

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

CARMELA VERO AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
Complainants

Against

Docket No. 05-BEM-00933

AMERICA WEST AIRLINES, INC.,
Respondent

Appearances: Jeffrey R. Mazer, Esq., for Complainant Carmela Vero
Andrew Pickett, Esq. and Christopher Campbell, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 6, 2005, Carmela Vero (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“Commission” or “MCAD”) against America West Airlines (“Respondent”) and Valerie Tsirigotis. Complainant alleged that she was discriminated against on the basis of disability in violation of G.L.c.151B, sec. 4, para. 16.

On July 5, 2005, the Commission found probable cause against America West but issued a Lack of Probable Cause Finding against Tsirigotis and dismissed the case against her. The case was certified to public hearing on May 23, 2007.

A public hearing was held on January 29 to February 1, 2008 and on March 11-

12, 2008. The parties introduced the following exhibits into evidence: Exhibits A-1 through A-5; and A-12 through A-13; and Exhibits B-1 through B-34. The parties also introduced a binder containing twenty-one relevant Social Security Administration documents. Written statements submitted by Complainant as Exhibits A-6-11 were accepted de bene, subject to Respondent's objections to their admission on grounds of relevancy and hearsay. Having considered these arguments, I conclude that the statements should be disregarded.

Complainant testified on her own behalf, as did Nikole Casoli and Dorothy Sanders. Respondent called Otavio Nunes, Valerie Tsirigotis, Beth Leavitt LaMonica, Manal El-Hajal, Bonnie Thompson, and Alan Braverman.

Counsel for the parties submitted post-hearing briefs on or around June 2, 2008.

To the extent the testimony of the witnesses or other evidence is not in accord with or irrelevant to my findings, the testimony or other evidence is disregarded. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. The Complainant, Carmela Vero, is a resident of Revere, MA. In June of 1998, she commenced employment as a customer services representative for Respondent America West Airlines at its station in Boston's Logan Airport.
2. When Complainant began to work for Respondent, she became good friends with Assistant Station Manager Valerie Tsirigotis. Transcript, Volume I at 141. Complainant and Tsirigotis traveled together to numerous vacation destinations, including Italy and Las Vegas.

3. Complainant became a customer services supervisor in October of 1999. As a supervisor, Complainant reported to the Station Manager. She oversaw customer service agents and fleet service agents.
4. Complainant's performance evaluations from 1998 through 2001 were submitted into evidence. Exhibit A-2. She was rated as "meeting" expectations in these evaluations.
5. In September of 2002, Complainant voluntarily transferred to Respondent's Phoenix office as a gate supervisor. She remained in Phoenix for one year. While in Phoenix, Complainant received a "counseling documentation" in July of 2003 stating that during the previous three months (April through June of 2003), she had not completed the twenty-four agent evaluations per month required of supervisors. Exhibit B-11; Transcript, Volume III at 5.
6. Complainant voluntarily returned to Boston in October of 2003. According to Complainant, when she returned to the Boston office, Tsirigotis was not as friendly as she had been before Complainant's transfer to Phoenix.
7. In December of 2003, Complainant received a "corrective action discussion" for failing to verify the tail number on a flight, which contributed to the flight departing from Boston with the wrong "flight release and trim." Exhibit B-12. Tsirigotis, who was Boston's Assistant Station Manager at the time, testified that it was Complainant's responsibility to view the aircraft, record the number of the aircraft, and relay the number to an operations agent and to the captain of the aircraft. Transcript, Volume IV at 163-164. Tsirigotis gave corrective action discussions to both Complainant and the operations agent. Id. at 166. According

to Tsirigotis, Complainant admitted that she did not check the aircraft, indicated that she understood the severity of the situation, and did not object to the discipline. Id. at 167. According to Complainant, she was in another terminal prior to the plane's departure, although she acknowledged that a mistake occurred on her "watch" that was a very serious matter because it could have caused a crash. Transcript, Volume I at 100-101; Volume III at 10. Complainant testified that then-Station Manager Dan Allen told her that the discussion was going to be removed from her file because it was determined, after an investigation, that the operations agent and captain of the aircraft were responsible for the mistake. Transcript, Volume I at 101-102. I do not credit Complainant's testimony as it was credibly denied by Tsirigotis. Id. at 168.

