

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & PHILLIP LAMONTAGNE,
Complainants

v.

DOCKET NO. 01-SEM-0290

MASSACHUSETTS DEPARTMENT
OF YOUTH SERVICES
& MARIA CORDERO,
Respondents

Appearances:

John J. Ferriter, Esquire for Phillip LaMontagne
Jurgen Kern, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about May 7, 2001, Phillip LaMontagne filed a complaint with this Commission charging Respondents with discrimination on the basis of handicap and retaliation in violation of M.G.L.c.151B§4¶16. The investigating commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on December 13 and 14, 2005. 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. Respondent Department of Youth Services (“DYS”) is the juvenile justice agency of the Commonwealth of Massachusetts and is responsible for overseeing juvenile detainees who are committed to its custody after a court ruling that they have violated the law. Respondent oversees approximately 12 secure facilities throughout Massachusetts, including two secure facilities in Western Massachusetts and is an employer within the meaning of M.G.L.c.151B§1. Respondent Maria Cordero is Director of Human Resources/HR liaison for DYS.

2. Complainant Phillip LaMontagne resides in Chicopee, Massachusetts. In November 1980 Complainant was hired by the Respondent as a Group Worker 1. During 1994 he worked the third shift at the Westfield Youth Services Center, a secured detention facility.

3. On July 24, 1994, there was an armed break out of eight residents of the Westfield Youth Services Center. During this breakout, Complainant was pistol-whipped and grazed by a bullet.

4. On the following day, July 25, 1994, Complainant went out on leave, applied for and was awarded Worker’s Compensation benefits. He was diagnosed with Post Traumatic Stress Disorder resulting from the break-out, and remained out of work for the following three and a half years under a temporary full disability that included “assault pay.”

5. Pursuant to an “Individual Written Rehabilitation Plan” negotiated by the Department of Industrial Accidents and Respondents, in December 1997, Complainant returned from his disability leave and was assigned to the position of Campus

Police/Security Officer, third shift, at Respondent's Western Area office, located on Tinkham Road in Springfield, Massachusetts. The Western Area Office contained administrative offices as well as four units of juvenile detainees. In addition to Complainant there were three other security officers at Tinkham Road. On weekends, security officers worked in three shifts. There was no security officer assigned to the day shift Monday through Friday. Complainant testified that, prior to returning to work, he met with George Ashwell, the Western Regional Director of DYS, who assured him that he would not have to handle physical altercations and told him that if he had any trouble to call William Rosenbeck. (T-3, 12/13/05)

6. Complainant's rehabilitation plan placed a number of functional limitations on him as follows: "[Complainant] should not be exposed to any physical risks. Should not demand more than he has been trained to do. Should not be in a job that is high pressured multiple demands. Can't be around loud noises." (Ex. C-5) According to Complainant, he was told that he would never be alone with a detainee and that if the need for restraint arose, he was merely to radio for help. Complainant testified that he was told not to respond to any unusual incidents in a manner that would create a security risk for him or for Respondent and that he was to call the Springfield police, log in the incident and notify the supervisor on-call. I credit Complainant's testimony that he was told not to be involved with restraining detainees, however, I do not believe that this restriction was ever communicated to Bill Rosenbeck, Complainant's supervisor at Tinkham Road.

7. Maria Cordero, Director of Human Resources/HR liaison, was involved in negotiating Complainant's return to work agreement. Cordero explained that the process involved reviewing Complainant's medical documentation, with the goal of slowly

easing him back into the work force performing “temporary modified duty”.

Accordingly, Respondents placed him in a less demanding and less dangerous security position than the one involving direct care that he had been performing prior to his leave.

(Ex. C-5)

8. Cordero testified that, as a technical matter, DYS did not fill Complainant’s former position during his leave, but instead moved the position to the Springfield location with the intent to return him to his former duties in Westfield when his physician approved his return to full duty. (T-6, 12/14/05)

9. William Rosenbeck is Director of Secured and Residential Services for the Western Area of DYS. Rosenbeck described the Campus Police/Security position as the “eyes and ears” of the facility. The duties of the position included: conducting perimeter checks, internal checks of doors, random radio checks and checks of open doors. Security Officers were also charged with opening the doors in the morning and responding to emergencies. (T-3, 12/14/05) Rosenbeck testified that Complainant was stationed directly outside his office and that they had a pleasant working relationship, although he did not see Complainant very often because Complainant worked nights and Rosenbeck worked days.

