COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission
Against Discrimination and
Yerica Santiago,
Complainants

v. DOCKET NO. 17-SEM-02059

Caregivers of Massachusetts, Inc.,
Respondent

Appearances: Chelsea K. Choi, Esq. for Complainant
George J. Kahi for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On August 22, 2017, Complainant, Yerica Santiago, filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD" or "Commission") charging her former employer, Respondent, Caregivers of America LLC, with (a) sexual harassment, (b) retaliation, (c) a violation of the Massachusetts Parental Leave Act (G. L. c. 149, § 105D), (d) disability discrimination including failure to provide a reasonable accommodation, (e) sex discrimination, and (f) pregnancy discrimination. The Investigating Commissioner made a probable cause determination. On July 29, 2021, the Investigating Commissioner certified the issues raised in the complaint for public hearing.

On August 11, 2022 and August 17, 2022, a two-day hearing was held before me by Zoom video-conference due to the COVID pandemic. The recording, which was provided to the parties after the hearing, is the official record. During the hearing, the parties presented two witnesses, Yerica Santiago and George Kahi, and submitted eleven (11) joint exhibits. Complainant filed a

post-hearing brief on October 24, 2022; Respondent did not file a post-hearing brief. Unless stated otherwise, where testimony is cited, I find the testimony credible and reliable, and where an exhibit is cited, I find it reliable to the extent it is cited. Having reviewed the record of the proceedings, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

INTRODUCTORY FACTS

1. Complainant, Yerica Santiago (hereinafter referred to as "Ms. Santiago"), is a female who was employed by Respondent Caregivers of Massachusetts, LLC (hereinafter referred to as "Caregivers") from April 6, 2016 to March 24, 2017. Testimony of Santiago (Day 1); Joint Exhibit ("JE") 1 (P-0003-P-0009).[1]
2. In 2016, Ms. Santiago was thirty-two (32) years old and had four (4) children. JE 8 (P-0097).
3. Caregivers is a home health care company founded by George Kahi ("Mr. Kahi") and Willie Kangela ("Mr. Kangela") providing personalized home health care through skilled nursing and home care. JE 2 (P-0021).
4. In 2016 and 2017, Caregivers operated an office at 125 Liberty Street, Suite 100, Springfield, Massachusetts and employed between one hundred (100) and one hundred-fifty (150) individuals. Testimony of Kahi (Day 2); JE 2 (P-0021).
5. In 2016 and 2017, the President of Caregivers was Mr. Kahi. From May 2013 to July 2015, Mr. Kahi also held the position of Administrator and was charged with overseeing Caregivers' day-to-day operations. Testimony of Kahi (Day 2).

[1] Joint exhibits are internally paginated and referred to herein as JE _, (P-____).

6. During Ms. Santiago's employment, Mr. Kangela was Caregivers' Vice President and Financial Director. Testimony of Kahi (Day 2).
7. During Ms. Santiago's employment, Sheila Binyenya ("Ms. Binyenya") was Caregivers' Admissions Director. Testimony of Kahi (Day 2). Ms. Binyenya and Mr. Kahi were married at the time of Ms. Santiago's employment and at the time of the hearing. Testimony of Kahi (Day 2).
8. From April 2016 to October 2016, Beth Kanjau ("Ms. Kanjau") was Caregivers' Director of Human Resources and Ms. Santiago's direct supervisor. Testimony of Kahi (Day 2). In 2016, Ms. Kanjau was married to Mr. Kangela. Testimony of Ms. Santiago (Day 1); Testimony of Mr. Kahi (Day 2).
9. In July 2015, Caregivers hired Lynda Willetts ("Willetts") as Administrator, reporting to Mr. Kahi. Testimony of Kahi (Day 2).
10. In October 2016, Susan Matua ("Ms. Matua") became the Director of Human Resources and Ms. Santiago's direct supervisor. Testimony of Kahi (Day 2).

MS. SANTIAGO'S EMPLOYMENT AT CAREGIVERS

11. On or about April 4, 2016, Caregivers hired Ms. Santiago as a Human Resources Manager/Personnel. JE 1 (P-0004); JE 7 (P-0092-P-0093). While the Position Statement submitted by Respondent states that Ms. Santiago was hired as the Director of Human Resources, JE 2 (P-0023), I credit Mr. Kahi's testimony that the job description in the Position Statement were in error. Testimony of Kahi (Day 2); JE 4 (P-0082).
12. Ms. Santiago's responsibilities at Caregivers generally included the recruitment and selection of employees; the coordination of an orientation program for new employees; ensuring that employees meet required training requirements; ensuring that employees

meet employment expectations; and ensuring employees are in compliance with mandatory requirements for employment. Testimony of Santiago (Day 1); JE 2 (P-0045 - P-0046); JE 4 (P-0081-P-0083).

13. Ms. Santiago was offered employment at Caregivers at a rate of $26 per hour, and was scheduled to work 40 hours a week. JE 7 (P-0092-P-0093). On July 28, 2016, Ms. Santiago was paid at an hourly rate of $19. JE 11 (P-0168). Ms. Santiago spoke with Ms. Kanjau about her hourly wage, and thereafter, was paid at a rate of $25 per hour, 40 hours per week. Testimony of Santiago (Day 1); JE 11 (P-0169–P-0173).
14. Caregivers' failure to pay Ms. Santiago at a rate of $26/hour, as initially promised, was due to administrative error. I base this finding on Mr. Kahi's credible testimony on this point. Testimony of Kahi (Day 1 & 2).
15. When Ms. Santiago began working at Caregivers in April 2016, she had a co-worker named Moises Ngarukiye ("Mr. Ngarukiye"). Testimony of Santiago (Day 1). Initially, Mr. Ngarukiye worked as an office assistant doing filing for Caregivers. Testimony of Kahi (Day 1); JE 2 (P-0023). Mr. Ngarukiye did not have any supervisory authority over Ms. Santiago at any time during her employment. Testimony of Santiago (Day 1).
16. In June 2016, Mr. Ngarukiye took pictures of Ms. Santiago without her permission. JE 1 (P-0004-P-0005). Mr. Ngarukiye took pictures of Ms. Santiago at least once and the last incident of Mr. Ngarukiye taking pictures of Ms. Santiago occurred in June 2016. JE 1 (P-0005). I base this finding on the lack of evidence that Mr. Ngarukiye took pictures of Ms. Santiago after June 2016.

17. Until the June 2016 Video Incident, described herein at ¶19, Mr. Ngarukiye would often touch Ms. Santiago when he spoke with her - putting his hand on her back and grabbing her hand. Testimony of Santiago (Day 1).

18. When Mr. Ngarukiye and Ms. Santiago were both working in the office, Mr. Ngarukiye would stare at Ms. Santiago while biting his lips, which she interpreted as Mr. Ngarukiye implying that he "wanted" her. Mr. Ngarukiye's staring made Ms. Santiago very uncomfortable and continued throughout Ms. Santiago's employment. Testimony of Santiago (Day 1).

19. At some point in June 2016, Mr. Ngarukiye was working next to Ms. Santiago and trying to get her attention. Testimony of Santiago (Day 1). Ms. Santiago was trying to ignore Mr. Ngarukiye when he said: "You know, Americans are crazy." In response, Ms. Santiago said: "I have work to do." Testimony of Santiago (Day 1). Mr. Ngarukiye said to Ms. Santiago, "Do you know what an orgy is?" Mr. Ngarukiye then showed Ms. Santiago a video on his phone with no volume showing multiple people having sex. Testimony of Santiago (Day 1); JE 1 (P-0005). Ms. Santiago told Mr. Ngarukiye that she was going to report this to her supervisor. This incident occurred before 9 a.m. when there were no other employees working near Ms. Santiago or Mr. Ngarukiye. Testimony of Santiago (Day 1). This incident is referred to herein as "the June 2016 Video Incident."

20. After the June 2016 Video Incident, Ms. Santiago and Mr. Ngarukiye did not talk any more. Testimony of Santiago (Day 1).

21. In June 2016, Ms. Santiago told Ms. Kanjau of the June 2016 Video Incident and that she found working with Mr. Ngarukiye intolerable due to his staring, taking photos, touching

her, and showing her internet pornography. JE 1 (P-0005); Testimony of Santiago (Day 1).

22. Subsequently, in June 2016, Ms. Santiago met with Ms. Binyenya and Ms. Kanjau to discuss the June 2016 Video Incident. JE 1 (P-0006). Ms. Binyenya seemed very upset during the meeting, and told Ms. Santiago that Ms. Binyenya thought that Ms. Santiago was lying when she accused Mr. Ngarukiye of showing her a video of people having sex. Ms. Binyenya said that Ms. Santiago should not be making these accusations against Mr. Ngarukiye. Ms. Binyenya told Ms. Santiago that touching was part of Mr. Ngarukiye's culture, and that Ms. Santiago was being too sensitive. JE 1 (P-0006); Testimony of Santiago (Day 1).

23. After the June 2016 Video Incident, Ms. Santiago told Mr. Ngarukiye that she was going to report him for the June 2016 Video Incident, Mr. Ngarukiye did not touch or take pictures of Ms. Santiago. I make this finding based on the following: (a) Ms. Santiago did not testify to any instances of Mr. Ngarukiye taking pictures of her after the June 2016 Video Incident; (b) Ms. Santiago did not testify to any instances of Mr. Ngarukiye touching her after the June 2016 Video Incident; (c) the September 2016 Incident Report, discussed herein at ¶27, states that Mr. Ngarukiye took pictures of Ms. Santiago which she reported to Ms. Kanjau, but does not indicate or provide an example of any incident of Mr. Ngarukiye touching or taking photographs of Ms. Santiago <u>after</u> it was reported to Ms. Kanjau and Ms. Binyenya in June 2016; and (d) when asked to provide examples of other alleged touching by Mr. Ngarukiye, the only incident Ms. Santiago cited besides the June 2016 Video Incident was the November 2016 Incident (discussed below), when Mr. Ngarukiye stood close to Ms. Santiago but did not touch her. Testimony of Santiago (Day

1); JE 1 (P-0013-P-0017). In making this finding, I have considered Ms. Santiago's general allegation in the MCAD complaint that she told Mr. Ngarukiye to stop touching her and that he continued to do so. In light of a lack of a specific timeframe in the MCAD complaint as to the alleged touching and Ms. Santiago's acknowledgement at the hearing that she and Mr. Ngarukiye did not talk after the June 2016 Video Incident, the general statement in the complaint is insufficient to alter this finding. JE 1 (P-0005).

