

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & ANNA TODESCA,
Complainants

v.

DOCKET NO. 01-BEM-10529

AMERICAN AIRLINES, INC.,
Respondent

Appearances:

Daniel A. Capodilupo, Esquire for Anna Todesca
Aderonke O. Lipede, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On or about November 15, 2001, Anna Todesca filed a complaint with this Commission charging American Airlines with discrimination in employment on the basis of her handicap, osteoarthritis, in violation of M.G.L.c.151B, §4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on February 7 & 8, 2005. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. In January 2000, Complainant Anna Todesca began her employment with Respondent American Airlines as a Passenger Service Representative (“PSR”) at its facility located at Boston’s Logan International Airport. Complainant’s job duties included monitoring ticket counter activity to ensure professional service, checking baggage, informing passengers of excess baggage charges and answering passengers’ inquiries regarding travel. (Exh. R-1).

2. On September 11, 2001, two of Respondent’s aircraft were hijacked by terrorists. (Tr. 143). Following the September 11 attacks, the federal government required commercial airlines, including Respondent, to implement changes in airport security until the federal government could assume complete control of airport security. As part of an industry-wide response to the events of September 11, on October 4, 2001, all PSRs, including Complainant, were laid off as part of a company-wide reduction in force.

3. In October 2001, Respondent created the position of Temporary Airport Security Coordinator (“TASC”) in response to the federal mandates requiring increased airport security. To meet federal directives, Respondent had to fill the TASC positions as soon as possible. Respondent offered several PSRs, including Complainant, the opportunity to apply for positions as TASCs. The TASC position was initially projected to end in February 2002, but actually was phased out from February 2002 to November

2002 when the Federal Government TSA took over the function.(Tr.II, P. 291). Linda Johnson , a training instructor, and Gary Ritenhour, a customer service manager, were responsible for interviewing and hiring the TASCs.

4. Bronwen McKenzie has worked at Respondent since 1990 and at the time of the events in question, was manager of passenger services at Respondent's Logan Airport location. As manager she supervised customer service managers, training managers, skycaps, ticket counter agents and gate agents. In October 2001, McKenzie supervised about 220 people.(Tr. II, p. 228)

5. McKenzie testified that Respondent was expected to have completed the TASC hiring process by Thanksgiving 2001 (Tr II, p.232). When TASCs were hired they were not assigned to a particular location because assignments changed on a daily basis depending on Respondent's coverage requirements on any given day. (Tr. II, p.233) I credit her testimony.

6. The duties of the TASC, according to Respondent's written job description, are as follows: "vigilant security observation of baggage, aircraft and passengers; continual screening of passengers with hand-held metal detectors in conjunction with pat-down searches and physical searches of accessible (carry-on) property to quickly detect objects that could pose safety risks; verify passenger identification and travel documents to ensure that only authorized passengers are clear for boarding the aircraft." (Exh. C-3)

7. McKenzie testified that TASCs could be assigned to any of the following locations: The “skycap”, which involved sitting on a stool outside of the terminal to make sure that no one other than skycaps placed luggage on the conveyor belt for curbside check-in; the “security check”, which involved announcing to passengers entering the security check area to have their identification and airline tickets ready for inspection; and the “gate”, which involved going from gate to gate at departure time to search specifically identified passengers. (Tr. 196) The gate assignment also involved searching the contents of a passenger’s carry-on luggage, searching the passenger using a hand-held wand or conducting a pat-down search and checking IDs. The gate assignment required the TASC to bend and stoop. There was always more than one TASC assigned to the gate. The total number of TASCs assigned to Respondent at Logan Airport was approximately 20. I credit her testimony.

8. According to McKenzie, Respondent did not assign each TASC to a particular location on a regular basis because of constantly changing security requirements. At the time of hiring, applicants for the TASC position were expected to perform all of the assignments of the TASC position, including the gate assignment. Regardless of their initial assignment of the day, TASCs could be pulled from one location and assigned to another during the course of a shift. For example, if several planes were departing, TASCs could be pulled from the skycap location and assigned to the gate. (Vol. 2, p.199-200) I credit her testimony.

9. On or about October 23, 2001, Complainant attended training for the TASC position. At that time Complainant signed a written job description acknowledging that she could perform all of the essential functions of the TASC position. An employee's ability to "twist, stoop, turn, bend and lift" is included in the list of the essential functions of the TASC position. (Exh. C-3).

10. On October 26, 2001, Complainant visited her physician, Clay Miller. She testified that during the visit, she told Dr. Miller that the TASC position involved increased bending and stooping, and that during the training for the TASC position, she had experienced difficulty in bending.

