

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and FRANCIS SONNIER,

Complainants

v.

Docket No. 97- SEM-1039

LIFE CARE CENTER OF AUBURN,

Respondent

DECISION OF THE HEARING COMMISSIONER

I. Procedural History

On December 10, 1997, Complainant Francis Sonnier (hereinafter “ Mr. Sonnier” or “Complainant”) filed a handicap discrimination complaint with the Massachusetts Commission Against Discrimination (hereinafter “MCAD” or “the Commission”) against his employer Life Care Center of Auburn (hereinafter “Life Care”). The complaint alleges that Life Care failed to accommodate his disability (back injury), harassed him, and terminated his employment on the basis of his disability in violation of G.L. c. 151B.

On December 22, 1998, the Investigating Commissioner issued a finding of probable cause in this matter. After conciliation efforts failed, the case was certified for public hearing. A public hearing was held before me on this matter on May 30 and 31, 2001. 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. Complainant, Mr. Francis Sonnier, resides in Worcester Massachusetts.
(Tape 1)
2. Life Care operates a nursing home facility in Auburn Massachusetts and employs over 100 employees. (Tapes 12, 14)
3. On April 29, 1996, Cheryl Gould (hereinafter “Ms. Gould”), Life Care’s Food Service Director, hired Mr. Sonnier as a second shift cook. He worked from 11:00 a.m. to 7:30 p.m. on Friday, Saturday, Sunday and Monday. His Monday shift was later switched to a Wednesday shift. Mr. Sonnier worked 32 hours per week as a cook, and was hired an additional 8 hours per week to perform stocking and cleaning functions. Ms. Gould hired Mr. Sonnier to perform the cleaning and stocking functions so that he would be able to work enough hours to obtain medical benefits, which he had told her he needed. (Tapes 1, 5, 8)
4. As the second shift cook, Mr. Sonnier was responsible for preparing and serving the evening meal to the residents, supervising dietary aides in the absence of the Food Service Director, and cleaning the kitchen. (Tapes 1, 8)
5. Ms. Gould testified that she considered Mr. Sonnier to be an exceptional cook with respect to meal preparation and presentation. She testified that

he had some difficulties with respect to cleanliness of the kitchen. (Tape 9) I credit her testimony.

6. Life Care's Handbook of Employment Guidelines outlined a progressive discipline policy, but allowed supervisors to terminate an employee if the supervisor loses confidence in the employee's ability to perform his/her job. (J-7, Tape 8).
7. Ms. Gould testified that she did not like to issue formal discipline to employees unless they were unresponsive to informal counseling. She testified that she generally discussed performance issues with employees prior to issuing formal discipline, in order to give them an opportunity to correct the problem. Ms. Gould indicated that usually she would only issue formal discipline if an employee failed to correct a performance deficiency that had previously been discussed. (Tape 8)
8. Ms. Gould testified that from April 1996 through March 1997 she discussed various performance deficiencies with Mr. Sonnier. She expressed dissatisfaction to him regarding the cleanliness of the kitchen, failing to perform kitchen-closing procedures, bringing a television to work, having visitors in the dining room and kitchen, and using her office. Ms. Gould did not issue formal discipline to Mr. Sonnier for any of these violations. (Tape 9) Mr. Sonnier testified that Ms. Gould never discussed any performance deficiencies with him until he returned from medical leave. (Tape 2) I credit Ms. Gould's testimony regarding these discussions. I generally found her to be a credible witness. Her

recollections were usually clear, and she was specific about details of the various incidents in question. With limited exceptions, I did not find Mr. Sonnier to be a credible witness. His testimony was vague and confusing. He was not clear about details, even simple ones, such as which days he worked for Life Care. In addition, he had difficulty recollecting details of conversations and incidents relevant to his claim. I do not credit his testimony that Ms. Gould never brought any performance issues to his attention.

