

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MELINDA SCHNEIDER

Complainants

v.

DOCKET NO. 98-SEM-0072

BERKSHIRE HUMANE SOCIETY,
Respondent.

Appearances: David Engle, Esq., for the Complainant
Patricia Rapinchuk, Esq., for the Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On January 28, 1998, Complainant Melinda Schneider filed a complaint with this Commission charging Respondent Berkshire Humane Society with unlawful discrimination in employment on the basis of handicap in violation of Massachusetts General Laws. (M.G.L.) Chapter 151B, section 4(16).

The Investigating Commissioner issued a finding of probable cause with respect to the allegations in the complaint. Attempts to conciliate the matter were unsuccessful and the case was certified for public hearing.

A public hearing was held before me on May 22, 23, 29 and June 13, 2001. I have duly considered the entire record before me in making the following findings. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented. To the extent that

testimony of the witnesses is not in accord with the findings herein, such testimony is not credited. To the extent the proposed findings of either party comport with my analysis and determination of the matter, they have been adopted.

II. FINDINGS OF FACT

1. Complainant Melinda Schneider resides in Pittsfield, Massachusetts.

2. Respondent Berkshire Humane Society is a non-profit organization located in Pittsfield, Massachusetts. Respondent maintains an animal shelter and provides care, treatment and placement of homeless animals. Respondent is an employer within the meaning of M.G.L. Chapter 151B, section 1(5).

3. Complainant was hired by Respondent in October 1994 as a part-time animal caregiver. In January 1995, Complainant accepted a full-time position at Respondent. Complainant's responsibilities included walking dogs, cleaning adoption kennels and other rooms at Respondent, and feeding and providing proper medication to the animals in the shelter. Complainant was also responsible for greeting members of the public and assisting with animal surrenders and adoptions.

4. At all times relevant to this matter, Respondent's Shelter Manager was John Perrault, who was responsible for hiring, disciplining and firing shelter employees. Complainant reported directly to Perrault, along with Shelter Supervisor Lisa Boschetti and animal caregivers Cheryl Truskowski and Linda Overbaugh.

5. Complainant received her first performance evaluation on November 8, 1995. This evaluation, which was written by Perrault, rated Complainant in ten categories. Complainant received an "exceeds expectations" rating in eight categories, a "meets

expectations" rating in one category, and a "needs improvement" rating in one category. Perrault testified that he considered this performance evaluation to be very good and that he was pleased with Complainant's job performance.

6. Boschetti testified that Complainant's job performance began to show signs of decline in 1996. Specifically, Boschetti testified that she had trouble supervising Complainant because Complainant seemed to disagree with her and challenge her authority on a regular basis. Boschetti also testified that Complainant was not performing her animal care job adequately and that she was neglecting some of her basic animal care tasks. I credit Boschetti's testimony that Complainant's performance deteriorated.

7. Complainant received her second performance evaluation in November of 1996. This evaluation, which again rated Complainant in ten categories, was written by Boschetti. Complainant received an "exceeds expectations" rating in three categories, a "meets expectations" rating in four categories, and a "needs improvement" rating in three categories. The three categories in which Complainant was found to need improvement were (1) cleaning the adoption kennels, holding room, euthanasia room and front office; (2) providing proper socialization and exercise for the shelter animals; and (3) keeping fenced-in exercise areas clean, sanitary and safe. Boschetti testified that keeping animal areas clean and socializing the animals were among the most important functions of shelter employees. This testimony was echoed by animal caregivers Truskowski and Overbaugh. Boschetti testified that while Complainant was deficient in performing certain of basic tasks, Complainant was also deficient in her attitude and manner of communication with Boschetti. Boschetti acknowledged that she did not note these deficiencies in the November 1996 evaluation. She testified that Complainant's

evaluation was the first she had ever performed in her new supervisory role (assumed earlier that year), and because the evaluation form did not provide any area or category in which to assess employee attitude and communication performance and/or problems, she did not do so. I credit Boschetti's testimony.

8. In early 1997, Perrault restructured job descriptions and responsibilities at Respondent and, in the process of doing so, created the position of Front Office Coordinator for Complainant. Complainant had a history of multiple sclerosis since before she became employed at Respondent and by late 1996 and early 1997, the symptoms of her condition, especially fatigue, began to interfere with her ability to do certain tasks, particularly those requiring physical exertion. Perrault testified that he created the new position in part to accommodate Complainant's medical condition and in part to respond to Complainant's often expressed preference for office work. Complainant testified that she openly discussed her multiple sclerosis and its symptoms, and that Respondent made accommodations for her illness when she experienced flare-ups of such symptoms. I credit Perrault's and Complainant's testimony about her assumption of the Front Office position.

9. The Front Office Coordinator position required Complainant to be in regular contact with the public, as she was the person who greeted individuals as they entered Respondent's shelter. In addition, Complainant's job responsibilities as Front Office Coordinator included assisting in morning cleaning of the shelter, walking dogs, receiving surrendered animals, and assisting with the euthanasia of animals. Complainant testified that she was never given any specific training with respect to the public relations aspects of her new position. I credit Complainant's testimony.

