COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ALBERTINE DECOSSA,

Complainant

vs. DOCKET NO. 09-BEM-02217

ALLIED BARTON SECURITY SERVICES,
LLC., and KATHERINE WHITE,

Respondents

Appearances: Alan H. Crede, Esq. for Complainant
Matthew Crawford, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 20, 2009, Complainant, Albertine DeCossa, filed a complaint against her former employer, Allied Barton Security Services, LLC, and its supervisors, Katherine White and Stephanie Holmes, alleging discrimination for Respondents' failure to hire her to a new position because of her gender/pregnancy. Complaint alleged that after her position of Assistant Account Manager was eliminated because Respondent lost the contract for the building where she worked, she was denied another position within the company because she was 7 and ½ months pregnant. Respondent denied that it offered another position to Complainant and then rescinded the offer, alleging that the company never intended to fill the

new position because of financial considerations. It denied that Complainant's pregnancy was a consideration in rejecting her for the position. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified to public hearing and a hearing was held before the undersigned hearing officer on May 20 and 21, 2014. At the conclusion of the public hearing the complaint against Stephanie Holmes was dismissed by the undersigned Hearing Officer. Subsequent to the hearing, the parties filed post-hearing briefs. Having reviewed the record and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Albertine DeCossa, is a Haitian American woman who was more than seven months pregnant at the time of the incidents at issue. Complainant began working at Respondent, Allied Barton in 2006. Shortly thereafter she was promoted to Assistant Account Manager. She received merit based raises and favorable reviews. At the time of the hearing Complainant was working as a shift supervisor for Respondent, a position she has held since May of 2012. (Tr. 16-18)

2. Respondent is a private company that provides contract security services to businesses at various locations throughout Massachusetts and New England. Respondent assigns security officers to client locations and bills the client for the hours worked by the security officers. David Silvey is the Vice President and General Manager for the New England region and held that position in 2009. (Tr. 152-153) He testified that the company generates profit from the difference between the cost billed to the client and the wage paid to

the security officers. Respondent incurs overhead costs for certain positions that are not revenue generating which are factored in to the cost to the client. (Tr. 180-181)

3. In or about March of 2009, Complainant was working with account manager Marisol Viera on location at 501 Boylston Street, a building for which Respondent provided security services. Her supervisor was Eleonora Tumbiolo, whom she considered a mentor. (Tr. 18-19)

4. In early April 2009, both Viera and Tumbiolo informed Complainant that Respondent had lost the contract for the 501 Boylston Street building to a rival company, Northeast Security, and that Respondent's last day as the security provider for the building would be April 30th. (Tr. 19) Effective April 30, 2009, Complainant would lose her job with Respondent unless she could secure another position within the company.

5. In response to learning that Respondent had lost the contract for 501 Boylston Street, Complainant reached out to Tumbiolo to let her know that she wished to continue working for Respondent and that she would appreciate anything Tumbiolo could do to assist her. In addition to seeking other opportunities with Respondent, Complainant also applied to Northeast Security. (Tr. 19) Northeast Security offered Complainant a position as site supervisor at 501 Boylston Street with a start date of May 11, 2009. (Tr. 20)

6. On May 8, 2009, Tumbiolo telephoned Complainant to advise her about an available position at Respondent which she characterized as something "definite, which would "get her working right away." The position was an Operations Assistant to the new District Manager, Kathryn White. (Tr. 20) As a result of receiving this information from Tumbiolo, Complainant turned down the position with Northeast Security.

7. Complainant interviewed with White for the Operations Assistant position on May 12, 2009. She had never met White prior to the interview and had had no prior dealings with her. (Tr. 20- 21) White testified that Complainant came highly recommended from Eleanora Tumbiolo. (Tr. 75) Complainant was seven and ½ months pregnant at the time of the interview and according to White, she was visibly pregnant. (Tr. 21, 138)

8. As an Operations Assistant, Complainant would have been responsible for payroll, scheduling, invoices and activity reports. (Tr. 71) Complainant was qualified to fill this position because these responsibilities were similar to the responsibilities she performed as an Assistant Account Manager. White testified that because she was new to the company, she anticipated relying heavily on her Operations Assistant. (Tr. 74, 135) White discussed her weaknesses as a new manager with Complainant and the support role of the Operations Assistant. (Tr. 78-79)

