

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MAGGIE M. TORRES
Complainants

v.

DOCKET NO. 16-BEM-02782

NEW ENGLAND SPORTS
ORTHOPEDICS, SPINE &
REHABILITATION,
Respondent

Appearances:

Meaghan E. Murphy, Esq. & Kathryn S. Crouss, Esq. for Complainant
L. Alexandra Hogan, Esq. & Edward V. Sabella, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about September 12, 2016, Maggie M. Torres filed a complaint with this Commission alleging that Respondent discriminated against her on the basis of her gender and pregnancy in violation of M.G.L. c. 151B. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on September 23 and 24, November 4 and December 18, 2019.

After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Maggie Torres resides in Springfield, Massachusetts. After earning a G.E.D, she became a certified nurse's aide in 2012. She worked in that field off and on for nine years. She then attended Branford Hall, a trade school located in Springfield, where she earned a certificate in medical assisting in 2016. (V. I, p. 21)

2. Respondent New England Sports Orthopedics Spine and Rehabilitation is a physical medicine, pain management and rehabilitation facility with locations in Ludlow, MA and W. Springfield, MA. Dr. Maurice Bernaiche, an osteopath, is Respondent's sole owner and physician. In 2016, Respondent had 11 employees. (V. III, p. 41)

3. Bernaiche's practice focuses on managing multiple conditions including chronic pain through the use of injections, braces, and physical therapy. Patients taking pain medications are required to undergo urine toxicology testing to ensure that they are not abusing medication and are taking only prescribed drugs. (V.III, p. 41)

4. Respondent entered into an agreement with Branford Hall whereby Respondent would mentor students who participated in externships at Respondent's facilities and, in return, Respondent would hire such interns if openings were available. (V. III, p.44-45)

5. Respondent employs a company called STAT Personalized Health ("STAT") located in Rhode Island that acts as a liaison by connecting medical offices to medical testing companies. Kevin Moriarty, an owner of STAT, recommended that Respondent utilize the services of Molecular Testing Services ("MTL") a company which processed toxicology tests. STAT acted as a liaison between Dr. Bernaiche and MTL, which bills patients separately for the testing performed. Mark Bergeron, another owner of STAT, handled STAT's payroll, filing, taxes and all administrative matters. (V. II, p. 40)

6. From 2013, Respondent employed another third-party company called New England Practice Management ("NEPM") to handle its bookkeeping, payroll, billing and human resources. Tom Bogacz, an owner of NEPM, works out of Naples, Florida, visits Bernaiche's office several times a year and communicates with frequently with Bernaiche. Wendy Tanner is an employee of NEPM working out of W. Springfield, MA. Tanner testified that NEPM dedicated 10 to 15 hours per week to work for Respondent. (V. III, p.39; V. IV, p.5)

7. In March 2016, Complainant completed an externship at Respondent through Branford Hall. During her externship, Complainant learned how to perform the duties of a medical assistant as well as toxicology procedures, including obtaining specimens from patients, labeling and bagging specimens to be shipped to the testing site, completing requisition forms and logging in patients' test results when they were received. (V. I, p.23-24)

8. On March 18, 2016, following her externship, Complainant was hired in a dual role. Respondent hired Complainant as a medical assistant ("MA") and she was simultaneously hired by STAT to collect the urine samples of Respondent's patients for testing by MTL. All of Complainant's working hours were spent at Respondent's Ludlow office. Complainant performed well and was knowledgeable about her duties. (V. I, p.30)

9. At the time of Complainant's hire, Wendy Tanner interviewed her along with Bernaiche, assisted her with completing tax forms, and went over Respondent's general business code of conduct, including appropriate attire, cell phone use, cordiality to co-workers and acting in a professional manner. Tanner testified that she told Complainant to track separately the hours she performed work for STAT and the hours she worked for Respondent. (V. IV, p. 9-10)

10. Complainant was scheduled to work between 24 and 32 hours per week for STAT at the rate of \$14 per hour and six hours per week for Respondent at the rate of \$13 per hour. (V. II, p. 25; V. III, p. 30)

11. In late June or early July 2016, Respondent hired a lead Clinical Medical Assistant (“CMA”) who was Complainant’s supervisor for medical assistant duties but not for her urine toxicology duties.

