

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LAMYA THAIFA and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 03 BEM 01630

WHITE HEN PANTRY and
PETER SANNIZZARO,

Respondents

Appearances: Lisa M. Renzi, Esq. for Complainant Thaifa
Douglas I. Louison, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or around June 26, 2003, Lamyia Thaifa (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination charging that she was discriminated against on the basis of sex by Peter Sannizzaro, the owner and operator of an Everett White Hen Pantry. The Complainant asserts that she was terminated as a result of her pregnancy. The Investigating Commissioner issued a finding of probable cause and on March 24, 2006, certified the case for public hearing. A public hearing was conducted on September 26, 2006. The Complainant submitted five

exhibits. She testified on her own behalf, and Respondent Sannizzaro testified on his behalf. The Complainant submitted a post-hearing brief on December 18, 2006.

In deciding the matter, I have considered the entire record, including the testimony of the witnesses and the exhibits introduced at the public hearing. To the extent the testimony of the witnesses is not in accord with or irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Lamya Thaifa is a resident of Everett, Massachusetts. She came to the United States in 2001 from Morocco. Complainant's native language is Arabic. She speaks some English but is not fluent.¹ In February of 2001, Complainant Thaifa was hired as a clerk/cashier at the White Hen Pantry in Everett. Complainant's starting hourly rate was \$8.50. She worked 7:00 a.m. to 3:00 p.m., Mondays through Fridays, and generally worked overtime on weekends. Her duties included operating the cash register, selling lottery tickets, and making deli sandwiches. Complainant was supervised by store owner Peter Sannizzaro, who was present at the store when she was there. Complainant did not usually work with other employees except when performing overtime. Complainant spoke English to Sannizzaro and to the store's customers.
2. Respondent White Hen Pantry is located at 543 Ferry Street in Everett,

¹ Complainant was assisted by a translator at the public hearing, but spoke English while performing her job at the White Hen Pantry.

Massachusetts. Respondent Peter Sannizzaro has been the owner of the franchise since approximately 1996. According to Sannizzaro, the store employs approximately seven to nine people and is therefore an employer within the meaning of G. L. c.151B, sec. 1(5). In 2003, Respondent Sannizzaro worked at the store on Mondays through Fridays, from 5:00 a.m. to 4:00 p.m. and on weekends. Sannizzaro testified that he and Complainant were generally the only individuals working in the store on Mondays through Fridays.

3. In September of 2002, Complainant returned from vacation and was promoted to store manager. Her hourly rate was increased to \$9.00. Complainant did not supervise any other employees following her promotion but became responsible for keeping track of expired food items such as meats and cheeses, food items that needed to be rotated or put on sale because they were approaching expiration, and food items that had to be re-ordered. Approximately one month after she was promoted to store manager, Complainant's hourly rate was again increased to \$9.25.
4. Complainant described her relationship with Sannizzaro as "excellent" prior to her pregnancy. She testified that Sannizzaro was "very proud and satisfied" with her work. She testified that she did not have any problems getting along with other employees or customers.
5. Part of Complainant's job was to clean the area where lottery tickets were sold. Complainant testified credibly that she never rooted through the trash to find discarded lottery tickets.
6. Complainant testified credibly that she never failed to rotate or otherwise

mishandle meat or cheese.

7. In February of 2003, Complainant became pregnant with her first child. She informed Sannizzaro's wife of her pregnancy. Sannizzaro's wife congratulated Complainant and informed Sannizzaro of the pregnancy.
8. Complainant testified credibly that she heard Respondent Sannizzaro say on multiple occasions that women with children should stay home and take care of their children. According to Complainant's credible testimony, when female applicants came into the store accompanied by their children, Sannizzaro threw away their applications. Sannizzaro denied that he had concerns about pregnant employees or employees with small children and testified that, "If a woman [with small kids] wants to work, it's her business." However, Sannizzaro testified that it was "hard" when employees couldn't work because they, "had to go somewhere" or "had a sick kid." He also acknowledged that he ripped up applications all the time, but denied that he did so because applicants were pregnant or had small children.
9. According to Complainant's credible testimony, Sannizzaro gave her harder and increased work after learning of her pregnancy in February of 2003. He began to ask her to pick up boxes of produce. Complainant testified that Sannizzaro would sit in his office watching television or talking on the telephone while she performed all the work in the store. According to Complainant, Sannizzaro stopped greeting her in the morning and began to talk to her in a loud voice. I credit Complainant's testimony.
10. Respondent Sannizzaro gave conflicting responses about Complainant's alleged

