

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD & LABRANCHE VALERIUS,  
Complainants

v.

DOCKET NO. 05-BEM-00213

ACUSHNET COMPANY,  
Respondents

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Appearances:

Michael A. Vitali, Esquire for Labranche Complainant

Laurence Donoghue, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 14, 2005 Labranche Valerius (“Complainant”) filed a complaint with this Commission charging Respondents with discrimination on the basis of handicap (kidney disease), in violation of M.G.L., c. 151B § 4(16).<sup>1</sup> Specifically, Complainant alleges that he was laid off indefinitely and subsequently terminated when he sought to return to work following a kidney transplant. The Investigating Commissioner issued a Probable Cause finding. After attempts to conciliate the matter failed, the case was certified for public hearing. A public hearing was held before me on April 1 and 2, 2008. After careful consideration of the post-hearing submissions of the parties and the entire record in this matter, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Acushnet Company headquartered in Fairhaven, Massachusetts, is a manufacturer of products for the golf industry. Respondent operates a manufacturing

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<sup>1</sup> Complainant’s claims of age and national origin discrimination were dismissed for lack of probable cause. Accordingly those claims were not certified for public hearing.

facility in Brockton, Massachusetts which produces hand assembled high-end golf shoes under the Foot Joy brand.

2. Complainant resides in Brockton, Massachusetts. He began working at Respondent's Brockton facility ("Brockton") in June 1988, weeks after immigrating to the United States from his native Haiti. Haitian Creole is his first language.<sup>2</sup>

3. In 1999 Complainant was diagnosed with kidney disease and kidney failure. On or about August 15, 1999, he commenced kidney dialysis treatment and was placed on a transplant list. As a result of his illness, Complainant took medical leaves of absence from work from July 30, 1999 through August 16, 1999, August 18, 1999 through January 12, 2000 and June 13, 2000 through July 17, 2000. Complainant returned to work following each leave, sometimes with lifting restrictions or reduced hours, limitations which Respondent accommodated. (Joint Stipulation of Facts, no. 3; Tr. Vol. II, pp. 198-201) During some of his leaves, Complainant received short-term disability benefits provided by Respondent's insurer, MetLife. On August 6, 2003 Complainant was notified that a donor kidney had become available and he underwent kidney transplant surgery that same day. He remained out of work on medical leave until March 22, 2004. (Tr. Vol. I, pp.28-32)

4. The manufacturing facility at the Brockton location included the following departments; cutting, prefit, stitching sole, lasting, finishing, dressing and packing. Shoes were moved on racks from one department to the next as the jobs in each department were completed. Some of these departments employed "flex utility" employees who are cross-trained in four skilled jobs and are able to fill in for absent employees in a number

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<sup>2</sup> Livie Gelis, a Haitian-Creole interpreter, interpreted the proceedings for Complainant at the public hearing.

of departments. Jose Lobo was a flex utility worker in the finishing department. (Tr.Vol. II, p. 120)

5. The number of employees at the Brockton facility has varied from 162 in 2001 to 103 in 2005. The facility has manufactured as many as 75 dozen pairs of shoes a day. Fluctuations in the number of employees are largely driven by changes in production volumes and production forecasts. (Tr. Vol. II, p.106).

6. Matthew Horris is the director of manufacturing at the Brockton facility; he functions as both plant manager and senior director. Horris has worked at Respondent for 20 years in various capacities. Horris has been involved in three layoffs at the facility due to reduced production demands. He is personally present when employees are informed of a layoff, and each layoff has followed the same procedure. (Tr.Vol. II, pp. 135-6)

7. The majority of production employees at the Brockton facility, including Complainant, are members of the Brotherhood of Shoe and Allied Craftsman whose working conditions are governed by a collective bargaining agreement (“CBA”) (Tr. Vol. II, p 107.) Union jobs, or “crafts,” range from grade 1 through 12. Complainant performed a grade 1 craft, the lowest grade. (Ex. 2) By the terms of the CBA, layoffs are determined by craft, and not by seniority. Only if multiple employees are performing the same role is seniority considered in identifying employees to be laid off. More senior employees are not permitted to bump less senior employees from their assigned craft if the more senior employee’s craft is eliminated.

