

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JOHN INACIO,
Complainants

v.

DOCKET NO. 97-BEM-3518

TOWN OF WINTHROP
CEMETERY DEPARTMENT

Appearances:

Steven Reardon, Esquire for the Complainant
Howard Greenspan, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about September 30, 1997, John Inacio filed a complaint with this Commission charging Respondent with discrimination on the basis of handicap in violation of M.G.L.c.151B, sec. 4(16). Specifically, Complainant alleged he was denied light duty after an on-the-job injury. The complaint was later amended to include a charge of retaliation. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on February 5 and 6, 2003. At the public hearing, Respondent's Motion to Dismiss the claim of retaliation was taken under

advisement. After careful consideration of the 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. John Inacio, a lifelong resident of Winthrop, Massachusetts, has worked for the Winthrop Cemetery Department as a laborer and truck driver since the early 1980s, first as a "provisional" employee, and for the past 15 years as a permanent employee.

2. Complainant's duties include digging graves, assisting in funerals and cemetery maintenance. Much of the work is heavy, and includes digging and lifting veterans' markers weighing 100 pounds. There is also lighter work such as driving a truck and trimming around head stones. Respondent employs six or seven laborers.
(T1)

3. In 1997, Complainant's direct supervisors were Edwin Wright and Richard Kraft. Paul O'Donnell was the superintendent who reported to three cemetery

commissioners. In 1997, the cemetery commissioners were Ernest LeSarte, Leo Defini and Paul Ford.

4. There were three job classifications in the cemetery department; laborer/truck driver, heavy equipment operator and foreman. The duties of a laborer/truck driver included opening graves, an arduous task requiring constant bending and lifting. This task involved marking lines with paint and cutting the sod with a hand tool, while standing, to make a neat hole that was then excavated by machine. The laborer then climbed down into the hole by ladder and shaved the sides of the hole by hand. The laborer would dig by hand a hole 12 inches wide, two to three feet long and three feet deep.

5. After the grave was dug, a cement truck would pour cement into wheelbarrows each holding up to 120 pounds. The laborer would then push to wheelbarrow to the grave and dump its contents into the hole. After being poured into the grave, the cement would slurry to one side and the laborer would push it in the grave and level it off. The laborer would then, on hands and knees, smooth out the cement.

6. Other duties performed by laborers included lowering coffins into graves, mowing the lawn primarily by sit-down mower and mowing smaller, less accessible areas with either push-mowers or weed-whackers.

7. Complainant testified that he did not get along very well with Superintendent O'Donnell. Complainant testified that his problems with O'Donnell started in March 1997, when on one occasion near the end of his shift, O'Donnell yelled at him concerning a matter related to cutting the grass. Complainant filed a union grievance concerning this incident and had subsequent problems with O'Donnell regarding other work-related matters. Complainant filed a number of union grievances during the year 1997. None involved allegations of discrimination.

8. On April 25, 1997, Complainant and co-worker Steven Lawlor were cutting burlap to place over newly planted seeds at gravesites. While he was down on one knee cutting a piece of burlap, Complainant was assaulted by a man named William Carroll, a non-employee. Complainant later learned that Carroll had attacked him on behalf of a co-worker whom Complainant had angered. Complainant and

Carol were injured in the attack, as was Lawlor, who tried to stop the fight. (T1)(T2).

9. Complainant testified that, while not apparent at the time of the incident, he sustained a lower back injury during the assault. Within a few days, his lower back began to stiffen and he experienced muscle spasms. Within a few weeks, he informed Superintendent O'Donnell and Kraft that he was going to seek medical attention and he completed an accident report for purposes of filing a workers compensation claim.

10. Approximately three weeks after the incident, Complainant saw Dr. Michelle Hallee at the Winthrop Community Health Center. Hallee told Complainant that he had a serious muscle strain in his lower back that would require physical therapy.

11. Complainant testified that he told his supervisor that he did not want to take Workers Compensation leave, but wanted the town to pay for his physical therapy. He made several inquiries of O'Donnell about the status of his workers compensation claim. O'Donnell referred him to the town administrator, to whom he repeatedly inquired about

the status of his claim and was repeatedly advised that his workers compensation claim had been submitted. Complainant contacted town employees so frequently that they complained that his conduct was harassing.

12. Complainant continued to work full-time throughout the spring and summer of 1997, although he worked with pain. Complainant testified that during the beginning of September he had constant lower back pain. He managed to go only to work and go directly home. Complainant testified that he had trouble sleeping and did not engage in any of the activities he enjoyed such as camping or hiking. During this time he was sometimes required to ride a sit-down lawn mower for close to eight hours, which caused him additional pain.

