The attached Decision and Order discusses the following issues:

Sex Discrimination in Employment with respect to Terms and Conditions of Employment and Termination

Retaliation for Opposing Unlawful Employment Practices

Damages

9/25/07

Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 04 ESE 210 EEOC No. 16JA400117

In the matter of

Brenda A. Zeigler
Complainant

v. DECISION AND ORDER

J.J. GREGORY & SON
Respondent

INTRODUCTION

On February 18, 2004, Brenda A. Zeigler (hereafter referred to as the complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission) against J.J. GREGORY & SON (hereafter referred to as the respondent). The complainant alleged that the respondent discriminated against her with respect to terms and conditions of employment and termination from employment because of her sex and because she opposed unlawful employment practices, a violation of R.I.G.L. Section 28-5-7. This charge was investigated. On December 31, 2004, Preliminary Investigating Commissioner Camille Vella-Wilkinson assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondent violated the provisions of Section 28-5-7 of the General Laws of Rhode Island as alleged in the charge.

On November 8, 2005, a complaint and notice of hearing issued. The complaint alleged that the respondent discriminated against the complainant with respect to terms and conditions of employment and termination of employment because of her sex and in retaliation for opposing unlawful employment practices.

Hearings on the complaint were held on May 30, 2006, June 16, 2006, July 17, 2006 and August 17, 2006 before Commissioner John B. Susa.[1] The respondent filed its Memorandum of Law on September 29, 2006. The complainant filed her Memorandum of Law on November 9, 2006.

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[1] The transcript of the hearing of May 30, 2006 will hereafter be referred to as Vol. 1. The transcript of the hearing of June 16, 2006 will hereafter be referred to as Vol. 2. The transcript of the hearing of July 17, 2006 will hereafter be referred to as Vol. 3 and the transcript of the hearing of August 17, 2006 will hereafter be referred to as Vol. 4.

JURISDICTION

The respondent is a corporation that employs four or more employees within the State of Rhode Island and thus it is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i) and is subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The complainant began her employment with the respondent as a parts clerk in or around 2001. At that point, she had over twenty years of employment experience in the Parts Departments of equipment stores. She had worked as a Parts Manager at Stephen Roy Power Equipment and in the Parts Department at J & M Mower prior to her employment at the respondent.

2. The complainant's immediate supervisor was Mark Darling; he was the Parts Manager Supervisor. Richard Brogan was the respondent's Corporate Secretary and General Manager. He was the supervisor of Mr. Darling. John J. Gregory, III was a shareholder and Vice President of the respondent and the Operating Partner who made day-to-day decisions for the corporation.

3. The complainant spoke with Mr. Darling, Mr. Brogan and Mr. Gregory in the interview process.

4. The complainant's duties as a parts clerk for the respondent entailed supplying parts and equipment for customers. She was paid $13 per hour. Her regular work week was forty-one (41) or forty-two (42) hours. Every other week, she would work for five hours on Saturday, receiving one and one-half times her hourly wage. The respondent gave her medical benefits.

5. Approximately six months after the complainant was hired, her relationship with Mr. Darling deteriorated. Mr. Darling often spoke to the complainant very harshly, more harshly than he spoke to the complainant's male co-workers. He confronted the complainant first whenever there was a problem. He spoke harshly to the complainant in front of customers. He did not confront the complainant's male co-workers in front of customers. The complainant spoke with him on several occasions to ask if he had a problem with her, but he always told her "no".

6. The complainant's lunch was scheduled from noon to 1 p.m. On occasion, the complainant did not leave for lunch exactly at noon, because she was in the middle of assisting a customer. Mr. Darling would often remind the complainant that her lunch started at noon, despite her explanations that she could not leave while assisting a customer. The complainant observed her male co-workers leave after their scheduled time for their lunches without comment by Mr. Darling.

7. On one occasion, the individuals in the Parts Department were each awarded a $100 bonus. The male parts clerks received their bonuses in the morning; Mr. Darling gave the complainant's bonus to her at 5 p.m.

8. Sometime in June, July or August 2003, the complainant wore sneakers to work. Mr. Darling asked her what she was doing with sneakers on. The complainant replied that she was wearing sneakers because her feet hurt. Mr. Darling told her that she was not supposed to wear sneakers and that she could get corrective shoes if necessary. A male co-worker of the complainant was wearing sneakers that day and Mr. Darling and male co-workers of the complainant had worn sneakers to work in the past. When the complainant pointed out to Mr. Darling that a male parts clerk was wearing sneakers, he said that he was not aware of that.

9. The complainant occasionally, when repairing/replacing a hose, had to deal with hoses that were covered in hydraulic oil and grease. On these occasions, she wore cotton gloves supplied by the respondent, but these did not protect her hands and she was subject to rashes on her hands. When she approached Mr. Darling about getting a different type of glove, he directed her to the Service Department. They issued rubber gloves to her, but these gloves did not prevent the hand rashes. When she went back to Mr. Darling to tell him that the Service Department gloves did not work, he told her that she could buy herself another pair of gloves if she wanted to. Male co-workers of the complainant who wanted gloves simply got a pair from respondent's stock and marked it on a chart.

10. Mr. Darling's treatment of the complainant left her emotionally drained and she would often go home in tears. She testified that she was not always able to enjoy the visits of her grandson or go about her normal routine because of her distress. Trans. Vol. 1, pp. 28 – 29. She testified that during the last year of her employment, she was "a total wreck". Trans. Vol. 1, p. 29. After talking with her doctor, Dr. Carolyn Troise, Dr. Troise prescribed her "something to relax" the complainant when she got home. Trans. Vol. 1, p. 30.

