COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and ANGELA JARAMILLO-DUQUE,
Complainants

v. Docket Nos.: 06-BEM-02824

CONCORD VALLEY COUNSELING
And MONICA LAMBERT,
Respondents

Appearances: Gregory Oberhauser, Esq. for Complainant

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 10, 2006, Angela Jaramillo-Duque ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that Respondents Monica Lambert, Ph.D and Concord Valley Counseling, discriminated against her on the basis of gender in violation of M.G.L. c. 151B, section 4(1) and (11A); M.G.L. c. 149, section 105D, and 29 U.S.C. 2613 (the FMLA).[1] A probable cause finding was issued by the Investigating Commissioner on February 25, 2010. The case was certified for public hearing on January 11, 2013.

The public hearing took place on September 9, 2013. Respondent did not attend the public hearing and, accordingly, the hearing was conducted as a default proceeding. Complainant was the sole witness. One exhibit was submitted on behalf of Complainant.

[1] The FMLA is inapplicable as it applies to employers with more than fifty employees. Complainant also charged that she worked overtime for which she was not paid. This allegation lies outside the jurisdiction of the MCAD and will not be addressed.

The following findings of fact and conclusions of law are based on Complainant's unrefuted testimony.

II. FINDINGS OF FACT

1. In or around 2001, Complainant began to work as secretary to Monica Lambert, Ph.D. Complainant became Dr. Lambert's office manager in July of 2006. Complainant worked as office manager until November of 2006. As office manager she earned $12.50 per week. Complainant testified that she frequently worked in excess of a full-time schedule but she was not paid overtime.
2. Dr. Monica Lambert, Ph.D, is a board certified psychologist who owned and operated Concord Valley Counseling at 25 Central St in Lowell, MA at all times relevant to this dispute. Complainant testified that Dr. Lambert had eight employees in total. According to Complainant, Dr. Lambert employed five office workers: a receptionist, medical assistants, translators, and a bookkeeper. Complainant stated that Dr. Lambert also had a professional staff consisting of several psychiatrists and psychotherapists and other individuals employed "off the books."
3. In March of 2006, Dr. Lambert instructed Complainant to reduce the work hours of receptionist Ruth Diaz who was pregnant at the time. According to Complainant, Diaz's hours were reduced in order to encourage her to resign. Complainant testified that Diaz resigned a short time later.[2]

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[2] Diaz also filed a gender/pregnancy complaint with this Commission and after a hearing in 2009, Respondents were found liable for discrimination. Diaz was awarded damages and a $10,000.00 civil penalty was assessed against Respondents. See Diaz v. Concord Valley Treatment Center, Inc., 32 MDLR 15 (2010).

4. Complainant became pregnant in 2006. Her due date was May 22, 2006. Complainant described her pregnancy as "high risk" because she developed placenta previa, a prenatal condition. On April 25, 2006, Complainant became dizzy at work as a result of a severe elevation in her blood pressure and was hospitalized. Complainant gave birth prematurely on April 29, 2006.
5. On May 6, 2006, Complainant was discharged from the hospital. Complainant testified that when she got home, she called Concord Valley Counseling and spoke to "Elizabeth" who identified herself as the new office manager. Elizabeth told Complainant that she was terminated per instructions of Dr. Lambert.
6. On May 12, 2006, Complainant spoke to Dr. Lambert who confirmed that Complainant's employment had been terminated. Dr. Lambert accused Complainant of leaving her position "without explanation" even though Complainant had left work in an ambulance due to complications of pregnancy.
7. For the six months following her termination, Complainant earned $364 per week in unemployment compensation. In January of 2007, Complainant began working at Orthopedic Surgical Associates of Lowell as a phone operator earning $10.50 per hour. In April of 2008, Complainant transferred to Lowell General Hospital as a medical receptionist/secretary earning $17.85 per hour.

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. A violation of the MMLA constitutes a violation of M.G.L. c. 151B, section 4(11A). The statute specifies that an employee is to give two weeks' notice of her anticipated date of departure and of her intent to return to work neither of which Complainant provided.

Complainant was a full-time/ non-probationary employee of Respondent who, during the latter stages of her pregnancy, left work in an ambulance on April 25, 2006 and give birth several days later. Since Complainant did not anticipate leaving work on April 25, 2006, she did not give two weeks' notice to her employer of her anticipated date of departure. After giving birth on April 29, 2006 and being discharged from the hospital on May 6, 2006, she immediately called Respondent about her job. At that time, Complainant was informed that she had been fired.