shortcomings, asserting at several points in his testimony that he reprimanded Complainant on multiple occasions about failing to use older, opened packages of meat before using newer, unsealed packages but claiming at another point that she only failed to do so on the last day of her employment. Sannizzaro testified at the public hearing that Complainant argued with one other employee, but in his position statement he asserted that she had trouble getting along with three other employees. Sannizzaro testified at the public hearing that Complainant always did her job and that he was satisfied with her as an employee, but in his position statement he said that Complainant was rude to customers and that hundreds of dollars of meat and cheese had to be thrown out because of her.

11. While Complainant worked at the White Hen Pantry in 2003, Phyllis Reed also worked at the store. Reed had four children, the youngest of whom was approximately fourteen years old in 2003.²
12. Employment records show that for four pay periods beginning on May 17, 2003 and ending on June 7, 2003, Complainant averaged weekly gross income of \$451.00, inclusive of 13.875 hours of overtime per week. Complainant's Exhibit 1.
13. Complainant testified that at approximately 2:30 p.m. on June 25, 2003, she notified Sannizzaro that a block of cheese had expired and that it had to be thrown out. Prior to expiring, the cheese had been placed on sale. Sannizzaro refused to throw out the cheese and ordered Complainant to return it to the storage area. Complainant offered to pay for the cheese herself, but her offer was rejected.

² Sannizzaro mentioned another employee -- Maryellen Evans -- who had a son in third grade but he did not establish that Evans worked at the store while Complainant was there.

- According to Complainant, Sannizzaro told her that she did not deserve the money she was paid, that her work wasn't the same as it had been before she had gotten pregnant, and that she should not to come back. Complainant left the store crying. I credit Complainant's testimony.
14. According to Sannizzaro, he and Complainant had a disagreement on her last day of employment about her alleged failure to rotate meat, but he expected her to come back when she left at the end of her shift. I do not credit Sannizzaro's testimony.
 15. Complainant's husband observed her crying after she returned home on June 23, 2005. According to Complainant, her husband called Sannizzaro for an explanation and was told by Sannizzaro that he had fired Complainant. I credit Complainant's testimony.
 16. Sannizzaro denied that he fired Complainant. He testified that Complainant's husband called him and said, "If you don't like the way [my wife] is doing things, why don't you fire her?" Sannizzaro testified that he responded, "It's up to you. You do what you want." I do not credit Sannizzaro's testimony.
 17. Complainant began to look for alternative employment two months after giving birth on November 18, 2003. She did not find a job until June 14, 2004. After looking for work in person and over the internet, Complainant found work at Boston Jurys Hotel as a room attendant and as a hotel café attendant. Her hourly wage at the hotel exceeded her hourly wage at White Hen Pantry.
 18. Complainant testified that after she was fired, she cried all the time and became very nervous. She stated that she constantly wondered why Respondent fired her.

Complainant was referred by Mass General Hospital's satellite facility in Revere to therapist Polly Grant. Although Complainant did not obtain her treatment records from Grant, Complainant testified credibly that she was referred for crying, feeling sad, and not wanting to talk to anyone. Complainant saw Grant every two weeks for five months until she gave birth. After giving birth, her depression improved. Complainant had never been to a therapist before commencing treatment with Grant.

