

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

DOCKET #: 95 SEM 0046 ET ALS.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
ANGELINA ROMERO-PEART *et al.*
Complainants,
vs
MASSACHUSETTS DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REVIEW

I) Introduction

Complainant Ana Andino filed the first class complaint in the above-entitled action on January 23, 1995. The Class was certified and probable cause found on March 16, 1999 by Investigating Commissioner Dorca Gomez and the named class-member was changed as reflected above. A public hearing was held over eleven days commencing on November 27, 2000 and completed on August 2, 2001. The Parties to this action submitted several Memoranda of Law from October 19, 2001 through December 21, 2001. The Hearing Officer submitted his Decision of the Hearing Officer (hereinafter referred to as "Decision") on October 17, 2003. (Decision, pages 2-3)

The Complainants consist of a class comprised of over 100 people of Latino heritage certified by the Department to be fluent in Spanish. The defendant, Department of Transitional Assistance [hereinafter "the Department"] employed each member of the class as a Financial Assistance Social Worker I or II (FASW) between 1991 and the present. (Stipulated Facts, a and b, Order of Certification) (Decision, pages 4).

The questions certified for public hearing were as follows:

1. Have the Complainants satisfied the elements of proving discrimination under

the disparate impact approach regarding discrimination in workload and pay levels, specifically:

- A. Is there an identified employment practice or policy?**
- B. Is there a causal relationship between the identified practice or policy and the disparate impact?**
- C. If so, is the challenged practice job-related and consistent with business necessity, or does the practice fall within a *bona-fide* exception?**

The burdens of proof in disparate Impact cases under Title VII of the United States Civil Rights Act of 1964, sec. 701 *et seq.* as amended 42 U.S.C.A. sec. 2000e *et seq* are as follows:

To establish a *prima facie* case of discrimination by disparate impact, Plaintiff bears the burden of demonstrating that the challenged employment practice causes a significantly discriminatory impact on a protected group. See *Connecticut v. Teal*, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982). Once Plaintiff establishes its *prima facie* case, the burden shifts to Defendant employer to demonstrate that the challenged practice is job related for the position in question and consistent with a business necessity. 42 U.S.C. § 2000e-2(k)(1)(A) (Supp.1992); see also *Teal*, 457 U.S. at 446, 102 S.Ct. 2525. If Defendant demonstrates a business necessity for the practice, the burden shifts back to Plaintiff to prove that Defendant employer could have used some other nondiscriminatory practice to satisfy the same business necessity. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975).

E.E.O.C. vs. Premier Operator Services, INC. 75 F. Supp.2d 550, 555 (1999)

Investigating Commissioner Gomez also certified a series of issues to be addressed on disparate impact as follows:

2) Have the Complainants satisfied the elements of proving discrimination under the disparate treatment approach regarding workload and pay levels, specifically:

1. Is there evidence that Complainants have/had additional job responsibilities, as compared with monolingual employees of the Department?
2. If so, what are these responsibilities?
3. Do these additional responsibilities, if any, amount to adverse under the statute? Examples of adverse action may include, but are not limited to:
 1. Complainants being disciplined in any way for failing to meet productivity standards, due to their bilingual responsibilities.
 2. Complainants having exhibited heightened levels of workplace stress as a result of the additional bilingual responsibilities.
4. If the Class has established that they were required to perform additional responsibilities, and that these responsibilities amount to adverse action, has the Department presented evidence of a legitimate nondiscriminatory reason for the additional responsibilities? If so, what?
5. If the Department has presented evidence of a legitimate nondiscriminatory reason for its actions, has the Complainant class presented evidence of pretext? If so, what?

II Standard For Review

The responsibilities of the Full Commission are outlined by statute, the Commission's Rule of Procedure (804 CMR 1.00 et seq.) and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Commissioner or Officer. MGL c. 151§5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a

reasonable mind might accept as adequate to support a finding..."Katz v. MCAD, 365 Mass. 357, 365 (1974), MGL c.30A. It is the responsibility of the Hearing Officer to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact, and the Full Commission defers to these determinations. See, e.g. School Committee of Chicopee v. MCAD, 361 Mass, 352 (1972); Bowne v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982).

The role of the Full Commission is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See, 804 CMR 1.16(8)(f).

III. Errors Assigned as Not in Accordance with the Law, Arbitrary or Capricious, an Abuse of Discretion, or was otherwise not in Accordance With the Law.

The United States Ninth Circuit Appeals Court has considered the relationship between language and national origin in a case involving "English Only Rules" in the workplace and has stated the following:

It is beyond dispute that, in this case, if the English-only policy causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at [Defendant-Employer] Spun Steak, who speak a language other than English--and virtually all those employees for whom English is not a first language--are Hispanic. It is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it relevant that some non-Hispanic workers may speak Spanish. If the adverse effects are proved, it is enough under Title VII that Hispanics are disproportionately impacted.

Garcia v Spun Streak, 998 F 2d. 1480, 1486 (1993), cert den'd 512 U.S. 1228 (1994).

PART ONE

A. The Decision is Arbitrary and Capricious wherein it concludes that the “Complainants have failed to identify a Department interpreter policy or practice that requires bilingual caseworkers, including the class members to “accede to” their co-workers’ requests for “extensive translations”. (Decision, page 92).

The Hearing Officer has misunderstood the nature of the burden placed on the Complainants. Complainants need not prove that there is a Department policy that “establish a mandatory requirement for the class members ... to interpret for co-workers.” (Decision, pages 93). The Complainants do not allege they were terminated for a refusal to interpret. Instead, the Complainants have established the following:

I The Department has a policy and practice of burdening bilingual Hispanic FASWs with extensive request for translations, in addition to their regular duties, that does not apply to their monolingual counterparts.

If the Department had a state-wide practice of regularly asking the women to make the coffee in addition to their regular duties, or the Afro-Americans to empty the trash in addition to their regular duties, even though they would not be fired for refusing to do so, there would be no question that it would amount to actionable discrimination.

A) The Department has burdened the Class Members by design through *subtle and not-so-subtle pressures to accede* to Department request for translations.

1) The department has notified its local offices that the non-bilinguals should request that Class Members translate for its non-English speaking clients.

As far back as 1993 Joyce Sampson, at that time the Assistant Commissioner for

Field and Eligibility Operations, required that all Local Office Staff “provide interpretation services for non-English speaking applicants”. She sent a memorandum to all area directors telling them that they should provide interpretation in the “local office”. The memorandum goes on to state that if the “local office staff” is not available to interpret, then the worker should request assistance from a community agency. If a community agency is not available, then the Director will call the Department’s Human Resource Department.” (Joint Exhibit 8) [Decision Finding 38-39]. In compliance with Ms. Sampson’s Memo (Joint Exhibit 8) one of the offices then sent to “all staff” a “list of our bi-lingual staff and languages (other than English) they speak.” (Decision, Finding 41) The referenced “bilingual staff workers” are not contracted interpreters. (see Joint Exhibit 8A) They are Class Members who are thereby burdened with interpretation requests, and the Department makes it clear what is expected of them.

