

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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ELENA KOTSOPOULOS and  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,

Complainants

Against

Docket No. 98-BEM-1863

IMAGINATION SPALON, INC. and  
RICHARD MATER,

Respondents

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Appearances: Todd S. Rosenfield, Esq. for Complainant Kotsopoulos  
Michael Talty, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 6, 1998, Elena Kotsopoulos (“Complainant”), filed a complaint of discrimination with the Massachusetts Commission Against Discrimination (“Commission”), charging Richard Mater and Imagination Spalon, Inc. (“Respondents”) with unlawful discrimination on the basis of handicap, epilepsy in violation of M.G.L. c. 151B, sec. 4(16). The Investigating Commissioner found probable cause to credit the allegations of the Complaint. Conciliation efforts failed. The case was certified for a public hearing on February 7, 2001.

A public hearing was held on October 16, 17, and November 22, 2002. Complainant submitted eleven (11) exhibits. Respondent submitted three (3) exhibits. The Complainant testified on her own behalf, as did her former boyfriend, John Silva; her mother, Anna DiMaria; and former Imagination Spalon employee, Carol Chakarian. Respondent Mater testified on his own behalf as did his wife, Donna Mater; and Imagination Spalon employee, Lucie Duquette.

Counsel presented certain stipulated facts in their joint pre-trial memorandum. Those facts are incorporated into this decision. Counsel also submitted proposed findings of fact and rulings of law following the public hearing, on or around September 11, 2003. To the extent the parties' proposed findings are not in accord with the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with my findings, such testimony is not credited. Based on all the credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant Elena Kotsopoulos was employed as a receptionist at Imagination Spalon<sup>1</sup> from August 22, 1997 until May 13, 1998.

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<sup>1</sup> "Spalon" is an amalgamation of the words "salon" and "spa."

2. At the age of twelve (12), Complainant was diagnosed with epilepsy. During the period relevant to the charge of discrimination, Complainant took Dilantin and Clonazepam several times a day to control seizures. Prior to working at Imagination Spalon, Complainant estimated that she experienced approximately two to three grand mal seizures per year, consisting of muscle spasms, loss of consciousness, disorientation, headaches, and memory loss. Complainant's most recent seizure before the commencement of her job at Imagination Spalon was February 1997.

3. Respondent Imagination Spalon, Inc. is a Massachusetts corporation located in Chelmsford, Massachusetts. It is a hair salon employing more than six persons. The salon is owned by Respondent Richard Mater who is responsible for the hiring and firing of all employees. Mater has been a barber/hair stylist for over thirty-six years. He typically works at the salon on Tuesdays, Thursdays and Saturdays. Mater requires that employees punch in and out on a time clock located in the back of the salon.

4. The duties of a receptionist at Imagination Spalon include booking appointments, answering telephones, making sure the stylists are on time with scheduled appointments, keeping track of where everyone is in the salon, greeting customers, and cashing out customers.

5. Complainant submitted her application for employment at Imagination Spalon on

August 18, 1997. One of the questions on the application was whether or not the applicant had any physical condition that would limit her ability to perform the job. Complainant did not fill out this part of the application. Complainant's Exhibit 1.

6. In response to instructions on the application that Complainant identify her former employers and the reason for leaving, she listed Catherine Michaels Hair Salon and Perfect Ten Nail Salon. Complainant indicated that the Catherine Michael's position was a "Temp Job" and gave no reason for leaving Perfect Ten Nail Salon. Complainant's Exhibit 1. Complainant actually had four jobs between 1994 -1997. John Silva, Complainant's then-boyfriend who was a hair stylist at Catherine Michaels, testified credibly that Complainant's employment at Catherine Michaels ended because Complainant was sick and couldn't work the necessary hours. Silva described Complainant as being rundown and having cold symptoms at the time she left Catherine Michaels.

