

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
REBECCA HAMMOND,
Complainants

v.

DOCKET NO. 08-BEM-01063

CAROL O'LEARY RESIDENTIAL
CLEANING SPECIALISTS & CAROL
O'LEARY,
Respondents

Appearances:

Lisa S. Carlson, Esq. for Complainant Rebecca Hammond
Thomas J. Canavan, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about April 18, 2008, Complainant Rebecca Hammond filed a complaint with this Commission charging Respondents with discrimination on the basis of gender/pregnancy in violation of M.G.L.c.151B§4. Specifically, Complainant alleges that Respondents terminated her employment after Complainant informed O'Leary that she was pregnant. 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 11 and 12, 2012. After careful consideration of the entire record before me and the post-hearing submission of the Complainant, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Carol O'Leary is the owner of Carol O'Leary Residential Cleaning Specialists, a cleaning company located in North Easton, MA. which has been in business since May 1987. In 2008, Respondents employed two residential cleaning crews and one commercial crew. In addition, O'Leary maintained a list of substitutes to fill in for regular employees when absent.

2. Complainant Rebecca Hammond resides in Taunton with her son. In January 2008, Complainant applied for a cleaning position with Respondents. After interviewing Complainant, O'Leary initially hired her to work one day per week. Her first day of work was Friday, January 18, 2008. The number of Complainant's work days was gradually increased and by her sixth week she was scheduled to work four days per week, Tuesday through Friday, which was considered full-time. Complainant was paid \$10 per hour and worked an average of 25 hours per week. Her gross weekly pay was approximately \$250.

3. John Edwards currently resides in Bridgewater MA. In 2008 he and Complainant were involved in a romantic relationship and he is the father of her young son.

4. The other members of Complainant's crew were usually Amy Goucher, Gloria McNutt, Barbara Palmer and Paula Doonan. Each morning the crew met at O'Leary's home in North Easton at about 7:30 a.m. and would depart for its first assignment by van at 7:50. Each crew would clean four to six houses per day. Typically the crew returned to O'Leary's home in the van at the end of the work day.

5. Employees were paid on Thursdays. On the envelope containing their paycheck, O'Leary wrote the next week's work schedule, including the prescribed time of arrival at

O'Leary's house in the morning. The schedule was subject to change at the last minute, should a client cancel that week's cleaning. O'Leary also kept weekly time sheets for each employee.

(Ex. C-2)

6. On the way to their first job, the crew divided up the work assignments and determined who would do the wet work (bathrooms and kitchens) and who would do the dry work (living rooms, bed rooms). The cleaning supplies were provided by Respondent and consisted of Windex, Scrubbing Bubbles, bleach, Pledge, dust cloths, brooms and vacuum cleaners. Complainant testified that the cleaning supplies used were similar to those she used in her home. She also testified that her job involved lifting only light objects such as a vacuum cleaner and cleaning supplies. I credit her testimony.

7. With the exception of the van driver (who might also be the crew leader), crew members were paid from the time they arrived at their first assignment until the time they left the last house. The van driver was paid from the time of arrival at O'Leary's house until the time the van returned to O'Leary's house because of her extra duties, including reviewing the schedule and preparing the day's supplies.

8. At some point during her employment with Respondent, Complainant's car was totaled and thereafter she relied primarily on Edwards to drive her to work. Complainant acknowledged being late for work on occasion, but according to O'Leary, Complainant was late for work four or five times and other occasions when O'Leary had to drive Complainant directly to a client's house because she missed the van. O'Leary did not dock Complainant's pay on these occasions because she claimed she would not do so as long as the employee arrived at the first client's house by 9:00 a.m. I do not credit O'Leary's testimony that Complainant was late

for the van on more than one occasion, as this assertion does not comport with her written time records indicating Complainant started later than the rest of the crew on only one occasion. Moreover, I find it incredible that O'Leary would not dock the pay of employees who arrived up to an hour late to their first job.

9. By all accounts, Complainant was a very good worker with no complaints about the quality of her work. If she finished her assignment she would help the other crew members. Complainant testified that she was never warned about tardiness.

10. O'Leary testified that on one occasion, McNutt told her that Complainant was using her cell phone on the job, which was forbidden. After O'Leary spoke to Complainant about this issue, the telephone calls stopped.

11. On Friday, March 28, 2008, Complainant was absent because of a doctor's appointment for which O'Leary received advance notice. On Tuesday, April 1, 2008, Complainant fell ill at work and at 10:00 a.m., Barbara Palmer drove her back to O'Leary's home. On Wednesday April 2 and Thursday April 3, Complainant was out of work with the flu. On those days, the crew consisted of three women. Complainant returned to work on Friday, April 4, and provided O'Leary with medical documentation of her illness.

