

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PATRICK GRACIA,
Complainants

v.

DOCKET NO. 05-BEM-00627

NORTHEASTERN UNIVERSITY,
Respondent

Appearances:

Michael L. Mason, Esquire for Patrick Gracia
Scott A. Roberts, Esquire for Northeastern University

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about March 2, 2005, Patrick Gracia filed a complaint with this Commission charging Respondent with discrimination on the basis of handicap. Specifically, Gracia alleged that Respondent subjected him to a hostile work environment because of his handicap and denied him a reasonable accommodation. The Investigating Commissioner issued a probable cause finding, and upon Respondent's Motion for Reconsideration of the Finding, the Investigating Commissioner dismissed the hostile work environment claim.

Therefore the sole issue before the Hearing Officer is whether Respondent failed to provide a reasonable accommodation to Gracia's handicaps subsequent to his taking a leave of absence and, if so, what damages he suffered on account of Respondent's actions. A public hearing was held before me on January 29, 30 and 31, 2008. After

careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Northeastern University is a large, private university located in Boston, Massachusetts and is an employer within the meaning of M. G. L. c. 151B.

2. Complainant Patrick Gracia resides in Taunton, Massachusetts. Gracia was hired by Northeastern University in 2000 to work as a Network Administrator. His job duties included installing operating systems onto computer hardware and repairing network services. Gracia was diagnosed with Attention Deficit Disorder¹ in December 2003. In January 2004 he was diagnosed with Bi-Polar Disorder.

3. Attention Deficit Disorder is a biological illness with symptoms of being non-attentive, easily distracted and impulsive, and making decisions without thinking. Bi-polar Disorder is characterized by mood swings. As a result of his Bi-polar Disorder Gracia experienced mood swings from normal, to “manic,” to very depressed, without an obvious reason. (Tr. 63-65)

4. May Lee has been employed by Respondent since 1988. In 2003 and 2004 she was a senior human resources management consultant, and a self-described “point person” for employees in several departments, including the information services (“IS”) department where Gracia worked. Among other duties, she assisted employees with job-related issues, including any difficulties they had with co-workers.

5. Erika White has worked at Northeastern University since 1998. She is a benefits administrator who, in 2003 and 2004, was responsible for administering Respondent’s health and welfare programs, including FMLA, short-term disability,

¹ The disorder is sometimes referred to in the records as “ADD” or “ADHD”

interim disability leaves and sick leaves. White is familiar with the requirements of the ADA through training and seminars she has attended. According to White, an employee seeking an accommodation must go through Respondent's office of Affirmative Action or Human Resources, although employees may also make informal requests for certain accommodations, such as chairs, lighting and keyboards, through a supervisor or manager.

6. Kathryn Burke Kelly² has a B. S. in nursing and an M. S. in mental health from Boston College. She is employed as a nurse practitioner at a private practice in Brockton, Massachusetts called Van S. Batchis & Associates where she treats private patients, mostly children. Sixty per cent of her work involves psychopharmacology only, while the remainder includes both therapy and psychopharmacology. (Kelly depo. at p. 20-21)

7. As a Network Administrator, Gracia received positive work evaluations. During the course of Gracia's employment the IS department underwent several reorganizations and he experienced a number of job changes and changes in supervisors. During one of these reorganizations, Gracia was transferred to the "Applications" work group within the IS department, which installed various computer software applications. This was a significant change for Gracia who had, up until that time, specialized in the field of hardware maintenance and installation. In addition to the challenge of learning new skills, Gracia experienced difficulty integrating into the Applications group because of internal conflict among the employees in the group.

² Kelly did not appear at the public hearing and the parties agreed to submit highlighted portions of her deposition in lieu of her live testimony.

8. In 2002, Fouad Ahmed became Gracia's supervisor. Ahmed was eventually fired, and thereafter filed a discrimination complaint against several co-workers including Gracia, whom he accused of making a racist comment. Gracia testified that although Ahmed's complaint was ultimately dismissed, the false accusations by Ahmed were extremely upsetting to him. He became more depressed and anxious over the charges as they took months to resolve. In 2003, Rhonda Htoo became Gracia's supervisor. Yvonne Sullivan was Htoo's manager.

