

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
JANICE SWITZER,

Complainant,

v.

DOCKET NO. 07-BEM-00737

OFFICE MAX, INCORPORATED

Respondent

Appearances: Patricia A. Washienko, Esq., Mark D. Frieberger, Esq., for Complainant
Ilisa S. Clark, Esq., Stephen T. Melnick, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 23, 2007, Complainant, Janice Switzer, filed a charge of discrimination with the Commission against her former employer, Respondent, Office Max, Inc. alleging that Respondent discriminated against her based on her gender and age and in retaliation for her protected activity of complaining of disparate treatment, in selecting her to be laid off from the company. The Investigating Commissioner issued a Probable Cause Finding solely on the allegation of gender discrimination, dismissing the claim of age discrimination. The Investigating Commissioner also rejected a continuing violation theory, ruling that Complainant could recover damages only for those alleged acts of discrimination falling within the 300 day

statute of limitations period.¹ The case was certified for hearing and a public hearing was conducted before the undersigned hearing officer on September 19-23, and October 13, 2011. In November of 2011, Respondent submitted additional affidavits and the deposition transcript of Complainant's treating psychiatrist, Dr. William J. Moran, for inclusion in the record. The parties submitted post-hearing briefs in February of 2012. Having duly considered the record before me and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Janice Switzer, began working for Boise Cascade, as a district sales manager in 1999. In 2003, Respondent acquired the business unit Complainant worked for and she became an employee of Respondent. Prior to 1999, Complainant had worked in the office supply industry in New England for over 15 years. (Stipulated facts, Tr. 70) Her previous employment included the position of Vice President of Sales for Union Office Supply, a family owned business where she began working in the warehouse to learn the business from the bottom up, and Vice President of Sales for the New England Region at Corporate Express. (Tr. 41, 42, 50)
2. Respondent, Office Max is a national distributor of office products and is one of the leading office products companies in the country. (Tr. 59-60) Respondent had 44 distribution centers nationwide in 1999. (Tr. 63) The Boston distribution center's region extended west to Worcester, south to Rhode Island and north to New Hampshire. (Tr. 71)

¹ The Investigating Commissioner's rulings were the subject of Motions in Limine decided at the commencement of the Hearing. I ruled that I was constrained by the Investigating Commissioner's disposition.

3. A General Manager headed each of the distribution centers, and the GM supervised District Sales Managers (DSM's), who in turn supervised sales representatives. (Tr. 63-64) General Managers reported to Regional Vice Presidents, who reported to Senior Vice Presidents of Sales, who report directly to the CEO. (Tr. 64-65) In 2006 there were 34 distribution centers nationwide and only three female General Managers. (Ex. C-31) At the time of her hire, Complainant was the only female District Sales Manager in the Boston market on the office products side of the business, and she was aware of only one other female DSM prior to her tenure. (Tr. 72, 73, 344) At the time of Complainant's hire there were three male DSM's in the Boston region.
4. A number of male DSM's were sent to Respondent's Chicago headquarters for training and introduction to high level executives at the time of their hires. (Tr.83-87) Complainant testified that she was not extended this opportunity at the time of her hire. She believed it was a significant training opportunity for future career advancement because it gave the new DSM's exposure to high level executives within the company as well as to their peers in other departments upon which they relied for information and support. (Id., Tr. 860) I credit her testimony.
5. As a DSM for the Boston region, Complainant's job included leading and managing a group of sales representatives, who are responsible for geographic territories and charged with acquiring, retaining and growing customer business. This includes coaching and mentoring sales reps, and assessing their skills and abilities. DSM's also have responsibility for customers and are charged with developing new business, expanding sales to existing customers, and servicing existing customers. (Tr. 65, 66, 750)

6. Each DSM is responsible for a specific geographic territory and Respondent's customers are assigned to DSM's based on the location of the customer's business. During the relevant time period, Complainant was assigned Boston and Cambridge. Two other DSM's, Gregg Manning and Chris Tobin were assigned the territory North and West of Boston and the territory South of Boston and Rhode Island, respectively. Those customers located in the Boston area were handled by Complainant and her sales team. (Tr. 136, 548-550)
7. The General Managers to whom Complainant reported during her tenure at Respondent were Mike Gentile, Mark Honeycutt, James Durkin and James Fuller. Durkin was GM in 1999 and hired Complainant. (Tr. 54, 61) Gentile was the GM of the Boston Region from late 1999 or early 2000, until January of 2003, when he was replaced by Mr. Honeycutt. (Tr.90, Tr. 533) Honeycutt was GM in Boston until November of 2005 when he was succeeded by James Durkin, who returned to the company in February of 2006. (Tr. 532-533, 727) James Fuller succeeded Durkin as the GM in Boston at the end of November, 2006 (Tr. 935)
8. Complainant testified that a number of male sales managers including, General Managers, Mark Honeycutt and Jim Durkin and DSM's Mike McKinley, Greg Manning and Chris Tobin played golf together, usually on Friday afternoons. (Tr. 1138-1139) She testified that golfing was a big deal with the sales team and occurred on a regular basis. (Tr. 198) Complainant was not a golfer and was not invited to these golf outings, but did play golf once with Durkin when he asked her to introduce him to prospective clients. (Tr.196-198, 1137, 1235) Margaret Bulman, a Senior Key Account manager who worked in the region confirmed that there were Friday afternoon golf outings with male

sale managers and the General Manager and females were not invited. She described the culture at Respondent as “an old boy network.” (Tr. 1136-38) I credit this testimony.

9. In 2001 Complainant determined that she was the lowest paid DSM despite the fact that she had either more seniority or experience in the industry. She testified that certain marquee accounts in her territory were assigned to a male DSM, Mike McKinley; and that despite winning significant business from key accounts, in 2003, her male colleagues were chosen to make presentations at the National Sales meeting and she was not. When she asked GM Mike Gentile why she was not chosen, he stated words to the effect of “these guys need exposure.” Complainant’s compensation in 2003 was \$103,000. At that time her male counterparts who had less tenure with Respondent or less industry experience, earned \$115,000 and \$107,000. (Tr. 94-95,98) Complainant testified that male colleagues were also selected to participate on company-wide task forces and other special assignments which provided networking and career building opportunities, and that she was not chosen for these assignments despite requesting consideration. (Tr. 106-107) Complainant asserted that this deprived her of exposure to Respondent’s CEO and senior executives and impacted her career opportunities and advancement. (Tr. 91-95; 103-104, 107,108) I credit this testimony.
10. Complainant testified that not all job opportunities were posted and that candidates might be selected without a competitive interview process, citing two specific examples, the selection of a Director of Business Development for the Boston Region and the selection of James Fuller to succeed Jim Durkin as GM. (Tr. 227-232)
11. In 2005, Complainant played a major role in landing a significant new account for Respondent, UMass Medical Systems. While Complainant was part of a team that

included the GM and two other sales managers, and GM Honeycutt attempted to downplay her role in securing the account, stating she was just being a “good team player,” (Tr. 605-609), I credit her testimony that the account was won largely as a result of her professional relationship with the Senior Purchasing Manager at UMass and the work she did with him to secure the account. (Tr. 114-117, 608-610) I do not credit Honeycutt’s testimony that only some ten percent of the account win was attributable to Complainant’s efforts or that the account would have been landed without her involvement. (Tr. 615-617) He admitted that Complainant had a great relationship with the client and that they had worked together for years. (Tr. 609-610) The contract with UMass generated approximately 3 million dollars a year in revenue over its lifetime and proved to be one of the top five accounts for Respondent in Boston and the largest account win in some ten years. (Tr. 114-119)

12. The UMass account was assigned to DSM Greg Manning, who was the DSM responsible for the Worcester geographic area. Complainant did not object to the assignment of Mr. Manning to this account, as this was consistent with Respondent’s practice to assign accounts by geographic territory. (Tr. 609, 614) However, Complainant asked GM Honeycutt for some assurance that she would be compensated fairly for her role in securing the UMass account and he agreed that he would speak to the Vice President of Sales about her request. (Tr. 147,148,666) Complainant testified that the Vice President of Sales dismissed her request for some additional financial recognition for landing the UMass account. (Tr. 151) I credit Complainant’s testimony that she was told this was just part of her job. (Id.)

