COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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SERAFIN FERNANDES AND
MASSACHUSETTS COMMISSSION
AGAINST DISCRIMINATION
Complainants

Against   Docket No. 03 BEM 02432

AMERICAN DRYER CORP.
Respondent

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Appearances: Goncalo M. Rego, Esq. for Complainant
Brenda McNally, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 26, 2003, Serafim Fernandes ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that Respondent American Dryer Corporation discriminated against him on the basis of perceived 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 January 16, 2007. A public hearing was held on May 10, 2007. . .

The Complainant testified on his own behalf as did John Carvalho. Elizabeth Moniz testified on behalf of Respondent. The parties submitted joint exhibits 1-3 and 5-10. The parties initially agreed to the entry of wage records as Joint Exhibit 4 but

Respondent subsequently opposed their submission on the basis that Complainant failed to supply complete wage information for 2003. Respondent submitted excerpts from the deposition transcript of Complainant which were accepted into evidence as Respondent's Exhibit 1. Counsel submitted post-hearing briefs on and after June 25, 2007.

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. Complainant applied for a manufacturing position at Respondent American Dryer Corporation on July 14, 2003. On his job application Complainant listed two employers under the employment history section: Priority Finishing, a prior employer, and Brittany Dye, his current employer. The application had a "yes" marked off for "may we contact for a reference."
2. Complainant worked at Brittany Dye for approximately six years prior to applying for employment with American Dryer Corporation. His hourly rate of pay at Brittany Dye was $14.81. Complainant testified that he sought employment at American Dryer Corporation because his work hours at Brittany Dye were being reduced.
3. On July 24, 2003, Complainant had an interview with Elizabeth Moniz, Respondent's Human Resource Assistant. Moniz conducted the interview in Portuguese, Complainant's native language. She noted on Complainant's application that Priority Finishing had closed down.
4. According to Moniz's credible testimony, she advised Complainant that prior to a

final employment decision being made, his references would have to be checked and he would have to pass a pre-employment physical. According to Moniz, it is the practice of Respondent to ask for two work references but it will take one if two are not available.

5. Moniz testified credibly that Complainant expressed concern about Respondent contacting his current employer because he did not want the company to know he was seeking another job. I credit Moniz's testimony that she arranged to have Complainant's pre-employment physical exam take place prior to his reference check in response to Complainant's concern. Typically, once Respondent makes a conditional offer of employment to a job applicant, it conducts a reference check prior to arranging for a pre-employment physical exam.

6. Respondent employs Work-Med to perform pre-employment physical examinations. Work-Med examiner, Jean Martineau, N.P., performed Complainant's pre-employment physical examination on July 31, 2003. Complainant informed Martineau that he had sustained a stroke in 2002. Complainant's treating physician forwarded a note to Work-Med stating that Complainant was capable of working as a machine operator. Martineau noted the Complainant "presently displays no weakness, no neurological deficits, [and] has been cleared for work by his physician." Martineau determined that Complainant was physically capable of work.

7. According to Work-Med's policies and procedures in effect in July of 2003, it first determines whether an applicant is physically capable of working, then contacts the hiring employer with this result, and subsequently sends the employer

a copy of the results of the physical exam. Joint Exhibit 5, Affidavit of Jane Hathaway.

8. Candy Cuoto of Work-Med contacted Elizabeth Moniz approximately three or four days after the physical examination to advise Moniz that Complainant had passed his pre-employment physical. Moniz informed Complainant the same day that he had passed.

9. I credit Moniz's testimony that after informing Complainant that he had passed the pre-employment physical, Moniz told Complainant that she would have to contact Brittany Dye in order to obtain a reference check. According to Moniz's credible testimony, Complainant wanted a guarantee that he would be given a position by Respondent if he provided the information, but Moniz told Complainant that she couldn't guarantee him a position until she obtained the reference check. Complainant became angry and hung up the phone. Moniz testified credibly that Complainant later called her back and accused her of refusing to guarantee him a job because of his stroke. Although Complainant testified that Moniz sought to contact a former employer, Priority Finishing, which was not in business at the time, I find more credible the testimony of Moniz that she sought to contact his current employer, Brittany Dye, rather than a closed company. I also credit Moniz that she was not aware that Complainant had sustained a stroke prior to their second conversation.

