

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ALAN SHEA and MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION,
Complainants

v.

Docket No. 01-SEM-0014

T.S. TRUCK SERVICE, INC.,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Richard A. Mulhearn, Esq., for Complainant.
Robert G. Parks, Esq., for Respondent.

I. PROCEDURAL HISTORY

On January 3, 2001, Complainant Alan Shea filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against his former employer Respondent, T.S. Truck Service, Inc. In his complaint, Complainant alleged that Respondent had engaged in unlawful disability discrimination in violation of M.G.L. c. 151B, § 4(16).

On January 12, 2004, the Commission issued a probable cause finding with respect to Complainant's complaint. On July 14, 2004, the Commission certified Complainant's claim for a public hearing. The parties appeared before me on September 16, 2004, for a public hearing in Springfield, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law

submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Alan Shea, is an individual who lives in Rutland, MA. Complainant worked for Respondent as a commercial truck driver from February to November 2000. Complainant is an employee within the meaning of M.G.L. c. 151B, §1(6).

2. Respondent, T.S. Truck Service, Inc., is a Massachusetts corporation engaged in the commercial trucking business. Respondent has its principal place of business and main terminal in Worcester, MA. During the months of December through March, the vast majority of Respondent's trucking business is devoted to transporting petroleum products such as heating oils and diesel vehicle fuel. In the warmer months, Respondent primarily transports bulk commodities, such as bituminous concrete materials, in dump trucks. At the time Complainant worked for Respondent, it employed over seventy persons including approximately forty truck drivers. Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. Complainant testified that he knew he had Hepatitis C at the time he applied for work with Respondent. In April 1999, prior to working for

Respondent, Complainant had a physical examination for purposes of obtaining a Commercial Driver's License ("CDL"). In the nurse practitioner's notes of that examination, she indicated that Complainant had "? Hep C (lost health ins – did not [follow up])." But the nurse practitioner did not note or mention that Complainant might have Hepatitis C on the physical examination form completed as a result of the same examination.¹ In addition, Complainant, in the "Health History" section of the physical examination form, did not indicate that he suffered from "any other diseases" or any "permanent defect from illness, disease, or injury." The document merely stated that he had a 1984 neck injury and 1983 thumb surgery. Joseph ("Jay") Howard, who owned and managed Respondent's business, testified credibly that these documents were not contained in Complainant's personnel file.

4. In February 2000, Respondent hired Complainant as a truck driver. Upon being hired, Complainant presented to Respondent his CDL license with both a certificate of medical fitness and an updated physical examination form dated February 7, 2000. The medical examiner's certificate that Complainant submitted to Respondent never mentioned or referenced Hepatitis C. Moreover, in the Health History section of the physical examination form, Complainant responded "no", to the questions of whether he "[suffered] from any other disease"; and whether he had any "permanent defect from illness, disease, or injury." The certification did state that Complainant suffered from hypertension,

¹ Pursuant to U.S. Department of Transportation regulations, a person hired for a CDL truck driver's position must submit an updated physical examination form and medical examiners certificate to his or her employer.

5. Complainant testified that he disclosed to Respondent upon being hired that he had Hepatitis C. Specifically, Complainant claimed that at his interview he told Respondent's Operations Manager, Steve Burdett, that he would need to attend medical appointments for treatment related to Hepatitis C; and, in response, Burdett said, "no problem." Burdett died in October 2000. Although Complainant may have suspected that he had Hepatitis C as of February 2000, I decline to credit Complainant's testimony that he specifically informed Burdett of this condition. I note that the medical documents submitted by Complainant to Respondent upon being hired failed to mention anything about Hepatitis C. In addition, Jay Howard testified credibly that Complainant's personnel file did not contain any notes or documents from Burdett mentioning or describing Complainant's condition. Moreover, medical records submitted into evidence by Complainant indicated that he was apparently not tested for Hepatitis C until July 26, 2000.

