

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

Julie A. Marsian,
Complainant

v.

Docket No. 96-SEM-0255

Springfield Transit Management, Inc., and
Transit Express, Inc.,
Respondents

Appearances: Done Rosencrance, Esquire, for Complainant
Philip J. Shine, Esquire, for Respondents

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

This case concerns an individual who claims that she was subjected to discrimination on the basis of her gender (female) by being denied promotions to a supervisor position. Her complaint alleges unlawful discrimination in violation of M.G.L. Chapter 151B, Section 4, paragraph 1.

II. PROCEDURAL HISTORY

On April 16, 1996, Complainant, Julie Marsian, filed a complaint of age and gender discrimination against Respondent Springfield Transit Management, Inc. Complainant's amended complaint, filed February 25, 2000, alleged further instances of denial of promotions to supervisor, and added Transit Express, Inc. as a Respondent. The

Investigating Commissioner issued a finding of Probable Cause on the gender discrimination allegation. After conciliation efforts failed, the case was certified for hearing. A public hearing was held before me on June 11, 2001. The parties submitted post-hearing proposed findings of fact and conclusions of law.

I have considered the entire record of the proceedings, including all proposed findings of fact, conclusions of law, and supporting arguments of the parties. To the extent the proposed findings and conclusions are not in accord with the findings therein, they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented; others have been modified to accord with my findings. To the extent the testimony of various witnesses is not in accord with the findings herein, such testimony is not credited. Having duly considered the record before me, I make the following Findings of Fact and Conclusions of Law and Order.

III. FINDINGS OF FACT

1. Complainant, Julie Marsian, is a female resident of Springfield, MA.
2. Respondent Springfield Transit Management, Inc. ("STM") is an employer within the meaning of M.G.L. c. 151B.
3. STM is a wholly owned subsidiary of Transit Express Management ("TEI"). TEI employed a maximum of six persons at all material times. STM and TEI share space in a building located at 2840 Main Street, Springfield, MA. Letterhead for TEI lists STM beneath it, as well as Hampshire County Transit, Inc. and Hampden County

Transit, Inc. The relevant collective bargaining agreement covering the Amalgamated Transit Union, the collective bargaining unit for clerical workers, bus drivers, garage workers and supervisors, from July 1, 1996 through June 30, 2002 is entitled Labor Contract Between Transit Express Inc. and Amalgamated Transit Union Local 448. (Exs. Jt-6, Jt-7, C-6, C-9)

4. Complainant began her employment with Respondents as a bus driver in September, 1975.
5. In 1984, Complainant was appointed to the position of supervisor by TEI's General Manager. She was not required to undergo a selection process. Prior to 1994, when a supervisor position became available, the General Manager or Superintendent merely selected a person for the position.
6. Between the years 1984 and 1989, Complainant performed the duties and responsibilities of a supervisor.
7. Complainant testified that in 1989, she requested to return to the position of driver due to an incident of sexual harassment she experienced. She resumed her driver position in 1989.
8. Domingo Gonzalez, hired as a bus driver in 1974 and promoted to supervisor in 1984, testified that Complainant resigned her supervisor position due to a confrontation with another driver. He stated that other employees did not respect her and initiated a petition for her removal. No documentation was submitted to support Gonzalez's testimony and I do not credit his explanation for Complainant's resignation. I find that the reason Complainant voluntarily resigned her supervisor position is unclear, but

was not performance related. I further find that Complainant satisfactorily performed her supervisor position from 1984 until 1989.

9. In late 1994 and continuing thereafter, Respondent began posting notices to employees regarding vacancies for the position of Operations Supervisor (“supervisor”), a position reporting to the Assistant Director of Operations. Such notices indicated that no experience was required for the position and that the employer “will train.” Beginning in 1997, the position description for supervisor cited minimum qualifications that included two years PVRTA bus operator experience; ability to act with sound judgment with minimal supervision, good communication and public relations skills, with supervisory experience a plus. The position required that a supervisor provide on-site driver supervision and monitor all facets of daily operations as assigned, including Starter and/or Dispatch Desk responsibilities, Cruiser and Street duty, Springfield Bus Terminal Supervision, and other functions as necessary to assure compliance with company policies, ensure buses operate smoothly and safely, schedules are maintained, and passengers are assisted to the maximum extent consistent with existing conditions. The supervisor position did not require driving a bus. (Exs. C-2, C-4, C-5)
10. Complainant testified that during the years she served as a supervisor, she regularly performed the duties of Starter and/or Dispatch Desk and Cruiser and Street Duty as well as those duties enumerated in the posting for Springfield Bus Terminal Supervision, although this terminal did not come into existence in its current mode until 1989. I credit Complainant’s testimony.