9. The stress and depression resulting from the Ahmed complaint, in addition to all of the job changes and new managers, led Gracia in December of 2003 to seek treatment from Kathryn Kelly, whom he had seen in 2001. Gracia discussed work-related matters with Kelly, and told her he was very depressed and stressed over Ahmed's allegations.

10. Kelly recommended to Gracia several strategies to deal with his attention deficit disorder while in the workplace, including wearing earphones, going for a walk, eating lunch, and not becoming involved in workplace gossip. Gracia testified that he wore earphones occasionally at work. On one occasion, Htoo instructed him to remove the earphones because she wanted him to be with the group. Gracia did not tell Htoo at this time that he was wearing earphones in order to ease his attention deficit disorder. (Tr. 140)

11. In February 2004, Gracia met with his supervisors, Yvonne Mulligan and Rhonda Htoo, for his annual performance review. At this review, he was rated lower than in his previous performance reviews which had always been positive. His overall rating was "2" or "needs improvement" and his ratings on specific performance areas,

were, with one exception, “needs improvement.” Although the review noted that Gracia “takes pride in his job” and “places a high priority on loyalty and dedication,” it was also noted that he “is not very good at communicating with our customers and providing them (sic) information that they can clearly understand.” The review also stated Gracia “needs to take responsibility for his complete work load; currently his team members are carrying him around the area of application installation and project meeting.” (Exh. 4) Gracia was shocked by the review, but he did not reveal his medical conditions to Mulligan and Htoo at this meeting, nor did he request any workplace accommodation.

12. After Gracia’s performance review, Mulligan and Htoo met with May Lee to discuss ways to improve his performance. Lee assisted Mulligan and Htoo in preparing a performance plan to meet these objectives. On March 24, 2004, Gracia met with Htoo and Mulligan to discuss this performance plan which called for, among other things, a meeting with Htoo every week for eight weeks, with the possibility of further disciplinary steps, if at the end of eight weeks he did not meet the requirements of the performance plan. (Exh.6)

13. Gracia testified that he became very depressed over his work situation and developed sleep problems and loss of appetite. He was concerned about losing his job if he did not meet the objectives of the performance plan. He discussed his concerns with Kelly and considered taking a leave of absence.

14. On March 27, 2004, Gracia and his wife went to Kelly’s office for an unscheduled emergency visit. According to Kelly, Gracia was “having a meltdown” and felt that everything was “falling apart.” Gracia feared losing his job as a result of his poor job evaluation, and expressed concern that “people did not like him.” (Kelly depo. pp 79-

81) Kelly advised Gracia to file an FMLA application and seek a leave, and then to contact an employee advocate at Northeastern to discuss his review and ask for accommodations. (Tr. 60) (Kelly depo. at 90) Kelly repeatedly advised Gracia not to inform his supervisor directly about his medical conditions for fear of retribution. Instead she advised him to speak with an “employee advocate” at Northeastern. Kelly testified that she advised Gracia generally about ways employees could better cope with attention deficit disorder in the workplace, such as having a quiet work area and receiving more supervision to make sure deadlines are met; however she noted that such methods of coping would not accommodate Complainant’s Bi-polar Disorder. (Kelly depo. at p.158-9)

15. Respondent has an “Interim Disability/Salary Continuation Policy” whereby eligible employees receive up to 180 days of pay at 60% of their salary, after using up their sick and vacation days. This benefit is also referred to as “short-term disability.” At the end of 180 days, employees may apply for long term disability benefits.

16. On March 29, 2004, Gracia submitted an Application for Leave of Absence to Respondent in which he requested a three-month leave from March 30 through June 30, 2004 in order to “get himself back together.” He completed the forms with the assistance of Lisa Broderick, a Senior Benefits Administrator in Respondent’s Human Resources Department. In response to Broderick’s inquiry about what was wrong, Gracia told her that he was very depressed and anxious and had been instructed by his medical health provider to see her. He stated that Broderick was “very nice” and assisted him with his paperwork.

