

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & KRISTEN DIANGELO,
Complainants

v.

DOCKET NO. 05-SEM-02133

JOSEPH PANDISCIO, JR. &
JOSEPH'S BISTRO & PUB, INC.,
Respondents

Appearances:

Kimberley M. Arroyo, Esquire for Kristen DiAngelo
Charles E. Vander Linden, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 9, 2005, Kristen DiAngelo filed a complaint with this Commission charging Joseph Pandiscio, Jr. and Joseph's Bistro & Pub, Inc., with discrimination on the basis of gender. Specifically, Complainant charged that Respondent terminated her employment on account of her pregnancy, in violation of M.G.L.c.151B§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 July 30 and 31, 2007 and August 14, 2007 in Fitchburg, Massachusetts. 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. Respondent, Joseph's Bistro & Pub ("the restaurant") is located in Westminster, Massachusetts and is owned and operated by Respondent Joseph Pandiscio, Jr. (Mr. Pandiscio") and his son Joseph Pandiscio III ("Joey" or "Joey Pandiscio"). Mr. Pandiscio has operated the restaurant for nearly 30 years.

2. Complainant Kristen DiAngelo resides in Westminster, Massachusetts with her husband Christopher, a member of the United States Air Force, and their children, ages 9, 7 and 20 months. Complainant is currently employed as a sales clerk at Wine and Roses in Westminster, MA.

3. Joseph's Bistro and Pub consists of a dining room and a coffee shop as well as a gift shop located near the front of the restaurant carrying knick-knacks and other items. The restaurant is open seven days a week, for breakfast, lunch and dinner and employs approximately 40 people, including bartenders, kitchen staff, servers, hostesses and office staff. In the spring 2005, the restaurant closed at 9:00 p.m. on weekdays and at 10:00 p.m. on weekends.

4. Complainant was hired by Respondents as a waitress in August 2003. Her usual work schedule was Tuesday, Thursday and Friday nights and Sundays during the day. While working as a waitress, Complainant was supervised by Respondent's front-of-the-house manager, Shellie Bachelor. In February 2004, Complainant was promoted to the position of hostess, at which time her shifts changed. In the hostess position, Complainant's usual work schedule was Monday, Wednesday and Friday nights from

5:00 p.m. until closing. She also worked a shift as a bartender from December 2004 through April 2005. The hostess supervisor was Bridged Selig.

5. Mr. Pandiscio's wife, Carol Pandiscio, has managed the gift shop for 20 years. She has no other duties at the restaurant although on occasion she has worked as hostess or server as needed. Ms. Pandiscio reviewed the shop's sales receipts daily and frequently discussed issues related to the shop with Shellie Batchelor. However, the hostess on duty was responsible for the daily operation of the gift shop and was expected to be in the gift shop whenever she was not dealing with customers.

6. In 2005, Mr. Pandiscio was spending less time in the restaurant itself and more time in the office, which is located in a separate building behind the restaurant. His goal was to turn the operation of the restaurant entirely over to his son in the future. Mr. and Ms. Pandiscio spent from mid-January to late March 2005 in Florida.

7. Joey Pandiscio, age 32, is part-owner and General Manager of Joe's Bistro. He has worked at the restaurant his entire life and has been there full-time since graduating from college in 1999. Joey Pandiscio is in charge of the restaurant in his father's absence. He also manages the bar staff.

8. Shellie Jo Bachelor has worked for Respondent for ten years and has been the "front of the house" manager for the past seven years. In this position she directly supervises the servers, bussers and the hostess supervisor. She has the authority to hire, fire, schedule and discipline front of the house staff. In the spring 2005, in addition to her managerial duties, Batchelor worked as a hostess Monday, Tuesdays, Thursdays and Fridays from 9:00 a.m. to 5:00 p.m. She also performed office work and on occasion, set

up and ran functions on weekends. On Fridays, Bachelor's shift overlapped with Selig's by an hour and on Friday afternoons they would discuss matters relative to the restaurant.

9. Bridged Selig worked for Respondent from July 2001 to May 2005. She began as a server, was promoted to hostess in 2003 and in 2004 was promoted to hostess supervisor. As the supervisor, in addition to hostess duties, Selig was responsible for the hiring, firing, scheduling and disciplining of hostesses. Selig also worked as a waitress. Selig and Complainant have been friends since Complainant began working at the restaurant and they continue to socialize with one another, as do their children.