10. Perrault testified that he received numerous verbal complaints about Complainant from Boschetti and Truskowski during late 1996 and, in particular, early 1997. The complaints concerned Complainant's attitude and her inability to get along well with other shelter employees. Perrault testified that Complainant complained to him in turn about Truskowski and Boschetti. Perrault testified that at some point in January of 1997, he held a meeting with Complainant, Boschetti and Truskowski to discuss the problems occurring among Respondent's staff. Perrault emphasized to all three employees that it was critical for them to work together as a team. He also advised them that if they could not all get along, then they would have to be broken up. Complainant, Boschetti and Truskowski all testified that they understood Perrault to mean he would have to terminate someone's employment if the problems they were experiencing were not resolved. Perrault testified that he was unsure of the source of the problems among his staff at the time. Complainant testified that Perrault spoke to all three individuals about improving their relationships with each other, but he did not criticize particular aspects of Complainant's work performance at this time. Complainant testified that she believed her difficulties interacting with other members of the staff at Respondent stemmed from her multiple sclerosis symptoms, which caused her to be irritable in dealing with other people. I credit Complainant's testimony that Perrault did not single her out for special criticism at this time. I credit Complainant's, Boschetti's and Truskowski's testimony that they understood Perrault would terminate someone's employment if their work relationship did not improve.

11. Complainant testified that during the spring of 1997, she volunteered to serve as a member of Respondent's New Shelter Committee, whose purpose was to study the

feasibility of building a new shelter. The committee consisted of three members of Respondent's Board of Trustees, two community members, Perrault and Complainant. Perrault testified that as he began to attend committee meetings with Complainant, he observed several things about Complainant's conduct that gave him cause for concern. Specifically, he testified that during these meetings Complainant often interrupted him, contradicted him, and questioned information that he presented to the committee members. Perrault testified that he found Complainant's behavior toward him extremely inappropriate, especially since Board members and individuals from the community were present. Perrault testified that he believed Complainant displayed disrespect toward him, and that such disrespect was not only embarrassing, but it also undercut his credibility with the other committee members. Perrault testified that he found Complainant's conduct to be increasingly consistent with the complaints he had received from both Boschetti and Truskowski in the past, namely that Complainant was argumentative and confrontational. I credit his testimony about Complainant's behavior.

12. Boschetti testified that she saw no improvement in Complainant's attitude and work performance after the January 1997 meeting and that she continued to have difficulties supervising Complainant into and during the spring of 1997. Boschetti testified that Complainant openly challenged Boschetti's authority, questioned her decisions, and argued with her in the presence of Respondent's staff and volunteers. Boschetti testified that at some point during this time period her relationship with Complainant deteriorated to the point where Complainant would leave any room that Boschetti entered. Boschetti became very uncomfortable supervising Complainant for these reasons and she felt she could not criticize or comment upon Complainant's

performance without precipitating a major confrontation. Boschetti stated that even though she had worked for Respondent since the shelter was founded, she was contemplating looking for another job because of the tension generated by working with Complainant. I credit her testimony.

13. Truskowski testified that she had difficulties working with Complainant. She testified about a specific incident that occurred on February 12, 1997, when she was placed in charge of the shelter for a short period of time while Perrault and Boschetti were attending a seminar. Truskowski testified that when she approached Complainant about changing the timing of certain early morning tasks, Complainant became angry, left the shelter and slammed the door behind her. Truskowski was left to complete the morning tasks by herself, and when Complainant still had not returned when the shelter opened for business, Truskowski had to page her to return to the front office. Truskowski also testified about Complainant's general work performance, stating that Complainant did not pay enough attention to the basic tasks of cleaning animal areas and socializing the animals in the shelter's care. Truskowski testified because Complainant caused tension in the workplace, she generally tried to avoid being around Complainant and even considered leaving her job at Respondent because of Complainant. I credit her testimony.

14. In late June of 1997, the New Shelter Committee visited a shelter in Fall River and then went to lunch at a local restaurant with Fall River shelter personnel and the manager of another shelter the Committee had visited. Perrault and Lynn West, a member of Respondent's Board of Trustees and a member of the New Shelter Committee, testified that during this lunch they overheard certain remarks made by Complainant that

disturbed them. According to Perrault and West, Complainant told people at her table that a couple who adopted an animal at Respondent's shelter told her they never would have adopted an animal from the shelter when it was formerly run by the M.S.P.C.A. Complainant told the couple that Respondent was no better than the M.S.P.C.A. because it killed animals in its care every day. Perrault and West testified that they were upset Complainant had responded in this fashion to the couple's expression of support for how Respondent was running the shelter, and they were also upset that Complainant was sharing this anecdote with members of her lunch party. Perrault testified that after this incident he wondered about Complainant's ability to represent the shelter to other people, particularly members of the public, due to what he considered her inappropriately loud and angry manner. Complainant acknowledged having the conversation in Fall River and testified that West told her she was upset by Complainant's comments. West testified that when she spoke to Complainant about what she had said, Complainant was adamant that her comments had been appropriate. Complainant testified that Respondent had no policy preventing her from discussing shelter practices. I credit Perrault's and West's account of the Fall River incident.

