

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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MASSACHUSETTS COMMISSION AGAINST  
DISCRIMINATION and RAPHAELA THOMAS,  
Complainants

v.  
STASH’S PIZZA,  
Respondent

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DOCKET NO. 20BPA02269

Appearances:

For Complainants: Robert Johnson, Jr., Esq. and Deborah A. Bondzie, Esq.

For Respondent: Portia C. Charles, Esq.

**DECISION OF THE HEARING OFFICER**

Complainant, Raphaela Thomas (“Thomas”), filed a complaint with the Massachusetts Commission Against Discrimination (“Commission”) against Respondent, Stash’s Pizza. The Investigating Commissioner issued a probable cause finding and a Certification Order. The Certification Order was amended by this Hearing Officer. After amendment, there were two certified claims to be addressed at a public hearing: whether Thomas was subjected to disparate treatment by Stash’s Pizza as a result of her race and/or color in violation of Section 98 of M.G.L. c. 272, and whether Stash’s Pizza retaliated against Thomas in violation of Section 98 of M.G.L. c. 272.<sup>1</sup>

Thomas alleges that she was treated differently because of her race and color by Stash’s Pizza on October 4, 2020. Thomas further alleges that when she sought to talk to a manager about the customer service that she had received, an employee or agent of Stash’s Pizza, made numerous racist and threatening comments to Thomas during telephone calls and by a text message.

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<sup>1</sup>At hearing, Counsel agreed that the two issues identified above were the two certified issues. (Day I at 11-12)

I presided over the public hearing on May 24-26 and June 2, 2023. Thomas, Neeberdotthe Louis, Dylan Jones, LCSW<sup>2</sup> and Stavros Papantoniadis testified. There are 21 exhibits. The stenographic transcript is the official record. The parties filed post-hearing briefs. In this decision, *unless stated otherwise*, where testimony is cited, I find such testimony credible and reliable, and where an exhibit is cited, I find such exhibit reliable to the extent cited.<sup>3</sup> Evidence contained in the record which is not cited within this decision does not alter any findings of fact or conclusions of law.

## I. FINDINGS OF FACT

### A. OCTOBER 4, 2020 INCIDENT

1. Complainant Raphaela Thomas, also known as Eladivine, identifies as African American and Haitian, is Black and is 36 years old. (Thomas I at 37, 189; Thomas II at 56) Thomas graduated from Boston Adult Evening Academy in 2008. During 2009-2011, she attended, but did not graduate from, Bunker Hill Community College. In 2011, Thomas became a certified cosmetologist. (Exhibit 15; Thomas I at 40; Thomas II at 152)
2. Thomas' cousins, Nee Jackie Dimache ("Nee Jackie") and Neeberdotthe Louis ("Louis"), are also Black. (Thomas I at 64, 78; Louis II at 77, 80)
3. Respondent, Stash's Pizza, is a restaurant located at 612 Blue Hill Avenue in Dorchester, Massachusetts ("Stash's Pizza"). As of October 4, 2020, Stash's Pizza's hours of operation were 10:00 a.m. to 1:00 a.m., seven days per week, and its telephone number was 617-282-9200. At all material times, Stavros Papantoniadis ("Papantoniadis") has been one of the owners of Stash's Pizza. (Papantoniadis IV at 8, 17, 72; Thomas I at 212; Exhibits 12 and 18)

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<sup>2</sup>LCSW stands for Licensed Certified Social Worker. (Jones III at 28-29)

<sup>3</sup>Citations to testimony include witness' name, day(s) on which testimony occurred, and associated transcript page(s) – e.g. (Thomas I at 50-51; Thomas II at 20-21). Citations to exhibits include the exhibit number, and if applicable, the associated pages in the exhibit – e.g. (Exhibit 5; Exhibit 17 at 50-51).

4. On October 4, 2020, Thomas' cellular telephone number was 857-492-XXXX. (Thomas II at 229)<sup>4</sup>
5. At approximately 12:30 a.m. on October 4, 2020, Thomas was with her aunt along with Nee Jackie, Louis and others at her aunt's house. At approximately 12:36 a.m., a telephone call was made by Thomas' cellular telephone to Stash's Pizza at 617-282-9200 by either Thomas or Nee Jackie and resulted in an order of a large cheese pizza under the name "Ela." Louis then drove Thomas and Nee Jackie to Stash's Pizza. After about a 15 minute drive, they arrived at, and entered, Stash's Pizza, which was open. (Thomas I at 63-67, 69-71, 82-83, 203; Louis II at 80-83, 115, 120-121; Exhibit 10 at 5)
6. On October 4, 2020, Thomas, Nee Jackie and Louis entered Stash's Pizza, and the following occurred. An African-American customer picked up food and left the restaurant. Nee Jackie and Louis went to the counter. Thomas went to the vending machine. A White man behind the counter at the cash register told Nee Jackie and Louis that there was no order placed under the name "Ela" and offered them a small cheese pizza. Nee Jackie and Louis called Thomas to the counter. Thomas declined the small cheese pizza and said they could go to another food place. The man behind the counter offered slices of pizza, and Thomas declined. The man then said to Thomas, Nee Jackie and Louis "you can take it or leave it" in a loud and rude manner. Thomas and her cousins left Stash's Pizza.<sup>5</sup> I base these findings on Thomas' and Louis' testimony and Thomas' November 20, 2020 complaint with the Commission ("Complaint") (Exhibit 18), which I find materially corroborate each other, and are credible and reliable as to this issue. (Thomas I at 70-74, 76-77, 80-82, 117, 234-238; Louis II at 82-88, 117, 119-120, 128; Exhibit 18)

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<sup>4</sup>Thomas' un-redacted cellular telephone number was entered in evidence. In this decision, the number has been redacted for privacy.

<sup>5</sup>While inside Stash's Pizza, Thomas was not called the N-word and her race was not referenced. (Thomas I at 238). In this decision, unless otherwise indicated, the "N-Word" refers to the word spelled "nigger" or "nigga."

7. After leaving Stash's Pizza, Thomas, Nee Jackie and Louis returned to Louis' car and drove away. They discussed the rude manner in which the White man behind the counter inside Stash's Pizza had addressed them. Thomas decided to telephone Stash's Pizza to complain to a manager about poor customer service which she believed was based on her and her cousins' race. (Thomas I at 78, 84)<sup>6</sup>
8. Exhibit 10 contains records of telephone calls made from, and received by, Thomas' cellular telephone with the number 857-492-XXXX ("cellular telephone") for October 3-4, 2020 which were produced by Thomas' mobile carrier. Exhibit 10 states that all times are in "Coordinated Universal Time" ("CUT"), which is an undefined term. (Exhibit 10 at 1) The telephone records also do not define the term "Duration." Based on these telephone records, I find that on October 4, 2020, Thomas made the following calls from her cellular telephone to Stash's Pizza at 617-282-9200: (a) at 05:07:58 CUT with a duration of 42; (b) at 05:08:53 CUT with a duration of 39; (c) at 05:11:09 CUT with a duration of 11; and (d) at 05:11:32 CUT with a duration of 11. Based on the telephone records, I also find that at 05:12:07 CUT, there was a text message sent from 617-XXX-6988<sup>7</sup> to Thomas' cellular telephone, and at 05:15:40 CUT, Thomas made a call from her cellular telephone to 617-XXX-6988 with a duration of 42.<sup>8</sup> (Exhibit 10 at 5-6) Based on review of the telephone records, and the timing of calls discussed in Thomas' testimony (Thomas II at 31-32, 34-35; Exhibit 10 at 5-6), I infer that CUT was four hours ahead of Boston time. (Exhibit 10 at 5-6)<sup>9</sup> Having made these inferences, I make the findings in paragraphs 9-13.