10. Julie Pepper worked as a hostess for Respondents from October, 2004 to May 2005. Pepper worked weekends, Wednesdays, and occasionally Mondays.

11. Rosamery Aizpurua worked as a server for Respondent from 2001 to 2005. In spring 2005 she worked Monday and Friday nights and Saturday mornings.

12. Jamie Lynch worked for Respondent as both waitress and hostess from December 2004 to April 2005. Lynch became pregnant in January 2005.

13. Complainant's duties as a hostess were to greet and seat customers, conduct cash transactions, facilitate take-out orders, and perform closing duties such as preparing end-of-shift reports, counting money and locking it in the safe, setting the alarm and locking up the restaurant. The hostess on duty was also responsible for gift shop sales and cleaning duties related to the gift shop. A posted list detailed the duties to be performed nightly by the hostess. On Friday nights, the hostess on duty was scheduled to clean the ice cream cooler.

14. Complainant testified that in addition to hostessing, she occasionally covered shifts for servers, and from December 2004 through mid-April 2005, she filled in as a

bartender on Saturdays, pending the hiring of a permanent bartender. Complainant did not work the same shift as Shellie Batchelor, and only saw Batchelor on Fridays when their shifts overlapped by several minutes.

15. It was a common practice for hostesses and servers to cover one another's shifts and switching of shifts was done with Bachelor's knowledge and approval.

16. Mr. Pandiscio, Joey Pandiscio and Shellie Batchelor met over lunch in the dining room on a regular basis to discuss work-related matters.

17. In mid-March 2005, Complainant learned she was pregnant and informed Joey Pandiscio of her pregnancy sometime in April 2005 while Mr. and Ms. Pandiscio were in Florida.

18. Complainant experienced nausea and weight loss during the first trimester of her pregnancy, as she had with previous pregnancies.¹ Sandra Fleming M.D., an obstetrician/gynecologist, examined Complainant on May 16, 2005 and found that Complainant was medically cleared to work. Dr. Fleming testified that Complainant had mild nausea early in her pregnancy for which Dr. Fleming's office prescribed an anti-nausea medication.

19. Complainant testified that she occasionally sat down briefly at work during her pregnancy and was never instructed not to do so. On one occasion, Shellie Batchelor told her to place a stool at the hostess station during her next shift so that she could rest. Complainant stated that Bridged Selig, Mr. Pandiscio and Joey Pandiscio never criticized her work performance and she never left a shift uncovered. I credit her testimony.

¹ During her first pregnancy Complainant was employed as a sales assistant and worked until shortly before delivering her child. During her second pregnancy she was a server at Hartwell House restaurant in Lexington and worked until one week before delivering her baby.

20. Complainant testified that on Friday, April 15, 2005, while picking up her paycheck, she saw Mr. Pandiscio, who had recently returned from Florida. She asked him if he had heard she was pregnant. He replied, "Yes," and then turned away. She saw Mr. Pandiscio very few times between April 15, 2005 and her termination. Complainant testified that during her last week of employment, neither Mr. Pandiscio nor Joey criticized her job performance.

21. Mr. Pandiscio stated that Complainant's job performance began to decline in the fall of 2004 when she stopped working weekends. He stated that despite instructing Bridged Selig to schedule Complainant on weekends and directly confronting Complainant about her schedule, she failed to change her schedule. Mr. Pandiscio claimed that he urged Batchelor to terminate Complainant's employment in October or November of 2004. Mr. Pandiscio stated that he wanted Complainant to work weekends because she was experienced but she refused to do so.

22. I do not credit Mr. Pandiscio's testimony that Complainant refused to work weekends in fall of 2004. His testimony is inconsistent with Respondents' documents previously submitted to the Commission, stating that he did not learn until April 2005 that Complainant was taking Saturdays and Sundays off. Moreover, his testimony is inconsistent with that of Shellie Batchelor, who testified that Complainant's shifts began to change from weekends to weekdays in the spring of 2005. It is also inconsistent with the credible testimony of Complainant that her hours changed when she became a hostess.

