

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION AND
KATHRYN S. DAMON,
Complainants

v.

DOCKET NO. 95-BEM-2594

INCRE, Inc. and
JOHN ZUMAN,
Respondents

Appearances: John Davis, Esquire for Kathryn S. Damon
Sean M. Beagan, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about October 19, 1996, Kathryn S. Damon filed a complaint with this Commission charging Respondents with discrimination on the basis of handicap, in violation of M.G.L. c. 151B, section 4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on November 29, 2001. 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.

II. FINDINGS OF FACT

1. Complainant, Kathryn S. Damon, was diagnosed with scoliosis, or curvature of the spine in 1981 at age 10. As a teenager, Complainant wore a back brace for this condition for two years from 1984 to 1986. She also underwent physical therapy for many years. Complainant's condition limited her ability to lift heavy items. Until 1995, Complainant saw her physician every three years for this condition.

2. Respondent, INCRE, is a small, non-profit, educational research institute, with the goal to improve the quality of education for linguistic minority children both in the U.S. and abroad. INCRE has only 6 employees. Dr. John Zuman has been the Executive Director of INCRE since it was founded in 1990. About one half of INCRE's projects are international, and entirely funded by grants and contracts.

3. Dr. Nancy Barra, who is married to Zuman, is INCRE's president. While Zuman spent about 50% of his time traveling internationally, Barra remained in the office and was responsible for INCRE'S day-to-day management.

4. In January of 1995, INCRE placed an advertisement in a newspaper for the position of Administrative Assistant. The advertisement did not indicate that the ability to speak Spanish was a requirement of the position. However, Respondent states that this qualification was discussed verbally with Complainant and her resume represented that she was proficient in Spanish. (Ex. C-1)

5. Complainant graduated from college with a bachelor's degree in history in 1993 and was working as an administrative assistant for a temporary agency when she saw Respondent's job advertisement. Complainant testified that she applied for the job because she was interested in working for a non-profit corporation.

6. Dr. Zuman interviewed Complainant for the administrative assistant position and offered her the job. Complainant's first six months of employment were probationary, and during that time either party could terminate the employment relationship without further obligation by one week written notice. (Ex. C-2)

7. Complainant began working on February 1, 1995. Her job duties included secretarial support, report

preparation, data processing, word processing, desktop publishing, answering the telephone and other administrative tasks. During the first six weeks of Complainant's employment, Respondent had no complaints about her performance. Complainant testified that during this time there were only two occasions when she needed to communicate in Spanish.

8. In mid-March, 1995, approximately six weeks into her employment with Respondent Complainant visited her physician for her tri-annual check-up. At this visit Complainant's physician informed her that the scoliosis had worsened and he recommended a surgical procedure called spinal fusion, in which metal rods would be implanted permanently in Complainant's back to correct the curvature. Her physician estimated that the recovery period following surgery would be about three months. Complainant did not have health insurance immediately prior to working for Respondent. Respondent provided 100% individual coverage for Complainant through Harvard Community Health Plan.

9. Subsequent to her doctor's visit, Complainant informed Dr. Barra that she would be required to undergo back surgery and that recuperation would necessitate her

being out of work for up to three months. According to Complainant, Barra expressed her sympathy. Zuman wrote Complainant a letter stating, in part, that Respondents supported her and would hold her job open for up to three months during her convalescence. Respondent also agreed to continue to provide full medical coverage for Complainant despite the fact that her leave would be unpaid, and Zuman wished her well. (Ex. C-4)

10. Complainant testified that on March 28, 1995 she faxed a letter from INCRE's office in Arlington to Zuman, who was traveling. The letter stated in part that Complainant was concerned about Zuman's "reference to a search for a replacement" for her and wished to confirm that Respondent intended to hold her job open for three months. (Ex. C-5) Zuman denied ever receiving the March 28, 1995 letter. However, since his letter of March 23, 1995, does not mention searching for a "replacement", it is apparent that Complainant had some conversation with Zuman or Barra wherein this was mentioned. Apparently Complainant was sufficiently concerned about this to underscore in writing her need to know if Respondent intended to replace her while she was on leave.

11. Complainant underwent spinal fusion surgery on April 27, 1995. Zuman sent a get-well card and flowers to her in the hospital. According to Complainant she wrote a thank-you note stating that she intended to return to work on June 19, 1995, a period of less than two months. Complainant testified that except for the get-well card and flowers, Respondents never communicated with her during her leave.

12. Complainant testified that she phoned INCRE's office on June 12, 1995 and left a message on the answering machine that she planned to return to work the following week. She received no response to this message. She telephoned Respondent again on June 19, 1995 the day before she intended to return to work at INCRE.

