

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION &  
MARILYN LEWIS,  
Complainant

v.

DOCKET NO. 96-BEM-2461

BOSTON PUBLIC HEALTH COMMISSION  
Respondent

Appearances: Frank J. Teague, Esq. for Complainant  
Elise A. Brassil, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On July 22, 1996, the Complainant, Marilyn Lewis, filed a complaint with the Massachusetts Commission Against Discrimination alleging discrimination on the basis of race as a result of a lay-off from Trustees of Health and Hospitals (“TH&H”) on January 24, 1996. Complainant also alleges that Respondent refused to notify her of the posting or consider her for the position of Controller subsequent to her lay-off. The Respondent, Boston Public Health Commission, the successor to TH&H, denied all allegations of discrimination claiming that Complainant was laid-off due to a restructuring of the TH&H corporate accounting department and a legislative reorganization that ultimately resulted in the merger of Boston City Hospital with University Hospital and the dissolution of TH&H.

The Investigating Commissioner found Probable Cause to credit the allegations of the complaint. Conciliation efforts were unsuccessful and the matter was certified for a public hearing. A hearing was held before the undersigned hearing officer on November, 22, 25, 26, and 27, 2002. The parties filed post-hearing briefs in February of 2003. Having reviewed the entire record of the proceedings 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 is a 41 year old black woman who is a native of Trinidad and a U.S. citizen. Complainant resides in Boston with her husband and children. She is a certified public accountant with a degree in business administration and accounting from Suffolk University. Complainant's previous employment includes two years as a Staff Accountant and Senior Accountant at KPMG Peat Marwick, a large accounting firm. She also worked as a supervisor and audit manager for the public accounting firm of DePisa & Co. for over two years before coming to TH&H. Complainant passed the CPA exam, completed her experience requirements, and was certified as a CPA by the Massachusetts Board of Accountancy in 1991.

2. Respondent, Boston Public Health Commission, is a statutorily created quasi-public entity which administers the public health services of the City of Boston pursuant to the Boston Public Health Act of 1995, G.L. c. 111 App. Sections 2-1 through 2-15 (the "Act"). The Commission is the successor in interest to TH&H, a quasi-public entity which administered grant funding and certain other operations of the Boston Public Health Department prior to July 1, 1996, the effective date of the Act. Prior to that date, the hospital and public health functions of the City of Boston were operated by the

Department of Health and Hospitals and TH&H. Under the Act, the former Boston City Hospital was merged with the Boston University Medical Center into a new entity known as “the Boston Medical Center.” G.L. c. 111 App. s. 2-5(a). The functions of the Department of Health and Hospitals and TH&H were transferred to the Commission and all legal and contractual obligations of the former entities were assumed by the Commission. G.L. c. 111 App. s.2-6(b).

3. Complainant was hired by TH&H in September of 1993 as the Grants Administration Manager. The duties of this position included the financial and accounting oversight of more than eighty grants from government agencies, private companies and individuals that were the primary sources of funding for TH&H. Annual revenue from these grants that funded specific medical research and public health activities was in excess of one hundred million dollars. Complainant was responsible for the administration and accounting functions for these grants. She supervised a staff of six accountants, three of whom she hired and all of whom she trained.

4. Complainant was familiar with all aspects of accounting principles and procedures, including maintaining general ledgers, payroll accounts and other aspects of financial accounting and record-keeping. As Grants Administrator she developed policies and procedures for grant accountants to meet funding guidelines, helped TH&H to maximize cash flow and directed her staff in the auditing of grant information to assure compliance with donors’ guidelines. She also reviewed and coordinated a number of accounts payable functions; reviewed reports from TH&H’s Management Information Systems (MIS) Department; reviewed the status of billing on grants; helped determine

billing needs and to identify problems; and worked with the MIS Department on the implementation of new information processes. (Exhibit 1).

5. After four months Complainant received a favorable verbal performance evaluation from her supervisor, Kathleen Petrillo-Gray, then the TH&H's Chief Financial Officer. After six months, Complainant received a merit pay increase in the amount of \$2,180.00. She was assigned additional responsibilities related to letters of credit and grant compliance. (Exhibit 6)

6. On February 22, 1995, Complainant was promoted to the position of Assistant Finance Director at TH&H. In addition to grant administration oversight, Complainant was assigned responsibilities in the TH&H corporate accounting department, which she admitted was experiencing significant problems. In this position she became responsible for broader accounting functions such as generating monthly financial reports, maintenance of the general ledger, oversight of accounts payable and receivable and monthly budget reports. Complainant believed that this promotion evidenced the Trustees' respect for her capabilities. Subsequent to receiving this promotion Complainant received no criticism of her performance as Assistant Finance Director.