23. I also do not credit the testimony of Mr. Pandiscio that Complainant's performance otherwise began to decline in the fall of October 2004. His testimony in this

regard is inconsistent with Respondents' position statement, Mr. Pandiscio's sworn affidavit, and Respondents' statement of fact and law which state that "[Complainant's] performance suffered a severe decline in the spring of 2005." (Exh. C-4). In addition, Mr. Pandiscio wrote positive comments on two of Complainant's pay stubs in the fall of 2004. On her pay stub for the period November 21, 2004 through December 12, 2004, he wrote: "thanks for wearing more than one hat." On her pay stub for the period September 26, 2004 to October 9, 2004, he wrote: "Nice job doing the party we appreciate your setting everything up for Sunday. Thank you. Joe, Carol and Joey." (Exh. C-3) Mr. Pandiscio explained the inconsistencies in these documents by saying that he "doesn't know the procedure," presumably referring to the Commission's procedures.

24. Mr. Pandiscio and Shellie Batchelor testified that Complainant frequently took smoke breaks in back of the restaurant, contrary to Mr. Pandiscio's instructions to hostesses to take their breaks in front in order to see customers entering and exiting the restaurant.

25. Bridged Selig stated that hostesses smoked outside the front door for about a week after Mr. Pandiscio's instruction, but resumed smoking out back so that customers could not observe them smoking. Selig stated that she continued to smoke out back without comment from Mr. Pandiscio. Complainant stated that in 2005 she was told not to smoke out back and complied with that instruction, but that she later resumed smoking out back with the knowledge of supervisors and managers, while a server watched the front door for customers. Jamie Lynch stated that hostesses were permitted to smoke out back.

26. While I credit the testimony of Mr. Pandiscio and Batchelor that for a period of time they instructed hostesses to take their breaks in front of the restaurant, I find that this instruction was routinely flouted by numerous employees and that Complainant was singled out in this regard as an after the fact justification for terminating her employment. Moreover, when asked why she did not terminate Complainant's employment in the fall of 2004 because of the smoking issue, Batchelor responded that it was "just one thing" and she wanted to keep employees working.

27. Mr. Pandiscio testified that Complainant's co-workers complained about her not assisting with take-out orders and not helping servers clear tables. He stated that he addressed these issues with Bridged Selig and Shellie Batchelor. Complainant stated that clearing tables was the job of the servers and not the hostess. Complainant denied not helping with take-out orders and I credit her testimony.

28. Mr. Pandiscio stated that while in Florida from January to April 2005, he regularly spoke to Joey and to Shellie Batchelor and inquired about Complainant's performance. He claimed he advised Joey to terminate Complainant's employment in late January or February 2005. Joey Pandiscio also testified that his father inquired about Complainant's performance while in Florida. I do not credit their testimony. Joey acknowledged that during this time, Complainant was working extra shifts as a bartender when he was shorthanded.

29. Batchelor testified that when she arrived at work on Thursday mornings, she observed that Complainant had not cleaned and swept the gift shop the previous evening, leaving Batchelor to perform these tasks. She stated that she spoke to Selig about this issue on many occasions.

30. Shellie Batchelor stated that in 2005, staff complained that Complainant would sit behind a large cooler out of sight of customers, that she watched television at the end of her shift instead of helping to bus tables and that on occasion, Complainant would remain in the bathroom for up to fifteen minutes at a time.

31. Shellie Batchelor testified that Complainant failed to adequately clean the ice cream coolers on Friday evenings, despite her having informed Selig about Complainant's failure to perform this task. Batchelor acknowledged that she had the authority to terminate Complainant's employment but never did so.

32. Ms. Pandiscio testified that she had "feedback that the ice cream cooler was not being cleaned," but did not know first hand whether this was because Complainant failed to clean the ice cream cooler on Fridays or because it was used by other employees on weekends. She acknowledged that she never instructed Batchelor or Selig to discipline Complainant. Complainant testified that she thought that it was the responsibility of Batchelor or the servers to clean the ice cream case and that she was never reprimanded for failing to do so. I do not credit Complainant's testimony that it was not her responsibility to clean the ice cream case. However I find that Batchelor exaggerated the extent of Complainant's neglect of this and other cleaning tasks.

33. Ms. Pandiscio testified that in April 2005, she observed Complainant more than once, seated in an area out of sight of restaurant patrons. She stated that she was informed that Complainant was not performing her cleaning duties relative to the gift shop and expressed concern to Batchelor about these matters. I do not credit this testimony.

