COMMONWEALTH OF MASSACHUETTS
COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission Against Discrimination
and Michelle Pavlov,
Complainants

v. Docket: 15- NEM- 00434

Happy Floors, Inc. and New Floors, Inc.,
Respondents

For the Complainants:
Simone R. Liebman, Esq.,
MCAD Commission Counsel

For the Respondents:
Gerald A. Phelps, Esq.,
Law Offices of Gerald A. Phelps

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

Complainant, Michelle Pavlov ("Pavlov"), filed a complaint with this Commission[1] alleging sex ("gender") and pregnancy discrimination in violation of G.L. c. 151B regarding the termination of her employment by Happy Floors Inc. ("HFI") and alleging New Floors Inc. ("NFI") is liable as a successor corporation to HFI. The matter proceeded to public hearing under the above heading. On March 23, 24 and 25, 2021, I held a public hearing on this case by Zoom video conference due to the COVID 19 pandemic. Complainant was assisted by MCAD Commission Counsel and Respondents were represented by private counsel. A number of documents were entered as exhibits. Five persons testified. The parties filed post-hearing briefs. Unless stated otherwise, where testimony is cited, I found such testimony credible and reliable, and where an exhibit is cited, I found such document reliable to the extent cited. Evidence not cited within this decision

[1] The Massachusetts Commission Against Discrimination is also referred to as the Commission or the MCAD.

that is contrary to my findings was considered and does not alter my findings of fact or conclusions of law.

II. OVERVIEW

As a threshold matter, this order addresses whether HFI has six or more employees and thus are subject to G.L. 151B. In addition, Pavlov alleges sex and pregnancy discrimination when HFI terminated her employment on February 19, 2015. Respondents deny the termination was based on sex and pregnancy, and they argue that the Commission lacks jurisdiction to hear these claims because HFI employed less than six employees at material times. Furthermore, Respondents deny successor liability and argue that NFI is a separate entity from HFI.

III. FINDINGS OF FACT AS TO BACKGROUND AND JURISDICTION

1. HFI is a business located in South Yarmouth, MA that specializes in the installation and refinishing of hardwood floors and selling its products to the public in its showroom. At material times, Alexander Cheglakov ("Cheglakov") was an owner of HFI. Cheglakov's role included obtaining new jobs, preparing estimates, ensuring customer satisfaction, working in the field, growing the business, and monitoring the progress and status of jobs. At material times, Siarhei Huba ("Huba") was an owner of HFI. Huba was responsible for accounting and finances, advertising, marketing, growing the business, overseeing the showroom, and approving blogs/articles for the HFI website and other sites. Huba ceased being a co-owner of HFI in June or July 2015. (Pavlov Testimony; Huba Testimony; Cheglakov Testimony)

2. In March 2014, Pavlov was hired by HFI. On February 19, 2015, HFI terminated her employment. During her employment with HFI, Pavlov reported to Huba. Pavlov worked full time as the showroom/store manager, but her hours were flexible. She opened the store at 8 a.m. and worked until 3 or 4 p.m. Pavlov's duties at HFI also included sales, marketing, advertisement, customer service, accounting, inventory, scheduling, sending estimates to clients, website work, ordering supplies, providing workers clothing, ordering supplies, and distributing supplies to workers. (Joint Exhibit 1; Pavlov Testimony; Huba Testimony; Cheglakov Testimony)

3. Huba, Cheglakov and Pavlov were HFI employees during Pavlov's employment at HFI.[2]

4. In the mornings, Cheglakov would meet the floor workers at the job site and directed whether the floor was to be installed or finished and discussed the details of the job. When the job was completed he inspected the quality of the work. Cheglakov worked at the job sites; completed projects himself as necessary; and provided direction to floor workers as to which projects they should work on. (Cheglakov Testimony) In the afternoons, Cheglakov was present at the job sites with the floor workers where he "would oversee their work, make sure that they were doing what they were supposed to be doing, make sure that they were performing to his standards and fixing problems, sometimes even doing the work himself." (Pavlov Testimony)[3] In 2014-2015, if the work did not meet HFI standards, Cheglakov would instruct the floor workers to bring it up to standard. (Cheglakov Testimony) A few times Cheglakov complained to Pavlov that he felt he was babysitting the floor workers. (Pavlov Testimony) While Cheglakov referred to the floor workers as "subs," I ascribe little weight to such characterization, and while he stated he did not control their work, I reject such testimony as inconsistent with the credible evidence to the contrary. (Cheglakov Testimony)

5. Huba acknowledged the floor workers "were told what needs to be done, like install and finish with this type of finish." I reject Huba's testimony that HFI did not care how floor workers performed the job and that they merely needed to agree on terms, rate, and getting the job completed. (Huba Testimony) I found this testimony to be inconsistent with the credible evidence to the contrary.

[2] The jurisdictional determination revolves around the status (employee or independent contractor) of six floor workers who performed, or were alleged to have performed work for HFI during Pavlov's employment with HFI: Allen Tibbetts ("Allen"); Bogdan Zynoviev ("Bogdan"); Yerlan Zhumagulov ("Yerlan"); Matthew McGillveary ("Matthew"); Alex X. [last name unknown] and Roman Federov ("Roman").

[3] Pavlov's testimony was that she never visited an HFI job site and obtained this information through communications with Cheglakov. (Pavlov Testimony)

6. In Cheglakov's absence, Huba would visit the work sites to determine if work was being done properly. If it was not, he would instruct the floor workers to fix it, and refused to pay the floor workers if the work was not properly completed. (Huba Testimony)

7. Bogdan, Yerlan, Matthew and Allen performed floor installation or floor refinishing.

8. Neither Bogdan nor Yerlan testified at the hearing. Each submitted an affidavit stating, among other things, that in 2015 he performed each job by his own methods. (Respondent Exhibit 2) I ascribe little weight to such conclusory language.

9. Huba told Pavlov to refer to the floor workers as employees in discussions with customers and to represent that the floor workers were HFI employees. (Pavlov Testimony; Huba Testimony)

10. In a HFI website blog, there is a reference to the floor workers as a HFI "crew" which was part of a HFI marketing approach. In a profile created by Huba and placed in *Home Advisor*, and as part of its marketing strategy, HFI referenced an "experienced team of expert professionals." HFI marketed the floor workers as its crew, suggesting to the public the floor workers were HFI employees. HFI considered this as advantageous to its business. (Huba Testimony)

11. An HFI customer agreement has a section stating "[i]f HFI is hired to move any furniture, it is client's responsibility to inform HFI employees [i.e. the floor workers] about any fragile furniture." (Complainant Exhibit 14)

12. Bogdan and Allen were in a HFI produced "You Tube" video [commercial]. (Cheglakov Testimony)

13. Bogdan, Yerlan and Allen wore HFI clothing with the HFI logo at job sites. (Cheglakov Testimony) See also Respondents Exhibit 2 (Bogdan and Yerlan affidavits). HFI required the floor workers to wear clothing with the HFI logo at job sites. As Huba testified, that "was the agreement between us." Pavlov recalled that Cheglakov spoke with both Yerlan and Bogdan, and particularly Bogdan for repeatedly not wearing HFI tee shirts at job sites.

