

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ALYX TINKER f/k/a REBECCA
TINKER,

Complainant

Docket No. 13-BEM-01906

v.

SECURITAS SECURITY SERVICES
USA, INC. and NAJEEB HUSSAIN,

Respondents

Appearances: Andrew S. McIlvaine, Esq. for Complainant
Liam T. O'Connell, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 17, 2013, Complainant Alyx Tinker, f/k/a Rebecca Tinker filed a complaint of discrimination against his then employer, Respondent Securitas Security Services, and his supervisor, Respondent Najeeb Hussain. Mr. Tinker alleged that he was discriminated against on the basis of his sex/gender, his gender identity, and his sexual orientation in that he was subjected to a hostile work environment by his immediate supervisor Najeeb Hussain.¹ The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified for hearing which was held before the undersigned hearing officer on January 11, 12 and 13, 2016. The parties filed post-

¹ The complaint alleged disability discrimination also, but Complainant has chosen not to pursue that claim.

hearing briefs in March of 2016. Having considered the record in this matter and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, now known as Alyx Jaden (A.J.) Tinker, began working for Respondent Securitas as a part-time Security Officer in October 2009. At the time Complainant was a woman who self-identified as female and as lesbian. Complainant's name at that time was Rebecca Michele Tinker. Complainant testified that he is transgender, but had not yet begun the gender reassignment process to become male. Complainant did not publically identify as transgender until roughly late 2010 and he changed his name to Alyx Jaden Tinker on July 20, 2011. (Tr. I, pp.14, 16, 26, 27, 29) Complainant informed his employer and Respondent Hussain that he was transgender, was transitioning to a man and asked to be called by his new name and by the pronoun "he." (Tr. I, p. 29)

2. During Complainant's employment, Securitas provided security services for various buildings and departments at Harvard University in Cambridge, including Harvard University School of Law (HLS). During Complainant's employment, Securitas employed 9-10 employees at HLS. (Stipulated facts nos. 2, 7, 8)

3. Respondent Hussain worked as a security officer at the Harvard site for two predecessor companies and testified that he began working for Respondent Securitas sometime in 2009 when it took over for Allied Barton. He was the Lead Officer for the company that preceded Securitas and believes he became the Securitas supervisor at HLS sometime in 2011. (Tr. II, pp. 246, 249) Complainant testified Hussain was made the official supervisor for the HLS site in November 2011. (Tr. I, p. 22) In late 2012 or early 2013, Hussain was promoted to the position of Account

Representative for Securitas' HLS security detail. (Tr. p. 251) As supervisor and Account Representative, Hussain had responsibility for managing the schedule for Security Officers at the HLS site. He controlled Security Officers' work hours and assignments, assigned required overtime, and approved employee vacation requests. Hussain testified that in the latter position, he basically did more management, and according to Complainant he was the sole person in charge of the HLS site. (Tr. I, p. 23-24, Tr. II, pp. 251, 281-282)

4. Complainant's duties as a Security Officer were to walk routes in HLS properties, lock and unlock doors per a varying activity schedule, check doors and windows for security lapses, and report any unusual activity to Securitas and/or the Harvard Police Department. (Tr. 36) Prior to the late Spring of 2011, Complainant did not have a permanent post assignment and was a "floater" who worked where needed. As a "floater" he was supervised by various Securitas QCV (Quality Control) Staff, a/k/a Road Staff. (Tr. I, pp 18-19, 21) In the late Spring of 2011, he received a full time "permanent" assignment at the HLS location. (Tr. I, pp. 16-17) At the time, there was one female officer at the HLS site, Misty McCracken, and Complainant, who was transgender. The remaining employees were male. (Tr. I, p. 23; Stip. Fact 8)

5. Complainant was never disciplined or issued any warnings at work and passed all drug tests. (Tr. I p. 32, 34) Respondent's witnesses testified that he was a good and reliable employee and his personnel file contains no record of discipline. (Ex. 6) Complainant received an exceptional service award in December of 2009. He was offered a promotion to be quality control supervisor in 2011 shortly before he was assigned to a permanent position at HLS. (Ex. 13; Tr. I p. 32) He turned down the promotion because he was a student and the hours were not conducive to his schedule. (Tr. I, pp. 32, 33)

