

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PATRICIA D. KANE
Complainants

v.

Docket No. 04 SEM 00259

COLLEGE CENTRAL NETWORK, INC.,
Respondent

Appearances: Jerrold Levinsky, Esq. and Smriti Rana, Esq., for Complainants

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 19, 2004, Patricia D. Kane (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was subjected to discrimination by Respondent on the basis of sex (pregnancy/maternity related).

The MCAD issued a probable cause finding on September 21, 2005 and certified the case for public hearing on June 21, 2007. A public hearing was conducted on October 22, 2007. Respondent was notified of the hearing but failed to attend. An Order of Entry of Default was made by Commissioner Ebel on July 23, 2008 and the hearing proceeded as a default hearing.

Prior to rendering a decision in this matter, Commissioner Ebel left the employ of the Commission and, pursuant to 804 CMR 1.21, I was appointed as successor Hearing

Officer to render proposed findings of facts, conclusions of law, and an order. Since Respondent did not appear at the public hearing, the record reflects no disputed issues of fact that require determinations regarding credibility.¹

Complainant testified at the hearing as did Michelle Shirey. Complainant introduced seven (7) exhibits into evidence. Based on Complainant's unrebutted, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Patricia D. Kane resides in Millville, MA. She began working for Respondent in September of 1999 on a contractual, hourly basis. In April of 2000, Complainant began working full time for Respondent as a Regional Manager at a salary of \$46,000.00.
2. Respondent College Central Network, Inc. provides electronic communication support ("application services") to community colleges and schools of art and design. Complainant Exhibit's 3 & 6. As of 2003, Respondent had contracted with approximately 230 schools in 34 states. Id. At the time Complainant filed her charge of discrimination, Respondent's mailing address was 141 W. 28th St. 9th Floor, New York, New York, 10001-6115. While Complainant worked for Respondent, the Company's President was Mark Mancini, its Vice President/Supervisor of Regional Managers was Mike Baldiga, and its Regional

¹ Appointing a substitute hearing officer to issue a decision based on the record in the event the original hearing officer is unable to do so, under G. L. c. 30A, Section 11 (7), and MCAD rule Section 1.15(6), "is only acceptable and reasonable where the credibility of witnesses is not at issue. Salem v. Massachusetts Commn. Against Discrimination, 404 Mass. 170 at 174-175.

Managers were: Complainant, Michelle Shirey, and two or more others.

Altogether, Respondent had eight to ten employees on staff.

3. Complainant worked out of her home. Respondent provided her with a phone, an internet connection, a laptop, and a combination printer/fax. Complainant's job consisted of obtaining clients, creating databases of college career centers, performing demonstrations, training and supporting clients, and engaging in product development.
4. At the time of hire, Complainant resided in Westminster, Maryland. At some point prior to 2001, she moved to Massachusetts. Complainant testified that she was responsible for a region consisting of Maryland, Pennsylvania, Delaware, Rhode Island, Connecticut, Maryland, Maine, Vermont, California, Oregon, and Washington.
5. Regional Manager Michelle Shirey, who was hired in June of 2000, lived and worked in Lancaster, Pennsylvania. She testified that she was responsible for eastern Pennsylvania, New Jersey, Maryland, Delaware, Hawaii, Arizona, and Florida.
6. After becoming co-workers, Shirey and Complainant communicated daily or every other day.
7. At no time during her employment was Complainant's work ever criticized by Respondent. None of Complainant's supervisors expressed any problems with her performance or productivity. According to Complainant, she was occasionally told by Company President Mancini that she was doing a great job.

8. Complainant became pregnant for the first time in July of 2001. Complainant requested maternity leave and was informed that she could take four weeks of maternity leave and receive compensation equal to one week's salary.
Complainant's Exhibit 1.
9. Prior to announcing her first pregnancy, Complainant had been asked by her supervisor Mike Baldiga to attend a conference of southeastern state colleges in Hilton Head, South Carolina. Complainant was to stand at a booth and sell Respondent's products and services. She had previously attended similar conferences. After Complainant announced her pregnancy, Baldiga informed her that she could not attend the conference and that Shirey would attend instead.
When Complainant asked why, Baldiga told her that the situation had changed.
10. Complainant went out on maternity leave on April 16, 2002. She returned to work after four weeks.
11. Complainant became pregnant for a second time in January of 2003. She testified that at the end of May of 2003, she called Baldiga and informed him of her pregnancy. During this conversation, Baldiga stated that Complainant would not be travelling anymore. According to Complainant, she responded that she could still travel despite her pregnancy.
12. Complainant testified that after she notified Respondent of her second pregnancy, the Company diverted work away from her. Complainant claims that internet leads that should have been directed to her were given to other people. Shirey testified that Baldiga expressed concern about Complainant's ability to travel.

