STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 07 EMD 142 EEOC NO. 523-2006-01162

Anthony Selvidio
Complainant

v. DECISION AND ORDER

TGI Fridays (Carlson Restaurants Worldwide)
Respondent

INTRODUCTION

On or around December 15, 2006, Anthony Selvidio (hereafter referred to as the complainant) filed a charge of discrimination against TGI Fridays (Carlson Restaurants Worldwide) (hereafter referred to as the respondent) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge alleged that the respondent discriminated against the complainant with respect to terms and conditions of employment, demotion, denial of reasonable accommodation and termination of employment because of his disability, in violation of Sections 28-5-7 and 42-87-2 of the General Laws of Rhode Island. On November 19, 2008, Preliminary Investigating Commissioner Camille Vella-Wilkinson found probable cause to believe the respondent discriminated against the complainant in violation of Sections 28-5-7 and 42-87-2 of the General Laws of Rhode Island, as alleged in the charge. On December 11, 2008, a complaint and notice of hearing issued. The complaint alleged that the respondent violated the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA) and the Civil Rights of Persons with Disabilities Act, Title 42, Chapter 87 of the General Laws of Rhode Island (hereafter referred to as the PDA) by discriminating against the complainant with respect to terms and conditions of employment, demotion, denial of reasonable accommodation and termination of employment because of his disability.

Hearings on the complaint were held before Commissioner Nancy Kolman Ventrone on June 9, 2009, June 16, 2009, July 23, 2009, July 28, 2009 and October 8, 2009.[1] The parties were represented by counsel.

On January 27, 2010, the complainant filed a Post-Trial Memorandum. On April 14, 2010, the respondent filed a Post-Hearing Brief. On May 11, 2010, the complainant filed a Rebuttal to

[1] When the transcripts of the hearings are referred to in this Decision and Order, the Volumes will be referred to as follows: the June 9, 2009 transcript will be referred to as Vol. 1, the June 16, 2009 transcript as Vol. 2, the July 23, 2009 transcript as Vol. 3, the July 28, 2009 transcript as Vol. 4 and the October 8, 2009 transcript as Vol. 5.

Respondent's Post Trial Memorandum.

JURISDICTION

The respondent 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). The respondent 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. The respondent is therefore subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The complainant received a B.S. Degree from Salve Regina University. Before his employment with the respondent, the complainant owned and operated his own restaurant for eleven years. He applied for employment with the respondent in early 2001 and was hired in March 2001 for the position of manager-in-training. He commenced his employment at respondent's Warwick store. The General Manager of the Warwick store at that time was Barbara Gremza who trained and supervised the complainant. He was not given scheduling guidelines when he started. After eight weeks of training, he was given the position of Manager.

2. The complainant has a disability; he has a chronic neurological condition in that he suffers from migraine headaches. He has suffered from migraine headaches since he was a teenager and still suffered from them as of the date of the hearing. Before he was specifically treated and prescribed medication for the migraines, he could not function when he had migraine headaches. In 2001, before he was specifically treated for migraines, he had approximately one per month. When he had a migraine, he had to stay still, usually lying down. A dark room and coolness would help. His migraines lasted from two hours to more than six hours. In 2004, the complainant was getting more migraine headaches than he had been previously. In April 2004, he consulted with Dr. Jeffrey Wishik who prescribed medication to treat the migraines. In March 2005, the complainant started treatment at NeuroHealth with Dr. Gary L'Europa, Dr. Keith Brecher and Nurse Practitioner Kathleen Franchina. The complainant's prescribed treatments decreased the number of his migraines to some extent. It would often, although not always, be the case that when a migraine started, he could take medicine that would alleviate the migraine within approximately ten to fifteen minutes. The frequency of the complainant's headaches varied from one per month to one per day at various times.

3. The complainant's employment evaluation in August 2002 was 3.4 (3 being "Consistently Meet the Standards" and 4 being "Exceeds Standards"). The complainant's evaluation in January 2003 was 3.3. In July 2003, the complainant's evaluation rating was 3.83. In February 2004, the complainant's evaluation rated him at 3.83. The format of evaluations changed and for the complainant's evaluation for the period ending in June

2004, his overall performance rating was at the next to the top category: "Exceeded Some Expectations". In the January 2005 review of the previous six months, the complainant was rated as: "Met Expectations". In his performance appraisal covering 2005, his last evaluation before his termination, his overall rating was "Met expectations". He received a rating of "Exceeds expectations" in the "Carlson attribute" of "Performance". This appraisal was done by his new General Manager in the Seekonk restaurant, Richard McCann.

4. The complainant received merit increases of 3.5% effective in April 2002 and 5% effective in April 2003. He received merit increases in his subsequent years of employment with the respondent. He received no discipline from the respondent prior to his termination.

5. The complainant was promoted to Assistant General Manager (AGM) in or before 2004.

6. By 2004, the frequency of the complainant's migraine headaches had been increasing. His supervisor, Ms. Gremza, had suggested that he seek treatment. In April 2004, the complainant sought medical treatment for his migraine headaches from Dr. Wishik who prescribed medication for him. The complainant discussed his treatment with Ms. Gremza.