6. A few months after becoming a permanent employee at HLS, Complainant was assigned

to the 12:00 midnight to 8:00 a.m. shift. (Tr. I, p. 22) As the person in charge of Securitas' security detail at HLS, and later as Account Representative, Hussain was Complainant's immediate supervisor. (Tr. II, pp. 281-282) Hussain normally worked the 4:00 p.m. to 12:00 midnight shift at HLS. (Tr. I, p. 39) The end of Hussain's shift overlapped with the beginning of Complainant's shift and they saw each other on a daily basis at shift change. Hussain would also occasionally work the 12:00 midnight to 8:00 a.m. shift if the Security Officer scheduled to work with Complainant called off. Hussain lived in Cambridge MA not far from Harvard Law School and there were other times when he showed up on the site during Complainant's shift. (Tr. I, pp. 39-40)

7. After Complainant legally changed his name, he filed paper work with Securitas to register his name change on or about August 1, 2011. (Ex. 5) In the summer of 2011, Complainant also revealed to Securitas co-workers and management that he was transgender and in the midst of the gender reassignment process to change from the female to male gender. At this time, Complainant asked his co-workers and supervisor Hussain to begin referring to him by the name Alyx, or A.J. Tinker, and to refer to him by male terms and pronouns. (Tr. I, pp. 28-30) Complainant testified that Hussain refused to comply with his request and regularly referred to or addressed Complainant as "she" or "Becky." Hussain eventually began addressing him as "Becky" or "A.J.," but continued to use the female pronoun "she" to refer to Complainant. (Tr. I, pp. 43-44) Complainant testified that despite his repeated requests that Hussain stop using female terms to refer to him, Hussain persisted in using female terminology to describe him. (Tr. 47-48) According to Complainant, Hussain often referred to him and McCracken as "you girls" or "those girls," and berated them for causing problems at the site. (Tr. I, pp. 76, 80, 105)

Complainant believed that Hussain's persistent use of female terms was not unintentional, but a deliberate attempt to degrade him.

8. Complainant testified that when he was employed as a floater, before he identified himself as transgender, and when Hussain was not yet his supervisor, Hussain would make derogatory statements about women and lesbians. He testified that Hussain made the following derogatory comments about Complainant's gender, gender identity, and sexual orientation: Hussain told Complainant that according to the Quran, homosexuality is wrong, but that being a lesbian was not as bad as being a gay male and f---king a male. Hussain stated it was "wrong" and "unclean" for one woman to love another woman and that Complainant was going to hell; that Complainant's lifestyle was an abomination and that females were biologically not as intelligent as males. Hussain said that women should not have certain positions at HLS and did not need weekends off because they "just go out and whore around." (Tr. I, pp. 41-42; 45; 103-104; 110; Tr. II, p. 187) Complainant told Hussain that these comments were inappropriate and made Complainant feel uncomfortable. (Tr. I, p. 43) Complainant also testified that he witnessed Hussain approach the female security officer, McCracken, and rub her stomach and tell her she was gaining weight and needed to lose weight. He did not witness Hussain act or speak in a similar manner to male security officers. (Tr. I, pp. 45-46)

9. In April of 2012, Complainant began taking hormones as part of his gender transition process. His voice began to get deeper, he began to grow facial hair, and his shoulders grew broader. (Tr. I, p. 26, 91) During June of 2012, Complainant underwent surgery to remove his breasts and to construct his male pectorals. In February 2013, Complainant underwent a full hysterectomy. (Tr. I, pp. 26-27, 91) Complainant used vacation time for the breast removal

surgery, and applied for and was granted a Family Medical Leave of Absence for his hysterectomy. (Tr. I, p. 91)

10. Complainant testified that after he revealed that he was transgender and began under-going gender reassignment, Hussain made the following derogatory and highly offensive comments regarding his sexual identity and surgeries: Complainant would “never be a real man;” that if he wanted to be treated like a man, he should not take offense at things that were said in the office; and that the transition he was undergoing was wrong. (Tr. I, pp. 44; 45) Hussain asked why Complainant would have all his organs removed and stated Complainant’s insides would be filled with scar tissue. (Tr. I, pp. 47 110) Hussain told Complainant he was unclean and going to hell and that if he was going to be a guy, he needed to act like a guy. (Tr. I, p. 110) After Complainant began hormone treatments Hussain told him he finally sounded like a man, and that his brain would continue to grow because of the testosterone he was taking because biologically, men are smarter than women. (Tr. I, p. 45) I credit Complainant’s testimony that Hussain made these comments to him.

