Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 07 EPD 058 EEOC No. 16J-2006-01433

In the matter of

Thai-Ping Mays
Complainant
v. DECISION AND ORDER

JDTK Food Services, LLC and Dennis Rochon
Respondents

INTRODUCTION

On September 6, 2006, Thai-Ping Mays (hereafter referred to as the complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter Commission) against JDTK Food Services, LLC. On April 20, 2007, the complainant filed an amended charge adding Dennis Rochon as a respondent. The charge alleged that JDTK Food Services, LLC and Dennis Rochon (hereafter referred to as the respondents) discriminated against the complainant with respect to terms and condition of employment and termination because of her disability in violation of Sections 28-5-7 and 42-87-2 of the General Laws of Rhode Island. This charge was investigated. On June 30, 2008, Preliminary Investigating Commissioner Alton W. Wiley, Jr. assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents violated the provisions of R.I.G.L. Sections 28-5-7 and 42-87-2. On August 14, 2008, a complaint and notice of hearing issued. The complaint alleged that the respondents discriminated against the complainant with respect to terms and conditions of employment, and termination of employment because of her disability.

A hearing on the complaint was held before Commissioner Rochelle Lee on June 24, 2009. The complainant was represented by counsel. Dennis Rochon was present and represented himself. Mr. Rochon filed a Memorandum on August 11, 2009. The complainant did not file a memorandum.

JURISDICTION

The respondent, JDTK Food Services, LLC (hereafter JDTK), employed four or more people within the State of Rhode Island at the time of the events in question and thus it is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i). JDTK was an entity doing business within the state at the time of the events in question and thus it is covered by the prohibitions of Title

42, Chapter 87 of the General Laws of Rhode Island. JDTK is therefore subject to the jurisdiction of the Commission.

Respondent Dennis Rochon was a member and the operator of JDTK at the time in question. He acted, directly and indirectly, in the interest of the employer, JDTK, and thus he is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i). He was also doing business within the state and thus is covered by the prohibitions of Title 42, Chapter 87 of the General Laws of Rhode Island. Mr. Rochon is therefore subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The complainant has had severe vision impairments since birth. She has been diagnosed with very high myopia, retinopathy of prematurity, nystagmus, phthisis and glaucoma. She is totally blind in her left eye and has severe visual limitations in her right eye. She cannot drive due to her limited vision. At times, she has problems seeing things that are far away and she can have trouble reading very small print.

2. JDTK is a company which provided food services for employees at the Corliss Street Post Office. It was a small business with a limited number of employees. Mr. Rochon was the operator of JDTK and a member of it.

3. The complainant, prior to applying for employment with the respondents, worked as a waitress at Newport Creamery for almost four years. She operated a cash register there as part of her duties. She also worked for several months in 2000 at Burger King where she took customers' orders, served customers, made sandwiches and used a cash register. During the holiday season of 2003, she worked at the Dollar Tree and used a cash register there. She also worked as a dietary aide at Bannister House, making the residents' food, the salads or desserts, and putting them on trays. She was working sixteen hours per week at Bannister House when she applied for a job with the respondents.

4. On July 10, 2006, the complainant contacted Mr. Rochon to ask about the position. He asked her to come in the next day to fill out an application and speak with him. On July 11, 2006, the complainant filled out the application. Mr. Rochon wanted her to start the next day. The complainant said that she had to give notice at her former job. The complainant and Mr. Rochon agreed that the complainant would start on July 19, 2006. He asked her to arrive at 2:30 p.m. to fill out paperwork. The complainant was scheduled to work thirty hours per week at a rate of $8 per hour.

5. The complainant used the RIDE program, a program that provides transportation for people with disabilities, to go to work on July 19, 2006. She arrived shortly before 2:30 p.m. She arranged for the RIDE program to pick her up at 10:45 p.m.

6. Mr. Rochon did not arrive until about 4:30 p.m. The complainant sat and waited for him. When Mr. Rochon arrived, he showed the complainant the condiments in the cafeteria and then asked her to operate the cash register. He did not give her any specific training on the

cash register before he asked her to operate it.

7. The cash register was an older model and the buttons and numbers were faded. The complainant could not distinguish the numbers. The postal workers were coming for their break and a line developed. The complainant could not read the change amount on the register. Mr. Rochon took over the operation of the cash register.