34. Ms. Pandiscio acknowledged that she never spoke with Complainant directly regarding her nausea or pregnancy-related illness. In her affidavit she stated that Complainant told her she was not feeling well and had difficulty working in the gift shop.

35. Mr. Pandiscio testified that on Friday April 15, 2005, he was present at the restaurant most of the day. He stated he was present at the hostess station that afternoon when Complainant came in prior to her shift to get her pay check. He testified that Complainant looked “a wreck” and told him she was sick and felt terrible. Mr. Pandiscio stated that he instructed Complainant to find coverage for her shift and go home. However, Complainant responded that she would rather be at work than at home with her kids and did not leave. I credit his testimony that Complainant told him she did not feel well; however I do not credit his testimony that she told him she would rather be at work than at home with her kids.

36. Mr. Pandiscio testified that when he returned to the restaurant from the office at 6:00 p.m., he observed Complainant curled up in a chair at the waitress station. He stated that Complainant “did not do a damn thing all night.” I do not credit his testimony.

37. Mr. Pandiscio testified that between 7:00 and 7:30 p.m. that evening his wife and her brother, who was visiting from Florida, joined him for dinner in the dining room. He observed that several tables had not been cleared and was ashamed of the dining room’s appearance. He asked Rosamery Aizpurua, the server, why the restaurant was a mess and she responded that it had been a busy evening and he commented to Complainant about the condition of the dining room as well. I credit his testimony.

38. Mr. Pandiscio stated that his wife and brother left the restaurant about 9:00 p.m. and he stayed to close. He approached Complainant, who was by then sitting on the counter at the coffee shop, watching television and told her to go home, but she said she would wait until the dishwasher mopped the floor. Mr. Pandiscio stated that this incident was the “straw that broke the camel’s back” and that on that evening he decided to terminate Complainant’s employment. I credit his testimony.

39. Carol Pandiscio stated that after Mr. Pandiscio spoke to Complainant that evening, she cleaned up a little. However, the Pandiscios remained concerned about Complainant’s work ethic and considered whether to terminate her employment. Ms. Pandiscio claimed that she was not aware of Complainant’s pregnancy at the time and she was not involved in the decision to terminate Complainant’s employment. I do not credit her testimony that she was unaware of Complainant’s pregnancy or that they questioned Complainant’s work ethic. I otherwise credit her testimony

40. Complainant testified that the evening the Pandiscios and family members dined at the restaurant in April 2005 was a Monday because there was only one server, Rosamery Aizpurua, on duty. Complainant and Aizpurua both stated that the restaurant was unusually busy and acknowledged that some tables had not been cleared. Complainant stated that she did not clear away dishes because that was the server’s job. She testified that the Pandiscios did not sit down to dinner until around 9:00 p.m. and remained at their table until well after closing. Complainant stated that she only sat down after the restaurant closed in order to complete her end of night paperwork. While I credit Complainant’s testimony that the restaurant was busy, I find that it was part of a

hostess' side work to assist servers with tables if they had time and that Complainant did not do so on this evening.

41. On May 2, 2005 Mr. Pandiscio met with Joey and Shellie Batchelor. They were joined by Bridged Selig, who had just returned from a week's vacation. At the meeting, Pandiscio told the others that he wanted to terminate Complainant's employment because he had "observed things he did not like," and he directed Selig to "get rid of her." Selig protested but agreed to call Complainant after Mr. Pandiscio told Selig that if she did not terminate Complainant, he would do it.

42. Mr. Pandiscio testified that Selig left the meeting to call Complainant and returned, stating that Complainant "was not happy" and asked if she could get severance pay. Pandiscio responded that she could not, and Selig returned again to ask if he would put Complainant on a medical leave so that she could collect unemployment compensation. He stated that he told Selig; "Do what you gotta do. I don't want to hurt anybody." Mr. Pandiscio denied that he first suggested a leave of absence and stated that it was Complainant's idea.

43. Mr. Pandiscio testified Selig approached him a couple of days after the meeting and told him that she needed something in writing for the unemployment office and he told her to "take care of it."

