

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & LYNN A. NELSON,
Complainants

v.

DOCKET NO. 98-BEM-2651

HERB COGLIANO, JOHN
COGLIANO, & SULLIVAN &
COGLIANO TRAINING
CENTERS, INC.,
Respondents

Appearances:

Kimberly A. Raimondo, Esquire for the Complainant
Stephen L. Jones, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 21, 1998, Lynn Nelson filed a complaint with this Commission charging Respondents with discrimination on the basis of handicap, in violation of M.G.L.c.151B, sec. 4(16). Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on July 15-19 and on July 22-23, 2002. After carefully considering the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

I. FINDINGS OF FACT

1. At all times relevant to this matter, Respondent Sullivan and Cogliano Training Centers, Inc. operated computer training centers in Taunton, Brockton and North Dartmouth, Massachusetts.

2. Herb Cogliano is the President of Sullivan & Cogliano Training Centers, Inc.; John Cogliano is the Chairman of the Board and Sheila Chapman is the Vice President. The company's administrative offices are located in Waltham, Massachusetts. The Coglianos also own and operate several other companies, including a temporary placement firm called Sullivan & Cogliano Office Staffing Services, with headquarters at the same location as the Sullivan & Cogliano Training Center in Waltham.

3. Complainant Lynn Nelson resides in Taunton Massachusetts. Complainant, who had worked in the medical field, suffered a back injury that restricted her from lifting, and as a result, in the summer of 1996, she sought the services of the Massachusetts Rehabilitation Commission (Mass Rehab) in order to obtain retraining in the field of computers.

4. In early 1997, Sullivan & Cogliano assumed ownership and operation of certain computer training centers in Taunton, Brockton and North Dartmouth from a company named MALS, Inc. Gunnar Hexum, who had been the director of the Taunton Center since approximately 1995, remained in that position after Sullivan and Cogliano assumed the ownership from MALS, Inc.

5. On January 8, 1997, Complainant began computer training classes at the Taunton, Massachusetts location. The cost and expenses of the computer-training program were paid for by Mass Rehab. By all accounts, Complainant performed well as a student.

6. On April 7, 1997, Gunnar Hexum offered Complainant an unpaid internship as a technical support specialist at the Taunton Training Center. Complainant accepted the internship and testified that at this time she informed Hexum that she was disabled and receiving Social Security Disability Benefits.

7. Complainant testified that as an intern she was given increasing responsibility, including instructing classes, filling in for instructors who were absent,

installing and configuring software at local businesses, trouble shooting, consulting and training at local businesses and government agencies. In the summer of 1997, the Training Center began offering courses in Information Technology (IT), which Complainant began to assist in and teach.

8. Hexum told Complainant that he would like to hire her as a full-time employee of Sullivan & Cogliano. Hexum testified that enrollment at the Taunton location was increasing and that Rick Mondeau, then the only full-time IT instructor, was working long hours and needed assistance. Hexum testified that he told Sheila Chapman, Sullivan & Cogliano's Vice President, that he intended to hire Complainant as an IT instructor.

9. In October 1997, Hexum prepared a business plan for the Taunton location that specifically included Complainant as an IT instructor. Hexum submitted the business plan to Sheila Chapman and Herb Cogliano.

10. On November 24, 1997, Complainant met with Hexum regarding a full-time position. Hexum offered her a salary of \$28,000.00 per year. Complainant completed two job

applications, along with several forms, including a W-4 that Hexum delivered to Susan Thompson, Respondent's Human Resources Director at Sullivan and Cogliano's Waltham office. On her application forms, Complainant stated that her reason for leaving her previous employment was a "back injury".

11. Hexum testified that the same evening Sheila Chapman phoned him to say that Herb Cogliano was aware that Complainant had filed two worker's compensation claims in the past. Chapman asked Hexum about the details of the claims. I do not credit this testimony. I do not believe that Chapman raised this issue with Hexum at any time.

12. The next day Hexum discussed the worker's compensation claims with Complainant and telephoned Chapman. According to Hexum, Chapman informed him that Herb Cogliano refused to hire Complainant because of her history of worker's compensation claims. Hexum testified that he asked Chapman to lobby Herb Cogliano on Complainant's behalf. I do not credit this testimony. I do not believe that Chapman ever discussed Complainant's workers compensation claims with Hexum.

13. Sheila Chapman denied telling Complainant or Hexum that Herb Cogliano did not want to hire Complainant. Chapman testified that Complainant was hired on a temporary basis because there was no need for a long-term full-time employee. I credit her testimony

14. Herb Cogliano denied ever telling Hexum or Chapman that he would not hire Complainant because of past worker's compensation claims. Herb Cogliano testified that he never spoke to Hexum about the Complainant and that he never saw the Complainant's application for employment prior to her hire. I credit his testimony.