8. After the rush was over, Mr. Rochon asked the complainant if she had a vision impairment. The complainant told him that she was blind in her left eye. The complainant told Mr. Rochon that the numbers on the cash register were fading and she couldn't make them out. Mr. Rochon said that that was all he had. Mr. Rochon then told the complainant that he could not use her. The complainant asked if she could do the work of the person who was doing grill work. Mr. Rochon said no, because he needed both people to do both jobs. Mr. Rochon said he was sorry, gave her $10 and escorted her out.

9. Mr. Rochon testified at the hearing that he terminated the complainant because she had a poor attitude. He testified that when he took over the register from her, he asked her to work with the employee assigned to the grill but the complainant just sat in the corner and waited. He testified that after he fired her, he asked about her poor vision. He testified that the termination didn't have anything to do with her being legally blind because she could have been on the grill and done prep work. Trans. p. 31. He also testified that if people know how to work as a cashier, they don't have to be trained. Trans. p. 32. In a prior written statement, written by Mr. Rochon and dated October 30, 2007, Mr. Rochon made the following statements: "After the break I asked her if she could see the register and she said no. I told her right there if I had work where it would be prep work I could offer her 40 hrs. But at the time I could not keep her". Complainant's Exhibit 3, p. 2.

10. The complainant took public transportation home because the RIDE program requires that trips be scheduled twenty-four hours in advance.

11. The complainant was not able to find another job for three months. That job, at the Bannister House, was for sixteen hours per week at a rate of $8.35 per hour. The complainant worked there from November 2006 to December 28, 2007 when she left to have back surgery. She was on medical leave for nine months.

12. The complainant was upset when she was terminated. She could not understand why this had happened to her. The termination caused her to have low self-esteem and to feel depressed. While looking for other work, she felt if she filled out an application that they would look at her differently because of her disability. The complainant started feeling better when she started working again. As of the date of the hearing, the termination was still affecting her. It still made her think that people will look at her differently because of her disability.

CONCLUSIONS OF LAW

The complainant proved by a preponderance of the evidence that she has a disability as defined in the Fair Employment Practices Act, R.I.G.L. Section 28-5-6, and as defined in the Civil Rights of People with Disabilities Act, R.I.G.L. Section 42-87-1.

The complainant proved by a preponderance of the evidence that the respondents discriminated against her with respect to terms and conditions of employment and termination of employment because of her disability, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island and in violation of the Civil Rights of People with Disabilities Act, Title 42, Chapter 87 of the General Laws of Rhode Island.

DISCUSSION

I. THE STANDARDS FOR EVALUATING EVIDENCE OF DISABILITY DISCRIMINATION IN TERMINATION

The Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (FEPA), prohibits employment discrimination on the basis of disability with respect to terms and conditions of employment and termination. R.I.G.L. Sections 28-5-7(1)(i and ii) provide that it is an unlawful employment practice for any employer:

> (i) To refuse to hire any applicant for employment because of his or her race or color, … disability, …;
>
> (ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment. ….

The Civil Rights of People with Disabilities Act, Title 42, Chapter 87 of the General Laws of Rhode Island (PDA) prohibits employment discrimination on the basis of disability. R.I.G.L. Section 42-87-2 provides that: "No otherwise qualified person with a disability shall, solely by reason of his or her disability, be subject to discrimination by any person or entity doing business in the state ...."

R.I.G.L. Section 42-87-3(2) provides in relevant part that:

> (2) Notwithstanding any inconsistent terms of any collective bargaining agreement, no otherwise qualified person with a disability shall, solely on the basis of disability, who with reasonable accommodation and with no major cost can perform the essential functions of the job in question, be subjected to

> discrimination in employment by any person or entity receiving financial assistance from the state, or doing business within the state.

R.I.G.L. Section 42-87-1(6) defined[1] an "otherwise qualified" person with respect to employment as "a person with a disability who, with reasonable accommodations, can perform the essential functions of the job in question".

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. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See* Newport Shipyard, Inc., 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998).

The courts in DeCamp v. Dollar Tree Stores, 875 A.2d 13 (R.I. 2005), Barros, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993), Gillen v. Fallon Ambulance Serv., 283 F.3d 11 (1st Cir. 2002) and Monette v. Electronic Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996) set forth methods for analyzing evidence of discrimination. According to these methods, the complainant must first establish a prima facie case of discrimination. DeCamp provides that a person may prove a prima facie case of disability discrimination in termination by proving that:

> (1) he or she was disabled within the meaning of FEPA and RICRA [the Rhode Island Civil Rights Act, Title 42, Chapter 112 of the General Laws of Rhode Island]; (2) that the employee was a "qualified" individual, which means that "with or without reasonable accommodation, she was able to perform the essential functions of her job"; (3) "that the employer discharged her in whole or in part because of her disability." [Cite omitted.] *Id*. at 25.

