COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and APRIL ROBAR,
Complainants

Docket No. 09 NEM 03054
11 NEM 02713

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1413-1465 and JOSEPH FORTES
Respondents

Appearances: Simone Liebman, Esq. for Complainant MCAD
Gigi Tierney, Esq. for Respondent International Longshormen's Association, Local 1413-1465

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 25, 2009, Complainant April Robar filed charges of gender and race, color (Caucasian) discrimination against International Longshoremen's Association, Local 1413-1465 and Joseph Fortes. Complainant alleges that Respondents refused to hire her as a forklift operator. On October 17, 2011, Complainant filed a second charge of discrimination against the Union and Joseph Fortes based on retaliation alleging that Fortes showed her MCAD paperwork to co-workers in an effort to tarnish her name and prevent her from working.

Probable cause findings were issued on the allegations of gender discrimination and retaliation but not on the allegation of race/color discrimination. The matters were certified for a consolidated public hearing.

A public hearing was held on September 25, 26 and 27, 2017. The following witnesses testified at the hearing: Complainant, Daniel Fernandes, Jose Couto, Joseph Fortes, Edmond Lacombe, and Kevin Rose Sr.

Fifteen joint exhibits were submitted into evidence. In addition, Complainant submitted ten exhibits and Respondent submitted five exhibits. MCAD counsel submitted a post-hearing brief. Respondent's counsel did not file a post-hearing brief.

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.

II. FINDINGS OF FACT

1. Complainant April Robar ("Complainant") is female. Prior to seeking work on the docks of New Bedford, Complainant worked for Decus Cranberry and for Ocean Spray Cranberries, Inc. as a cranberry screener, packer, and forklift driver for approximately four years. She received on-the-job training as a forklift operator and obtained a forklift certification from Ocean Spray on November 28, 2004. Joint Exhibit 11.
2. Respondent International Longshoremen' Association, Local 1413-1465 (the "Union") is a labor union with membership consisting of longshoremen working at the following docks in Massachusetts: Maritime Terminal, Inc. and Bridge Terminal, Inc. in New Bedford and State Pier in Fall River. Joint Exhibit 6. The Union selects workers for dock jobs. After Union members are selected for assignments in the order of their seniority, non-union ("dollar-a-day") workers are selected. From its inception through the events at issue, the Union has had an exclusively male membership. Stipulated Fact 2; Couto, Day 2(b) at 47:30; Fortes, Day 3(a) at 2:11.

3. Respondent Joseph Fortes has been associated with the Union for approximately thirty years. He served as President from October 1, 2008 to September 30, 2009 and subsequently as Vice President. Day 3(a) at 1:26:20.

4. Beginning in 2004, Complainant worked at New Bedford's Maritime International, Inc. Terminal as a dollar-a-day "wrapper/stamper" of fish. Day 1(a) at 42:00. She described the work as "backbreaking." Day 1(a) at 43:30. Complainant's description was confirmed by Jose Couto and Daniel Fernandes. Day 2(a) at 10:29-12:30; Day 2(b) at 11:25. The job of a wrapper/stamper of fish involves walking around pallets of fish with wrapping material and bending down constantly to stamp boxes. The quality of Complainant's work as a wrapper/stamper was deemed to be excellent. She worked hard and did not spend time fraternizing with people. Couto, Day 2(b) at 11:57.

5. The wrapper/stamper job was typically filled by women. Day 1(a) at 47:00; Fortes, Day 3(a) at 2:11:45. Females who worked as wrapper/stampers included Complainant, Karen Barboza, Lana Lessa, Brenda Fortes, and Cynthia Lee. Day 1(a) at 47:00; Fernandes, Day 2(a) at 12:49; Couto, Day 2(b) at 10:05. Complainant testified that the Union would only hire men as wrapper/stampers if there were not enough women available to do the job. No male Union members wanted to work as wrapper/stampers. Fernandes, Day 2 (a) at 7:17-10:29, 14:00.

6. Aside from wrapper/stampers, other positions on fish boats were: general foreman, gang foremen, winchmen, signalmen/landers (those who made signals to direct crane operators as to where to take products from the boats), forklift operators for the dock and hold, and crane operators. Day 1(a) at 47:30; 51:30. According to Complainant's

credible testimony, there were no women who operated forklifts or cranes. Day 1(a) at 48:50.