10. Rosenbeck testified that in 1997, he was contacted by DYS Regional Director, Monica Perez, about a position for Complainant that would meet his restrictions, including no exposure to loud noises. Rosenbeck was not part of the negotiations regarding Complainant’s position, but was aware of Complainant’s stress-related illness and that he should avoid any exposure to physical risks. Rosenbeck stated that the Security Officer position was, for the most part, consistent with Complainant’s

limitations because residents were asleep when Complainant was on duty. Rosenbeck denied telling Complainant that he would never be expected to restrain a client and stated that Complainant was required to respond to all emergencies and to assist in any way necessary, including entering a unit to help with a restraint or to make telephone calls. Rosenbeck stated that if Complainant found a client escaping he would be expected to hold him or her until staff arrived. He denied ever telling Complainant that his responsibility was limited to calling 911 in such situations. I credit this testimony.

11. Gary Lemoine was a supervisor and former Security Officer who worked directly under Rosenbeck. Lemoine supervised the facility, and oversaw food service, maintenance, and security and helped with the transition of the 45 boys and 12 girls housed within the facility. Rosenbeck stated that Lemoine's supervisory position was newly created and his duties evolved over time, but in general, Lemoine supervised the security officers regarding day-to-day issues and Rosenbeck undertook the more formal supervision of employees.

12. Complainant testified that he was assigned to the third shift to minimize his contact with residents. He claimed that Rosenbeck told him that this position would be less stressful than his previous position and that he would be primarily responsible for paperwork and making telephone calls. Complainant testified that he was assigned to the third shift to minimize his contact with residents. I credit this testimony. (Testimony of Complainant) (T 3, 12/13/05)

13. In November 1998, Complainant requested overtime assignments, on first and second shifts. Although Rosenbeck was concerned that working the first and second shifts involved more client contact, after receiving assurances from Complainant that

working overtime would not violate Complainant's Individual Written Rehabilitation Plan, Rosenbeck eventually assigned a few weekend overtime shifts to Complainant. Rosenbeck stated that he understood Complainant's requests to work overtime as effectively lifting the restrictions contained in the agreement. I credit this testimony.

14. Complainant testified that during his first year at Tinkham Road, he worked on Y2K computer issues, and his duties primarily involved processing juveniles brought into custody, ensuring they were medically stable, notifying workers on the unit of new arrivals and ensuring that clients were asleep on the unit. In addition, he made outdoor rounds, ensuring that lights were on and doors were locked. (T3, 12/13/05) I credit this testimony.

15. Complainant testified that he performed the duties of this position without incident until June 2000. During this period Complainant received occasional calls on his security radio and would respond to the units, but if there were altercations in clients' rooms, he remained in the office while workers on the units responded to disturbances.

16. In late 1999, following a series of deaths of children in the State's custody, the Office of Child Care Services (OCCS), the child care licensing agency for the Commonwealth, revised its regulations regarding restraint of children in the State's care and custody. The revisions included mandatory restraint training for all employees who could potentially have hands-on contact with children. OCCS interpreted these revisions to apply to employees of DYS, as well as to private vendor agencies contracting with DYS for residential and community based services. OCCS did not require training for employees performing administrative work, or who were not responsible for restraining

residents, such as office workers and kitchen workers. (Testimony of Lucille Foran, T-6, 12/13/05)

17. Rosenbeck testified that in May 2000, DYS was given a mandate to conduct restraint training by June 30, 2000 for all employees working directly with children, such as group workers and security officers. Rosenbeck scheduled several training sessions in Springfield for his employees and upon reviewing attendance sheets from those sessions discovered that Complainant had not attended the training. On June 23, 2000, Rosenbeck confronted Complainant about his failure to attend the training and Complainant replied that he mistakenly believed the training had been located in Westfield. I credit this testimony, which was corroborated by Complainant. After consulting with his supervisors Perez and Cordero, Rosenbeck issued a formal warning to Complainant for his failure to attend the training. (Ex. C-7)

18. Complainant testified that when Rosenbeck first informed him of the mandatory training, he told Rosenbeck that he “couldn’t handle it.” He testified that Rosenbeck responded that the training was required, became angry and went in his office. I do not credit this testimony.