12. Complainant worked full days on Friday, April 4 and Tuesday, April 8.

13. On Wednesday, April 9, 2008, Complainant left work sick with nausea at 9:05 a.m. and Edwards took her to the hospital, where the couple was shocked but excited to learn Complainant was pregnant. Unable to reach O'Leary, Complainant testified that she called Barbara Palmer and informed her of her pregnancy. Palmer did not seem happy for her and

asked Complainant whether she had told O'Leary the news.¹ According to O'Leary's records, Doonan replaced Complainant at 12:30 p.m. on April 9.

14. Complainant was out sick on Thursday April 10 and Friday April 11. On April 10 and 11, O'Leary had scheduled four crew members: Palmer, Goucher, McNutt and Doonan. I find that O'Leary had advance notice that Complainant would be out on those days and was able to replace her.

15. Barbara Palmer worked at Respondent from October 2007 until June 2008 and was the van driver of Complainant's crew. Palmer, an R.N. by profession, has known O'Leary for 35 years. Palmer liked Complainant and stated that she was a good worker. Palmer testified that once O'Leary drove Complainant to a client's house when Complainant missed the van. Palmer acknowledged that O'Leary once spoke to Palmer about being late and once drove Palmer directly to a client's house when she was late. During her tenure with Respondent, Palmer was absent three or four times and was out for a week for scheduled medical treatment. Palmer was never disciplined by O'Leary for tardiness or absenteeism. I credit her testimony.

16. Paula Doonan worked for Respondents from February 22, 2008 until her retirement on December 30, 2011, and often worked the same crew as Complainant. Doonan testified that Complainant was late for work several times and was sometimes absent. Doonan recalled O'Leary driving Complainant directly to a client's home after she missed the van and recalled working with a three person crew when O'Leary could not find a replacement for Complainant. Doonan acknowledged that she herself had been late for work in bad weather and had missed a

¹Palmer testified that Complainant announced her pregnancy to the crew in the van and not over the phone. While walking from the van to the client's house, Palmer asked Complainant whether her pregnancy was a "good thing," because of her concern about Complainant's rocky relationship with Edwards. I need not resolve this factual dispute because it is not material to the outcome of the case.

few days of work. Doonan was never disciplined by O'Leary for tardiness or absenteeism. I credit her testimony.

18. On Friday, April 11, Complainant called O'Leary and told her she was pregnant and planned to return to work the following Tuesday. Complainant testified that O'Leary asked whether she planned to keep the baby and Complainant responded that she did. O'Leary expressed concern that the job involved working with chemicals and required lifting and suggested Complainant would be better off finding a job closer to her home. (Testimony of Complainant & O'Leary) Complainant assured O'Leary that she was capable of working with chemicals and could perform the functions of the job, and pleaded with O'Leary to let her work for two more weeks. According to Complainant, O'Leary told her she had dealt with a pregnant employee in the past and did not want to go through that type of situation again. I do not credit Complainant's testimony that O'Leary directly told her she did not want to deal with her pregnancy based on past experience and I find that Complainant said this to enhance her claim of discrimination. O'Leary told Complainant she would think about it and to call her on Sunday or Monday. (Testimony of Complainant) Complainant and Edwards testified that Edwards was present during the call and heard some of O'Leary's words. They testified that O'Leary never mentioned Complainant's attendance during this telephone call. After the call ended, Complainant began to cry and shake and Edwards tried to reassure her by saying that perhaps O'Leary would change her mind. I do not credit Edwards' testimony that he overheard O'Leary's side of the conversation. Even if Edwards were credible, by his own testimony he heard "bits and pieces" of O'Leary's statements and had no way of knowing the entirety of what she said.

19. O'Leary's testimony regarding the April 11 telephone call differed somewhat from Complainant's. O'Leary denied asking Complainant whether she planned to keep the baby, but did ask her how she felt about the pregnancy, given Complainant's shaky financial and personal circumstances. O'Leary acknowledged telling Complainant that working with chemicals and lifting might not be good for her. O'Leary expressed reservations about Complainant's returning to work due to her tardiness, absenteeism and transportation problems. She told Complainant that she would think it over and to call her Sunday morning. I credit O'Leary's testimony that she expressed concern about Complainant's tardiness, absenteeism and transportation issues either during this conversation or in a later conversation or both. It was undisputed that O'Leary told Complainant of her concern about Complainant's working with chemicals and lifting.

20. After work on the afternoon of April 11, O'Leary met with crew members Paula Doonan, Barbara Palmer, Amy Goucher and Gloria McNutt at O'Leary's house and asked them how they felt about Complainant's returning to work. According to O'Leary, all the crew members said they did not want Complainant back because she was unreliable. Palmer and Doonan corroborated O'Leary's testimony.