7. The corporate accounting department at TH&H had been in disarray due to systemic problems and outmoded bookkeeping procedures. Complainant acknowledged that she inherited these systemic problems with the general ledger and that she and the accountants she hired and trained were charged with correcting the problems after years of inattention. Complainant testified that the general ledger had not been properly maintained and could not be used to make the proper decisions. She became responsible for the computerized set-up and maintenance of the general ledger, which up to that point

had been maintained manually. She over-saw the process of integrating information that had been kept manually into a new software system and stated that this was a long and painstaking task. Complainant testified that she worked very long hours at TH&H, sometimes up to 80 hours a week, that she was often there very late at night and her husband would be calling her to come home. She did whatever needed to be done to get the job done and sometimes even worked on holidays

8. Michael Gaudreau was a long-term employee of TH&H who was the General Ledger manager and supervised payroll in the Corporate Accounting Department. Complainant testified that she performed his duties in his absence, but that she did not supervise him in 1993 and 1994. Complainant evidenced discomfort when asked to comment on Gaudreau's performance and declined to venture any opinion. From this reluctance I draw the inference that she felt uncomfortable offering a negative assessment of his performance at the hearing.

9. In April of 1995, TH&H hired Joseph Brown as Fiscal Director. He was designated as Complainant's immediate supervisor and they met initially to discuss her duties. Complainant testified that she received no evaluations from Brown and that he provided no meaningful interaction, guidance, or supervision to her. Despite the fact that their offices were next door to each other, Complainant had limited communication with Brown, he did not meet with her regularly, and he did not review her work. He provided no guidance, assistance or suggestions nor oversight of her general ledger duties. I credit her testimony that she received no feedback from Brown and that he did not review her work. Complainant testified that he was often not in the office, did not tell her where he was and often kept his door closed when he was there. It is apparent that Brown made no

attempt to assist Complainant in her job or to have any meaningful interaction with her regarding her duties and performance. Indeed, Brown appears to have distanced himself from Complainant and the ongoing operations of the department. At the time Complainant supervised the corporate accounting department and seventeen employees, and Brown supervised only her. A few months after Brown was hired Complainant was informed without explanation that her free parking space was being revoked.

10. Brown testified to a number of long-standing and systemic difficulties in the corporate accounting department at TH&H. However it was apparent from the testimony of Complainant, Brown, and Thomas Traylor, President of TH&H in the two years prior to the merger, that these difficulties preceded Complainant's tenure at TH&H, that she was not responsible for certain problems, and that senior managers had neglected these problems for a significant period of time. Brown testified further that he spent a great deal of time out of the office dealing with Board members and attempting to resolve a number of these difficult problems. He stated that he could not recall whether he had conducted any review of Complainant's educational and professional experience nor did he formally assess her capabilities and qualifications. He did not review her resume or personnel file and never conducted a performance evaluation. In November of 1995, when TH&H contracted with KPMG/ Peat Marwick to conduct an external audit of TH&H compliance with grant administration functions, Brown did not assign Complainant to assist with this audit, despite the fact that as a former employee of KPMG/Peat Marwick, she was thoroughly familiar with their auditing procedures. However, Brown never bothered to make himself aware of Complainant's prior experience.

11. With no advance warning, on January 23, 1996, Complainant was summoned to Brown's office and in the presence of Brown and Sandra Warren, HR director for TH&H, was handed a letter advising her that she would be terminated from her position at the close of business the next day, January 24, 1996. The reason stated in the letter for the termination was that "it has been determined that the structure of the Corporate Accounting Department requires modification. This programmatic restructuring will involve the elimination of your position." (Exhibit 3 ). Brown could not recall who in the management hierarchy he had discussed the re-organization with nor could he recall whether he had committed the reorganization plan to writing. He did admit that the purported reorganization that resulted in Complainant being terminated was his initiative and recommended by him to the Board of Directors. When Complainant attempted to ask how the corporate accounting department would be structured and who would perform her duties, Brown could not give her an answer. She testified that Brown had never engaged her in any discussions about necessary restructuring of the department and this came as a complete shock to her. At this meeting, Complainant was also handed a proposed agreement in which TH&H offered to pay her two months severance. The proposed agreement characterized Complainant's termination as a voluntary resignation by which she waived any claim to reinstatement or re-employment by TH&H. (Exhibit 4). Complainant refused to sign this document.