She also noted that Cheglakov seemed visibly upset by the fact that he had to continue to ask Bogdan to wear a Happy Floors tee shirt. (Pavlov Testimony)

14. HFI had two credit cards - one issued in Huba's name and the other in Cheglakov's name. Bogdan and Yerlan had regular access to these credit cards and could use them to purchase supplies for jobs that were not available in the HFI showroom. (Pavlov Testimony)

15. HFI provided tools if a floor worker broke a tool. (Huba Testimony)

16. In 2015, Allen used some HFI tools. Matthew used some HFI tools. (Cheglakov Testimony)

17. Cheglakov and Huba testified Yerlan used his own tools. I do not credit their testimony to the extent it is inconsistent with Yerlan's affidavit that in 2015 he would borrow a tool from HFI if his was missing. (Respondents Exhibit 2)

18. Cheglakov and Huba testified Bogdan used his own tools. I do not credit their testimony to the extent it is inconsistent with Bogdan's affidavit that in 2015 "[w]hen I used my own tools and equipment I was paid [X] per sq. ft.; when I was loaned tools from Happy Floors, I was paid [less than X] per sq. ft."). (Respondents Exhibit 2) Bogdan's reference to a differential pay structure is consistent with Huba's testimony that some contractors had an agreement that they provide everything for themselves while HFI would pay other contractors at a lower rate but provide them with material.

19. Bogdan's and Yerlan's respective affidavits each note HFI supplied materials to them in 2015. (Respondents Exhibit 2) This is consistent with Pavlov's testimony, which I credit, that she regularly ordered supplies for the floor workers.

20. Yerlan has been a floor worker with HFI for almost seven years. Bogdan did work for HFI for a continuous period of approximately five or six years. (Cheglakov Testimony)

21. In 2014, Allen was the HFI store manager prior to Pavlov's hire and subsequently worked on job sites because he preferred working in the field. (Huba Testimony; Cheglakov Testimony)

22. The record reflects a continuing relationship between Matthew and HFI until he suffered an injury.

23. Huba and Cheglakov testified that HFI preferred (but did not require) the floor workers to wear HFI shirts at the job sites. I do not credit this testimony because it contradicts the testimony later when asked if the floor workers could not work for HFI if they refused to wear an HFI tee shirt, Huba responded that this was a "fair" statement. I found this testimony to be more credible than the testimony that wearing HFI clothing was merely a company preference. Requiring the workers to wear HFI clothing was entirely consistent with HFI's marketing strategy and desire to market the business with this type of advertising.

24. It was HFI company policy for the floor workers to use HFI vehicles to travel to its job sites. Bogdan usually drove a HFI vehicle to the job site. (Cheglakov Testimony) At one point, there was an incident in which Cheglakov and Huba were present in the showroom with Bogdan and both instructed Bogdan to travel to the job site in a HFI vehicle, not his own vehicle, and they would not tolerate any excuses. (Pavlov Testimony) Yerlan sometimes used a HFI vehicle. Yerlan had a car accident in October 2014 driving a HFI vehicle to a work site and HFI's insurance covered the damage to the vehicles involved. (Huba Testimony; Cheglakov Testimony)

25. The vehicles were wrapped with HFI marketing information. Matthew sometimes used HFI vehicles. Allen used his own car to travel to job sites. (Cheglakov Testimony; Huba Testimony). Although not all floor workers complied with the directive to use company vehicles, I reject Cheglakov's testimony that it was merely preferable – and not mandatory – for the floor workers to use HFI vehicles at HFI job sites. Cheglakov's testimony is inconsistent with credible testimony that use of company vehicles by the floor workers at job sites was required, was a significant aspect of HFI's marketing strategy, and was considered free advertising.

26. Workers' compensation documents regarding an on-the-job injury sustained by Matthew on March 23, 2015 lists him as an employee and HFI as his employer. (Complainant Exhibit 15)

27. During the hearing, Cheglakov admitted in an affidavit that he signed for this case, he referred to Allen Tibbets and Matthew McGillveary as arguably employees at the time of Pavlov's termination. (Cheglakov Testimony)

28. Matthew, Allen, Yerlan and Bogdan received training from Cheglakov as floor workers. Yerlan specialized in refinishing, whereas Bogdan largely did installation. Cheglakov informed Pavlov that Yerlan and Bogdan had been cross-trained so that one could cover if the other was absent. (Pavlov Testimony) Cheglakov spent 2-3 days working together with and training Matthew in 2014. In 2014, Cheglakov provided Allen with training on how to install a floor. (Cheglakov Testimony)

29. Pavlov testified that the floor workers were paid by the hour. She stated that payroll was done on Fridays and that the floor workers would send her their hours by text, or by telephone, or inform her in person as to what days and how many hours they had worked that week. Bogdan would submit his hours to Pavlov by text on Friday unless he went to the showroom and gave them to her verbally. Yerlan submitted his hours to Pavlov every Friday by text. Pavlov would tally the information into a spreadsheet for each worker, and sent the information to Huba for him to issue a paycheck. She did not receive invoices for a job project from Bogdan, Allen, Matthew or, Yerlan. (Pavlov Testimony) I credit Pavlov's testimony about her role in collecting payroll information and that the floor workers were paid hourly. Bogdan's and Yerlan's affidavits also reference payment by the hour. (Respondents Exhibit 2: Bogdan affidavit noting in 2015 "[o]n occasion I was paid an hourly rate"; Yerlan affidavit noting in 2015 "[i]f paid hourly").[4] In contrast, Huba testified that HFI did not care how many hours it took for the floor workers to complete a job, (Huba Testimony) and Cheglakov testified that upon completion of a project the floor

[4] Bogdan's and Yerlan's 2015 affidavits note in almost identical language that they performed each job on his schedule, submitted an invoice to HFI, and was paid the contract price after HFI inspected the completed job. (Respondents Exhibit 2) I ascribe little weight to these assertions which contain boilerplate language.

worker would send in an invoice for the project for payment. (Cheglakov Testimony) I reject their testimony on this point in light of Pavlov's testimony and the corroborative affidavits of Bogdan and Yerlan.

30. Pavlov saw Yerlan and Bogdan every day most often in the morning. She saw Allen and Matthew approximately 2-3 times per week - most often in the mornings. (Pavlov Testimony)

31. Huba secured workers' compensation insurance for HFI covering some but not all of the floor workers. As stated earlier, Matthew received workers' compensation from HFI's insurer for a job-related accident on March 23, 2015. (Cheglakov Testimony) (Complainant Exhibit 15)

32. In 2015, neither Bogdan nor Yerlan received vacation, sick or retirement benefits from HFI. In 2015, Allen did not receive benefits from HFI. (Cheglakov Testimony; Huba Testimony)

33. HFI did not dictate the number of days, or hours per day, that Bogdan, Yerlan, Allen or Matthew worked on a particular project. There was no punch clock, but workers were expected to finish the project within a specified time frame. (Cheglakov testimony; Huba Testimony)

34. In 2015, each job in the field for the floor workers had a different location. (Cheglakov Testimony; Huba Testimony)

35. In 2015, Bogdan and Yerlan also worked on projects for others and were offered additional jobs by HFI which they refused because they were busy on other projects. Yerlan refused one job because it was too difficult. (Cheglakov Testimony; Respondents Exhibit 2)

36. In 2015, Matthew had the right to refuse work offered by HFI. Matthew worked for other companies as an independent floor worker. (Huba Testimony; Cheglakov Testimony)

37. Allen was not required to take every job HFI offered him. In 2015, Allen could refuse a job. (Huba Testimony; Cheglakov Testimony)

38. According to HFI, Bogdan, Yerlan, Allen and Matthew agreed to be paid as independent contractors. (Huba Testimony; Cheglakov Testimony)

39. In 2014, HFI issued a 1099 form (as opposed to a W2 form) to Bogdan, Yerlan, and Matthew. In 2015, HFI issued a 1099 to Allen, Bogdan, Matthew, and Yerlan. In contrast to W2 forms which refer to "employee" and "employer", 1099s referred to "payer" and "recipient" (Joint Exhibit 1)