13. As of November 2006, Manning's sales exceeded his 2006 quota by over 3 million dollars. (Ex. C-8) The revenue generated by the collective UMass accounts in 2006 totaled over \$2.9 million and represented an increase of more than 368% over UMass account revenue in 2005. (Ex. R-38) In November of 2005 when Complainant learned that GM Honeycutt intended to resign, she again asked him to seek additional compensation for her landing the UMass account and I credit her testimony that Honeycutt replied he could not do so because it "would be political suicide." (Tr. 152) He advised Complainant the best he could do was to offer her an excellence award in the amount of \$2500. The Vice President of Sales reduced this award to \$1000, which Complainant viewed as a token and insulting because such awards were not generally for executive accomplishment, but to award the rank and file for things like good cost savings ideas. (Tr. 152-154)
14. Honeycutt left Respondent in November of 2005. Prior to his resignation, he did not set target sales quotas for the Boston area DSMs for 2006. Complainant applied for the Boston GM position vacated by Honeycutt, but was not chosen for promotion. (Tr. 159-161) Honeycutt stated that he did not recommend Complainant for promotion to GM, because he did not believe she had the respect of her peers and this was necessary to be a successful GM. He testified that the recommendation of the current GM would have had significant weight. (Tr. 625-628) Complainant was told by the Vice President of Sales that she was not selected for the position because "no one knew who she was." (Tr. 166-168) She nonetheless advised upper management that she wished to be considered for future GM positions. (Ex. C-10) DSM Greg Manning also applied for the GM position and was not selected. (Stipulated Facts no. 31; Tr. 422)

15. James Durkin was recruited for the GM position and returned to Respondent after Respondent's Senior VP for North American Operations advised him of the opportunity and suggested he might be interested. Durkin began serving as the Boston GM for the second time in February 2006. (Tr. 168-169, 180) He did not set the target sales quotas for the Boston area DSMs for 2006. (Tr. 914)
16. During Mr. Durkin's tenure as GM in 2006, Respondent created a new position, titled Director of Business Development. (DBD) DBD's were exclusively responsible for pursuing larger customer's business, which if landed, would be serviced by the sales representatives. Complainant described the position as a "super hunter," and she and other female colleagues perceived that a male colleague, Greg Rangnow, was chosen to be the Boston DBD largely based his personal relationship with male executives. Complainant testified that a qualified female colleague who was interested in the position never even saw a posting for the job and was not given the opportunity to apply. (Tr. 227-230) Complainant was particularly frustrated by this new initiative because she lacked confidence in the abilities of the individual assigned to be the Boston DBD, she was concerned about maintaining ongoing relationships with customers, and because the new business development structure prevented her from pursuing business with Partner's Health Care where her contact from UMass had moved. (Tr. 253, 256-257, Tr. 768-769, Tr. 1239-1240) Complainant was counseled by Durkin about her reluctance to work collaboratively with designated DBD. (Tr. 770)
17. Durkin's management responsibilities included the region's DSM's, Complainant and her two male counterparts, Greg Manning and Chris Tobin. Complainant testified that Durkin rarely met with her one-on-one, that she did not go to lunch with him, but that she

observed him meeting much more frequently with Manning and Tobin and leaving at lunch-time with them. She recalled a meeting with other managers where Durkin glared at her with venom. (Tr. 193-196) She testified that Durkin rarely spent time with her in the field and accompanied her on very few sales calls, despite his testimony that he spent most of his time in the field, (Tr. 1241, 750) and that he did not applaud her for landing new business in the way he celebrated male counterparts who won new business. (Tr. 189-192) I credit her testimony that Durkin was less supportive of her efforts and, outside of their sales meetings, spent less time with her than he did with her male counterparts.

18. In 2006, Complainant was awarded “Supplier of the Year” by the New England Regional Health Care Cooperative and she secured contract extensions for two significant customers without necessity of a bidding process. (Tr. 762-763, 190-192)
19. In March or April of 2006 Complainant learned that her total compensation was less than that of her male peers who had less seniority and experience, and several significant account losses. She met with Durkin to express her concerns that she was being paid less than her male peers and was not being compensated fairly and he did not get back to her. She stated that her relationship with him began to change after that discussion. (Tr. 181-183) Complainant again raised her concerns about compensation in an email to Durkin in May, 2006, asking for a meeting. (Tr. 183-184)
20. In June of 2006 Respondent held a two-day off-site meeting for the Boston management team to discuss company strategy. Durkin expressed displeasure and disappointment that Complainant was unprepared to present on her assigned topic at that meeting. (Tr. 776, 787) Complainant acknowledged that she was not prepared and did not make a

presentation on government business, as previously assigned. (Tr. 438-439) She attributed some of her difficulty in otherwise presenting that day to a heated public exchange she'd had with Durkin in the meeting. (Tr. 205-206) Complainant testified that part of this meeting was to assess each DSM's sales team, and their potential for promotion. Durkin disagreed with Complainant's high rating of her sales team. (Tr. 777) Complainant stated that Durkin challenged and criticized her assessment of her team in a very unprofessional and aggressive fashion, in a tone reserved for her presentation and not directed toward her male peers. She testified that three of her female colleagues expressed to her that they were stunned by Durkin's behavior and commented that he seemed out to get her. (Tr. 199-230) Margaret Bulman, who was present at the meeting, testified that Durkin's interaction with Complainant was contentious, inappropriate, and verged on attacking her and that she had never observed him interact in that manner with a male colleague. (Tr. 1149-1150) I credit their testimony that Durkin behaved in a hostile and demeaning manner to Complainant in the presence of other managers. In a follow-up meeting with Durkin, Complainant was spoken to about her persistence in defending her sales representatives and her lack of preparation. As to the latter issue, Complainant acknowledged that she was unprepared for the presentation and apologized. (Tr. 445-448, Stipulated facts, PP.44-45, 785-787)

21. At that same meeting in early July of 2006, Complainant again asked Durkin to review her compensation because of the significance of the UMass account. (Tr. 208-209) Complainant, Durkin and a Human Resources employee met at the end of July 2006 to discuss Complainant's compensation concerns, and she reiterated her belief that she had not been fairly compensated for her work in landing the UMass account. Durkin stated

his concern that Complainant continued to take credit for single-handedly securing the UMass account and that he believed this eroded the teamwork element essential for the sales team to succeed. (Tr. 810-812)

