

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JILL MERCURIO,
Complainant

v.

DOCKET NO. 98-BEM-2818

ATAMIAN VOLKSWAGEN, INC.,
ROBERT ATATMIAN, REED ATAMIAN,
& SHERYL ATAMIAN,
Respondents

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF THE HEARING OFFICER

Appearances: Frank Mondano, Esq. and Maria Luise, Esq. for Complainant
James L. Frederick, Esq. for Respondents

I. PROCEDURAL HISTORY

On September 2, 1998, Complainant, Jill Mercurio, filed a charge of sex discrimination against her former employers, Respondents, Atamian Volkswagen, Inc., Robert Atamian, Reed Atamian, and Sheryl Atamian alleging that she was terminated on the basis of her pregnancy in violation of G.L. c. 151B. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts to conciliate the matter proved unsuccessful. The case was certified for Public Hearing and a hearing was held before me on January 8, 9, and 14, 2002. Subsequent to the hearing, both parties submitted proposed findings of fact and conclusions of law. Having considered

the entire record in this matter, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. The Complainant, Jill Mercurio, a female, was employed at Atamian Volkswagen, Inc., from May of 1996 until March of 1998 when she was terminated. Complainant is a graduate of Boston University and has a Master's Degree in Business Administration from Suffolk University. Prior to her employment at Atamian Volkswagen, Complainant worked at Back Bay Jeep as a bookkeeper and as the Officer Manager, and subsequent to that, as the Controller at Hodgdon-Noyes Buick-Pontiac. Complainant is married and the mother of one child, Samantha who was born on September 10, 1998. (Mercurio testimony)

2. Respondent, Atamian Volkswagen, Inc., is a car dealership located in Tewksbury, Massachusetts and is an employer within the meaning of G.L. c. 151B.

3. Respondent, Reed Atamian (also known as Terry) was President of the corporation at the time of the hearing. In 1997 during Complainant's employment, he was the Director of Operations. In 1997, his father, Robert Atamian, was the President of the corporation. In 1997, Respondent Sheryl Atamian (also known as Sherry) was the Director of Human Resources and the wife of Reed Atamian. (Testimony of Reed Atamian)

4. In May of 1996 Complainant was interviewed by both Reed and Sheryl Atamian and was hired to be the Office Manager at Atamian Volkswagen. Reed Atamian was her supervisor. (Mercurio testimony)

5. Complainant's duties and responsibilities included overseeing the accounting office, performing day to day accounting procedures and preparing accurate financial statements. She also handled the cash and assisted with the floor plan audits for the banks with which the dealership had financing arrangements. Her responsibilities were similar to those she had performed at Hodgdon-Noyes Buick-Pontiac as a Controller. (Mercurio testimony)

6. Coreen (O'Neill) Powderly worked with Complainant at Respondents' dealership. Powderly was initially hired as the Finance Assistant in July of 1996. She would also assist in the accounting office when they were shorthanded and eventually, she worked solely in accounting and Complainant became her supervisor. (Mercurio and Powderly testimony)

7. Shirley (McCarter) McDaniel also worked with Complainant at Respondents' dealership. McDaniel began her employment at Atamian in 1997 and worked there for approximately one year. Initially, she was a cashier/receptionist but she eventually moved to the accounting office as a bookkeeper. Her responsibilities included handling payables, receivables and bank deposits.

8. In 1997 Respondent dealership employed 30-40 employees. At the hearing Reed Atamian testified that he worked four to five days per week, but at his deposition he described his job as part-time and stated he was at the dealership only three days per week. According to Powderly, Reed's hours depended on the time of year and the

number of hours he work varied. (Powderly testimony) I find that Reed Atamian did not work at the dealership full time during Complainant's tenure and was there at most three days a week.

