

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
FRANCIS CROKEN & JOHN TAMAYO

v.

Docket Nos. 05-BEM-03408
05-BEM-03099
06-BEM-00409

HAGOPIAN HOTELS, NUBAR HAGOPIAN,
NEWBURY GUEST HOUSE, INC., AND H&H,
LLC, d/b/a HARBORSIDE INN

Appearances: David P. Angueira, Esq. for Complainants
Jeffrey Bok, Esq. for Respondents Hagopian Hotels, Nubar Hagopian &
Newbury Guest House, Inc.
Jennifer Pinkham, Esq. for Respondent H& H, LLC d/b/a Harborside Inn

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 17, 2005, Complainant Francis Croken filed a complaint with this Commission against Hagopian Hotels and owner Nubar Hagopian, charging them with retaliation for Croken's having opposed discriminatory practices. On November 22, 2005, Complainant John Tamayo filed a complaint with this Commission charging Respondent Hagopian Hotels with discrimination based on his race and color. On February 22, 2006, John Tamayo filed a complaint of against Respondent Harborside Inn, alleging retaliation for his having filed a previous complaint of discrimination. The Investigating Commissioner found probable cause to credit the allegations of the complaints and conciliation of the matters was unsuccessful.

On November 12, 2008, the Investigating Commissioner granted Tamayo's motion to amend his complaint to add Harborside Inn, Inc., Newbury Guest House, Inc. and Nubar Hagopian as party Respondents.

On December 9, 2009, Complainant John Tamayo's complaints were certified for public hearing. On February 4, 2010, Complainant Francis Croken's complaint was certified for public hearing. On February 24, 2010 the Investigating Commissioner consolidated the above referenced complaints for the purpose of proceeding to a public hearing. A Hearing was held before the undersigned hearing officer on June 7-10, 2010 and June 30 and July 1, 2010. At the Hearing, the complaint was amended to reflect the correct name of Respondent Harborside Inn as H&H LLC d/b/a Harborside Inn.

Subsequent to the Hearing, on September 23, 2010, the Complainant Tamayo filed a motion seeking to add Nubar Hagopian and Mark Hagopian as individual party Respondents and to add an additional claim of retaliation against Nubar Hagopian and Hagopian Hotels to conform to the evidence adduced at the hearing. By Order of the undersigned hearing officer dated November 15, 2010, Tamayo's motion to add Nubar Hagopian as and individual Respondent was granted and Tamayo's charge was also amended to include a claim of retaliation against all the named party Respondents.

Tamayo's motion to add Mark Hagopian as a party-Respondent was denied.

The parties submitted post-hearing briefs on September 23, 2010. Having considered the record in this matter, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Francis Croken, lives in Malden Massachusetts and has worked in the hospitality industry for over 20 years in a number of hotels, restaurants, private resorts and private clubs. He has held positions ranging from general manager, food and beverage manager, front desk agent and concierge in various operations. Prior to coming to work for Respondents, Nubar Hagopian and Hagopian Hotels, Croken worked as general manager of the Algonquin Club, a prestigious private business and social club in Boston. In this position he supervised approximately 60-80 employees at any given time. (Tr. pp. 42-46)

2. Complainant Croken was employed as the General Manager of the Newbury Guest House and the Harborside Inn, from mid-February 2005 through November 21, 2005 when he was terminated by Nubar Hagopian.

3. Complainant John Tamayo is a Hispanic man who was employed as the Operations Manager of the Harborside Inn, with some responsibilities at the Newbury Guest House, from March of 2005 until a shortly after the sale of the Harborside Inn in February of 2006.

4. In 2005, Respondent, Nubar Hagopian, owned the Newbury Guest House and Harborside Inn. Hagopian testified that the properties are held in trusts and the operating companies are corporations. Hagopian resides in a small apartment on the top floor of the Newbury guest house. The two hotels were collectively referred to as Hagopian Hotels. The Newbury Guest House is located at 261 Newbury Street in Boston and is a 32 room boutique hotel. It was developed by Nubar Hagopian and his son Mark in 1991 as a 15 room bed and breakfast and expanded two years later. The Harborside Inn was

developed by Nubar Hagopian in 1997 as a 56 room hotel and is located at 185 State Street in Boston. (Tr. I. pp. 50, 54-55, 68; Tr. III, pp. 635-639, 641-643) At the time of the hearing, Nubar Hagopian remained the owner of the Newbury Guest House, but had sold the Harborside Inn to his son, Mark Hagopian and his son's business partner. (Tr. V pp. 987-989)

5. Mark Hagopian worked with his father in the hotel business until December of 1997 when Nubar Hagopian fired him after some personal and professional disagreements. Mark Hagopian later filed suit against Nubar Hagopian seeking an ownership interest in the two hotels which he claimed he had been promised by his father and then denied. The law suit was settled after many months of negotiation, but Nubar and Mark Hagopian remained estranged and thereafter did not speak to each other for many years. (Tr. III, pp. 540-542, 551-553; 645-649; Tr. IV, pp. 666-668, 675-679, 774-775; Tr. V, pp. 979-980, 983-986; 1008-1009) Hagopian had also hired his daughter Lisa to manage a restaurant in the Harborside Hotel in 1997, but she was terminated just prior to Croken becoming the General Manager in February of 2005. (Tr. III, pp. 651-652; Tr. IV, pp. 660-667)

6. During his interview Croken was informed by Nubar Hagopian that Hagopian was seeking a general manager who could take over much of the responsibility of operating the hotels so that Hagopian, who was in his seventies and had a home at the Cape, could begin to retire. Hagopian also stated to Croken the he hoped new management would help improve the financial condition of Hagopian Hotels, the high turnover rate, and the overall performance of the hotels. Hagopian also told Croken that he was expecting the

general manager to bring new staff to the hotels and that he viewed Croken's experience positively. (Tr. I, pp. 50-51)

7. Croken was hired for the position of General Manager and began his employment with Hagopian Hotels in February of 2005. His base salary for the position was \$75,000 with health insurance and a bonus, which was to be negotiated. Croken's responsibilities included supervising all business operations, marketing and sales, administration, and the authority to hire and fire staff. (Tr. pp. 49-52, 65)

8. Croken testified that Hagopian Hotels were severely understaffed when he took over as general manager because Nubar Hagopian had fired a number of staff and managers a few weeks earlier. Croken was informed that re-staffing the hotels was a priority and he proceeded to hire two operations managers in early 2005, Valentin Zsok, who is Caucasian and of European descent and John Tamayo who is Hispanic and from Ecuador. (Tr. I, pp. 54-55, 61-62, 65)

9. Croken had worked with both Zsok and Tamayo at the Algonquin club. Tamayo had worked at the Algonquin club for several years prior to Croken and they worked together for approximately two years. Tamayo began working at the Algonquin Club in 1998, and held a variety of positions including dining room manager, grill manager, and concierge. He worked his way up to Captain of banquets which entailed supervising all the employees on the banquet floor. He also filled in for managers who were absent which included supervisory experience, directing the kitchen staff, and resolving issues related to staff or guests. He interacted regularly with the club's prestigious clientele. (Tr. I, p. 60-62; Tr. II, pp. 356-360) Croken testified that he was impressed with Tamayo's strong work ethic, dependability and trustworthiness, and felt Tamayo would

be well suited for a managerial position at Hagopian Hotels. Croken testified that he believed Zsok also possessed the positive attributes and personal skills needed to be an operations manager and felt both he and Tamayo could easily be trained in the hotel business. (Tr. I, pp. 60-64)

10. Tamayo and Zsok's responsibilities as operations managers were the same and entailed overseeing the front desk and housekeeping staff, training the front desk personnel and making the staff's schedules. Zsok was primarily responsible for managing the Newbury Guest House, while Tamayo managed the Harborside Inn. If one of the operations managers was not working on a weekend, the other manager would be in charge of both hotels. (Tr. III, pp. 367-368, 370)

11. The two hotels had many common procedures, but had different facilities, clientele, and neighborhoods. Although hotel employees were primarily assigned to the hotel where they worked, employees were occasionally assigned to work at the other hotel for cross-training purposes. Cross-training allowed the two hotels to use each other's staff to cover for vacations and other periods of short-staffing, and helped familiarize all staff with both hotels. (Tr. II, pp. 380-384; Tr. IV, pp. 719-721; Tr. V, pp. 845-846)

12. The Harborside Inn, where Tamayo was primarily assigned as Operations Manager, had significantly more problems than the Newbury Guest House. The Harborside Inn had recently closed its kitchen and ceased serving complimentary breakfast to its guests, which generated numerous complaints. Likewise, the hotel no longer offered valet parking to its guests, causing additional complaints for Tamayo to manage. Tamayo testified that he occasionally paid for guest's breakfasts out of his own

pocket and personally parked guests' cars for them. There was an ongoing roof project underway at the hotel and sometimes the roof leaked during rain storms. Tamayo stated that, on more than one occasion, he had to re-pack guests' luggage and move their belongings to another room or even to another hotel. He testified that he did whatever was necessary to ensure guests were satisfied and happy and to keep the hotel running smoothly, including jobs that were not his responsibility, such as attending to minor plumbing problems. He testified that despite these efforts, he received a smaller bonus than Zsok. (Tr. II, pp. 375-378) I credit his testimony.