15. Herb Cogliano testified that both permanent and temporary employees working for his companies are insured under Respondent's workers' compensation laws. Cogliano denied ever discussing Complainant's employment status with Chapman or Hexum. I credit his testimony.

16. Hexum asked Complainant to develop a website and present it at a Sullivan & Cogliano retreat on January 9, 1998. According to Hexum, Chapman was impressed by Complainant's performance at the retreat and agreed to contact Herb Cogliano once again on Complainant's behalf.

17. Hexum testified that he learned that despite Complainant's successful presentation at the retreat, Herb Cogliano refused to hire Complainant. He testified that he then became extremely upset and telephoned Herb Cogliano directly and in a tense conversation, Herb Cogliano explicitly stated that he would not hire Complainant because of her history of worker's compensation claims. I do not credit this testimony in its entirety. I do not believe that Hexum ever discussed the matter of Complainant's workers compensation claims with Cogliano.

18. Sheila Chapman scheduled a job interview with Complainant on or about February 12, 1998. Complainant testified that during the interview she told Chapman that she was willing to accept only a full-time, permanent position. According to Complainant, Chapman told her she would get back to her, but led Complainant to believe that she would be offered a full-time position. I do not credit this testimony.

19. Sheila Chapman testified that she was responsible for interviewing candidates for temporary positions and that she interviewed Complainant at Gunnar Hexum's request. Chapman denied offering Complainant a full-time position

and stated that she specifically informed Complainant that there was no job available, but that she would let her know if any temporary, part-time work became available. I credit Chapman's testimony regarding this interview. I found Chapman's testimony in this regard to be more credible than that of Complainant or Hexum.

20. When Complainant arrived at school on February 16, 1998, Hexum told her that there was good news, and that she was hired as the new networking instructor at \$14.00 per hour with benefits. Hexum told Complainant she could start right away. Complainant began work as a part-time instructor in Taunton that day. She asked Hexum for information regarding her health benefits and status as a full-time permanent employee.

21. On February 17, 1998, Complainant called Hexum and again asked about her benefits. Hexum cancelled a scheduled meeting with Complainant for the following day and avoided Complainant from then on.

22. On February 25, 1998, Complainant called Susan Thompson at Sullivan & Cogliano's Human Resources Department to inquire about the status of her employment

and her eligibility for health insurance benefits. Susan Thompson informed her that she had been hired through Sullivan & Cogliano's Temporary Placement firm and was not entitled to health insurance benefits.

23. On February 26, 1998, Complainant resigned. On March 31, 1998 Complainant wrote a letter to Hexum with a copy to Herb Cogliano reiterating her desire to work for Sullivan & Cogliano. In the letter, Complainant did not mention that she had been treated unfairly or discriminated against.

24. Complainant testified that she never spoke directly to Herb Cogliano regarding her employment status and that all of the statements attributed to Herb Cogliano were related to her by Gunnar Hexum.

25. Diane Baldi was a student at Sullivan and Cogliano Training Center in Taunton from October 1997 until June 1998. At the suggestion of Gunnar Hexum, Baldi became an intern in April 1998. In May 1998, Hexum offered Baldi an instructor's position in Fall River, Dartmouth or Taunton. Baldi testified that she assumed that the job would include benefits. In mid-June 1998, Baldi began as a

full-time instructor of business applications in North Dartmouth. Although Baldi believed at the time of her hire that she was a permanent employee, she learned shortly afterward that she had been hired as a temporary employee through Sullivan & Cogliano Office Staffing Services and that she was not entitled to benefits. Baldi testified that although not pleased about her job status, she continued to work as a temporary employee until her position was converted to permanent in June 2000. She remained in the permanent position until her lay-off in 2002. I credit her testimony.

26. In August 1998, while still employed by Respondent, Hexum opened a computer applications business, Massachusetts School of Information Technology ("Mass Info Tech"). Complainant began working for Hexum at Mass Info Tech in 1998.

27. Complainant testified that she went to work for Hexum at Mass Infotech at the end of August 1999, as a senior networking instructor and operations manager. Complainant testified that she is still employed at MassInfotech although she has not worked there since May 2001 when she fell down some stairs at work. She stated

that she currently collects workers compensation benefits as the result of that injury, although she testified that the benefits are "being disputed".

28. Hexum was extremely evasive when questioned about Complainant's employment at Mass Info Tech. He denied having any information about Complainant's employment at Mass Info Tech, including her dates of employment, and whether she was employed there at the time of the public hearing.

29. Gunnar Hexum was terminated by Sheila Chapman in October 1998 for what he described as "philosophy differences". By all accounts, Hexum did not agree with Chapman over many management issues and was not happy about the changes when Sullivan and Cogliano took over from MALS, Inc.