22. Each of Respondent's DSM's is assigned a sales quota annually, normally in the fourth quarter of the preceding year. Quotas are based on projections for future business and historic sales and trends for each customer. (Stipulated Fact 26) The sales actually generated by the DSM's and their sales representatives, divided by the DSM's sales quota is designated as quota attainment. (Stip. Fact 21) DSM's were paid on a system known as Total Targeted Compensation (TTC) Seventy per cent (70%) of a DSM's compensation was a fixed base salary, while the remaining thirty percent (30%) was incentive based compensation. Incentive compensation was based on quota attainment. (Stip. Fact 20)

23. Complainant's annualized compensation for 2006 was \$128,064; Tobin's was \$132,990; Manning's was \$148,060. Manning's annualized compensation was also greater than Complainant's in 2004 and 2005. (Ex. R-23; Tr. 878) With respect to fixed base pay, which does not include incentive compensation, Manning's salary was higher than Complainant's in 2004, by some \$6000, in 2005 by some \$5000 and in 2006 by some \$1600. (Ex. R-23)

24. At Durkin's request the Regional HR Manager initiated a compensation review for Complainant. (Tr.793) Durkin testified that the salary review Respondent conducted was an analysis of the sales managers, their total targeted compensation (TTC), their actual compensation based on their performance, their volume quota attainment and the shares quota attainment they achieve. (Tr. 796; Ex. R-23)

25. Durkin declined to make any adjustment in Complainant's salary. (Tr. 184-185) He denied any disparity in compensation based on the fact that he considered Complainant and Manning to have comparable experience (Tr. 800) and that Complainant received larger raises than Manning in 2004 and 2005, she did not make her quota in 2005, and her TCC for 2006 was set within 1% of Manning's. He also noted that Complainant's compensation was set higher than DSM Tobin's in 2004-2006. (Tr. 793-802) He testified that the Regional Vice President of Sales would not agree to adjust Complainant's Excellence Award. (Tr. 807) Complainant testified that when she was informed that her compensation would not be adjusted, she was angry, emotionally upset and had to fight back tears. (Tr. 213)
26. While Complainant did not specifically refer to gender discrimination in pay disparity, I find that Durkin understood that she was seeking a review of her compensation as compared to her male peers, specifically the other two male DSMs, her counterparts. (Tr. 794) Complainant's observation that Durkin's treatment of her deteriorated after she expressed concerns about her compensation, vis-à-vis her male counterparts, was confirmed to her by Khatija Samma, a Human Resources employee, who noted to Complainant that Durkin treated her differently in sales meetings. (Tr. 209-210)
27. In October of 2006, Durkin was promoted to the position of Regional Vice President of Sales. (Tr. 222, 812) As a result the Boston GM position was again open. Complainant was not encouraged by any member of senior management to apply for the position and when she informed Khatija Samma of Human Resources, that she was considering applying for the position, Samma advised her not to do so, because Durkin was not considering her for the position and did not think she was qualified. (Tr.224) As a result,

she did not apply for the open GM position in Boston because she believed it would have been futile for her to do so. (Tr. 227) Complainant also expressed frustration at how male colleagues and outsiders with less or no industry experience were chosen for managerial positions based on their personal relationships with male executives in the company. (Tr. 227-234) I credit her observations in this regard.

28. In November of 2006, Respondent hired James Fuller to the position of Boston GM.

Fuller was a former colleague of Durkin's at Aramark, where Durkin had worked in the interim between his two stints as Respondent's Boston GM. Durkin contacted Fuller and encouraged him to apply for the position. Despite the fact that Fuller had no prior office products industry experience, Durkin testified that he considered him the most qualified applicant for the GM position, stating that the "selling process" and "values" at Aramark were consistent with those at Respondent, and "he made a very good fit." (Tr. 813-814)

29. In an introductory meeting with Mr. Fuller, Complainant discussed her accomplishments and discussed her ongoing concern about not having been fairly compensated for the UMass business. (Tr. 240-241) He informed her by email in early December that he had spoken to Durkin and that the three of them would meet to discuss her concerns, but no such meeting occurred.

30. On November 27, 2006 Respondent's Senior Vice President of Sales sent an email to Regional Vice Presidents, including Durkin, instructing them to restructure the ratio of DSM's to sales representatives to bring them in line with goal of 8-10 sales reps per DSM. (R-25; Tr. 816-819) As a result, Durkin had to eliminate one of the three DSM's in Boston. *Id.* On December 18, 2006, the Boston-area DSM's were called to a meeting with Fuller and Durkin. (Tr. 244) At that meeting Durkin announced that Respondent

was about to implement a reduction in force and that there would be only two remaining district sales managers in the Boston region going into 2007, as opposed to three. He invited each of the Boston DSM's to consider voluntarily resigning. (Tr. 244, 844) Complainant asked Durkin what criteria he would use to determine which two would remain if no one chose to resign, but he did not provide that information. (Tr. 244) Complainant stated that it was an emotional meeting and the three DSM's were in a state of shock. Id. None of the three chose to resign. (Tr. 844)

31. Durkin had already determined as of December 5, 2006 that Complainant would be the DSM whose position would be eliminated. (R-28) He only offered the option of voluntary resignation to the three DSM's upon the suggestion of the Boston HR team. (Tr. 840-841) I find that this offer was a charade to create an appearance of fairness, and that Respondent knew no one would voluntarily resign.
32. Durkin testified that the factors he considered in determining whose position should be eliminated were quota attainment and adherence to company values, in particular "teamwork and trust." (Tr. 836-837) Quota attainment is calculated by actual sales generated divided by an assigned sales quota. Complainant's quota attainment was lower than the other two DSMs for the prior 5 quarters. Durkin testified that this was the appropriate criterion for making a RIF decision. (Tr. 834-835) However, Complainant's sales quota in 2005 was some 7 million dollars greater than Manning's and in each quarter of 2006, it was in the area of a million to a million and a half dollars greater. (R-27) Durkin did not consider profit margin, new business generation, customer renewals, or gross sales volume on their own in his analysis, because according to him, quota attainment incorporates all of these elements as well as the other responsibilities of a

DSM. (Tr. 756-757; 822) However, he testified that “It’s very difficult to hit your sales quota if you’re not retaining your customers and if you’re not generating new business. That’s the way they’re established.” (Tr. 756)