11. Complainant testified that sometime around March of 2013, Hussain made comments that were offensive to him about female subservience, punishing women when they misbehave, and about the need for women to obey orders. (Tr. I, pp. 46-47)

12. Complainant did not register a formal complaint of harassment or discrimination regarding Hussain’s conduct through the Securitas hotline, a mechanism available to employees to register Complaints. He testified that he did, however, report Hussain’s inappropriate gender-based comments and his use of the female pronoun to refer to Complainant, to a number of supervisory level employees as early as late 2011. (Tr. I, pp. 49-58) These included Brian Reardon (Account Manager), Chris Connolly (Account Manager) Ryan Pitt (Road Staff), Eddie

Polaski (Road Staff), Eric Riddick (Road Staff) and Duane Spagnola (Road Staff). (Tr. I, p. 49-58; 112-118) He also discussed problems with safety and procedural protocols at the HLS site, inability to contact Hussain, and the fact that Hussain spoke to the security officers in a tone that was unacceptable. (Tr. I, p. 52) Complainant testified that he also complained about Hussain's conduct to Gerald Costello, (Training Manager) around the end of 2012 or the start of 2013. (Tr. p. 58) I credit Complainant's testimony that he spoke to numerous supervisory employees about Hussain's demeaning conduct as well as about other difficulties with his management of the site.

13. Respondent's witnesses, Ryan Pitt, Chris Connolly, Brian Reardon and Maureen Dittmar all denied hearing from Complainant about Hussain making harassing or discriminatory comments. (Tr. 303, 322, 345-346, 396) None of these witnesses were subpoenaed and all were current Securitas management level employees, except for Pitt, who admitted that he was currently unemployed and relying on Securitas for a reference in seeking new employment. Misty McCracken, who worked on the same shift with Complainant and was subpoenaed to testify, stated that she personally witnessed and overheard Hussain make many of the abusive comments Complainant testified to and confirmed Hussain's sexist behavior towards her. McCracken also testified that she personally observed Complainant report to supervisory personnel Spagnola, Riddick and Pitt that Hussain persisted in referring to Complainant as a female and confirmed that he made negative comments about gender and women in general. (Tr. II, pp. 188-194) I found both Complainant's and McCracken's testimony on these matters to be consistent and credible. While Complainant was friends with McCracken both at work and socially, I do not believe that this tainted her testimony or rendered her not credible on the matters to which she testified.

14. Complainant testified that he became very frustrated because the situation with Hussain did not improve, especially after he complained to Eddie Riddick at least three times and Riddick said he would speak to Maureen Dittmar, the Director of Security for Securitas. Complainant felt that Hussain's abusive conduct actually got worse any time he complained and it became even more difficult to reach Hussain. He testified that Hussain would treat him more harshly after he articulated complaints to management about Hussain's conduct, including Hussain's making abusive comments related to gender and gender identity. (Tr. I, pp. 56-59, 132-133) Complainant approached Dittmar in or around April of 2013 to ask for a transfer and to verbally complain about Hussain's refusal to address him as a male, his derogatory comments about women, and his disparaging comments about Complainant's gender transition. (Tr. I, pp. 66-67; 135-136) Dittmar testified that she recalled Complainant reporting that there were problems with not being able to find Hussain or to get a hold of him after hours and difficulties with scheduling. She also recalled having heard that there were a large number of complaints about Hussain regarding scheduling. Dittmar did not deny, but could not recall, meeting in person with Complainant to discuss Hussain. (Tr. II, p. 368-369)

15. In early April, 2013 Complainant sought a promotion to what he thought was an Account Manager position but did not receive the promotion to what was actually an Area Manager position, a position for which he was not qualified. The only available position of Account Manager had previously been filled by Hussain. (Tr. I, pp. 121-124; Exs. R-4, R-5)