6. In mid-April 2000, Complainant submitted another medical examiner's certificate to Respondent. Again, neither the certificate nor the physical examination form mentioned or described anything related to Complainant having Hepatitis C. Complainant also continued to answer, "No", to the questions regarding whether he "[suffered] from any other disease"; and whether

he had any “permanent defect from illness, disease, or injury.” Complainant testified that he could not recall whether he told the medical examiner about his having Hepatitis C.

7. Complainant also testified that he told William (“Bill”) Howard on multiple occasions that he had Hepatitis C. Bill Howard is the son of Jay Howard and worked as Burdett’s assistant. After Burdett’s death in October 2000, he assumed the position of Operations Manager. Bill Howard denied that Complainant ever disclosed to him that he had Hepatitis C and claimed he had no knowledge of Complainant receiving any medical treatment except for attending some “dental” appointments. I credit Bill Howard’s testimony.

8. Complainant claimed that he made no attempt to keep his condition a secret at work and told “a lot of guys” at work that he had Hepatitis C. Complainant offered no evidence to corroborate his testimony on this matter. I decline to credit his testimony.

9. Although Complainant testified that he informed Respondent that he had Hepatitis C in February 2000, he apparently did not get tested for the disease until five months later. Medical records from the Fallon Healthcare System dated July 26, 2000, indicated that Complainant had an HIV test and hepatitis screening as a result of being “[i]n a new relationship, [and] concerned with sexually transmitted diseases.” The tests conclusively established, apparently for the first time, that Complainant had Hepatitis C.

10. Complainant stated that from July to November 2000, he tried to schedule his medical appointments for his treatment for Hepatitis C when he was off duty. If he could not arrange his appointments when he was off from work, he tried to schedule them in the afternoon in order to minimize interruptions to his work schedule. However, Complainant testified that he was not always able to schedule his appointments at these times and he claimed that he repeatedly informed Burdette about his need to have time off. According to Complainant, when he asked Burdette if he needed a medical note for his appointments, Burdette said it was not necessary. I decline to credit Complainant's testimony.

11. Complainant claimed that Burdette assigned him to jobs that made it difficult or impossible to make his medical appointments. Complainant believed that Burdette could have given him different assignments that would have made it easier for him to get treatment for his Hepatitis C. I decline to credit Complainant's testimony on this matter.

12. Complainant testified that in October 2000, he scheduled his first interferon injection treatment for November 28, 2004. He claimed that after scheduling the treatment, he had a discussion with Burdette, Bill Howard and Joseph Howard regarding the matter. Complainant testified that he told them that he could get very sick from the treatment and, therefore, he would like to take a week's vacation. According to Complainant, they denied his request for a week off but said he could have the day off on November 28. Complainant further claimed that they told him vacation time could only be used in the summer. Complainant introduced no credible evidence to corroborate his

testimony. Both Bill and Jay Howard had no recollection of this discussion or any request by Complainant for a day-off on November 28. Contrary to Complainant's testimony, Bill Howard testified that Complainant had asked him for some time off to work on his own business. Bill Howard claimed that he then discussed Complainant's request with Jay Howard. According to Bill, Jay denied Complainant's request because it was the busiest time of year for fuel oil deliveries. Jay Howard further testified that pursuant to company policy, Complainant was not entitled to vacation time since he had not worked with Respondent for at least one year. Jay Howard likewise recalled that Complainant had requested two weeks off to work on his own business involving winterizing and transporting campers. Jay Howard also claimed that at the same time, Complainant requested permission to park his personal truck on Respondent's property. I credit Bill and Jay Howard's testimony.

13. Complainant further testified that he asked Respondent to assign him to operate a dump truck ("end dumps") as opposed to oil deliveries because oil deliveries would make it more difficult to make his medical appointments. According to Complainant, Respondent denied his request. Instead, he claimed that Respondents assigned him to work nights delivering oil so he could attend his medical appointments during the day. Complainant introduced no credible evidence to corroborate his testimony. Bill and Jay Howard each testified credibly that they had no knowledge of Complainant ever requesting to operate "end dumps" as opposed to oil deliveries. Therefore, I decline to credit Complainant's testimony on this matter.