13. Croken testified that at the start of his employment, employee morale was low and many employees were fearful that they would lose their jobs, since Nubar Hagopian had laid off some 10-12 employees in December of 2004 and terminated others shortly before Croken was hired, including the previous general manager and three front desk managers. Croken testified that he had individual meetings with each employee and began a performance incentive program which he paid for out of his own pocket and which included rewards such as Red Sox tickets for employees who exhibited exceptional performance. (Tr. I, pp. 88-89)

14. Croken attended regular meetings with Nubar Hagopian every Tuesday and they had weekly meetings with all the department heads, including both operations managers, every Thursday. Croken prepared a written agenda for the department heads meeting with any issues in the hotel that needed to be addressed. Hagopian prepared that agenda for his private meetings with Croken. (Tr. I, p. 76-77)

15. Croken testified that initially Hagopian attended every scheduled hotel meeting, but during the summer months he attended fewer and fewer meetings, remaining at his

summer home doing renovations and spending time on his new boat. Croken testified that by summer, the financial condition of both hotels had significantly improved. Additionally, Croken had successfully completed a number of major projects at the hotels. He updated the company web-site, installed wireless internet in the hotels, and managed extensive renovation at the Harborside Inn which included painting and buying new furniture and bedding. Croken also oversaw maintenance projects at the Newbury Guest House, such as a kitchen repair project. Croken observed that as the months progressed, Nubar Hagopian felt comfortable taking more time off and leaving the operation of the Hagopian Hotels in his hands. (Tr. I, pp. 78-79) I credit this testimony.

16. At some point in the summer of 2005 a female employee named Helen Selmecki who was from Panama, quit her position at the Harborside Inn. Croken testified that she was also an Operations Manager and rumors abounded at the Hotel that Ms. Selmecki and Nubar Hagopian had a romantic relationship and she frequently referred to him by the nicknames “Nubie,” “Daddy,” and “Sugar Daddy.” Ms. Selmecki told employees that she worked on special projects for Hagopian. Croken testified that Ms. Selmecki quit after he asked to speak to her about a number of issues of concern to him, including possible billing irregularities, but she accused Croken of harassing her and told him she did not report to him, but to Hagopian. I credit Croken’s testimony about how Selmecki came to leave the Hagopian Hotels. Nubar Hagopian denied having an intimate relationship with Selmecki and testified that he presumed Croken fired her because he didn’t like her and wanted to bring in his own people, but I find that this to be inconsistent with Croken’s stated management style. Moreover, Selmecki was the subject of a sexual harassment complaint by another hotel employee. Hagopian testified

that Selmecki admitted to him that she had kissed this employee in front of other employees, but denied any sexual relationship. Other employees reported to Hagopian that they had witnessed Selmecki slapping the employee in question at the Hotel. Selmecki returned to work for Hagopian as his “personal assistant” shortly after Croken was terminated. (Tr. II. 265-267; 345-347, 350; Tr. IV, p. 672, 697; Tr. V, pp. 917-922)

17. In October of 2005, Croken was assigned to oversee a patio construction project on the front sidewalk of the Newbury Guest House. The project was negatively impacting the hotel and was the source of complaints from guests and neighboring businesses. Croken was called upon to advance the project and was to be the liaison with all the utility companies involved and Boston City Hall and to secure the necessary insurance certificates. Croken testified that this was a time consuming project in conjunction with his many other responsibilities. He testified that Hagopian frequently complimented him for the progress he made on the construction project as well as in his role as general manager. I credit this testimony. Hagopian attempted to downplay Croken’s role on the project, but there was a memo in evidence indicating that per Hagopian’s instructions, Croken was charged with taking the lead on the project to move it along. (Ex. C-3; Tr. IV, pp. 713, 804-806)

18. During his tenure at Hagopian Hotels, Croken handled two employee complaints that had been filed at MCAD and that were ultimately dismissed. (Tr. IV, pp. 790-793) Croken also made revisions to the employee handbook, which included a provision informing employees of their rights to file an MCAD complaint in the event of a discriminatory conduct in the workplace. After reviewing those revisions, Hagopian asked Croken to make certain changes to the handbook stating that it was “slanted in

favor or employees,” and he instructed Croken to delete all references to the MCAD in the revised handbook, stating that it was not necessary and he did not want employees going to the MCAD. (Tr. I, p. 90-91; Ex. C-5) Hagopian denied making these statements and claimed he did not know why he deleted the MCAD references, but it may have been because MCAD was referred to in a poster on hotel property. (Tr. pp. IV, pp. 793-796) I credit Croken’s testimony that Hagopian made these statements and instructed him to alter his handbook revisions.

19. Hagopian testified that some eight claims of discrimination filed against the hotels over the years were all “frivolous,” that that he had prevailed in all of them and boasted that he had never paid any money to settle a discrimination claim.

20. Tamayo testified that he experienced his first unpleasant incident with Nubar Hagopian on July 5, 2005. While Tamayo was working at the Harborside Inn, Hagopian called and directed him to come to the Newbury Guest House because someone had broken into Hagopian’s apartment. When Tamayo arrived, Hagopian accused him of breaking into his apartment with his wife and friends to watch the fireworks on the roof the night before. Tamayo informed Hagopian that he did not enter his apartment. In fact, Tamayo was not at the Newbury Guest House, but stated that on the night in question, he was working the evening shift at the Harborside Inn, after working a day shift at the Guest House. When Tamayo denied having broken into Hagopian’s apartment, Hagopian stated he would speak to Croken. The schedule for July 3 and 4, 2005 in fact shows that Tamayo was off work on those days. (Tr. Vol. II, p. 400- 402; Ex. R-13)

21. In testifying about this incident, Nubar Hagopian stated he was “very confused” by Tamayo’s testimony. Hagopian stated that on the day of the incident, he went up to

the deck of the Newbury Guest House to find 3 to 4 guests, not staff, using the property. Hagopian stated that he had no recollection of accusing Tamayo of unauthorized use of the roof deck. (Tr. IV, pp. 706-707) I credit Tamayo's testimony that Hagopian accused him of breaking into his apartment and that he was stunned by the accusation. (Tr. II, p. 403)

22. In furtherance of cross-training staff of the two hotels, Croken devised a program whereby the operations managers and staff of the two hotels would switch work locations for a period of time. On or about November 1, 2005, Tamayo was transferred to the Newbury Guest House, along with about five other employees, while Zsok was transferred to the Harborside Inn, with an additional five to six employees. Croken had discussed this plan at the weekly department head meetings. He believed that since the two hotels had very different clientele, the managers would benefit from being exposed to the new environment, clientele, and operations associated with the other hotel. (Tr. II, p. 385) According to Tamayo, being the operations manager at the Harborside Inn was more difficult, particularly because that hotel was larger and the clientele was different. (Tr. II, pp. 380 -381, 384-385)

23. Tamayo testified that when he was transferred to the Newbury Guest House it was bad from the beginning. The first weekend he was there Nubar Hagopian approached him and repeatedly interrogated him about where Zsok was, and told him that Zsok, belonged at the Newbury Guest House, and that he, Tamayo, did not. Hagopian also told Tamayo that he was not needed there because Zsok already knew the daily operations of the hotel. Tamayo stated that Hagopian was aware of the cross-training and the reasons for it, and Hagopian admitted this. (Tr. V, p. 846) This was the first

conversation Tamayo and Hagopian had about the cross-training, and Tamayo stated that he felt “horrible” after the way Hagopian spoke to him. He also stated that Hagopian’s conduct made him, as well as other employees, feel insecure about their job positions. (Tr. II, pp. 385-389) Tamayo stated he felt like Hagopian was “picking on him for some reason, which made him feel “very uncomfortable and very down.” (Tr. II, p. 404-405)

24. According to Croken, on November 7, 2005, Hagopian called him for a meeting at the Newbury Guest House and asked Croken why Tamayo was working at the Guest House instead of Zsok. Croken reminded him of the cross-training program to which Hagopian replied “I don’t want Johnny (Tamayo) here, I want Valentin (Zsok) here.” (Tr. I, pp. 113-114) Croken also discussed bonuses for Tamayo and Zsok with Hagopian on November 7, 2005, and suggested that both employees receive the same amount since they had the same responsibilities and were progressing equally. According to Croken, Hagopian told him he was giving Zsok a larger bonus because he liked Zsok more than Tamayo. Hagopian testified that he told Croken that Zsok should receive a higher bonus because he was more adept at the front desk functions and the new technology used at the front desk, while acknowledging that Tamayo’s strength was supervision and that Tamayo had better management and people skills. (Tr. IV, p. 710-711, 722) Tamayo received some 40% less in his bonus than Zsok despite the fact that Croken advised him that this was unfair and would cause Croken problems if word got out. (Tr. I, pp. 105-106)

25. After stating he could not recall saying he did not want Tamayo at the Newbury Guest House, Hagopian denied asking Croken to transfer Tamayo back to the Harborside Inn and stated he did not keep track of employees’ schedules. He admitted telling

Croken at one point that he found it more useful to work with Zsok rather than Tamayo. (Tr. Vol. V. pp. 862-863) He also testified he had no ill feelings for Tamayo, and that he had always found Tamayo to be very courteous and very solicitous. (Tr. IV, p. 718, 726) This testimony is not consistent with his actions toward Tamayo.