17. Gracia informed Kelly that he had applied for short-term disability benefits. In connection with his application for short term disability benefits, Kelly prepared an “Attending Physician’s Statement” on April 1, 2004 which stated: “Currently, patient is severely depressed, unable to function except for the simple tasks of daily living... and is “Generally, unable to leave home without difficulty.” (Exh.11) Respondent granted Gracia a leave which began on March 30, 2004.

18. On April 14, 2004, while he was on leave, Gracia met with May Lee, at his request, in order to discuss his 2004 review and performance plan. At the meeting Gracia informed Lee that he was undergoing treatment for anxiety and depression. He discussed his performance review, pointing out the criticisms he did not think were valid. He discussed with Lee the difficulties he had experienced under Htoo’s supervision and asked if it would be possible for him to transfer to another position at Northeastern. At the meeting, Gracia presented Lee with a nine page memorandum describing his work problems. The memorandum stated that he was being treated for stress and attention deficit disorder. The memorandum does not mention workplace accommodations. (Exh. 12) Lee told Gracia that she would read his memorandum at a later time.

19. Gracia testified that at the April 14th meeting he told Lee that his physician had instructed him to request workplace accommodations for his attention deficit disorder and anxiety. Lee asked him what sort of accommodations he had in mind and he suggested a quiet place to work, use of headphones, a reduction in hours, and not being on call or transferring to another position. According to Gracia, Lee responded, “We don’t make accommodations for people here.” Gracia responded, “You don’t?” Lee responded, “No we don’t.” With respect to his request for a transfer, Lee told

Complainant that he would have to return to his current position before applying for a job in another department. Gracia was “very depressed” when he left Lee’s office. I do not credit Complainant’s testimony that Lee told him Respondent did not make accommodations. I otherwise credit his testimony regarding this meeting.

20. Lee denied telling Gracia that Northeastern did not make accommodations. According to Lee’s account of their meeting, Gracia complained of unfair treatment at work, the challenges of numerous changes in managers and positions, and his desire to be transferred because he did not get along with Htoo. Lee told Gracia to first “get better” and they would then look into his work situation. She did not recall discussing the issues of workplace accommodations with Gracia, although she recalled that he requested a transfer. Lee testified that she did not believe Gracia’s request for a transfer was tied to attention deficit disorder or anxiety, and did not believe that meeting triggered any legal obligation on the part of Respondent to provide an accommodation. I credit her testimony. (Tr. 405) I find that Lee reasonably believed Gracia was requesting a transfer because of difficulties working with Htoo and did not believe this triggered the need to make an accommodation.

21. On June 8, 2004, Kathryn Kelly completed a form that Gracia’s current conditions were, “Generalized Anxiety D/O, Mood D/O NOS Attention Deficit Disorder.” She also noted that Gracia would tentatively be able to return to work on July 31, 2004. This form was provided to Erika White. (Exh. 16)

22. Kelly testified that if Gracia had followed his treatment plan he might have been able to return to work; however, Gracia did not follow his treatment plan, which included seeking individual psycho-therapy and taking medications to stabilize his

moods, because he was “out of control.” (Kelly depo. at 144-145) In her treatment notes of June 10, 2004, Kelly wrote that Gracia had increasing anxiety as his scheduled date of return to work approached. He was concerned that his wife would be angry if he did not return to work but he believed that he was not ready to return to work on June 30 as planned. (Kelly depo. at 146) During this time period Gracia was experiencing marital problems which were exacerbated by his wife’s wanting him to return to work, as his job included the perquisite of free tuition for his son, who was enrolled at Northeastern.

23. In early June Erika White notified Gracia by letter and telephone that he would be placed on short-term disability as of June 10, when he would have exhausted his vacation and sick time. (Exh. 14)

24. Gracia testified that by early July 2004 his condition had improved. On July 28, 2004, he informed White that he was planning to return to work and would provide her with the appropriate paperwork from Kelly along with a list of requested accommodations. Gracia testified that White responded that Respondent did not offer accommodations but only job restrictions. White denied telling Gracia that Respondent did not provide accommodations and stated that she has never told any employee that Northeastern does not provide accommodations. I do not credit Gracia’s testimony that White told him that Respondent did not offer accommodations. I find White’s testimony in this regard more credible.