8. After working in various other positions, in 1997 Complainant was moved to the position of “rougner welts” located in the finishing department. He was the only

employee assigned to this job that involved working on a “welt roughing machine” which flattened or sanded the rough surface on a partially assembled shoe, making the surface smooth enough for the sole to adhere. His hours were 7:00 a.m. to 3:45 p.m. (Ex. 6) Complainant’s direct supervisor was Tony Lima, the finishing department supervisor. (Tr. Vol. II, p.127)

9. When there were no shoes to “welt,” Complainant performed “utility” work such as burning plastic, putting shanks in shoes and, on occasion, gluing heels. These jobs were performed on a machine other than the welt roughing machine.

10. In the shoe assembly process, the job performed prior to roughing welts is “inseam trimmer,” in which a worker using a specialized machine flattens out the welt and prepares its surface for adhesion to the outsole. At the time of Complainant’ layoff Ralph Roberts was the inseam trimmer (Tr. Vol. II, p. 121) The job performed after roughing welts is “bottom filling.” (v. II, p. 128)

11. Horris testified that in the spring or summer of 2003 Respondent sought to reduce the number of employees at the Brockton facility and to consolidate jobs due to a decrease in production, and in preparation for a planned move to a smaller and more streamlined facility. To this end, the engineer and department supervisors surveyed the Brockton facility to identify ways to consolidate positions and to improve the performance of employees to facilitate a reduction in their numbers. (Tr. Vol. II, p. 124) Respondent then developed a list of positions to be eliminated and the human resources department matched employee names to each eliminated position and reviewed the list for compliance with the union contract. (Tr.Vol. II, pp.211-213) Between August 2003 and February 2004, 24 employees were laid off. (Ex. 4; Tr. Vol.II, pp. 214-5) None of

these employees was on a medical leave of absence at the time of the layoff. (Tr. Vol. II, p. 217)

12. Horris testified that after reviewing the make up of the finishing department with supervisor Tony Lima, Respondent determined that by training Ralph Roberts to trim inseams in way that made subsequent roughing unnecessary, Respondent could eliminate Complainant's position of welt rougher.<sup>3</sup> The "adjustment" to Roberts' job was made in August or September of 2003, shortly after Complainant began his medical leave in August of that year. Horris testified that Jose Lobo, the utility worker, may have performed Complainant's job for about a week after Complainant went out on leave (Tr. Vol.II, p. 132) After the welt roughing position was eliminated the utility tasks formerly performed by Complainant were assigned to the inseam trimmer and the bottom filler. (Tr. Vol. II, p. 128) I credit this testimony.

13. Carolyn Lopes, Senior Manager of Human Resources, testified that discussions about combining Roberts' and Complainant's positions occurred sometime in the early fall of 2003 after a round of layoffs which had occurred on August 12, 2003. Complainant was not advised that his position was being eliminated while he was on leave. (Tr. Vol. II, pp.153, 219-220).

14. On or about March 5, 2004, Complainant's physician cleared him for work starting March 22, 2004, for four hours per day until he felt capable of working longer hours, and with the additional restrictions of no ladder climbing or lifting more than 10 pounds. (Ex. 12) Complainant testified that on March 5, 2004 he brought his form

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<sup>3</sup> Horris and Lopes testified that when two jobs are consolidated the individual who previously held the more skilled job is retained. Because the inseam trimmer job was more skilled than the welt roughing job, Roberts was retained and Complainant was laid off. (Tr. Vol. II, pp. 130, 218)

authoring his return to work to H.R. senior manager, Carolyn Lopes, who told Complainant she could see him on March 22. (Tr. Vol. I, p. 35) Lopes did not recall this meeting. (Tr. Vol. II, pp. 258-9; 264-5) I credit Complainant's testimony that Lopes told him she would see him on that date.

