

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD & BETHANY CARR,  
Complainants

v.

DOCKET NO. 00-BEM-3556

STUART G. MERLE, D.M.D. &  
ALAN R. ZICHERMAN, D.D.S, P.C.  
& STUART G. MERLE, INDIVIDUALLY  
Respondents

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Appearances:

Joseph P. Dever, Esquire for Bethany Carr  
Joseph S. Provenzano, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 30, 2000, Bethany Carr filed a complaint with this Commission charging Respondents with discrimination on the basis of gender/ pregnancy, in violation of M.G.L. c. 151B sec. 4. Specifically, Complainant alleged that Respondents terminated her employment after she informed them of her pregnancy. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on August 2 and 3, 2005. After carefully considering the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

1. Complainant Bethany Carr resides in Peabody Massachusetts with her son now age 4 1/2. Complainant learned she was pregnant in early May 2000.

2. Respondent Stuart G. Merle, D.M.D. and Alan R. Zicherman, D.D.S., P.C. is a pediatric dentistry practice (“the practice”) with offices located in Peabody and Lynn, Massachusetts. Respondent Stuart Merle is a pediatric dentist and Dr. Zicherman practices pediatric orthodontics. In 2000, the practice employed five or six dental assistants, including Karen Buonapane and Janet Turbyfill. Buonapane was clinical coordinator of dental assistants and was responsible for supervising and scheduling the monthly assignments for the dental assistants. Joseph DeAngelis was Respondent’s office manager and was in charge of hiring all clerical personnel for Respondent.

3. The practice sometimes utilizes nitrous oxide, a gas, in treating its dentistry patients. The gas is administered only by dentists; however, dental assistants are present when nitrous oxide is used. Nitrous oxide is not used in the orthodontics part of the practice.

4. In around April 2000, Complainant responded to Respondents’ newspaper advertisement for a full-time pediatric dental assistant, and spoke to Joe DeAngelis, who told her to come in for an interview. Shortly thereafter, Complainant completed an application and spoke briefly to DeAngelis and Dr. Merle. On May 2, 2000, DeAngelis

offered Complainant the position of full-time dental assistant at a salary of \$10 per hour to start, with an increase to \$11 per hour after the first month and \$12 after three months, and a raise after a year. Complainant began working for the practice on May 22, 2000. Complainant was in training her first week of work and during this time she “shadowed” various dental assistants in order to learn the duties of the position, including operative exams, preparing fillings, and calming the pediatric patients.

5. On Wednesday May 31, 2000, Complainant was scheduled to work from 12:00 to 8:00 p.m. Complainant testified that just before the shift was about to begin, a dental assistant and long time employee named Janet Turbyfill informed the staff that she was pregnant. Complainant testified that after Turbyfill’s announcement, she observed Karen Buonapane rearranging the dental assistants’ schedules in order to keep Turbyfill out of the operating rooms where nitrous oxide was used. Buonapane scheduled Complainant for the operating rooms. I credit Complainant’s testimony.

6. When Complainant had a chance to speak with Turbyfill alone, she asked Turbyfill why the schedule had been changed. Turbyfill responded that it was because of her pregnancy and the potential danger to the fetus from working with nitrous oxide. Complainant then became nervous and told Turbyfill that she too was pregnant. Turbyfill advised Complainant to stay away from the gas and to inform Dr. Merle of her pregnancy. Complainant testified that Turbyfill told her she was probably going to be “out of a job” because the practice was “losing too many people as it is now.” I credit

Complainant's testimony. Turbyfill did not testify at the public hearing and this testimony was unrebutted.

7. At the end of her shift that day, Complainant informed Buonapane of her pregnancy and of her concerns about coming into contact with nitrous oxide. Buonapane told Complainant that she would speak to Dr. Merle about the matter. Shortly thereafter, Buonapane and Merle asked her to meet with them in one of the practice's treatment rooms.

8. Complainant testified that at the meeting she looked at Merle and said, "Well I guess you heard." And Merle responded, "Yes." Complainant said jokingly, "Do I still have a job?" Merle responded, "No, I'm afraid not." Complainant said "Are you joking?" According to Complainant, Merle then told her that although said some dentists allow pregnant assistants to work around nitrous oxide, he does not. Complainant asked if she had harmed her baby in the weeks she had been there, and Merle said that she probably had not. Complainant testified that Merle told her to call back after she had her baby. I credit her testimony.

9. Complainant testified that she then asked if there were any other positions available, such as working in the reception area. According to Complainant, Merle replied that she would need to speak to Joe DeAngelis, the office manager. Merle then commented to Buonapane, "What's going on? Everyone is getting pregnant. Is it something in the drinking water?" Complainant acknowledged that this remark was made in a light-hearted

manner in an attempt to ease the tension. By all accounts, Complainant began crying uncontrollably and left the office. I credit her testimony.