The Department sent another memorandum on November 9, 1994 (Complainants Exhibit 25, page 3, paragraph 2) which provides:

Use of interpreters. When a bilingual staff member fluent in the appropriate language is available, he or she should be involved in any necessary conversation with the LEP.¹ If no bilingual staff member is available, staff should arrange for interpreter services furnished by the Department

The Hearings Officer ignores this essential portion of the Memorandum, and instead characterizes it as a description of “key provisions of the OCR [a court order prohibiting the Department from turning away its LEDs] settlement agreement relating to its provisions of interpreters for non-English speaking applicants and recipients.” [Decision, Finding 46.]

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“LEP refers to “Limited English Proficiency” which I will be using throughout this Memorandum to identify those Department clients/recipients who require interpreters in their dealings with the Department.

The following month Ms. Sampson sent another memo to the Local Office Directors with an updated list of “contracted interpreters.” (Joint Exhibit 9) This memorandum indicated that the contracted interpreters are available by speaker phone and, because the Department does not incur any “additional expense by using them,” the Department would like to use these resources “whenever possible.” [Decision, Finding 47.] The utility of this plan was nullified, however, because there were only two full time and two part time Spanish interpreters for the entire state. (Jane Durland, Tr. May 29/111). Spanish is the largest minority language in the state. (Jane Durland, Tr. May 29/105). The monolingual worker is further burdened by a procedure that requires the worker to contact the “local office manager to request telephonic interpreting. The contact person will confirm the interpreter’s availability and will gather any necessary information (i.e., background or instructions regarding the case) to relay to the interpreter.” (Joint Exhibit 9).

The 1994 Sampson memo, Joint Exhibit 9, also reminds the local office directors that they need to explore all the “interpreting possibilities (**office staff**, community agencies, contracted interpreters)” before contacting Catholic Charities.² They are also instructed to “keep in mind that Catholic Charities are expensive “and are, therefore, hired only after all other options have been fully explored.” (Joint Exhibit 9, emphasis added). [Decision, Finding 48.] It appears that “office staff” refers to Class Members. While a local office may have an occasional bilingual clerk or Photo ID person, it is clear that the burden of interpreting falls to Class Members.

The Hearing Officer credits Associate Commissioner Jane Durling’s testimony that the Department had a policy of using a “hierarchy of interpreter services for recipients” that does not include the use of class members. [Decision, Finding 49]. Ms. Durling also testified that she could not recall a single document [or] memorandum setting forth

² Catholic Charities provides interpretation service over the phone in numerous languages for a fee.

that hierarchy.” (Tr. May 29, 2001 page 116.) Instead, any of the dissemination of said “hierarchy” to the local field offices was left to Ms. Sampson. (Tr. May 29, 2001, page 117.)

Assistant Commissioner Sampson did not appear to know of Director Durling’s “hierarchy”, for again in 1999 she again clarified the policy of having monolinguals request assistance from Class Members. She first reminded the “local office staff” that “interpretation services must be made available to [LEPs] who call or come to a Transitional Assistance Office (TAO)”. Assistant Commissioner Sampson then continued:

“If a bilingual Transitional Assistance Worker or an interpreter who speaks the applicant’s or recipients’ language is not available, applicants or recipients should be given an appointment to return at a time when the TAO is able to provide interpretation services.”

(Joint Exhibit 11) The 1999 Memorandum continues in a section entitled “Transitional Assistance Workers Responsibilities” that the workers are instructed as follows:

If a bilingual Transition Assistance Worker is available who speaks the language of the non-English speaking or ASL applicant or recipient, the applicant or recipient **must** be seen when he or she comes to the TAO and not told to return another day. [Emphasis provided].

If there is no bilingual worker available, the Transitions Assistance Worker should ask the Transitional Assistance Office Director of designee to request an interpreter through a local community service, the Department’s Human Resource Office, or if there are no other available options, the AT&T Language line for offices with access to it.”

Assistant Commissioner Sampson’s 1999 Memorandum explains why the

Department was unable to locate witnesses who had extensive experience with the AT&T Language line, other office interpreters or Catholic Charities. The memorandum **requires** that office staff request that Class Members interpret for **first**. [Decision, Finding 51.] The 1999 Memorandum does not appear to give the Class Member a choice in the matter.

Despite the Department's alleged reliance on contracted interpreters, Statewide there were only four full time and two part time interpreters in 1994, (not necessarily in Spanish), and two full time and two part time interpreters in 1999. At the Commencement of the hearing, in November, 2000, the department had need to hire seventeen full time interpreters, eight of which were for Spanish. [Decision, Finding, 51.] The gap that the additional Spanish interpreters met in year 2000 was being filled by the Class Members prior to then.

2) The managers and supervisors have a number of methods to coerce Class Members into providing translation services for the Department.

Director Shirley Storey from the Dorchester office admitted that she was aware of a 1994 Office of Civil Rights Agreement (OCR) that required the department provide translators for its LEP clients. The OCR is explained fully in the Decision, [Finding 42-45] (Joint Exhibit 2). One of the ways the Department encouraged Ms. Storey "to conform to the OCR Agreement was to have bilinguals [social workers] assist and translate." (Tr. July 30/182) When her full time interpreter was not available, all the translations were provided by the Class Members. (Tr. July 30 /168-9). This does not appear to be "Voluntary". Moreover, a full-time interpreter was only occasionally available due to chronic illness. See below, part 2 (D).

Several supervisors testified that they never "required" that Class Members interpret, but they have never had an occasion where a Class Member has refused. (Clarence Moten, Tr. May 29/215). But Supervisor Maria Maio articulated that it is "important" that the supervisors "model behavior". (Tr. Aug. 1/211). Each of the

testifying supervisors requested underling Class Members interpret for them. (Anne Gerde, Tr. July 30/33; Moten, Tr. May 29/2150) Marie Maio asks DET workers in a different department, and none of them ever refused. (Tr. XI/210-211).

The Fitchburg office required that Class Members be the interpreter for the day by the institution of "Duty Day". The Class Members are assigned "Duty Day" responsibilities that include translating. The Department assured that there is always one Class Member "duty day" worker available to assist with translations. It is no small burden, as the workers are on duty once a week. While both non-Spanish and Monolinguals also have duty days, Monolinguals do not have the additional interpreting responsibilities. (Anne Gerde, Tr. Jul 30/54, 59)

Management "encouraged cooperation" between the workers. (Tr.. Aug 1/212). The supervisors' offices may have walls, but the workers have cubicles, without doors and walls only going six feet, not to the ceiling. They are seated next to each other in groups. "For the most part" the relationships between various co-workers are encouraged by the seating arrangement." (Tr. Aug 1/221-222). There are also numerous examples of Management commending Class Members for their translating services. See II(A) below for examples.

The translation alternatives provided to the monolingual workers are slow and cumbersome for someone needing unanticipated translation services. Ms. Maio believes it would be faster using a Class member than any of the translation services. She herself has never used a translation service. (Tr.. Aug 1/224-228). Director Gerde has never used one. (Anne Gerde, Tr.. Jul 30/181-2) In the end Ms. Maio testified that she encouraged a policy and practice of using bilinguals as interpreters and that policy and practice was in existence before she came into that office. (Tr.. Aug 1/237-238).

II) As a result of the identified practice of calling upon Class Members to translate, the Class Members engage in extensive translation work while their

monolingual counterparts do not.

A) The Class Members translated for co-workers and supervisors.

