

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD & JOANNE NICKLAS,  
Complainants

v.

DOCKET NO. 96-BEM-3149

GARGANO & ASSOCIATES,  
Respondent

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Appearances:

Wendy A. Cassidy, Esquire, Commission Counsel for  
Complainant

Sean M. Beagan, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 9, 1996, Complainant Joanne Nicklas filed a complaint with this Commission charging Respondent Gargano & Associates with unlawful discrimination on the basis of handicap, in violation of M.G.L.c.151B§4¶16.

Specifically, Complainant alleges that Respondent refused to accommodate her after back surgery, and terminated her employment. The Investigating Commissioner found probable cause to credit the allegations and the case was certified for public hearing. A public hearing was held before me on June 23 and 24, 2003. After careful consideration of the record in this matter 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. Respondent Gargano & Associates is a law firm located in Cambridge, Massachusetts engaged primarily in litigation, with an emphasis on worker's compensation. Paul Gargano is Respondent's owner and sole shareholder. In 1996, Respondent employed 18 persons.

2. Complainant Joanne Nicklas resides in Cambridge, Massachusetts. Complainant was hired as a receptionist for Respondent on April 14, 1993. Two weeks later, she was promoted to the position of paralegal, with responsibilities for preparing cases for litigation before the Department of Industrial Accidents, reviewing client files, and summarizing medical files and court histories. Complainant was a full-time, salaried employee. In addition to her work, Complainant took an occasional, part-time evening course.

3. Attorney Nancy Hall and proprietor Paul Gargano supervised Complainant's work as a paralegal.

4. Verity Francis-Hill was Respondent's office manager when Complainant commenced her employment. Francis-

Hill and her successor Jennifer McCarthy supervised Complainant with respect to other terms and conditions of employment, including scheduling, vacation and other personnel matters.

5. Since childhood, Complainant has suffered from rheumatoid arthritis affecting her knees, spine, neck and elbow. She had also been treated for many years for spondylolysis that affected her back. As a result of her impairments, Complainant experiences pain when bending, kneeling and squatting and is unable to perform these movements with great frequency or regularity.

6. During the early 1990s Complainant's back caused her increasingly severe and constant pain, making it difficult for Complainant to sit for any extended period of time. As a result, her rheumatologist, Dr. Massarotti, referred her to specialists who attempted to alleviate the pain with various back braces.

7. Before June 1995, Complainant wore a soft back brace over her clothes. Thereafter, she wore a hard brace. This brace was readily visible to her supervisors and co-workers at Respondent.

8. Complainant told Respondent about her medical condition and provided them with supporting medical records throughout the second half of 1995. The back braces did not alleviate the pain, and Complainant's orthopedic specialists recommended that she undergo surgery on her spine. The surgery was scheduled for January 18, 1996.

9. On November 29, 1995, Dr. Elena Massarotti wrote:

For the last several months [complainant] has continued to suffer from spondylolysis of the L5 vertebrae. She also has a spondyloarthropathy which requires follow up and treatment with remittive agents. The spondylolysis is separate from the spondyloarthropathy and may need to be treated surgically. She has been unable to sit for prolonged periods because of back pain secondary to the spondylolysis.

(exh. C-4)

10. On December 26, 1995, Dr. Massarotti wrote: "[Complainant] is a motivated patient whose back pain has significantly interfered with her studies and activities of daily living."

11. On January 2, 1996, Dr. Nomi Khan diagnosed Complainant with

"spondylolysis bilaterally at L5-S1 with spondylolisthesis Grade 1 at L5-S1 with moderately severe low back pain." Dr. Khan reported...[Complainant] has problems with her low back for approximately a year. The pain is worse in the morning, occurs in and around her low back and sometimes radiates into her groin area...she has bilateral knee pain but has had this pain since she has had juvenile rheumatoid arthritis... She also has a history of sacroiliitis...Presently, the pain wakes her up out of sleep occasionally. She has a lot of difficulty with sitting...she continue[sic]to do poorly with her back affecting her life dramatically..Ms. Nicklas has a quite classic anatomic

reason for her pain, and is having quite a bit of disability due to this. We think that this operation would significantly improve her condition.

(exh.C-2)

12. During the first few days of January 1996, Complainant informed McCarthy, Hall and Gargano that she would be undergoing back surgery. Immediately after informing Respondent about her need for surgery, McCarthy provided Complainant with a memorandum changing her status from salaried to hourly. The memorandum stated in part... "This will alleviate any conflicts with your surgery/recovery schedule and payroll..."

