

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

\*\*\*\*\*  
JANICE WAREING and  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,  
Complainants

v.

Docket No. 99-BEM-3363

NEW BEDFORD  
SCHOOL DEPARTMENT,  
Respondent  
\*\*\*\*\*

**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Respondent New Bedford School Department. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for unlawful discrimination on the basis of handicap under M.G.L. Chapter 151B, section 4, as defined by M.G.L. Chapter 151B, section 1(17), or for retaliation in violation of M.G.L. Chapter 151B, section 4(4). Complainant filed an appeal to the Full Commission challenging the finding that Respondent is not liable for handicap discrimination. The appeal does not challenge the Hearing Officer's finding on Complainant's retaliation claim.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et. seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, Section 5. The Hearing Officer's findings of fact must be supported by substantial evidence,

which is defined as ". . . such evidence as a reasonable mind might accept as adequate to support a finding . . ." *Katz v. MCAD*, 365 Mass. 357, 365 (1974); M.G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. *See, e.g., School Committee of Chicopee v. MCAD*, 361 Mass. 352 (1972); *Bowen v. Colonnade Hotel*, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. *See* 804 CMR 1.23.

### **BACKGROUND**

Complainant works as a teacher's aide for Respondent New Bedford School Department. Respondent denied Complainant a summer position as job coach in 1999 because Complainant suffers from a skin condition that is exacerbated by extended exposure to the sun. Instead, Respondent offered Complainant the position of greater supervision aide. The position of job coach paid five dollars an hour more than the greater supervision aide position. Complainant began working for Respondent in 1978 and continues to work for Respondent as a teacher's aide.

Similar to job coaches, greater supervision aides and teacher aides help developmentally delayed students acquire basic life skills. As a teacher's aide, Complainant occasionally leaves the school building with one or more students under her supervision for "community orientation" purposes. As a summer job coach, Complainant would have spent more of her day exposed to the sun.

During the fifteen-year period prior to the public hearing, Complainant had five skin cancers surgically removed on an outpatient basis. Complainant identified or described her

condition as skin cancer and/or skin sensitivity. Complainant offered no medical evidence identifying or describing her condition,<sup>1</sup> testifying that she takes no medication for her skin condition and manages her condition by wearing a hat and using sunscreen outdoors. The Hearing Officer concluded that Complainant did not meet her burden of establishing a handicap within the meaning of M.G.L. c. 151B.

The Hearing Officer determined that Respondent perceived Complainant to be unfit to perform “the particular position of job coach in the summer of 1999,” and that “Respondent based the decision on its concern about the amount of time she would have to spend in the sun.” However, Respondent’s concerns about Complainant’s ability to perform as a job coach did not extend to related paraprofessional positions at New Bedford High School and, as such, the Hearing Officer found that Respondent did not perceive Complainant’s condition as substantially limiting her ability to work.

### **COMPLAINANT’S PETITION FOR REVIEW**

Complainant contends on appeal that the Hearing Officer’s analysis is flawed, “because even though she found that Janice Wareing’s skin cancer was the reason the employer denied her the job coach position, she misapplied the law, giving undue weight to the discussion in *City of New Bedford v. Massachusetts Commission Against Discrimination*, 440 Mass. 450 (2003), concerning inability to work. She argues that the Hearing Officer mistakenly interpreted the *New Bedford* case to mean that the only issue is whether the City perceived Complainant to be unable to work a class of jobs or a broad range of jobs in various classes.” Complainant argues

---

<sup>1</sup> Wareing correctly points out that medical records entered into evidence as Joint Exhibit 15 dating from 1981 to 1989 and 2001 and 2002 indicate issues from blemishes (1981) to Basil cell carcinoma (1989 and 2001). Two one-page medical notes, one dated November 23, 1998, and one dated February 1999, which were introduced into evidence do not state that Wareing was suffering from skin cancer on those dates. These records do not undermine the Hearing Officer’s decision. As argued by Wareing, she “did not contend that her ongoing battle with cancer prevented her from working . . . .”

that “the Hearing Officer should have also considered whether the employer regarded Ms. Wareing's skin cancer as a health risk in the position she sought.”