8. In March of 2004, Allen was relieved of his duties as the Boston Station Manager and replaced by Tsirigotis, who became interim Station Manager. Transcript, Volume II at 170-171. Tsirigotis began to enforce rules more stringently than Allen had done, drafting warnings for attendance violations, and requiring that more ramp audits be performed by customer service supervisors. Id. at 171-176. Ramp audits consist of inspecting equipment on the tarmac beneath Respondent's airplanes in order to ensure that the equipment is in working order. Complainant acknowledged that during this period she was at fault for not doing the number of audits that she was required to perform. Id. at 176.
9. In April of 2004, Complainant received an "Initial Counseling" from Tsirigotis because thirty pieces of luggage were left off a flight the previous month and because Complainant failed to put away the key to the cash safe. Exhibit B-13.

According to Complainant, the bags were left off the flight because they had gotten stuck inside a conveyer belt. Complainant testified that she arranged for them to be put on a direct flight in order to arrive at their destination before the passengers. Transcript, Volume I at 103-104. Complainant also asserted that she hid the key to the cash safe so that she and other supervisors would have it available for making morning deposits. *Id.* at 108. Tsirigotis disputed that the thirty pieces of luggage arrived at their destination before the passengers because the passengers were on a non-stop flight to Phoenix. *Id.* at 104; Volume IV at 171-172. I credit the testimony of Tsirigotis over that of Complainant.

10. Tsirigotis was appointed permanent Station Manager in May of 2004. At or around the time of her appointment, Tsirigotis stopped socializing with the customer service supervisors who reported to her. Transcript, Volume IV at 156, 158-159. Tsirigotis thought Complainant was a good supervisor up to that point, but after Tsirigotis became Station Manager, Complainant tried to take advantage of their friendship by not performing required tasks such as ramp audits, giving out cash bags, and following directives. *Id.* at 160; Transcript, Volume V at 63-64. Tsirigotis testified that during the 2004 time period, supervisors were expected to conduct five to seven ramp audits a week, which other supervisors performed, but that Complainant refused to do them, saying they were “stupid.” Transcript, Volume IV at 179. I credit Tsirigotis’s testimony.

11. Complainant testified that in May of 2004, she injured her left shoulder and arm as she was helping to load baggage onto a conveyer belt. Transcript, Volume IV at 18. Complainant testified that the injury caused a bump on the top of her

shoulder and pain radiating down her arm, a tingling sensation, and almost no mobility in her left hand. Transcript, Volume I at 111, 121. Complainant asserted that following the injury, she kept her left arm tucked into the waist band of her pants and did everything with her right arm. Id.

12. Respondent requires that injured employees must report their workplace injuries immediately to their supervisors and must complete incident reports within twenty-four hours of injury. Transcript, Volume V at 51, Volume VI at 46-47. Respondent's Boston station receives approximately one to two dozen such claims per year. Transcript, Volume V at 126; Volume VI at 48. In 2004, the Boston station received sixteen reports of workplace injuries. Transcript, Volume VI at 48.
13. Complainant testified that she reported her arm injury to Tsirigotis in a timely fashion, but Tsirigotis testified that she first learned of the alleged workplace injury at an investigative conference at the MCAD after Complainant's resignation. Transcript, Volume IV at 185, 192-193. I credit the testimony of Tsirigotis over that of Complainant.
14. Complainant testified that she made a doctor's appointment for her arm in June of 2004, but cancelled it in order to attend a three-day supervisors' meeting in Phoenix, from June 7, 2004 to June 10, 2004. Transcript, Volume I at 113-114.
15. Complainant became sick to her stomach on the trip home from Phoenix and began vomiting as soon as she exited the plane. Transcript, Volume I at 115. Coworkers called an ambulance. Complainant testified that she experienced severe nausea and vomiting, as well as numbness, tingling, and pain down her left

- arm, but she declined to go to the hospital in the ambulance. She called a friend for a ride home. Id. at 118.
16. Tsirigotis was not on the same plane as Complainant on the trip home from the supervisors' meeting in Phoenix but learned from a coworker that Complainant had experienced violent vomiting and numbness in her arms. Transcript, Volume IV at 189-190.
17. Following the Phoenix meeting, Complainant saw her internist, Dr. Philip Triffletti, and an endocrinologist, Dr. Sunil Sheth, for diagnostic testing. Complainant's medical tests indicated that she had a bleeding gastrointestinal ulcer that was exacerbated by taking Ibuprofen and by smoking. Respondent's Exhibit 31 (6/11/04 and 8/30/04 medical notes); Transcript, Volume I at 120; Volume II at 146; Volume IV at 21. Dr. Triffletti's medical notes do not mention that Complainant sustained a left arm injury in May of 2004. Respondent's Exhibit 31. The medical notes first mention left arm pain on September 16, 2004. Id.; Transcript, Volume IV at 21, 34, 37.
18. Complainant informed Tsirigotis that she had been diagnosed with an ulcer and that her arms became numb when she vomited. Transcript, Volume IV at 191, 196-198. Tsirigotis told Complainant to stop smoking and drinking coffee in order to prevent an exacerbation of her ulcer and advised Complainant to stay at home when she was sick. Transcript, Volume IV at 191, 198. Complainant declined to do so.
19. Complainant estimates that between June and September of 2004, she vomited between three and ten times per shift and at least twenty times per day.

