

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

RENEE MCFAIL and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 04-BEM-01224

SYLVANIA LIGHTING SERVICES,
Respondent

Appearances: Katherine J. Michon, Esq. and Marc D. Freiburger, Esq. for Complainant;
Laurie F. Rubin, Esq. and Kristin J. Knuuttila, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 16, 2004 Renee McFail brought an action against Sylvania Lighting Services for discrimination based on sex in violation of G.L. c. 151B, section 4 and the Massachusetts Maternity Leave Act, G.L. c. 149, section 105D. Complainant claims that Respondent discriminated against her on the basis of sex when it denied her maternity leave and terminated her employment in July of 2003.

On or around August 24, 2004, Complainant moved to amend her Charge of Discrimination in order to provide additional information. The motion was allowed on October 14, 2004. On August 3, 2005, the Commission issued a Lack of Probable Cause

Finding on both claims, but on May 12, 2006 it vacated the Lack of Probable Cause finding and entered a finding of Probable Cause. On January 16, 2007, the case was certified to public hearing.

A public hearing was conducted on September 24, 25, and November 15, 2007. The parties submitted 50 joint exhibits. Following the public hearing, the parties submitted post-hearing briefs.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings, they are rejected. 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 Renee McFail ("Complainant") began working at Sylvania Lighting Services in 1993 as a full-time Financial Analyst. According to her direct supervisor, Linda McNeely, Supervisor of the Billing Department, Complainant was responsible for contract billing and was the only person performing this function. Transcript at 417.
2. Sylvania Lighting Services ("Respondent") is a company located in Danvers, Massachusetts. It is a subsidiary of Osram Sylvania, a nationwide company. Respondent employs more than six employees. Transcript at 362.
3. In early January of 2003, Complainant verbally informed McNeely that she was pregnant. When she communicated the information to McNeely, Complainant was in the very earliest stages of her pregnancy. She had previously suffered

four miscarriages and one still birth. Complainant testified credibly that she told McNeely she wished to “return” to work, in the sense of working from home, after giving birth and taking a maternity leave. Transcript at 134-135, 148.

4. Complainant testified credibly that in mid-January of 2003, she called Human Resources Assistant Marci Piper to go over maternity leave policies; to learn about short-term disability, salary continuance, and long-term disability; and to communicate her wish to “return” to work after her maternity leave. Transcript at 140, 145.
5. Respondent’s personnel policies provide that salary continuance (i.e., paid sick leave) and short-term disability payments run concurrently up to a maximum of twenty-six weeks. During the twenty-six week period, Respondent grants employees “job retention rights.” Job retention rights guarantee that an employee has an open position to which he/she can return.
6. Respondent’s twenty-six week job retention policy is computed on the basis of hours rather than weeks. The maximum period of short-term disability leave can exceed twenty-six weeks if an employee works part-time during a period of disability. Transcript at 398-399. If an employee works half-time and takes half- time off as disability leave, the twenty-six week retention period would not expire for fifty-two weeks. Transcript at 180-182, 376. After an employee’s job retention rights are exhausted, the employee becomes “inactive” and no longer has a guaranteed position. Transcript at 376, Exhibit 41. An individual who is “inactive” as opposed to terminated has two benefits: 1) less costly

medical coverage through COBRA and 2) waiver of a six-month waiting period for certain benefits if the individual subsequently obtains another job within the Company. Transcript at 494-495.

7. At the start of Complainant's 2003 pregnancy, she had been employed by Respondent for nine years and had 432 hours of "salary continuance" (i.e., paid sick leave). Joint Exhibit 19. Transcript at 399. Complainant had previously used 288 salary continuance hours in July/August of 2002.
8. Complainant testified that in mid-January of 2003, Leslie Lavelle, who was McNeely's supervisor and Manager of Financial Analysis, informed Complainant that she wasn't going to be allowed to work from home after her maternity leave. Transcript at 45. Complainant immediately pursued the matter with Company Comptroller David Fine. Id. According to Complainant, she told him that she felt like she wasn't going to have a job to come back to after her maternity leave and he responded by saying that the job she returned to after her maternity leave might be a "little bit different" than what she had at the time." Transcript at 45-46. I credit Complainant's testimony.
9. On or around January 14, 2008, Complainant presented Respondent with a note from her obstetrician, Dr. Bruce Cohen, stating that as of January 16, 2003, she would no longer be able to work in the office but that she could work from home for forty hours per week in a reclining position. Exhibits 1 and 4. While this request was being considered, Complainant was out of work from January 16, 2003 through January 31, 2003 on disability leave related to her pregnancy. Transcript at 401.