26. Tamayo testified that on one occasion during the cross-training period there was another incident where Hagopian approached him in the kitchen while he was eating his lunch and accused him of eating food in the refrigerator that did not belong to him, and that was meant for the guests' breakfasts. Tamayo replied that he was eating his own food that he brought from home and had put in the refrigerator. Hagopian persisted in accusing Tamayo of eating food that belonged to the hotel, despite Tamayo's protestations to the contrary, and the fact that he was clearly eating his own food and not hotel breakfast food. Tamayo was offended by the accusation and Hagopian's treatment of him. (Tr. II, pp.391-393, 395) I credit Tamayo's testimony that he was falsely accused of eating the hotel's food and that Hagopian did not apologize when he was told otherwise. (Tr. V, pp. 863-864)

27. On another occasion, Hagopian approached Tamayo and accused him of using a guest room without authorization and of damaging the toilet. After a toilet was found to be leaking, Hagopian told Tamayo that one of the housekeepers had seen him in the room. Tamayo denied that he had been in the room and sent for the maintenance person who discovered that the toilet was clogged and shut off the valve. The maintenance man testified that he found a sanitary pad clogging the toilet. (Tr. II, pp. 396-398, 242) Hagopian testified vaguely that there was a rumor about Tamayo's wife using the room,

but he could not recall the details or who the source of the rumor was. (Tr. IV, pp. 725, 726, 727) I credit Tamayo's testimony that he had not used a guest room.

28. Hagopian gave conflicting accounts of this incident, testifying at his deposition the he went to the room to investigate the leak, and found the toilet was not properly clamped to the floor. At the hearing he testified that the maintenance person informed him the toilet was overflowing because there was something stuffed inside it. He testified that he saw only water leaking. He could not explain the reason for his inconsistent accounts of the incident, but more importantly, there is no credible explanation for why he held Tamayo personally responsible for the incident. (Tr. V, pp. 852-856)

29. Croken testified that on November 14, 2005, Hagopian called him to his office for a meeting. According to Croken, Hagopian yelled loudly at that meeting and used profanity. He accused Tamayo of not showing up for work and of staying overnight at the Newbury Guest House with his wife the previous weekend without permission, causing damage to the hotel. (Tr. I, pp.112-113)

30. During that same meeting Hagopian also told Croken that Tamayo was rude and unprofessional to other staff and guests, was sleeping on the job, and was using the kitchen without authorization. (Tr. I, p. 113) Croken did not believe that Tamayo would have engaged in such unprofessional conduct. He told Hagopian that he knew Tamayo well, that Tamayo would not behave in such a manner and that he believed Hagopian's accusations were "out of line," and "unprofessional." Nonetheless, Croken said that he would conduct an investigation into Hagopian's accusations, to which Hagopian replied, "Why would I want you to investigate? He's a wetback." Croken was shocked by this

statement, but reiterated that he would conduct an investigation, to which Hagopian replied, "If you don't do what I tell you, you should resign." Croken believed that as the General Manager it was his duty to conduct an investigation into Hagopian's allegations, and he proceeded to do so. He testified that both Tamayo and Zsok were stunned by the allegations. (Tr. I, p. 113-118) I credit Croken's testimony about this conversation.

31. Croken testified that in addition to calling Tamayo a "wetback," on other occasions, Hagopian had made derogatory and offensive comments about other minority groups. Hagopian told Croken that women should not be given managerial responsibilities because they are too emotional and "emotionally incapable." He also stated that women should not be promoted in the work place, and that they belonged at home raising children, and were put on the planet to please men. Hagopian made repeated comments about the breasts and legs of two female employees and encouraged them to wear tight clothing. After an African American employee left the Hotels sometime around April of 2005, Hagopian told Croken not to hire any more African Americans because they are lazy, and instructed Croken to hire more Europeans. Croken testified that he found these comments to be very offensive. (Tr. Vol. I, pp. 95-103) I credit Croken's testimony that Hagopian made these comments and that he was troubled by them. At one point Croken reported them to Karen Cherelli, who until April of 2005 was the Human Resource manager, and her response was, "That's the way he is." (Tr. I, pp. 102-103)

32. In January of 2006, Hagopian accused another Hispanic employee, Raul Valdez of stealing his laptop computer, without any evidence to support the allegation. Despite his denial that he would fabricate false accusations against an employee, he was

unresponsive to the question of whether he had falsely accused Valdez of stealing his computer. In an email complaint by Zsok addressed to Hagopian's assistant, Anne O'Conner, Zsok reported that Hagopian confronted him aggressively with suspicions that Valdez had stolen his laptop. It came to light that the laptop had been lent to Helen Selmecki. Even when presented with Zsok's email account of this incident, Hagopian refused to admit to the conduct. (Tr. V, pp. 864-867; Ex. 24)

33. Despite Hagopian's admonition to Croken not to investigate the allegations against Tamayo, Croken undertook an inquiry. Tamayo denied the accusation that he had stayed in the Newbury Guest House and informed Croken he had been in New Hampshire that weekend. After speaking to a number of other hotel staff, including employees and managers, asking if they could substantiate any of the allegations against Tamayo, Croken concluded that there was no basis for Hagopian's allegations. (Tr. I, pp. 117-123) I credit Croken's testimony that he conducted a thorough inquiry of the charges and could find no one who substantiated the complaints. Hagopian admitted later in his testimony that he had never received a single complaint regarding Tamayo's work performance as operations manager. Other employees including Croken, Anthony Miano, and Maria Martins, all stated that Tamayo was always respectful and professional. (Tr. II, pp. 236-237, Tr. V, pp. 894-895, 1089) Their observations comport with his demeanor at the hearing.

34. Croken testified that on November 15 or 16, 2005, Hagopian called him at home at 7:00 am while he was caring for his elderly father and demanded that Croken come to the Guest House and make him breakfast because the breakfast cook had not arrived.

Croken advised Hagopian that he would not come in and Hagopian advised him that he should resign if he would not do what Hagopian told him to do. (Tr. I, pp. 130 -132)

35. At the November 17th department head meeting, Croken informed the managers present of the outcome of his investigation and that the charges against Tamayo were false. Earlier he had advised Tamayo of his rights and that he could file at the MCAD. Hagopian was invited but did not come to this meeting. After the meeting Croken called Hagopian and informed him of the outcome of his investigation and that he had communicated his findings to the staff, at which point Hagopian asked him to resign. Croken testified that he refused to resign his position. (Tr. I, pp. 125-127) In contrast to Croken's account, Hagopian testified that he asked Croken to investigate the allegations against Tamayo and that Croken never conducted any investigation. He also denied that he ever received any oral or written report of Croken's investigation. I do not credit this testimony. (Tr. IV, pp. 727, 728)

36. Croken testified that Hagopian phoned him the next day, and asked him again to resign for not doing as he was directed. Croken took this to mean that he should have fired Tamayo without investigation, but he refused to do this, because, "it just wasn't right," even though he knew he was putting his own job at risk. (Tr. I, pp. 128-129) The following day, Croken learned from Valentin Zsok that Hagopian had come into the hotel and told Zsok that Croken was fired. Croken phoned Hagopian the following Monday and morning and was informed that his services were no longer needed. (Tr. I, pp.129-130) Croken stated that he then filed a complaint at MCAD because he believed he was the victim of unlawful retaliation and that he had been fired for conducting an investigation and opposing what he viewed as discriminatory conduct by Hagopian. At

that point he was fairly certain he would lose his job for supporting Tamayo, but felt that if he stood up and filed a complaint, maybe it would help someone else down the line.

(Tr. I, pp. 133, 135) I credit his testimony.

