

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MITZI MORAN AND  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
Complainants

Against

Docket No. 05 BEM 00674

DAVID'S GYM and  
MAXINE GONSALVES,  
Respondents

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Appearances: Simone Liebman, Esq. for Complainant  
Maxine Gonsalves, pro se

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 8, 2005, Mitzi Moran ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that Respondents Maxine Gonsalves and David's Gym discriminated against her on the basis of disability in violation of G. L. c. 151B, section 4 (16).

The MCAD issued a probable cause finding and certified the case for public hearing on April 23, 2007. A public hearing was held on August 16 and 17, 2007.

Complainant testified on her own behalf as did her husband, David Moran, Heidi Champagne, Cathy Weidaas, and Jocelyn French. Maxine Gonsalves and Ruth Sherman

testified for Respondents. The Complainant submitted 14 exhibits.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. The Complainant resides at 23 Coach House Lane, South Dennis, MA 02660. She was employed as a day care attendant at David's Gym, South Dennis, MA from September of 2002 until her termination in January of 2005. Complainant's primary responsibility was to care for children at the gym while their parents used the gym, but she also served, on occasion, as a desk attendant.
2. Respondent, David's Gym, is an exercise gym located at 50 Route 134, Dennis, MA. David's Gym employs more than six employees.
3. Respondent, Maxine Gonsalves, is the owner of David's Gym. Gonsalves was rarely at David's Gym during the time that Complainant worked there.
4. Complainant worked at the gym in the mornings. According to Complainant's personnel records, her schedule ranged from a minimum of 3.25 hours per week to a maximum of 19 hours per week. Complainant's Exhibit 6.
5. Complainant has used a wheelchair since 1996 due to a condition known as Post Polio Syndrome. Post Polio Syndrome is a progressive condition. During the time Complainant worked at David's Gym, she had arthritis, weakness of her arms, scoliosis, paralysis in her right leg, and partial feeling in her left leg. Complainant cannot walk or run but can transfer and pivot on her left leg. Complainant has some ability to care for herself but requires assistance in

dressing and bathing. At the commencement of her employment in 2002, Complainant could lift ten pounds, but as of the date of public hearing, Complainant could not lift more than three pounds. Complainant's Exhibit 12. Between the time that Complainant's employment with Respondent ended in January of 2005 and the date of public hearing in August of 2006, Complainant experienced increasing fatigue on a daily basis.

6. One of the symptoms of Post Polio Syndrome is intolerance to cold temperatures. Complainant's Exhibit 12. In cold weather, Complainant's legs swell, become discolored, and become cold and painful. If the weather falls below twenty degrees Fahrenheit, Complainant has difficulty commuting to work.
7. Complainant has taken courses in early childhood education and has worked in numerous child care positions. Her friend, Heidi Champagne, testified that Complainant is "amazing" in taking care of Champagne's own children and "excellent" working with other children at their church.
8. Complainant was interviewed for her job at David's Gym by Ruth Sherman, the gym manager. Complainant told Sherman that snow and extremely cold weather would interfere with her ability to come to work. Sherman conferred with Gonsalves about Complainant's limitations prior to hiring her. Sherman admitted that Complainant occasionally missed work in the winter due to cold weather.
9. Throughout the two and one-half years that Complainant was employed by Respondents, Sherman hired replacements for Complainant from a list of

individuals whom she called as substitutes for Complainant, filled in for Complainant herself, or had Complainant secure a substitute from the list. Sherman estimated that there were approximately nine individuals on the substitute list as of January of 2005, but there was no guarantee that any of the substitutes would be available when called.