12. All of this occurred against the backdrop of the impending merger of Boston City Hospital and University Hospital and the re-organization of the Department of Health and Hospitals and TH&H. At the Hearing, Respondent asserted that the impending merger, which was well publicized, and the consequent potential for job losses, justified the

elimination of Complainant's position. Neither Complainant's successor nor other senior managers including Brown, lost their jobs as a result of the merger. Complainant testified that she was aware of this legislative re-structuring, she was unaware that it would impact her job, and more significantly, the impending merger was not the reason given for the elimination of her job. Nor was she informed of, or invited to apply for, the new position of "Controller" that would be posted a mere eight days after her termination.

13. Gaudreau, a white male, was also terminated at the same time as Complainant. While Complainant supervised Gaudreau's activities after 1995, and performed his duties in his absence, he did not perform any of her duties. He was not a CPA nor did he possess an MBA, and he had no experience with a public accounting firm that was comparable to Complainant's five years of experience. I find that his position and his duties were not comparable to Complainant's. No other employees of the TH&H's Corporate Accounting Department were terminated due to the purported restructuring.

14. On February 1, 1996, eight days after Complainant's termination, Brown and TH&H posted an "Internal Job Posting" for the position of "Controller" in the Corporate Accounting Department of TH&H. (Exhibit 5). The duties listed for the so-called new position of "Controller" were virtually identical to those duties directly performed by Complainant or which she had previously supervised. The new Controller position was a consolidation of Complainant's Assistant Fiscal Director's position with certain duties performed by Gaudreau as General Ledger Manager. Complainant was fully competent to perform all of the duties listed, had in fact performed them in a satisfactory fashion, and met all of the stated qualifications in the job posting. Gaudreau did not have the experience or qualifications to perform the Controller's job. It is clear from

Complainant's testimony that the job of Controller was, in substance, her former job as Assistant Fiscal Director, and that after the purported elimination of her job, Respondent sought to fill what was essentially her former position.

15. The internal job posting expired on February 23, 1996. Brown contacted at least one placement agency to solicit applicants for the Controller position. Complainant was not informed of the new position by TH&H or Brown, nor was she invited to apply. Brown gave Complainant no consideration for the Controller's position. The fact that Brown made no effort to determine Complainant's experience and qualifications or to legitimately assess her performance during the time that she worked for him is suspect. Complainant was made aware of the internal job posting in March of 1996 when an employee of TH&H faxed it to her. She did not apply because she felt that her recent abrupt termination along with a request that she sign away all rights to re-hire meant that Respondent was not looking to hire her. She legitimately believed she would receive no consideration for the job. Prior to receiving this job posting, Complainant had been willing to reconsider the offer of severance pay, but she so strongly believed that the advertised Controller position was her job that she declined to negotiate further with Respondent on this issue.

16. In March of 1996, Brown interviewed Lawrence Burke, a white male, for the position of Controller. Burke testified that during his interview the Legislative re-organization and the Hospital mergers along with their affiliated enterprises was discussed, but the loss of jobs was not discussed and he considered the job of Controller to be a permanent position. Burke was hired by TH&H and started his employment on May 20, 1996. In contrast to Brown's limited interaction with Complainant, Burke had

weekly meetings with Brown one hour per week. Burke had an MBA degree but was not a certified public accountant. He had worked as controller of a private corporation for ten years, but had been laid off from his position ten months prior to being hired by TH&H. He had no experience working in the public sector. Similarly, he had no experience in grant administration which was Respondent's primary source of funding, nor did he have any knowledge of Banner Software which was the system used by TH&H and suited for grant administration accounting. Complainant had been trained in the use of Banner Software and had used it consistently throughout the course of her employment with TH&H. I find that Burke was less qualified than Complainant for the job of Controller at TH&H.

