COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

****

GLADYMYRA RECUPERO and
MASSACHUSETTS COMMISSSION
AGAINST DISCRIMINATION,
Complainants

Against Docket No. 08 BEM 01256

TERRI'S LITTLE PUMPKINS and
TERRILL BATTANO
Respondents

****

Appearances: Matthew W. Perkins, Esq., for Complainant Recupero
Charles R. Balliro, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 6, 2008, Gladymyra Recupero ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that Respondents Terri's Little Pumpkins and Terrill Battano violated G.L. Chapter 151B, section 4 (1) and (4A) by discriminating against her on the basis of gender (female/pregnancy). On June 15, 2009, Complainant requested that the Commission amend the charge of discrimination to include a claim of discrimination based on disability (pregnancy-related) in violation of G.L. Chapter 151B, section 4(16).

Pursuant to 804 CMR 1.10(6), the Commission granted the amendment on July 3, 2009.

On August 29, 2009, the MCAD found probable cause. The matter was certified to public hearing on December 13, 2011. A public hearing was held on June 15, 2012.[1]

The Complainant testified on her own behalf and Michelle Arevalo testified for Respondents. The parties submitted eleven (11) joint exhibits and Respondents submitted two (2) additional exhibits. The parties submitted post-hearing briefs.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings, they are rejected. To the extent the testimony of various witnesses is not in accord with or irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Gladymyra Recupero was hired on September 25, 2006 as a full-time assistant teacher/cook at Terri's Little Pumpkins Inc. earning $9.00 per hours. Joint Exhibit 2. At the time she commenced employment, Complainant presented a doctor's note dated October 4, 2006 stating that she was up to date with immunizations and indicating that she was capable of lifting up to 40 pounds as needed. Joint Exhibit 4. Respondents' personnel records indicate that Complainant was given an "anticipated" full-time[2] work week of 8:30 a.m. to 5:00 p.m., however, Complainant's time card lists her actual hours as ranging from a high of almost thirty-nine hours per week to a low of eleven hours per

[1] Respondent Terrill Battano did not attend the public hearing.

[2] Per the employee handbook at p. 11, a full-time employee is defined as one who works thirty or more hours per week and a part-time employee is defined as one who works less than thirty hours per week. Joint Exhibit 1.

week. Exhibit 11.

2. Respondent Terri's Little Pumpkins, Inc. is a corporation operating four day care centers in Massachusetts. It employs more than six individuals. Its president and owner is Respondent Terrill Battano. Battano oversees payroll, pays state and federal taxes, advertises the centers, recruits students, and arranges for transportation contracts and facility inspections.
3. Complainant became pregnant on or around March of 2007. She informed her employer of her pregnancy and said that she wanted to continue her employment.
4. During her pregnancy Complainant experienced health issues variously described as bronchitis, asthma, acid indigestion, and reactive airway disease. Complainant had difficulty breathing and had bouts of wheezing and coughing. Joint Exhibit 8 at p. 6. Complainant's doctor prescribed treatment with Prednisone, Flovent, Albuterol and Prilosec and filled out a note stating that Complainant might need to consider decreased hours. Id. & Joint Exhibit 6. At some point during her pregnancy, Complainant was removed from all classroom work in order to avoid exposing children to her coughing.
5. Complainant testified that during the period prior to October of 2007, she worked a full-time schedule, but her employee time card indicates that she did not work full-time (i.e. thirty hours a week or more) after June 8, 2007, that in June of 2007, she began to work exclusively in the kitchen as a cook,[3] that during her last two months of employment she consistently worked fewer than fifteen hours per week, and that she stopped working altogether on November 15, 2007. Joint

[3] Joint Exhibit 11 lists Complainant solely as a cook as of 6/26/07 but the drop in her hours beginning on 6/11/07 and the notation that her "teacher aid" designation is "miscoded" between 6/11/07 and 6/26/07 suggests that she left the classroom as of 6/11/07.

Exhibit 11. An "action sheet" signed by facility director Michele Arevalo on October 22, 2007 acknowledges that at some point Complainant's position changed from full-time assistant teacher/cook to part-time cook with an "anticipated" work week of eighteen hours and that her hourly rate increased from $9.00 an hour to $9.50 an hour. Joint Exhibit 3.

