COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD, NATALIA GUTIERREZ, and
CHANI DUPUIS,

Complainants

Docket Nos. 10-NEM-02160 and
10-NEM-02161

v.

GABRIEL CARE, LLC,

Respondent

Appearances: Robert M. Novack, Esq. for Complainants
David H. Stillman, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 23, 2010, Complainant Natalia Gutierrez filed a charge of employment discrimination against Respondent Gabriel Care, LLC, an adult foster care nursing agency, based on national origin (Puerto Rico), race (Hispanic), and retaliation. Complainant Gutierrez alleges that after she began working for Respondent as a registered nurse, she was: 1) harassed by being told not to speak Spanish in the office and ridiculed for her accent; 2) was subjected to disparate treatment when pressured to sign a non-competition agreement that non-Hispanic employees were not required to sign; and 3) was subjected to retaliation by being fired after complaining about discrimination.

On the same date that Complainant Gutierrez filed her charges of employment discrimination, Complainant Chani Dupuis filed a charge of retaliation. She alleges that

she was threatened with termination for discussing employee rights and was fired for offering to serve as a witness to Gutierrez's termination.

Probable cause findings were issued on both cases on October 29, 2013. The cases were certified to public hearing on December 30, 2014.

A public hearing was held in the Gutierrez case on February 22, 23, and 29 and on March 3, 2016 and in the Dupuis matter on April 25 and 26, 2016. The following witnesses testified at the Gutierrez hearing: Complainant Gutierrez, Dennis Etzkorn, Jennifer Reid, Chani Dupuis,Yaritza Escobar, Danielle DaSilva, Abigail Ramirez, Sandra Bedard, Milagros Rodriguez, Nilda Thornburn, Pauline Ouellette, and Diane Roy. The following witnesses testified at the Dupuis hearing: Complainant Dupuis, Dennis Etzkorn, Jennifer Reid, Danielle DaSilva, and Sandra Bedard. The parties presented ten (10) joint exhibits. Complainant presented an additional four (4) exhibits.[1] Respondent presented an additional three (3) exhibits. Evidence submitted at the first hearing was incorporated into the record of the second hearing. The cases were formally consolidated on April 26, 2016 pursuant to Complainants' motion asserting that interwoven factual and legal issues in both actions supported consolidation.[2]

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

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[1] Complainants attached to their post-hearing brief a number of non-evidentiary documents including position statements, answers to interrogatories, and responses to requests for production. Complainants' reliance on these materials, except for impeachment purposes, will be disregarded. See 804 CMR 1.21 (11) (noting that while Commission is not generally bound by rules of evidence, it should, as far as practicable, follow the rules of evidence prevailing in the courts of the Commonwealth). Such documents are not subject to cross-examination and are not authenticated. Consequently, they do not stand the test of reliability sufficient to merit consideration as evidence.

[2] References to the Dupuis public hearing will be deemed days 5 and 6 of the consolidated case.

II. FINDINGS OF FACT

1. Complainant Natalia Gutierrez is a registered nurse in Massachusetts who was born in Puerto Rico. She began working at Gabriel Care, LLC in January of 2009 as an adult foster care nurse. Gutierrez was paid $23.00 per hour by Respondent upon her hire. Her duties as an adult foster care nurse included performing home visits to clients to ensure that their medical needs were being met. Complainant was the first Spanish-speaking nurse to work for Respondent, although the company previously employed other Spanish-speaking individuals. Gutierrez received two raises during her employment with Respondent, first to $24.00 per hour and then to $26.00 per hour.
2. Respondent Gabriel Care, LLC is located in Fall River, MA. The company is owned by Dennis Etzkorn. Gabriel Care provides medical services as part of a Medicare program which pays a stipend to relatives or other individuals providing at-home care for elderly clients. Etzkorn testimony, Day 1 at 3.10, Day 4 at 3:33. A significant number of Gabriel Care's elderly clients are Spanish and Portuguese-speaking.
3. Gabriel Care manager Danielle DaSilva testified that the agency sought to hire Spanish-speaking nurses in order to communicate with its Spanish-speaking clients. DaSilva testimony, Day 1 at 3:56.
4. Upon hiring Gutierrez, Etzkorn advanced her $1,200.00 out of her initial paychecks so that she could reinstate her driver's license and buy a car. Etzkorn testimony, Day 1 at 3.14; Gutierrez testimony, Day 3 at 16.30, 3:28.30.
5. Jennifer Reid was originally hired by Etzkorn as a case manager. She subsequently became Gabriel Care's assistant program director and, in late-2009, its program director (despite records that continued to list her as assistant program director). Reid

testimony, Day 2 at 11.30; 20.33; Etzkorn testimony, Day 4 at 3:42.20. At or around the time that Reid began to manage the daily operation of the business and to supervise the staff, Etzkorn stopped overseeing the business on a full-time basis. Reid was Gutierrez's supervisor for administrative matters. Nursing Supervisor Sandra Bedard oversaw Gutierrez in regard to nursing matters.