44. Mr. Pandiscio stated that he subsequently completed a form from the Department of Unemployment Assistance on Complainant's behalf. He wrote on the form that complaint, "was on medical leave she couldn't perform her duties we felt her baby was at risk." (Exh. C-1) He stated that he completed the form in accordance with the "negotiations" with Complainant, via Bridged Selig, and that he wrote what he

thought Complainant needed in order to collect benefits. I do not credit his testimony that he wrote these words as the result of discussions with Complainant.

45. Mr. Pandiscio's testimony about Complainant's poor performance is inconsistent with his position statement in which he stated: "In light of my observations in April 2005 and her apparent weak condition, I advised her that she was being placed on a medical leave of absence. I also advised her that I was concerned for her health and safety. Her pale and weakened condition appeared to be sufficiently serious that it might pose a risk to her health to continue to work as a hostess." (Exh. C-4) Mr. Pandiscio testified that contrary to the position statement he did not discuss the matter directly with Complainant and stated that: "These are not my words," but "lawyer's rhetoric."

46. Shellie Batchelor testified that no one raised the leave of absence issue at the May 2 meeting; and that the issue of a leave was raised by Selig the following day.

47. Bridged Selig testified that at the May 2 meeting, Joseph Pandiscio instructed her to tell Complainant to take a leave of absence because she was not doing her job. She stated that Mr. Pandiscio seemed primarily concerned that Complainant was sitting down on the job. Selig reluctantly called Complainant and told her that that Mr. Pandiscio wanted her to take a leave of absence because he was concerned about her health. Selig testified that at the meeting, she told Mr. Pandiscio that she was shocked and did not think Complainant wanted a leave of absence. Mr. Pandiscio stated that if she did not talk to Complainant, he would.

48. Selig testified that after informing Complainant that she was off the schedule and that Mr. Pandiscio wanted her to take a leave, Complainant called her back in order to clarify whether she was being placed on a leave of absence or a medical leave. Selig

relayed the message to Joey who told Selig that he or his father would get back to Complainant.

49. The following day Selig told Joey Pandiscio that she was very upset and disagreed with Respondents' decision to remove Complainant from the schedule. Selig resigned her position at the end of May 2005. I credit her testimony.

50. Complainant testified that on May 2, 2005 Bridged Selig called her at home and informed her that she was calling at Mr. Pandiscio's direction, that he had removed her name from the work schedule and that he wanted her to take a leave of absence because of her poor health. Complainant became upset at this news and responded that although she did not feel her best, she was still coming to work and performing her job. Complainant was so upset she had to get off the phone. I credit her testimony.

51. Complainant testified that after a couple of hours, she called Selig back and asked her if Mr. Pandiscio was placing her on medical leave and whether he would offer any type of compensation or unemployment. Selig advised Complainant to discuss the issue directly with Mr. Pandiscio or Joey Pandiscio because she did not want to be involved. Complainant testified that Selig did not tell her that her termination was for performance reasons. I credit her testimony.

52. Joey Pandiscio was involved in the decision to remove Complainant from the schedule although he never spoke to her directly regarding her termination. He stated that Respondent never placed Complainant on a leave of absence. I do not credit his testimony

53. Complainant testified that on May 4, she called the restaurant and spoke with hostess Julie Pepper, and asked to speak with Joseph Pandiscio about her termination.

After placing her on hold, Pepper returned to the phone and told her Mr. Pandiscio refused to speak to her.

54. Julie Pepper corroborated Complainant's testimony about the telephone call which she believed took place on May 2nd or 3rd. Pepper testified when she told Mr. Pandiscio that Complainant was calling, he responded that she could wait until he had finished eating. Soon thereafter, Pepper returned to Mr. Pandiscio, who told her he would not speak to Complainant. He told Pepper he did not want Complainant to work there because she was too moody because of her pregnancy, and stated he "didn't want to deal with that crap." I credit her testimony.

