

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION &  
MEGAN RICHNER,

Complainant,

v.

DOCKET NO. 07-BEM-00730

HIGHLAND PIZZA,

Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 15, 2007, Complainant, Megan Richner, filed a complaint with the Commission charging Respondent, Highland Pizza, with discrimination in employment based on her disability, in violation of G.L. c. 151B, §4(16). Complainant asserted that her hours were reduced and that she was constructively discharged from her position as a counter person on account of a chronic condition affecting her knees (chondromalacia patella) which limits her ability to walk long distances, causes her to limp, and which is often quite painful. The Investigating Commissioner found probable cause to credit the Complainant's allegations and conciliation efforts having failed, the matter was certified for hearing. A public hearing was held before the undersigned hearing officer on October 20, 2009. The parties submitted post-hearing briefs. Having reviewed the record in this

matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

## II. FINDINGS OF FACT

1. At the time of the hearing, Complainant, Megan Richner, was 27 years old and residing with her parents and two year old son in Fall River, Massachusetts. As a young child, Complainant developed a painful condition in both knees which was diagnosed when she was age 15 as bilateral chondromalacia patella. Complainant testified that her condition is chronic, causes her knees to become inflamed, and makes walking difficult, slow and limited to short distances. Complainant is also limited in her ability to kneel and climb stairs and she sometimes has difficulty sleeping because of the pain. She underwent surgery of her left knee at age 15, which was partially successful and ameliorated her pain to some extent. By 2006, her right knee had worsened and her mobility was limited and the condition was extremely painful.

2. Complainant graduated from Bristol County Agricultural High School in 2000, and then attended Johnson and Wales University but was unable to continue her studies for financial reasons. She subsequently held a number of jobs primarily working with the mentally and physically disabled. Complainant testified that she was able to work despite the limitations and pain resulting from her knee condition, and she worked through the pain because she needed a job.

3. In December of 2006, Complainant and her boyfriend were living in an apartment in Fall River and she unexpectedly lost her job at a car dealership because her driver's license was suspended. Complainant's boyfriend, who was a member of the carpenter's union, had just been assigned to a job in Braintree and needed the couple's

only car to commute to work. Consequently, Complainant's job search was limited to the areas near her home.

4. Respondent, Highland Pizza, is a family owned pizzeria, with counter service only, that serves pizza, salads and sandwiches in the "Highlands" section of Fall River. Respondent is owned by Maria Vlahos who started the business with her husband in 1983. Her husband is deceased. Vlahos works at the restaurant every day from early morning until closing time at 9:45 p.m. Vlahos' daughter, Harriet Dimitriadis, began working at Respondent in 2002 and her duties include food preparation, ordering and stocking supplies and provisions, preparing the payroll and scheduling. Dimitriadis testified that Highland Pizza employs 7-9 employees, most of whom work part-time.

5. Complainant applied for employment at Respondent Highland Pizza, which was within walking distance of her apartment. She interviewed for the position with Maria Vlahos, Respondent's owner, and stated that she was looking for a full time job but would take whatever was available because she needed a job. She was hired as a counter person on December 12, 2006, at a rate of \$7.00 per hour. On her first day, Complainant met with Dimitriadis, who was responsible for setting her hours and explaining her duties. Complainant informed Dimitriadis that she needed to work as many hours as she could, and Dimitriadis told her that Respondent could not promise her full time but could guarantee at least 20 hours per week.

6. Complainant began work on December 12, 2006, and generally worked at least 20-25 hours per week but her hours varied and she sometimes worked up to 30 hours per week. She did not inform Vlahos of her knee condition, because she did not believe it would impair her ability to do the job. Complainant arrived at work at 9:00 a.m. and her

duties were to assist with making salads in the back “prep room” for about ½ hour. The rest of her day was spent working behind the counter making sandwiches and servicing customers at the counter. There is no dispute that during the entire term of her employment, Complainant performed all her duties satisfactorily and was never counseled or disciplined.

7. Complainant’s duties involved some walking when she worked behind the counter as the oven was at one end and the sandwich area was at the other end. As a result of her knee pain, Complainant exhibited a noticeable limp when moving back and forth behind the counter. Complainant’s limp was noticed by Vlahos, Dimitriadis, and many of the restaurant’s regular customers. According to Complainant, sometimes customers asked about her limp and she’d explain that she had a problem with her knees, but that she was “ok.” Regular customers would often ask her “how she was doing” or “how she was feeling,” within earshot of Vlahos and Dimitriadis. Complainant never discussed her condition in detail with the customers and it never interfered with her work. I credit her testimony. According to Dimitriadis no customers ever complained about Complainant.