6. In 2009, the offices of Gabriel Care moved from North Main Street to South Main Street in New Bedford. Gutierrez's son assisted with the move. According to Gutierrez, around the time of the move, her son suggested that she leave Gabriel Care and open up her own adult foster care agency under the name, "Bay State Adult Foster Care." Gutierrez claims that she did not act on her son's advice but nonetheless wrote down the proposed name along with her son's telephone number on a piece of paper and placed it in her wallet. I do not credit Gutierrez's testimony that she did not act on her son's advice.
7. The office at South Main Street has two floors. Employees work in areas separated by partitions which do not go all the way to the ceiling. Patient records are located on the first floor. Gutierrez shared an office space on the first floor with three other employees, two of whom were Hispanic and one of whom was not Hispanic and did not understand Spanish. Supervisors Sandra Bedard and Jennifer Reid had offices on the first floor close to Gutierrez's.
8. Complainant Chani Dupuis, born in the United States, is a non-Hispanic nurse registered in Massachusetts who began working for Respondent on June 23, 2010 at an hourly rate of $24 per hour ($920.00 per week). Dupuis testimony, Day 5 at 2:22.0. Dupuis was initially stationed downstairs at Bedard's desk and shadowed Bedard for

the first two weeks of her employment. Dupuis testimony, Day 2 at 4:03.00. The shadowing consisted of going to client meetings with Bedard and observing Bedard complete paperwork in the office. After two weeks, Dupuis was given a small caseload and moved to a desk upstairs. She continued to spend time downstairs in order to access files, the copy machine, the lunchroom, and co-workers.

9. In May of 2010, Reid gave Gutierrez a work performance evaluation. Respondent's Exhibit 1. Gutierrez received a score of 3 ("consistently meets standards") out of 5 in seven categories and a score of 2 ("generally works toward standard") in three categories. Id. Reid also provided written comments stating that Gutierrez was "inconsistent" in completing paperwork in a timely fashion, had time management issues when visiting clients, had difficulty accepting assistance from a supervisor, and needed to refrain from delegating her job responsibilities to others. Id. Gutierrez refused to sign her evaluation. Id.

10. Reid was out of the office on maternity leave during the summer of 2010 but during July and August of 2010, she sometimes came into the office in the late afternoon. Reid testimony, Day 2 at 50.20.

11. Reid credibly denied telling Gutierrez not to speak Spanish to her clients. Reid testimony, Day 2 at 36.00. Reid's testimony was corroborated by Danielle DaSilva and Diane Roy. DaSilva testimony, Day 1 at 4:14.20; Roy testimony, Day 4 at 2:51.49.

12. Gabriel Care employees were asked to speak English in the workplace when clients weren't involved so that all employees could understand what was being said. Bedard testimony, Day 4 at 16.50, 3:16.12. On one occasion, Gutierrez spoke Spanish in the office with a co-worker and they laughed, causing another co-worker to look down in

an uncomfortable manner. Reid testimony, Day 2 at 36.00. On that occasion, Reid commented that the co-worker might feel uncomfortable if she thought Gutierrez was talking about her. Id.

13. I do not credit the testimony of Gutierrez and Dupuis that Reid accused Gutierrez of stealing office supplies. Gutierrez, Day 3 at 58.57; Dupuis, Day 2 at 4:19.18. Reid acknowledged that at one time supplies were missing but testified credibly that she did not accuse any particular employee of stealing them. Her testimony is corroborated by Abigail Ramirez (Day 3 at 3:01.0), Sandra Bedard (Day 4 at 22.10), Pauline Ouellette (Day 4 at 2:33.50), and Diane Roy (Day 4 at 2:49.20).

14. The office kept an "on-call" cell phone that rotated among the nurses. Etzkorn testified credibly that after Gutierrez took possession of the phone for about one month, phone records indicated an increased number of phone calls to Puerto Rican area codes. According to Etzkorn, Gutierrez admitted to him that she used the on-call phone for making personal calls to Puerto Rico because she thought the cell phone account permitted unlimited usage. Etzkorn testimony, Day 1 at 3:24.30. I credit this assertion over Gutierrez's claim that she was communicating with clients in Massachusetts who had kept their Puerto Rican telephone exchanges. Gutierrez testimony, 1:16.30. Gutierrez was not disciplined for inappropriate use of the on-call cell phone, but she was reminded to restrict her use of the phone to work-related matters. Reid testimony at Day 2 at 41.40. According to Gabriel Care's Employee Handbook, long distance phone calls require approval from management. Joint Exhibit 5, p. 10.