Class Member Amado Aburdo testified that he translated forms, summarized forms for Supervisors, translated for co-workers. From 1991-1994 he spent about one hour a week translating. (Tr. Nov. 27/108-115) Since 1994 he has spent about three hours a week translating. (Tr. Nov. 27/118). In 1999 his Supervisor wrote in Mr. Aburdo's performance evaluation that "many times Amado has been called upon to work with non-English-speaking clients of other workers, and has done so without complaint". (Tr. Nov. 27/120) It is Mr. Aburdo's understanding that if there is no interpreter in the office that he "has to interpret for them". (Tr. Nov. 27/124). His supervisor, told him that if "somebody in the unit have (sic) a LEP client and the client coming in, they know where to go", referring to himself or the other bilinguals.(Tr. Nov 27/128). [Decision Findings 58-63] Mr. Aburdo's immediate supervisor required that he translate for co-workers.

Carmen Carrizales from Fitchburg gets a "duty day" once a week where she has to interpret for the entire unit.(Tr. Nov 27/178-180) The office does not have its own interpreter. On her duty day she spends three hours translating for other people's clients. (Tr. Nov 27/185) In addition she spends another two hours a week assisting co-workers with translations where the bilingual duty worker is too busy or they need help with the phones. (Tr. Nov 27/186)) Carmen Carrizalez spends also one hour a week translating for co-workers. [Decision, Finding 77.]

Nelson Vega, from Boylston, interprets for his supervisors. (Tr.. Nov. 28/37) He has had co-workers "beg" for translations (Tr. Nov. 28/37), and interprets for the receptionist and switchboard, who just put calls through to him when they are not able to understand what is being said. Mr. Vega only spends between one-half hour to an hour a week translating. (Tr. Nov. 28/43) Decision Finding 101-104 Class Member Carmen Benson from Sommerville interprets for co-workers about two hours per week.

(Tr. Nov. 27/166) [Decision Finding 73] Renato Vera from Revere translates documents for clients from community agencies such as the gas company and hospitals. (Tr. Nov. 28/103-104) His co-workers request his interpreting services about three to four times a day. (Tr. Nov. 28/107) There are still not enough forms in Spanish (Tr. Nov. 28/121) and he has to translate Spanish forms back into English for his supervisors. (Tr. Nov. 28/122) Mr. Vera spends two hours per week engaged in translating services. (Tr. Nov. 28/113)

Class Member Brunilda Baez spends 3-5 hours a week translating for co-workers. [Decision Finding 64-65.] Class Member Sarah Barrientos spends “probably” 2 hours a week translating for co-workers in the last 2 years and before that 4-5 hours a week. [Decision Finding 69-70]

Class Representative, Angelina Romero-Peart from the Springfield office, testified that she needs to translate English forms and rules and procedures to her LEPs. No such translations are needed for her English-speaking clients. (Tr. Nov. 28/198-200) From the years 1991 to 1994 Ms. Romero-Peart translated for the receptionist, and other co-workers. In 1995 she was the only bilingual in her unit. She was asked to translate for co-workers for redetermination three to four times a week, which takes between fifteen to twenty minutes for each form. (Tr. Nov. 28/159) She is asked to translate letters, and official documents written in Spanish.(Tr. Nov. 28/160). She is interpreting for co-workers between four and five hours a week. (Tr.. Nov. 28/165) [Decision Finding 96]

Luis Meija is from the Roslindale office, which has a part-time interpreter. (Tr. Nov. 28/244) He still translates for co-workers. (Tr. Nov. 28/242-243) He spends between an hour and a half and two hours a day translating for co-workers. (Tr. Nov. 28/244) [Decision Finding 88] In Mr. Meija’s Year 2000 Performance Evaluation, his supervisor acknowledged that Mr. Meija “uses his bilingual (sic) to translate for both clients and co-workers.” (Tr. Nov. 28/248) Decision Finding 91 Rosa Cintron, also from

Roslindale, interpreted for co-workers about four-to-five hours a week. (Tr. Nov 30/123) Decision Finding 82 Her Supervisor wrote in her 1998 Performance Evaluation that Ms. Cintron is “frequently asked to translate for her co-workers’ clients.” (Tr. Nov 30/130) [Decision Finding 84]

Marta Rivera, from the Boston Family Housing and Homeless Units, translates for her supervisor and co-workers about one and a half to two hours a week. (Tr. Nov. 30/151-153) Decision Finding 93 Linda Domingo is from the Lawrence office where about 85 to 90 percent of the case load is Spanish-speaking. At one point it only had it had just one part-time interpreter. (Tr. Nov. 30/170) Sara Barrientos is currently at the New Market Square Office. They have a mixed Spanish-English caseload and no interpreter. Her Unit consists of four non-bilinguals and herself. She did all of their interpreting. (Tr. Nov. 30/178.) She has never seen her co-workers use the phone translation services. (Tr. Nov. 30/179-181) Now Ms. Barrios serves the Teen Unit Spanish with translations. She also translates domestic violence forms, which are not in Spanish. (Tr. Nov. 30/183) Prior to 1998 Ms. Berrientos was spending about four to five hours a week interpreting for co-workers. Since then she translates about two hours a week. (Tr. Nov 30/184) Flaura Salcedo interpreted 3-4 hours a week. [Decision Finding 101]

Brunilda Baez from Revere spends three to five hours a week interpreting for her co-workers. (Tr. Nov. 30/195) The Class Members found this additional responsibility to be stressful. (See Vega, Tr. Nov. 28/16, 51,61; Vera, Tr. Nov. 29/100, 105, 125 136-138; and Romero-Peart Tr. Nov. 29/171, 182, 196, 208)

B) Numerous monolingual co-workers testified that they use the Class Members to assist them with translation services.

Barbara Pax, FASW II, from the New Bedford office, testified that she uses bilinguals to translate three or four times a week, which takes about an hour to an hour

and a half a week of the Class Members' time. (Tr. Nov 30/17) Russell Michaud, FASW III testified that while in the Brocton office from 1991 -1994 he had a mixed Spanish-English caseload, and if the recipient came without his own interpreter, he had to use a bilingual co-worker. (Tr. Nov 30/49) He moved to Taunton in 1994 and got an English caseload in 1998. Even with an English-speaking caseload, Mr. Michaud requires the use of Class Member translations for applications for new LEPs. A short application takes about 30-35 minutes. (Tr. Nov. 30/48-50).

Paul Foster, FASW III from Roslindale Office, uses Class Members for phone calls six to seven times a week (Tr. Nov 30/104) and walk-in clients "a couple of hours a week." (Tr. Nov 30/ 112-113.) He has observed other monolingual co-workers doing the same. (Tr. Nov 30/113).

Wendy Russo, FASW III from the Revere Office had a mixed English-Spanish caseload until 1998. She now has about fifteen Spanish-only clients and an occasional part-time interpreter in the office. She uses Class Members for translations "several times a day", "thirty minutes to an hour a day, five days a week on average". (Tr. May 29/23-24). Former RRP worker Juliette Nguyen used Class Members to assist her at the State Street, Springfield Office. (Tr. May 29/54-55).

C) The Class Members' supervisors also extensively called upon the Class Members for translations.