7. In March 2005, the complainant began treating with Dr. L'Europa, Dr. Brecher and Nurse Practitioner Franchina at NeuroHealth. He asked for a medical leave of absence during the summer of 2005. The complainant was having trouble with "rebound" migraines, where he was getting migraine headaches every 24 hours. Dr. L'Europa wanted the complainant to take a leave of absence to try some other forms of treatment that would make him unable to function in a normal setting. The complainant discussed his need for a medical leave with Ms. Gremza and Director of Operations Stephen Rosetti. The complainant told them that the medication he was currently taking was not breaking the pattern of the migraines, that he needed to have other treatment and that NeuroHealth recommended a leave. Mr. Rosetti told him to take the time he needed to take care of his problem. At that time, the complainant signed a release that would allow the respondent to receive the complainant's medical records from NeuroHealth and Dr. Wishik.

8. The complainant's leave of absence was for somewhat more than three weeks in the summer of 2005. The complainant underwent the prescribed treatments. He was hospitalized for four days during that period. After his leave, he returned to the Assistant General Manager position without a change in job duties. He continued to work through 2005, during which time his migraines had subsided somewhat, but he was still in a pattern of migraines.

9. In or around November 2005, Ms. Gremza was replaced as General Manager of the Warwick restaurant. Marvin Joseph Piscione became the General Manager of the Warwick restaurant. Around this same time, the complainant was moved to the Seekonk restaurant for approximately six months.

10. In April or May of 2006, the complainant returned to the Warwick restaurant in the position of Assistant General Manager. By that time, Dale Broach had replaced Stephen Rosetti as Director of Operations. Mr. Piscione, the complainant's supervisor, evaluated him in August 2006 and gave him a positive evaluation. Mr. Piscione testified that the complainant was a "good manager". Trans. Vol. 3, p. 25.

11. Keith Fregeolle, who worked for the respondent for ten years, his last position being bartender, testified that the complainant was: "maybe the top three of all the managers" for whom he had worked. Trans. Vol. 3, p. 52. During the course of his employment with the respondent, Mr. Fregeolle had worked for approximately thirty managers of various levels.

12. Mr. Piscione resigned as General Manager in August 2006. Mr. Broach and Lori Cassidy of Human Resources had had a meeting with Mr. Piscione and told him that the respondent was planning to terminate him for misrepresentation of payroll. After discussing the actions in question, the respondent agreed that Mr. Piscione could resign. After a brief interval, Brian Pippins became the new General Manager for the Warwick restaurant.

13. When the complainant began his employment with the respondent, he told the respondent of his preference for being scheduled for the closing shift. At that time, his preference was welcomed. The complainant generally worked the closing shift in his early years with the respondent. In the early summer of 2006, the complainant was working the day shift on Tuesdays to do inventory and the closing shifts on Wednesdays through Saturdays. At the end of the summer, Mr. Pippins told him that his schedule needed to be changed because it was not acceptable to the new Operations Manager, Dale Broach. The complainant understood that Mr. Broach wanted to schedule the complainant to work at different times on different days. The complainant brought management at the respondent a note from the Nurse Practitioner at NeuroHealth, dated September 21, 2006. The note stated that the complainant was currently under care for headaches, a chronic neurological condition, and that NeuroHealth recommended that the complainant stabilize his work schedule as variations in his sleep schedule, due to irregular work hours, had been a known trigger for his headaches. The complainant testified that at one point, Mr. Broach commented on the note, saying: "This isn't even from a real doctor. It's from a nurse practitioner." Trans. Vol. 1, p. 89. Neither Mr. Broach not anyone else from respondent's management staff asked the complainant to provide additional medical documentation. No one from respondent's management staff told him that the September 21, 2006 note from NeuroHealth was insufficient. After Mr. Broach received the note, he called the former Director of Operations, Stephen Rosetti, and asked whether the complainant was under any restrictions when the complainant returned from his 2005 leave of absence. Mr. Broach testified that Mr. Rosetti told him that the complainant was under no limitations on his work at that time. Trans. Vol. 4, p. 184. Mr. Broach gave that information to Lori Cassidy of Human Resources.

14. In September 2006, the complainant called NeuroHealth on a number of occasions for

assistance with respect to his migraine headaches.

15. Mr. Pippins told the complainant that they would try to accommodate his scheduling request. Mr. Pippins, the complainant, Mr. Broach and Ms. Cassidy had a telephone conference on the scheduling request. On October 20, 2006, Mr. Broach sent a memorandum to the complainant. The memorandum set forth the complainant's new set schedule – Tuesday inventory starting at 6 a.m., Wednesday, Thursday and Friday, the closing shift, and a swing shift on Saturday that would run from 2 p.m. to midnight or noon to 10 p.m. The closing shift generally ended at approximately 2 a.m. The memorandum stated that the schedule would be set except for circumstances such as meetings and vacations. The memorandum further stated that: "Due to receiving a set/limited schedule you will step down as AGM and take over a management position". Complainant's Exhibit 9. Mr. Pippins told the complainant that if he did not sign the memorandum, he would end up being terminated. The complainant signed the memorandum indicating that he had read it and understood all the listed items.