15. Nurses at Gabriel Care are required to post their schedules on a glass door in the central area of the office. At times, Gutierrez failed to post her schedule on the door. Reid

testimony, Day 2 at 45.17. I do not credit testimony to the contrary by Gutierrez and Dupuis. Gutierrez testimony, Day 3 at 1:12.17, 3:48.0; Dupuis testimony, Day 2 at 4:31.45; 5:30.10.

16. According to Daniella DaSilva, there were times when Gutierrez failed to make scheduled client visits. DaSilva testimony, Day 1 at 4:02.40. I do not credit testimony to the contrary by Gutierrez. Day 3 at 3:59.04

17. In mid-2010, case managers "Holly" and "Keith," both Caucasian, left Gabriel Care. Etzkorn, Reid, and Bedard all testified that they were not aware at the time that Holly and Keith were leaving to start their own adult foster care agency in New Bedford. Respondent gave them a goodbye party. Etzkorn testimony, Day 1 at 2:27; Reid testimony at Day 2 at 52.11; Day 4 at 1:39.20.

18. As a result of Holly and Keith leaving to start their own agency, Etzkorn arranged to have all employees sign non-compete agreements. Etzkorn testimony, Day 5 at 3:16.38; Reid testimony, Day 2 at 51.20, 3:08.20; Bedard testimony, Day 4 at 32.00; Ramirez testimony, Day 3 at 3:01.40. Etzkorn testified that his main concern was that departing employees not solicit his client lists, but according to Reid, the non-compete agreements purported to prevent former employees of Gabriel Care from working as adult foster care nurses for a period of time after they left Gabriel Care's employ. Etzkorn testimony, day 1 at 2:48.0; Reid testimony, Day 5 at 1:23.45.

19. On Friday, August 13, 2010, Reid and Bedard went to Gutierrez's desk where they instructed her to sign a non-compete agreement. Reid testimony, Day 2 at 58.50; Gutierrez testimony, Day 3 at 1:28.30. Gutierrez refused to sign the agreement. She

was sent home and her office keys were taken by Reid. After she left, Etzkorn called Gutierrez and told her to come back to work the following week.

20. Gutierrez returned to work the following week. On August 18, 2010, Gutierrez signed a newly-worded, non-compete document. Joint Exhibits 7 & 8; Reid testimony, Day 2 at 1:01.00; Gutierrez testimony, Day 3 at 1:29.50. The signed document states that Gutierrez agrees: "not to contact, solicit and/or service clients . . . of Gabriel Care . . . [and] not to copy or remove any files . . . or any other relevant material to Gabriel Care LLC's Adult Foster Care Program."

21. On the same day -- August 18, 2010 -- Etzkorn and Reid met with Dupuis and asked her why she was passing out information about nurses not having to sign non-compete agreements when she, herself, signed the one presented to her. Dupuis testimony, Day 2 at 4:46.04. Dupuis explained that she signed the agreement because she considered it to be invalid, unenforceable, and "not worth the paper it was written on." Dupuis testimony, Day 2 at 4:38.03; Reid testimony, Day 5 at 1:10.54; Etzkorn testimony, Day 5 at 3:17.35. Etzkorn described Dupuis's behavior on August 18, 2010 as a little "brazen" but not so insubordinate that he would fire her on the spot. Day 5 at 3:33.41.

22. Dupuis testified credibly that when she met with Etzkorn and Reid on August 18, 2010, she showed them a copy of G.L. c. 112 section 74D, rendering unenforceable any contract provisions restricting nurses from practicing as nurses.[3] Dupuis told them that she gave a copy of Chapter 112, section 74D to Gutierrez but not to other co-workers

[3] G.L. c. 112, section 74D states that "Any contract or agreement which creates or establishes the terms of a partnership, employment, or any other form of professional relationship with a nurse registered to practice as a registered nurse pursuant to section seventy-four, or a practical nurse registered to practice as a licensed practical nurse pursuant to section seventy-four A, which includes any restriction of the right of such nurse to practice as a nurse in any geographical area for any period of time after the termination of such partnership, employment or professional relationship shall be void and unenforceable with respect to said restriction. Nothing in this section shall render void or unenforceable any other provision of any such contract or agreement.

although she allowed them to duplicate her copy. Dupuis testimony, Day 2 at 4:38.40, Day 5 at 2:08.0, 2:10.55, & 2:51.20. Dupuis also claims that she accused Reid at the meeting of discriminating against Gutierrez and others who were not white and accused Reid of making fun of Gutierrez's accent, targeting her, and calling her "stupid." Dupuis testimony, Day 2 at 4:48.09; Day 5 at 3:05.40. Etzkorn and Reid denied that any such accusations were made. Etzkorn testimony, Day 1 at 2:59.01, 3.27.57, Day 5 at 3:19.40; Reid testimony, Day 2 at 1:51.17, Day 5 at 1:10.30. I credit Etzkorn and Reid over Dupuis regarding the alleged accusations because I do not believe that Dupuis, while still an employee, made accusations in Reid's presence about her treatment of Gutierrez or other employees.