9. During the interview, White discussed Complainant's pregnancy. She inquired how far along Complainant was in her pregnancy and if she were committed to returning to work after her maternity leave. Complainant responded that she was committed to returning to work because she needed the income. (Tr. 21, 79, 138) White told Complainant that she had been reluctant to return to the workplace after that birth of her son and, in fact, White did not return to her job after the birth of her child. (Tr. 81, Complaint ¶ 19) She asked Complainant how she could be sure that she would not change her mind about returning to work after the baby was born. White also asked Complainant what her anticipated child care arrangements were and Complainant responded that her mother-in-law would be watching the baby. (Tr. 21)

10. White testified that she loved Complainant, thought she would be "perfect" for the position and was excited to have someone who was going to help her be successful. (Tr. 85, 87) I credit this testimony. Contrary to a sworn statement made earlier in Respondent's Position Statement, White conceded at the hearing that she extended a verbal offer to Complainant at the conclusion of the interview. (Tr. 86-87) Complainant accepted the offer, but White insisted that she sleep on it and call White in the morning to be sure Complainant felt comfortable with the choice and being part of White's team. (Tr. 87) She deemed this a "professional courtesy" to Complainant. (Tr. 88)

11. The following morning, May 13, 2009, Complainant telephoned White, as directed, to confirm her acceptance of the job offer. (Tr. 22, 23) Later that day, White called Complainant and left a voice mail message that Respondent was "moving in a different direction," and that therefore Complainant would not be hired for the position. (Tr. 93) According to Respondents, after extending the job offer to Complainant, White had a conversation with General Manager David Silvey about the hire, and Silvey was very upset with White for extending the offer to Complainant and told White she had no authority to make such a decision. (Tr. 94, 140, 164) Silvey purportedly told White that he had been planning to eliminate the position of Operations Assistant for financial reasons and because he felt it was an unnecessary overhead expense. (Tr. 108-109, 165, 168, 170) His testimony that the position was unnecessary and a useless overhead expense conflicted with White's testimony that she needed significant support because she was a relatively new employee. White testified that she needed the help, believed the position was vital and wanted it filled. (T. 104) Despite Silvey's testimony that the position was eliminated for financial reasons, i.e. lost business and economic pressure, no other cost-cutting measures were undertaken at the time. Silvey could

not provide a single example of another cost-cutting measure he took at the time. White was unaware of any other budget cutbacks that were made in 2009. (Tr. 170, 108)

12. White testified that she and Silvey did not discuss Complainant's pregnancy. (Tr. 141) However it strains credulity that White would not have mentioned the fact that Complainant was over seven months pregnant and would be taking a maternity leave not long after assuming the new position. I conclude that White and Silvey did discuss Complainant's pregnancy and that Silvey directed White to rescind the offer. Silvey claimed to very angry at White for interviewing and offering the position to a candidate without authority to do so. (Tr. 166-167) However, I find that White had sufficient knowledge of Respondent's hiring practices to know the extent of her authority to interview and make offers, and she was not disciplined for her actions.

13. As early as March 2009, White had determined that the then current Operations Manager was not working out and needed to be replaced. She admitted to having had several discussions with Silvey about terminating him and discussed hiring a replacement with Human Resources during this period. (Tr. 136, 160-161) The evidence suggests that Respondent had made the decision to downgrade the Operations Manager position to an Operations Assistant position. As early as mid-April of 2009 White had scheduled a person to be interviewed for the Operations Assistant position. (Tr. 100-101) Thus she had been interviewing candidates for at least a month prior to interviewing Complainant. These actions belie White's claims that she was unfamiliar with the interview and hiring process and that she needed to obtain Silvey's approval prior to actually hiring for the Operations position. I believe that White and Silvey had discussed filling the Operations position and do not credit her testimony that she was mistaken about her decision making power. (Tr. 95,101)

14. Respondent's Position Statement states that Silvey made the decision to completely eliminate the Operations Manager position in June of 2009. (Ex. C-8) Silvey could not reconcile the reference in Respondent's Position Statement to its plan to downgrade the Operations Manager position to an Operations Assistant with his testimony at the hearing that he decided, instead, not to fill the Operations Assistant position as early as mid-May, prior to Complainant's interview. (Tr. 162,163, 167) The fact that he had not communicated his stated intent to White is also significant.

15. White testified that after Silvey told her he was eliminating the Operations Assistant position, she did not interview any other candidates for the position. (Tr. 109) This testimony is contradicted by an email she sent to an internal employee on May 29, 2009, some two weeks after interviewing Complainant for the Operations Assistant position. In response to his inquiry about an Operations Support Assistant position, White's email response with the subject line, "Operations Support Assistant," and stated,…"I have reviewed your resume and would like to set up a time to discuss *this* [emphasis added] position." She then asked about the employee's availability to interview for the position the following week and asked that he inform his Area and District managers that he was interviewing for the position. (Ex. C-11) White testified she could not recall whether she interviewed this individual, but later stated she did not meet with him and did not hire him. (Tr. 112) She also testified that she was not looking to fill any specific position, but was merely looking to "build her bench" and develop a pool of qualified candidates for future openings and was not necessarily interviewing for the Operations Assistant position. (Tr. 113-114) I did not find this testimony worthy of credence.