10. Complainant testified that the following week, after calling DeAngelis a couple of times, she reached him on June 5 and inquired about other available positions in which she could be placed temporarily. DeAngelis told her there were no other positions available, he asked her how she was doing, hoped she would “do the right thing” and said her check was “in the mail.” I credit her testimony.

11. Complainant testified that following her termination, she applied for unemployment compensation and learned that her claim was denied because DeAngelis told the Department of Employment and Training that Complainant had voluntarily left her position. Complainant advised the agency’s representative that she had not left her job voluntarily and her request for benefits was subsequently approved. Complainant ultimately received a total of \$2800 in unemployment compensation. (Exh. C-2)

12. On August 20, 2000, Complainant secured a position as a unit secretary at Salem Hospital, where she has been employed to date. Complainant was first hired to work 28 hours per week, at a rate of \$13.44 per hour. During the first year of her employment, Complainant received a raise to \$14.30 per hour. In her second year of employment she received another raise to \$15.30 per hour. In June 2004, Complainant began working 40 hours per week. At the time of the public hearing, she was earning \$18.00 per hour.

13. Dr. Stuart Merle testified that he utilizes nitrous oxide in his practice and that he believes that exposure to the gas in the first tri-mester of pregnancy poses a potential risk for a developing fetus. Notwithstanding, Merle stated that his office has safely administered nitrous oxide for thirty years. Because of his concerns about the potential risk to pregnant women, Merle stated that he advises employees to consult with their own physician, but does not require them to do so and that the decision whether to continue to work with nitrous oxide is up to the employee. He stated that the Respondents' practice was very flexible and tried to rearrange the schedules of employees whose physicians advise them against working with nitrous oxide. He stated that Turbyfill told him that she wanted to limit her exposure to nitrous oxide and he agreed to arrange her schedule accordingly, as he had done with other employees who had become pregnant and asked to limit their exposure to nitrous oxide and other "medicaments." Merle testified that he has employed 13 pregnant employees over the years. I do not credit Merle's testimony that he advises employees to consult with their physicians. I otherwise credit his testimony.

14. Dr. Merle denied terminating Complainant's employment. He testified that when Buonapane told him of Complainant's pregnancy, Buonapane did not know how to handle the matter, so he agreed to meet with Complainant and Buonapane. Dr. Merle testified that during the meeting with Complainant and Buonapane, he recommended that Complainant speak to her own physician. Merle stated that he told Complainant to check with Joe DeAngelis, who handled the hiring of administrative staff. He testified that it was

Complainant who raised the issue of an administrative position as an option and denied making the suggestion himself. I do not credit his testimony that Complainant first raised the issue of an administrative position, nor do I credit his testimony that he advised Complainant to check with her physician. I otherwise credit his testimony.

15. Dr. Merle testified that when performing dental work he utilized two dental assistants, one to remain “chairside” and another to perform tasks such as sterilizing equipment. He testified that this made it easy to adjust for an employee who did not want to remain in the room while the dentist administered nitrous oxide to a patient. He stated that Janet Turbyfill’s schedule change was not because of her pregnancy, but because of a planned move into the area of orthodontics where she continues to work primarily to date. I do not credit this testimony.

16. Dr. Merle testified that Complainant did not tell him that she was quitting her job and he expected her to show up for work as scheduled on the day following their meeting, June 1. I do not credit this portion of his testimony. Merle testified, however, that he did tell DeAngelis that Complainant might be calling to inquire about a clerical position, which is inconsistent with his testimony that he expected her to appear for work on June 1, but which is consistent with Complainant’s credible testimony that Merle terminated her employment. I credit this portion of his testimony.

17. Joseph DeAngelis has worked for Respondent for seven years. He was in charge of hiring all clerical personnel for Respondent. According to DeAngelis he called Complainant on Saturday, June 3 following her failure to report to work on either June 1st or 2nd. He testified that during their first telephone conversation, he asked Complainant why she hadn't come to work. He testified that Complainant responded that she was pregnant and was not coming back. DeAngelis testified that during a second conversation, Complainant called him at the office and asked him if there were any available positions in the office. DeAngelis told her there were no vacancies, but to keep in touch and if something opened up they could talk about it. I do not credit DeAngelis' testimony about a conversation with Complainant wherein she told him she was not coming back to work. I credit his testimony regarding the discussion about the availability of office work.

18. In his affidavit dated September 19, 2000, (Exh. C-6) DeAngelis stated that Complainant did not show up to work on June 1, he tried to call her home and the call was not returned. In his affidavit he did not mention the call on June 3<sup>rd</sup>. I do not credit DeAngelis' testimony that he called Complainant on June 3. It is inconsistent with his affidavit written in close proximity to the events in question, and it is inconsistent with the credible testimony of Complainant.