33. Notwithstanding, Durkin did not consider business losses separately as part of his decision as to which DSM to select for elimination. Both Manning and Tobin had major account losses: Allmerica Insurance, Reebok and Dunkin Brands, which represented approximately \$4 million in annual lost revenues. (Tr. 1107-1108) Durkin also stated that he did not consider new business generation or contract renewals in eliminating Complainant’s position. Two of Complainant’s accounts which were in the top five in size in the Boston region, Biogen Idec and Goodwin Proctor, were renewed without bid in 2006. In 2006, Complainant also landed the account of Millenium Pharmaceuticals without bid. (Tr. 190-191) Manning won the Caldwell Banker account in 2006 and Tobin landed several new accounts. (Tr. 822-824)
34. Complainant’s total sales volume in 2006, a factor which Durkin did not consider separately, was calculated to be approximately \$25.7 million, approximately \$1.5 million higher than Manning’s and \$4.7 million higher than Tobin’s. (Ex.R-12; Tr. 707) With adjustments made to Manning’s percentage attainment quota to exclude certain sales volume for the UMass account, total sales volume in 2006 was calculated by Durkin to be approximately \$25.7 million for Complainant and approximately \$19 million for Manning. With these adjustments, Complainant’s sales volume exceeded Manning’s by \$5 million in 2005 and 6.7 million in 2006. (Ex. R-27)
35. Durkin testified that he also considered the values of “teamwork and trust” as factors in his decision to terminate Complainant’s employment. He cited a number of incidents he

believed demonstrated Complainant's deficiencies in this area: her lack of preparation and failure to present on her assigned topic at the off-site meeting in June 2006; her agreeing to a proposal at a management team meeting and then criticizing that proposal in the presence of her subordinates, which he viewed as disrespectful; her reticence regarding the new DBD program; her insistence that she be given more credit for her significant role in landing the UMass account and diminishing the role of others; and her inadvertently including Rangnow as a recipient in an email she sent to others that was critical of his performance. Complainant's comment that she doubted Rangnow would follow up with a customer whose business he did not secure, resulted from her extreme frustration with Rangnow as the new Director of Business Development and because the new management structure precluded her from pursuing a potentially large and lucrative account with Partners Health Care where she had a significant personal contact. Nonetheless, Complainant apologized personally to Rangnow for her comment, and at the time of the incident, Durkin had already decided to eliminate Complainant's position. (Tr. 252-254)

36. On December 22, 2006 Complainant was informed by Durkin and Fuller that her position was eliminated, and her employment was terminated. (Tr. 260-261) Durkin testified that he would not have terminated Complainant if either of the male DSM's had voluntarily resigned. (Tr. 899) Complainant was subject to a non-compete agreement which was signed as a condition of her employment and which prohibited her for a period of 12 months from engaging in the sale or distribution of office supplies in any geographic region in which she worked for Respondent. (Ex. C-15; Tr.694)

37. Complainant testified that she began to look for a new job immediately and that she contacted a recruiter to learn about how job searches were conducted since she had never really had to look for a job previously and the process had changed considerably over the years. She also subscribed to “Ladders” a paid subscription job site for those earning over \$100K per year, to which recruiters also have access. Complainant also contacted a good friend who was a CEO and mined her contacts of successful Boston female business leaders. She sent letters to all her clients letting them know she was unemployed, sent letters and made phone calls to companies, and submitted applications daily on line, estimating that she contacted hundreds of companies. Complainant received few responses to her inquiries. (Tr. 262-270) I credit her testimony that she began a job search in earnest as early as January of 2007.

38. In March of 2007 Complainant’s father who was 89 years of age became very ill and she spent a great deal of time caring for him and assisting with doctor’s appointments in the spring and summer. She testified that as a result she could no longer spend full time at her job search, but she continued to seek out and apply for positions. Her father passed away in September of 2007. Thereafter she resumed her job search full time. (Tr. 272-275) Complainant noted in some letters to prospective employers that she had spent a year and a half in the role of health care advisor to her elderly parents, nursing her father through the final stages of illness and thereafter assisting her mother with financial and estate administration issues and securing an independent living situation. In August of 2008, she sought a professional reference from former GM Mark Honeycutt and noted in her email to him that she was just beginning her formal job search after caring for her parents. I find that this comment served to explain Complainant’s prolonged absence

from the workforce to prospective employers, and is not evidence that she failed to seek employment or pursue opportunities during that time period. (C-16, R-18) I do find that Complainant was diverted from seeking employment as full time endeavor during the time she cared for her parents, but do not find that failure to document her job search during that period of time evidences a failure to continue seeking employment.

Complainant testified that she did not retain all electronic communications that she had relating to her job search and did not know in 2007 that she had an obligation to retain all documents related to her efforts to mitigate damages and I credit her testimony. (Tr. 507, 509) Complainant testified that she was aware of sales positions at Staples in 2007 and 2008, but that she did not apply for those positions because they were sales as opposed to sales management positions. (Tr. 512-513)

39. In 2006, Complainant earned \$133,329 from her employment at Respondent.

Complainant testified that in 2007 she was unable to secure alternative employment in part because of the limitation of her non-competition agreement, although she did not seek legal advice regarding the scope of this agreement's restrictions on any subsequent employment in the industry. She testified that she did not apply for jobs in the office products industry in part because she felt limited by this agreement and in part because she felt her reputation was sullied and she would be viewed as damaged goods in the industry. Complainant's sole income in 2007 was from unemployment compensation in the amount of \$17,250. (Ex. C-21) She also took an early distribution from her 401k plan for which she had to pay a penalty. (Ex. C-22[d];Tr. 297)

40. In October of 2008 Complainant secured employment at Tiffany earning \$24,032 for that year. She also received \$7,475 in unemployment compensation in 2008. (Ex. C-21; C-

22(d)) In 2009 Complainant earned \$32,250 at Tiffany and she collected \$9,226 in unemployment compensation after she and her entire sales team were laid off in a restructuring that included some nine hundred employees. (C-21;Tr. 283-284) In 2010 Complainant had no earnings but took a 401k distribution of \$66,116 to cover living expenses. (Tr. 300) During 2010 up to the time of hearing, Complainant had no earnings from employment and collected no unemployment compensation. (C-22 a-f; R-13) Complainant's mother passed away in 2010 and she inherited some \$40,000 some of which she used for living expenses. (Tr. 711) At the time of the hearing Complainant was in a non-paying position with a start-up consulting organization, the Stratford Group and is one of three principals in this business, but stated the organization has yet to land a client. (Tr. 291-292)

41. Complainant was forced for financial reasons to put her home on the market in May of 2009 and her home sold in August of 2009. (Tr. 303-304, 308) In November of 2009 Complainant moved into her parent's home where she lives with her sister and has a rent-free leasehold until 2019. (Tr. 310, 526) She testified that she is essentially being supported by her sister. (Tr.310) She has also incurred increased health insurance costs in the amount of including \$5603.36 in health insurance costs and had to secure health insurance through Mass Health. She also lost Respondents contribution to her 401K in the amount of 50% of 6% of her salary. (Tr. 300-302; 1026; R-26)

42. Complainant testified that she had intended to retire at age 66. (Tr. 712) At the time of her termination Complainant was 56 years old and as of the hearing in this matter she was 61 years old. Complainant testified that she is certain that her age has been an impediment to her job search and that she has been told by a recruiter that one

prospective employer was seeking someone who was “coming up in their career.” (Tr. 288-289) She stated that she has reluctantly come to the realization that at age 61 she is not the ideal candidate for hiring managers to reach out to. (Tr. 290)

43. Respondent presented an expert witness with a Ph.D. in Economics who works in the areas of economic loss and performs statistical evaluations of employment outcomes. He was hired by Respondent to evaluate Complainant’s economic losses. He testified that there was a 24% chance that Complainant would not have survived a subsequent RIF at Respondent in October of 2009 when 22 DSM’s nationwide were involuntarily terminated and left the company. (Tr. 1007, 1010, 1013) He also testified that from 2007 to 2010, 10% of the DSM workforce left for voluntary reasons and that this factored into his calculations of Complainant’s economic loss. He testified that he could not know what the outcome of Complainant’s job search would have been had she looked for a job in the office products industry between 2007 and 2010, but that studies show with some variation that displaced workers who perform a diligent job search in their industry are generally re-employed at 85% of their previous earnings within six months of unemployment. He therefore used a 15% diminution in earnings for his estimate of Complainant’s salary loss. (Tr. 1020-24) He also made an assumption that Complainant was less than diligent in her job search. (Tr. 1016-1017) Based on all of these factors, he determined that Complainant’s back pay damages through the end of 2011 are \$79,485. (Ex. R-36)