9. Complainant testified that upon her arrival at the dealership, she discovered much of the finances in disarray and was confronted with a difficult challenge. Accounts had not been balanced for at least six months. She immediately attempted to rectify this situation and essentially spent a great deal of her time "putting out fires," while accomplishing the daily tasks that needed her attention. (Mercurio testimony)

10. One of Complainant's immediate responsibilities was to assist with the floor plan audits as Reed Atamian had impressed upon her the importance of correcting a deficiency with these audits. She also learned from Powderly that there had been problems with the most recent audits and that the dealership had been "out of trust." Powderly testified that prior to Complainant's arrival, the dealership had been "out of trust" with the bank and as a result, the bank was keeping a closer watch. (Powderly and Mercurio testimony).

11. Complainant explained how an audit is conducted and the significance of being "out of trust." She stated that the dealership did not own the vehicles in its possession, rather they are owned by a bank with which the dealership has contracted. When the manufacturer delivers a vehicle to the car dealer, the bank receives the invoice and pays the manufacturer. It is the responsibility of the dealership to pay off the bank when the vehicle is sold and it must do so within a circumscribed time period after the sale.

12. An audit consists of one or two auditors from the bank arriving at the dealership, unannounced, and physically locating the cars on the floor to determine if the bank has been timely paid for any cars that the dealer has sold. The dealership is considered “out of trust” if the bank has not received the monies for a vehicle for which the dealership has been paid.

13. During Complainant’s employment, the financial institutions serving the dealership were Bay Bank and Primus and she maintained a good working relationship with both entities. In order to address the “out of trust” issue Complainant first contacted the bank involved to inquire about the specific contract terms and to determine what was required of the dealership. She testified that the first audit in which she was involved was conducted by Bay Bank and she was informed that it was a “satisfactory audit” and a “great improvement” over previous audits. Bay Bank conducted audits every month thereafter and the results continued to be “satisfactory.” The sole exception involved one occasion when a fax transmittal was not received by the bank. (Mercurio testimony)

14. At some point in 1997, Reed Atamian contracted with Primus to be the dealership’s financing institution. Complainant testified that the initial first audit conducted by Primus was “unsatisfactory” because Primus has different contract terms and procedures than Bay Bank. However, once Complainant made the necessary adjustments, the audits again became “satisfactory.” After a satisfactory audit in December of 1997, Primus did not return to the dealership until March of 1998 because of the consecutive successful audits. (Mercurio and Powderly testimony)

15. At no time did Reed Atamian or anyone else suggest to Complainant that her performance in connection with the floor plan audits was deficient or had ever occasioned negative consequences to the dealership. Complainant never received any warning or reprimand of any kind and Atamian never questioned her performance. Complainant testified that Reed was satisfied because the bank never had to contact him once she began assisting with the audits. (Mercurio testimony)

16. In addition to rectifying the floor plan audits, Complainant uncovered other existing problems. She began balancing the reserve schedules from the different banks and uncovered a number of what she referred to as “phony” reserves which represented overstated finances in the amount of approximately \$70,000. Complainant explained that if a customer purchased a vehicle and financed it through the dealership, the dealership would, in turn, receive a certain amount of reserve money from the bank. Complainant immediately brought the issue of what she believed to be non-payment by the banks on certain deals to Reed Atamian’s attention because it significantly affected the net profit of the company. However when she contacted the bank on every deal that had not been paid she determined that a number of these deals involved leasing of cars, for which the banks do not give reserve money. She informed Atamian that the dealership schedule of these “phony” reserves amounted to approximately \$70,000 in overstated reserve. Complainant actively assisted the dealership’s insurance company with an ongoing effort to collect any actual monetary loss occasioned by this incorrect auditing practice.

17. Complainant also had regular contact and a good working relationship with the dealership’s accounting firm, which had no complaints about her performance. After

Complainant's termination from Respondent, the firm contacted her and assisted her in obtaining employment. (Mercurio testimony)

18. In her review of all the accounts payable, Complainant discovered charges on Nynex bills for non-existent phone lines. She reviewed the account with Nynex and obtained a credit of over \$5000 for the dealership. Complainant also applied for certain insurance rebates for the dealership and discovered it was behind in its submission of applications. Complainant testified that she would often advance her own personal monies to the business in order to facilitate sales. As an example she noted that a runner came by each morning to pick up registrations for payment at the Registry and since Reed Atamian was often not around she would give the runner her own personal check.