10. At the time of her hire, Complainant earned \$7.00 per hour with no benefits. When Complainant learned that another employee was being paid \$8.00 per hour, she asked for and received a raise to \$8.00 per hour.
11. During part of the time that Complainant was employed by David's Gym, she had difficulty accessing the room in which the time clock was located in order to punch in and out. Complainant had to write her hours down by hand.
12. Complainant testified that she liked working at the gym. She did many arts and crafts projects with the children for whom she provided babysitting services at the gym's day care center. Sherman testified that there were gym members who commented on how well Complainant worked with children. Sherman acknowledged that Complainant loves children and was responsible in caring for them.
13. On or around September of 2004, Complainant offered day care services in her home to one or more gym members. Sherman instructed Complainant not to do so. I credit Complainant's testimony that she never made such an offer again.
14. In the winter of 2004/2005, there was a great deal of snow in Dennis, MA. At times when there were advanced predictions of snow storms on Cape Cod, Complainant notified Sherman ahead of time that she would not be able to come

to work. At other times, Complainant notified Sherman at approximately 6:30 a.m. on the morning of an absence that she would not be able to come to work. Complainant estimated that she was out of work “quite a bit” around Christmas of 2004 and that she missed three days in January of 2005 prior to being terminated.

15. Complainant testified credibly that on January 13, 2005, Sherman called her to say that she was being terminated because Gonsalves wanted someone who was more reliable. Complainant’s Exhibits 8, 9, and 10. Complainant testified credibly that no other reasons for her termination were offered at that time.
16. Complainant filed for unemployment compensation but there is no evidence in the record about the amount of unemployment compensation, if any, Complainant received as a result of being terminated from David’s Gym.
17. Complainant testified credibly that a representative of the Department of Unemployment Assistance told her that David’s Gym gave as reasons for termination the fact that she had offered babysitting services in her home to gym patrons and had encouraged gym patrons to write to Gonsalves in order to complain about the cold temperature in the gym’s day care room.
18. Complainant acknowledged at the public hearing that she felt the day care room was too cold. She testified that she had written to Gonsalves about the temperature in the day care room, had encouraged parents to write to Gonsalves about it, and had suggested to parents that they bring blankets for their children.
19. Complainant and advocates at the Cape Organization for the Rights of the Disabled (CORD) attempted, unsuccessfully, to communicate with Gonsalves

about why Complainant had been terminated. Gonsalves testified that due to emotional problems and depression, she did not respond.

20. At the public hearing, Sherman raised, for the first time, a concern about Complainant selling crafts at the gym during a two-month period prior to Christmas of 2004. Complainant testified credibly that Sherman had told her she, “really shouldn’t do it” but that it didn’t bother her [Sherman] “as long as Gonsalves did not know about it.”
21. Sherman testified that another reason why Complainant was terminated was that a gym member had quit the gym because Complainant had told her to dress her child more warmly for the day care room. Sherman also alleged that Complainant had encouraged the member to threaten to quit the gym if the temperature in the day care room wasn’t raised and had suggested that the member take her child to Complainant’s house for child care rather than to the gym. Sherman did not mention these matters in a written statement she prepared in or around April of 2007 concerning why Complainant was terminated, nor could Sherman identify the gym member by name or by physical description at the public hearing. I do not credit Sherman’s testimony that Complainant’s allegedly inappropriate interaction with a gym member was a reason for termination.
22. Sherman testified that in November and December of 2004, there were “a lot” of people who were on a list to provide fill-in day care when Complainant could not come to work, but there was no guarantee that they would agree to fill in if called.

23. Gonsalves admitted that other employees failed to come to work on a reliable basis, talked excessively on cell phones, and read magazines or watched TV when they were supposed to be working. Gonsalves did not terminate any of these employees.
24. Sherman testified that the only other individual fired by Respondents was a male employee who allegedly stole money from the gym.
25. Complainant never received a written or oral warning about her failure to come to work on cold and/or snowy days.
26. Complainant was upset and angry about losing her job in January of 2005. Her termination adversely affected her self-esteem. The loss of her job caused stress in her marriage. Complainant testified that she began bickering with her husband after losing her job and used him as a “battering ram.” Complainant’s husband testified that Complainant became less communicative. Complainant became socially withdrawn, stopped going out to dinner with her husband, and stopped socializing with friends. Complainant testified that after losing her job, “everything just shut down.” Complainant’s participation in a church group called “Circle of Friends” decreased after she lost her job.
27. The evening that she lost her job, Complainant called her friend, Cathy Weidhaus, to tell her what happened. Weidhaus testified that Complainant sounded “devastated” about losing her job and remained sad for over a year. Another friend, Heidi Champagne, testified that Complainant appeared depressed and angry after losing her job. According to Champagne, Complainant’s personal appearance deteriorated, she withdrew socially, was not

her “perky self,” and did not have as much energy as she previously displayed. Vocational Rehabilitation Advocate Jocelyn French testified that Complainant was “emotionally beside herself” after she lost her job. According to French, Complainant said that she felt worthless after she was fired from the gym and appeared upset for close to a year. Complainant cried when she talked to friends about losing her job and brought the subject up regularly.