15. Lopes testified that upon receiving notification that Complainant could return to work on March 22, 2004, she determined that his position had been eliminated and prepared his layoff paperwork. (Tr. Vol. II, p.221). Horris testified that on March 22, 2004 there was no open position for him to return to without displacing another employee. (Tr. Vol. II, p.175). I credit their testimony.

16. On March 22, 2004, Complainant reported to the Brockton facility, but when he attempted to clock-in, the system did not recognize his timecard. He proceeded upstairs and stood next to his machine in preparation for the workday to begin. Tony Lima then instructed him to go downstairs to the office. There he met with Matthew Horris, Carolyn Lopes and union steward Jackie Dupuis and was given a letter stating that he was on indefinite layoff status. The letter also stated that Complainant's medical, life, and short term disability insurance coverage would cease at midnight, that he had recall rights as established in the union contract, and that unemployment benefits might be available to him. (Ex. 14) The letter did not state that Complainant's job was eliminated. (Tr. Vol. II, p. 227) Lopes read the entire letter aloud to Complainant and he was asked if he had any questions. Complainant testified that he understood the letter to mean that there was "no job" and that he would be called back when work picked up. (Tr. Vol. II, pp.136-7, 224-5)

17. Horris testified that he explained briefly to Complainant that his job had been eliminated, but did not explain in detail that his job had been consolidated with Roberts' job. (Tr. Vol. II, p.141). Horris acknowledged that because Complainant's job was eliminated, there was little chance he would be recalled to the position of rougher welts, but he could be recalled to some other position in the finishing department.<sup>4</sup> (Tr. Vol. II, p.161)

18. On or about Thanksgiving of 2004, Respondent's manufacturing operations moved to a single floor facility with 42,000 square feet of manufacturing space. According to Horris, the welt roughing machine used by Complainant before his leave was never moved to the new facility and the welt roughing job was no longer performed as a separate job at the new manufacturing facility. (Tr. Vol. II, pp, 127, 142-145)

19. The floor plan for the current manufacturing plant indicates that the in seam trimming machine is located immediately next to the hand waterproofing machine and there is no location for the welt roughing machine. (Ex. 7; Tr. Vol. II, pp. 143-145) I credit Horris' testimony that the rough welting machine was not moved to the new facility and that the rough welting job was never performed as a separate function after the facility moved in November of 2004.

20. Horris testified that the decision to layoff Complainant was made prior to August 2003, but that because he was on a medical leave of absence, Horris, Lopes and Lima decided that his layoff would not take effect until his medical leave ended so that he could continue to receive medical benefits during his recovery. (Tr. Vol. II, p.208). I credit his testimony. (Tr. Vol. II, pp.206-207)

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<sup>4</sup> According to the CBA, based on his years of service Complainant had recall rights for one year following his layoff on March 22, 2004, but he was never recalled and lost his seniority and recall rights on March 22, 2005.

21. Complainant testified that after his layoff he ran into a friend and employee of Respondent, Roosevelt Barbier, who told him someone else was working on the rougher welts machine shortly after his layoff and that Acushnet had hired new people. I do not assign any weight to Complainant's testimony regarding his conversations with Barbier as it was vague and contradictory with respect to both the timing and the content of the conversation. (Tr. Vol. I, pp.45-47; 71; 73-77)

22. Rougher welts is listed as a position in the 2004-2005 CBA. Horris and Lopes each testified that Respondent did not necessarily remove all obsolete positions from the list prior to signing the CBA and that other jobs such as "leveler" appeared in the CBA, but were no longer performed. I credit their testimony. ((Ex. 2; Tr. Vol. II, pp.183-184)

23. Complainant testified that he received his vacation check four months after his layoff, a practice that he said is consistent with a termination and not a layoff. The CBA indicates that accrued vacation pay is paid out upon discharge, but not immediately upon layoff. (Ex. 13; Tr. Vol.II, p.177). Lopes testified vacation checks were cut in late June. I find that Complainant received his accrued vacation pay in the same manner as any other employee on layoff.