15. Perrault and West testified that while Respondent performs euthanasia on a regular basis, they were distressed that Complainant had discussed this with the people at her lunch table. Perrault preferred his employees to educate the public about euthanasia as it relates to animal overpopulation, particularly in the context of the importance of spaying and neutering animals. West was disturbed that Complainant was ruining people's positive perception of the shelter. Both Perrault and West had worked at the shelter when it was run by the M.S.P.C.A. and they both believed that there were

significant differences in the way the two organizations had run the shelter. After the Committee returned from Fall River, West spoke to Perrault about the lunch incident and specifically expressed her concerns about allowing Complainant to perform a job in which she represented Respondent to the public.

16. Perrault testified that on June 25, 1997, he wrote a memorandum about the Fall River lunch incident. Perrault testified that pursuant to his regular practice, he wrote the memorandum by hand and then gave it to his secretary to type up. The typed memorandum is dated June 25, 1997. Perrault testified that he believed that although he wrote the memorandum on June 25, he believed his secretary did not get around to typing it up until a day or two later due to her schedule and workload. I credit his testimony.

17. Perrault testified that shortly after the Fall River incident he decided to conduct a formal disciplinary meeting with Complainant. Perrault acknowledged that in taking this step, which he had never taken before with any employee, he was departing from his usual practice of verbally pointing out performance problems as they occurred in an informal yet direct manner, and then hoping that matters would resolve themselves and improve. Perrault acknowledged that prior to this incident he had addressed Complainant's performance problems in this manner and had not formally confronted or disciplined Complainant. Perrault testified that he felt he had to conduct a formal disciplinary meeting with Complainant at this time in order to advise her of the numerous problems in her capacity as Front Office Coordinator. Perrault directed his secretary to type up a two sentence memorandum summarizing the matter he intended to discuss with Complainant and to include signature lines for both Complainant and himself.

18. On July 2, 1997, Perrault met with Complainant to conduct a formal

disciplinary meeting. During this meeting, Perrault discussed with Complainant the problems he had with her performance, to wit: the Fall River incident, her deficiencies in performing her role as Front Office Coordinator and promoting the shelter to the public, and the manner in which she questioned his decisions and judgment in public, particularly with respect to the New Shelter Committee. Perrault also advised Complainant that he and certain of Respondent's Board members were questioning whether Complainant "was the person who should continue" to greet the public and evaluate adoptions. In addition, Perrault notified Complainant during the meeting that he was thinking about both removing her from the front office position and asking her to resign from the New Shelter Committee. Complainant signed a memorandum about the July 2 meeting in which Perrault had written: "Today we discussed Melinda's deteriorating attitude toward the shelter manager and her opinions in public regarding the operation of the shelter." Complainant handwrote on the memorandum that she respected Perrault, that she understood his concerns, and that she was confident she could address the situation successfully.

19. Complainant also wrote on the July 2 acknowledgement: "It had helped today to air some of my concerns and difficulties." In response to Complainant's voicing of her concerns during the meeting, Perrault wrote another memorandum, dated July 3, 1997, in which he outlined his frustration with what he perceived as Complainant's shifting the blame for her own actions to Boschetti and Truskowski. Perrault wrote: "After discussing with Melinda her inappropriate (sic) behavior while we were away and at committee meetings, she voiced her comments regarding Lisa and Cheryl. These comments were Melinda's thinking that Lisa and Cheryl were once again out to get her,

that they don't like her. It was obvious at this point that Melinda cannot work with either Cheryl or Lisa." Perrault testified that his interaction with Complainant during the July 2 meeting convinced him that Complainant was the reason for the tension and lack of teamwork among his staff that had persisted since January of 1997. I credit Perrault's testimony.

20. Complainant testified that while she believed the July 2 meeting was constructive, she was nevertheless very concerned about some of the comments Perrault had made about her behavior, as she did not perceive that her behavior was problematic. Complainant stated that Perrault's comments prompted her to seek an evaluation by a psychiatrist, Dr. Stuart Bartle, at the Berkshire Mental Health Center on July 3, 1997. At the conclusion of the evaluation, Dr. Bartle informed Complainant that she was suffering from bipolar disorder. He discussed with her the specifics of her disorder and prescribed medication, which Complainant testified she began taking on that or the following day. I credit Complainant's testimony.

21. On July 3, 1997, Complainant told Perrault about Dr. Bartle's diagnosis. Complainant testified that she told Perrault that she was taking medication for the disorder and indicated that the medical treatment she was seeking would ensure that her disorder would not interfere with her ability to perform her job. Perrault testified, and Complainant acknowledged, that Complainant did not explain to Perrault any specific symptoms of bipolar disorder and did not indicate that the disorder affected her ability to perform her job in any way. Complainant asked Perrault not to share the news of her diagnosis with any of Respondent's staff members. Perrault agreed to Complainant's request, but he advised her that he believed he should convey the information to Robert

Fuster, Respondent's founder and Chairperson of Respondent's Board of Directors.