8. Complainant testified that a month or so after she began working, Vlahos asked her why she was limping. Complainant explained that she had a chronic condition in both her knees and had had surgery as a teenager. In response to Vlahos’ questions about whether anything could be done medically to ameliorate the problem, Complainant said that nothing could be done. Complainant went on to state that the only treatment that might help would be surgery, but she could not even contemplate surgery because

she did not have health insurance and did not qualify for Mass Health. According to Complainant, Vlahos continued to ask her if she should see a doctor about the problem.

9. On February 27, 2007, Complainant came to work with a cold. Dimitriadis asked her not to come to work the next day because she was sick. When Complainant returned to work on March 1, 2007, she went into the “prep room” to prepare salads, as usual. According to Complainant, when she began bringing salads out to the front cooler, Vlahos stopped her and told her to stay in the “prep room,” and that she “didn’t want her limping around in front of the customers”, because it was “bad for business.” Vlahos and Dimitriadis denied that Vlahos made this statement, but I credit Complainant’s testimony that this occurred. Complainant obeyed Vlahos’ directive and returned to the “prep room” where she spent the rest of her shift primarily assembling “tons” of un-needed pizza boxes. At times during the day when the front counter would become busy, Complainant tried to come out front to help, only to be sent back to the “prep room” by Vlahos. At the end of her shift, Complainant was told again by Dimitriadis that they did not want her limping around in front of customers, that they did not need her to come in for awhile, and that they would call her when they needed her to work.

10. Dimitriadis testified that she and her mother noticed Complainant had difficulty walking and was in pain, were concerned about her condition, and repeatedly suggested that she see a doctor. Dimitriadis stated that Complainant’s response to their entreaties to seek medical help was that she had no health insurance. While I believe that Dimitriadis suggested to Complainant that she seek medical help for the pain, Complainant never complained that she was unable to do the job, did not seek any accommodation, and wanted to continue working in spite of her pain.

11. After March 1, 2007, Complainant did not hear from Respondent for five days and she telephoned Dimitriadis on March 6, 2007, asking whether there was work for her. She was told she could come in on March 7, for four hours. Complainant worked on March 7, but was again confined to the “prep room” assembling pizza boxes. When her four hour shift ended, Dimitriadis paid her for the day in cash and told her that she was being placed “on call” and that Respondent would call her if someone called out sick or if they were really busy. Complainant testified that she knew she was being terminated when she was paid in cash and told she was being placed on call because employees are generally paid by the week and never at the end of each shift.

12. Dimitriadis denied noticing that Complainant was limping when she first began working, but stated that a month or so later, she complained that her knee was hurting her. Dimitriadis could tell Complainant was in pain and noticed in late February that she had difficulty walking. Vlahos also testified that about one month after Complainant began working, she noticed Complainant was “not walking right,” but never said anything about this to her. According to Dimitriadis, she and her mother were concerned for Complainant’s well being and told her to get medical attention and pain medication for her knee before calling to come back to work. Dimitriadis denied that she and Vlahos made a decision that Complainant should work only in the back room, but I do not find this testimony credible. There is no other explanation for Complainant not being allowed to work the front counter, as she had done for three months. Dimitriadis also denied that Respondent terminated Complainant’s employment or placed her “on call.” However, I do not find this explanation credible, as there is no other credible explanation for why Complainant ceased working for Respondent. Dimitriadis asserted

only that she told Complainant not to return to work until after she had seen a doctor and gotten some relief for pain, and admitted that she and her mother did not want Complainant to return to work until she addressed the issue. It was clear that Complainant was expected to have seen a doctor and gotten medication as a condition of returning to work.

13. Complainant testified that neither Vlahos nor Dimitriadis ever contacted her again to ask how she was doing or to ask her to return to work at Respondent. Dimitriadis stated that she did not fire Complainant, but told her to call as soon as she got some medical attention and pain relief. She stated she placed Complainant on the schedule, but was waiting for Complainant to call Respondent with news that she had gotten treatment. Vlahos testified that Complainant was a good employee and that it's hard to find reliable employees. She stated she did not fire Complainant and expected her to return to work and to call if she needed work. I do not credit this testimony. It is contrary to Complainant's testimony that Dimitriadis told her she was being placed "on-call," and that they would call Complainant if they needed her. It is also reasonable that Vlahos or Dimitriadis would have contacted Complainant if they were so concerned about her well-being and expecting her to return to work. It is clear from their failure to do so, that they also considered her employment terminated.