7. In 2008/2009, the number of fish boats entering the New Bedford docks began to decline and boats carrying fruit cargo began to increase. Robar, Day 1(a) at 1:07:00. The working conditions on fruit boats are warmer than on fish boats because fruit boats do not contain frozen products. There are no wrapper/stamper assignments on fruit boats and less lifting. Fernandes, Day 2(a) at 28:56; Couto, Day 2(b) at 9:00; Fortes, Day 3(a) at 26:16. Most of the assignments on fruit boats involve operating forklifts. Lacombe, Day 3(a) at 4:34:50.
8. According to Union President Edmond Lacombe (10/1/09-9/30/10), there are about half the number of job assignments per fruit boat (approximately thirty to forty jobs) than fish boats (approximately seventy to eighty jobs). Day 3(a) at 2:47:20.
9. On April 14, 2009, Cynthia Lee filed a charge against the Union with the National Labor Relations Board alleging that the Union refused to select her for employment at Maritime or assigned her to more onerous assignments because she is female, not a Union member, and disliked by the Union president/business agent. Complainant's Exhibit 5. Lee claimed that she was unable to obtain dollar-a-day work as a forklift operator on New Bedford fruit boats despite obtaining a Maritime forklift certificate. Complainant at Day 1(a) at 1:08, 1:13; Fernandes at Day 2(a) at 25:44, 27:36; Joint Exhibit 15.
10. In order to become a vested member of the Union entitled to pension, death, and other benefits, an individual must work a certain number of hours as a non-union, dollar a day, laborer. Until October 1, 2009, the number was *300 cumulative* hours.

Complainant's Exhibit 2. I do not credit testimony of Union President Lacombe that the Union, prior to October 1, 2009, required individuals to work 300 hours *per year* in order to qualify for Union membership. Such testimony is contradicted by the Union's Constitution (Joint Exhibit 12) and credible testimony of Daniel Fernandes. Day 2(a) at 32:30.

11. On September 11, 2009, the Union submitted a response to the NLRB's Complaint and Notice of Hearing in the Cynthia Lee matter. Complainant's Exhibit 6.

12. Effective October 1, 2009, a new policy required that individuals work *400 hours in a single fiscal year* in order to join the Union. Complainant's Exhibit 2; Fernandes, Day 2(a) at 32:50; Couto, Day 2(b) at 6:59; Joint Exhibit 12 (Article IV, Section 1).

13. During November, 2009, following the change in the Union's membership policy, five males were sworn in as Union members despite having worked less than 400 hours per year in a dollar-a-day capacity: 2009: Richard Lake, Eric Gelmete, Daniel Muniz, Tyron Johnson, and Anthony Lessa, Jr. Complainant's Exhibit 4.

14. Between 2004 and 2009, Complainant only worked 179.5 hours, in total, as a dollar-a-day worker on the New Bedford docks, primarily as a wrapper-stamper, distributed as follows: 30 hours in 2004, 101.5 hours in 2006, and 48 hours in 2009. Joint Exhibits 3 & 4.

15. On October 24, 2009, Complainant became credentialed to operate a forklift for Maritime International, Inc. ("Maritime") by obtaining a Transportation Worker

Identification Credential ("TWIC") card[1] and a forklift certification, after attending a class about how to operate a forklift on the docks. Joint Exhibits 10 & 11. The Maritime certification is a requirement imposed by OSHA for forklift operators at the Maritime Terminal. Joint Exhibit 7; Respondent's Exhibit 5; Fernandes, Day 2(a) at 16:30. It requires that individuals view an instructional video, attend demonstrations and training exercises, and have their work evaluated. Id. Subjects consist of operating instructions, precautions, steering and maneuvering, visibility, fork and attachment adaptation, operation and use limitations, vehicle stability, surface conditions, composition of loads and load stability, load manipulation, and stacking and unstacking. Id. Complainant's trainer was Carlos Rita. Rita did not express any concerns about Complainant's forklift driving and passed her on the first attempt. Complainant, Day 1 at 1:02; Joint Exhibit 10. Complainant also received informal forklift training from Jose Couto, Paul Gomes, David Soares and Arthur Tavares. Complainant, Day 1 at 1:05:17; Couto, Day 2(b) at 21:00. Cuoto testified that he thought Complainant did an outstanding job. Day 2(b) at 22:50. The contention by Union President Lacombe that Complainant could not operate a forklift with the required skill is contradicted by the contrary opinions of others and the fact that Lacombe testified that he never observed Complainant operate a forklift. Day 3(a) at 1:27:10, 3:21:23.