24. In early July 2016, Ms. Santiago was moved from the first floor of the Caregivers office to the basement. Testimony of Santiago (Day 1); JE 1 (P-0006).

25. Mr. Ngarukiye was not working near Ms. Santiago for between six (6) and eight (8) weeks in July and August 2016. JE 1 (P-0006) ("By early July, 2016, some of the staff had been moved to the basement, including Ms. Santiago. . . Mr. Ngarukiye had been sitting in another office area with two (2) other staff and stayed there for about two (2) months."); JE 1 (P-0013). Ms. Santiago did not testify to any interactions with Mr. Ngarukiye in July or August 2016. Testimony of Santiago (Day 1).

26. On September 1, 2016, Ms. Santiago was working in the basement when Mr. Ngarukiye confronted Ms. Santiago for putting files on a desk he claimed was his own. Testimony of Santiago (Day 1); JE 1 (P- 0006). Ms. Santiago explained that she was placing the files there temporarily while she obtained forms to place in a file. Testimony of Santiago (Day 1); JE 1 (P-0006). Mr. Ngarukiye angrily stated to Ms. Santiago: "You are not my boss." and "Go to your office." Testimony of Santiago (Day 1); JE 1 (P-0006). When Santiago protested, Mr. Ngarukiye accused Ms. Santiago of harassing him. JE 1 (P-0006). This incident is referred to herein as "the September 2016 Incident."

27. After the September 2016 Incident, Ms. Santiago wrote a report dated September 1, 2016 ("September 2016 Incident Report"). JE 1 (P-0013). While the emphasis of the September 2016 Incident Report was the September 2016 Incident, Ms. Santiago also stated:

> In the latest incident, it seemed to me that his use of the phrase, "you're harassing me" almost seemed like a reference to being upset that I had made an issue about these inappropriate sexualized actions in the past. JE 1 (P-0016)
>
> As you also know, Moises was inappropriate with me in the past by showing me videos in his phone of people having sex, taking pictures of me, and making inappropriate comments. JE 1 (P-0017).

28. In the September 2016 Incident Report, Ms Santiago stated that she would prefer not to work in the same area with Mr. Ngarukiye and that "this is not a pleasant work environment" and "seems more of a potentially hostile work environment when he is around." JE 1 (P-0017).

29. Ms. Santiago gave the September 2016 Incident Report to Lynda Willetts. Testimony of Santiago (Day 1).

30. In mid to late September 2016, Mr. Kahi and Mr. Kangela met with Ms. Santiago, told her that they had spoken with Mr. Ngarukiye about sexual harassment and told Ms. Santiago that they were going to try to move Mr. Ngarukiye to a different area. Testimony of Santiago (Day 1).

31. The testimony was vague as to precisely when Mr. Ngarukiye was moved to a different area after Mr. Kahi and Mr. Kangela spoke with Ms. Santiago, but supports the finding that a few weeks after Ms. Santiago submitted the September 2016 Incident Report, Mr. Ngarukiye was not working near Ms. Santiagio. Between mid to late September 2016 and November 2016, Ms. Santiago did not see Mr. Ngarukiye in the office. Around

November of 2016, Mr. Ngarukiye returned to work within the building. JE 1 (P-0007-P0008).

32. In November 2016, Ms. Ngarukiye came in to Ms. Santiago's office to ask for some documents. Mr. Ngarukiye was standing close to Ms. Santiago. A co-worker named Ms. Moreno-Escobar got between Mr. Ngarukiye and Ms. Santiago. As Ms. Moreno-Escobar stepped between them, Mr. Ngarukiye passed by Ms. Moreno-Escobar and "brushed his arm across" Ms. Moreno-Escobar's breasts. JE 1 (P-0008-P-0009); Testimony of Santiago (Day 1). This incident is referred to herein as "the November 2016 Incident."
33. Ms. Santiago did not provide any evidence as to: (a) whether the touching appeared to be accidental or intentional; (b) the length of time Mr. Ngarukiye's arm was in contact with Ms. Moreno-Escobar's breast, or further information pertinent to the nature of the touching; (c) how Ms. Santiago or Mr. Ngarukiye responded once physical contact was made; (d) how Ms. Moreno-Escobar responded once physical contact was made; (e) whether Ms. Moreno-Escobar complained to Ms. Santiago or Caregivers about the incident, or (f) how the incident affected Ms. Santiago's workplace and conditions of employment. Testimony of Santiago (Day 1).
34. Ms. Santiago did not complain internally or notify anyone at Caregivers of the November 2016 Incident. Testimony of Santiago (Day 1); JE 2 (P-0031-P0032).
35. Caregivers did not issue Ms. Santiago any performance-related discipline during her employment at Caregivers, including any written or verbal performance-related warning. Testimony of Santiago (Day 1). Ms. Santiago was not placed on a performance improvement plan or suspended for performance. I do not credit Mr. Kahi's testimony that she was "kind of" placed on a performance improvement plan, because no such

documentation was submitted at hearing and I credit Ms. Santiago's testimony that she never received any disciplinary documentation. Testimony of Kahi (Day 2); Testimony of Santiago (Day 2).

36. Mr. Kahi viewed Ms. Santiago as having difficulty working with some of the employees assigned to assist her in performing her job duties. Testimony of Kahi (Day 1 & 2). Mr. Kahi also described Ms. Santiago as having provided "good input" to Caregivers. Testimony of Kahi (Day 2).

SEXUAL HARASSMENT POLICY AND INVESTIGATION

37. In 2017, Caregivers had an Employee Handbook ("Employee Handbook") that included a sexual harassment policy. JE 2 (P-0052). The policy states that sexual harassment will not be tolerated and that an employee who feels that he or she is a victim of sexual harassment, or a victim of retaliation for complaining of sexual harassment, should immediately report such actions to the Director of Nursing, or any other member of management. JE 2 (P-0052). There is no requirement in the Employee Handbook that an employee submit internal harassment complaints in writing. JE 2 (P-0047 - P-0061).
38. The Employee Handbook states: "The reporting employee and any employee participating in any investigation under this policy have (sic) the company's assurance that no reprisals will be taken as a result of a sexual harassment complaint. It is our policy to encourage discussion of the matter, to help protect others from being subjected to similar inappropriate behavior." JE 2 (P-0052).
39. Ms. Santiago was not provided a copy of the Employee Handbook. I base this on the following: (1) Ms. Santiago's credible testimony that she was never provided a copy of the Employee Handbook. Testimony of Santiago (Day 1); (2) Mr. Kahi's lack of first-

hand knowledge as to whether Ms. Santiago was provided with an Employee Handbook; and (3) Caregivers' failure to submit documentation, as an attachment to its Position Statement, or exhibit at hearing, showing that Ms. Santiago received the Employee Handbook. Testimony of Kahi (Day 1 & 2); JE 2.

40. After Ms. Santiago reported the June 2016 Video Incident to Ms. Kanjau and Ms. Binyenya, and prior to Ms. Santiago's September 2016 Incident Report, someone from Caregivers spoke with Mr. Ngarukiye who denied the allegations and told Caregivers that he had shown Ms. Santiago a video of African dancers on his telephone. Testimony of Kahi (Day 1). I base this conclusion on: (1) Mr. Kahi's testimony that Mr. Ngarukiye claimed that he had shown Ms. Santiago African dancers on his phone, and (2) Ms. Santiago's testimony that on September 1, 2016, Mr. Ngarukiye accused Ms. Santiago of harassment, reflecting Mr. Ngarukiye's awareness that Ms. Santiago had reported the June 2016 Video Incident. Testimony of Kahi (Day 1 & 2); Testimony of Santiago (Day 1).

41. After Ms. Santiago reported the June 2016 Video Incident to Ms. Kanjau and Ms. Binyenya, and prior to Ms. Santiago's September 2016 Incident Report, Caregivers did not interview Ms. Santiago because it was waiting for Ms. Santiago to file a written complaint of sexual harassment. I base this finding on the following: (1) Ms. Santiago's testimony that after she spoke with Ms. Kanjau and Ms. Binyenya in June 2016, there was no sexual harassment investigation; (2) Mr. Kahi's testimony that after Ms. Santiago reported the June 2016 Video Incident, the claims could not be substantiated because Caregivers was awaiting Ms. Santiago's written report; and (3) Mr. Kahi's initial testimony that Caregivers had a written policy requiring that internal claims of sexual

harassment be submitted in writing. Testimony of Kahi (Day 2); JE 2 (P-0047-P-0061); JE 1 (P-0006); Testimony of Santiago (Day 1).

42. In assessing Ms. Sangiago's claims of harassment, Caregivers gave Mr. Ngarukiye the benefit of the doubt and concluded that there was no credible evidence to support Ms. Santiago's allegations of harassment. Testimony of Kahi (Day 2) ("With the matter of the sexual harassment, we did our investigation as Caregivers and we did not find a credible conclusion that it happened, and giving the accused the benefit of the doubt and with both of them aware that an event would need to be reported immediately…uh.. I thought we concluded that matter….") (emphasis added).
43. At the time of hearing, Mr. Kahi had not received training focused on sexual harassment. Testimony of Kahi (Day 2).
44. Mr. Ngarukiye was not disciplined as a result of Ms. Santiago's complaint of sexual harassment in June 2016. Testimony of Kahi (Day 2).

WORCESTER OFFICE TRANSFER

45. On or about November 22, 2016, Caregivers transferred Ms. Santiago from Caregivers' Springfield office to the Worcester office. Testimony of Santiago (Day 1). Mr. Kahi notified Ms. Santiago on a Friday, and transferred her to the Worcester office the following Monday. Testimony of Kahi (Day 2); Testimony of Santiago (Day 1). At the time of the transfer, Caregivers was on notice that Ms. Santiago was pregnant. See ¶56.
46. Mr. Kahi made the decision to assign Ms. Santiago to the Worcester office with Mr. Kangela and Ms. Willetts. Testimony of Kahi (Day 2).
47. I do not credit Mr. Kahi's testimony that the transfer was intended to be temporary or that he told Ms. Santiago that the transfer was temporary. I make this finding for the

following reasons: (1) Ms. Santiago credibly testified that Mr. Kahi's decision to transfer was not communicated as a temporary transfer; and (2) Mr. Kahi's testimony that it was a temporary transfer is inconsistent with his testimony that the reason Ms. Santiago was transferred was because the Worcester office location had recently been acquired, and they were hiring more employees whose personnel files needed to be reviewed. Testimony of Kahi (Day 1 and 2); Testimony of Santiago (Day 1).