23. In the late afternoon of August 19, 2010, Reid received a call at work from the "national provider registry" about a "national provider identification number" requested by Gutierrez. Respondent's Exhibit 2; Reid testimony, Day 2 at 1:06.30; Etzkorn testimony, Day 1 at 3:43:10. Such numbers are needed by individuals providing adult foster care services or by entities operating adult foster care agencies. Reid testimony, Day 2 at 3:38.40. As a salaried nurse working for Gabriel Care LLC, Gutierrez did not need a national provider identification number. Gutierrez denied that she applied for a national provider identification number in 2010 (Day 3 at 4:44.50), but I do not credit this denial. A national provider identification number was issued to Gutierrez in June of 2010 allowing her, as a registered nurse, to bill for adult foster care nursing services. Respondent's Exhibit 2.

24. Immediately after receiving the registry call, Reid went to Gutierrez's desk and found inside her drawer a sheet of paper containing the name "Bay State Adult Foster Care"

and two phone/fax numbers belonging to Gutierrez and her son. Reid testimony, Day 2 at 1:08.30; 3:17.00. Reid also found searches on the office computer for "how to start a business" and for Massachusetts licensing information. Reid testimony, Day 2 at 1:42.40; 3:20.26. From this information, Reid and nursing supervisor Sandra Bedard concluded that Gutierrez was taking steps to open her own adult foster care agency called Bay State Adult Foster Care. Reid testimony, Day 2 at 3:20.26; Bedard testimony, Day 4 at 37.40, 1:46.10.

25. Reid and Bedard arranged to meet with Gutierrez on August 20, 2010. At some point during the meeting, Gutierrez brought fellow employees Chani Dupuis and Daniella DaSilva into the meeting as witnesses.

26. Gabriel Care's Employee Handbook, Joint Exhibit 5 at p. 23, states that when a supervisor calls an employee to a disciplinary meeting, the supervisor "shall inform the employee of the reason for the meeting and allow the employee to choose a co-worker to accompany him or her [as an observer] to the meeting." Joint Exhibit 5.

27. When Dupuis and DaSilva arrived at the meeting, Reid told them to leave. Reid testimony, Day 2 at 1:39.00 & 3:23.25; Bedard testimony, Day 4 at 44.20, & 1:50.30; Dupuis testimony, Day 5 at 1:59.45, 2:57.50. DaSilva left immediately, but Dupuis did not. DaSilva testimony, Day 1 at 4:06. Bedard testified that Dupuis was very "vocal" about wanting to remain, initially refused to leave, and made a "scene." Day 4 at 45.30, 1:50.00. I credit that Dupuis remained a few minutes and said she had no problem leaving but that if Gutierrez were fired and filed a lawsuit for discrimination, she (Dupuis) would "stand up" for her and/or be a witness. Dupuis testimony, Day 2 at

4:56.50, 5:35.30; Day 5 at 2:00, 2:57.50. Her statement in this regard is corroborated by Sandra Bedard and Jennifer Reid. Day 2 at 3.23.25; Day 4 at 1:50.54.

28. Reid called Etzkorn for advice about how to handle Dupuis's refusal to leave the meeting. Etzkorn claims that he told Reid to call the police (Day 1 at 3:01.40, Day 5 at 3:27.20), but I do not credit this testimony. I credit Reid's testimony that Etzkorn told her to have Dupuis "removed" and to "get rid of" her because "it was not a good fit." Day 5 at 46.22; Day 5 at 1:18.50. Reid implemented Etzkorn's instructions by terminating Dupuis that day. According to the credible testimony of Reid and Etzkorn, Dupuis was terminated for her insubordination in refusing to leave the August 20th meeting. Reid testimony, Day 5 at 53.45; Etzkorn testimony, Day 5 at 3:26.0. Dupuis was still a probationary employee when she was terminated.

29. The meeting with Gutierrez commenced after Dupuis left. Bedard testified credibly that during the meeting, Gutierrez denied that she was starting her own company, but when Reid left the room at one point during the meeting, Gutierrez admitted that she intended to do so. Bedard testimony, Day 4 at 46.30, 1:58.30. Gutierrez claimed that she was only being sarcastic when she made this statement but her assertion was disputed by Bedard and is not credible. Gutierrez testimony, Day 3 at 4:26.05; Bedard testimony, Day 4 at 48.41, 1:58.50.

30. Etzkorn testified that Gutierrez was terminated for a variety of reasons including insubordination, her absence from work, the inability to track her time, and her failure to post her schedule, but that the "straw that broke the camel's back" was her attempt to open a competing business. Etzkorn testimony, Day 1 at 3:50.