- Transcript, Volume I at 124-125. Tsirigotis testified that during this period, she observed Complainant vomiting at work in the morning after drinking coffee and smoking. I credit Tsirigotis's testimony over that of Complainant's testimony.
20. Dr. Triffletti recommended that Complainant take a temporary disability leave from work. Complainant declined to do so because America West's temporary disability rules require employees to exhaust vacation time before receiving temporary disability pay and limit disability income to 70 or 75 percent of an employee's salary. Transcript, Volume IV at 11-12. According to Tsirigotis's credible testimony, Complainant never asked for a temporary disability leave. Transcript, Volume IV at 190.
21. Tsirigotis, Beth Leavitt LaMonica, Manal El-Hajal, Alan Braverman, and Octavio Nunes all testified credibly that Complainant was able to perform her job following the trip to Phoenix despite having vomiting episodes, was able to move her arms, did not tuck her arm into her pants at work, and did not immobilize her left arm. Transcript, Volume at IV at 114, 118, 195-198, Volume V at 129; Volume VI at 22, 75-76. Neither Dorothy Sanders nor Nikole Casoli, who both testified on Complainant's behalf, corroborated Complainant's assertion that she was impaired in performing the duties of her position as a result of an arm injury and/or that her left arm was immobilized for several months. Transcript, Volume III at 115 et seq.
22. Shortly after the supervisors' trip to Phoenix, Tsirigotis arranged to take her supervisors to New York for the day as a team building excursion. Transcript, Volume IV at 186. She arranged for a limo to take them to Ground Zero, Canal

Street for shopping, Times Square for lunch, and to see a play. Id. at 187.

According to Tsirigotis, everyone had a great time. Id. She testified credibly that Complainant did not appear to be in any pain or to have an injury.

23. In July of 2004, Tsirigotis asked all supervisors and relief supervisors at the Boston station to take a class called “ramp initial training.” Transcript, Volume IV at 200. Tsirigotis included Complainant in the class even though she had previously taken the initial ramp training because Complaint had not performed any ramp functions during her reassignment in Phoenix and did not have up-to-date qualifications for working on the ramp. Id. at 202
24. In July of 2004, Tsirigotis called all the Boston office supervisors together and instructed them to “tighten up” the time sheets, i.e., to fill them out completely and accurately so that people working on their shifts could be properly paid and so that customer service representatives and supervisors alike would receive the proper amount of overtime. Transcript, Volume III at 31-33. Prior to the July meeting, Complainant had already been coached on a number of occasions about how to complete time sheets. Id. at 36; Exhibit B-14.
25. On August 6, 2004, Complainant received an “Initial Counsel Documentation” for neglecting to properly fill out a time sheet on August 5, 2004. Exhibit B-14.
26. During late summer of 2004, the Boston terminal was short-staffed, and America West employees were loaned from Phoenix to work on the ramp. Transcript, Volume III at 77. Tsirigotis informed all supervisors that the ramp workers on loan from Phoenix were not licensed by MassPort to drive on the ramp, and if they drove vehicles on the ramp, Respondent could face a substantial fine. Id.;

- Transcript, Volume IV at 235. After Tsirigotis informed Complainant and other supervisors not to allow the Phoenix ramp agents to drive on the ramp, a Phoenix agent did so during Complainant's shift. Transcript, Volume III at 79; Volume IV at 236-237. Complainant testified that she assigned him a stationary loading job and that he was not supposed to be driving, but she took responsibility for the violation and accepted a write-up for the incident. Transcript, Volume III at 80.
27. Complainant began to go to physical therapy for her arms during late August or early September of 2004. Transcript, Volume I at 126. Complainant attended physical therapy at Beth Israel in Chelsea for approximately two years. Complainant testified that during this period, she had difficulty washing and drying her hair, dressing, and cleaning her house. Transcript, Volume II at 4-5.
28. On one occasion, Complainant raised with Tsirigotis the possibility of filling out Workers' Compensation paperwork in order to pay for her continued physical therapy. Tsirigotis responded by telling Complainant to "do what you have to do," but "you didn't get hurt [on the job]." Transcript, Volume IV at 199. Tsirigotis asserts that Complainant did not raise the issue again. Transcript, Volume IV at 200.
29. The first reference to an arm problem in Complainant's medical notes is September 3, 2004 wherein Dr. Triffletti states: "The patient complains of numbness feeling throughout her arms and in her thighs over the past two months since she was diagnosed with peptic ulcer disease." Exhibit B-31. On September 16, 2004, Dr. Triffletti reports that, "The patient complains of pain in her left upper arm and forearm for approximately 3 months. . . . She does a lot of lifting