13. Complainant memorialized her discussions with McCarthy about time off in a memorandum dated January 17, 1996.

14. On January 18, 1996, Complainant underwent laminectomy surgery. She was discharged from the hospital on January 22, 1996.

15. On February 6, 1996, McCarthy called Complainant to find out when she would be ready to return to work. During this conversation, Complainant informed McCarthy that, upon her physician's recommendation, she would initially return to work part-time and expected to obtain

clearance to return full-time after a doctor's appointment on March 4, 1996. Complainant and McCarthy agreed that Complainant would return to work part-time on February 9, 1996. Complainant did not discuss her part-time medical restriction with Gargano.

16. Complainant worked four hours on Friday, February 9, 1996. She testified that she was able to perform all of the essential functions of her job during this time. McCarthy asked Complainant to provide her with medical authorization to return to work with the four-hour per day limitation.

17. Complainant was unable to reach her physician over the weekend and therefore was unable to obtain a note by the following Monday.

18. After Complainant worked for one hour on Monday, February 12, McCarthy sent her home and told her not to return without a note certifying her fitness to return to work with restricted hours.

19. On February 13, Complainant's surgeon faxed to McCarthy a note stating that Complainant was fit to work

part-time. Later that day, Complainant called McCarthy to make sure that she had received the medical note. McCarthy informed Complainant that Gargano did not want her to return to work until she was able to work full-time.

20. Complainant responded that she would be seeing her physician on March 4, 1996 and expected the physician to pronounce her fit to work full-time. Complainant testified that McCarthy responded: "Great. We look forward to it." I credit this testimony.

21. On February 23, 1996, Complainant received a letter from McCarthy terminating her employment. The letter stated:

It is with regret that I must inform you that Gargano & Associates has filled your full-time position as Administrative Assistant. Due to our lack of Administrative Staff, it was imperative that someone be brought in immediately. However, if another full-time position should become available, we would encourage you to return to work for us. I speak for all of us when I say that it was great working with you and that you will be missed.

(Jt. Exh. 4)

22. Complainant testified that after receiving the termination letter, she spoke to Gargano by telephone. He first claimed no knowledge of the letter, and then

remarked, "What good is four hours?" He then told Complainant that she needed to speak with McCarthy. I credit this testimony.

23. Complainant's physician cleared her to work full-time on March 4, 1996. Complainant did not provide Respondent with a medical letter clearing her to return to work because her employment had already been terminated.

24. Complainant testified that after receiving the termination letter, she was angry, distressed and demoralized and felt as though she had been "kicked in the stomach." She also felt anxious about having lost her health insurance and overwhelmed at the prospect of looking for work. Complainant saw a social worker and attended a stress management course after her employment was terminated. I credit her testimony.

25. Paul Gargano is the president and sole shareholder of Gargano and Associates, Gargano testified that throughout his 40 years of practicing law, he has had the sole authority to hire and fire on behalf of his firm. Gargano stated that Complainant was a superior employee.

26. According to Gargano, on February 12 when Complainant returned to work, he observed her walking down the hall, apparently in excruciating pain. Complainant stopped, rested her head against the wall and began to cry. Gargano asked her how she was doing, and Complainant composed herself and said she was okay. Gargano claimed that he was alarmed by Complainant's appearance and feared she would hurt herself. He testified that he told Complainant to again speak to her doctor and find out what duties she could perform. He told her he wanted her back to work.

27. Gargano testified that when Complainant returned to work with a doctor's note stating she could work four hours per day, he believed that Complainant's doctor was unaware of what duties Complainant's job entailed. He stated that her job required her to pick up and organize heavy boxes of medical files and that, in his opinion, Complainant was unable to walk, bend or carry four hours a day.

28. Gargano denied that McCarthy was "office manager" and described her as a "bookkeeper". However, in Respondent's responses to discovery in this matter,

McCarthy was described as an office manager. Gargano testified that McCarthy sent the termination letter without his authorization and that McCarthy was acting beyond the scope of her employment and without his knowledge. He also testified that the letter was not really a termination letter because it encouraged Complainant to return to work when she was ready to work full-time. Gargano stated that the second part of the letter was written in his "terminology" because he wanted Complainant to come back. He stated that the job was full-time and could not be performed on a part-time basis. I do not credit Gargano's testimony regarding McCarthy's lack of authority to terminate Complainant's employment.