30. According to Chapman, Hexum was very disappointed with the takeover from MALS, Inc. by Sullivan and Cogliano. He disliked the transition and spoke of it openly. I credit this testimony.

31. Chapman identified Debbie Chace as a student of Mass Rehab who started as a temporary employee of Respondent who later became permanent. Chace's job application, dated June 20, 1997 stated that her reason for leaving her prior employer was "injury".

III. CONCLUSIONS OF LAW

General Laws c. 151B, s. 4 (16), provides that an employer may not "dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation". A handicapped person is one who has an impairment that substantially limits one or more major life activities, has a record of such impairment; or is regarded as having such impairment. M.G.L. c. 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. c. 151B sec. 1(16). There was no evidence offered by Complainant that she was unable to perform her duties or that she was unable to engage in any major life activity. However, Complainant may be regarded as a handicapped person because of her past record or medical evidence of a handicap. Such person may be entitled to protection under M.G.L. c.151B where an employer refuses to hire her because of a belief that hiring her will drive up insurance costs or out of an unfounded fear that the person will re-injure herself. Dartt v. BFI, Inc., 427 Mass 1(1998); Cook v. Rhode Island Dept. of Mental Health, Retardation and Hospitals, 10 F3d. 17(1st Cir. 1993); Gaughan v. Ellis Nursing Home, 19 MDLR 7 (1997); Drzewianoski v. Cook Builders Supply, 18 MDLR 201(1996); MCAD and Nemerowski v. Northeast Nursery, Inc., 97-BEM-2957 (Waxman,B.,Hearing Officer, 2/6/03). In order to prevail on her claim of handicap discrimination, Complainant must not only establish that she was a qualified handicapped person, she must show that she was rejected under circumstances that give rise to the inference that the decision was based on her perceived handicap or record of impairment. Thus if I were to find that Respondents in this case refused to hire Complainant on a permanent basis because of a belief that she had filed

previous workers' compensation claims, the Respondents would be liable for unlawful discrimination based on a perception of Complainant as handicapped. Dartt v. BFI, Inc., supra. However, there is no credible evidence that this in fact was the reason for failing to hire Complainant on a permanent basis.

Gunnar Hexum, Complainant's supervisor at the Taunton Center, testified that Cogliano and Chapman told him they would not hire Complainant because of her history of filing workers' compensation claims. However, I did not credit Hexum's testimony regarding these conversations. I found his testimony generally evasive and not credible. Hexum exhibited a bias against Respondents, with whom he had philosophical differences and by whom he had been fired. After leaving Respondent, Complainant worked for Gunnar Hexum at his company, Mass InfoTech. At the public hearing Hexum was extremely evasive about Complainant's employment at Mass InfoTech. Incredibly, he denied knowing whether Complainant was still employed by him at the time of the public hearing. I draw the inference that Hexum's reluctance to discuss this matter resulted from Complainant's having filed a worker's compensation claim against InfoTech.

Significantly, Herb Cogliano testified without contradiction that both temporary and permanent employees of his companies were insured under workers' compensation plans. Therefore, hiring Complainant as a temporary employee did not shield Respondent from liability for a potential workers compensation claim filed by Complainant and Respondent gained no advantage in this regard by offering Complainant only temporary employment. Further, Respondent's assertion that the Taunton location could not support another full-time instructor was borne out. The Taunton location closed the following year in the fall of 1998.

Complainant alleged in her complaint that Diane Baldi, who was not disabled, was hired by Respondent as a full-time permanent employee, however, this allegation is contradicted by the credible evidence. Baldi's employment records reflect that she completed applications for both temporary and permanent employment. Like Complainant, Baldi believed that she had been hired as a permanent employee, but after inquiring about benefits learned to her dismay that she had also been hired through Sullivan & Cogliano's temporary placement service. Thus there is no evidence that Baldi was treated differently from Complainant in this regard. I am not persuaded by Complainant's argument that

Respondent changed Baldi's status from permanent to temporary during the month of June 1998 in order to avoid the appearance that Complainant was the only full-time instructor hired through Respondent's temporary placement firm. It is far more plausible that Hexum made unrealistic promises of permanent positions to both Complainant and Baldi that he was unable to keep, and then tried to shift the blame onto Respondents. Finally, no one was hired to teach IT after Complainant left Respondent and the Taunton office was closed in the fall of 1998.

For the reasons stated above, I conclude that Respondent did not engage in unlawful discrimination and I hereby order that the complaint in this matter be dismissed.

IV. ORDER

For the reasons stated above, this matter is 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 23rd day of April, 2003.

JUDITH E. KAPLAN
Hearing Officer