31. After Gutierrez was terminated from Gabriel Care, Gutierrez had in her possession a list of Respondent's clients and their phone numbers. Gutierrez testimony, Day 3 at 3:34.07.

32. Complainants allege that the requirement of signing non-compete agreements was dropped after they were fired and there were no consequences for white employees who refused to sign non-compete agreements. I do not credit these assertions. According to Gabriel Care employee Milagros Rodrigues, she signed a non-compete agreement soon after she was hired in June of 2010. She testified that all employees did so. Day 3 at 2:30.00.

33. Reid testified credibly that she terminated Tammy Pereirra as well as Gutierrez for starting a competing adult foster care agency while working for Respondent. Reid testimony, Day 2 at 3:08.50.

34. Gutierrez and Dupuis testified that Reid made fun of Gutierrez's accent and pronunciation, called her an "idiot," "stupid," and a "troublemaker," and questioned Gutierrez's education and credentials in front of other employees. Dupuis testimony, Day 2 at 4:09.00, 4:15.00; Gutierrez testimony, Day 3 at 37.47, 48.39. According to Dupuis, Reid was annoyed by anyone who wasn't white and spoke disparagingly about clients from other countries. Day 2 at 4:15.55, 4:35.40. I credit that Reid, at times, became impatient and frustrated with Gutierrez's difficulty speaking English and her failure to adhere to office procedures, but I do not credit that Reid displayed the racial and national origin animus claimed by Gutierrez and Dupuis.

35. Reid denied that she insulted Gutierrez, other employees, and clients from other countries. Day 2 at 1:55.04. Her denials were corroborated by Gabriel Care employees

Danielle DaSilva, Abigail Ramirez, Sandra Bedard, Nilda Thorburn, Pauline Ouellette, Diane Roy, and Yaritza Escobar. They testified that Reid did not subject Gutierrez to discriminatory treatment nor did Reid treat Hispanic/Spanish-speaking employees[4] as a group in a manner that was inferior to other employees. DaSilva testimony, Day 1 at 3:58.30; Ramirez testimony, Day 3 at 2:50.00;[5] Bedard testimony, Day 4 at 19.05; Thorburn testimony, Day 4 at 2:17.01; Ouellette testimony, Day 4 at 2:30.55, Roy testimony, Day 4 at 2:45.20, and Escobar testimony, Day 4 at 3:12.10, 3:15.02.

36. Witness Milagros Rodrigues worked at Gabriel Care from June of 2010 to 2013 as a nurse, left for eight months, and then returned. She was born in Puerto Rico and Spanish is her first language. Rodrigues observed Gutierrez interacting with Reid at work in June of 2010. Rodrigues testified that she did not observe Reid treating Gutierrez differently than other employees. Day 3 at 2:32.38. According to Rodrigues, the ability to speak Spanish is a "plus" at Gabriel Care. Day 3 at 2:33.44. Rodrigues testified that Gutierrez never complained to her about discrimination. Day 3 at 2:36.50.

37. In May of 2011, Dupuis commenced working as a nurse case manager for two private duty nursing agencies after being out of work for thirty-nine weeks. They were the first jobs she had since leaving Gabriel Care. After being terminated from Gabriel Care, Dupuis received a total of $17,500.00 in unemployment compensation to cover fifty per cent of her lost wages from Gabriel Care. Dupuis applied for numerous jobs, both nursing-related and non-nursing related. Day 5 at 2:23.59. She performed job searches

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[4] The reference to "Spanish-speaking employees" denotes those who speak English with an accent due to Spanish being their first language.

[5] Abigail Ramirez has worked for Gabriel Care as a case manager since mid-2009. According to Ramirez, about a month prior to the public hearing, she received a telephone call from Gutierrez who asked her not to testify at the public hearing. Ramirez testimony, Day 3 at 3:09.40. I credit her testimony over Gutierrez's denial. Day 3 at 4:40.45.

at the Plymouth Care Center. Dupuis went on numerous job interviews. Day 5 at 2:23.20. 2:26.09. She applied to the following hospitals: Cape Cod Hospital, Boston Medical Center, Mass. General Hospital, Children's Hospital, Jordan Hospital, Falmouth Hospital, and Charlton Memorial Hospital. Day 5 at 2:26.54.

38. Dupuis testified that after being terminated by Respondent, she cried, had stomach issues, diarrhea, trouble sleeping, lost weight, and went down to a size "00" from a 5-7. Dupuis saw a counselor at Harvard Vanguard in Braintree, MA weekly for a month to six weeks but had to stop because she couldn't afford the gas or co-pay. Her primary care physician put Dupuis on an anti-depressant and administered a colonoscopy to rule out physical causes for stomach problems. Day 5 at 2:28.13.