13. At some point after announcing her second pregnancy, Complainant was told that she could take no more than four weeks of maternity leave and could not use any sick time towards her maternity leave. Complainant had received five days of sick pay during her first maternity leave pursuant to Company policy outlined in Complainant's Exhibit 1.
14. During the latter part of her second pregnancy, Complainant received a telephone call from Company President Mancini. He said that he needed her "on board" to reach team goals and commented that, "All I know is when my sister had a baby, she couldn't wait to get back to work." Complainant testified that she felt pressured by this comment to return to work in four weeks.
15. On September 10, 2003, Complainant sent Baldiga an email stating that she intended to take an eight-week unpaid maternity leave beginning in October of 2003 when her baby was born. Complainant's Exhibit 4. In addition, Complainant asked to return to work three days a week for a "transition period" through March 1, 2004. Id.
16. Complainant gave birth on October 7, 2003 and began her second maternity leave at that time.
17. While Complainant was on maternity leave, Respondent deleted her name from the list of Regional Managers in Respondent's electronic newsletter, inserted Baldiga's name in her place, stopped making lease payments on Complainant's car, and shut off Complainant's work cell phone. On or around December 2, 2003, Complainant was locked out of the Company's intranet and email systems.

18. Complainant attempted unsuccessfully to return to work on a three-day a week basis on December 3, 2003. She called Baldiga and told him that she was locked out of the Company's intranet and email systems. Baldiga contacted Complainant later that day to say that Respondent was closing her regional office in order to cut expenses and was laying her off. Complaint's Exhibit 3 at 3.
19. Subsequent to Complainant's layoff, she made repeated requests that Respondent reimburse her for wages allegedly due her and informed Respondent that she intended to file a complaint with the Massachusetts Attorney General. Complainant's Exhibit 5. The Company responded via email asking, "Are you threatening the company?" Id.
20. A day or two after Complainant was laid off, Regional Manager Michelle Shirey was informed by Baldiga that she did not have to worry about losing her job, that the situation with Complainant was an isolated one, and that her job was safe, but several weeks later, Baldiga called her to say that Respondent was closing Shirey's office in Lancaster, Pa. and laying her off. According to Shirey's testimony at public hearing, when she reminded Baldiga that he had previously said there were no concerns about her continued employment, he responded by saying, "Things have changed because of the situation with Patti [Complainant], [and] we must close your office." Shirey interpreted this to mean that the Company needed to lay off another Regional Manager in order to bolster its claim that laying off Complainant was due to financial constraints.

21. According to Shirey, her sales record was better than any other Regional Manager, she received positive feedback from clients, and she never received any negative feedback from her supervisors about her performance or productivity.
22. When Complainant found out that she was terminated, she was extremely upset. Complainant had never before lost a job. She testified that she was not able to function normally for a period of time. Complainant testified that she was passionate about her job and that her career was very important to her. Complainant had trouble eating and lost weight after she was terminated. Complainant testified that her ability to nurse her newborn was adversely affected by her emotional reaction to being terminated and that her difficulty nursing negatively impacted her relationship with her baby. Complainant felt stressed and was not able to give her newborn baby or other young child the full attention that they needed.
23. Complainant testified that at the time she lost her job, she was earning \$47,360.00. Immediately after she lost her job, she began to look for a new job. Complainant looked for work in the same field and in other fields. She pursued informational interviews to locate job opportunities and obtained a real estate license. Complainant began to work as a real estate agent in June of 2004. Complainant received unemployment compensation for twenty-six (26) weeks in the amount of \$13,680.00. Complainant's earnings as a real estate agent are as follows: \$16,454.00 in 2004; \$18,996.75 in 2005; \$22,000.00 in 2006; and approximately \$7,000.00 in 2007, up to the date of hearing.

III. CONCLUSIONS OF LAW

M. G. L. c. 149, sec. 105D requires employers to provide eight weeks of maternity leave to full-time female employees with the right to return to the same or similar position. Pursuant to M. G. L. c. 151B, sec. 4 (11A), it is an unlawful practice for an employer to refuse to restore such employee to the same or similar position following such leave or refuse to allow such employee to use accrued sick leave concurrently with maternity leave. See MCAD Guidelines on the Massachusetts Maternity Leave Act, IV (C) (2).

Complainant presented credible, un rebutted evidence that after she informed her supervisor in May of 2003 that she intended to take an eight-week unpaid maternity leave beginning in October of 2003, she was informed that she could not use accrued sick time to cover her absence and was pressured by Company President Mancini to return to work in four weeks. During her maternity leave, Complainant had her name deleted from the list of Regional Managers in Respondent's electronic newsletter, her work cell phone shut off, her leased car payments terminated by the Company, and her internet access to the Company cut off. When Complainant attempted to return to work, she was informed that Respondent was closing her regional office and was laying her off even though her work was never criticized and Respondent's President told her she was doing a great job. Other regional managers, with the exception of Michelle Shirey, were retained in employment. These actions constitute a prima facie case of discrimination under the Massachusetts Maternity Leave Act, Chapter 149, sec. 105D. See Weber v. Community Teamwork Inc., 434 Mass. 761 (2001) (prima facie case requires showing that

Complainant is member of protected class, was performing acceptably, was terminated, and circumstances raise reasonable inference of discrimination).