6. At 7:45 a.m. on November 15, 2007, Complainant called the day care center to say that she was experiencing contractions three to five minutes apart and would not be in to work. According to Complainant, she was told that she needed to come to work until someone else was located to substitute for her. Complainant drove to work, stayed a little over an hour, and then left to seek medical attention.
7. At the time that Complainant left work on November 15, 2007, it was her understanding that her maternity leave would extend until February 11, 2008. Facility Director Michelle Arevalo concurred that Complainant was given a three-month maternity leave from November 15, 2007 to February 11, 2008.
8. Complainant gave birth on November 16, 2007. She called her employer from the hospital to say that she had given birth.
9. While Complainant was out on maternity leave, she sought to use accrued vacation and sick time to cover part of the leave. At first, her request was denied based on the employee handbook which states that "[w]hen a full time employee goes to part time, full-time benefits will cease the day your schedule changes." Joint Exhibit 1 at p. 11. Respondent subsequently reversed its position and permitted Complainant to use her accrued vacation time to cover a week of the period she was off from work on maternity leave in November of 2007. Joint

Exhibit 7.

10. Complainant visited the day care facility where she worked on January 2, 2008 in order to sign paperwork allowing her to use accrued vacation time for a portion of her maternity leave. While she was at the facility, she spoke to assistant facility director Christina Studley. Studley did not inform Complainant that she needed to bring in a doctor's note upon her return to work in February of 2008.
11. Complainant testified credibly that on Friday, February 8, 2008, she called her employer to confirm that she was returning to work on Monday, February 11, 2008. Complainant spoke to Arevalo who said that she would see Complainant the following Monday but did not mention a doctor's note during their conversation. I do not credit Arevalo's testimony that she told Complainant on February 8, 2008 to bring a medical note with her on February 11, 2008 clearing her to work and stating that she could lift 40 pounds. I also decline to give evidentiary weight to a memorandum dated February 11, 2008 which purportedly documents Arevalo's statement to Complainant on February 8, 2008 that she could not come back to work without medical clearance. Respondent's Exhibit 2.
12. Complainant arrived at work on February 11, 2008, just prior to 8:30 a.m. and tried to punch in. Arevalo asked Complainant if she had a doctor's note and informed her that she needed a full physical exam from her primary care physician and medical clearance prior to returning to work and going back on the "floor." According to Arevalo, Complainant said that she did not yet have a medical appointment and added, "Good … I'd like more time at home with my baby." Respondent's Exhibit 2. I do not credit Arevalo's testimony about

Complainant's purported response.

13. Complainant arranged to see a doctor but the first appointment she could get was on March 7, 2008 on a "walk-in" basis, i.e., filling a slot that had been cancelled by another patient. Complainant called Arevalo at the day care facility to say that she had scheduled an appointment with her primary care physician. Following the appointment, Complainant obtained a medical note clearing her to return to work "without restrictions." Joint Exhibit 9.
14. Between Complainant attempting to return to work on February 11, 2008 and obtaining a doctor's note clearing her to return to work on March 7, 2008, she never heard from Respondents. Neither Arevalo nor anyone else associated with Respondents ever told Complainant that she needed to produce a note by a date certain. Arevalo testified that she did not attempt to contact Complainant after February 11, 2008 and assumed that Complainant had abandoned her position. I do not credit Arevalo's testimony that she assumed Complainant had abandoned her position.
15. While Complainant was out of work, a substitute – "Anna" – was hired to assume Complainant's duties as a cook. According to Arevalo, Anna was going to move to another one of Respondent's facilities when Complainant returned to work, but when Complainant did not return, Arevalo arranged for "Anna" to continue in the kitchen in place of Complainant.
16. Complainant attempted to contact Arevalo and assistant director Christina Studley beginning on March 7, 2008 to say that she had a note from her primary care physician documenting her physical exam and clearing her to return to work but

they would not take her calls. Complainant also tried to contact owner Terrill Battano to "let her know what was going on." Complainant left messages but she was not successful reaching Battano. Complainant finally spoke to a new assistant director who said that she was no longer needed.

