

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

CINDY BULLOCK AND THE MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION,
Complainants

v.

Docket No.: 03-23000490

WINTERGREEN KENNELS, JUDITH CONLIN,
and MICHAEL CONLIN,
Respondents

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

Appearances: Rebecca Kislack, Esq. and Rachel Brown, Esq., for
Complainant
William J. O'Grady, Esq., for Respondent

I. PROCEDURAL HISTORY

On January 30, 2003, Complainant Cindy Bullock filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission" or "MCAD"), against her employer Wintergreen Kennels ("Respondent"). In her complaint, Complainant alleged that Respondent engaged in unlawful disability discrimination in violation of Massachusetts General Laws, c. 151B, § 4(16).

On February 4, 2005, the Commission certified the case for Public Hearing. A Public Hearing was held before me on March 1, 2005, 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. Respondent is an unincorporated business that provides boarding kennels and a grooming shop for dogs. The business is owned and operated by Judith Conlin. Judith's husband, Michael Conlin, also worked for Respondent. In November 1999, Respondent hired Complainant as a dog groomer. Her duties included bathing and grooming dogs. Complainant testified that as of July 2002, she typically groomed as many as 18 or 20 dogs a day for Respondent. Complainant stated that she had a very good relationship with Judith and Michael Conlin. Judith Conlin also admitted that Complainant competently performed her job. I credit this testimony.

2. At the time of hiring, Complainant suffered from obesity and diabetes. However, Complainant claimed that neither condition hindered her performance as a dog groomer. In the spring of 2002, Complainant became pregnant, which was complicated by her diabetes. As a result, she had to go on a special diet and carefully monitor her blood sugar. Complainant testified that during her pregnancy, she took time off from work to attend weekly doctor appointments. In addition, she admitted that during her pregnancy, Respondent's employees regularly assisted her by helping lift the dogs. Complainant eventually suffered a miscarriage. I credit Complainant's testimony regarding these matters.

3. Complainant testified that after her miscarriage, her physician advised her to consider gastric bypass surgery. She claimed that she decided to have the gastric bypass

operation because she had been unsuccessful in losing weight by diet and exercise. According to Complainant, as a result of her obesity and inability to lose weight, her blood sugars were “getting higher and higher.” Consequently, she claimed she needed the surgery to lose weight and get control of her diabetes. Judith Conlin and Complainant discussed this matter. Complainant testified that Judith was very understanding regarding her health problems and the need for the surgery. In particular Complainant acknowledged that Judith attempted to get Respondent’s health insurance carrier to cover the operation. Furthermore, at this time, Judith was shopping for a new health insurance policy for Respondent’s employees. Judith claimed that she eventually decided on a particular new health insurance policy primarily because it would cover Complainant’s planned gastric bypass operation. Complainant admitted that Respondent chose a new health insurance policy in part to provide coverage to her for the surgery. I credit this testimony.

4. Complainant claimed that she had originally scheduled the gastric bypass surgery for January 2003. However, sometime in either June or July 2002, her surgeon offered her the opportunity to have the surgery on July 26, 2002. Complainant and Judith Conlin then discussed the earlier date for the surgery. Because Respondent’s grooming business is busiest during the summer months, Judith suggested to Complainant that Respondent would be better able to accommodate her surgery in the winter. Notwithstanding Judith’s concerns, Complainant decided to have the surgery on July 26. Respondent then granted Complainant medical leave for the surgery. However, Respondent requested that Complainant sign the following letter of agreement:

I will be undergoing major elective surgery on July 26, 2002. I anticipate being out from work for four to six weeks. During that time I will maintain my health

insurance payments by paying all of my contribution toward the premiums [for August and the first week of September] from my last paycheck for July 2002. Should I be unable to return to full-time work by September 9th, 2002, I will submit my resignation so that I can continue my health benefits under COBRA, and pay the full monthly premium to Wintergreen Kennels for the length of that benefit, or for whatever part of that time I request. I can then reapply for my position when I am ready to resume full time work.

Complainant voluntarily signed the letter on July 20, 2002.¹ Complainant testified that at the time she signed the document, she wanted to continue working after the surgery and had no intention or desire of resigning. Contrary to Complainant's understanding, I don't believe Respondent intended to terminate Complainant's employment if she failed to return to work by September 9. In particular, I credited Judith Conlin's testimony that she desperately wanted Complainant to return, notwithstanding any medical complications Complainant might have incurred. Moreover, I believe Respondent that proposed the letter of agreement merely to avoid paying for Complainant's health insurance after September 9, in the event she was unable to return to work by that date. By terminating her employment, Respondent would thus avoid any further contributions toward Complainant's health insurance and, if Complainant wanted to continue coverage, she would have to pay the full cost of the insurance premium under COBRA.