25. According to White, Respondent’s policy is that employees returning from leaves must provide Respondent with medical documentation clearing them for work and listing any restrictions, limitations or special needs they might have upon returning. She stated that whenever an employee is out of work and might possibly need assistance

returning to work, Respondent tries to gain an understanding of what the employee's needs might be upon return. Respondent then informs the employee's supervisor of any restrictions and the scheduled date of return to work. White told Gracia she needed written authorization from his medical provider of his fitness to return to work and he informed her that he was having trouble obtaining the documentation.

26. White testified that after learning that Gracia would tentatively be returning to work on July 31, 2004, she set up a meeting with May Lee in order to discuss Gracia's potential work restrictions upon returning to work, which she then planned to discuss with Yvonne Mulligan. I find that while White did not expressly use the term "accommodations" in describing Respondent's procedures for returning employees to work, she clearly described a process whereby Respondent endeavored to accommodate the limitations of employees returning from medical leaves.

27. Gracia testified that on July 29, 2004, he went to Kelly's office to obtain the paperwork that would clear him to return to work. According to Gracia, Kelly refused to see him because he did not have an appointment, even though he had scheduled the appointment two weeks earlier. As a result, Gracia was unable to obtain the required paperwork that would authorize his return to work. Given Kelly's testimony about Complainant's failure to adhere to a treatment plan, I draw the inference that this was the reason that Kelly would not see him and did not authorize his return to work.

28. Gracia testified that was very angry about his situation. He became extremely depressed and that night he attempted suicide by overdosing on prescription medication. Gracia woke up in the hospital where he remained for several days. His

hospitalization was followed by nine weeks of out-patient mental health therapy. Gracia testified that during this period of therapy his condition improved.

29. In late July, 2004, White learned from Gracia's wife that Gracia was hospitalized and would not be returning to work. She subsequently learned that the hospitalization was due to a suicide attempt. White then contacted a representative of Respondent's insurer, Unum, in order begin the process of moving Gracia from short-term to long-term disability.

30. According to Cheryl Whitfield, Respondent's Director of HR programs and employee relations, Respondent has a policy that if after six months medical leave of absence a physician does not authorize an employee's return to work, their employment is terminated. Employees may then be approved for long-term disability. Whitfield testified that under these circumstances, an employee's job is not held open even if, at the end of six months leave, a physician requests a short extension of the leave. (Tr. 357-358)

31. Gracia testified that in September 2004 White called to inform him that his interim disability benefits were set to expire on September 30th and told him that he would have to make a decision about returning to work. White also told Gracia that Mark Hildebrand, Director of Enterprise Systems, wanted to fill his position. White testified that she asked Gracia whether he intended to return to work and he said that he did not. Gracia testified that he asked White whether anything was going to change in his department and she said no, but he could speak to Hildebrand about any issues he wished to address when he tendered his resignation. According to Gracia he told White that he would consider his options over the weekend.

32. On October 1, 2004, White wrote to Gracia to confirm that his medical leave interim disability benefits ended on September 30, that he had not been medically cleared to return to work and that his long term disability application was under review. She also confirmed her understanding that Gracia did not intend to return to work at Northeastern and since his department would no longer be able hold open his position under Respondent's policy, she would notify his department head by letter that he would not be returning to his position. (Exh. 25)

33. On October 4, 2004, Gracia responded to White by letter that he always intended to return to work and spoke with both White and May Lee about returning to work with potential accommodations, but that White told him that only "job restrictions" would be available. He stated that he did not intend to resign from his position and apologized if White misunderstood him. (Exh. 26) White acknowledged that after receiving this letter, she did not take any steps to hold Gracia's job open.