16. On April 21, 2013, Complainant sent an email to Gerard Costello, Training Administrator Securitas' Harvard portfolio, asking if he knew of any positions available outside of the HLS site. (Jt. Ex. 14, p. 7) He complained about the inability to reach Hussain during an emergency and Hussain's lack of willingness to make sure that shifts are filled accordingly,

among other operational issues. In response, Complainant received an email from Alonzo Herring, the Area Manager and Labor Relations Manager for Respondent's Harvard University portfolio, asking Complainant to provide details of his complaint and seeking specific dates and times of incidents and any witnesses who might assist Securitas in their investigation. (Tr. I, p. 124; Jt. Ex. 14; Tr. II, pp.126-127) On April 23, 2013, Complainant sent a lengthy email to Alonzo Herring, raising a number of serious concerns about the inability to reach Hussain and confusion about procedures and protocols during an emergency and campus lockdown arising from the Marathon bombing suspects having shot an MIT police officer and still being on the loose. His email also addressed several other problems with Hussain at the HLS as far back as November of 2011. (Jt. Ex. 14, p. 1) In his email, Complainant included numerous and specific complaints about Hussain, but he did not make any allegations of transgender discrimination or gender harassment. (Tr. I, pp. 130-132; Jt. Ex. 14) Complainant testified that he did not raise discrimination in his April 23rd email to Herring because he was concerned that Hussain would retaliate against him, as he had in the past when Complainant reported his offensive conduct. (Tr. I, pp. 62-63; 132)

17. Complainant testified about a particularly troubling interaction he had with Hussain in June of 2013 that resulted from a workplace disagreement. On the evening of June 17th and the morning of June 18th, McCracken called in sick and another employee, Fareed Duranni, was assigned to McCracken's shift. (Tr. I, pp. 71-72) At the beginning of his shift Complainant learned he had been assigned by Hussain to patrol a portion of HLS (the WCC portion)² that was not part of his normal duties. (Tr. I, 36, 72) Complainant was concerned that he was not familiar with a number of policy and procedural changes at WCC because he had been out on medical leave and had not done that patrol for some time. He called Hussain to voice his

² Complainant testified that WCC refers to the Wasserstein Building part of the yard. (Tr. I, p. 72)

discomfort with this assignment. Hussain advised him to just do his normal patrol. At approximately 2:00 a.m. on June 18th, Hussain came to the HLS Securitas office to assist with the WCC duties and to train Durani. He encountered Complainant doing paperwork in the office and proceeded to berate Complainant in a profane manner in Durani's presence for not being fully trained on WCC procedures. Complainant testified that Hussain cornered him behind a desk while cursing at him, accusing him of not doing his "f---king job," yelling that "you girls are always causing problems," and asking him why "you girls" won't do your job. (Tr. I, pp. 71-77) Complainant advised Hussain that he would walk through the WCC patrol with him and Durani for a quick refresher, but Hussain refused to train him, telling him the McCracken should train him. Hussain began speaking in Pakistani to Durani. He advised Complainant to go back to the f---king office and sent him on his way to deal with another matter. Complainant filled out two Incident Reports and a daily Activity Report about the events of that shift. (Tr. I, pp. 80-83; Ex. 8, 9, 10)

18. Complainant testified that this incident made him "extremely anxious" and "nervous," "very fearful," and left him "very shaky," and that he went to the bathroom and "vomited." (Tr. I, pp. 80-82) Despite feeling very upset he decided to shadow Hussain and Durani because he felt he needed to learn the WCC procedures. McCracken confirmed that around June of 2013, Complainant had become so afraid to be alone with Hussain that he asked McCracken to meet him before work in the parking garage so they could enter the work site together. She further testified that Complainant was uneasy to be in a room alone with Hussain and accompanied her if she left the office to avoid being alone with Hussain. (Tr. II, p. 197)

19. Hussain categorically denied making many of the inflammatory and offensive statements alleged by Complainant and confirmed by McCracken. He stated that his referring to Complainant as "she," was unintentional and occurred at most only three times. He denied intentionally using female pronouns to refer to Complainant and stated that within months he ceased doing so and became accustomed to referring to Complainant as a man. (Tr. II, pp. 259-265; 281; 284) However, this assertion is contradicted by a June 19, 2013 email he wrote to Securitas upper management responding to Complainant's reports wherein he repeatedly used female pronouns at least nine (9) times to refer to Complainant. (Ex. 12) Hussain admitted that he was angry at Complainant for making complaints about him in the email Complainant sent to management and stated that he wanted Complainant and McCracken removed from the HLS site. (Tr. II, pp. 287-290) Hussain also alleged that Complainant was filing false reports against him and accused Complainant of discriminating against him. I did not find Hussain's denials or assertions to be credible.