7. Complainant was hired by Respondent Richard Mater as a receptionist and began working in August 1997 at \$8.00 per hour. On weekdays, Complainant's work schedule at Imagination Spalon was either 11 a.m. to 6 p.m. or noon to 8 p.m. On Saturdays, she began work at 8 a.m. Complainant testified that at the beginning of her employment at Imagination Spalon, the atmosphere was very friendly and that she had a good working relationship with Mater.

8. On October 10, 1997, Complainant was given a one-year employment contract as a receptionist. The contract provided that Respondent (i.e. Mater) would not terminate Complainant for a period of one year except for cause, and if Respondent terminated Complainant for cause, it would pay her a sum equal to one week's pay. Complainant's Exhibit 2. In November 1997, Mater promoted Complainant to salon coordinator and gave Complainant a dollar per hour raise. She was given a key to the salon.

Complainant's responsibilities as salon coordinator included receptionist duties as well as opening the salon in the morning or closing it at night, taking inventory, and stocking products.

9. Complainant testified credibly that on a few occasions she discussed her epilepsy with Mater. Salon bookkeeper Carole Chakarian testified that she learned of Complainant's epilepsy within a few months of Complainant's employment and discussed it with Mater. Chakarian was employed by Respondent for approximately six years beginning in 1993. During the course of her employment, she misappropriated several thousand dollars from the business. Chakarian subsequently reimbursed Mater for the funds which she took for her personal use and continued in the employ of the salon. After she left Respondent's employment in 1999, she continued to have her hair done at the salon and receive an employee discount. Chakarian testified involuntarily pursuant to a subpoena issued by Complainant. She described Mater as a kind and caring boss who treated Complainant well. Chakarian was a reluctant witness who did not voluntarily come forward to testify against her former employer. She initially refused to honor her subpoena. Counsel for Complainant was given an additional four weeks to enforce the subpoena in order to

secure Chakarian's presence at the public hearing. Notwithstanding the concerns raised about Chakarian's character, I find her testimony about Respondent's knowledge of Complainant's epilepsy to be credible. I do not credit Mater's testimony that he was unaware of Complainant's epilepsy during her employment at Imagination Spalon.

10. Complainant testified that following a discussion of her epilepsy with Mater, he offered to let Complainant keep her medication in his office drawer. Mater denies that he ever allowed Complainant to keep medication in his office. He described his office as inaccessible to Complainant because it is located on the second floor of the salon and is locked on days when he is not at the salon. Mater testified that the reception desk has numerous lockable drawers which were available for Complainant's use. Mater's testimony was corroborated by his wife but contradicted by Chakarian who recalled only one locked drawer in the reception desk and testified that everyone had access to the key. Chakarian testified that she saw medication belonging to Complainant in Mater's office desk. Chakarian described Mater's office as only occasionally locked. I find Complainant's testimony about the storage of her medication, as corroborated by Chakarian, to be more persuasive than Mater's, as corroborated by his wife.

11. On Sunday, February 1, 1998, Complainant suffered an epileptic seizure while at home. She went to the hospital that day for treatment. Complainant went to work on her next scheduled day. According to Complainant, she told Mater that she had a seizure and showed him a note regarding a follow-up appointment with her doctor scheduled for Thursday, February 5, 1998. Complainant testified that she asked Mater if she could

come in late on February 5<sup>th</sup>. Mater denies that Complainant told him about the seizure at the time or that she showed him a doctor's note regarding an appointment on February 5<sup>th</sup>. I find Complainant's testimony in regard to notifying Mater to be more credible than Mater's denial of notification.

12. Complainant testified that after her February 1, 1998 seizure, she began taking her one-hour lunch break on the advice of her doctor. According to Complainant, the stylists resented having to cover the desk during Complainant's lunch break, and Mater became less friendly.