21. On Monday, April 14, Complainant again spoke with O'Leary by telephone. O'Leary told her that after consulting with the crew members and giving the matter more thought, she decided that Complainant had missed too much work and it was best for Complainant and the baby for her not to return to work. Complainant accused O'Leary of illegally terminating her employment because of her pregnancy and she testified that O'Leary agreed that Complainant's pregnancy was the reason for her termination. Complainant told O'Leary that she would be hearing from her attorney. I do not credit Complainant's testimony that O'Leary admitted her pregnancy was the reason for her termination and I find that

Complainant made this allegation in order to embellish her claim. I otherwise credit her testimony. Edwards testified that he was present in the room for the second telephone call with O'Leary. He stated it was only during this call that O'Leary raised the issue of Complainant's absenteeism and tardiness.² I do not credit Edwards' testimony. I found his testimony generally to be unreliable.

22. Complainant stated that she was upset and devastated by her termination which shattered the happy news of her pregnancy. She did not know what she was going to do for income and worried that she would lose her apartment. She felt like O'Leary had stepped on her like a piece of dirt and she wondered how O'Leary, who had raised children of her own, could treat another woman in that manner. She suffered from depression during her pregnancy that was alleviated after the birth of her child. I credit her testimony.

23. After her termination, Complainant could no longer afford her apartment and had to move into a housing project in an undesirable neighborhood while Edwards moved into his parents' house.³ In addition she was forced to go on welfare, which was embarrassing for her. Complainant had no complications of pregnancy and gave birth to a healthy baby in November. I credit her testimony.

24. Complainant testified that she begin looking for work a week or two after her termination. She applied to several stores located at a nearby strip mall, including McDonald's, Shaw's, CVS and other pharmacies. She looked at newspaper ads, called nursing companies, dry

² The testimony of Complainant and O'Leary varied with respect to the content of their two telephone conversations. I find that these differences do not constitute disputes of material fact necessary to making a determination in this matter.

³ Both Complainant's and Edwards' testimony was vague and contradictory concerning their living situation at the time of Complainant's employment with Respondent. At the time of the public hearing they were living apart and sharing joint custody of their child.

cleaners and housecleaning companies. She stated that her job search was hampered by her anxiety and loss of self-esteem after her termination. She wondered who would hire her given her pregnancy. She stopped looking for work when she was six or seven months pregnant and began looking for work again three months after her baby's birth in November, 2008. I credit her testimony that she looked for work during her pregnancy. However, I do not credit her testimony that she made a good faith effort to find work after her baby's birth.

25. In 2009, Complainant was treated with injections for a right torn rotator cuff that caused pain in her shoulder and arm. The injections did not resolve the problem and since 2010, Complainant has had three surgeries on her right shoulder, most recently in June 2012. Each surgery required six to eight weeks of recuperation followed by three months of physical therapy. Complainant continues to undergo physical therapy.

26. In April 2012, Complainant underwent back surgery to relieve pressure from sciatica.

27. From 2009 to the present, Complainant has applied for two jobs, at CVS and Art's. She also checked newspaper listings and offered to clean the homes of friends. She searched for jobs at the Division of Employment Security on one occasion.

28. Complainant did not seek employment in 2010, 2011 or 2012. She did not try to become re-certified as a CNA or personal care attendant, two jobs she had done in the past, out of concern that her medical problems would prevent her from physically lifting patients. Complainant's only work currently is occasionally cleaning the home of a friend. She continues to receive welfare benefits.

29. Complainant acknowledged that she had to factor in the cost of day care for any job and also acknowledged that her job at Respondents would not have covered day care costs.

30. I find that Complainant would have reasonably worked until the eighth month of her healthy and uncomplicated pregnancy in approximately mid-October 2008. I conclude that given her average wages of \$250 per week, she incurred lost wages of \$6,500. (\$250 x 26 wks.)

III. CONCLUSIONS OF LAW

A. Discrimination

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to discharge an employee because of her sex. "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, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984)

An employer may not require a pregnant employee to stop working because of its concern about safety to the fetus. In striking down an employer's "fetal protection policy", the Supreme Court stated that "an employer may take into account only the woman's ability to get her job done... The decision to become pregnant or to work while being either pregnant or capable of becoming pregnant is reserved for each individual woman to make for herself." International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Johnson Controls, Inc., 499 U.S. at 204, 205-6, 111 S. Ct. at 1206, 1207(1991). An employer may not... use a woman's pregnancy...as a reason for an adverse job action, such as ...discharging her, laying her off, failing to reinstate her or restricting her duties. An employer may not, moreover, force a pregnant woman to take leave prior to giving birth if

she is willing to continue working.” Massachusetts Commission Against Discrimination, Maternity Leave Guidelines, Part VI. Sex Discrimination Issues Arising Under M.G.L. c. 151B. Likewise, termination of an employee during pregnancy because of fears of further absences and coverage during leave may be deemed unlawful sex discrimination. Gowen-Esdaile, supra, at pp. 1271-1274.