11. At this visit, Complainant was diagnosed with osteoarthritis in her right hip. At Complainant's request, on October 26, 2001, Dr. Miller wrote a "patient status letter" stating that Complainant could return to work with a "permanent" restriction of "no squatting, forward bending, stooping or crawling." (Exh. C-4). At the public hearing, Complainant testified that her arthritis limits her in that she cannot touch her feet and must use a special brush in the shower to wash her feet, she cannot groom her toenails, nor can she tie her shoes, requiring her to wear only slip-on shoes. She is able to walk, and testified that she can perform many types of jobs that do not involve bending. I credit her testimony.

12. On or about October 29, 2001, Complainant advised Linda Johnson, then a manager and trainer at Respondent, that she could not perform the bending, stooping or twisting function of the TASC position. According to Complainant, Johnson responded

that there was “no light duty” for the TASC position and to “take it or leave it”. Johnson further told Complainant that her medical provider would need to submit documentation of her restrictions to Respondent’s medical department, located at JFK Airport in New York. (Tr. 145) I credit her testimony.

13. When Complainant learned that she needed to submit additional medical documentation, she then altered her position and told Johnson that she could obtain a note from her physician stating that she was able to perform the essential functions of the job.

14. On October 29, 2001, Complainant contacted Dr. Miller and asked him for a medical note indicating she had no restrictions on her ability to return to work because she “knew that bending and stooping was not a big essential part of the job.” Dr. Miller asked her if that was what she wanted and she responded that she needed the job and Respondent would not let her come back unless she was cleared to perform all the functions of the job. (Tr. I, p.149)

15. Sharon Douglas was a senior human resources manager for Respondent’s Northeast Region, including Logan Airport, in October 2001. Her duties included advising and counseling members of management as well as counseling employees who approached her for advice. (Tr. Vol. II, p.254) Douglas testified that she was never aware that Complainant made a request for an accommodation and was not aware that Complainant had ever disclosed that she had a disability. (Tr. vol. II. p.268) I credit her testimony.

16. Douglas testified that employees disclosing a medical condition or restriction were asked to submit supporting documentation to Respondent's medical department. According to Douglas, the first phase of the process is for Respondent's regional physician, Dr. Yiannou, to review the job description and the restrictions to determine if the person can perform the tasks. According to Douglas, the medical department at JFK never received documents from Complainant's physician. I credit this testimony. (Tr. Vol. II, p. 311)

17. Sharon Douglas testified that she first learned of Complainant's situation when Johnson approached her and told her that an employee, whom Johnson did not identify as Complainant, had disclosed her inability to perform all of the essential functions of the TASC job and Johnson did not know what to do with the information. I credit her testimony.

18. After talking with Johnson, Douglas spoke with Complainant. Douglas testified that during their conversation, Complainant did not request an accommodation. Instead she told Douglas that she wanted to return to work at Respondent. Douglas told her that because she had disclosed the information about her restrictions, she would have to submit information to Respondent's medical department in order for them to assess whether or not she could perform the specific job, as local management could not make this determination. (Tr. II, 299) I credit Douglas' testimony.

19. Douglas testified that after this conversation with Complainant, on the same day, October 29, 2001, she called Dr. Miller's office and spoke with Dr. Miller's secretary, Nicole. Douglas told Nicole that she was sending Dr. Miller a medical questionnaire regarding Complainant's condition. Douglas advised her to have Dr. Miller call or fax a response to the medical questionnaire. She then faxed a copy of the essential functions of the TASC position along with a questionnaire to Dr. Miller's office requesting information on Complainant's ability to perform the essential job functions and to advise Dr. James Yiannou at Respondent's medical department whether Complainant could perform any of the functions. Douglas testified that she later learned that Dr. Miller's office did not receive the information and she emailed the information to his office on November 9, 2001. (Tr II, p.303-5) I credit her testimony.

20. Douglas stated that following her conversations with Johnson and Complainant she was concerned that Complainant had made conflicting statements, originally telling Johnson that she had certain physical restrictions, but then later insisting that she could perform all the functions of the TASC job. Douglas was also concerned that Complainant told Johnson that she if got hurt on the job she could simply claim an on-the-job injury. Douglas felt that statement raised a "flag" that Respondent would have to make sure Complainant would not do anything that would cause harm to herself or to others. Douglas stated that the ultimate decision as to whether Complainant's restriction met the needs of a particular job description would have to be made by Respondent's medical department. (TrV. II, p.309-310) I credit her testimony in its entirety.

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21. On or about November 6, 2001, Complainant sent a certified letter to Bronwen McKenzie, the manager of Respondent's Passenger Services unit at Logan Airport, stating in part, that she had not yet been returned to work, despite being "ready, willing and able." The letter was forwarded to Sharon Douglas because it involved a human resources issue.