at work at the airport of baggage. . . . Symptoms are worse when she lifts any object or abducts her arm with lifting motion. Occasionally has tingling also particularly in the index finger. . . . She states the pain is constant.” On September 27, 2004, Dr. Triffletti mentions “left shoulder, forearm and numbness and tingling in her hand. . . . Patient feels that work-related activities are aggravating her symptoms with lifting potential up to 70 lbs.”

30. Orthopedic Surgeon Robert R. Pennell, who evaluated Complainant in relation to her workers’ compensation claim, reports that Complainant’s physical therapist did not attribute Complainant’s symptoms to her employment but to an “incident of prolonged vomiting with arms in outstretched position and protrusion of neck and head in July of 2004.” Exhibit B-25.

31. During September of 2004, Complainant worked four days a week on Wednesdays, Thursdays, Fridays, and Saturdays from 4:00 a.m. to 3:30 p.m. Tsirigotis gave Complainant permission to leave work early in order to attend physical therapy appointments but told her to record the time she actually left work rather than her regularly-scheduled departure time. Transcript, Volume III at 126-127, 131; Volume IV at 192. On occasion, Complainant left work early but signed out that she was leaving at her regular time, i.e., at 3:30 p.m. Transcript, Volume III at 130.

32. On September 13, 2004, Respondent’s payroll agent Alan Braverman re-distributed to supervisors a memo with time sheet codes and reminded supervisors to properly monitor the time sheets of individuals under their supervision. Exhibit B-29. The next day, Tsirigotis informed the supervisors that she would scrutinize

their handling of time sheets and institute progressive discipline for those who failed to monitor the sign-ins and sign-outs of their supervisees. Id. On September 26, 2004, Alan Braverman emailed Complainant about five time sheet problems she had on a single day. Exhibit B-15; Transcript, Volume III at 62. Braverman informed Complainant that she had to pay closer attention to the time sheets because he could not ascertain how to pay her supervisees. Exhibit B-15. Complainant acknowledged that Braverman was frustrated by her errors, but asserted that she was sometimes sick or away from the office performing work-related errands and could not always initial the departure times of her supervisees. Transcript, Volume III at 47, 57-58, 63, 70.

33. Complainant testified that on one occasion shortly before her termination, while she was counting approximately four hundred dollars that had been placed in the office safe, she received a call from an operations agent reporting that a passenger was accusing a pilot of being drunk. Complainant left the cash on her desk, locked the door to the supervisors' office, and proceeded to the gate in order to deal with the accusation. Transcript, Volume III at 81-81. The supervisors' office is a communal space to which all the supervisors, the station manager, the administrative assistant, the auditors, the payroll agent have a key. Id.; Volume IV at 218. When Complainant returned to the office, the money was not on the desk. Tsirigotis had entered the office while Complainant was gone, discovered the cash on the desk, photographed it, and removed it. Exhibit B-6. Tsirigotis did not impose discipline but told Complainant to make sure it never happened again. Transcript, Volume II at 13; Volume III at 89-93. Complainant acknowledged

that Respondent's cash control policy prohibited money from being left out on the desk and that she should have put it in the safe before she left the office. Id. at 84-85.

34. Complainant testified that she began "vomiting violently" at work on October 9, 2004. Complainant testified on direct examination that she reported to Tsirigotis that she was sick and that Tsirigotis told her to "just go," i.e., to go home, but on cross-examination Complainant testified that she did not discuss leaving early with Tsirigotis. Id. at 16-17; Transcript, Volume III at 110. Although Complainant left work early on October 9, 2004, she signed out that she left at 3:30 p.m., her regular departure time. Transcript, Volume III at 111. Prior to leaving work on October 9, 2004, Complainant promised to give two passengers Future Travel Award coupons at 3:00 p.m. on that day. Tsirigotis called Complainant on her cell phone a little before 3:30 p.m., after the passengers showed up to collect the coupons and learned that Complainant was at home in her pajamas. Transcript, Volume II at 17; Volume III at 110; Volume IV at 225. Complainant arranged for another supervisor to come to her house in order to pick up the coupons and take them to the airport.
35. On or about October 10, 2004, Complainant asked fellow supervisor Manal El-Hajal to fill out the employer's portion of a Workers' Compensation claim on her behalf and submit the claim to Respondent. Transcript, Volume V at 49; Volume VI at 20. He refused to do so. Id. Tsirigotis did not know about Complainant's request to El-Hajal until after Complainant's discharge. Transcript, Volume V at 49.