13. Complainant testified that over the course of her employment with Respondent, she was not late more or less than any of the other employees. I do not credit this testimony. According to the credible testimony of Mater, Mater's wife (a stylist at the salon), and Charkarian, Complainant was frequently late or absent after the first few months of her employment.<sup>2</sup> When Complainant called to say that she would be late or absent, she gave various reasons including oversleeping, fighting with her boyfriend, not feeling well, having a flat tire, or running out of gas. Complainant admitted at the public hearing that she was having panic attacks, petite seizures in her sleep, and severe

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<sup>2</sup> Mater testified that it is his practice to maintain time cards for his employees but that the cards from 1997 and 1998 were ruined in a flood. He asserted that he also kept a record of when employees were late or absent in his "Daytimer" based on daily reports from the salon which he transferred to an attendance log. At the public hearing I accepted into evidence copies of the log which indicate that Complainant was late, absent, or left early on twenty-six occasions between September, 1997 and May, 1998. Respondent's Exhibit 3. Upon further consideration, I decline to accord the calendars any weight for the following reasons: 1) it is implausible that Mater would call his office daily for an oral attendance report when he required his employees to punch daily time cards; 2) there is no calendar notation reflecting that Complainant was late to work on February 5, 1998 due to a doctor's appointment even though the parties agree that she was; 3) a calendar notation characterizes Complainant as "late" on May 8, 1998 in contrast to credible testimony that she was absent that day; and 4) the May calendar contradicts Mater's testimony that Complainant was late on her last day of employment. Respondent's Exhibit 3.

insomnia at the time. Her hospital records indicate that prior to May 1998, she was feeling tired. Complainant's Exhibit 3. Mater had discussions with Complainant about her attendance. He gave her numerous verbal warnings about lateness. Mater contemplated firing Complainant but decided not to. On April 3, 1998, Mater gave Complainant a disciplinary warning for tardiness and absenteeism because she was more than one hour late with no explanation. Complainant's Exhibit 5. The warning states that, "Complainant has been spoken to numerous times regarding being late to work." Id.

13. Complainant, on occasion, used the office computer for personal matters such as writing to a car dealership, writing letters to relatives, and making "to do" lists. Respondent's Exhibit 2. Complainant wrote about having sex with a client on the company computer. Mater's daughter discovered the personal correspondence when she went through computer records. One night, Complainant entered the salon at approximately two o'clock in the morning in order to use the computer for personal matters. The salon was found to be unlocked the next morning and the lights left on.

14. On Thursday, May 7, 1998, Complainant suffered a grand mal seizure while at home. She was treated at the hospital and released later in the day. Complainant testified that she went straight to work from the hospital to give Mater a doctor's note saying that she had suffered a grand mal seizure and had been treated at the hospital. She testified that she arranged to take time off until Tuesday, May 12, 1998. According to Complainant, when she returned to work on the 12<sup>th</sup>, Mater demanded that she sign a medical release which stated that she would not hold the salon accountable if she had a seizure on the

premises. Complainant testified that she telephoned her mother who advised her not to sign the release. Complainant testified that she communicated her refusal to Mater who took back the release form and told her to go home for the day. Complainant states that she went to the hair salon where her boyfriend worked, had a panic attack, and proceeded to a hospital for treatment of panic attack and nausea. Complainant's Exhibits 6 and 7. Complainant testified that she reached Mater the next morning on May 13, 1998, and he terminated her over the phone. I credit Complainant's testimony that she suffered a grand mal seizure on Thursday, May 7, 1998, that she did not work between May 7, 1998 and May 12, 1998, that Mater asked her to sign a release upon returning to work, and that when she refused, he told her to go home and fired her the next day.