III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, sec. 4, para.1 makes it an unlawful practice to discharge or otherwise discriminate against 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." MCAD & Campbell v. Suffolk University Law School, 28 MDLR ____ (2006) *quoting* School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); see also, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled pregnancy because of fears of further absences deemed unlawful sex discrimination). In this case, Complainant asserts that Respondent Sannizzaro began to treat her in an unfriendly and demanding manner after learning that she was pregnant and ultimately fired her as a result of her pregnancy. See Mercurio v. Atamian Volkswagen, Inc., 25 MDLR 55, 60 (gender discrimination where employer called employee's competency into question, treated her coldly, and stopped speaking to

her after she announced her pregnancy).

A. Direct Evidence

Direct evidence is evidence that, “‘if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.’” Wynn & Wynn, PC v. MCAD, 431 Mass. 655, 667 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991); Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000). In a direct evidence case, a complainant does not have to adhere to the three stage burden shifting paradigm set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1972). Rather, a mixed motive analysis is applied to Complainant’s allegation of discrimination. Pursuant to this analysis, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. *See* Fountas, 22 MDLR at 269. If Complainant meets her initial burden, the burden of persuasion shifts to 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 & Wynn, 431 Mass. at 667, *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989); Fountas, 22 MDLR at 269.

Complainant asserts that Respondent Sannizzaro uttered several comments which convey a general disapproval of working mothers. Complainant testified credibly that she heard Respondent Sannizzaro say on multiple occasions that women with children needed to stay home and take care of their children. Sannizzaro, himself, testified that it was “hard” when employees couldn’t work because they had to go somewhere or had a “sick kid.” However, these comments were not directed at Complainant and, thus, do not

constitute direct evidence of discrimination. See Wynn & Wynn, 431 Mass. at 667, quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (statements made by decision makers unrelated to the decisional process do not constitute direct evidence); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. at 302 ("[s]tray remarks suggestive of impermissible bias do not constitute the sort of evidence that places a case in the mixed motive category"). While they might reveal a predisposition against hiring pregnant women or working mothers of small children, the comments do not prove that Respondent Sannizzaro fired Complainant -- a woman he hired, worked with for over a year, and promoted to manager -- because she was pregnant. Complainant also asserts that Sannizzaro told her that her work wasn't the same as it had been before she became pregnant. Such a remark suggests the possibility of bias, but the inference is not inescapable. See Wynn & Wynn, PC v. MCAD, 431 Mass. at 667. Based on the foregoing, there is insufficient direct evidence to prove that sex discrimination played a motivating part in Complainant's termination.

B. Indirect Evidence

In order to establish a prima facie case of sex discrimination based on pregnancy in the absence of direct evidence, Complainant must show that: 1) she is a member of a protected class, 2) she was performing her job at an acceptable level, 3) she was terminated, and 4) Respondent hired a replacement with similar qualifications or there is proof that Complainant's termination occurred in circumstances that would raise a reasonable inference of discrimination. See Weber v. Community Teamwork Inc., 434 Mass. 761 (2001); Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34 (2005).

Complainant was approximately four months pregnant on June 25, 2003, and,

thus, a member of a protected class. By all accounts Complainant was a good employee who performed her job at an acceptable level. Respondent Sannizzaro terminated Complainant from her position as day shift manager at his White Hen Pantry franchise. Since there is no evidence that Respondent replaced Complainant with another employee, the central issue in the case is whether there is proof that Complainant's termination occurred in circumstances that would raise a reasonable inference of discrimination. I conclude that there are such circumstances.

A reasonable inference of discrimination can be drawn from the change in Respondent Sannizzaro's attitude towards Complainant between February of 2003, when Complainant announced she was pregnant, and June of 2003, when she stopped working at White Hen. I credit Complainant's testimony that once Sannizzaro learned about her pregnancy, he became unfriendly, increased her work, and made himself less available to assist her. On Complainant's last day of employment, Sannizzaro became angry when she notified him that a block of cheese had expired and had to be thrown out. According to Complainant's credible testimony, Sannizzaro told her that she did not deserve the money she was paid, that her work wasn't the same as it had been before she had gotten pregnant, and that she should not to come back. Complainant also credibly testified that her husband called Sannizzaro for an explanation and was told by Sannizzaro that he had fired Complainant. Sannizzaro, for his part, acknowledged that he had a disagreement with Complainant on her last day at work, although he denies firing Complainant. These events are sufficient to give rise to a prima facie case of discrimination based on sex/pregnancy.