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<sup>6</sup>While inside Stash's Pizza, Louis did not draw the conclusion that the poor customer service was based on race. (Louis II at 89, 128-129)

<sup>7</sup>The un-redacted telephone number was entered in evidence. In this decision, the number has been redacted for privacy.

<sup>8</sup>I infer the term "Duration" in Exhibit 10 stands for seconds. Inferring it meant minutes or hours would mean Thomas had engaged in five concurrent telephone calls which is extremely unlikely. (Exhibit 10 at 5-6)

<sup>9</sup>Exhibit 10 contain an entry that on October 4, 2020 at 04:35:38 CUT there was an outgoing call from Thomas' cellular telephone to Stash's Pizza. (Exhibit 10 at 5) Making the same inference as to CUT versus Boston time, I infer that at 12:35:38 a.m. on October 4, 2020 an outgoing call was made from Thomas' cellular telephone to Stash's Pizza and further infer that that entry regards the telephone call in which the large cheese pizza was ordered.

9. On October 4, 2020 at 1:07:58 a.m., Thomas telephoned Stash's Pizza at 617-282-9200. The person who answered the telephone said "Stash's" and had the same voice as the White man behind the counter at the cash register inside Stash's Pizza that Thomas and her cousins had encountered. Thomas told that person that she had just left Stash's Pizza and would like to speak to a manager. The person said "for what?" Thomas stated that she didn't like the customer service that she had received at Stash's Pizza. The person responded "why don't you come here" so "I can put a bullet in your head" and called Thomas a "nigger" or a "fucking nigger." Thomas was shocked. The person hung up the phone. (Thomas I at 86-87, 89; Thomas II at 34-35; Louis II at 92-96, 122; Exhibits 10 at 5; Exhibit 12; Exhibit 18)<sup>10</sup>
10. At 1:08:53 a.m., Thomas telephoned Stash's Pizza at 617-282-9200 seeking to speak to a manager and to make sure that the previous telephone call was not made to a wrong number. (Thomas I at 89-90; Exhibit 10 at 5) Thomas identified the individual who answered the telephone in this call as the person who had answered the telephone in the previous call. The person who answered said "stop calling me you fucking nigger" and hung up. (Exhibits 12 and 18)
11. At 1:11:09 a.m., Thomas telephoned Stash's Pizza at 617-282-9200. Thomas identified the individual who answered the telephone in this call as the person who had answered the telephone in the previous two calls. The person who answered the telephone asked Thomas whether she knew "how many niggers like you get hung" at Franklin Park and told her to "[s]top calling me you fucking nigger." (Exhibits 10 at 5; Exhibit 12; Exhibit 18) Thomas said "[y]ou fucking racist" and the conversation ended. Thomas was shocked and angry. Thomas began crying, as she started to think about how black slaves had been hung from trees. (Thomas I at 94-95; Exhibit 18)

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<sup>10</sup>Exhibit 12 is a Boston Police Department ("BPD") report of October 5, 2020.

Thomas was so upset that she tried to exit the car when it stopped at a light. Louis locked the car doors. (Louis II at 97-98)<sup>11</sup>

12. At 1:12:07 a.m., Thomas received a text message on her cellular telephone sent from the number 617-XXX-6988. The text message said “Fucking nigga.” (Thomas I at 96, 101, 218; Exhibits 2, 10, 12 and 18)
13. At 1:11:32 a.m., Thomas telephoned Stash’s Pizza at 617-282-9200, and at 1:15:40 a.m., Thomas made a telephone call to 617-XXX-6988. (Exhibit 10 at 5-6) During either the 1:11:32 a.m. or the 1:15:40 a.m. call, the same person, who had answered the calls described in paragraphs 9-11, told Thomas that he was “off work” and “ready to hang a nigger” and asked “where are you?” As Thomas described, “[i]t was the same anger that I just heard over the phone. It was the same voice.” Thomas said to her cousins “[o]h, my God. I can’t believe this.” (Exhibit 12; Thomas I at 95-96)<sup>12</sup>
14. Based on the following, I infer that the person who sent the text message to Thomas described in paragraph 12 was the White man behind the counter at the cash register inside Stash’s Pizza: the timing and nature of the telephone calls and the text message described in paragraphs 9-13; and Thomas’ corroboration that the White man behind the counter had the same voice as the person who answered the telephone in the first call that she made inside Louis’ car, and that the same person answered the subsequent telephone calls.

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<sup>11</sup>The October 5, 2020 BPD report and the November 20, 2020 Complaint evidence that during the second telephone call made by Thomas after Thomas had left Stash’s Pizza, the person said “stop calling me you fucking nigger” and during the third telephone call made by Thomas after Thomas had left Stash’s Pizza asked the menacing question regarding hanging “niggers” and again said “stop calling me you fucking nigger.” (Exhibits 12 and 18) In light of these contemporaneous documents, I do not find reliable Thomas’ memory that the comment regarding hanging was made in the second call. (Thomas I at 92)

<sup>12</sup>The telephone records are devoid of any telephone calls *received* by Thomas during this period. (Exhibit 10 at 5-6) The October 5, 2020 BPD report evidences that Thomas made this telephone call. (Exhibit 12) For these reasons, I do not find reliable Thomas’ memory that this telephone call was *received* by Thomas. (Thomas I at 95)

15. Based on the findings in paragraphs 9-14, I find that the person who made the threatening and racist comments by telephone and text message described in paragraphs 9-13 was the White man behind the counter at the cash register inside Stash's Pizza on October 4, 2020 when Thomas and her cousins were inside Stash's Pizza.
16. Based on the following, I find that the White man behind the counter at the cash register inside Stash's Pizza on October 4, 2020 who made the threatening and racist comments by telephone and text message described in paragraphs 9-13 was an employee of Stash's Pizza. First, the man's location evidences that he was an employee of Stash's Pizza. He was positioned behind the counter at the cash register. Second, the man engaged in extensive customer service interactions with patrons (Thomas and her cousins) evidencing that he was an employee of Stash's Pizza. Third, when Thomas first telephoned Stash's Pizza to complain about customer service, the person who answered the telephone (who had the same voice as that White man) said "Stash's" evidencing that he was an employee of Stash's Pizza. Last, and significantly, there is evidence that Stash's Pizza fired an "employee" because of the Incident. A supplemental BPD report dated October 30, 2020 stated that detectives went to Stash's Pizza and "spoke to person in charge, Gerry Skordas, who confirmed that his staff had informed him of the incident. Mr. Skordas informed Detectives that the employee in question, had been terminated." (Exhibit 13)<sup>13</sup> Further, on October 20, 2020, BPD Detective Maloof emailed Respondent's counsel that he had had a conversation with Papantoniadis who "indicated to me that he 'fired' the employee that he determined was involved in the incident that I am investigating." (Exhibit 14)<sup>14</sup>

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<sup>13</sup>After the alleged Incident, Skordas became a manager at Stash's Pizza on October 5, 2020. Skordas was a manager at Stash's Pizza during 2008-2013. (Papantoniadis IV at 71-73)

<sup>14</sup>In light of the representation by Detective Maloof to Respondent's Counsel that Papantoniadis had indicated to Detective Maloof that he had fired an employee for the Incident, (Exhibit 14), and Skordas' representation to the BPD that the employee in question had been terminated (Exhibit 13), I do not credit Papantoniadis' testimony that he did not fire anyone because of the Incident nor do I credit Papantoniadis' testimony that he never told anyone he had fired an employee for it. (Papantoniadis IV at 59, 129-130) For the same reasons, I do not credit Papantoniadis' testimony that "we still don't know of the employee involved" (Papantoniadis IV at 111-113) nor do I find reliable

