

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & DONNA GIROUARD,
Complaints

v.

DOCKET NO. 98-BEM-1130

BEKIRO CORPORATION, d/b/a
BURGER KING OF BUNKER HILL,
HALUK BEKIROGLU &
VIJA BEKIROGLU,
Respondents

Appearances:

John D. Burke, Esquire for Donna Girouard
Haluk Bekiroglu and Vija Bekiroglu, pro se

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 31, 1998, Donna Girouard filed a complaint with this Commission charging Respondent with discrimination on the basis of handicap in violation of M.G.L. c.151B, §4¶16. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on March 24-28 and April 4, 2003. After careful consideration of 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. Respondent Hal Bekiroglu established Bekiro Corporation in 1992 for the purpose of doing business as a Burger King restaurant franchise located at the Charlestown Mall in the Charlestown neighborhood of Boston. In 1997, Mr. Bekiroglu was the company's sole owner. Respondent Vija Bekiroglu is Haluk Bekiroglu's wife. The Burger King Corporation required the franchise to employ persons with a management certificate. In 1997, Complainant, Vija Bekiroglu and Haluk Bekiroglu were the only ones who had such certificates. Several of the Bekiroglus' children worked at the restaurant over the years, including their son Kaya Bekiroglu and their daughter Nilay Johnson. In January 1998, Nilay Johnson was sent to Burger Management training and later that year became the restaurant's new manager. The restaurant closed on December 31, 2000.

2. Complainant Donna Girouard resides in Charleston, MA. In March 1994, Mr. Bekiroglu hired Complainant for the position of shift supervisor. According to Complainant, at the time of her hire, both Haluk Bekiroglu and Vija Bekiroglu were managers and were present at the restaurant on a regular basis. Mrs. Bekiroglu oversaw the employees' work, as well as checked work schedules and performed paperwork. The Burger King was a

convenient, 10-minute walk from Complainant's home.

3. In January 1996, Complainant was promoted to the position of restaurant manager. In connection with her promotion, Complainant attended a manager's school operated by the Burger King Corporation. By all accounts, Complainant was a highly valued employee who received positive reviews, was never disciplined or warned and missed only one day of work prior to May 1997.

4. As a manager, Complainant usually worked the evening shift at a salary of \$350.00 per week. Complainant's duties included scheduling, inventory, payroll, monitoring food temperatures, supervising employees and a variety of other duties. Complainant testified that when they were present at the restaurant, the Bekiroglus reviewed work-related matters with her in the office. In addition, the Bekiroglus would call Complainant on the phone several times per week to discuss work-related matters.

5. In May 1997, Complainant was diagnosed with breast cancer. In early May, Complainant informed Mr. Bekiroglu that she would require surgery to remove a lump in her breast and requested a leave of absence. Complainant testified that he

approved her request and told her that she could have her job back when she was ready to return to work. During this discussion, Mr. Bekiroglu asked Complainant to train his wife, Vija, in various aspects of her job prior to taking her leave. I credit this testimony. Complainant's sister, Kelly Armstrong, who was a shift supervisor at the Restaurant, was present during this conversation.

6. Complainant testified that on or about May 14, 1997, she had a second discussion with Mr. Bekiroglu in which she provided him with more details about her planned cancer treatment. Complainant informed Mr. Bekiroglu that following surgery, she would undergo radiation and chemotherapy that would require her to be out of work until November or December. Complainant testified that he responded that she could have her job back when her treatment was completed. Kelly Armstrong was present during this conversation as well.

7. Complainant testified that at Mr. Bekiroglu's request, in May she trained Vija Bekiroglu, Kelly Armstrong and Mary Sgro to perform several of her managerial duties. In particular, Complainant trained Mrs. Bekiroglu to print out payroll information, take food temperatures, conduct inventories, and various other duties. Complainant's last day of work was May

18, 1997.

8. On May 19, 1997, Complainant had surgery to remove her breast. Shortly thereafter, Complainant's surgeon informed her that the surgery was not entirely successful and she would require a second operation. She underwent the second surgery on June 17, 1997, requiring re-opening of the incisions from the previous operation.