Since Complainant had established a prima facie case, the burden then shifts to the

second stage of proof in which the Respondent must articulate and provide credible evidence in support of a legitimate, nondiscriminatory reason for his action. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent asserts such a reason, Complainant bears the burden to persuade the fact-finder by a fair preponderance of the evidence that Respondent's articulated justification is not the real reason, but a pretext that permits a finding of unlawful discrimination. See Abramian, 432 Mass. at 117-118. Complainant must ultimately prove by a preponderance of the evidence that Respondent was motivated by discriminatory animus. See Lipchitz v. Raytheon, 434 Mass. 493 (2001). Complainant may meet this burden of proof by circumstantial evidence such as the inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the employer is false. Id. at 504.

Sannizzaro's improbable and inconsistent versions of Complainant's performance and what transpired on June 25, 2003 fail to rebut Complainant's prima facie case of sex discrimination. Sannizzaro described Complainant at the public hearing as a good worker, a satisfactory employee, and a person whom he and his wife liked, but in his position statement Sannizzaro described Complainant as rude, argumentative, and lazy. Sannizzaro contradictorily described the June 25, 2003 incident as both a unique occurrence and as the culmination of a series of incidents. Sannizzaro was unclear whether the June 25, 2003 dispute dealt with mishandled meat or expired cheese. He testified at one point in the public hearing that he told Complainant's husband, "You do what you want" in response to Complainant's husband daring him to fire Complainant but testified at another point that he said "fine" in response to Complainant's husband

daring him to fire Complainant. Sannizzaro contended in his position statement that he fired Complainant whereas at the public hearing he maintained that Complainant quit.

Sannizzaro offered myriad explanations for his inconsistent statements about Complainant's performance -- he didn't read the position statement, he was mad, he was provoked, he had ADD. These explanations may indicate why he was untruthful in his position statement, but they do nothing to support his credibility as a witness. Even if one or more of his explanations are true, they do not constitute a defense to the charge of discrimination. To the contrary, the Respondent's history of shifting rationales undermines his version of events at the public hearing. I conclude that Sannizzaro has failed to provide reliable evidence in support of a legitimate, nondiscriminatory reason for his action and, thus, Complainant is entitled to prevail on her sex discrimination claim.

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Lost Wages

Complainant began to look for alternative employment in January of 2004, two months after giving birth on November 18, 2003. She found a job on June 14, 2004, at an

hourly wage exceeding her hourly wage at White Hen Pantry. Complainant is therefore entitled to damages for lost wages of \$ 9,471.00, for the period between January 18, 2004 and June 14, 2004, based on an average weekly gross income of \$451.00 at the time her employment terminated at White Hen Pantry.

Emotional Distress Damages

Complainant's entitlement to an award of monetary damages for emotional distress does not need to be based on expert testimony; it can be based solely on her testimony as to the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

In regard to the above-articulated standards, Complainant testified that after she was fired, she cried all the time and became very nervous. She stated that she constantly wondered why Respondent fired her. Complainant was referred by Mass General Hospital's satellite facility in Revere to therapist Polly Grant. Complainant saw Grant every two weeks for five months until she gave birth. After giving birth, her depression improved. Complainant had never been to a therapist before commencing treatment with Grant.

In light of the foregoing, I conclude that Complainant is entitled to \$20,000.00 in

emotional distress damages for the emotional distress she suffered as a direct result of Respondent's unlawful conduct.

V. ORDER

This decision represents the final order of the Hearing Officer. Respondent is hereby ORDERED to:

1. Cease and desist from engaging in discrimination based on pregnancy.
2. Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$ 9,471.00 in damages for lost wages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$ 20,000.00 in damages for emotional distress , plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as payment has been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

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 (10) days of receipt of this decision, and a Petition for Review to

the Full Commission within thirty (30) days of receipt of this decision.

So ordered this 30th day of January, 2007.

Betty E. Waxman, Esq.