48. The only employee at Caregivers' Springfield office who was required to transfer in November 2016 was Ms. Santiago. Testimony of Santiago (Day 1). When Ms. Santiago arrived in Worcester, she did not have access to a computer and her only access to a phone was the phone at the front desk. Testimony of Santiago (Day 1).
49. Ms. Santiago was not given personnel files to work with at the Worcester office, and had little to do at the Worcester office. Testimony of Santiago (Day 1). She credibly testified that she would sit at the front desk waiting for the hours to go by because she did not have access to the computer.
50. The transfer to the Worcester office put a substantial strain on Ms. Santiago by increasing her commute time from eight (8) minutes to forty-five (45) minutes to an hour. Testimony of Santiago (Day 1). Ms. Santiago cried during the commute, and was upset because she was pregnant and was having pregnancy-related health problems and felt the commuting time contributed to her health issues. In addition, she believed that the reason she was transferred was because Caregivers wanted to "get rid of" her. Testimony of Santiago (Day 1).

51. After the transfer, Ms. Santiago was anxious about retaining her position, and how she would pay for her mortgage if she lost her job, particularly after the baby was born. Testimony of Santiago (Day 1).

52. Mr. Kahi testified as follows as to the reason for the transfer:

> "We were able to acquire a business in Worcester, and we already had about twelve staff members and forty (40) patients. It was almost going to work like a satellite office. So, we thought to move some of our staff that we could to that new office. Moise was not comfortable with Yerica anymore. Moise was giving a counterclaim of harassment by Ms. Santiago." Testimony of Kahi (Day 1).

I do not credit Mr. Kahi's testimony that the reason Ms. Santiago was transferred to Worcester was because the company needed to place a human resources representative in the Worcester office to work on personnel files. I base this conclusion on (a) the lack of work for Ms. Santiago to do when she arrived at the Worcester office; (b) the fact that Caregivers did not provide her with a computer to work on in Worcester; and (c) Mr. Kahi's admission when explaining why he transferred Ms. Santiago to Worcester that "Moise was not comfortable with Yerica anymore," and that Mr. Ngarukiye had brought a counterclaim of harassment against Ms. Santiago.

53. After five (5) days of working in the Worcester office, Ms. Santiago provided Caregivers with a letter from a doctor seeking to return to the Springfield office. Testimony of Santiago (Day 1). Ms. Santiago spoke with Ms. Kanjau, Mr. Kangela and Mr. Kahi and told them she was experiencing a high-risk pregnancy, and that sitting during her commute was resulting in early contractions. Testimony of Santiago (Day 1).

54. On or about November 28, 2016, Mr. Kahi made the decision to transfer Ms. Santiago back to the Springfield office, and she returned to the Springfield office the following Monday. Testimony of Santiago (Day 1 & 2).

55. During Ms. Santiago's employment, Mr. Ngarukiye was not reassigned to another Caregivers office. Testimony of Kahi (Day 2). At some point after Ms. Santiago's complaint of the June 2016 Video Incident, Caregivers trained Mr. Ngarukiye as a home health aid. Testimony of Kahi (Day 1).

MS. SANTIAGO'S PREGNANCY AND MEDICAL CONDITION

56. In September 2016, Ms. Santiago informed Caregivers that she was pregnant and that her due date was February 28, 2017. JE 1 (P-0009); Testimony of Santiago (Day 1); Testimony of Kahi (Day 2).

57. Prior to her pregnancy, Ms. Santiago had been treated for stress, anxiety and depression. Testimony of Santiago (Day 1).

58. In early December 2016, Ms. Santiago began to seek care for depression and anxiety from Caroline Cole, a Licensed Mental Health Counselor at West Central Family & Counseling. JE 8 (P-0096). On December 8, 2016, Ms. Cole noted that Ms. Santiago was experiencing anxiety due to feeling harassed at work and felt compromised due to being 8 months pregnant. Ms. Cole's notes also reflect Ms. Santiago's concern that she would lose her job after giving birth and that this would cause her financial stress, particularly given that she would soon have five children. The notes describe Ms. Santiago's triggers as financial stress, job loss and feelings of being overwhelmed. In addition, Ms. Santiago described having symptoms of decreased concentration. JE 8 (P-0096). Ms. Cole's December 8, 2016 notes describe Ms. Santiago as anxious and experiencing frequent and excessive worry, tearful episodes and racing thoughts at bedtime. JE 8 (P-0097).

59. On December 13, 2016, Ms. Cole met with Ms. Santiago and described her as having "generalized anxiety disorder." JE 8 (P-0098). Ms. Cole's December 13, 2016 notes describe Ms. Santiago as experiencing depression, anxiety, tearful episodes, difficulty with stress management and sleep, and experiencing excessive worry and feeling easily overwhelmed. JE 8 (P-0098). Ms. Santiago met with Ms. Cole again on December 20, 2016, and reported symptoms of anxiety and depression. JE 9 (P-0100).
60. On December 28, 2016, Ms. Santiago sent a text to the Director of Human Resources, Ms. Matua, informing her that she was having contractions and was going to the hospital. Ms. Santiago also told Ms. Matua that she had called the on-call nurse at Caregivers so that she could pass the message to Linda. JE 6 (P-0086-P-0090). Ms. Matua responded by text, stating: "Hi Yerica, oh sorry to hear that. Hope you feel better soon." JE 6 (P-0087).
61. On January 2, 2017, Ms. Matua texted Ms. Santiago, stating: "Please give me a call as soon as you receive this message. I have very important message for you." JE 6 (P-0088).
62. In response, Ms. Santiago texted Ms. Matua on January 2, 2017 and informed her that she was at the hospital, that she did not have good reception, and asked Ms. Matua to text her and that she would do her best to respond via text. JE 6 (P-0088).
63. January 16, 2017 was Ms. Santiago's last day in the office and she gave birth to her child shortly thereafter. Testimony of Santiago (Day 1).
64. Ms. Santiago continued to receive therapeutic care from Ms. Cole in January 2017 and Ms. Santiago's symptoms were described by Ms. Cole in her notes as anxiety, panic, excessive worry, hypervigilance, and sleep disturbance. JE 8 (P-0103) (P-0106).

65. As of January 23, 2017, Ms. Matua knew that Ms. Santiago had given birth. JE 6 (P-0088). On January 23, 2017, Ms. Matua sent Ms. Santiago a text congratulating her for the birth of the baby and stated: I have a few questions for you. Please give me a call as soon as possible or have Jose give me a call." JE 6 (P-0088).

66. The text stream between Ms. Matua and Ms. Santiago submitted into evidence spans between the dates December 28, 2016 and May 15, 2017. JE 6 (P-0086 – P-0090). The text stream supports the conclusion that Ms. Santiago did not respond by text on this text stream to Ms. Matua's January 23rd text message. JE 6 (P-0087-P-0096).

67. During her parental leave, Ms. Santiago generally communicated with Caregivers by text or email and did not recall communicating by telephone. Testimony of Santiago (Day 1).

68. In a letter dated January 31, 2017 from Ms. Matua to Ms. Santiago, re: Maternity leave and marked "Corrected Copy," Ms. Matua congratulated Ms. Santiago and stated, in relevant part:

> Per Massachusetts maternity leave care Act (MMLA), you are eligible to up to eight weeks of unpaid leave to take care of your newborn. Since the last day, you worked was on **January 16, 2017,** your maternity leave commenced on **January 17, 2017** for a period of eight weeks. Your return to work will be **March 22, 2017. . . .** JE 2 (P-0069) (bold in original text).

69. In February and March 2017, Ms. Santiago continued to seek therapeutic care from Ms. Cole, who described Ms. Santiago's symptoms as depression, anxiety, panic, excessive worry, hypervigilance and sleep disturbance. JE 8 (P-0108 - P-0112).

70. On March 1, 2017, Ms. Santiago sent an email to Ms. Matua and Ms. Willetts stating that it was her "intent to return to work on March 15, 2017, pending doctor's approval and instructions after such a delicate and high risk delivery." JE 2 (P-0073). This email was

received by Ms. Willetts, who responded on March 1, 2017, stating: "See you in two weeks, if your MD gives the green light." JE 2 (P-0073).

71. On March 9, 2017, Ms. Santiago had a post-partum visit with Lauren Orr, DO, who prepared a "Gynecology Note Office" which states that Ms. Santiago's depression "has continued since delivery and . . . her anxiety level has been increasing. She continues to see her therapist Carolyn Cole at West Central Family in West Springfield at least once a week. She was started on Sertraline at the end of her pregnancy and has continued to take this medication as prescribed. She thinks that a lot of her anxiety revolves around stress of taking care of newborn and the idea of having to go back to work. States that she only has off 8 weeks per her job, but doesn't feel ready to go back. Her husband does not live with her so she doesn't have a lot of support at home with caring for the newborn, he does come and visit with her and the newborn though. Today she would like me to prescribe her anxiolytics, she was previously given Klonopin/Ativan by her PCP. She does not currently have a psychiatrist. She also states that her therapist has requested to speak with us regarding her care. She reports feeling sad, having crying episodes, feeling tired. She denies any thoughts of harming herself, the baby, or anyone else." JE 10 (P-0131).

72. In March 2017, Ms. Santiago continued to seek therapeutic care from Ms. Cole and on March 10, 2017, Ms. Santiago's OB-GYN called Ms. Cole to inquire about Ms. Santiago receiving psychiatric medication. JE 8 (P-0108 - P-0112).

73. Ms. Santiago did not return to work after her MPLA leave expired. Instead, on March 15, 2017, Ms. Willetts received an email from Ms. Santiago directed to Ms. Willetts and Ms. Matua stating that Ms. Santiago had a doctor's appointment on March 15, 2017, that her

doctor advised her to stay out of work, and that she would have a note by Friday (March 17, 2017). JE 1 (P-0075).

74. On March 15, 2017, Ms. Santiago met with Spencer Haller, MD, of River Bend Medical Group. JE 10 (P-0130). Dr. Haller's notes reflect that the reason for the visit was Ms. Santiago's depression and that the primary diagnoses was depression with anxiety. Dr. Haller's notes state: "Plan: Letter written; continue with counseling. Recommend continuing with current dose of sertraline. Wonders about pm med, I think resumption of lorazepam pm would be reasonable…" JE 10 (P-0130).

