

**JAMS ARBITRATION No. 1220059030**

**MARILYN SCHIAMBERG**

**Claimant**

**and**

**COLON & RECTAL MEDICAL SERVICES GROUP, INC., BETH MOORE M.D., BETH MOORE, M.D.,  
INC.; and THOMAS SOKOL, M.D.**

**Respondents**

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**AWARD**

**Counsel:**

**Steven M. Rubin  
The Rubin Law Corporation  
1875 Century Park East, Suite 1230  
Los Angeles, California 90036  
Telephone 310-285-0777  
Fax 310-288-0207  
Counsel for Claimant**

**Landon R. Schwob  
Cruser, Mitchell, Novitz, Sanchez, Gaston & Zimet, LLP  
800 Wilshire Boulevard, Suite 800  
Los Angeles, California 90017  
Telephone 213-689-8500  
Fax 213-689-8501  
Counsel for Respondent**

**Arbitrator:**

**Hon. Melinda A. Johnson, Ret.  
JAMS  
555 West 5<sup>th</sup> Street, 32<sup>nd</sup> Floor  
Los Angeles, California 90013  
Telephone 619-237-0801  
Fax 619-236-9032**

**Place of Arbitration:**

Century City, California

**Date of Interim Award:**

January 12, 2019

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Comprehensive Agreement, Employment At-will and Arbitration, dated September 4, 2007 and the stipulation of the parties dated March 21, 2018, and having examined the submissions, proof and allegations of the parties, finds, concludes and issues this Interim Award as follows:

**I. Introduction and Procedural Statement**

Claimant (hereafter, "Schiamberg") filed her claim in arbitration on or about March 29, 2018. The claims asserted were for: age discrimination; failure to take all steps to prevent discrimination; wrongful termination; and declaratory relief. Her claim prays for lost wages and benefits, damages for emotional distress, attorney's fees and punitive damages.

The evidentiary hearing was conducted on November 14 through 19, 2018. The matter was not reported.

At the conclusion of the testimony, each side stated that it had no further evidence to offer; the matter was argued by counsel and was submitted for decision on November, 19, 2018.

**II. Facts**

The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. To the extent this recitation differs from any party's position, that is the result of determinations as to credibility and relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

Schiamberg was hired by CRMSG on or about September 6, 2007 as "practice manager." She was 58 years old at the time of hiring. Her salary began at \$60,000 per year and increased over time to \$82,000 per year, plus \$5,000 annual bonuses, benefits and three weeks paid vacation per year. By the time of her termination, she was the highest paid employee of CRMSG.

Her primary supervisor was Dr. Beth Moore (hereafter, "Moore") a partner in and vice-president of CRMSG throughout Schiamberg's tenure there. Although Dr. Thomas Sokol

(hereafter, "Sokol"), partner and President of CRMSG was ostensibly also a supervisor, he generally ceded those responsibilities to Moore.

CRMSG is a "shell" corporation into which the doctors who are partners, or who practice with the partners, contribute certain dollar amounts to the corporation, adequate to meet its expenses. If unanticipated or higher expenses are incurred by the corporation the partners contribute enough funds to see those are paid. Each doctor has his/her own entity or operates professionally as a sole proprietor and receives all revenues due from billings for his/her own professional services. From these revenues, they fund CRMSG. Only Moore and Sokol are owners of CRMSG, and they refer to themselves as "partners," rather than "shareholders" or "owners." There has apparently been no stock issued. Other physicians were not considered "partners" but did contribute an agreed-upon monthly amount to overhead expenses in exchange for practicing at the CRMSG offices. Sokol founded CRMSG and Moore became his partner in 1997. Dr. Mari Madsen (hereafter, "Madsen") became a partner on or about 2010.

The practice had its office on Wilshire Boulevard for approximately 32 years. The suite had been built specifically for a colorectal practice, including bathrooms attached to each examination room. It has become too large for the existing personnel by 2016, with one permanently unused office. Dr. David Wagner (hereafter, "Wagner"), who had practiced at CRMSG since approximately 2011 had announced, to Moore and Sokol's surprise, in the late summer of 2017, that he would leave the practice by the end of the year. This left an additional vacant office, and one less contributor to overhead costs. Moore was very concerned because she felt she could not work any harder than she was, or contribute any more to overhead.

Since 2010, the total office overhead has hovered around \$1,000,000 annually. Through 2014, Moore, Sokol and Madsen each paid 1/3 of that. Wagner, who was never a partner, made increasingly large contributions, which, at a maximum were \$12,000/month. Madsen left the practice at the end of 2014, to return to the East Coast. Madsen's contribution did not increase, which meant Moore and Sokol were each paying approximately 43% of the overhead. Dr. Zuri Murrell (hereafter, "Murrell") joined in 2017 the practice on a parttime and temporary basis in January, 2017. He contributed \$9,000/month, eventually increasing to \$12,000/month, or approximately 12% of the total CRMSG overhead for 2017. Moore and Sokol's contributions for 2017 were thereby reduced to approximately 39% each. When it was certain the Wagner would be gone at the end of 2017, and it was uncertain whether Murrell would remain past 2017, Moore and Sokol were each looking at meeting 50% of the 2018 overhead, or approximately \$500,000 each. Given that Sokol had already decided he was only going to remain working for a maximum of two years, Moore was looking at having to shoulder virtually all the overhead, no later than January, 2020, and, quite possibly, before that. This caused her a great deal of stress, given the highly competitive nature of this type of medical practice.