5. On July 26, 2002, Complainant had the gastric bypass surgery. Both Judith and Michael Conlin called Complainant while she was in the hospital. In addition, after the surgery Complainant's mother, Valerie Desplaines, kept in touch with Respondents regarding her daughter's progress. Complainant remained out of work for all of August 2002. Judith Conlin testified that as a result of Complainant's absence, Respondent's dog

¹ Complainant has not alleged that Respondent engaged in unlawful disability discrimination by requesting she enter into the agreement.

grooming business lost approximately \$4,000 to \$5,000 in income in August 2002. I credit Judith Conlin's testimony.

6. After the surgery, Complainant developed post-surgical complications including a slow healing incision wound. In particular, Complainant acknowledged that she was readmitted to the hospital in mid-August after experiencing a serious infection.

Nevertheless, during the last week of August, Complainant informed Judith Conlin that she was ready to return to work. Complainant claimed that she felt capable of returning to work since she had resumed taking care of her own dogs and horses, which included lifting hay bails weighing 50 to 70 lbs. Complainant testified she informed Judith Conlin of the resumption of her activities, but Conlin nevertheless requested that she provide a doctor's note sanctioning her to return to work. Complainant subsequently provided Conlin with a note clearing her to return to work without restrictions effective September 3, 2002. According to Complainant, she and Judith then agreed that Complainant would return to work on September 3, 2002. Complainant also testified that she requested Judith provide her with special accommodations upon her return. Specifically, Complainant claimed she asked for assistance in lifting dogs for a couple of days, similar to when she was pregnant. Complainant denied stating to Judith that upon her return she could only work on one or two dogs a day. I decline to credit Complainant's testimony with respect to her conversations with Judith Conlin.

7. Complainant testified that she had planned on returning to full-time work on September 3, but Judith called her that morning and requested another doctor's note specifying her limitations. According to Complainant, Judith said she wanted the second note because she did not feel comfortable with her coming back to work. Complainant

further claimed that Judith said she could reapply for her position after her wounds had completely healed. Although Complainant admitted that Judith never stated she was “fired” or didn’t have a job, Complainant believed Judith’s statement about reapplying for the position meant that she no longer had a job with Respondent. Complainant testified that she then called her doctor and tried to get another note, but her doctor wanted more information pertaining to Respondent’s specific concerns. Complainant stated she then attempted to call Judith several times by telephone and had left messages with Michael Conlin and other employees, or left messages on the answering machine. Complainant claimed that Judith never returned her calls and, as a result, Complainant believed Respondent had terminated her employment. Complainant, thus, took no further action to get another doctor’s note. Complainant admitted, however, that on September 11, 2002, she returned to the hospital because she was experiencing severe back pain. I refuse to credit Complainant’s testimony regarding these matters.

8. Contrary to Complainant’s testimony, Judith Conlin claimed that when she spoke to Complainant on or about August 30, they had agreed that Complainant would return to work on September 9. Judith stated that in anticipation of Complainant’s return and based on the first doctor’s note that stated she could return to work without restrictions, Respondent then proceeded to book Complainant with a full slate of grooming appointments for September 9. However, Judith claimed that Complainant subsequently informed her that she could not handle a full slate of dogs since she still had a large open wound and continued to suffer a great deal of pain. Judith further testified that Complainant requested assistance in lifting the dogs. Judith stated that Complainant’s statements caused her concern since Complainant’s requested accommodations were

contrary to the doctor's note, which stated she could return to work without restrictions. After discussing this matter with husband and her insurance agent, Judith told Complainant that she could not return to work until her wound was fully healed or unless she obtained a second doctor's note. According to Judith, she told Complainant that the doctor's note should specify how long she could stay on her feet, how much could she lift, and how much pressure could be put on the wound. Judith claimed that she asked for the additional information because she had genuine concerns that Complainant could hurt herself. I credit Judith Conlin's testimony on this matter.

9. Judith Conlin testified that she spoke with Complainant and Complainant's mother regarding the importance of getting the second doctor's note. According to Judith, during one phone conversation, Complainant turned the phone over to her mother, who then told Judith that her daughter was not going to get a second note. Judith testified that in another telephone conversation just prior to September 9, Complainant and her mother again told her "there was no way" Complainant was going to get the doctor's note. Judith claimed that in their last conversation, she reiterated to Complainant that she needed the note, otherwise, she could not come back to work until she was fully healed. Judith testified that she emphasized to Complainant that she desperately wanted her to return to work notwithstanding her medical condition. In fact, Judith stated that her husband Michael then attempted to get the note directly from Complainant's physician. Judith stated that Complainant neither produced another doctor's note, nor returned to work. She testified that they kept Complainant's position open for an extended period of time, but Complainant never contacted them;

consequently, approximately six weeks after last talking to Complainant, Respondent hired another groomer on a part-time basis. I credit Judith Colin's testimony.