In the instant case, Complainant presented direct evidence of animus based on her pregnancy. Complainant was terminated shortly after announcing her pregnancy to O’Leary. O’Leary’s statement to Complainant that it would not be good for her and the baby to work with household cleaners and O’Leary’s concern about Complainant lifting as part of her job duties constitute strong direct evidence that Respondents were motivated by impermissible considerations of Complainant’s pregnancy.

Respondents denied that Complainant’s pregnancy was a factor in their decision to terminate her employment and stated that Complainant was terminated because of her tardiness and absenteeism. There was evidence that Complainant missed several days of work due to illness and was late on one occasion, causing O’Leary to drive her directly to a client’s house. While I conclude that Respondents’ articulated reasons regarding Complainant’s tardiness were exaggerated, there is some credible evidence that Respondents were concerned about Complainant’s missing work and getting to work on time, given her lack of reliable transportation. Respondents have thus met their burden of articulating a legitimate, nondiscriminatory reason for their actions.

While the decision to terminate Complainant’s employment may have been motivated, in part, from concerns about her attendance issues, O’Leary’s concerns about Complainant’s

working with chemicals and performing lifting while pregnant were also reasons for her termination. I conclude that Respondents 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.

Respondents have failed to persuade me that they would have terminated Complainant’s employment had she not been pregnant. While Complainant’s attendance may have temporarily suffered because of her pregnancy-related nausea, another unrelated illness and her difficulties with transportation, there was evidence that co-workers who had been absent and tardy were not disciplined. The evidence suggests that Complainant was treated more harshly in this regard because of her pregnancy. Thus, I conclude that Respondents' actions were motivated primarily by unlawful discriminatory animus and not by lawful considerations as they contend. Rather than allow Complainant the opportunity to decide for herself whether she wanted to work while pregnant, O’Leary terminated Complainant outright because of concerns that her pregnancy would be endangered, a belief that her ability to perform certain functions of her job would be diminished because of her pregnancy, and O’Leary’s concern that Complainant’s pregnancy would result in further absences and potential liability to Respondent. These are impermissible

reasons for requiring a pregnant employee to stop working. International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Johnson Controls, Inc., supra. I conclude that impermissible considerations of Complainant's pregnancy were the primary reason for terminating her employment. Complainant was not allowed to consider the possibility of continued employment and was terminated upon announcing her pregnancy. Thus I conclude that Respondents' actions were motivated by unlawful discriminatory animus in violation of M.G.L.c. 151B§4.

Since O'Leary was the company owner and made the decision regarding Complainant's termination she is individually liable for the discrimination. I conclude that Respondents engaged in unlawful discrimination on the basis of gender in violation of M.G.L.c.151B§4 and I find them jointly and severally liable for unlawful discrimination.

IV. REMEDY

Pursuant to M.G.L. c. 151B s. 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her termination by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature

and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549 (2004). “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id.

Based on Complainant’s credible testimony concerning her distress upon learning that she had been terminated, I am persuaded that Complainant experienced emotional distress as a result of Respondents’ unlawful conduct. Complainant testified credibly that she was upset about having been terminated, especially by another woman who was herself a mother, who could appreciate her predicament and the resulting financial hardship. She was embarrassed about having to receive welfare and moving into a public housing project. However, Complainant’s emotional distress was short-lived and not extensive. Given her pre-existing precarious personal and financial circumstances, she would have experienced financial hardship notwithstanding Respondents’ actions, and would have been unable to afford to continue working and paying for childcare. I conclude that Complainant is entitled to nominal award of \$10,000 for the emotional distress she suffered as a result of Respondents’ unlawful conduct.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. The evidentiary burden is on the Respondent to show that the

Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Complainant essentially stopped looking for work after the birth of her baby, due to her inability to find work that would cover the cost of child care and unrelated physical problems and surgeries that took her out of the work force for extended periods of time. I conclude that Complainant is entitled only to those wages that she would have earned had Respondents not terminated her employment during her pregnancy. It is reasonable to conclude that Complainant would have worked until the eighth month of her uncomplicated pregnancy in approximately mid-October 2008. I conclude that given her average wages of \$250 per week, she is entitled to lost wages in the amount of \$6,500. (\$250 x 26 wks.)

V. 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:

- 1) Respondents immediately cease and desist discriminating on the basis of gender and pregnancy.
- 2) Respondents pay to Complainant the amount of \$10,000 in damages for emotional distress 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 until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- 3) Respondents pay to Complainant the sum of \$6,500 in damages for back pay 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 until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 19th day of February 2013.

JUDITH E. KAPLAN,
Hearing Officer