28. After losing her job, Complainant experienced trouble sleeping and was put on a sleep medication. Complainant’s smoking increased after she lost her job.
29. When Complainant was fired from David’s Gym, she temporarily lost Common Health benefits. The receipt of Common Health benefits is predicated on the recipient working forty hours per month or meeting a “spend-down” which, in Complainant’s case, was \$9,000.00. According to Jocelyn French, Vocational Rehabilitation Advocate for Cape Organization for the Rights of the Disabled (CORD), Complainant was able to satisfy the spend-down requirement by collecting and submitting medical and personal care bills which resulted in the reinstatement of her Common Health benefits.
30. In 2002, Respondent paid Complainant \$1,898.75 for approximately six months of work. In 2003, Respondent paid Complainant \$5,110.00. In 2004, Respondent paid Complainant \$4,7702.75. Complainant was terminated on January 13, 2005 and was still unemployed at the time of the public hearing. In 2005, Complainant earned \$234.00 in wages, tips and other compensation. Complainant’s Exhibit 7. There is no evidence in the record about how much unemployment compensation, if any, Complainant received in 2005.

31. After she lost her job, Complainant looked for employment by contacting children's publishers, Readers Digest, and Hallmark Cards. She also looked for day care and teaching jobs in the Cape Cod Times and on the internet, but focused on seasonal and at home work because she was having "more difficulty with winter." Complainant consulted with the Massachusetts Rehabilitation Commission which provided her with an analysis of her skills, aptitudes, and interests.

### III. CONCLUSIONS OF LAW

#### Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful to discriminate against a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, a record of having such an impairment, or is regarded as having such an impairment. See M.G.L. c. 151B, sec. 1 (17); *Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998)* ("MCAD Handicap Guidelines") at p. 2. In order to be a "qualified" handicapped person, Complainant must be capable of performing the essential functions of the job with or without a reasonable accommodation. M.G.L. c. 151B, sec. 1(16).

A prima facie case of handicap discrimination consists of Complainant establishing that she is a qualified handicapped person who was terminated under circumstances which give rise to an inference of discrimination. Once a prima facie case is established, the burden of proof shifts to Respondents to articulate a legitimate, nondiscriminatory reason for the adverse employment action, supported by credible

evidence. See Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441-442 (1995). If the Respondents succeed in offering such a reason, the burden then shifts back to the Complainant at stage three to persuade the fact finder by a preponderance of evidence that the articulated justification is a pretext for discrimination. See Blare, 419 Mass. at 444-445. Complainant may carry this burden of persuasion with circumstantial evidence that the proffered reason is not true and that Respondents are covering up a discriminatory motive which is the determinative cause of the adverse employment decision. See Lipchitz v. Raytheon Co., 434 Mass 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is pretextual, a finding of discrimination is not mandatory in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 117-118 (2000).

Complainant's Post Polio Syndrome renders her a handicapped individual who is unable to walk and care for herself without assistance. Nonetheless, she was qualified to perform the essential functions of a child care attendant at David's Gym. There is no dispute that Complainant was an excellent babysitter who kept children safe and stimulated while their parents used the gym facilities. Complainant's supervisor, Ruth Sherman, acknowledged that Complainant loves children, was responsible in caring for them, and that gym members commented on how well Complainant worked with children. Although Complainant's condition made it impossible for her to lift children, this limitation was not a problem because she did not care for infants. I conclude that Complainant was capable of performing the essential functions of her position, subject to the accommodation that she could not travel to work on unusually cold or snowy days.