17. Later in the morning of October 4, 2020, Thomas created a document summarizing events and embedding a text message from 617-XXX-6988 dated “today 1:12 AM” stating “Fucking nigga.” (Thomas II at 213; Exhibit 2) The next day, October 5, 2020, Thomas reported the events of October 4, 2020 (hereinafter, the “Incident”) to the BPD. (Exhibit 12)
18. On March 20, 2023, Thomas received text messages regarding the arrest of the owner of Stash’s Pizza and accessed news articles related to that (“March 2023 Articles.”) (Thomas II at 7-8) The first name of the man arrested was referenced as “Steve” or “Stavros.” Thomas was unable to pronounce the referenced last name but it was “Papa something.” (Thomas I at 117, 119, 122) I find the man referenced in the March 2023 Articles was Papantoniadis.
19. Based on the following, I find that Thomas has failed to prove that Papantoniadis was the White man behind the counter at the cash register inside Stash’s Pizza on October 4, 2020 who made the racist and threatening comments by telephone and text message described in paragraphs 9-13.<sup>15</sup> First, Papantoniadis has demonstrated that he was not at Stash’s Pizza on the evening of October 3, 2020 or the early morning hours of October 4, 2020. On the evening of October 3, 2020, Papantoniadis, his wife and four friends had dinner at Davio’s Steakhouse on the Fan Pier in the Boston Seaport area (“Davio’s”). Papantoniadis arrived at Davio’s at approximately 8:00 p.m. His party stayed at Davio’s for approximately three hours and then went to a club called Pontiaki on Albany Street in Boston, arriving there between 11:00 to 11:30 p.m. Papantoniadis left the club to go home at approximately 12:30 a.m. on October 4, 2020. Papantoniadis arrived at his house in Westwood, Massachusetts at approximately 1:00 a.m. A picture with a time stamp of October 3, 2020 at 9:21 p.m. depicts Papantoniadis and his wife at Davio’s. (Papantoniadis IV at 22-25, 29, 81; Exhibit 20) Second, as of October 4, 2020, the last four digits of Papantoniadis’

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the response by Respondent’s Counsel to Detective Maloof’s email that she “spoke with [Papantoniadis] and he indicated that he did not fire anyone regarding this incident.” (Exhibit 14)

<sup>15</sup>In making my findings, I have taken into account that Thomas was approximately four feet from the White man behind the counter inside Stash’s Pizza on October 4, 2020. (Thomas I at 74)



cellular telephone were 9063. (Papantoniadis IV at 71) The last four digits of the number for the telephone that sent the text message to Thomas described in paragraph 12 were 6988. (Exhibit 10) Third, I credit Papantoniadis' testimony denying that on October 4, 2020, he threatened to hang anyone in Franklin Park, or to shoot anyone, or texted anyone the N-word. (Papantoniadis IV at 70) Fourth, in her answers to interrogatories, Thomas described the age of the White man behind the counter inside Stash's Pizza on October 4, 2020 as "about age late fifty/early sixty, his hair was salt and pepper." (Exhibit 9 at answer 5)<sup>16</sup> In the October 3, 2020 photograph of Papantoniadis and his wife, Papantoniadis' hair appears dark brown or black with no indication of salt and pepper hair, and he looks considerably younger than in his late fifties or early sixties. (Exhibit 20) Fifth, I do not credit Thomas' testimony that the White man behind the counter inside Stash's Pizza on October 4, 2020 was in his late forties. (Thomas I at 74-75; Thomas II at 19) When asked whether she had described that man in her interrogatory answer as being in his late fifties, early sixties with salt-and-pepper hair, she unconvincingly answered "at that moment, yes." (Thomas II at 21) Sixth, when questioned whether she was familiar with what Papantoniadis looks like "now", Thomas answered "[a]fter March [2023], I do" and that she had seen "some salt and pepper on the side of his hair" in the images in the March 2023 Articles. (Thomas II at 23-24) I find this testimony unreliable as to how Papantoniadis appeared on October 4, 2020. Seventh, Louis was unable to provide reliable testimony regarding the age of the White man other than he was younger than 30 years old. (Louis II at 118-119)

20. It was against Stash's Pizza policy for an employee to answer the store telephone when the store was closed. (Papantoniadis IV at 58) Stash's Pizza Employee Handbook's list of misconduct that may result in discipline or termination included illegal discrimination or harassment; violence or threats of violence; and excessive use of obscene, profane or abusive language. (Exhibit 11 at Section 4.5)

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<sup>16</sup>Thomas' understanding of "salt and pepper" hair is black and white hair. (Thomas II at 23)

## B. EMOTIONAL DISTRESS

21. Thomas has received treatment at Upham's Corner Community Health Center ("Upham's"). In 2016, Thomas started receiving treatment from Upham's for trauma and depression. (Thomas II at 197-198) At some point, she stopped treatment. She resumed treatment at Upham's on March 30, 2020, and from that date to the time of the hearing, received treatment from Upham's clinicians: Sarah Castaneda, LICSW ("Castaneda"), Ivory Roberts-Clarke, PHD ("Roberts-Clarke"), Dylan Jones LCSW ("Jones"),<sup>17</sup> Deborah Ortiz, MSW ("Ortiz"), Alison Tam, MD ("Tam"), Joan Wattimo, LADC ("Wattimo") and Desire Rivera ("Rivera"). (Exhibit 17; Thomas I at 175)
22. Based on the findings in paragraphs 22-24, I find that the Incident has had a prolonged, pervasive and severe adverse impact on Thomas' emotional and mental health that has lasted until the time of the hearing.<sup>18</sup> First, Thomas' personality changed after October 4, 2020. Before October 4, 2020, she was charismatic, loving, cuddly and affectionate. After October 4, 2020, she became less friendly, a bit more anxious towards others and thought people were going to harm her. In 2020, Louis saw Thomas a few times after October 4, 2020. Each time, Thomas discussed the

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<sup>17</sup>I found Jones qualified to offer opinions as an expert witness regarding adult psychotherapy and predicting Thomas' future based on her diagnosis. (Day III at 75, 78) He received a master's degree in social work. After accumulating approximately 200 hours of clinical experience, he passed an examination to receive a LCSW license in 2009, which has remained active. He worked at Upham's from April 2018 to December 2022 where the majority of his patients had complex trauma. He explained complex trauma is another word for post-traumatic stress disorder ("PTSD") and "is sort of a cumulative trauma from multiple and varied forms of it throughout the person's life." He described an assessment as an in-depth intake that takes place over time where one gathers history and then make a diagnosis or "primary presenting problem." He has conducted approximately 100 assessments and made approximately 100 diagnosis. Regarding the 100 diagnosis he made, PTSD/complex PTSD, adjustment disorder, depression, anxiety and substance use disorder were the most common ones. Jones reviewed Upham's records of Thomas contained in Exhibit 17. (Jones III at 28-30, 32-33, 42-43, 49, 52, 56-57, 60-61, 82)

<sup>18</sup>In making these findings, I took into account Thomas' usage of the N-Word before and after the Incident. Before and after October 4, 2020, Louis heard Thomas use the N-word. (Louis II at 124-126) On October 6 and 10, 2020, there was a protest outside Stash's Pizza about the Incident. (Thomas I at 107-108; Thomas II at 49) Thomas shared videos on social media regarding the protests and used the "N-word" during those videos. She made a video where she was wearing a jacket with writing which said "[t]hey got the right N-word." As part of the same or another video, Thomas said "F Stash's. N is still not eating at Stash's." These statement were made to describe what had happened to her regarding Stash's Pizza. (Thomas II at 54, 59-60, 66-67) I do not find that such usage of the N-Word lessened in any manner the adverse impact upon Thomas of the Incident.