9. On July 3, 1997, Complainant commenced a twelve-week course of chemotherapy that caused numerous severe side effects, including frequent nausea and vomiting, hair loss, extreme fatigue and mouth sores.

10. In October 1997, Complainant commenced a six-week course of daily radiation treatments that were scheduled to end around December 15th. The radiation treatments left Complainant exhausted.

11. During the summer of 1997, Complainant spoke with Mr. Bekiroglu on several occasions. He would either call her or she'd stop by the restaurant when picking up medications at the nearby pharmacy. Complainant testified that Mr. Bekiroglu called her at least twice during her leave, asking her to return

to work. She informed him that she was still sick and could not return at the time.

12. During the spring and summer of 1997, Mr. Bekiroglu never asked Complainant for medical documentation of her illness or treatment. He told her not to worry and that her job would still be open.

13. During Complainant's leave Kelly Armstrong, Mary Sgro, Robert Pedro and Mrs. Bekiroglu performed some of her job duties. Complainant testified that during her leave, Mrs. Bekiroglu, Mary Sgro and Kelly Armstrong called her periodically for instructions on restaurant procedures.

14. Complainant testified that in October 1997, after the completion of her chemotherapy, her oncologist advised her that she could return to work on a part-time basis, four hours a day, from 8:00 a.m. to noon, and receive her radiation treatments in the afternoons.

15. Complainant testified that on October 25, she called Mr. Bekiroglu and informed him that she could return to work on a part-time basis, 24 hours per week. Mr. Bekiroglu responded that he would speak to his wife, Vija about putting Complainant

back on the schedule. Complainant testified that she looked forward to returning to work. Mr. Bekiroglu did not request any medical documentation at that time. I credit Complainant's testimony.

16. Subsequent to the October 25 call to Mr. Bekiroglu, Complainant called Mrs. Bekiroglu to inquire whether she had scheduled Complainant to work. She testified that Mrs. Bekiroglu responded that the schedule had not been posted and hung up the phone. I credit this testimony.

17. Complainant testified that because of the Bekiroglus' seeming evasiveness, she had become anxious about her job and called the restaurant on November 1, speaking to the Bekiroglus' daughter Nilay Johnson, who told Complainant that she could not find the schedule.

18. On November 2, 1997, Complainant called the restaurant and spoke to the Bekiroglus' son Kaya Bekiroglu and requested to speak with Mrs. Bekiroglu. Kaya told Complainant that Mrs. Bekiroglu did not want to speak to her. However, she later spoke to Mr. Bekiroglu, who told her that she could not return to work until she obtained a doctor's note regarding her hours.

19. On November 3, Complainant came to the restaurant and asked Mrs. Bekiroglu if she planned to put her on the schedule. Mrs. Bekiroglu's response was that Complainant could not work because she was still receiving radiation treatments and would not be able to work sufficient hours.

20. On November 6, 1997, Complainant obtained a note from her oncologist stating that she could return to work part-time for one month and then full-time beginning December 15th. Complainant testified that after obtaining the letter, she called and visited the restaurant numerous times, attempting to provide the letter to Mr. Bekiroglu, and was repeatedly told that Mr. Bekiroglu was not present. I credit her testimony.

21. Complainant testified that on November 13, 1997, she visited the restaurant and hand-delivered the physician's letter to Mr. Bekiroglu, who put the letter in his pocket without reading it and told Complainant he would speak to his wife about putting her on the schedule. I credit Complainant's testimony.

22. Concerned that Mr. Bekiroglu did not read the letter when she gave it to him, Complainant sent a copy of the letter via certified mail to Mr. Bekiroglu at his home address in order to prove that he had received the document. Vija Bekiroglu

signed the return receipt on November 17, 1997. Respondents did not call Complainant about returning to work.

23. The November 6, 1997 note, written by Dr. Irene Kuter at the MGH Cancer Center, states as follows:

Donna Girouard is a patient of mine with a diagnosis of breast cancer. She has been treated with surgery followed by a course of chemotherapy. Donna experienced severe side effects associated with chemotherapy, mainly nausea, vomiting and herpes simplex infection. This was the reason she was completely incapacitated and unable to work during her treatment period from July to the present time.

She is presently receiving daily radiation which has some side effects such as low blood counts, tiredness and general fatigue. She could however resume part time duties limited to nonstrenuous functions for a period of four hours a day.