36. On October 13, 2004, Complainant was questioned by Tsirigotis about leaving work prior to the end of her shift on October 9, 2004. Tsirigotis's questioning was part of a "Corrective Action Discussion" on October 13, 2004 about numerous concerns involving Complainant's handling of money, errors on time sheets, failure to perform ramp audits, failure to hand out cash bags, failure to prevent unauthorized agents from driving on the ramp, and favoritism towards a customer service agent who was her friend. Exhibit B-16; Transcript, Volume III at 104.
37. During the October 13, 2004 discussion, Tsirigotis asked Complainant how many times she had left work early, in response to which Complainant said that it had happened twice -- on October 7 and 9, 2004. Transcript, Volume II at 18; Volume III at 107, 111; Volume IV at 103; Volume V at 19. Tsirigotis informed Complainant that she would be suspended, effective October 14, 2004, pending an investigation. Exhibit B-18.
38. On October 20, 2004, Complainant met with Tsirigotis in person and human resources representative Michelle Carrigan by phone. Tsirigotis informed Complainant that parking garage records indicated that on seven occasions she had left work earlier or arrived later than the times written on the time sheets and that she was going to be terminated. Transcript, Volume II at 46; Volume IV at 101. According to the Massport records, Complainant recorded that she had worked approximately two and one-half hours when she was not actually on the premises. Transcript, Volume V at 34.
39. On October 20, 2004, Tsirigotis issued a "Termination Recommendation" that

- Complainant be terminated for falsifying time sheets, failing to follow managerial direction, refusing to perform assigned work, and compromising integrity of employee/management team. Exhibit B-19.
40. Complainant testified that she occasionally had to leave Respondent's premises in order to pick up parts at the Home Depot, attend meetings, or perform other work-related tasks, and that when she did so, Tsirigotis told her to just sign out her regular departure time. Transcript, Volume IV at 124-125. If, however, an employee leaves work earlier than his/her normal time for personal reasons, the employee is expected to write the actual time of departure and is not compensated for the authorized time off. Transcript, Volume IV at 146-147.
41. Complainant asked to submit a resignation in lieu of termination. She was permitted to resign, effective October 20, 2004. Exhibits B-20 & 21; Transcript, Volume IV at 104.
42. Tsirigotis testified that when she arrived at work on the day after Complainant resigned, she was advised that Complainant was in the breakroom meeting with several agents. Transcript, Volume V at 45. Tsirigotis instructed Dorothy Sanders to tell Complainant that she needed to leave the premises. Id. Tsirigotis spoke to some of the agents who attended the meeting and learned that Complainant was warning them to "watch out" because Tsirigotis was "out to get them." Transcript, Volume V at 46.
43. Complainant testified that Tsirigotis treated her more harshly than other employees. Complainant claimed that supervisor Manal El-Hajal received no discipline for going to Las Vegas while Tsirigotis was attending a manager's

meeting in Phoenix, despite instructions from Tsirigotis that managers not go on vacation while she was gone. Transcript, Volume II at 65.

44. According to Dorothy Sanders, a former employee of Respondent, there was an incident in which El-Hajal and two companions were able to fly first class to Las Vegas in three vacant seats on an America West flight. Sanders testified that she was asked to research why the seats were vacant. She determined that El-Hajal had reserved the seats for three individuals who allegedly made the reservations by phone but did not show up for or pay for the flight. Transcript, Volume III at 127. According to former ticket agent Nikole Casoli, the telephone number on the reservation was subsequently determined not to be an accurate listing for the individuals. *Id.* at 200. Tsirigotis threatened to write-up El-Hajal and take away his flying privileges for six months, but she ultimately decided not to take disciplinary action because El-Hajal denied falsifying the reservation. Transcript, Volume V at 106, 110. At the public hearing, El-Hajal testified that he would never jeopardize his career by making false reservations in order to secure upgrades to first class, that he has a discipline-free record, and that he has been promoted to a senior managerial position since 2004. Transcript, Volume VI at 24-25.
45. Sanders, who testified on behalf of Complainant, considered El-Hajal to have treated her disrespectfully when they both worked for Respondent. Transcript, Volume III at 156. Sanders' animosity toward El-Hajal stemmed from an incident in which she mistakenly failed to obtain a key to a "lav" disposal truck, asked El-Hajal for his copy of the key, and he refused to give it to her. *Id.* at 155.