34. On October 18, 2004, Mark Hildebrand, Director of Enterprise Systems, wrote to Gracia that in conformity with Respondent's practice, because Gracia had out on medical leave for more than six months, he could no longer hold open his position but that the termination of his employment would not affect the review of his application for long term disability benefits. As of September 30, Complainant had been on leave for six months. (Exh. 28)

35. Gracia's claim for long-term disability benefits was approved on December 8, 2004 by Unum Life Insurance Company. The policy defines a person as disabled when he is "completely unable, due to sickness, bodily injury, or pregnancy, to perform the material and substantial duties" of his/her regular occupation. The policy also states that

after 24 months of benefits, a person is disabled when s/he is “unable to perform the material and substantial duties of any occupation” for which he/she is “reasonably fitted by education, training or experience.” (Exh. 31) Gracia continues to receive long-term disability benefits.

36. Kathryn Kelly testified that from January through March 2004 she talked to Gracia in a general way about possible workplace accommodations for attention deficit disorder but Gracia was unwilling to discuss accommodations with Northeastern and did not want Kelly to discuss with anyone at Northeastern any possible accommodations. She did not recall having a conversation with anyone from the University. (Kelly depo. at 142-144; 159-160)

37. There was never a time through the end of July 2004 that Kelly believed Gracia was able to return to work because, in her view, there is no workplace accommodation for someone who suffers from Bi-polar Disorder and who, like Gracia, is not compliant with his treatment plan and whose moods are not stable. (Kelly depo. at 164-165)

38. Gracia stopped seeing Kelly after his hospitalization in July 2004. Gracia subsequently was treated by Dr. Lyudmila Rakita, beginning on September 24, 2004 through 2005. Dr. Rakita wrote in her treatment notes that Gracia has had mood problems and anxiety since his teens and concentration and attention problems since elementary school. (Exh. 34) He was also treated by Social Worker Betsy Ross in 2005 and 2006. Neither Dr. Rakita nor Ross ever communicated to anyone at Respondent that Gracia was fit to return to work. Since Gracia began his medical leave in March of 2004, no medical provider has ever cleared him to return to work.

39. Gracia's marriage which was troubled prior to the issues at Northeastern, deteriorated over his inability to return to work, and Gracia and his wife divorced in November 2006. Gracia has not worked since his termination by Northeastern. He testified that as a result of his termination and divorce, he was very depressed and things were terrible. He testified that he has been distressed over his discrimination case, and when it is over, he plans to go back to work, start over again and move on with a new girlfriend.

40. Gracia has signed up for job training at the Massachusetts Rehabilitation Commission. He stated that he is going to receive job training as soon as his discrimination claim is completed. He is not sure that he would go back to working with computers and has been considering courses in air conditioning and refrigeration, as well as plumbing.

III. CONCLUSIONS OF LAW

A. Failure to Accommodate Claim

In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Gracia must show: (1) that he is a "handicapped person within the meaning of the statute;" (2) that he is a "qualified handicapped person" capable of performing the essential functions of his job; (3) that he needed a reasonable accommodation to perform his job; (4) that Respondent was aware of his handicap and the need for a reasonable accommodation; (5) that Respondent was, or through reasonable investigation could have become, aware of a means to reasonably accommodate his handicap and; (6) that Respondent failed to provide Gracia the reasonable accommodation. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214,

aff'd, 26 MDLR 216 (2004); See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX(A)(3) (1998)

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. Gracia is substantially limited in the major life activity of working if his impairment "prevents or significantly restricts [him] from performing a class of jobs or a broad range of jobs in various classes." Id. at 7 Gracia has established (and Respondent concedes) that he is a handicapped person within the meaning of M.G.L.c.151B because of his Attention Deficit Disorder and Bi-polar Disorder which causes severe mood swings.

Gracia has asserted if he were granted certain accommodations he would have been able to return to work after his medical leave. In order to establish that he is a qualified handicapped person, Gracia must prove that he is capable of performing the essential functions of his job, with or without a reasonable accommodation. On the basis of the evidence before me in this case, I conclude that Gracia has failed to establish that he is a qualified handicapped person at the time he indicated he wished to return to work.³ Once Complainant has identified his disability and requested an accommodation from his employer, it is incumbent on the employer to determine if the accommodations sought are reasonable and to engage in an interactive dialogue with Complainant.