Marie Lonczak, a team Supervisor in the State Street Springfield office, testified that now that more forms are in Spanish than before, she makes her bilingual workers translate them back into English so she can review the files (Tr. Nov. 29/80-82), as well as use them weekly for translations. (Tr. 11/84). Peter Bellew, a Supervisor at the New Market office has a "flair for languages" (Tr. Nov 30/71) and only needs to use Class Members 5-6 minutes a week. He has seen the people who he supervises calls upon the Class Members for such services as well. (Tr. Nov 30/79-80).

Gary Smalley, a supervisor in the Roslindale office hired a part-time Spanish interpreter in 2000. He uses Class Members in his unit up to “a half-hour to an hour a week”. (Tr. Nov. 30/94-95). He needs them for direct translations and document translations. (Tr. Nov 30/93) and client phone calls (Tr.. Nov 30/117).

Kathleen Townley, who supervises the New Bedford office, reports that her office obtained a full time interpreter in 1998. Before that, it was the practice in her office to have a bilingual assist co-workers in translations, and it happened “daily”. (Tr. Nov. 30/25). Florence Webb, an area director for the Department, recalled that Hispanic employees translate for her “sometimes”. (Tr. May 29/94).

D) Each of the managers called by the Department support the fact that the Class Members are called upon extensively to translate.

Clarence Moten is the only witness called by the Department to estimate the weekly time spent by Class Members interpreting. Mr. Moten is the area director for the Roslindale office. When Department asked him how much time was spent by the Class Members translating for their co-workers, he did not think it “was a lot.” When pressed further by the Department, Mr. Moten estimated that it was “during a week, no more than an hour a week.” (Tr. May 29/219) In his office, Spanish-speaking clients are assigned to monolingual workers. (Tr. May 29/208) Mr. Moten himself asks Class Members to interpret for him, including translating letters. (Tr.. May 29/215).

The Roslindale office had one half-day Spanish interpreter, who had just gone to a full-day the week before Mr. Molten testified. The Spanish interpreter was initially hired part time in 2000. (Tr. May 29/223) The interpreter tends to help the receptionist. (Tr. May 29/212) Even with a full-time interpreter, the bilinguals continue to assist co-workers with their interpreting. If the part-time interpreter was not available, then the co-worker would ask the Class Member for assistance. (Tr. May 29/ 213).

The Department called Anne Gerde, the Assistant Director of the Fitchburg office. In her office, thirteen per-cent of the recipient population is Spanish LEP. (Tr. July 30/14, 64) (The next language down is Vietnamese, at two percent. (Tr. July 30/ 51-52) and the office has a Vietnamese worker (Tr. July 30/ 53)). In that office they use a “duty day” worker to cover the walk-in clients and other problems when the client’s own worker is unavailable. The Duty Day worker does not get a reduction in workload, except that s/he does not take any new applications. (Tr. July 30/ 52) While both Monolinguals and Bilinguals are assigned a “duty day” once a week, (see Respondent’s Exhibits 15-20, “Duty Schedules”) only the Bilingual worker is called upon to translate for the walk-in LEP client. (Tr. July 30/53-55, 57-59).

The Fitchburg office has new clients “screened” by workers who establish their needs and assigns LEPs to Class Members. Prior to October, 2000, there were no bilingual screeners. A Spanish LEP being screened would use the Spanish duty worker. (Tr.. July 30/65) There is no office interpreter. (Tr.. July 30/ 59-60). The office does not contact Catholic Charities or the AT&T phone lines for interpreting. They have one clerk who speaks Spanish who was often busy. Ms. Gerde now has Employment Service Program (ESP) workers in her office to do translations. They do not have assigned cases and do the screenings. (Tr.. July 30/ 74). The food stamp program and other services do not assign an on-going. There are many as one hundred a month. It is the Class Members who translate for the Spanish LEPs. (Tr. July 30/ 61).

Ms. Gerde has not had her own caseload since 1986. She has never had a Spanish LEP as part of her caseload. (Tr. July 30/ 70) She only speaks to recipients one to three times a month. (Tr. July 30/ 70) While she acknowledges that co-workers get client’s personal letters translated by Class Members, she claims that this is not to be very “time-consuming”. (Tr. July 30/ 41) . There is no indication of to how she derived her opinion on the amount of time required.

Ms. Gerde also testified that there are many forms that are now in Spanish, but she is unable to say when that came about. (Tr. July 30/ 79,92) Many forms are still in English. (Tr. July 30/111) When the forms are not in Spanish, Class Members need to fill them out, which is not true for a monolingual worker. (Tr. July 30/ 80, 82) Even where the forms are in Spanish, the Class Member will have to translate parts of some forms back to their Supervisors. (Tr. July 30/ 89, 92). There are no Spanish speaking supervisors. (Tr. July 30/ 78) Monolingual workers never need to translate. (Tr. July 30/ 90). When the documents are filled out by the worker in English, the LEP needs Class Members to translate them back to the LEP. (Tr. July 30/ 97) Documents still in use by the Department have signature pages containing up to three paragraphs of English legal jargon that needs to be translated back to the LEP. (Tr. July 30/97, 113)

Shirley Storey, Dorchester office director, testified that she relies on her full time FASW III interpreter, Ada Rayford, for her office's translation needs. (Tr. July 30/ 145) Ms. Storey told the Hearing Officer that Ms. Rayford retired in March, 2001 and a new one was hired in July, 2001. (Tr. July 30/ 145, 185) She admits that when the interpreter is not there for her thirty-seven and a half hours a week, the "slack" is picked up by the bilingual workers. (Tr. July 30/ 168-9). We learn from Flaura Salcedo, FASW III who was at the Dorchester Office, that Ms Rayford, at the time of her retirement was seventy-five years old. She had stopped coming into the office regularly since 1998 because of illness, and had not been in at all since November, 2000. (Tr. Aug. 2/114-5). Moreover, Ms. Rayford only worked for screening, and was not available for the myriad of other things outside of screening. (Tr. Aug. 2/117-8)

E. The Hearings Officer's finding that contracted translation services and strategies enabled the Department to meet its needs for translations are not supported by the record. (Decision, pages 94-95)

Asa stated above, Associate Commissioner Jane Durling's testimony that the Department had a policy of using a "hierarchy of interpreter services for recipients"

that does not include the use of class members. [Decision, Finding 49]. Ms Durling also testified that she could not recall a single document [or] memorandum setting forth that hierarchy.” [Tr. May 29, 2001 page 116.] Instead, the dissemination of said “hierarchy” to the local field offices was left to Ms. Joyce Sampson. [Tr. May 29, 2001, page 117] who set out a series of memorandum directing the area offices to use the office staff, including class members, first. See discussion of Sampson Memoranda, above, Part I(A)(1)

Director Storey reported that if there's a need for an interpreter and one is unavailable, then her office contacts Catholic Charities or the AT&T lines. (Tr. July 30/ 146-147) Consistent with the other testimony adduced from witnesses for the Complainants and the Department, it turns out, that Ms. Story has never personally used either service, or even seen anyone use these services. (Tr. July 30/181) She has no idea how long the delays are to use such services. (Tr. July 30/182). She further stated that the AT&T lines could have been used for languages other than Spanish. (Tr. July 30/ 190-91) It turns out that when Ms. Storey needs an interpreter, she does not go to Catholic Charities, AT&T or Ms Rayford. When she needs translations she “asks for someone to help translate, but usually I go to a manager.” (Vo. July 30/156) This is not available for the front line FASWs who would instead rely on their Class Member peers.