15. Complainant's then-boyfriend, Jack Silva, testified that he took Complainant to Imagination Spalon approximately one week after the May 7, 1998 seizure so that she could give Mater a doctor's note and/or find out about her work schedule for the subsequent week. According to Silva, after he dropped off Complainant and proceeded to his own place of employment, Complainant called him to say that she wasn't allowed to work unless she signed a release form. Silva testified that he told her to call her mother. Complainant later appeared at the salon where Silva was working. She was upset and crying. Silva took her to the hospital that night. I credit Silva's testimony,

16. According to Complainant's mother, Anna DiMaria, Complainant gave Mater the doctor's note the day of the May 7, 1998 seizure and thereafter stayed out of work for a period of days. DiMaria testified that she received a telephone call from Complainant on

her first morning back to work. DiMaria described Complainant as very upset as a result of being asked by Mater to sign a release. DiMaria advised her daughter not to sign anything. DiMaria received a second telephone call from Complainant in which she was hysterical and questioned whether she was fired. DiMaria testified that Complainant went to a hospital that evening, May 12, 1998, and was treated for a panic attack. I find DiMaria's testimony about the events of May 12, 1998 to be credible. I do not credit DiMaria's description of her daughter as "strong as a bull" and unaffected by anxiety or panic attacks.

17. Mater denied that he was ever informed about Complainant's May 7, 1998 seizure or that he was given a doctor's note. He testified that Complainant said she needed a week off for some reason such as a family emergency and he agreed. He testified that he did not speak to her directly. According to Mater, on Complainant's first day back, she was late and he spontaneously fired her. I do not find Mater's testimony about the events leading up to Complainant's termination to be credible. It strains credulity that Mater would have allowed Complainant to take a week off without speaking to her directly, just one month after formally warning her about poor attendance. The fact that Mater could not recall any specific, compelling reason or documentation offered by Complainant to support her request for a week off makes his assertion even less credible.

18. The parties stipulated that Mater terminated Complainant's employment on May 13, 1998. However, a termination report signed and dated by Mater on May 11, 1998, states that Complainant's termination was effective May 11, 1998. Complainant's Exhibit 11.

Mater attempted to explain this discrepancy by testifying that he made the decision to terminate Complainant while she was out of work on May 11<sup>th</sup>, prepared the termination report on May 11<sup>th</sup>, but waited to fire Complainant until the 13<sup>th</sup> in order to tell her in person. This explanation contradicts Mater's testimony that he spontaneously fired Complainant on her first day back from a week-long absence because she arrived late.

19. Complainant was paid through May 6, 1998.

20. Prior to Complainant's termination, she typed on the company computer that she had never been completely happy, cried too much, always had problems, was tired and run down, felt like something was wrong with her character, and had problems in relationships. While Complainant was employed at Imagination Spalon, she had a dating relationship with a customer and was very upset over how that relationship was going.

21. Complainant testified that following her termination, she was so depressed that she couldn't get off her sofa, get dressed in the morning, cook, or clean. She struggled financially. Complainant attributed problems with her boyfriend to her emotional and financial state following the termination. She described herself as an emotional wreck. Her mother testified that she had never seen her daughter so distressed. After an eleven-month period, Complainant obtained employment as a receptionist at Logistics.com. Respondents did not produce any evidence concerning Complainant's attempts, if any, to obtain employment during the eleven months between her job at Imagination Spalon and her job at Logistics.com.

### III. CONCLUSIONS OF LAW

M.G.L. ch. 151B, sec. 4 makes it unlawful to discriminate in employment on the basis of handicap. In order to come within the protection of the statute, the Complainant must establish that she is a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, a record of having such an impairment, or is regarded as having such an impairment.

M.G.L. ch. 151B, sec. 1 (17). A qualified handicapped person is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap. M.G.L. ch. 151B, sec. 4(16).

