

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. & TRIXIE DIETZ,  
Complainants

v.

DOCKET NO. 04BEM01853

BEVERLY HOSPITAL,  
Respondent

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Appearances:

Matthew A. Haymer, Esquire for Trixie Dietz  
J. Allen Holland, Esquire for Beverly Hospital

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 13, 2004, Complainant Trixie Dietz filed a complaint with this Commission against Beverly Hospital and Michele Donovan charging that Respondents discriminated against her on the basis of her gender and disability, in violation of M.G.L.c.151B, sec. 4(1) and (16). The investigating commissioner issued a lack of probable cause finding. On appeal, the investigating commission vacated the lack of probable cause finding and issued a probable cause finding on Complainant's claim of discriminatory failure to hire because of her gender/pregnancy. The investigating commissioner also found, sua sponte, that complaint's allegations supported probable cause to find potential violations of M.G.L.c.149, §105D, and M.G.L.c.151B§, 4(11A). The Commissioner upheld the previous lack of probable cause finding with respect to the disability claim and all claims against the individual respondent, Michele Donovan. A

public hearing was held before me on January 13 and 14, 2009. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

1. Complainant Trixie Dietz currently resides in Virginia. She is a former resident of Massachusetts where she received a bachelor's degree in biology from Salem State College. Following a one-year internship at Lawrence General Hospital, in January of 1997, Complainant became a licensed medical technologist.

2. Respondent Beverly Hospital is located in Beverly Massachusetts and is a unit of Northeast Hospital Corporation, which also includes Addison Gilbert Hospital.

3. Complainant was initially hired by Respondent as a full time, third-shift medical technologist in October of 1996. As a medical technologist, Complainant's primary duties included conducting laboratory tests in the following areas: routine blood tests, chemistry and hematology, microbiology, planting of specimens and blood banking for blood infusions. Michele Goodwin (formerly Doherty) was her supervisor at Respondent. David Sciamanna was lab director and was Goodwin's supervisor.

4. In October of 2001, Complainant resigned her position at Respondent to take a similar position at Faulkner Hospital in Boston, working the second shift. After close to a year at Faulkner, Complainant was promoted to the position of evening shift supervisor. Complainant testified that while employed at Faulkner, she retained "per diem" status at Respondent.

5. In November of 2002, Complainant left her position at Faulkner and returned to Respondent as a full time Evening/Night Laboratory Supervisor. In addition to

performing the duties of a technician, in this position Complainant was responsible for scheduling and assessments, acting as a liaison between doctors and nurses, reviewing quality control, trouble-shooting machines and ensuring that the work flowed smoothly. Complainant also supervised 25 people.

6. Michele Goodwin has been laboratory operations manager for Respondent since October of 2004. She was core laboratory manager from February of 2001 to October of 2004. The core lab employs approximately 60 people and consists of three departments; chemistry, hematology and blood bank. The lab performs testing of various bodily fluids. As core laboratory manager Goodwin oversaw the daily operations of the laboratories at Respondent's Beverly and Addison Gilbert sites. Goodwin was Complainant's direct supervisor and met regularly with Complainant when Complainant reported for her shift.

7. Harriet Brooks was employed by Respondent from October of 1986 until March of 2006, in a variety of positions. During 2003 and 2004 she was a human resources generalist whose duties included handling recruitment, retention and employee relations issues. She is currently employed by Winchester Hospital. Brooks participated in interviewing and hiring Complainant for the evening supervisor position.

8. Judith Doe has been manager of compensation and benefits for Respondent for 30 years. Doe supervised Eileen Barrett, a benefits assistant who is no longer employed by Respondent.

9. In January of 2003, Complainant learned she was pregnant with twins with a delivery date of September 27, 2003. In February of 2003 Complainant informed Goodwin of her pregnancy. After congratulating Complainant, Goodwin instructed her

to schedule an appointment with Eileen Barrett in order to review Respondent's benefits and leave policies.