9. Ms. Gould testified that in March 1997 she presented a written warning to Mr. Sonnier for continuing to have visitors in the kitchen, despite her earlier admonitions regarding this behavior. She testified that Mr. Gould became very upset when she issued him the warning and told her he was afraid he'd lose his job. Ms. Gould testified that when he promised not to do it again, she ripped up the warning. (Tapes 3, 9) I credit her testimony, despite Mr. Sonnier's testimony that this entire incident never occurred, and his girlfriend's testimony that when she visited, it was not in the kitchen. (Tapes 2, 13)
10. In February or March 1997, Mr. Sonnier requested to be excused from working weekends. Ms. Gould, after discussing his request with her superiors, denied his request. Ms. Gould testified that she told Mr. Sonnier that he was hired to work weekends, and that it would be too difficult to hire someone just to work weekends. She testified that Mr.

Sonnier appeared upset when she denied his request, and said that nobody cared about him. (Tape 9)

11. On April 2, 1997, Mr. Sonnier requested Sunday April 5th off. Ms. Gould denied his request based on her inability to obtain coverage on such short notice. (Tape 9)

12. Mr. Sonnier testified that later that day he slipped and fell while carrying a large pot of chowder. He testified that he fell flat on his back and hit his head. (Tape 2) There were no witnesses to the fall, although Mr. Michael Rose, the first shift cook, and Kim Gizzonio, the Assistant Food Service Director, were in the kitchen area at the time of the fall. Shortly thereafter, Ms. Gould learned of the fall and asked Mr. Sonnier if he was o.k. He testified that he hit his head on the floor and had a bump. Ms. Gould reported the incident to Jennifer Brothers, Life Care's coordinator of worker compensation claims. She then instructed Mr. Sonnier to go to Fallon clinic for treatment. (Tapes 6, 7, 9)

13. Ms. Gould investigated the incident and filled out a Supervisor Accident Investigation Report. Ms. Gould obtained statements from the two people in the kitchen at the time of the fall – Michael Rose, the first shift cook, and Kim Gizzonio, the Assistant Food Service Director. Ms. Gizzonio, Mr. Rose and Ms. Gould all questioned whether Complainant actually fell and sustained a work-related injury.¹ According to their reports, neither witness heard any noise at the time Mr. Sonnier fell. Both witnesses saw

¹ Ms. Gizzonio testified that she had heard from a co-worker that Mr. Sonnier was going to fake an injury, because he had been treated so badly by Life Care. I conclude that this hearsay testimony lacks sufficient indicia of reliability to be afforded any weight.

Mr. Sonnier sitting on the floor after the fall. Mr. Sonnier had chowder on his back, buttock area, and the bottom of his chef's coat, and chowder was on the floor. (R-1 – R-4; Tapes 6, 7, 9) Given that neither witness observed Mr. Sonnier's descent to the floor, and that Mr. Sonnier testified credibly about the fall and his ensuing injuries, I credit Mr. Sonnier's testimony that he fell at work and sustained a work-related injury.

14. On April 2, 1997, Mr. Sonnier received treatment at the Fallon Urgent Care. At that time, Mr. Sonnier complained of back pain. He was prescribed medication and advised not to return to work that day. The next day he was advised by Fallon's Occupational Health that he could return to work on restricted duty. (Tapes 2, 4)
15. Mr. Sonnier sought another opinion from his own physician, Mario Moretti, M.D., on April 4, 1997. Mr. Sonnier's physician diagnosed him with lumbosacral strain and told him to remain out of work indefinitely. He also prescribed physical therapy and bed rest. (C-2; Tapes 2, 4)
16. Mr. Sonnier remained out of work in April and attended physical therapy. On May 13, 1997, he saw his primary care physician, Frank Domino, M.D. who cleared him to return to work with no restrictions. (J-6; C-2; Tape 4)
17. Mr. Sonnier testified that he received clearance to return to work on light duty in April 1997, and that he presented Ms. Gould with a note to that effect. (Tape 2) Ms. Gould credibly testified that she never received such a note or heard of any doctor's note of Mr. Sonnier's, other than the one

clearing him to return to work on full-duty. (Tape 12) Mr. Sonnier presented no evidence in support of his assertion, such as the doctor's note or testimony from his physician regarding the note. I do not credit Mr. Sonnier's testimony that he presented a note to Life Care in April 1997 clearing him to work on light duty.