75. On March 17, 2017, Ms. Willetts received an email from Ms. Santiago directed to Ms. Matua and Ms. Willets, and dated March 17, 2017. JE 2 (P-0077-P0078). The email subject was "Doctors note" and asked that Ms. Matua and Ms. Willetts please call or email with any questions. The email attached a letter from Dr. Haller dated March 15, 2017 which states that Ms. Santiago "is currently under my medical supervision. Due to a medical issue, she is currently unable to work. She is under the care of a specialist for her condition. A return to work date has not been set." JE 2 (P-0078).

76. There were no emails, texts or other written communications between Ms. Santiago and Ms. Willetts, Ms. Matua or any other Caregivers employee between March 18, 2017 and March 24, 2017.

77. On March 24, 2017, Caregivers terminated Ms. Santiago's employment by correspondence dated March 24, 2017 and signed by Susan Matua. Testimony of Santiago (Day 1); JE 9 (P-0118).

78. The letter terminating Ms. Santiago's employment (the "Termination Letter") states:

> Your employment ended because you did not return from your maternity leave and failure to correctly request for an extension of your leave which must be submitted in writing and approved as per as per (sic) agency policy. Additionally, you failed to respond to the Administrator's call back request. Thus, the management considers lack of communication and/or return to work a voluntary resignation. JE 9 (P-0118).

79. In addition, the Termination Letter states that on February 10, 2017, a letter was sent to the address on file informing Ms. Santiago that her personnel file remains missing, and that Ms. Santiago failed to respond to the letter as requested by the Human Resources Director. JE 9 (P-0118).

80. Mr. Kahi "had a fit" when he learned that Ms. Santiago had been terminated, and testified that he took "ownership of that untimely decision to terminate her." Testimony of Kahi (Day 2).

CAREGIVERS' POLICIES: DISABILITY, LEAVE AND STANDARDS OF CONDUCT

81. Caregivers' Employee Handbook contains a disability leave policy that provides employees with unpaid disability leave after completing three months of employment. JE 2 (P-0055). The policy states that "[d]isability leaves due to non-occupational illness, injury or pregnancy-related disability is (sic) not to exceed 8 weeks." JE 2 (P-0055 – P-0056). In addition, the policy states, "Employees requesting leave must provide written notice of the disability, including a doctor's certificate stating the nature of the disability and the expected date of return to work." JE 2 (P-0055).

82. Caregivers' Employee Handbook includes a provision that states: "Our company is committed to providing equal employment opportunities to otherwise qualified individuals with disabilities, which may include providing reasonable accommodation where appropriate. In general, it is your responsibility to notify the company of the need

for accommodation. Upon doing so, you may be asked for your input or the type of accommodation you believe may be necessary or the functional limitations caused by your disability. Also, when appropriate, we may need your permission to obtain additional information from your physician or other medical or rehabilitation professionals." JE 2 (P-0051).

83. The Employee Handbook contains a section on FMLA leave, but does not provide information about the Massachusetts Parental Leave law. JE 2 (P-0047 – 0061).

84. Caregivers' Employee Handbook includes a standards of conduct policy which states: "Disciplinary action may include a verbal warning, written warning and suspension with or without pay and/or discharge." JE 2 (P-0057).

CAREGIVERS' RESPONSE TO MS. SANTIAGO'S REQUEST FOR AN EXTENSION OF LEAVE AND REASONS FOR TERMINATION

85. I do not find credible Mr. Kahi's testimony that he approved Ms. Santiago's request for an extension of her leave. I base this on the following: (1) Mr. Kahi's demeanor when testifying on this subject; (2) the lack of an explanation by Mr. Kahi as to why Ms. Willett's would disregard Mr. Kahi's instructions to extend the leave and issue the Termination Letter; (3) inconsistencies in the testimony of Mr. Kahi, who testified that Ms. Willetts informed him of Ms. Santiago's request for a leave extension, but did not inform him of her intent to terminate Ms. Santiago. Testimony of Kahi (Day 2).

86. There was no attempt by any Caregivers employee, including Mr. Kahi, Ms. Matua or Ms. Willetts, to contact Ms. Santiago or Dr. Haller on or after March 17, 2017 to discuss Ms. Santiago's request for an extension of leave. I base this determination on the following: (1) Ms. Santiago's credible testimony regarding the lack of communication; (2) Mr. Kahi's lack of personal knowledge as to whether Ms. Matua or Ms. Willetts

contacted Ms. Santiago between March 18, 2017 and March 24, 2017; (3) the lack of evidence that any representative of Caregivers attempted to, or did communicate, with Dr. Heller or Ms. Santiago; (4) the lack of any documentation, attached to the Position Statement or submitted at the hearing, reflecting an attempt to communicate with Ms. Santiago by text, email or other correspondence; and (5) the short time period between the request for an extension of leave on March 17, 2017 and the date of termination on March 24, 2017. Testimony of Santiago (Day 1); Testimony of Kahi (Day 2); JE 2 (P-0019 – P-0078).

87. After Caregivers issued the Termination Letter, no Caregivers employee, including Mr. Kahi, attempted to contact Ms. Santiago to discuss reinitiating an employment relationship.

POST EMPLOYMENT FACTS

88. In May 2017, Ms. Santiago commenced work at Hancock Used Tires, Inc. in Springfield Massachusetts ("Hancock"). Testimony of Santiago (Day 1). Ms. Santiago did not provide evidence as to her specific start date in May 2017 at Hancock. Ms. Santiago currently works at Hancock. Testimony of Santiago (Day 1).

89. At Hancock, Ms. Santiago performed and performs accounting work, a position in which she has less contact with people. She has been compensated at an hourly rate of $14.25 working 40 hours a week since she commenced working at Hancock. Testimony of Santiago (Day 1).

90. Ms. Santiago testified credibly that the impact of the transfer to the Worcester office and her abrupt termination adversely affected her self-confidence and ability to interview

effectively, resulting in the need to take a position at a significantly lower hourly wage. Testimony of Santiago (Day 1).

91. Ms. Santiago's mental health deteriorated between December 2016 and March 2017, requiring adjustments to her medication in March 2017. See ¶¶ 69, 71.

92. After Caregivers terminated Ms. Santiago's employment, she continued to seek therapeutic care for depression and anxiety. On April 26, 2017, Ms. Santiago saw Dr. Haller for depression and anxiety. JE 10 (P-0119- P-0122) The medical record dated April 26, 2017 states that the physician's impression was "depression with anxiety." JE 10 (P-0122). It further indicates that Ms. Santiago had been "sleeping better", that her mood was "fair, steady." The medical notes also reflect Ms. Santiago's interest in discontinuing Sertraline and starting a different anti-depressant, and noted that she would be seeing her psychiatrist in a few weeks to further discuss medication changes. JE 10 (P-0119- P-0122).

93. Ms. Cole's letter, dated June 7, 2017, states that Ms. Santiago had been a client of West Central Family Counseling for approximately six months, and that Ms. Cole recently transferred to a therapeutic center in East Longmeadow, where Ms. Cole would continue to provide her with therapeutic care. The letter states that Ms. Santiago is currently diagnosed with general anxiety and post-traumatic stress disorder. JE 3 (P-0080)

94. I find that the termination of Ms. Santiago's employment caused Ms. Santiago further stress and depressive symptoms. Ms. Santiago credibly described the impact of Caregivers' decision to terminate her employment, including affecting her ability to look for another job and being able to trust males. She testified that after March 24, 2017, she remained on the same prescriptions to address her depression and anxiety and stopped

using such medications six months before the public hearing. Testimony of Santiago (Day 1).

III. LEGAL CONCLUSIONS

Respondent, Caregivers of Massachusetts, LLC, is an employer within the meaning of G. L. c. 151B, § 1(5). As noted, Ms. Santiago charges Caregivers with sexual harassment, retaliation, a violation of the Massachusetts Parental Leave Act (G. L. c. 149, § 105D), disability discrimination including failure to provide a reasonable accommodation, sex discrimination, and pregnancy discrimination.

A. Sexual Harassment

Ms. Santiago alleges that her co-worker, Mr. Ngarukiye, subjected her to sexual harassment and that Caregivers knew or reasonably should have known of the harassment, and failed to take prompt, effective and reasonable remedial action. As part of her claim of sexual harassment, Ms. Santiago has raised the following six acts: (1) Mr. Ngarukiye taking photographs of Ms. Santiago over her objections ("Taking Photographs"); (2) Mr. Ngarukiye touching Ms. Santiago's hands and back when he spoke with her ("Touching"); (3) Mr. Ngarukiye staring at Ms. Santiago throughout her employment, while biting his lips which made her very uncomfortable ("Staring"); (4) June 2016 Video Incident involving Mr. Ngarukiye showing Ms. Santiago a video of an orgy; (5) September 2016 Incident involving Mr. Ngarukiye yelling at Ms. Santiago; and (6) November 2016 Incident in which Mr. Ngarukiye stood too close to Ms. Santiago and brushed his arm against a female co-worker's breast, with Ms. Santiago in close proximity. Regarding the timing of the Taking Photographs and Touching allegations, I have found that those acts ceased in June 2016 after Ms. Santiago told Mr. Ngarukiye she would report him for the June 2016 Video Incident.

In this case, several of the allegations comprising Ms. Santiago's claim of co-worker sexual harassment are not timely. Ms. Santiago filed her Charge of Discrimination on August 22, 2017. Pursuant to G. L. c. 151B, § 5, complaints must be filed within 300 days of the alleged act of discrimination. Allegations of harassment before October 26, 2016 – Taking Photographs, Touching, the June 2016 Video Incident, and the September 2016 Incident - are untimely unless Ms. Santiago can prove these actions were a continuing violation.

1. Continuing Violation Doctrine

The continuing violation doctrine, an exception to the 300-day statute of limitations, recognizes that some claims of discrimination involve a series of related events that must be viewed in their totality to adequately assess their discriminatory nature and impact. Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001). To invoke the continuing violation doctrine, Ms. Santiago must offer a timely incident that anchors all "related" and untimely incidents, thereby "making the entirety of the claim for discriminatory conduct timely." Id. at 533; 804 CMR 1.04 (4)(b) (2020).[2] The anchoring act must be (1) an incident of sexual conduct, (2) which substantially relates to the earlier alleged incidents, and (3) substantially contributes to the continuation of a hostile work environment. Id. For the continuing violation doctrine to apply, the November 2016 Incident must be an anchoring act. The November 2016 Incident does not meet any of the requisites necessary to constitute an anchoring act.