12. Bernaiche testified he staggered the work hours of MAs and administrative staff so that the office could be open from 7:30 a.m. to 5:00 p.m. in order to accommodate patients’ work hours. He stated that Complainant was supposed to perform toxicology duties each day from 8:30 to 2:00 or 2:30 and to work her MA hours at the end of each day as the other employees’ day shifts were ending. Bernaiche testified that he advised Complainant how to break down her hours when she started working at Respondent, but did not review timecards on a daily or weekly basis. (V. III, pp. 49-52) I do not credit Bernaiche’s testimony that Complainant’s schedule was so stringently regulated. I find it implausible that Complainant would have been expected to adhere to such an artificially constrained schedule that strictly limited when she could perform work for Respondent since she worked all of her hours in Respondent’s facility under the direction of Respondent’s managers.

13. Complainant testified that she did not work set hours or days for either STAT or Respondent and that she was pulled away from her urine toxicology duties by her supervisor and directed to perform medical assistant duties, whenever needed. (V. I, p.27) I credit Complainant's testimony that she had no set hours as to when she could perform duties for STAT or Respondent.

14. STAT's owner Moriarty trained Complainant for her STAT toxicology position, providing her with a computer, teaching her how to access MTL's computer portal, how to complete the paperwork, how to mail the specimens to MTL and whom to contact at MTL with problems. He instructed her to send her STAT hours to Mark Bergeron at the end of the week. Moriarty and Bergeron explained to Complainant how to complete her timesheet. (V. II, pp. 20-23)

15. According to Bernaiche, Complainant was instructed to complete separate timesheets for STAT and Respondent. Bernaiche testified that the separate time sheets were important because, under federal anti-fraud laws, if a medical practice paid employees for the sole purpose of supporting a laboratory, this could be considered a kick-back scheme that might result in serious fines or shutting down of Respondent's business. (V. III, p.20)

16. On March 21, 2016, Sandy Viens was hired by Respondent as the office manager. Bernaiche knew Viens from working with her at a previous place of employment. As the office manager, Viens was responsible for daily oversight of

Respondent's staff which included disciplining employees. Viens worked for Respondent until November 27, 2018. (V. III, pp. 5-6)

17. STAT did not have its own timesheet form so Complainant used Respondent's timesheet for both employers. Every Friday, she emailed a timesheet to Mark Bergeron at STAT and gave a time sheet to Respondent's office manager Viens, who forwarded all the timesheets to NEPM, Respondent's payroll contractor. (V. IV, pp. 9-10)

18. Despite the majority of Complainant's hours being dedicated to the toxicology position with STAT, STAT did not control or monitor her attendance. STAT did not get involved with day-to-day employee issues and Complainant's time-off requests were never submitted to STAT, but to Respondent's office manager, Viens. Only when there was a serious matter did STAT get involved. (V.II, p. 5; V. IV, p.10)

19. Viens reviewed Complainant's timesheets that reflected the hours worked for Respondent weekly. Viens testified that she did not recall the exact breakdown of Complainant's hours but believed that Complainant worked 32 hours per week for STAT and eight hours per week for Respondent by an arrangement that was fashioned before she was hired by Respondent. She understood that Complainant was supposed to work Monday through Thursday for STAT and on Friday for Respondent, but this was not how Complainant worked in

practice. In practice, Complainant did not adhere to a strictly circumscribed schedule in performing work for Respondent, but would perform MA tasks as needed when requested by Viens or the lead CMA, whenever she had down time on any day of the week. (V. III, p.11) I credit her testimony. The entry of Complainant's hours on her timesheets also did not reflect how she actually worked.

20. For the first seven weeks of her employment, Complainant submitted identical or near identical timesheets to both Respondent and STAT for her total hours worked, billing both employers for the same hours and receiving pay for twice as many hours as she worked. On some weeks she submitted slightly different time sheets to each employer but, nonetheless, she overbilled both Respondent and STAT. For example, on April 9, 2016, Complainant submitted a timesheet to Respondent for 26.05 hours and to STAT for 30 hours for a total of 56 ½ hours; on April 23, 2016, she submitted a time sheet to Respondent for 30 hours and to STAT for 29.55 for a total of 59.55 hours; and on May 7, 2016, she submitted a time sheet to Respondent for 24 hours and to STAT for 30 hours for a total of 54 hours. (V. I p. 38, 140-142; V. II, p. 35-37; Ex. C-1; C-2)

21. There were seven pay periods from March 26, 2016 through May 2016 wherein Complainant was overpaid. Between STAT and Respondent,