13. On June 20, 1995 Complainant showed up at INCRE's office to resume working, spoke with Barra and presented her with a letter from her orthopedic surgeon, John B. Emans, dated June 14, 1995. The letter stated in part:

"Kathryn underwent anterior spine fusion for severe lumbar scoliosis on 27 April 1995. She has had a protracted post-operative course. She now is immobilized in a body brace. She may safely return to work but cannot successfully sit or stand for prolonged periods. She needs to be able to get up and move around and perhaps once an hour needs to lie down for about 15 minutes. It is quite

safe for her to return to work in so far as being at work will not be dangerous to her or to her spine fusion but she simply cannot tolerate full time sitting yet. Part time work with periodic periods [sic] of being able to lie down would be ideal for her." (Ex. C-6)

14. Complainant testified that Barra gave her some reading material related to a project and suggested she read the materials while lying on a couch in INCRE's reception area. After about an hour, Barra returned to the reception area and told Complainant that it appeared unprofessional for her to be lying on the couch, expressed concern about what people would think if they saw her there and stated she did not think this was a good idea. Complainant offered to move to an area of the office out of view of visitors, but Barra instructed her to go home saying Zuman would call her. According to Zuman, Barra believed the purpose of Complainant's visit on this day was social and Barra did not anticipate her commencing work. I do not find this notion credible in light of Complainant's messages to Respondent regarding her anticipated return to work.

15. Complainant testified that a couple of days later, Zuman called her and said that he was sorry to hear the bad news that she wouldn't be able to work for six

months. Complainant told him that she did not know what he was talking about. According to Complainant, Zuman replied that clearly she was not yet able to work and he was not going to pay her to lie around the office. I credit Complainant's version of this conversation.

16. Complainant's employment with Respondent was terminated by a letter from Zuman dated June 27, 1995. The letter stated no reason for the termination, however it did reference continuation of Complainant's medical benefits through July of 1995.

17. Complainant testified that she was surprised and very upset to be terminated. She testified that had she known she would be fired, she would have sought other work during her period of recuperation.

18. Complainant's annual salary at Incre was \$19,500. She testified that following her termination she was without work for three months. She was subsequently employed for six weeks in a temporary position at Consensus Building Institute. From November 1995 through June 1996, Complainant lived in Burlington, Vermont and worked at the Burlington YMCA. Complainant's income tax returns and W-2

forms for the years 1995-1997 indicate that her actual earnings for 1995 were \$7,889.47; however this did not include the 3 months she did not work for Incre, January and the 2 months she was on leave. The maximum she could have earned working for INCRE for 9 months in 1995 was \$14,625. Complainant's earnings in 1996 were \$11,117. In 1997 she worked for three months as a nanny and was employed at Upper Story Books and the Globe Corner Book Store. Her earnings for 1997 were \$11,688.99, however this was for a 9 month period only because in September 1997 she underwent a second operation on her back, and was unable to work for the three months following her surgery. Had Complainant worked for 12 months at the same rate she would have earned \$15,576. In January 1998, Complainant began graduate school at Wheelock College, and essentially removed herself from the full-time job market.

19. John Zuman testified that when Complainant was hired Respondents were seeking someone with good computer skills who was fluent in Spanish and who could communicate with Spanish-speaking clients. According to Zuman, when Complainant was hired Respondent had some important projects in El Salvador and subsequent to hiring Complainant INCRE had obtained a grant to develop a bi-

lingual curriculum. Zuman came to the conclusion that while Complainant had claimed to speak Spanish well, her Spanish was poor and although her word processing skills were acceptable, her desktop computer skills were poor.

20. Zuman testified that shortly after Complainant went on leave, a woman named Effie Silva sought employment at INCRE. According to Zuman, Silva was initially hired as a temporary replacement for Complainant at a lower rate of pay than Complainant. However, it became clear that she possessed skills superior to Complainant's, was fluent in Spanish and possessed a creative energy. Motivated by a wish to retain Silva on a permanent basis, Zuman testified that he called Complainant in May, during her leave to inquire about the progress of her recovery. According to Zuman, Complainant told him that things were going badly and she did not know when she would be returning to work and based on this conversation, Respondent hired Silva to replace her on a permanent basis. Complainant denied that this conversation occurred. Zuman claimed that during his conversation with Complainant, he asked her if she preferred a week of severance pay or an extension of medical coverage for one month. According to Zuman, Complainant chose to extend her medical coverage for one

month. I do not credit Zuman's testimony that this conversation occurred.

21. Zuman testified that he did not actually terminate Complainant's employment at the time of the telephone call because he did not want to upset her or put pressure on her, while she was recuperating. I did not find this testimony to be credible and believe it was fabricated to explain why Complainant showed up for work on June 20, 1995. Moreover, the mere mention of severance pay would have put Complainant on notice that she was being let go, and would not explain why she presented herself for work with a doctor's note one month later.

22. Zuman testified that Complainant did not communicate with INCRE prior to her returning to work. I do not credit this testimony. He stated that he was in El Salvador when Complainant returned to the office in June and that it was a total surprise to him that Complainant had come back to work. He testified that when he returned from his trip he called Complainant to notify her that she was terminated from her employment with INCRE based on her performance.