20. In addition to the allegations of Hussain's misconduct by Complainant and McCracken, Hussain had other difficulties in his employment with Respondent and the company had already disciplined him for matters relative to the inefficient, substandard performance of duties. (Tr. I, p. 176) Herring testified that Hussain was issued a final written warning in March of 2013 for substandard, inefficient performance of his duties. (Tr. III, pp. 414-415) In contrast, Respondent's witnesses, including Hussain testified that Complainant was a great security officer who did excellent work and had no record of discipline. One quality control supervisor described Complainant as an "outstanding" security officer. (Tr. II, pp. 257, 303, 317, 342-343)

21. Despite his having been disciplined for other operational infractions, Hussain was not

disciplined for repeatedly using female pronouns to refer to Complainant in his June 2013 email to management. Respondent was aware as early as 2011, that Complainant was a transgender man and that he had requested that he be referred to as a male. (Tr. I, pp. 169-171) Complainant did not report allegations of gender discrimination in his email to Herring, nor did he ever personally discuss these allegations with Herring. Herring never contacted Complainant in person to discuss the workplace difficulties he was experiencing with Hussain. Herring confirmed that Respondent did not address Hussain's repeated use of female terms to refer to Complainant in his June 2013 email and that Hussain was not reprimanded for doing so. (Tr. I, pp. 135, 167, 170-171; Tr. II, p. 285) According to Herring, the investigation into Complainant's allegations about operational difficulties caused by Hussain was delayed because Complainant filed a union grievance and sought union representation. He testified that the investigation was put on hold because the matter had been referred through the grievance process. The union ultimately withdrew its grievance and Complainant filed his MCAD charge. (Tr. I, pp. 174-175)

22. Complainant filed the instant charge of discrimination in July of 2013. (Complaint; Tr. I, p. 101) He was transferred shortly after filing his complaint of discrimination and no longer reported to Hussain after his transfer. (Tr. I, p. 88) McCracken also sought a transfer out of HLS shortly after June of 2013 because she couldn't take continuing to work for Hussain. (Tr. II, pp. 197-198) Complainant's sole allegation of "wrongful" treatment after July 2013 related to the expiration of his I.D. badge and difficulty getting a new badge. (Tr. I, pp. 87-88) This problem was not unique to Complainant and was attributable to a delay in getting Harvard University to "program the access level" of the I.D. cards. (Tr. II, pp. 438-439)

23. Complainant resigned from his employment with Respondent Securitas in the fall of 2014, over a year after he filed his complaint of discrimination and was transferred to another site. He did not allege any further harassment by Hussain during the 15-month period between his transfer in July 2013 and his resignation of employment in October 2014.

24. Complainant testified that he considered Hussain's conduct to be inappropriate and it made him feel uncomfortable. He made it clear to Hussain that his comments about gender, sexual orientation and gender identity were unwelcome. (Tr. I, 42-43, 47-48, 85-87)

Complainant felt nervous about coming to work and stated that he was always on edge when he was at work and nervous about being alone in the office with Hussain. Even prior to the incident of June 2013 he was anxious about the way Hussain spoke to him and felt stressed from being persistently degraded and ridiculed by Hussain. After the June 2013 incident, he had trouble sleeping and was having nightmares about the incident and was jittery all the time. (Tr. I, 85-86) He asked for reassignment in large part because of the stress he felt from Hussain's constant ridicule and inappropriate comments and wished to work at another site where he was not so disrespected because of his gender identity and sexuality. (Tr. I, pp. 86-87)

III. CONCLUSIONS OF LAW

General Laws c. 151B s. 4 (1) prohibits discrimination in the workplace on the basis of sex, gender identity, and sexual orientation. Harassment in the workplace based on these protected classes is also prohibited. Section 4(16) of c. 151B, which prohibits sexual harassment in the workplace and has been interpreted to prohibit harassment and the creation of a hostile work environment based on other protected classes. *See Connors v. Luther & Luther*, 32 MDLR 71 (2010) (hostile work environment based on age and disability; *Beldo v. Univ. of Mass.*

Boston, 20 MDLR 105 (1998) (hostile work environment based on race); *Richards v. Bull H. N. Information Systems, Inc.*, 16 MDLR 1639 (1994) (hostile work environment based on race).