55. Pepper testified that she was stunned by Mr. Pandiscio's response, which she relayed to Complainant. Pepper testified that she quit "then and there," telling Mr. Pandiscio that she could not abide working in a place where a person would be fired because of her pregnancy. I credit her testimony. Mr. Pandiscio denied telling Julie Pepper that Complainant was "moody" and stated that the only time he spoke with Pepper was when she called him and said, "I hear you're going to fire me so I'm going to quit." I do not credit his testimony. ²

56. After her termination, Complainant called Respondents and requested a copy of her personnel file, which she picked up from Batchelor on Friday, May 6, 2005. The file contained an unsigned document dated April 27, 2005, entitled "Internal Memo," that stated, "Kristen DiAngelo has been put on medical leave. We feel for the safety of her and her unborn child. She has been offered her hostess position back when he (sic)

² Mr. Pandiscio, Joey Pandiscio and Shellie Batchelor all testified that they had planned to terminate Julie Pepper because of her habit of reading a book instead of working, but before they could do so, Pepper voluntarily quit her job. I do not credit their testimony that they planned to terminate Pepper.

doctor decides it is safe for her to return to work at her full potential in the restaurant environment.” (Exh. J-7) Complainant had never seen this document before May 6, 2005.

57. Joey Pandiscio, Shellie Batchelor and Mr. Pandiscio all denied authoring the memorandum and all testified that they did not know how it came into existence. I conclude that it is likely that Mr. Pandiscio directed Respondent’s former bookkeeper, Monique to draft the memorandum.

58. Batchelor testified that Respondents’ former bookkeeper Monique copied Complainant’s personnel file and left it on Batchelor’s desk to give it to Complainant on Friday, May 6, 2005. Batchelor testified that she did not see the Internal Memorandum until a month before the public hearing and found the document on the hard drive of the computer used by Monique about two weeks before the public hearing.

59. A document entitled Employer Statement, dated May 27, 2005 and sent Complainant by the Division of Employment Assistance (“DUA”) regarding Complainant’s claim for benefits, states that Respondent “co-owner Joe Pandiscio,” told DUA that Complainant was “put on a leave of absence due to her medical condition, she’s pregnant. She was observed not being able to do her work. She was often seen sitting in a chair. To avoid a possible liability we placed her on a leave, she did not request one. We did not want her child to be at risk.” (Exh. C-1) Mr. Pandiscio stated that he did not provide this information to the DUA and that it must have been Joey who spoke with the DUA.

60. Jamie Lynch testified that on one occasion, after learning of her pregnancy in January 2005, Batchelor gave her permission to sit in a chair at the hostess stand and

another time, Joey Pandiscio observed her sitting down and asked if she was okay. I credit her testimony.

61. Lynch testified that head chef Vincent DiLeo insinuated that she should have an abortion. A co-worker reported DiLeo's comments to Batchelor, who addressed the issue with DiLeo and assured Lynch that his inappropriate comments had been addressed. Thereafter, a cook named Dave asked Lynch if he could watch her breastfeed her child. Lynch never reported Dave's remarks to a manager although Batchelor learned of these remarks from a co-worker as well and testified that she addressed the issue with Dave. I credit Lynch's and Batchelor's testimony regarding these incidents.

62. Lynch testified that she called out of work once in February 2005 and provided a doctor's note explaining her absence. She stated that when she called out of work a second time in April 2005 because her car broke down and she couldn't get to work, her employment was terminated. Batchelor denied ever giving Lynch permission to sit in the hostess station and stated that Lynch was terminated for "no call-no show" on two consecutive Sundays. I do not credit Batchelor's testimony.

63. Deborah Rinquist testified that she worked for Respondent from 1982 to 1989 and again from 1996 to 1999. During her first period of employment she had two children and returned to work after each birth.

64. Batchelor was pregnant twice during her employment at Respondent. In 2003 she miscarried at three months into her pregnancy and in 2005 miscarried at 7 ½ months into her pregnancy. Batchelor has supervised pregnant waitresses and hostesses over the years and stated that many of them worked up until their delivery with no problems. I credit her testimony.

65. Complainant received unemployment compensation totaling \$3,000.00 over a six month period ending in October 2005. She began working at her current sales position at Wine and Roses in January 2006. In 2005 Complainant earned wages of \$3,449.15. Thus her total income in 2005 was \$6,449.15. According to Mr. Pandiscio, Complainant's earnings in 2004 were approximately \$8,000.00.

66. Complainant testified that after her employment was terminated she felt horrible, destroyed and lost all self-confidence. She had been very happy about having a third child and enjoyed working for Respondents because she had a lot of friends at work. She stated that she did not understand why Respondents terminated her employment because she did her job. She tried to contact them to ask the reason for her termination. She stated that her previous employers had treated her adversely when she was pregnant and the Respondents' conduct was difficult to deal with. I credit her testimony.