17. Notwithstanding the "legislative re-organization" which resulted in the creation of the Commission and the dissolution of TH&H, there were substantial grant administration and accounting duties to be performed by the successor entities. A Consolidation Agreement between the City of Boston and University Hospital, Inc., dated June 29, 1996, two days before the effective date of the reorganization, recited that the assets and public health activities conducted under the care and custody of the Department of Public Health and TH&H would be transferred to the Boston Public Health Commission. (Exhibit 11, p. 2). The Consolidation Agreement further provided that the City, the Commission and the Boston Medical Center Corporation would enter into a ten-year agreement whereby the Corporation would provide fiscal agent and grant administrative services to the Commission. (Exhibit 11, Article 7.5, p. 35.)

18. The Consolidation Agreement specifically provided that as of July 1, 1996, each employee of TH&H whose work was determined by the Commissioner of Health and

Hospitals of the City to be primarily related to the operation of Boston City Hospital or otherwise to the powers, duties, and obligations of the Department or TH&H “shall be offered employment by the Corporation.” (Ex. 11 Art. 6.1(a), p. 24).

19. A separate Public Health Services and Grant Administration Agreement was executed between the City of Boston, the Commission and Boston Medical Center Corporation on July 1, 1996, the effective date of the legislative reorganization. (Ex. 12). This Grant Administration Agreement provided that Boston Medical Center Corporation would provide fiscal, grant management, and administrative support services to the Commission. The grant administrative services were detailed in Article 3.1. All of these services were within the experience and ability of Complainant. (Ex. 12, Art. 3, pp.2-6). The Grant Administration Agreement specifically mandated that the Boston Medical Center Corporation “shall offer to employ those individuals who as of June 30, 1996 performed Grant Administrative Services for the Trustees of Health and Hospitals.” (Ex. 12, Art. 5, p.6-7).

20. On April 17, 1996, almost three months after Complainant was terminated, Thomas Traylor, President of TH&H, signed a letter addressed to Complainant stating that “After careful consideration of the needs of the New Medical Center and the Public Health Commission, you shall be offered employment at the New Medical Center.” (Ex. 10). There was some testimony that this was a mere form letter sent to all employees at TH&H, although the letter appears to reflect a determination that the position of Assistant Fiscal Director or “Controller”, in the accounting department at TH&H, although no longer filled by Complainant, was to survive the legislative reorganization. Complainant never saw this letter until it was disclosed during the course of this litigation.

21. Significantly, Lawrence Burke, the white male who succeeded Complainant with the title of “Controller” survived the legislative reorganization and became an employee of the Boston Medical Center Corporation. He voluntarily resigned shortly after the merger to take a job in the private sector. Brown also survived the merger and became employed by the Commission as Director of Financial Compliance with a pay raise of over ten percent. Since Complainant had been terminated in January of 1996, she did not qualify under the statute, Consolidation Agreement or the Grant Administration Agreement for employment by the Boston Medical Center or Commission. I find that Complainant’s position was not eliminated by the legislative re-organization.

22. Complainant testified that the loss of her job with no advance warning was stressful. She had two young children and lived near her TH&H office. This facilitated day care and child-raising arrangements, since her husband’s job caused him to travel a great deal. Her termination caused significant instability in her home life. Complainant was totally shocked by such an unexpected termination with 24 hours notice and she testified she felt like she was left hanging. She said that having one day to clear out and one week to decide to sign a resignation letter after all she had done was devastating to her. She was embarrassed by the staff watching her walk out the door with a box. When she learned that a position virtually identical to hers was posted with a new title at TH&H eight days after her termination, Complainant’s shock and humiliation were compounded. Complainant was a competent, hard-working and dedicated employee who was legitimately shocked by her precipitous termination and the ensuing events. I found her testimony to be quite candid and compelling and believe that Complainant suffered

significant embarrassment, humiliation, and emotional distress as a result of Respondent's actions.

23. After Respondent terminated her employment, Complainant was unemployed for a period of approximately two months and received unemployment benefits. She immediately began discussion with some placement firms and with colleagues in the business. She secured work in the public accounting field for six months as a contract consultant to one of her former employers, DiPesa & Co. Under the terms of this agreement she was paid \$800.00 for a 32 hour week, with no benefits. Complainant stated that having endured two lay-offs in her career, she did not wish to face this situation again. After consulting with placement specialists and other CPA's, she decided that starting her own business was the best way not to face this risk again.