In order to establish a claim of discriminatory harassment, Complainant must show that he worked in a hostile work environment that is linked to his protected classes, in this case his sexual orientation, gender, and gender identity. A hostile work environment is one that is “pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization [and that] poses a formidable barrier to the full participation of an individual in the workplace.” *Ramsdell v. Western Mass. Bus Lines, Inc.*, 415 Mass. 673, 677-678 (1993); *College-Town Div. of Interco, Inc. v. MCAD*, 400 Mass. 156, 162 (1987).

Complainant alleges that he was the victim of discrimination and harassment because of the persistent ridicule and abuse directed at him by his supervisor Hussain, because he was a member of certain protected classes. Essentially Complainant asserts that his supervisor Hussain subjected him to a hostile work environment based on his gender, gender identity and sexual orientation. Complainant testified credibly about the very offensive comments Hussain persisted in making, first about his gender and sexual orientation when he identified as female and a lesbian, and later about his transgender identity when he transitioned to being male, changed his name and had hormone treatments and surgery. Hussain displayed great disrespect for and hostility toward the female gender and Complainant’s sexual orientation when Complainant identified as female and lesbian. The ridicule and hostility continued and was directed at Complainant’s gender identity when he became a transgender man. Hussain’s comments included assertions that Complainant was “unclean” and “going to hell” and that his gender identity was an “abomination.” He continued to refer to Complainant as female and a “girl,” in situations where the reference could no longer be deemed accidental or unintentional. Hussain

referred to Complainant as female no less than nine times in an email he wrote in 2013, at least two years after Complainant identified as a transgender male. I found credible Complainant's and McCracken's testimony about Hussain's comments and behavior and that he intended to demean and degrade Complainant. These comments were so offensive and inflammatory as to offend not only Complainant, but any reasonable person. I also find it highly unlikely that Complainant and McCracken would have imagined or fabricated many of the comments they allege were made. I conclude that Hussain's conduct was unwelcome and sufficiently severe or persistent to interfere with Complainant's ability to do his job and to create a hostile work environment for him.

Respondent asserts that Complainant's allegations of discrimination are not credible and should be dismissed because he did not formally complain in writing to any of its supervisory or management personnel and because Respondent's managers all denied having received any complaints about discrimination or harassment either verbally or in writing. I found Complainant's assertions that he had made verbal reports about Hussain's demeaning conduct related to his gender and gender identity to be credible. My observation of Complainant's demeanor leads me to conclude that he is a sincere and quiet person whose intent was not to disrupt the workplace. The evidence demonstrates that he was committed to doing a good job and ensuring there was a smooth operation at the HLS site. He merely wanted to be treated respectfully rather than persistently ridiculed for who he was.

With the exception of one, all of Respondent's witnesses still worked for the company, and the one witness who did not was relying on Respondent for a job reference. Respondent is a large security company which has subsumed two other security companies in recent years. It is reasonable to conclude that its employees would have little incentive to take sides against an

employer which plays a dominant role in the industry and where their future careers in the industry are at stake. I also draw the inference that it is likely that there was significant discussion among employees about Complainant being transgender, how to deal with his ongoing transition, and how Hussain was reacting to the issue.

I conclude that Respondent did not take seriously any of Complainant's complaints about Hussain. There was no conversation with Complainant about the operational concerns he raised. If Respondent's response to those complaints, which clearly had the potential to impact its relationships with its client, its business and its bottom-line, was inadequate, its response to Complainant's reports of Hussain's personal harassment of him was similarly lacking. Complainant was very frustrated with the inadequate response to his operational complaints. Respondent's inaction and lack of response in this regard tends to explain why Complainant did not make a formal complaint in writing about Hussain's egregious behavior towards him based on his gender and gender identity.