46. One of the subjects addressed in Complainant's final "Corrective Action Discussion" involved mishandling deposits by failing to count cash in the presence of a fellow agent. Transcript, Volume III at 85; Exhibit B-16. Sanders testified that she had also performed daily deposit duties by herself or with an auditor, rather than with a fellow agent as required by company policy. Transcript, Volume III at 130. According to Sanders, she was never disciplined. I decline to give any weight to this testimony because Sanders did not indicate whether Tsirigotis was aware of the misconduct. Id. at 130, 131.
47. Complainant claimed that no discipline was imposed on one occasion when a supervisor left forty-three bags off a flight or on another occasion when a supervisor claimed unnecessary overtime. Id. at 67, 72. I decline to credit this testimony as it is not supported by documentary evidence and is not corroborated by other witnesses.
48. At the time that Complainant resigned, she earned approximately \$28,000.00 in salary, received health benefits, had flights benefits which allowed her and family members to fly free on America West and partner airlines, and participated in a buddy pass system permitting her friends and family to receive discounted standby tickets from Respondent. Id. at 73.
49. Following her termination, Complainant continued to receive treatment for left arm and shoulder pain and for depression. Complainant's medications consisted of: Cortisone injections, IV Lidocaine, Ketamine, trigger point injections, ganglion block therapy, Topamax, Tizanidine, Tylenol, and Nortriptyline. Complainant also received acupuncture treatment, rehabilitative services, physical

therapy, and psychological counseling. Complainant was administered an EMG and an MRI, both of which were negative. Social Security Records at Exhibit 4 and 19.

50. On December 8, 2004, Complainant filed a claim for benefits at the Massachusetts Department of Industrial Accidents. Exhibit B-25. The claim alleged injury to Complainant's left upper extremity as a result of heavy lifting at work. It listed the date of injury as 10/13/04, the last day she worked for Respondent. Id. An impartial medical examiner, Orthopedic Surgeon Robert Pennell, MD, examined Complainant on May 10, 2005. Exhibit 25. He found no causal relationship between Complainant's medical condition and her employment as an airline supervisor or any event at work in May of 2004. Id.; Transcript, Volume IV at 47. Dr. Pennell based his conclusion on the fact that Complainant's symptoms arose too late in time, were "extremely variable," and were "not consistent with a recognizable injury or orthopedic or neurologic condition." Id. On or around January 19, 2006, Complainant's claim for Workers' Compensation settled for a lump sum payment of \$28,000.00, including attorneys' fees, without a finding of liability. Id.; Transcript, Volume IV at 45. Complainant received approximately \$40,500.00 in total, including periodic payments of \$270.00 a week for a year and the lump sum payout. Transcript Volume IV at 15.

51. Complainant applied for Supplemental Security Income on March 8, 2006, asserting that she was disabled as of May 31, 2004. Exhibit B-27. On May 19, 2006, her claim was denied based on reports from Beth Israel Deaconess, Dr.

Sheth, and Dr. Triffletti. Exhibit B-26. The denial letter states that Complainant's neck, shoulder, and arm pain following a lifting accident in May of 2004 did not prevent Complainant from working at jobs other than the work she performed for Respondent. Id.

52. On September 28, 2007, U.S. Administrative Law Judge Thomas Fallon reversed the denial of Social Security benefits, concluding that Complainant was disabled from October 13, 2004, based on severe impairments of the neck and shoulder, arm pain from thoracic outlet syndrome, depression secondary to pain issues, limitations on use of the upper extremity, limitations on the ability to perform basic work activities and deal with stress at work, subjective complaints, and the combined effect of multiple impairments. Social Security Records, Exhibit 18, pp. 3 and 5. He determined that Complainant's residual functional capacity was insufficient to transfer to other occupations. Id. As of the date of public hearing, Complainant continued to receive total disability benefits in the amount of approximately \$700.00 per month. Transcript, Volume II at 111; Volume IV at 74.