40. Pavlov contends the 1099's HFI issued to the floor workers are not reliable evidence as to the employee status of the floor workers because HFI paid people "under the table" "all the time." Pavlov also contends that in 2015, Allen asked to be paid on a 1099 to avoid deductions. I do not accept Pavlov's assertion that HFI paid employees under the table as there was no evidence of this practice. Pavlov's contention with respect to Allen ignores that Allen's role was changing. In 2014, Allen had been the HFI store manager before Pavlov, but he subsequently worked in the field. (Huba Testimony; Cheglakov Testimony)

41. Floor worker services performed by Bogdan, Yerlan, Allen and Matthew required special skill. (Cheglakov Testimony; Huba Testimony)

42. In 2015, both Bogdan and Yerlan controlled those who worked for them and could hire helpers. In 2015, Allen could hire help, and if he did, would be paying and managing them. In 2015, Matthew could hire helpers. (Cheglakov Testimony; Huba Testimony)

43. Pavlov testified that Roman was hired while she was employed at HFI. She provided him with HFI tee shirts, a long sleeve and a sweatshirt. She gave him a spare key to an HFI vehicle. She was told by Cheglakov and Huba that Cheglakov had trained Roman. (Pavlov Testimony) I do not credit this testimony as it contradicts the following evidence that I credit Roman started working at HFI in 2016. (Roman Testimony) There is no W2 or 1099 for Roman issued by HFI before 2016 when a 1099 was issued. (Compare Joint Exhibit 1 with Complainant Exhibit 13) Roman testified he never met Pavlov before the hearing. Despite Roman's long-term friendship with Huba, the evidence supports a finding that he was not working for HFI before 2016.

44. As to Alex X, Pavlov testified that Alex X worked for HFI the summer after Pavlov was hired. She provided him with HFI tee shirts and a long sleeve, and gave him a spare key to an HFI vehicle. She was told that Cheglakov had trained Alex X and testified that she saw Alex X two to three times per week generally in the morning. (Pavlov Testimony) I do not credit her testimony regarding Alex X, which in part, parrots her discredited testimony regarding Roman.

IV. LEGAL FRAMEWORK AS TO JURISDICTION

Massachusetts General Laws Chapter 151B excludes from its coverage an entity with fewer than six persons in its employ. Thurdin v. SEI Boston, LLC, 452 Mass. 436, 440–41 (2008); G.L. c. 151B, Section 1(5). For Pavlov's complaint to proceed, it must be determined that HFI had the requisite number of employees.

a. Pavlov has the Burden of Proving HFI had Six or More Employees

Pavlov has the burden of proving HFI had the requisite number of employees. First, G.L. c. 151B contains no explicit language that the burden of proof regarding a worker's status rests with the employer, and nothing in G.L. c. 151B evidences such an intent.[5] Second, MCAD precedent places the burden of proving the requisite number of employees on the Complainant. Zereski v. American Postal Workers Union, Central Massachusetts Local 4553, 23 MDLR at 277 ("Complainant has the burden of establishing that the Local met the definition of an employer by having at least six employees during the time of her employment."); Tunstall v. Acticell H'W Cosmetics & Weizmann, 22 MDLR 284, 287 (2000), vacated on other grounds by, 25 MDLR 301 (2003) ("to distinguish between an employee and an independent contractor for the purposes of Chapter 151B jurisdiction, the Commission examines the nature of the employment relationship…. and the complainant has the burden of proof"); Baptista v. Teamsters Local 526/251, 22 MDLR 358, 362 (2000) (Complainant failed to persuade hearing officer that employer had six employees and that the Commission had jurisdiction to adjudicate her claims under M.G.L. c. 151B) Third, MCAD precedent is consistent with the general principle that when subject matter

[5] Compare G.L. c. 149, § 148B (a) "Under § 148B (*a*), an individual who performs services shall be considered to be an employee, for purposes of G.L. c. 149 and G.L. c. 151, unless the employer satisfies its burden of proving by a preponderance of the evidence that…." Somers v. Converged Access, Inc., 454 Mass. 582, 589 (2009)

jurisdiction is challenged, the plaintiff has the burden of establishing jurisdiction exists. See Hiles v. Episcopal Diocese of Massachusetts, 437 Mass. 505, 515–16 (2002); Caffyn v. Caffyn, 441 Mass. 487, 491 (2004).

b. Pertinent Period of Time for Assessing Number of Employees

Chapter 151B does not specify the period during which an entity must employ six or more persons to be an "employer" for purposes of MCAD jurisdiction. HFI contends that the MCAD should examine the number of employees at the time of the alleged unlawful act. Section 9 of Chapter 151B states that Chapter 151B "shall be construed liberally for the accomplishment of its purposes." Respondent's overly restrictive construction would run afoul of this mandate by creating a gaping hole in the Commission's ability to enforce Chapter 151B's anti-discrimination provisions. I find the following scenario (raised but rejected by the judge in Terespolsky) a true impediment to enforcing Chapter 151B's mandate – "[f]ocusing on the date of discharge [or other unlawful act] would give a small employer at the cusp of employing six persons an incentive to discharge an employee in order to reduce its work force to five employees, discriminate against an employee, and later, 'when the coast was clear' increase its work force back to six employees." Terespolsky v. Law Offices of Stephanie K. Meilman, P.C., 2004 WL 333606, at *3 (Mass. Super. 2004). Further, MCAD precedent generally examines the number of employees during the entire period of a complainant's subject employment. In Tunstall, 22 MDLR at 287, the MCAD Hearing Commissioner concluded "that at the time complainant was employed by respondent, it did not have the requisite number of employees to meet the definition of an employer pursuant to M.G.L. c. 151B, § 1(5)." Similarly, in Zereski, v. American Postal Workers Union, Central Massachusetts Local 4553, 23 MDLR 270, 277 (2001), the MCAD Hearing Officer stated the "Complainant has the burden of establishing that the Local met the definition of an employer by having at least six employees during the time of her employment." I conclude that the entire period Pavlov worked for HFI (March 2014 – February 19, 2015) should be considered in assessing the number of employees needed to satisfy the statutory requirement. Further, because questioning was vague as

to explicit time frames with numerous references merely to 2015 and no reference to exact time frames during 2015, answers to questions that generally reference to 2015 shall be considered.[6]

c. Factors for Determining Whether a Worker is an Employee or an Independent Contractor

The Massachusetts Supreme Judicial Court rejected a reading of G.L. c. 151B that would include an independent contractor within the definition of employee. Comey v. Hill, 387 Mass. 11, 15 (1982) In Comey, the Court adhered to the "traditional common law employer employee relationship;" would "not depart from the common law definition of employee absent a legislative substitute;" and directed that "all the factors that may be useful in distinguishing employees from independent contractors" be considered. Id. at 15-16. The Massachusetts Appeals Court has stated that in "the employment context, a master-servant relationship is determined by a number of factors, including the right of the employer to control the details of the work done by the employee, the method of payment, the skill required in the particular occupation, whether the employer supplies the tools, instrumentalities and place of work, as well as the parties' own belief as to whether they are creating a master-servant relationship," citing Restatement (Second) of Agency § 220 (1957). Chase v. Independent Practice Association, Inc., 31 Mass. App. Ct. 661, 665-666 (1991)[7]

[6] Contrast the following decisions which I have considered: Scaife and Massachusetts Commission Against Discrimination v. Florence Pizza Factory Corp, 34 MDLR 19, 21 (2012) ("Pizza Factory employed more than six individuals at the time of Complainant's termination and is an employer"); Weston v. Town of Middleborough, 2002 WL 243197, at *6 (Mass. Super. 2002) (reference to "the employment status of plaintiff at the time of the alleged sexual harassment"); Terespolsky v. Law Offices of Stephanie K. Meilman, P.C., 2004 WL 333606, at * 3 (Mass. Super. 2004) ("most natural, common-sense reading of the statute points to the relevant time frame being when the acts giving rise to the alleged unlawful discriminatory practice were committed"); Turley v. Sec. Integration, Inc., 2001 WL 1772023, at *8 (Mass. Super. 2001) ("c. 151B, § 1 definition of 'employer' contains a static requirement of six employees in contrast to Title VII")