18. Life Care has a modified duty policy, which provides light duty work for people who are injured on the job, but does not provide light duty work for individuals who are injured off the job. (Tapes 12, 14)
19. Mr. Sonnier applied for worker's compensation, but his employer denied his claim on April 4, 1997. (Tape 1) On November 30, 1999, an administrative judge at the Department of Industrial Accidents found that Complainant's injury was work-related and awarded him benefits. (C-1)
20. A few weeks after Mr. Sonnier's fall, while Mr. Sonnier was out on leave, Mr. Rose encountered Mr. Sonnier at a convenience store. (Tape 4) Mr. Rose testified that Mr. Sonnier was carrying a bag of groceries and did not appear to be in pain. Mr. Rose testified that he was very upset when he saw Mr. Sonnier, because he believed Mr. Sonnier was faking his injuries. He was particularly upset, because he had just finished a double shift in order to cover for Mr. Sonnier. Mr. Rose told his co-workers about the encounter and his belief that Mr. Sonnier was not really hurt. Mr. Rose told his co-workers that he did not say much to Mr. Sonnier, because he was angry and did not want to do anything violent. (Tape 6)

21. One of the dietary aides present during the conversation with Mr. Rose, Eben Green, informed Mr. Sonnier of Mr. Rose's comments. Mr. Sonnier told Mr. Green that Mr. Rose "better mind his own business or he will get what's coming to him." (Tape 5) I credit this testimony.
22. Shortly thereafter, Mr. Sonnier called Mr. Rose and told him to mind his own business. (Tape 2, 4) Mr. Rose testified that Mr. Sonnier said that he had heard Mr. Rose wanted to beat him up. Mr. Rose explained that he didn't want to beat him up, but that he was angry at Mr. Sonnier. Mr. Rose testified that Mr. Sonnier told him he better "watch his back because he (Mr. Sonnier) has a couple of guys looking for him (Mr. Rose)." Mr. Sonnier did not recall exactly what he said. I credit Mr. Rose's testimony regarding this conversation. Mr. Rose testified that he was not overly concerned about Mr. Sonnier's threat, but that he did "keep an eye out" after work for a few days. (Tape 6).
23. On May 14, 1997, Mr. Sonnier returned to work. Ms. Gould testified that she was concerned that there would be tension between Mr. Sonnier and others who believed Mr. Sonnier was faking his injury. Mr. Sonnier testified that his co-workers gave him the "cold shoulder" when he returned to work, in that he was not greeted by his co-workers or joined during breaks. (Tape 2, 5) Ms. Gould testified that it was awkward when Mr. Sonnier first came back to work, but the situation improved as time went on. Ms. Gould further testified that she was happy that Mr. Sonnier was returning to work, and that others would no longer have to work

overtime to cover his shift. (Tape 10) I do not believe that Ms. Gould “had it in” for Mr. Sonnier or was negatively disposed to him. I believe that she was genuinely pleased that he was returning to work, and wanted his transition back to work to go smoothly.

24. Mr. Sonnier testified that he was able to perform all of his functions as a cook, but that he moved more slowly when he performed his duties. He testified did not ask for an accommodation or any help when he returned to work. (Tapes 2, 3)
25. Shortly after he returned to work, Ms. Gould instructed him to clean the oven. Mr. Sonnier testified that he had never been told to clean the oven before, and believed the request to be an attempt to harass him. (Tape 2, 4) I do not credit this testimony. Both Ms. Gould and Mr. Rose testified that the cooks were routinely required to perform heavy cleaning, including the stove, particularly the cook on the evening shift who had only one meal to prepare. (Tapes 7, 8) I credit their testimony. Mr. Sonnier testified that he complained about cleaning the oven to Ms. Gould, at which time she reminded him that he had been cleared to return to work on full-duty. She told him that he would need a doctor’s note if he wished to be excused from cleaning duties. (Tape 10) Despite this, Mr. Sonnier refused to clean the stove. Ms. Gould did not discipline him for failing to clean it. (Tape 2, 4)
26. Mr. Sonnier testified that he was upset that people believed he was faking his injury and upset that he was denied worker’s compensation. (Tape 2)