19. Complainant worked approximately 50-55 hours per week, including evenings and weekends in an effort to remedy the chaotic state of affairs at the dealership. Her workload was affected by Reed Atamian's elimination of employee overtime and the fact that they were short-handed. While there were initially three employees to assist Complainant in the Accounting Office, two months after Complainant was hired one of those employees left. Powderly confirmed that the office became short-handed about the time Complainant was hired and remained short-staffed by one or two employees during Complainant's tenure. Throughout her employment with Respondent, Complainant worked increased hours and her office continued to be understaffed. She discussed with Reed Atamian the need for someone to handle the payroll and at one point she interviewed a candidate for the position. However no one was hired for the position because Atamian claimed that there were insufficient resources.

20. Complainant testified that she had no problems with her fellow employees and she had a good working relationship with each of the Respondents, Reed Atamian, Sheryl Atamian and Robert Atamian. She described her relationship with the Respondents as “excellent” and said they treated her “like family.” Powderly also observed that Complainant got along well with everyone, even Reed Atamian who she testified was not an easy person to work for. She stated that he had mood swings and was short tempered. In her words, “He was a hard person. If he did not like your answer, he would storm off.”

21. Respondents never reprimanded Complainant nor did they criticize her work. The dealership utilized an Employee Warning Notice form that was placed in an employee’s file in a disciplinary situation. Complainant never received any written or verbal warnings prior to her termination and she does not recall anything of a negative nature in her personnel file. (Testimony of Mercurio)

22. During the fall of 1997, Complainant’s title changed from Office Manager to Business Manager. At this point, her salary increased from \$1000 per week to \$1200 per week but her duties remained the same. Respondent continued to provide her with a company car as it had from the beginning, even while it discontinued this perk for other employees.

23. On January 14, 1998, Complainant’s doctor confirmed that she was pregnant and she shared the news with her co-workers Powderly and McDaniel and informed Sheryl Atamian. Complainant testified that following her announcement, Reed Atamian’s attitude toward her changed almost immediately. That very afternoon he came into the Accounting Office and threw the mail on her desk. Thereafter he ceased speaking

to Complainant directly, and began leaving her “post-it” notes. He also shortly began criticizing Complainant’s work and spoke to her only to reprimand her. She recalled one occasion when she was reproached because some of the salespeople did not get their commission checks on time. The delay had occurred because Powderly had been out sick and was unable to get the commissions completed in time for payroll. Despite the fact that Complainant had received instructions from the General Manager, Robert Herschman, as to how to handle the situation, Reed blamed Complainant for the problem. (Mercurio testimony)

24. Powderly also testified that once Complainant announced her pregnancy, Reed Atamian became more moody and short and began to “snap” at Complainant and resorted to communicating with her by “Post-it” notes. She observed that he was easily annoyed, would storm out of the office if he did not like Complainant’s answer to his question, and would sometimes just throw the mail on Complainant’s desk. (Powderly testimony)

25. On January 27, 1998, at a weekly managers meeting, Reed Atamian announced that he was hiring a Controller. The managers were told that this person would oversee the office and Complainant would not be in charge of the accounting functions any longer. It was Complainant’s understanding that the new Controller would basically be performing the same duties that she had been performing on a daily basis. Complainant testified that she was asked to move out of her office. (Mercurio testimony) Powderly testified that once this announcement was made, she sensed that Complainant would not be long for the place. (Powderly testimony)

26. Upon the arrival of the new Controller, John Maroney, Reed Atamian had no further contact with Complainant. She testified that for the most part Maroney took over her responsibilities and she retained the functions that Maroney had not yet begun to tackle. She characterized her relationship with Maroney as a good working relationship and she assisted him when he had questions. To her knowledge, Maroney had no complaints about her.