14. Complainant testified that he had a CT scan of his abdomen scheduled for November 3, 2000, in connection with his treatment for Hepatitis C. He claimed that a week beforehand, he told Bill Howard about the test and asked for the day off. Complainant stated that Bill Howard denied his request on November 2. Bill Howard testified that he had no recollection of having this conversation with Complainant. I credit Bill Howard's testimony.

15. Complainant stated that on November 3, 2000, the dated of his scheduled CT scan, Bill Howard called him at home and told him that he had to come to work. According to Complainant, he explained that he had the CT scan scheduled, but Bill Howard told him he would be fired if he did not show up. Complainant claimed he then had a conversation with Jay Howard. Complainant testified that he told Jay that he had to drink a special liquid medication in preparation for the CT scan. According to Complainant, Jay told him to come to work and then leave work later on to go for the test. Complainant then reported to work. He claimed that while operating a truck, he became incontinent as a result of his having to drink the medication for the test. Bill and Jay Howard denied having these conversations with Complainant or knowing that Complainant had become incontinent, and I credit their testimony.

16. On November 28, 2000, Complainant had his first interferon treatment. He claimed that afterwards, he began experiencing severe flu-like symptoms. He testified that the next day, he still did not feel well, so he called Bill Howard and told him he could not come to work. Complainant claimed that Bill told him to "come in or get fired." Complainant testified that he then reported to work and

told Bill again that he was too sick to work. He stated that Bill repeated he would have to work or be fired. Complainant claimed that Bill then gave him twice the amount of his usual deliveries. He further testified that when he got in his truck and began his route, he became very dizzy and feverish and almost hit something at a tollbooth. Complainant stated that he then stopped his truck and called Bill to say he was too sick to drive and his truck was low on fuel. Complainant claimed that he then drove back to the facility and again spoke to Bill. According to Complainant, Bill then fired him for refusing to work.

17. Bill Howard denied Complainant's account of his last day of work. He testified that he heard that Complainant had experienced some difficulties when he reported for work. Specifically, Bill claimed that he heard from others that Complainant had left Respondent's yard at a high rate of speed and with his truck's landing gear down, leaving sparks. He also testified that shortly after Complainant left the facility, he learned that Complainant's truck was low on fuel. Bill testified that he then called Complainant and told him to come back to the terminal to refuel the truck. According to Bill, he did not witness Complainant returning to the terminal, but learned a few hours later that after returning, Complainant parked his truck and then left the worksite without completing his assigned runs. Bill denied having any discussion with Complainant after he came back to the terminal. To the contrary, Bill believed that Complainant voluntarily quit his job. Bill testified that a few days later, Complainant returned to the terminal to return his uniform and get his last paycheck. I credit Bill Howard's testimony.

18. Both Bill and Jay Howard testified that they considered Complainant to be a good driver. Jay Howard further stated that Complainant had no record of any major difficulty in his work performance from the inception of his employment to November 27, 2000. The also both denied having any knowledge that Complainant had any malady or medical condition prior to Complainant's last day of work. Lastly, Jay Howard testified that Respondent employed other truck drivers with Hepatitis C and the condition did not pose a barrier to working as long as the driver submitted a valid certificate of medical fitness and a physical examination form that acknowledged the condition. I credit Bill and Jay Howard's testimony.

III. CONCLUSIONS OF LAW

M.G.L. ch.151B, § 4(16) makes it unlawful for an employer to discriminate against an employee on the basis of disability.² Complainant has alleged that Respondent engaged in unlawful discrimination when it both terminated his employment after he was unable to work due to his treatment for Hepatitis C and failed to provide reasonable accommodations for his alleged disability.

With respect to Complainant's disability discrimination claim, in the absence of any direct evidence of discriminatory motive, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1, 10 (1998); Wheelock College v. MCAD, 371 Mass. 130, 137 (1976). First,

² The use of the term "disability" instead of "handicap" reflects the preference of persons with disabilities to use that term rather than "handicapped" as used in the law. Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686, 688 n. 4 (1996), *quoting*, H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 3, at 26-27 (1990), *as cited in*, 29 C.F.R. § 1630(1)(a), app. at 337.