Harassment of a nonsexual nature is not an "anchoring event" sufficient to permit the extension of the limitations period pursuant to the continuing violation doctrine. Sansoucy v.

[2] When facts are alleged which indicate unlawful conduct is of a continuing nature and part of an ongoing pattern of discrimination, the complaint may include actions outside of the statutory filing period so long as the last discriminatory act in the pattern occurred within the statutory filing period. 804 CMR 1.04 (4)(b) (2020) (emphasis added).

Southcoast Health Systems, Inc., 84 Mass. App. Ct. 1114 (2013) (1:28). During the November 2016 Incident, Mr. Ngarukiye neither touched Ms. Santiago, made a sexual comment to Ms. Santiago, nor made a sexual advance toward Ms. Santiago. While the allegation is that he stood too close to Ms. Santiago, there was negligible evidence presented as to how close Mr. Ngarikuye was to Ms. Santiago, or how long he was close to her. Moreover, there was no allegation that Mr. Ngarukiye stood too close to Ms. Santiago regularly during the timely period, but instead, that it happened once, in November 2016. In addition, the evidence does not warrant a finding that the conduct was of a sexual nature because there was no evidence as to the nature of the brushing across Ms. Santiago's co-worker's breast, whether it appeared intentional, and whether it was objectionable to Ms. Santiago or Ms. Moreno-Escobar. Ms. Santiago did not report the incident to Caregivers, and she did not testify that this incident had an impact on her or her co-worker.

Moreover, the November 2016 Incident cannot be viewed as substantially related to earlier untimely events, nor did it substantially contribute to the continuation of a hostile work environment for purposes of concluding there was a continuing violation. While the subject matter of the untimely June 2016 Video Incident was highly inappropriate, sexual behavior directed at Ms. Santiago, the November 2016 Incident was a discrete instance involving a vague claim of standing too close to Ms. Santiago, allegedly resulting in his brushing the breast of another co-worker. The November 2016 Incident did not "substantially relate" to the untimely acts – Taking Photographs, Touching, the June 2016 Video Incident, and the September 2016 Incident - because it was not of the same character or nature as the earlier actions.

The November 2016 Incident did not "substantially contribute" to a continuation of hostile work environment. [3] The November 2016 Incident may have been unpleasant, but it cannot be said to have created or contributed to a "prolonged and compelling pattern of mistreatment" that forced Ms. Santiago to work under intolerable, sexually offensive conditions." Cuddyer at 533. In sum, the continuing violation doctrine does not apply in this case because the November 2016 Incident is not an "anchoring act." [4]

2. The Timely Allegations of Sexual Harassment

Having concluded that the continuing violation doctrine does not reinvigorate the untimely claims of sexual harassment, the remaining question is whether the November 2016 Incident and Mr. Ngarukiye's timely staring, constitute sexual harassment. Sexual harassment includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment. G. L. c. 151B, § 1(18). Ms. Santiago has alleged "hostile work environment" sexual harassment in this case. To prevail on this claim, Ms. Santiago must prove that: (1) she

[3] With respect to the allegation that Mr. Ngarukiye stared at Ms. Santiago, both during, and outside of, the timely period, I decline to apply the continuing violation doctrine to permit Ms. Santiago to resurrect an otherwise untimely set of allegations based on Mr. Ngarukiye's staring. While staring can be of a sexual nature sufficient to anchor a continuing violation, I am not persuaded that the timely staring in this case was of a sexual nature, substantially related to the untimely allegations or substantially contributed to a hostile work environment. Ms. Santiago did not provide evidence that the timely staring occurred on a continuous basis, or how frequently it occurred, and she did not testify that Mr. Ngarukiye was staring at particular parts of her body, at any time during her employment. She did not respond to any timely staring after October 26, 2016 in a fashion that would support the conclusion that it reflected a prolonged or compelling pattern of mistreatment.

[4] Because Ms. Santiago has not shown a continuing violation, it is unnecessary to evaluate whether Ms. Santiago knew or reasonably should have known more than 300 days prior to her MCAD filing that her work situation was pervasively hostile and unlikely to improve and that therefore, a reasonable person in her position would have filed a seasonable complaint with the MCAD. Cuddyer at 541.

was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment; and (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. College-Town, Division of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 166-67 (1987); MCAD & Tia v. Herb Chambers 1186, 41 MDLR 105 (2019); MCAD Sexual Harassment in the Workplace Guidelines ("Sexual Harassment Guidelines"), II. C., 24 MDLR (2002).

To prevail on a claim of sexual harassment based on the creation of a sexually hostile work environment, the employee bears the burden of establishing that the conduct was both "subjectively offensive" and sufficiently severe or pervasive to interfere with a reasonable person's work performance. Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 296 (2016); Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2011). A sexually hostile or offensive work environment is one that is "pervaded by harassment or abuse," resulting in "intimidation, humiliation, and stigmatization" that poses a "formidable barrier" to the employee's full participation in the workplace. Gyulakian, 475 Mass. at 296. Whether an employee has been subjected to a sexually hostile environment must be assessed in light of the totality of the circumstances which "may include the frequency of the discriminatory conduct; its severity; [and] whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." 15 LaGrange Street Corp. v. Massachusetts Comm'n Against Discrimination, 99 Mass. App. Ct. 563, 572 (2021).

I have considered the frequency, severity and nature of the conduct of the November 2016 Incident, coupled with the timely Staring, and conclude that they are not sufficiently severe or

pervasive to be held to interfere with a reasonable person's work performance. As previously noted, I am not persuaded that the "brushing" which Ms. Santiago witnessed in the November 2016 Incident was sexual in nature. Ms. Santiago did not testify as to whether the touching appeared to be an intentional, inappropriate touching, or an accidental brushing. While Mr. Ngarukiye invaded Ms. Santiago's space by getting too close to her during the November 2016 Incident, Ms. Santiago did not report the November 2016 Incident to Caregivers nor did she testify that her coworker reported it to management, or even that the co-worker was offended by it. To be sure, there may be instances where an employee observes sexual conduct directed at a co-worker that constitutes harassment against the employee because it rises to the level of conduct objectively severe and pervasive enough to interfere with a reasonable person's work performance. Romero v. McCormick & Schmick Restaurant Corp. d/b/a McCormick & Schmick's Seafood Restaurant, 448 F. Supp. 3d 1 (D. Mass. 2020) (denying summary judgment where plaintiff witnessed multiple instances of a supervisor's non-consensual grabbing and touching of coworkers, and another supervisor's lewd sexual propositions to a co-worker). The evidence here, however, does not support the conclusion that witnessing the "brushing" during the November 2016 Incident, was objectively severe or pervasive enough to interfere with a reasonable person's work performance.

While staring alone, may, in appropriate circumstances, meet the threshold for proving sexual harassment, the evidence in this case did not support such a conclusion. Compare Billings v. Town of Grafton, 515 F.3d 39, 50-51 (1st Cir. 2008) (frequent and intense staring by a supervisor at his secretary's breasts sufficient to overcome motion for summary judgment).

Finally, and fatally, it is uncontested that Ms. Santiago did not report the timely incidents – the November 2016 Incident or staring after October 26, 2016 - to Caregivers. To hold an

employer liable for a hostile work environment caused by a co-worker, the employee must show that the employer was on notice of the objectionable conduct. College-Town, 400 Mass. at 166-67. Ms. Santiago did not notify Caregivers of any conduct that she perceived to be objectionable and that occurred after October 26, 2016, and there was no evidence offered that Caregivers knew or should have known about the timely acts. As such, I dismiss the claim of sexual harassment.

B. Retaliatory Transfer

Ms. Santiago alleges that Caregivers transferred her to the Worcester office in November 2016 in retaliation for complaining verbally, in June 2016, and in writing, in September 2016, of sexual harassment. G.L. c. 151B, § 4(4) makes it unlawful to discriminate against any person because she has opposed any practices forbidden under G.L. c. 151B or because she has filed a complaint. Retaliation is a separate and independent cause of action from a claim of discrimination under G. L. c. 151B. Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405 (2016).

To establish a *prima facie* case of retaliation, Ms. Santiago must produce evidence that she engaged in protected conduct, suffered some adverse action, and that a causal connection existed between the protected conduct and the adverse action Verdrager, 474 Mass. at 406, citing Mole v. University of Massachusetts, 442 Mass. 582 (2004). Once the *prima facie* case is established, Caregivers must articulate a legitimate, non-retaliatory reason for the adverse employment decision. Id. If Caregivers meets its burden, Ms. Santiago must produce evidence that Caregivers' stated reason for the adverse action was a pretext for retaliating against her on account of her protected conduct. Id.

In showing that she engaged in protected conduct, Ms. Santiago must show that she

reasonably and in good faith believed that Caregivers was engaged in wrongful discrimination and that she acted reasonably in response to that belief. Verdrager at 405. The June 2016 Video Incident was highly inappropriate, sexual behavior directed at Ms. Santiago. Ms. Santiago acted reasonably and in good faith when she complained verbally in June 2016 and in writing in the September 1, 2016 Incident Report. I find that these complaints were a reasonable response to Ms. Santiago's good faith and reasonable belief that she had been sexually harassed.[5] Complaining internally of sexual harassment constitutes protected activity under G. L. c. 151B. Ritchie v. Dep't of State Police, 60 Mass. App. Ct. 655, 664-665 (2004). Ms. Santiago has established that she engaged in protected conduct.

The transfer to Worcester was an adverse action for several reasons.[6] Ms. Santiago was given no work to do in the Worcester office, had no access to the office equipment necessary to do her job and sat at the front desk "waiting for the hours to go by." In short, it was not the same position she held in the Springfield office, but instead, a banishment to a non-job significantly further from her home. The transfer increased Ms. Santiago's commute time at a particularly vulnerable time for Ms. Santiago when Caregivers knew that she was far along in her pregnancy.

The causal relationship between the decision to transfer Ms. Santiago and her previous complaints of sexual harassment in June and September 2016 can be found both in the abrupt

[5] Town of Brookline v. Alston, 487 Mass. 278, 294 n. 16 (2021) (where underlying discrimination claim fails, retaliation claim may succeed provided that employee proves she reasonably and in good faith believed that employer was engaged in wrongful discrimination).