Fuster is also a practicing attorney and had previously represented Complainant in divorce proceedings. Complainant agreed that Perrault could speak with Fuster about what she had told him.

22. Perrault testified that because he knew nothing about bipolar disorder, he called the Berkshire Mental Health Center in early July to ask some general questions about the illness. Perrault did not identify Complainant in any way during this conversation. I credit his testimony.

23. At some point in early July 1997, Boschetti advised Perrault that Overbaugh had become very upset after assisting in an owner-present euthanasia performed by Complainant. Overbaugh testified that the euthanasia was extremely difficult because after Complainant was unable to administer the euthanasia drug into two of the dog's veins, she injected a device called an "IP stick" into the dog's stomach, causing a slow and painful death. Overbaugh testified that an IP stick is supposed to be used only with cats and puppies, but not dogs, and if it is used on an adult dog then the animal should be sedated first in order to spare it undue pain. Overbaugh testified that the owners became extremely upset with the way the euthanasia was performed and told both Overbaugh and Complainant that they hoped they never saw them again. I credit Overbaugh's testimony.

24. Overbaugh testified that after Complainant could not access a vein in the first instance, she should have called in a senior staff member to assist with the procedure. Boschetti also testified that Complainant should have sought assistance and stated that she, Boschetti, was in the building at the time and would have been available to assist.

Overbaugh testified that she told Boschetti about the incident because this was in fact the second time that Complainant had performed an owner-present euthanasia that caused great stress to both the animal and its owners. After the second incident, in which she believed Complainant used extremely poor judgment, Overbaugh decided to tell Boschetti, her supervisor, that she no longer wanted to assist Complainant with euthanasia procedures. I credit Overbaugh's testimony.

25. Upon learning of the incident from Boschetti, Perrault wrote a memorandum stating: "Linda told Lisa that she was very upset and that she no longer wanted to do OR Presents (sic) with Melinda. Melinda IP'd an adult chow with an owner present when she never even considered pre-mix. Comments: once again Melinda showed very poor judgment. Melinda is hurting us as well as the animals in our care." This memorandum is dated July 1997. I credit Perrault's testimony that he wrote this memorandum after he spoke with Boschetti about the euthanasia incident.

26. On July 11, 1997, Perrault wrote a memorandum about an incident reported to him by Boschetti. Boschetti told him that when Complainant saw Boschetti during a horseback riding lesson, Complainant became very upset and began to cry. Boschetti complained to Perrault that she had trouble supervising an employee who became upset at seeing her outside of work. Perrault wrote in the memorandum: "Lisa asked for my advice on how she could work with and manage an employee who cannot even see her outside of work without a scene happening. I, at this time, told Lisa I have noticed a severe decline in Melinda's work performance and the difficult time working with her on the new shelter committee. I agreed with Lisa that we have a problem. Comments: For six months the staff has not been working as a team, and as I told them six months ago, if

they cannot function as a team then I will break up the team. Melinda cannot work well with Lisa & Cheryl. Very paranoid for no reason. Melinda cannot take criticism from Lisa! (MAJOR PROBLEM)!" I credit Perrault's testimony that he wrote this memorandum after he spoke with Boschetti .

27. On July 16, 1997, Perrault wrote a memorandum about Complainant's misconduct. On that morning, Complainant attended a Police Dog demonstration and Perrault covered the Front Office Coordinator position during her absence. After the demonstration was over, Perrault observed Complainant spend at least thirty minutes outside the shelter talking to a former volunteer and then enter the building only to announce that she was leaving for lunch. When Complainant returned from lunch, Perrault observed that she immediately went into the euthanasia room to make a phone call, that Perrault presumed was personal in nature, that lasted at least forty minutes. Perrault noted that since Complainant never checked in to resume her Front Office Coordinator position, her behavior was consistent with Boschetti's past reports to him that Complainant often shirked her job responsibilities. He wrote in his memorandum: "I noticed for myself, what Lisa had been telling me. ...I saw this first hand because instead of doing my own job, I spent the entire day doing Melinda's." I credit Perrault's testimony that he wrote this memorandum after he observed Complainant's behavior on July 16.

28. Also on July 16, 1997, Perrault received a complaint from a member of Respondent's Board of Directors and Foster Care Coordinator, Judith Embry, concerning an incident that had occurred between Complainant and one of Respondent's long-term volunteers, Doreen Coones. Coones regularly served as a foster parent for animals who