13. On September 9, 1997, Complainant saw Dr. Halleer who, according to Complainant, told him that because of his failure to begin physical therapy, his back condition had worsened. Complainant told Halleer that he was unable to sit for long periods of time and she recommended that Complainant be placed on light duty until completing physical therapy.

14. Dr. Hallee wrote a note on September 9, 1997, stating:

John Inacio has suffered a back injury which will require physical therapy for a full recovery. He should be on light duty until this is obtained. He has difficulty sitting for long periods of time and any work activity that involves this for prolonged periods of time. Again this restriction is until further notice and appropriate evaluation and/or physical therapy is obtained. (Exh. J-1)

15. Complainant handed the note to Paul O'Donnell when he reported to work on September 10, 1997. Complainant then reported to his foreman, Steve Babcock, who instructed him to drive the truck from one end of the cemetery to the other for the entire day. According to Complainant, this task would have permitted him to stretch for periods of time and he would have been able to perform that duty for the entire day. At about 10:00 a.m. O'Donnell told Complainant to get out of the truck and to go home because there was no work for him.

16. On September 12, 1997, Complainant saw Dr. Fred Kohanna, an independent medical examiner, in connection with his workers compensation claim. Dr. Kohanna's evaluation stated in part:

The patient should undergo conservative treatment for his low back problem including physical therapy and a self-directed exercise program for four to six (4-6) weeks...[he]

should continue to take his medication...and should continue to remain active. It would be most beneficial if he could continue to work on modified duty. The modifications would include: Lifting, pushing and pulling restricted to no more than ten (10) pounds, and no repetitive twisting or bending of the trunk. He should be allowed to change position often, and if he is sitting, he should be allowed to take a mini-stretch break every twenty (20) minutes.

17. On September 22, 1997, Complainant's worker's compensation claim was denied, but he appealed the denial and, in about mid-1998, he eventually received workers compensation for his medical costs after an appeal.

18. On October 7, 1997, Complainant was seen by Dr. Mark Kaplan, a specialist in Physical Medicine and Rehabilitation, at the East Boston Neighborhood Health Center. Kaplan's report stated, in part:

"... [Complainant's symptoms were] consistent with a nonradicular low back injury. We will place him in physical therapy with treatments consisting of range of motion modalities and a home exercise program." (Exh.J-8)

19. On October 12, 1997, Complainant broke his left leg while driving his motorcycle in Biddeford, Maine. On October 16, 1997 he was fitted with a long leg cast that he wore for three weeks. He then was fitted with a half cast for several more weeks.

20. Complainant remained out of work throughout the months of September, October, November and December, 1997 because he was not allowed to work light duty. During this time, Complainant applied for and obtained unemployment benefits.

21. On December 11, 1997, Complainant was evaluated for physical therapy at Winthrop Community Health Center at the referral of Dr. Kaplan. His work-related health insurance covered most of the expense, with Complainant paying the \$5.00 co-payments out of his pocket. Complainant underwent physical therapy twice a week for five weeks. Complainant's physical therapy concluded on January 28, 1998 at which time his back problem was completely resolved and he returned to full duty.

22. Complainant testified that the Respondent offered light duty to others on many occasions and that he himself was permitted to perform light duty on three prior occasions during his employment. (T2 2/5/03)

23. Complainant testified that in 1997 Matthew Proctor suffered a back injury and for two or three weeks he did

not have to push a wheelbarrow. Babcock recalled that sometime in the previous 18 months, Matthew Proctor had returned to work after being out with a broken arm. However, Proctor was a heavy equipment operator whose primary duty was operating a backhoe, a job requiring no heavy lifting. O'Donnell also testified that Proctor was able to perform all of the functions of his job after returning to work following a broken arm. Proctor did not testify at the public hearing. (T42/5/03)

24. Complainant testified that even with his restrictions he would have been able to perform aspects of his job such as raking leaves, sweeping the ground, picking up papers, operating a backpack blower and painting a fence. (T3 2/5/03)

25. Complainant workers compensation and unemployment compensation benefits totaling \$10,191.12 for the time period September 12, 1997 to January 13, 1998. (Stipulation of the parties)

26. Robert Linquist worked as a laborer for Respondent from February 1987 until December 1996,

performing work similar to that of Complainant. Linguist testified that during the late 1980s he strained his lower back and was given light duty for about two weeks. He was able to rake and sweep but was unable to dig, push wheelbarrows or move grave boards.