In a similar vein, Department witness Mari Maio, Director of the Lawrence office, uses D.E.T. workers to help her with her interpretations. They are not even in her department, but she uses them because she has a “close personal relationship with them” because “they’re willing to do [my translation].” They are physically the closest to where she is when she needs the translation. (Tr. Aug 1/ 209) Since 1992, her office has used Catholic Charities for interpreting Spanish only twice and has never used AT&T. (Tr. Aug 1/194-5) She has never used these translation services herself. (Tr.. Aug 1/201) While there is a bilingual clerk and photo ID person who sit at the front

area and may be available to assist with interpretation, it is on a “catch as catch can” basis.” The workers sit in cubicles amongst the bilingual workers. Ms. Maio would not expect that a worker would walk by Class Members’ desks, with whom they may have a personal relationship, to go to the front area to get a clerk or the photo ID person to obtain a translation when a “difficult situation” came up requiring a translation. (Tr. Aug 1/202-3)

Ms. Maio’s needs for Spanish interpreters were so great that in October, 2000 a month before the Hearing in this case commenced, she assigned two bilingual ESP³ workers to help her with interpretation. (Tr. Aug 1/182) Monolinguals in Ms. Maio’s office have Spanish-only clients.(Tr. Aug 1/162) She has schedulers only make appointments for Cash Assistance Program LEP clients so one of the ESP interpreter will be present to help with translation. (Tr. Aug 1/179, 187). Prior to the assignment of the ESP workers as interpreters in October, 2000, it is clear that this work was left to the Class Members. An LEP client does not go through the scheduler if the LEP does not make an appointment, comes off the street, is a food stamp or emergency assistance recipient. (Tr. Aug 1/178-179) According to Ms. Maio they have “a hundred” of such recipients coming in every day. (Tr. Aug 1/181). These LEP Spanish clients need to be serviced by the Class Members.

A monolingual co-worker Paul Foster testified that the Department uses class members first, approximately six to twelve times” a week, and Catholic Charities for appeals hearings, which he has done once. It is, according to Mr. Foster, “time consuming, and takes approximately one week.” (Decision findings 134-137).

Clarence Moten, the Area Director in the Roslindle Office since 1989 testified that The AT&T lines have only been used once in Mr. Moten’s office and are too “cumbersome” for the workers to use. (Tr. May 29/218). Even though the contract

³ “Employment Service Worker” - They have no assigned caseloads.

interpreters in his office are theoretically available for other offices, no other office has ever used them. (Tr. May 29/ 216) Catholic Charities have been used to translate for appeals in denials of services, because the Department deems it inadvisable to use in-house interpreters for appeals. (Tr. May 29/ 217).

F) The Hearing Officer's reliance on the "time study" submitted by the Department is arbitrary and capricious as it relates to measurement of bilingual activities, because it is not reliable.

The Department called Dennis Johnson to rebut the Complainants' claims that they were engaged in extensive translation work. Mr. Johnson testified that he was responsible for a study dated July 1993 entitled "Department of Public Welfare Assistance Payments Program Work Measurement Study," which will be referred to hereinafter as the "Time Study". (Joint Exhibit 2). The Time Study is purportedly a "journal approach" to measuring work. An observer follows a worker around all day, noting "activities" that the worker did in a "Daily Observation Log". Those activities were later aggregated so the department could determine averages for each such activity. (Tr.. May 30/33). By this method, Mr. Johnson claimed to have determined that the bilinguals spent an average of 4.4 minutes per day engaged in "bilingual activities" related to interpreting for co-workers. (Tr. May 30/115)

1) Mr. Johnson did not measure bilingual translation for co-workers because the "activities list" did not include Bilingual translation for co-workers.

According to Mr. Johnson's testimony on direct examination, he developed a "Function List" which grouped together "activities" of the specific job being done. He then developed a master list that comprised the original activities. (Tr. May 30/33-34) He provided a copy of the Master List of activities to the observers during the course of their training as an "example" of what the observers should look for. (May 30/170,173, 176,180) It is the list of activities developed by the Department which the observers

were to identify on the activities portion of the Daily Observation Log. (Tr.. May 30/180) The observer then shadowed the worker for a day and every activity of the worker would be written down in the Daily Observation Log. The Observer then brought the observation logs back to Mr. Johnson. Mr. Johnson then took the “activities” from the observation logs and “where those activities we were looking for from the master list that comprised a function, we would aggregate those activities and would determine averages on the amount of time required to do – such as pull a case folder or make a specific copy. We would aggregate all of those, develop a detailed activity list with an associated time standard.” (Tr. May 30/34)

The Hearing Officer described Mr. Johnson’s methodology as follows:

The Department’s work-measurement methodology is essentially a journal study approach. The ultimate objective of a time study is to produce a list of all day-to-day, major activities that workers perform in their jobs. Mr. Johnson used the following approach as part of the Department’s general methodology in the 1993 time study: (1) **the observer⁴ establishes or develops a master list of functions or a grouping of activities that result in a worker performing a specific task or activity such as an approval or denial or an application or a redetermination;** (2) the observer “shadows” a worker, records each activity performed in a journal log and assigns a specific time allocation for each activity; (3) the observer aggregates the activities previously described in the matter list and determines the average time required to perform each activity. Using the collected data, the Department then develops a detailed activity list with associated time frames and establishes an overall time standard for the function, e.g., redetermination, after adding an additional 10% factor to account for personal fatigue and delay.

⁴ The Hearing Officer mistakenly said that it was the “observer” who established the master list. It is Mr. Johnson who developed the master list. (Tr. May 30/33-34)

[Decision, finding 218]

The “master activities list” is Attachment 2 to Joint Exhibit 2. ***It does not include “translates for co-workers.”***

Mr. Johnson testified on direct examination that a Bilingual Committee had been established through the Local Union. One of the areas that the Bilingual Committee asked him to look at was the “amount of time that is spent by bilingual workers translating for workers that are in the office that can’t speak the same language that they can.” (Tr.. May 30/112) Mr. Johnson stated that in response he grouped the bilingual activities into function “Q”. “Q”, according to Mr. Johnson, included such things as “*translating for co-workers*” (Tr. May 30/115) and was attached to the Time Study as Attachment 25 to Joint Exhibit 2. Mr. Johnson provided the observers with attachment 25 and told them to review those materials as example of bilingual activities.⁵ ***Attachment 25 also does not include “translates for co-workers.”***

5

The observers could have noted when a bilingual translates for co-workers, but they were not required to do so by their training materials, or Mr. Johnson. Their failure