Complainant was paid approximately \$700.00 per week, which was nearly double the amount she should have been paid. (V. I, pp.141-143)

22. Bernaiche testified that in May 2016, Sandy Viens informed him that there was a discrepancy with Complainant's timesheets. Thereafter, he examined her timesheets and observed that Complainant was attributing anywhere from 28 to 37 hours of work per week to Respondent, which was far more than the six hours per week she was hired for and scheduled to work for Respondent. Bernaiche was concerned about this because if STAT paid Complainant for hours that she actually worked for Respondent, his business could run afoul of anti-kickback laws. After discussing the matter with Bernaiche, Viens informed Complainant that she was filling out her timesheets incorrectly and was being overpaid. (V. III, pp. 18-19; 72-73) Viens also brought the matter to the attention of Wendy Tanner of NEPM and Kevin Moriarty of STAT who met with Bernaiche and Viens to determine what should be done to address the matter. (V. III, pp. 16-17)

23. Moriarty testified that STAT did not review or question the hours employees submitted to them, and had never seen the timesheets Complainant provided to Respondent. Moriarty first learned of the issue when Viens called to tell him that Complainant was submitting hours to STAT and Respondent that did not reflect her actual hours worked for either employer. (V. II, pp.33-38)

24. On May 18, 2016, after discussions among Bogacz and Tanner of NEPM and Moriarty of STAT, Moriarty met with Viens to address the issue of Complainant's inaccurate timesheets. Later that same day, Complainant met with Bernaiche, Viens, Tanner and Moriarty who confronted her about overbilling. Complainant appeared very upset and cried at the meeting. (V. II, p. 38-39)

25. Complainant testified that Viens and Tanner explained to her that she was filling out her timesheets incorrectly and that she had been overpaid. They instructed her to submit time sheets to Respondent for only six hours per week and to bill the remainder of her time to STAT. (V. I, p.153)

26. Complainant knew that STAT paid her \$14.00 per hour and Respondent paid her \$13.00 per hour, and she knew that her total weekly wages from the two employers should have been \$370.00. She testified that she did not notice that she was receiving about \$700.00 per week because her checks were direct deposited into her checking account and she did not regularly check her account balance or her pay advices. (V. I, p. 49) I do not credit Complainant's testimony that she was unaware of being overpaid. I find it implausible that Complainant did not notice for nearly two months that her pay was double what she expected to earn.

27. Moriarty met with Bernaiche after the meeting with Complainant. Moriarty testified that he believed Complainant had made a "bad choice" by intentionally falsifying her timesheets but Bernaiche wanted to give Complainant a

second chance. Bernaiche proposed that Complainant work off the hours that she had improperly charged to Respondent. (V. II, p. 39-40) Bernaiche testified that he discussed terminating Complainant's employment with the others but decided to give Complainant a second chance because she was a struggling single mother who was good at her job, and training someone to replace her would be difficult and costly. (V. III, pp.76-77; V. IV, p.17)

28. At a subsequent meeting with Complainant, Viens, Tanner and Moriarty, Moriarty explained to Complainant that she could not bill both employers for hours worked for each respectively. She was also informed that in return for agreeing to repay the money she owed Respondent, her employment would not be terminated. (V. I, p. 153)

29. On May 23, 2016, Complainant, Viens and Bernaiche signed a written agreement, drafted by Tanner, acknowledging that Complainant mistakenly submitted incorrect time sheets to payroll, overstated her hours and had been overpaid. She stated, "I am willing to work off the 158 hours in question. Commencing this week ending May 20, 2016 I will work for Dr. Bernaiche 6 hours a week for 26 weeks ending on November 11, 2016 in order to work off the amount overpaid." (V. I, pp.153-155; Ex. C-3)

30. Moriarty testified that STAT did not pursue the overpayment because the vast majority of hours inappropriately billed for were charged to Respondent

and STAT did not have time to pursue the minimal amount of overpayment charged to them. (V. II, pp. 42, 68-69)

31. It was agreed that, from then on, Complainant would complete separate time sheets for Respondent and STAT and that upon receipt of Complainant's STAT time sheet every Friday, Bergeron would forward it to Viens, who would cross check it with Complainant's timesheet to Respondent to ensure there was no overbilling. (V. II, p.45-46)

32. Subsequent to signing the repayment agreement, Complainant would sometimes note on her time sheet that she had performed six hours of work for Respondent all on one day of the week, as instructed by Viens. Viens knew that Complainant did not work those six hours for Respondent on one day only, but generally assisted Respondent with MA duties whenever requested by the lead CMA or Viens. (V. II, p.5)

33. Even though Complainant continued to record her six hours of work per week for Respondent, she was no longer receiving a paycheck from Respondent because she was working off the hours owed.