Donna can return to work immediately on a part time basis and can return to work on a full time basis approximately one month after completion of her radiation therapy on 11/15/97. Please feel free to contact me if you have any further questions...

(Exh. C-2)

24. On November 19, 1997, Complainant again visited the Burger King restaurant accompanied by her neighbor, Dennis Higgins. Complainant testified that when they arrived at the restaurant, they found Mrs. Bekiroglu outside washing the restaurant windows and Complainant asked Mrs. Bekiroglu, "Are you going to put me back on the schedule?" Mrs. Bekiroglu responded in an angry voice, "No. You're terminated." Mrs. Bekiroglu then went to the back of the restaurant, retrieved Complainant's personal items from her locker and handed them to

her in a box. Mrs. Bekiroglu said nothing about the doctor's letter. I credit Complainant's testimony.

25. Complainant testified that she was too "shocked" and "dumbfounded" to respond to Mrs. Bekiroglu. After this incident, she went home and cried. She testified that she was very upset and sick to her stomach and could not do much for several days. She testified that it was "just awful" to have been terminated after having gone through all of her treatments. I credit her testimony.

26. At the time of her termination, Complainant's husband was ill, she was the sole support of her family and she did not know what to do.

27. In November 1997, Dennis Higgins lived in the same apartment building as Complainant. He accompanied her to the Burger King on November 19 and corroborated Complainant's testimony that Vija Bekiroglu was outside washing the windows, that she told Complainant that she was no longer employed and that she went to retrieve Complainant's belongings. I credit his testimony.

28. Kelly Armstrong, Complainant's sister, had previously

worked for Respondents in 1995 and 1996. Armstrong was rehired in 1997 as a full-time shift manager. Armstrong testified that she was present during a conversation between Complainant and Mr. Bekiroglu when Complainant informed him that she needed a leave of absence of unknown duration. Armstrong was also present during a second conversation Complainant had with Mr. Bekiroglu on May 14, when Complainant informed him that she needed chemotherapy and radiation and could not return to work until November or December. Armstrong stated that Mr. Bekiroglu agreed that Complainant could return in November or December. I credit her testimony.

29. Armstrong worked as a shift supervisor throughout the summer of 1997. She stated that Vija Bekiroglu worked daily as a manager, performing paperwork for the payroll and checking in orders. Armstrong testified that she reported to Mrs. Bekiroglu. I credit her testimony.

30. Armstrong testified that during Complainant's leave, Mr. and Mrs. Bekiroglu occasionally asked her about Complainant's health. Armstrong quit on September 4, 1997 to take another job.

31. Mary Sgro (Connelly) worked for Respondents on and off

over the years the restaurant was in business. She testified that on June 17, 1997, Mr. Bekiroglu asked her to come back to work on a temporary basis as Complainant's replacement until Complainant returned from her medical leave. I credit her testimony.

32. Sgro testified that Mrs. Bekiroglu worked in the restaurant daily, performing managerial tasks such as overseeing and directing the work of employees, including Sgro. I credit her testimony.

33. Sgro testified that after her husband had a stroke, she requested a reduction in hours in order to spend more time caring for him. Respondent denied her request and she resigned in mid-August 1997. I credit her testimony.

34. Vija Bekiroglu denied ever working as a manager for Bekiro Corporation. She pointed to Respondent's payroll records showing that she earned a total of \$400.00 in 1997 for bookkeeping performed at the end of that year. Mrs. Bekiroglu had no ownership interest in Bekiro Corporation and was not an officer of the corporation in 1997. I do not credit Mrs. Bekiroglu's testimony that she did not work as a manager.

35. At the public hearing, Mrs. Bekiroglu denied knowledge of any agreement for Complainant to return to work in November or December 1997. However, in her deposition she stated that she always knew that Complainant would return to work.

36. Mrs. Bekiroglu denied that she was surprised that Complainant was unable to work during her cancer treatments. However, in her deposition she stated that she was very surprised that Complainant could not work during her treatment because her own sister had worked while undergoing chemotherapy and radiation treatments following surgery for breast cancer. She stated, "I thought [Complainant] was dying if she couldn't come to work."