10. On January 30, 2003, Respondent, through its Human Resource Manager Michelle Farrell, notified Complainant that the Company was willing to accommodate her request to work at home beginning on February 3, 2003 but only for four hours per day. Exhibit 9. Farrell testified that Respondent made the decision to limit Complainant's at home work schedule to twenty hours per week because Complainant could not perform all of her work responsibilities at home. Transcript at 375. According to Farrell, Complainant could not efficiently complete monthly invoicing because she did not have access to a machine in the office mailroom which stuffed envelopes, nor could Complainant perform branch audits; download, print, and work with large Company reports necessary for completing quarterly reconciliations; access the Company's 800 telephone line in order to respond to customers; or perform various other office projects. Transcript at 432-446. Farrell testified that Complainant was placed on partial short-term disability leave for the twenty hours per week that she was not allowed to work at home.
11. Between February 10, 2003 and February 21, 2003, Complainant was not able to work at all because she was hospitalized for surgical procedures related to her pregnancy.
12. On February 18, 2003, Complainant's physician wrote that he was again clearing her to work up to forty hours per week, at home, in a reclining position. Exhibit 12.
13. Complainant re-commenced working half-time from home in a reclining position on February 24, 2003 and continued to do so until May 26, 2003. Her

work hours were 8:00 a.m. to noon except for Mondays when Complainant worked flexible hours. Complainant continued to earn a salary for the twenty hours per week she worked at home and collected salary continuance payments (i.e., paid sick leave) for the hours she did not work. Transcript at 53.

14. Complainant testified credibly that in March or April of 2003, she again discussed with McNeely whether she could work at home one or two days a week after giving birth. According to Complainant, McNeely said that she would think about it. Transcript at 43, 149. Complainant did not put her request into writing. Id. at 148.
15. On April 25, 2003 and on May 7, 2003, Complainant emailed Michelle Farrell to ask, “What happens when my sick time runs out and I’m still working 20 hours a week?” Exhibit 19. Farrell responded on May 9, 2003 that after the exhaustion of Complainant’s sick time, which Farrell projected to run out on May 15, 2003, Complainant could subsequently collect short-term disability pay for eight more weeks at 60% of her base pay, based on a maximum of twenty-six weeks of combined salary continuance (i.e., sick time)pay and short-term disability pay, and thereafter apply for long-term disability pay.¹ Exhibit 19. Farrell also informed Complainant that the Company had a twenty-six week job retention policy, i.e., once she was out of work for twenty-six weeks, the Company would no longer hold open her position. Id.; Transcript at 401.
16. Human Resources Manager Michelle Farrell testified that the purpose of the Company’s job retention policy is to maintain consistency among employees

¹ Respondent characterizes individuals as being on short-term disability status if they receive “salary continuance” at full pay or short term disability pay at 60% of their pay. See Revised Joint Pre-Hearing Memorandum at 8.

but that, “if someone comes and requests an exception to the policy, we’ll review it and see if it makes sense for that specific situation.” Transcript at 377, 404. According to Farrell, an employee and/or the employee’s supervisor could ask for an exception to the twenty-six week job retention policy, but Farrell acknowledged that nowhere in the written retention rights policy does it state that such an exception can be requested and granted and that she did not inform Complainant that such a request could be made. Transcript at 381-382.

Transcript at 378-379. Farrell testified that she is aware of two exceptions to the policy during her ten years of employment with Respondent. Transcript at 404-405.

17. Complainant did not contact Farrell with any questions. Transcript at 401.
Complainant testified that she thought her short-term disability benefits would extend for more than eight weeks after May 15, 2003 because they were based on her part-time work schedule but acknowledged that after May 27, 2003, she no longer worked part-time at home. Transcript at 187.
18. Complainant testified credibly that she did not ask anybody at the Company about holding open her job for more than twenty-six weeks under the job retention policy because she didn’t know that such a request was an option. Transcript at 196.
19. On May 27, 2003, Complainant had to stop her twenty-hour per week at home work schedule because of medical complications related to her pregnancy. Transcript at 55-56. Complainant left Linda McNeely a voicemail message on May 27, 2003 stating that she was being hospitalized for a few days. The

following day she contacted Respondent's medical department to deliver the same message. Due to further medical complications, however, Complainant stayed in the hospital for five weeks rather than several days. Complainant contacted one of Respondent's onsite nurses at the beginning of June of 2003 to inform the Company that she was still hospitalized.