19. Complainant testified that he did not want to attend restraint training because he believed that being trained in restraint methods meant DYS would expect him to intervene when altercations with clients occurred. Complainant believed this was not required of him under his rehabilitation plan. He “had a sense” that Rosenbeck understood why he resisted attending the training because Rosenbeck was familiar with his restrictions. I credit Complainant’s testimony regarding his reasons for not attending restraint training. However, I find that Complainant did not convey his concerns to

Rosenbeck and therefore did not notify Respondents about his reasons for not attending the training.

20. Complainant stated that Respondents' pressuring him to attend the restraint training "brought him back" to the traumatic events surrounding the break out in 1994. (T-5, 12/13/05) After his refusal to attend the restraint training in June 2000, he claimed the pressure on him to attend the training caused a relapse of his symptoms of Post Traumatic Stress Disorder. According to Complainant, he could not handle the stress and began to call in sick. I credit this testimony.

21. Complainant testified that Rosenbeck told him his hands were tied and when Complainant replied he did not think he could attend, Rosenbeck accused Complainant of playing games. Complainant stated that he responded "You [sic] got to be kidding me." and slammed the door. He gave Rosenbeck no specific reason for refusing to attend the restraint training because Rosenbeck had "shaken him up." I credit this testimony.

22. Complainant testified that on September 5, 2000, he met with Gary Lemoine to discuss the restraint training, and other issues. He testified that Lemoine, a large person, leaned over him and said he did not understand the problem. Complainant told Lemoine that he couldn't attend the restraint training and Lemoine raised his voice and repeated that he did not understand the problem. Complainant told Lemoine that he could not discuss it then, and left the meeting. Nonetheless, Complainant testified that during this discussion he told Lemoine that he was restricted from administering restraints because it was uncomfortable for him and would involve physical altercations. He also believed that Lemoine, who worked with Rosenbeck on a daily basis, knew about his restrictions. I do not credit Complainant's testimony that he told Lemoine that he was

restricted from administering restraints or engaging in physical altercations. His testimony regarding this meeting with Lemoine was contradictory as to this issue. (T-3, 4, 12/13/05)

23. After this incident, Rosenbeck wrote a memorandum to Maria Cordero and Monica Perez:

This is an update on the formal warning on Phil LaMontagne for his failure to attend Restraint Training as mandated by the Department of Youth Services by June 30, 2000. Phil was scheduled to meet with Gary Lemoine today...to review this formal warning after he refused to sign the letter on July 28th. This morning at 8:15 am Gary asked if Phil would like to meet[sic] with him now rather than at 4:00pm. Gary reported that Phil did not want to meet with him at all. Gary stated to Phil that the formal warning was still on file even if he refused to sign it. Phil left the building without a response back to Gary. A restraint training is scheduled for September 21, 2000 at the Western Youth Service Center in the Learning Center. Phil will be notified to attend this training. If there are any further problems with this issue, I will notify your office. (Ex. C-8)

24. Rosenbeck testified that he instructed Complainant to attend a restraint training scheduled for September 29, 2000. Complainant did not attend this training and he never provided Rosenbeck with a physician's letter stating he could not attend restraint training. Thereafter, in mid to late October, Complainant began calling in sick on a regular basis. I credit this testimony. Complainant testified that he worked fairly steadily until September 21, 2000 when Respondent told him he would receive a second warning for not attending restraint training. Complainant stated that in October he became very ill and was under great stress. He claimed he was unable to sleep at this time, but would come to work sick and attempt to work. (Ex. C-9)

25. Complainant stated that because of intimidation by his employer over the issue of restraint training, he was unable to return to work. On or about November 7, 2000, Complainant sent his supervisors a handwritten note from Kiran Chouhan, M.D.