37. Vija Bekiroglu recalled that on one occasion in late October, Complainant came into the restaurant and screamed at her, asking why she wasn't on the schedule. Mrs. Bekiroglu testified that she told Complainant to call her husband because he made the schedule. According to Mrs. Bekiroglu, Complainant did not ask if she could work on a part-time basis.

38. Vija Bekiroglu testified at the public hearing that she did not recall signing for receipt of the doctor's note. However, in her deposition she stated that she received the note

sometime in mid-November. She testified that she must have placed the envelope on her husband's desk. She denied opening the letter. I do not credit her testimony. I believe that Mrs. Bekiroglu had knowledge of the letter and its contents.

39. Mrs. Bekiroglu recalled Complainant and Higgins coming to the restaurant in the early morning on November 19 or 20 while she was cleaning the windows. She stated that Complainant asked her if she was on the schedule and she told Complainant to ask her husband because he made the schedule and that she would soon be on the schedule. She told Complainant that Mr. Bekiroglu was thinking about putting her on the early morning shift as a cashier because Nilay Johnson had told her that Complainant wanted to work the breakfast shift. She stated that Complainant asked to retrieve some of her belongings. She denied terminating Complainant's employment. I do not credit her testimony.

40. Vija Bekiroglu denied receiving any additional training in May 1997 in preparation for Complainant's leave and stated that she did not want to be a manager and was not asked to do so. She testified that she came to the restaurant prior to 1997 to visit her children who were working and to get free food. She denied working at the restaurant on a regular basis as

a manager in 1997. She testified that she picked up the weekly schedule and bank statements from Mr. Bekiroglu's office and occasionally delivered the weekly payroll if he requested her to do so. I do not credit her testimony that she did not perform managerial duties in 1997 as it is contradicted by a number of credible witnesses.

41. Vija Bekiroglu testified that in 1997, Kelly Armstrong and Mary Sgro argued frequently and called her "all the time" to come to the restaurant to resolve their disputes. She stated that she visited the restaurant quite frequently to listen to their complaints. She stated that after Complainant went on leave, she visited the restaurant more often. She testified that the months of July and August were very stressful, with employees complaining, equipment malfunctioning and employees quitting or not showing up for work.

42. Vija Bekiroglu testified that she was present at the restaurant when Robert Pedro quit on September 11, 1997 after he could not explain cash shortages. She denied approaching Pedro to fill Complainant's position because she did not have the power to hire or fire and he would not have qualified for the position of shift manager.

43. Kaya Bekiroglu, Respondents' son, is currently employed as a software writer in Seattle, Washington. He worked for Respondents on and off from 1992 until 1998 as a cashier and a shift supervisor. He did not have a Burger King Manager certificate or training. He testified that both he and his sister Nilay did not like working at the Burger King, but did so reluctantly in the fall of 1997 at their parents' request.

44. In September 1997, while employed as an intern at Microsoft in Washington, Kaya Bekiroglu returned to the Boston area, took a full-time computer-related day job and worked nights at Burger King as a shift supervisor. He testified that he and Nassar Benabdal performed some of Complainant's job responsibilities, such as opening and closing the restaurant, making deposits and counting out money. He stated that the positions of shift supervisor and store manager overlapped in many respects. He stated that Respondents made no attempt to hire a manager or to promote a shift supervisor to the store manager position during the fall of 1997.

45. Kaya Bekiroglu testified that in prior years his mother would come in to the restaurant to entertain herself or to pick him up when he was too young to drive. Kaya stated that when she came in she would clean or read a book.

46. Kaya Bekiroglu testified that employees sometimes resented his mother because she inquired into work-related matters and they feared that she would communicate information directly to her husband. He stated that as the owner's wife his mother had the authority to investigate matters such as cash shortages and employees were explicitly told to cooperate with her when she made inquiries. I credit his testimony.

47. Kaya Bekiroglu testified that he spoke to his father weekly about Complainant's leave of absence, asking when Complainant was coming back, and his father responded that she would return when she was well.

48. Kaya Bekiroglu spoke to Complainant every two weeks, making small talk. He recalled that on one occasion Complainant called to speak to his mother, who told him that she could not speak to Complainant because she was too busy.