27. In March of 1998, Complainant was again admonished by Reed Atamian because he claimed not to have knowledge of the "Huertas deal," a car deal which fell through. Complainant explained that she had informed both Atamian and Maroney of this deal. I credit her testimony that she informed her superiors of this matter.

28. From January to March of 1998 Complainant's working environment was very stressful. She described it as "awful." Reed and Sheryl Atamian did not speak to her and Maroney only addressed her when he had a question. Complainant had no conversation other than with her co-workers. She felt there was no one for her to complain to about this situation because Sheryl Atamian, was the Director of Human Resources.

29. Complainant's colleague, Shirley McDaniel also noted that once Complainant announced her pregnancy, Complainant's relationship with Reed Atamian changed for the worse. McDaniel testified that although she had seen him yelling, "the only time she ever saw Reed Atamian become someone else is when Jill announced that she was pregnant." (McDaniel testimony) She also noted that his behavior toward Complainant was very nasty. She observed him yelling at her and throwing the mail. McDaniel became

very upset by what she witnessed because she had a young son, and identified with how upset Complainant must have felt.

30. McDaniel testified that she believed that Complainant was the Controller prior to Maroney's arrival, because she had heard Sheryl Atamian refer to her by that title. She also recalled that once Maroney arrived, Complainant specifically directed her to report any problems to him. She was specifically directed to report any type of cash receipt problem or discrepancy to Maroney. Oftentimes, however, when she would approach Maroney with a question or issue, he would direct her back to Complainant. (McDaniel testimony)

31. Atamian testified that he had begun the search for a Controller prior to any knowledge of Complainant's pregnancy. He alleged that in the last quarter of 1997 he'd had a discussion with his accountant and as a result of that conversation, it came to his attention that the office was "somewhat slack" and that the dealership "needed some firming up." He came to believe that Complainant should not be in charge of the business office, but should be second in command. He noted that she had been working weekends and he wanted to get her help. I do not credit much of his testimony about this, as it was vague, short on specifics and generally not credible.

32. Atamian further testified that he contacted a search firm, Automotive Management Consultants, and requested assistance in hiring a Controller. He received resumes, and contacted Maroney, who he eventually hired as Controller. A facsimile of correspondence from this search firm to Sheryl Atamian indicating that Reed Atamian contacted the firm in early December was admitted into evidence. (Ex. R-6), However, this correspondence is dated October 29, 1998 and the facsimile header indicates that it

was faxed on January 6, 1995. Furthermore, the facsimile is missing a first page and the header indicates that it is page two. The letter also indicates that Reed Atamian interviewed Maroney “shortly after initial contact.” Maroney’s placement agreement which was discussed at the interview is dated January 6, 1998 and his start date was February 9, 1998. (Exhibits C-4, 5, R-6) For the reasons mentioned above I do not find this document to be a reliable indicator of when Respondents first contacted a head hunter or when Maroney was first introduced to Respondent.

33. Maroney testified that he heard of the position at Atamian through a head hunter agency, Automotive Management Consultants. He contacted them some time in December, 1997 and spoke to Reed Atamian some time in January, 1998. He interviewed with Reed Atamian and an agreement regarding his employment was reduced to writing by a document dated January 26, 1998. (Maroney testimony; Ex. C-4).

34. Maroney began his employment as the Controller on February 9, 1998. His duties were to oversee the financial operations of the company and to interact with all the managers of the company. It was his responsibility to ensure that bills were paid, that cash transactions were appropriately recorded and to prepare financial statements. When Maroney began his employment Complainant was performing most of these tasks. She had been overseeing the operations of the office, preparing the financial statements and performing all the tasks attendant to the functions of an accounting office. (Maroney testimony)

35. Reed Atamian explained that Complainant would continue as the office manager but that this position would be subordinate to the Controller. Complainant testified that during the first few weeks she assisted Maroney in learning the operation

and did whatever he asked and always acted in a professional manner, however her relationship with him was understandably guarded. (Maroney/ Mercurio testimony)

36. Maroney testified that upon his arrival at Respondent, he conducted a review of the condition of the dealership in an attempt to familiarize himself with the operation. He discovered that the cash balance was inadequate and the dealership could not pay off the trade-ins. This was a situation which could result in the dealership being considered “out of trust.” Maroney spoke to Complainant about this issue and inquired how much cash was needed in the operating account. She responded that \$250,000 to \$300,000 would be sufficient and brought the matter to the attention of Reed Atamian who agreed to put the cash into the dealership.