[7] The Restatement section cited in Chase states that in determining whether one acting for another is a servant or an independent contractor, the following, among others, are considered:

a. extent of control which, by the agreement, master may exercise over the details of the work;
b. whether or not the one employed is engaged in a distinct occupation or business;
c. kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
d. skill required in the particular occupation;
e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. length of time for which the person is employed;
g. method of payment, whether by the time or by the job;

The MCAD has noted the "focus of the inquiry is the extent to which the employer has the right to exercise control over the employee's work, not only to specify the final result, but also to supervise and direct the details and the means by which the result is achieved. [Citation omitted]…. Additional factors which the courts and this Commission have considered as indicative of an employer-employee relationship include: 1) whether work is of a type done under supervision or by a specialist working independently; (2) the skill required; (3) whether the employer furnishes the equipment and workplace and bears the costs of operation; (4) whether payment is wages or salary for the time worked rather than profit or a set contractual fee on production of a final product or service; and (5) whether the parties have an ongoing relationship which may be terminated without notice or explanation by either party…. The Commission must consider all the enumerated factors; no one factor will necessarily control in every case." Tunstall v. Acticell H'W Cosmetics & Weizmann, 22 MDLR 284, 287 (2000), vacated on other grounds by, 25 MDLR 301 (2003)[8]

Based on the cited authorities, I find that the following questions/issues should be considered in this case to determine if the referenced floor workers were employees or independent contractors:

1. Did the hiring entity retain the right to exercise control over the individual's work, not only to specify the final result, but also to supervise and direct the details and the means by which the result is achieved?[9]

2. Did the hiring entity operate a business?

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h. whether or not the work is a part of the regular business of the employer;
i. whether or not the parties believe they are creating the relation of master and servant; and
j. whether the principal is or is not in business.

[8] For additional authorities on this issue, see the following. Weston v. Town of Middleborough, 2002 WL 243197, at *6 (Mass. Super. 2002) (noting MCAD and courts have adopted a functional approach to determine who is an independent contractor and generally consider the factors listed therein); 2 Equal Employment Opportunity Commission, *EEOC Compliance Manual,* § 2–III, at 5716–17 (2008) (listing non-exhaustive factors indicative that a worker is in an employment relationship with an employer)

[9] It is the right to control - as opposed to actual control - that is determinative. Peters v. Haymarket Leasing, Inc., 64 Mass. App. Ct. 767, 774 (2005) See also O'Hara's Case, 310 Mass. 223, 225 (1941) ("The test of the relationship of master and servant, or employer and employee, is the right to control, rather than the exercise of it."); Case of McDermott, 283 Mass. 74, 77 (1933) ("it is the right to control rather than the exercise of it that is the test.")

3. Was the work performed a regular part of the hiring entity's business?

4. Was there a continuing relationship between the individual performing the work and the hiring entity?

5. Did the hiring entity provide tools/supplies/instrumentalities and bear the cost of work performed?

6. Was the work performed on the hiring entity's premises?

7. Did the hiring entity have the right to require the worker to perform other projects?

8. Did the hiring entity provide the worker with benefits such as insurance, leave or workers' compensation?

9. Did the individual performing the work perform work that is of the type usually done under the direction of an employer?

10. Did the hiring entity and the individual believe they were creating an employee – employer relationship?

11. Did the hiring entity treat the individual as an employee for tax purposes?

12. Did the hiring entity hold out the individual to the public as one of its employees?[10]

13. Did the hiring entity train the individual to perform the work?[11]

14. Did the hiring entity determine the number of days the individual would work on a project or dictate the hours to be spent per day?

[10] While this factor is not specifically recognized in the case precedent cited above, Comey dictates that one should consider "all the factors that may be useful in distinguishing employees from independent contractors." Comey, 387 Mass. at 16. This factor is deemed to be pertinent in determining floor worker status in this case.

[11] See footnote 10.

15. Did the hiring entity pay the individual based on time spent working as opposed to setting a fee based upon the final result?

16. Did the individual have an opportunity to sustain a profit or loss relative to the work?

17. Did the services performed by the individual require special skill?

18. Was the individual engaged in his/her own distinct occupation?

19. Did the individual have the discretion to hire and pay assistants?

20. Was the hiring entity or individual able to terminate the relationship without any notice or explanation?

V. ANALYSIS AS TO JURISDICTION

Most importantly, HFI had the right to control not only the final work product but also the details and means by which the final result was achieved by Yerlan, Bogdan, Matthew and Allen. The facts do not support the contention that HFI turned the project over to these floor workers and only was interested in the ultimate result. There was significant evidence HFI monitored, directed, and controlled how work was performed by these floor workers. Cheglakov was present at the job sites with the floor workers, would oversee their work, ensuring they were completing the work as was required by HFI's standards, and addressing any problems. The floor workers did not provide all their own materials and did not shoulder all the costs for the work. HFI provided some tools and some supplies and bore some cost for the work performed by these floor workers.

The work performed by Bogdan, Yerlan, Matthew and Allen was a regular part of and constituted the core of HFI's business. The facts do not suggest that these floor workers provided services that were only tangential or incidental to HFI's business. The relationship between Bogdan, Yerlan, Matthew and Allen and HFI cannot reasonably be viewed as a "one-off" or occasional. Yerlan was a flooring worker with HFI for almost seven years. Bogdan provided services for HFI for five to six continuous years. Allen was the HFI store manager before Pavlov, and subsequently worked on job sites. The record reflects a continuing relationship between Matthew and HFI until he suffered a work-related injury.

In many ways, HFI held out Bogdan, Yerlan, Matthew and Allen to the public and its customers as HFI employees. Allen and Bogdan appeared in a HFI produced "You Tube" video commercial. Huba told Pavlov to refer to the floor workers as employees in discussions with customers. HFI required the floor workers to wear HFI clothing with the HFI logo at job sites. HFI directed the floor workers to drive HFI vehicle to the job sites.

Cheglakov, an owner of HFI, provided training to these floor workers regarding the work to be performed by them for HFI. Cheglakov cross-trained Yerlan and Bogdan so that one could cover if the other was absent, and also trained Matthew and Allen.

Cheglakov basically admitted that Allen and Matthews were HFI employees. Finally, the evidence suggests it was likely Bogdan, Yerlan, Matthew and Allen were paid by the hour and submitted their hours to Pavlov every week as opposed to submitting an invoice for payment at project completion.

VI. CONCLUSION OF LAW AS TO JURISDICTION

In light of this analysis, I find sufficient evidence to conclude that Pavlov **established** that Bogdan, Yerlan, Allen and Matthew were employees of HFI, and therefore, HFI had six or more employees (Bogdan, Yerlan, Allen, Matthew, Cheglakov, Huba and Pavlov) during Pavlov's employment.[12] [13] [14] Thus, I conclude that HFI is an employer under G.L. c. 151B, Section 1(5), and the MCAD has jurisdiction to address the merits of Pavlov's claims of discrimination.

[12] I render this conclusion having considered the evidence that mitigates in favor of independent contractor status. Despite such evidence on some of the factors of the common law test, it is outweighed by the above evidence supporting the conclusion of employee status for these four floor workers in this case.

[13] The record is silent as to whether Bogdan, Yerlan, Allen or Matthew or HFI could terminate the relationship without any notice or explanation; Bogdan, Yerlan, Allen or Matthew had an opportunity for making a profit or sustaining a loss relative to work performed for HFI; work of the type performed by them was usually done under the direction of an employer; and these four floor workers operated their own business.