were too young to be kept in a shelter environment, and at some point in mid-July, she returned to the shelter for adoption of a litter of kittens that she had been fostering in her home. During a telephone call after the incident, Coones told Embry that when she returned the kittens, Complainant, who was working at the front desk, criticized and became verbally abusive toward her in the presence of other volunteers and staff members. Coones told Embry that she believed there had been some kind of miscommunication between Complainant and herself, and she did not believe Complainant should have treated her in such a disrespectful and demeaning manner. Coones also told Embry that she did not feel that she should continue volunteering at the shelter because, based upon Complainant's behavior toward her that day, she did not feel that Respondent valued her contribution. Embry apologized to Coones on behalf of Respondent and convinced her to stay on as a volunteer. She then related the contents of Coones' telephone call to Perrault. After speaking with Embry, Perrault called Coones himself to apologize about the incident. Perrault then wrote a memorandum about the incident dated July 16, 1997. Perrault wrote: "When I spoke to Doreen about the situation, Doreen confirmed that Melinda was both rude and impolite to her. It was not Doreen's fault that the shelter had a communication problem with Judy Embry and the foster care program. Melinda should not have taken it upon herself to place the blame on Doreen. Doreen then stated to me that she could not believe that she was treated this way when she was just trying to help the shelter."

29. Perrault testified that after the July 16 Coones incident he reached the conclusion that Complainant could not be trusted to work as Front Office Coordinator any longer because she could not interact properly with volunteers, customers and fellow

staff members.

30. On July 18, 1997, Perrault met with Complainant to discuss the Coones incident. Perrault then advised Complainant to take a few days off from work. Perrault testified that he did not terminate Complainant at this time because he wanted to speak with Fuster first about how to conduct the termination. After Perrault spoke with Fuster, he wrote a memorandum dated July 18, 1997, which stated: "I spoke to Melinda today about the Doreen Coones situation. Melinda was totally surprised by the situation, she did not admit (or maybe didn't realize) the way she had treated Doreen. I then gave Melinda the next day off and told her she needs to take some time off. If she needs to take some vacation time she should take it. When she didn't volunteer to take time off, I gave her a three day weekend. Comments: Called Robert and explained that Melinda is not someone who I trust out front dealing with staff, the public and volunteers. I explained the many reasons why I will probably not bring her back." Complainant testified that she was not shown this memorandum until she saw it in her personnel file at the time of her termination. Complainant acknowledged in her testimony that she had a "negative interaction" with Coones.

31. Overbaugh testified that at some point while Complainant was taking a few days off from work, Complainant called Overbaugh at home. Overbaugh testified that Complainant confided that she was feeling very depressed due to personal problems. Overbaugh testified Complainant then said she had heard about a veterinarian who had killed himself by using euthanasia drugs and that she, Complainant, felt she should take her dogs to Respondent's shelter, euthanize them, and then kill herself by using the same drugs. Overbaugh testified that after this conversation she became extremely concerned

because Complainant had a key to the shelter and access to the drugs of which she had spoken. Overbaugh testified she went to work early the following morning, spoke to Boschetti about the matter, and then spoke to Perrault. I credit Overbaugh's testimony.

32. Perrault testified that he became very concerned about what Overbaugh had told him and, out of concern for both Complainant and Respondent's liability, he immediately changed the lock on the drug cabinet and the code for Respondent's alarm system. Perrault testified that he had already decided to terminate Complainant, but Complainant's talk of using the shelter for suicide cemented his decision. I credit his testimony.

33. Fuster testified that after Perrault called and told him about Complainant's conversation with Overbaugh, he completely agreed with Perrault's decision to terminate Complainant. Fuster explained that prior to the telephone call, he had been hoping that Perrault might change his mind about terminating Complainant, even though Perrault had been telling him about Complainant's work performance problems since late 1996. Fuster testified that Respondent could not employ anyone who had expressed an intention to misuse the shelter's euthanasia drugs. I credit Fuster's testimony.

34. Fuster testified that since he already had an appointment with Complainant regarding her divorce scheduled for July 24, 1997, he suggested to Perrault that they use this time to terminate Complainant's employment. Perrault agreed. Neither Perrault or Fuster called Complainant to let her know that the purpose of her July 24 meeting with Fuster had changed.

35. Perrault testified that on July 22, 1997, he placed a second call to the Berkshire Mental Health Center to inquire about the best way to go about terminating an

employee with bipolar disorder. Perrault did not identify Complainant in any way. Perrault testified that he was concerned about the effect the termination would have on Complainant, especially in light of her recent discussion of suicidal intentions. Perrault testified that an individual from the Berkshire Mental Health Center advised him to be direct in his communications with Complainant and provided him with the name of a counselor to pass on to Complainant.

36. On July 24, 1997, Perrault met with Fuster in Fuster's office prior to Complainant's arrival. At this time, Fuster asked Perrault to consider placing Complainant on a paid medical leave of absence rather than terminating her employment during the upcoming meeting. Fuster testified that he made this suggestion because he knew Complainant was experiencing financial difficulties and he wanted her to be able to receive income and insurance benefits for a longer period of time. Fuster also told Perrault that placing Complainant on a medical leave would "soften the blow" of the termination when it occurred as planned in September. Perrault agreed to Fuster's suggestion. Perrault testified that he and Fuster planned to terminate Complainant's employment as soon as her medical leave was completed. I credit this testimony.