Ms. Gould testified that her relationship with Mr. Sonnier broke down after he was denied worker's compensation. She testified that he displayed a poor attitude and would refuse to respond to her when she addressed him. She testified that she recalled an incident when Mr. Sonnier had left a mess in the kitchen, and would not look at her when she attempted to discuss it with him. She testified that she began having to ask him to look at her while she was trying to discuss things with him. I credit her testimony. (Tape 10)

27. A few days after returning to work, Ms. Gould found out that Mr. Sonnier was complaining about being denied workers compensation to the nursing home patients. Ms. Gould told him not to do that and also expressed dissatisfaction to him that he had left the kitchen dirty. She told him that if his conduct did not improve, she would have to write him up. He told her to go ahead, write him up and fire him. He also stated, "I'll own this place." (Tape 10)

28. Ms. Gould testified that Mr. Sonnier's attitude and conduct did not improve. She testified that she used to be able to counsel him informally, without resort to formal discipline. However, at this point, she testified that she could not deal with him, because he would not speak to her and would ignore her when she spoke to him. She testified that it was as if a wall had gone up in their relationship that she could not tear down. (Tape 10) Mr. Sonnier testified that after he returned from his leave, Ms. Gould began to criticize him more than she had previously. (Tape 2) I do not

credit his testimony, but credit Ms. Gould's testimony that Mr. Sonnier was unresponsive to her, and that their relationship had broken down.

(Tapes 10, 11)

29. Ms. Gould gave Mr. Sonnier a verbal warning on May 21, 1997 for failing to follow written cleaning instructions, after she unsuccessfully counseled him about keeping the kitchen clean. This warning was followed by a written warning for failing to follow food safety regulations. Mr. Sonnier would not sign the warning. (J-6; Tapes 3, 10) He testified that he did not commit the infractions. I do not credit his testimony. Ms. Gould testified in detail about the circumstances surrounding the warning and her basis for issuing it. (Tape 10) I do not believe that Ms. Gould fabricated these infractions in an effort to discriminate against Mr. Sonnier, or that she wrote him up for discriminatory reasons. Ms. Gould testified that Mr. Sonnier told her he did not care if Life Care wrote him up. He stated that his lawyer told him that this would happen and that she should "do what she has to do." (Tape 11) I credit her testimony.
30. Ms. Gould testified that Mr. Sonnier's attitude and conduct did not improve, despite the warnings, and that it was increasingly difficult to deal with him. (Tape 10)
31. On June 15, 1997, Mr. Sonnier called Ms. Gould from work and told her that he needed to leave, because he was in pain. Ms. Gould allowed him to go home, and came into work to cover his shift. (Tape 4, 10)

32. Later that day, two dietary aides came to her to complain about threats being made by Mr. Sonnier against Mike Rose. They informed Ms. Gould that Mr. Sonnier told them that he was going to beat up Mr. Rose or have someone waiting outside with a bat for Mr. Rose after his shift. The next day Ms. Gould asked other aides about the threats, and obtained at least four statements from aides who had heard them. (J-6; Tapes 10, 11)
33. Ms. Gould spoke to Mr. Rose about the allegations of threats, at which point he informed her about the telephone call from Mr. Sonnier. Ms. Gould indicated that she was very concerned about the statements, in part because they caused the dietary aides, most of whom were high school age, to be afraid. (Tape 11)
34. On June 16, 1997, Ms. Gould filled out four Associate Conference Forms (written warnings) regarding Mr. Sonnier. (J-6) The first was for the threats. The second form was for continuing to have visitors at work and making telephone calls during work hours, after being informally counseled about these issues. The third form was for leaving work during work hours without punching in or out. The fourth form was for failing to follow fire drill procedure. Ms. Gould testified about the infractions in detail, including how she came to learn of them and why she decided to formally discipline Mr. Sonnier for them. Although Mr. Sonnier denied committing any of the infractions, I credit Ms. Gould's testimony that he did. (J-6; Tapes 4, 11)