29. Gargano denied talking with Complainant by telephone after the letter from McCarthy was sent to her. He stated that if someone called Respondent after 5:30 p.m. the call would go to the receptionist, who was present at the office until 6:00 p.m., and not directly to him. He stated he had no conversations with Jennifer McCarthy regarding Complainant. He believed when Complainant felt well enough she would discuss the matter with him or Nancy Hall. I do not credit his testimony that he did not speak with Complainant on the telephone.

30. Gargano testified that he was pleased with Complainant's work and wanted her to return to Respondent as soon as she was physically capable. He stated that Complainant never advised him that she was capable of returning to full time work. He stated that without any contact from Complainant, he could not be expected to hold her job open indefinitely.

31. I do not credit Gargano's testimony. I find it implausible that he did not direct McCarthy to write the termination letter. Gargano would have the Commission believe that despite his satisfaction with Complainant's work performance and his desire for her to return to her job, he made no inquiries regarding Complainant's status following her surgery. I find this testimony ludicrous on its face. Instead, I credit Complainant's version of events and conclude McCarthy wrote the termination letter at Gargano's direction and with his approval.

32. Gargano testified that after Complainant left her job at Respondent he received several calls from potential employers seeking references regarding Complainant, including a call from the Deaconess hospital. Gargano claimed that he told all of these callers that Complainant

was an outstanding employee. He claimed that he asked the callers to tell Complainant if she called Gargano she could have her job back. I do not credit this testimony.

33. Julie Monahan, then a recent law school graduate who worked in the office, took over Complainant's workload after she left her job.

34. While employed by Respondent, Complainant's rate of pay was \$12.26 per hour (\$25,500.80 annually), plus health insurance and paid vacation.

35. Complainant was unable to work at all for a three-week period from January 18, 1996 to February 9, 1996. From February 9, 1996 to March 4, 1996, she was able to work part-time, and from March 4 on she was able to work full-time. After her termination, Complainant paid health care premiums totaling \$1,238.00. She earned \$8,222 for the calendar year 1996, plus \$5,235.00 in unemployment compensation.

36. After her termination, Complainant actively sought employment as a general secretary, legal secretary,

medical secretary, paralegal and legal assistant. She attended job training and job counseling sessions.

37. In April 1996, Complainant turned down an offer of a full-time position as a legal assistant in a Boston law firm. She testified that she was receiving unemployment compensation at the time and turned the job down because it paid less money than she had received at Respondent and she did not feel it was suitable.

38. In August 1996, Complainant was hired as a part-time medical secretary at Brigham and Women's hospital where she earned \$12.50 per hour, plus medical benefits. She worked 25 hours per week. She accepted this job because it was the first offer that equaled her hourly rate at Respondent and she immediately liked the physician who became her supervisor.

39. I find that Complainant's lost wages for 1996 total \$9,591.80.  $\{ \$25,500.80 - [1471.20(3\text{wks out}) + 980.80(4\text{wks part/time}) + 8,222(\text{earnings}) + 5,235(\text{unemployment}) ] \}$

40. In December 1997, Complainant transferred to the position of research assistant at Brigham and Women's

Hospital. She worked between 20 to 32 hours per week, earning \$12 to \$13 per hour. Complainant's income for 1997 totaled \$17,338.00. (Exh.J-7). I find that Complainant's lost wages for 1997 were \$8,162.00 (\$25,500.00-17,338.00).

41. After the research job ended in April 1998, Complainant took herself out of the job market for a period of time in order to concentrate on school. Had she worked at Respondent her wages for the first four months of 1998 would have been \$8,500, ( $\$25,500.00/3$ ). Thus I find that she is entitled to back pay for 1998 in this amount.