[6] Transfers may constitute retaliation. In Rizzi v. College Town, Inc., the MCAD found a mandatory transfer and subsequent discharge to be retaliatory, and noted that if an employer "could transfer. . . with impunity individuals who complain of harassment . . . [t]his, of course, is just the opposite of what the statute intended and would undercut any deterrent effect the law .. might have." Rizzi v. College Town, Inc., 6 MDLR 1011, 1031-1031 (1984). On appeal, the Supreme Judicial Court agreed, finding both the transfer and the discharge, to be retaliatory. College-Town, 400 Mass. at 169.

manner that Mr. Kahi informed Ms. Santiago of the transfer decision and the timing of the decision. Ms. Santiago was informed one business day prior to her transfer and was not informed why she was being transferred, or how long her relocation to the Worcester office would continue. At the time of the transfer, Ms. Santiago was the only employee in the Springfield office selected for transfer. Moreover, Mr. Kahi testified that he learned of Ms. Santiago's September 1, 2016 written complaint of harassment in mid-September 2016, and the decision to transfer occurred approximately two months later, reflecting a temporal relationship between Mr. Kahi's awareness of Ms. Santiago's internal complaint and his decision to transfer her. Ms. Santiago has proven a *prima facie* case of retaliation.

The legitimate non-retaliatory reason for the decision to transfer, offered by Caregivers, was that it had an operational need to place Ms. Santiago in the Worcester office. Mr. Kahi testified that Caregivers had recently opened the Worcester office, was in the process of hiring individuals in the Worcester area, and needed a human resources employee to work with the new employees and update the personnel files in Worcester. Caregivers has met its burden of production.

Ms. Santiago has shown by a preponderance of the evidence, however, that Caregivers acted with retaliatory intent when it transferred her to Worcester. Ms. Santiago was provided with limited office equipment to perform any human resources functions in Worcester, and was given no personnel files with which to work. If there was truly an operational need for Ms. Santiago to work in Worcester, Ms. Santiago would have been given personnel files to work on and the infrastructure necessary to do her work, even in the first week of the transfer. Further, in testifying about the transfer, Mr. Kahi stated that Mr. Ngarukiye "was not comfortable with [Ms. Santiago] anymore" and that Mr. Ngarukiye had lodged a counterclaim of harassment against

Ms. Santiago. This evidence supports the conclusion that the transfer was motivated by a desire to eliminate Ms. Santiago from the Springfield office because of her internal complaints of harassment against Mr. Ngarukiye.[7] I find Caregivers liable for transferring Ms. Santiago in retaliation for her internal complaints of sexual harassment.

C. **G. L. c. 149, § 105D**

The Massachusetts Parental Leave Act (MPLA), G. L. c. 149, § 105D[8] requires employers to provide eight (8) weeks of unpaid leave to full-time employees who have completed a probationary period and provided requisite notice, and to allow them to return to the same or similar position that they held prior to the leave. It is a violation of G. L. c. 151B, § 4(11A) to fail to comply with G. L. c. 149, § 105D. Ms. Santiago qualified for MPLA leave as she was a full-time employee who had completed a three (3) month probationary period and had provided notice of her anticipated date of departure and intention to return. Ms. Santiago's last day of work was January 16, 2017, and her MPLA leave commenced on January 17, 2017. Pursuant to the MPLA, Ms. Santiago's parental leave ended as of March 14, 2017 – eight weeks from the commencement of the leave – and her return to work date was March 15, 2017.

Ms. Santiago communicated an intention to return to work on March 15, 2017, but subsequently sought an extension to her leave based on her medical condition and did not return to work on March 15, 2017. G. L. c. 149, § 105D provides no job protection beyond the eight

[7] The fact that Mr. Kahi transferred Ms. Santiago back to the Springfield office after she presented him with medical documentation and sought, based on her medical condition, to be returned to the Springfield office does not affect my findings. Mr. Kahi's willingness to return Ms. Santiago to the Springfield office was predicated upon Ms. Santiago supplying him with medical documentation that the transfer had adverse effects on her pregnancy. His initial motivation for transferring Ms. Santiago was retaliatory.

[8] In 2015, the Massachusetts Maternity Leave Statute, G. L. c. 149, § 105D was amended to include all employees, and is now referred to as the Massachusetts Parental Leave Act. Chapter 484, S.B. No. 865 (January 7, 2015).

weeks. Guo v. Datavantage Corp., 2008 WL 660338 (D. Mass. 2008) (the protections of G. L. c. 149, §105D do not apply to her because no case has held that "a period not exceeding eight weeks" means "a period exceeding eight weeks").

G. L. c. 151B, §4 (11A) provides broader protections for employees than those found in G. L. c. 149, §105D. It prohibits employers from "refus[ing] to restore certain employees to employment following an absence by reason of a parental leave taken pursuant to section 105D of chapter 149" and prohibits employers from imposing "any other penalty as a result of parental leave of absence." [9] Caregivers did not refuse to restore Ms. Santiago to her employment, because she did not return to work at the end of her MPLA leave but instead sought an accommodation. Had Ms. Santiago sought to return to work on March 15, 2017, and had Caregivers refused to restore her to employment, this would have constituted a violation of G. L. c. 151B, § 4 (11A). On these facts, there is no violation of either G. L. c. 149, §105D or G. L. c. 151B, §4 (11A), and therefore, this claim is dismissed.

D. Disability Discrimination and Failure to Accommodate

Ms. Santiago alleges that Caregivers discriminated against her because of her disability in violation of G. L. c. 151B, § 4(16) when it failed to engage in an interactive process designed to identify a reasonable accommodation, denied her March 15 and 17, 2017 requests for an extension of leave, and instead, terminated her employment on March 24, 2017.

1. **Failure to Engage in an Interactive Process and Provide a Reasonable Accommodation**

Employers are required by law to provide reasonable accommodations to disabled employees, if feasible, to permit them to carry out the job and continue working. A "reasonable

[9] Given the statutory structure of G. L. c. 151B, §4 (11A), "other penalty" appears to cover actions other than termination or refusing to restore any employee's job.

accommodation" is any adjustment to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions, and benefits of employment. MCAD Guidelines, Employment Discrimination on the Basis of Handicap, § II (C) (2002), citing G.L. c. 151B § 4(16).

To establish a *prima facie* claim of disability discrimination based on a failure to provide a reasonable accommodation, Ms. Santiago must show that: (1) she is a "handicapped person within the meaning of the statute;" (2) she is a "qualified handicapped person" capable of performing the essential functions of her job with or without an accommodation; (3) she needed a reasonable accommodation; (4) Caregivers was aware of her disability and of the need for a reasonable accommodation; (5) Caregivers was, or through reasonable investigation could have become, aware of a means to reasonably accommodate her disability and; (6) Caregivers failed to provide Ms. Santiago the reasonable accommodation. MCAD & Lapete v. Country Bank for Savings, 39 MDLR 24 (2017); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, affd, 26 MDLR 216 (2004); See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX (A) (3) 20 MDLR Supplement (1998). [10]

First, a handicapped person is one who has an impairment that substantially limits one or more major life activities, has a record of having such impairment, or is regarded as having such an impairment. G. L. c. 151B, § 1(17). Massachusetts courts have broadly construed G. L.

[10] In 1983, when Chapter 151B was amended to include the prohibition against disability discrimination, the term "handicap" was used in the statute. Since its enactment, the term handicap has fallen into disfavor. Therefore, where possible, the term disabled and disability will be used in place of "handicapped" in this decision.

c. 151B based on the Legislature's intent that the statute cover a wide range of people with mental and physical impairments. Dahill v. Police Dept. of Boston, 434 Mass. 233, 240-241 (2001); Massasoit Industrial Corp. v. Massachusetts Commission Against Discrimination, 91 Mass. App. Ct. 208 (2017).[11] In evaluating whether Ms. Santiago had a disability at the time she was terminated, it is proper to consider whether: (1) Ms. Santiago's condition constituted a mental or physical impairment; (2) whether a life activity was curtailed by the impairment, and if so, whether it constitutes a major life activity as defined in G.L. c. 151B, § 1(20); and (3) whether Ms. Santiago's impairment substantially limited the major life activity.

Depression and anxiety are impairments under G. L. c. 151B. G. L. c. 151B, § 1(17) (defining handicap to include a mental impairment); MCAD & Pereira v. JS International d/b/a JSI Cabinetry, 42 MDLR 1 (2020); Disability Discrimination Guidelines, § II.A.2 (1998).[12] The disability Ms. Santiago sought an accommodation for in March 2017 was depression and anxiety.

Ms. Santiago's impairment substantially limited one or more major life activities. In December 2016, she was diagnosed with a generalized anxiety disorder, and experienced depression, anxiety, excessive worry, tearful episodes, difficulty with stress management and sleep, and felt easily overwhelmed. In January 2017, Ms. Santiago also suffered from feelings of hypervigilance, and sleep disturbance. She took medication, had crying episodes, felt sad and tired and in March 2017, continued to seek therapy and medication adjustments to address her

[11] Likewise, the regulations interpreting the Americans with Disabilities Act, as amended, state that the term "substantially limits" shall be construed broadly in favor of expansive coverage . . . [and] is not meant to be a demanding standard." 29 C.F.R. § 1630.2 (j)(1)(i) (2012).

[12] Calero-Cerezo v. United States Dep't of Justice, 355 F.3d 6, 20 (1st Cir. 2004) (depression is a mental impairment that may constitute a disability under federal law); Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998).

mental health condition. Ms. Santiago credibly testified that in addition to the above, she did not have an appetite and struggled to care for her infant. Ms. Santiago's impairment substantially limited her ability to do major life activities, including her ability to engage in some day-to-day activities such as caring for her newborn, and her ability to sleep and eat. Disability Discrimination Guidelines, § II (A) (5) (1998); O'Brien v. Massachusetts Institute of Technology, 82 Mass. App. Ct. 905 (2012) (major life activity of sleeping); Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456, 462 n. 6 (2017) (eating is a major life activity). Thus, I conclude that Ms. Santiago was disabled.

Having established that she was disabled, Ms. Santiago must show that she was a qualified disabled person capable of performing the essential functions of the job with or without a reasonable accommodation. Ms. Santiago adequately performed the duties of her human resources position. Caregivers never issued Ms. Santiago a verbal or written warning, suspended or otherwise disciplined her. While Mr. Kahi asserted that Ms. Santiago had difficulty getting along with some of her subordinates, he also testified that the company appreciated the contributions that Ms. Santiago had made at Caregivers. I conclude that Ms. Santiago was a qualified disabled person capable of performing the essential functions of her job with reasonable accommodation. G. L. c. 151B, § 1(16).