14. Complainant testified that she was very distressed about losing her job and returned home crying on her last day. Her boyfriend had been laid off from his job not long before then and there was very little household income. He had been earning up to \$600 per week as a carpenter, but after being laid off, was receiving only about \$100 per week in unemployment compensation. The rent for their apartment was \$725 per month

and they were two months behind in rental payments at the time. Complainant testified that they had made an arrangement with the landlady, whose husband was a former teacher of her boyfriend, that as long as they paid some rent, they would not be evicted. However, after Complainant's termination, they were evicted and Complainant became homeless for the first time in her life. Complainant described the distress of having to put all their belongings in storage and testified that her parents loaned them money to live in a hotel. They lived in a motel for several weeks and ate meals at soup kitchens or got food from local food pantries. Complainant described being devastated and humiliated by the experience and too embarrassed to tell her parents, who were retired and on a fixed income, that she had no money for food. She stated they often went to bed hungry and had trouble sleeping. Approximately four weeks later, Complainant and her boyfriend found an apartment and her parents paid the first and last month's rent. Complainant testified that the experience placed stress on her relationship with her boyfriend and she feared they would have to separate.

15. Complainant found a full time job in June of 2007 working for the Key Program at a group home in Wareham for \$12.50 per hour. She was out of work for approximately 12 weeks and testified that her lost wages for that period were approximately \$2,200. In addition she owed her parents approximately \$2000-\$3000 for motel, rent and storage fees. Complainant worked for Key, Inc. for almost 2 years and then worked several other jobs. Complainant had surgery on her right knee on March 4, of 2009 and was left with only 80% range of motion in her knee and atrophy in right leg. She has been unable to work since. At the time of the Hearing, complainant was



receiving public assistance and had applied for disability benefits. She has been living with her parents and her two year old child at her parents home since August of 2009.

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B §4(16) prohibits discrimination in employment based upon handicap, where the applicant or employee is a qualified handicapped person capable of performing the essential functions of the position involved with reasonable accommodation. A handicap is defined as an impairment that substantially limits one or more major life activities, having a record of such impairment or being regarded as having such an impairment. G.L. c.151B §1(17). Complainant testified that she has suffered from a chronic knee condition, diagnosed as bilateral chondromalacia patella, since childhood and that her condition limits her ability to walk, often causes her to limp and is very painful. Complainant cannot walk long distances and is limited in her ability to kneel and climb stairs. I conclude that Complainant is disabled within the meaning of the statute.

Complainant testified that she was able to perform the functions of her job as a counter person at Respondent without any accommodation. Respondent confirmed that she had no difficulty completing her duties, and the only outward manifestation of her painful condition was a limp, that was noticed by Respondent's owner and her daughter and some of the customers. Complainant took no time off other than the one day in February shortly before her employment ended when Dimitriadis told her not to come in because she had a cold. I conclude that Complainant was a qualified handicapped individual who performed her job in accordance with Respondent's expectations.

The sole issue that remains contested is why Complainant was told that her services would not be needed for awhile, why she was relieved of her duties as counter person and told to work only in the back room, and why she was told her status would be “on-call” after March 7, 2007. Complainant testified credibly that both Vlahos and Dimitriadis told her that they did not want her working out front at the counter because the customers could see her limping and that was bad for business. While they denied making any such statements, I credit Complainant’s testimony that Vlahos and Dimitriadis said this to her after her limp became more pronounced and customers began asking Complainant about it. The statement is consistent with Vlahos’ directive that Complainant stop working at the counter and remain confined to the back “prep” room, where there was no real work for her to do. There was no other apparent reason for the change in Complainant’s duties and her hours. There was no evidence that business slowed, that Respondent was over-staffed or that Complainant was not performing her duties acceptably. Indeed, Vlahos testified that Complainant was a good employee and that reliable employees are hard to find.