39. Gutierrez received a national provider information number for Bay State AFC (Adult Foster Care), LLC on March 29, 2013. Complainant's Exhibit 3. At some point in 2013 or earlier, Gutierrez offered Bedard a job. Bedard testimony, Day 4 at 2:02.30. Gutierrez received a license from the Department of Public Health to operate Bay State AFC in January of 2014.

III. CONCLUSIONS OF LAW

Harassment Based On Race and National Origin

In order to prove harassment based on race (Hispanic) and Puerto Rican national origin, Complainant Gutierrez must establish that: 1) she is a member of a protected class; 2) she was the target of speech or conduct based on her membership in that class; 3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and 4) the harassment was carried out by a supervisor or by a non-supervisor under circumstances in which the

Respondent knew or should have known of the harassment and failed to take prompt remedial action. See College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987) (employer liable for discrimination committed by those on whom it confers authority and by non-supervisors where employer is notified and fails to take adequate remedial steps); Lattimore v. Polaroid Corp., 99 F.3rd 456, 463 (1st Cir. 1996) (charge of hostile environment harassment may be brought in race discrimination context).

Gutierrez, an Hispanic individual of Puerto Rican national origin, claims that she was constantly harassed by manager Jennifer Reid who imitated her accent, admonished her not to speak Spanish in the office, and unreasonably questioned her about her travel time, her work time, her cell phone usage, and her handling of office supplies. The facts, however, do not support these claims.

Rather than treat Gutierrez in an inferior manner because of her Hispanic race and Puerto Rican ancestry, the credible evidence establishes that the agency sought out Gutierrez's services in order to obtain a nurse who could communicate with its Spanish-speaking clients. In order to secure her as an employee, Dennis Etzkorn advanced Gutierrez funds to buy a car and reinstate her driver's license. Gutierrez was thereafter given two raises over the eighteen months she worked for Gabriel Care. These are the actions of an employer seeking to bolster, not undermine, an employment relationship.

There is no credible evidence that Reid told Gutierrez not to speak Spanish to clients. To the contrary, Gutierrez was hired because of her ability to communicate with Spanish-speaking clients. The ability to speak Spanish is a "plus" at Gabriel Care. While it is probable that Gabriel Care supervisors discouraged private conversations in Spanish

between co-workers, such disapproval derived from the exclusionary impact of such conversations on other employees, not out of discriminatory animus. Concern about the feelings of co-workers is a legitimate, non-discriminatory reason for discouraging the speaking of Spanish in the workplace. See Hernandez v. Merrimack Valley Area Transportation Company, 26 MDLR 210, 215 (2004) (directive that bus operators not speak Spanish while on company property upheld as a legitimate, non-discriminatory requirement for the "safety and comfort of customers and other employees. Thus, even if Reid made a comment to the effect that speaking Spanish in the presence of non-Spanish speaking co-workers might make individuals uncomfortable, such a comment is not evidence of discriminatory animus.

The credible evidence likewise fails to support accusations that Reid made fun of Gutierrez's accent and pronunciation, called her an "idiot," "stupid," and a "troublemaker," questioned Gutierrez's education and credentials, expressed annoyance at anyone who wasn't white, and spoke disparagingly about clients from other countries. Reid's denials of these accusations are corroborated by a significant number of Gabriel Care employees, many of whom are Hispanic. Danielle DaSilva, Abigail Ramirez, Sandra Bedard, Nilda Thorburn, Pauline Ouellette, Diane Roy, Yaritza Escobar, and Milagros Rodrigues all testified that Reid did not treat Gutierrez in a manner that was inferior to other employees and that Reid did not treat Hispanic/Spanish-speaking employees as a group in a manner that was inferior to other employees. Reid, at times, may have become impatient and frustrated with Gutierrez, but her impatience stemmed from Gutierrez's job-related shortcomings, not her membership in a protected classification.

Evidence also fails to sustain charges that Reid unfairly targeted Gutierrez in regard to office supplies, travel time, work hours, the posting of her schedule, and the office cell phone. Reid acknowledged that she questioned all employees about office supplies when they disappeared, but she testified credibly that she did not accuse any particular employee of stealing them. Similarly, Reid's expectation that Gutierrez place her schedule on a glass door where other staff posted theirs did not constitute ill-treatment. Reid's reminder that the on-call cell phone was dedicated to professional, not personal, matters was likewise a legitimate response to Gutierrez making unapproved personal calls to Puerto Rico on the office phone. The agency's reaction to Gutierrez's conduct in this regard appears to have been lenient rather than harsh.

In sum, Gutierrez voices numerous examples of alleged harassment that are not supported by the factual record. Consequently, they fail to establish that she was subjected to severe or pervasive hostility based on race or national origin which altered the conditions of her employment and created an abusive work environment. Compare Augis Corp. v. MCAD, 75 Mass. App. Ct. 398 (2009) (supervisor who calls a black subordinate a "fucking nigger" has engaged in conduct sufficiently offensive as to constitute actionable racial harassment).