[14] Pavlov failed to establish Alex X was an employee of HFI during her employment at HFI. Pavlov also failed to establish Roman was an employee of HFI during her employment at HFI.

VII. FINDINGS OF FACT ON SEX/PREGNANCY DISCRIMINATION CLAIMS

45. Pavlov found an advertisement for the position she was hired for at HFI on Craig's list. She interviewed with Huba. During the interview, Huba informed her the salary range was $12-15/hour and promised Pavlov would receive $15/hour. Pavlov started working at HFI in March 2014. After familiarizing herself with HFI and its practices, she went on her honeymoon. (Pavlov Testimony)

46. Pavlov testified that when she returned from her honeymoon, she saw Huba and said "I have great news." Huba did not appear happy and said "[j]ust tell me you're not pregnant." Huba put one hand up and the other on his hip, and reiterated, "[j]ust tell me you're not pregnant." Pavlov was not pregnant at the time. (Pavlov Testimony) Huba testified he does not recall Pavlov going on a honeymoon or returning and denied making such statements. (Huba Testimony) I credit Pavlov's testimony and reject Huba's testimony regarding this incident. Pavlov provided a vivid, detailed account of the conversation while Huba's memory was wanting. He did not even recall Pavlov going on a honeymoon.

47. Pavlov testified regarding a conversation with Huba in mid-November 2014, wherein she informed him she was pregnant. Huba's reaction was one of concern. He seemed exasperated, and stated, "[w]ell, at least I don't have to deal with that. I'm going to be selling my half of the company, and at least I don't have to deal with maternity leave." (Pavlov Testimony) Huba testified that at some point Pavlov told him while in the showroom that she was pregnant. He stated he was happy and congratulated her, because he knew she had had difficulty conceiving a child. He denies making the statement Pavlov attributes to him. (Huba Testimony) I credit Pavlov's testimony and reject Huba's testimony regarding this incident. There is evidence of a discussion in the summer of 2014 in which Pavlov told Huba she had difficulty becoming pregnant and Huba attempted to console Pavlov. (Complainant Exhibit 9) However, this evidence is outweighed by other more compelling evidence that Pavlov's account is true. Pavlov's account of the conversation is vivid and detailed, and the fact that Huba was planning to sell his interest of HFI – is consistent with the uncontested fact that in the Spring/Summer of 2015, he did in fact sell his interest in HFI. Further, Pavlov's demeanor during her testimony

convinced me that she was reliving Huba's negative reaction to her pregnancy and was still angry about it.

48. Pavlov testified regarding her efforts to discuss her maternity leave with Huba and Cheglakov. Pavlov had a conversation with Huba regarding whether HFI needed her to train someone to perform her duties during her leave. Huba said "[d]on't worry, we'll take care of it." Pavlov subsequently asked Cheglakov if there was a process HFI wanted her to follow relative to the leave. Cheglakov responded "I don't deal with that stuff; I deal with the guys. You need to talk to [Huba]." Subsequently, Pavlov had an interaction with Huba, in which he told her, "I don't have to deal with [the leave] because I'm going to be leaving." Pavlov responded "we have to figure out what's going to happen for the few weeks that I'm out." Huba responded that HFI would look into finding someone new, and if that person worked out, Pavlov "would not be returning most likely at the same hours, if at all." Pavlov retorted that was illegal and she expected to return to her position. Huba stated "I don't have to deal with that;" gave Pavlov a wave of a hand; and stated they would deal with it later. (Pavlov Testimony) Huba denied that he had discussions with Pavlov about maternity leave and denied the statements attributed to him by Pavlov. (Huba Testimony) I credit Pavlov's testimony regarding her interactions relative to maternity leave and reject Huba's testimony that he did not have discussions with Pavlov about maternity leave. Pavlov's testimony is extremely detailed with no internal inconsistencies. In addition, her testimony that Cheglakov stated he did not deal with that stuff, that he dealt with the guys, and that she needed to talk to Huba about maternity leave, is entirely consistent with the evidence regarding the different responsibilities and roles that Cheglakov and Huba played at HFI. It is not credible that as Pavlov's supervisor, Huba would not have had conversations with her regarding her maternity leave. Pavlov's demeanor during her testimony convinced me that the conversations occurred as she relayed them and that she was still angry about Huba's response and unwillingness to discuss her leave. Huba's demeanor while testifying did not reflect an honest account of these interactions with Pavlov.

49. Huba and Cheglakov decided they should close the showroom or hire a new store manager. They decided that telling Pavlov about the possibility of the showroom closing - as opposed to the hiring of a different manager - "would be less stressful for her to handle knowing that she is expecting." (Complainant Exhibit 9; Huba Testimony)

50. On February 19, 2015, Huba and Cheglakov told Pavlov her employment with HFI was terminated that day. Pavlov recalls that when she told them she would have liked more notice, Huba replied, "[w]ell, you're pregnant so it's probably better for you to be on unemployment. You can just relax until the baby comes." (Pavlov Testimony)

51. After her termination from HFI and while seeking employment, Pavlov saw her former position at HFI advertised on Craig's List. Huba admitted the advertisement was posted prior to Pavlov's termination. The advertisement stated HFI was seeking a person "[p]referably male, since job requires unloading and carrying heavy materials few times per month." (Complainant Exhibit 6; Pavlov Testimony; Huba Testimony) In attempting to defend the language in the advertisement, Huba testified the job entailed carrying heavy materials, that he should have used words like "preferably athletic," and that his English is not that good. He claimed he did not intend to offend and now understands this was not permissible language. (Huba Testimony) Although I recognize that English is not Huba's first language, I do not find Huba's language deficiency to be a credible justification.

52. Huba admitted the successful applicant, John Jasset, did not appear athletic. (Huba Testimony)

53. Approximately three weeks before her employment at HFI was terminated, Pavlov asked for help moving sealer that came in five gallon buckets and was extremely heavy. Pavlov was having difficulty moving heavy boxes even prior to her pregnancy. (Pavlov Testimony; Huba Testimony)

54. Huba and Cheglakov were dissatisfied with Pavlov's job performance. Her job duties included writing articles for HFI's website and other sites. Huba created a schedule regarding social media blogging which Pavlov did not follow. During her employment at HFI, Pavlov updated 19 blogs rather than the 48 blogs she was expected to complete. When Huba tried to discuss an issue with Pavlov, she would say she did not need micromanagement. Pavlov was spending a lot of time on her phone and the internet. (Huba Testimony; Complainant Exhibit 9)

55. The showroom was losing money when it was managed by Pavlov. HFI's goal was to profit from selling products to contractors in the showroom, but there were complaints from contractors about Pavlov's attitude. (Cheglakov Testimony; Huba Testimony) During Pavlov's

tenure, HFI supply sales declined by 7.2%, despite an expectation of 10% growth. During the entire year of her employment, Huba and Cheglakov attempted to give Pavlov advice regarding how to perform better and improve the showroom, but she repeatedly exhibited a dismissive attitude, saying she was not having the conversation or didn't need micromanagement. (Complainant Exhibit 9).