Complainant must establish a prima facie case of disability discrimination. In order to prove a prima facie claim, Complainant must establish: (1) he suffers from a handicap; (2) he is a qualified handicapped person; (3) Respondent took an adverse employment action against; and, (4) the position he had occupied remained open and the employer sought to fill it, or Respondent took adverse action against him under circumstances giving rise to the inference that the termination was based on unlawful discrimination based on his handicap. Dartt, 427 Mass at 9; LaBonte v. Hutchins & Wheeler, 424 Mass. 813, 821 (1997). Complainant need not show that Respondent terminated his employment “solely” on the basis of his disability in order to establish a prima facie case of discrimination. Dartt, 427 Mass. at 8-9.

In this case, Complainant introduced substantial evidence that he suffered from Hepatitis C during his employment with Respondent. However, he has failed to establish that Respondent took any adverse employment action against him or terminated his employment under circumstances that give rise to the inference that the termination was based on unlawful discrimination. In particular, I find that Complainant has failed to prove that Respondent knew about his medical condition. Although Complainant testified he informed Steve Burdett of his having Hepatitis C upon being hired and then throughout his employment, I did not find Complainant’s testimony credible. Contrary to Complainant’s testimony, the medical documentation he gave to Respondent in February 2000, and a few months later in April 2000, failed to mention anything about Hepatitis C. Moreover, in the Health History sections of the physical

examination forms submitted to Respondent, Complainant continually responded “no”, to the questions of whether he “[suffered] from any other disease”; and if he had any “permanent defect from illness, disease, or injury.” Additionally, the medical documentation introduced into evidence by Complainant indicated that he did not conclusively know he had Hepatitis C until he was tested in July 2000. Complainant also failed to introduce any credible testimony that he gave these test results or any other medical records related to his treatment for Hepatitis C to Respondent. To the contrary, I credited Jay Howard’s testimony that Complainant’s personnel file contained no documentation that even remotely alluded to his having Hepatitis C. Bill and Jay Howard also testified credibly that Complainant never mentioned at any time that he had any disabling medical condition, except for the possible periodic need to attend “dental” appointments. Ironically, I believe Complainant’s failure to reveal his condition during his physical examinations in February and April 2000, as well as his failure to provide any medical records regarding his condition to Respondent, strongly supports the conclusion that Complainant tried to conceal his condition from both Respondent and the CDL medical examiner. I, therefore, refuse to credit his testimony that he openly discussed his having Hepatitis C with Burdett, Bill or Jay Howard, or any other employee of Respondent. Consequently, Complainant has failed to establish a prima facie claim of disability discrimination.

For the similar reasons, I also conclude that Complainant has failed to prove that Respondent unlawfully failed to provide him with reasonable accommodations. In order to establish a prima facie case of disability

discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) he is a “handicapped person” within the meaning of M.G.L. c. 151B, § 4(17); (2) he is a “qualified handicapped person” capable of performing the essential functions of a particular job; (3) who needed a reasonable accommodation to perform his job; (4) Respondent was aware of the handicap and the need for a reasonable accommodation; (5) Respondent was also aware, or through a reasonable investigation could have become aware, of a means to reasonably accommodate the handicap; and, (6) Respondent failed to provide Complainant the reasonable accommodation. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 217 (2003), *aff’d*, 26 MDLR 216 (2004); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at 26 (2002).

Again, I declined to credit Complainant’s testimony that he informed Respondent that he had Hepatitis C or that he needed a reasonable accommodation to obtain medical treatment. To the contrary, Jay and Bill Howard testified credibly that they had no knowledge of his condition. Moreover, I credited Jay Howard’s testimony that Complainant’s personnel file contained no documentation that either referenced his condition or requested time off to attend medical appointments for treatment related to his Hepatitis C.

In conclusion, Complainant has failed to establish that Respondent either knew he had Hepatitis C during the course of his employment, became aware of his need for any reasonable accommodation as a result of his condition, or took adverse action against him as a result of his alleged disability. Complainant has,

therefore, failed to prove that Respondent engaged in unlawful discrimination in violation of M.G.L. c. 151B, § 4(16).

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 23rd day of March, 2005.

Edward R. Mitnick
Hearing Officer