16. On May 18, 2009, Paul Caruso, a Senior District Manager at Respondent, wrote in an email to a prospective applicant about a position in the office supporting the Equity portfolio which was largely administrative, and included significant interaction with account managers. He offered to set the applicant up with White, the District Manager for that area. (Ex. C-12) Complainant had worked as an Assistant to the Account Manager at 501 Boylston Street, but she was not informed of this opportunity. White stated that she did not recall the prospective candidate mentioned in the email and had never interviewed him. (Tr. 117)

17. A few weeks after her interview with White, Complainant received a phone call from her friend and former colleague at 501 Boylston, Marisol Veira. Viera told Complainant that she had heard from Tumbiolo that Complainant was passed over for the Operations Assistant position because there was "no point" in hiring her if she were going to go right back out on a maternity leave soon after being hired. [1] (Tr. 25-27) Viera also told her that Respondent was continuing to interview for the position, and that the Operations Manager was still working and was scheduled to leave at the end of June. (Tr. 27) When Complainant responded that she might be the victim of discrimination, Viera told her she did not want to be involved if Complainant took the matter any further because she was still employed by the company and did not want to jeopardize her position. She told Complainant she would deny having told her what she heard. (Tr. 27 -28) Despite Viera's testimony that this conversation never took place, I credit Complainant's testimony that the interchange occurred and reinforced her belief that she was a victim of discrimination, causing her to file a complaint. (Tr. 27, 29) Complainant referenced the conversation in her complaint to the MCAD. (Complaint)

[1] Tumbiolo had retired and was living in Florida at the time of the hearing and did not testify.

18. Viera's testimony that she did not keep in touch with Complainant after their employment at 501 Boylston Street ended, is contradicted by Complainant's testimony, which I credit, and an August 2009 email correspondence between Viera and Complainant in which Complainant asks Viera if she found out if "that position is still available." (Tr. 25, 66, 240, Ex. C-15) Viera's information that White was continuing to interview for the position is consistent with other evidence that White was doing just that. Viera's credibility on this issue is also colored by the fact that both she and her husband continue to work for Respondent and Viera currently reports to White. (Tr. 214, 242)

19. White testified that the position of Operations Assistant was never filled and that she assumed all of the duties and responsibilities previously performed by the former Operations Manager. (Tr. 118 -119)

20. In the Fall of 2009, Complainant learned from Tumbiolo that there was an available Assistant Account Manager position at Respondent. Complainant applied for the position and received an offer which she accepted on October 20, 2009. (Ex. 13; Tr. 128) White was aware of the fact that Complainant had filed a discrimination complaint at the time she corresponded with Complainant about the job offer. (Tr. 128) White testified that she liked Complainant, found her to be professional and enthusiastic, and believed she had the necessary qualities to succeed in the role. (Tr. 130) Complainant remained employed with Respondent in that position until 2012 when she had a second child and took a maternity leave and decided to return as a shift supervisor. (Tr. 38-39)

21. In 2009 Complainant earned $18,771.90 and received unemployment compensation in the amount of $9,731. According to Viera, as Operations Assistant, Complainant's salary would have been approximately $38,000 per year. (Tr. 239) Pursuant to Respondent's policy at

the time, Complainant would have received 60% of her salary while on maternity leave, and would have been eligible for 12 weeks leave. (Tr. 224) Complainant testified that she had intended to take a three month maternity leave, and believed it was unpaid leave. (Tr. 65) Complainant was without employment for approximately six months. Her last day at 501 Boylston St. was April 30, 2009. (Tr. 65) Had Complainant been hired for the Operations position in mid-May of 2009 she would have earned approximately $7916.65 for two and one-half months at a salary of $3166.66 per month. Presuming that Complainant would have taken a three month maternity leave at 60% of the salary, she would have received approximately $5,700.60 during her leave, for a five and one half months total of $13,617.25 in lost income. She received $9,731 in unemployment compensation which if deducted from her potential income amounts to a total loss of $3,886.25.