Incident, was “really upset” and “it would take a long time to console her.” In 2021, Louis saw Thomas every few months and “just about” each time, Thomas talked about the Incident. In 2022, Louis saw Thomas twice, and on those occasions, Thomas referenced the Incident and it could take “literally up to 45 minutes to get her to, like stop crying.” Louis saw Thomas in April 2023 at a party. At the party, Thomas was “more peppy” with the children, but when they discussed Stash’s Pizza, Thomas was upset, angry and yelling. (Louis II at 102-106, 108-110)

23. Second, on May 5, 2021, Thomas told Wattimo that she worries that the owner of Stash’s Pizza will hurt her. (Exhibit 17 at 43) Third, the threat about being hung at Franklin Park played “over and over” in Thomas’ mind. She had nightmares and frequent panic/anxiety attacks<sup>19</sup> because of the Incident. (Thomas I at 156-158, 160)<sup>20</sup> On May 14, 2021, Thomas told Tam “that she often feels like she is in a daze and perseverating on thoughts about people getting hanged”; has “physical symptoms of vomiting, body aches, racing heart, shortness of breath, dizziness... when she thinks about the stressful incidents and memories. These sometimes last all day”; and “reports that she has been having recurring nightmares of being killed several times/week.” (Exhibit 17 at 45) Fourth, on September 19, 2022, Jones explored the Incident with Thomas who characterized it as “an open wound.” Jones’ notes state “we did some processing of the trauma she experienced (someone threatened to hang her in Franklin Park, called her the N word).” (Exhibit 17 at 95-97) (Parenthesis in original) In his testimony, Jones elaborated that in that visit, Thomas became “very emotional”, experienced a change in her breathing, and was “the most upset I ever experienced her being.” (Jones III at 110-112, 141-142)

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<sup>19</sup>To Thomas, a panic attack and an anxiety attack is the same thing. (Thomas I at 157)

<sup>20</sup>I do not credit Thomas’s testimony that she had panic/anxiety attacks “every day” in light of the absence of supporting evidence in the Upham’s records as to such frequency. Between December 2020 and December 2022, there were five or more visits with Upham’s clinicians in which Thomas did not refer to the Incident. (Thomas II at 182-183) See also Exhibit 17 at 30-36 (no mention of Incident in progress notes for Thomas’ visits with Ortiz on November 17, 2020 and December 4, 2020; first reference to Incident in progress notes for December 16, 2020 visit with Ortiz)

24. Fifth, on December 7, 2022, Thomas became tearful when telling Castaneda “the verbal threat that was made towards her by someone associated with Stash’s. Pt reports they threatened to ‘hang me.’” (Exhibit 17 at 101) Sixth, reading the March 2023 Articles “made [Thomas] freak out and ... start having more anxiety attacks.” Thomas read that Stash’s Pizza’s owner allegedly “had called one of his employees ... a fucking Mexican, and the text that I got was fucking nigger. I read in the articles where he [had] beaten his employees where they had to have surgery.” (Thomas II at 8, 11)<sup>21</sup> Seventh, as of the time of the hearing, Thomas was receiving treatment from clinicians at Upham’s including taking medication prescribed by Tam. (Thomas II at 205-206) Despite her treatment and medication, Thomas’ mental and emotional distress was manifested during the hearing. During her testimony regarding the telephone calls and text message occurring while she was in Louis’ car, Thomas engaged in behavior including rubbing her shoulders. When asked why she was rubbing her shoulders, Thomas testified “I can’t breathe.... just the thought about that night and hearing his voice and just thinking about the stuff that he said to me, it feels like I can’t breathe. It hurts. My heart hurts. My chest hurts.” (Thomas I at 96-97) During Louis’ testimony regarding the question posed over the telephone to Thomas regarding hanging “niggers” at Franklin Park, Thomas needed to take a break. (Day II at 97) Upon hearing Jones testify regarding hanging, Thomas was crying and had to leave the room. (Day III at 111-112) I found Thomas’ strong emotional response to hearing or discussing the threatening and racial comments to be genuine and a reflection of how severely they impacted her. Eighth, the Incident has affected Thomas’ family activities. Thomas stopped taking her children to Franklin Park for family time because of the Incident. When Thomas’ children ask for pizza, Thomas thinks about the Incident. (Thomas I at 93, 195-196)

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<sup>21</sup>The evidence from “had called” to “surgery” was admitted solely for the limited purpose of the effect upon Thomas’ mindset.

25. From March 30, 2020 to December 2022, Thomas reported to her clinicians at Upham's a number of life stressors including a relationship issue, pending divorce, pandemic, a housing dispute with a property management company, an issue with Children's Hospital, and the Incident. (Exhibit 17) In his sessions with Thomas during August to November 2022, Jones diagnosed Thomas with complex trauma (complex PTSD) because that took into account all the stressors. (Jones III at 123, 128, 138) During Jones' sessions with Thomas, there was discussion of divorce, struggles with the management company, the Incident and a new dating relationship. Thomas reported to Jones "feeling 'overwhelmed' by numerous stressors: displaced from her apartment for 6 months until recently, three open court cases (lawsuit against her property management company, divorce case, case involving a restaurant)." (Jones III at 103, 170; Exhibit 17) (Parenthesis in original) During her last session with Jones (November 28, 2022), Thomas identified anxiety regarding the Incident, the property management company, divorce and a relationship with a person - "Mr. X" - as what she is "most struggling with right now." (Exhibit 17 at 98-100)
26. Based on the findings in paragraphs 26-27, I find that a housing related dispute with a property management company had a severe adverse impact upon Thomas' emotional and mental health in 2021 and 2022 and further find that such dispute does not have as severe an effect on Thomas' current emotional and mental state. First, Thomas "was dealing with a lot ... there was mice in the unit. The walls was messed up.... [W]e had to be placed in a hotel.... There was mold in the house, also, that caused the kids to have breathing issues: asthma, nose bleeds. Constant nose bleeds. And it took them about six to seven months to fix that unit." (Thomas I at 169) Second, at one point during the hearing, Thomas characterized the housing related dispute as "my main stressor" before changing her answer to describe it as "part of my stress." (Thomas II at 192) Third, in July 2021, Thomas discussed with Ortiz an upcoming court event regarding her housing situation and reported she "believes she's being targeted by housing management." (Exhibit 17 at 54) On September 3, 2021, Thomas told Tam that she "is having more problems with her management who she feels has been retaliating against her by doing renovations in her apartment.

She reports that she's taken them to court. She states that she has been having panic attacks."