Complainant's abrupt and humiliating termination from TH&H, which she felt was due to race discrimination, was a factor in her decision to open her own accounting practice.

24. Complainant has worked full time in her private accounting practice from October 1996 through the present. Her salary at the time of her termination was \$50,400.00 per year with a 3% cost of living increase. Had she remained working for the Respondent, for the period of six years and 10 months from the time of her termination to the time of the hearing she would have earned \$387,447.00. Complainant testified that her earnings in mitigation of back pay through unemployment compensation, contract work at DiPesa & Co. and her earnings from self-employment were \$279,896 for the same period of time. (Ex. 21). Thus she is claiming damages for back pay in the amount of \$107,551.00. Complainant also makes a claim for loss of the following:

Increased Cost of Health Insurance	\$7,107.00
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Lost Vacation Benefits	\$30,000.00
Lost Paid Holidays	\$19,000.00
Lost Sick Time	\$21,000.00
Lost Personal Time	\$4,000.00
Loss of Matching Employer Contributions to 401K	\$80,000.00

Thus her total claim for back pay and lost benefits is \$268,658.00. Complainant was able to take advantage of certain tax deductions as a result of having her own business, including her home office and her automobile.

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B s. 4 (1) prohibits discrimination in the hiring and firing of employees based upon race. In order to prove a claim of race discrimination in employment, Complainant must first establish by a preponderance of the evidence a prima facie case of discrimination. The elements of a prima facie case of race discrimination are (1) that Complainant is a member of a class protected by G.L. c. 151B; (2) that Complainant was performing the duties of her job at an acceptable level; (3) that Complainant was terminated or suffered some adverse employment action; and (4) that the employer sought to fill the position with an individual whose qualifications are similar to the Complainant's. Blare v. Huskey Molding Systems, 419 Mass. 437, 441 (1995).

Complainant in this case has established a prima facie case of race discrimination. It is undisputed that Complainant satisfied the first three elements of the test. While it was noted that there were long-standing systemic problems in the corporate accounting department, it was clear that the blame for this did not lie with Complainant and that she

was performing her duties at an acceptable level. Indeed, she had received raises and a promotion to Assistant Fiscal Director of the department. I conclude that Complainant also established that Respondent sought to fill, what was in essence, her position when it created the newly named, but barely altered “Controller” position and hired a white male who was less qualified for the position than Complainant. Having established a prima facie case, Complainant has created the presumption of unlawful discrimination.

Once Complainant establishes a prima facie case of discrimination, it is incumbent upon the Respondent to articulate a legitimate, non-discriminatory reason for Complainant’s termination. It must also produce credible evidence that the proffered reasons for its employment action were the real reasons. Blare, supra. at 441-442.

If Respondent meets its burden at the second stage, Complainant must prove that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001). In an indirect evidence case, such as this, if the fact-finder is persuaded that one or more of the employer’s articulated reasons for the termination is false, he or she may “infer the employer is covering up a discriminatory intent, motive or state of mind.” Id. at 501. The Court in Lipchitz reasoned that allowing the fact-finder to draw such an inference “strikes the proper balance by holding the plaintiff to her ultimate burden without requiring her to produce evidence of discriminatory animus, a form of evidence that we recognize, rarely exists.” Id. at 501.

In the instant matter the reasons advanced by Respondent for Complainant’s termination were (1) a vague and unexplained assertion in Respondent’s January 1996 termination letter that the structure of the Corporate Accounting Department required modification which would involve the elimination of her position, and (2) an assertion at

the public hearing that as a result of the impending merger and the dissolution of TH&H, Complainant's job was eliminated. However, the evidence suggests that there was no substantive modification or restructuring of TH&H's corporate accounting department in January of 1996. Only two employees were terminated, Complainant and Michael Gaudreau, the General Ledger Manager whose duties were supervised by Complainant. The job of "Controller" which was posted a week after Complainant's termination, consisted of the duties performed or supervised by Complainant as Assistant Fiscal Director. Indeed, Complainant testified credibly that she already performed or was qualified to perform all of duties listed in this job description. Thus, the job description for Controller was little more than a semantically altered description of Complainant's position of Assistant Financial Director. The assertions that this position was different from the one Complainant held and that she was not qualified for the position, were proven to be false.