11. In November 1994, Vicki Shotland was hired as TEI's Director of Operations. Shotland testified that she commenced her employment "looking for new blood." She stated that she planned to employ positive punishment strategies, rather than a military style. She testified that she strove to institute diversity with respect to filling supervisor vacancies as well as encouraging qualified female drivers to apply to be supervisors. Shotland testified that when she became Director of Operations, all ten to twelve supervisors were Caucasian and only one was female. She stated that of approximately 150 drivers, only fifteen to eighteen were female and, of those, only a few possessed sufficient driving experience to warrant consideration for promotion to supervisor.
12. Complainant applied for a supervisor position in December 1994, May 1995, September 1995, April 1996, and September 1997. I find that each time Complainant applied for a supervisor position, she met the minimum requirements. I further find that Respondent was aware of Complainant's prior STM supervisory experience.
13. After applicants for a supervisor position were interviewed, Shotland and Gonzalez narrowed the field to a few finalists and discussed their qualifications, with Shotland ultimately deciding who would be promoted. Shotland testified that she discussed the applicants with Gonzalez because of his knowledge of STM and of many of its employees. By that time, Gonzalez had been promoted to Assistant Director of Operations.
14. Gonzalez testified that he and Shotland were attempting to change the Respondent's old mentality that "if you were my friend, you became a supervisor."

15. In December 1994, a male driver, Sam Grant, was selected for a supervisor position over Complainant, who was the sole female applicant. Shotland testified that she chose Grant because he was a good communicator, was more respected by the drivers than Complainant, and had many years experience at Respondent. Gonzales stated that Grant was well liked by both drivers and passengers.
16. In July 1995, a male driver, Peter Jones, was selected for a supervisor position over Complainant. Shotland testified that she chose Jones because he had a good rapport with drivers, supervisors and passengers, as well as prior experience in a supervisory role with Five Star Towing, and because of his “compassion” and being a “visionary.”
17. In July 1995, a male driver, Robert Trepe, was selected for a supervisor position over Complainant. Shotland testified that she chose Trepe because of his communication skills, prior work for Peter Pan bus lines, customer service background, excellent values and desire to get ahead.
18. In September 1995, a male driver hired in 1992, Logan Collins, was selected for a supervisor position over Complainant. Shotland testified that she chose Collins because of his management/supervisory background with American Bosch prior to being laid off, several years experience with the Police Department, and desire to get ahead as indicated by his coming into the office with suggestions.
19. Shotland testified that she asked the same questions of each candidate in an interview, and attempted to be consistent. She testified that due to the passage of time she was unable to remember the specific promotional criteria she applied in judging one candidate against another.

20. Shotland, in answer to whether the men promoted were more qualified than Complainant, replied “yes and no,” explaining she considered Complainant less qualified due to intangible characteristics such as compassion and sensitivity. Shotland stated that she was attempting to get away from a “rigid and stern character” in a supervisor, and that Complainant’s stern manner and the way she handled things “on the street” was not something she wanted in a supervisor. She also stated she had concerns about Complainant’s attitude and testified that Complainant could be antagonistic at times. I credit her testimony that she harbored these concerns about Complainant.
21. Shotland stated that although none of the males selected for supervisor positions possessed supervisory and management experience with STM, they brought management experience from other companies. She testified that she believed people from other industries could bring experience to a company that needed to undergo some change and that management skills were readily transferable. She noted that she did not come to Respondent from a transit system but her skills were transferable.
22. Shotland testified when considering Complainant for promotion, she relied upon information from Gonzalez. Gonzalez testified that in 1984, when he and Complainant were supervisors, they had a good relationship until he suggested to Complainant that she grant another chance to a bus driver who had committed an infraction. He stated that this suggestion led to an altercation between them and to Complainant not speaking to him for a couple of years. Gonzalez also testified that Complainant had two “run-ins” with drivers during the time period she was a supervisor. Gonzalez testified that there was a two year period during which Complainant’s demeanor could

change within five minutes and that at one point, Complainant told him that she was going through the “change of life.”