10. Complainant testified that she met with Barrett in March of 2003 to review Respondent's leave policy. Barrett told her she was entitled to 12 weeks of maternity leave. Complainant testified that in reviewing Respondent's leave policy she noticed that "multiple births," constituted an exception to the leave policy and she asked Barrett if having twins entitled her to more time off and Barrett told her that it did not. Barrett provided Complainant with a leave application and instructed her to complete the paperwork when her leave began. I credit Complainant's testimony that Barrett told her that she was entitled to 12 weeks of maternity leave.

11. Judith Doe testified that Eileen Barrett was new at the job when she first met with Complainant and thus was not aware that under both Respondent's policy and Massachusetts law, Complainant was entitled to 16 weeks of maternity leave because she was pregnant with twins. (R-2)

12. Harriet Brooks testified that in 2003, she overheard Eileen Barrett on the telephone discussing Respondent's leave policy for multiple births. Barrett told the caller that she had to consult with her supervisor and put the caller on hold. Brooks then heard Judith Doe explain the multiple birth policy to Barrett, whom Brooks understood had been on the phone with Complainant. Brooks then heard Barrett relay to the caller that she had 16 weeks of maternity leave. I find that Brook's hearsay testimony regarding one side of a telephone conversation is insufficient evidence of Respondent's notice to Complainant that her maternity leave was of 16 weeks' duration.

13. Judith Doe testified that sometime in 2003, Harriet Brooks and Eileen Barrett asked her to clarify Respondent's policy regarding Complainant's maternity leave. Doe explained to Brooks and Barrett that Complainant was entitled to 16 weeks under both state law and Respondent's policy. Doe then followed Brooks and Dietz into Barrett's office and listened as Barrett called Complainant and conveyed to Complainant that she would have 16 weeks of maternity leave. Doe did not speak to Complainant and did not hear Complainant's side of the telephone conversation. As with the testimony of Brooks, I find that Doe's hearsay testimony regarding one side of a telephone conversation is insufficient evidence of Respondent's notice to Complainant that her maternity leave was of 16 weeks' duration.

14. In June of 2003, Complainant developed pregnancy complications, was hospitalized for a week and was subsequently restricted to bed rest by her physician. She reported her condition to Respondent's human resources department and was instructed by an HR representative to complete the leave application that Barrett had given her in preparation for her maternity leave. Complainant completed the form, requesting a leave under the FMLA and listing July 28, 2003 as her return to work date. Complainant's boyfriend dropped off the completed form at Respondent. (Ex. C-1) On June 5, 2003 Complainant was granted FMLA leave retroactive to June 2, 2003.

15. Goodwin was aware that Complainant was having a difficult pregnancy and had been placed on bed rest in the beginning of June 2003.

16. Complainant did not return to work at the end of July and on August 7, 2003; she gave birth to twins by Caesarian section at New England Medical Center. As of that date her FMLA was automatically converted to maternity leave. She remained in the

hospital for three to four days. Sometime during the week following her release from the hospital, Complainant contacted a human resources representative to report that she had delivered twins. Complainant told the representative, whose name she did not know, that she wanted to make sure of her new return to work date. The representative responded that her maternity leave was 12 weeks in length and her return to work date was November 1, 2003. I credit Complainant's testimony that she was told her maternity leave was 12 weeks long.

17. Goodwin learned in early August of 2003 that Complainant had delivered twins. On August 11, 2003 Goodwin received an e-mail from Eileen Barrett informing her that Complainant was entitled to 16 weeks of maternity leave, ending on November 27, 2003. (C-5) Goodwin testified that she did not communicate this information to Complainant. I credit her testimony.

18. Complainant testified that no one at Beverly Hospital ever contacted her by phone or in writing regarding the duration of her maternity leave. I credit her testimony. Complainant was never instructed to complete another leave application after she delivered her twins. Complainant never received any written confirmation that her FMLA leave had been converted to maternity leave; nor did she receive any written confirmation regarding her return-to-work date. Judith Doe confirmed that, at that time, Respondent did not send employees a notice when their FMLA leave converted to maternity leave.