44. I decline to rely on the expert’s testimony for a number of reasons. The first reason is that despite the stated 24% statistical probability that Complainant would not have remained working for Respondent beyond 2009, the evidence is that her male DSM

colleagues in the Boston Region whose jobs were not eliminated in 2006 have remained employed with the company through the date of the Hearing, and Complainant's job performance was not significantly deficient as compared to theirs. Second, there is no evidence to suggest that Complainant's job performance would have declined. Given Complainant's age and her longevity with the company is it not reasonable to assume that she would have voluntarily relinquished her employment with Respondent at any time from 2006 to 2011. Thirdly, I do not believe that Complainant's job search was less than diligent, despite the periods of time where she was unable to devote full time to the search because of caring for her elderly parents. Moreover, one of the scholarly research papers that Respondent's expert relied on (C-27-Faber report) and that was admitted into evidence noted that except for two years in the 1980's, there was no information on unemployment duration for job losers who did not find a new job, and that during the "Great Recession" only 56% of job losers, regardless of the time since job loss, had found a job by the survey date in 2010. (Tr. 1047-1051) Respondent's expert testified that Complainant does not fall within this category because she lost in her job in December of 2006 prior to the onset of the Great Recession in December of 2007, and because the Faber report analyzes data regarding job losses in 2008 and 2009. Another research paper cited (C-28 - Levine report) noted that "only 60% of men and 55% of women who lost their jobs at age 55 were employed two years later, in contrast with 80% employment for non-displaced workers of the same age." (Tr. 1054) Respondent's expert stated that this assumes that many displaced workers over the age of 55 drop out of the work force and therefore this statistic is not applicable to Complainant because she has not done so. (Tr. 1074) I do not find this assertion at all credible. Moreover, to

assert that Complainant's circumstances were not impacted by the "Great Recession" ignores that fact that she remained unemployed and continued to seek employment throughout a period of time that the economy was in significant decline resulting in increased joblessness and greatly reduced job opportunities. Respondent's expert suggests that her failure to find a job within a year of her termination means that she bears the burden of the subsequent economic downturn, and Respondent's obligation to remunerate her for back pay losses is thereby significantly diminished. (Tr. 1079-1081)

45. Complainant testified that the loss of her job at Respondent has had a devastating impact upon her life, that she loved her career, took her work very seriously and that her identity was very much related to the work she did. In addition to the financial loss, she deeply feels the loss of professional camaraderie and the clients she had relationships with. She testified that she has lost all of her self-esteem and seen her confidence "crumble." Relying on others to support her is "anathema" to the way she has lived her life and makes her feel awful. Complainant stated she is depressed and feels like a "light has gone out of the person [she] used to be," and that she feels like a "dead person." Nonetheless, Complainant remains productive every day because that is her nature "but to not be a part of something or building something or developing something is just extraordinarily difficult for [her]." She stated that she "hides" and does not go out socially because doesn't have the money and because she has nothing substantial to talk about and remains consumed by what happened to her. She stated that it's very painful to know that all of her male colleagues are still working for Respondent and have been promoted and are having a life while she has none. She stated that she feels as if her

reputation in an industry where she spent 24 years of her life is “sullied and ruined.” (Tr. 310-313)

46. Complainant testified that prior to her termination she had treated with a psychiatrist and was prescribed Paxil for depression. She began treating with a new psychiatrist, Dr. William Moran, in 2006 but her sessions with him were primarily “med-checks,” consisting of a brief conversation and re-authorization of her prescription for Paxil. Complainant stated that she stopped seeing this psychiatrist after he made some derogatory allegations about her reasons for seeing him in his deposition in this matter. She stated that he made assertions that she could not believe and that just “blew [her]mind,” and that she felt betrayed by him. (Tr. 316-320) Complainant stated that in her last visit she complained of sleeplessness related to ongoing anxiety over being without a job and facing financial insecurity and was prescribed sleeping pills which she never took. (Tr. 321-322) Complainant admitted that her sister’s cancer diagnosis in 2006, the loss of her parents in 2007 and 2010 and the loss of her job at Tiffany in 2009 also contributed to her sadness and depression. (Tr. 518-519)
47. Complainant’s psychiatrist, Dr. William Moran gave a deposition in this matter which was introduced into evidence. Initially Dr. Moran diagnosed Complainant with minor depression in January 2006. He stated that he based his diagnosis solely on Complainant’s word that she was depressed and that she did not appear to be particularly depressed, yet he continued to prescribe Paxil for her. He did not see Complainant at the time of her termination and saw her only for a re-fill of her Paxil medication in March of 2007 at which time he observed that she appeared to handle her termination from Respondent “really quite well,” and that it did not do “any kind of serious psychiatric

harm” to her. (Moran Dep. pp. 7-8, 32-34,49-51, 53-54,78,87-89/131-132) Dr. Moran only saw Complainant twice yearly to refill her Paxil prescription. He stated it was his impression that she was basically doing well and he wasn’t sure why she came to a psychiatrist. (Moran Dep.) He also opined that he formed the impression that Complainant was seeing him only to bolster her legal case against Respondent. (Moran Dep. 81-83) I decline to credit Dr. Moran’s deposition testimony which is based on brief infrequent sessions with Complainant primarily for the purpose of renewing her prescription medication and his testimony struck me as tainted by inexplicable hostility toward her. In contrast, Complainant’s testimony and her demeanor which I observed over the course of several days, was overwhelmingly credible and compelling. I also find that Complainant’s brief, infrequent visits to Dr. Moran were apparently dictated by the need to reauthorize prescriptions for medication and that their primary purpose was not psycho-therapy.

III. CONCLUSIONS OF LAW

General Laws c. 151B, §4(1) prohibits discrimination on account of gender by an employer in the hiring, firing or terms, conditions, or privileges of employment. Absent direct evidence of discrimination, Complainant may establish disparate treatment by utilizing the three-stage inferential model of proof articulated in *Wheelock College v. MCAD*, 371 Mass. 130 (1976) Pursuant to that analysis, Complainant must first establish a prima facie case. Complainant may establish a prima facie case of gender discrimination by demonstrating that as a female, she was performing her job at an acceptable level, that she suffered adverse employment actions, in this case unequal pay and elimination of her position, and that the adverse job actions occurred under

circumstances that would raise a reasonable inference of gender discrimination. *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 45 (2005). I find that Complainant has established a prima facie case of discrimination on the issues of unequal pay and termination.

If the Complainant satisfies her initial burden, the burden of production shifts to Respondent to articulate a legitimate non-discriminatory reason for the adverse job action, supported by “credible evidence to show that the reason or reasons advanced were the real reasons.” *Blare v. Huskey Injection Molding Systems*, 419 Mass 437, 441-442 (1995) quoting *Wheelock College*, 371 Mass at 138. If Respondent succeeds in producing credible evidence at the second stage the burden shifts back to Complainant to prove “by a preponderance of the evidence that Respondent’s facially proper reasons given for its actions...were not the real reasons, *Wheelock, supra.* at 139, but that Respondent acted with discriminatory intent, motive or state of mind. *Lipchitz v. Raytheon*, 434 Mass. 493, 504 (2001). More often than not, a Complainant “must carry her burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not credible.” *Blare*, 419 Mass. at 445.