10. Complainant testified that she earned \$16,861.28 from Respondent between January 1, 2002 and July 26, 2002, earning approximately \$670.00 per week. She claimed that her high earnings at Respondent were attributable to her having built up a sizable client base. After believing she was terminated from her employment by Respondent, Complainant then applied for and began receiving unemployment benefits. Complainant received \$4,448.00 in unemployment in 2002. She stated that while receiving unemployment, she actively sought positions as a dog groomer. Complainant stated she eventually obtained a position as a dog groomer with Camelot Kennels in September 2003. She claimed that in 2003, she earned a total of \$16,629.00 in compensation and wages, or approximately \$320 per week. For 2004, Complainant earned a total of \$24,378 in wages or about \$469 per week. Complainant claimed that it would take two years of employment at Camelot before her work load would be comparable to the one she had at Respondent. I credit Complainant's testimony.

11. Complainant also stated that she suffered emotional distress as a result of the loss of her job. She claimed that her depression led her to overuse painkillers and sleeping pills, including Vicadin and Percocet. Complainant did not provide any testimony that she sought medical treatment for her emotional distress or depression. Complainant also admitted that she had been treated for depression at various time throughout her life. I credit Complainant's testimony on this matter.

III. CONCLUSIONS OF LAW

Complainant has alleged that Respondents engaged in unlawful disability discrimination in violation of G.L. c.151B, § 4(16) when they failed to provide her with her requested reasonable accommodations and then purportedly terminated her employment. In order to recover under either theory, Complainant must first establish that she is a “handicapped person” within the meaning of M.G.L. c. 151B, § 1(17). The statute defines a “handicapped person” as one who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of such impairment; or, (c) is regarded as having such impairment. Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996); Dahill v. Police Department of Boston, 434 Mass. 233, 241 (2001); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 3 (1998); Talbert Trading Co. v. MCAD, 37 Mass. App. Ct. 56, 61 (1994).

Complainant has not asserted that her claim falls within the meaning of subsection (a) of § 1(17); however, Complainant has argued that Respondents “regarded” her as disabled within the meaning of subsection (b). In support of her claim, Complainant relies on the doctor’s note provided to Respondents on August 30, 2002 that stated she could return to work without restrictions. She claimed that after she present the doctor’s note, Respondents refused to allow her to return to work based on their perception she would be unable to perform the major life activities of lifting, standing, or performing various manual tasks associated with her grooming job. I disagree. The evidence strongly supports the conclusion that Respondents desperately wanted Complainant to return to work, but they had some reasonable concerns regarding her medical condition. In particular, Respondents requested that she provide another detailed doctor’s note only

after she indicated that she would need accommodations related to her post-surgical recovery. I credited Judith Conlin's testimony that after Complainant presented the doctor's note, Complainant stated she could only handle a few dogs a day and needed additional assistance in lifting. Recognizing the inconsistencies between the doctor's note and Complainant's stated limitations, Judith Conlin reasonably requested a second doctor's note specifying how long she could stay on her feet, how much could she lift, and how much pressure could be put on the wound. Clearly, Respondent may request medical information or make inquiries regarding a handicap or disability in order to help identify an effective accommodation or to determine whether a handicap or disability exists and whether an employee is entitled to an accommodation. MCAD Guidelines: Employment Discrimination on the Basis of Handicap, at § VI(B)(2) (2002). Moreover, an employer may ask an employee about their handicap or disability, if the inquiry is job related and consistent with business necessity. *Id.* In this case, Complainant has not established that Respondents perceived her to be disabled; rather, the evidence strongly supports the conclusion that Respondents merely requested she provide medical documentation confirming her stated limitations.

Ironically, had Complainant provided the second doctor's note, I believe Respondents would have provided the accommodations that she had requested, as they had done for her in the past. I also find that Complainant's rationale for not getting the second doctor's note to be incredulous. The evidence supports the finding that Complainant did not follow-up with her doctor because she feared the doctor would place

restrictions on her return to work.² I also find that Complainant unreasonably assumed that Respondents' had terminated her employment. Judith Conlin testified credibly that she repeatedly told Complainant she wanted her to return to work. I also credited Judith's testimony that Respondent kept Complainant's position open for a reasonable period of time, but Complainant failed to contact them.

Under these circumstances, Complainant has failed to establish that she was a handicapped person within the meaning of M.G.L. c. 151B, § 1(17). Moreover, even if Complainant were "disabled" within the meaning of the statute, I concluded that Respondent did not refuse to provide her with a reasonable accommodation. In addition, I conclude that Respondent eventually filled Complainant's position for legitimate non-discriminatory reasons, namely, she failed to comply with Respondents reasonable request that she verify her ability to return to work with or without reasonable accommodations and she abandoned the job. Consequently, Complainant has failed to show that Respondent engaged in wrongful disability discrimination.

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.

² Complainant admitted that she returned to the hospital on September 11, 2002 for severe back pain, which is consistent with Judith Conlin's testimony that Complainant told her prior to September 9, 2002 that she still suffered from severe pain.

So Ordered this 7th day of October, 2005.

Edward R. Mitnick,
Hearing Officer