(Exhibit 17 at 55) On October 6, 2021, Thomas told Tam that "she had a nervous breakdown" last week when she was buying clothes to replace ones the landlord placed into storage; is having nightmares twice a week, on average; is living in a hotel with her children; and does not feel comfortable there as she fears people breaking in. (Exhibit 17 at 63) On November 3, 2021, Thomas told Tam that she "is still going through a lot with her housing situation and she has continued feeling paranoid and unsafe." (Exhibit 17 at 67)

27. Fourth, in December 2021, Tam described the reason for Thomas' treatment as "assistance with housing stressors." (Exhibit 17 at 77) Tam's notes of her visit with Thomas on March 9, 2022 reflect the stress that the housing issue was causing Thomas: after Thomas moved back home in February 2022, she found belongings damaged and "may need to go to court to get compensated"; "while they were at the hotel, [Thomas] was having more nightmares and was on edge, worrying constantly about people breaking into her room;" and "even though she is back in her own home, she doesn't feel comfortable or safe as she worries about possible retaliation." (Exhibit 17 at 78-80) Fifth, Jones' notes of his visit with Thomas on August 10, 2022 state: "[p]atient provides a run-down of major stressors she's been dealing with. Just moved back into her apartment after 6 months of staying in hotels and other places, related to protracted battle with property management over conditions in her apartment. States she filed lawsuit vs them approx 1 yr ago, has appeared in court 10 times." (Exhibit 17 at 85) Sixth, on August 31, 2022, Thomas told Jones that she had "a breakdown this weekend" while "trying to clean her room from the damage done by workers in her absence, became very upset/triggered.... Explains her housing management is responsible." (Exhibit 17 at 91) Seventh, as of the date of the hearing, the housing related lawsuit was pending. At one point, Thomas testified that the housing issue is no longer a stressor and at another point, testified that it is now less stressful. Thomas explained that as of the time of the hearing, she now has legal help in that lawsuit and new people are running the property management. (Thomas II at 202-204) Given the impact of the home displacement, its

duration, the health impact upon her children and the pending lawsuit, I do not credit Thomas' testimony that the housing related issue is no longer causing her stress, but I do credit her testimony that the level of stress it is generating has lessened.

28. At all material times, Thomas has had an ongoing divorce case. In numerous visits with Upham's clinicians after October 4, 2020, Thomas sought therapy to address the stress caused by her divorce. (Thomas II at 191) On September 20, 2021, Thomas identified "her estranged husband" to Roberts-Clarke as a trauma. (Exhibit 17 at 60) On August 31, 2022, Thomas told Jones that she "has a court date tomorrow for her divorce and how that is contributing to her stress." (Exhibit 17 at 91) At hearing, Thomas testified the pending divorce is "not as much [a stressor] as before. It's not stressful. My husband and I have been communicating, and now we have come to a term of agreement so this will be much easier." (Thomas I at 168; Thomas II at 204) Given the prolonged and personal nature of the pending divorce, I do not credit Thomas' testimony that the divorce is no longer causing her stress, but I credit her testimony it causes her less stress than in the past.
29. In the fall of 2022, a relationship with "Mr. X" was causing Thomas stress. On September 1, 2022, Thomas told Jones that "she's 'stressed the F out'. Notes stressors ... her neighbor/friend [Mr. X] has become 'obsessive.'" (Exhibit 17 at 94) On November 28, 2022, Thomas told Jones that she and Mr. X broke up, had a "big argument on Thanksgiving resulting in [Mr. X] calling the police and pt being detained." (Exhibit 17 at 100) On December 7, 2022, Thomas told Castaneda that she is in a relationship that she would like support around which I infer regarded Mr. X. (Exhibit 17 at 101)
30. In 2021, an issue with Children's Hospital regarding scheduling appointments for her children was causing Thomas stress. (Thomas II at 207-208) Due to a lack of evidence that that issue continued after 2021, I credit Thomas' testimony that the issue is no longer causing her stress. (Thomas I at 168)
31. This litigation regarding the Incident has caused Thomas significant stress. On December 7, 2022, Thomas reported to Castaneda "feeling like 'they (people a[t] Stash's) are going to do something

to me (to cause harm)” and referenced an upcoming “court” date in this case. (Exhibit 17 at 101) (Parenthesis in original) From January 2023 until sometime in March 2023, Thomas had weekly appointments with Rivera. Since then, the frequency of visits has increased because of the “fear, this court date. This – having to relive everything that happened, it’s been putting more fear in me to the point where I’m having breakdowns more.” (Thomas I at 175-177) Each time Thomas relives the Incident, she becomes anxious and scared. She fears somebody from Stash’s Pizza “will do something to me before coming here.” A week before the hearing, she had a “breakdown.” She fears someone will harm her to prevent her from “telling my story.” (Thomas I at 184, 191-192)<sup>22</sup>

32. Jones opined that the Incident was the most impactful stressor in Thomas’ life because it involved fearing for her safety while the other stressors were not threats to her physical well-being. Jones explained that Thomas was worried Stash’s Pizza would hurt her. (Jones III at 104-105, 170-171) Jones rated the Incident as “being in a class by itself because it involves ... her safety, whereas the other stressors were more financial and emotional.” (Jones III at 158-159) In his progress notes, Jones did not “rank” the impact of the stressors, (Jones III at 183), but I do not find that this undermines his opinion.
33. The Incident exacerbated the impact of the other stressors in Thomas’ life by creating a “compounded effect” that “put things over the top for her.” It “really elevated the level of distress for her and fear for her physical safety.” (Jones III at 137-138)
34. As of the time that Jones left Upham’s in December 2022, he had the opinion that Thomas would probably be struggling with complex trauma for “at least another year.” (Jones III at 161-162) Based on that opinion, and Jones’ opinion that the Incident was the most impactful stressor in

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<sup>22</sup>There is no evidence that anyone associated with, or acting on behalf of, Stash’s Pizza has ever sought to harm Thomas. Jones described paranoia as an extreme fear that may not be totally justified although from the patient’s view it is. Thomas presented with symptoms of paranoia during her visits with Jones. When asked whether her belief of being harmed by the owner of Stash’s Pizza could have been an unreasonable perception, Jones answered “[i]t’s possible.” (Jones III at 108, 199)



Thomas' life, I find that the Incident is reasonably expected to negatively impact Thomas into 2024 (excluding working, see below).

35. Based on the findings in this paragraph, I find that Thomas has failed to prove that the Incident is reasonably expected to negatively impact her beyond 2024. First, the following testimony from Jones, which I credit, evidences that he was unable to “put a time frame” on the future impact of the Incident on Thomas. (Jones III at 112-113)

I haven't spoken with her in six months, but I imagine [the Incident] still impacting her just on its own, but also given that the case is sort of wrapping up. Until there is some sort of resolution, I think it's going to remain impactful, particularly impactful until there is some sort of legal resolution. And even beyond that.... I think it will continue to impact her. I can't put a time frame on it because you can't really do that with trauma. Everyone is different in how they kind of handle it.

Second, other than his opinion regarding the significance of a legal resolution in this case, a number of Jones' opinions regarding “the future” for Thomas were inconclusive or qualified. When Jones was asked whether he had an opinion as to how long the “open wound” from the Incident would last, he answered “I have an opinion, but it's just a guess.” (Jones III at 154-155) Jones did not have an opinion regarding how long Thomas would need treatment. (Jones III at 142) When asked whether Thomas will suffer from the Incident for the rest of her life, Jones answered “I don't think she will suffer acutely for the rest of her life.” Regarding whether she would suffer “less than acutely” for the rest of her life, Jones answered “[u]nlikely if she gets the proper care.” (Jones III at 163-164)

### C. EMPLOYMENT

36. In April 2019, Thomas began working at the Beth Israel Deaconess Medical Center (“BIDMC”) in the podiatry department at the front desk answering phones, checking in patients, rescheduling appointments and communicating with doctors and patients. (Thomas I at 53-54, 189) On March 18, 2020, she went on leave under the Family Medical Leave Act (“FMLA”).<sup>23</sup> In March 2020,