Complainant has demonstrated that her annualized compensation was less than her two male DSM colleagues in 2006 and far less than Manning’s, by some \$20,000. Her base compensation was also less than Manning’s in 2004 and 2005, despite her having more experience in the industry. Respondent asserts that there was no legally cognizable disparity in pay between Complainant’s compensation and that of her peers and claims that the significant differential in actual annualized compensation between Complainant and her peers was the result of their receipt of greater incentive compensation because they achieved a higher percentage of their sales quota. I find the use of sales quota attainment to measure achievement is a red herring and easily manipulated. (see discussion below)

Durkin testified that Respondent declined to adjust Complainant's salary at mid-cycle in 2006 because Complainant's TTC for 2006 was set within 1% of Manning's, that he considered her and Manning's experience comparable, and that she had not met her sales quota in 2005. He also stated that Complainant had received a larger raise than Manning at the end of 2005. This appears to be a legitimate justification for the relatively minor discrepancy between Complainant's and Manning's base salary for 2006.

However, Complainant asserts that Respondent's refusal to appropriately recognize and reward her financially for her prominent role in landing the UMass account in 2005 impacted her compensation going forward. Indeed, while Manning exceeded his 2006 quota by 3 million dollars, 2.9 million of that amount was related to the UMass accounts. I credit her testimony that when she asked GM Honeycutt to ensure that she was compensated fairly for her role in securing the UMass account, he informed her that for him to do so would be "political suicide." Durkin also declined to support Complainant in her quest for some financial recognition for securing this account and it is clear that higher level executives in the sales organization were also not supportive of her request. I am convinced that Respondent's refusal to formally acknowledge Complainant's role with any meaningful financial compensation was related to her gender (see discussion below) and that doing so would have likely increased her compensation relative to Manning's in 2006.

Moreover, there was a consistent pattern of Complainant being paid less than her male colleagues dating back to at least 2001. The fact is that Complainant's target compensation consistently remained below that of her similarly situated, but less experienced male colleagues. I conclude that Complainant was subjected to unequal pay based on her gender over a period of time, but am constrained from awarding damages for these salary discrepancies prior to

2006, because they fall outside the statute of limitations and Complainant testified that she was aware that she was the lowest paid DSM in the region as early 2001. Since Complainant's compensation was re-determined each year, I do not consider the salary issue to be a continuing violation. While I ruled at the outset of the hearing that I was not constrained from admitting evidence about issues or events arising prior to May of 2006, and could consider such evidence in my deliberations, I am constrained from awarding damages for events outside the statute of limitations.

The second issue before me is whether Complainant's termination in December of 2006 was for reasons related to her gender. Complainant has established a prima facie case that as the only female DSM in the Boston region, who was performing her job capably, she was targeted for layoff in December of 2006 when Respondent instituted a restructuring which mandated the elimination of one DSM position in the Boston Region. While I accept Respondent's assertion that a restructuring of its sales organization necessitated the elimination of one DSM position, the ultimate issue is why Respondent chose to terminate Complainant and not one of her male colleagues.

Durkin asserts that he chose Complainant as the DSM to be terminated because her quota attainment for the last 5 quarters was lower than her two male DSM colleagues and because her adherence to the company values of "teamwork and trust," was problematic. As examples of the latter he cited Complainant's lack of preparation at a sales managers meeting, his disagreement with her assessment of her sales representatives and her criticism of a male Business Development Manager and refusal to accept the reorganization which changed the role of DSM's in recruiting new business. I find that Respondent has met its burden of production to articulate a legitimate non-discriminatory reason for its action.

The burden of persuasion remains with Complainant to prove that the reasons articulated by Respondent were pretexts masking a discriminatory motive. *Lipchitz*, 434 Mass. at 501; *Sullivan*, 444 Mass. at 54-55. I conclude that Complainant has proven that Respondent's articulated reasons are a pretext for discrimination for the following reasons.

While Complainant's quota attainment at the end of 2006 was lower than her male counterparts, I find implausible Respondent's assertion that quota attainment was the sole best measure of each sales manager's performance and value to the company. This assertion seems too facile to be accepted at face value. There is no dispute that Complainant's percentage of quota attainment was lower than her two male counterparts in 2006. However her sales quota was set significantly higher than her male peers. In 2006, Complainant's quota was five and six million dollars higher than the two male DSM's. The determination of quotas was based on a number of factors including past sales activity, projected sales activity, projected gains or losses of new accounts and other influences that might impact sales in a coming year. Durkin testified that the approach to setting quotas from the top down based on senior managers views of growth rate in the territory should be. Both Durkin and former GM Honeycutt denied having any role in setting Complainant's quota for 2006, as Honeycutt resigned in the fall of 2005 and Durkin did not return to the company until February of 2006. Therefore, the factors relied upon to set Complainant's quota for 2006 were not articulated by Respondent, nor was it clear who was responsible for the numbers.

Moreover, the determination of quotas was not an exact science and was based on variable factors that could not be anticipated at years end. Complainant gave an example of how quotas can be grossly underestimated. A quota which underestimates projected sales volume can result in an artificially exaggerated quota attainment metric. Quota attainment was the only

measure by which the performance of Complainant's peers exceeded hers. Complainant's total sales volume in 2005 was \$25.7 million as compared to Manning's 20.7 million which include the UMass account for which Complainant received no credit. Complainant's total sales volume in 2006 was \$25, 778, 675 and Manning's adjusted sales volume was \$19,004,344. Despite the fact that Complainant's sales volume exceeded Manning's by \$5 million in 2005 and by \$6.7 million in 2006, Durkin chose not to consider this criterion in making his decision to select Complainant for termination. Durkin stated that in determining which DSM to terminate, he did not independently consider factors such as Complainant's better record of new business generation, retention of existing accounts and contract renewals and the fact that she had lost no major accounts, as her colleagues had. It is also telling that the percentage difference in Complainant's quota attainment was not so significant as to preclude Durkin from retaining her if one of the male DSM's had chosen to voluntarily resign. I conclude that Respondent's management chose to rely on quota attainment percentage as the metric for determining who to lay-off, as opposed to various other measures of performance in which Complainant vastly outperformed her peers, because it served as a neat and convenient justification for termination of Complainant's employment. She has demonstrated sufficient implausibility and inconsistency in the employer's proffered legitimate reason to support a finding of pretext for gender discrimination. *City of Salem v. MCAD*, 44 Mass. App. Ct. 627, 643(1998). There is ample evidence to support this conclusion, as further discussed below.