#### Layoffs During 2003 and 2004

24. Under the CBA, when a position opens, a laid off employee with recall rights who formerly held the same job is recalled to the position. If the laid off employee does not exercise his recall rights, the position is posted internally to allow current employees to apply for the opening. If the position remains unfilled, it is then offered to other laid

off individuals by seniority within the same department and then to laid off employees plant-wide. (Tr. Vol. II, pp.138, 226-227).

25. On August 16, 2003, Respondent laid off five employees, including Antonio Barros, a hand water-proofer in the lasting room. Barros was recalled on November 5, 2003 to the position of sweeper in the stitching room, after no internal employees applied for the job. Five days after being called back, Barros went on medical leave and was terminated on March 10, 2004, for failing to return from leave. Lopes testified that the position was not filled after Barros' termination due to a downturn in business. Thus on March 22, 2004, the day Complainant was laid off, the sweeper position was no longer open. (Tr. Vol. II, pp.233-5; Ex. 4) I credit her testimony.

26. In January and February 2004, Respondent laid off 19 employees. Of these employees, seven were recalled to their previous positions, except for Robert Chisholm who was laid off from an upper cutter position on January 10, 2003. On April 7, 2004, he was recalled to the position of Utility II in a different department. (Ex. 4)

27. Edwino Lopes was hired on January 23, 2003 and later transferred to the position of hand water-proofer in the finishing department. While Complainant had more seniority than Lopes, he was not recalled to the finishing department or offered the hand water-proofer job. Carolyn Lopes testified credibly she did not know whether the position was filled during the time Complainant was eligible for recall but that in accordance with the CBA, as an employee who was not laid off, Edwino Lopes had the right to transfer internally to the position before Complainant could be recalled to that position. (Tr. Vol. II, pp.256-8, 284) I credit her testimony, which is consistent with the CBA.

28. In 2004 and 2005 Clifton Kimball and Frank Cipullo, returned to their former positions after medical leaves of absence. (Tr. Vol. II, pp.231-2; 238)

29. Ralph Roberts went on medical leave on March 22, 2004, the same day Complainant was laid off. With the exception of two days in October, Roberts did not return to work until February 14, 2005 when he returned to the same job duties. (Ex. 15; Tr. Vol. II, pp.240-1) Lopes testified that during the eleven months Roberts was out on medical leave, utility workers including Jose Lobo, who had been trained to perform Roberts' job, did the job during Roberts' leave of absence. Following Roberts' leave of absence he resumed the position where he continued to work at the time of the public hearing. I credit her testimony.

30. After his termination from Respondent, Complainant collected unemployment insurance benefits. After those benefits were exhausted, Complainant began to receive Social Security Disability Benefits, which he continued to receive at the time of the public hearing.

### III. CONCLUSIONS OF LAW

#### A. Handicap Discrimination

Complainant claims Respondents discriminated against him in violation of M.G.L. c.151B, § 4(16), by discharging him because of his handicap.

M.G.L. c. 151B, § 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 a prima facie case of handicap discrimination, Complainant must prove that he was an otherwise qualified handicapped person and that

he was terminated under circumstances which give rise to the inference that his layoff and termination were based on his handicap. See Ryan v. Town of Lunenburg, 11 MDLR 1215(1989); McLain v. Holyoke Hospital, Inc., 19 MDLR 101 (1997). Lipchitz v. Raytheon Corp, 434 Mass. 493, 501 (1991).

Respondent does not challenge Complainant's assertion that he was capable of performing the essential functions of his job under M.G.L. c. 151B, § 4 (16). Therefore I conclude that at the time of his lay off Complainant was a qualified handicapped person, able to perform the essential functions of his job with a reasonable accommodation. Complainant was laid off on the day he returned from a medical leave of absence. This is sufficient to give rise to the inference that his layoff and subsequent termination were based on his handicap. Therefore, I conclude that Complainant has established a prima facie case of handicap discrimination.