11. The complainant's last day of work was August 6, 2003. On that day, she met with Mr. Gregory and told him that she did not like the way that she was treated, that what she wanted was to be treated "like the guys, with respect". Trans. Vol. 1, p. 35. She told him about the sneaker incident and the glove incident. Mr. Gregory told her that he would look into it.

12. While Mr. Gregory remembered that the complainant had come to talk to him on August 6, 2003, that she was upset and that she was very dissatisfied with Mr. Darling, when he was asked at the hearing if the complainant explained, he testified that "I cannot remember the context of the conversation". Trans. Vol. 1, p. 105.

13. On August 7, 2003, Mr. Gregory talked to Mr. Darling. When asked at the hearing if he remembered anything about the conversation, Mr. Gregory replied: "No, nothing of note." Trans. Vol. 3, p. 8. His testimony on a different hearing date was that: "my manager told

me he wasn't happy with the performance after her confronting me in my office". Trans. Vol. 1, pp. 112 – 113. Mr. Darling testified that: "Her [the complainant's] job performance as a parts person was fine. ... I had no trouble with her job performance". Trans. Vol. 4, pp. 25 – 26. He also testified that: "she [the complainant] did her job as well as any of the other two". Trans. Vol. 4, p. 34.

14. The complainant testified that she had not complained to Mr. Gregory or Mr. Brogan before August 6, 2003 because she had been told that complaints should be brought to the immediate supervisor, who was Mr. Darling, and because she had been told by co-workers that it "was no use, nobody ever listens." Trans. Vol. 1, pp. 37, 79 – 80. Mr. Gregory testified that the complaint procedure was to first go to your supervisor and then go up the chain of command. Trans. Vol. 1, p. 101. Neither party presented evidence that the respondent had a written policy on complaints.

15. On August 7, 2003, the complainant went to Dr. Troise for a regularly-scheduled appointment. She told Dr. Troise about her problems at work, how unfairly she thought she was being treated and why she was so upset. Dr. Troise prescribed medication for her and advised her to see a mental health provider. Dr. Troise gave her a note stating that the complainant should remain out of work from August 7, 2003 to September 7, 2003. The reasons given for the consultation were diabetic neuropathy and stress. The complainant gave the note to Mr. Darling.

16. On August 28, 2003, Mr. Brogan sent the complainant a letter terminating her employment. The letter states in part that:

> As a result of diminished demand and certain economic conditions in the Parts Department, it became necessary to implement a complete restructuring and reorganization of the Department.
>
> Hence, staffing needs had to be downsized. Therefore, at this time your employment is hereby terminated effective this date."

Complainant's Exhibit 2.

17. The complainant was shocked when she received this letter. At that time, there were two other parts clerks beside herself and one, Fred Weigand, was scheduled to retire at the end of the year. The complainant had never received reprimands or complaints about her work from the respondent. To her knowledge, no customers had complained about her work.

18. On August 10, 2003, two days after the complainant submitted her medical note, the respondent had run an advertisement in the Providence Journal seeking a parts clerk.

19. After August 6, 2003, the complainant was compensated by Temporary Disability Insurance. In or around February 2004, the Temporary Disability Insurance benefits ran out and the complainant began receiving approximately $400 per week in unemployment

insurance benefits. In or around June 2004, the complainant began working at Stephen Roy Power Equipment as a Parts Manager for $13 per hour.

20. The complainant's physician, Caroline Troise, gave it as her opinion to a reasonable degree of certainty in her profession as a duly licensed physician that the complainant was disabled from August 2003 through March 15, 2004 as the proximate result of job-induced stress in the course of her employment with the respondent. Complainant's Exhibit 5, p. 1. Dr. Troise's notes for September 5, 2003, indicate that the complainant's stress was "worse this month because of her termination". Complainant's Exhibit 5, p. 5. In September 2003, the complainant began to see a counselor, Pat Morena, whom she saw for two to three months. The complainant testified that when she started seeing her counselor, she was "a wreck" and "[v]ery emotional" (Trans. Vol. 1, pp. 43, 44). She testified that when she last saw Pat Morena she felt better.

21. The complainant's husband, Kenneth Zeigler, testified that while the respondent employed the complainant, she would often come home with problems from work and be upset. He testified that for a period of five or six months, his wife would be upset now and then, but it got to the point where she was upset on a daily basis. He testified that she would come home crying, that she would sometimes sit in her chair at night and cry, and that sometimes she would not want to cook dinner but just want to go to bed. He testified that after she left the respondent's employment she improved over time but was depressed for at least a few months. Trans. Vol. 1, pp. 84 - 88.

22. In respondent's "Response to Claim" filed during the investigation of the charge, the respondent stated that "Complainant was terminated because the Parts department was downsized from three to two persons and complainant had the poorest work performance". Complainant's Exhibit 4, p. 1. The "Response to Claim" also stated that "Any criticism leveled at the complainant was justified, based upon her poor work record". Complainant's Exhibit 4, p. 1. In his testimony, Mr. Gregory agreed that he had looked at the complainant's personnel file and that he did not see any documentation of poor work performance. Trans. Vol. 1, pp. 115 – 116. The last line of the termination letter of the complainant is: "Thank you for your valued service". Complainant's Exhibit 2. Mr. Gregory testified that the complainant was terminated because he wanted to downsize that department. When asked why the complainant wasn't kept, he replied: "she made it clear she didn't like Mr. Darling, and my feeling was Mr. Darling wasn't happy with her". Trans. Vol. 3, p. 9. Mr. Gregory testified that "when she [the complainant] was working for us, I thought she was a good employee. ... I didn't know her then." Trans. Vol. 1, p. 112. Mr. Darling testified that "[t]here were no plans to downsize" when the complainant left and that "[w]e were trying to hire to make it come back up to three". Trans. Vol. 4, p. 31.