37. Croken received a letter from Hagopian dated November 21, 2005, advising him that he was terminated, informing him that he was not allowed back on the hotel premises, and noting he would be paid through November 26, 2005 to “cover all obligations owed” to him. Croken did not receive any further communication from Hagopian regarding extension of coverage for health benefits. (Ex. C-8)

38. Hagopian alleged that his reasons for firing Croken were that he was rude, unprofessional and “insubordinate.” He claimed that on the morning of November 15, 2005 when he called Croken at home, Croken was “belligerent,” and was yelling and screaming at him, but he could provide no further details to support this allegation. He admitted that he had never witnessed Croken act in a belligerent manner to anyone during his employment. (Tr. IV, pp. 741-744; Tr. V, pp. 931-932) Tamayo described Croken as fair, respectful, professional and well-liked by all staff. Anthony Miano, another employee of Hagopian Hotels, also testified that Croken was always professional, courteous and respectful. (Tr. II, p. 362, 374, Tr. V p. 1089) These latter descriptions of Croken are consistent with my observations of Croken’s demeanor. I do not credit Hagopian’s testimony that Croken was rude, unprofessional or belligerent with him.

39. Hagopian testified that by November of 2005, there started to be some friction between him and Croken, and Croken did not return his phone calls and was difficult to reach. (Tr. Vol. IV pp. 809- 810) He also testified that he heard rumors that Croken did not arrive at work until 9:30 or 10:30 in the morning and sometimes Croken was not at

the Harborside Inn when he went there. Hagopian did not document instances of Croken's failure to communicate with him and never complained to Croken. He also never attempted to reach Croken on his cell phone. He had difficulty recalling the details of his final communications with Croken. At the hearing he claimed that he never asked Croken to resign. In an earlier position statement he stated that "Croken was unambiguously asked to resign on November 14," but at the hearing claimed he could not recall this. (Tr. IV. pp. 735,-741 811-815; Tr. V, pp. 933-936) I do not credit Hagopian's testimony that Croken was habitually unavailable and refused to contact him. Nor do I credit Hagopian's denial that he repeatedly demanded Croken's resignation.

40. Hagopian was shown a memo dated November 14, 2005 which was the agenda he created for a meeting he claimed did not take place. However, this was the meeting where Hagopian yelled and made accusations against Tamayo, which foreclosed any discussion of the other substantive items. The agenda for this meeting included subjects which he intended to discuss with Croken, such as the asset management of the company, staffing, long term investments, capital and image creation. Hagopian admitted that these items related to the future management of the hotels and that he intended that Croken be a part of that future. Hagopian claimed that he was beginning to doubt Croken's competence to handle these issues and his commitment to be on the job and that's why it was important he discuss them at this meeting. Instead, he spent the entire time disparaging and complaining about Tamayo. (Tr. IV pp. 742-743) At no time did he indicate to Croken verbally or in writing that he was dissatisfied with Croken's performance or the lack of communication between them. (Tr. IV, pp. 825-828; Ex. C-7)

41. Hagopian asserted that “poor performance” was the reason for Croken’s termination. However financial reports indicate that both hotels improved significantly under Croken’s management. Financial statements show the net income for the Newbury Guest House grew by over \$16,000 for the eight months after Croken became General Manager. The year to date net income for the Newbury Guest house for 2004 and 2005 showed an increase of almost \$160,000 in net income under Croken’s management. Likewise the net income for the Harborside Inn for October 2004 as compared to October 2005, showed an increase of over \$21,000. The year to date income figures show an increase in net income of over \$97,000 under Croken’s management. These numbers are an indication that under Croken’s management the financial condition of both hotels had significantly improved. (Ex. C-1, C-2)

42. Hagopian stated that he was “more or less satisfied” with Croken’s work performance up until the time he was terminated in the fall of 2005. Other than his allegations that he had trouble reaching Croken or that he was not always present at the Harborside Inn, Hagopian could not remember anything specific that occurred in the fall of 2005 that made him doubt Croken’s performance. He claimed he was not receiving reports from Croken addressing long term plans and objectives. (Tr. IV, pp. 799, 801-801-803) He then claimed Croken’s termination resulted from a series of events that constituted insubordination. Those latter allegations related to Croken’s unwillingness to remove Tamayo from the Newbury Guest House without first investigating Hagopian’s serious accusations against him. Hagopian’s son Mark testified that his father told him he terminated Croken because they had an argument over the breakfast cook not showing

up for work on time, and that Mark Hagopian found it “odd and unusual” that his father would fire the General Manager based on this one incident. (Tr. V, p. 1056)

43. Hagopian’s daughter, Lisa Hagopian, who worked for her father for a time managing the restaurant at the Harborside Inn described her father’s management style as very demanding, with high expectations of people, and stated he was difficult and not patient to work with. She also stated that he was not always clear about what he asked of people and was very opinionated. However, she stated that when he wanted something done, there was no changing his mind. She also stated that on occasion he could not control his temper. Hagopian’s son Mark testified that his father had broken promises to him and he had difficulty trusting him. Anthony Miano, an employee of the hotels, testified that he witnessed Hagopian “yelling and screaming” at the previous general manager and at his daughter. Miano also testified that Hagopian cursed and used inappropriate language and profanity in the workplace. Hagopian testified that he was extremely emotionally charged at the time he fired Croken and the evidence suggests that he is unable to control his language when he becomes angry. (Tr. IV, pp. 662-665, 685-686, 742, Tr. V, pp. 868-870, 983, 1087) These descriptions of Hagopian were consistent with my observations of his demeanor and conduct during the hearing.

44. Croken, who was living with and caring for his elderly father at the time of his termination, became extremely emotionally distraught and humiliated after losing his job. Croken testified that following his termination, he felt depressed withdrawn, embarrassed and “just felt horrible.” He had difficulty sleeping for a few months and worried about his future and his ability to continue care for his elderly father. Worrying about whether he was ever going to work again caused him great stress and anxiety, but he knew he had

to forge ahead because he had no other option. He immediately sought and received unemployment in the amount of \$500-\$600 per week for 28 weeks. Croken began seeking alternative employment immediately by recruiting the help of four different placement agencies, cold calling companies, networking and answering online and newspaper advertisements and sending out numerous emails. He also sought the help of friends and acquaintances to help him find a new job, which also made him feel extremely humiliated. Despite his efforts to secure subsequent employment, Croken was unable to procure a permanent full-time job until one year after his termination at the age of 49. He worked a temp job in 2006 as a site manager for Cirque de Soleil and earned approximately \$2000, and due to lay-offs and the poor economy, he accepted a number of other temporary positions and other more menial jobs for which he was over-qualified because he had to survive. This caused him to feel embarrassed and humiliated. Croken testified that he is much less secure about his future and given his age, (almost 50) the recession, high unemployment and companies downsizing, he is uncertain about re-establishing his career. As witnessed at the hearing, Croken is still overcome with emotional pain when he revisits this difficult period in his life and considers his bleak employment prospects. The suffering he continues to endure was visibly apparent in his demeanor as he discussed these trying events. (Tr. I, pp. 149-153, 162-163) Despite the loss of his career, the significant diminishment of his income, and the lack of confidence in his future, Croken testified that if he had to do it over again, he would still defend Tamayo and wouldn't have been able to live with himself if he had sacrificed Tamayo to save his own job. (Tr. I, p. 163)

45. Croken's first permanent position after his termination was at the Boston Convention Center as a Director of Concessions and Special Projects in the fall of 2006. His salary was \$58,000, almost \$20,000 less than he was earning at Hagopian Hotels. Croken was promoted approximately 3-4 months later and his salary was raised to \$63,000. In the late summer or fall of 2007, Croken accepted a position at the Federal Reserve Bank of Boston as General Manager of Conference services, with a salary of \$75,000. After only a few months at the Federal Reserve Bank, Croken was laid off in December of 2007, due to budget cuts. (Tr. I, pp. 154-156) He was unemployed for most of 2008 and received unemployment benefits for 32-37 weeks at approximately \$580 - \$600 per week. His income for the entire year was only \$18,560-\$22,200, significantly less than what he would have continued to earn had he not been terminated from Hagopian Hotels. (Tr. I, p. 156)

46. Thereafter, Croken accepted a temporary position as a project manager which ended in December 2008, at a salary of approximately \$1500 per week. On March 18, 2009, he was then offered a full time position at Longwood Events as a General Manager at a salary of \$80,000. However this job lasted only 6-7 months because the company was restructured. After being unemployed again for a few months, Croken began working with a hospitality management consulting company around January of 2010. The position has a base salary of \$65,000. (Ex. C-1; Tr. I, pp. 159-163)