49. Kaya Bekiroglu testified that in November 1997 his sister Nilay told him that Complainant had herpes. Concerned that the presence of an employee with herpes would result in a health code violation, he told his father to ask Complainant for a doctor's note that specified exactly what her limitations would be if she returned to work.

50. Kaya Bekiroglu testified that Complainant's name was on the schedule at one point in November 1997. He asked his father why Complainant was scheduled to work at a particular time of day and his father told him that Complainant had asked for time restrictions.

51. Haluk Bekiroglu described himself as an absentee owner who was not present at the restaurant on a daily basis, but instead hired managers to run the business. He went to the restaurant to pick up paperwork and would sometimes remain to listen to the employees' problems.

52. Mr. Bekiroglu testified that around May 30, 1997 Complainant told him that she required another surgery and needed three months of leave. She did not ask for six or seven months of leave. He stated that if Complainant had asked for six or seven months leave at the outset, he would have asked her to train the shift supervisors so that the restaurant would have run smoothly.

53. Mr. Bekiroglu testified that on August 17 he decided to terminate Sgro's employment because he suspected her of stealing from the cash drawer. He asked his daughter Nilay and his wife to be present when he fired Sgro because Sgro is a

former wrestler and he feared she would hit him. He went to the restaurant on Sunday August 17 and asked Sgro to explain the cash shortages. She became angry, threw her keys on the floor and walked out. I do not credit Mr. Bekiroglu's testimony. I believe Sgro's testimony that she quit because he would not permit her to work part-time.

54. Mr. Bekiroglu testified that a few hours later, Complainant and Kelly Armstrong entered the restaurant. He did not tell them that Sgro had been fired and may have told them that she quit. At this time Mr. Bekiroglu asked Complainant to return to work. Complainant, who was wearing a scarf on her head, responded that she was sick and did not want to return to work. Mr. Bekiroglu stated that he then asked Kelly Armstrong to begin training Robert Pedro as a shift supervisor. The training was not complete when Armstrong quit on September 4.

55. On September 1, 1997 Mr. Bekiroglu began working as professor and director of business administration at Becker College in Worcester, about an hour's drive from Charlestown. He testified that this full-time position kept him very busy and he was rarely present at the restaurant.

56. Mr. Bekiroglu testified that after Armstrong quit on

September 4, he asked Complainant to return to work, even if only part-time, because her medical leave was exhausted. Complainant responded that she could not return to work because she was too sick.

57. Mr. Bekiroglu testified that on November 2, his daughter Nilay told him that Complainant had herpes simplex, a contagious condition that prohibited her from touching food. Nilay also told him that Complainant could not lift heavy objects and she wanted to work part-time as a cashier. Mr. Bekiroglu called Complainant the next day and asked her to provide a doctor's letter. He stated that he knew he had to make accommodations for Complainant and wanted her doctor's instructions. Complainant denied telling Nilay that she had herpes simplex, that she could not lift heavy objects or that she wanted to work as a cashier.

58. Contrary to Complainant's testimony, Mr. Bekiroglu denied that he was present at the restaurant on November 13th, when Complainant she gave him the doctor's letter. I do not credit his testimony. I believe that he was present at the restaurant and that Complainant handed him the letter which he pocketed.

59. Mr. Bekiroglu testified that the letter from Complainant's physician probably arrived at his home around November 17, 1997. He stated that he was busy with relatives visiting from Turkey and his duties at Becker College and consequently did not see the letter until November 24 when he turned his attention to a pile of mail on his desk. In his answers to interrogatories Mr. Bekiroglu claimed he picked up the certified mail at the post office on November 24th. He explained this inconsistency by stating that Respondents did not thoroughly check their answers to interrogatories because of pressure from Complainant to respond.

60. Mr. Bekiroglu testified that he called Complainant on the evening of Monday November 24 and suggested that she return to work as a part-time cashier for the breakfast shift on Wednesday morning, November 26. He stated that Complainant agreed, but told him that she could only work four hours a day. He told her she could start full-time December 15, 1997. He told her that Kaya and Nilay were leaving their jobs to return to school and the earlier she started, the better. Mr. Bekiroglu stated that Complainant was never terminated, but failed to return for her assigned shift on November 26th. I do not credit this testimony. Complainant's name was removed from the payroll on the first week of January 1998.