17. Arevalo maintains that she never heard from Complainant after February 11, 2008, assumed that Complainant had abandoned her position, and did not attempt to contact Complainant for clarification. I do not credit Arevalo's testimony that Complainant failed to contact the day care facility after February 11, 2008 or that Arevalo "de-coded" Complainant based on the assumption that Complainant had abandoned her position.
18. Complainant testified credibly that she loved her job and that the loss of her job was a "big blow" to her ego. Complainant had no other income and was forced to give up her apartment and move into her parent's house where she had to occupy the same bedroom as her son and daughter.
19. Complainant received unemployment compensation based on the loss of her part-time, pre-maternity position with Respondent. Complainant looked for work in the newspaper and on Craig's List. In 2009, she was offered re-employment by Respondent but declined the offer. In or around June of 2010 she found other employment within one or two months of her unemployment benefits running out.
20. Complainant sought mental health treatment from therapist Theresa Grignon at a MGH facility in Chelsea beginning in March of 2008. According to Complainant, Grignon diagnosed her with depression and prescribed antidepressants. As of the date of public hearing, Complainant described herself as "better." She works two

jobs and lives independently in her own apartment.

21. Respondent's employee handbook states in a section entitled "Health" that employees are required to "notify the employer of any change in health which may affect your work, whether temporary or permanent. You will be allowed to continue working as long as it is medically safe for you to do so and poses no danger to the welfare of the children. Physician's statements may be required upon the request of the Director, to ensure your ability to carry out your responsibilities." Joint Exhibit 1 at p. 17. In a section addressing personnel files the handbook states that an employee's record will contain a doctor's note attesting to physical fitness and the ability to "life [sic] 40 lbs numerous times daily [and that] Management reserves the right to request proof as it deems necessary throughout your employment." The handbook grants twelve weeks of maternity leave without pay but states that, "At the end of six weeks, the employee may return to his/her position provided the position still exists. . . . If a decision to return has not been made by the fifth week, we reserve the right to fill the position."
22. According to 102 CMR 7.08, day care licensees may require that an employee provide documentation of a current physical examination if, in the licensee's judgment, the employee's physical condition requires such screening.
23. Facility director Arevalo also gave birth while employed by Respondents. After delivering in August of 2007, she obtained a medical note clearing her to return to work and stating that she was "able to lift 40 lbs. numerous times a day." Respondent's Exhibit 1.

III. CONCLUSIONS OF LAW

A. Maternity Leave Statute

The Massachusetts Maternity Leave Act ("MMLA"), M. G. L. chapter 149, sec. 105D requires employers to provide eight weeks of unpaid maternity leave to full-time employees and to allow them to return to the same or similar position they occupied prior to the leave. Contrary to the specifications of the MMLA, Complainant was working a part-time schedule prior to giving birth and took three months of maternity leave, not two. See Dietz v. Beverly Hospital, 31 MDLR 116 (2009) (MMLA doesn't apply to part-time or per diem schedules). Even if her part-time status was only a temporary accommodation for respiratory issues during her pregnancy and even if she intended to revert to full-time status after giving birth, the fact remains that the length of her maternity leave did not fall within the purview of the MMLA. See Global NAPs, Inc. v Awiszus, 457 Mass. 489 (2010) (employee who is absent for more than eight weeks does not fall under the protection of MMLA). Since Complainant's leave was not protected under the maternity leave statute, she cannot successfully pursue a cause of action under G. L. c. 151B, sec. 4(11A) for the restoration of her employment following a MMLA-protected maternity leave. See G. L. c. 151B sec. 11A (recognizing unlawful practice under Chapter 151B for employer to refuse to restore female employee to employment following a MMLA-protected maternity leave).

Although Complainant does not have a cause of action under G. L. c. 149, sec. 105D, she may pursue an alternative cause of action for maternity leave benefits in excess of eight weeks. See Global NAPs, Inc. v Awiszus, 457 Mass. 489 (2010)

(recognizing additional maternity leave benefits may arise under a collective bargaining agreement, company policy, or oral representation from an employer). In her complaint of discrimination filed with the MCAD, Complainant sought the protection afforded by the gender discrimination prohibition of G.L. c. 151B, sec. 4(1). Her rights under this provision are discussed below.

B. Gender Discrimination

Principles of gender bias are relevant in this case insofar as Complainant attempted to return to work after an approved maternity leave but was not permitted to do so. See Dietz v. Beverly Hospital, 31 MDLR 116 (2009) (even though MMLA is inapplicable to a part-time employee, a cause of action for gender discrimination exists where an employer places undue burdens on an employee to establish fitness to return to work after pregnancy and maternity leave).