23. After the complainant's termination, Fred Weigand asked Mr. Darling about the termination and Mr. Darling said: "I will never hire another woman". At some point in time, Mr. Darling told Doris Sears, the Parts Department Clerk: "Make sure I don't hire any more women". After the complainant's charge of discrimination was filed, Mr. Darling hired a woman, Kaylee Amaral, to work in shipping and receiving in the Parts Department.

24. After the complainant's termination, the respondent employed two parts clerks until it hired a male parts clerk about two months later. Mr. Weigand retired on December 31, 2003. On January 1, 2004, the respondent had two parts clerks, both male.

CONCLUSIONS OF LAW

The respondent discriminated against the complainant because of her sex with respect to terms and conditions of employment and termination.

The complainant did not prove by a preponderance of the evidence that the respondent discriminated against her because she opposed unlawful employment practices, as alleged in the complaint.

DISCUSSION

The Commission utilizes the decisions of the R.I. Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination.

I. THE COMPLAINANT PROVED THAT THE RESPONDENT DISCRIMINATED AGAINST HER WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT AND THAT THIS DISCRIMINATION LED TO HER TERMINATION

A. THE COMPLAINANT PROVED THAT THE RESPONDENT TARGETED HER BECAUSE OF HER GENDER

After assessing the testimony of the witnesses, the Commission found that the complainant was subjected to frequent harsh confrontations from Mr. Darling, in front of other workers and in front of customers. Male co-workers were not spoken to so harshly and were not confronted in front of customers. Mr. Darling singled the complainant out for criticism and confrontation. He criticized the complainant for not taking her lunch break exactly on time even though the delay was caused by her assistance of a customer. He did not criticize her male co-workers for delaying their lunches to assist a customer. Mr. Darling criticized the complainant for wearing sneakers and ordered her to do otherwise when male co-workers had worn sneakers for years. Mr. Darling gave the complainant's male co-workers bonus checks early in the day but did not give the complainant her bonus until the end of the day. Mr. Darling targeted the complainant for censure.

The Commission's conclusion that Mr. Darling treated the complainant in a disparate manner was based not only on her testimony, which the Commission found to be credible, but also on the testimony of Fred Weigand and Doris Sears. Fred Weigand testified that the relationship of the complainant and Mr. Darling deteriorated, that Mr. Darling had a good relationship with the male parts clerks and that Mr. Darling's tone of voice to the complainant changed. He testified that: "If she would bring up a subject like this department is planning to do this or that, he would just tell her to mind her own business and be quiet". Trans. Vol. 1, pp. 96, 97. The Commission found Mr. Weigand's testimony to be credible for a number of reasons. Among the reasons for finding him to be credible were that he did not have a personal interest in the case, he had worked for the respondent for thirty-six years before his retirement and he testified that Mr. Darling treated him well and that he liked Mr. Darling. Trans. Vol. 1, p. 96. Doris Sears testified that Mr. Darling was "very prejudice against her [the complainant]" and that he "just was very verbally abusive to her". Trans. Vol. 2, p. 14, 29. The Commission found her testimony to be credible. There was no evidence that she was personally connected with either of the parties. In addition, after her retirement, she sent a note to Mr. Gregory thanking him and telling him that she was proud to be a member of the J.J. Gregory Company. Respondent's Exhibit B. Based on this testimony, it is clear that Mr. Darling singled the complainant out for criticism and ill treatment.

There can be no dispute that "discrimination 'because of ... sex' includes 'requiring people to work in a discriminatorily hostile or abusive environment.'" Gorski v. New Hampshire Dept. of Corrections, 290 F.3d 466, 471 (1st Cir. 2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (internal quotations and citations omitted). *See also* O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) (harassment that is not explicitly sexual but is gender-based and detracts from the plaintiff's effectiveness at her job is evidence of an unlawful hostile environment based on sex). The complainant was treated more harshly than her male co-workers. Therefore, the Commission finds that the respondent discriminated against the complainant with respect to terms and conditions of employment because of her gender.

B. THE COMPLAINANT PROVED THAT THE RESPONDENT TERMINATED HER BECAUSE OF HER GENDER

The Commission generally evaluates evidence of discrimination in termination by utilizing the well-established method set forth in such cases as DeCamp v. Dollar Tree Stores, 875 A.2d 13 (R.I. 2005); Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680 (R.I. 1998); and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (hereafter referred to as Hicks). According to this method, the complainant must first establish a prima facie case of discrimination. A complainant may establish a prima facie case of discrimination with respect to termination by proving that:

1. She is a woman;
2. She met the basic requirement of the job and had not received warnings about her work;
3. She was terminated;
4. She was replaced by a male employee or a male employee was

retained.

The complainant proved a prima facie case of discrimination. She is a woman, she met the basic requirements of her job and had not received any warnings about her work. She was terminated. Male employees were retained as parts clerks and a male was hired to replace her.

Once the complainant has made a prima facie case of discrimination, the respondent has the burden of presenting a legitimate, non-discriminatory reason for its actions.

> Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case - i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, non-discriminatory reason". Burdine, 450 U.S. at 254. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Id. at 254-255, and n.8.
> Hicks, *supra*, 509 U.S. at 506 – 507. [Emphasis in original.]

The burden of persuasion remains with the complainant at all times.

The respondent gave several reasons, at various times, for the termination of the complainant. At the hearing, Mr. Gregory testified that the complainant was terminated because he wanted to downsize the department and that she wasn't retained because "she made it clear that she didn't like Mr. Darling, and my feeling was Mr. Darling wasn't happy with her". Trans. Vol. 3, p. 9. See Finding of Fact, Paragraph 22. The presentation of this evidence meets the respondent's burden of presenting an explanation for its actions.

Once a respondent has presented an explanation for its actions, a complainant may prove discrimination by proving that the reasons given are a pretext for discrimination. In order to prove that the respondent was motivated by discrimination, the complainant may present direct evidence or indirect evidence (such as evidence that the reasons presented by the respondent are not credible). Under Hicks, the finder of fact, in this case the Commission, must find that the respondent's actions were motivated by discrimination. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, *supra*, 509 U.S. at 519. [Emphasis in original.] The "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" but it does not compel such a finding. Hicks, *supra*, 509 U.S. at 511. [Emphasis in original.]

In addition to the above method for proving discrimination, the Fair Employment Practices Act (FEPA) provides for another way to analyze evidence of discrimination. The FEPA specifically provides that a plaintiff may prove discrimination by proving that discrimination was a motivating factor for the respondent's actions, even though the decision was also motivated by other lawful factors. R.I.G.L. Section 28-5-7.3.

The respondent gave different reasons at different times for the termination of the complainant. Mr. Gregory testified that the respondent wanted to downsize the Department. Trans. Vol. 3, p. 9. During investigation, the respondent stated that the complainant had the poorest performance. Complainant's Exhibit 4. At hearing, Mr. Gregory testified, as discussed above, that the complainant and Mr. Darling did not like each other. Trans. Vol. 3, p. 9. (See Findings of Fact, Paragraph 22 above.)

The respondent's proffered explanation that it terminated the complainant because it wanted to downsize the Department was not credible. After the complainant's termination, the respondent had two parts clerks. In January, 2004, the respondent had two parts clerks. However, between the termination of the complainant and January 1, 2004, the respondent hired a new male parts clerk. The advertisement for this position ran on August 10, 2003. When Mr. Gregory was asked whether this advertisement was for the complainant's position, he testified that this was: "[p]robably, Fred Weigand's position." Trans. Vol. 1, p. 111. (Fred Weigand was scheduled to retire on December 31, 2003.). Even if that is true, that does not explain why, two months after the complainant's termination, the respondent hired a new male parts clerk rather than retaining the complainant. Mr. Gregory testified that: "... it's not always easy to find help. You don't know if you're gonna get an immediate response or if it will take some time and you also have to train some people". Trans. Vol. 1, p. 112. The respondent terminated the complainant when it knew that it needed another parts clerk, that it was not always easy to find a parts clerk and that a new person might need training. It should also be noted that Mr. Darling testified, in direct contradiction to Mr. Gregory, that at the time of the complainant's termination: "[t]here were no plans to downsize" and that "[w]e were trying to hire to make it come back up to three". Trans. Vol. 4, p. 31. The Commission did not believe the respondent's explanation that it terminated the complainant because it needed to downsize.

The respondent's statement during investigation that it chose the complainant for downsizing because she had the worst performance was not credible. During investigation, the respondent stated in its Response to Claim that the complainant was terminated because the Parts Department was downsized and the complainant had the worst performance. As discussed above, its claim that the complainant was terminated because of downsizing was not credible. It is also clear from the evidence that the complainant's performance was as good as that of the other parts clerks. The complainant's termination letter thanks her for "valued service". The complainant's personnel file contains no documentation of poor work performance. Mr. Gregory testified that: "when she [the complainant] was working for us, I thought she was a good employee". Trans. Vol. 1, p. 112. Mr. Darling testified that the complainant: "did her job as well as any of the other two". Trans. Vol. 4, p. 34. Thus, the testimony of respondent's own witnesses contradicts the respondent's statement during investigation that the complainant had the worst performance and therefore the Commission gives no credence to that statement.

The respondent's statement that it terminated the complainant because she and Mr. Darling did not like each other cloaks the genesis of Mr. Darling's dislike which was sex discrimination. Mr. Gregory's statement that he downsized the complainant because she and Mr. Darling did not like each other obscures the cause of Mr. Darling's dislike. The complainant complained to Mr. Gregory that Mr. Darling was not treating her with the same respect as he treated the men. If Mr.

Gregory is characterizing the complainant's complaints of sex discrimination as a dislike for Mr. Darling which justifies termination, that would be an unlawful, retaliatory reason for termination. As for Mr. Darling's "dislike" of the complainant, there is convincing evidence that sex discrimination was a primary component of this "dislike". Mr. Darling targeted the complainant for criticism in a way that he did not target the male employees. (See the discussion above.) Mr. Darling also made overt statements of sex discrimination. After the complainant had been terminated, Mr. Darling told Fred Weigand that "I will never hire another woman". He told Doris Sears, the Parts Department Clerk: "Make sure I don't hire any more women". As discussed above, the Commission found Mr. Weigand and Ms. Sears to be credible witnesses. In fact, Mr. Darling, when asked whether he said that he would never hire another woman testified that: "I may have said that in the heat of the moment, yes, to Fred Weigand, but I have no problem with women at all. You know, and it would have been in the heat of the moment." Trans. Vol. 4, p 18. Mr. Darling's words and actions demonstrate that his "dislike" of the complainant was generated by his sex discrimination.