Massachusetts Bay Transportation Authority v. Massachusetts Commission Against

³Gracia acknowledged that, prior to his medical leave, he never discussed his disabilities with Respondent and did not seek accommodations because of his disabilities. Even when presented with a poor performance evaluation, he did not discuss his disabilities or the need for an accommodation. It was only after he was granted a medical leave that he identified and requested certain accommodations that he believed would have allowed him to perform the essential functions of his job.

Discrimination et al, 450 Mass. 327, 342 (2008) Gracia testified that while on leave he discussed some possible workplace accommodations with Respondent, including requesting a transfer. However, Gracia has failed to produce credible evidence that Respondent rejected his proposed workplace accommodations. In April 2004, when Gracia discussed possible accommodations with May Lee, he was out on an extended medical leave and she acted reasonably in telling Gracia to wait until he was ready to return to work in order to discuss possible workplace accommodations and/or a transfer to another position.

In anticipation of Gracia's expected return to work at the end of July, 2004, Erika White set up a meeting between Gracia and Lee in order to discuss his transition back to the workplace, demonstrating Respondent's willingness to engage in the "interactive process" and in assessing Gracia's workplace needs, assuming his return to work. There is no evidence that Respondent denied reasonable accommodations to Gracia. When Gracia indicated he was ready to return to work Respondent reasonably sought some medical documentation of his fitness to return to the job. Gracia never provided any documentation that he was fit to return to work, and thereafter attempted suicide.

Respondent did provide Gracia with reasonable accommodations by allowing him to take an extended six-month leave of absence, during which time he received vacation and sick pay and short-term disability benefits, after which he placed on long-term disability, a benefit that he continues to receive.

During his leave, Gracia continued to suffer from anxiety and depression which worsened as the date of his return to work approached. He failed to seek the treatment recommended by his medical provider, and was unable to obtain clearance from his

medical provider to return to work. He ultimately attempted suicide, was hospitalized and received several weeks of daily therapy.⁴ During his leave he ceased treating with one medical provider and began treatment with a psychiatrist and social worker. None of these medical providers ever cleared Gracia to return to work within the six months provided by Respondent, or at any time thereafter. There is no evidence that, since March 2004, or the time that Gracia first requested workplace accommodations, that he has been fit to return to work, even with a reasonable accommodations. His medical provider, Katherine Kelly, testified that from March through mid-August 2004, Gracia was incapable of working because he failed to follow the prescribed course of treatment for his Bi-polar Disorder, and because his moods were not stabilized which, in her view, was a requirement of returning to work. An employer is not required to engage in fruitless dialogue if it is absolutely clear no accommodation could be made without undue hardship. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008)

Gracia continues to receive long-term disability benefits. While the application and receipt of long-term disability benefits is not a per se bar to a claim for handicap discrimination, Labonte v. Hutchins and Wheeler, 424 Mass. 813, 819-20 (1996), there is no credible evidence in this case that Gracia obtained long term disability benefits in lieu of a job he could perform with accommodations; he was simply unable to return to his job. Complaint relies on the case of Criado v. IBM Coporation, 145 F.3d 437 (1st Cir. 1998) which is inapposite to the facts of his case. In that case, the Court found that the employee who was fired after seeking an extension of a medical leave was a qualified disabled person. However, in Criado, the employee's physician wrote numerous letters

⁴ Gracia does not contend that Respondent's conduct in any way contributed to his suicide attempt.

to her employer requesting an extension of her leave of absence. And while it may not be required that an employee provide a date certain of when he will return to work, in this case, Gracia provided no information whatsoever concerning his ability to return to work and when his return might be anticipated.⁵ Thus I conclude that Gracia is not a qualified handicapped person within the meaning of the statute, as he was at all times subsequent to his medical leave of absence, unable to perform the essential functions of his job, with or without an accommodation. However, even if Gracia could be determined to be a qualified handicapped individual, I conclude that Respondent accommodated his disabilities by granting him the leave time he requested and by taking steps to prepare for his return to work with restrictions, even though Gracia was ultimately not able to return. Therefore, I determine that Respondent did not unreasonably fail to grant Gracia a reasonable accommodation and did not violate G.L. c. 151B.