67. Complainant testified that her termination affected her home life and "threw her into another world." She stated that she found it difficult to perform her daily activities, such as house cleaning and cooking. Losing her job made her question whether she should have had a third child. Since filing a complaint she suffers from heightened anxiety which still consumes her. She found it very overwhelming driving to the MCAD Springfield office for conferences. She stress and anxiety consume her to this day. Complainant testified that she felt horrible and torn up inside. I credit her testimony.

68. Complainant suffered from anxiety in 2001 and 2002, when her husband was employed overseas. At that time she was prescribed a low dose of an anti-anxiety medication. When her husband returned, her anxiety was alleviated. She resumed taking

a higher dose of the anti-anxiety medication after the birth of her third child.

Complainant did not seek counseling, but spoke to her primary care physician who monitored her medications and she also talked with her husband about her anxiety and distress. I credit her testimony.

69. Complainant testified that she had relied on a steady paycheck, plus tips and extra shifts and that the loss of her job caused great financial hardship. She and her husband had to take equity out of their home in order to survive financially. She stated that the job was convenient to her home and enabled her to leave for work at 4:45 when her husband arrived home from work. She had difficulty finding another job as there were no other restaurants in town.

70. Complainant testified that although she recalled applying for jobs between May 2, 2005 and January 2006, she did not remember any of the employers or the dates she applied. She obtained her current job in January 2006. I credit his testimony.

71. Complainant's husband, Christopher DiAngelo stated that after her termination, Complainant was "extremely emotional" and frequently called him on the telephone. He stated that Complainant suffered from increased migraine headaches, was unable to do housework and sometimes could not even get out of bed. He stated that Complainant "went into a shell," and stated that when matters related to her MCAD claim arose it was a tremendous burden on her. He stated that they have had a "roller coaster relationship since her termination." I credit his testimony.

72. Mr. DiAngelo stated that Complainant's outlook toward her pregnancy changed at first because of their financial situation. The couple relied on two incomes

and took a “huge hit financially” when Complainant lost her job and struggled to pay bills. I credit his testimony.

III. CONCLUSIONS OF LAW

A. 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)

An employer may not require a pregnant employee to stop working because of its concern about safety to the fetus. In striking down an employer’s “fetal protection policy”, the Supreme Court stated that “an employer may take into account only the woman’s ability to get her job done... The decision to become pregnant or to work while being either pregnant or capable of becoming pregnant is reserved for each individual woman to make for herself.” International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Johnson Controls, Inc., 499 U.S. at 204, 205-6, 111 S. Ct. at 1206, 1207(1991). An employer may not, therefore, use a

woman's pregnancy...as a reason for an adverse job action, such as refusing to hire or promote a woman or for discharging her, laying her off, failing to reinstate her or restricting her duties. An employer may not, moreover, force a pregnant woman to take leave prior to giving birth if she is willing to continue working.” Massachusetts Commission Against Discrimination, Maternity Leave Guidelines, VI. Sex Discrimination Issues Arising Under M.G.L. c. 151B.

In the instant case, Complainant presented direct evidence of sex discrimination on the basis of pregnancy. Complainant was terminated shortly after announcing her pregnancy and Respondents refused to discuss or consider the possibility of her continued employment. A memorandum contained in her personnel file, as well as notices from the Division of Unemployment constitute strong direct evidence that Respondents were motivated by impermissible considerations of Complainant’s pregnancy.³

In addition to the direct evidence, there was strong circumstantial evidence of a pervasive attitude of sexism within the restaurant; witness Julie Pepper testified credibly that Mr. Pandiscio commented disparagingly that Complainant's pregnancy made her unacceptably moody and finally, Jamie Lynch testified credibly that the head chef and a cook made offensive comments to her related to her pregnancy, after which her employment was terminated.