20. Complainant learned in the beginning of July that her due date had been moved up from September of 2003 to the end of July of 2003 because she was experiencing contractions that could only be controlled by medication.

Transcript at 246.

21. Complainant was released from the hospital on July 3, 2003. Complainant testified credibly that on or about July 7, 2003, she informed Company nurse Anne Viehl by phone and Linda McNeely in a voicemail about her release. Transcript at 60, 247-256. Complainant asserts that her doctor was willing to allow her to recommence working at home in a reclining position for about two weeks until the anticipated birth of her baby but that she and Viehl decided that recommencing work for such a short period didn't make sense and that it would be better if Complainant were to return to work after her maternity leave.

Transcript at 62, 152-155, 257. According to Complainant, neither Viehl nor any other representative of Respondent informed her that her job was in jeopardy if she did not return to work. Transcript at 63. I credit Complainant's testimony that she informed Viehl and McNeely about her release from the hospital and her revised delivery date, but I do not credit Complainant's assertion that Viehl authorized or permitted Complainant to refrain from re-

commencing work.

22. Anne Viehl has been an occupational health nurse with Respondent since 1997 and a regional risk manager since 2003. She testified that she records any kind of contact and all communications with employees in “nurse notes.” Transcript at 509-512. According to Viehl, she did not tell Complainant that it made no sense for her to return to work in July of 2003 for a short period of time. Transcript at 526. Viehl testified that she did not have the authority to give such a directive and that it contradicted her role to bring people back to work. Transcript at 526-527. I credit Viehl’s testimony that she did not authorize Complainant to refrain from re-commencing her part-time work schedule in July of 2003.
23. Complainant received a letter from Respondent dated July 17, 2003 stating that it could no longer hold her position open because she had been out of work for twenty-six weeks or longer; that if she wished to return to work in the future, she could apply for open positions; and that her long term disability claim was approved. Exhibit 23. Complainant testified that she did not respond to the letter because she was too upset and stressed. Complainant asserts that the loss of her job caused her trouble sleeping and eating. Transcript at 105, 159.
24. Complainant received a subsequent letter from Respondent dated July 29, 2003 reiterating that she had no job retention rights and that she was required to return Company equipment. Exhibit 25.
25. Complainant did not respond to the letters of July 17 or 29, 2003 because she was too upset to do so. She testified that she had planned to return to work for

Respondent after an eight-week maternity leave prior to being informed by Respondent in the correspondence dated July 17, 2003 and July 29, 2003 that she was not eligible to do so. I do not credit Complainant's testimony that she planned to return to the office on a five day-a-week basis within eight weeks after delivering her daughter, but I do credit Complainant's testimony that she made repeated inquiries about working at home on a part-time basis after giving birth. According to Complainant's credible testimony, she would have returned to her former job in a limited capacity, around September 23, 2003, at the end of her maternity leave, but was not prepared to look for other work until November of 2003. Transcript at 314-315. Complainant's deposition testimony states that she did not want to start working again until November of 2003 but her errata sheet states that she was prepared to return to work for Respondent at the conclusion of her maternity leave, although not prepared to work for an employer other than Respondent until November of 2003. Transcript at 320-322.

26. Farrell testified that she did not ask Complainant whether she planned on returning to work after giving birth. Transcript at 396-397.
27. On July 29, 2003, Complainant gave birth to her daughter, who was six weeks premature. At birth, Complainant's daughter weighed five pounds, twelve ounces. Transcript at 262. Complainant did not have any child care arrangements in place at that time. Transcript at 264. Complainant testified that because her baby was premature and slow in gaining weight after birth, she was concerned about putting her in day care as a newborn infant and she was

concerned about looking for a new job. Complainant described the day she gave birth as, “probably one of the best days” of her life, testified that she was happy about giving birth, and said that she enjoyed spending time with her new baby. Transcript at 304. According to Complainant, at the same time she experienced pleasure at the birth of her daughter, she attributed the following reactions to Respondent: problems sleeping, crying, difficulty eating, being short with her husband, and having a “little bit” of difficulty bonding with her daughter. Transcript at 305-313. I do not credit Complainant’s testimony that the majority of her emotional and physical reactions following the birth of her daughter were due to Respondent although I credit her testimony that she experienced additional stress as a result of Respondent notifying her in July of 2008 that her job retention rights had expired. Exhibits 23 and 25.