35. Ms. Gould spoke with her supervisor and in-house counsel regarding Mr. Sonnier's employment and was advised to terminate him. (Tapes 11, 14)

36. On June 18, 1997, Ms. Gould met with Mr. Sonnier to address the warnings. She first confronted him about the threats, and told him he could not threaten anyone at Life Care. Ms. Gould testified that Mr. Sonnier then stated that "people get beat up, mugged and robbed every day and no one will prove that I would have anything to do with it because I would be out of town." I credit her testimony. Ms. Gould testified that she understood the statement to be a threat to her, and was frightened. I credit her testimony. Ms. Gould testified that as she began reviewing the other written warnings, Mr. Sonnier began to yell and swear at her. Mr. Sonnier denied that he swore at Ms. Gould, but conceded that he spoke harshly to her. I credit Ms. Gould's version of the conversation. Mr. Sonnier refused to sign the warnings. Ms. Gould told him that he was being terminated for the threatening behavior, and instructed him to leave the building. (J-6; Tape 11)

III. Conclusions of Law

G.L. c. 151B, sec. 4(16) provides that it shall be an unlawful practice for an employer to discharge because of a handicap a person who is a qualified handicapped person capable of performing the essential functions of the job with or without reasonable accommodation.

Individual claims of employment discrimination based upon disparate treatment may be analyzed by a three stage order of proof set forth in Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). A complainant has the initial burden of establishing a *prima facie* case of discrimination by establishing that: (1) he is a qualified handicapped person; (2) he performed his job at an acceptable level (3) he was terminated; and (4) similarly situated individuals without a handicap were treated more favorably under the circumstances. Id. At 116. Once the complainant establishes a *prima facie* case of discrimination, the respondent may rebut the presumption of discrimination created by the complainant's initial showing by articulating a non-discriminatory reason for its actions supported by credible evidence. Id. The complainant is then afforded an opportunity to demonstrate by a preponderance of evidence that the respondent's articulated reason is a pretext for discrimination. Id. at 117.

Complainant is deemed a qualified handicapped person pursuant to G.L. c. 152 sec. 75B(1), which provides:

(a)ny employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B.

Mr. Sonnier sustained a work-related injury for which he received benefits. In addition, he testified he was capable of performing the essential functions of his position. He was cleared to return to work

without restriction, and did so. Thus, pursuant to c. 152 sec. 75B(1), Mr. Sonnier is a qualified handicapped person under c. 151B. See also Everett Industries, Inc. v. MCAD, 49 Mass.App.Ct. 1116; MCAD Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, Section II (A)(6) at 4, n. 3 (1998).

Mr. Sonnier meets the third prong of the *prima facie* case, in that he was terminated. However, Mr. Sonnier cannot satisfy the second or fourth prong of the *prima facie* case. Mr. Sonnier cannot establish that he was performing his job satisfactorily or that similarly situated non-disabled individuals were treated differently than he. Mr. Sonnier committed a number of workplace infractions illustrated above, including infractions for which he was warned multiple times. Mr. Sonnier presented no evidence of other employees with similar infractions who were not terminated. Nor did he present other credible evidence to establish an inference of discrimination.