61. Mr. Bekiroglu stated that Complainant's position remained open until the beginning of January 1998. He stated that he did not know she was alleging that she had been terminated until February 1998, although he knew on November 25 that there was "something strange going on" because Complainant had applied for unemployment compensation.

62. Mr. Bekiroglu stated that he would have taken Complainant back either part-time or full-time because she was a valued employee. He stated that he had no concerns about Complainant's cancer. He stated that he has a disabled son, and people in his family have disabilities. He testified that he has donated to a group for mentally retarded persons and would be the last person to discriminate against persons with disabilities.

63. Mr. Bekiroglu testified that his daughter Nilay managed the restaurant after obtaining her certificate of training in 1998.

64. Complainant testified that after her termination, she looked for work by going to stores and putting in applications for cashier and restaurant manager positions and by checking at the unemployment office. Complainant testified that she applied

for positions at Papa Gino's, Blockbuster, K-Mart, Johnny's Foodmaster, Stop and Shop, Sony Movie Theatre and Home Depot. She testified that despite applying for at least 150 jobs, she received no offers. She listed Respondents as her employer of three years on her job applications. I credit her testimony.

65. On July 1, 1999, Respondent made to Complainant an immediate and unconditional offer of either full-time or part-time employment as a manager, shift supervisor or cashier. Complainant did not accept Respondents' unconditional job offer because she did not want to return to the restaurant after having been terminated by Respondents.

66. Complainant's salary was \$350.00/week. Her annual salary was approximately \$18,200.00. (Exhibit C-3, C-4).

67. But for her termination, Complainant would have worked 24 hours per week between November 19 and December 15, 1997. Assuming a 40-hour week, Complainant's lost wages for this one-month period were \$810.00 (\$350.00 x 3/5 x 4 weeks). Thereafter, Complainant would have worked full-time. Respondent made an unconditional offer of reinstatement to Complainant on July 1, 1999. Her lost wages during this period of time were \$28,000.00. (350/wk x 80 wks.). Therefore, Complainant's lost

wages total \$28,810.00.

III. CONCLUSIONS OF LAW

A. AUTHORITY OF VIJA BEKIROGLU

The Respondents in this case contend that Vija Bekiroglu was not a supervisor because she was not an owner of the company, that she had no authority to hire and fire and did not assign work to other employees. However, numerous witnesses, including the Bekiroglus' son, testified that Vija Bekiroglu exercised managerial control over employees, including directing their work, investigating cash shortages and mediating disputes among workers. The evidence showed that Mrs. Bekiroglu was frequently present at the restaurant in a managerial capacity, particularly in the fall of 1997 after Mr. Bekiroglu took a full-time position at Becker College. While Mrs. Bekiroglu may have reluctantly fallen into a managerial role, I conclude that for all functional and practical purposes she was a supervisor at Respondent. It was clear to Complainant she spoke for her husband and the corporation when she fired Complainant.

Under the theory of apparent authority, an employer is liable for a supervisor's actions, if the actions represent the exercise of authority that third parties reasonably believe her

to possess by virtue of her employer's conduct. See Przybycien v Aid Maintenance Company, 13 MDLR 1266 (1991). Complainant had every reason to believe that Vija Bekiroglu had the authority to fire her and there is no evidence that the Respondent indicated to her that her belief was unfounded. Thus, I conclude that Vija Bekiroglu had both actual and apparent authority to fire Complainant and her conduct bound the corporate respondent.

B. HANDICAP

Massachusetts General Laws c. 151B, sec. 4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation. A claim of handicap discrimination may be proved by showing that the Complainant (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by her employer; and (4) her position remained unfilled and the employer sought to fill it. Dartt v. Browning Ferris Industries, Inc., 427 Mass. 1 (1998).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such

impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. Complainant will be determined to be substantially limited in the major life activity of working if her impairment "prevents or significantly restricts [her] from performing a class of jobs or a broad range of jobs in various classes."