stating that Complainant had been seen for his physical and mental illness and Dr. Chouhan recommended he see a specialist and be re-evaluated after ten weeks. (Ex. R-6) Complainant stated that the handwritten note was unacceptable to Rosenbeck and he thereafter delivered a typed version of the letter to Rosenbeck on November 17, 2000. (Ex.C-10)

26. On November 18, 2000, Complainant hand-delivered a note to Rosenbeck which stated that:

I have recently spoke [sic] my doctors [names omitted] and My Attorney Richard Ianello. At this time they are all in agreement with me, that it would be in the best interest of DYS and myself to seek out an opportunity to change my shift. This would in turn alleviate but not eliminate my current emotional and health problems caused from the 94 incident and length of stay on this shift of 20 plus years. I have spoke [sic] to my primary care physician and have come to a decision to give the shift a try and return a little bit sooner. I will possibly be returning to work on 12-8-00 and have a new note from Dr. Chouhan stating a return to work on 12-08-00. I will be evaluated about it on 12-8-00 and 12-20-00 with two different Dr's. ... (Ex. R-5)

Complainant did not testify as to how a shift change would accommodate his Post Traumatic Stress Disorder. According to Complainant, Rosenbeck never responded to the request for a shift change.

27. Rosenbeck testified that after receiving the notes from Dr. Chouhan and then the letter from Complainant requesting a shift change, he and Gary Lemoine called Complainant's home on several occasions in order to clarify Complainant's medical condition. Each left several messages on Complainant's telephone answering machine, but did not receive a return call from Complainant. I credit this testimony.

28. On December 2, 2000, Complainant's girlfriend, Tina Parro, hand-delivered a written resignation from Complainant to Rosenbeck which stated:

I have recently spoke[sic] to my doctors, (Dr. Kiran Chouhan M.D.PCP, Dr. Luz Martin, M.D., Dr. Sheehan, M.D.ENT Specialist and My Attorney, Richard Ianello). At this time they are all in agreement with me, that it would be in the best interest to DYS and my self [sic] to seek out an opportunity to change my career field. At this time I will be leaving DYS and resigning from the position of group worker 12 and taking an early retirement as of 12-08-00. This in turn will allow me to have an opportunity to seek out other ventures in different areas of work. I am Sorry if this has caused you any inconvenience but I must take care of my self in order for me to move on to other areas of interest. Many thanks for your time and understanding in this matter. (Ex. R-1)

29. Rosenbeck testified that after receiving Complainant's written resignation, he unsuccessfully attempted to reach Complainant by telephone to arrange an "exit interview". On December 14, 2000, Rosenbeck wrote Complainant a letter stating that his resignation had been accepted. The letter stated:

Dear Phil, I received your letter of resignation and early retirement dated December 2, 2000... Gary Lemoine and myself had left several phone messages on your answering machine to contact us so that we could do an exit interview and paperwork. To date, we have not heard from you to set up a time with us. At this point your resignation is effective on December 8, 2000. Good luck with your future endeavors. (Ex. R-7)

30. Complainant testified that on many occasions between December 2, 2000 and February 16, 2001, he telephoned "DYS" and Maria Cordero in an attempt to rescind his resignation, buy back his sick leave time and apply for disability retirement.

31. Some time after December 14, 2000, Complainant contacted the State Retirement Board in order to apply for retirement. In addition, shortly after December 14, 2000, Complainant called Rosenbeck and told him that he wanted to be "fired" instead of resigning because he had been informed by someone at the State Retirement Board that this would help his efforts to secure retirement benefits. Rosenbeck declined to fire Complainant because he had no cause to do so.

32. Maria Cordero testified that some time thereafter, she received a call from the Governor's Office inquiring about the status of Complainant's retirement. Cordero explained to the caller that she had not yet received any retirement paperwork.

33. On February 16, 2001, Complainant's Counsel John Ferriter wrote to Maria Cordero that Complainant was "rescinding his resignation and constructive discharge" on December 13, 2000. (Ex. C-12)

34. Maria Cordero testified that she was told by a liaison in her office that Complainant had called the liaison requesting to rescind his resignation and to instead retire. The liaison told Complainant to contact the State Retirement Board, the agency that processes retirement applications.

