

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & JENNIFER ACKERMAN,
Complainants

v.

DOCKET NO. 96-BEM-2125

DONALD SCHWARTZ, M.D.,
DRD DILUTER CORP., &
APEC, INC.,
Respondents

Appearances:

Lawrence Sweeney, Esquire for the Complainant
Donald Schwartz, pro se, for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about June 12, 1996, Jennifer Ackerman filed a complaint with this Commission charging Respondents with discrimination on the basis of sex, pregnancy and handicap¹, in violation of M.G.L.c.151B, sec. 4. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on January 21-24 and March 20, 2003. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

¹ Complainant did not argue the handicap claim in her brief. Based on my finding that Respondent engaged in pregnancy discrimination, I do not address the handicap claim.

II. FINDINGS OF FACT

1. Complainant Jennifer Ackerman resides in Standish, Maine. In 1993, Complainant obtained a degree in Biology and Chemistry from St. Joseph's College in Windham, Maine. From January 1995 through November 1996, she worked at Instrumentation Laboratory in Lexington, Massachusetts, in a part-time position as a quality assurance laboratory technician.

2. Respondent APEC developed, manufactured and sold a glucose analyzer and associated supplies and was attempting to modify the analyzer to measure blood lactate as well. Respondent DRD Diluter Corp. manufactured and sold a pump that mixed and also measured and metered liquids. APEC and DRD were located within the same building in West Peabody, Massachusetts. Respondent Donald Schwartz is the president and CEO of both DRD and APEC.

3. Complainant, who was seeking to obtain a permanent position, responded to an advertisement and was interviewed by Schwartz. On November 17, 1995, Complainant was offered a position with APEC performing both laboratory work and customer support and sales. Complainant commenced

employment on December 4, 1995. Complainant worked for APEC primarily with the marketing and production of the glucose analyzer, although she performed some work for DRD. She was a salaried employee, earning \$2,500.00 per month, plus paid vacation. Although Respondent offered health insurance, Complainant chose to remain covered under her husband's health insurance plan. When she was hired, Complainant signed confidentiality agreements with both APEC and DRD that also required the parties to give 30 days notice of termination. Although hired by APEC, Complainant performed work for both Corporations, and was paid out of the accounts of both APEC and DRD.

4. Soon after commencing her employment with Respondents, Complainant learned she was pregnant and due to deliver in July 1996. At around the same time, both Respondent companies were in the process of moving to a new location. Complainant informed Schwartz of her pregnancy because she did not wish to lift heavy objects during the move. Schwartz acceded to her request not to perform heavy lifting.

5. Complainant testified that Schwartz made comments to her and her co-workers indicating concern about her

pregnancy. On one occasion, when shipping out some large packages, Schwartz said to Complainant, "I don't want you picking them up. I'm not paying compensation." I credit this testimony.

6. According to Complainant, Bernadette Stoddard, then Respondents' bookkeeper, told her that Schwartz commented that he did not know what they would do as Complainant got bigger.

7. Complainant testified that at a business meeting with Schwartz on April 23, 1996 he asked her how her body was handling all the extra weight. Complainant responded that she was pregnant, not handicapped. Schwartz denied making this remark. I credit Complainant's testimony that this comment was made. She testified that Schwartz made other similar comments about her pregnancy.

8. Farzin Khaghamni worked for Respondent DRD as a mechanical engineer in 1995. He stated that Complainant was a good worker. Khaghamni testified that Schwartz commented in a negative manner that he believed that Complainant knew she was pregnant when she took the job. Khaghamni testified that Schwartz complained about

Complainant being out sick. I credit his testimony. (Tape 1, 1/21/03)

9. Complainant testified that she was heavily involved in the production aspect of her job. She stated that because of the production work she had little time to work on the lactate analyzer. Complainant testified that employees worked for both companies and "flocked" to wherever there was work to be done within the companies. I credit this testimony.

10. Complainant and Schwartz met on April 15, 1996, at which time Schwartz handed Complainant a typewritten memorandum entitled "Job Priorities and Time Allocation". The memorandum stated:

Your technical understanding of the chemistry systems and interaction with customers has been very good, but we seem to have gotten you sufficiently bogged down in production testing that you have not been able to get to measurement of lactate or diluter samples, something which you are at present the only person in the company suitable to do. We have talked a little about this, the time required to test electrodes and reactors, etc., but I would like to formalize a shift along the following lines:

1. I want you to work backwards from making some time each day (perhaps 1-2 hours) to work on the important R & D items and utilize Randy² to do some of the testing (which is obviously also excellent background training for him) as well as one or two of our existing people.