I further conclude that Caregivers was on notice of Ms. Santiago's disability and the need for a reasonable accommodation. In most circumstances, an employer must be on notice that the employee needs an adjustment or change at work for a reason related to a medical condition. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; EEOC Notice Number 915.002, 10/27/02 ("EEOC 915.002"). An individual may use "plain English" and need not mention G. L. c. 151B or use the phrase

"reasonable accommodation." Id.; Massachusetts Comm'n Against Discrimination & Lincoln v. Natick Paperboard Co., 25 MDLR. 304 (2003). Moreover, in the initial request for accommodation, the employee need not identify the nature of the disability. EEOC 915.002.[13]

On March 17, 2017, Ms. Santiago communicated to Caregivers that she had a medical issue resulting in her inability to work, that she was under the care of a specialist, and that an extension to her leave was needed but that a return to work date had not been set. As such, Caregivers was on notice that Ms. Santiago needed an accommodation to perform her job, specifically, an extension to MPLA leave due to a medical condition.

Ms. Santiago has also proven that Caregivers was, or through reasonable investigation, could have become aware, of a means to reasonably accommodate Ms. Santiago's disability, but did not provide her with a reasonable accommodation. Once Caregivers received Ms. Santiago's request for an accommodation, Caregivers had an obligation to participate in the interactive process of determining a reasonable accommodation. Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 443, 457 (2002), citing Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir.), cert. denied, 519 U.S. 1029 (1996) ("[I]t is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one."); Sabella v. Boston Public Schools, 27 MDLR 90 (2005) (unilateral refusal to consider requested accommodation of job-sharing and unwillingness to investigate possible reasonable accommodations is contrary to Respondent's lawful obligation to engage in an interactive dialogue with Complainant).

[13] During the interactive process, the employer may need to evaluate whether the employee's condition meets the definition of "disability", but in the initial stages of the dialogue, identifying the employee's medical condition is not required. EEOC 915.002.

Caregivers was required to make a reasonable effort to determine the appropriate accommodation through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Figueroa v. Springfield Transit Management, 23 MDLR 17 (2001); Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000) ("[t]he importance of this interactive process cannot be overemphasized. It is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations."). The interactive process includes engaging in an open and constructive dialogue and requires a good faith effort to explore options that are feasible.

Instead of engaging in an interactive process to identify an accommodation, Caregivers terminated Ms. Santiago's employment on March 24, 2017. Caregivers made no attempt to discuss with Ms. Santiago or her doctor, the nature of Ms. Santiago's medical condition or the length of a leave extension required. While employers are not required to provide employees with an indefinite leave of absence, they are obligated to conduct a reasonable investigation, including an interactive process, designed to identify the precise accommodation required and in this case, the amount of time Ms. Santiago needed to return to work.[14] Had Caregivers inquired of Dr. Heller or Ms. Santiago, it would have learned that Ms. Santiago had depression and anxiety, needed an extension of her leave and could have negotiated a specific leave period. Disability Discrimination Guidelines, § II.C (a reasonable accommodation under G. L. c. 151B, § 4(16) may include granting a leave of absence); Santagate v. FSG, LLC, 36 MDLR 23 (2014) (extension of a leave of absence is an appropriate reasonable accommodation)

[14] Had Caregivers inquired of Ms. Santiago, and the medical providers refused to provide a date by which they expected Ms. Santiago to return to work, and instead, requested an open-ended or indefinite leave extension, Caregivers may have complied with its obligation under G.L. c. 151B. Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443 (2002). That is, most decidedly, not what happened here.

Because Ms. Santiago has met her burden relative to her disability claim, Caregivers has the burden to show that granting the requested accommodation would impose an undue hardship. Godfrey v. Globe Newspaper, Co., 457 Mass. 113, 120 (2010); Gustafson v. Genesis Rehabilitation Services, Inc., 89 Mass. App. Ct. 1135 (2016) (1:28). The factors to be considered in assessing whether an accommodation would impose an undue hardship on the employer's business include (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and (3) the nature and cost of the accommodation needed. G. L. c. 151B, § 4 (16). Caregivers presented no evidence that extending Ms. Santiago's leave would pose a financial or operational burden on the company. On the contrary, Caregivers employed between one hundred and one hundred and fifty employees at the time Ms. Santiago worked for Caregivers, employed other human resources representatives, and had more than one office location. As such, I conclude that permitting Ms. Santiago to extend her leave of absence, beyond that provided under the MPLA, would not have imposed an undue burden on the company.[15] Caregivers' failure to engage in an interactive process and provide a reasonable accommodation violates G. L. c. 151B, § 4(16). Davidowicz v. 4M Fruit Distributors, Inc., 93 Mass. App. Ct. 1117 (2018) (1:28).

[15] Insofar as Caregivers relied on its policy stating that leaves of absence are not to exceed eight weeks, limiting leave to a specific number of weeks without consideration of the employee's disability is a violation of the obligation in Massachusetts to engage in an interactive dialogue designed to identify a reasonable accommodation to permit the employee to carry out the job and continue working. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (employer leave policies must be sufficiently flexible to anticipate the facts of each individual claim); Santagate v. FGS, LLC, 36 MDLR 23, 27 (2014).

2. Termination Based on Disability Bias

Caregivers went beyond just failing to accommodate Ms. Santiago when it terminated Ms. Santiago's employment by letter dated March 24, 2017. To establish a *prima facie* showing of disability discrimination, Ms. Santiago must demonstrate that she is "handicapped" within the meaning of the statute; that she is a "qualified handicapped person" capable of performing the essential functions of her job either with or without a reasonable accommodation; and that she was subjected to an adverse employment action because of her disability. Godfrey v. Globe Newspaper Co., 457 Mass. 113, 120 (2010). As noted above, Ms. Santiago has proven a *prima facie* case, as she was a qualified disabled person capable of performing the essential functions of her job with a reasonable accommodation, and was terminated.

As Ms. Santiago has established a *prima facie* case, the burden now shifts to Caregivers to show with credible evidence that the real reason for the adverse employment action was not Ms. Santiago's disability but a lawful reason unrelated to Ms. Santiago's disability. Gannon v. City of Boston, 476 Mass. 786, 794 (2017) (citations omitted). The Termination Letter states that Ms. Santiago was terminated because she failed to correctly request an extension of her leave which, Caregivers contends, must be submitted in writing and approved per agency policy. In addition, the Termination Letter states that Ms. Santiago failed to respond to the Administrator's call back request and that "management considers lack of communication and/or return to work a voluntary resignation." JE 9 (P-0118). Caregivers has met its burden of production..

At this stage, it is Ms. Santiago's burden to prove that Caregivers terminated her because of her disability, a burden that I conclude that she has met. Gannon at 794. Caregivers' contention that Ms. Santiago failed to correctly request an extension of her leave in writing is patently untrue, as Ms. Santiago showed that Caregivers received her March 15 and March 17, 2017

written requests for a leave extension. Caregivers next asserts that Ms. Santiago failed to respond to the Administrator's call back request. While Ms. Santiago may not have been responsive during her MPLA protected leave of absence, Caregivers did not attempt to contact Ms. Santiago after her MPLA leave ended. Thus, the contention that Ms. Santiago was somehow resigning has no basis in the evidence. When Ms. Santiago's MPLA leave ended on March 15, 2017, Ms. Santiago requested an accommodation and followed up her written request with documentation from a physician which stated she was under the care of a doctor, had a medical issue which resulted in her current inability to work, and that a return to work date had not been set. Ms. Santiago was not resigning, but instead, seeking an accommodation to allow her to return to her position at Caregivers. Rather than meeting this request with a conversation designed to elicit dialogue as to an appropriate accommodation, Caregivers terminated Ms. Santiago's employment. Moreover, Mr. Kahi's acknowledgement that the termination was "untimely" and that he "had a fit" when he learned that Ms. Santiago had been terminated, coupled with his failure to rehire Ms. Santiago upon learning of her termination, also supports a finding of disability discrimination. For the reasons stated above, I conclude that Caregivers engaged in unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, § 4(16) by terminating Ms. Santiago's employment within days of receiving a request for an accommodation.[16]

[16] A termination decision which immediately follows an employee's request for an accommodation can also be analyzed using a retaliation analysis. Compare Serrano & Commonwealt of Massachusetts v. Cataldo Ambulance Service, Inc., 41 MDLR 90 (2019) (disability discrimination) and Lapete v. Country Bank for Savings, 39 MDLR 24 (2017) (disability discrimination) to Pereira v. JS International Inc. d/b/a JSI Cabinetry, 42 MDLR 1 (2020) (retaliation).

E. **Pregnancy and Sex Discrimination**

Pregnancy and childbirth are sex-linked characteristics and an employer's adverse action against an employee based on those characteristics constitutes sex discrimination. Verdrager, 474 Mass at 384 n. 3, citing Mass. Electric Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160 (1978) (pregnancy discrimination is form of gender discrimination). To establish a *prima facie* case of discrimination based on her sex/pregnancy, Ms. Santiago must show that she: (1) is a member of a class protected by the statute; (2) performed her job at an acceptable level; and (3) was terminated or otherwise subjected to an adverse employment action. Id. Ms. Santiago is female and, at the time of her termination, had recently given birth and was seeking an extension of her parental leave.[17] Ms. Santiago performed her job at an acceptable level and was terminated. She has proved a *prima facie* case of discrimination, a showing which is not designed to be an onerous burden.

Caregivers has met its burden of production by articulating that Ms. Santiago's employment was terminated because she failed to correctly request an extension of her leave in writing and failed to respond to the administrator's call back request.