28. Complainant received long term disability payments from Respondent’s disability insurer, Unum Provident, in the amount of \$3,890.55 for the period between July 17, 2003 and September 8, 2003. Exhibits 26 and 27.
29. Complainant’s long-term disability benefits ended on September 8, 2003. Exhibit 28. Respondent characterized Complainant’s status after September 8, 2003 as on “inactive” status or “leave of absence.” Complainant’s position was posted on July 19, 2003. Exhibit 24; Transcript at 456-457. Complainant was subsequently replaced by Tim Wiedner. Her medical, dental and vision expired on October 8, 2003. Exhibit 28.
30. When Complainant stopped working for Respondent, she was earning \$44,890.56. In 2003, the Company administered a 401K program in which it

contributed fifty cents on the dollar up to six percent of an employee's contribution. Complainant testified that she contributed at least three percent of her salary to her 401K plan but Human Resources Assistant Marci Piper testified that Complainant's contribution to her 401K in 2003 was two percent. Transcript at 499-501. According to Piper, Respondent would match a two percent contribution with a contribution of one percent. Transcript at 501. As of September 2003, Complainant no longer had health insurance through Respondent. Complainant incurred \$710.00 in out-of-pocket expenses when she switched her health coverage to her husband's medical insurance. Transcript at 296.

31. After giving birth, Complainant communicated with co-workers about her baby, about reimbursement for a telephone bill, and about returning a Company laptop; Complainant sent former co-workers baby pictures and she brought her daughter into the office.
32. On November 11, 2003, Complainant emailed Respondent that, "Now that I am fully capable of resuming my previous duties my attorney has advised me to inquire about current positions that I may apply for." Complainant received notices of openings beginning in November of 2003. Exhibits 34 and 35. She testified that she applied for one Supervisory Account Services I position with Respondent but couldn't remember if she followed up after Marci Piper contacted her to say that the Company hadn't received her application or resume. Exhibit 33; Transcript at 299. Complainant did not receive the job. Complainant testified that she didn't apply for other positions such as Senior

Financial Analyst, Sales and Marketing Assistant, Supervisor of Accounting Services, Accounting Assistant II, and Financial Analyst I/II because she did not consider herself to have the necessary experience in sales, distribution, and Lotus. Transcript at 318. Her supervisor, Linda McNeely, testified that Complainant was qualified for these positions. Transcript at 453-456.

33. Complainant testified that in November of 2003, she began to look for available positions in the Boston Globe and on the internet. At the end of December of 2003, Complainant began sending out applications. Transcript at 273.

Complainant testified that she contacted approximately twenty-five companies about jobs, but asserted that she no longer has any records of her job search because her family's personal computer crashed in the summer of 2004 causing the loss of documents and email messages on the hard drive, her email site got full during and after the summer of 2004 which resulted in the deletion of messages, and hard copies of documents got lost when Complainant moved from Massachusetts to Georgia and subsequently within Georgia. Transcript at 289, 348-350. Complainant did not use any job placement services or any recruiters and did not receive any job offers. Transcript at 290.

34. Complainant received unemployment compensation benefits totaling \$10,686 for the period following the birth of her daughter. In order to obtain unemployment benefits, Complainant needed to keep a log of her job hunting efforts consisting of a minimum of three contacts per week. Transcript at 289.

35. Complainant stopped looking for employment in Massachusetts as of September of 2004 because of plans to move to Georgia. Transcript at 277. During that

month, Complainant's husband, Timothy McFail, finalized plans to join his father-in-law's business in Georgia. Transcript at 343-344.

36. Complainant, her husband, and her daughter moved to Georgia in November of 2004.

37. After moving to Georgia, Complainant took some time to get "settled." Transcript at 93. She started applying for work in late February or March of 2005 and contacted job recruiters in September of 2005. Transcript at 96.

38. Complainant secured full-time employment in Georgia in November of 2005 as a senior accountant in the acquisition department at AT&T Mobility/Cingular Wireless., earning \$50,000.