Complainant is a qualified handicapped person as a result of her epilepsy. See Lombardo v. The Rendezvous Restaurant and Lounge, Inc., 24 MDLR 250 (2002) (seizure disorder that results in occasional momentary loss of consciousness interferes with major life activities and therefore constitutes a disability under chapter 151B). While experiencing a grand mal seizure, Complainant becomes unconscious. Following a grand mal seizure Complainant can be so debilitated that she cannot work for a period of time. Although Complainant only experiences several grand mal seizures per year, she experiences petit mal seizures on a more frequent basis. These seizures interfere with her normal sleep cycle and cause fatigue. Complainant's medical history and her own credible testimony establish that her seizures are chronic and debilitating. Episodic

disorders that are substantially limiting may be handicaps. See Commonwealth of Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination On The Basis of Handicap – Chapter 151B, at II. A. 6. (20 MDLR Appendix, 1998).

There is no dispute that Complainant is capable of performing the essential functions of a receptionist position at Imagination Spalon. There was some testimony about inappropriate use of the office computer for personal matters and excessive socializing with customers, but Complainant was generally considered to be an adequate if not good receptionist. In November 1997, Complainant was promoted to salon coordinator and given a dollar per hour raise. Complainant did not require, nor did she seek, a reasonable accommodation in order to perform her job. Based on the foregoing, I conclude that Complainant was a qualified handicapped person.

The question in this case is whether Complainant was terminated by Respondent Mater as a result of her handicapped status. Complainant offers as support for this position her testimony and that of corroborating witnesses that some time after she informed Mater about her epilepsy and went to the hospital for treatment of a grand mal seizure, he demanded that she sign a release absolving the salon of responsibility in the event she suffered a seizure while at work. When Complainant refused to do so, Mater told her to leave for the remainder of the day and fired her the next morning. Such testimony, if believed, would constitute direct evidence of discriminatory animus.

Direct evidence is evidence that, “if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.” Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665 (2000). In a direct evidence case, the Complainant does not have to adhere to the three-stage burden shifting paradigm because she does not need the benefit of an inference. Rather, a mixed motive analysis is applied to Complainant’s allegation of discrimination. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (direct or circumstantial evidence may be used to prove discrimination in a mixed motive case where multiple motives coexist). Pursuant to this analysis, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a role in the challenged employment decision. See Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass. 729, 735 (2003) *citing* Lipchitz v. Raytheon Co., 434 Mass. 493, 506, n.19 (2001) (where discriminatory and nondiscriminatory hiring motives are both present, decision is unlawful if discriminatory animus is a “‘material and important ingredient’”); Wynn & Wynn, 431 Mass. at 665-667.

Complainant has satisfied this threshold burden by virtue of her testimony that she informed Mater of her epilepsy soon after the commencement of her employment, that he offered her the use of his desk for the storage of her medication, and that he ultimately fired her immediately after she refused to sign a release absolving the salon of responsibility for any seizure-related injury. Her testimony is corroborated by Chakarian, Silva, and her mother. Chakarian and Silva, in particular, have no reason to lie on Complainant’s behalf. Circumstances indicate that Chakarian should be indebted to

Mater for not pursuing a legal action against her arising out of a claim that she misappropriated company funds. She continued to patronize Mater's salon after she left his employ and continued to receive a company discount. She testified that Mater was a kind and caring boss who, in her opinion, treated Complainant well. There is no basis to infer that Chakarian would manufacture evidence against Mater. Similarly, I conclude that Silva's prior romantic relationship with Complainant did not cause him to lie on Complainant's behalf. Their romantic relationship ended years prior to the public hearing and his current relationship with Complainant is limited to that of hairdresser-client. Silva married another woman following his breakup with Complainant. He did not appear voluntarily at the public hearing but, rather, testified pursuant to a subpoena. These circumstances, as well as Silva's demeanor, support the truthfulness of his testimony.