As detailed above, the reasons that Caregivers gave for Ms. Santiago's termination were untrue. However, I conclude they were not pretext for sex or pregnancy discrimination. See Abramian v. President & Fellows of Harvard College , 432 Mass. 107 (2000) (even if the employer's articulated reason for the adverse action is untrue, the employer may counter that he had no discriminatory intent, or that his action was based on a different, nondiscriminatory

[17] EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, at I.A.2 (6/25/2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm, states that "[a]n employee may claim she was subjected to discrimination based on past pregnancy, childbirth, or related medical conditions.

reason.) There is no evidence in the record that Caregivers believed that Ms. Santiago had post-partum depression or other pregnancy related condition. There was scant evidence in the record that the mental health condition that Ms. Santiago sought an accommodation for was a pregnancy-related condition. While Ms. Santiago referenced it once during her testimony as "post-partum depression", the medical records submitted did not diagnose Ms. Santiago with post-partum depression, but instead, general depression and anxiety. In addition, Ms. Santiago testified that she had depression both before her pregnancy, and after, strongly supporting the conclusion that Ms. Santiago's depression was not related to her pregnancy. Secondly, Caregivers took some actions to accommodate and treat Ms. Santiago's pregnant condition in a fair and evenhanded manner, providing her with the MPLA leave required by that statute, and indicating that they anticipated her return to work at the completion of her maternity leave. In addition, Caregivers immediately returned Ms. Santiago to the Springfield office when she discussed the high-risk nature of her pregnancy and the transfer's impact on her. Ms. Santiago did not provide any evidence of sex or pregnancy bias, such as a temporal causal relationship between the announcement of her pregnancy and her termination, comments evidencing bias based on sex or pregnancy, or other evidence showing animus toward women or pregnant women. In this case, the evidence strongly supports discriminatory intent based on disability, but not on sex or pregnancy. For these reasons, I dismiss the claim that Caregivers terminated Ms. Santiago based on her sex and/or pregnancy.[18]

[18] In her post-hearing brief, Ms. Santiago raises the Pregnant Workers Fairness Act (PWFA), which was not effective until April 1, 2018. See G.L. c. 151B, § 4(1E), as amended by the Pregnant Workers Fairness Act, St. 2017, c. 54. As the PFWA was not enacted until after the facts giving rise to this case, it has no applicability to this matter.

E. Retaliatory Termination

Ms. Santiago has alleged that her termination was in retaliation for her June 2016 and September 2016 internal complaints of sexual harassment. Complaining internally of sexual harassment constitutes protected activity under G. L. c. 151B. Ritchie v. Dep't of State Police, 60 Mass. App. Ct. 655 (2004). However, Ms. Santiago did not offer sufficient evidence to support a causal connection between her internal complaints of harassment, which were made in June and September 2016, and her termination in March 24, 2017. I dismiss Ms. Santiago's claim that she was terminated in retaliation for complaining of sexual harassment.

IV. REMEDIES

A. Lost Wages

Upon a finding that Caregivers has committed an unlawful act prohibited by G.L. c. 151B, the Commission is authorized to award damages to make Ms. Santiago whole. G.L. c. 151B §5. This includes damages for lost wages and benefits. [19] Ventresco v. Liberty Mutual Ins. Co., 55 Mass. App. Ct. 201, 209 (2002).

Caregivers has been found liable for a retaliatory transfer, from which no lost wages flow, and for a discriminatory termination, resulting in lost wages.

When Ms. Santiago was terminated on March 24, 2017, she was earning $25/hour working 40 hours per week. Ms. Santiago made efforts to mitigate her damages and was able to find work

[19] There was no claim for benefits in this case.

in May 2017. [20] Ms. Santiago testified credibly and compellingly that the impact of the retaliatory transfer and her abrupt termination adversely affected her self-confidence and ability to interview effectively, resulting in the need to take a position at a significantly lower hourly wage.

Ms. Santiago's lost wages from March 24, 2017 to May 15, 2017 are $7,000.

In May 2017, Ms. Santiago obtained alternate employment at Hancockat a significantly lower hourly rate in a position which involved less contact with other people. Ms. Santiago testified that she earned $14.25 per hour and worked 40 hours per week at Hancock.[21] As a result of her pay cut, Ms. Santiago earned $430 less per week ($1000/week - $570/week) than she would have had she not been terminated from Caregivers. In this case, it is reasonable to award lost wages from May 15, 2017 until the date of this decision. Caregivers has the burden of proof on mitigation of damages. Caregivers has the burden to show that Ms. Santiago has unreasonably failed to seek out comparable employment which she was reasonably likely to have obtained.[22] Caregivers failed to provide any evidence relative to mitigation of damages. Lost wages for the

[20] The record establishes that Ms. Santiago began her employment at Hancock at some point in May 2017, but does not establish the specific date her employment there commenced. I find it fair and reasonable in this case to select the mid-point in May 2017, in calculating lost wages: May 15, 2017.

[21] In her Post-Hearing Brief, Ms. Santiago's counsel stated that Ms. Santiago earned less than $14.25 during 2017 through 2021. This information was not submitted pursuant to the MCAD's regulations. 804 CMR 1.12 (17) (2020) (permitting the submission of additional evidentiary documents or exhibits within a reasonable time subsequent to the completion of the hearing after a showing of good cause). As such, I am obliged to rely on the evidence provided at the public hearing that Ms. Santiago earned $14.25 per hour working forty hours a week at Hancock since the time she began working at Hancock Used Tires in May 2017.

[22] Buckley Nursing Home, Inc. v. Massachusetts Commission Against Discrimination, 20 Mass. App. Ct. 172, 185 (1985); Everett Industries, Inc. v. Massachusetts Commission Against Discrimination, 49 Mass. App. 1116, n. 17 (2000) (1:28); J.C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass. App. 204 (1989) ; Mills and Ronan v. A.E. Sales, Inc. and Prete, 38 MDLR 87 (2016).

time period May 15, 2017 until the date of this decision amount to $125,560 (292 weeks X $430).

Ms. Santiago's total lost wages amount to $132,560.

B. Damages for Emotional Distress

The Commission is also authorized to award damages for emotional distress resulting from Caregiver's unlawful conduct. Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass 549 (2004). Awards for emotional distress "should be fair and reasonable, and proportionate to the distress suffered." Id. at 576. Some of the factors to be considered are: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time [Ms. Santiago] has suffered and reasonably expects to suffer; and (4) whether [Ms. Santiago] has attempted to mitigate the harm..." Id. Ms. Santiago must show a sufficient causal connection between Caregivers' unlawful act and her emotional distress. Id.

Ms. Santiago suffered emotional distress from both the retaliatory transfer and the discriminatory termination. The emotional distress damages that flow from these two separate unlawful acts are apportioned herein.

The retaliatory transfer was deeply distressing for Ms. Santiago. Ms. Santiago testified compellingly that the transfer exacerbated her depression and anxiety, because the additional time sitting during her commute increased the physical discomfort she was having with her pregnancy. She described crying while she commuted to and from the Worcester office. I recognize that Ms. Santiago's increasing depression and high-risk pregnancy were also significant sources of emotional distress during that period. While the medical issues that the pregnancy entailed, and some of the depressive symptoms which Ms. Santiago testified that she had experienced prior to her pregnancy, were contributing factors not caused directly by

Caregivers, Ms. Santiago's depression and anxiety were greatly exacerbated by the transfer and its attendant fear that Caregivers was positioning her for termination. As Ms. Santiago's therapist noted on December 8, 2016, Ms. Santiago expressed great worry about losing her job and the financial stressors that accompany job loss. While the transfer lasted for five days, the distress it caused continued for months, because it raised a concern that Ms. Santiago was in danger of losing her job. After consideration of the Stonehill factors, and based on the credible testimony of Ms. Santiago, who conveyed the stress she felt at the time she was transferred and thereafter, I award Ms. Santiago $10,000 for the emotional distress caused by the retaliatory transfer.[23]

I am persuaded that Ms. Santiago sustained emotional distress attributable to the discriminatory termination. Ms. Santiago expressed concern about her ability to pay her mortgage and struggled with interviews after her experience at Caregivers. In addition, she continued therapy for at least three months after the termination. In June 2017, her therapist described her as having general anxiety and post-traumatic stress disorder. Ms. Santiago took medication for depression and anxiety until six months before the hearing. In fashioning an emotional distress award for the discriminatory termination, I have considered that Ms. Santiago suffered from depression and anxiety prior to her pregnancy and that this is not attributable to her employment or Caregivers' actions. I have also taken into account that some of the emotional distress Ms. Santiago suffered was a byproduct of the sexual harassment she claimed she was subjected to, and which I have found untimely and/or not actionable. Being mindful of the obligation to award emotional distress damages for only those acts for which Caregivers is

[23] I have also taken into account that some of the emotional distress that Ms. Santiago suffered was a byproduct of the sexual harassment she claimed she was subjected to, and which I have found untimely and/or not actionable. No award of damages has been made for that distress.

responsible, I conclude that Ms. Santiago is entitled to damages for emotional distress resulting from the discriminatory termination in the amount of $20,000.

Ms. Santiago is entitled to a total of $30,000 in emotional distress damages resulting from the retaliatory transfer and discriminatory termination.

V. **ORDER**

Based on the forgoing Findings of Fact and Conclusions of Law, Caregivers is hereby ordered:

1) To cease and desist from any acts of discrimination based on disability discrimination and/or retaliation.

2) To promulgate, implement and distribute to all Caregivers employees lawful policies on reasonable accommodation and the interactive dialogue to be reviewed and approved by the Commission.

3) To conduct, within one hundred and twenty (120) days of the receipt of this decision, a training of Caregivers' (a) owners, (b) human resources directors, (c) managers, (d) supervisors and (e) other employees who have authority to negotiate reasonable accommodations for employees or to terminate employees. The training will focus on disability discrimination and retaliation. Caregivers shall utilize a trainer certified by the Commission. Following the training session, Caregivers shall report to the Commission's Director of Training the names of persons who were required to attend the training and those who attended the training. Caregivers shall repeat the training session at least one time - for any of the above described employees who failed to attend the original training, and for those new personnel hired or promoted into such positions - within one year after the date of the initial training session. For purposes of enforcement, the Commission shall retain jurisdiction over training requirements.

4) To pay to Complainant, Yerica Santiago, the sum of $132,560 in damages for lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed with the Commission until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

5) To pay to Complainant, Yerica Santiago, the sum of $30,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed with the Commission until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

VI. NOTICE OF APPEAL

This decision represents the final order of the Hearing Officer. 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).

VII. PETITION FOR ATTORNEY'S FEES AND COSTS

Any petition for attorney's fees and costs for Complainant Counsel shall be submitted to the Clerk of the Commission within 15 days of receipt of this decision. Pursuant to 804 CMR 1.12 (19) (2020), such petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. Respondent may file a written opposition within 15 days of receipt of said petition.

So ordered this 19th day of December, 2022.

Simone Liebman

Simone R. Liebman
Hearing Officer