16. The only difference between the schedule requested by the complainant as an accommodation, and the schedule that he was given, was that instead of having the closing shift on Saturday, he was on one of two swing shifts, with a difference of two to four hours from the scheduled time of the closing shift. Mr. Broach testified that it was respondent's standard that no manager work more than three closing shifts and that managers should not be scheduled to open the restaurant the day after they close the restaurant. Trans. Vol. 4, p. 92. He testified that, as of the date of the hearing in 2009, these guidelines were not in writing in the restaurants, but were part of the "culture" of the respondent. Trans. Vol. 4, p. 94.

17. Mr. Broach testified that the complainant could not continue to perform the duties of Assistant General Manager while he had a set schedule. He testified that one of the primary duties of the Assistant General Manager was to teach and counsel other managers and that on the complainant's set schedule he would not have the time for his direct report managers and he would not have enough hourly employees to direct. On his set schedule, he often would not be there when orders were done. His set schedule would impair his development as he would not see all the different shifts and work with different people. Trans. Vol. 4, pp. 100-102.

18. The demotion to manager meant that the complainant had a reduced bonus structure. His salary did not change. He was not replaced as Assistant General Manager before his termination and he continued to perform the same duties that he had performed as Assistant General Manager. Within two weeks after his demotion, the complainant was scheduled for times that were not in the set schedule – he had to work the closing shift on a Friday until 2 a.m. and then report to work on Saturday at 8:00 a.m.

19. On November 9, 2006, the complainant was working the closing shift at the respondent. Sara Radensky, who had recently been trained for management, was shadowing the complainant that day to observe the particular operation of that store. Sometime around

9:30 p.m., after the dinner rush, the complainant started developing a migraine headache. He called a friend, James Howe, who told him that he would bring migraine medication to him. The complainant told Ms. Radensky that he was stepping outside, that he had a bad headache. The complainant waited outside for Mr. Howe as the cooler air could make the headache somewhat better. Mr. Howe arrived in approximately ten to fifteen minutes and gave the complainant the nasal spray medicine. The complainant and Mr. Howe sat in the complainant's car, a silver Infiniti SUV, while the complainant took the medicine. The medicine took effect in approximately ten to twenty minutes. The complainant closed his eyes while it was taking effect but did not sleep. While the complainant was in his car, an hourly employee came out and told him that Ms. Radensky had a question. The complainant told the hourly employee that he would be in shortly. The medicine dissipated some of the pain from the migraine headache so that the pain was at the level of a regular headache. The complainant and Mr. Howe then went into the restaurant. Upon returning to the restaurant, the complainant continued with his regular duties and closed the restaurant.

20. After the complainant closed the restaurant, his headache was at a strength which rendered him unable to drive. A friend came and took him to her house for the night. He took a second dose of the medicine. In the morning, the headache was still painful. He took a third dose of the medicine but it was not effective. He went to Westerly Hospital and received medication for the migraine headache. He had been scheduled to work that day. He called a manager to tell the respondent that he would be out that day and the next, November 10 and 11, 2006.

21. At some point in time in November 2006, Mr. Pippins heard that Ms. Radensky was alleging that the complainant had been unavailable for Ms. Radensky's questions on November 9, 2006 and was sleeping in his car. Mr. Pippins conveyed this information to Mr. Broach who conveyed it to Ms. Cassidy of Human Resources. Ms. Radensky had been assigned to shadow managers at the Warwick location for two weeks. Her first day was November 8, 2006. At some point in November 2006, she went to Dallas for three days of training. (She was unsure of the dates of her Dallas training, initially testifying that it was in the last week of November, 2006. Trans. Vol. 3, pp. 127-128.) Mr. Pippins called her when she was at the Dallas airport to ask her about the events of the night of November 9, 2006. That call from Mr. Pippins was the only time that Ms. Radensky made a statement to respondent's management about the events of November 9, 2006 before her termination in 2008. Trans. Vol. 3, p. 130. She was never asked to make a written statement.

22. The complainant was not scheduled to work on November 12 and 13, 2006. He worked Tuesday, November 14, 2006 and Wednesday, November 15, 2006 as usual. On Thursday, November 16, 2006, when he came into work, he was met at the door by Mr. Pippins who asked him to come talk with him and Mr. Broach. Mr. Broach terminated him, saying that "this wasn't working" and that the complainant was not a "fit" for the respondent.

23. Mr. Broach and Ms. Cassidy made the decision to terminate the complainant. Mr. Broach testified that he told the complainant that he was terminated for sleeping on the job and that "there wasn't any other reason". Trans. Vol. 4, p. 117. He testified that the "main reason" that the complainant was terminated was "the actual eye witness incident that happened with Sara [Radensky]", that emails he reviewed validated that "it wasn't the first time". Trans. Vol. 4, p. 120.

24. The complainant received a termination letter, dated November 16, 2006, which stated that it would "serve as an explanation of your separation", but the letter did not give a reason for the termination. Complainant's Exhibit 10.