² Refers to Randy Rollins, who commenced working for Respondents in April 1996.

2. See if you can carve out some additional time by having Randy start picking up some of the customer support activities, particularly as they relate to communications and letters having to do with instrument operation, processing of goods for repair or refurbishment, etc.

I would like you to think this over, Jennifer, and then make a brief (maximum one-half page) outline for us to discuss these and any other ways you can think of to enable you to get more into the applications and R&D work. I would like to target to do this by the end of this week or by next Tuesday, if I turn out to be away much of the week.

11. There are in evidence two versions of the April 15, 1996 memorandum. One version contains handwritten notations at the bottom "PS. 1) I know we're limited by only 2 analyzers 2) I'd like you to routinely start the day at 8:00 AM".³

12. At the public hearing, Schwartz was emphatic that he presented to Complainant the memorandum containing his handwritten notations and testified that at the April 15 meeting he advised Complainant that he wanted her to arrive daily at 8:00 a.m.

¹ Schwartz had a practice of making handwritten additions to his typewritten documents. He also hand-wrote responses at the bottom of typewritten letters from himself or from others.

13. Complainant testified that she did not have possession of the original memorandum and the copy she possessed did not contain the handwritten notations. Complainant recalled Schwartz telling the entire staff at a company meeting in April 1996 to report to work regularly at 8:00 a.m. She testified that she did not recall Schwartz speaking to her individually about tardiness.

14. I need not determine whether Complainant received the memorandum with the handwritten notations because I credit Schwartz' testimony that he told Complainant specifically at the April 15 meeting to arrive at 8:00 a.m. Schwartz' testimony is consistent with the statement of Complainant taken by the MCAD investigator: "I was coming from Maine in the middle of winter, so I came late but I don't think it was an hour. On April 15th I was asked to come every day at 8:15."

15. I do not, however, credit Schwartz' testimony that Complainant was routinely very late for work and that he had talked to her about this matter several times. Complainant acknowledged that she was occasionally late for work. I credit Complainant's testimony because it is

consistent with Respondent's time records that do not reflect tardiness. C-1)

16. Complainant has Crohn's disease, a chronic illness affecting her colon. As her pregnancy progressed, Complainant developed abscesses related to Crohn's disease. By May 1996, Complainant's abscesses had become extremely painful and Complainant's physician advised her to stay off her feet in order to reduce pressure. As a result, Complainant was absent from work from May 20-22, 1996.

17. Complainant testified that she called Schwartz to explain her absence and she obtained a note from Dr. Mary Brandes describing her medical condition. On May 24, Complainant met with Schwartz to explain her medical problems related to Crohn's disease and how her condition was complicated by her pregnancy. I credit her testimony.

18. During the May 24 meeting, Schwartz suggested changing Complainant's employment status from a salaried to an hourly position. Complainant testified that she did not agree to this proposed change in status, as she did not foresee any further health issues between that time and her planned maternity leave to commence on July 6th. Complainant

asked Schwartz whether she would be assured of a job when she returned from maternity leave if she agreed to the change and Schwartz said no. I credit Complainant's testimony that she did not agree to the change in status at this meeting.

19. On June 4, 1996, Schwartz gave Complainant a set of documents for her signature purporting to change her employment status from salaried to hourly. Later the same day he gave her copies of the documents containing revisions eliminating vacation time and benefits. (Exhibits 7 and 8). According to Complainant, she did not accept Schwartz' offer and asked if she could take the contract home to think it over.

20. Complainant testified that she took the documents home. On June 6, Complainant wrote and handed to Schwartz a letter stating that she was not willing to sign the new agreement and wrote of her plans to take an eight-week maternity leave beginning July 6th. (Exhibits 9, 10). Complainant never signed the agreement that would have changed her status from salaried to hourly.

21. The night of June 6, 1996 Complainant's abscesses worsened and the following day, Friday, June 7, she entered the hospital where the abscesses were surgically drained. Complainant called in to work on the morning of June 7 and informed then office manager Bernadette Stoddard that she would be out.

22. Complainant called Schwartz that same day when she arrived home following the surgery. In response, Schwartz informed Complainant that her employment was terminated and to make plans to clean out her desk. Complainant testified that she was very upset and could not believe that Schwartz had fired her. When she asked for a reason, Schwartz did not respond. I credit her testimony.