Mr. Johnson asks the Hearing Officer to believe that he recalls, eight years after the fact, that he informed the observers in their half-day of training that they were to look for “co-worker translations” as well as provided them with the activities list, attachment 25, as an “example” of what to look for. (May 30/182). This detail is not included in his four page Training Outline, attachment 5 to Joint Exhibit 2. The following day Mr. Johnson admitted that outside of his Training Outline, he has no independent memory of what he told the observers during training. (May 31/60–61) This is an example of Mr. Johnson’s pattern of obfuscation. See e.g. Prior to Complainants’ opening the computer files, Mr. Johnson reports that the computer data is “a mirror of the information” contained in the Daily Observation Log” (Tr. June 26/100). On August 1, Mr. Johnson was presented with the computer printouts of the Daily Observation Sheets, which showed numerous changes, i.e. the “activities” section on the Daily Observation Log (Complainants’ Exhibit 26 pages two and three) say “translate verification” in Spanish. It was entered into the computer for the purposes of aggregation as a non-Spanish item as “Review verifications”. (Tr.. Aug 1/50-54) Mr. Johnson suggested to this Hearing Office that he may be able to produce a computer document that contains the above-referenced Log entry. (Tr.. Aug 1/54) The record was left open for him to be able to do so: Johnson’s attempts to explain checkmarks in “bilingual activity box” of Daily Observation Log as “something to do with Federal Cost allocations” or have “no meaning at all” when confronted by the fact that he did not enter “bilingual activities” in the Computer for aggregation. (Tr. Jul.31/204-205).

to note such an activity would still be correct. Thus, it cannot be said that the observers were measuring *“translates for co-workers.”* If the Observer did not measure it, certainly Mr. Johnson did not capture it in his “aggregations”.

2. Mr. Johnson did not allow measurement to be taken for translations provided within the “Q” designation, unless the client was clearly shown to not belong to the worker.

Dennis Johnson had informed the bilingual committee in face to face meetings in 1992 that he would use the time study to test whether or not the bilinguals were being used as translators. (Tr.. Aug 2/132-133) The Committee did not approve the plan, for many reasons, and indicated in a letter to the Tri-partite Committee. (Complainants’ Exhibit 3) In an effort to make the Study more comprehensive the Bilingual Committee personally gave Mr. Johnson a list of nine items they wanted studied in addition to “co-worker translations.” (Tr. Aug. 2/128-131) Mr. Johnson agreed to do so, and included them as Attachment 24 to the Time Study, “Bilingual Allowance Summary” (Joint Exhibit 2). This turned out to be the basis of Code “Q” discussed above. (Tr. Aug 2/135) While the last three items refer to co-worker assistance, the first six refer to translation duties for “clients”. Mr. Johnson contends that it was understood that it would only apply to “clients not belonging to the bilingual worker” despite the plain language of Attachment 24. (Tr. June 26/157-159) At one point he attempted to place the blame on that absurd interpretation on Union representative Kevin McKenna, saying that Mr. McKenna said that the Bilinguals did not want it counted if it was their own client. (Tr. June 26/160-161). Mr. Johnson had not recalled that he had met with the committee members himself, and they had told him nothing of the sort. (Tr. Aug. 2/136)

The effect of Mr. Johnson’s efforts in this area is that when he went to aggregate the numbers in the computer to obtain the “average” time spent engaged in “Q” activities, an unknowable amount of time spent by bilinguals translating for the department went unquantified. Mr. Johnson further exacerbated the problem by adding

changes to the Observation Log as he made his aggregations. See footnote 4 above.

Accordingly he did not identify the following bilingual activity: translating verifications for supervisors (Tr.. July 31/ 59) which went into the computer only as “review verifications” (Tr. XI/48-49); collateral contacts with outside agencies, or attorneys for LEPs (Tr.. July 31/59); translate for a supervisor with one’s own client (Tr. July 31/ 140); Supervisor request to translate not a “Q” because a “supervisor is not a co-worker” (Tr. July 31/156); giving information to clients without knowing what information or even whose client (Tr. July 31I).

3) The use of Quality Control personnel as observers, and the manner in which they made their observations, prevented an accurate measurement of co-worker translations.

Mr. Johnson agreed that the “act of being observed, especially with humans, necessarily changes the conditions that are being studied.” (Tr. May 31/82)

Mr. Johnson borrowed workers from quality control department to be the observers. Quality Control workers (herein after referred to as “LOQC”) typically review the FASW’s paperwork and if there is a problem, can interview the worker. If they find errors, it gets reported to the Director of Quality Control who reports it to the regional director responsible for the worker who made the error. At some point it gets back to the worker. As Jane Durland, Director of Quality Control admitted, “no one ever asks to get audited”. (Tr. May 29/78-85) Marta Rivera described the LOQCs as the people who are always “looking over us to do it right.” (Tr. Nov. 30/153). Linda Domingo described the LOQC person who observed her as someone who made her “uncomfortable”, in part because “they’re the ones who check your work.” (Tr. Nov. 30/193).

In the training outline, Mr. Johnson sought to reassure the worker being observed

that LOQCs were not performing their usual investigatory role. In the only item underlined in the training outline, Mr. Johnson emphasized that the observer was to tell the worker that “You are not there to evaluate their individual performances or performance.” (Tr. May 30/187, Training Outline, attachment 5 to Joint Exhibit 2) **He did not likewise reassure the co-workers with the same information. What they were measuring for the bilinguals were interruptions by co-worker. Mr. Johnson admitted that typically, if one bilingual appeared to be very busy, a co-worker seeking interpretation would simply go to another co-worker.** (Tr. May 31/84) Mr. Johnson did not instruct the observers to instruct the co-workers to go about their normal day. (Tr. May 31/87) If the Class Member being observed for the study looked to a co-worker like the observed Class Member was busy, or even worse, being audited because of the presence of the LOQC, it is unlikely that the co-worker would interrupt him for a translation unless the co-worker was unable to locate any other Class Member who would translate for him.

To make matters worse, some of the offices had told the workers who were not being observed not to bother the observed workers. Renato Vera testified that his Assistant Director Sylvia Lezcano told workers not to approach the worker-observer. (Tr. Nov. 29/118). Angie Romero-Peart testified that she was informed that her supervisor told people not to bother her while she was being observed by LOQC Josephine Gonzalez. (Tr. Nov. 29/167).

Josephine Gonzalez, one of the LOQC observers, recalled the observing of Ms. Romero-Peart, with the assistance of her observation log. She described the day as follows: “I thought it was kind of strange because I was a worker in the past and there were no interrupting, (sic) no other workers asking for feedback on a case or anything. The maintenance was very low and usually the flow of clients, you have no control over that. There wasn’t much. And the phone calls were very limited ...” (Tr.. Nov. 29/221) The same was true for the other observations she made. (Tr.. Nov. 29/222) Josephine Gonzalez observed the following bilingual workers as an observer in the Time Study: A

Baez (140), J. Brown (143), R. Acevedo (147), M. Juan (177), G. Articulaez (178), M Feliciano (179), Angie Romero and Joe Perez (185). (See Respondent's Exhibit 26 "the box". All numbers refer to the index number provided by the Respondent.) In the eight observations made, there is only one personal worker-to-worker interruption. There are four "Q"s, although two of them do not involve a co-worker interruption.

The effect of these errors is enormous. At the Complainants' request, the Department produced a list of all "worker-to-worker" personal contacts. (Tr. May 31/95-96) They were "coded" by Mr. Johnson as Code "S". (Complainants' Exhibit 10). There were 215 workers observed for a full day. (Tr. May 31/96) There were only 39 worker-to-worker personal contacts. Assuming each contact is from a separate individual, that means that 176 people had no social contact during work all day. These are offices that have no doors or floor-to-ceiling walls. The workers were closely grouped together to encourage cooperation. (Tr. Aug 1/212, Tr.. Nov. 29/167).