19. On October 27, 2003, believing that her maternity leave ended on November 1, 2003, Complainant visited Beverly Hospital unannounced in order to discuss her return to work with Goodwin. Goodwin was not expecting Complainant. After introducing her

boyfriend and her new born infants to Goodwin, Complainant and Goodwin proceeded to talk in the lab's break room.

20. During their discussion, Complainant informed Goodwin that her twins had medical problems and that one of the twins was too small to be vaccinated and could therefore not be placed in day care. Complainant also told Goodwin that her mother had been diagnosed with breast cancer and could not assist her with child care. Complainant testified that Goodwin told her that the human resources department had informed Goodwin that Complainant was due back to work on November 1. Goodwin denied discussing Complainant's maternity leave with her and was said she was not thinking about the end date of Complainant's maternity leave when Complainant asked to speak with her. I credit Complainant's testimony that she and Goodwin discussed that her maternity leave was ending on November 1, as there would have been no pressing reason for Complainant to come in and talk with Goodwin about alternative work plans if she believed that she had additional month of leave remaining. I do not credit Goodwin's testimony that she did not discuss Complainant's maternity leave with her.

21. Complainant testified that during this discussion she asked Goodwin whether she could return to her job on a part time basis until her child was immunized and able to be placed in day care. She stated that Goodwin responded in the negative saying that the position was full time and that Goodwin had herself already assumed some of Complainant's supervisory duties. Goodwin denied that Complainant requested to work part-time for a short time only and testified that her request was open-ended and not dependent on the baby's immunization. I credit Goodwin's testimony that

Complainant's request to work part time was open ended. I do not credit Complainant's testimony that she proposed part-time work as a temporary stop-gap measure.

22. After Goodwin rejected her request to work at her previous position part-time, Complainant asked Goodwin if there were any other part-time positions available and Goodwin said no. Complainant then asked Goodwin if she could work on a per diem basis and stated that she had observed an open eight-hour shift on the lab's posted schedule for November. Goodwin agreed that Complainant could work per diem but would have to first resign from her full-time job. However, she could not work the currently-posted per diem shift because having been out of work for six months, she needed to be re-assessed. Goodwin told Complainant that she could draft a simple resignation letter in the break room. Complainant testified that she hadn't planned on to resigning, and believing this was her only employment option at the time, she wrote a resignation letter in the break room and submitted it to Goodwin. (Ex. C-2)

23. Reassessment is a process involving training/retraining of an employee to ensure competency in key areas of job performance and knowledge. Goodwin testified that under the hospital's policy, lab workers who are "away from the bench" for an unspecified period of time have to be reassessed by the lab coordinators in the chemistry, hematology and blood bank departments. The coordinators review instruments and procedures with them to ensure they can demonstrate continued competency. At the time of Complainant's resignation the coordinators were Ann Toroyan, Pete Lovejoy and Jeanine Lynch. (C-2) No evidence was offered regarding how much time is required for re-assessment.

24. Goodwin testified that at the end of their discussion she said to Complainant, “Trixie, give me a call when you’re ready.” She then processed the paperwork to have Complainant’s status changed from full time to per diem and to post the supervisor position from which Complainant had just resigned. The supervisor position ultimately remained open for approximately one year after Complainant’s resignation.

25. Complainant testified that after meeting with Goodwin, it occurred to her that she not been out of work for six months as Goodwin had stated, and she wondered whether she needed re-assessment after all. Complainant called Goodwin the day after the meeting and left a voice mail message stating that she had only been out of work for about four months and wanted to discuss whether re-assessment were required under these circumstances. Goodwin did not return her call. I credit Complainant’s testimony that she called and left a voice mail for Goodwin, who did not return her call.

26. Complainant testified that she obtained her child’s required immunizations in November of 2003 and planned to enroll her twins in Respondent’s on-site day care center on a part-time basis, dropping them off when she arrived for her evening shift and having her boyfriend, who then worked a day shift, pick them up on his way home from work.

27. Complainant testified that she attempted to contact Goodwin on a weekly basis concerning the need for re-assessment, but Goodwin did not return her phone calls. I credit her testimony that Goodwin was entirely unresponsive to her inquiries for a long period of time.