10. In his complaint, Complainant alleges that another individual, Antonio Viveiros, was hired by Respondent without a reference check from Priority Finishing. Viveiros's job application listed two other employers -- Darwood Manufacturing

and Main Street Textiles -- in addition to Priority Finishing. Joint Exhibit 7. A reference check was performed on Viveiros by contacting Main Street Textiles.

11. All of the individuals hired by Respondent for manufacturing jobs in 2003 received reference checks consisting of Respondent contacting at least one current or prior employer. Joint Exhibits 8 and 9.
12. Numerous individuals hired by Respondent during the 2002-2003 period had medical conditions at hire, including hypertension, reduced vision, heart conditions, chest discomfort, low back injuries, epilepsy, diabetes, bleeding disorder, arthritis, shoulder separation, and carpal tunnel symptoms. Joint Exhibit 10.
13. Complainant did not miss any time from work at his employer, Brittany Dye. He continued to be employed there from 2003 through the public hearing in 2007.

III. CONCLUSIONS OF LAW

Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful to discriminate against a qualified handicapped person who is capable of performing the essential functions of a job with or without a reasonable accommodation. 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. 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. An individual is considered handicapped even if the person has no physical or mental impairment as long as the

individual is regarded as having such an impairment.

In order to establish a prima facie case of handicap discrimination, Complainant must not only establish that he was a qualified handicapped person, he must show that he was rejected under circumstances which give rise to an inference of discrimination. In this case Complainant charges that discrimination should be inferred from the fact that Respondent refused to hire him after learning that he had a stroke in 2002. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998); Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997); McLain v. Holyoke Hospital, Inc ., 19 MDLR 101 (1997).

Once a prima facie case is established, the burden of proof shifts to Respondent 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 Respondent succeeds 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 Respondent is 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 asserts that he has set forth a prima facie case of handicap discrimination on the basis that Respondent decided not to hire him after Work-Med reported that he had a stroke in 2002. The facts do not support this assertion. The evidence establishes only that Candy Cuoto of Work-Med contacted Moniz approximately three or four days after the physical examination to advise Moniz that Complainant had passed his pre-employment physical, not to share with Moniz the details of Complainant's medical history. Work-Med's policies provide that medical histories are not communicated over the phone, but, rather, are contained in a subsequent written report that is mailed to the hiring company.

Even if Cuoto had shared such information, however, Respondent satisfies its burden at stage two by proffering a legitimate, nondiscriminatory reason for the adverse employment action, supported by credible evidence, to wit: Complainant's refusal to allow Respondent to contact his current employer, Brittany Dye, for an employment reference. Respondent supports this reason with credible testimony by Moniz that at least one employment reference must be checked for every applicant and that she could not contact Complainant's prior employer because it had closed. I found Moniz to be credible in testifying that she deviated from Respondent's normal practice of performing a reference check prior to the pre-employment physical in order to accommodate Complainant's request for privacy but that once the pre-employment physical was completed, she could not longer delay in obtaining an employment reference.

At stage three, Complainant fails to rebut the non-discriminatory reason proffered by Respondent. Complainant's allegation that Moniz insisted on obtaining a reference check from Priority Finishing -- a prior employer she knew to be out of business -- defies

credulity. Complainant's reliance on the manner in which fellow applicant Viveiros was screened by Respondent is similarly unpersuasive because Viveiros was able to provide the name of a prior employer whom Respondent was able to contact. Finally, evidence of the medical histories of other employees supports Respondent's position that it hires individuals with medical conditions as long as they are capable of performing the essential functions of their jobs. This evidence provides additional support for Respondent's position that the medical information regarding Complainant's prior stroke played no role in the decision not to hire him.

For the reasons set forth above, the complaint is dismissed.

IV. ORDER

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 28th day of November, 2007.

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Betty E. Waxman, Esq.,
Hearing Officer