The respondent argues that there are several factors which should persuade the Commission that Mr. Darling was not motivated by sex discrimination. It cites Mr. Darling's decision to hire a woman after the complainant's termination. Since this hiring was done after the respondent received notice that the complainant had filed a charge of sex discrimination, the Commission does not consider it persuasive evidence that Mr. Darling was not motivated by sex discrimination in his treatment of the complainant. The respondent also notes that Mr. Darling hired the complainant. While it appears that Mr. Darling had a role in the complainant's hiring, and this is a factor to be considered in determining whether there is sex discrimination, Mr. Darling's disparate treatment of the complainant and overt statements of discrimination outweigh it in the assessment that he was motivated by sex discrimination. Mr. Darling testified to being bothered by the complainant's alleged vulgar language (Trans. Vol. 4, pp. 14, 15), but he also testified that he did not "consider it a company problem, so I wouldn't have talked to the company about it". Trans. Vol. 4, p. 29. He agreed that in his deposition he testified that: "She wanted to be – wanted to try to be like one of the men. She would swear, she would." Trans. Vol. 4, p 27. His trouble with her alleged vulgarity thus appears connected with her trying to act "like one of the men" instead of acting in a way he associated with women. With respect to the complainant's complaint that he would always approach her first if there was a criticism, Mr. Darling admits that he went to complainant first with his complaints, testifying that he considered her an "assistant manager" and that she was going to "kind of run that area" because of her experience. Trans. Vol. 1, p. 7. No one else testified that the complainant was considered an "assistant manager" and since Fred Weigand had been a parts clerk with the respondent for thirty-six years, Mr. Darling's purported reliance on her years of experience as a justification for complaining to her about every problem is not credible. The Commission, in general, found the complainant's testimony to be clear and consistent and credible. As discussed above, the testimony of Mr. Weigand and Ms. Sears, who supported crucial parts of the complainant's testimony, was also credible. The testimony of Mr. Darling and Mr. Gregory was not consistent. (See, i.e., Finding of Fact Paragraph 13 above.) The testimony of Mr. Gregory was not internally consistent, was at times evasive and was not consistent with statements made by the respondent during investigation. (See discussion and Findings of Fact above.) Given the lack of credibility of Mr. Darling and Mr. Gregory, the evidence cited by the respondent does not outweigh the clear evidence that Mr. Darling was motivated by sex discrimination.

Having found that Mr. Darling was motivated by sex discrimination, the Commission further finds that he influenced Mr. Gregory to terminate the complainant because of her sex. As discussed above, Mr. Gregory testified that he terminated the complainant because Mr. Darling disliked her. Mr. Gregory consulted with Mr. Darling the day after the complainant came to him with complaints about Mr. Darling's treatment of her. While at one point Mr. Gregory's testimony was that Mr. Darling said nothing "of note", (Trans. Vol. 3, p. 8), on another day of testimony, he testified that "my manager told me he wasn't happy with the performance after her confronting me in my office". Trans. Vol. 1 pp. 112 – 113. Mr. Brogan also testified that Mr. Darling told him that he was not happy with the complainant's performance. Trans. Vol. 2, p. 39. (Mr. Darling's testimony was that he did not terminate the complainant and he agreed that he had nothing to do with her termination. Trans. Vol. 4, p. 35.) It is evident that Mr. Darling communicated to Mr. Gregory that the complainant had performance problems, even though his sworn testimony was that she did not have performance problems. Given his hostile and different treatment of the complainant and his overt comments of sex discrimination, the Commission concludes that he influenced Mr. Gregory to terminate the complainant because he did not want to work with a female parts clerk. *See* Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 – 227 (5th Cir. 2000), which held that:

> If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker. *See, e.g., id.* [Long v. Eastfield College, 88 F.3d 300 (5th Cir.1996)] at 307 (stating that if official decisionmaker "merely 'rubber stamped' " the wishes of others, that decisionmaker would inherit the discriminatory taint); Haas v. ADVO Systems, Inc., 168 F.3d 732, 734 n. 1 (5th Cir.1999) (rejecting defendant's argument that subordinate exerted no influence over ultimate decisionmaker and thus determining that sufficient evidence existed to demonstrate a causal nexus between the discriminatory remarks and the employment decision (citing Long, 88 F.3d at 307)).
>
> Our sister circuits also support this approach. For instance, in Shager v. Upjohn Co., Judge Posner, writing for a panel of the Court of Appeals for the Seventh Circuit, reversed a summary judgment for the employer in an ADEA case, finding that the influence of the person with the discriminatory attitude may well have been decisive in the employment decision. *See* 913 F.2d 398, 405 (7th Cir.1990). "If the [formal decisionmakers] acted as the conduit of [the employee's] prejudice-his cat's paw-the innocence of the [decisionmakers] would not spare the company from liability." *Id.* [Footnotes omitted.]

See also EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006) (summary judgment for employer in race discrimination case overturned when there was evidence that the supervisor, who provided the facts to the decision maker, had made discriminatory remarks and "nit-picked" the work of black employees compared to other employees). The Commission finds that Mr. Darling's prejudice against the complainant, which was based on her sex, led him to provide false information to Mr. Gregory which led to her termination.