28. Goodwin testified that a couple of months after their meeting, she attempted to return Complainant’s voice mail message; however, when Goodwin called

Complainant's number, she received an automated message that the call could not be put through. Within two or three weeks, she received another voice mail message from Complainant, and again was unable to leave a message. Goodwin claimed that Complainant's voice mail messages simply asked Goodwin to return her calls and did not specify the reason for her calls. I do not credit her testimony. I believe that Complainant stated the reason for her calls to Goodwin and I believe that Goodwin could have left her name or a voice mail message on Complainant's phone.

29. Complainant testified that at the time her telephone service included a feature, "call intercept," that would not put through a call from an unrecognized number; however the feature allowed unrecognized callers to leave their names and she never received a message that Goodwin had called. Complainant stated that while she was on maternity leave her co-workers had called her and were able to leave messages. I credit her testimony.

30. Goodwin knew of approximately six employees who had become pregnant, some of whom returned from maternity leaves and others who did not. She testified she did not know whether Complainant would return to work after the birth of her children. Goodwin testified that she made no attempt to contact Complainant to arrange a reassessment because during their discussion at the end of October 2003, Complainant seemed "completely overwhelmed with her life situation, including her pregnancy, her child care problems and her mother's cancer." I credit her testimony, and find that her failure to give Complainant the proper information about her return date and her view of Complainant's situation effectively foreclosed Complainant's returning to work.

31. Complainant testified that while visiting Respondent in January of 2004, she learned from co-workers about an available part-time eight hour per week laboratory technician position. This position had been open since at least October 27, 2003. A couple of days later she called blood bank supervisor, Ann Toroyan about the position and said she had not been able to reach Goodwin to schedule her reassessment. According to Complainant, Toroyan was unaware that Complainant had been trying to schedule re-assessment and put Complainant on hold in order to check with Sciamanna. When Toroyan returned to the phone, she told Complainant that Sciamanna said to wait until Goodwin returned from a conference to discuss the reassessment issue and to submit an application for the part-time position. Complainant faxed an application to Respondent's HR department on January 28, 2004.

32. Complainant testified that in February 2004, Goodwin called her, said that she had tried once to reach her and told her someone else had been given the part-time position. Complainant then asked Goodwin about per diem work; however Goodwin responded that Complainant had by then been out of work so long that she would have to be re-trained,<sup>1</sup> which would not be financially beneficial for the hospital. Complainant asked Goodwin, "Are you sure I cannot come in per diem?" Goodwin responded that she could not. Complainant testified that she was "in shock" and did not know what to say. She did not believe Goodwin had already hired someone for the part-time position because Goodwin had been out the previous week. I credit Complainant's testimony regarding this conversation and her reaction to it. Goodwin testified that she did not recall this telephone conversation.

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<sup>1</sup> There was no evidence as to what re-training would entail.

33. Harriet Brooks testified that she hired Mary Roderick for the part-time position and Goodwin approved the hire. She did not know the exact date of Roderick's hire. I credit her testimony.

34. Goodwin testified that part-time positions are posted by Respondent and Complainant could have applied for such position if interested but Complainant had never expressed interest in any posted part-time position. I do not credit Goodwin's testimony that Complainant never expressed interest in a part-time position. Complainant testified credibly that she asked Goodwin about part time work at their October 27, 2003 meeting.

35. The day after speaking with Goodwin, Complainant spoke to Sciamanna, who told her that the position had been filled before she had submitted an application. Complainant told Sciamanna that she was still wanted per diem work and he responded that it was not fiscally beneficial for the hospital to re-train her. I credit Complainant's testimony.<sup>2</sup>

36. After her discussion with Sciamanna, Complainant filed an internal grievance with Respondent claiming that Respondent did not act in good faith and engaged in unfair practices for failing to offer her the eight hour per week position. (C-4) Complainant asked to be given a part-time eight hour night shift position as well as other job benefits, but did not seek reinstatement to her full-time supervisor's position. She met with Harriet Brooks and Sciamanna who heard the grievance and she received a written denial on March 19, 2004. The denial stated, in part, that Complainant was considered a per diem employee on inactive status because she had never submitted a physician's letter approving her for return to work. The following day, she provided a return to work letter,

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<sup>2</sup> Sciamanna did not testify at the public hearing

dated October 20, 2003, to Respondent's employee health department. She testified credibly that she had not previously submitted the letter to Respondent because she had not returned to work, and I find that no one had informed her that she needed to submit it prior to actually returning to work.