23. Thereafter, Complainant wrote a letter to Schwartz, along with a physician's note (exhibit 11) explaining that she was out of work on June 7 for medical reasons and should remain out of work until June 11.

24. On or about June 7, Schwartz wrote a note to Complainant: "To Jennifer this is to inform you that you are terminated due to reasons we have discussed." According to Complainant, she and Schwartz had not

discussed the reasons for her termination. I credit her testimony. (Exhibit 13)

25. On June 12, 1996 Complainant wrote to Schwarz:
"Do you intend to honor your contract which states 30 days notice of job termination?" Schwartz responded: "Your full time employment was terminated on May 24, you will be paid through June 26."

26. On June 19, Complainant wrote to Schwartz that she had not yet received a reason for her termination. (Exhibit 20) On June 23, Schwartz wrote to Complainant; "I don't have the time to be corresponding with you... I will write you a check for full time through June 28." He still did not give her a reason for her discharge.

27. On June 26th Complainant wrote to Schwartz and asked if he would honor the contract and provide her with reasons for her termination. On July 2, 1996, Schwartz wrote to Complainant, "The reasons you know that I have to deal with your routine tardiness and failure to do critical R & D application work." Complainant testified that the first time Schwartz had discussed the R & D application was

on April 15 when he stated that he wanted her to start doing R & D work on the lactate analyzer. (Exhibit 23)

28. Schwartz testified that he expressed his concerns about Complainant's pregnancy to Khaghamni because Khaghamni and Complainant were contemporaries who were friendly with one another and Schwartz believed that somehow Khaghamni could "get through" to Complainant. He testified that Khaghamni misunderstood his intentions, and that his worries were about Complainant's performance, not her pregnancy. I find Schwartz' testimony in this regard not credible. It is difficult to believe that Schwartz would not have directly asked Khaghamni to talk to Complainant regarding her performance issues instead of commenting on her pregnancy if he believed that Khaghamni could "get through" to Complainant. I find Khaghamni's testimony that Schwartz complained about Complainant's pregnancy and absences far more credible.

29. Schwartz testified that he wrote the April 15 memorandum to Complainant because she had not worked on the lactate analyzer as her job required.

30. Schwartz testified that Complainant never wrote an outline regarding the work she intended to perform, as he had requested. Complainant stated that she left an outline on Schwartz' desk because he was out of the office for the remainder of the week.

31. Schwartz testified that when Complainant informed him of her pregnancy and told him that she could not lift, he was concerned, not because she was pregnant, but because of the "obvious implications for the job." He testified that he wondered if Complainant could not do the job, if it was a mistake to hire her, or if he should modify her job.

32. Schwartz testified that as part of the customer services aspect of her position, Complainant was required to lift the heavy glucose analyzers and carry them to customer sites. Schwartz felt that Complainant was unable to perform this aspect of her job because of her request that she would be relieved of performing any lifting. I do not credit this testimony. Complainant testified that most of her customer support responsibilities were conducted by telephone. She never brought a glucose analyzer to a customer site and was never asked to do so. I credit her

testimony.

33. Another part of Complainant's customer support function was to correspond by fax and telephone to European dealers. Schwartz testified that Respondent was critically dependent on these dealers who used the glucose analyzer. This function required a good customer support person who would be in close touch with these foreign dealers. Because of the time difference, Respondents' key dealers in Europe usually left work at 10:00 a.m. local time. According to Schwartz, dealers would fax their requests and he would retrieve them in the morning.

34. Schwartz testified that through April 15th, Complainant did not arrive regularly in the morning. He testified that he raised the issue with her several times, gently telling Complainant that the European dealers went home early and it was important to get back to them. Complainant did not respond. Schwartz testified that as a result of Complainant's failure to come to work on time, Respondents lost credibility with dealers. While I credit his testimony that the European dealers were important to his business, I do not credit that portion of his testimony that Complainant's tardiness adversely impacted the

business. The only documentary evidence Schwartz presented regarding a problem with a European dealer had to do with a back order and was unrelated to Complainant. Further, Schwartz did not explain how converting Complainant's employment from salaried to hourly would overcome this problem.

35. Schwartz testified if Respondents could develop a lactate reactor there was a major marketing opportunity overseas. He stated that Complainant was not performing this aspect of her job. According to Schwartz, he lost business and market opportunities, lost credibility with dealers, and lost valuable time that he needed to deal with other aspects of his business because of Complainant's erratic hours and failure to work on the lactate reactor. I do not credit this testimony.

