leakage and preserve the fuel. The Colchester Fire Department responded to the scene and, that same day, the Department's Deputy Chief wrote that Complainant was to be commended for his quick thinking and action that contained the fuel and lessened the impact of the accident. (Ex. C-1)

13. The following morning when Complainant punched in, Hemmingway called Complainant into his office and terminated his employment ostensibly because of the previous day's incident.

14. Complainant testified credibly that a white driver who had demolished his truck by driving off an embankment, requiring the truck to be towed out of the woods at great expense to Respondent, was not disciplined and in fact was assigned a newer truck the following day.

15. Complainant testified credibly that Hemmingway's constantly calling him the "n-word" was extremely hurtful and Hemmingway's racially offensive actions were painfully evocative of his experiences growing up in the segregated South.

16. During his employment, Complainant suffered from significant stress and frequent headaches from constantly being picked on by Hemmingway. He had to be careful of what he said and constantly was "walking on pins and needles," so as not to aggravate Hemmingway.

17. Complainant testified that as a result of his termination he lost his apartment and car and had to move in with his sister. He stated that he lost more than \$60,000 in wages.

18. After his termination, Complainant sought work on a daily basis at the unemployment office, but was out of work for close to a year. Sometime in 2016 Complainant obtained work as a truck driver at T & T Enterprises at the rate of \$27.05 per hour. He worked there until February 2018. From February 2018 to June 19, 2018 he collected weekly unemployment benefits of approximately \$460. Since June, 2018, Complainant has worked as a truck driver at Pat Salmon at the rate of \$28 per hour.

19. Complainant testified that after his termination he was depressed and stressed out and lost a lot of sleep. His primary concern was his ability to take care of his then three-year old daughter who is the most important thing in his life. Prior to his termination he enjoyed taking his daughter to the mall and to movies and it bothered him that he could not provide her with those same experiences after his termination. Prior to his termination Complainant enjoyed playing basketball but he stopped playing for a time following his termination. He testified that the stress of not being able to pay for groceries and other necessities continued until he found subsequent employment.

19. Complainant testified that he still has flashbacks to his job at Respondent. He saw Hemmingway at a gas station in W. Springfield a few months prior to the public hearing and he left the premises, to avoid engaging with Hemmingway. He continues to have headaches although they are not as severe as when he was employed by Respondent. I wholly credit Complainant's testimony about how badly he was treated by Hemmingway and the extreme distress that it caused and continues to cause him.

III. CONCLUSIONS OF LAW

A. Hostile Work Environment

Complainant alleges that Respondent subjected him to a racially hostile work environment and terminated his employment on account of his race and color. In order to establish a claim of racial harassment that creates a hostile work environment, 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 perpetrated by a manager or supervisor, or there is proof that Respondent knew or should have known of the harassment and failed to take prompt remedial action. 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). 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);

As a black man, Complainant was targeted for racial harassment by his direct supervisor Don Hemmingway. I credit Complainant's unrebutted testimony that on frequent occasions in the workplace, Hemmingway referred to Complainant as a "n---r;" told Complainant, "Get your black ass out of my office;" told Complainant he was "black and black is stupid;" and repeatedly threatened to terminate Complainant. Hemmingway further denigrated Complainant as "ignorant" and "illiterate" because he had not completed school. He commented that Complainant and Latino employees had to obey him to keep working to afford cars. Complainant testified Hemmingway's frequent racial epithets and racially denigrating statements were very hurtful and painful and that the racist words and actions evoked painful memories of his upbringing in the segregated South.

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." *College-Town* at 162; *Harris v. International Paper Co.*, 765 F.Supp. 1509 at 1512-16 and notes 11 and 12(1991); See *Gnerre v. Massachusetts Commission Against Discrimination*, 402 Mass. 502, 507 (1988)(sexual harassment in housing) *Baldelli v. Town of Southborough Police Dept.*, 17 MDLR 1541, 1547 (1995).