23. Gonzalez testified that any time Complainant spent in the crew room was alone, and not with other drivers. Complainant stated that she spent very little time in the crew room and was there primarily at the beginning and end of the day. I find this was not a criteria for promotion.
24. In February 1996, Respondent created the Supervisor Internship Program (“SIP”) to develop “experienced, motivated and knowledgeable employees into potential Supervisors.” A pamphlet entitled “The Vision of the Supervisor Internship Program” explained that when a supervisor position became available, the normal hiring process would be followed, but SIP interns would be well positioned to receive the promotion if they had shown they had the necessary skills. (Ex. C-3)
25. Complainant applied for the SIP. After two interviews, a March 28, 1996 letter from Shotland congratulated her upon her selection for admission into the SIP. Three other applicants were also selected. (Ex. C-1)
26. Shotland testified that in April 1996, Complainant received a warning for returning a bus fifteen minutes early rather than five minutes, as required by policy.
27. In April 1996, Roman Castro, a driver and SIP intern, was selected for a supervisor position over Complainant. Shotland testified that Castro was selected based on his supervisory experience, good relationships with employees and being bilingual.
28. Evidence showed that Castro had been written up for misconduct on October 4, 1993 by Respondent’s one female supervisor, Jean Wheeler. Wheeler documented Castro’s not following rules with regard to a detour, verbally abusing her, not acting in the best

customer service manner, and exhibiting a bad attitude, “an on going problem for this operator.” When questioned concerning Castro’s misconduct, Shotland testified that she could not say whether Wheeler’s report was accurate as the incident occurred before she arrived. However, Wheeler was still a supervisor at the time Shotland was considering Castro for promotion. (Ex. C-10)

29. Complainant filed her MCAD complaint on April 16, 1996.
30. Shotland testified that in the spring of 1996 she felt Complainant was giving her the “cold shoulder.” She stated that on one occasion in April 1996, she attempted to approach Complainant about this situation but Complainant ignored her overture.
31. On May 8, 1996, Shotland wrote Complainant that her SIP appointment had been rescinded. Shotland’s letter stated that Complainant’s attitude had deteriorated since she had been issued the April 16, 1996 written warning and noted that when she had approached Complainant for discussion on May 2, 1996, Complainant had immediately become defensive and refused her request to discuss the problem. Shotland’s letter closed with, “In summary, I am convinced that you have ‘not changed’ and that it would not be correct at this time to place you in the SIP.” Shotland also informed Complainant that if she reapplied, she would be considered based upon her entire employment history from this time forward. (Ex. R-1)
32. Robert Rosati was selected for a supervisor position in September 1997. Shotland testified that Complainant did not submit her application within the posting period. She stated that although she had informed Complainant she could submit an application for the position, she subsequently discovered that the posting period had passed and it was too late for Complainant to apply. Shotland testified that three other

applicants also submitted their applications too late for consideration for the position and all four applicants were rejected on the grounds of lateness. (Ex. C-2) I credit Shotland's testimony.

33. No testimony or evidence was submitted concerning Rosati's qualifications.
34. In September 1997, Complainant's co-workers elected her to be President of the Amalgamated Transit Union Local 448. Shotland testified that she believed there was a policy of not promoting the Union President to a supervisor position during his or her term of office. Respondent's policy was not supported by documentation.
35. Respondent posted openings for two temporary supervisor positions in March 1998. Complainant testified that she did not apply for the positions because she was angry and tired of being rejected. I credit her testimony.
36. Shotland testified that affirmative action considerations were a factor in promotion decisions. Testimony indicated Grant was African American, Castro Hispanic, and the other men promoted to supervisor were Caucasian.
37. Shotland left Respondent in August 1998. Gonzalez replaced her as Director of Operations.
38. In November 1999, Respondent posted a notice for two applicants to serve as supervisors from January 2000 until May or June 2000 at the Dispatch/Starter desk, while the company was installing a software package to assist with dispatch functions. Complainant applied for a temporary supervisor position. In February 2000, two applicants, Alvin Jones and Carl Ronca, were selected. The selection decisions were made by Gonzalez, after consultation with and approval by Peter Cavanaugh, TEI's General Manager. Cavanaugh testified that Jones had supervisory experience with a

manufacturer, was articulate, soft-spoken and had a commanding presence. He testified that Ronca, an auxiliary police officer, possessed academic credentials that might qualify him to replace the accident investigator. (Ex. C-5)