16. After she obtained forklift credentials, Complainant made five unsuccessful attempts to obtain forklift assignments on New Bedford fruit boats. According to Complainant and

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[1] TWIC cards involved a criminal background screening. They became a requirement after the 9/11 terrorist attack. Couto, Day 2(b) at 26:00.

Daniel Fernandes, Complainant's attempts to be hired as a dollar-a-day forklift operator were vetoed by Respondent Joseph Fortes. Day 2(a) at 33.50; Complainant at Day 1(a) at 1:03; 1:17:40; Day 1(backup) at 11:00. Fernandes testified about one occasion when Fortes sent Complainant home to get her Ocean Spray certification and when she left, Fortes hired a male to drive the forklift. Day 2(a) at 43:56. I find Fernandes's testimony to be credible despite a history of professional and personal conflicts between Fernandes and Fortes. I discredit the testimony of Fortes who was evasive and non-responsive in answering questions. Fortes at Day 3(a) at 50:38, 53:30. Fortes testified unconvincingly that forklift certification training does not prepare an individual to operate a forklift.

17. Respondent Fortes informally trained at least two dozen people on the forklift, but none were female. Day 3(a) at 2:05. Fortes testified that no women ever requested training, but his deposition testimony contradicts this assertion. Fortes at Day 3(a) at 2:20:17.

18. Complainant provided credible testimony that no women were allowed to operate forklifts or cranes on the New Bedford fruit boats. Day 1(a) at 48:50. Her testimony was corroborated by Jose Couto and Daniel Fernandes who testified credibly that they never saw any females selected for work on New Bedford fruit boats even though Complainant and other females sought work. Couto at Day 2(b) at 31:40; 45:40; Fernandes, Day 2(a) at 30:15 & Day 2(b) at 14:00.

19. On November 24, 2009, Jeff Spinks and Mark Gonsalves were selected as forklift operators even though they were dollar-a-day workers who did not have forklift credentials from Maritime. MCAD Charge, 11/25/09; Joint Exhibit 15; Complainant, Day 1(a) at 1:18:00; Fernandes at Day 2(a) at 41:35. Respondent Fortes asked all the

people who had forklift certifications to raise their hands but did not select Complainant or any other credentialed female even though their hands were raised. Couto testimony, Day 2(b) at 31:00-33:00. Complainant became very angry about being passed over. Fernandes, Day 2(a) at 23:00; Couto, Day 2(b) at 35:20. According to Couto, David Soares said, "We don't pick women to work on fruit boats." Day 2(b) at 36:00.

20. On November 25, 2009, Complainant filed charges of gender and race discrimination for being passed-over as a forklift driver.[2] Complainant stopped soliciting work at the New Bedford docks. Day 1(a) at 1:20.

21. Respondent Fortes estimated that non-Union members worked approximately 150-200 hours, on average, at the New Bedford docks during 2009-2010. Fortes, Day 3(a) at 2:11.

22. After filing gender/race discrimination charges at the MCAD, Complainant started to work in Providence, Rhode Island, driving new cars off a dock as a dollar-a-day worker selected by Local 1329 of the International Longshoremen's Union. The docks in Rhode Island are a forty-five minute drive from Complainant's house whereas the New Bedford dock is a twenty-five minute drive from her house. Day 1(a) at 1:36.

23. Complainant testified that three to five ships arrive at the Providence, Rhode Island docks per month, generating assignments that last one day each. Day 1(a) at 25:00. Complainant's tax records and credible testimony establish that from 2010 to June of 2016, she worked more than three hundred hours each year in Rhode Island except for 2012. Respondent's Exhibit 1; Day 1(a) at 28:40; 1:38.

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[2] The race charge was dismissed by the MCAD as lacking probable cause.

24. In response to Complainant's MCAD charge of discrimination, Union President Lacombe submitted a Position Statement which asserted: "We, the ILA, have hired females in the past and have the hours to prove it. These other women did not complain to anyone when they did not get hired for other positions. *They*, more or less, *knew their place when work was issued* and accepted the outcome." Complainant's Exhibit 8 [emphasis supplied]. At the public hearing, Lacombe asserted that females were assigned to work on fruit boats but this testimony is not credible in light of his prior sworn statement to the contrary and the Union's acknowledgement, in discovery, that no females had ever been hired to work on the fruit boats that the Union serviced. Joint Exhibit 5, Interrogatory 3.