Mater disputes that he knew about Complainant's epilepsy, much less demanded that she sign a release as a condition of continued employment. He notes that Complainant did not fill out the part of the employment application which asked whether the applicant had any physical condition that would limit her ability to perform the job.<sup>3</sup> His purported ignorance of Complainant's epilepsy is corroborated by his wife and one of his long term employees. Mater denies that he made his desk available for the storage of Complainant's medicine. As Mater points out, it would have been impractical for Complainant to keep her medication in his second floor office when Complainant had

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<sup>3</sup> Complainant was on firm legal footing in declining to provide information relative to her epilepsy on the job application. Under Massachusetts law it is illegal to ask any disability-related question, "that is likely to elicit information about a handicap or disability of the job applicant." Commonwealth of Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination On The Basis of Handicap – Chapter 151B at 10 IV. B. (20 MDLR Appendix, 1998).

access to the reception desk with its many lockable drawers. Mater also asserts that Complainant was a troubled employee with problematic behavior such as entering the salon at two a.m. to write about personal matters and leaving the salon unlocked.

Having considered the arguments presented by Respondent Mater, I nonetheless conclude that Complainant's version of the events at issue is more likely to be true than Mater's version. I discount the testimony of the individuals who corroborated Mater's professed ignorance of Complainant's epilepsy as they are closely affiliated with Mater and have a personal and/or financial interest in the outcome of the proceedings. As far as Complainant's use of the company computer is concerned, Mater conceded that he allows employees to type personal items such as grocery lists or budgets while on break.

Although he testified that Complainant's coming in after hours to use the office computer was not "appreciated," he took no action against her after she entered the salon at 2 a.m. and failed to lock the salon door when she left. There is no credible evidence that Mater disciplined Complainant for any performance-related deficiencies. Rather, the credible evidence establishes that Mater terminated Complainant for her refusal to sign the medical release.

The demand that Complainant sign the release, the instruction that she immediately leave the premises after refusing to do so and the fact that she was fired the next morning constitute direct evidence that her handicap played a role in the challenged employment decision. Once Complainant establishes direct evidence of discrimination, the burden of persuasion shifts to Respondents, "who 'may avoid liability only by

proving that it would have made the same decision' even without the illegitimate motive." Wynn & Wynn, 431 Mass. at 667, *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). In other words, the employer must show that, "its legitimate reason, 'standing alone, would have induced it to make the same decision.'" Wynn & Wynn, 431 Mass. at 665, *quoting* Price Waterhouse, 490 U.S. at 252.

Respondent Mater relies on Complainant's alleged poor attendance to argue that her unreliability was the motivating cause for her termination. According to the credible testimony of Mater, Mater's wife (a stylist at the salon), and Charkarian, Complainant was frequently late or absent after the first few months of her employment. They testified that Complainant gave various reasons for her attendance problems, including oversleeping, fighting with her boyfriend, not feeling well, having a flat tire, or running out of gas. Complainant admitted at the public hearing that during her employment with Respondents, she was having panic attacks, petite seizures in her sleep, and severe insomnia. There is credible evidence that Mater had discussions with Complainant about her attendance and gave her numerous verbal warnings about lateness. On April 3, 1998, Mater gave Complainant a disciplinary warning for tardiness and absenteeism because she was more than one hour late with no explanation. Complainant's Exhibit 5.

While there is substantial evidence concerning Complainant's record of lateness and absenteeism, there is also evidence that Mater tolerated these matters. He admitted that he contemplated firing Complainant for attendance-related problems but decided not to do so prior to May 1998. According to Mater, it was not until he granted Complainant

a week off for a family emergency and she was late on her first day back to work that he could no longer tolerate her lateness and absenteeism. He testified that he just “had enough” that morning and fired her.

Mater’s testimony does not stand up under close scrutiny. Mater testified that he authorized the week off without speaking directly to Complainant, even though he had formally warned her about poor attendance just one month earlier. Mater also testified that he could not recall any specific, compelling reason or documentation offered by Complainant to support her request for a week off. It is not reasonable that Mater would have allowed Complainant a week off under these circumstances. Further, Mater’s own employment records do not support his version of the events that allegedly resulted in Complainant’s termination. I conclude that Complainant’s refusal to sign the release was the primary reason for her termination. The release is inextricably tied to Complainant’s handicapped status. It was imposed solely on Complainant and no other employee. Pursuant to ch. 151B, sec. 4(16), the requirement that Complainant execute the release or face termination constitutes unlawful discrimination on the basis of her handicap.