36. Schwartz testified that he was aware that "something was going on with Complainant." He stated that he knew Complainant was "not feeling well", but was unaware of her physical problems. According to Schwartz, Complainant "wasn't the person she appeared to be when he hired her." Schwartz testified that between mid to late April he thought to himself, "She's obviously sick. What

the hell am I going to do about this?" I do not credit Schwartz' testimony that he did not know the reasons for Complainant's physical problems. I find that Schwartz was aware that Complainant was suffering from physical problems relating to her Crohn's disease and pregnancy because Complainant had informed him of these problems.

37. Schwartz testified that during their May 24th discussion he told Complainant that they could not continue with the full-time employment arrangement and would have to try to work out something else. He told her that the current situation was not good for her and not good for the baby. He suggested that she work on an hourly basis when she felt good and they would see how things worked out. Complainant asked for assurance that after having her baby she could return to a full-time position. Schwartz responded that he could not guarantee her a job. Schwartz testified that Complainant agreed to the new arrangement. He testified that that if she had not agreed, he would have terminated her employment at that meeting. I credit this testimony.

38. Schwartz testified that Monica Duh worked for him as a software engineer from 1989 to 1993. When Duh became

pregnant he allowed her to work flexible hours, threw her a baby shower, granted her a generous maternity leave, and permitted her to return to work flexible hours. I credit this testimony. I also credit Schwartz' testimony that he treated a disabled employee with respect.

39. Complainant, who is now divorced, testified that her discharge put a financial strain on her family and also put a strain on her marriage. The loss of her income required her former husband to work a lot of overtime, and they rarely saw one another. She stated that even with two incomes she and her husband had lived from paycheck to paycheck, and suddenly their income was cut by more than one-half. Complainant testified that she was put in the difficult position of borrowing money from her parents to make ends meet. I credit her testimony.

40. Complainant testified that it was difficult going through the stress of job loss while caring for her first child. She testified that she and her former husband had created a budget and had been saving for her maternity leave. Complainant stated that the birth of her child should have been a time to enjoy, but instead she and her husband were arguing about money and she had to send out

resumes. She also experienced mastitis and difficulty in nursing her newborn, requiring her to make several hospital visits to a lactation specialist. Complainant testified that while not the primary factor in her divorce, her termination played a role. She testified that looking back at that time period, it was a "big blur of not knowing, and questioning." I credit this testimony.

54. Complainant's salary at DRD and APEC was \$30,000.00 per year. I find that, but for her termination, Complainant would have earned \$25,000.00 in 1996. (\$30,000.00, minus eight-weeks maternity leave). Complainant earned \$13,846.00 in 1996. I find that Complainant's lost wages for 1996 are \$11,154.00 (\$25,000.00 - \$13,846.00). In 1997, Complainant earned \$7,420. I find that her lost wages for 1997 are \$22,580 (\$30,000-\$7,420). In 1998, Complainant earned \$20,106. I find that her lost wages for 1998 are \$9,894.00 (\$30,000-\$20,106). Complainant testified that in 1999 her salary was equivalent to what she earned at Respondent, therefore, I find that her period of lost wages ended in 1998 and I find that Complainant's total lost wages are \$43,629. (\$11,154 + \$22,580 + \$9,894)(Tape 4)

III. CONCLUSIONS OF LAW

A. Single Employer

Complainant presented evidence that Respondents DRD and APEC acted as a single employer. In the matter of Robinson v. FM and Melco, 17 MDLR 57(1997), the Commission adopted the four-part test utilized by the NLRB to determine whether two or more corporations are acting as a single employer. The following four criteria must be met: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; (4) common ownership or financial control. See Baptista v. Teamsters Local, 22 MDLR 358(2000); Radio & Television Broadcast Technicians Local 1264 v. Broadcast Services of Mobile. Inc., 380 U.S. 225 (1965). Other factors considered are combined accounting records, bank accounts, telephone lines, shared buildings and office spaces, lack of reimbursement for services rendered by one company for another. Fike v. Goldkist, Inc., 514 F 2d. 722 (1981). In this case the operations of DRD Diluter Corp. & APEC, Inc. clearly meet the four-part test adopted by the Commission. The two companies were totally interrelated, sharing offices, an office manager, and employees. Donald Schwartz was the president and had ownership interest in both

companies, which establishes common ownership and financial control. Schwartz required Complainant to sign employment contracts with both companies, presumably to provide the flexibility of assigning her work for either corporation. Further, there was evidence that employees would perform work for both companies, depending on the needs of the moment. The corporations shared office space and an office manager, and Complainant received paychecks from both corporations. Based on the evidence of record, I conclude that Complainant was employed by both DRD Diluter & APEC Corporations as a single employer.