47. Croken's tax returns reflect a significant and steady decrease income after his termination from Hagopian Hotels. In 2005 Croken claimed \$61,962.00 in gross income. His gross income and unemployment for 2006 was \$24,151. In 2007 Croken reported

earning income and unemployment in the amount of \$54,685. In 2008, Croken reported earning salary and unemployment compensation in the amount of \$29,425. (Ex. C-13)

48. Nubar Hagopian testified that over the last year, the Newbury Guest House has generated approximately \$1.7 million in gross sales, and that he sold the Harborside Inn for \$8.5 million realizing a profit of \$6.5 million. (Tr. V, pp. 907-908, 930)

49. Johnny Tamayo continued to work at the Newbury Guest House for a short time after he filed his MCAD complaint against Hagopian Hotels and Nubar Hagopian. According to Tamayo, when Hagopian received notice of the MCAD complaints filed against him by Tamayo, he spoke to Tamayo at the Newbury Guest with the MCAD complaint in hand, stating words to the effect of “you too,” and making reference to Croken’s claim. He also said “since you filed a claim, I can’t fire you now.” Tamayo testified that Croken’s firing made him feel uncomfortable and frightened about his own job security. Hagopian also told Tamayo that his lawyers had advised him not to speak to Tamayo, and therefore, Tamayo was being transferred back to the Harborside Inn in early December. (Tr. II, pp. 410-411; Tr. III p. 456) Hagopian testified that he was advised by his attorney not to speak to Tamayo after the MCAD complaint was filed and that he was worried about saying anything to Tamayo that could be used against him. He also stated that Tamayo was more familiar with the Harborside Inn. (Tr. V, pp.885- 888)

50. Tamayo was returned to the Harborside Inn in early December of 2005. He was the only one of the 5 or 6 employees who had been cross-training at the Newbury Guest House, sent back to the Harborside Inn. He stated that serving as the operations manager at the Harborside Inn, in the absence of a general manager to consult with, or ask questions to, and not being able to communicate with Nubar Hagopian, created a very

difficult and burdensome work environment for him. He could communicate with Hagopian only through Valentin Zsok, and had to deal with issues that that he was not trained to handle that were normally the responsibility of the general manager or Hagopian. Many of the employees at the Harborside Inn were relatively new there and still in training. He felt like he was on his own and very isolated and was working many more hours and not seeing his new-born daughter. (Tr. Vol. II, p. 412-418; Tr. III, pp. 455-456)

51. In the fall of 2005, Nubar Hagopian had begun negotiating to sell the Harborside Inn to his son, Mark. Mark Hagopian has a Bachelor's degree in business and has been self-employed as a hotel developer for the last 20 years. He and his father developed the Newbury Guest House and Harborside Inn together, but after the opening of the Harborside Inn the two had a personal and professional falling-out and did not speak for several years prior to late 2005, when they met to discuss the sale of the Harborside Inn. Mark Hagopian testified that he sued his father because his father failed to honor an agreement about his percentage ownership of the business. (Tr. V, pp. 974-976, 979-980. 983-985) Nubar Hagopian testified that he was "deeply hurt" by his son suing him and he refused to speak to his son for several years. (Tr. V, pp. 879)

52. Mark Hagopian testified that he learned from his sister Lisa that his father was interested in selling the Harborside Inn sometime prior to the sale of the hotel which occurred in February of 2006. Lisa Hagopian testified that her brother initiated the purchase of the Harborside Inn by telling her he would ask his business partner to contact Nubar Hagopian to inquire if he was willing to sell the property. Mark's business partner met with Nubar Hagopian at some point in late 2005 to discuss the purchase price for the

Inn, but Mark Hagopian was not present. (Tr. V. pp. 985-986) There was conflicting testimony about whether Mark Hagopian ever met with his father to discuss the purchase of the hotel. I find that they did have at least one face to face meeting at the Newbury Guest House in December of 2005. (Tr. V. pp. 924-926, 985, 1032) Mark Hagopian testified that the deal for the sale of the Harborside Inn was negotiated and consummated in a few short weeks because his father wanted to “get it done fast.” The purchase and sale agreement was signed on December 15, 2005, and the sale was completed on February 15, 2006. There was some suggestion that prior to the negotiations, Lisa Hagopian had informed her brother of the lawsuits filed against Nubar Hagopian, but Mark claimed to know specifically only of an embezzlement claim that his father had filed against a former employee, who in turn sued him for sexual harassment. (Tr. V, pp. 986-988)

53. Mark Hagopian testified that he and his partner reviewed the hotel’s profit and loss statements prior to the purchase, and as part of his due diligence he considered any claims against the hotel that might affect him. Prior to the sale, he also discussed the conditions and price of the business with his father, in a number of phone conversations, but claimed to know nothing of the details of the operation of the business. (Tr. V, p. 990) His attorneys drafted the purchase and sale agreement and the MCAD claims were referenced in the agreement. Mark Hagopian testified that he did not focus on these complaints because he was not assuming liability for any claims against the prior business, and Nubar Hagopian agreed to indemnify him against any such claims. He also stated that he relied on the expertise of his attorneys who generated the agreement. (Tr. V, pp. 991, 992, 1016, 1018-1021; Ex. C-15) In contrast to his earlier statement that he

knew nothing of the operations of the Harborside Inn, he later admitted that he discussed the operations of the facility with his father, including the staffing and who was running the hotel, and he knew that the General Manager had been fired. (Tr. V, pp. 1029-1033) I find that Mark Hagopian had knowledge of the three MCAD complaints filed by Croken, Tamayo and a third employee, and that he knew Tamayo was running the Harborside Inn at the time of purchase.

54. Tamayo testified that he was given no prior notice of the change in ownership or management of the Harborside Inn until Mark Hagopian walked in and informed him that he was Nubar's son and that he had just purchased the hotel and that Tamayo now reported to him. (Tr. II, p. 420) He testified that a few days later he and the other employees were given papers to fill out, which appeared to be in the nature of a job application. Tamayo asked if it had anything to do with keeping his job to which Mark Hagopian replied his job was fine. (Tr. II, pp. 422-424) A few days later a man named Calvin Cherry began work at the hotel and Tamayo was asked to train him in the hotel operations. When Tamayo asked Mark Hagopian if Cherry was replacing him, he was told Cherry was hired to be the front desk agent. (Tr. II, p. 426) This statement was not entirely true. Mark Hagopian claimed that Tamayo's position was eliminated, and that he was assuming the position of operations manager, with Cherry assisting him. (Tr. V, p. 997-998) Cherry, who is African American, held two bachelors degrees and an associates degree in hotel and restaurant management and had over a decade of extensive experience in the hotel industry, much of it in a managerial capacity. (Tr. V, pp. 997-998) I credit Mark Hagopian's testimony that he believed Cherry was significantly more

qualified than Tamayo to run the hotel and conclude that he hired Cherry to replace Tamayo as operations manager.

55. Tamayo trained Cherry for about a week and on February 22, 2006 at approximately 10:00 a.m. Mark Hagopian called Tamayo and Cherry into his office. Hagopian informed Tamayo that his position was no longer needed and he “hoped there were no hard feelings.” He also gave Tamayo his final pay check. Tamayo asked if this had anything to do with Mark’s father, but he got no response. He testified that the check he was given bounced. (Tr. II, p. 429)

56. Mark Hagopian knew that Tamayo had held the position of operations manager at the Harborside Inn for some nine months prior to the sale of the hotel, but he considered him the “interim operations manager,” stating he was just “holding the fort,” and that he did a great job in holding the fort. He admitted that Tamayo was good with the guests and there were no complaints about him. (Tr. V, p. 998, 1002-1003, 1049) He testified that Tamayo was terminated because he lacked the experience in hotel management and the specialized education to hold the position of operations manager. (Tr. 1046-1047) Mark Hagopian stated that he reached this conclusion based on his observations of Tamayo’s performance, from his talks with him, and from information on Tamayo’s application. He testified that Tamayo did not have the ability to train, coach and supervise, had no accounting background or revenue enhancement background, didn’t know financial systems, didn’t have the required IT skills, and didn’t know how to market the hotel on line. (Tr. V, pp. 1067-1072) In short, Mark Hagopian did not think Tamayo had the experience and skills to manage the business. (Tr. V, pp. 1002-1003) He denied terminating Tamayo in retaliation for his having filed a discrimination claim

against his father, although he believed it was possible that the complaints might have been part of a scheme to extort money from his father. (Tr. V, p. 1002, 1059-1060, 1065) He also denied Tamayo's charge that his final check bounced and introduced bank records showing that a check written to Tamayo on February 21, 2006 in the amount of \$1680.00 for 4 days pay and 50 hours of severance pay had cleared the hotel's account. (Ex. R-20) Hagopian also asserted that he wished to bring his own management team into the hotel, stating, "I was going to go over and take a team. A new coach is coming in. You set up your own systems, develop your own players." (Tr. V, p. 1034) Mark Hagopian did not terminate the non-managerial employee who had also filed an MCAD complaint against Hagopian Hotels and Nubar Hagopian, during the same time period. This employee was related to Tamayo. (Tr. V, pp. 1003-1004) I credit Hagopian's testimony that as a new owner, he wished to bring in his own management team and that he believed that Tamayo lacked the skills and experience in hotel management and the education in revenue and financial systems required to be operations manager of this new operation.