25. According to Complainant, Respondent Fortes, on or about October 15, 2011, while in Providence Rhode Island showed her 2009 MCAD complaint to John Lopes, President of International Longshoremen's Union, Local 1329 and to co-workers Jeff Spinks and Mark Gonsalves. Testimony, Day 1 at 1:24.

26. Complainant receives Social Security disability income due to treatment for a childhood illness which adversely impacts her ability to read. Complainant's testimony, Day 1(a) at 22:15; Day 1 (backup) at 32:18. Complainant's disability income places a ceiling on income from other sources. Between 2009 and 2015, Complainant received the following in Social Security net benefits: $11,100 in 2009, $10,991 in 2010, $11,100.50 in 2011, $11,507.90 in 2012, $11,700 in 2013, $13,207.70 in 2014, and $12,072 in 2015. Respondent's Exhibit 1. Complainant receives more in Social Security benefits than she earns on the Providence docks. Her average yearly income on the Providence docks between 2009 and 2015 was approximately $7,000.00.

Id. Complainant's disability does not affect her ability to operate a forklift. Day 1 (backup) at 55:00.

27. Complainant testified in a sincere, though muted, fashion about the emotional impact of the aforementioned circumstances. She acknowledged having difficulty discussing her feelings. Day 1(a) at 1:35. Nonetheless, she stated with great persuasiveness that she felt targeted because of her gender when the Union refused to hire her as a forklift operator. Complainant stated credibly that her failure to secure work on the fruit boats hurt her, upset her and caused her to feel like a second-class citizen. Day 1(a) at 1:33. Had Complainant qualified as a member of the Union while she worked in New Bedford, she might have earned pension benefits from the Union. According to Complainant, Respondent's actions in refusing to give her a chance to prove that she could successfully operate a forklift on the New Bedford docks made her feel unworthy and unqualified.

III. CONCLUSIONS OF LAW

A. Gender Discrimination

Direct Evidence

In support of her claim of gender discrimination, Complainant asserts that after obtaining a Maritime forklift certification in 2009, Respondents refused to hire her to operate a forklift on the fruit boats it staffed at Maritime Terminal in New Bedford.

Pursuant to G. L. c. 151B, section 4(2), it is an unlawful for a labor organization to exclude from full membership any individual because of sex unless based on a bona fide occupational qualification. One method of establishing a prima facie case of disparate treatment is by proffering direct evidence of discrimination. Such evidence,

"if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present ...." Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991); Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000).

In a direct evidence case, the analysis does not have to adhere to the three stage burden shifting paradigm set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1972). Rather, the analysis focuses on whether the direct evidence shows that a proscribed factor played a motivating part in the challenged decision. See Fountas, 22 MDLR at 269. If the evidence satisfies this initial burden, Respondents must prove that they would have made the same decision even without the illegitimate motive. See Wynn & Wynn, 431 Mass. at 667; Fountas, 22 MDLR at 269.

Complainant offers as direct evidence of gender discrimination an MCAD Position Statement by Union President Lacombe asserting that the Union hired females who "knew their place" relative to work assignments and accepted the "outcome." Union member David Soares described the "outcome" in the following terms: "We don't pick women to work on fruit boats." Such assertions underscore the plain fact that no females were ever hired by Local 1413-1465 to operate forklifts on the fruit boats in New Bedford. Given the history of no female hires, such statements cannot be dismissed as mere stray comments. Compare Wynn & Wynn, 431 Mass. at 667, *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (statements made that are unrelated to the decisional process do not constitute direct evidence); Yu v. Li, 28 MDLR 212 (2006) (stray remarks consist of comments that are isolated, occasional, random, or casual). Lacombe's Position Statement, buttressed by

the credible hearsay statement attributed to David Soares, reveal that the Union was motivated by a proscribed intent to prevent females from filling certain coveted positions. See Chief Justice for Administration and Management of the Trial Court v MCAD, 439 Mass. 729, 732, n. 11 (2003) (direct evidence typically consists of statements of discriminatory intent attributable to an employer). They create a highly probable inference that forbidden bias was present. See id.