III. CONCLUSIONS OF LAW

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

Massachusetts General Laws c. 151B, §1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment which substantially limits one or more of the individual's major life activities. Complainant has established that she is a handicapped person within the meaning of M.G.L. c. 151B because at the time of her termination, she had a record of a back impairment which had existed since childhood, had progressively worsened and

which ultimately required her to have two operations as an adult. While there was no evidence that her scoliosis limited a major life activity at the time of her termination, there is evidence that Respondent perceived Complainant as impaired given the view of Drs. Barra and Zuman that she was not able to return to the job despite her physician's recommendation to the contrary. See Talbert Trading Co. v. MCAD, 37 Mass App. Ct. 56 (1994)

Complainant has also established that she was otherwise capable of performing the duties of the position, with the reasonable accommodation of easing back into the job part-time one month earlier than she had anticipated with periods of rest. This was manifested by her physician's note that she could return to work with the restriction that she periodically lie down for a short duration. While the note refers to part-time work, Complainant was actually returning to work a month sooner than anticipated. Complainant asserts that at the time Zuman fired her, he stated his belief that she was not sufficiently recuperated to return to work, and that Respondent was not going to pay to have her lie around.

Respondent argued that Complainant was terminated solely for performance reasons and because Silva was better suited to the position and had performed more to

Respondent's satisfaction. Once Respondent articulates a legitimate non-discriminatory reason for its employment action, the Complainant must prove that Respondent acted with a discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). Complainant may satisfy this element of proof by demonstrating that regardless of whether her replacement was more qualified than she was, this was not the real reason for her termination. While it may be true that Silva was more qualified than the Complainant and performed more to Respondent's satisfaction, I do not believe that this was the real reason for Complainant's termination, as evidenced by the fact that Respondent terminated her stating that she was medically unable to perform the job, contrary to her physician's assertions.

Zuman was named as an individual Respondent from the outset and is alleged to have been personally responsible for Complainant's unlawful termination. He was on notice of the allegations made against him personally. See Beaupre v. Smith & Associates, at el. 50 Mass. App. Ct. 480 (2000). Zuman made unwarranted assumptions about Complainant's fitness to perform the job and stated outright that he was not going to pay her to lie around. Zuman also refused to explore with Complainant the possibility of a reasonable

accommodation. Mazeikus v. Northwest Airlines, 22 MDLR 63,69 (2000). I find that Zuman intentionally denied Complainant's request to return to work with a reasonable accommodation and lied about the reasons for her termination. I conclude that Zuman thus interfered with Complainant's rights protected under G.L. c. 151B and is therefore individually liable for discrimination pursuant to s.4(4A) of G.L. c. 151B. See Bendel v. Lemax, Inc. & Lee, 22 MDLR 259, (2000).

Thus, having concluded Complainant's termination was a violation of G.L. c. 151B, I find that both Respondents INCRE and Zuman are liable for discrimination.

IV. REMEDY

Massachusetts General Laws c. 151B s. 5 permits the Commission to award damages and such other relief as will make a Complainant whole. This includes damages for lost wages and emotional distress. A finding of discrimination, alone, permits an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824, quoting Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 182 (1985).

Expert testimony is not necessary to prove emotional distress damages. College-Town div. Of Interco c. MCAD, 400 Mass. 156 at 169 (1987).

The Complainant in this case, is entitled to damages for lost wages. Complainant made efforts to mitigate her damages by seeking other employment after her termination. She lost wages in the amount of \$6,725 for the year 1995 as a result of being terminated from her job with Respondent. Complainant's annual salary at INCRE was \$19,500. She did not begin working until February and was unavailable for the two months she was on medical leave. Thus the maximum amount she could have earned at INCRE in 1995 was \$14,625. If her actual earnings for that year of \$7,900 are subtracted from her available potential earnings, her lost wages are \$6,725. Complainant's lost wages for 1996 were \$8,383 (19,500 minus earnings of \$11,117); her lost wages for 1997 were \$3,924. Complainant earned \$11,688.99 in 1997, but would have earned \$15,576 had she not been unable to work for three months because of additional back surgery. (19,500 minus \$15,576 = \$3,924) Beginning in 1998 Complainant made the decision to attend graduate school and essentially removed herself from the workplace. I conclude that she is entitled to be compensated for lost wages in the total amount of \$19,032.

Complainant is also entitled to a minimal award of damages for emotional distress. While I believe that Complainant was upset and surprised by her termination, I am not persuaded that she suffered any great upheaval or serious distress. She had only worked at INCRE for two months prior to leaving for surgery and she did not have a great deal invested in this job which was one of her first jobs out of college. I find that she is entitled to an award of \$5,000 to compensate her for any distress she may have suffered.

V. ORDER

Respondents are hereby Ordered to:

(1) Pay to Complainant the sum of \$19,032 in damages for lost wages within 60 days of receipt of this decision with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made.

(2) Pay to the Complainant the sum of \$5,000 in damages for emotional distress within 60 days of receipt of this decision, with interest thereon from the date the Complaint was filed until such time as payment is made.

(3) The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If any

Respondent fails to comply with the terms of this Order
Within the time period allotted, Complainant shall
notify the Clerk of the Commission.

This constitutes the final order of the hearing officer.
Any party aggrieved by this order may file a Notice of
Appeal to the Full Commission within ten days of receipt of
this order and a Petition for Review to the Full Commission
within thirty days of receipt of this order.

SO ORDERED, this 9th day of January, 2003 .

EUGENIA M. GUASTAFERRI,
Hearing Officer