Complainant and others offered credible testimony that as a successful female manager in a predominantly male sales organization, her achievements were discounted. Complainant was the only female DSM in Boston throughout her employment and there were only 3 female GM's out of 34 nationwide in 2006. She was marginalized from the outset in subtle ways, such as not

being included in the male golf outings and luncheons, not sent to the Chicago headquarters for training with exposure to high level executives, and not chosen to present at national sales meetings. GM Gentile told her she was denied opportunities to attend national training and meetings because “the guys” needed exposure and ironically when she later sought a promotion to GM, she was told “no one knows who you are.” In contrast to her male managerial colleagues, Complainant was not offered the opportunity to participate in “task forces” that presented opportunities for networking and career building, something she was told she needed to do to advance. There was testimony that Respondent’s male managers were extended career advancement opportunities through a network of personal and professional relationships whereby they were chosen and groomed for promotions. Durkin returned to Respondent as a GM in 2006 because he was recruited by a high level manager at Respondent, the Senior VP of North American Operations. After being promoted, Durkin recruited a male colleague from a previous job who had no experience in the industry to be Boston GM, bypassing any consideration of Complainant for the job. Another male was chosen for the Director of Business Development after it was apparent he had been hand-selected by the Vice President and Manager of the Eastern Region. Complainant stated that she did not apply for the GM position in 2006 because after a discussion with HR in which she was dissuaded from applying, she justifiably believed it was futile for her to do so. There is ample evidence to suggest that Complainant was consistently treated differently because she was a woman and not part of the “old boy network,” and against this backdrop, it reasonably follows that her gender was an impermissible factor in her termination by Durkin.

I also conclude that the lack of ‘trust and teamwork’ articulated as a reason for Complainant’s termination was a rationale masking subtle discriminatory animus. It is

manifestly clear that criteria such as “teamwork and trust” are subjective terms that can be colored by unconscious stereotypes about the manner in which male and female employees should behave in the workplace. What is deemed appropriate workplace behavior for men is often viewed as objectionable in female employees. Complainant is an extremely intelligent and capable business woman who repeatedly sought fair remuneration and professional advancement and did not shrink from vocalizing her concerns to management. There was compelling testimony from Complainant and Bulman that Durkin treated Complainant differently from her male counterparts, did not support her in the field, as he did others, did not celebrate her for landing new business as he did her male peers, and was quick to attack her in a contentious manner in the presence of colleagues because she dared to disagree with him. Once Complainant became convinced that she was being treated unfairly, she did not quietly accept this situation. I conclude that Complainant’s refusal to “go along to get along,” and to accept her lot, inevitably clashed with the male dominated sales culture at Respondent. I conclude that she was the victim of disparate treatment largely because she was not one of the guys.

Teamwork flows from the development and nurturing of personal and professional relationships in the workplace. As former GM Honeycutt acknowledged teamwork is a two-way street. It is evident that Complainant was not a beneficiary of mentoring relationships with senior level executives and that this also strained relationships with her peers. The one exception to this may have been GM Honeycutt. He praised Complainant as a team player for her significant role in securing the UMass account which was not in her territory and which she knew she would not be managing. Nonetheless, he was honest enough to admit that to go the extra mile for her would have been “political suicide,” a most telling admission. Ultimately, Complainant was criticized for not being a ‘team player’ when the unfortunate reality is that she

was not invited or permitted to be part of the “team” and because she refused to settle for the unfair treatment she experienced. In contrast to the picture Respondent paints, the evidence suggests that Complainant was a high achieving sales manager due largely to her extraordinary professionalism and ability to nurture and maintain good relationships with customers as demonstrated by those who chose to renew contracts without going out to bid.

The evidence does not suggest that Complainant was untrustworthy or that she sought to undermine management initiatives, but that she dared to assert contrary opinions to her superiors. The fact that Complainant was forthright and vocal in expressing legitimate concerns about productivity and fairness was labeled a matter of “trust.” Voicing justifiable concerns about a male colleague’s performance meant she undermined the team. She paid the ultimate price for daring to be outspoken and fighting for fairness. I find that the allegations of lack of teamwork and trust lodged against Complainant are a subterfuge and a pretext for gender animus on the part of Durkin and other senior male executives who viewed her persistent requests for fair treatment as a refusal to gratefully accept her lot, as was expected. When asked by a National Account Manager why she couldn’t be the “nice little girl” she had been in her prior job, Complainant responded that she was having a really hard time at Respondent, had to fight for everything she wanted, and had to have her guard up. Her struggle is representative of the situation facing many successful female professionals in male dominated industries.

Complainant presented as a mature, intelligent, articulate professional who was committed to her career. She promoted and sought due recognition for her accomplishments, behavior that male managers would be praised and admired for. Respondent’s assessment of Complainant’s character promotes an unflattering stereotype of females who seek to advance their professional interests as overly aggressive and selfish, whereas male professionals who

exhibit similar behavior are viewed as confident, hard-charging and successful. I conclude that Respondent's reliance on such subjective measures to assess Complainant's performance merits particularly close scrutiny "because of their capacity for masking unlawful bias." *Harrison v. Boston Financial Data Services*, 37 Mass. App. Ct. 133, 138 (1994). In the end, I am left to conclude that the real reason for Complainant's termination was that she was a strong and persistent female who did not conform to the standards of behavior expected of a woman in the workplace.

Complainant also alleges that she was the victim of retaliation and that her termination was the result of her having lodged complaints about unequal pay and disparate treatment as a female. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains of unlawful practices." *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (quoting *Ruffino v. State Street Bank and Trust Co.*, 908 F. Supp. 1019, 1040 (D.Mass. 1995)) To establish a prima facie case of retaliation, Complainant must demonstrate that (1) she engaged in protected activity, (2) suffered some adverse action, and (3) a causal connection existed between the protected conduct and the adverse action. *Mole v. University of Massachusetts*, 442 Mass. 582, (2004). Protected activity includes internal complaints as well as formal complaints of discrimination.

Complainant expressed her concerns to Durkin about unequal pay on a number of occasions in the spring and summer of 2006. She expressed her disappointment that she was being paid less than her two male colleagues who were less experienced and less qualified. I credit Complainant's testimony that each time she raised concerns about her compensation to Durkin, he isolated and further marginalized her, to the point where he largely stopped interacting with her. Within a week of one such conversation, Durkin publically attacked her at

an off-site meeting. Other colleagues commented to Complainant that Durkin exhibited unexplained hostility in his attitude and treatment of her. Ultimately Durkin selected Complainant for termination. She clearly was the victim of adverse actions that materially disadvantaged her employment. *See Bain v. City of Springfield*, 424 Mass. 758, 765-766 (1997)

I do not credit Durkin's testimony that Complainant did not raise concerns about gender issues, and find that Respondent's assertion that management did not understand that Complainant's concerns about unequal pay related to her gender to be disingenuous. Respondent was aware of her complaints of discriminatory treatment and there is a causal connection temporally between her complaints and the adverse actions she suffered. I have found the reasons Respondent has articulated for its actions to be implausible and entirely subjective. Therefore I conclude that the determination to eliminate Complainant's position and her ultimate termination resulted from unlawful retaliatory animus on Respondent's part, and was motivated by a desire on Respondent's part to punish her for complaining about gender disparities and for not quietly accepting less remuneration than her male colleagues. (see discussion above) Complainant has proved by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. *Lipchitz v. Raytheon Co.* 434 Mass. 493, 504 (2001)

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and benefits, lost future earnings, and emotional distress suffered as direct and probable consequence of the unlawful

discrimination. In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent. It has broad discretion to fashion remedies to best effectuate the goals of G.L. c. 151B. *Conway v. Electro Switch Corp.*, 825 F. 2d 593, 601(1st Cir. 1987) .