37. Complainant testified that when she arrived for her appointment on July 24, 1997, she saw Perrault sitting in Fuster's office. Fuster asked Complainant in private for her permission to invite Perrault to the meeting to discuss her employment. Complainant agreed. Complainant testified that she learned during this meeting that she was being placed on paid medical leave until September 1997. Fuster testified that Complainant asked several times if she was being fired, and he responded that she was not. Fuster acknowledged that his response was not truthful, explaining that he did not want

Complainant to believe that she was being terminated out of concern for her emotional state and recent thoughts of suicide. Fuster testified that they did discuss Complainant's performance problems at work and that Perrault specifically made clear her job was "not secure" and there was "no guarantee" that she could come back to work at Respondent after her leave. Perrault testified that he told Complainant that he and Fuster would have to see how the shelter ran in her absence. Complainant turned over her keys to the shelter at the conclusion of the meeting.

38. Perrault and Fuster testified that at the meeting Complainant did not tell them or indicate in any way that her work performance problems were related to her diagnosis of bipolar disorder. Perrault and Fuster also testified that Complainant never asked any questions of Perrault as her manager and never asked for any accommodation or changes in her job responsibilities. I credit their testimony.

39. On August 28, 1997, Complainant called Respondent and asked if she could come in to the shelter to "test the waters." Perrault advised Complainant to come in and meet with him on September 5.

40. On September 5, 1997, Complainant met with Perrault in his office and was told that her employment was being terminated. Perrault testified that he reminded Complainant of the performance problems she had exhibited and of the warning he had given to staff members about having to terminate someone if the team could not get along. Perrault advised Complainant she would receive her full pay through the month of September. Perrault testified that Complainant was calm during the meeting and did not appear to be surprised by the termination decision. Complainant testified that she cried during the meeting with Perrault. Complainant testified that she asked Perrault if she

could work on a part-time basis, but that this request was denied. Perrault acknowledged in his testimony that Complainant may have asked him for a part-time position at this time. He stated that he did not believe the problems created by Complainant in the workplace would be resolved by allowing Complainant to work part-time. I credit Perrault's testimony.

41. Complainant acknowledged in her testimony that there was no discussion of her bipolar disorder diagnosis during her September 5 meeting with Perrault.

III. CONCLUSIONS OF LAW

Massachusetts General Laws Chapter 151B, section 4(16) provides that it is unlawful to discriminate in employment on the basis of handicap. Complainant has alleged that Respondent, upon learning that she had been diagnosed with bipolar disorder, terminated her employment and therefore discriminated against her because of her handicap.

In order to establish a prima facies case, Complainant must show that (1) she is handicapped within the meaning of the statute; (2) she was qualified to perform the essential functions of her job with or without a reasonable accommodation; (3) she was terminated by her employer; and (4) the position remained open and the employer sought to fill it. Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998). Once Complainant establishes a prima facie case of discrimination, Respondent may rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for its action. The burden then shifts to Complainant to show by a preponderance of the evidence that Respondent's articulated reason is a pretext for discrimination

As a threshold issue, Complainant must prove that she is a “handicapped person” within the meaning of M.G.L. Chapter 151B, section 1(17). I find that Complainant has established that her bipolar disorder is a handicap within the meaning of section 1(17), as she demonstrated that bipolar disorder “substantially limits one or more major life activities,” such as concentrating, thinking, and interacting with others. Complainant provided ample testimony that she takes medication for her disorder and receives psychiatric and other medical treatment on a monthly basis.

Complainant has not persuaded me, however, that she is a qualified handicapped person. Pursuant to M.G.L. Chapter 151B, section 1(16), 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 her handicap. The evidence in this case demonstrates that Complainant was not adequately performing the essential functions of her job both prior to the time when she announced that had been diagnosed with bipolar disorder on July 2, 1997 and thereafter. Since late 1996, Complainant had exhibited difficulty in getting along with other staff members, unwillingness to accept direction and supervision from her supervisor, and a tendency to shirk certain basic job tasks.

Boschetti, Truskowski and Overbaugh all testified credibly about Complainant’s inability to function as a team member, as well as her failure to complete her job tasks in many instances and her refusal to take direction from others. Both Boschetti and Truskowski testified that they considered leaving their employ at Respondent specifically because of Complainant and the tension she generated at work. Complainant also challenged and embarrassed Respondent’s manager at New Shelter Committee meetings and portrayed

Respondent in a negative light in public on at least one occasion. Perrault provided credible testimony that Complainant constantly undercut his authority and credibility at meetings in front of Board members and community members, and that she was regularly argumentative, confrontational and disrespectful. While Complainant makes a legitimate point by noting that the two formal performance evaluations she received in November 1995 and November 1996 were essentially positive, the fact remains that her ratings declined between the two evaluation periods, and credible, consistent testimony indicated that the deficiencies delineated in the 1996 evaluation persisted into 1997. That is, Boschetti, Truskowski and Overbaugh all testified that Complainant failed to keep shelter areas clean and to socialize animals properly as required by the responsibilities of her position.