37. Harriet Brooks investigated the grievance on behalf of Respondent. Brooks testified that on February 4, 2004, in connection with Complainant's grievance, she spoke with Goodwin who told her that Complainant had never returned her calls. Brooks notified Complainant that she would not be offered the part-time position because it had already been offered to someone else. After investigating the internal complaint, Brooks concluded that there was no discrimination, because Respondent was able to provide a "simple answer" to all of Complainant's questions about the events of which she complained. (R-8) Complainant had submitted no documentation to Respondent's employee health department concerning her fitness for return to duty; however Brooks never asked Complainant as part of the grievance proceeding whether she had clearance to return to work. Brooks wrote the decision in consultation with Althea Lyons, Vice President of Human Resources.

38. Complainant testified that in researching the matter for a possible complaint to MCAD, she learned for the first time that she was entitled to 16 weeks of maternity leave. She testified that had she known about this she would not have met with Goodwin on October 27 because she would have had four more weeks to arrange day care and would not have resigned her position. I do not credit her testimony that she would not have resigned her position, as I do not believe she intended to return to full-time work. I

otherwise credit her testimony that she would not have come in on October 27, if she had known she had four more weeks of leave.

39. Complainant testified that she did not seek work elsewhere because she was focused on trying to return to work at Respondent. She stated that she was “in shock,” because, in her words: “I was loyal to [Respondent] and they weren’t loyal to me.” Respondent never reassessed Complainant for work in the lab because Goodwin never contacted her with the necessary information and it appeared that Goodwin did not want her returning to work in the lab. She did not initially go to human resources to explore other openings because HR was not involved in reassessment and she believe that she first had to go through Goodwin to obtain reassessment and Goodwin had told her that there were no part-time jobs available. I credit her testimony.

40. Doe testified that under Respondent’s leave of absence policy, FMLA and maternity leave ran concurrently. (Ex.R-2) However, Doe also testified that Complainant had taken a “maternity-related” FMLA leave and yet was eligible for an additional 16 weeks maternity leave following the birth of her twins.

41. Doe testified that as soon as Complainant resigned on October 27, she became a per diem employee and was no longer on maternity leave; her leave converted to a personal leave of absence and she had no right of return to her full-time job at Beverly Hospital. Brooks testified that Complainant was considered a per diem, inactive employee.

42. In May of 2005, Complainant and her family moved to Virginia to live with her grandfather. In approximately August of 2005, Complainant began working at the Johnston-Willis Hospital in Richmond, Virginia as a per diem night-shift medical

technologist at the rate of \$19.00 per hour. She worked from 16 to 24 hours per week. In February of 2006, Complainant obtained a 20 hour per week permanent position with benefits. Complainant currently works a full-time, day shift at the rate of \$26.00 per hour. At Beverly hospital she received \$25.00 per hour or \$56,064 per year plus vacation and she was vested in a retirement plan.

43. Complainant testified that she felt very confused, shocked and humiliated after being denied a per diem and a part-time position at Respondent. She did not know what to do or where to go to find work. She was depressed and upset, feeling unsure of herself as an employee, and regretted that she had devoted almost eight years of her life to working for and being loyal to Respondent, when Respondent showed her no loyalty. Complainant testified that she suffered from stomachaches and headaches for several months after her meeting with Goodwin and resigning her position. She did not seek counseling or professional help because she had no health insurance and could not afford to pay a mental health professional. I credit her testimony.