39. In mid January 2000, Complainant resigned from her Union President position.
40. Complainant testified that in June 2000, she became ill while driving a bus and remained out of work for the contractual time period that she was allowed.
41. A November 20, 2000 Neurologist's note diagnosed Complainant with moderate peripheral neuropathy causing significant numbness and pain in her feet as well as unsteadiness at times. He recommended Complainant not continue driving a public bus because of the decreased sensation in her feet. (Ex. C-7)
42. A December 13, 2000 doctor's note stated that Complainant was able to return to work but was unable to drive a bus. (Ex. C-8)
43. Complainant testified that she was afraid she would lose her job because of her medical condition and attempted to speak with Respondent about her medical condition and desire to return to work.
44. Complainant testified that her restrictions would not have impacted her ability to perform a supervisor position. Having found that the supervisor position did not require driving a bus, I credit Complainant's testimony.
45. By letter dated December 19, 2000, Cavanaugh informed Complainant that he could not think of a position that would be suitable for her as there were no positions available that did not involve driving. (Ex C-9)
46. A December 20, 2000 letter from Gonzalez to Complainant stated that due to her absence from work for a period of time exceeding six months, her employment with

STM was terminated. (Ex. C-6) I find that had Complainant been promoted to a supervisor position, she would not have been terminated when her doctor stated that she was able to return to work but was no longer able to drive a bus.

47. Complainant testified that she felt degraded, humiliated and devastated by the Respondent's repeated refusal to promote her to a supervisor position. I credit her testimony.
48. Shotland testified that on occasion she felt Complainant's behavior was antagonistic and attributed this to the fact that she continued to apply for a supervisor position and, not receiving the job, was "getting angrier, and that came out...." I credit Shotland's testimony.
49. Complainant testified that she has not been the same since being terminated after 25 years of service to Respondents. I credit her testimony.
50. As a driver, from July 1, 1994 through June 30, 1995, Complainant's wage rate was that of an "A Operator," \$14.79 per hour for her normal forty-hour work week. Between July 1, 1994 and June 30, 1995, the wage rate for a supervisor was \$16.27 per hour.
51. As a driver, from July 1, 1995 through June 30, 1996, Complainant's wage rate was that of an "A Operator," \$15.42 per hour for her normal forty-hour work week. Between July 1, 1995 and June 30, 1996, the wage rate for a supervisor was \$16.96 per hour.
52. As a driver, from July 1, 1996 through December 31, 1996, Complainant's wage rate was that of a "Top Operator," \$15.52 per hour for her normal forty-hour work week.

Between July 1, 1996 and December 31, 1996, the wage rate for a supervisor was \$17.07 per hour.

53. As a driver, from January 1, 1997 through June 30, 1997, Complainant's wage rate was that of a "Top Operator," \$15.67 per hour for her normal forty-hour work week.

Between January 1, 1997 and June 30, 1997, the wage rate for a supervisor was \$17.24 per hour.

54. As a driver, from July 1, 1997 through December 31, 1997, Complainant's wage rate was that of a "Top Operator," \$15.77 per hour for her normal forty-hour work week.

Between July 1, 1997 and December 31, 1997, the wage rate for a supervisor was \$17.35 per hour.

55. As a driver, from January 1, 1998 through June 30, 1998, Complainant's wage rate was that of a "Top Operator," \$15.92 per hour for her normal forty-hour work week.

Between January 1, 1998 and June 30, 1998, the wage rate for a supervisor was \$17.51 per hour.

56. As a driver, from July 1, 1998 through December 31, 1998, Complainant's wage rate was that of a "Top Operator," \$16.12 per hour for her normal forty-hour work week.

Between July 1, 1998 and December 31, 1998, the wage rate for a supervisor was \$17.73 per hour.

57. As a driver, from January 1, 1999 through June 30, 1999, Complainant's wage rate was that of a "Top Operator," \$16.32 per hour for her normal forty-hour work week.