III. CONCLUSIONS OF LAW

A. Tamayo's Discrimination Claim

General Laws c. 151B §4(1) prohibits discrimination based on race color and national origin. Discrimination includes disparate treatment of an employee who is in a protected class. It may also include harassment or the creation of a hostile work environment based on one's protected class. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Collegetown v. MCAD, 400 Mass. 156, 162

(1987); Beldo v. UMass Boston, 20 MDRL 105 (1998); Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994). Discrimination cases are analyzed according to the three stage burden shifting paradigm established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973) and adopted in Wheelock College v. MCAD, 371 Mass. 130 (1976). The burden of proof in an employment discrimination case rests with the Complainant who must first establish a prima facie case. The elements of a prima facie case are: (1) membership in a protected class; (2) harm; (3) discriminatory animus; and (4) causation. Trustees of Health & Hospitals of the City of Boston v. MCAD, 449 Mass. 675, 686 (2007). At the second stage, the employer may rebut the employee's prima facie case by offering evidence of a legitimate non-discriminatory reason for the alleged discriminatory practice against the employee. Blare v. Huskey Injection Molding Sys. Boston, Inc. 419 Mass. 437, 441-442 (1995). At the third stage of the analysis, the employee must demonstrate that the reasons advanced by the employer for the adverse employment decisions are not true, and the real basis for the employment decision was unlawful discrimination. Abramian, 432 Mass. 107 at 117. In order to do so the employee must show that the employer acted with discriminatory intent, motive of state of mind. Lipchitz v. Raytheon, Co., 434 Mass. 493, 504 (2001).

Complainant Tamayo has met his burden of establishing a prima facie case of discrimination based on both disparate treatment and harassment. Tamayo is a member of a protected class in that he is Hispanic and from Ecuador. Tamayo and Croken proffered credible evidence that Nubar Hagopian harassed him and treated him differently by repeatedly making false accusations against him, treating him rudely,

authorizing a smaller bonus for him, essentially banishing him from the Newbury Guest House, and refusing to work with or communicate with him at all about business matters subsequent to Croken's termination.

A claim of a hostile work environment based on race or ethnicity may be established by showing that (1) Complainant is a member of a protected class, (2) he was the target of speech or conduct based on his membership in that class; (3) the speech or conduct was sufficiently severe or pervasive to alter his conditions of employment and create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to Complainant, or the employer knew or should have known of the harassment and failed to take prompt remedial action. Beldo, supra. at 111.

Hagopian accused Tamayo of breaking into his apartment on the top floor of the Newbury Guest House to watch the fireworks on the night of July 4, 2005. There was no basis for this accusation and Tamayo credibly denied that he had done so and was stunned by the accusation. He stated that he would never take such liberties without permission, knowing what the consequences could be. The work schedule corresponding to the date Tamayo was accused of breaking into Hagopian's apartment shows that Tamayo was not even scheduled to work that day and was not on the premises at the Newbury Guest House that night. When Tamayo denied the allegation, Hagopian said he would speak to Croken. Hagopian claimed that he had discovered some guests, not staff, on his roof deck and did not accuse Tamayo of breaking in. I credited Tamayo's testimony about this incident, and find that it is consistent with a number of other

unfounded accusations that Hagopian made against him and another employee who was Hispanic.

In a similar situation, Hagopian approached Tamayo at the Newbury Guest House and accused him of using a guest room without authorization and causing a water leak in the bathroom. Tamayo denied this and immediately investigated the problem with the facilities manager. The two men discovered that there was a water leak in the room, and that the source of the leak was a clogged toilet. There was no evidence that Tamayo was involved in any way. Croken subsequently conducted his own investigation into the matter and discovered that a guest had checked out of the room late at night and no housekeeper was available to clean the room until the following day. Two other employees testified that they spoke to Tamayo at his home on the morning after he was alleged to have stayed in the guestroom. It is clear that there was no credible reason for Hagopian to suspect or accuse Tamayo of being involved in this incident. Hagopian's testimony about this incident was confused and conflicting and he provided no credible reason for his having accused Tamayo of using a guest room.

During the same time period, Hagopian falsely accused Tamayo of eating the breakfast food intended for hotel guests. When Tamayo informed him that he was eating food brought from home, Hagopian was rudely dismissive of him. I credited Tamayo's testimony that he was very offended by these repeated false accusations and that Hagopian made him feel uncomfortable, insecure and intimidated. Hagopian either denied falsely accusing Tamayo or was unable to explain what prompted the accusations. His failure to adequately explain his conduct and hostile demeanor towards Tamayo leads me to conclude that he was motivated by discriminatory animus. I also conclude that his

conduct was sufficiently severe and pervasive as to create a discriminatory and hostile work environment for Tamayo. These many incidents clearly created a work environment for Tamayo that was “pervaded by harassment” with the resulting “intimidation” and “humiliation” that “poses a formidable barrier to full participation of an individual in the workplace.” College-Town, 400 Mass. at 162.

Another probative means to establish that an employer’s actions were a pretext for discrimination is to demonstrate that similarly situated people , whose race is different from Complainant’s were treated differently than Complainant. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997) There was ample evidence that Hagopian treated Tamayo differently and favored his white European counterpart, Valentin Zsok. After Croken implemented the cross-training program which sent Tamayo to the Newbury Guest House, Hagopian repeatedly and rudely asked Tamayo why he, and not Zsok, was at the Newbury Guest House. When Tamayo reminded him of the cross-training program, Hagopian continued to tell Tamayo that he was not needed at the Newbury Guest House and that Hagopian wanted Zsok working there. Tamayo stated that these exchanges made him feel very intimidated and worried about his job security. Croken testified that Hagopian specifically requested that Zsok be transferred back to the Newbury Guest House stating that he did not want Tamayo there, and that he liked Zsok better. Hagopian recalled telling Croken only that he found it more useful to work with Zsok. I credit Croken’s testimony that Hagopian repeatedly asked him to transfer Tamayo back to the Harborside Inn.

When bonuses were being awarded, Hagopian disregarded Croken’s advice that both operations managers should receive equal bonuses because their duties were

substantially similar and they were progressing similarly. Hagopian decided that Zsok would receive a larger bonus, based on no credible objective criteria. He recalled only stating to Croken that Zsok seemed more adept at front desk functions and Tamayo's strength was supervision. The difference in bonuses did not reflect any articulated appreciable difference in performance and is evidence of Hagopian's disparate treatment of the two operations managers.

Finally, Hagopian's discriminatory animus toward Tamayo was expressly stated when he dismissed Croken's offer to conduct an investigation into any allegations against Tamayo, by stating words to the effect of, "why would you want to investigate, he's a wetback." Hagopian's derisive comment was a clear expression of his view that there was no need for any investigation because Croken should accept his word without question against that of a Hispanic immigrant. Moreover, it is apparent that Hagopian did not want Croken to investigate because his allegations were fabricated and a pretext to get rid of Tamayo. Hagopian's "wetback" comment was an express statement of his belief that because Tamayo was an Hispanic immigrant, his word would not be worthy of credence. Hagopian made it clear that Croken should not challenge his word as against Tamayo's.

An employer can be liable based on a single incident of racial discrimination, and "actionable job discrimination has no irreducible quantitative requirement that allows supervisors...one free racial slur." Augus Corp. v. Mass. Comm'n Against Discrimination, 75 Mass. App. Ct. 398, 408 (2009). However, in this case, Hagopian's derogatory ethnic slur was not made in a vacuum. His statement must be viewed in light of his conduct and the other discriminatory views he expressed to Croken. When viewed

in this context, the statement clearly evidences Hagopian's discriminatory animus toward Tamayo. Hagopian's response was to deny, make light of, or not recall the alleged acts of discriminatory conduct. I found his responses unworthy of credence. I conclude that he articulated no legitimate non-discriminatory reasons for his adverse and hostile treatment of Tamayo.