The Complainant seeks back pay from the date of her termination up to the date of the public hearing. Complainant testified that she immediately began to look for alternative employment by contacting a recruiter, subscribing to on-line job search sites, and by networking with friends and clients. She testified that she made phone and on-line inquiries, submitted on-line applications for work daily and estimated that she contacted hundreds of companies. Respondent would have me conclude that Complainant did not comply in earnest with her duty to mitigate damages, because she took time to care for her elderly infirm parents and to arrange their affairs, did not apply for sales jobs in the office products industry and lacked documentary evidence of her search in 2007. While I find that caring for her parents did divert Complainant some from a full time job search during some months, I credit her testimony that she steadily continued to seek employment, but that her endeavors were not successful and were discouraging.

Complainant testified that she did not apply for jobs in sales because her profession was sales management and that she did not maintain records of her employment search early on because she was unaware of any requirement that she do so. She also testified that she did not seek employment in the office products industry because of her non-compete agreement and because she felt that her reputation was sullied and she was washed up in the field. The evidence does not suggest that Complainant stopped diligently looking for work. I decline to accept the opinion of Respondent's expert that Complainant failed to find comparable work within six

months of her termination at 85% of her previous income because she was not diligent in her job search. I also decline to accept his opinion that Complainant would likely not have survived a subsequent RIF at Respondent, as none of her male comparators were laid off and continue to work for Respondent. It is reasonable to assume that Complainant's age was a significant factor in her inability to find work. Moreover she continued to be unemployed and seeking work throughout the severe economic downturn beginning in 2007 which undoubtedly compromised her ability to secure employment. Complainant is currently involved in a joint venture to develop a start-up consultancy business, but has not realized any income as yet from this enterprise.

Complainant's annual compensation at the time of her termination was \$133,328. She was unable to find employment in 2007 and received income from unemployment compensation in the amount of \$17,250. In 2008 Complainant secured employment with Tiffany and earned \$24,042 from employment and received unemployment compensation in the amount of \$7,475. In 2009 Complainant earned \$32,250 from Tiffany. After her position at Tiffany was eliminated for reasons related to the poor economy, Complainant received \$9,226 in unemployment compensation in 2009. Since that time Complainant has been unable to secure employment and has received no further unemployment compensation. She has been able to survive by withdrawing funds early from her 401K paying a significant penalty, selling her home, living rent free in her family homestead, and relying on her sister for support. Subtracting complainant's unemployment compensation and interim earnings for the years at issue, I conclude that Complainant is entitled to back pay in the amount of \$116,030 for 2007; \$101,763 for 2008; \$91,804 for 2009; \$133,280 for 2010 and \$94,406.66 for 2011 for a total of \$546,283.66 in back pay damages. Complainant is also entitled to recoup the loss of benefits,

including \$5603.36 in health insurance costs and Respondents contribution to her 401K in the amount of 50% of 6% of her salary. Her lost benefits total \$21,451.85.

Complainant also asserts that she would have continued working at Respondent until age 66 and seeks front pay from the time of hearing until age 66. Given Complainant's age, (61 at the time of hearing) her longevity with the company and the limited opportunities for her to secure alternative employment given the severe downturn in the economy which continues to this day and into the foreseeable future, I find that she is an appropriate candidate for front pay and that such an award is reasonable. *See Haddad v. Walmart, Inc.* 455 Mass. 91(2009) (affirming 19 year front pay award where employee would have continued to work for same employer but for the discrimination and was unable to find comparable work) I find that Complainant is entitled to front pay in the amount of \$666,400 ($\$133,328 \times 5$ years) discounted to present value at a rate of 2.1 % based on the interest rate for municipal bonds at the time of hearing. (Testimony of Respondent's expert at Tr.1081-1082) Accepting the testimony of Respondent's expert that this is a reasonable discount rate Complainant's front pay award would be reduced by \$13,994.40 for a total of \$652,405.60. She is further entitled to an additional award of Respondent's future 401K contributions in the amount of \$19,992 also discounted at the rate of 2.1%.

I conclude that Complainant is also entitled to a significant award of damages for emotional distress she suffered as a direct result of Respondent's unlawful conduct. Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004).

Complainant was forthright, sincere, and articulate in testifying about how her termination and the adverse treatment leading up to it impacted her emotional state. I found her testimony to be credible and compelling. While her demeanor was generally quiet and composed her words forcefully conveyed how Respondent's unlawful actions made her feel disrespected, belittled and unappreciated and frustrated. I believe that she was devastated by her termination and the certainty that her gender was the reason. As a witness, Complainant's strength of character was fully on display and she was embarrassed at those moments when she lost her composure and cried while describing how diminished her life and sense of self are as a result of her termination. Complainant testified that she lost more than a job, but a career, the camaraderie of colleagues and clients, and a sense of purpose and identity that was defined by her professional accomplishments. She felt that her reputation in the industry was sullied and she is "damaged goods." Her confidence and self-esteem have crumbled and she is embarrassed and humiliated by having to rely on others for support. She was forced to sell her home and move into her family homestead. Complainant suffers from depression, the diagnosis of which pre-dated her employment with Respondent but I find her depression was exacerbated by her termination and she has continued to take Paxil and received medication for sleeplessness, which began after her termination. Complainant testified that she no longer goes out socially, feels her life lacks purpose, and feels like a "dead person." She expressed the pain and humiliation of seeing that her male colleagues still have careers with Respondent, have advanced in their professional lives and enjoy a life that she no longer has. It was evident at the hearing that she continues to suffer emotional harm to the present time. For the reasons stated earlier, I decline to credit the deposition testimony of Complainant's psychiatrist who testified that he came to believe she was doing fine.

In apportioning causation and I have considered that Complainant suffered from other events in her life at the time including the illness of her father and sister and loss of her parents. Clearly the years in question were very trying times for Complainant and her inability to find subsequent employment exacerbated her distress. While I believe these were factors that contributed to her distress, they do not diminish the role that Respondent's unlawful actions played in her emotional suffering, which I conclude is significant. I find that Complainant is entitled to an award of \$300,000.00 to compensate her for the emotional distress she suffered as a consequence of Respondent's actions.

V. ORDER

Consistent with the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered to:

- 1) Cease and desist from discrimination on the basis of gender in the provision of training, support, compensation and other opportunities for the advancement of females in its sales management force.
- 2) Pay to Complainant, Janis Switzer, the sum of \$546,283.66 for back pay damages with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.
- 3) Pay to Complainant the sum of \$652,405.60 for front pay damages.
- 4) Pay to Complainant the amount of \$41,443.85 for health insurance costs and lost 401K contributions, \$21,451.85 of which is for back benefits and \$19,992.00 for front benefits, the latter to be discounted at a rate of 2.1%.

- 5) Pay to Complainant, Janis Switzer, the sum of \$300,000.00 in damages for emotional distress suffered as a direct and proximate result of Respondent's unlawful conduct, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.
- 6) Provide to the Commission annually for the next 5 years commencing from the date of this decision the statistics by gender of its DSM sales force in the New England region, including information regarding the numbers of female sales managers hired, promoted, fired or laid off, and the dates of any such actions.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804CMR 1.23 by filing a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 25th day of September, 2012.

Eugenia M. Guastaferr
Hearing Officer