Massachusetts Commission Against Discrimination Guidelines:

Employment Discrimination in the Basis of Handicap-Chapter 151B

at 7. Rapoza v. Ocean Spray, 21 MDLR 43(1999). Complainant has established that she is a handicapped person within the meaning of M.G.L.c.151B because of her breast cancer, two related operations and grueling post-operative treatments including radiation and chemotherapy with debilitating side effects such as frequent nausea, vomiting and extreme fatigue, which rendered her unable to work for a number of months. Albanese v. Co-Ri, 21 MDLR 6(1999)(cancer surgery and treatment are impairments); Gordon v. E.L. Hamm & Assoc., 100 F3d., 907, 912(11th Cir 1996)(negative effects of treatment, including side effects of medications must be considered when determining existence of impairment). Chanson v. Westinghouse, 17 MDLR 1293(1996)(working is a major life activity). I conclude that Complainant's cancer and treatments substantially limited the major life activity of working.

Complainant has also established that she was otherwise

capable of performing the duties of the position, with the reasonable accommodation of returning to work on a part-time basis for a one-month period before resuming full-time employment. Complainant testified credibly that Vija Bekiroglu terminated her employment two days after receiving her physician's letter supporting her request to return to work part-time. Complainant's position was filled by Respondents' daughter, Nilay Johnson, after Complainant's termination. Therefore, I conclude that Complainant has established a prima facie case of unlawful termination. The burden then shifts to Respondent to offer a legitimate, non-discriminatory reason for its conduct. In this case, Respondents have denied terminating Complainant's employment, claiming that Complainant abandoned her position. I did not credit Respondents' testimony in this regard. The credible evidence showed that Complainant was terminated after providing a doctor's letter approving her return to work. Therefore, I conclude that Respondents unlawfully terminated Complainant's employment on the basis of handicap in violation of M.G.L.c.151B.

Further, I conclude that Complainant sought a reasonable accommodation. To state a prima facie case of discrimination based upon Respondent's failure to accommodate her handicap, Complainant must demonstrate that she is a handicapped person within the meaning of the statute; she is qualified for the

position, i.e., able to perform the essential functions of the job with reasonable accommodation; she requested a reasonable accommodation; and she was prevented from performing her job because Respondent failed to reasonably accommodate the limitations associated with her handicap. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1(1998).

Complainant has established that she was a qualified handicapped person. She was able to perform the essential functions of her job if allowed to return to work on a temporary part-time schedule, as described in the letter written by her physician and provided to her employer. Once the employer is placed on notice that an employee needs an accommodation, the employer has an affirmative duty to engage in the interactive process in an attempt to offer some form of reasonable accommodation. MCAD GUIDELINES: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP - CHAPTER 151B, 15-16. Mazeikus v. Northwest Airlines, 22 MDLR 63,69 (2000). "It is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one." Elise Russell vs. Cooley Dickinson Hospital, Inc., & another, 437 Mass. 443 (2002) [citations omitted]. "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a

reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Id. While Respondents permitted Complainant a reasonable accommodation by granting her a leave of absence, the duty to engage in the interactive process is a matter of continuing obligation by Respondents. Respondents did not explore with Complainant the possibility of a further reasonable accommodation. Figueroa v. Springfield Transit Management, 23 MDLR 17(2001). Rather than allow Complainant's request to return to work on a part-time basis for a short period of time, Respondents instead terminated her employment. The employer has the burden of showing that the requested accommodation would create an undue hardship. Id. at 17. Respondents in this matter have been prohibited from raising the defense of undue hardship as a sanction for repeatedly failing to respond to Complainant's requests for discovery. Therefore, I find that Respondent failed to reasonably accommodate Complainant's handicap and unlawfully terminated Complainant's employment because of her handicap in violation of M.G.L.c.151B§4¶16.

C. 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." Woodason v. Town of Norton School Committee, 25 MDLR____, (2003)(Full Commission. In order to prove interference with a protected right, Complainant must show that Mr. and Mrs. Bekiroglu had the authority or the duty to act on behalf of the employer; their 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, supra.