42. Complainant's total lost wages were \$26,253.80.

43. After her termination, Complainant was required to pay for her own health insurance under COBRA for a period of six months at the cost of \$1238.00 ( $\$619.00$  per quarter x 2 quarters). (T3, 6/23/03)

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, sec. 4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is

capable of performing the essential functions of the job with or without a reasonable accommodation. To establish the prima facie case of unlawful employment discrimination on the basis of handicap, pursuant to G. L. c. 151B, a plaintiff who has been terminated from employment must show that: (1) she suffers from a handicap; (2) she is a "qualified handicapped person"; and (3) was terminated or otherwise subject to an adverse action by her employer; and (4) her position remained unfilled and the employer sought to fill it. Dartt v. Browning Ferris Industries, Inc., 427 Mass 1 (1998); Labonte v. Hutchins & Wheeler, 424 Mass. 813(1997).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. Complainant has established that she is a handicapped person within the meaning of M.G.L.c.151B because of her joint and back impairments that have existed since childhood. Over the years, Complainant's back pain progressively worsened to the point where, despite taking medications and wearing a brace, the pain woke her up at night and prevented her from sitting for extended periods of time. Finally, Complainant was

advised by several physicians to undergo surgery in order to alleviate the pain. I conclude that Complainant's back and joint pain substantially limited the major life activities of sitting and sleeping. Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap-II, A(5).

Complainant has also established that she was otherwise capable of performing the duties of the position, with the reasonable accommodation of returning to work on a part-time basis for a one-month period before resuming full-time employment. Complainant testified credibly that Respondent terminated her employment shortly after she attempted to return to work on a part-time basis. Complainant's duties were given to Julie Monahan after Complainant's termination. Therefore, I conclude that Complainant has established a prima facie case of unlawful termination.

The burden then shifts to Respondent to offer a legitimate, non-discriminatory reason for its conduct. In this case, Respondent has simply denied terminating Complainant's employment, claiming simultaneously that McCarthy was not authorized to terminate Complainant's employment and that McCarthy did not actually terminate

Complainant's employment because her letter instructed Complainant to call when she was ready to return to full-time work. I did not credit Gargano's testimony in large part. The credible evidence showed that McCarthy terminated Complainant after she returned to work on a part-time basis. Gargano claimed that McCarthy terminated Complainant without authority. He also stated that she was not terminated and because he never heard back from Complainant after McCarthy's letter, he did not hold her job open. I found Gargano's testimony preposterous. I conclude that Gargano authorized McCarthy to terminate Complainant's employment, and that her conduct bound Respondent.

Furthermore, even if Gargano had not explicitly authorized McCarthy to terminate Complainant's employment, I conclude that the Respondent must be held liable for her actions.

M.G.L.c.151B "clearly evinces an intent to reduce discrimination in the workplace by holding employers responsible for the discriminatory actions of their employees, regardless of whether these actions were authorized or supported by the employer or its policies."

Thomas v. E.D.I. Specialists, 437 Mass. 536 (2002).

Therefore, I conclude that Respondents unlawfully terminated Complainant's employment on the basis of handicap in violation of M.G.L.c.151B.

Further, I conclude that Complainant sought a reasonable accommodation. To state a prima facie case of discrimination based upon Respondent's failure to accommodate her handicap, Complainant must demonstrate that she is a handicapped person within the meaning of the statute; she is qualified for the position, i.e., able to perform the essential functions of the job with reasonable accommodation; she requested a reasonable accommodation; and she was prevented from performing her job because Respondent failed to reasonably accommodate the limitations associated with her handicap. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1(1998).

Complainant has established that she was a qualified handicapped person. She was able to perform the essential functions of her job if allowed to return to work on a temporary part-time schedule, as described in the letter written by her physician. Once the employer is placed on notice that an employee needs an accommodation, the employer has an affirmative duty to engage in the interactive process in an attempt to offer some form of

reasonable accommodation. MCAD GUIDELINES: EMPLOYMENT  
DISCRIMINATION ON THE BASIS OF HANDICAP - CHAPTER 151B, 15-  
16; Mazeikus v. Northwest Airlines, 22 MDLR 63,69 (2000).  
"It is the employee's initial request for an accommodation  
which triggers the employer's obligation to participate in  
the interactive process of determining one." Russell v.  
Cooley Dickinson Hospital, Inc., & another, 437 Mass. 443  
(2002) [citations omitted]. "Once a qualified individual  
with a disability has requested provision of a reasonable  
accommodation, the employer must make a reasonable effort  
to determine the appropriate accommodation . . . through a  
flexible, interactive process that involves both the  
employer and the qualified individual with a disability."  
Id. While Respondent permitted Complainant a reasonable  
accommodation by granting her a short time off for her  
surgery, the duty to engage in the interactive process and  
provide reasonable accommodation are matters of continuing  
obligation by Respondent. Respondent did not explore with  
Complainant the possibility of a further reasonable  
accommodation. Figueroa v. Springfield Transit Management,  
23 MDLR 17(2001). Rather than allow Complainant's request  
to return to work on a part-time basis for a short period  
of time, an accommodation that I find to be reasonable,  
Respondent instead terminated her employment. The employer