Since there is direct evidence of gender discrimination, the burden shifts to Respondent to prove that Complainant's gender played no role in her failure to be selected for forklift assignments. See Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 302. For reasons set forth in the next section, the Union fails in this endeavor. Even if the remarks do not constitute direct evidence sufficient to invoke a mixed motive analysis as opposed to an indirect evidence analysis, they lend powerful support and context to the analysis below.

Indirect Evidence

In addition to offering direct evidence of a retaliatory motive, Complainant may prevail on a charge of disparate treatment discrimination with circumstantial evidence 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). See 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. MCAD, 431 Mass. 655, 665-666 n.22 (2000) (prima case established where protected class member applies for position, is not selected, and employer seeks or fills position with similarly-qualified individual). The

Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as "not onerous," requiring only that a qualified individual establish circumstances "which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky, 419 Mass. 437 (1995).

Applying the elements of a prima facie case to the credible evidence at hand, I find that Complainant is a long-term female dock worker with an excellent work history who received a Maritime Terminal forklift certification on October 24, 2009. Despite her experience and credentials, Complainant was unable to secure forklift assignments on fruit boats docked in New Bedford. Males, by comparison, obtained forklift assignments whether or not they were certified forklift operators. Based on the foregoing, I conclude that Complainant satisfies the elements of a prima facie case of gender discrimination under an indirect evidence analysis.

Once a prima facie case of gender discrimination is established, the burden of production shifts to Respondents to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for failing to hire Complainant as a forklift operator. See Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34, 50 (2005) *quoting* Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 238 (1976). I conclude that Respondent has failed to do so.

I arrive at this conclusion based on the unconvincing nature of the testimony provided by Joseph Fortes and his demeanor as a witness. Fortes was evasive and non-responsive in answering questions. He testified unpersuasively that forklift certification

training does not prepare an individual to operate a forklift. He made the unsupported and inaccurate assertion that no females ever requested training as a forklift operator. He could not refute the bald fact that no females were ever hired to operate forklifts on fruit boats despite Complainant and Cynthia Lee seeking such assignments and obtaining the necessary credentials. Fortes likewise failed to credibly refute the accusation that on November 24, 2009, he declined to select Complainant and Cynthia Lee for forklift assignments but took Jeff Spinks and Mark Gonsalves who lacked forklift credentials.

My findings of fact credit Complainant's version of the disputed events as corroborated by Daniel Fernandes and Jose Couto and discredit the testimony of Respondent Fortes and witness Lacombe. See Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Abramian v. President & Fellows of Harvard College, 402 Mass. 107 (2000) (third step of circumstantial method of proof may be satisfied by proof that one or more of the reasons advanced by the employer is false leading to inference of discriminatory animus). The falsity of Respondents' reasons lead to an inference of discriminatory animus as the "determinative cause" of Respondents' actions. See Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001).

The indirect evidence of gender discrimination is buttressed by the direct evidence of gender discrimination discussed in the previous section. These factors combine to establish that Complainant's gender was a material and important ingredient motivating the actions taken against her. But for Complainant's gender, the Union would not have limited her work assignments between 2004 and 2009 to a mere 179.5 hours and would not have refused to select her at all as a forklift operator after she became certified. I am

convinced that Complainant would have achieved the 300 cumulative hours on the New Bedford docks that were required for Union membership prior to October 1, 2009 based on evidence that non-Union members worked approximately 150-200 hours, on average, in 2009-2010 and that work was more plentiful in prior years..

Nor can Complainant's entitlement to Union membership be defeated by implementation of the 400 hour yearly requirement on October 1, 2009 because that rule was not enforced during the following month when five men were permitted to become Union members despite having fewer than 400 hours yearly of prior work assignments. Rather than constitute a valid rule change, it appears that the 400 hour yearly requirement was intended to – and did – bar female membership. In sum, Respondents' actions reveal discriminatory animus based on gender. Had such discrimination not occurred, it is likely that Complainant would have achieved Union membership by October 1, 2009 and would have received regular forklift assignments commencing on October 24, 2009.

B. Retaliation

Retaliation is defined by Chapter 151B, sec. 4 (4) as punishing an individual's opposition to 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). It applies, *inter alia*, to "any person" or labor organization.

In order to establish a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondents were aware

that she had engaged in protected activity; (3) Respondents subjected her to an adverse employment action; and (4) a causal 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).