27. Steven Babcock testified that he has worked for Winthrop cemetery for more than seven years, initially as a truck driver laborer and as a foreman since 1997. Babcock testified that on September 10, 1997 he observed an argument between Complainant and O'Donnell, but did not hear their words. After the argument Complainant told Babcock that he had been denied light duty and had been sent home. Babcock testified that at the time of the argument, Complainant had been placing rocks in the bucket of the front-end loader and was having no trouble performing the work. Complainant's job assignment that day involved lifting rocks weighing 50 to 60 pounds and driving a truck. (T4 2/5/0003)

28. Virginia Wilder is Executive Secretary to the Winthrop Board of Selectmen and Chief Administrative Officer. Her duties include supervision of all departments and sitting in on all collective bargaining sessions.

Wilder explained that the town of Winthrop is self-insured for workers compensation, but that its claims are processed by a third-party administrator, Massachusetts Interlocal Insurance Association (MIIA). MIIA was notified of Complainant's injury when he filed his claim and the company indicated in a letter dated June 10, 1997 that the claim had been received(J-11). Wilder had no role in the decision-making process regarding requests for light duty.

29. Paul O'Donnell has been superintendent of the cemetery for over nine years. His job duties include supervising the day-to-day activities, filing reports for the commission and department heads and scheduling work assignments.

30. O'Donnell testified that from May 1997 through August 1997, Complainant performed his usual job duties, including frequent pushing, lifting, shoveling, driving a truck, and raking. Approximately three days a week, Complainant's job required him to prepare graves for funerals which involved a lot of heavy work, including digging graves and shaving the sides of the graves. Complainant did not request any accommodations from April through August, 1997.

31. O'Donnell testified that after Complainant presented him with Dr. Hallee's note requesting light duty, O'Donnell consulted with the cemetery commissioners, who decided to obtain a second opinion from the physician who was to examine Complainant in connection with his workers compensation claim, because of the restrictions recommended by Hallee and the indefinite length of the restrictions.

32. O'Donnell testified that after reviewing Dr. Kahanna's report, he believed that Complainant was unable to perform the essential functions of his job, and so advised the Cemetery Commissioners, who made the final decision not to put Complainant back to work. Complainant was not terminated from his position and was placed on a medical leave of absence.

33. O'Donnell testified that the restrictions contained in Dr. Kahanna's report were substantially more limiting than those of Dr. Hallee. Dr. Kahanna placed restrictions on lifting, bending and twisting, tasks Complainant was required to perform on a regular basis. Based on these restrictions, Complainant would not be able to complete a regular eight-hour day. O'Donnell stated

that Respondent does not have any regular light duty jobs. O'Donnell testified that light duty was given on a case-by-case basis, with primary consideration given to the person's medical restrictions and the length of time requested. I credit this testimony.

III. CONCLUSIONS OF LAW

A. Handicap Discrimination

M.G.L. ch.151B, sec. 4(16) makes it unlawful to discriminate in employment on the basis of handicap. In order to come within the protection of the statute, the Complainant must establish that he is a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities; has a record of having such an impairment; or is regarded as having such an impairment. M.G.L. ch. 151B, sec. 1(17). A qualified handicapped person is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap. M.G.L. ch. 151B sec. 4(16).

Complainant's back injury would not ordinarily be a qualifying handicap within the meaning of M.G.L.c.151B, because of its temporary nature, see, Hallgren v. Integrated Financial Corporation et al, 42 Mass. App. Ct. 686 (1997)(A knee injury of short duration is not a handicap within the meaning of G. L. c. 151B, s. 1.). However, because the injury was ultimately determined to be compensable under Workers' Compensation, Complainant is deemed a qualified handicapped person within the meaning of c. 151B, provided he is able to perform the essential functions of the job with or without a reasonable accommodation. See, M.G.L.c.152,§75B.

The essential functions of the job are "... those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job." In determining whether a job function is essential, the Commission will ask whether removing a given function from the job would fundamentally change the nature of the job in question. Consideration shall be given to the employer's judgment as to what functions of a job are essential..." See, Commonwealth of Massachusetts, Commission Against Discrimination Guidelines: EMPLOYMENT

DISCRIMINATION ON THE BASIS OF HANDICAP-CHAPTER 151B, III,
D.(March 31, 1998).

