

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and SHANNON SHAW,
Complainants

v.

DOCKET NO. 98-BEM-1632

CIRO'S RISTORANTE &
PIZZERIA,
Respondent

Appearances:

Richard J. Rosa, Esquire for the Complainant

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 14, 1998, Shannon Shaw filed a complaint with this Commission charging Respondent with discrimination on the basis of pregnancy, in violation of M.G.L.c.151B. The Investigating Commissioner issued a finding of probable cause. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on December 13, 2002. The Respondent failed to appear at the public hearing and the hearing proceeded as a default hearing. Respondent was notified of its default by certified mail, return receipt requested and

failed within the time required by regulation to respond in any manner. At the public hearing, Complainant's motion for sanctions was granted, and Complainant's requests for admissions were deemed admitted, following Respondent's failure to respond to discovery. After reviewing the entire record in this matter, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Shannon Shaw resides in Haverhill, Massachusetts. In 1990, Complainant graduated from Whittier Vocational Technical School where she studied culinary arts. She received a degree in Applied Science with a major in Culinary Arts from Newbury College in Brookline, MA in 1996.

2. Respondent operates a chain of restaurants. Its headquarters is located in Maynard, Massachusetts. In August 1992, Complainant was hired as a prep cook at Respondent's restaurant in Chelmsford, Massachusetts.

3. Complainant was later promoted to the position of sauté cook, and became assistant kitchen manager in July

1996. Complainant received a salary of \$9.50 per hour. Complainant's duties included cooking, ordering supplies, keeping inventory, scheduling, supervising staff, cleaning, sweeping and mopping. Complainant reported to Manny Lappa, the head kitchen manager.

4. In June 1997, Complainant obtained medical insurance through Respondent. She had also accrued two weeks paid vacation.

5. In May 1997, Complainant learned she was pregnant and was due to deliver her baby in February 1998. She reported her pregnancy to her supervisor in October 1997, advising him that she planned to work until two weeks before her due date, that she intended to return to work after the birth of her child, and had arranged to have her mother care for her child.

6. On Wednesday, December 17, 1997, Manny Lappa informed Complainant that her employment was terminated effective the following Sunday and that he had hired someone to take over her position who needed to start right away.

7. Complainant testified that she attempted to discuss the matter with Respondent's owner, George Yannakopolous, who told her that he needed to "cover his butt" because he did not believe that she intended to return following her maternity leave, although Complainant assured him that she would.

8. Complainant testified that the position of kitchen manager opened in the fall of 1997 after Respondent learned of her pregnancy. Complainant informed Manny Lappa that she was interested in the position, however, Lappa responded that she was not ready for the job. Complainant testified that a male was then hired for the position in October 1997. Complainant trained the man in all of his managerial duties. Complainant believed that the man did not have a degree, as she did.

9. Complainant testified that she was very upset about having been terminated by Respondent because of her pregnancy after having been with company for 6 ½ years. Complainant was worried that medical expenses related to the delivery of her baby would no longer be covered by insurance. Although Complainant was eligible for coverage under COBRA, she could not afford the premiums of \$420.00

per month. Complainant instead was forced to apply for health benefits under MassHealth, the state welfare program. Complainant's son was born February 25, 1998. In late May 1998, Complainant began to seek employment at various bakeries and restaurants.

10. Complainant's final earning statement from Respondent indicates that her gross income was \$460.00 for the pay period ending December 20, 1997 and her year to date income was \$23,450.08. (Exh. C-1)

11. Complainant testified regarding various positions held by her in the three years subsequent to her termination from Respondent. However, I find that there was insufficient evidence to determine Complainant's interim earnings during this period of time.

12. In December 2000, Complainant obtained full time employment as a shift manager at Panera Bread in North Andover. She earns \$12.00 per hour.

13. Complainant testified that she was under a lot of stress after her termination because of the uncertainty

about income and medical coverage and having to go on welfare. I credit her testimony.

14. Complainant collected unemployment benefits of approximately \$3,000.00 following her termination.

III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to discharge an employee because of her sex. "Pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because of her pregnancy or the requirement of a maternity leave are considered sex discrimination." School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); Carmichael v. Wynn & Wynn, 17 MDLR 1641, 1650 (1995).

Complainant in this case asserts that she was terminated because of her pregnancy. In order to prove discrimination, Complainant must first establish a prima facie case. The complainant may prove a claim of discrimination by presenting direct evidence of discrimination or by utilizing the three-stage order of

proof articulated in both federal and state court decisions. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130 (1976). Complainant presented un rebutted, direct evidence that Respondent's owner terminated her employment because he did not believe she would return to work after the birth of her child terminated.

Once Complainant establishes a prima facie case, the burden shifts to Respondent to establish a legitimate, non-discriminatory reason for its action. Wheelock College, 371 Mass. at 136. As Respondent did not appear at the hearing and I credited Complainant's testimony, I conclude that Complainant has established an un rebutted, prima facie case of sex discrimination in employment.

Complainant also established an un rebutted prima facie case of gender discrimination in that she was passed over for a kitchen manager position that was awarded to a man in October 1997. However, there was no evidence in the record about the salary and benefits of the manager's position and thus I decline to award of damages with regard to this position as such damages be entirely speculative.

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purpose of c. 151B and to make the Complainant whole, including damages for emotional distress incurred.

Bournewood Hospital v. MCAD, 371 Mass. 303, 315-6 (1976).

I conclude that Complainant suffered from emotional distress as the result of Respondent's unlawful conduct. Complainant testified that she was upset about losing her income and worried about how to cover the medical expenses associated with her labor and delivery. I conclude that an award in the amount of \$25,000.00 is appropriate to compensate Complainant for the emotional distress she endured as a result of Respondents' unlawful conduct.

I further conclude that Complainant is entitled to damages for lost wages as a result of Respondent's unlawful conduct. Complainant has the duty to mitigate damages, however, the burden is on Respondent to prove interim earnings. Similarly the Respondent has the burden to prove what Complainant would have earned in mitigation of her employment losses had she made a reasonable effort to find employment. Buckley Nursing Home v. MCAD, 20 Mass.App.Ct.172, 185(1985); J.C.Hillary's v. MCAD, 27 Mass.App.Ct.204(1989). Although there was evidence that

the Complainant had worked during the three year period after her termination, there was insufficient evidence of her actual earnings to calculate interim earnings. Because Respondent has defaulted and has failed to meet its burden in this regard, I conclude that Complainant is entitled to lost wages for a three year period from December 1997 until she began working full-time at Panera Bread in December 2000. Complainant earned \$23,450.08 at Respondent in 1997. Therefore the amount of her lost wages for the three-year period following her termination is \$70,350.24. Complainant received \$3,000.00 in unemployment benefits. Therefore she is entitled to the sum of \$67,350.24 to compensate her for her lost wages during this period. ($\$23,450.08 \times 3 = \$70,350.24$) - \$3,000.00 unemployment comp. = 67,350.24).

IV. ORDER

For the reasons stated above, Respondent is hereby ordered:

1. To cease and desist discriminating on the basis of sex and pregnancy.

2. To pay to Complainant the sum of \$25,000.00 in emotional distress damages, 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. Payment shall be made within 60 days of receipt of this decision.

3. To pay to Complainant the sum of \$67,350.24 in 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.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time period allotted, please notify the Clerk of the Commission.

Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 19TH of March, 2003.

JUDITH E. KAPLAN
Hearing Officer