25. The complainant filed a charge of disability discrimination with the federal Equal Employment Opportunity Commission (EEOC). He received a copy of the respondent's response to his charge and, for the first time, learned that the respondent alleged that he was terminated for sleeping on the job on November 9, 2006.

26. The respondent terminated Ms. Radensky in 2008. She had received an evaluation that indicated that she was underperforming. Management personnel at the respondent sat down with her and discussed it and gave her two weeks to improve. When the two weeks were over, she was terminated.

27. Following his termination from the respondent, the complainant made reasonable efforts to find employmentht work. Except for a short period of time when he worked on commission selling insurance, he was unable to find work until January 2008.

CONCLUSIONS OF LAW

The complainant proved by a preponderance of the evidence that he had a disability as that was defined in the FEPA, R.I.G.L. Section 28-5-6(4) and the PDA, R.I.G.L. Section 42-87-1(1) at the time of the events in question.[2]

The complainant did not prove by a preponderance of the evidence that the respondent discriminated against him with respect to terms and conditions of employment, denial of reasonable accommodation or demotion because of his disability, as alleged in the charge

The complainant proved by a preponderance of the evidence that the respondent discriminated against him with respect to termination of employment because of his disability in violation of the FEPA and the PDA.

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

DISCUSSION

I. THE COMPLAINANT PROVED THAT HE HAD A DISABILITY

The FEPA prohibits employment discrimination on the basis of disability with respect to terms and conditions of employment, denial of reasonable accommodation, demotion and termination. At the time of the actions in question, the FEPA, in R.I.G.L. Section 28-5-6(4), 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.
>
> (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; …
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> ….

[Emphasis added.]

The definition of disability in the PDA, at the time of the events in question, was essentially identical to the above definition, although in a slightly different format.

The complainant had a physiological disorder affecting his neurological system. He had a chronic neurological condition, migraine headaches. The complainant had suffered from migraine headaches for many years. This condition substantially affected his major life activities, in that a migraine headache prevented him from functioning, he had to lie in a dark room until the headache dissipated. While medication generally assisted him and allowed him to function once a migraine headache had started, he continued to have migraines of a strength and frequency that interfered with his ability to do any physical activity. His migraines lasted from two hours to over six hours. At times, he suffered migraines at a frequency of once per month and at times, he suffered migraines once per day. In September 2006, he sought assistance with his migraine headaches from NeuroHealth on multiple occasions. In November 2006, he had a migraine headache for over twelve hours and obtained treatment for it at Westerly Hospital.

Migraine headaches have been found to be a disability under the Americans with Disabilities Act (ADA), prior to the amendments of 2008, which took effect in 2009. See Castro v. Child Psychiatry Ctr., 1997 WL 141860 (E.D. Pa. 1997) (plaintiff proved that she had a disability, she had suffered from migraine headaches for many years, when she had a migraine headache, she was unable to function normally, she needed to lie down in a dark, quiet room until the migraine passed; she took medicine to function but would still get occasional headaches). (*See also* Dvorak v. Clean Water Services, 319 F. Appx. 538, 539 (9th Cir. 2009), which denied summary judgment to the employer on the question of whether the plaintiff's migraines constituted a disability.) Prior to the 2008 amendments to the ADA, the assessment of disability under federal law required evaluating disabilities in their corrected and mitigated state. Sutton v United Airlines, 527 U.S. 471, 119 S. Ct. 2139 (1999). Under the FEPA and the PDA, however, whether a condition was considered a disability was determined "without regard to the availability or use of mitigating measures, such as … medications …". R.I.G.L. Sections 28-5-6(4) and 42-87-1(1). Considering that, without medication, the complainant was unable to function for a number of hours when he had a migraine headache, there is no question that the complainant's condition was a disability as it was defined under the FEPA and the PDA.

II. THE COMPLAINANT DID NOT PROVE THAT HE WAS DENIED A REASONABLE ACCOMMODATION, AS ALLEGED IN THE COMPLAINT

A. THE STANDARDS FOR PROVING DENIAL OF REASONABLE ACCOMMODATION

Denial of reasonable accommodation for a disability is 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.[3] It is a violation

[3] 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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> …
>
> (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.

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

of the ADA to deny an employee with a disability a reasonable accommodation, even if the employer is not motivated by discriminatory bias. *See e.g.*, 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".[4]

B. THE COMPLAINANT DID NOT PROVE THAT THE RESPONDENT DENIED HIM A REASONABLE ACCOMMODATION OR THAT THE ASSOCIATED DEMOTION WAS DISCRIMINATORY

The complainant proved that he had a disability. He submitted a note from a medical professional that clearly requested an accommodation – that he receive a set schedule because lack of a set schedule had been a trigger for his migraines. The respondent, in response, gave the complainant a schedule that was virtually identical to the one he requested. The only difference was that instead of working the closing shift on Saturday, he would work a swing shift. The swing shift would start one or two hours earlier than the closing shift and end one or two hours earlier than the closing shift. Complainant offered no evidence that this minimal shift in hours would disrupt his sleep schedule. This schedule would also be in accordance with the respondent's preference that managers work no more than three closings per week.