39. Complainant sought counseling with Respondent's employee assistance program in regard to her prior miscarriages and her stillborn birth but did not seek counseling in regard to losing her job. Complainant described her emotional state after giving birth as happy and the postpartum period as exciting but stressful. Complainant testified that she experienced anxiety about her financial situation. Transcript at 305.

III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, sec. 4 (1) makes it an unlawful practice to discriminate against an employee because of her sex. Since pregnancy and childbirth are sex-linked characteristics, actions by an employer which "unduly burden" an employee because of pregnancy or childbirth may amount to sex discrimination under M.G.L.c.151B. See MCAD Guidelines on the Massachusetts Maternity Leave Act (2000) *citing* School

Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979) and White v Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997) *quoting* Lane v. Laminated Papers, Inc., 16 MDLR 1001, 1013 (1994); *see also*, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled pregnancy because of fears of additional absences deemed unlawful sex discrimination). Further, M.G.L. c. 151B sec. 4 (11A) makes it unlawful for an employer to refuse to restore a female employee to employment following a maternity leave under M.G.L. c. 149, sec. 105D.

In the absence of direct evidence, a prima facie case of sex discrimination based on pregnancy/maternity leave requires a showing that Complainant: 1) is a member of a protected class, 2) was performing her job at an acceptable level, 3) was terminated and/or her position was eliminated, and 4) was replaced or terminated under 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).

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 sex/pregnancy discrimination. In refuting the accusation that Complainant was singled out for disparate treatment, Respondent asserts that Complainant was treated in the same manner as any other employee with respect to the Company's twenty-six week job retention policy. The policy, in essence, permits employees who are out of work as a result of temporary disabilities to return to their positions within twenty-six weeks. If they are unable to do so, they lose the right of return. Respondent labels employees who fail to return within twenty-six weeks as "inactive" but a more accurate description of

such employees is that they have been separated from their positions or terminated. In computing the twenty-six week period, Respondent measures its job retention protection in terms of the number of hours, not weeks, during which an employee is unable to work. Thus, an employee who misses part of each work week because of a temporary disability consumes his/her twenty-six week job retention protection in proportion to the percentage of time he/she does not work.

In 2003, Complainant missed some weeks in their entirety as a result of pregnancy-related disability. During other weeks in 2003, Complainant worked half-time as a result of pregnancy-related disability. During those weeks, Complainant consumed one week of job retention protection for every two weeks she worked on a half-time basis.

The evidence indicates that Respondent acted reasonably in accommodating Complainant with a twenty-hour per week at-home work schedule during the period of time when Complainant's doctor cleared her to work at home in a reclining position. Although Complainant's physician stated that she was physically capable of working forty hours per week in a reclining position, the credible evidence indicates that only half of Complainant's duties could reasonably be performed at home.

Less persuasive than Respondent's approval of a half-time schedule is the rigid and uncommunicative manner that Respondent implemented its twenty-six week job retention policy in relation to Complainant. Although Respondent informed Complainant in early May of 2003 that the Company would not hold open her position after twenty-six weeks of disability, it never identified precisely when that date would occur. Respondent failed to inform Complainant, a valued ten-year employee, that she could seek an

extension of the twenty-six week policy as it had permitted others to do. Moreover, Respondent failed to arrange for Complainant to resume working at home on a part-time basis after her May 27-July 3, 2003 hospitalization in order to prolong her job retention rights through the end of her pregnancy. These omissions constitute a disparate application of the Company's twenty-six week job retention policy -- harsh in relation to Complainant's pregnancy, flexible in relation to others. See Davidson v. Franciscan Health System of the Ohio Valley, Inc., 82 F.Supp.2d 768 (S.D.Ohio 2000) (requiring evenhanded, albeit not favorable, application of a twenty-six week job retention policy for pregnant women). Even if company nurse Anne Viehl testified credibly that she did not authorize Complainant to remain out of work until giving birth, it is nonetheless significant that Respondent terminated Complainant less than ten days before she delivered and did so at a time when Complainant was confronting serious medical complications. At a minimum, Respondent applied its job retention policy to Complainant in a harsh and unyielding manner, wholly at odds with Respondent's description of the policy in relation to others.