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to discriminate against an employee based on gender,[4] to refuse to hire an individual based on gender or to discharge an individual based on gender. Since pregnancy and childbirth are sex-linked characteristics, actions by an employer which unduly burden an employee because of pregnancy or childbirth may amount to sex discrimination under M. G. L. c.151B. See School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); White v Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997) *quoting* Lane v. Laminated Papers, Inc., 16 MDLR 1001, 1013 (1994); 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).

[4] The terms "gender" and "sex" are used interchangeably in regard to Chapter 151B, section 4(1).

In order to prove sex/pregnancy discrimination, Complainant must first establish a prima facie case. In the absence of direct evidence, Complainant may prove a claim of discrimination by utilizing the three-stage order of proof articulated in both federal and state court decisions. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130 (1976). A prima facie case of sex discrimination based on pregnancy/maternity leave requires a showing that Complainant: 1) is a member of a protected class, 2) was performing her job at an acceptable level, 3) was subjected to adverse action such as being terminated and/or having her position was eliminated, and 4) was replaced or terminated under circumstances that would raise a reasonable inference of discrimination. See Weber v. Community Teamwork Inc., 434 Mass. 761 (2001); Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34 (2005).

Complainant satisfies these requirements on the basis that she was terminated after childbirth, had hitherto been an acceptable employee, and was given no warning about the requirement of having to produce a doctor's note before returning to work or any information about when the note was due. Respondents' Employee Handbook indicates that requesting medical notes after the commencement of employment is a discretionary practice on the part of management, not a mandatory requirement. Handbook references to medical notes state that they "may be required" and that management "reserves the right to request proof as it deems necessary." Nowhere does the Handbook set forth a circumstance in which documentation of a current physical examination must be provided. Given the discretionary nature of such notes, Complainant had no way of knowing from references in the Employee Handbook that she

would be called upon to provide medical documentation upon her return from a maternity leave.

Respondents assert that they exercised the discretion provided in the Employee Handbook in order to solicit from Complainant a doctor's note after a full physical exam clearing her to return to work and attesting to her ability to lift forty pounds. According to Respondents, Assistant Director Studley informed Complainant of such a requirement when Complainant visited the facility during her maternity leave on January 2, 2008, and Director Arevalo repeated the requirement during a telephone conversation on Friday, February 8, 2008 confirming Complainant's return to work the following Monday. I do not find these assertions to be credible. Rather, the credible evidence supports Complainant's version of the relevant events, i.e., that neither Studley nor Arevalo discussed any medical verification requirements. See Dietz v. Beverly Hospital, 31 MDLR 116 (2009) (rejecting argument that employee failed to follow employer's return-to-work procedures where no one told her that she needed to provide a letter to employer's health department confirming her fitness to return to work). Having failed to provide notice of the need for medical documentation, Respondents' termination of Complainant for failing to provide such paperwork raises a reasonable inference of discrimination.

Once Complainant has established a prima facie case, Respondents must articulate a legitimate, nondiscriminatory reason for their action and produce credible evidence supporting their reason. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) *quoting* Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 442 (1995). Respondents assert that they required a

doctor's note upon Complainant's return to work from her maternity leave and that rather than comply with company protocol, Complainant abandoned her position. This assertion, supported by testimony from Studley and Arevalo and a memo drafted by Arevalo, is sufficient to satisfy Respondents' burden of production at stage two. See Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34, 50-51 (2005).

Once Respondents satisfy their stage two burden, Complainant may still establish unlawful discrimination by showing that the reasons given by Respondents were pretexts to hide discriminatory animus, i.e., that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian, 432 Mass at 117; see Sullivan v. Liberty Mutual Insurance Co., 444 Mass. at 55. Complainant may meet this burden through circumstantial evidence showing that one or more of the employer's reasons for taking action is false. See Lipchitz, 434 Mass. at 504. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass at 117.

Complainant has satisfied her stage three burden by testifying persuasively that she kept in "constant" contact with Respondents, called on multiple occasions, visited the day care facility during her maternity leave, and attempted to punch in for work on February 11, 20011 at the conclusion of her leave. Complainant makes the compelling point that these are not the actions of an individual who has abandoned her job. On the strength of her efforts to maintain contact with the day care center, I conclude that Complainant did not abandon her position and that Respondents did not, in good faith, believe that she intended to stop working.