Complainant's departure in an ambulance for pregnancy-related complications during the latter stages of her pregnancy constituted de facto notice that her maternity leave was commencing. The statute requires two weeks' notice of the anticipated date of departure but such a requirement must be reconciled to the exigencies of a medical emergency. Complainant's telephone call to Respondent on the day she left the hospital likewise constituted adequate and timely notice under the MMLA of her intent to return to work. While Complainant could have broached the subject of a maternity leave prior to leaving work in an ambulance on April 25, 2006 or immediately after giving birth, her failure to do so was likely attributable to a legitimate fear that she would be fired. The experience of a co-worker who broached a similar request was fired just weeks earlier. See Diaz v. Concord Valley Treatment Center, Inc., 32 MDLR 15 (2010). The

experience of Complainant's co-worker likely had a chilling effect on the exercise of Complainant's rights under the MMLA.

Under the aforesaid circumstances, Complainant' was entitled to rely on the MMLA when she communicated with Respondent on May 6, 2006.

B. Gender Discrimination

Principles of gender bias are relevant to this case separate and apart from Complainant's unsuccessful MMLA claim. See Dietz v. Beverly Hospital, 31 MDLR 116 (2009) (even where MMLA is inapplicable, a cause of action for gender discrimination may exist under G.L. c. 151B, sec. 4(11A) where employer refuses to restore female employee to employment following a pregnancy-related medical leave).

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice to discriminate against an employee based on gender. [3] 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).

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

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

(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 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, was given no warning prior to her termination that her job was in jeopardy, and, in her role as office manager, had previously been required to reduce the hours of a pregnant receptionist, Ruth Diaz, in order to encourage Diaz to resign. These factors raise a credible inference of gender discrimination based on pregnancy.

Once Complainant has established a prima facie case, Respondent must articulate a legitimate, nondiscriminatory reason for its action and produce credible evidence supporting the 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). Respondent defaulted at the public hearing and, thus, failed to rebut the prima facie case.

IV. <u>REMEDY</u>

A. <u>Lost Wages and Benefits</u>

Chapter 151B provides for monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. <u>See</u> <u>Stonehill College</u>, 441 Mass. 549, 586-587 (Sossman, J. concurring) *citing* <u>Bournewood Hosp., Inc. MCAD</u>, 371 Mass. 303, 315-316 (1976).

As lost wages, Complainant is entitled to reimbursement for the loss of the income she would have received but for her termination. During the time Complainant worked for Respondent, her income consisted of an hourly wage of $12.50 for a full-time employment. According to Complainant, she frequently worked overtime but was not paid for the additional hours that she worked. Accordingly, I conclude that her maximum weekly income was $500.00.

Following her termination, Complainant received Unemployment Compensation at the rate of $364.00 per week for six months. In January of 2007, Complainant secured another job and began to earn $10.50 per hour. In April of 2008, Complainant's hourly wage increased to $17.85 per hour.

Based on the foregoing, Complainant's net loss of income between her termination on May 12, 2006 and January of 2007 was $6,536.00 (consisting of a six-week loss of all compensation and a $136.00 weekly differential for the six months of unemployment compensation). Between January of 2007 and April of 2008, Complainant sustained a loss of income at the rate of $2.00 per hour, totaling $5,200.00. Altogether, Complainant's lost wages amounted to $11,736.00.

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). 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).

Complainant neither alleged nor testified to any emotional distress that she suffered as a result of being terminated. She stated that she was not surprised to be "let go." Accordingly, Complainant has not proven that she suffered emotional distress as a result of her termination. I therefore decline to award damages for emotional distress.

V. CIVIL PENALTY

Given the convincing evidence of discriminatory animus based on pregnancy, the repeated nature of Respondents' statutory violations, and their demonstrable bad faith in terminating Complainant, I conclude that a civil penalty in the amount of $10,000.00 should be assessed against Respondents.

VI. 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) Pay Complainant $11,736.00 with interest at the rate of twelve per cent per annum through such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(2) Pay to the Commonwealth a civil penalty in the amount of $10,000.00.

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 2nd day of May, 2014.

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Betty E. Waxman, Esq.,
Hearing Officer