37. After Maroney assumed the position of Controller, Reed Atamian claimed he became aware of the fact that shortages and overages in the daily accounts were commonplace. He testified that he overheard a conversation between two employees wherein one of them stated, “we’re short again,” and he instructed Maroney to look into the matter. Reed Atamian claimed in deposition testimony that Maroney told him that money was being stolen from the dealership.

38. Maroney testified that shortages and overages were not one of his immediate concerns but about one month after he started McDaniel, who was responsible for the deposits, informed him about cash shortages and as a result he conducted a general ledger inquiry and discovered that there were a fair number of overages and shortages. He did not recall if he or McDaniel brought this to Reed Atamian’s attention. However, he never told Reed that money was being stolen.

39. According to Complainant, on February 12, 1998 Reed Atamian scheduled a manager's meeting because he was upset about the number of shortages and overages. He claimed that Complainant was responsible and she explained to him that she had instructed McDaniel to report any shortages to Maroney. He then spoke to McDaniel and claimed that Complainant was lying because McDaniel would not acknowledge this conversation. McDaniel testified that Complainant specifically told her to report shortages to Maroney and that she had complied by doing so. She also testified that this is what she told Atamian when he questioned her. I credit the testimony of Complainant and McDaniel on this issue. Moreover, there was testimony that although overages and shortages at the end of a day were commonplace, the amounts were relatively minor and often the accounts corrected themselves on the following day.

40. Complainant's employment was terminated on March 13, 1998 about four weeks after Maroney assumed the position of Controller. Complainant was informed during a meeting with Reed and Sheryl Atamian that she was being terminated because of her failure to keep track of vacation time, for failing to inform them about a certain car deal that fell through, and for the dealership being in a position that could have resulted in it being found to be "out of trust" with the bank. Complainant was very upset to hear this and began to cry during the meeting. She was asked to leave the premises immediately and she sat in the customer lobby with someone from the service department and waited for her husband to come and pick her up while Sheryl and Reed Atamian left for the day.

41. Reed Atamian testified that he had generated an outline for the termination meeting with Complainant which noted the numerous problems with her performance.

Atamian testified about the contents of the outline that he intended to discuss with Complainant, but he never got through the list because she became too upset and began crying. The problems included : (1) “no controls-money stolen-for how long? And how much?” He testified that he felt controls were slack and that those handling the money were not properly keeping track of it. (2) “unable to support management team;” Atamian testified that this referred to the fact that Complainant did not support Maroney in the new position. (3) “not considerate of the owner” He stated that this referred to the fact that his father, Robert Atamian, had mentioned to him that he was not happy with Complainant. (4) “never helpful to sales- no support.” Atamian claimed that this was the impression the Sales Manager had given him and that Complainant was “giving work to the Sales Manager that a girl in the office could do.” Atamian also testified that Complainant was unable to plug in forecasts to the Daily Operations Controls and that she never kept track of “vacation and personal days.” He also stated that there were issues with posting errors and that Complainant could not properly use the computer. (Atamian testimony; Exhibit R-3)

42. Reed Atamian also testified that he was not aware that there was a problem at the dealership involving cash; he was not aware of a situation where Complainant had reported a one-time large cash discrepancy to the Tewksbury police and assisted them in an investigation; he was not aware of the situation involving phony reserves; he was not aware that when Complainant was first hired the dealership was in danger of being out of trust; he did not recall that floor plan audits had been less than satisfactory, but had improved after Complainant was hired; and he was not aware that there was a period of time when the staff was reduced and overtime eliminated. This testimony was just not

believable. Atamian appeared to be ignorant of so many matters of importance to a family run dealership that he would have had to be virtually absent and uninterested in the business to have so little understanding of the operation. I found his testimony to be unfocused, unconvincing and I do not believe he coherently expressed any reason for firing Complainant. This is bolstered by the fact that Complainant had never received any warnings or discipline and was never informed the dealership was displeased with or found problems with her performance.