19. DeAngelis testified that Respondents had no policy regarding pregnant women working in the office. He stated that when he learned an employee was pregnant, he would request a medical letter from her physician. I do not credit this testimony. It is

inconsistent with the testimony of Dr. Merle who stated that he had never asked a pregnant employee for a physician's letter.

20. Karen Buonapane has worked as a dental assistant for Respondent since 1997. In around December 2000, Buonapane was promoted to the position of clinical coordinator, with duties including scheduling and supervising the dental assistants.

21. Buonapane testified that Janet Turbyfill was going to move into the expanding orthodontic practice, a move that had been planned since April 2000. She stated that Turbyfill was scheduled as a dental assistant during the month of May and she planned to move Turbyfill to orthodontics in the month of June 2000. She denied rearranging Turbyfill's schedule because of her pregnancy. I do not credit this testimony as it is inconsistent with the credible testimony of Complainant that Turbyfill's schedule was immediately rearranged following the announcement of her pregnancy.

22. Buonapane testified that when Complainant told her she was pregnant, she did not know how to respond as she was still new to her supervisory position. She went to Merle, who said they would talk to Complainant together. She testified that during the meeting with Merle, he congratulated Complainant on her pregnancy. Buonapane testified that Complainant was upset and afraid that she had already hurt her fetus and that Merle told her that the chances were no damage was done. Merle tried to diffuse the situation with a joke. Merle then asked her to consult with her physician for approval to work around certain medicaments and Respondents would arrange her schedule

accordingly. Buonapane stated that Complainant never asked to be placed in a position where she was not exposed to nitrous oxide. According to her, Complainant became upset and left the meeting. . I do not credit her testimony that Merle told Complainant to check with her physician and that Respondents would arrange her schedule as is it inconsistent with the Complainant's credible testimony that her employment was terminated. I otherwise credit her testimony.

23. Buonapane testified that Dr. Merle did not fire Complainant nor did he tell Complainant that she could not continue to work there because of her pregnancy. Buonapane testified that Complainant did not come in on June 1 or 2 as scheduled and Buonapane assumed that Complainant had abandoned her position. I do not credit this testimony.

24. At the time of her hire at Respondent, Complainant was paid an hourly rate of \$10.00. She worked 40 hours per week, for a total of \$400.00 per week. As of June 22, 2000, Complainant would have received a raise to \$11.00 per hour for a total of \$440.00 per week. From her date of termination (May 31) to the date of hire at her new job (August 20), Complainant lost three weeks of wages at the rate of \$400.00 per week for a total of \$1200.00; and eight weeks of wages at the rate of \$440.00 per week for a total of \$3520.00. Accordingly, her lost wages up to the time of her new job were \$4720.00. The unemployment compensation she received in the amount of \$2800.00 should be deducted for a total of \$1920.00 in compensable lost wages. At Salem Hospital, Complainant worked 28 hours per week at an hourly salary of \$13.44 or

\$376.32 per week. About a year from her date of hire she got a raise to \$14.34 per hour or \$401.52 per week. In her first year of work at Salem Hospital Complainant made \$63.00 less per week than she would have at Respondents' for a period of 47 weeks (as she took off 3 to 4 weeks for childbirth). Her total lost wages for that year were \$2961.00. From August 20, 2001 to August 20, 2002, Complainant made \$38.00 less per week for a period of 52 weeks for a total loss of \$1976.00. Accordingly, Complainant's total lost wages for the first two years are \$6857.00.

25. Complainant testified that after her termination, she was upset, confused and aggravated. She stated she was drained and depressed and generally felt terrible. She enjoyed the work and enjoyed working with children and was saddened by the loss of a job she really liked. She testified that 2000 was a bad year for her because in addition to being fired from her job, her boyfriend left her while she was pregnant. Due to financial hardship she had to move out of her apartment and back with her parents. In addition she had to cash in a pension plan to support herself while looking for another job. Complainant testified that she was anxious and felt worthless and had to start at "square one" as by the end of 2000, every aspect of her life had changed. I credit her testimony.

### III. CONCLUSIONS OF LAW

#### A. Discrimination

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to discharge an employee because of her sex. "Pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because

of her pregnancy or the requirement of a maternity leave are considered sex discrimination." School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); Carmichael v. Wynn & Wynn, 17 MDLR 1641, 1650 (1995); see also, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled pregnancy because of fears of further absences and coverage during leave deemed unlawful sex discrimination).