56. After her employment at HFI was terminated, Pavlov asked Huba for a Letter of Recommendation which Huba initially agreed to but never provided. (Pavlov Testimony; Joint Exhibit 1)

57. Despite the concerns with Pavlov's performance, articulated above, Pavlov never received any written warnings from HFI regarding her job performance, and the loss of her job was never threatened or discussed prior to her pregnancy. (Pavlov Testimony; Huba Testimony; Cheglakov Testimony)

VIII. ANALYSIS FOR SEX/PREGNANCY DISCRIMINATION CLAIMS

Pavlov alleges gender and pregnancy discrimination in violation of G.L. c. 151B regarding the termination of her employment by HFI. General Law c. 151B forbids discrimination in employment on the basis of gender. G.L. c. 151B, § 4(1) Discrimination on the basis of pregnancy is a form of gender discrimination. Butner v. Dep't of State Police, 60 Mass. App. Ct. 461, 467 (2004), review denied, 441 Mass. 1105 (2004); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 384, (2016)

To prevail, Pavlov must demonstrate: she is a member of a protected class; she was subject to an adverse employment action; HFI bore discriminatory animus (discriminatory intent, motive or state of mind) in taking that action;[15] and that the animus was the determinative cause[16] for the

[15] References "to 'motivation' and 'animus' do not mean that an employer must be found to have a negative motive or feelings of animosity, but only that [the protected status] was the moving or animating force behind the decision, regardless of intent." Gates v. Flood, 57 Mass. App. Ct. 739, 745, n. 12 (2003)

[16] "[P]laintiff must prove by a preponderance of the credible evidence that the defendant's discriminatory animus contributed significantly to that action, that it was a material and important ingredient in causing it to happen. [Citation omitted] That a defendant's discriminatory intent, motive or state of mind is 'the determinative cause' does not imply

action. Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016); Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001); Trustees of Health & Hosps. of City of Bos., Inc. v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 681–82 (2007)

Many cases analyzing the application of Chapter 151B discuss the framework first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973)[17] That framework presumes that either a legitimate or an illegitimate set of considerations led to the challenged decision. But challenged decisions can be based on both legitimate and illegitimate considerations. As the Court in Wynn & Wynn stated "[t]here exists, [] a rare class of cases, referred to as 'mixed-motive' cases, in which the plaintiff, armed with some strong (direct) evidence of discriminatory bias, demonstrates that at least one factor motivating the employer's decision is illegitimate." Under the mixed-motive framework, a plaintiff must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. If a plaintiff carries her initial burden, the burden of persuasion shifts to the defendant who may avoid a finding of liability only by proving it would have made the same decision even without the illegitimate motive. Wynn & Wynn, 431 Mass. at 666, 669-670 (parenthesis in original text) "In the context of a discrimination claim, direct evidence 'is evidence that, if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.' [Citation omitted] A mixed motive analysis is appropriate where a 'plaintiff can demonstrate with a high degree of assurance' that the employer's action was based on an illegitimate motive but the defendant posits a legitimate motive as well; a plaintiff can meet this burden by either 'direct or strong' evidence. [Citation omitted]" Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 114 (2009) Based on the facts found above, I conclude that the mixed-motive framework is the applicable framework for this case.

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the discriminatory animus was the only cause of that action." Lipchitz v. Raytheon Co., 434 Mass. 493, 506, n. 19 (2001)

[17] Under that approach, the employee has to establish a prima facie case. Once she succeeds, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision and produce credible evidence to show the reason advanced was the real reason. Once the employer meets its burden, plaintiff must prove the employer's stated reason is a 'pretext.' Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 664 (2000), overruled on other grounds by Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 664-666 (2004)

Pavlov has demonstrated through direct or strong evidence that her pregnancy played a motivating part in HFI's decision to terminate her employment. Pavlov demonstrated that Huba (owner of HFI; her supervisor; and a decision maker) exhibited an on-going negative reaction to, and consideration of, her pregnancy status throughout her employment. Very early in her employment at HFI, in response to Pavlov telling him that she had "great news," Huba twice said "[j]ust tell me you're not pregnant." Months later, when Pavlov became pregnant and disclosed her pregnancy to Huba, he appeared concerned and stated that he would be selling his part of the company, and would not have to deal with her maternity leave. Subsequently, when discussing her maternity leave, Huba told Pavlov that HFI would look into finding someone new, and if the new person worked out, Pavlov "would not be returning most likely at the same hours, if at all." Huba (and Cheglakov) decided telling Pavlov about the possibility of the showroom closing—as opposed to the hiring of a different manager—"would be less stressful for her to handle knowing that she is expecting." During the termination meeting, Huba stated "[w]ell, you're pregnant so it's probably better for you to be on unemployment. You can just relax until the baby comes." Further, while Pavlov had difficulty moving heavy material prior to her pregnancy, Huba placed the advertisement stating a preference for male candidates only after Pavlov became pregnant and asked for help moving heavy buckets of sealer. Notwithstanding Huba's ongoing dissatisfaction with Pavlov's job performance, Pavlov never received any written warnings from HFI regarding her job performance, nor was her job security threatened until after the disclosure of her pregnancy. It was only after disclosure or her pregnancy and request for maternity leave, that HFI terminated Pavlov's employment.

Given these circumstances, HFI failed to satisfy its burden that it would have terminated Pavlov's employment even had she not been pregnant. While Huba's (and Cheglakov's) dissatisfaction with Pavlov's job performance predated her disclosure that she was pregnant, no action was taken against her prior to her pregnancy. Notwithstanding HFI's long-standing dissatisfaction with Pavlov's job performance, Pavlov suffered no adverse consequences prior to her pregnancy and request for maternity leave. Huba's comments about Pavlov's pregnancy and request for maternity leave are further evidence of discriminatory animus. He made negative statements about her pregnancy and rebuffed her attempts to discuss a maternity leave, instead placing an advertisement for Pavlov's job which stated a preference for a male candidate. Even

the stated reasons given during the termination meeting took into account her pregnancy status. Finally, Huba suggested during that meeting that it was better for her to be unemployed because of her pregnancy.

IX. CONCLUSION OF LAW AS TO SEX/PREGNANCY DISCRIMINATION CLAIM

In light of the forgoing analysis, I conclude that in accordance with the mixed-motive framework, Pavlov has demonstrated that as a pregnant female—a member of a protected class—she was subjected to an adverse employment action when her employment was terminated; HFI bore discriminatory animus with respect to her pregnancy; and that animus was the determinative cause for the termination of her employment. Bulwer, 473 Mass. at 680; Lipchitz, 434 Mass. at 506, n. 19. Therefore, I conclude that HFI engaged in unlawful sex/pregnancy discrimination against Pavlov in violation of Section 4(1) of G.L. c. 151B when it terminated her employment in February 2015.

X. FINDINGS OF FACT AS TO SUCCESSOR LIABILITY

58. Cheglakov has been president of HFI since 2012. Cheglakov is president of New Floors, Inc. ("NFI"). Cheglakov opened NFI two years before the public hearing in this matter. (Cheglakov Testimony)

59. HFI provides installation and refinishing of hardwood floors and also has a showroom and sells floors.[18] (Cheglakov Testimony; Complainant Exhibit 10) NFI provides installation and refinishing of hardwood floors. NFI doesn't have a showroom.[19] (Cheglakov Testimony)

[18] Regarding Cheglakov's testimony that HFI had a showroom at the time of the hearing, Pavlov did not contend otherwise.

[19] At one point, Cheglakov testified NFI does exactly the same work as HFI. At another point, Cheglakov denied they perform the same business explaining NFI doesn't have a showroom. I credit the latter in light of HFI corporate filings in December 2014 and June 2015 describing HFI's business as "floor sales, installation, hardwood refinish." (Complainant Exhibit 10)

60. The record includes a print out from NFI's website with the following language:

a. "Welcome to New Floors Inc. previously Happy Floors Inc."

b. "In 2019 Happy Floors Inc. had to change its company name, because it was trademarked by [another company]. Now we're officially New Floor Inc."

c. "Don't worry. We have all the same capabilities as we always did and now more. We still specialize in refinishing of hardwood floors but have expanded our offerings to include state of the art materials…. New Floors Inc. provides a huge variety of flooring services starting from existing floor removal to unfinished hardwood floor installation, sanding staining and finishing. We provide both services and materials."

d. "With over 15 years of experience, we've dealt with almost all flooring materials and can provide consultation if needed."