The failure to capture worker-to-worker interruption, including the failure to capture request for translations, is a failure of the Time Study. It is of no value in determining the issues in this case.

4) The Time Study is too stale to be of value

The observations underlying the Time Study were done in September and October of 1992. The Hearing in this case began in November, 2000 and ended in August, 2001. (See Respondents' Exhibit 26 "the box", where the dates of the observations are in the top left hand corner) Time alone makes this Time Study obsolete.

Beyond that the Department has had to make numerous changes in the way it handles its LEPs. Prior to 1993 if an LEP required a translator, the Department was permitted to rely on Community Agencies, required that LEPs bring their own

interpreters or otherwise send its LEPs home. By the Departments' 1994 agreement with the United States Department of Health and Human Service Office of Civil Rights these options were no longer available to the department. (See OCR Agreement, Joint Exhibit 3)

In anticipation and in response to the investigation and the Agreement, Joyce Sampson, Assistant Commissioner for Field and Eligibility Operations, sent out a series of memorandums to the local offices requiring that the Class Members be used as interpreters. That Argument has been made above in this Memorandum of Law, I(A)(2), and is incorporated herein.

As stated by Shirley Storey, director of the Dorchester office, she was aware that the 1994 Office of Civil Rights Agreement (OCR) required that the Department provide translators for its LEP clients. One of the ways the Department encouraged her "to conform to the OCR agreement was to have bilinguals [social workers] assist and translate." (Tr. July 30/182).

III The Hearing Officer's conclusion that Complainant's failed to show an injury is not supported by the evidence.

The Hearing Officer concludes that the Complainants suffered no injury by the amount of time they spend responding to co-worker request for interpreting. (Decision, pages 97-99) He does not discredit class member testimony, which shows "that 8 of 13 class members spent only 2 hours or less a week (3% of the work week interpreting for co-workers and 3 class members spent only 3 hours a week (8% of the work week performing such activities. The remaining two class members testified that they only spend 3-5 hours a week (13% of the work week) interpreting for their co-workers." (Decision, page 100) He credits the testimony of co-workers and Supervisors who testified as to the amount of time they uses class members to help them with interpreting: "5-6 minutes (Bellow, Lon Zack); one-half hour to one hour (Smalley); one

hour (Motion); one and one-half hour (Pax); two Hours (Foster) 3.75 hours (Townley) once a month.” (Decision, pages101-102). This is one of many monolinguals requesting these services, and certainly do not support the 4.4 minutes per day as suggested by the Time Study.

In fact, the 4.4 minutes suggested by the time study would be an “injury” that is imposed by the Department’s practice of requesting these services. . This issue goes to the amount of damages to be awarded to each class member. The 4.4 minutes is an average. Some class members may not interpret at all for co-workers. If the Department continually requested that the Hispanics, or Females, “voluntarily” make the coffee every morning, it would amount to the same amount of time, and would amount to an injury. The time established, however, by Class members, co-workers and their supervisors, including many of those called by the Department, suggest much more than 4.4 minutes per day. That is 25.5 minutes a week and (4.3) a month. That is not insignificant, and the Department would not ask any other group to volunteer this time w/out compensation.

IV The Department’s Policy and Practice of extensively burdening the Class Members with requests for translations is not job-related, is not consistent with business necessity, does not fall within a *bona fide* exception under the Disparate Impact Theory and legitimate nondiscriminatory reason under the Disparate Treatment Theory.

The Department’s position appears to be that to the extent it has a policy of requesting Class Members to interpret it is *de minimus*. The Department offers Mr. Johnson’s Time Study to suggest the Class Members only spent an average of 4.4 minutes engaged in “bilingual activities”. (Tr. May 30/115)⁶ Accordingly, it has not

⁶ If the 4.4 minutes was accurate, that means that over a month the Class Member would be donating about one-and-one half hours a month to the Department that their monolingual counterparts do not. This is more than *de minimus*, and requires that

proffered a reason for this policy and practice.

It does acknowledge, however that there is a serious need to have interpreters for its clientele. The Department has proffered testimony through Jane Durland, the Department's Director of Human Resources in charge of the Department's discrimination policies and its interpreting services. (Tr. May 29/20, 26) The Department's policy is that here is a "Hierarchy" for requesting interpreting services. The local offices in need of interpreting are to use getting the translator and fix this 1) office interpreter, 2) another office interpreter 3) Catholic Charities 4) language line and finally, if none of these services are available 5) ask the LEPs to return the next day. (Tr. May 29/65-66). The Class Member may or may not "Volunteer"⁷ to translate. (Tr. May 29/ 66). **Accordingly, Department's position is once again, that the class member interpreting is not a necessity, because of the Department's alternative strategies.** It appears to be the Department's position that that the extensive translation requests are merely incidental. The Department has established policy to deal with its interpreting needs, and does not have a need to burden the Class Members with that problem.

Ms Durland does not recall having seen any documentation regarding the "hierarchy". (Tr. May 29/116) She left the dissemination of the hierarchy to Joyce Sampson. Joyce Sampson apparently misunderstood. She instead disseminated a series of documents saying the opposite, which has been discussed at length above in part I(A)(1) of this Memorandum. The fact that Ms. Durland apparently neglected to

the Hearing Officer rule in the Complainant's favor.

⁷ The Department cannot cite a single instance where a case-carrying Class Member "Tr.unteered" without first having someone request that the Class Member do so.

inform anyone else in the Department of the policy should not be counted against the Class Members.

A thorough review of the job descriptions contained in the Department's Classification Specifications do not include translating for co-workers. (See Complainants' Exhibit 4, 1987 and Complainants' Exhibit 5, 1995) It is not job related. As discussed below, interpreting is the job of others in the Department, as is washing the windows, cleaning the floors and managing the Department's budget.

Although it may in the end prove more expensive for the Department to use its resources in the manner described by Director Durland, that is not a defense for the Department under either disparate impact or treatment theory. The Supreme Judicial Court has considered this matter and ruled as follows:

We find no error in the single Commissioner's determination that evidence of cost was irrelevant in a commission proceeding investigating an employer's denial of sick leave for pregnancy-related disabilities. Although it is well established under the Federal equal employment law that some discrimination may be justified in case of "business necessity." see *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the touchstone of the "business necessity" exception is whether the discriminatory employment practice is vital to safe and efficient job performance. See *Dothard v. Rawlinson*, 433 U.S. 321, 331-332 n. 14, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Johnson v. Pike Corp. of America*, 332 F.Supp. 490 (C.D.Cal.1971). The mere fact that an employer may incur additional costs by ending a discriminatory practice is usually insufficient reason to justify its perpetuation in discrimination cases where "business necessity" defenses are otherwise available. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n. 8 (4th Cir.), cert.

dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971).

Where discrimination is manifested by "disparate treatment," as in this case, cost is an even weaker defense. Indeed, courts have repeatedly held this reason an inadequate justification for the exclusion of pregnancy from a disability or sick pay program. See *Hutchison v. Lake Oswego School Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975), vacated and remanded, 429 U.S. 1033, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977); *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F.Supp. 784 (N.D.Iowa 1975); Larson, Sex Discrimination as to Maternity Benefits, 1975 Duke L.J. 805, 823 (1975). This view is particularly applicable where, as here, the increased cost for pregnancy benefits can hardly be termed "devastating." ([FN15]) See *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), vacated and remanded on jurisdictional grounds, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976).