After Wagner's announcement, Moore and Sokol were looking to all possible ways of reducing overhead. As their lease on Wilshire ended December 31, 2017, they decided they should move to smaller and less expensive offices, rather than sign a ten to fifteen year lease for more space than they needed. Moore asked her sister-in-law, Holly Takahashi (hereafter,

"Takahashi") to look for a new space. Though not compensated for the work, Takahashi located offices in Beverly Hills, whose rent was \$7,000/month less than the Wilshire offices. The new office is somewhat cramped, and not specifically designed for a colorectal surgery practice, but Sokol testified they have "adjusted." Moore, alone, signed the lease, in mid-October, 2017. Sokol declined to sign as he did not expect to practice much longer and Murrell did not sign as he had not yet decided if he was going to stay with the practice. This fact, alone, cause Moore additional anxiety about overhead.

Moore also looked for any other cost savings she could find, after discussing the situation with Sokol. They changed one employee to parttime, and terminated another before the end of 2017. They terminated the services of a public relations firm, and looked to change to a less expensive telephone system. Moore felt under immense personal stress. Sokol generally deferred to Moore in making these decisions, and testified every decision was made for financial reasons only, including Schiamburg's termination. Sokol testified he felt stressed from the overhead concerns and described Moore as "frazzled."

Murrell came to CRSMG in January, 2017, as a parttime and temporary physician, and was expected to stay only through calendar year 2017. Moore and Sokol were, essentially trying him out, to see if he would be a good "fit" in the practice. Murrell practiced parttime at CRSMG and parttime at his Los Cerritos office, which schedule he still retains. Throughout 2017, he was actively looking for another place to practice, but he wanted a fallback position in case that did not work out. Schiamburg was apparently unaware that Murrell was looking elsewhere. He was, as he put it, "hedging his bets."

However, if he ultimately decided to stay with CRSMG, he wished to have more modern offices, to reflect the modernized medical procedures in their specialty field. (Moore agreed that, to attract and maintain clients, their offices needed to be "cutting edge.") For that reason, in October and November, 2017, he was the contact person with Christie Bruno (hereafter, "Bruno"), who was designing the new offices. He had known Bruno through their children's school. He participate in design of the new office space, not negotiations regarding it. Although he was still uncertain whether he would remain an CRMSG, he, nonetheless, contributed 1/3 of the October rent on the new offices. He did this so he would have a "say" in its set-up in case he remained. He believed, that, if he ultimately decided not to stay, Moore would, in good faith, return his paid share of the rent to him. Moore testified that was, in fact, their oral agreement. Much of the "business" of the practice, among the doctors, was handled in this informal fashion.

On October 31, 2017, Schiamburg was informed she was being laid off, effective November 1, 2017. She was 69 years old at the time. Although offered a two week extension of her employment to train a replacement, Schiamburg declined. Moore asked if Schiamburg would stay at a reduced salary, and she declined that offer as well. She was paid one month's salary as severance. Moore, who effected the termination was approximately 52 at the time. and Sokol was approximately 64. Schiamburg's duties were effectively taken over by Takahashi who was approximately 54 years old at the time. Moore had offered Takahasi the job on

October 29, 2017. Takahashi's salary was then, and continued to time of trial, to be \$55,000 per year, and she has received bonuses in 2018 totaling \$2600. CRMSG also pays her health insurance premium, and allows three paid sick days and one week's paid vacation annually. Murrell testified he was not consulted on terminating Schiamburg or hiring Takahashi, as he was not a partner and had not yet decided if he was going to stay. He further testified that, despite her lack of background in the medical field, Takahashi had grown into the job and was handling it very well.

Schiamburg immediately suspected she had been terminated due to her age, and accused Moore and Sokol of age discrimination, even though Moore specifically told her the decision was due to the need to cut costs.

CRMSG still employs a scheduler, Miss Yakahoshi, who is 71 years of age and whose salary is \$74,000 annually. Moore expects Yakahoshi to continue working for the practice indefinitely.

Murrell was not able to identify a suitable second facility at which to work, in place of CRSMG. He finally decided to remain at CRSMG around November 19, 2017, after the Beverly Hills lease was signed. He contributes \$20,00 a month as his 1/3 share of the costs, and has five year written agreement with CRSMG, which was only signed shortly before the arbitration. Until that time, Moore, Murrell and Sokol worked under an oral understanding.