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<sup>23</sup>At the BIDMC, Thomas worked 40 hours per week with an annual salary of \$40,506. (Thomas I at 63, 198)

she started having panic attacks and went on leave to “protect myself and my kids” as she believed her department did not know how to properly address the pandemic. (Thomas I at 57-58, 60; Thomas II at 148; Exhibit 16) With the exception of August 28-September 14, 2020, Thomas was on approved leave from March 18, 2020 to October 15, 2020. (Exhibit 16) At some point in October 2020, which I infer to be on or after October 16, 2020, BIDMC terminated Thomas’ employment. (Thomas I at 187-188; Thomas II at 154-155) Based on the timing of the termination, and the absence of any evidence to the contrary, I infer that the termination from BIDMC was because Thomas did not return to work after her approved leave ended. Since beginning her leave in March 2020, Thomas did not work until January 3, 2023. (Thomas I at 186-187; Thomas II at 148)

37. Based on the findings in this paragraph, I find that Thomas has failed to prove that the Incident caused, or will cause, her to be unable to work. First, I do not credit Thomas’ testimony that she would have returned to work at the BIDMC if the Incident had not occurred.<sup>24</sup> On March 30, 2020, Thomas told Ortiz that since the pandemic, she “feels PTSD, depression and anxiety all kicking in at the same time.” (Exhibit 17 at 7) On June 26, 2020, Thomas told Tam that she had “a history of depression and trauma-related symptoms” which were exacerbated by “worrying about the coronavirus pandemic” and “was experiencing panic attacks twice a day.” (Exhibit 17 at 15, 20) On August 28, 2020, Thomas told Tam “that she has been feeling more anxious because she found out two weeks ago that [BIDMC] was going back to Phase 1 [related to pandemic] and she had a panic attack,” and Tam noted Thomas’ “psychological condition is worsening due to upcoming return to work and feeling anxious about the pandemic.” (Exhibit 17 at 21, 25) On September 2, 2020, Thomas told Ortiz that she “is having difficulties with the idea of returning to work” as she provides direct service to patients which “she states puts her at greater risk of contracting covid.” (Exhibit 17 at 27) Second, I do not credit Thomas’ testimony

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<sup>24</sup>I credit Thomas’ testimony that she enjoyed working at the BIDMC. (Thomas I at 185)

that if the Incident had not occurred, she would have continued to work at the BIDMC until she retired at approximately 70 years old. (Thomas I at 188-190) Based on her demeanor at hearing regarding this line of questioning, I found Thomas' testimony on this point not credible. Further, Thomas' resume evidences that she has worked since 2005 but never for the same employer for more than two years and three months. (Exhibit 15) See also Thomas II at 151 (since January 2015, longest period she has worked at a particular job was "about two years") Third, from January 3, 2023 to April 4, 2023, Thomas worked at the Boston Medical Center. In April 2023, Thomas was "let go" by Boston Medical Center. (Thomas I at 186-187) The record is devoid of evidence that that decision had any connection to the Incident or her health. Fourth, Jones did not opine that the Incident affected Thomas' ability to work. When asked if he had an opinion regarding Thomas' ability, from an emotional and mental perspective, to be employed in the future, Jones answered "it never occurred to me as something that I ruled out for her. I never thought of her as unemployable during the time that we worked together." (Jones III at 200-201) Jones was asked whether he ever concluded that because of the Incident and any other stressors that Thomas would never be able to work again, and answered "no." (Jones III at 188) When asked whether he "ever formed an opinion as to whether or not Ms. Thomas is emotionally or mentally able to work", Jones answered "I have not." (Jones III at 204)

## II. CONCLUSIONS OF LAW

The Commission has authority to redress violations of the public accommodation laws including M.G.L. c. 272, § 98 ("Section 98"). See M.G.L. c.151B, § 5 (person claiming to be aggrieved by a violation of Section 98 may file a complaint with the Commission, and if the Commission finds a violation of Section 98, it may take such affirmative action as in its judgment will effectuate the purposes of Section 98) Thomas asserts that she was treated differently by Stash's Pizza because of her race and

color and that Stash’s Pizza retaliated against her when she complained about such disparate treatment, all in violation of Section 98.<sup>25</sup>

A. THOMAS WAS DISCRIMINATED AGAINST BASED ON HER RACE AND COLOR BY A PLACE OF PUBLIC ACCOMMODATION IN VIOLATION OF SECTION 98 OF M.G.L. c. 272

Section 98 provides in part that whoever makes any distinction, discrimination or restriction on account of race or color relative to treatment in a place of public accommodation shall be liable to the person aggrieved. In Section 98, the Legislature declared that “[a]ll persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation.... This right is recognized and declared to be a civil right.” (Section 98)

Stash’s Pizza is a place of public accommodation because the definition of a place of public accommodation includes “a restaurant, bar or eating place, where food, beverages ... are sold for consumption on or off the premises.” (Section 92A of M.G.L. c. 272)<sup>26</sup>

I next address whether Thomas suffered a distinction, discrimination or restriction in her treatment by Stash’s Pizza because of her race and/or color. On October 4, 2020, Thomas sought services from Stash’s Pizza and was displeased by the customer service she received which she believed was based on her (and her cousins’) race. After his offer of a small cheese pizza and pizza slices in lieu of a large cheese pizza was declined, an employee of Stash’s Pizza rudely told Thomas, Nee Jackie and Louis (who are all Black) inside Stash’s Pizza “you can take it or leave it.” Within minutes after leaving Stash’s Pizza, Thomas

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<sup>25</sup>I do not apply the burden-shifting paradigm set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to the disparate treatment and retaliation claims. See Adams v. Schneider Elec. USA, 492 Mass. 271, 281, n. 5 (2023) (“McDonnell Douglas test is not used at trial.”) In three recent Commission decisions, a Hearing Commissioner and two Hearing Officers respectively decided not to apply the framework in analyzing disparate treatment claims, and in the latter, also did not apply it to a retaliation claim: Johnson and Massachusetts Commission Against Discrimination v. Arabic Evangelical Baptist Church, Inc. d/b/a Lighthouse Early Learning Center, 45 MDLR 47 (2023) (Hearing Commissioner); Jenson and Massachusetts Commission Against Discrimination v. Rockdale Care & Rehabilitation Center, 45 MDLR 54 (2023) (Hearing Officer); Ambroise and Massachusetts Commission Against Discrimination v. Law Office of Howard Kahalas et. al., 45 MDLR 67 (2023) (Hearing Officer) After a discrimination or retaliation claim is fully tried on the merits, the ultimate question of discrimination or not, or retaliation or not, is directly before the finder of fact who has all the evidence needed to decide whether a place of public accommodation unlawfully discriminated against or unlawfully retaliated against a customer.

<sup>26</sup>Stash’s Pizza admits it is a place of public accommodation. (Day I at 12; Stash’s Pizza Post-Hearing Brief at p. 27)

sought to talk to a Stash's Pizza manager about the customer service, and in a series of telephone calls and a text message, was barraged by racial epithets and threats from the same employee whom she had interacted with inside Stash's Pizza. Specifically, she was bombarded by the following comments: (a) called a "nigger" or "fucking nigger" and asked "why don't you come here" so "I can put a bullet in your head"; (b) twice told to "stop calling me you fucking nigger"; (c) asked if she knew "how many niggers like you get hung" at Franklin Park; (d) asked where she was, by a person who stated he was "off work" and "ready to hang a nigger;" and received (e) a text message that said "Fucking nigga." This conduct constitutes a distinction and a discrimination in treatment on account of race and color in violation of Section 98.