34. Viens testified that she continued to review Complainant's time sheets for Respondent after the agreement was signed, but she denied receiving or reviewing emailed timesheets from Bergeron at STAT. (V. III, pp. 22-24) I do not

credit her testimony as it contradicted the more credible testimony of Moriarty as confirmed by the emails that Bergeron forwarded to Viens. (V. II; Ex. R-13A-K)

35. On May 26, 2016, Complainant underwent an ultrasound that confirmed she was pregnant. The ultrasound also revealed that she had an ovarian cyst that would require monitoring. Shortly thereafter, she informed Viens and Bernaiche of her pregnancy. She told Bernaiche that she planned to take an eight-week maternity leave and he expressed approval, stating that the office could cover her absence and she could return to work following her leave. (V. I, p. 116; Ex. R-11)

36. The procedure for taking time off from Respondent was to fill out a request form and submit it to Viens for approval. There was no corresponding procedure or form required by STAT for taking time off and STAT did not monitor Complainant's attendance. (V. I, p.53; V.II, p. 81)

37. Complainant provided as much advance notice of needed time-off as possible and Viens had always approved her time-off requests. Complainant was never warned about taking excessive time off. (V. I, pp.60-61; V. II, pp.118-119) Viens testified that she was not responsible for finding coverage for Complainant when she took time off and that the responsibility for doing so fell to the CMA. (V. III, pp. 27-28)

38. Of the twelve times Complainant requested time off from May 13, 2016 to August 11, 2016, three or four were for medical appointments. All but three of her requests for time off were submitted in advance of the date requested.

39. During the week ending June 4, 2016, Complainant billed the same six hours worked on Tuesday June 1st to Respondent and STAT. (V. I, p.49; Exs. C-1-K; C-2-K)

40. During the week ending June 11, 2016, for Monday, June 6, Complainant billed Respondent for 6 hours and STAT for 6 ½ hours. At the public hearing, she acknowledged that she did not work the reported hours for each company on the same day, and stated that it was a mistake. (V. I, p. 49; Exs. C-1-L and C-2-L)

41. During the week ending June 25, 2016, Complainant billed STAT for 7 ½ hours on Tuesday, June 22nd and billed Respondent for an additional six hours on that same day. Thus, she was billing STAT for hours she worked for, and owed to, Respondent for which she otherwise would not have been paid. Complainant acknowledged that she did not actually work 13 ½ hours on June 22nd and was not sure why she double billed for that day. (Ex; C-1-N; C-2-N; V. I, p.8)

Complainant's testimony with regard to the discrepancies in billing was not credible.

42. During the week of July 2nd, Complainant submitted separate timesheets purporting to have worked 6 hours for Respondent and 7 ½ hours for STAT on Monday June 28th. (Ex.C-1-0; C-2-0; C-2-P) Viens noticed the discrepancy and notified Complainant who forwarded a corrected timesheet to STAT.

43. Bernaiche testified that in late June, 2016, Viens brought to his attention that Complainant was again overbilling, and that he considered this a “second offense.” Bergeron and Tanner were on vacation during the summer and they spent a lot of time playing “telephone tag,” so he did nothing more about the information at the time. (V. III, pp.85-90)

44. Moriarty testified that in July or August, 2016, Viens called him while he was on vacation to say that there was another problem with Complainant’s stealing time and she “had to go.” (V. II, p. 217) Bogacz testified that in late July, 2016 he learned that Complainant was again falsifying her time sheets. (V. IV, p.10)

45. Complainant testified that on August 10 or 11, 2016, Viens and the CMA called her into the break room for a meeting. According to Complainant, the CMA told her that she was upset because Complainant and other office staff were acting cliquishly and appeared to be talking about her behind her back, a belief that Complainant told her was “absurd.” Complainant testified that the CMA also raised the issue of employees’ excessive cell phone use and singled out

Complainant as a problem cell phone user although, according to Complainant, other employees also used cell phones during work hours. The meeting ended with an understanding that cell phone use would no longer be permitted in the workplace. (V. I, p. 45) I credit her testimony about what was discussed in this meeting.