II. THE COMPLAINANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT TERMINATED HER IN RETALIATION FOR OPPOSING UNLAWFUL EMPLOYMENT PRACTICES

Section 28-5-7(5) of the General Laws of Rhode Island provides that it is an unlawful employment practice:

> (5) For any employer ... to discriminate in any manner against any individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding or hearing under this chapter.

Discrimination against an individual by an employer because that individual has opposed unlawful employment practices or has assisted in an investigation is often referred to as "retaliation". Federal cases interpreting evidence in retaliation cases generally use the method of proof used to evaluate evidence of discrimination. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) (hereafter referred to as Quinn). Quinn sets forth the standards used to evaluate evidence. The prima facie case for proving unlawful retaliation can be made by demonstrating that:

1) The complainant engaged in protected activity (such as opposing unlawful employment practices) known to the respondent;
2) The respondent took adverse action against the complainant;
3) There is a causal link between the protected activity and the adverse action.

The Commission finds that the complainant engaged in protected activity known to the respondent. The complainant testified that she told Mr. Gregory of her difficulties with Mr. Darling and said that she wanted to be treated with respect, like the "guys". Mr. Gregory did not dispute this testimony. (See Trans. Vol. 1, p. 105.) Therefore, the complainant engaged in protected activity known to the respondent. The respondent took adverse action against the complainant. It terminated her.

The causal connection between the protected activity and the adverse action can be established by a number of factors. The complainant's "prima facie burden [in a retaliation case] is not onerous." Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996). In this case, the complainant was terminated within a month of her conversation with Mr. Gregory. The time between the protected activity and the adverse action can establish a causal connection, particularly if the time period is short. *See* Quinn, *supra*. Therefore, the complainant made a prima facie case of retaliation. She engaged in protected activity known to the respondent, she was terminated and the timing of the termination supports a causal link between the protected activity and the termination.

Once the complainant has made a prima facie case of retaliation, the respondent has the burden of presenting a legitimate, non-discriminatory reason for its actions. (See the discussion above

for burdens of proof in discrimination cases.) The burden of persuasion remains with the complainant at all times. *See* Fennell, *supra*; Quinn, *supra*. At the hearing, the respondent's proffered reasons for the termination of the complainant were that it wanted to reduce the workforce and that the complainant and Mr. Darling did not get along. See Findings of Fact, Paragraph 22 above.

Once a respondent has presented legitimate, non-discriminatory reasons for its actions, a complainant may prove retaliation by proving that the reasons given are a pretext for retaliation. (See the exposition above on proof of pretext in discrimination cases.) As with discrimination cases, the finder of fact, in this case the Commission, must find that the respondent's actions were motivated by retaliation. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, *supra*, 509 U.S. at 519. [Emphasis in original.] The "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" but it does not compel such a finding. Hicks, *supra*, 509 U.S. at 511. [Emphasis in original.]

As set forth in the previous section, the Commission did not find the respondent's reasons for the complainant's termination to be credible. The Commission found that the respondent was motivated by sex discrimination. The Commission does not believe that the respondent was motivated by retaliation. Mr. Gregory did not terminate the complainant immediately, he consulted with Mr. Darling. The Commission's evaluation of the witnesses' testimony and their demeanors convinced the Commission that Mr. Darling's sex discrimination infected Mr. Gregory's decision to terminate the complainant but the Commission is not persuaded that they were motivated by retaliation. Therefore, the Commission finds that the complainant did not prove that she was terminated in retaliation for her opposition to unlawful employment practices.

III. DAMAGES

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that the respondent has committed an unlawful employment practice. R.I.G.L. Section 28-5-24(a)(1) provides as follows:

> **§ 28-5-24 Injunctive and other remedies – Compliance.** – (a) If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. Back pay shall include the economic value of all benefits and raises

to which an employee would have been entitled had an unfair employment practice not been committed, plus interest on those amounts.

...

The Commission orders that the respondent reinstate the complainant and awards the complainant back pay, the amount she would have earned if the respondent had not discriminated against her. The complainant testified that she was paid $13 per hour, that she worked forty-one to forty-two hours per week and that every other week she worked five hours of overtime at time and one half. Therefore, her salary for two weeks of work was $1176.50 ({41.5 hours x $13 x 2} plus {5 hours x $19.50}) and her average weekly wage was $588.25. She also received health benefits. While unemployment compensation and interim earnings will be deducted from the amount she would have earned, her temporary disability insurance payments will not be deducted. See, for example, federal employment discrimination cases that hold that collateral source income should not be deducted. Maxfield v. Sinclair Int'l, 766 F.2d 788, 793-795 (3d Cir. 1985), *cert. denied* 474 U.S. 1057, 106 S. Ct. 796, 88 L. Ed. 2d 773 (1986) (Social Security benefits should not be deducted from a back pay award under the Age Discrimination in Employment Act); *accord* Dominguez v. Tom James Co., 113 F.3d 1188, 1191 (11th Cir. 1997). *See also* Moysis v. DTG Datanet, 278 F.3d 819, 828 (8th Cir. 2002) (the lower court was correct to refuse to deduct Workers' Compensation benefits from a back pay award, allowing the deduction of this collateral source income would be a windfall to an employer who discriminated); Thurman v. Yellow Freight Sys., 90 F.3d 1160, 1171 (6th Cir. 1996) (Worker's Compensation benefits paid by a third party should not be deducted from back pay); Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 16 (1st Cir. 1999) (Under the Maine Human Rights Act, disability insurance proceeds, AFDC benefits and food stamp benefits could not be deducted from back pay awarded in a disability discrimination case and since federal law is unclear as to whether such deductions are prohibited or in the lower court's discretion, these collateral source benefits should not have been deducted). While the respondent cites two cases which hold that the collateral source rule applies in tort cases, Colvin v. Goldenberg, 108 R.I. 198, 273 A.2d 663 (1971) and Oddo v. Cardi, 100 R.I. 578, 218 A.2d 373 (1966), and one case which holds that the collateral source rule does not apply in Workers' Compensation cases, Moniz v. Providence Chain Co., 618 A.2d 1270 (R.I. 1993), these cases do not address the situation in discrimination cases. Generally, Rhode Island law on discrimination is interpreted using federal cases as guidelines. See Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998). Therefore, the Commission will follow the federal cases cited above and will not deduct the Temporary Disability Insurance received by the complainant from her back pay award.