Aside from the fact that I did not find the supervisor's denials about being on notice of Hussain's conduct to be credible, notice to management is not required to find liability since Hussain was a supervisor and Respondent is vicariously liable for his unlawful conduct. *See College-Town, supra.* at 165- 167. An employer is vicariously liable for unlawful harassment committed by as supervisor upon whom it confers authority. I find that Securitas is liable for the actions of Hussain as well as Hussain being individually liable for his actions, as the perpetrator of the harassment. ³ *See Pico v. Town of Reading & Stamatis*, 38 MDLR 42, 47 (2016) Individual liability is predicated upon G.L. c. 151B, s. 4(4A) which prohibits any person from interfering with an individual in the exercise of rights protected under c. 151B. *Woodason*

³ The sole exception to liability is for comments made about Complainant's gender and sexual orientation prior to late 2011. This is when Hussain became Complainant's supervisor, and when Complainant alleges he first began to report the offensive behavior.

v. Town of Norton School Committee, 25 MDLR 62, 64 (2003) (individual liability found against individual who has authority or duty to act on behalf of employer and has acted in deliberate disregard of an employee's rights). Respondent Hussain was the perpetrator of the acts of discrimination and harassment against Complainant in deliberate disregard of Complainant's rights and, as such, is liable for his unlawful conduct.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and benefits and emotional distress suffered as direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders and award other affirmative, non-monetary relief. It has broad discretion to fashion remedies to best effectuate the goals of G.L. c. 151B. *Conway v. Electro Switch Corp.*, 825 F. 2d 593, 601(1st Cir. 1987)

Since Complainant was transferred to another site after filing his complaint, something he had sought for some time, and left his employment with Respondent over a year after filing his complaint for reasons unrelated to his claims of discrimination and harassment, he is not claiming lost wages.

Complainant is, however, entitled to compensation for the emotional distress he suffered for having to endure Hussain's persistent and degrading insults, inflammatory comments, and offensive opinions about his gender and gender identity. An award of emotional distress damages must rest on substantial evidence that it is causally-connected to the unlawful act of discrimination and must take into consideration the nature and character of the alleged harm, the

severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. *See Stonehill College, supra.* at 576. An award of damages may be based on Complainant's own credible testimony. *Id.*

Complainant testified that he felt anxiety and great discomfort while working with Hussain and that he feared being alone with Hussain after a particularly disturbing incident in June of 2013 where Hussain yelled at him. He testified that this incident caused him to have nightmares and to lose sleep. I was persuaded that Complainant was genuinely fearful of Hussain and anxious about being alone with him at work. It was also apparent to me that some of Complainant's distress and dissatisfaction with his job resulted from numerous operational difficulties that he complained about which were largely unresolved. However, I conclude that Complainant suffered significant distress as a direct result of Hussain's unlawful actions related to his gender and gender identity and that he is entitled to damages in the amount of \$50,000 for the emotional distress resulting therefrom.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law Respondents are hereby Ordered:

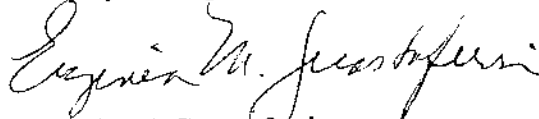
- 1) To cease and desist from any acts of discrimination and harassment toward employees based upon gender and gender identity, and to take measures to remedy complaints that are reported to its supervisors or managers.
- 2) To pay to Complainant, Alyx Jaden Tinker, the sum of \$50,000 in damages for emotional distress with interest thereon at the 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.

- 3) Respondent, Securitas shall, within one hundred twenty (120) days of the receipt of this decision, conduct a training or trainings sessions of its human resources personnel, and its managers and supervisors on issues related to gender and transgender discrimination in the workplace, including the duty to report alleged reported instances of such and measures to address and remedy any potential unlawful conduct. Respondent Securitas shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. Following the training sessions, Respondent shall send to the Commission the names of persons who attended any training sessions and their positions within the company.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 9th day of August, 2016.



Eugenia M. Guastaferrri
Hearing Officer