The respondent, as part of the accommodation, demoted the complainant from Assistant General Manager to Manager. While this did not change the complainant's salary, it did reduce his bonus structure. Mr. Broach's explanation, in summary, was that the respondent wanted Assistant General Managers to deal with different shifts and different people at various times so that Assistant General Managers would have a more global understanding of the operation and serve as teachers and counselors to a variety of managers and staff. See Finding of Fact Para. 17.

> (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.

[4] The Commission generally 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).

Given the minimal effect on the complainant's compensation and the legitimacy of expecting Assistant General Managers to be generalists, the Commission finds that this demotion was a reasonable component of the accommodation given to the complainant. *See* Hedrick v. W. Reserve Care Sys., 355 F.3d 444 (6th Cir. 2004) (the employer offered a reasonable accommodation to the plaintiff when it offered her a position that she could perform; the lower salary in the offered position did not make the proposed accommodation unreasonable in this instance) and Gratzl v. Office of Chief Judges of 12th, 18th, 19th, & 22nd Judicial Circuits, 601 F.3d 674, 681-82 (7th Cir. 2010) (the employer restructured its workforce and required rotation of court reporters through various courtrooms; it then offered the plaintiff court reporter various work modifications that would have accommodated her disability, thus meeting its legal obligations; it was not required to give the plaintiff the accommodation she preferred which was permanent assignment to her previous duties).

III. THE COMPLAINANT PROVED THAT THE RESPONDENT WAS MOTIVATED BY DISABILITY DISCRIMINATION WHEN IT TERMINATED THE COMPLAINANT

A. THE STANDARDS FOR PROVING DISABILITY DISCRIMINATION WITH RESPECT TO TERMINATION

It is unlawful under the FEPA and the PDA to terminate an employee because of the employee's disability. 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 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 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 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[5] 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.

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.

The other method for analyzing evidence of discrimination is the mixed motives method. The FEPA specifically provides that a plaintiff may prove discrimination by establishing 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 provides in relevant part that:

> An unlawful employment practice may be established in an action or proceeding under

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

> this chapter when the complainant demonstrates that race, … disability, …, or country of ancestral origin was a motivating factor for any employment practice, even though the practice was also motivated by other factors. Nothing contained in this section shall be construed as requiring direct evidence of unlawful intent or as limiting the methods of proof of unlawful employment practices under § 28-5-7.

Title VII of the Civil Rights Act of 1964 contains similar language (42 U.S.C. Section 2000e-2(m)) which was interpreted in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (hereafter referred to as Desert Palace). Both R.I.G.L. Section 28-5-7.3 and Desert Palace provide that a plaintiff does not need direct evidence to prove that discrimination was a motivating factor. A complainant may use circumstantial evidence to prove that discrimination was a motivating factor. Desert Palace, 539 U.S. at 99 - 101.

Since the decision in Desert Palace, federal courts have been considering whether to modify the long-standing method of analyzing evidence of discrimination as set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) and Hicks to reflect the holding of Desert Palace. The results of this consideration are not uniform. The Fifth Circuit has established a modified McDonnell Douglas approach, where it continues to use the first two "prongs" of the analysis – i.e., that the plaintiff must make a prima facie case of discrimination and the defendant must then proffer a legitimate, non-discriminatory reason for its actions, and then modifies the third "prong".

> This Circuit has adopted use of a "modified McDonnell Douglas approach" in cases where the mixed-motive analysis may apply. *See* Rachid, 376 F.3d at 312. After the plaintiff has met his four-element *prima facie* case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action:
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> > [T]he plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic. (mixed-motive[s] alternative). *Id.* (internal quotation marks and citations omitted).

Keelan v. Majesco Software, Inc., 407 F.3d 332, 341 (5th Cir. 2005)

The First Circuit Court of Appeals has declined to delineate a modified standard of proof, instead giving a comprehensive overlook of the effect of Desert Palace as follows:

> Chadwick presses her claim under two separate, though related, theories. She puts forth a "mixed motives" claim, under Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L.Ed.2d 84 (2003), [Footnote omitted] and a traditional discrimination claim under the familiar McDonnell Douglas burden shifting

> scheme. [Footnote omitted.] Our decision here, however, is not dependent on analyzing Chadwick's claim under each of these theories, [Footnote omitted] because under both approaches, "plaintiffs must present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias." Hillstrom, 354 F.3d at 31 (discussing the "interaction between Desert Palace and McDonnell Douglas").

Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009)

The Commission has utilized a modified McDonnell Douglas standard of proof in determining discrimination cases.[6] *See* Bagnall v. UPN 28 TV, WLWC, Paramount Pictures, Commission File No. 01 EAG 069 (2005); DeCarlo v. C & D Security Management, Inc. et al., Commission File No. 08 EAG 154 (2011).

B. THE COMPLAINANT PROVED THAT THE RESPONDENT WAS MOTIVATED BY HIS DISABILITY WHEN IT TERMINATED HIM

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

The complainant successfully established a prima facie case of disability discrimination.