I credit Complainant's testimony that prior to accepting a job at David's Gym, she asked for and received permission to miss work on days when it was too cold or snowy for her to commute to work. Such an accommodation was granted to Complainant at the time of hire in 2002. Throughout the two and one-half years that Complainant was employed by Respondents, Complainant occasionally missed work in the winter due to cold or snowy weather. Sherman hired replacements for Complainant or filled in for Complainant herself on the days that Complainant could not leave her house. According to Sherman, there was a list of approximately nine individuals whom she called to fill in for Complainant. Gonsalves admitted that there were other employees who failed to come to work on a reliable basis and that they were not terminated for this reason. The foregoing evidence establishes that Complainant was a qualified handicapped individual whose disability was accommodated by Respondents from 2002 until January of 2005 when she was terminated under circumstances which give rise to an inference of discrimination. Complainant has therefore established a prima facie case of disability discrimination.

In order to rebut Complainant's prima facie case of discrimination, Respondents must articulate a legitimate, nondiscriminatory reason for the adverse employment action, supported by credible evidence. Although Respondents assert an array of reasons for terminating Complainant, none are credible. Respondents claim that Complainant missed an unusually large amount of time from work in December of 2004 and January of 2005 which they were unable to accommodate, that she solicited in-home babysitting jobs from the gym's clientele, that she encouraged a gym patron to write a letter complaining about the temperature in the gym's day care room, and that she attempted to sell crafts at the

gym. None of these reasons pass muster.

As far as the issue of attendance is concerned, there was, to be sure, unusually inclement weather in December of 2004 and January of 2005 which caused Complainant to miss work, but there is no evidence that clients of the gym sought day care services during that period or that Respondents had difficulty finding replacements for Complainant. The record is likewise devoid of any evidence that Complainant was ever warned about excessive absenteeism. Complainant presented unrebutted testimony that other employees frequently missed work and were not fired for poor attendance. These circumstances contradict any contention that Complainant's attendance became such a problem towards the end of her employment that Respondents were no longer able to accommodate her absences.

The alternative reasons that Respondents provide for terminating Complainant are also not credible. After Respondents criticized Complainant for offering in-home babysitting services to a gym client in September of 2004, Complainant never repeated the offer. The lack of temporal proximity between the babysitting offer in September of 2004 and the termination in January of 2005 makes clear that it was not a reason for termination. Respondents also assert that Complainant expressed concern about the temperature in the day care room, but fail to explain how this related to her termination. At the public hearing, Respondents raised, for the first time, an accusation that Complainant attempted to sell crafts to gym clients but never before mentioned this as a reason for termination.

The fact that Respondents have provided shifting reasons for firing Complainant undermines the credibility of each rationale. Respondents told Complainant she was

fired for absenteeism, but gave different reasons for her termination at the Department of Unemployment Assistance and at the public hearing. Complainant's supervisor, Ruth Sherman, testified that Respondent Gonsalves made the decision to terminate Complainant, but Gonsalves testified that it was Sherman who made the termination decision. These contradictory positions provide circumstantial evidence that Respondents' reasons are not the real reasons for terminating Complainant and that Respondents are covering up a discriminatory motive which is the determinative cause of the adverse employment decision.

I conclude that Complainant was terminated as a result of Respondents making a unilateral decision to cease accommodating Complainant's disability which consisted of allowing her to stay home on cold and snowy days. In doing so, Respondents violated the continuing obligation of Massachusetts employers to engage in an interactive process with a disabled employee who requests or requires an accommodation. See MBTA v MCAD, SJC-09893 at fn.16 (January 4, 2008) *citing* Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648-649 (2004) *and* MCAD Guidelines: Employment Discrimination on the Basis of Handicap Sec. VII.B (1998) (recognizing that an employer is obligated to participate in an interactive process where employee requesting an accommodation is disabled). Moreover, Respondents did not demonstrate that to continue the accommodation would constitute an undue hardship to its business.

Where an employer has a long history of providing a particular type of accommodation, the employer is generally required to provide the benefit to a handicapped employee. See Donohoe v. Sodexo-Marriott Services, Inc., 21 MDLR 204 (1999) (rejecting respondent's unilateral determination that long-established reasonable

accommodations would no longer be provided); Cook v. Town of Wakefield Municipal Light Department, 18 MDLR 253, 254 (1996) (policy of assigning employees to light duty makes such reassignment a reasonable accommodation); Yates v. Mass-C.E.O.P.S.-MCI Norfolk, 17 MDLR 1503, 1515(1995) (light duty positions create rebuttable presumption that such position should be available for handicapped employees as reasonable accommodation).