B. Respondent's Policy Violates the Massachusetts' Handicap Law

While Mr. Gracia has not prevailed in his claim against Respondent, the Commission had an interest in ensuring that employers enact and implement policies that comply with the letter and spirit of the anti-discrimination laws. The Commission is authorized to issue orders designed to eliminate discrimination where it is found to exist. See M.G.L.c.151B sec. 3; In Re Mohawk Greenfield, United States Bankruptcy Court for the District of Massachusetts, Case No. 98-44133-HJB) (1999)

In this case, Respondent acknowledged that Mr. Gracia was terminated pursuant to Respondent's disability leave policy, by which Respondent terminates the employment of all employees, without exception, who are unable to return to work after being granted

⁵ Although no evidence of such was introduced at the public hearing, presumably a medical provider was updating the insurer, Unum, as to Gracia's medical condition; however the employer did not receive this information.

six months of disability leave. Such a rigid policy, if taken to its logical conclusion, might prevent an employee who has taken a leave of six months from seeking one or two additional days prior to returning to work for documented medical reasons. Under Respondent's policy, his employment would nonetheless be terminated. I conclude that such a "per se" policy violates M.G.L.c.151B4 (16) and that employer leave policies must be sufficiently flexible to anticipate the facts of each individual claim. Garcia-Alaya v. Lederle Parenterals, Inc., 212 F.3d 638, 647(1st Cir. 2000) Handicap cases are by nature "difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes," requiring employers to make an individualized analysis of whether an employee's accommodation is reasonable Id. at 650. A leave of absence of longer than six months may be a reasonable accommodation under some circumstances, if it does not create an undue hardship for the employer. The factors in determining undue hardship include: 1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; 2) the type of the employer's operation, including the composition and structure of the employer's workforce; and 3) the nature and costs of the accommodation needed. **MCAD** Guidelines: Employment Discrimination of the Basis of Handicap, at II, B. (1998)

While c. 151B does not require employers to retain employees who cannot perform the essential functions of their jobs without reasonable accommodation, the employer may in some instances be able to hire temporary help or find some other alternative that will enable it to conduct business uninterrupted while a disabled employee is recovering. If however, allowing the disabled employee to retain his or her job places the employer in position where it cannot conduct the operations of its business

in some reasonably alternative manner, the employer may have no option but to discharge a disabled employee and to seek a replacement. There is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business. [citations omitted] Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008) Respondent presented no evidence as to why its disability leave policy which is strictly limited to six months is essential to the operation of its business.

While in the present case there was no evidence that an extended leave of absence would have enabled Gracia to return to his job, it is foreseeable that a large employer such as Respondent would, under some circumstances, be able to extend the medical leaves of employees beyond the six month period without undue hardship. The statute requires Respondent to undergo a case-by-case analysis of each employee to determine whether a medical leave of absence in excess of six months would create an undue hardship. Thus I conclude that Respondent's medical leave policy violates M.G.L.c.151B 4(16).

IV REMEDY

Pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

Respondent Northeastern University shall immediately rescind its policy of automatically terminating all employees who are unable to return to work following a six month medical leave for disability, and adopt a more flexible policy that determines

whether extended leave beyond six months is a reasonable accommodation on a case-by-case basis.

V. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. The claims of Patrick Gracia against Respondent are hereby dismissed.
2. Respondent Northeastern University shall immediately rescind its policy of automatically terminating its employees who have exhausted a six months of leave of absence on account of a disability.
3. Respondent shall within sixty days of receipt of this order adopt a written medical leave of absence policy that allows for flexibility and states that in determining the length of an employee's medical leave of absence it shall consider the facts specific to the employee's situation in order to determine whether a medical leave is a reasonable accommodation, taking into account whether the employee's absence would create an undue hardship for Respondent.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 30th day of December 2008

JUDITH E. KAPLAN,
Hearing Officer