43. Powderly testified that after Complainant was terminated she eventually became the Office Manager. She had begun working for the dealership at a salary of \$32,000 per year and was earning \$48,000 when she left. Reed Atamian testified that he subsequently hired an Office Manager at the same rate of pay Complainant had received but he could not recall this person's name.

44. Complainant's daughter was born on September 10, 1998. Complainant had every intention of returning to work at the dealership after her child was born had she not been terminated. Complainant was earning \$1200.00 per week at the time she was terminated from Respondent and she had the use of a company car. Subsequent to her termination Complainant made COBRA payments in the amount of \$180 per month for three months to continue her health insurance. She received unemployment compensation for a few months and then began working part time as a consultant for Woburn Foreign Motors. She earned \$600.00 per week with no benefits.

45. In October of 1998 Complainant secured full time employment with Woburn Foreign Motors. Her rate of pay was \$700.00 per week with no benefits. In February of 1999 she received the use of a company car. Complainant submitted into

evidence her tax returns for the years 1997, 1998 and 1999 and she testified extensively about her lost benefits. (Ex.C-1; Mercurio testimony) These calculations were detailed in a chalk that aided her testimony. Based on all of the evidence submitted, Complainant's lost wages for the year 1998 were \$46,874.15. Her lost wages for 1999 were \$15, 551.00. In the year 2000 Complainant earned \$60,000 at Woburn Foreign Motors and left there in June, 2001 for a better opportunity. She is not claiming lost wages for these years. Complainant also testified that her lost benefits totaled \$8,837.70 and her out of pocket medical expenses totaled \$30.00. The total of lost wages, benefits and expenses incurred by Complainant is \$71,292.85.

46. Complainant was very upset at her termination from Respondent. She also had endured several months of very bad treatment by her employer leading up to the termination. She testified that her termination affected her home life, marriage and relationship with her husband. She described being irritable and moody and would snap at her husband. She also became less trusting of others and her self-esteem suffered and she felt a lot of anxiety about bringing a baby into the world without a job.

47. Complainant sought mental health counseling from the Wilmington Family Counseling. She recalled having seven or eight visits with a counselor. She testified that these sessions did not help her resolve the stress she was experiencing so she was referred to a psychiatrist who she saw two or three times. Although the psychiatrist prescribed medication for her, Complainant decided not to take it. I found Complainant's testimony about her emotional distress to be compelling and truthful.

III. CONCLUSIONS OF LAW

Massachusetts General Laws, chapter 151B prohibits discrimination on the basis of gender in the workplace. The law is clear that discrimination on account of pregnancy is gender discrimination because pregnancy is a sex-linked characteristic. 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).

The complainant may prove a claim of discrimination 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). In the first instance Complainant bears the burden of establishing a prima facie case of unlawful discrimination. She may do so by demonstrating that (1) she is a member of a class protected by G.L. c. 151B; (2) she was performing her job at an acceptable level; (3) she was terminated from her employment or otherwise subject to an adverse employment action, and (4) her employer sought to fill her position by hiring another individual with qualifications similar to hers. Abramian, supra., 432 Mass. at 116; Wynn & Wynn v. MCAD, 431 Mass.655, 665 (2000).