Once Complainant establishes a prima facie case, the three-part burden shifting paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) requires that Respondent, at stage two, articulate a rationale and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). Respondent defaulted and therefore failed to fulfill its burden at stage two. Accordingly, Complainant is entitled to prevail on her Massachusetts Maternity Leave Act claim.

Apart from violating the Massachusetts Maternity Leave Act, Respondent's termination of Complainant also constitutes sex discrimination under M.G.L. c. 151B, section 4 (1). That provision makes it an unlawful practice to refuse to hire or to discharge an employee because of the employee's sex. Since pregnancy and childbirth are sex-linked characteristics, actions by an employer which "unduly burden" an employee because of pregnancy or childbirth have a discriminatory impact related to sex. See MCAD Guidelines on the Massachusetts Maternity Leave Act (2000) *citing* School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979) and White v Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997) *quoting* Lane v. Laminated Papers, Inc., 16 MDLR 1001, 1013 (1994); *see also*, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled pregnancy because of fears of additional absences deemed unlawful sex discrimination).

Where, as here, Complainant presents indirect evidence of sex discrimination, a prima facie case requires a showing that Complainant: 1) is a member of a protected class, 2) was performing her job at an acceptable level, 3) was terminated, and 4) the circumstances of the removal raise a reasonable inference of such discrimination. See Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 41 (2005) (retention of lower-rated, similarly-situated male attorneys rather than a female attorney during a reduction in force is sufficient to satisfy fourth prong of prima facie case); Weber v. Community Teamwork Inc., 434 Mass. 761 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000).

There is no dispute that the first three requirements of a prima facie case are satisfied by evidence that Complainant was a competent employee with no record of performance problems who was terminated by Respondent approximately four weeks after the commencement of her second maternity leave. For the reasons set forth below, there is also sufficient evidence to support the forth prong of a prima facie case, i.e., circumstances raising a reasonable inference of discrimination based on sex.

The uncontroverted evidence establishes that following the announcement of Complainant's second pregnancy, Respondent terminated Complainant's business travel, diverted work from Complainant to other employees, pressured her to return to work in four weeks, refused her request to use sick time to cover part of her leave, and terminated her employment rather than permit her to return to work. There is no evidence that the same or similar restrictions were placed on male employees who required time off. Accordingly, these circumstances give rise to an inference of discrimination.

Respondent defaulted at public hearing and, thus, failed to offer evidence to rebut Complainant's allegations. Respondent also failed to rebut testimony by Michelle Shirey that she was the Company's leading salesperson in 2003 and was laid off to buttress Respondent's specious defense of downsizing. Based on the foregoing, Complainant is entitled to prevail on her claim of sex discrimination under M.G.L. c.151B, section 4 (1).

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Lost Wages

At the time she lost her job, Complainant was earning approximately \$47,360.00. Immediately after she lost her job, she began to look for a new job. Complainant looked for work in the same field and in other fields. She pursued informational interviews to locate job opportunities and obtained a real estate license. Complainant began to work as a real estate agent in June of 2004. Complainant received unemployment compensation for twenty-six (26) weeks in the amount of \$13,680.00. Complainant's earnings as a real estate agent are as follows: \$16,454.00 in 2004; \$18,996.75 in 2005; \$22,000.00 in 2006; and approximately \$7,000.00 in 2007, up to the date of hearing. Based on the evidence presented by Complainant, she is entitled to \$111,310.00 in back pay.

Emotional Distress Damages

Complainant's entitlement to an award of monetary damages for emotional distress does not need to be based on expert testimony; it can be based solely on her testimony as to the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

When Complainant found out that she was terminated, she was extremely upset. Complainant had never before lost a job. She testified that she was not able to function normally for a period of time. Complainant testified that she was passionate about her job and had moved up the Company's ranks very quickly. Her career was very important to her. Complainant had trouble eating and lost weight after she was terminated. Complainant's ability to nurse her newborn was adversely affected by her emotional reaction to being terminated and her difficulty nursing negatively impacted her relationship with her baby. Complainant felt stressed and was not able to give her newborn baby or other young child the full attention that they needed. Based on the foregoing, I conclude that Complainant is entitled to \$35,000.00 in emotional distress damages.

V. ORDER

This decision represents the final order of the Hearing Officer. Respondent is hereby ORDERED to:

- (1). Cease and desist from engaging in discrimination based on age and handicap.
- (2). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$111,310.00 in lost income, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (3). Pay to Complainant, within sixty (60) days of this decision, the sum of \$35,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 21st day of October, 2010.

Betty E. Waxman, Esq.
Hearing Officer