In this case, Complainant suffered from a back injury that temporarily restricted him from pushing, pulling or lifting more than 10 pounds, and restricted him from repeated twisting and bending of his trunk. I conclude that these restrictions prevented Complainant from performing the essential functions of his job as a laborer. The inability to perform these functions would fundamentally change his job. The evidence suggests that Complainant was unable to perform the essential functions of a cemetery laborer job with or without any reasonable accommodation. The principal functions of cemetery laborer involved frequent digging of graves which was heavy work, including bending, digging and lifting objects weighing up to 100 pounds. According to the medical evidence, Complainant was temporarily restricted from lifting, pushing and pulling more than ten (10) pounds, and could not engage in any repetitive twisting or bending of the trunk. While there were functions of his job that Complainant might have been able to perform on a limited basis, these were tasks that according to Superintendent O'Donnell's credible testimony, could not fill an eight-hour day. Thus, at the time his superintendent sent him home, Complainant was unable to

perform the essential functions of his position. Moreover, the evidence establishes that there was no reasonable accommodation that would have allowed Complainant to perform the essential functions of a cemetery laborer. Although an employer has a duty to provide reasonable accommodation, an employer is not required to disregard or waive an employee's inability to perform an essential function of the job in question. Handicap Guidelines, at X, B; Cox v. N.E. Telephone, 414 Mass. 375, 390(1993). To complicate matters, Complainant fractured his leg during this time period and for a period of several weeks time he was in a cast and would have been unable to perform even those light tasks that were associated with his position.

There was some testimony regarding light duty provided to other workers. One employee, Matt Proctor, who returned to work after suffering from a broken arm, was a heavy equipment operator, whose job did not involve digging and heavy lifting and thus he was able to perform the essential functions of his job when he returned to work. There was brief testimony that another worker, Robert Linguist, was permitted to return to work on light duty for two weeks following a back injury some years earlier, however, there was no evidence regarding the extent of his injury and this

incident occurred in the late 1980s. The fact that Respondent may have, on occasion, permitted an employee to work a temporary light duty position on a limited basis does not establish a formal practice of permitting light duty work.

More importantly, Respondent permitted Complainant to go on a medical leave of absence for a period of over four months until he was able to return to work during which time he collected unemployment and retained his health insurance, which paid for his physical therapy. Although a leave was not the accommodation requested by Complainant, it was reasonable under the circumstances. This Commission's Guidelines relating to handicap discrimination specifically state. "In determining the type of reasonable accommodation required for an applicant or employee, the employer need not provide the best accommodation available, or the accommodation specifically requested by the individual with the handicap. Rather, the employer must provide an accommodation (at its own expense) that is effective for its purpose." Commonwealth of Massachusetts, Commission Against Discrimination Guidelines: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP-CHAPTER 151B, II, C (1998). Petrillo v. Boston Water and Sewer Commission, 20 MDLR 150 (1998).

For the above-stated reasons, I conclude that Respondent did not engage in unlawful discrimination on the basis of handicap in violation of M.G.L. ch. 151B §4(1)

B. Retaliation

G.L. ch. 151B, sec.4(4) prohibits employers from discharging, expelling or otherwise discriminating against a person who has opposed any practice prohibited by Chapter 151B or has who has filed a complaint alleging a violation of Chapter 151B. In order to establish a prima facie case of retaliation, a Complainant must show that, (1) he was engaged in a protected activity; (2) that the employer was aware of the protected activity; (3) he subsequently was subjected to an adverse employment action; and (4) evidence existed sufficient to establish a retaliatory motive or the adverse employment action followed the protected activity within such time as a retaliatory motive can be inferred. Richards v. Bull HN Information Systems, Inc., 16 MDLR 108, 1639(1994). Here Complainant has alleged that Respondent's failure to provide him with a light-duty assignment was retaliation for his having filed various union grievances against Respondent.¹ However, union activity is not protected conduct under M.G.L. c. 151B §4(4). Complainant

¹ At the public hearing, Respondent moved to dismiss the retaliation claim. Complainant's counsel asked for the opportunity to brief the issue and I took the motion under advisement. Complainant did not address the charge of retaliation in his post-hearing brief, but he did not withdraw the claim. Therefore I address it in this decision.

acknowledged that the numerous union grievances he filed prior to seeking light duty were not related to discrimination. Therefore I conclude that Complainant has failed to establish a prima facie case of unlawful retaliation.

IV. ORDER

For the reasons stated above, this matter is hereby dismissed.

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 6th day of August, 2003.

JUDITH E. KAPLAN
Hearing Officer