Respondent asserts that Gaudreau was similarly situated to Complainant and that his simultaneous termination demonstrates that Complainant was not singled out on account of her race. However, Complainant has proved that Gaudreau was not qualified to fill the job of Controller. I conclude that Gaudreau was not a "comparator" to Complainant as Respondent would have me find, but that the "comparator" is Lawrence Burke. Burke was hired essentially to replace Complainant. It is worth noting that Burke was not a CPA, had no experience working for a government entity, and had no experience in grant administration, the primary source of funding for TH&H. Burke also had no experience using the Banner software system.

Respondent's further contention that Complainant was not considered for the position of Controller because she did not apply is disingenuous, at best. Brown did not inform Complainant of the Controller position which was posted one week after her termination notwithstanding her obvious qualifications. It is reasonable to assume that at the time of Complainant's termination, Brown had already formulated the plan to post the position and hire a Controller. Complainant did not even learn of the job posting until March 10, 1996, over two weeks after the posting closed. It is preposterous to argue that Complainant should have been checking the job postings on her former employer's bulletin board eight days after she was terminated. Moreover, Complainant testified quite credibly that even after she became aware of the job she did not apply because as she put it, "she knew they were not looking to hire her" and to apply would have been futile.

Respondent's assertion at the hearing that the legislative reorganization of July 1, 1996, and the dissolution of TH&H resulted in the elimination the position of Controller, is similarly pretextual. Burke was transferred to the new entity. Moreover, Respondent's letter of April 17, 1996 offering Complainant employment after the merger clearly demonstrates that her position was not eliminated. Even if I were to accept Respondent's assertion that this letter was mistakenly addressed to her, it demonstrates, at the very least, that future employment in the Boston Medical Center was available to the occupant of her position.

As noted above, the Boston Public Health Act expressly provided for a seamless transfer of functions and employees from TH&H to the Boston Public Health Commission as of July, 1, 1996. G.L. c. 111 App. ss. 2-6(a), sub-part (v) mandated that

the Commission provide for the transfer of TH&H employees to the Commission and /or Medical Center after July 1, 1996. Section 2-6 (b) of the Act provided that after the dissolution of TH&H, all of TH&H's rights, powers, appropriations and obligations, under laws or contract (including obligations to employees) be transferred to and assumed by the Commission. Section 2-6(c) provided that all civil actions and proceedings commenced by or against TH&H shall be assumed by the Commission. Section 2-6(g) expressly mandated that each employee of TH&H on July 1, 1996, should become an employee of the Commission without loss of accrued rights, wages or benefits.

Additionally, the Consolidation Agreement (Exhibit 11) and the Grant Administration Agreement (Exhibit 12) encouraged, if not mandated, that employees of TH&H continue employment by the Commission or its fiscal agent, the Boston Medical Center Corporation. It is noteworthy that the Controller, Burke, in essence Complainant's successor, was employed at the Medical Center after the merger, as were Brown and Traylor. I conclude that the "legislative re-organization" was an ex-post facto justification for Complainant's termination and was untrue. Thus, Respondent's articulated reasons for Complainant's termination were not only unsupported by credible evidence, but were also proven to be false. The fact that the reasons articulated for Complainant's termination are false, permits me to draw the inference that they were a pretext for unlawful discrimination. Lipchitz, supra. at 501.

Other indirect evidence supports this inference of discriminatory animus, including Brown's cold and distant treatment of Complainant during the nine months he was her direct supervisor, notwithstanding his own inexperience working for a public entity and the systemic problems in the accounting department that demanded his attention.

Complainant stated they never worked as a “team.” Brown’s failure to familiarize himself with and to utilize Complainant’s skills and experience to address the serious systemic problems in the Corporate Accounting Department is inexplicable.

Complainant’s precipitous termination; Brown’s refusal to offer any explanation of the purported corporate “restructuring” when he notified Complainant of her termination; the transparent and unconvincing attempt to distinguish the duties of the newly created “Controller” position from those performed by Complainant as Assistant Financial Director; Respondent’s failure to inform Complainant about the Controller position posted one week after her termination; the one week deadline for her to sign the proposed severance agreement which expired one day prior to the internal job posting for the Controller position; and Burke’s total lack of grant administration or public sector experience all warrant a conclusion that Complainant was terminated on account of her race. I thus conclude that Respondent’s actions were in violation of G.L. c. 151 B.