Between January 1, 1999 and June 30, 1999, the wage rate for a supervisor was \$17.95 per hour.

58. As a driver, from July 1, 1999 through September 30, 1999, Complainant's wage rate was that of a "Top Operator," \$16.42 per hour for her normal forty-hour work week. Between July 1, 1999 and September 30, 1999, the wage rate for a supervisor was \$18.14 per hour.
59. As a driver, from October 1, 1999 through December 31, 1999, Complainant's wage rate was that of an "Top Operator," \$16.52 per hour for her normal forty hour work week. Between October 1, 1999 and December 31, 1999, the wage rate for a supervisor was \$18.25 per hour.
60. As a driver, from January 1, 2000 through March 31, 2000, Complainant's wage rate was that of a "Top Operator," \$16.62 per hour for her normal forty-hour work week. Between January 1, 2000 and March 31, 2000, the wage rate for a supervisor was \$18.37 per hour.
61. As a driver, from April 1, 2000 through June 30, 2000, Complainant's wage rate was that of a "Top Operator," \$16.77 per hour for her normal forty-hour work week. Between April 1, 2000 and June 30, 2000, the wage rate for a supervisor was \$18.53 per hour.
62. As a driver, from July 1, 2000 through September 30, 2000, Complainant's wage rate was that of a "Top Operator," \$16.87 per hour for her normal forty-hour work week. Between July 1, 2000 and September 30, 2000, the wage rate for a supervisor was \$18.73 per hour.
63. As a driver, from October 1, 2000 through December 31, 2000, Complainant's wage rate was that of a "Top Operator," \$16.97 per hour for her normal forty-hour work

week. Between October 1, 2000 and December 31, 2000, the wage rate for a supervisor was \$18.84 per hour.

64. Complainant has been unemployed from December 20, 2000 through the date of hearing, June 11, 2001.

IV. CONCLUSIONS OF LAW

Jurisdiction

The parties dispute whether TEI is a proper party to this action. Complainant asserts that as the administrative and management entity of STM, TEI is also potentially liable. Respondents contend that Complainant is employed only by STM and that TEI is not legally responsible for STM's decisions and is accordingly not liable to Complainant. TEI also argues that it did not have a sufficient number of employees to be an "employer" within the meaning of G.L. c. 151B, as it only employed between four and six employees at all material times.

Separate entities can, in the aggregate, constitute an employer, thereby bringing either or both within the coverage of G.L. c. 151B. The Commission's cases have referred to such entities as either "joint" employers or a "single" employer. See e.g. Robinson v. FM Management, Inc., 19 MDLR 1601, 1607 (1993). The term single employer is used where the basis for aggregating the entities is that they are interrelated in various ways. This inquiry considers the degree of interrelationship in the operation of the entities in such areas as management, work location, financial matters and control over labor relations. No single isolated factor is dispositive. If the indicia of interrelation

are sufficient, the entities are treated as a “single” employer for purposes of G.L. c. 151B. See Keeling v. Wilfert Brothers Realty Co., 22 MDLR 201 (2000).

I find that the operations of STM and TEI meet the test for “single employer” adopted by the Commission. Based on the degree of interrelationship implied by sharing letterhead and office space in the same building, as well as a collective bargaining agreement that is entitled Labor Contract Between Transit Express, Inc. and Amalgamated Transit Union Local 448, I conclude that the entities STM and TEI shall be viewed as a single employer for purposes of Complainant’s claim of discrimination.

Gender Discrimination

Massachusetts General Laws, Chapter 151B, Section 4, paragraph 1, makes it unlawful to discriminate against an employee because of her sex. In order to establish a prima facie case of employment discrimination with regard to failure to promote, Complainant must demonstrate that she is a member of a protected class, applied for and was qualified for promotion, that despite her qualifications, was not promoted, and that someone not in her protected class with similar qualifications was selected for the position. Abramian v. President and Fellows of Harvard College, 432 Mass 104 (2000).

I find Complainant has established a prima facie case of gender discrimination based on Respondent’s failure to promote her to supervisor. Complainant is a member of a protected class based on her gender. Credible testimony and documentary evidence established that Complainant adequately performed the responsibilities of supervisor from 1984 until 1989 and thus had the requisite qualifications for the position. She

applied for the position repeatedly from 1994 until 2000, but was never promoted and Respondent repeatedly selected males for the openings.