Complainant cites to no case law or other supporting authority for her contention that the Hearing Officer should also have considered whether the Respondent regarded her “skin cancer” as a health risk in the position she sought, “The term ‘handicap’ means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) record of having such impairment; or (c) being regarded as having such impairment . . . .” G.L. c. 151B, § 1(17). “The statute draws a distinction between persons who have a physical or mental impairment, and those whose impairment substantially limits a major life activity.” *Dahill v. Police Dep't of Boston*, 434 Mass. 233, 237 (2001). “Only the latter are protected by the statute.” *Id.*

“[D]etermination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment.” *Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap Under Chapter 151B, § II.A.6* (1998) (MCAD Guidelines). Complainant identified or described her condition as skin cancer and/or skin sensitivity. This, without more, is insufficient to meet her burden to show that she has a disability under the statute. (“No evidence was presented as to whether Complainant's lesions were treatable basal cells or uncontrollable melanomas. Given the fact that Complainant takes no medicine or other treatment for her condition, I am unwilling to conclude that her condition is life-threatening. It is [therefore] difficult to assess whether Complainant's skin condition constitutes a physical impairment since Complainant has offered no medical evidence identifying or describing her condition . . .”).

Complainant next contends that Respondent perceived her as fit only for inside jobs and therefore perceived her to be unable to work a class of jobs or broad range of jobs in various classes. Respondent's officials testified that "many if not most jobs in the School Department required employees to work outside." Complainant further argues that "the Commission, as the hearing officer was requested to, should take judicial notice of the commonplace fact that many jobs (postal workers, firemen, policemen, etc.) require outside work."

The fact that an individual is unable to perform "only a particular aspect" of a "single, particular job" is not sufficient to satisfy the "substantial limitation" requirement of the statute. *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination*, 441 Mass. 632, 639 (2004) citing *New Bedford v. Massachusetts Comm'n Against Discrimination*, 440 Mass. 450, 464, 466 (2003). Going outside for extended periods was only one particular aspect of a single particular job and did not extend to the class of teaching jobs. Moreover, the Commission declines to take judicial notice of a fact that Complainant had the duty, but failed, to prove as part of her claim.

While Respondent may have perceived Complainant as unfit for the position of summer job coach, Respondent offered her the position of greater supervision aide during the summer of 1999 and Complainant continues to work as a teacher's aide for Respondent, a position that requires at least some exposure to the sun. These facts further support the Hearing Officer's conclusion that Respondent did not perceive Complainant's condition as substantially limiting her ability to work. *See City of New Bedford*, 440 Mass. at 466 (perception that police officer was emotionally unfit to perform as member of SWAT team, but not as regular police officer insufficient to satisfy the "'substantial limitation' requirement of the statute."); *Keating v. Gaffney*, 182 F. Supp. 2d 278, 279 (disability or perceived disability based on exposure to the

sun and resulting inability to perform this narrow range of tasks does not "substantially limit" the ability to perform the major life activity of working).

Accordingly, Complainant has failed to establish that she was perceived by the school administration as substantially limited in the major life activity of working.

We have carefully reviewed the petition for review and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated herein. As a result of this review, we find no material errors of fact or law and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. We therefore deny the appeal and affirm the decision below in its entirety.

**ORDER**

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer. Complainant's appeal to the Full Commission is hereby dismissed.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint seeking judicial review pursuant to M.G.L. c.30A and M.G.L. c.151B, s.6 in the Superior Court within thirty (30) days of receipt of this decision.

SO ORDERED this 18<sup>th</sup> day of August, 2005.

---

CYNTHIA A. TUCKER,  
Commissioner

---

WALTER J. SULLIVAN, JR.,  
Commissioner