46. Bernaiche testified that on Thursday August 11, 2016, the day before Complainant's termination, Complainant came in late which upset the CMA and "roiled the whole office." Bernaiche told the CMA that she would be instructed to fire Complainant the next day for reasons related to her time-keeping issues. (V. III, pp. 86-89)

47. On Friday, August 12, 2016, Complainant arrived at work and began to perform her usual duties. Between 11:00 to 11:30 a.m., she was called into the break room for a meeting with the CMA and Viens. She testified that the CMA informed her that she was being terminated due to her poor attendance for doctor's visits and other reasons. The CMA said that they understood that Complainant had many scheduled doctor's appointments, that kids get sick, and "life happens," but they needed someone more reliable. I credit her testimony. (V. I, pp. 102-103, 138)

48. Complainant responded that she felt she was being treated unfairly because her requests for time off had been approved by Viens well in advance and

she had provided doctor's notes when required for family medical appointments. The CMA told Complainant that the decision to terminate her employment was made before the CMA began working there. Complainant asked to speak to Bernaiche, however Viens told her that Bernaiche was in the West Springfield office and unavailable. When Complainant refused to leave until she spoke to Bernaiche, Viens called him and relayed to Complainant that Bernaiche did not wish to speak to her and wanted her out of the office by noon. Complainant then finished what she was working on, gathered her belongings, placed her office key and timesheet on her desk and left the building.

49. Before leaving the break room, Complainant asked Viens for copies of her time-off request forms and a letter of termination. Viens refused to give her the requested items, but Complainant received a termination letter days later.

50. Viens testified that she could not recall when the decision to terminate Complainant was made, nor could she recall who made the decision to terminate Complainant or whether she was involved in the matter. (V. III, pp. 29-31) I do not credit her testimony in this regard.

51. Complainant's friend and former co-worker, Tatiana Thomas, testified that Viens frequently made remarks to others about Complainant's having falsified her timesheets. According to Thomas, on the day Complainant was fired, Viens pulled Thomas into the break room to say that Respondent had terminated

Complainant's employment because she had too many unexcused doctor's appointments and because she had "messed up" on her time sheets. (V. II, pp.123-126) I credit Thomas's testimony that this is what Viens told her.

52. Complainant understood that her termination by Respondent effectively ended her employment with STAT because the toxicology position was contingent on her continued employment with Respondent. I credit her testimony.

53. Following her termination, Complainant contacted Bergeron and Moriarty at STAT to request a letter of termination in order to provide evidence of her status to the Department of Unemployment Insurance. At the time of her termination, Complainant was approximately four and one-half months pregnant.

54. Moriarty was never told by anyone at Respondent that Complaint was terminated from her position with Respondent for taking excessive time off or for engaging in office small talk. Moriarty also testified that he did not know Complainant was pregnant during her employment at Respondent. (V. II, pp.53-54) He also asserted that STAT made no independent decision about whether to terminate Complainant and that STAT would not have automatically terminated her employment after her termination from Respondent. However, he testified that based on Complainant's timesheet issues, even if STAT had had an available

position in the area, he probably would not have placed her anywhere else.¹ (V. II, pp.56-57) I credit his testimony.

55. Tatiana Thomas has been friends with Complainant for nine years and they attended Branford Hall for medical assisting training at the same time. After completing an externship at Respondent, in March 2016, Thomas was hired by Respondent as an administrative assistant with occasional MA duties. Thomas testified that, on one occasion, Viens pointed out a mathematical error on her time sheet which she then corrected. (V. II, pp.103,105-6,109)

56. Thomas became pregnant while employed by Respondent. When she informed Viens of her pregnancy, Viens replied, "Oh my goodness, why would you do that? Now I'm going to have to find someone to fill your spot." Thomas continued to work at Respondent and attend pre-natal medical appointments. She began her maternity leave on March 17, 2017. Respondent hired an older woman to replace her. According to Thomas, when she attempted to return to work at the expiration of her six-week leave, Viens told her that business was slow and

¹ Following her termination, Complainant collected unemployment benefits and testified that she was unable to find work for the duration of her pregnancy. After her baby was born in January 2017, her pediatrician recommended for that he be cared for in a home setting rather than in a day care center. She next worked in September 2017 as a home health aide until the end of October 2017, when she had to leave the job because she had no working vehicle. I do not credit her testimony with regard to the reasons why she did not secure subsequent employment and found it to be vague and unconvincing.