Once Complainant has established a prima facie case of gender discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent meets this burden of production, Complainant must then show by a preponderance of the evidence that Respondent's proffered reason(s) is not, in fact, the real reason(s) for her not being promoted to supervisor but a pretext for unlawful discrimination based on her gender. Abramian, 432 Mass at 107. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Notwithstanding, Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. *Id.*; Abramian, 432 Mass at 117.

Respondent contends that although Complainant was qualified for a supervisor position, intangible qualities considered by Shotland resulted in Complainant's non-promotion. Shotland testified she considered qualities such as a candidate's personality traits, their rapport with drivers, management experience, compassion and sensitivity, and communication skills. She determined Complainant was lacking in some of these areas and stated this as the reason for not selecting her. Shotland also stated that she was seeking "new blood," and diversity. By this she meant she was dissatisfied with the prior practice of nepotism in hiring.

Respondent has met its burden of production and Complainant must show by a preponderance of the evidence that Respondent acted with discriminatory intent, motive or state of mind. “Even when nondiscriminatory reasons play some role in a decision not to hire a particular applicant, that decision may still be unlawful if discriminatory animus was a ‘material and important ingredient’ in the decision-making calculus.” Chief Justice for Administration and Management of the Trial Court, et al v. MCAD, 439 Mass 729, 735 (2003).

For the following reasons, I am persuaded that Respondent’s explanations for not promoting Complainant are not believable and are not supported by credible evidence in the hearing record.

Shotland’s testimony demonstrated a lack of recall of the specific criteria she applied in selecting a supervisor. She was unable to state with much specificity the objective reasons she chose various candidates over Complainant and prominently mentioned the issue of “personality,” a very subjective criteria. Shotland’s selection decisions are subject to increased scrutiny because of her admission that she employed subjective and intangible criteria for choosing a supervisor and because there was a lack of documentation regarding the selections. Testimony revealed that none of the males selected had prior experience performing the duties and responsibilities of an STM supervisor, while Complainant had five years in this position with an unblemished record. Although the reasons for Complainant’s resignation were unclear, they were not shown to be performance related. Complainant’s credible testimony demonstrated that during the years she had served as a supervisor, she regularly performed the duties of Starter and/or Dispatch Desk and Cruiser and Street Duty as well as those duties enumerated in the

posting for Springfield Bus Terminal Supervision. Complainant's five years of experience as a supervisor at STM appear to have been discounted by Shotland, while she repeatedly credited male applicants' experience unrelated to STM. This indicates Shotland applied different criteria in comparing Complainant with the males who were promoted over her. It further suggests that for appointment to a supervisor position at STM, actual supervisory experience at Respondent was of little or no value.

Further, Shotland gave different consideration to the alleged misconduct of Complainant and Castro when considering each for promotion. Although Shotland stated that she relied on Gonzalez's feedback about Complainant's altercations with drivers as a reason for denying her promotion, she promoted Castro despite a fairly harsh write up by a supervisor. Testimony indicated that although the incident for which Castro was disciplined occurred prior to the start of Shotland's tenure, the supervisor who gave the written warning remained employed by STM at the time of Castro's promotion, and thus available to consult with Shotland about Castro's suitability for promotion, yet Shotland failed to speak with her.

Protection from discrimination extends not only to overt or blatant acts of discrimination. The law has been interpreted to also safeguard employees from adverse treatment resulting from unwarranted and unspoken assumptions and stereotypes based on one's protected class. Employment decisions that are the result of "stereotypical thinking about a protected characteristic or members of a protected class, whether conscious or unconscious, are actionable under G.L. c. 151B." Lipchitz v. Raytheon, 434 Mass. 493; see also Thomas v. Eastman Kodak Co., 183 F.2d 458, 469 (1st Cir.) 1999. In the present case, Shotland negatively referred to Complainant as having a "stern"

demeanor while she referred to certain traits of male applicants, such as possessing a commanding presence, as positive attributes. Such characterizations suggest that Shotland's assessment of the personality and leadership ability of the candidates was gender biased or colored by gender stereo-types. Moreover, despite Shotland's assertion that she encouraged qualified female drivers to apply for promotion to supervisor and encouraged diversity in management, no woman was promoted to a supervisor position by Respondent between 1994 and 2001. Contrary to Respondent's contention that it sought females for supervisory positions, it perpetuated a virtually all male supervisory workforce over the course of those seven years.