All of the afore-described behavior occurred before Complainant was diagnosed with and revealed a diagnosis for bipolar disorder. Even though Complainant was diagnosed with bipolar disorder, she cannot rely on her protected status to justify unprofessional behavior. See Covino v. Town of Framingham Board of Health, 19 MDLR 67 (1997). See also Abrams v. Paddington's Place et al., MDLR (2004) (Complainant deemed not to be a qualified handicapped person where she was not adequately performing child care duties prior to announcing diagnosis of depression); Covino, supra, at 172 ("An employer is not prohibited from taking adverse action against an employee where the employee's misconduct is the motivating factor and not any handicap to which the conduct may be related."). An employer is entitled to establish standards for employee performance that should not be second-guessed by the Commission. Smith College v. MCAD, 390 Mass 221 (1978). A handicapped individual

cannot be deemed “otherwise qualified” if she commits misconduct that would disqualify an individual who did not fall under the protection of Chapter 151B. See also EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997) (employee with depression held not qualified to perform essential functions of team leader job for individuals with severe mental disabilities where employee had twice attempted suicide by overdose); Motzkin v. Trustees of Boston University, 983 F. Supp. 983 (D. Mass. 1996) (professor with psychological disorder held not qualified to perform essential functions of job because of inability to recognize and conform to boundaries of conduct that would appropriately separate professor and students). Complainant has not produced any evidence that her work performance deficiencies were related to her bipolar disorder. Under such circumstances, Respondent was not required to lower its standards of qualifying conduct once it learned of Complainant’s handicap where it would not have done so for an employee without such handicap. “[A] handicapped person who engages in conduct significantly inimical to the interests of his employer and in violation of the employer’s rules is not an ‘otherwise qualified’ person within the meaning of [the governing statute].” Garrity v. United Airlines, Inc., 421 Mass. 55, 60 (1995). In this matter, Complainant engaged in such “inimical” conduct when she was disrespectful toward her co-workers, supervisor and manager to the point of disruption and causing others to consider quitting their jobs, and when she disparaged her employer in public settings.

Because Complainant has not established that she is a qualified handicapped person, she cannot make out a prima facie case of handicap discrimination in this matter. Even if Complainant could establish that she were a qualified handicapped person, however, I find that Respondent has sustained its burden of demonstrating that its reasons

for terminating Complainant's employment were legitimate, non-discriminatory, and supported by credible evidence.

I am persuaded that on July 18, 1997, Perrault made a legitimate decision to terminate Complainant's employment based upon a history of work performance problems that were no longer tolerable. By this time, Perrault had concluded that Complainant's attitude, inability to function as a team player, and deteriorating work ethic were causing morale problems among the staff at large. As stated above, these work problems all predated Complainant's diagnosis of bipolar disorder. Perrault also concluded that Complainant's conduct during New Shelter Committee meetings, which undermined and embarrassed him, and her conduct at the Fall River lunch were not acceptable. This conduct continued and became exacerbated by the complaints Perrault received after July 2 about two instances of owner-present euthanasia during which Complainant inflicted physical and emotional pain to dogs and their owners, further complaints from his staff about Complainant, complaints from Board members about Complainant, his own personal observations of Complainant shirking her job responsibilities, and an instance of verbal abuse toward a long-term volunteer which prompted that volunteer to consider resigning. By July 18, Perrault regarded Complainant as a serious liability to Respondent because she was not doing any aspect of her job properly and because she represented the shelter poorly to the public, thereby damaging its reputation in the community.

I am persuaded that Perrault's reasons were non-discriminatory because Complainant never told him that any of her work problems were in any way related to her diagnosis of bipolar disorder. I believe that Perrault based his decision to terminate

Complainant's employment based on six months of deficient performance and unacceptable conduct that occurred before the July 3 disclosure of Complainant's diagnosis, and that Complainant was already on the path to termination before the post-July 3 events occurred, as indicated by Perrault's extreme displeasure with Complainant's behavior in Fall River for which he instituted his first formal disciplinary proceeding on July 2. I believe that Complainant's conduct toward Coones was simply the last straw, the culmination of a long series of transgressions committed by Complainant at Respondent during the last eight months of her employment. Further, while Perrault was the ultimate decisionmaker, he was not the only observer of Complainant's deficiencies: Complainant's work problems and misconduct were observed and corroborated by Boschetti, Truskowski, Overbaugh, West, Embry and Coones, all of whom provided credible testimony in this proceeding. Since Perrault was the only one of these individuals who was aware of Complainant's diagnosis, it is impossible to assign any discriminatory motive to the other six witnesses. Under these circumstances, where Complainant's behavior after July 3 was consistent with her behavior prior to July 3, where she never ascribed her behavior problems to bipolar disorder, and where her behavior was witnessed, corroborated, and complained about by numerous other witnesses, namely other staff members, Board members and volunteers, who were totally unaware of her handicap, I cannot reasonably conclude that Perrault's decision to terminate Complainant's employment was motivated by discriminatory animus. Moreover, even if Complainant's work problems and misconduct did not justify termination, which I conclude they clearly did, Complainant's expression of her possible intent to commit suicide at the shelter by using Respondent's euthanasia drugs was

legitimate, non-discriminatory reason enough to support Respondent's action.