It is immaterial that Thomas was not physically inside Stash's Pizza when these telephone comments were made and the text message sent, because they flowed from the customer service that she had received from Stash's Pizza and was seeking to address with a manager of Stash's Pizza. To bifurcate events taking place inside Stash's Pizza from those taking place outside Stash's Pizza would effectively limit, without authority, the declaration in Section 98 that all persons shall have the right to the full and equal accommodations of any place of public accommodation. See Samartin v. Metropolitan Life Insurance Company, 27 MDLR 210, 213-214 (2005) (Full Commission) ("The rights guaranteed by M.G.L. c. 272, s. 98 ... do not require a person to enter a physical structure. [Citation omitted]"); Currier v. Nat'l Bd. of Med. Examiners, 462 Mass. 1, 19 (2012) (analyzing Samartin; "The commission noted that times are such today where business is increasingly conducted through the Internet or over telephones. *Id.* To limit the statute's reach to physical accessibility would be contrary to the goals of the statute and 'would allow any number of discriminatory actions that the statute prohibits.' *Id.* The commission provided an example to illustrate its point: 'individuals who receive inferior or limited services of a restaurant because of their race would have no relief so long as the restaurant did not prevent their access to the property.' *Id.* We agree with this reasoning.")

Interpreting Section 98 to allow a place of public accommodation to subject its customers to discriminatory conduct after they have left the premises and seek to address the customer service they received in the place of public accommodation, would thwart the purpose of public accommodation law in Massachusetts and runs afoul of the principle that “the public accommodations law is to be given a broad and inclusive interpretation in order to fulfill the policy of preventing discrimination in the public sphere.” Sahir and Massachusetts Commission against Discrimination v. 2 Belsub Corp. et. al., 40 MDLR 81, 85 (2018) (Hearing Officer) (Citation omitted)

Stash’s Pizza is vicariously liable for the actions of its employee who threatened, intimidated and instilled fear in Thomas. Brooks v. Martha's Vineyard Transit Auth. et. al., 433 F. Supp. 3d 65, 73 (D. Mass. 2020) (deferring to Commission’s interpretation that Section 98 can be enforced on a vicarious liability theory); Sahir, 40 MDLR at 84 (“an employer in a public accommodations case is responsible for the actions of an employee or agent who acts within the scope of his/her actual or apparent authority. [MCAD citations omitted]”) I reject Stash’s Pizza’s argument that the telephone comments and text message were not made within the scope of employment. Those comments and message were made during a patron’s attempt to speak to a manager about poor customer service. Interacting with a patron about customer service falls within the scope of employment duties. Sahir, 40 MDLR at 85 (“call involved customer interaction and sandwich making which were core elements of her job;” words “may have been outrageous, but the subject of the call was related to her job”) That the employee who acted to intimidate and put a customer (Thomas) in mortal fear appears to have violated the restaurant’s policy by answering its telephone after 1:00 a.m. and subjected himself to discipline, does not negate vicarious liability. There is no statutory exception in Section 98 that permits a place of public accommodation to avoid vicarious liability by barring the subject conduct in its handbooks or policy statements. Stash’s Pizza is liable for disparate treatment under Section 98 to Thomas under a vicarious liability theory.<sup>27</sup>

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<sup>27</sup>In her Post-Hearing Brief at 40-41, Thomas argues Papantoniadis participated in the harassment and asks the Commission to amend the Complaint to include him as an additional respondent under M.G.L. c. 151B, § 4(5). The request is denied. It is untimely and allowing it at this point would be unduly prejudicial to Papantoniadis.

B. THOMAS WAS RETALIATED AGAINST BY A PLACE OF PUBLIC ACCOMMODATION IN VIOLATION OF SECTION 98 OF M.G.L. c. 272

Concluding that Stash's Pizza is liable for disparate treatment under Section 98 to Thomas, justifies, by itself, the remedies detailed below. Nevertheless, I shall address the retaliation claim because it was certified to hearing and briefed by the parties. Stash's Pizza raises a threshold issue relative to the retaliation claim. It argues that "[r]etaliations claims are born out of the context or [sic] an employer/employee relationship." (Stash's Pizza's Post-Hearing Brief at 33) Implicit in this argument is that a retaliation claim by a patron against a place of public accommodation cannot be actionable under Section 98. I reject this position.

First, the Commission has been charged in the first instance to interpret Section 98 and determine its scope,<sup>28</sup> and has previously held a place of public accommodation liable for retaliation to a patron pursuant to Section 98. Poliwczak and Massachusetts Commission Against Discrimination v. Mitch's Marina and Campground et. al., 33 MDLR 133, 133, 137 (2011) (Hearing Commissioner) (Complainant alleged Respondents discriminated against her on the basis of handicap and retaliated against her in violation of Section 98; finding that "temporal evidence establishes the inference of a retaliatory motive on the part of Respondents to deny both Complainant and her husband a contract for their campsite because her husband had spoken out against Respondents' decision to prohibit them from parking near the bottom of the ramp as a reasonable accommodation.")

Second, the "rule for the construction of remedial statutes is that cases within the reason, though not within the letter, of a statute shall be embraced by its provisions." [Citations omitted]" Thurdin v. SEI

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<sup>28</sup>Currier, 462 Mass. at 18–19 ("Any person who is 'aggrieved' by an alleged violation of the public accommodation statute may file a complaint with the Massachusetts Commission Against Discrimination [], which will investigate, conciliate, and adjudicate the matter under the procedures set forth in c. 151B.... With the integration of the statute into c. 151B, the Legislature essentially delegated to the commission the authority in the first instance to interpret the statute and determine its scope. We thus are guided in our interpretation of the statute by the construction afforded by the commission. [Citation omitted]")

Bos., LLC, 452 Mass. 436, 444 (2008); Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985)<sup>29</sup>

Prohibiting a place of public accommodation from engaging in retaliatory action against a customer who has engaged in protected activity by opposing discriminatory treatment received from that place falls within the reason of Section 98 and is embraced by its provisions. In Section 98, the Legislature not only prohibited differential treatment based on protected class in places of public accommodation, but also declared that all persons have a civil right to full and equal accommodations in such places.<sup>30</sup> Consider the frustration of Legislative intent if the following scenario is not actionable under Section 98. After receiving poor customer service from a salesperson because of her sex, a female customer then complains to the store manager. The manager responds that the store does not want, as customers, people who complain that they were treated differently because of their sex and is barring her from the store because of her complaint. For these reasons, I conclude that a claim of retaliation against a place of public accommodation by a patron is actionable under Section 98.<sup>31</sup>

I now address whether Thomas has proven a claim of retaliation. To prevail on her claim of retaliation, Thomas must prove four things. She reasonably and in good faith believed that Stash’s Pizza was engaged

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<sup>29</sup>Remedial statutes seek to address misdeeds suffered by individuals rather than to punish public wrongs. See Depianti v. Jan-Pro Franchising Int’l, Inc., 465 Mass. 607, 620 (2013) Section 98 has a penal component as it references punishment by a fine and/or by imprisonment in addition to damages enumerated in c. 151B. However, in a civil proceeding brought by the Commission, Section 98 is remedial. See Currier, 462 Mass. at 17, 18, n. 18 (“we are not reviewing a criminal case against the NBME and therefore are not required to construe the statute narrowly”; “because [Section 92A of c. 272] is an antidiscrimination statute, we have directed that, in construing its reach, we give it ‘a broad, inclusive interpretation’ to achieve its remedial goal of eliminating and preventing discrimination. [Citation omitted]”)

<sup>30</sup>I do not find the statutory construction principle not “to add words to a statute that the Legislature did not choose to put there in the first instance,” Glob. NAPs, Inc. v. Awiszus, 457 Mass. 489, 496 (2010), useful to the analysis under the circumstances.