35. Cordero testified that on February 23, 2001 she received a letter from an attorney seeking to rescind Complainant's resignation/constructive discharge because he wished to retire instead. (Ex. C-12) Cordero testified that she received numerous calls regarding Complainant and his wish to retire, and she informed the callers that Complainant had to contact the Retirement Board, as she could not retire someone who had not followed the proper retirement system procedures.

36. Cordero testified that Complainant's status from December 2000 until he ultimately obtained retirement status in 2004 was "resigned." He was not an employee during this time. She stated that during the time period after December 2000 she received from Complainant an application for disability retirement that was lost or misplaced by her office and therefore she asked Complainant to re-submit the application about 18 months after his resignation. I credit Cordero's testimony in its entirety.

37. In 2004, Complainant ultimately received disability retirement benefits as well as a lump sum settlement of his Worker's Compensation claim.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, sec. 4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation. A claim of handicap discrimination may be proved by showing that the Complainant (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by his employer; and (4) his position remained unfilled and the employer sought to fill it. Dartt v. Browning Ferris Industries, Inc., 427 Mass. 1 (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. Complainant will be determined to be 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." Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination in the Basis of Handicap-Chapter 151B at 7 Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination, et al, 441 Mass. 632 (2004). Complainant has established that he is a handicapped person within the meaning of M.G.L.c.151B because

of his record of Post Traumatic Stress Disorder which rendered him unable to work at all for a number of years and also, because his injury was determined to be compensable under Workers' Compensation, Complainant is deemed a qualified handicapped person within the meaning of c. 151B, provided he is able to perform the essential functions of the job with or without a reasonable accommodation. See, M.G.L.c.152, §75B.

However, there is no evidence that Respondent discriminated against him on the basis of his record of Post Traumatic Stress Disorder or for his having received Worker's Compensation benefits.

When Complainant returned to work, he required work in a low stress environment with limited exposure to any physical risks. While Complainant alleges that Respondents refused to accommodate his handicap by ordering him to attend restraint training in June 2000 and again in September 2000, there was no credible evidence that Respondents were on notice that Complainant's failure to attend restraint training was on account of his Post Traumatic Stress Disorder. Indeed, Complainant told Rosenbeck that he missed the first training because of a mistake about its location and did not reveal to Rosenbeck his concerns about having to engage in restraints. Further, there was no evidence that Respondents failed to respond to Complainant's request to change his shift, as Complainant did not return his supervisors' calls regarding this request, and shortly thereafter submitted his resignation.

Complainant argues that he was constructively discharged because he was compelled to resign. I do not concur. While Complainant may have believed he had no choice but to leave his employment in December 2000 because of pressure to attend restraint training, I conclude that his termination was voluntary and not compelled.

Complainant's supervisors attempted on several occasions to contact Complainant to determine his medical status and discuss this matter with him. Complainant did not return their calls. Complainant never provided a physician's letter that attending the training or remaining on the night shift would violate his work restrictions or cause him undue stress. I do not conclude that Respondents can be deemed to be on notice of this. There appears to have been an honest dispute about the extent of Complainant's restrictions on the job.

Finally, Complainant contends that Respondents' refusal to "rescind" his resignation and process his retirement was discriminatory. However, Complainant failed to establish that Respondents were responsible for processing a change in Complainant's status and any delay in securing retirement benefits resulted from Complainant's own error in submitting his resignation in the first place and then not seeking retirement through the proper channels.

For the reasons stated above, I conclude that Respondents did not engage in unlawful handicap discrimination when they required Complainant to attend restraint training, and did not change his shift. Further, I conclude that Complainant was not constructively discharged. Therefore, this matter must be dismissed.

IV. ORDER

For the reasons stated above, I hereby order that this complaint in this matter be dismissed.

This decision constitutes the final order of the hearing officer. Any party aggrieved by this decision 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 26th day of September, 2006.

JUDITH E. KAPLAN,
Hearing Officer.