Based on the above, I am persuaded that Respondent's articulated reasons for not promoting Complainant to supervisor were based on unlawful gender stereotypes and that unlawful discriminatory animus was a 'material and important ingredient' in Respondent's repeated failure to promote Complainant from 1994 through 2000. When a Complainant proves discrimination, the fact that the decision-maker may not have been aware of that motivation, even within himself, neither alters the fact of its existence nor excuses it. "Unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination." See Thomas v. Eastman Kodak Company, 183 F.3d 38 (1st Cir. 1999); citing Hopkins v. Price Waterhouse, 825 F2d 458, 469 (D.C. 1987); see also Andrade v. Stop & Shop, 23 MDLR 213, 217 (2001).

Based on the above, Complainant has demonstrated that Respondent's reasons for not promoting her are pretextual. Establishing that Respondent's stated reasons for its action were pretextual permits an inference that there was unlawful discrimination. Abramian, 432 Mass 107. Accordingly, I conclude that Respondent's action of denying

Complainant a promotion to a supervisor position was unlawful gender discrimination in violation of G. L. c. 151B, Section 4 (1).

V. REMEDY

Upon a finding of unlawful discrimination, the Commission has broad discretion to fashion remedies to effectuate the goals of G.L. c. 151B. College-Town, Div. Of Interco, Inc. v. MCAD, 400 Mass. 156, 179 (1987). This includes an award of damages to Complainants for lost wages and emotional distress suffered as a direct and probable consequence of Respondent's unlawful discrimination. Stonehill College v. MCAD, 441 Mass. 549, 576 (2004); Bournewood Hospital, Inc. v. MCAD, 371 Mass. 303, 315-317 (1976). In Stonehill College, the Supreme Judicial Court cited factors that should be considered in determining an appropriate award for emotional distress damages, including "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the Complainant has attempted to mitigate the harm." 441 Mass. at 576.

For the reasons discussed below, I believe Complainant is entitled to damages for emotional distress. Complainant testified credibly concerning her ongoing frustration from her repeated failure to be promoted to supervisor, and also to feelings of humiliation, frustration and anger brought about by Respondent's bypassing her in favor of males with no STM supervisory experience. She sobbed as she recounted her efforts to continue her employment with Respondent after her neuropathy diagnosis, and testified persuasively as to her distress, devastation, and genuine bewilderment upon learning that she had been terminated after 25 years of service to her employer.

Complainant also testified persuasively that she has not been the same since her termination. Accordingly, I am persuaded that Complainant suffered emotional distress due to Respondent's actions. Complainant is entitled to an award of \$50,000 in compensation for the emotional distress she suffered as a direct and probable result of Respondent's unlawful conduct.

Complainant is also entitled to lost wages as a result of the discriminatory actions of Respondent in its repeated failure to promote her. Had Complainant been promoted to a supervisor position, she would no longer have been required to drive a bus as an essential function of her job and thus, would not have been subject to termination when her doctor stated that she was able to work but could no longer drive a bus. Therefore, but for Respondent's discriminatory failure to promote, Complainant would not have lost her job. Accordingly, she is entitled to back pay from in December 2000 until the date of hearing, June 11, 2001. Had she been promoted she would have earned an additional \$20,189.00 from December 20, 1994 until her termination on December 20, 2000. Her earnings from December 2000 until June 11, 2001, the date of her termination would have been \$17, 488.74. Therefore she is entitled to an award of backpay totaling. \$37,677.74. Respondent submitted no evidence to show that Complainant failed in her duty to mitigate her damages.

VI. ORDER

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

Respondent shall pay Complainant, within sixty (60) days of the receipt of this decision, the amount of \$50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post judgment interest begins to accrue.

Respondent shall pay Complainant, within sixty (60) days of receipt of this decision, the amount of \$37,677.74 in damages for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainant is instructed to immediately notify the Clerk of the Commission.

This constitutes the final order of the Hearing Commissioner. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this order.

So Ordered this 27th day of January, 2006

Cynthia Tucker
Hearing Commissioner