22. Complainant testified that as a result of not getting the Operations Assistant position, she was disappointed and unable to provide for her newborn child. (Tr. 30-31) She faced the birth of her child with no job and no income, having forfeited the opportunity for a job with Northeast Security, believing that she would be hired for the position at Respondent. (Tr. 56) Her baby was born on June 17, 2009. What should have been a time of great joy in her life, was instead a time of anxiety, fear and financial insecurity. Complainant testified compellingly about how she felt unable to provide for her newborn child. She discussed how her parents, as Haitian immigrants struggled to provide for her, and that she wanted better for her children. Complainant and her fiancée struggled to pay rent and she relied on handouts from her family to pay for the baby's needs and received some public assistance. (Tr. 30-31, 61) The financial hardship strained her relationship with her partner. She testified that it was stressful and they struggled to pay bills and argued about bills that needed to be paid. (Tr. 32-33) Her

relationship with family members who loaned her money was also strained. (Tr. 32) As early as August, Complainant felt the pressure to begin working again. (Ex. C-15) While Complainant suffered emotional distress as a result of not being hired for the Operations Assistant position for a period of about five months, her distress was not long-lasting. I find that once she was able to secure employment with Respondent in October of 2009, her stress abated and she suffered no adverse consequences at work. (Tr. 59-60)

III. CONCLUSIONS OF LAW

General Laws c. 151B § 4(1) prohibits discrimination based on an employee's gender. Pregnancy and childbirth are sex-linked characteristics, and adverse employment actions based on a female employee's pregnancy constitute unlawful discrimination. *See Sch. Comm. of Braintree v. MCAD,* 377 Mass.424, 430 (1979); *White v. Univ. of Massachusetts at Boston,* 410 Mass. 553, 557 (1991); *Lane v. Laminated Papers, Inc.,* 16 MDLR 1001(1994).

To establish a prima facie case of failure to hire because of sex/pregnancy discrimination Complainant must demonstrate that (1) she is a member of a protected class; (2) that she applied for an available job for which she was qualified; (3) that she not hired; and (4) the failure to hire occurred under circumstances that give rise to a reasonable inference of discrimination.

At the time Complainant interviewed for the Operations Assistant position she had been employed by Respondent for several years, had been promoted to an Assistant Account Manager and had an excellent employment record. She was seven and ½ months pregnant when Respondent lost the contract at the building where she was working. She was advised of another opportunity for which she was qualified, told that it was definite, and interviewed for that

position. In reliance upon Respondent's representations, Complainant forfeited a job offer from the company that took over management of security at 501 Boylston Street.

At the interview with White for the Operations Assistant position, Complainant made a very favorable impression and White offered her the job. The evidence strongly suggests that there was an available position at the time of Complainant's interview. During the interview, White made a number of suspect inquiries regarding Complainant's pregnancy that went beyond mere casual discussion of her pregnancy. She inquired about Complainant's intent to return to work after the birth of her child and asked about her child care arrangements. It is understandable that White sought some assurance from Complainant that she intended to return to work after the birth of her child and Complainant was clear about her intent. I am not persuaded that White's questions manifested discriminatory animus or that they were unlawful. I do, however, believe they evidence sufficient concern about Complainant's pregnancy to cause her to mention it to Silvey even if just to assure him that Complainant planned on returning to the job after her leave. I believe White's testimony that she liked Complainant, wanted to hire her and offered her the position. It was only after Silvey was informed of the job offer to Complainant that the offer was rescinded. White was then placed in the untenable position of having to inform Complainant that the offer was being rescinded, a position which caused her great discomfiture, as evidenced by her testimony at the hearing. The fact that White continued to seek candidates for the position supports the inference that Silvey did not want White to hire Complainant when she was 7and ½ months pregnant. I conclude that Complainant was rejected under circumstances that give rise to a reasonable inference that her pregnancy was the reason for the rejection and find that she has established a prima facie case of discrimination.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondents to articulate a legitimate non-discriminatory reason for its actions supported by some credible evidence. *See Abramian v. President & Fellows of Harvard College*, 432 Mass. 107 (2000). If Respondents do so, Complainant, at stage three, must prove by a preponderance of evidence that Respondents' articulated reason was not the real one but a pretext and that there was a discriminatory motive. *Lipchitz v. Raytheon Company*, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondents' adverse actions were the result of discriminatory animus. *See id.; Abramian*, 432 Mass. at 117.