As discussed above, the Commission found that the complainant had a disability. This disability was known to the respondent for quite some time before the complainant's termination. He had received a leave of absence for treatment in 2005 and he requested a reasonable accommodation for his disability less than two months before his termination.

The complainant was qualified for the position in question. The uncontroverted evidence established that the complainant had worked for the respondent for over five years and that all of his evaluations rated him as having met or exceeded standards. He had received no prior discipline from the respondent.

There is no dispute that the respondent terminated the complainant's employment and that the respondent continued to need a person to work in the position.

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[6] The Commission does not intend to foreclose other methods of analysis that might be appropriate in a particular case to prove discrimination. For example, there may be cases in which a complainant who could not present sufficient evidence to establish a prima facie case of discrimination could still establish that discrimination was a motivating factor in the employer's decision. In most cases, however, the modified McDonnell Douglas approach provides a useful method of analysis.

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

2. THE RESPONDENT PRESENTED EVIDENCE OF LEGITIMATE, NON-DISCRIMINATORY REASONS FOR ITS 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 respondent met this burden. Mr. Broach testified that he told the complainant that he was terminated for sleeping on the job and that "there wasn't any other reason". Trans. Vol. 4, p. 117.

3. THE COMPLAINANT PROVED THAT HE WAS TERMINATED IN WHOLE OR IN PART BECAUSE OF HIS 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 so motivated (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, 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.]

For the reasons listed below, the Commission concludes that the complainant proved that disability discrimination was one of the reasons that motivated the respondent to terminate him. The circumstances surrounding his termination demonstrate that his disability was a motivating factor in his termination.

According to Mr. Broach, the "eyewitness" account of Ms. Radensky was the "main reason" that the complainant was terminated. The Commission did not find Sara Radensky to be a credible witness. Ms. Radensky testified that she saw the complainant asleep in the office at 9:45 p.m., that when she came into the office, he had his head back and his eyes closed and that he seemed startled when the door slammed behind her. Trans. Vol. 3, p. 85. She testified that she could not find him for at least an hour after 9:45 p.m. when she needed him to provide assistance with

the duties in closing the restaurant.[7] Trans. Vol. 3, p. 87. (She later expanded that time period to one to one and one-half hours. Trans. Vol. 3, pp. 87-88.) That would mean that she was looking for him until 10:45 (or 11:15 p.m.). However, in reference to the closing of the previous days, her testimony indicates that the closing paperwork started after the last alcohol call at 12:45 a.m. Trans. Vol. 3, p. 114. She testified that she saw him in his car, then appeared to back track and say that she saw the car. Trans. Vol. 3, pp. 86. On cross-examination, she admitted that she could not identify the person in the car that she thought was the complainant's car. Trans. Vol. 3, pp. 124. Ms. Radensky testified that the complainant was in a blue or black Explorer, Trans. Vol. 3, p. 124, when other testimony established that he was in a silver Infiniti SUV. Trans. Vol. 1, p. 103, Trans. Vol. 5, p. 20. Ms. Radensky characterized herself as new, nervous and scared on that evening. Trans. Vol. 3, p. 90. The Commission found that her account was inconsistent and not believable. Whether her self-confessed condition of being nervous and scared on that night influenced her perception of events or some other factor was in operation, the Commission finds that the complainant's testimony of the events of that night, as supported by the testimony of James Howe, was more credible.

The evidence is clear that Mr. Broach did not hear Ms. Radensky's account directly, but instead heard a hearsay version of it. Ms. Radensky's testimony was that she gave only one statement about the events of November 9, 2006 to management prior to her termination in 2008. She testified that she discussed the matter with Mr. Pippins over the telephone while she was in the Dallas airport. Mr. Broach did not obtain a first-hand version[8] or a written statement of the allegations which he said were the main reason for the complainant's termination.

Further, Mr. Broach deliberately gave the complainant no opportunity to respond to the allegations. Trans. Vol. 4 p. 145. Mr. Broach's method of proceeding was contrary to respondent's practice with respect to two other managers. When the respondent obtained evidence against Mr. Piscione, it discussed it with him, allowed him to respond and allowed him to resign. When Ms. Radensky's evaluation indicated that she was underperforming, management discussed it with her and gave her two weeks to improve. Mr. Broach not only gave the complainant no opportunity to respond during respondent's "investigation" of the allegations against him ("talking with Tony [Selvidio] during the investigation probably would have

[7] She also testified that he told her that he was going outside to take some medicine (Trans. Vol. 3, pp. 85-86), so it is questionable why she did not look to find him where he said he would be.