Hemmingway called Complainant a "n-----," and made other egregious comments about Complainant's race, in his presence and in the presence of others, in a particularly cruel and demeaning manner. Hemmingway's remarks distressed Complainant to the point that he sometimes left work in tears, suffered loss of sleep and appetite, had headaches and was constantly anxious about what Hemmingway might do or say next. I conclude that Hemmingway's conduct was sufficiently egregious, severe and pervasive so as to alter the

conditions of Complainant's employment and create an abusive working environment. See Thomas O'Connor Constructors, Inc. vs. Massachusetts Commission Against Discrimination et al, 72 Mass. App. Ct. 549, 560-61(2008). Since Respondent did not appear at the hearing and I credited Complainant's testimony, I conclude that Complainant has established an un rebutted prima facie case of racial harassment discrimination and therefore prevails on his claims. Hemmingway's position as the manager of the Springfield garage renders Respondent vicariously for his behavior under G.L. c. 151B s.4 (1); College-Town, at 162. Thus, Respondent is liable for subjecting Complainant to a racially hostile work environment in violation of M.G.L.c. 151B.

B. Termination

M.G.L. c. 151B, s. 4(1) prohibits an employer from discharging an individual from employment based on race and/or color. In order to establish a prima facie case of discriminatory termination, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated persons not of his protected class were not treated in a like manner. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). Complainant has established a prima facie case of termination on the basis of his race and color. There is no evidence to indicate that he was not performing his job at an acceptable level and he was terminated from his employment after an incident with his truck that he characterized as an accident. Complainant alleges that he was treated more harshly than a similarly situated white man for the same or similar conduct.

I conclude that Complainant's termination was motivated by discrimination based on his race and that Hemmingway would not have fired Complainant had he not been black. Complainant testified credibly that a similarly situated white truck driver who had a much more severe accident with his truck was not disciplined and was given a new truck, whereas Complainant's employment was terminated after a relatively minor accident. The ample evidence of Hemmingway's pervasive racist attitude also suggests that race was the reason he terminated Complainant's employment. I draw the reasonable inference from Hemmingway's racist comments that he acted with discriminatory intent, motive and state of mind in terminating Complainant. Thus I conclude that Respondent is liable for unlawful termination in violation of G.L. c. 151B.

IV. REMEDY

A. Emotional Distress

Pursuant to G.L. c. 151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his unlawful treatment by Respondent. Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004) See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997). Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976);

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 at 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.

I conclude that Complainant is entitled to damages for emotional distress resulting from his being subjected to a racially hostile work environment and unlawful termination. Complainant testified credibly that he was extremely upset about being subjected to and having to tolerate Hemmingway’s explicit and outrageous racist comments and attitude. He stated that the constant barrage of racial epithets and Hemmingway’s denigrating treatment of him and other black and Latino employees upset him greatly, caused him to lose sleep, and to suffer frequent headaches, stress and anxiety. He spoke of “walking on pins and needles” at work in anticipation of the next disparaging, belittling and racially hostile conduct from Hemmingway. He spoke poignantly of how Hemmingway’s conduct evoked unpleasant memories of living in the segregated South. Complainant also asserted that his discriminatory termination caused him distress and anxiety. He lost his apartment and his car, had to move in with his sister, and worried about finances and caring for his daughter. He was unable to take his daughter on outings to the movies and the mall and stopped playing basketball, a hobby he previously enjoyed. He suffered from frequent flashbacks, insomnia and headaches, that were severe and that did not diminish until he was re-employed nearly one year later. I conclude that his considerable distress was serious and lasting and resulted directly from Respondent’s unlawful actions. Given the circumstances, I conclude that Complainant is entitled to an award of

\$150,000.00 for the emotional distress he suffered as a result of Respondent's egregious, unlawful racial discrimination.

B. Lost Wages

Complainant seeks back pay damages from the time of his termination until he obtained full time employment in 2016. Complainant was unemployed for close to a year despite searching daily for work and estimated that he lost more than \$60,000.00.² I conclude that Complainant is entitled to the sum of \$60,000.00 from the time he was terminated by Respondent until he was re-employed at a higher rate of pay than he earned at Respondent.

V. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1) Respondent immediately cease and desist from discriminating on the basis of race and color.


2) Respondent pay to Complainant the sum of \$150,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3) Respondent pay to Complainant the sum of \$60,000.00 for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

² No payroll or tax records were submitted into evidence.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 15th day of February 2019



JUDITH E. KAPLAN,
Hearing Officer