Even if Mr. Sonnier had established a *prima facie* case of discrimination, Life Care has articulated non-discriminatory reasons for terminating Mr. Sonnier, which are supported by credible evidence. The record reveals that after Mr. Sonnier was denied workers compensation, his attitude towards his job and his supervisor became extremely negative. Mr. Sonnier continued to have performance difficulties at work, but was unresponsive to his supervisor's attempts to correct his deficiencies. His supervisor, unable to work with him to improve his performance, began

writing him up. His performance continued to deteriorate, and his supervisor believed that their relationship had completely broken down. In addition to these performance difficulties, Ms. Gould learned that Mr. Sonnier had threatened another employee. At this point she decided to terminate his employment. During the termination meeting, the Complainant continued to make threatening statements. I conclude that these reasons were the real reasons for Life Care's decision to terminate Mr. Sonnier.

There is insufficient evidence in the record to support the conclusion that Ms. Gould harbored discriminatory animus towards Mr. Sonnier, or that her actions were a pretext for discrimination. The evidence reveals that she was happy that Mr. Sonnier was returning to Life Care after his medical leave, and that she made every effort to retain him as an employee. I do not believe that Ms. Gould's behavior was that of a supervisor who was trying to punish an employee or drive him out for discriminatory reasons. She did not discipline him when he first came back to work and refused to look at her or speak to her. She did not discipline him when he refused to follow her directives, and was unresponsive to her requests. Ms. Gould did not discipline Mr. Sonnier until there was no other way to deal with him. I conclude that Life Care's articulated reasons for terminating Mr. Sonnier were based on legitimate non-discriminatory reasons, and were not a pretext for discrimination.

Mr. Sonnier also alleges that he was subjected to a hostile work environment and treated differently on the basis of his disability. See Sleeper v. New England Mutual Life Insurance Company, Inc., 24 MDLR 55 (2002)(holding that harassment on the basis of disability is actionable under c. 151B). He alleges that after he became disabled, Ms. Gould required him to clean the ovens when she had not done so before. He also alleges that she unjustly criticized his performance. I do not credit either of these allegations. Mr. Sonnier alleges that he was not greeted or joined for breaks by his co-workers, because people believed he was faking his injury. While I do believe certain of his co-workers did believe that he had faked his injury and were angry at him about it, I conclude that the “cold shoulder” treatment he complained of was not sufficiently severe or pervasive to rise to the level of a hostile work environment under c. 151B.

Finally, Mr. Sonnier alleges that Life Care failed to accommodate his disability. Employers are required to provide reasonable accommodations to disabled employees in order to enable them to perform the essential functions of their jobs. G.L. c. 151B, sec. 4(16). Mr. Sonnier alleges that Life Care failed to reasonably accommodate his disability by refusing to allow him to work on modified duty. However, this argument must fail, as Mr. Sonnier, never presented a request, by a doctor or otherwise, indicating that he needed any accommodation in order to perform his job, or requesting light duty. Mr. Sonnier was cleared to work

with no restrictions. Moreover, Mr. Sonnier performed the essential functions of his job as a cook without any accommodation.

Mr. Sonnier did present evidence that Life Care has a policy of offering modified duty positions to employees injured on the job, but not to employees who become disabled as a result of non-work related injuries. This policy is in direct violation of G.L. c. 151B. See Yates v. Mass.-C.E.O.P.S. –MCI-Norfolk, 17 MDLR 1503, 1515 (1995) (holding “once any light duty positions exist in the workforce of an employer, there is a rebuttable presumption that such position should be available for those handicapped employees who seek them as reasonable accommodation.”); See also EEOC Enforcement Guidance: Workers’ Compensation and the ADA, No. 915.002, (September 3, 1996) (stating, if an employer provides light duty positions for employees injured on the job, the employer may not deny a light duty position to a disabled employee needing an accommodation on the basis that the employee’s disability was sustained off the job) .

ORDER

Complainant has failed to persuade me that he was discriminated against on the basis of his disability, and I hereby order that his complaint be dismissed. However, I do find that Respondent's policy of offering modified duty to employees injured on the job, but not to other disabled individuals needing accommodation, is in violation of c. 151B. Therefore, I hereby order Respondent to cease and desist from applying this policy.

So Ordered this 28th day of August, 2003.

Cynthia A. Tucker
HEARING COMMISSIONER