See also Monette which similarly describes how a plaintiff can establish a prima facie case of disability discrimination[2] in termination by proving that:

1. He or she had a disability known to the employer;
2. He or she was qualified for the position, with or without reasonable accommodation;
3. He or she was terminated/laid off;
4. He or she was replaced.

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[1] The FEPA and the PDA have been amended since the time of the events in question. The Commission will utilize the statutory language in effect at the time of the events in question.

[2] Monette analyzed evidence under the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101 et seq.

Once a complainant has made a prima facie case of discrimination, a respondent must present a legitimate, non-discriminatory reason for its actions. Once a respondent has presented legitimate, non-discriminatory reasons for its actions, a complainant may prove discrimination by proving that the reasons given are a pretext for discrimination. Hicks.

In addition to the above method for proving discrimination, the 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.

II. THE COMPLAINANT PROVED THAT THE RESPONDENTS DISCRIMINATED AGAINST HER BECAUSE OF HER DISABILITY WITH RESPECT TO TERMINATION

A. THE COMPLAINANT ESTABLISHED A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION

In accordance with the standards set forth in Section I, the complainant successfully established a prima facie case of disability discrimination.

The FEPA, in R.I.G.L. Section 28-5-6(4), at the time of the actions in question, defined disability in relevant part as follows:

> "Disability" means any physical or mental impairment which substantially limits one or more major life activities, … and includes any disability which is provided protection under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and federal regulations pertaining to the act, 28 CFR 35 and 29 CFR 1630; provided, that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids. As used in this subdivision, the phrase:
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> …
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> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
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> (iii) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; …

….

The definition of disability in Section 42-87-1, at the time of the events in question, was essentially identical to the above definition, although in a slightly different format.

The complainant proved that she had a disability as that term was defined under the FEPA and the PDA. The complainant had a diagnosis of visual impairments, very high myopia, retinopathy of prematurity, nystagmus, phthisis and glaucoma. She is totally blind in one eye and has severe vision impairment in the other eye. *See* R.I.G.L. Section 28-5-6(4)(iii), cited above, which specifically included "any physiological disorder or condition … affecting …special sense organs" as physical impairments. At the time of the events in question, it was insufficient to simply have a diagnosis, "the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.' Albertson's, Inc. v. Kirkingburg, *supra*, at 567." Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002). Consistent with this requirement, the complainant testified on how her impairment substantially limited[3] her life activities of seeing, reading and driving. "Seeing" was specifically listed in R.I.G.L. Section 28-5-6(4)(ii) as a major life activity. Reading is a major life activity. *See* Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005) (reading and thinking are major life activities; a plaintiff employee should have been allowed to proceed to trial on his claim of disability discrimination when he testified that reading was very difficult and that he could not read for more than three to five minutes at a time) and Bartlett v. New York State Bd. of Law Examiners, 226 F.3d 69, 80 (2d Cir. 2000) (reading is a major life activity under the ADA). The complainant proved that she had an impairment that substantially impaired a major life activity.

The Commission has found as a Finding of Fact that Mr. Rochon knew of the complainant's vision impairment before he terminated her employment. (See Finding of Fact 8 above.) While Mr. Rochon testified that he did not know about the vision impairment until after he terminated her (Trans. p. 31), his own prior statement indicates that he asked her about her vision before he terminated her (Complainant's Exhibit 3, p. 2), and that is consistent with the complainant's

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[3] Regulations of the U.S. Equal Employment Opportunity Commission (EEOC), in effect at the time of these events, defined "substantially limits" as follows:

> (j) Substantially limits -- (1) The term substantially limits means:
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> (i) Unable to perform a major life activity that the average person in the general population can perform; or
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> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 CFR 1630.2

credible testimony that he asked her about her vision before he terminated her (Trans. p. 17). The complainant established that she had a disability known to the respondents.

The complainant was qualified for the position in question. The uncontroverted evidence establishes that she had worked as a cashier and in food preparation for other employers.

There is no dispute that the respondents terminated the complainant's employment and that the respondents continued to need a person to work in the position for which the complainant had been hired.

In light of the above factors, the complainant made a prima facie case of discrimination.