Disparate Treatment Race Discrimination

In order to prevail on a charge of disparate treatment discrimination under M.G.L. c. 151B, s. 4(1), Complainant may establish a prima facie case based on circumstantial evidence by showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of her protected

class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). A qualified individual need only establish circumstances "which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must persuade the fact-finder by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for discrimination. See Abramian, 432 Mass. 117-118; Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001).

In her charge of discrimination, Complainant Gutierrez maintains that in addition to the claims rejected in the prior section, she was treated differently from non-Hispanic employees by being pressured to sign a non-compete agreement. The facts do not support this assertion. To be sure, Gutierrez was sent home on Friday, August 13, 2010 when she initially refused to sign a non-compete agreement, but she returned to work the following Monday, participated in the re-wording of the document, and signed a newly-worded provision. Complainant Gutierrez maintains that only Hispanic employees were pressured to sign non-compete agreements or face termination, but credible evidence establishes that all employees were asked to sign such documents. Etzkorn's testimony

in this regard was supported by that of Reid, Bedard, Ramirez, and Rodriguez.[6] Etzkorn testified credibly that his main concern was that departing employees not take his client lists or solicit his clients. The fact that Chani Dupuis acknowledged being asked to sign a non-compete is additional evidence that Caucasian and Hispanic employees alike were subject to the same requirement. Since the provision applied to all employees, it cannot serve as a basis for a disparate treatment claim.

Retaliation Claims by Gutierrez and Dupuis

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. Retaliation is a separate claim 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 Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case of retaliation by demonstrating that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal

[6] Complainants make much of the fact that Respondent failed to produce copies of the signed non-compete agreements allegedly executed by all employees. I have considered this failure but nonetheless credit the testimony of Etzkorn, Reid, Bedard, Ramirez and Rodriguez that all employees were asked to sign and, for the most part, did sign non-compete agreements. Regarding the failure of Respondent to produce signed non-competes during discovery, the likely explanation – as Complainants concede in their post-hearing brief at p. 29 -- is that the non-compete agreements were discarded.

connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable belief that unlawful discrimination has occurred. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003) *citing* Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000). There need not be actual discrimination in order to prove retaliation as long as the individual engaging in protected activity acted in good faith. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 205 (claim of discrimination need not prevail in order to give rise to a viable retaliation complaint); Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995). Thus, the fact that Complainant Gutierrez did not prevail in her discrimination claim does not defeat her retaliation claim or the retaliation claim brought by Dupuis.

Credible evidence establishes that Gutierrez and Dupuis were both fired on August 20, 2010 after meeting with Reid and Bedard. There is no evidence that Gutierrez threatened, at the meeting, to bring a discrimination suit. Even if she had, the record makes clear that Gutierrez was terminated for taking steps to open a competing business, not for complaining about discrimination. In this regard it is noteworthy that

Gutierrez was initially sent home from work on August 13, 2010 for refusing to sign a non-compete agreement, brought back to work the following week, and again fired on August 20, 2010 after Reid received a call from a national provider registry about an identification number requested by Gutierrez. The call from the national provider registry was not definitive proof that Gutierrez was taking steps to immediately open a competing adult foster care agency but it was strong evidence that Gutierrez was contemplating doing so. Respondent's reaction to the call consisted of the summary firing of Gutierrez. Such action may have been precipitous, but it was unrelated to any protected activity. See G.L. c. 151B, s. 4(4) (defining protected activity as opposition to c. 151B discrimination such as the filing of c. 151B complaint or testifying in such an action). Rather than constitute opposition to protected activity, Gutierrez's termination was designed to punish behavior deemed by Etzkorn to be disloyal and deceitful. Hence, Gutierrez's retaliation claim must fail.

Turning to Complainant Dupuis, the credible evidence establishes that she was fired for two reasons. The first reason is she advised co-workers that the agency's non-compete agreement was invalid. The second reason is that Dupuis told Reid and Bedard that she would serve as a supporting witness were Gutierrez to file a discrimination claim arising out of her termination. The second reason, alone, constitutes protected activity because it opposes discriminatory practices forbidden under c. 151B.