[8] It is possible that Mr. Broach only heard a fourth-hand version of Ms. Radensky's allegations. Ms. Radensky took the telephone call from Mr. Pippins in the Dallas airport while she was in Dallas for training. Given that she had been assigned to the Warwick restaurant for two weeks, starting November 8, 2006, it is probable that this phone call came after the complainant's termination on November 16, 2006. If Mr. Pippins did not hear directly from Ms. Radensky before the complainant's termination, he would have learned of her allegations third-hand. Ms. Radensky testified that on November 9, 2006, she called her sister, who worked for respondent, complaining that the complainant was in his car, sleeping. Trans. Vol. 3, p. 90. She further testified that her sister told the sister's manager some version of this story, who told Mr. Pippins (Trans. Vol. 3, p. 92). Mr. Pippins told Mr. Broach (who told Ms. Cassidy). Trans. Vol. 4, pp. 58, 109.

impeded the investigation" {Trans. Vol. 4, pp. 146-147}), he did not specify why the complainant was being terminated during his termination interview so that the complainant could respond to the allegations on the events of November 9, 2006. Vol. 4, pp. 145. (The Commission credits the complainant's testimony that he did not learn of respondent's allegations that he had been sleeping on the job until the respondent brought it up in the EEOC investigation of his charge. Mr. Broach's testimony is that he told the complainant that: "He was being terminated for sleeping on the job". When asked if he gave the complainant any other reasons, he responded: "No. There wasn't any other reason." Trans. Vol. 4, p 117.) If the complainant had been given a full opportunity to respond, he could have cleared up misinformation. He also could have given the respondent the information that he was in his car to obtain and take medication to deal with a migraine headache. Once the respondent had information that the absence from the building was due to the complainant's disability, it would have been under a duty to give the complainant a reasonable accommodation.

The Commission finds that this deliberate avoidance of the complainant's explanation demonstrates disability discrimination rather than ineptitude or personal animus. The complainant had worked for the respondent for over five years and received good evaluations. The respondent favored retention of experienced management, it based bonuses of Directors of Operations, in part, on retention of managers. Trans. Vol. 4, p. 118. The termination occurred less than four weeks after the complainant was granted the reasonable accommodation of a set schedule and five days after he was out for two days for illness related to his disability. While the respondent had granted him the reasonable accommodation of a set schedule[9], there were several circumstances that reflect Mr. Broach's unease with the accommodation. When Mr. Broach saw the complainant's note for an accommodation he made the comment that it wasn't even from a "real doctor". Mr. Broach also demonstrated his hostility to the request by looking for ways to discredit the note. Before contacting Human Resources about the note, he contacted the former Operations Manager to see if the complainant had restrictions when he returned to work after his 2005 leave of absence. While the Commission has found that the respondent acted lawfully in demoting the complainant while granting his request for a set schedule, the demotion is some indication that the respondent was carefully calculating every detriment that could be caused by accommodating the complainant. The second week of complainant's new "set" schedule was not in accordance with the set schedule (or respondent's avowed standard that managers should not be scheduled to open if they closed the previous night). That second week's schedule included a closing shift on a Friday until 2 a.m. and a shift starting at 8:00 a.m. on Saturday – just the sort of sleep-disrupting schedule that was a trigger for the complainant's migraines. The evidence establishes that Mr. Broach was hostile to the complainant's request for a reasonable accommodation.

Given Mr. Broach's hostility to the complainant's request for a reasonable accommodation, his acceptance of second-hand (or fourth-hand) information against the complainant, his failure to give the complainant the purported specific reason for his termination and instead preventing the complainant from giving his explanation of the circumstances, the complainant's experience and

[9] Ms. Cassidy of Human Resources was part of the conversation when the complainant's accommodation was determined, but she was not present when he was terminated.

good evaluations, and the respondent's departure from how it treated other managers with difficulties, the Commission finds that the complainant's disability was a motivating factor in his termination. *See* Head v. Glacier Nw., Inc., 2006 WL 752530 (D. Or. Mar. 20, 2006) *aff'd*, 270 F. Appx. 561 (9th Cir. 2008) (jury finding of a violation of the ADA upheld; while there was evidence that the plaintiff violated the employer's equipment policy, evidence supported a finding that one of the factors for the plaintiff's termination was the Plant Manager's dislike of an accommodation of the plaintiff's disability consisting of a daytime-only schedule; evidence in support of the jury's finding included the Plant Manager's failure to fairly investigate the equipment policy violation); Butler v City of Prairie Village, Kansas, 172 F.3d 736 (10th Cir. 1999) (plaintiff presented a triable case of pretextual termination because of disability when he demonstrated that the defendant took adverse action against him shortly after he revealed his disability and requested a reasonable accommodation).

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 in relevant part 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, …, 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 the respondent to offer the complainant the next available position as manager in the Warwick restaurant.

The Commission orders the respondent to pay the complainant the difference between the value of the benefits and salary of a manager at the respondent and his unemployment benefits and his benefits and salary at his other employment, from the time of his termination until such time as he is placed in a position as a manager at the Warwick restaurant with the respondent or refuses an offer for such a position with the respondent.

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.

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).

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 and Azimi v. Jordan's Meats, Inc., 456 F.3d 228 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 1831 (2007) (jury that found that the plaintiff was subjected to a hostile work environment based on his ancestral origin, race and religion was authorized to evaluate the testimony on the plaintiff's emotional distress and determine that no compensatory damages should be awarded).

In the circumstances of the instant case, the Commission does not award compensatory damages for pain and suffering. The Commission was not convinced that the termination of the complainant caused him emotional distress on a level that would warrant compensation.