B. Sex/Pregnancy 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 prove 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. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); 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 established a prima facie case of discrimination based on her pregnancy. Complainant has established that after informing Schwartz of her pregnancy, he made disparaging comments about her pregnancy and expressed concern about her ability to perform her job. After Complainant experienced complications of pregnancy that caused a brief absence, Schwartz changed the terms and conditions of Complainant's work from salaried to hourly and informed Complainant that he would not guarantee her employment following her maternity leave. After a subsequent, one-day absence, Schwartz terminated Complainant's employment.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000).

If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. Notwithstanding, Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. *Id.*; Abramian, 432 Mass at 117.

Respondents have articulated two nondiscriminatory reasons for changing the terms and conditions of Complainant's employment and subsequently terminating her employment, asserting that Complainant was frequently tardy and was not performing certain aspects of her job. Respondents have met their burden of production and

Complainant must show by a preponderance of the evidence that Respondents acted with discriminatory intent, motive or state of mind.

Evidence supports Complainant's contention that Respondents' articulated reasons were a pretext for discrimination and that she was terminated because of her pregnancy. Respondents' time records did not show a pattern of tardiness and Respondents produced no credible evidence to support their assertion that Complainant's purported tardiness resulted in lost business. Further, Respondents did not explain how converting Complainant from a salaried employee to an hourly employee would resolve the problem of tardiness. Finally, Respondents' claim that Complainant was converted to an hourly employee so that she could work whenever she was able is belied by the fact that the next time she called in sick, she was terminated. Therefore, I find that this reason was false and not the real reason for Respondents' action. With respect to Complainant's failure to perform certain aspects of her job, I conclude that Respondents' assertion in this respect is also a pretext for unlawful discrimination. The memorandum provided to Complainant by Schwartz indicates that Respondents had "gotten her sufficiently bogged down" in other aspects of her job so that she was unable to get to

measurement of lactate or diluter samples. The memorandum further indicates that Randy Rollins had been assigned to perform certain aspects of her job, which would presumably relieve her heavy workload. Further, I conclude that Schwartz's expressed opinions with respect to Complainant's pregnancy reveal an underlying bias that motivated his decision to terminate her employment. He was sufficiently upset about Complainant's pregnancy to make disparaging comments about it to co-workers, to wonder whether he had made a mistake in hiring Complainant in the first place and to refuse to hold open Complainant's job after her return from maternity leave. I believe that Schwartz' conduct toward Complainant was motivated by his resentment of Complainant's pregnancy. I conclude, in light of all of the above, that Respondents' actions were motivated by unlawful discriminatory animus and not by lawful considerations as they contend. Additionally, I believe that by converting Complainant to an hourly worker, Schwartz hoped to circumvent the Massachusetts maternity leave law, which protects only full-time workers.⁴

C. Individual Liability

⁴ M.G.L.c.149§105D requires an employer to restore a full-time employee to her previous or similar job following maternity leave.

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 Schwartz 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____, (2003)(Full Commission.

The evidence in this record establishes the requisite intent to discriminate required in order to find Donald Schwartz individually liable for unlawful discrimination. Schwartz was the Complainant's direct supervisor and was president and CEO of both DRD Diluter and APEC. He was the sole decision-maker with respect to establishing the terms and conditions of Complainant's employment and ultimately terminating her employment. The evidence firmly established Schwartz' intention to discriminate and to interfere with Complainant's rights under c. 151B. I

conclude that Donald Schwartz shall be held individually liable for unlawful discrimination in this matter.

Therefore, 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).

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 upon learning she had been terminated, that her

relationship with her husband suffered, and that she felt a period of her life that should have been joyful had instead become a period of anxiety and stress. I conclude that Complainant is entitled to an award of \$50,000.00 for the emotional distress she suffered.

Further, I conclude that Complainant is entitled to lost wages in the amount of \$43,629. (\$11,154 + \$22,580 + \$9,894) to compensate her for the pay she would have earned had she not been unlawfully terminated.

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 Respondents have engaged in a discriminatory practice, I conclude that a civil penalty in the amount of \$10,000.00 is warranted.

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 \$50,000 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 \$43,629 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.

(4) Respondents pay to the Commonwealth of Massachusetts the sum of \$10,000.00 as a civil penalty.

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 Commissioner. 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 9th DAY OF February, 2004.

JUDITH E. KAPLAN
Hearing Officer