Respondent asserts that Complainant was not hired for the Operations Assistant position because there was no available position. White's supervisor, General Manager David Silvey, asserted that he made the decision to eliminate the position for economic reasons and that he considered the position unnecessary. Silvey apparently made no other cost-cutting measures at this time. Silvey also testified that White had no authority to interview Complainant or to offer her the position. I did not find Silvey's assertions credible. His view of the position contradicted White's view that she valued the position and needed significant administrative help because she was relatively new to the job and the Operations Manager was about to be terminated. Moreover there is evidence to suggest that prior to Complainant applying for the job, management's plan was to downgrade the position of Operations Manager to Operations Assistant and not to eliminate the position altogether. Finally, I do not credit Silvey's assertion that White did not have authority to interview and offer the position, nor do I credit White's testimony that she was mistaken about her authority. I believe that White offered Complainant the position fully believing that she had the authority to do so, only to be overruled by Silvey. Complainant's exemplary work record, the fact that she was well liked and championed by Tumbiolo, and that

White thought she was perfect for the Operations Assistant position, all support the inference that she would have been hired for the job, but for her pregnancy.

The evidence strongly suggests that White continued to seek candidates for the position even after Complainant was rejected and White's assertion that she was merely trying to build a bench of strong candidates qualified for other positions was not credible. The fact that the Operations Assistant position was not ultimately filled is not dispositive of whether it was available and being offered at the time Complainant interviewed. It is not unreasonable to conclude that Respondent decided it was more prudent not to fill the position in anticipation of a discrimination complaint, which Complainant did indeed file a few short months later. Finally, Complainant's former colleague and friend Viera called her to relay a conversation she overheard where Tumbiolo stated that Complainant was not hired because she would be going out on maternity leave. All of this leads me to conclude that Respondent's proffered reason for rejecting Complainant is simply not credible, is not the real reason, and is a pretext for discrimination.

Rather, the reasonable inference can be drawn that White told Silvey she had offered Complainant the job and that they discussed Complainant's pregnancy and planned maternity leave. It is also reasonable to assume that Silvey objected to White hiring an Assistant who was then 7 and ½ months pregnant and would soon be commencing a maternity leave. This inference is supported by convincing evidence that despite White's denials, she continued to seek candidates for the position after telling Complainant that Respondent was going in a different direction. Given all of the above, Complainant has proved by a preponderance of the evidence that she was rejected for the position on account of her pregnancy, and that Respondent Allied Barton's actions violated G.L. c. 151B. The complaint against Katherine White in her individual

capacity is hereby dismissed, because I conclude that White did not act with any discriminatory intent or state of mind, she was eager to hire Complainant, was overruled by senior management and acted solely pursuant to Silvey's directive leaving her to be the bearer of bad news.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and benefits, lost future earnings, and emotional distress suffered as direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent. It has broad discretion to fashion remedies to best effectuate the goals of G.L. c. 151B. *Conway v. Electro Switch Corp*., 825 F. 2d 593, 601(1st Cir. 1987)

Having been rejected for employment because of her pregnancy Complainant is entitled to lost wages for the period of time that she was without employment based on what her salary would have been had she been hired for the Operations Assistant position. This amount is calculated to be $3,886.25 based on her anticipated full income for 2 and ½ months and her anticipated maternity leave income at 60% for three months, reduced by the amount of unemployment compensation she received for that period of time. I conclude that she is entitled to back pay in this amount.

Complainant is also entitled to an award of damages for emotional distress she suffered as a direct result of Respondent's unlawful conduct. Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the

extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Stonehill College v. MCAD,* 441 Mass. 549, 576 (2004).

Complainant testified that she was disappointed at not being offered the position and that having no income meant she had to struggle to pay bills and borrow money from family. She had no prospect of returning to a job at the conclusion of her maternity leave. This strained her relationships with her fiancée and family. She was saddened by the prospect of not being able to provide for her newborn in the manner she had anticipated, having struggled herself as the child of immigrants. She had to rely on loans and some public assistance for a period of several months. Complainant did not offer evidence of depression, or other psychiatric or physical manifestations of distress. Complainant presented as a resilient and optimistic individual with the ability to move forward in her life. This does not mean, however, that she did not experience some emotional distress as a result of being rejected for the position, but I conclude that her distress was relatively short lived. Respondent made her an unconditional offer of employment some five months later, despite the fact that she had sued the company for pregnancy discrimination. Complainant accepted the offer and returned to work at Respondent with no adverse consequences. Given these circumstances and the evidence in the record, I conclude that she is entitled to an award of damages for emotional distress in the amount of $20,000.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law, Respondent Allied Barton is hereby Ordered:

1) To cease and desist from any acts of discrimination based upon pregnancy in hiring decisions.

2) To pay to Complainant, Albertine DeCossa, the sum of $3,886.25 in damages for lost wages and maternity leave income with interest thereon at the 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.
3) To pay to Complainant, Albertine Decossa, the sum of $20,000 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 decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. 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. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 29th day of December, 2014.

Eugenia M. Guastaferri
Hearing Officer