

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JILLANNE DEXTER,)
Complainant)
v.) Docket No. 98-BEM-1738
NEXXUS HOSPITALITY MANAGEMENT, INC.,)
d/b/a DAYS INN OF NEW BEDFORD,)
Respondent)

Appearances: Mitchell Jay Notis, Esquire, for Complainant

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On May 22, 1998, Complainant Jillanne Dexter, filed a complaint with the Massachusetts Commission Against Discrimination ("Commission"). The complaint alleged handicap discrimination by her employer, Nexxus Hospitality Management, Incorporated ("Respondent"), in violation of M.G.L. c. 151B, § 4 (16). Specifically, Complainant alleged that Respondent unlawfully terminated her employment because she suffered a temporary spinal injury, which prevented her from working for ten weeks.

The Commission found probable cause to credit Complainant's allegations, and on July 8, 2002, the case was certified for public hearing. On September 19, 2002, a Pre-

hearing Order was sent to Nexxus Hospitality Management's last known business address in New Bedford and to Mukesh Patel, the company's agent, at his address in Attleboro.¹ On October 22, 2002, Attorney Michael Duggan of North Attleboro wrote to the Commission, stating that "Mr. Patel has not been involved in Nexxus for over 7 years" and requesting that all correspondence be sent to Attorney Scott Baer in Providence, Rhode Island.

On January 9, 2003, the Commission sent a Notice of Hearing by certified mail to Nexxus, Mukesh Patel, Attorney Duggan and Attorney Baer. The notice sent to Nexxus at its last known business address was returned to the Commission, marked "unknown." On January 30, 2003, Attorney Baer sent a letter stating that he has "no involvement in the case." Subsequently, Respondent failed to appear at the March 4, 2003 hearing and a default was entered against the company pursuant to 804 CMR 1.21(8).

Both Notice and Order of Default were sent certified mail to Nexxus, Patel and Attorneys Duggan and Baer on March 7. Patel as well as both Attorneys Duggan and Baer signed the return receipts. Respondent failed to file a petition to remove the default within ten days of receipt, as required by 804 CMR 1.21 (8)(D). In fact, the Commission has received no response from Respondent regarding the

¹ According to the corporate records on file with the Massachusetts Secretary of State's office, Mr. Patel was listed as the President and Treasurer of Nexxus Hospitality Management as recently as December 2002.

default. Complainant has submitted Proposed Findings of Fact and Conclusions of Law.

In reaching my decision, I have considered the entire record including the post-hearing brief of the Complainant. 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. Complainant, Jillanne Dexter, worked as a banquet manager for Respondent at the Days Inn of New Bedford from late 1995 to December 4, 1997. Her duties included hiring and training servers, setting up functions, and working with customers, chefs, vendors and the sales managers at the hotel. (Tape 1).
2. Complainant testified that her paychecks and W-2 forms were issued by Nexxus Hospitality Management, Inc. and she understood that Nexxus owned the Days Inn of New Bedford. (Tape 1).
3. Complainant testified that she received positive performance reviews during her employment with Respondent, and was granted a salaried position in

May 1997 and a subsequent raise in July 1997. (Tape 1).

4. Complainant testified that her supervisor was a woman named "Sarah," who was the general manager of the hotel. (Tape 1).
5. On October 10, 1997, Complainant suffered a sprained spine when she was involved in an automobile accident outside of work. (Tape 1).
6. Complainant testified that she immediately began treatment in physical therapy according to her doctor's orders and that she made regular visits to her doctor's office during the subsequent ten weeks while she recuperated from her injury. (Tape 1).
7. Complainant testified that she notified Respondent immediately after the accident and provided her supervisor with four separate doctor's notes over the next ten weeks stating that she was unable to come back to work due to her injury. Each doctor's note extended Complainant's recovery time by two or three weeks, but gave specific dates at which Complainant could be expected to return. (Tape 1, Exhibits 1, 2 and 3).
8. Complainant testified that she was not capable of working at all during her recuperation, as she was in constant pain and had difficulty showering and even walking. She testified that she was

"practically immobile" during most of the ten weeks of her recovery. (Tape 1).