### **III. Analysis**

Moore and Sokol are physicians who must run the "business" of a medical practice, and are not "businessmen" by the standard definition. When they saw one of their overhead contributors leaving, and another being unwilling to commit to remaining, combined with Sokol's uncertainty and the duration of his time with the practice, they had immediate concerns about their ability to finance the practice as it then existed. Moore was the only physician on whom, by October, 2017, CRMSG could count to pay all its ongoing expenses for any time period past the upcoming 12-24 months. Moore estimated the overhead for 2018 would be \$1,000,000, and that she would be responsible for at least \$500,000 of it, if not the entire \$1,000,000. As it turned out, she is currently only responsible for 1/3 of an approximate annual overhead of \$750,000, but that is not how the situation appeared in October, 2017.

Schiamburg, as practice manager had a great deal of information regarding the practice itself, although she may not have been completely aware of the variables Moore and Sokol were considering in the cost-saving decisions they made, including terminating Schiamburg.

It is clear that Schiamburg, given her age, was part of a protected class (age 69), was qualified to perform her duties (any complaints about her were relatively insignificant and did not play a role in her termination) and suffered an adverse employment action (termination). The only issue in this matter is whether her termination was motivated, even in part, by a discriminatory animus.

There is no direct evidence of animus toward Schiamburg because of her age, or that age was a consideration in her termination. In fact, Schiamburg had been hired by CRSMG when she was approximately 59 years old, had been compensated well from the start with increased compensation and improved benefits over time, and worked for a company that continues to employ persons of Schiamburg's age or older.

CRSMG's work force is diverse in terms of age, nationality and sexual orientation. No witness testified to even anecdotal evidence of discriminatory behavior or remarks on the part of Moore or Sokol

Moore was credible in her testimony that she panicked at the thought of maintaining the entire practice on her own and cut costs wherever she could find a place to do so. Sokol was credible in his testimony that he did not know in October of 2017, or at trial, whether he would continue to practice through 2019. Murrell was credible in his testimony that he did not decide to remain with CRSMG past 2017 until after Schiamburg had been terminated.

Given the small number of employees at CRSMG, there is insufficient evidence to detect any "pattern" of terminating, or otherwise dis-favoring older workers. The employee who took over Schiamburg's duties was in her mid-50's. There was a 70 year old scheduler still working at CRSMG as of the dates of hearing after many years there.

The only piece of circumstantial evidence presented at hearing was the termination of a 70 year old employee, scheduler Judy Pogany (hereafter, "Pogany") in 2014 and Schiamburg's belief the reason given for her termination was a pretext, because CRSMG really wanted to replace her with a much younger receptionist. This was based on CRSMG obtaining a release from the Pogany when she was terminated, apparently on advice of counsel. Moore, on the other hand, testified that when former partner Madsen had left the practice in the end of 2014, CRSMG lost a substantial overhead contributor. Madsen's departure created significant financial concerns which Moore and Sokol alleviated by terminating Paganl, a fulltime scheduler, whose services were not needed when the medical staff went from four to three. Moore testified Pogany's age was not a consideration in her termination.

CRSMG was a small enterprise, without a dedicated Human Resources person. Moore had virtually all overall managerial responsibility. She became very anxious, as, with good reason, she feared she would shortly be responsible for \$1,000,000 overhead. She reacted swiftly, and, perhaps, somewhat impetuously, but not discriminatorily. Moore made quick decisions to protect herself and the company financially. While some may have turned out not to have been necessary, in retrospect, the evidence does not support a finding that any decision was based on discrimination based on age.

There is no doubt Schiamburg has suffered both financially and emotionally from her termination. However, California allows termination for any reason not based on being a member of a protected class, or retaliation for participating in a protected activity. As difficult

as this has been for Schiamburg, the evidence is that she was terminated based on anticipated financial distress, and nothing more.

**IV. Conclusion**

An award is made in favor of Respondents. Each side shall bear its own fees and costs.

January 12, 2019

A handwritten signature in cursive script, appearing to read "Melinda A. Johnson".

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Hon. Melinda A. Johnson, Ret.  
Arbitrator

**PROOF OF SERVICE BY E-Mail**

**Re: Schiamberg, Marilyn vs. Colon & Rectal Medical Services Group, Inc.  
Reference No. 1220059030**

I, Jeff Lucas, not a party to the within action, hereby declare that on January 14, 2019, I served the attached AWARD on the parties in the within action by electronic mail at San Diego, CALIFORNIA, addressed as follows:

Marc J. Zimet Esq.  
Landon R. Schwob Esq.  
Cruser, Mitchell, Novitz, et al.  
800 Wilshire Blvd  
Suite 1400  
Los Angeles, CA 90017  
Phone: 213-689-8500  
mzimet@jzlaw.com  
lschwob@cmlawfirm.com

Parties Represented:  
Colon & Rectal Medical Services Group, Inc.

Steven M. Rubin Esq.  
Paymon Mondegari Esq.  
Rubin Law Corporation  
1875 Century Park East  
Suite 1230  
Los Angeles, CA 90067  
Phone: 310-385-0777  
steve@stevenrubinlaw.com  
paymon@stevenrubinlaw.com

Parties Represented:  
Marilyn Schiamberg

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Diego, CALIFORNIA on January 14, 2019.



Jeff Lucas  
JAMS  
JLucas@jamsadr.com