(Complainant Exhibit 11)

61. The spelling of Cheglakov's last name on NFI's corporate documents was incorrect. (Cheglakov Testimony)

XI. LEGAL FRAMEWORK FOR SUCCESSOR LIABIILTY

"As a general rule of corporate law, the liabilities of a corporation are not imposed upon its successor." Smith v. Kelley, 484 Mass. 111, 120 (2020) There are four exceptions. A successor in interest may be held responsible for the liabilities of its predecessor where "(1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor." Smith, 484 Mass. at 120 n. 10 [Citations omitted]; Cargill, Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 359 (1997)[20] Regardless of which exception is alleged to apply, a corporation (NFI) cannot be subject to

[20] Pavlov argues that each exception applies.

successor liability unless it is a successor to all, or substantially all, of another corporation's (HFI) assets. As the Massachusetts Supreme Judicial Court has explained:

> In order for one corporation to be deemed a successor corporation in the first place, it must be a successor to all, or substantially all, of another corporation's assets." [Citation omitted] In other words, a transfer of assets is "an essential prerequisite to successor liability." [Citation omitted] Our decisions addressing successor liability have recognized consistently that successor liability depends on a transfer of all, or substantially all, assets from predecessor to successor. See, e.g., Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008), quoting Guzman v. MRM/Elgin, 409 Mass. 563, 566 (1991); Cargill, Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 362 (1997). In those cases, we applied the rule that "the liabilities of *a selling predecessor corporation* are not imposed upon the *successor corporation which purchases its assets,* unless (1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor" (emphasis added). [Citations omitted]

Premier Cap., LLC v. KMZ, Inc., 464 Mass. 467, 475 (2013) (Italics in original text) See also See also Genentech, Inc. v. Arendal Mgmt., Inc., 92 Mass. App. Ct. 1108 (2017) (1:28 Decision) ("Creditors seeking to come within one of these exceptions must show a transfer of all or substantially all of the predecessor corporation's assets to the successor corporation")

XII. ANALYSIS AS TO SUCCESSOR LIABILITY

Pavlov has failed to establish that all or substantially all of HFI's assets were transferred to NFI. The only asset of HFI specifically addressed in this case was its showroom, and HFI continues to retain the showroom. The record is devoid of any evidence that would permit one to determine that all or substantially all of HFI's assets were transferred to NFI. Language in NFI's website, such as "[d]on't worry. We have all the same capabilities as we always did and now more," is insufficient for me to determine whether any transfer from HFI to NFI was of all or substantially all of HFI's assets. Genentech, Inc., 92 Mass. App. Ct. at 1108 ("First, the record was devoid of evidence regarding the status of AMI's assets at the time it was shut down. Absent such evidence, the judge was unable to weigh the substantiality, if any, of the asset transfer.") See also Premier Cap, 464 Mass. at 476 ("The record contains no undisputed facts establishing that Zeller ever assigned any of its leases or contracts to KMZ. Premier contends that Zeller transferred its good will to KMZ; however, Premier has identified no agreement, express or implied, between Zeller

and KMZ to transfer that good will. At most, the undisputed facts show that KMZ operated the same kind of business as did Zeller, sold its products from some of the same locations after Zeller had ceased its own operations, and used variations of the Zeller family name in labeling its products. These facts alone are insufficient to establish successor liability on summary judgment.") Without proof that all or substantially all of HFI's assets were transferred to NFI, a claim of successor liability must fail.

Even if Pavlov had satisfied this essential prerequisite, she would still have failed to establish a ground for successor liability. First, I reject her contention that the misspelling of Cheglakov's last name on NFI corporate records is evidence of a fraudulent transaction. Second, there is no evidence NFI expressly assumed HFI's liability; and I reject her contention HFI and NFI having the same attorney establishes NFI has impliedly assumed liability of HFI. It is more reasonable to infer Cheglakov simply did not want to pay two attorneys in this case. Third, the "mere continuation" exception does not apply because both HFI and NFI remain in existence. McCarthy v. Litton Indus., Inc., 410 Mass. 15, 23 (1991) ("we reaffirm that the indices of a 'continuation' are, at a minimum: continuity of directors, officers, and stockholders; **and the continued existence of only one corporation after the sale of assets**.") (Emphasis added) Finally, the "de-facto merger" exception does not apply. That exception has usually been applied where ownership, assets and management of one corporation are combined with those of a preexisting entity. Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 557 (2008) There is no evidence NFI was a preexisting entity. Further, the record is devoid of evidence relative to at least three of the four factors courts generally consider in determining whether to characterize an asset sale as a de facto merger: NFI paying for HFI's assets with shares of NFI's own stock; HFI ceasing its ordinary business operations; and NFI assuming the obligations of HFI ordinarily necessary for the uninterrupted continuation of normal business operations of HFI. Id.[21] Establishing the last factor

[21] "'The factors that courts generally consider in determining whether to characterize an asset sale as a de facto merger are whether (1) there is a continuation of the enterprise of the seller corporation so that there is continuity of management, personnel, physical location, assets, and general business operations; whether (2) there is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation; whether (3) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and whether (4) the purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.' [Citations omitted]" Id.

– continuation of the enterprise of HFI – by itself would be insufficient to establish a de facto merger. Id. ("'[n]o single factor is … sufficient to establish a de facto merger.' ")[22]

XIII. CONCLUSION OF LAW AS TO SUCCESSOR LIABILITY

In light of this analysis, I conclude NFI is not liable for HFI engaging in unlawful sex/pregnancy discrimination against Pavlov in violation of Section 4(1) of G.L. c. 151B.

XIV. FINDINGS OF FACT AS TO REMEDIES

62. Pavlov was earning $15/hour at HFI and working 30-40 hours per week. (Joint Exhibit 1) I draw the reasonable inference that Pavlov's average weekly wage at HFI approximated $525 (35 hours x $15/hour). Pavlov received $1,100 in severance payment from HFI. (Pavlov Testimony; Complainant Exhibits 5 and 9)

63. Within a week of her termination from HFI, Pavlov began looking for employment. During her search for employment, Pavlov submitted her resume to various web-sites that post available job openings - Monster, Indeed, and Craig's List. She contacted previous colleagues and employers; asked her sister who worked in the hotel industry, to put out "feelers," asked her father who was in the flooring industry if he could find an administrative position; used the job search engine of the Commonwealth's unemployment agency; and looked on Craig's List nearly every day. (Pavlov Testimony)

64. Pavlov did not look for employment for 6-8 weeks after the June 2015 birth of her child. (Pavlov Testimony) The record does not reflect the exact date her child was born. As the burden is on Pavlov to establish lost wages, I shall assume Pavlov temporarily ceased searching for employment beginning June 1, 2015. This is presumably the period she would have been on maternity leave had she remained working for HFI.

65. Pavlov restarted her search for employment in the first week of August 2015. (Pavlov Testimony)

[22] Thus, it is not necessary to determine if Pavlov established that factor.

66. Pavlov testified that she applied for jobs for which she qualified within 45 minutes of her home (e.g. Cumberland Farms, Dunkin Donuts, peer counsel, maintenance job). (Pavlov Testimony) I do not credit her testimony that she seriously sought minimum wage jobs while caring for a new-born infant for whom she would have needed daycare. However, I draw the reasonable inference that she would have returned to her full time position at HFI after the completion of her maternity leave had she not been terminated.

67. In January 2016, Pavlov became employed at Capizzi Home Improvement ("Capizzi"). At Capizzi, Pavlov was the front desk manager, was paid $13.50 per hour, and worked 40 hours per week [$540 per week]. Capizzi had financial difficulties and Pavlov's position was eliminated in the last week or two of August 2016. (Pavlov Testimony) The record does not reflect the exact date in January 2016 when Pavlov started working at Capizzi. As Pavlov has the burden of establishing lost wages, I shall assume she was hired by Capizzi in the first week of January 2016 and laid off in the last week of August 2016.