I do not find credible Complainant's claim of pretext in this matter. Complainant attempted to undermine the credibility of the memoranda Perrault wrote and placed in Complainant's personnel file by stating that they were not all written contemporaneously with the events described and they were not shown to Complainant. However, I find credible Perrault's testimony that he adhered to his usual practice of handwriting memoranda and then having his secretary type them up, possibly a day or two after the events occurred, depending on her workload. Moreover, I find credible Perrault's testimony regarding the memoranda and events described therein, as this testimony was credibly corroborated by numerous other witnesses and, most significantly, never meaningfully countered by Complainant. That is, Complainant failed to produce evidence that the content and substance of the memoranda, the incidents of misconduct and inappropriate behavior, did not occur as described, and therefore her claim that the series of events leading to her termination was "manufactured" is unpersuasive. I am also not persuaded that the fact Complainant was not shown all of the memoranda demonstrated pretext. Complainant cites no policy of Respondent that required memoranda to be shown to employees, and the fact that Perrault had Complainant sign a note memorializing their July 2, 1997 disciplinary meeting did not necessarily dictate that he follow this practice with respect to every ensuing incident. Complainant's claim in this respect does nothing to prove that Respondent's articulated reasons for terminating her employment, namely her inappropriate conduct and deficient work performance, were not the real reasons for her termination. Complainant has not convinced me that Respondent's justification for her termination was motivated by discriminatory animus.

Complainant also alleges in this matter that Respondent failed to provide her with a reasonable accommodation. M.G.L. Chapter 151 B, section 4(16) requires employers to make reasonable efforts to provide accommodations for qualified handicapped employees. As stated supra, I find that Complainant is not a qualified handicapped individual. However, even were I to find otherwise, which I do not, I conclude that Respondent did not violate its statutory duty to accommodate Complainant's disability in this matter.

An employee seeking an accommodation bears the initial responsibility of informing her employer that an accommodation is in fact needed. It is at this point that the employer's concomitant responsibility to engage in the interactive process regarding possible accommodations is triggered. "It is the employee's responsibility to request an accommodation, unless the employer knew or should have known of the Complainant's need for accommodation." Parenteau v. Springfield Girls' Club Family Center, Inc., MDLR (2004); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap. In this matter, however, Complainant never requested an accommodation for her bipolar disorder. I credit Perrault's testimony that while Complainant disclosed her diagnosis to him on July 3, she did not specify the need for or make a request for any accommodation. Complainant corroborated Perrault's testimony, acknowledging that she did not share any of the specifics of her disorder with Perrault at this meeting and did not indicate that the disorder interfered in any way with her ability to perform her job. In fact, Complainant told Perrault that she was taking medication for her disorder and seeing a psychiatrist to ensure that her symptoms did not prevent her from performing her job. The only request

Complainant made of Perrault at this meeting was that Perrault not inform her coworkers of her diagnosis. In addition, at no time following their July 3 meeting did Complainant ever indicate that her bipolar disorder was linked in any way to her problems at work and/or that she needed an accommodation. Where Complainant did not request an accommodation, Respondent did not violate its duty to provide one, especially where Complainant may have possessed information about her disorder that Respondent did not have. Beele v. Donahue & Donahue, P.C., 20 MDLR 5, 9-10. “[A]n employer does not have the responsibility to go in search of information, such as medical advice, that is uniquely in the hands of the employee.” Beele at 10, quoting McAlpine v. National Semiconductor Corp. 921 F. Supp. 1518, 1525 (N.D. Tex. 1996). I note that where Complainant did disclose her handicap of multiple sclerosis and associated symptoms, Respondent had a long and credible history of accommodating her particular needs, a fact readily attested to by Complainant throughout her testimony. While not dispositive, this fact certainly belies Complainant’s claim that Respondent violated its duty to accommodate in this matter.

Complainant claims that even if she did not request an accommodation during the months of July and August of 1997, she did request one at her termination meeting in September when she asked to return to work on a part-time basis. However, by Complainant’s own admission, she never mentioned her bipolar disorder during this meeting and never linked her handicap in any way to the reasons for her termination. Under these circumstances, I find that Perrault had no reason whatsoever to perceive Complainant’s request for part-time work as an accommodation and that, in fact, Complainant’s request for part-time work was not termed as a request for an

accommodation at all. Complainant requested no accommodation to her handicap and there is no evidence of any accommodation that would have allowed her to do her job in an acceptable fashion.

Complainant's claim that Respondent did not accommodate her handicap fails, and I find that Respondent did not violate M.G.L. Chapter 151B in this matter.

IV. ORDER

Based on the foregoing, it is hereby ordered that the Complaint be dismissed.

This decision represents the final decision of the Hearing Commissioner. Any party aggrieved by the decision may file a notice of appeal with the Full Commission within ten (10) days of receipt of this decision and a petition for review within thirty (30) days of receipt.

So Ordered this 31st day of May, 2005

Cynthia A. Tucker
Commissioner