The time period for the back pay will be from September 7, 2003, to the time when the respondent places the complainant in a job of parts clerk or she refuses an offer of parts clerk. The beginning of the period is September 7, 2003, because that is when her physician originally stated that she could return to work. She did not return to work on that date and was ultimately not released by her doctor to return to work until February 2004. Generally, back pay is not awarded for a period of time when the complainant is unable to work. In this case, the length of time that the complainant was unable to work was affected by an intervening event, her discriminatory termination on August 28, 2003. The medical records indicate that the

termination caused her additional stress. See Complainant's Exhibit 5, p. 5. Further, Dr. Troise gave her medical opinion that the complainant was disabled from August 2003 through March 15, 2004 as the proximate result of job induced stress in the course of her employment with the respondent. Complainant's Exhibit 5, p. 1. There was no medical testimony to contradict that assessment. Therefore, the Commission will utilize the original return date, the date given by her physician before the complainant was subjected to the increased stress of termination, as to when she would have been able to return to work, had she not been terminated.

The Commission has awarded compensatory damages for pain and suffering in previous cases. The Commission has indicated that it will be guided by federal cases interpreting federal civil rights laws and the state case law on damages for pain and suffering. R.I.G.L. Section 28-5-24(b) provides that:

> (b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages. As used in this section, the term "compensatory damages" does not include back pay or interest on back pay, and the term" intentional discrimination in violation of this chapter" means any unlawful employment practice except one that is solely based on a demonstration of disparate impact.

The U.S. Equal Employment Opportunity Commission (EEOC) has issued Policy Guidance on "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", CCH Employment Practices Guide, Vol. 2, Para. 5360 (1992). The Policy Guidance provides that it is EEOC's interpretation that compensatory damages are available for pecuniary and non-pecuniary losses caused by discriminatory acts. Non-pecuniary losses include damages for pain and suffering, inconvenience and loss of enjoyment in life. "Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", *supra*, p. 6225. While "there are no definitive rules governing the amounts to be awarded," the severity of the harm and the time that the harm has been suffered are factors to be considered. "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", *supra*, pp. 6226, 6227.

In Rhode Island, the determination of the appropriate amount of compensatory damages should not be influenced by sympathy for the injured party nor should the damages be punitive. Soares v. Ann & Hope of R.I., Inc., 637 A.2d 339 (1994). The decision makers should determine the damages for pain and suffering by the exercise of judgment, the application of experience in the affairs of life and the knowledge of social and economic matters. Quince v. State, 94 R.I. 200, 179 A.2d 485 (1962). There is no particular formula to calculate damages for pain and suffering, although lawyers are free to argue that the damages should be calculated at a certain amount per day. Worsley v. Corcelli, 119 R.I. 260, 377 A.2d 215 (1977).

Damages for the pain and suffering which result from discrimination fall within a wide range. *See, e.g.*, Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006) (reinstating a jury award of $950,000 {reduced to the statutory cap of $300,000} when there was evidence that the plaintiff was subjected to such constant ridicule about his mental impairment that it required him to be hospitalized and eventually to leave the workforce); O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) (reinstating a jury award of $275,000 where the plaintiff had endured years of sexual harassment causing insomnia, severe weight gain, depression, panic attacks and likely permanent disability); Howard v. Burns Bros., 149 F.3d 835, 843 (8th Cir. 1998) (upheld the propriety of an award of $1,000 compensatory damages to a plaintiff who proved that a co-worker "brushed" her on several occasions and made sexual remarks; the plaintiff and her husband had testified as to her emotional distress); Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) (plaintiff was awarded $10,000 for medical and psychological expenses and $10,000 in damages for pain and suffering when she had a nervous breakdown after suffering race discrimination including discrimination in denial of promotions, a discriminatory demotion and loud and rude public chastisement by a supervisor).

In the circumstances of the instant case, the Commission finds that $6,000 compensates the complainant for her pain and suffering. The discrimination consisted of harsh treatment, disparate treatment and termination based on her sex. The testimony of the complainant was that the discriminatory treatment left her emotionally drained, that she would often go home in tears and that she was not always able to go about her normal routine because of her distress. Trans. Vol. 1, pp. 28 – 30. The testimony of the complainant's husband is summarized in Finding of Fact Paragraph 21 above. In essence, he testified that the complainant was often upset when she came home from work, that her distress worsened over time, that at times she cried or would just want to go to bed after she came home. He testified that after she was terminated, she improved over time but was depressed for at least a few months. Trans. Vol., 1, pp. 84 – 88. The complainant consulted her physician about this stress. After her termination, she went into counseling for months. It is evident that the acts of discrimination caused the complainant stress, emotional distress and humiliation. The Commission finds that $6,000 is the proper amount to compensate her for that suffering.