Both Vlahos and Dimitriadis testified that they did not terminate Complainant’s employment but told Complainant that they wanted her to seek medical attention and get some pain relief before she came back to work and that they repeatedly encouraged her to do so. Even if the latter were true, and I were to ascribe benevolent motives to Respondent’s actions, it does not necessarily mean that their actions were non-discriminatory. This Commission long ago stated that “sincerity or good faith unsupported by objective proof, will not serve as a defense to an admittedly discriminatory act.” *Cooke v. Sarni Original Dry Cleaners*, 2 MDLR 1012, 1028 (1980).

Even if Respondent acted out of concern for Complainant's safety and well-being, it has been held that safety concerns must be supported by objective evidence that there is a "reasonable probability of substantial harm," to the employee or others. *See* MCAD Handicap Guidelines Section IX (B) (3) at 34-35, 20 MDLR Appendix (1998); *Ryan v. Town of Lunenburg*, 11 MDLR 1215, 1241-42 (1989) *citing* *Mantolete v. Bulger*, 767 F. 2d 1416 (9th cir. 1985). There was no evidence that Complainant's impairment was likely to cause harm to herself or others and Respondent did not articulate any specific safety concerns.

Given the facts of this case, I am persuaded that Vlahos and Dimitriadis decided that Complainant's limping was not what they wanted customers to see and that they believed her being out front at the counter was bad for business, and acted accordingly. Their actions manifest a bias about Complainant's disability that belies their stated concern for Complainant. Neither Vlahos nor Dimitriadis ever spoke to Complainant after she left their employ to ask how she was doing or to inquire about her returning to work.

In light of the above, I find that Complainant was terminated from her employment with Respondent for reasons related to her disability and that her termination was in violation of G.L. c. 151B § 4 (16).

#### 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). Upon a finding of discrimination, the Commission may award a Complainant monetary damages for, among other things, lost wages, other losses resulting from the discrimination, and for emotional distress suffered as a 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.

#### Back Pay

Complainant testified that after being separated from her employment with Respondent, she sought other employment but did not find work until June of 2007. I conclude that, but for her discriminatory termination, Complainant would have continued working the hours she had worked previously, having indicated a willingness to accept as many hours as Respondent could give her. Complainant was out of work for approximately 12 weeks and testified that her lost wages for that period were approximately \$2,200. I conclude that this figure is reasonable based on an approximate 25 hour week and that Complainant is entitled to recoup that amount of damages for back pay.

#### Consequential Damages

Complainant testified that as a result of being evicted from her apartment because she and her boyfriend could no longer pay any rent, she borrowed \$2000-\$3000 from her parents to pay for a motel and for storage of her belongings. I find that the loss of income from her boyfriend's job was, more likely than not, the primary reason for their being evicted, given that his earnings were substantially more than Complainant's. Given that Complainant worked many fewer hours and earned much less, it is unlikely that her

minimal income would have kept them from being evicted. Thus, I conclude that there is insufficient causation to find that Respondent is liable for Complainant's losing her housing and her having to borrow money from her parents to live in a hotel, and I decline to award damages for these expenses.

#### Emotional Distress Damages

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). Based on her credible testimony, I conclude that Complainant suffered emotional distress after her termination in large part due to the financial hardship of having no income. She testified about the stresses of being evicted, having to live in a motel, having little to eat and going to food pantries. She also discussed the stress the situation placed on her relationship with her boyfriend. I find that the loss of her job and her income contributed to this stress, as did other circumstances that were unrelated to Respondent's actions. Given those circumstances, and the very short tenure of her employment with Respondent, I conclude that Complainant is entitled to an award of damages for emotional distress in the amount of \$7,500.

#### V. ORDER

Based on the forgoing findings of fact and conclusions of law, Respondent is hereby Ordered to:

- 1) Cease and desist from any future acts that discriminate against its employees based on their disability.
- 2) Pay to the Complainant, Megan Richner, the sum of \$2,200 in damages for lost wages, 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 this until this order is reduced to a court judgment and post judgment interest begins to accrue.
- 3) Pay to Complainant, Megan Richner, the sum of \$7,500 in damages for emotional distress, 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.

This decision constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a notice of appeal to the Full Commission within 10 days of receipt of this Order and a Petition for Review to the Full Commission within 30 days of receipt of this Order. Complainant may file a petition for attorney's fees within 10 days of receipt of this Order.

So Ordered this 21st day of September, 2010.

Eugenia M. Guastaferr  
Hearing Officer