Respondent could offer her only per diem hours. I do not credit this testimony for the reasons stated below.

57. Thomas testified that she reluctantly signed a paper agreeing to work as a per diem employee because Viens, in essence, implied if she did not, she would not have a job. I do not credit this testimony. When asked on cross-examination if she initially raised the subject of possibly of working per diem with Bernaiche, Thomas stated that she did not recall. (V. II, p. 167) Thomas began a full-time college program at Bay Path Jr. College in September 2017, and has not worked full time since then. I do not credit Thomas' testimony that she reluctantly agreed to work per diem, but find that she requested to work per diem because she planned to attend school full-time and did not want to work full-time. Thomas also testified that Viens instructed her to call in to ascertain if hours were available, but each time she called she was told there was no work for her. She also claimed that sometime around September 2017, the CMA told her that Respondent had not planned on returning her to her previous position after her maternity leave. (V. II, pp 129-130, 176-177; Ex. R-15) I do not credit her testimony

58. Bernaiche testified that some months after Complainant's termination, the CMA in question spread false rumors about his intention to fire a pregnant employee. In early 2018, this employee, M.B., came to him in tears stating that the CMA had informed M.B. that Bernaiche intended to fire M.B. because he was

starting a new company and because M.B. was pregnant. Bernaiche testified that this was untrue and he informed M.B. that it was untrue. He testified that he fired the CMA because of this incident and M.B. remains employed by Respondent. (V. III, pp. 64-66)

59. Bernaiche testified that months after Complainant's termination, he overheard the CMA and Thomas discussing how Viens made negative comments about children and the difficulties women with children presented to the office. He testified that no one ever complained directly to him, but if they had, he would have investigated whether Viens made such comments. (V. III, p.61)

60. Viens testified that she informed the CMA of her termination in early 2018 but could not recall the circumstances surrounding the CMA's termination or if anyone else at Respondent was involved. I do not credit her testimony that she had no memory of the circumstances surrounding the CMA's termination. (V. II, p.55)

III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to discharge an employee because of her sex. Discrimination based on pregnancy has long been held to be discrimination based on gender. In reaching that

determination the SJC stated, "Pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because of her pregnancy or the requirement of a maternity leave are considered sex discrimination." School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); Carmichael v. Wynn & Wynn, 17 MDLR 1641, 1650 (1995); see also, Serrano & Atty. General of the Commonwealth v. Cataldo Ambulance, 41 MDLR 90 (2019) (termination of employee after hospitalization for pregnancy related complications held to be unlawful sex discrimination); Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled pregnancy because of fears of further absences and coverage during leave deemed unlawful sex discrimination)

An employer may not, therefore, take adverse actions based a woman's pregnancy including, refusal to hire or promote, discharging or laying off, failing to reinstate or restricting duties. An employer may not, moreover, force a pregnant woman to take leave prior to giving birth if she is willing to continue working." MCAD Maternity Leave Guidelines, VI. Sex Discrimination Issues Arising Under M.G.L. c. 151B.

Complainant alleges that her employment was terminated on the basis of her pregnancy. She announced her pregnancy to Respondent's managers sometime in late May or early June of 2016. Thereafter she took time off for regular pre-natal medical visits as well as for other, non-pregnancy-related matters. Most of her requests for time off were made in advance and were always granted. After she announced her pregnancy, two more incidents wherein she over-billed for time worked were uncovered. Complainant was terminated in August of 2016, while in her fifth month of pregnancy.

Respondent asserts that it terminated Complainant's employment for reasons related to fraudulent time-keeping and excessive requests for time off. The evidence in this case supports a conclusion that Respondent had "mixed-motives" for terminating Complainant's employment. Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainant carries her initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" even without the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist.

Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299. In mixed-motive cases, where there is some direct evidence of an illegitimate motive, Respondent must prove that the lawful motive was the but-for reason underlying the action. Wynn & Wynn, at 668.