B. THE RESPONDENTS PRESENTED EVIDENCE OF LEGITIMATE, NON-DISCRIMINATORY REASONS FOR THEIR ACTIONS

As discussed above, once a complainant has made a prima facie case of discrimination, a respondent must set forth legitimate, non-discriminatory reasons for its actions. The respondents met this burden. Mr. Rochon testified that he terminated the complainant because of her poor attitude. He testified that, after he took over for her at the register, he asked her to help the person on the grill and that she instead sat in a corner and waited. Trans. p. 31.

C. THE COMPLAINANT PROVED THAT SHE WAS TERMINATED IN WHOLE OR IN PART BECAUSE OF HER DISABILITY

Once a complainant has made a prima facie case of discrimination and the respondent has presented evidence of legitimate, non-discriminatory reasons for its actions, the complainant has the burden of proving that the respondent was motivated by disability discrimination. In order to prove that the respondent was motivated by disability discrimination, the complainant may present direct evidence that the respondent was motivated by disability discrimination, or indirect evidence that the respondent was motivated by disability discrimination (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 respondents' actions were motivated by discrimination. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, 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, 509 U.S. at 511. [Emphasis in original.]

The complainant proved that the reasons cited by the respondents for their actions were a pretext for disability discrimination. She testified that after she answered Mr. Rochon's question about her vision impairment by telling him that she was blind in her left eye, he said he couldn't use her. Trans. p. 17. The Commission found the complainant to be a credible witness whose testimony was consistent and convincing. Mr. Rochon's testimony was contradicted by his own prior written statement. He testified that he did not find out about the vision impairment until after the termination (Trans. p. 31), but his written statement said otherwise. (Complainant's Exhibit 3, p. 2.) He testified that if she had had a better attitude, he would have given her work on the grill and in prep work. Trans. p. 31. His written statement said that if he had work that was prep work, he could offer her work. His written statement does not state that he terminated the complainant because she had a poor attitude. Complainant's Exhibit 3. Given the contradictions in Mr. Rochon's statements and his termination of the complainant after she informed him of her disability, the Commission finds that the complainant proved that the reasons cited by respondents for their actions were a pretext for disability discrimination. *See* Gillen, *supra*, (the plaintiff's claims must go to trial; an employer who rejected a one-armed applicant as unqualified for an EMT position could be liable if it based its rejection on stereotypes about the disability rather than on an adequate, fact-based assessment of the plaintiff's capabilities); Chalfant v. Titan Distribution, Inc., 475 F.3d 982 (8th Cir. 2007) (jury verdict for the plaintiff upheld; contradictions between the employer's statements during investigation and statements at trial could justify a finding that the employer failed to hire the plaintiff because of his disability).

III. THE STANDARDS FOR PROVING DENIAL OF REASONABLE ACCOMMODATION

Denial of reasonable accommodation for a disability is also an unlawful employment practice. R.I.G.L. Section 28-5-7(1)(iv) provides in relevant part that it is an unlawful employment practice for an employer: "to refuse to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise, or business". R.I.G.L. Section 42-87-3(5)(iii) and (6) also make denial of reasonable accommodation a violation of the PDA.[4] It is a violation

[4] R.I.G.L. Section 42-87-3(5)(iii) provides that:

> (5) No qualified individual with a disability, as defined in the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., nor any individual or entity because of a known relationship or association with an individual with a disability shall be:
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> …
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> (iii) Subject to discrimination in employment by a public entity or employer covered by the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

of the ADA to deny an employee with a disability a reasonable accommodation, even if the employer is not motivated by discriminatory bias. *See* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999), which held that: "an employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the proposed accommodations would create undue hardship for its business".

IV. THE COMPLAINANT PROVED THAT SHE WAS DENIED REASONABLE ACCOMMODATION AND TERMINATED BECAUSE OF HER NEED FOR AN ACCOMMODATION

The complainant proved that the respondents denied her a reasonable accommodation for her disability. The complainant proved that she has a disability (see the discussion above). The complainant told Mr. Rochon, in response to his question, of her disability and she told him that she could not read the numbers on the cash register because they were fading. Mr. Rochon said that that was all he had. This is a failure to reasonably accommodate a disability. The complainant requested an accommodation. *See* Enforcement Guidance: Reasonable

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R.I.G.L. Section 42-87-3(6) clarifies that R.I.G.L. Section 42-87-3(5) should be interpreted to echo the ADA:

> (6) The application, exemptions, definitions, requirements, standards, and deadlines for compliance with subdivision (5) shall be in accordance with the requirements of the Americans with Disabilities Act, 42 U.S.C., § 12101 et seq. and the federal regulations pertaining to the Act, 28 CFR 36, 28 CFR 35, and 29 CFR 1630.