<sup>31</sup>The heading for the retaliation section in Stash’s Pizza’s post-hearing brief (at p. 33) states that “Complainant does not have a Claim Pursuant to MGL. 272 Section 98 or MGL. 151B Section 4(4).” Because Stash’s Pizza has raised Section 4(4), I address whether a retaliation claim against a place of public accommodation by a patron is also actionable pursuant to Section 4(4). I determine it is. Then Superior Court Judge Gants, for the purpose of a summary judgment motion, “assume[d] that this prohibition against retaliation [in § 4(4)] applies to retaliatory action taken against someone who opposes or complains about discrimination in public accommodations in violation of G.L. c. 272, § 98.” Kuketz v. MDC Fitness Corp., 2001 WL 993565, at \*4, n. 3 (Mass. Super. Aug. 17, 2001), aff’d sub nom. Kuketz v. Petronelli, 443 Mass. 355 (2005) I agree with the reasoning and do not find it limited to motion practice.



in wrongful discrimination. She acted reasonably in response to that belief through reasonable acts meant to protest or oppose such discrimination (protected conduct). Stash's Pizza took adverse action against Thomas. The adverse action was a response to the protected conduct. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405–06 (2016); Murray v. Framingham Country Club, 2005 WL 2009681, at \*6 (Mass. Super. June 20, 2005)

Thomas reasonably and in good faith believed that she had been treated differently because of her race and/or color by an employee of Stash's Pizza inside the restaurant when the employee told her and her cousins, who are all Black, in a loud and rude manner that they could "take it or leave it" regarding his offers of food.<sup>32</sup> Thomas reasonably responded to that belief by telephoning Stash's Pizza to speak to a manager about the customer service, thus engaging in protected conduct. In response, and as specified in the disparate treatment section, Thomas was barraged by racial and threatening telephone comments and a text message. Those comments and message easily demonstrate the requisite causative adverse action. A reasonable person in Thomas' position would find those threats adverse and materially harmful. Compare Yee v. Massachusetts State Police, 481 Mass. 290, 296–97 (2019) (material disadvantage to an employee judged by a reasonable person in the employee's position) Finally, applying vicarious liability, as discussed in the disparate treatment section, Stash's Pizza is liable to Thomas for retaliation in violation of Section 98.

### III. REMEDIES

Thomas seeks back pay, front pay and emotional distress damages. (Thomas' Post-Hearing Brief at 47) Because Thomas failed to prove that the Incident caused, or will cause, her to be unable to work, she is not entitled to back pay or front pay. The Supreme Judicial Court enunciated the following principles for the imposition of emotional distress damages after a hearing pursuant to Section 5 of M.G.L. c. 151B.

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<sup>32</sup>That an African American customer picked up food and left Stash's Pizza without incident while Thomas and her cousins were inside Stash's Pizza is not relevant to whether Thomas's belief, that the conduct of the employee of Stash's Pizza whom she interacted with was discriminatory, was reasonable or held in good faith. That Louis did not consider that the customer service was based on race is relevant, but I do not find that sufficient to alter my conclusion that Thomas' belief was held in good faith and was reasonable.

We stress that emotional distress damages should not be improperly considered, or awarded, as a substitute for punitive damages. Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered. . . . Some factors that should be considered include (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication). [Citation omitted] In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. [Citation omitted] Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.

Stonehill Coll. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 575–76 (2004)

(parenthesis in original) Applying these principles to the findings of fact in the Emotional Distress section, I find \$105,000 is a fair, reasonable and proportionate amount of damages for the emotional distress suffered and reasonably expected to be suffered by Thomas caused by the Incident.<sup>33</sup> This award is not a substitute for punitive damages. I have not compensated Thomas for stress not caused by the Incident – e.g. stress caused by the housing related issue or by the litigation regarding the Incident.<sup>34</sup>

The Incident has had a prolonged, pervasive and extreme impact on Thomas' emotional and mental health since October 4, 2020, and based on expert testimony, its impact is reasonably expected to continue into 2024. Thomas repeatedly thinks about the threat of being hung at Franklin Park. It has caused her to have frequent panic/anxiety attacks. In May 2021, she told Tam that she had thoughts about people getting hanged; recurring nightmares of being killed; and physical symptoms including vomiting, racing heart, shortness of breath and dizziness which sometimes lasted all day when thinking about the Incident. On September 19, 2022, almost two years after the Incident, she described the Incident to Jones as an "open wound." When Jones explored the Incident with Thomas, she became very emotional and was the "most upset" he had ever experienced her being. Louis described the Incident's pervasive effect

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<sup>33</sup>Apportionment of emotional distress damages between the meritorious disparate treatment and retaliation claims is not appropriate. The facts establishing emotional distress because of disparate treatment warrant \$105,000 in emotional distress damages. The facts establishing emotional distress because of retaliation warrant \$105,000 in emotional distress damages. The two numbers are not to be totaled because the facts establishing emotional distress because of the disparate treatment and the retaliation are the same.

<sup>34</sup>Hoyt v. LR Properties, LLC, 98 Mass. App. Ct. 1110, n. 9 (2020) (Rule 23.0 case), further review denied, 486 Mass. 1108 (2020); Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 79 (1st Cir. 2001)

upon Thomas. Thomas genuinely believes that someone associated with Stash’s Pizza is seeking to harm her. Despite treating with clinicians, and taking medication prescribed, the intense mental and emotional hold that the Incident continues to have on Thomas was apparent during the hearing. Thomas has had a number of other life stressors adversely affecting her emotional and mental health at material times, most notably the housing related dispute. However, Thomas has proven, through expert testimony, that the Incident has had the most significant impact on her health as it is “in a class by itself because it involves ... her safety, whereas the other stressors were more financial and emotional.” Further, Thomas has proven, through expert testimony, that the Incident exacerbated the impact of the other stressors in Thomas’ life by creating a “compounded effect” that “put things over the top” and “elevated the level of distress for her and fear for her physical safety.” In summary, despite taking medication and engaging in counseling, Thomas has been profoundly affected by the Incident. She has suffered mental, emotional and physical symptoms from an intense trauma which induced fear for over two and a half years, and is reasonable likely to continue to negatively impact Thomas into this year (2024).

#### **IV. ORDER**

For the reasons detailed above, and pursuant to the authority granted me under Section 5 of Chapter 151B and Section 98 of Chapter 272, I order the following.

1. Stash’s Pizza shall pay Thomas as an emotional distress damage award \$105,000 plus interest thereon at the rate of 12% per annum from the date of the filing of the Complaint with the Commission until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue.
2. Stash’s Pizza shall cease and desist from all acts of discrimination based on race and/or color.

#### **V. NOTICE OF APPEAL**

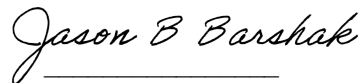
This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal within 10 days of receipt of this decision and file a Petition for Review within 30 days of receipt of this decision. 804 CMR 1.23 (2020). If a party files a Petition for Review, the other party has the right to file a Notice

of Intervention within ten days of receipt of the Petition for Review and shall file a brief in reply to the Petition for Review within 30 days of receipt of the Petition for Review. 804 CMR 1.23 (2020) All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other party.

**VI. PETITION FOR ATTORNEY’S FEES AND COSTS**

Any petition for attorney’s fees and costs for Complainants’ Counsel shall be submitted to the Clerk of the Commission within 15 days of receipt of this decision. Pursuant to 804 CMR 1.12 (19)(2020), such petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. Respondent may file a written opposition within 15 days of receipt of said petition. All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other party.

So ordered this 25th day of January, 2024

  
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Jason Barshak  
Hearing Officer