9. Complainant went to the hotel to update "Sarah," the hotel manager, on her condition and kept in constant contact with Sarah by phone during the entire ten-week recuperation period. (Tape 1).
10. When Complainant offered to do minimal work from her home, such as phone calls, Sarah told Complainant "not to worry about anything," but to rest and come back to work when she could. (Tape 1).
11. Complainant was finally able to return to work on December 4, 1997, and she appeared at the Days Inn with a note from her doctor clearing her for work. (Tape 1).
12. On December 4, Sarah informed Complainant that she was no longer needed at the hotel, because they were in the process of restructuring the management. (Tape 1).
13. Complainant testified that she was not permitted to clear out her desk, because there was a new employee who had already taken over her desk and her duties. She was never offered any other position within the hotel. (Tape 1).
14. Complainant had never heard anything about a plan to restructure the hotel's management and she suspected that she had been singled out for firing due to her injury. (Tape 1).

15. On March 12, 1998, four months after she was terminated from her job as a banquet manager, Complainant saw an advertisement in the local paper seeking a "banquet supervisor" for the Days Inn of New Bedford. (Tape 1, Exhibit 4).
16. Complainant testified that during her ten-week recovery from her injury, she was never told that she was going to be terminated or replaced by someone else, and in fact was led to believe that her job was waiting for her when she returned on December 4, 1997. (Tape 1).
17. Complainant testified that she earned approximately \$3,000 per month, or \$36,000 annually just prior to her termination by Respondent. She also had health insurance benefits worth approximately \$100 per month. (Tape 1).
18. After she was terminated, Complainant searched for a job using newspaper advertisements, websites, DET referrals, friends and contacts. (Tape 1).
19. Complainant received unemployment benefits for seven months, totaling \$3,317, and remained unemployed until July 1998, when she began working as a manager at Friendly's. (Tape 1).
20. At Friendly's, Complainant's initial annual salary was \$35,000 and she received a raise to \$36,000 after six months. (Tape 1).

21. Complainant testified that after being terminated by Respondent, she was very upset and felt depressed about it for a year and one half. She contracted psoriasis and lost weight during this time. She testified that she felt discouraged because she had gone to school for hotel management and losing the job at the Days Inn disrupted her work experience and her career in her chosen profession. (Tape 1).

III. CONCLUSIONS OF LAW

M.G.L. c. 151 B, § 4(16) prohibits discrimination against a qualified handicapped person who is capable of performing the essential functions of a job with reasonable accommodation. The law defines a handicapped person as "one who has a physical or mental impairment that substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment." M.G.L. c.151B, § 1(17).

Although Respondent is in default, Complainant must still prove that she was discriminated against because of her handicap. This she may do by establishing an unrebutted prima facie case. Mehri Jabari v. George Davekos d/b/a George's Landscaping Co., 17 MDLR 1599 (1995). In order to establish a prima facie case, 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 position remained open and the employer sought to fill it. Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1 (1988).

Complainant was in constant pain, had difficulty walking and taking care of herself and was "practically immobile" during the ten weeks that she recovered from a sprained spine following an automobile accident. However, at the end of the ten weeks, her doctor cleared her to go back to work and she appeared ready and able to perform all of her duties as a banquet manager at the Days Inn. The evidence presented by Complainant indicates that she had made a complete and full recovery by that time and therefore I find that she suffered no permanent or lasting damage as a result of her injury.

Following a line of cases brought under the analogous federal statutes, the Appeals Court has ruled that under M.G.L. c.151B, temporary disabilities that do not result in permanent injuries are not disabilities and therefore complainants who recover fully from temporary injuries, such as minor knee and back injuries, cannot be considered handicapped for purposes of employment discrimination claims. Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686 (1996).

However, although Complainant may not be deemed to be handicapped by virtue of her temporary injury, I find that she does fall within the protection of chapter 151B because Respondent *regarded her* as unable to do her job due to her

injury. Dahill v. Police Department of Boston, 434 Mass. 233 (2001). In Dahill, the SJC noted that the legislature provided protection under chapter 151B for those who have impairments that substantially limit their major life activities, those who have records of such impairments and those who are regarded as having such impairments. The Court stated that in addition to those with actual physical and mental limitations, the statute protects those who are "victims of stereotypic assumptions, myths and fears regarding such limitations," whether they actually suffer from the limitations or not. Id. at 241.

Therefore, in order to show that one is "regarded as disabled," one must show that the employer was aware of some impairment or medical condition suffered by the employee and acted upon that knowledge. See, e.g., Talbert Trading Company v. MCAD, 37 Mass. App. Ct. 56 (1994); Dahill v. Police Department of Boston, 434 Mass. 233 (2001).