The protected activity in this case took place on November 25, 2009, when Complainant filed discrimination charges relative to being passed-over as a forklift driver on the New Bedford docks. Complainant subsequently started to work in Providence, Rhode Island, driving new cars off a dock as a dollar-a-day worker selected by Local 1329 of the International Longshoremen's Union.

According to Complainant, an adverse employment action occurred almost two years later when Respondent Fortes, on or about October 15, 2011, showed her 2009 MCAD complaint to John Lopes, President of International Longshoremen's Union, Local 1329 in Rhode Island and to co-workers Jeff Spinks and Mark Gonsalves. Complainant asserted in her charge of retaliation that Fortes was attempting to "tarnish her name" and thereby prevent her from obtaining work at the Rhode Island facility.

The foregoing sequence fails to support a retaliation claim because the events lack proximity and the alleged harm is hypothetical. Almost two years passed between Compliant filing her MCAD complaint and Fortes allegedly showing her MCAD complaint to individuals in Rhode Island. Such a time frame undermines the claim of a

causal connection between Complainant's protected activity and alleged activity in Rhode Island. Following the alleged disclosure by Fortes, moreover, Complainant continued to drive cars off the docks in Rhode Island. There is no evidence that her assignments decreased. Complainant therefore fails to make out a prima facie case of retaliation.

C. Liability

Pursuant to G. L. c. 151B, section 4(2), I conclude that Respondent International Longshoremen's Association, Local 1413-1465 is liable for excluding Complainant from full membership rights based on her gender. Pursuant to G.L. c. 151B, sec. 4 (4A), I conclude, as well, that Respondent Joseph Fortes is individually liable, as well, because of credible evidence that he interfered with the exercise or enjoyment of Complainant's right to be free from gender discrimination. See Lopez v. Commonwealth, 463 Mass. 696, 707-708 (2012) (Chapter 151B, section 4 (4A) permits a claim of interference by "any person"); Woodason v. Town of Norton School Committee, 25 MDLR 62, 64 (2003) (individual liability permitted against individual who has authority or duty to act on behalf of employer and has acted in deliberate disregard of an employee's rights).

The evidence establishes that Respondent Fortes relied on his status as a Union official to interfere with Complainant's efforts to secure work assignments through the Union. Her attempts to be hired as a dollar-a-day forklift operator on New Bedford fruit boats following her certification as a Maritime forklift operator were thwarted by Fortes on five occasions. On one occasion, he asked all the people who had forklift certifications to raise their hands but did not select Complainant or any other credentialed female even though their hands were raised. He hired uncertified males

rather than give Complainant a chance. On another occasion, he sent Complainant home to get an outdated, Ocean Spray certification, only to hire a male to drive a forklift as soon as she left. Fortes trained scores of males on the forklift but no females. His testimony that no women ever requested training was not credible. Fortes also lacked credibility in testifying that forklift certification training does not prepare an individual to operate a forklift. Based on the foregoing, individual liability against Fortes is both permissible and appropriate.

IV. Damages

A. Emotional Distress

Upon a finding of unlawful discrimination, the Commission is authorized 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 id. at 576; Buckley Nursing Home, 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, 441 Mass. at 576.

Complainant acknowledged having difficulty discussing her feelings but nonetheless testified with great persuasiveness that she felt targeted because of her gender when the Union refused to hire her as a forklift operator. Complainant stated credibly that her failure to secure work on the fruit boats hurt her, upset her, and caused her to feel like a second-class citizen. According to Complainant, Respondent's actions in refusing to give her a chance to prove that she could successfully operate a forklift on the New Bedford docks made her feel unworthy and unqualified.

Based on the foregoing, I conclude that Complainant is entitled to $50,000.00 in emotional distress damages.

V. CIVIL PENALTY

Pursuant to G.L. c. 151B, section 5, the Commission has discretion to impose a civil penalty for an adjudication of discrimination, capped at $10,000.00 where Respondent has not been adjudged to have committed any prior discriminatory practice. A civil penalty against the Respondent Union is appropriate in this case based on the egregious nature of its conduct. Union officials engaged in concerted activity to deprive Complainant of the benefits of Union membership solely because of her gender. The Union granted employment opportunities to unqualified males while depriving Complainant of the same opportunities despite her qualifications, experience, and persistent efforts to obtain work. Respondent's action in closing its doors to Complainant because of her gender was disrespectful and unfair. It adversely impacted Complainant's opportunity to earn income within her chosen field. Based on the foregoing, the Union merits a civil penalty of $10,000.00.