Once Complainant establishes a prima facie case of discrimination, Respondent must articulate a legitimate, non-discriminatory reason for its layoff and failure to recall Complainant. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986)

The Respondent's legitimate, non-discriminatory reasons for Complainant's lay-off were, that due to its plan to move to a smaller, more streamlined, plant, its reduction in production requirements, and the economic need to eliminate and consolidate certain positions, Complainant's position was eliminated and consolidated by creating more

efficiencies in another position and thereby reducing the necessary steps in production. Respondent also asserts that Complainant was not recalled after his layoff because his recall rights under the union contract were not triggered during the one year period following his layoff.

As part of the move to a smaller manufacturing facility Respondent reviewed each department for potential job consolidation and in the Fall of 2004, while Complainant was on medical leave, Respondent taught inseam trimmer Ralph Roberts to perform his job in a manner that eliminated the need for Complainant's primary job function of roughing welts, when Respondent moved to its new facility. Respondent also asserted that reduced production demands mandated a reduction in force between August 2003 and February 2004 and that Complainant was part of a larger layoff. Nonetheless, Horris testified that training the inseam trimmer Ralph Roberts to better perform his job was the primary reason for eliminating Complainant's position. Respondent asserts that Complainant's position was eliminated during his medical leave, but his actual layoff was delayed until his return so that he could continue receiving health insurance benefits during his period of recuperation. Respondent also asserts that Complainant was not recalled during the year after his layoff because no openings became available for which he had recall rights under the CBA.

Once Respondent has articulated a legitimate, non-discriminatory reason for its actions supported by some credible evidence, Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. Complainant was unable to offer credible evidence of pretext. He failed to demonstrate that the reasons articulated by Respondent were not the real reasons for his being laid-off and not being recalled or that

Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997), Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 450 (2002). As evidence of pretext Complainant challenged Respondent's assertion that Roberts' improved ability to trim inseams justified Complainant's job elimination and that the rough welter job was still being performed after he commenced his medical leave in around August 2003. He argued further that because Roberts was on a medical leave of absence from the date of Complainant's lay off March 22, 2004 until February 14, 2005, Roberts' improved job performance could not have justified the elimination of the roughing welts position, since Roberts was, himself, on an eleven month medical leave of absence. However, Respondent's witness testified that utility workers including Jose Lobo were trained on, and operated Roberts' machine while Roberts was out on leave. While the position of rougher welts appeared in the 2004-2005 CBA despite its apparent elimination, Respondent explained that obsolete positions sometimes remained in the CBA as an oversight and cited other eliminated positions that continued to appear in the CBA. (Exs. 1 and 2)

I conclude that Complainant has failed to establish that Respondent's articulated reasons for his lay-off and non-recall are a pretext for discrimination. Complainant did not show that he was eligible to fill the positions of employees who were recalled from lay-off, or that there were available positions to which he was eligible for recall. There was no evidence that Complainant's position was not justifiably eliminated or that his job was chosen for elimination because of his disability.

While it was no doubt difficult for Complainant, a long time employee, to return from leave only to be laid off, the credible evidence showed that Respondent's decision to eliminate Complainant's position was based on legitimate, non-discriminatory reasons, and Respondent's decision to postpone Complainant's lay off until he returned from his leave was not motivated by discriminatory animus. To the contrary, Respondent chose to keep Complainant on the payroll so that he would continue to be eligible for work sponsored health insurance during his period of recuperation. Over the course of his employment, Respondent had granted Complainant numerous medical leaves for lengthy periods of time during which he retained his health insurance and received short-term disability benefits. In addition, Respondent had always accommodated Complainant's physical limitations upon his return to work from medical leave. For these reasons, I conclude that Complainant has failed to persuade me that Respondent's legitimate non-discriminatory reasons for its actions were a pretext for unlawful discrimination.

For the reasons stated above, I conclude that Respondent has not engaged in unlawful discrimination on the basis of handicap in violation of M.G.L. c.151B and hereby order that the complaint in this matter be dismissed.

#### IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. 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 the 10<sup>th</sup> day of March, 2009.

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JUDITH E. KAPLAN,  
Hearing Officer