Had Respondents engaged in an interactive process with Complainant, it is possible that an arrangement could have been established which met the needs of all concerned. See D'Ambrosio v. MBTA, 23 MDLR 81 (2001) citing Mazeikis v. Northwest Airlines, 22 MDLR 63, 68-69 (2000) (interactive process involves discussion of nature and scope of requested accommodation and an assessment of its feasibility). A discussion of this type would have allowed Respondents to communicate the problems posed by Complainant's need for days off in inclement weather and given Complainant an opportunity to respond to Respondents' concerns. It is possible that Complainant might have been able to arrange for an alternative mode of transportation to work, might have been willing to assume responsibility for finding her own substitute on days when she couldn't get to work, or might have taken a leave of absence until the spring. No alternative options were explored, however, because Respondent made a unilateral and unjustified decision to terminate the parties' employment relationship and sought, after the fact, to justify the termination by asserting a number of pretextual reasons. I conclude that this action violates the statutory requirements of G.L.c.151B, section 4(16) which prohibits an employer from terminating a qualified handicapped person who is capable of

performing the essential functions of a position with a reasonable accommodation, absent a showing of undue hardship on the employer's business.

#### IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

##### *Lost Wages*

As far as lost wages are concerned, Complainant's termination from David's Gym on January 13, 2005, had the effect of ending her career as a day care provider. After she lost her job, Complainant pursued employment opportunities in the fields of children's literature and arts and crafts but was still unemployed as of the date of public hearing. Complainant's efforts to find employment have focused on seasonal and at home work because of her difficulty leaving the house during winter. Complainant earned \$4,7702.75 from Respondent in 2004, but only \$234.00 in 2005 after her termination.

The award of back pay is hereby limited to \$4,468.00, an amount that represents her 2004 income from Respondent less the minimal income which Complainant earned in 2005, according to her tax return. Despite evidence that Complainant looked for alternative employment in the areas of teaching, day care, writing, and crafts, it would be inequitable to extend the award for lost damages beyond one year, given the progressive nature of Complainant's Post Polio Syndrome and the fact that Complainant became

more limited in her ability to work outside the home after 2005. Complainant admitted at public hearing that she experiences increasing fatigue on a daily basis and is having “more difficulty with winter.” Her ability to lift decreased from ten pounds in 2002 to three pounds by the date of public hearing. Complainant’s testimony indicates that the chances of her procuring and handling alternative employment after 2005 were sufficiently remote as to limit an award of back pay to lost earnings in 2005.

*Emotional Distress Damages*

Complainant and her supporting witnesses testified credibly and convincingly about the emotional distress which Complainant experienced as a result of losing her job. Her self esteem and her marriage were adversely affected. Complainant began bickering with her husband after losing her job, was less communicative, and became socially withdrawn. Complainant described herself as “shutting down.” Complainant experienced trouble sleeping, was put on a sleep medication, and began to smoke more.

Complainant’s friend, Cathy Weidhaus, testified that Complainant was “devastated” about losing her job and remained sad for over a year. Another friend, Heidi Champagne, testified that Complainant appeared depressed and angry after losing her job. According to Champagne, Complainant’s personal appearance deteriorated, she withdrew socially, and was not her “perky self.” Jocelyn French testified that Complainant was “emotionally beside herself” after she lost her job, felt worthless, and appeared upset for close to a year. Complainant cried when she talked to friends about losing her job and brought the subject up regularly.

Emotional distress does not need to be based on expert testimony. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley

Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Given the evidence in this case that Complainant suffered significant emotional harm as a direct result of Respondents' unilateral action, I conclude that Complainant is entitled to an award of emotional distress damages in the amount of \$40,000.00.

#### V. ORDER

This decision represents the final order of the Hearing Officer. Respondents are hereby ORDERED to:

- (1) Cease and desist from engaging in discrimination based on handicap.
- (2) Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$4,468.00 in lost wages, consisting of back and front pay, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (3) Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$40,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 13th day of January, 2008.

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Betty E. Waxman, Esq.,  
Hearing Officer