The foregoing analysis provides a substantial foundation for holding Mater individually liable for his discriminatory actions. Pursuant to G. L. C. 151B, sec. 4 (4A), it is unlawful for “*any person* to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter ...” [emphasis supplied]. The Commission has long recognized and imposed individual

liability under G.L. c. 151B where, as in this case, an individual respondent is named and circumstances justify holding that individual liable. See *Beaupre v. Cliff Smith & Associates*, 50 Mass. App. Ct. 480, 491 (2000); *Deeter v. Bravo's Pizzeria and Restaurant*, 23 MDLR 167, 270 (2001) (supervisor who co-owned business and engaged in sexual harassment held individually and jointly liable); *Tunstall v. Acticell H'W Cosmetic*, 22 MDLR 284, 287-289 (2000) (corporation's president and owner who made unwelcome sexual advances to employee deemed individually liable even where corporation was not liable); *Hope v. San-Ran, Inc.*, 8 MDLR 1195, 1210, 1211 (1986) (supervisor who perpetrated sexual harassment and manager who failed to act on employee's complaint held jointly and severally liable for their separate acts of aiding and abetting).

As described above, I credit evidence that Complainant's refusal to sign the release proffered by Mater was the primary reason for her termination and that the release was inextricably tied to Complainant's handicapped status. Mater was the sole owner of Imagination Spalon and had sole supervisory authority over Complainant. He, alone, made the decision to terminate Complainant. See *Deeter*, 23 MDLR at 170 (individual respondent held liable where he exercised supervisory authority over complainant and engaged in egregious conduct). Since Mater "interfered" with Complainant's right to be free of discrimination based on her handicapped status in violation of G. L. c. 151B sec. 4 (4A), he is to be held individually and severally liable along with the respondent corporation, Imagination Spalon, Inc.

#### IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. ch. 151B and to render the injured Complainant whole. These remedies include damages for lost wages and benefits and for emotional distress the Complainant has suffered as a direct result of Respondents' discriminatory actions. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997). Based on the evidence in the record, Complainant is entitled to back pay commencing on her last day of employment at Imagination Spalon, through the beginning of April 1999, when she began her employment at Logistics.com as a receptionist. Complainant was earning \$9.00 per hour when Mater terminated her employment on May 13, 1998. On average, Complainant worked thirty-seven (37) hours per week during the first four months in 1998. Accordingly, I find that Complainant is entitled to an award of \$15,318.00 in lost wages.

The burden of proving mitigation lies with Respondents. See J.C. Hillary's v. MCAD, 27 Mass. App. Ct. (1989); Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 132 (1985). To prove a failure to mitigate employment damages, a respondent must show that: 1) one or more comparable employment opportunities were available to a complainant in a location as convenient as or more convenient than the place of former employment; 2) the complainant reasonably made no attempt to apply for

any such job; and 3) it was reasonably likely that the former employee would obtain one of those comparable jobs. See Thompson v. Westinghouse, 12 MDLR 1261, 1335 (1990). Respondents have produced no evidence of Complainant's failure to mitigate her damages or the availability of any additional offsets against her claim for lost wages. See Northeast Metropolitan Regional-Vocational School District v. MCAD, 31 Mass. App. Ct. 84 (1991). Accordingly, Complainant's award of lost wages is not subject to mitigation.