Consideration of the two factors leads to the inescapable conclusion that the primary cause of Dupuis's termination was her threat to serve as a witness were Gutierrez were to file a discrimination suit. In this regard it is significant that Etzkorn did not fire Dupuis on August 18, 2010 when she disparaged the non-compete agreements that he

was attempting to obtain from his nursing staff. Etzkorn described Dupuis's behavior on August 18, 2010 as a little "brazen" but not so insubordinate that he would fire her on the spot despite Dupuis telling him that his non-compete agreements were invalid, unenforceable, and "not worth the paper it was written on" based on her reading of G.L. c. 112, s. 74D.[7] Rather than fire her on August 18, 2010, Etzkorn took no adverse action against Dupuis until August 20, 2010 when she said that she would testify on behalf of Gutierrez were Gutierrez to file a discrimination claim against Respondent. See Mole v. University of Massachusetts, 442 Mass. 582, 595 (2000) (inference of retaliation increases in proportion to the closeness in time between protected conduct and alleged retaliatory action); Ritchie v. Dept. of State Police, 60 Mass. App. 655, 666 (2004) (close temporal proximity between protected activity and adverse employment action supports causal nexus). Since Dupuis's words on August 20, 2010 constituted protected activity and since they served as the immediate cause of her termination, I conclude that Dupuis has made out a prima facie case of retaliation.

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to

[7] Complainant Dupuis challenges the legitimacy of non-compete agreements as applied to nurses in Massachusetts on the basis of G. L. c. 112, section 74D which prohibits restrictions on the right to practice as a nurse after the termination of an employment relationship. Because the restrictions in this case focused on the solicitation of clients, the removal of records, and the management of adult foster care, Respondent takes the position that its non-compete provisions were not subject to the restrictions set forth in c. 112, section 74D. A resolution of this matter is not necessary in order to address the claims at issue here.

Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent. See id.; Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

Respondent argues that Dupuis's termination was due to her alleged insubordination in opposing Respondent's efforts to procure non-compete agreements from staff and to her insubordinate refusal to leave the meeting of August 20, 2010 despite being ordered to do so. Based on the foregoing discussion, the first reason does not appear to be the proximate cause of Dupuis's termination whereas the second reason does. Accordingly, Dupuis's retaliation claim is hereby sustained based on the conclusion that she was fired for standing up in support of her good faith, if misguided, belief that fellow employee Gutierrez was the victim of discrimination.

IV. REMEDIES AND DAMAGES

A. Back Pay

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004);

Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). The wages that Complainant Dupuis lost as a result of Respondent's retaliatory termination of her employment are computed as follows.

Complainant Dupuis was fired on August 20, 2010. She remained unemployed for thirty-nine weeks until May of 2011 when she began to work as a nurse case manager for two private duty nursing agencies. During this period of unemployment, Dupuis received a total of $17,500.00 in unemployment compensation at the rate of fifty per cent of her gross wages. Dupuis's attempts to find work following her termination from Gabriel Care consisted of applying for numerous jobs, both nursing-related and non-nursing related. She performed job searches at a Plymouth, MA career center. Dupuis went on numerous job interviews. She applied to the following hospitals: Cape Cod Hospital, Boston Medical Center, Mass. General Hospital, Children's Hospital, Jordan Hospital, Falmouth Hospital, and Charlton Memorial Hospital. Dupuis testified that she was not hired because she did not have a Bachelor of Science degree.

It is Respondent's burden to establish that Complainant failed to mitigate her damages by producing contrary evidence. See Duso v. Roadway Express, Inc., 32 MDLR 131 (2010) *citing* Anderson v. United Parcel Service, 32 MDLR 45 (2010). Respondent failed to offer any credible evidence that Complainant Dupuis failed to make good faith and persistent efforts to mitigate her damages.

Based on the foregoing, Complainant Dupuis is entitled to $17,500.00 in lost wages.

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See Stonehill College, 441 Mass. at 576; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. at 182-183. Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill College, 441 Mass. at 576.

Dupuis testified that after being terminated by Respondent, she cried, had stomach issues, experienced diarrhea, had trouble sleeping, lost weight, and went down to a size "00" from a 5-7. Dupuis saw a counselor at Harvard Vanguard in Braintree, MA weekly for a month to six weeks but had to stop because she couldn't afford the gas or her co-pay. Her primary care physician put Dupuis on an anti-depressant and administered a colonoscopy to rule out physical causes for stomach problems. I conclude that Dupuis is entitled to $20,000.00 in emotional distress damages.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, the charges of discrimination and retaliation brought by Complainant Gutierrez are hereby dismissed. In regard to the charge of retaliation brought by Complainant Dupuis, Respondent is ordered to:

(1) Cease and desist from retaliating against employees in violation of G.L. c.151B;

(2) Pay Complainant Dupuis, within sixty (60) days of receipt of this decision, the sum of $17,500.00 in lost wages with interest thereon at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(3) Pay Complainant Dupuis, within sixty (60) days of receipt of this decision the sum of $20,000.00 in emotional distress damages with interest thereon at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(4) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's managers. Such training shall focus on prohibited retaliatory acts in relation to protected activity by employees. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of

Training at least one month prior to the training date, along with notice of the training date and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training.

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

So ordered this 24th day of August, 2016.

Betty E. Waxman, Esq.,
Hearing Officer