

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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LINDA JOHANSSON,

Complainant

v.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF CORRECTIONS,

Respondent

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NO. 92-BEM-0102

**DECISION OF THE FULL COMMISSION**

This matter came before us following a decision of Hearing Commissioner Chares E. Walker, Jr. in favor of Complainant. Following an evidentiary hearing, the Hearing Commissioner concluded that Respondent subjected Complainant to discrimination on the basis of disability in violation of M.G.L. c. 151B, § 4(16). Respondent filed a timely Petition for Review. The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et seq.*) and relevant case law.

It is the duty of the Full Commission to review the record of proceedings before the Hearing Commissioner or Officer. M.G.L. c. 151B, § 5. The Hearing Commissioner's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding..." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A. It is the responsibility of the Hearing Commissioner to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed questions of fact, and the Full Commission defers to these determinations.

See e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23(1)(h).

We have carefully reviewed the petition for appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated herein. As a result of that review, and for the following reasons, we find errors of law, which require us to reverse in this matter.

In his decision, the Hearing Commissioner concluded that there was “evidence to support a finding that Respondent regarded Complainant as being able to perform the essential functions of her job despite her mental illness, thus triggering its obligation to explore with her the issue of reasonable accommodation.” Additionally, he found that:

“(S) he requested two accommodations: 1) to have the Civil Service examination and certification interview occur in a "neutral setting"; and 2) to be laterally reassigned from MCI-Concord to the Central Office in Boston.”

Based on these findings, the Hearing Commissioner concluded that the Department's failure to consider the reasonable accommodation of a reassignment transfer request until after she filed her complaint with the Commission was sufficient to establish a prima facie case of disability discrimination.

In Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443, 454 (2002), the Supreme Judicial Court held:

Under Massachusetts law, an employer is barred from dismissing employees who are ‘capable of performing the essential functions of the position involved with reasonable accommodation’ (emphasis added). G.L.c. 151B, s.4(16). In this aspect, the Massachusetts statute is less generous than the ADA (Americans with

Disabilities Act of 1990), which defines ‘reasonable accommodation’ to include reassignment to vacant positions. See 42 U.S.C. s. 12111(10)(B) (1994).

The Decision of the Court in Russell is directly applicable to the application of M.G.L. c. 151B, § 4(16) to the facts in the instant matter. Similar to Russell, the issue is whether an employer’s reasonable accommodation obligations include the duty to transfer a qualified disabled employee to another position. Thus, the ruling by the Hearing Commissioner that a violation of M.G.L. c. 151B, § 4(16) is established when an employer fails to make a transfer is at odds with the decision in Russell. As that court noted:

The plaintiff never requested to return to her former position as an admitting assistant, nor did she indicate that she would be able to perform the essential functions of that position with accommodation. In fact, in May, 1995, Palmer wrote to Gasior to inquire whether the plaintiff could pursue a different job at the hospital, stating ‘[a]fter fairly extensive medical evaluation and trial work simulation, it has been determined that [the plaintiff] currently does not have the functional ability to fulfil the job of admitting clerk.’ By her conduct the plaintiff evinced that she could not perform the essential functions of the admitting clerk position in May, 1995, and did not request any accommodation that would enable her to perform those essential functions. **Instead she sought a different position in the hospital, an accommodation the hospital was under no obligation to provide.**” (emphasis added) Id.

Therefore, and for the aforesaid reasons, the Decision of the Hearing Commissioner in this matter must be **Reversed** and the complaint **Dismissed**.

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

SO ORDERED this 2<sup>nd</sup> day of July, 2003.

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Cynthia A. Tucker, Commissioner

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Walter J. Sullivan, Jr., Commissioner