Complainant is also entitled to an award of monetary damages for the emotional distress she suffered as a victim of Respondents' unlawful discrimination. See College-Town v. MCAD, 400 Mass. 156 (1987); J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). Such a damage award does not need to be based on expert testimony; it can be based solely on the Complainant's testimony as to the cause of her own distress. See College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

No proof of physical injury or psychiatric consultation is necessary to sustain an award for emotional distress. See Labonte v. Hutchins & Wheeler, 424 Mass. at 824 *quoting* Buckley Nursing Home Inc. v. MCAD, 20 Mass. App. Ct. at 182 (a finding of discrimination, by itself, permits an inference of emotional distress as a normal adjunct of such discrimination). Permissible considerations include such factors as the nature, severity, and duration of Complainant's emotional distress. See Baldelli v. Town of Southboro Police Dept., 18 MDLR 167, 169 (1996).

Complainant testified that following her termination, she was so depressed that she couldn't get off her sofa, get dressed in the morning, cook, or clean. She struggled financially. Complainant attributed problems with her boyfriend to her emotional and financial state following the termination. She described herself as an emotional wreck. Her mother testified that she had never seen her daughter so distressed.

However, prior to her termination by Respondent Mater, there is credible evidence that Complainant experienced physical and emotional difficulties. John Silva testified credibly that Complainant's employment at Catherine Michaels ended because Complainant was sick and couldn't work the necessary hours. Although Complainant initially fulfilled her duties at Imagination Spalon with enthusiasm, after the first few months of her employment, she was frequently late or absent. Complainant admitted at the public hearing that she was having panic attacks, petite seizures in her sleep, and severe insomnia at the time. Her hospital records indicate that prior to May 1998, she was feeling tired. Mater had discussions with Complainant about her attendance. He gave her numerous verbal warnings about lateness and contemplated firing Complainant but decided not to. On April 3, 1998, Mater gave Complainant a disciplinary warning for tardiness and absenteeism.

The record also establishes that Complainant's emotional state prior to her termination was depressed and that her sadness contributed to her debilitated

condition. Among Complainant's personal musings on the office computer is an entry which states:

I think I feel like crying too much, and at other times I can't cry at all. I'm always having some sort of problem in my life whether it be big or small, problems I usually can't deal with. I'm tired and run down and I'm still young, that scares me! I don't think I've ever been 100% happy.

Another entry states that:

Sometimes when I'm sad or depressed I just think to myself, what if I had children, or a sick grandmother to take care of, then what would I do? I wouldn't be this messed up, I know that. . . . I just don't have any luck in relationships. . . . Why aren't I happy? I haven't been happy for a long time and I don't know what's going on.

Respondent's Exhibit 2

I am persuaded that factors other than Complainant's termination contributed to Complainant's emotional distress in May 1998 and in subsequent months. It is not unusual for a complainant to suffer distress caused by factors separate and apart from the discriminatory act. See Rosati v. Town of Warren Bd. of Health, 19 MDLR 34, 38 (1997); Fiske v. R.P. Liquor, Inc., 16 MDLR 1042, 1057 (1994); Norman v. Andover Country Club, 15 MDLR 1394, 1422 (1993).

The presence of other significant stressors in Complainant's life does not absolve Respondents from liability for the distress caused by the termination. It does reduce the amount, however, because it prevents me from attributing all or most of the distress to the termination alone. See Franklin Publishing Co., Inc. v. MCAD, 25 Mass. App. Ct. 974, 975 (1988); Fiske, 16 MDLR at 1957. I conclude that Complainant's termination by Mater likely exacerbated her preexisting physical and emotional fragility. In

consideration of all these factors, Complainant is entitled to an award of \$20,000 in compensation for the emotional distress she incurred as a direct and probable consequence of Richard Mater's unlawful conduct.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.ch. 151B, sec. 5, Respondents are ordered to immediately cease and desist from further acts of handicap discrimination. Respondents shall pay Complainant, Elena Kotsopoulos within sixty (60) days of receipt of this decision:

- (1) the sum of \$15,318.00 in lost wages plus interest at the statutory rate of 12% per annum from the date the complainant was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (2) The sum of \$20,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complainant was filed until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondents fail to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 31<sup>st</sup> day of March, 2004.

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Betty E. Waxman, Hearing Officer