I do not credit the contents of Michelle Arevalo's memorandum dated February

11, 2008 which purports to document an alleged conversation with Complainant on February 8, 2008 in which Arevalo allegedly informed Complainant that she could not come back to work without a full physical exam and medical clearance. If Arevalo had informed Complainant of such a requirement on February 8th, why would Complainant have arrived at work on February 11th without complying? According to Arevalo, Complainant not only came to work but when turned away, expressed satisfaction about having more time at home with her baby. None of this evidence makes sense and its pretexual nature undermines Respondent's rebuttal.

Respondents' alleged policy of requiring medical clearance following maternity leaves also fails to withstand scrutiny in light of Complainant's convincing testimony that she heard about the so-called requirement for the first time on February 11, 2008 when she arrived at work and tried to punch in at the conclusion of her three-month leave. Complainant states convincingly that it was not until February 11th that she first heard of the requirement of a full physical exam clearing her to return to work, that she immediately proceeded to procure the necessary documentation, and that she was terminated for job abandonment three weeks later when she attempted to contact day care facility personnel on March 7, 2008 to say that she had obtained the required medical clearance.

The single example of a medical note proffered by facility director Arevalo following her own maternity leave is an insufficient basis for rebutting the conclusion that Complainant was not informed of having to provide a doctor's note until she attempted to return to work and then was deprived her of a reasonable opportunity to comply. Arevalo's medical note sheds no light on who else, if anyone, was subject to

medical verification requirements, how they were informed of such requirements, whether there was a deadline for providing medical notes, and whether summary dismissal was the uniform penalty for failing to comply. The Arevalo note, in short, is a wholly inadequate basis for establishing that all day care facility employees taking maternity leaves are obligated to provide medical clearance following full physical examinations.

Even if medical notes were solicited from other employees returning from approved maternity leaves, such circumstances do not preclude a finding of gender discrimination in this case. See Ackerman v. Schwartz, 26 MDLR 18 (2004) (employee's termination found to be based on resentment of her pregnancy even though employer allowed another pregnant employee to work flexible hours and granted her a generous maternity leave). Complainant's situation involved months of pregnancy-related accommodations followed by a three-month maternity leave. I conclude that it was this combination of factors which sets her situation apart from others in the all-female workforce and resulted in the denial of her right to return to work. See Dietz v. Beverly Hospital, 31 MDLR 116 (2009) (employee's troubled pregnancy and childbirth were reasons for employer failing to schedule her for an assessment of her ability to return to work on a per diem or part-time basis following maternity leave).

Respondents have failed to rebut Complainant's position that she kept in contact with the day care facility throughout her maternity leave, did not abandon her position, and made all reasonable efforts to return to work on and after February 11, 2008. After being informed on February 11th of the necessity for a full medical exam by her primary care physician, Complainant arranged for the exam and supplied a medical note dated

March 7, 2008, clearing her to return to work and attesting to her ability to lift forty pounds.[5] Complainant testified credibly that the first medical appointment she could get was on March 7, 2008 on a "walk-in" basis, i.e., filling a slot that had been cancelled by another patient. A three-week period of time is not unreasonably long to arrange for a full physical exam from a primary care physician. Under these circumstances, it defies credulity that Respondents actually thought that Complainant abandoned her position. See Dietz v Beverly Hospital, 31 MDLR 116 (2009) (finding sex discrimination where employer refused to allow Complainant to return to work after maternity leave despite telephone calls from Complainant seeking to return to work and despite the fact that part-time position were available. Rather, Respondents' allegation of job abandonment was pretextual and their actual motivation stemmed from Complainant's pregnancy-related accommodations combined with her three-month maternity leave. Thus, I conclude that a preponderance of credible evidence establishes that Respondents' actions violated G. L. c. 151B, sec. 4(1) because they were motivated by unlawful discriminatory animus resulting from perceived disruptions caused by Complainant's troubled pregnancy and subsequent maternity leave.

In their defense, Respondents make much of the failure of Complainant to supply telephone records supporting the contention that she maintained telephone contact with day care personnel while on leave. Complainant testified credibly that she was unable to obtain such records from her former telecommunications carrier and noted accurately that Respondent failed to solicit the records through proper channels of discovery. In any

[5] The evidence fails to establish whether Complainant was going to return to the classroom or remain in the kitchen as a cook. The fact that Respondents used a kitchen substitute for Complainant while she was on maternity leave whose services were retained after Complainant was terminated suggests that Respondents may have intended to continue using Complainant as a cook whereas Complainant anticipated returning to the classroom.

event, since there is no dispute that Complainant visited the day care facility twice while on maternity leave, spoke to Arevalo on February 8, 2008 about returning, attempted to punch in to work on February 11, 2008, and obtained a medical note clearing her to work on March 7, 2008, the telephone records sought by Respondents are unnecessary and duplicative.