Even if I were to accept Hagopian's vague assertion that he viewed Tamayo's abilities at the front desk as somehow deficient when compared to Zsok's, this does not explain or justify his repeated unfounded accusations against Tamayo, and his hostile rude treatment of him. His discriminatory actions and comments are all evidence of pretext and a discriminatory state of mind. Moreover, Croken testified credibly that Hagopian made numerous other discriminatory comments about racial minorities and women. He did not want information about employee's rights or MCAD in the employee handbook, and he directed Croken to remove these references from the handbook. Ultimately, I conclude that Hagopian's actions were motivated by a desire to diminish Tamayo's presence and to terminate his employment as an operations manager because of his Hispanic appearance and accent. There is no other plausible explanation for Hagopian's unfair and disparate treatment of Tamayo other than his discriminatory animus against him. He provided no evidence to rebut the allegations of discrimination other than his own self-serving denials.

Respondent argues that if Hagopian wanted to be rid of Tamayo, he would not have transferred him back to the Harborside Inn and would not have continued to employ him for the two to three months until that hotel was sold. However, as Tamayo credibly testified, Hagopian understood that he should not fire Tamayo, and in fact he told

Tamayo outright that he could not fire him because he had filed a complaint. Hagopian, nonetheless, decided to transfer Tamayo and cease all communications with him. I conclude that Hagopian's actions toward Tamayo were discriminatory and a violation of G.L. c. 151B.

B. Croken's Retaliation Claim

General Laws c. 151B §4 (4) protects employees who oppose practices prohibited by the statute. A claim under 4(4) is frequently referred to as retaliation and Complainant may establish a prima facie case by demonstrating that he engaged in protected activity, that his employer was aware of the protected activity, that his employer 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). Retaliation is a separate claim of from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sherriff's Dept., 22 MDLR 208, 215 [quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019 at 1040 (Dist. of Mass 1995)].

Croken claims that he was terminated from his employment as General Manager by Nubar Hagopian in retaliation for his having engaged in the protected activity of opposing discrimination against Tamayo. When presented with a host of allegations against Tamayo, including unauthorized use of a guest room, not showing up for work, sleeping on the job and being rude and unprofessional to guests and neighbors, Croken protested Hagopian's accusations and stated he would investigate the allegations.

Hagopian directed him not to investigate because Tamayo was a Hispanic immigrant and a person of color. Croken protested because he believed Tamayo was not capable of such conduct and because he viewed Hagopian's attitude and directive as improper and discriminatory. Moreover, Croken's reaction to the accusations was appropriate and professional and his subsequent investigation was intended to protect all the parties involved, including his employer. However Hagopian made it clear that Croken should abide by his admonishment not to investigate, or resign.

In contravention of Hagopian's directive, Croken undertook an investigation of the various accusations against Tamayo, because he believed it to be the proper and professional thing to do. He found the allegations to be false or unfounded and informed Hagopian and Tamayo of his findings. He also advised Tamayo of his right to seek redress with the MCAD. Upon receipt of this information, Hagopian again demanded that Croken resign as General Manager. When he refused to do so, he was terminated within days of concluding his investigation and reporting the results. The events leading up to Croken's termination occurred within a very short period of time. The fact that Croken's performance had not been at issue prior to November of 2005, and that his termination came within days of his defying Hagopian's directive not to investigate allegations against Tamayo, is sufficient to establish the causal relationship required for a prima facie case of retaliation.

Once the Complainant has articulated a prima facie case of retaliation, the Respondent must articulate and produce credible evidence of a legitimate non-retaliatory reason for its actions. Abramian, 423 Mass. at 116, 117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). While Hagopian testified that he terminated Croken's

employment for poor performance which he had witnessed over a period of time, I do not credit his testimony. I did not believe the allegations that Croken was frequently unavailable and failed to communicate with Hagopian. Moreover, Croken was given significant responsibility and autonomy to hire the personnel he needed and to implement new policies and protocols, which he did. He managed both hotels with little intervention from Hagopian, particularly throughout the summer months when Hagopian spent a great deal of time on the Cape. Under Croken's direction, the business improved and he was assigned some large projects to complete. Hagopian clearly intended Croken to remain as General Manager as part of his long range plans. Even Hagopian's displeasure at the departure of one of his favored employees, Helen Selmecki, some five months earlier, did not cause Hagopian to take any adverse action against Croken. He did not express any dissatisfaction with Croken or take any adverse action against him until Croken challenged what he viewed as Hagopian's discriminatory practices. This is particularly significant, since Hagopian and other witnesses made it clear that he does not hesitate to express a negative opinion or to act precipitously if he is displeased. Given all of these facts, I am left to conclude that there is insufficient credible evidence to support Hagopian's assertion of poor performance by Croken.

Respondent challenged Croken's credibility in part because of a misrepresentation in his resume about when his prior employment had ended, and because he denied assisting Mr. Tamayo with his complaint, when it was apparent that he had some involvement. However, I did not find these actions to be an indictment of his overall credibility. Generally, I found Croken to be extremely credible, earnest and driven by

deep convictions of fairness, professionalism and doing right by his employees, even at great personal risk to his own livelihood.

Hagopian's testimony with respect to allegations of discrimination and events surrounding Croken's termination was far less credible. I found his testimony to be vague, evasive and lacking in detail and his articulated reasons for his actions were largely unsubstantiated by any credible evidence. He was dismissive of the discrimination complaints filed against him, stating that all complaints were frivolous and boasting that he had never paid anyone a dime for what he viewed as frivolous claims. He implied that the allegations against him were ridiculous and unworthy of a response. His demeanor and behavior at the hearing were at times characterized by an unsettling display of disrespect for the proceeding. The descriptions by various witnesses of Hagopian's tendency toward outbursts and uncontrolled behavior are consistent with his conduct at the hearing. Ultimately, however, it is the compelling evidence in the record, that leads me to conclude that he was motivated by retaliatory animus and that he terminated Croken for supporting Tamayo and opposing what he viewed as discriminatory treatment. I therefore conclude that Croken was the victim of unlawful retaliation in violation of G.L. c. 151B §4(4).

C. Tamayo's Retaliation Claims

Tamayo asserts that he was the victim of retaliation by both Nubar Hagopian and Hagopian hotels and H & H, LLC., the corporate entity formed by Mark Hagopian, that purchased the Harborside Inn from Nubar Hagopian. I conclude that Nubar Hagopian retaliated against Tamayo for his filing of a discrimination complaint. Once Hagopian became aware of Tamayo's MCAD complaint, he transferred Tamayo to the Harborside

Inn within two weeks and thereafter refused to speak to him, even about legitimate, work related matters. He instructed Tamayo not to communicate with him directly, but only through Zsok. Tamayo stated that when he tried to contact Hagopian on business related matters he was always told that Hagopian was not available or not available to speak to him. Since the General Manager, Croken, had been fired, Tamayo was left with no guidance, and this made his job very difficult. The employees with whom he had worked and trained remained at the Newbury Guest House where they had been transferred for cross-training. Tamayo testified that he felt isolated and uncomfortable in his work environment and became more and more uncertain and insecure about his job. The only reason Hagopian gave for Tamayo's transfer was that it was based on his attorney's advice not to speak to Tamayo. I conclude that Tamayo's transfer, and even more so Hagopian's cutting off all communication with him, were adverse employment actions that materially disadvantaged Tamayo's employment. See Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997); MacCormack v. Boston Edison, 423 Mass. 652, 663 (1996). There was no legitimate reason why Hagopian could not have maintained cordial and professional communications regarding work related matters with Tamayo, who was charged with managing the Harborside Inn.

Retaliatory motive can also be inferred from the timing of the events. Kelley, supra, 22 MDLR 208. The timing of Hagopian's actions and his expressly stated reason for the transfer lead me to conclude that they were motivated by Tamayo's complaint and intended to be punitive. I conclude that Hagopian's treatment of Tamayo subsequent to the filing of his MCAD complaint was retaliation in violation of G.L. c. 151B § 4(4).

Tamayo also claims that his termination from his position as operations manager at the Harborside Inn in February of 2006, after Mark Hagopian and his business partner had purchased the hotel was retaliatory. While I believe that Mark Hagopian was aware of Tamayo's MCAD complaint against his father, I credit his testimony that he knew he was not liable for the actions of his father and that his father had agreed to indemnify him from all claims in the purchase and sale agreement. While I believe that Tamayo's complaint may have, in some small part, motivated Mark Hagopian to terminate Tamayo's employment, I do not believe that it was the but-for cause of his termination. Hagopian testified that the primary reasons he terminated Tamayo were because he wished to bring in his own management team and because he had determined Tamayo lacked the skills and education he believed was required for his operations manager. The question here is "whether the employer's proffered legitimate reason also motivated the employment decision and if so, to what extent." Wynn and Wynn, supra. at 666. The employer "must show that its legitimate reason, standing alone, would have induced it to make the same decision." Id. ; Johansen v. NCR Comten, Inc., 30 Mass.App. Ct. 294, 301(1991).