has the burden of showing that the requested accommodation would create an undue hardship. Id. at 17. Respondent in this matter has stated that it underwent no hardship while Complainant was on leave and offered no evidence that it would have been an undue hardship for Complainant to return to work part-time for a one month period of time. Therefore, I find that Respondent failed to reasonably accommodate Complainant's handicap and unlawfully terminated Complainant's employment because of her handicap in violation of M.G.L.c.151B§4¶16.

#### IV. REMEDY

Massachusetts General Laws c.151B§5 permits the Commission to award damages and such other relief as will make a Complainant whole. This includes damages for lost wages and emotional distress. A finding of discrimination, alone, permits an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, 424 Mass 824, quoting Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 182 (1985). Expert testimony is not necessary to prove emotional distress damages. College-Town Div. of Interco v. MCAD, 400 Mass. 156 at 169 (1987).

Complainant has the duty to mitigate her damages by making reasonable efforts to seek other similar employment. Black v. School Committee of Malden, 365 Mass. 197, 211 (1974). The burden of proving Complainant's failure to mitigate her damages rests with Respondent. J. C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). See Ryan v. Superintendent of Schools of Quincy, 374 Mass. 674, 677 (1978); Samuelson v. Sungard Financial Systems. Inc. and Chambers, 20 MDLR 49 (1998); Thompson v. Westinghouse, 12 MDLR 1282, 1334 (1990), citing Health v. Town of Greenfield Police Department, 6 MDLR 1880, 1890 (1984).

I do not concur with Respondent's argument that Complainant failed to mitigate her damages by turning down an offer of full-time work in April 1996. Complainant testified credibly that she declined this position because of the low pay and its unsuitability to her needs. She continued to actively seek employment and ultimately accepted a part-time secretarial job where the hourly rate was higher and she felt more comfortable. I conclude, however, Complainant's back pay period ended in April 1998, when she voluntarily took herself out of the job market in order to concentrate on schoolwork.

Complainant's annual salary at Respondent was \$25,000. She was unavailable for work for a period of two months.

Thereafter she was available for part-time work for one month. I find that Complainant lost wages in the amount of \$26,253.80 as the result of Respondent's unlawful termination of her employment. (See Findings of Fact #32-26) Further, I find that Complainant is entitled to \$1238.00 reimbursement for out-of-pocket expenses for having to pay her own health insurance premiums.

Complainant is also entitled to an award of damages for emotional distress. Complainant testified credibly that she was angry, distressed and demoralized and felt as though she had been "kicked in the stomach" when she learned of her termination. Complainant saw a social worker and attended a stress management course after her employment was terminated. I find that she is entitled to an award of \$50,000 to compensate her for the distress she suffered resulting from Respondent's unlawful discrimination.

M.G.L.c.151B§5 states, in part, If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any

prior discriminatory practice; Having found that Respondent has engaged in discriminatory practice, I conclude that a civil penalty in the amount of \$10,000.00 is warranted.

V. ORDER

Respondent is hereby Ordered to:

(1) Immediately cease and desist discriminating on the basis of handicap.

(2) Pay to Complainant Joanne Nicklas the sum of \$26,253.80.in damages for lost wages within 60 days of receipt of this decision with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made.

(3) Pay to the Complainant Joanne Nicklas the sum of \$50,000 in damages for emotional distress within 60 days of receipt of this decision, with interest thereon from the date the complaint was filed until such time as payment is made.

(4) Pay to the Complainant Joanne M. Nicklas the sum of \$1,230.00 for out-of-pocket expenses, with interest thereon from the date the complaint was filed until such time as payment is made.

(5) Pay to the Commonwealth of Massachusetts the sum of \$10,000.00 as a civil penalty.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If any Respondent fails to comply with the terms of this Order within the time period allotted, Complainant shall notify the Clerk of the Commission.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED THIS 4<sup>th</sup> DAY OF March, 2004.

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JUDITH E. KAPLAN,  
Hearing Officer