In regard to Complainant's assertion of disability discrimination, I reject the claim because childbirth is not a disability and there is no evidence that Complainant continued to be afflicted by respiratory problems after she gave birth.

IV. INDIVIDUAL LIABILITY

Individual personal liability has long been recognized under G. L c. 151B, sec. 4(1) which makes it is an unlawful practice for an "employer, by himself or his agent" to engage in discrimination based on sex. See Beaupre v. Smith & Assoc., 50 Mass. App. Ct. 480, 491, n. 16. Such recognition furthers the mandate set forth in G. L. c. 151B, sec. 9 to construe the provisions of the state's anti-discrimination law liberally in order to discourage and penalize discriminatory conduct. See Beaupre, 50 Mass. App. Ct. at 492.

The credible evidence in this case indicates that the decision was made to terminate Complainant was inextricably tied to her maternity leave. As owner and president of the day care facility, Respondent Terrill Battano played a dominant role in that decision. Respondents argue that Battano did not take part in the day-to-day operation of the day care centers but Complainant testified credibly that she attempted to contact Bettano in March of 2008 to "let her know what was going on" and could not get through to her. The refusal of Bettano to take Complainant's calls does not shield her from liability, rather, it underscores Bettano's role in the stonewalling of Complainant.

Respondent Bettano's involvement in this matter interfered in a deliberate manner with Complainant' right to be free from discrimination. See Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003). Accordingly, Respondent Bettano's conduct is sufficient to justify her individual liability jointly and severally with the corporate respondent.

V. REMEDY

Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on Respondents to show that the Complainant failed to mitigate damages. See J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). Complainant received unemployment compensation based on the loss of her part-time, pre-maternity position with Respondent. Complainant looked for work in the newspaper and on Craig's List. In 2009, she was offered re-employment by Respondent but declined the offer. She found other employment within one or two months of her unemployment benefits running out.

I conclude that Complainant is entitled to the difference between her unemployment compensation and a thirty-hour a week wage (the average of her weekly hours prior to working a reduced schedule as a part-time kitchen employee) from February 11, 2007 to January 1, 2009 or within two months of her unemployment benefits running out, whichever occurred first.[6]

Emotional Distress Damages

Pursuant to M.G.L. c. 151B, sec. 5, the Commission is authorized to grant remedies

[6] I selected January 1, 2009 as a cut-off date because the record indicates that Complainant was offered re-employment by Respondents in 2009 but the month and day were not specified.

in order 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 unlawful treatment by Respondents. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997); Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982) *citing* Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976).

An award of emotional distress damages 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 the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). It is not unusual for multiple sources of emotional distress to be present in a discrimination case. The presence of other significant stressors does not absolve an employer from liability for the emotional distress caused by its discriminatory actions. See Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002) *citing* Franklin Publishing Co., Inc. v. MCAD, 25 Mass. App. Ct. 974, 975 (1988).

Complainant testified credibly that she loved her job and that the loss of her job was a "big blow" to her ego. Complainant had no other income and was forced to give up her apartment and move in with her parents and siblings where she had to occupy the same bedroom as her son and daughter. Complainant testified that she sought mental health treatment from therapist Theresa Grignon at a MGH facility in Chelsea beginning in March of 2008. According to Complainant, Grignon diagnosed Complainant with depression and prescribed antidepressants. As of the date of public hearing, Complainant described herself as "better." She works two jobs and lives independently in her own

apartment.

I conclude that Complainant is entitled to $15,000.00 in emotional distress damages.

ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

(1) Cease and desist from discriminating against Complainant and other similarly-situated individuals on the basis of gender (female/pregnancy);

(2) Pay Complainant, within sixty (60) days of receipt of this decision, the back pay damages described in Part IV, *supra*, 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 Complainant, within sixty (60) days of receipt of this decision, the sum of $ 15,000.00 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 14th day of March, 2013.

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Betty E. Waxman, Esq.,
Hearing Officer

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