22. In response to the questionnaire received from the medical department at JFK, on November 9, 2001, Dr. Miller's office noted on the form that "Dr. Miller d/c this pt cannot answer these questions." (Exh. R-3)

23. On November 12, 2001, American Flight #587 crashed in New York, and as a result, McKenzie and Douglas, who were part of an emergency response team, flew to New York to assist with the crash site and victims. They did not return to Boston for over three weeks and therefore did not deal with any issues related to Complainant during this time period.

24. On December 18, 2001, at Complainant's request, Dr. Miller issued a "patient status" letter stating: "patient is able to return to work effective October 29, 2001." This letter did not address the issues of work restrictions, treatment or prognosis. (Exh. C-5). Complainant acknowledged that Dr. Miller issued the letter reluctantly.

25. On January 29, 2002, Dr. Miller wrote a letter to Respondent stating, in part, “This letter is to verify that Anna Todesca was able to return to work on October 29, 2001 in full capacity.” (Exh. C-7)

26. On February 18, Complainant met informally about her situation with Nicole Traer, a customer services manager who worked evenings and provided her with all of the medical information she possessed. On or about February 20, 2002, Complainant met with Sharon Douglas, Linda Johnson and Bronwen McKenzie to attempt to resolve the matter.

27. The same day, Bonnie Bibby, a customer service manager, who was Complainant’s direct supervisor, telephoned Complainant. Bibby told Complainant that she had spoken to McKenzie and that they were waiting for a “head count” from Respondent’s headquarters in Dallas. According to Complainant, Bibby told her that there was a possibility that she could return to work, but would lose her seniority and would also have to take a drug test. Complainant testified that she then called Respondent two or three times to set up an appointment for a drug test, but her calls were never returned.

28. On February 4, 2004, Respondent recalled Complainant and other PSRs to return to work. On February 9, 2004, Complainant signed a PSR job description acknowledging she could perform the essential functions of the PSR. Included in the PSR

job description is the requirement to twist and bend. On January 7, 2005, as part of a company-wide reduction in force, the PSR group, including Complainant, was laid off.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, sec. 4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation. A claim of handicap discrimination may be proved by showing that the Complainant (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by her employer; and (4) her position remained unfilled and the employer sought to fill it. Dartt v. Browning Ferris Industries, Inc., 427 Mass. 1 (1998).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities.

Massachusetts Commission Against Discrimination Guidelines: Employment

Discrimination in the Basis of Handicap-Chapter 151B at 7. Rapoza v. Ocean Spray, 21

MDLR 43(1999). I conclude that Complainant has failed to establish that she is a

handicapped person within the meaning of M.G.L.c.151B. In October 2001,

Complainant was diagnosed with arthritis in her right hip. At Complainant's request, her physician wrote a letter stating that she was permanently restricted from bending,

stooping and twisting. While under other circumstances, these limitations could be considered substantially limiting major life activities, in this case Complainant testified that her only limitations were that she cannot wash her feet in the shower, cannot tie her shoes, and cannot cut her toenails. Thus by her own testimony, her impairment imposes no substantial limitations on her major life activities. Further when Complainant's employer informed her that the restrictions would prevent her from obtaining the position she sought, Complainant immediately informed her supervisors that she could perform the job *without* restrictions, and ultimately obtained subsequent notes from her physician stating that she had no work restrictions. The contradictory medical information Complainant provided to Respondent understandably led Respondent to request further medical information in accordance with its policies. When the medical information was not forthcoming, Respondent did not hire Complainant for the temporary position that it was required to fill within a short period of time. Although Complainant attempts to frame this as a "failure to accommodate" claim, there is no credible evidence that she sought an accommodation. She simply told Respondent that she would have her physician write a letter eliminating the restrictions he had previously imposed upon her. Complainant attempts on the one hand to claim that she is able to perform all of the functions of her job while at the same time stating that she cannot perform the bending function and that somehow Respondent should have known this and attempted to accommodate her.

Complainant argues that Respondent stonewalled her by failing to respond to her requests to return to work. However, the evidence indicates otherwise; I infer from the evidence that Complainant's physician did not wish to complete the questionnaire as it

would have required him to make contradictory statements and that his failure to complete the form caused the delay. Further, the credible evidence shows that Respondent's managers in Boston who were involved with Complainant were also deeply involved in post September 11 matters both at Logan Airport and in a subsequent airline crash in New Jersey that kept them away from Boston for several weeks. There is simply no evidence that Respondent sought to ignore Complainant, nor is there evidence that Respondent perceived Complainant as handicapped.

For the reasons stated above, I conclude that Respondent did not engage in discrimination and conclude that the complaint in this matter is hereby **DISMISSED**.

IV. ORDER

For the reasons stated above, I hereby order the complaint in this matter be dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a notice of appeal within ten days of receipt of this order and a petition for review within 30 days of receipt of this order.

SO ORDERED, this 10th day of August 2005.

JUDITH E. KAPLAN,
Hearing Officer