Complainant has proven that a proscribed motive played a role in her termination. She presented both direct and indirect evidence of sex discrimination on the basis of pregnancy. There was evidence of statements made by Viens indicating bias against pregnant employees and working women with children and she testified that the CMA informed her that she was being terminated due to her poor attendance in part for pre-natal doctor's visits for herself and her children's illnesses. I also am led to believe that Complainant's pregnancy was a factor in the decision based on Viens's implausible testimony that she could not recall the circumstances surrounding Complainant's termination or the reasons therefore. I find it entirely implausible that the facts surrounding Complainant's termination would be forgotten by the office manager involved in the decision, particularly where Complainant was charged with stealing time on more than one occasion and where her purported excessive absenteeism "roiled the office." I draw the reasonable inference that Viens's reluctance to be forthcoming about her role in the

termination or the reasons therefore was because it was motivated in part by Complainant's pregnancy. In addition, Bernaiche's testimony surrounding Complainant's termination evidenced that Complainant's pregnancy and child care related absences caused her supervisors some consternation. It is reasonable to conclude that Bernaiche and Viens attempted to downplay or cover-up the fact that Complainant's pregnancy and child-care related absences were a factor in her termination. Thus, Complainant has proven by a preponderance of the evidence that a proscribed motive played a role in her termination and the burden of persuasion now shifts to the Respondent who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive.

Respondent denied that Complainant's pregnancy was a factor in its decision to terminate her employment. Bernaiche claimed that Complainant's employment was terminated because of a second incident of falsifying her time sheets and overbilling for work she had not performed. This was after she was paid significantly more than she was owed over a period of months and promising to work six hours a week for free to pay off the debt owed to Respondent. Respondent has thus met its burden of articulating a legitimate, nondiscriminatory reason for the termination that is unrelated to Complainant's pregnancy. It must

also by prove that it would have made the same decision to terminate Complainant's employment even without the illegitimate motive. Another way of stating this is that the lawful reason articulated, i.e. Complainant's fraudulent time-keeping was the but-for cause of her termination.

Notwithstanding that the fact that Complainant's termination was likely motivated in part by concerns about her pregnancy and absenteeism, Respondent has met its burden to prove that her repeated fraudulent activity surrounding her time-keeping was the but-for causation for her termination. The evidence leads me to conclude that despite the likely existence of a dual motive for Complainant's termination, her repeated manipulation of timesheets and stealing money from Respondent was the primary reason motivating her termination, and that but-for that unscrupulous behavior, she would not have been terminated. Bernaiche told the head CMA the day before the termination that the reason was her time-keeping. Respondent has persuaded me that it would have terminated Complainant's employment for this reason, even had she not been pregnant, and that her pregnancy alone would not have resulted in her termination. There was evidence that Bernaiche was very concerned after additional incidents of fraudulent time keeping were uncovered in June of 2016 and that Respondent was somewhat lax in determining what action to take during the summer months

because communication with the other parties was difficult due to vacation schedules. There was testimony that Viens called Moriarty while he was on vacation to say that there was another problem with Complainant's stealing time and she "had to go." But due to vacations, there was a lot of time with the parties playing "telephone tag" and the issue did not get resolved expeditiously.

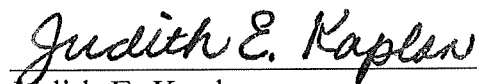
There are additional factors to indicate that Complainant's fraudulent representation of her hours played a significant role in Respondent's decision to terminate her employment. Bernaiche repeatedly testified about his concern that Respondent could be viewed as running afoul of anti-fraud laws by appearing to benefit from Complainant's dual employment and the improper record keeping surrounding her hours. His repeatedly expressed concerns regarding this issue support the conclusion that Complainant's consistent failure to adhere to reporting requirements that properly segregated her work hours for each employer increased Bernaiche's fear that his company could be found to be in violation of the law and reinforce that this was a significant factor motivating her termination. Given these overriding concerns, it is reasonable to draw the inference that the likely reason Respondent opted for a repayment agreement in lieu of terminating Complainant's employment in May, when it first discovered the overbilling was to avoid any appearance that Respondent had paid Complainant for toxicology work, which was impermissible.

Given all of these considerations, I conclude that Respondent's actions were motivated primarily by non-discriminatory reasons that would have resulted in termination regardless of Complainant's pregnancy, or any expressed discriminatory animus by Viens. Thus, I conclude that Respondent's termination of Complainant's employment was not unlawful discrimination in violation of M.G.L.c.151B.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that the above matter is hereby dismissed.

So Ordered this 17th day of June, 2020.



Judith E. Kaplan
Hearing Officer