The Complainant in this case has established a prima facie case of discrimination on account of her gender/pregnancy. Complainant had been performing her job at an acceptable level with no complaints, warnings or discipline for a period of almost two years. Complainant was hired into a situation with mismanaged finances and many problems that needed to be addressed and corrected. During this time she managed to

make significant progress on a number of serious financial problems that existed when she was hired and she did so with a smaller staff and no compensation for overtime. Complainant worked long hours and was committed to her job. She also got along well with management and her co-workers. The evidence suggests that Complainant's competency was not called into question until after she announced her pregnancy. Once Complainant announced that she was pregnant, the management of the dealership, particularly Reed Atamian began to treat her coldly, stopped speaking to her and began criticizing her work. The dramatic change in his attitude toward Complainant was noted by a number of her co-workers who corroborated her testimony and were shocked and saddened by this treatment of Complainant. Within a month after revealing her pregnancy, Respondent announced that a new financial person was being hired who would supervise the accounting department and within two months Complainant had been terminated. Complainant was replaced by a male, John Maroney, who undertook most of the functions that she had performed. Despite Respondent's claim that Maroney did not replace Complainant, he did assume all of her duties and responsibilities. While Respondent would have me believe that the search for a Controller began before Complainant announced her pregnancy, I did not find this assertion to be credible and the document supporting this assertion was not reliable. Even if it were true and Respondent sought to bring in a more senior manager to supervise Complainant and others in the accounting operation, this does not justify Complainant's termination shortly thereafter.

At the second stage of analysis the burden of production shifts to Respondent to articulate a legitimate non-discriminatory reason for its treatment of Complainant. The articulated reason must be supported by some credible evidence to show that it was the

real reason. Wheelock College, 371 Mass. at 138; Lewis v. Area II Home Care, 397 Mass. 761 (1986). Respondents contend that Complainant was terminated for cause and not because of her pregnancy. Complainant testified that at her termination interview she was informed that she was being terminated because of her failure to keep track of vacation time, failure to disclose problems with a car deal that fell through and for the dealership being in a position that could have resulted in it being “out of trust” with the bank. Reed Atamian testified that he terminated Complainant because of her failure to report cash shortages. He also generated notes with a number of other purported reasons for her termination, such as poor controls and accounting for cash, not being considerate of the owners and not supporting the new Controller. Atamian stated that he was unable to discuss all these issues with Complainant at her termination interview because she became very upset and started to cry.

Once a non-discriminatory reason has been articulated, Complainant must prove by a preponderance of the evidence that Respondents “acted with discriminatory intent, motive or state of mind.” Lipchitz v. Raytheon Company, 434 Mass. 493 (2001). She may do so by demonstrating that the Respondents articulated reason is a pretext for discrimination. The Complainant’s ultimate burden of persuasion on the issue of pretext may be satisfied by either direct or circumstantial evidence. In order to show pretext, Complainant must prove that the asserted lawful reason was not the real reason for the decision, but masked a discriminatory reason. Lipchitz, supra.

The evidence adduced at the hearing strongly contradicts the Respondent’s claim that Complainant was terminated for poor performance. The evidence suggests that the articulated reasons are not only a pretext, but a total fabrication. Reed Atamian testified

that he learned about the cash situation when he overheard “a couple of girls” in the office talking about it. He claimed to have then approached Maroney about the issue of cash shortages and was informed that there were some issues. However, Maroney testified that this issue was brought to his attention by McDaniel and not Atamian. Reed Atamian then blamed Complainant for not reporting the problem to him. Atamian testified that he spoke to McDaniel who denied receiving instructions from Complainant to report such issue to Maroney. Both Maroney and McDaniel testified to the contrary that Complainant had in fact handled the matter properly by going through the appropriate chain of command. Reed Atamian also testified that he was unaware of any problems with the accounting operations or the finances of the business and had no idea if Complainant took steps to address the issues of concern regarding bank floor plan audits. The evidence supports Complainant’s claim that the floor plan audits were satisfactory after she began working on them and that the dealership was not out of trust. I found Reed Atamian’s testimony about these other purported reasons for Complainant’s termination to be vague, confusing, unconvincing, and entirely lacking in credibility. There was no credible evidence to support any of the reasons outlined in his notes or set forth in his testimony. Complainant had never been counseled or disciplined about any of these alleged deficiencies or performance problems. Therefore, I conclude that these reasons were a pretext for unlawful gender/pregnancy discrimination in violation of G.L. c. 151B.