68. Pavlov began receiving unemployment benefits 6-8 weeks after her termination from HFI and received unemployment benefits until she began working for Capizzi. (Pavlov Testimony)

69. Pavlov's termination from HFI was professionally heart-breaking. She liked the job at HFI, believed she had a good working relationship with Huba and Cheglakov and believed she was doing a great job. (Pavlov Testimony)

70. After being told the reason for her termination was a financial one, she was very upset to discover a job posting for her replacement stating a preference for a male, and that the posting had been placed prior to her termination. (Pavlov Testimony)

71. Pavlov was drained and suffered from headaches, difficulty getting out of bed, depression, lack of appetite, lack of sleep, and a decreased level of attention and caring. She was depressed until she received the position with Capizzi. (Pavlov Testimony) The duration of the other symptoms is not established.

72. Pavlov did not consult a doctor or mental health professional for the fatigue or depression. She did not see a doctor specifically for headaches, depression or difficulty getting out of bed, but was seeing health care providers at the time (e.g. for pregnancy). (Pavlov Testimony)

73. Pavlov's biggest burden was financial. Pavlov's husband was a chef and it was difficult for him to find reliable work during the winter season on Cape Cod, rendering her the primary bread winner. Her family received transitional assistance and WIC and fuel assistance, had difficulty paying bills, and struggled with how to afford a new baby and hospital stay. (Pavlov Testimony)

74. Pavlov's sister, Elise Natale, described her observations of how the termination affected Pavlov. She testified that Pavlov was shocked and upset, and concerned about finances. Instead of being happy and excited about the impending birth of her child, Pavlov was stressed and unhappy. During a telephone conversation with Natale, Pavlov was in tears because she had applied for so many jobs but no one would hire her presumably due to her advanced pregnancy and need for maternity leave. Pavlov lost confidence as a result of being unable to find a job. (Natale Testimony)

XV. DETERMINATION OF REMEDIES

General Laws c. 151B, § 5 empowers the Commission to award back pay (lost wages) DeRoche v. Massachusetts Commission Against Discrimination, 447 Mass. 1, 13 (2006). The Commission is empowered to award emotional distress damages that are fair and reasonable, and proportionate to the distress suffered. Stonehill College v. Massachusetts Comm'n Against Discrimination, 441

Mass. 549, 576 (2004).[23] [24] The Commission may also impose civil penalties (G.L. c. 151B, § 5) and training requirements.

Based on the findings of fact, Pavlov is entitled to lost wages as follows: $525/week for 15 weeks (February 19, 2015 to June 4, 2015) = $7,875; plus $ 525/week for 21 weeks (August 3, 2015 to first full week in January 2016) = $11,025; less $1,100 in severance pay; for a total of $17,800. I conclude that the circumstances of Pavlov's lay-off from her employment at Capizzi in August 2016 constituted an intervening and discreet event for which HFI is not responsible, and that HFI's obligation to compensate her for lost wages ceased as of August 2016.[25] [26] Thus, I conclude that HFI is liable to Pavlov for lost wages in the amount of $17,800.

Based on the findings of fact, I conclude that Pavlov did suffer some compensable emotional distress as a result of her termination and is entitled to $20,000 in damages for emotional distress suffered as a direct consequence of the termination.

Chapter 151B, Section 5 authorizes the Commission to assess a civil penalty upon a respondent found to have committed a discriminatory practice. I decline to impose a civil penalty based on the fact that there was no evidence presented of any prior discrimination by HFI and the conduct

[23] "An award [of emotional distress damages] 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). [Citation omitted] In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress." Stonehill College, 441 Mass. at 576

[24] The commission is authorized to add pre-judgment interest on lost wages and emotional distress awards so employees do not suffer a loss in value of their earnings due to the passage of time. Hagopian v. Massachusetts Comm'n Against Discrimination, 89 Mass. App. Ct. 1127 (2016) (1:28 Decision) "Imposition of interest at a rate of twelve percent per annum continues to be rationally related to the Commonwealth's goals of eradicating discrimination in the workplace." Id.

[25] The period of time and amounts earned were calculated with aid of on-line calendar and calculator.

[26] I decline to deduct unemployment benefits Pavlov received. School Committee of Norton v. Massachusetts Commission Against Discrimination, 63 Mass. App. Ct. 839, 849 (2005), review denied, 445 Mass. 1103 (2005) ("hearing officer acted within her discretion to decline to offset any unemployment benefits received by Woodason." Buckley Nursing Home, Inc. v. Massachusetts Comm'n. Against Discrimination, 20 Mass. App. Ct. 172, 183 (1985), quoting from Jones v. Wayland, 374 Mass. 249, 262 (1978) (applying 'collateral source rule' to employment discrimination context")). Application of the collateral source rule is consistent with the Commission's broad discretion and authority to fashion appropriate remedies for violations. Buckley Nursing Home, Inc., 20 Mass. App. Ct. at 184

was not so deliberately egregious as to warrant such penalty. I conclude that the training requirements (see below) are more likely to have a greater impact on HFI's future conduct.

XVI. ORDER

For the reasons detailed above, and pursuant to the authority granted under G.L. c.151B, §5, I order the following.

1. HFI is liable to pay Pavlov lost wages in the amount of $ 17,800 - plus interest thereon at the 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.

2. HFI is liable to pay Pavlov the amount of $20,000 in damages for emotional distress - plus interest thereon at the 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.

3. HFI shall comply with the following training requirements.

    a. HFI shall conduct a training on unlawful discrimination on the basis of gender (sex) discrimination, including but not limited to, pregnancy discrimination.

    b. Required attendees for the training shall be HFI's managers, supervisors, officers, and owners.

    c. The training session must be at least four (4) hours in length. The training shall be repeated once each calendar year for the next 5 years for all new supervisors, managers and officers (i.e. hired, promoted or designated after the date of such training).

    d. Within 30 calendar days of the receipt of this decision, HFI shall select a trainer to conduct the initial training session that shall be approved by the Commission.

e. Within 30 calendar days after the completion of the training, HFI must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training, the names of the persons who attended the training, and the date and time of the training session.

f. In the event HFI is sold, materially changed, or taken over by new management, the successor entity shall be responsible for fulfilling the training requirements specified in this decision - if any of the following shall apply: (a) the majority of the managers and supervisors employed by HFI as of the date of this decision continue to work for the successor entity as of the succession date; (b) the majority of HFI's governing board as of the date of this decision continues to serve on the successor entity's board as of the succession date; (c) the new owner(s) or officer(s) are relatives of HFI's owner(s) or officer(s), or previously employed by HFI as a manager or supervisor; or (d) HFI continues to retain an interest in the successor entity.

g. For purposes of enforcement, the Commission shall retain jurisdiction over training requirements.

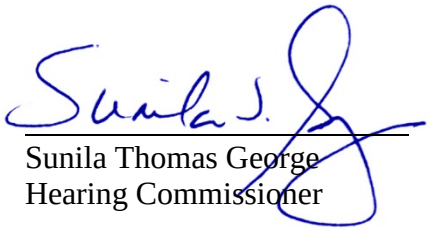
4. Any petition for attorney's fees and costs shall be submitted to the Clerk of the Commission within fifteen (15) days of receipt of this decision.[27]

[27] Pursuant to 804 CMR 1.12 (19) (2020), "[s]uch petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. A respondent may file a written opposition within 15 days of receipt of said petition."

XVII. NOTICE OF APPEAL

This decision represents the final order of the Hearing Commissioner. 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 with the Clerk of the Commission within 10 days of receipt of this decision and submit a Petition for Review within 30 days of receipt of this Decision. 804 CMR 1.23 (2020)

So ordered this 29th day of March, 2022



Sunila Thomas George
Hearing Commissioner