53. Administrative Law Judge Thomas Fallon's decision is based on a "Physical Residual Functional Capacity Questionnaire" filled out by Dr. Triffletti on June 21, 2006. Social Security Records, Exhibit 3. The questionnaire states that Complainant could only sit or stand for fifteen minutes at a time and could only sit and stand/walk for a total of two hours during an eight-hour work day. Id.; Transcript, Volume IV at 76-77. Complainant testified that this information was not accurate because she could sit and stand for much longer than fifteen minutes

at a time or two hours in total during an eight-hour day. Transcript, Volume IV at 78, 80. Complainant's physical therapist also reported to the Social Security Administration that Complainant's symptoms did not affect her ability to sit, stand or walk. Id. at 86; Social Security Records, Exhibit 8.

54. Following Complainant's resignation, she sought employment at various places during 2005 and 2006, including Jay Cleaners in Revere, the Roadway Inn Hotel, Metro MRI, the Ritz Carlton Hotel in Boston, SHL Construction, the Boston Convention Center, and Alitalia Airlines. Complainant testified that she told prospective employers that she had a problem with her arm and needed accommodations relative to lifting and time off for medical treatments. Complainant did not receive any of the positions. Since resigning from Respondent, Complainant has not worked for any employer except on four or five occasions for the City of Revere as a poll worker during elections commencing in 2006. She receives \$125.00 per day for this work. Transcript, Volume IV at 57. Complainant typically works a thirteen-hour day as a poll worker. The only accommodation that Complainant asked for was to not lift anything heavy. Id. at 68.

III. CONCLUSIONS OF LAW

Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful to discriminate against a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, a record of having such an impairment, or is regarded as having such an impairment. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment

Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998)
(“MCAD Handicap Guidelines”) at p. 2. In order to be a “qualified” handicapped person, Complainant must be capable of performing the essential functions of the job with or without a reasonable accommodation. M.G.L. c. 151B, sec. 1(16).

In order to establish a prima facie case of handicap discrimination, Complainant must show that: 1) she is handicapped within the meaning of the statute; 2) she is qualified to perform the essential functions of the job with or without a reasonable accommodation; 3) she was terminated by her employer; and 4) the circumstances of the termination give rise to an inference of discrimination. See Datt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998); MCAD Handicap Guidelines at p. 31. Once a prima facie case is established, the burden of proof shifts to Respondents to articulate a legitimate, nondiscriminatory reason for the adverse employment action, supported by credible evidence. See Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441-442 (1995). If the Respondent succeeds in offering such a reason, the burden shifts back to the Complainant at stage three to persuade the fact finder by a preponderance of evidence that the articulated justification is a pretext for discrimination. See Blare, 419 Mass. at 444-445. Complainant may carry this burden of persuasion with circumstantial evidence that the proffered reason is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment decision. See Lipchitz v. Raytheon Co., 434 Mass 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is pretextual, a finding of discrimination is not mandatory in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass.

107, 117-118 (2000).

Insofar as Complainant's handicapped status is concerned, a physical or mental condition is not a "handicap" under G.L. c. 151B unless it substantially limits a major life activity. See City of New Bedford v. MCAD, 440 Mass. 450 (2003). Complainant has failed to introduce credible evidence that she was substantially limited in the performance of a major life activity. Although Complainant asserts that she sustained a disability resulting from a work-related arm and shoulder injury in May of 2004, there is no corroboration for her assertion. Her supervisor, Val Tsirigotis, credibly denied that Complainant ever reported that she sustained a workplace injury to her left arm despite the fact that Respondent requires such injuries to be reported within twenty-four hours.

Complainant's claim is further undermined by the fact that she opted to attend a three-day supervisors' meeting in Phoenix in June of 2004 rather than seek medical attention for the alleged injury. When she finally saw her internist, she did not mention any difficulty with her arm until September of 2004, some three months after the alleged injury and, even then, did not attribute her arm symptoms to an injury but, rather, to the regular lifting activities at work.

Complainant testified that she kept her left arm immobilized inside her pants in the latter part of 2004, but none of her co-workers witnessed this nor were they aware that she was injured or incapacitated. Tsirigotis spent the day in New York with Complainant and other Boston supervisors shortly after the alleged accident and did not observe Complainant to be in pain. Between June and September of 2004, Tsirigotis did not see Complainant immobilize her arm at work. Her testimony is corroborated by that of Beth Leavitt LaMonica, Manal El-Hajal, Alan Braverman, and Octavio Nunes who all

testified credibly that Complainant did not tuck her arm into her pants at work and did not immobilize her left arm. Neither Dorothy Sanders nor Nikole Casoli, who both testified on Complainant's behalf, corroborated Complainant's assertion that she was impaired in performing the duties of her position as a result of an arm injury and/or that her left arm was immobilized for several months. Based on the foregoing I conclude that there is no credible evidence that Complainant sustained an arm injury which limited one or more major life activities.