Respondents denied that Complainant’s pregnancy was a factor in their decision to terminate her employment and stated that Complainant was terminated because of unacceptable performance. There was testimony critical of Complainant's performance as a hostess, including that she did not perform her “side work” and was observed sitting

³ There was voluminous, conflicting testimony as to whether Complainant or Mr. Pandiscio first suggested a “leave of absence.” I need not resolve this issue, as it was undisputed that Mr. Pandiscio instructed Selig to involuntarily terminate Complainant’s employment, despite Complainant’s desire to continue working.

at the end of her shift. Respondents have thus met their burden of articulating a legitimate, nondiscriminatory reason for their actions. While I conclude that Respondents' articulated reasons regarding performance were greatly exaggerated, there is some credible evidence that Respondents had some concerns about Complainant's performance for a short time prior to her termination in May 2005. In particular, I conclude that Mr. Pandiscio was upset on one specific evening in April when Complainant was sitting down on the job and did not assist the waitress on duty to clear tables.

While the decision to terminate Complainant's employment may have resulted in part from concerns about her performance, I find that Complainant's pregnancy was the primary reason she was terminated. I conclude that Respondents had "mixed-motives" for terminating Complainant's employment. Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainant carries her initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" even without the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299.

Respondents have failed to persuade me that they would have terminated Complainant's employment had she not been pregnant. While her performance may have

suffered somewhat because of her pregnancy-related nausea and fatigue, I conclude that considerations of Complainant's pregnancy were the primary reason for terminating her employment. Thus I conclude that Respondents' actions were motivated primarily by unlawful discriminatory animus and not by lawful considerations as it contends.

B. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B§4(4A) if they “interfere with a Complainant’s right to be free from discrimination in the workplace. In order to prove interference with a protected right, Complainant must show that Mr. Pandiscio 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 62, 63 (2003).

The evidence in this record establishes the requisite intent to discriminate required in order to find Mr. Pandiscio individually liable for unlawful discrimination. Mr. Pandiscio was the ultimate decision-maker with respect to terminating Complainant’s employment. The evidence firmly established Mr. Pandiscio’s intention to discriminate and to interfere with Complainant’s rights under c. 151B. I conclude that Mr. Pandiscio is individually liable for unlawful discrimination in this matter.

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).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, at al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress, “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” id. At 576.

Based on Complainant’s credible testimony, I am persuaded that she suffered emotional distress as a result of Respondents’ unlawful conduct. Complainant testified credibly that she was upset about losing a job she enjoyed and the resulting financial hardship which required her to borrow against the equity in her home. She suffered from

migraine headaches and anxiety, and there were times that she could not get out of bed, and was unable to perform household tasks. Complainant testified that a period of her life that should have been joyful had instead become a period of anxiety and stress.

Complainant was prescribed anti-anxiety medications by her primary care physician, but Complainant continued to feel anxiety in connection with events related to her claim of discrimination. Thus I conclude that Complainant's termination was the source of emotional distress that continued for some time. I conclude that that Complainant is entitled to an award of \$35,000.00 for the emotional distress she suffered as a result of Respondents' unlawful conduct.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Respondent in this case elicited testimony from Complainant the testimony that she could not recall the names of specific employers where she sought work or the dates. Respondents did not establish the other facts necessary to meet its burden of proving failure to mitigate. Respondents must prove that: a) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment; (b) the improperly discharged employee unreasonably made no attempt to apply for any such job and (c) it was reasonably likely that the former employee would obtain one of these comparable jobs. Black v. School Committee of Malden, 369 Mass. 657, 662 (1976). Respondents made no attempt at the hearing to

produce any evidence of the existence of comparable jobs during the relevant time period or that it was reasonably likely that Complainant would have obtained one of these comparable jobs. Thus I conclude that Respondents have failed to meet their burden of proof to establish Complainant's failure to mitigate damages.

Complainant's earnings in 2004 were approximately \$8,000.00. Complainant earned \$3,449.15 in 2005 and received \$3,000.00 in unemployment compensation for a total of \$6,449.15. Assuming she would have made \$8,000.00 in 2005 had she not been terminated, I conclude that Complainant's lost wages equal \$1,550.85 (\$8,000.00-\$6,449.15) I conclude that Complainant is entitled to lost wages in the amount of \$1,550.85 to compensate her for the pay she would have earned had she not been unlawfully terminated.

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 from discriminating on the basis of gender and pregnancy.
- 2) Respondents pay to Complainant the amount of \$35,000.00 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 \$1,550.85 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.

Payment shall be made within 60 days of receipt of this decision.

This constitutes the final order of the Hearing Officer. 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 the 28th day of April 2008.

JUDITH E. KAPLAN
Hearing Officer