I conclude that H & H, LLC has met this burden. I found credible and convincing the testimony of Mark Hagopian and others that he continued to be estranged from his father, and that the sale of the hotel was an arms-length transaction. I also credited Mark Hagopian's testimony that he, personally had no motive to retaliate against Tamayo nor had he any interest in carrying out, in his words, "his father's dirty work." I credited his testimony that as the new owner of the Harborside Inn, he wished to put his own management team in place and that he did not believe that Tamayo possessed the

necessary skill sets, experience, or education necessary to be continue as the operations manager under his ownership. I conclude that these were not only legitimate reasons, but his primary reasons for terminating Tamayo and that he harbored no retaliatory animus. The position of operations manager was critical to the operation of the hotel and Mark Hagopian was justified in seeking his own person with the qualifications he deemed necessary for that position. It is not so unusual for a new person in charge to want to hire his own management team upon assuming control of an operation, as did Croken, when he became the General Manager. And this reason is certainly not so suspect as to raise an inference of retaliation. Thus, while Tamayo's MCAD complaint may have been a consideration in Mark Hagopian's decision to terminate his employment, I conclude that Mark Hagopian was primarily motivated by a conviction that Tamayo lacked the experience and skills necessary to run his hotel and by the desire to bring in his own person to run the operation. This is supported by the credentials of Tamayo's replacement. While I believe that the transition and Tamayo's termination were handled in an insensitive and less than forthright manner by Mark Hagopian, that does not make his behavior retaliation. Therefore I conclude that H & H, LLC did not engage in retaliation against Tamayo when Mark Hagopian terminated his employment and it is not liable for a violation of G.L. c. 151B § 4(4).

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make Complainants whole, and to ensure compliance with the anti-discrimination statute. G.L.c. 151B s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576

(2004). The Commission may award monetary damages for, among other things, lost compensation and benefits, lost future earnings, and emotional distress suffered as a direct and probable consequence of the unlawful discrimination. In addition the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent. The Commission has broad discretion to fashion remedies best to effectuate the goals of G.L. c. 151B. Conway v. Electro Switch Corp., 825 F. 2d 593, 601 (1st cir. 1987)

A. Back Pay Damages

Since I have determined that Johnny Tamayo's termination from the Harborside Inn was not an act of retaliation, I conclude that he is owed no back pay from H & H, LLC. However, he would likely not have faced termination within a few short months had Nubar Hagopian not retaliated by transferring him back to the Harborside Inn in December of 2005. I draw the reasonable inference that Tamayo would have continued to work for Nubar Hagopian as an operations manager at the Newbury Guest House at least up until the time of the hearing in this matter, since Nubar Hagopian expressly stated that he could not fire him since he had filed a complaint of discrimination. His salary at the time of his termination in February of 2006 was approximately \$42,000 per year. Tamayo made efforts to find work after his termination and his tax records for the years 2006 -2009 were submitted into evidence at the hearing. The records show that he had interim earnings from unemployment compensation and work in those years in the amount of \$76,373 (Exs. C-16 through C-20) After deducting interim earnings from his back pay losses, Tamayo is entitled to back pay up to and until the date of the hearing in this matter, June of 2010, in the amount of \$112,127. I decline to award front pay in this

matter, since there is no evidence in the record as to the length of employment in the industry for this type of position, but there was anecdotal evidence that would lead me to conclude that there is high turnover in the industry.

Likewise I find that Croken is entitled to back pay damages as a direct result of his unlawful termination by Nubar Hagopian. Croken was earning \$75,000 per year at Hagopian Hotels prior to his unlawful termination in November of 2005. As such without consideration of interim earnings, his back pay up to the time of the hearing is in the amount of approximately \$343,750. However, Croken made valiant efforts to mitigate his damages and sought work immediately. He also collected unemployment compensation for a period in the amount of approximately \$15,400. His tax returns for the years 2006 -2008 show interim earnings from employment and unemployment compensation totaling \$108,261. In March of 2009 he received a job paying \$80,000 per year which he held for approximately six months for a salary of approximately \$40,000. Deducting these interim earnings and unemployment compensation, I find that Croken is entitled to \$195,489 for back pay. For the reasons stated above, and taking into account Nubar Hagopian's age, and intervening events, such as the sale of the Harborside Inn, and the turnover in the industry, it would be highly speculative to award front pay to Croken, as it is not reasonable to assume that he would have remained in the position of General Manager of Hagopian Hotels for 17 more years until the year 2022.

B. Damages for Emotional Distress

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering

and any steps taken to mitigate the harm. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004).

I conclude that Tamayo suffered emotional distress as a direct result of Hagopian's discriminatory and retaliatory conduct. He was falsely accused of a host of improprieties and of being dishonest. He was told he was not wanted at the Newbury Guest House and asked repeatedly why he, instead of Zsok, was working there. Tamayo's reputation was sullied and he was embarrassed and humiliated by Hagopian's rude and disrespectful treatment of him. Hagopian's unfair treatment and harassment also made him feel intimidated, anxious, and insecure about his job. He felt like Hagopian was "picking on him for some reason, which made him feel "very uncomfortable and very down." He was also offended by the repeated false insinuations that he was unprofessional and dishonest. He was subjected to an abusive work environment by constantly having to defend himself against Hagopian's unfounded and malicious accusations. He testified that he felt "horrible" about the way Hagopian spoke to him and it made him fear for his job. After being transferred back to the Harborside Inn with no supervisor and no communication with Hagopian, Tamayo felt isolated and insecure. He worked longer hours and assumed many more responsibilities and spent little time at home with his wife and young daughter. He testified that this was demoralizing and difficult for him. I conclude that the evidence supports an award of \$50,000 to Tamayo for the emotional distress he suffered as a direct result of Hagopian's unlawful conduct.

Croken, likewise, suffered significant emotional distress as a direct result of Hagopian's unlawful, retaliatory behavior. Confronting Hagopian and protesting his

discriminatory treatment was not only courageous, but extremely emotionally upsetting and anxiety provoking for Croken. He knew he was likely to lose his job. Croken found himself in a most difficult position, and attempted to respond professionally and ethically to both his employee and his employer. He placed his reputation and his career at great risk to support an employee who he believed was being treated unfairly for unlawful reasons. Croken knew the risk he was taking professionally and was uncertain that he would ever find comparable employment again given his age and the vicissitudes of the job market. Given the subsequent downturn in the economy, his worst fears have been realized. At the time of his termination, Croken was living with and caring for his elderly father, and worrying about if he could continue to care for his father, compounded his stress and anxiety. He testified that he had difficult sleeping for months, felt depressed, withdrawn, embarrassed and “just felt horrible.” He continues to be humiliated at having to accept jobs that are beneath his abilities in order to survive and feels great insecurity about his future. I observed that Croken was extremely emotional at the hearing, even breaking down at times when discussing his emotional pain and suffering during this difficult period of his life. It is apparent that the events continue to affect his emotional health and well-being even five years later. The fact that his termination was retribution for his having exercised his moral and ethical convictions and acted in a legal and professional manner makes the situation even more emotionally distressing to Croken, but he stated he would do it again, because it was the right thing to do. I conclude that Croken is entitled to \$80,000 in damages for the emotional distress he suffered and continues to suffer as a direct result of his unlawful termination.

I also conclude that Hagopian's conduct was sufficiently deliberate and egregious to warrant the imposition of a civil penalty in the amount of \$10,000.

V. ORDER

Based on the foregoing finding of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.c. 151B s. 5, John Tamayo's complaint of retaliation against H &H, LLC, is hereby dismissed.

Respondents Nubar Hagopian, Newbury Guest House, Inc. and Hagopian Hotels are hereby Ordered to:

- (1) Cease and desist from any discrimination on the basis of race, color and ethnicity, and from acts of unlawful retaliation;
- (2) Pay to Complainant, Johnny Tamayo, the amount of \$112,127 in damages for back pay with interest thereon at the rate of 12% per annum until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (3) Pay to Complainant, Johnny Tamayo, the sum of \$50,000 in damages for emotional distress with interest thereon at the rate of 12% per annum until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (4) Pay to Complainant, Francis Croken, the sum of \$195,489 in damages for back pay with interest thereon at the rate of 12% per annum until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue;

- (5) Pay to Complainant, Francis Croken, the sum of \$80,000 in damages for emotional distress with interest thereon at the rate of 12% per annum until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (6) Pay to the Commonwealth of Massachusetts a civil penalty in the amount of \$10,000.

This decision represents the final Order of the Hearing Officer. Any party aggrieved by this decision may file an appeal to the Full Commission by filing a Notice of Appeal with the Clerk of the Commission within ten (10) days of receipt of this decision and a Petition for Review within thirty (30) days of receipt of this decision. Complainant may submit a petition for attorney's fees within ten (10) days of receipt of this decision.

So Ordered this 31st day of May, 2011.

Eugenia M. Guastaferr
Hearing Officer