Here, Complainant showed that during her recuperation period, she provided Respondent with medical documentation of her injury and her inability to work. Although Respondent did not present evidence in its defense regarding the reason for its action, the evidence suggests that Respondent regarded her spinal injury as one that would continue to preclude her from performing her job as banquet manager at the hotel and, based on that assumption, terminated her employment.

I find Complainant's testimony credible regarding the fact that someone else was sitting at her desk performing her duties when she attempted to return to work after she recuperated from her injury and find Respondent's actions further evidence of its perception of Complainant as "disabled" from working. See Talbert Trading Company v. MCAD, 37 Mass. App. Ct. 56, 61 (1994) (where an employer's decision to replace an employee after his three-day absence due to complications associated with his heart condition was deemed to be an unlawful termination based on the employer's perception of his handicap).

Complainant has established a prima facie case of handicap discrimination. She had been performing her job as a banquet manager satisfactorily before she was injured and received regular raises and positive performance reviews. She has shown that she was regarded by her employer as unable to work due to her spinal injury, that she was in fact capable of working after her ten-week recovery period and that instead of allowing her to return to her position as banquet manager, she was terminated and replaced by someone else.

Because Complainant has established an unrebutted prima facie case, I find in her favor and conclude that Respondent acted unlawfully when it terminated her employment in violation of M.G.L. c.151B, § 4(16).

IV. REMEDY

Pursuant to M.G.L. c. 151B, § 5, the Commission may award lost wages to a Complainant terminated in violation of the employment discrimination statute. Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985).

Complainant was earning \$3,000 per month, or \$36,000 annually at the time she was terminated. She was unemployed for approximately seven months, for a loss of \$21,000 but received compensation in the amount of \$3,317 in unemployment benefits. Therefore, her loss of wages for the seven month period of unemployment was \$17,683. When Complainant began working at Friendly's, her salary was \$1,000 less per year than she had been earning with Respondent. However, because she received a raise to her pre-termination salary after six months at Friendly's, the difference between her salary at the Days Inn and her salary at Friendly's amounted to an additional loss of approximately \$500.

Complainant also received benefits worth \$100 per month when employed by Respondent, but offered no evidence regarding her benefits from any subsequent employers. As there is insufficient evidence regarding Complainant's receipt of benefits from subsequent employers, I must calculate her \$100 per month loss for only the seven months that she remained unemployed, for an additional loss of \$700. Therefore, I conclude Respondent is obligated to pay Complainant for her lost wages and benefits in the amount of \$18,883.

The Commission may also award monetary damages to compensate victims of discrimination for their emotional distress. Bournewood Hospital v. MCAD, 371 Mass. 303, 313-317 (1976); College Town Division of Interco, Inc. v. MCAD, 400 Mass. 156, 169 (1987); Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. at 182. Complainant was very upset and felt depressed for a year and one half after she was terminated. She contracted psoriasis, lost weight and felt discouraged about her career in hotel management. Based on her testimony, I find that Complainant suffered emotional distress as a result of Respondent's unlawful discriminatory conduct. I conclude that she is entitled to damages in the amount of \$25,000 as compensation for her emotional distress.

V. ORDER

Pursuant to the authority granted to the Commission under M.G.L. 151B, § 5, and based on the foregoing findings of fact and conclusions of law, I order Respondent to:

1. Within 45 days of receipt of this decision, Respondent shall pay Complainant the sum of \$18,883 as compensation for lost wages, with interest thereon at the rate of 12% per annum, from the date of the filing of his discrimination complaint until the date payment is made or until the date the obligation is reduced to a court judgment

and post-judgment interest begins to accrue.

2. Within 45 days of receipt of this decision, Respondent shall pay Complainant the sum of \$25,000 as compensation for emotional distress resulting from its unlawful termination of her employment, with interest thereon at the rate of 12% per annum, from the date of the filing of his discrimination complaint until the date payment is made or until the date the obligation is reduced to a court judgment and post-judgment interest begins to accrue.
3. The parties shall notify the Commission once the ordered payments have been made.

Pursuant to 804 CMR 1.23(1999), any party aggrieved by this decision may file a notice of appeal with the Full Commission within ten (10) days of receipt of this decision and a petition for review within thirty (30) days of receipt of this decision.

So ordered this 28th day of October, 2003.

Hearing Commissioner Walter J. Sullivan, Jr.