School Committee of Brocton v MCAD, 377 Mass. 392, 401-401 (1978).

There is no evidence of business necessity nor justification presented.

Part TWO

V The Department further discriminated against the Hispanics when it treated bilinguals other than Hispanics differently when it allowed former RRP workers to come into the local offices at a higher status and higher rate of pay.

In the 1980s and early 1990s the Department was involved in administering the Federal Refugee Resettlement Program. The Department was to provide services through social workers who were bilingual in refugee languages appropriate to the

major ethnicities who were to be served by the program. Job postings went out for applicants certified or certifiable in Vietnamese or Russian and later several other languages were added to the list. The Department did not post any opening for the RRP program for workers certified in Spanish. Beginning in November 1986 the Department began filing RRP position as FASW IIIs. (Stipulated Facts in Commission Complaint and Order of Certification to Public Hearing, section c) Many of the non-Hispanic people hired into the RRP programs were FASW 1s and were promoted to IIIs when they were hired. (See Refugees Redeployed, Respondent's Exhibit 8)

In July, 1991 the Department terminated the RRP Program and placed the RRP workers in the local offices. (Stipulated Facts in Commission Complaint and Order of Certification to Public Hearing, section c)

A new employee who is certified bilingual is hired as a FASW I and may be promoted to a Nov 29I if, after passing the Civil Service exam, the employee is selected from a Civil Service List. If there is no applicable Civil Service List, an employee can seek employment through a job posting. (Stipulated Facts in Commission Complaint and Order of Certification to Public Hearing, section c, para. 16). If there is an outstanding Civil Service list, appointments to positions are to be made from the list. If there is no Civil Service list for the position the Department wants to fill, then the Department may fill the position off that list. However, anyone who is appointed who is not on the list is at risk of being bumped out by somebody who is on the list. (Tr. I/43)

Fred Trusten, a union representative, was present and had discussions with the Department's Commissioner at the time the RRP's were hired. The RRP's were placed into "federal temporary positions" and they would be there only for the duration of the funding. Moreover none of the RRP's had taken the Civil Service Exam, and thus were hired "off the list" (Tr. I/44-45). Accordingly they were "provisional" appointees. (Durland, Tr. May 29/137)

The RRP closed down in 1991 and the RRP workers went into the field offices. When the RRP workers went into the field offices, they “for the most part” did the same functions of the field workers. (Durland, Tr. May 29/136). There was a “change in the nature of their employment” when they went into the field offices. It was different than the positions they held as RRP workers. (Durland, Tr. May 29/141-142). General Laws chapter 31 sec. 14, part of the Civil Service Laws, provides that “A provisional appointment shall be terminated if there’s a change in the nature of the employment or in the salary of the person who has been provisionally appointed.”

Instead of terminating their appointments and offering them to persons on the list the Department made all of the former RRP into bilingual social workers, certifiable or certified in languages other than Spanish, FASW IIIs. They had received the same training as the regular FASWs. (Tr. Nov 29/78-79). Their only additional skill is that they were bilingual.

The Department has gone “off the list” and hired as FASW IIIs “provisional” employees for other specialized programs, such as the “Teen Specialist Unit” and “Homeless Program.” When those FASW IIIs leave those programs, they return to their regular units to the position that they had before they entered the specialized unit. They do not maintain their FASW III status, unless they had it before when they entered the program. (Durland, Tr. May 29/145-46) There is no other occasion where the Department has “grandfathered” people into a “III” position. (Durland, Tr. May 29/181) There is no source in law that provides for the “grandfathering” of provisional employees.

The only difference between the former RRP FASW and the local FASW is their certification in another language. The Class Members are also certified in another language. They were excluded from this benefit because their language is Spanish, not Vietnamese or Russian. They are required to enter the workforce as FASW Is, with lower rate of pay and more difficulty climbing the career ladder.

The initial act of discrimination happened in 1991, but it continues each day that the Class Members are slowed down on their climb up the career ladder, and each week they receive less money in their paycheck. Accordingly, even though the initial case was not filed until 1995, the Commission should consider this a “continuing violation”. In the Supreme Judicial Court approved MCAD’s position on “continuing violations” in the case of case of *Lynn Teacher Union v. MCAD* ,

The commission found a continuing violation of G.L. c. 151B, § 4(1), in the failure of the union to credit the complainants with their pre-resignation seniority under the seniority system's requirement of consecutive years of service. The commission reasoned that, because the number of the complainants' consecutive years of service had been reduced by an illegal maternity leave policy, the seniority system gave effect to that discriminatory policy by failing to credit the complainants for their pre-resignation service. According to the commission, the complainants underwent a new act of illegal discrimination each day that their status on the seniority list remained lower than it would have been but for the illegal maternity leave policy. Thus, under this analysis, the union's refusal to credit the complainants with their pre-resignation seniority was a daily, continuing violation of > G.L. c. 151B, § 4(1).

Lynn Teacher Union v. MCAD , 406 Mass. 515, 521 (1990). The loss of opportunity for advancement and the suppressed wages continue.

In *Anderson v. Zubieta*, employees of Panamanian or Hispanic national origin, who were excluded from various salary and benefit programs because they were not United States citizens in relevant time frame, sued for national origin and race discrimination under Title VII. One of the claims made by the Plaintiff is that they “have a continuing violation of Title VII, actionable upon receipt of each pay check. In agreeing with the Plaintiff the D.C. Court of Appeals stated as follows:

As a unanimous Supreme Court said in *Bazemore v. Friday*, "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VNov 29, regardless of the fact that this pattern was begun prior" to the limitations period. 478 U.S. 385, 395, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (Brennan, J., concurring, joined by all other Members of the Court). The Courts of Appeals have repeatedly reached the same conclusion. [FN7]

FN7. See *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir.1995) (en banc); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-49 (4th Cir.1994) ("Our cases demonstrate ... that in a compensation discrimination case, the issuance of each diminished paycheck constitutes a discriminatory act."); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (11th Cir.1992); *EEOC v. Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (6th Cir.1988) (recognizing that "where an employer continues to presently impose disparate work assignment or pay rates between similarly situated employee groups" a continuing violation exists); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir.1986) ("The policy of paying lower wages on each pay day constitutes a 'continuing violation.' ") (internal quotation omitted); see also *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 843-44 (3d Cir.1992) (applying continuing violations doctrine to unequal pay claim under Equal Pay Act); *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 743 (8th Cir.1980) ("The practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues."). But cf. *HendrJuly 30 v. City of Yazoo*, 911 F.2d 1102, 1103-05 (5th Cir.1990) (holding that discriminatory pay reduction under Fair Labor Standards Act does not

constitute continuing violation).

Anderson v. Zubieta, 180 F.3d 329, 335 (D.C. 1999) . As with the Plaintiff's in the Anderson case, the discrimination caused by the Department is actionable upon receipt of each pay check. The Statute of limitations is avoided by the doctrine of "continuing violations".

The PLAINTIFFS,
By their attorney,

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