The Commission awards interest consistently with the method used for tort judgments. See R.I.G.L. Section 9-21-10.

ORDER

I. Having reviewed the evidence presented on May 30, 2006, June 16, 2006, July 17, 2006 and August 17, 2006, the Commission, with the authority granted it under R.I.G.L. Section 28-5-25, finds that the complainant failed to prove the allegations of the complaint with respect to allegations of retaliation and hereby dismisses that portion of the complaint.

II. Violations of R.I.G.L. Section 28-5-7 having been found with respect to complainant's

allegations of sex discrimination, the Commission hereby orders:

1. That the respondent cease and desist from all unlawful employment practices under R.I.G.L. Section 28-5-7;

2. That the respondent offer the complainant the next available position of parts clerk;

3. That the respondent pay the complainant $588.25 per week minus unemployment benefits and interim earnings for the time period starting from September 7, 2003, until she is placed in the position of parts clerk for the respondent or refuses an offer of a position of parts clerk for the respondent;

4. That the respondent pay the complainant the value of the benefits that she would have received if she had continued to work for the respondent, such as health insurance, minus the value of the benefits that she received from other employers for the time period from August 28, 2003 until she is placed in the position of parts clerk for the respondent or refuses an offer of a position of parts clerk from the respondent;

5. That the respondent pay the complainant $6,000 as compensatory damages for pain and suffering;

6. That the respondent pay 12% annual interest on the amounts specified in Paragraphs II (3 - 5);

7. That, within thirty days of the date of this Order, the complainant submit to the Commission and the respondent documents that demonstrate the amount of unemployment benefits, interim earnings and interim employment benefits she received during the time period of September 7, 2003 to the date of the Order;

8. That the respondent may request a hearing on the issue of the amount of the complainant's unemployment compensation, interim earnings and interim employment benefits within ten days of its receipt of the complainant's documents or waive its right for such a hearing. If the respondent should request a hearing, after the hearing the Commission will determine the amount of unemployment compensation, interim earnings and interim employment benefits to be deducted from the back pay and benefits awarded to the complainant and will set a date for payment of back pay and benefits;

9. That if the respondent waives its right for a hearing on the amount of the complainant's unemployment insurance, and interim earnings and interim employment benefits, that it pay the complainant the back pay, back benefits and interest, minus unemployment compensation and interim earnings and interim employment benefits, for the time period from September 7, 2003 to the date of the Order, on or before thirty days from its receipt of the documents from the complainant and that the respondent provide a copy of the cancelled check to the Commission;

10. That the respondent submit a cancelled check indicating remuneration of the complainant in accordance with the Paragraphs II (5 and 6) within forty-five days of the date of this Decision and Order;

11. That if the parties do not agree on a method for calculating unemployment insurance, interim pay and interim employment benefits for the time period after the date of the Order, the complainant will submit documents as to those amounts every three months, the respondent may request or waive a hearing as described above and the payments must be made as described above in Paragraphs II (8 or 9);

12. That the respondent post a copy of the Commission poster prominently in its facilities;

13. That the respondent provide training to all managerial and supervisory staff on state and federal employment anti-discrimination laws and provide a certification to the Commission within six (6) months of the date of this Order that the training has been completed, a list of the people who were trained and the name of the trainer.

III. The attorney for the complainant may file a Motion and Memorandum for Award of Attorney's Fees no later than forty-five (45) days from the date of this Order. The respondent may file a Memorandum in Opposition no later than forty-five days after receipt of the complainant's Motion. The parties' attention is directed to Morro v. Rhode Island Department of Corrections, Commission File No. 81 EAG 104-22/02 (Decision on Attorney's Fees 1982) for factors to be generally considered in an award of attorney's fees under the Fair Employment Practices Act. If either party would like a hearing on the issues involved in the determination of an appropriate award of attorney's fees, the party should request it in the memorandum.

John B. Susa
Hearing Officer

I have read the record and concur in the judgment.

Iraida Williams
Commissioner

OPINION OF COMMISSIONER NANCY KOLMAN VENTRONE WHO CONCURS IN PART AND DISSENTS IN PART

I have read the record. I concur with the Commission's finding that the complainant did not prove that the respondent retaliated against the complainant because she opposed unlawful employment practices.

I dissent from the Commission's finding that the respondent discriminated against the complainant with respect to terms and conditions of employment and termination because of her sex. I was not the Hearing Officer assigned to the case and while I defer to the credibility determinations of the Hearing Officer, Commissioner John B. Susa, I did not find sufficient evidence that Mr. Darling treated the complainant in a manner substantially different from the way that he treated the male employees. Several factors influenced my decision. Mr. Darling had participated in the hiring of the complainant. The specific incidents of which the complainant complained were inconsequential incidents. There was evidence that Mr. Darling was, at times, also hostile to male employees. (See Trans. Vol. 1, p. 59, Trans. Vol. 2 p. 18). To the extent that Mr. Darling treated the complainant harshly, there is not enough evidence that the harsh treatment was due to her sex instead of a personality conflict. It is my conclusion that the complainant did not prove sex discrimination by a preponderance of the evidence and I therefore dissent from that portion of the Decision and Order.

Nancy Kolman Ventrone — 9/28/07

Nancy Kolman Ventrone
Commissioner

Date