Turning to Complainant's assertion of handicap status related to effects of a bleeding ulcer, the evidence establishes that she experienced severe nausea and vomiting on the trip home from Phoenix in May of 2004 as a result of the ulcer, that she frequently vomited thereafter at work as a result of the ulcer, and that she complained of pain, numbness, and weakness in her arms when she vomited. Tsirigotis acknowledged that Complainant vomited at work in the morning after she drank coffee and smoked and that Complainant sought workers' compensation to pay for physical therapy to relieve the alleged pain, weakness, and numbness in her arms that she attributed to the vomiting. Even accepting these claims as true, they fail to support a conclusion that Complainant was handicapped in the latter part of 2004. As set forth above, the credible evidence in the case supports Respondent's position that Complainant could perform her job, move her arms, and engage in all major life activities. Numerous witnesses testified credibly that Complainant was able to perform her job following the trip to Phoenix despite having vomiting episodes and that Complainant was able to move her arms, did not tuck her arm into her pants at work and did not immobilize her left arm. While Complainant asserts that she had difficulty washing and drying her hair, dressing, and

cleaning her house, I do not credit this testimony because it lacks corroboration, is undermined by Complainant's refusal to take sick time or short-term disability in 2004, and is compromised by her failure to provide convincing testimony in regard to other significant aspects of her case.

Complainant next points to her receipt of Workers' Compensation benefits and Social Security disability payments as establishing a record of impairment and/or presumed qualified handicap status, but I conclude that the receipt of these benefits does not compel a finding of qualified handicap status in this case because: 1) Complainant was granted Workers' Compensation funds pursuant to a negotiated settlement arrived at after her employment terminated, 2) the settlement did not include a finding of liability, and 3) it was contradicted by the determination of an impartial medical examiner. Similarly, the Supplemental Security Income benefits awarded to Complainant in 2007 were based on discredited and inaccurate data that Complainant could only sit or stand for fifteen minutes at a time and only sit and stand/walk for two hours or less during an eight-hour working day.

Even if Complainant were considered a qualified handicapped employee who satisfied the elements of a prima facie case, however, her case falters at stage two where Respondent articulates legitimate, nondiscriminatory reasons for discharging Complainant, supported by credible evidence. This evidence establishes that Complainant engaged in numerous instances of misconduct from May through October of 2004, a period which coincides with Tsirigotis taking over as Station Manager and enforcing Respondent's rules of conduct more stringently than did the previous Station Manager. Complainant anticipated that her friendship with Tsirigotis would permit her to

underperform with regard to conducting ramp audits, giving out cash bags, filling out attendance sheets, maintaining security of cash, transferring baggage, and monitoring ramp workers on loan from other offices who were not licensed to drive on the ramp. Rather than treat Complainant with favoritism, however, Tsirigotis properly evaluated her performance as deficient. The deteriorating relationship between Tsirigotis and Complainant did not stem from bias, but resulted from a supervisor holding an employee to the same standards of conduct that others were required to follow. Based on the foregoing, Respondent has articulated legitimate, nondiscriminatory reasons for the adverse employment action, supported by credible evidence.

Complainant at stage three must persuade the fact finder by a preponderance of evidence that the articulated justification is a pretext for discrimination. Complainant attempts to do so by first by contrasting her treatment with that of Manal El-Hajal, who received no discipline for allegedly making false reservations for three first class seats and then appropriating the seats for himself and his two companions. The Manal El-Hajal incident is troubling but ultimately must be resolved in favor of Respondent's good faith belief in El-Hajal's denial of wrongdoing and its reliance on his spotless employment record.

Complainant next claims that even if she left work early on several occasions without recording her actual departure time, she did so under the mistaken belief that she was authorized to do so and that the discrepancy between her actual and recorded departure times amounted to just several hours. These assertions are unconvincing, as the more credible evidence in the record establishes that Complainant was permitted to attend physical therapy appointments provided she accurately recorded her actual work hours.

Complainant's failure to abide by this requirement was the final straw in Complainant's deteriorating work performance. The decision of Complainant's supervisor, Val Tsirigotis, to terminate Complainant in October of 2004 may have been harsh, but there is no evidence that it was based on discriminatory animus related to Complainant's purported disability or her need to attend physical therapy.

IV. ORDER

For the reasons set forth in this decision, the Complaint 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 the 5th day of February, 2009.

Betty E. Waxman, Esq., Hearing Officer