### III. CONCLUSIONS OF LAW

#### A. Maternity Leave Statute

M.G.L.c.149, sec.105D requires employers to provide eight weeks of maternity leave to full-time employees with the right to return the same or similar position held prior to the leave. The Commission's Maternity Leave Guidelines state that a woman who gives birth to twins is entitled to 16 weeks maternity leave. Complainant argues that Respondent violated M.G.L.c.149, sec.105D by failing to notify her that she was entitled to 16 weeks of maternity leave running from August 7, 2003 to November 27, 2003. Complainant resigned her full-time job on October 27, 2003 in return for the opportunity

to work per diem after her supervisor, Michele Goodwin, rejected her request to work in a part-time in the position. Complainant believed that her maternity leave ended on November 1, 2003 and asserts that had she known she was eligible for an additional four weeks of maternity leave, she would not have resigned her position so hastily, would have resolved her child care issues, and would have been able to return to her full time job at the end of November.

While it is clear that Respondent never communicated to Complainant that her maternity leave ran until November 27, 2003, Complainant has not convinced me that she intended to return to full-time work following the birth of her twins. The evidence shows Complainant requested to return to work part time and that after Goodwin rejected this request, Complainant sought only per diem and part-time work. Even in her internal complaint, Complainant did not seek reinstatement to her prior position or to any full time job, but instead sought to be placed in a part-time eight hour job or per diem work. The maternity leave law does not require an employer to return an employee to a part-time or per diem schedule; only to return the employee to the same or similar position. Once Complainant indicated that she no longer wanted to work full-time, Respondent had no obligation, under the maternity leave law, to return her to any other position. Had Complainant been ready, willing and able to return to her full time job, and been denied that right, then c. 149 §105 D would have been violated. That is not the case here. Therefore, I conclude that Respondent did not violate the Massachusetts maternity leave statute and I hereby dismiss that claim.

## B. Gender Discrimination

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to refuse to hire or to discharge an employee because of her sex. "Pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because of her pregnancy or the requirement of a maternity leave are considered sex discrimination." School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); Carmichael v. Wynn & Wynn, 17 MDLR 1641, 1650 (1995); see also, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258(1984) (termination of complainant during troubled pregnancy because of fears of further absences and coverage during leave deemed unlawful sex discrimination).

In order to prove sex/pregnancy 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).

In the instant case, Complainant presented direct evidence of sex discrimination in Respondent's refusal to re-hire her into available positions on a part-time or per diem basis, on account of her pregnancy and childbirth. Complainant's supervisor, Michele Goodwin testified that she did not call to schedule Complainant for reassessment or inform her about the availability of a part-time position because she determined Complainant was unavailable to work because of problems related to her children's

health and child care. She made this determination in the face of several phone calls from Complainant requesting to be reassessed so she could begin working for Respondent again. At what she believed to be the near end of her maternity leave, Complainant sought work at Respondent as part-time employee or a per diem employee. On Goodwin's recommendation, she resigned her full-time position in order to be classified as a per diem employee. She repeatedly attempted to contact Goodwin to schedule the necessary re-assessment to qualify her for per diem or part time work. I did not credit Goodwin's testimony that she was unable to contact Complainant by telephone. Despite telling Complainant to call her when she was ready to work, when Complainant did so, Goodwin did not communicate with her or schedule her for re-assessment. Goodwin also failed to inform Complainant about an available part-time position. After several months of trying unsuccessfully to communicate with Goodwin, Complainant applied for a part-time position with Respondent that had been posted for several months and was told that the job was given to another applicant. Not until nearly three months after their October 27 meeting did Goodwin call Complainant to inform her that the permanent part-time position was filled, that too many individuals were seeking per diem work, and that Respondent did not want to invest the money to retrain her.