See 42 U.S.C. Section 12112(b)(5) of the ADA which provides that it is discrimination when an employer is

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
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> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; …

Accommodation and Undue Hardship Under the Americans with Disabilities Act, 2002 WL 31994335, p. 4 (October 17, 2002) which provides that:

> 1. When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."
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> ….
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> Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

[Footnote omitted.]

See also the Americans with Disabilities Act Technical Assistance Manual, which provides that: "An applicant or employee does not have to specifically request a "reasonable accommodation," but must only let the employer know that some adjustment or change is needed to do a job because of the limitations caused by a disability." ADATAM I-3.6 Mr. Rochon made no attempts to sit down with the complainant and figure out what could be done to remedy the problem. He did not explore with her whether he could take simple, inexpensive steps that would allow her to use the register such as giving her training, giving her time to familiarize herself with the machine, restoring the faded keys by re-marking them or allowing the complainant to use a magnifier. He heard that she had a serious vision impairment that impaired her ability to read the fading keys on his cash register and immediately terminated her. This is discrimination. *See, e.g.*, Cutrera v. Board of Supervisors of La. State Univ., 429 F.3d 108, 113 (5th Cir. 2005) (a case must go to trial on allegations that the employer violated the ADA when the plaintiff presented evidence that the employer terminated her before she could present an accommodation that would allow her to do the job; an "employer may not stymie the interactive process of identifying a reasonable accommodation for an employee's disability by preemptively terminating the employee before an accommodation can be considered or recommended"); Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2nd Cir. 2008) (a jury verdict for the plaintiff was upheld when there was evidence that the plaintiff's disability was obvious and the employer failed to engage in an interactive process to find an accommodation).

On the day in question, Mr. Rochon was late. The complainant, his new employee, was unable to deal with the rush of customers at the cash register. He found out that she was having trouble reading his cash register because of her disability. Instead of fulfilling his responsibility to try to work out a reasonable accommodation with the complainant, he terminated her. His failure to take simple steps to work out the difficulty cost him the services of an experienced employee and cost the complainant her job. The respondents terminated the complainant rather than give her a reasonable accommodation. This was discrimination prohibited by the FEPA and the PDA.

RELIEF

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that a respondent has committed an unlawful employment practice. R.I.G.L. Section 42-87-5(a) provides that: "the commission may proceed in the same manner and with the same powers as provided in §§ 28-5-16 – 28-5-26…". 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 record is unclear as to the status of JDTK. Mr. Rochon testified that he was an employee of that company "[w]hen it closed down". Trans. p. 38. The Commission does not order JDTK to re-hire the complainant because of the gap in her employment, discussed below. The Commission will order JDTK to take steps to eliminate discrimination in the future.

The complainant was out of work for approximately three months. She was terminated on July 19, 2006 and obtained work in November 2006. The back pay for that time period is $3,600 ($240 [$8 per hour x 30 hours] times 15 weeks). From November 2006 through December 28, 2007, the back pay owed is the amount she would have earned if she had continued employment with the respondents minus her interim earnings or $6384 (60 weeks x $106.40 [$240 minus $133.60 {$8.35 x 16 hours}]). Thus, the total back pay owed is $9,984.00, plus statutory interest.

The Commission used December 28, 2007 as the ending point for the complainant's back pay award. After that date, she was out of work for nine months. When an intervening event causes a complainant to be unable to work for a substantial period of time because of a factor unrelated to the discrimination, the factfinder may decline to award back pay. *See* Lathem v. Department of Children and Youth Services, 172 F.3d 786, 794 (11th Cir. 1999) (while a plaintiff who has proved discrimination is presumptively entitled to back pay, courts exclude periods of time when the plaintiff is unavailable to work for reasons unrelated to the defendant's discrimination, instant plaintiff entitled to back pay because the defendant caused the disability that interfered with her ability to work); Thornley v. Penton Pub., Inc., 104 F.3d 26 (2nd Cir. 1997) (a plaintiff should not be awarded back pay for the period of time when an intervening disability would have prevented him

from continuing his employment). Given the length of the complainant's leave of absence for back surgery (nine months) and the small size of the respondents' workforce, the Commission finds that in this case the back pay should cease as of the date when the complainant started her first medical leave. The Commission notes that this finding is based on the circumstances in this particular case.