In order to prevail on a claim of sex/pregnancy discrimination, Complainant must first establish a prima facie case. The complainant may prove a claim of discrimination by presenting direct evidence of discrimination or by utilizing the three-stage order of proof articulated in both federal and state court decisions. Lipchitz vs. Raytheon Company, 434 Mass. 493(2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130 (1976). I conclude that Complainant has proved by direct evidence her claim of discrimination based on her pregnancy. Complainant has testified credibly that that after informing her employer of her pregnancy, her employment was terminated because of her employer's concerns that she would be exposed to nitrous oxide. Merle and Buonapane testified that Complainant was not terminated but abandoned her job when she failed to appear for work the next day following a meeting concerning her pregnancy. I did not find their testimony credible in this regard. I believe that Complainant was told that she no longer had a job once she advised them that she was pregnant and inquired about the safety of working around nitrous oxide. Complainant has provided direct evidence of discrimination. Nonetheless, accepting Complainant's testimony that Respondents

articulated a concern for the safety of the fetus, I will discuss whether this was a legitimate, non-discriminatory reason for terminating her employment.

It has been held that an employer may not require a pregnant employee to stop working because of its concern about safety to the fetus. In striking down an employer's "fetal protection policy", the Supreme Court stated that "an employer may take into account only the woman's ability to get her job done... The decision to become pregnant or to work while being either pregnant or capable of becoming pregnant is reserved for each individual woman to make for herself." International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Johnson Controls, Inc., 499 U.S. at 204, 205-6, 111 S. Ct. at 1206, 1207(1991). While this case presents a somewhat different scenario because *Complainant* raised the concern; nonetheless, she was not allowed to consider the possibility of continued employment and was terminated outright upon announcing her pregnancy.

Despite the fact that Respondents employed predominantly women and the practice had employed numerous pregnant women without incident, I conclude that because of the circumstances presented by Complainant's and Turbyfill's pregnancies coinciding, Merle made a rash decision to terminate Complainant's employment. I did not credit Merle's testimony that he left it up to his employees to determine whether they would work around nitrous oxide. I conclude that Merle's own policy was not to allow pregnant employees to work around nitrous oxide and he saw no option but to terminate Complainant, given that Turbyfill's schedule had already been rearranged. Rather than allow Complainant the opportunity to decide for herself whether she wanted to work at the practice while pregnant, he terminated Complainant outright because her pregnancy

and potential maternity leave presented a scheduling problem. Thus I conclude that Respondents' actions were motivated by unlawful discriminatory animus.

### B. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B§4(4A) if they “interfere with a Complainant’s right to be free from discrimination in the workplace. In order to prove interference with a protected right, Complainant must show that Merle had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant’s rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant’s exercise of rights. Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

The evidence in this record establishes the requisite intent to discriminate required in order to find Stuart Merle individually liable for unlawful discrimination. Merle was the sole decision-maker with respect to terminating Complainant’s employment. The evidence firmly established Merle’s intention to discriminate and to interfere with Complainant’s rights under c. 151B. I conclude that Stuart Merle is individually liable for unlawful discrimination in this matter.

I conclude that Respondents engaged in unlawful discrimination on the basis of gender in violation of M.G.L.c.151B§4 and I find them jointly and severally liable for unlawful discrimination.

#### IV. REMEDY

Pursuant to M.G.L.c.151B s. 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her termination by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

Awards of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress, Stonehill College vs. Massachusetts Commission Against Discrimination, at al, 441 Mass. 549 (2004). “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.”id.

On the basis of Complainant’s credible testimony concerning her distress upon learning that she had been terminated, I am persuaded that Complainant suffered emotional distress as a result of Respondents’ unlawful conduct. Complainant testified credibly that she was upset about losing a job she enjoyed and the resulting financial

hardship. She was upset about having to move in with her parents due to financial hardship and that she felt a period of her life that should have been joyful had instead become a period of anxiety and stress. However, it is also clear that Complainant experienced other sources of stress during this period of her life not related to Respondent's conduct, including an unintended pregnancy about which she was ambivalent initially, and the fact that her boyfriend left her during the pregnancy. Thus while I conclude that Complainant's termination was the source of some emotional distress, I also conclude other sources contributed to her stress, including her unplanned pregnancy and her failed relationship with her boyfriend. Given these circumstances, therefore I conclude that Complainant is entitled to an award of \$25,000.00 for the emotional distress she suffered as a result of Respondents' unlawful conduct.

In addition, Complainant is entitled to lost wages in the amount of \$6,857.00 to compensate her for the pay she would have earned had she not been unlawfully terminated.

## VI. ORDER

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

- 1) Respondents immediately cease and desist discriminating on the basis of gender and pregnancy.

2) Respondents pay to Complainant the amount of \$25,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.

3) Respondents pay to Complainant the amount of \$6857.00 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

Payment shall be made within 60 days of receipt of this decision.

The parties shall notify the Clerk of the Commission as soon as payment has been made. If Respondents fails to comply with the terms of this Order within the time period allotted, please notify the Clerk of the Commission.

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

SO ORDERED THIS 7<sup>th</sup> DAY OF NOVEMBER, 2005.

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JUDITH E. KAPLAN  
Hearing Officer