Claims against the Individual Respondents

Section 4(1) of G.L. c. 151B prohibits an “employer” from engaging in various forms of discrimination. However sections 4(5) and 4(4A) prohibit individuals from

aiding and abetting discrimination and from threatening, coercing or interfering with an employee's rights under the statute. Complainant asserts that Reed Atamian, Sheryl Atamian and Robert Atamian are all individually liable for discrimination because of their actions or failure to act in some manner to prevent the discriminatory acts. Based on all the evidence before me, I conclude that both Reed and Sheryl are individually liable for discrimination based on their deliberate hostile treatment of Complainant after she announced her pregnancy and their intentional acts depriving Complainant of her right to remain working despite her pregnancy and lying about the reasons for her termination. I conclude that they interfered with her rights protected under G.L. c. 151B.

However, there is no evidence to indicate that Robert Atamian took any sort of an active or deliberate role in any of the conduct alleged to be discriminatory. I do not believe that his failure to act in preventing Complainant's termination constitutes aiding and abetting, absent any other conduct or intervention on his behalf and thus I decline to find him individually liable.

IV. DAMAGES

General Laws c. 151B s. 5, authorizes the Commission to award damages for back pay and to make the Complainant whole. Upon a finding of discrimination, Complainant is entitled to a remedy which compensates her for the damages she sustained as a direct and proximate result of the discriminatory conduct. This includes damages for emotional distress. College-Town Division of Interco v. MCAD, 400 Mass. 156, 169 (1987). A finding of discrimination, by itself permits an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824

(1997), quoting Buckley Nursing Home, Inc. v. MCAD, 20 Mass App. Ct. 172, 182 (1985).

The Complainant produced evidence of lost wages for the years 1998 and 1999. Complainant also met her burden to mitigate her damages by seeking other work after her termination. She also lost 401K benefits and paid medical premiums and expenses as a direct result of her termination. Complainant is entitled to lost wages for 1998 in the amount of \$46, 874.15 and for 1999 in the amount of \$15, 551. 00. She is entitled to lost benefits, including the use of a company car in the amount of \$8,837.70, and out of pocket medical expenses in the amount of \$30.00. This amounts to a total of \$71, 292. 85.

Complainant testified credibly about the emotional distress she suffered upon losing her job, about her loss of self esteem and the embarrassment and humiliation of being treated so badly after announcing her pregnancy. Her superiors essentially stopped talking to her and treated her with hostility. She was then blamed for numerous problems all of which she had helped to fix while working long hours with less staff. She suffered through the embarrassment and humiliation of being replaced, having to give up her office, being alienated and exiled by her superiors, being chastised for omissions where she had acted appropriately, and ultimately being terminated unceremoniously without warning. Complainant described her stress and how it impacted her family life. She felt compelled to seek treatment from mental health professionals because of her depression and anxiety. She was concerned about bringing a child into the world with no job at a time when she should have been feeling joyful anticipation. Despite these feelings, she forged ahead and found part-time work as a contractor throughout her pregnancy. I

conclude that Complainant suffered significant emotional distress as a result of Respondent's discriminatory treatment and that she is entitled to an award of damages in the amount of \$100,000.00.

V. ORDER

Based on all of the above, Respondents Atamian Ford, Reed Atamian and Sheryl Atamian are hereby ordered to:

(1) Pay to Complainant, Jill Mercurio, the sum of \$71, 292.85 in damages for lost wages, benefits and medical expenses 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 the matter is reduced to a court order and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this decision.

(2) Pay to Complainant, Jill Mercurio, the sum of \$100, 000.00 in damages for emotional distress 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 the matter is reduced to a court order and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this decision.

The Complaint against Robert Atamian is hereby dismissed.

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

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days

of receipt of this Order and a Petition for Review with the Full Commission within thirty (30) days of receipt of this Order.

So Ordered this 11th day of February, 2003.

Eugenia M. Guastaferr
Hearing Officer