#### IV. REMEDY

M.G.L. c. 151B, s. 5 authorizes the Commission to grant remedies to make Complainants whole, including back pay and emotional distress damages. College-Town v. MCAD, 400 Mass. 156, 168-69 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985).

Complainant in this case seeks damages for lost wages and a number of benefits which she received while working at Respondent. Her claim for lost wages includes the approximately two months that she was unemployed subsequent to her termination and the difference in her income working as a contractor for a former employer and after she

established her own accounting practice. Her claim for back pay is in the amount of \$107,551.00.

Complainant testified that she made the decision to start her own accounting practice after working for several months as a contractor for one of her former employers and discussing her options with other professionals in the field. She determined that it was not feasible at that point in her career, to return to a CPA firm. Respondent asserts that Complainant's decision to start her own business was voluntary and introduced evidence of available comparable jobs that were advertised during the time period Complainant was seeking alternate employment. It thus urges me to find that she failed to mitigate her damages by seeking a comparable job. I conclude that Complainant's decision to start her own business was a sufficient effort to mitigate her back-pay losses. See Hawkins v. 1115 Legal Service Care, 163 F.3d 684, 696 (self employment if undertaken in good faith is a reasonable alternative to seeking other comparable employment, and may be considered permissible mitigation); Smith v. Great American Restaurants, Inc., 969 F.2d 430, (self-employment can constitute employment for purposes of mitigating damages, as long as the self-employment was a reasonable alternative to finding other comparable employment).

While I conclude that Complainant is entitled to back pay and lost benefits and the increased cost of health insurance, I decline to find that she is should be compensated for loss of vacation, holidays, sick time, personal time and employer 401 (K) contributions, because her decision to start her own business was in large part driven by her own convictions that this was the best option for her career and not necessarily by a lack of available jobs. There was no evidence that Complainant applied or was rejected

for any specific jobs. Respondent submitted proof of a number of available accounting jobs at CPA firms with comparable salaries during this time period. Complainant testified that many of these advertised jobs were entry-level positions in public accounting which would have been a step back for her. Nonetheless, had Complainant sought and obtained a similar position working for a corporation or another public entity she would likely have received benefits comparable to those she received at Respondent. I conclude therefore that foregoing these additional benefits was inherent in her decision to start her own accounting practice. Moreover, Respondent has contended and Complainant admits that she acquired the advantage of a number of tax deductions as a result of running her own business that would have otherwise not been available to her.

Complainant also seeks damages for emotional distress, embarrassment and humiliation she suffered as a result of Respondent's unlawful actions. I found Complainant to be a very compelling witness in this regard. I believe that she was astonished, shocked and hurt at her abrupt termination, after she had devoted long hours and worked tirelessly to turn things around in the corporate accounting department. She testified the termination caused a great deal of stress and instability in her home life. I believe that Complainant was distressed at the fact that Brown had essentially ignored her efforts and refused to work with her or consider her a valuable member of his management team. She was embarrassed and humiliated at the cruel manner in which she was terminated with no explanation. This was compounded by learning that Respondent had posted what was essentially her job after she was told it was eliminated. While Complainant was not demonstrative in her emotions, I am, nonetheless, persuaded that she suffered substantial embarrassment, humiliation and emotional distress as a result of

Respondent's unlawful act. I conclude that she is entitled to an award of damages for emotional distress in the amount of \$100,000.00.

V. ORDER

Based on the foregoing findings of fact and conclusions of law I hereby Order the following:

- (1) Respondent shall pay to Complainant the amount of \$107,551.00 in damages for lost wages.
- (2) Respondent shall pay to Complainant the amount of \$7,107.00 in damages for increased health insurance costs.
- (3) Respondent shall pay to Complainant the amount of \$100,000.00 in damages for emotional distress.
- (4) Payment of the above awards shall be made within 60 days of the date of this decision. The parties shall notify the Clerk of the Commission of compliance or any failure to comply with this Order.

This decision constitutes the final Order of the Hearing Officer. Any party aggrieved by this Order may file an appeal to the Full Commission pursuant to 804 C.M.R. 1.23(1) by filing a Notice of Appeal with the Clerk of the Commission within 10 days of receipt of this decision and a Petition for Review within 30 days of receipt of this decision.

So Ordered this 16<sup>th</sup> day of October, 2003.

Eugenia M. Guastaferr  
Hearing Officer