The evidence in this record establishes the requisite intent to discriminate required to hold both Mr. and Mrs. Bekiroglu individually liable for unlawful discrimination. Mr. Bekiroglu was the Complainant's direct supervisor and was owner of the Bekiro Corporation. He was the primary decision-maker with respect to establishing the terms and conditions of

Complainant's employment. He engaged in several discussions with Complainant regarding the terms and duration of her leave of absence, and it was Mr. Bekiroglu to whom Complainant first provided her doctor's note seeking to return to part time-employment. It was Vija Bekiroglu who took on managerial duties in the absence of her husband and it was she who ultimately terminated Complainant's employment after receiving her physician's letter seeking an accommodation. The evidence firmly established the Bekiroglus' intention to discriminate and to interfere with Complainant's rights under c. 151B. I conclude that Haluk Bekiroglu and Vija Bekiroglu shall each be held individually liable for unlawful discrimination in this matter.

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

IV. REMEDY

Massachusetts General Laws c.151B§5 permits the Commission to award damages and such other relief as will make a Complainant whole. This includes damages for lost wages and emotional distress. A finding of discrimination, alone, permits

an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, 424 Mass 824, quoting Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 182 (1985). Expert testimony is not necessary to prove emotional distress damages. College-Town div. of Interco v. MCAD, 400 Mass. 156 at 169 (1987). Complainant was consistently told that the job would remain open and she could return to it. She kept in touch with Respondents and informed them of her ongoing health issues. She had every expectation of returning to work after treatments and Complainant testified credibly that she was shocked and upset about having been terminated from the job she enjoyed after having undergone difficult treatment for cancer. I find that she is entitled to an award of \$50,000 to compensate her for the distress she suffered resulting from Respondent's unlawful discrimination.

Complainant has the duty to mitigate her damages by making reasonable efforts to seek other similar employment. Black v. School Committee of Malden, 365 Mass. 197, 211 (1974). The burden of proving Complainant's failure to mitigate her damages rests with Respondents. J. C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). See Ryan v. Superintendent of Schools of Quincy, 374 Mass. 674, 677 (1978); Samuelson v. Sungard Financial Systems, Inc. and Chambers, 20 MDLR 49 (1998); Thompson v.

Westinghouse, 12 MDLR 1282, 1334 (1990), citing Health v. Town of Greenfield Police Department, 6 MDLR 1880, 1890 (1984).

Respondents offered Complainant an unconditional job offer in July 1999. I conclude that Complainant's back pay period ended when she turned down this unconditional offer of employment.

"Absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential back pay liability." Ford Motor Co. v. EEOC, 458 U. S. 219, 241 (1982).

Notwithstanding, where one reasonably rejects an offer of reinstatement, the offer will not terminate liability for back pay. Fiedler v. Indianhead Truck Line Inc., 670 F.2d 806, 808

(8th Cir. 1982). Complainant's expressed reason for rejecting the offer was that she did not want to work there after having been terminated. Absent more compelling reasons, I conclude that Respondent's liability for lost wages ends at this point.

Fiske v. R. P. Liquor, Inc. d/b/a/ Sidelines Sports Bar & Pub, 16 MDLR 1042(1994), Donahoe v. Sodexho-Marriott, 21 MDLR 204(1999).

Complainant's annual salary at Respondent was \$18,200.00. She was available for part-time work for one month, and was thereafter available for full-time work. I find that Complainant lost wages in the amount of \$28,810.00 as the result of Respondent's unlawful termination of her employment.

M.G.L.c.151B§5 states, in part, "If, upon all the evidence

at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice." Having found that Respondent has engaged in discriminatory practice, I conclude that a civil penalty in the amount of \$10,000.00 is warranted.

V. ORDER

For the reasons stated above, Respondents are hereby

Ordered to:

(1) Cease and desist from discriminating on the basis of handicap.

(2) Pay to Complainant Donna Girouard the sum of \$28,810.00 for lost wages within 60 days of receipt of this decision with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Pay to the Complainant Donna Girouard the sum of

\$50,000.00 in damages for emotional distress within 60 days of receipt of this decision, with interest thereon 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.

(4) Pay to the Commonwealth of Massachusetts the sum of \$10,000.00 civil penalty.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If any Respondent fails to comply with the terms of this Order Within the time period allotted, Complainant shall notify the Clerk of the Commission.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to 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 23rd DAY OF FEBRUARY, 2004.

JUDITH E. KAPLAN,
Hearing Officer