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 Enforcement Guidance on "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", 1992 WL 1364354 (EEOC Guidance 1992) (hereafter referred to as the Enforcement Guidance). The Enforcement 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." Enforcement Guidance, p. 5. 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. Enforcement Guidance, pp. 7, 8.

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 (R.I. 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. Kelaghan v. Roberts, 433 A.2d 226 (R.I. 1981).

Awards for 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); Ledbetter v. Alltel Corporate Services, Inc., 437 F.3d 717 (8th Cir. 2006) (upheld award of $22,000 in compensatory damages to plaintiff who proved that delay in being classified as a manager was caused by racial discrimination; the plaintiff's own testimony about his humiliation, demoralization and diminished confidence was sufficient to prove damages for pain and suffering; medical or expert testimony was not required); 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); American Legion Post 12 v. Susa, 2005 WL 3276210 (R.I. Super. 2005) (compensatory damages of $25,000, $15,000 and $5,000 for pain and suffering awarded to complainants who proved that the respondent discriminated against them upheld, the complainants were distraught and reduced to tears on multiple occasions).

In the circumstances of the instant case, the Commission finds that $1,200 adequately compensates the complainant for her pain and suffering. The discrimination consisted of denial of reasonable accommodation and termination because of the complainant's disability. It was a one-time incident of discrimination. The Commission found, as set forth in the Finding of Fact 12 above, that the termination made the complainant upset; she felt depressed and had low self-esteem. While she started to feel better when she started working again, as of the date of the hearing, she still had concerns that her disability would make people look at her differently. (*See, e.g.,* Trans., pp. 22 and 23.) Taking all of the evidence into account, the Commission finds that the termination caused the complainant distress, and that $1,200 is the appropriate compensation for these effects.

The Commission awards interest consistently with the rate used for tort judgments. *See* R.I.G.L. Section 9-21-10(a):

> In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued, which shall be included in the judgment entered therein…. [Emphasis added.]

ORDER

I. Violations of R.I.G.L. Sections 28-5-7, 42-87-2 and 42-87-3 having been found, the Commission hereby orders that:

A. The respondents cease and desist from all unlawful employment practices;

B. The respondents pay the complainant $9,984.00 together with statutory interest of 12% per annum from the date the cause of action

accrued, July 19, 2006;

C. The respondents pay the complainant $1,200.00 in compensatory damages for pain and suffering together with statutory interest of 12% per annum from the date the cause of action accrued, July 19, 2006;

D. The respondents submit proof of payment to the complainant in accordance with the Paragraphs I (B and C) within 45 days of the date of this Decision and Order;

E. The respondents are jointly and severally liable for the amounts in Paragraphs I (B and C) above;

F. Mr. Rochon obtain training on state and federal 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, the name of the trainer and a copy of the syllabus;

G. JDTK train all of its supervisors on state and federal 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, the name of the trainer and a copy of the syllabus.

II. The attorney for the complainant may file a Motion and Memorandum for Award of Attorney's Fees no later than 45 days from the date of this Order. The respondents may file a Memorandum in Opposition no later than 45 days after receipt of the complainant's Motion. The parties' attention is directed to Banyaniye v. Mi Sueno, Inc. and Jesus M. Titin, Commission File No. 07 PPD 310 (Decision on Motion for Attorney's Fees 2009) 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.

Entered this [24th] day of [February] , 2010.

/S/

_____

Rochelle Lee
Hearing Officer

I have read the record and concur in the judgment.

/S/

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Camille Vella-Wilkinson
Commissioner

DISSENT OF COMMISSIONER ALBERTO APONTE CARDONA

I dissent from the Commission's Decision and Order. I interpret the evidence in this case differently than the Commissioners in the majority opinion.

When the complainant applied for the position at the respondents, she represented herself as a person with experience in food preparation and cashiering. Given those representations to the respondents, it was appropriate for the respondents to expect an employee who could fulfill the duties of her position as soon as she started. My interpretation of the evidence is that the complainant could not perform the basic task of making change and that Mr. Rochon terminated her employment, before he learned of her disability, because she was not able to perform the job adequately.

I dissent from the majority opinion because it is my opinion that the complainant did not prove, by a preponderance of the evidence, that the respondents discriminated against her because of her disability.

__/S/_____ [2/24/10]_____

Alberto Aponte Cardona Date