The Commission cannot award punitive damages; only a court is authorized to do that under the FEPA. *See* R.I.G.L. Section 28-5-29.1

The Commission awards interest consistent 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. Having reviewed the evidence presented, the Commission, with the authority granted it under R.I.G.L. Section 28-5-25, finds that the complainant failed to prove that the respondent discriminated against the complainant with respect to terms and conditions of employment, denial of reasonable accommodation and demotion and hereby dismisses those portions of the complaint with prejudice.

II. Violations of R.I.G.L. Section 28-5-7, 42-87-2 and 42-87-3 having been found with respect to respondent's termination of the complainant, the Commission hereby orders that

A. The respondent:

1. cease and desist from all unlawful employment practices;

2. offer the complainant the next available position of manager in the Warwick restaurant;

3. pay complainant back pay and bonuses in the amount he would have been paid if he had not been terminated minus the amount of unemployment compensation he received and his interim earnings for the period from November 16, 2006 to the date of this Order, together with statutory annual interest of 12% from the date the cause of action accrued, November 16, 2006, until he is paid;

4. pay the complainant front pay and bonuses in the amount he would be paid if he had not been terminated minus his interim earnings for the time period from the date of this Order until he is re-employed by the respondent or turns down an offer from the respondent of a manager position in the Warwick restaurant, together with statutory annual interest of 12% from the date the cause of action accrued, November 16, 2006, until he is paid;

5. pay the complainant the value of back benefits, including pension benefits, that he would have been paid if he had not been terminated minus the value of interim benefits that he received since his termination, for the time period from November 16, 2006 to the date of this Order, together with statutory annual interest of 12% from the date the cause of action accrued, November 16, 2006, until he is paid;

6. pay the complainant the value of benefits, including pension benefits, that he would be paid if he had not been terminated minus the value of interim benefits that he receives for the time period from the date of this Order until he is re-employed by the respondent or turns down an offer from respondent of a manager position at the Warwick restaurant, together with statutory annual interest of 12% from the date the cause of action accrued, November 16, 2006, until paid;

7. to pay the complainant the costs of his job search after his termination, together with statutory annual interest of 12% from the date the cause of action accrued, November 16, 2006, until paid;

B. The complainant submit to the Commission and the respondent documents indicating the unemployment compensation that he received after his termination and his interim earnings and benefits since November 16, 2006, on or before 45 days from the date of this Order, and that he submit monthly supplements relating to the value of interim earnings and benefits received every month until he is re-employed by the respondent or refuses an offer from the respondent of a position of manager at the Warwick restaurant;

C. The respondent submit to the Commission and the complainant, on or before 45 days from the date of this Order, documents that indicate the average monthly salary and bonuses and average value of its benefits for its Warwick restaurant managers with the complainant's experience for the time period from November 16, 2006 to the date of the Order and that it supplement its response every month until the complainant is re-employed by the respondent or refuses an offer from the respondent for a manager position in the Warwick restaurant;

D. The respondent and the complainant notify the Commission within 60 days of receipt if either party requests a hearing on the documents submitted pursuant to Paragraphs B and C;

E. The respondent submit proof of payment to the complainant in accordance with Paragraph II (3 and 5) within 75 days of the date of this Decision and Order;

F. The respondent, on a monthly basis, starting within four (4) months of the date of this Order, submit proof of payment to the complainant in accordance with Paragraphs II (4 and 6) for amounts accrued after the date of the Decision and Order;

G. The respondent post a copy of the Commission's anti-discrimination poster prominently in all of its Rhode Island facilities;

H. The respondent train all of its managers that work in Rhode Island 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, a list of the people who were

trained, the name of the trainer and a copy of the syllabus.

III. The attorney for the complainant may file with the Commission a Motion and Memorandum for Award of Attorney's Fees no later than 45 days from the date of this Order. The respondent 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 FEPA. If either party elects 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 [20th] day of [June], 2011.

_____/S/_____

Nancy Kolman Ventrone
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____

John B. Susa
Commissioner

CONCURRENCE AND DISSENT OF COMMISSIONER ROCHELLE BATES LEE

I concur with the Commission's finding that the respondent terminated the complainant because of his disability.

I dissent from the Commission's finding that the respondent did not discriminate with respect to reasonable accommodation and demotion. The complainant had been working under a set

schedule with four closings shifts for quite some time before Mr. Broach became the Director of Operations and the complainant had received good evaluations while doing so. This demonstrates that it would not have been a hardship for the respondent to continue that schedule while the complainant was in the position of Assistant General Manager. The previous schedule had been tried to good effect, and was therefore obviously reasonable and not detrimental to the respondent's business. Mr. Broach's testimony as to why Assistant General Managers must have a flexible schedule was vague and unconvincing.

I also dissent from the Commission's decision that the complainant did not prove that he should have been awarded damages for pain and suffering. The complainant testified to a long period when he experienced depression and an adverse affect on his family relationships resulting from his discriminatory termination. The respondent's actions shattered the complainant's finances and security. The complainant should have been awarded compensatory damages for his evident emotional distress.

_____/S/_____ _____[6/20/11]_____

Rochelle Bates Lee Date