Turning to Complainant's claim under the Massachusetts Maternity Leave Act, G.L.c.149, section 105D requires employers to grant non-probationary female employees eight weeks of unpaid maternity leave, provided that the employee gives at least two weeks notice of her anticipated date of departure and of her intention to return. The evidence indicates that Complainant notified Respondent, to the extent she could, of her anticipated date of departure and of her intention to return to work in some capacity following the birth of her daughter. Indeed, the credible evidence indicates that Complainant made numerous inquiries about working at home several days per week

following her delivery. While Complainant acknowledged that she had concerns about using day care for her premature and underweight baby, admitted that she had no child care arrangements in place at or after her delivery, and failed to contact Respondent about returning to work for three months following her delivery, these factors can be explained by Respondent's termination of Complainant in July of 2003 rather than by Complainant's desire to sever ties with Respondent. Complainant maintains that had she not been separated from her job per letters of July 17 and 29, 2003, she would have returned to her former job within the required eight week period. I do not need to reach this issue because Respondent preempted Complainant's right to take a maternity leave by separating her from her job in the final weeks of her pregnancy. The Massachusetts Maternity Leave Act does not permit Respondent to assume that Complainant would rather leave its employ than resume working on a full-time basis.

Insofar as damages are concerned, the evidence does not support Complainant's contention that she endeavored to locate alternative employment after being separated from her position in July of 2003. Complainant did not respond to the numerous job postings sent to her by Respondent. Although Complainant testified that she was not qualified to apply to for these positions, I credit the contrary testimony of her former supervisor, Linda McNeely, that Complainant possessed the qualifications to make her a viable candidate for these openings. Complainant also failed to produce any evidence of her alleged job search in 2003 or 2004, testifying that she lost such evidence during several residential moves and as a result of a computer crash. Without documentary evidence of a job search during those years, I decline to credit Complainant's alleged attempt to mitigate her lost pay. The credible evidence in the record does not establish

that Complainant engaged in a committed job search until 2005, despite receiving unemployment compensation in the interim. Once Complainant began to look for a job in earnest, she quickly found one at a salary higher than the one she earned from Respondent. For the stated reasons, Respondent has proven a failure to mitigate employment damages. See Northeast Metropolitan Regional-Vocational School District v. MCAD, 31 Mass. App. Ct. 84 (1991). Accordingly, I decline to award Complainant damages for back pay. Complainant is entitled, however, to any medical expenses that she incurred as a result of giving birth while designated as an “inactive” employee, i.e., terminated from her position with Respondent.

As far as emotional distress is concerned, it is noteworthy that Complainant’s successful birth in 2003 was preceded by several difficult years during which Complainant experienced miscarriages and a still birth. Complainant’s pregnancy in 2003 was also fraught with anxiety. During most of this period, Respondent appears to have been a caring and supportive employer. Following the birth of her daughter on July 29, 2003, Complainant acknowledged that she experienced stress in relation to her infant’s premature birth and her difficulty gaining weight. These circumstances, plus Complainant’s ambivalence about returning to work, suggest that factors other than her discharge played a significant role in her emotional state during July of 2003 and thereafter. See Tan v. Stonehill College, 44` Mass 549, 576 (2004) (recognizing that emotional distress existing from circumstances other than respondent’s actions or from a pre-existing condition is not compensable); Williams v. Storz Endovision, Inc., 24 MDLR 91 (2002) (recognizing that factors aside from discrimination may “overwhelmingly contribute” to complainant’s emotional distress); Raffurty v. Keyland

Corp., 22 MDLR 125, 128 (2000) (recognizing that emotional distress may come from more than one source).

Notwithstanding the emotional distress which Complainant experienced from sources other than employment discrimination, I credit her testimony that Respondent's action separating her from her position twelve days prior to giving birth was profoundly upsetting to her, caused her to experience trouble sleeping and eating, caused her to cry, and be "short" with her husband. I credit, as well, the assertion that as the new mother of a premature newborn who was slow in gaining weight, Complainant was unable to cope with looking for and accepting a new job but would have returned to her previous position with Respondent in some capacity. The presence of other stressors in a complainant's life does not absolve a respondent from liability for the distress caused by its actions. See Raffurty, 22 MDLR at 128; Franklin Publishing Co., Inc. v. MCAD, 25 Mass. App. Ct. 974, 975 (1988). In evaluating the relative contributions of each source of distress, I conclude that Complainant is entitled to \$25,000.00 in emotional distress damages.

III. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.ch. 151B, sec. 5, Respondents are ordered to immediately cease and desist from further acts of discrimination and retaliation. In addition, Respondents shall pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$ 25,000.00 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.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 19th day of August, 2008.

Betty E. Waxman, Esq.