Respondent denies that Complainant's pregnancy and childbirth were factors in its decision not to re-assess Complainant's skills and to not hire her for per diem or part time work. Respondent spent a significant amount of time at the public hearing eliciting testimony about Complainant's obligations under Respondent's written policies; Respondent asserts that Complainant's failure to provide Respondent's employee health department with confirmation of her fitness to return to work prevented her from being an

active per diem employee. I am not persuaded by this argument, particularly since no one at Respondent verbally communicated to Complainant that she needed to provide such a letter, prior to being considered for active per diem status. In addition, Respondent argues that Complainant should have searched out and applied for available positions. I find this argument disingenuous, in view of the undisputed evidence that Complainant could not return to work until Goodwin scheduled her for re-assessment. I conclude that Goodwin intentionally ignored Complainant's numerous attempts to schedule re-assessment. Moreover, there was evidence that Respondent's managers themselves ignored or were unfamiliar with many of Respondent's written policies, including those respecting FMLA and maternity leaves. It was evident that communications between Respondent's Human Resources Department and Complainant were poor to non-existent. Respondent never sent any communication to Complainant respecting her maternity leave or the end date of her leave. I conclude that Respondent's written policies regarding the reporting responsibilities of the employee and employer are not probative of the issue of Respondent's intent in this matter, as it is clear Goodwin had no intent to arrange for Complainant re-assessment, and no intent to offer Complainant a part-time or per diem position because she determined that Complainant was overwhelmed and unable to work because of her pregnancy and childbirth, a determination that was not hers to make, and thus evidences discriminatory animus. There is no evidence to support a conclusion that Complainant was unable to work part-time or per diem hours. Rather than assist Complainant in returning to work, Goodwin solicited her resignation with a promise of per diem status, failed to arrange for

reassessment and failed to inform Complainant of the availability of a part-time position that remained vacant from mid 2003 through January 2004.

I conclude that considerations of Complainant's troubled pregnancy and childbirth were the reason for Respondent's failing to reassess her and hire her on a per diem or part-time basis where there were positions and hours available and such a position was consistent with Complainant's request following her maternity leave. Thus I conclude that Respondent's actions in refusing to hire Complainant for available positions were motivated by unlawful discriminatory animus and not by lawful considerations as it contends.

#### IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournemouth Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

##### A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College vs. Massachusetts Commission Against

Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. at 576.

Based on Complainant's credible testimony, I am persuaded that she suffered emotional distress as a result of Respondent's unlawful conduct. Complainant testified that she felt very confused, shocked and humiliated by Respondent's refusal to communicate with her and assist her to achieve per diem or part-time status, once she had resigned her full time position at Goodwin's suggestion. She stated she did not know what to do or where to go. She felt depressed and upset, lost confidence in herself as an employee, and questioned why she spent almost eight years of her life as a loyal employee of Respondent, when her loyalty was not reciprocated. Complainant testified that the physical manifestations of her distress were that she suffered from stomachaches and headaches for a period of several months; however, she did not seek professional help because she had no health insurance. I conclude that an award of \$40,000.00 in damages is appropriate to compensate Complainant for the emotional distress she suffered as a direct result of Respondent's unlawful actions.

#### B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts

Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Complainant testified that she did not seek work other than the inquiries and attempts she made to return to work at Respondent and that this is where she focused her energy. She did not work again until moving to Virginia in 2005, well over a year after her final efforts to obtain work at Respondent failed. I conclude that Complainant's failure to explore other employment opportunities after March of 2004 constitutes an unreasonable failure to mitigate her damages.

I would ordinarily conclude that Complainant is entitled to a period of back pay beginning on October 27, 2003 when she notified Goodwin that she wanted to work per diem and ending on March 19, 2004, when Respondent notified her that her internal complaint had not been resolved in her favor. At this time Complainant was obligated to seek work elsewhere, which she did not do. However, there was no evidence in the record about the salary and benefits of either the part-time position or the per diem position, nor is there any evidence of how many hours Complainant might have worked on per diem basis. Thus I decline to award back pay damages as such damages would be entirely speculative.

#### V. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M.G.L. c. 151B, §5, it is hereby ordered that:

- 1) Respondent immediately cease and desist discriminating on the basis of gender.

2) Respondent pay to Complainant the amount of \$40,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Commissioner. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED THIS 7th DAY OF AUGUST, 2009

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JUDITH E. KAPLAN  
Hearing Officer