

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
& SYLVESTER MITCHELL,
Complainant

v.

DOCKET NO. 03-BEM-01035

MAL'S AUTO SERVICE CENTER
Respondent

Appearances: Kelley Broadbent, Esq. & Steven C. Goldwyn, Esq. for Complainant
Sally A. Kinder, Esq. & Allen E. Steinberg, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 23, 2003, Complainant, Sylvester Mitchell, filed a complaint with this Commission alleging that he had been discriminated against in the terms and conditions of his employment and terminated from his employment on April 15, 2003, on account of a disability. Specifically, Complainant alleged that he is HIV positive and that after notifying his employer of such in early January of 2003, his working conditions changed and he was ultimately terminated.

The Commission found Probable Cause to credit the allegations of the Complaint and after conciliation efforts were unsuccessful, the matter was certified for a Public Hearing. A Hearing was conducted before the undersigned Hearing Officer on May 8, 2006. The parties subsequently filed post hearing briefs on July 14, 2006.

Having duly considered the record of the administrative hearing and the parties' post hearing submissions, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. On October 1, 2002, Complainant, Sylvester Mitchell applied for an advertised position as a full time detailer of autos at the Respondent, Mal's Automotive Center. According to Complainant, he had been out of work for almost a year at that time.
2. Respondent, Mal's Automotive Center, is located on Massachusetts Avenue in Lexington, MA and is an employer within the meaning of G.L. c.151B. Malcolm Keljikian has been the owner of Respondent for 50 years. James Keljikian is Malcolm Keljikian's son. He testified that he works for his father as the manager of the body shop and oversees car repairs, towing, and does some office work.
3. Complainant was hired by Respondent and began work as a full time detailer on October 7, 2002. He was hired at \$12 per hour and according to Mr. Keljikian, Complainant did not indicate that he had any health concerns at the time of his hire.
4. Although Complainant was hired to work full time, his time cards reflect that he never worked a full week after his first week. After Complainant's first week, the hours he worked continually decreased. He was absent from November 10-20, and December 16-30, 2002. Mr. Keljikian recalled that one of these absences was for surgery and another involved workers compensation. By January of 2003, Complainant was working sporadically, with his hours ranging from a high of 24 hours one week to zero hours another week. (Ex. R-2).

5. According to his Complaint filed with the Commission on April 15, 2003, Complainant was diagnosed as being HIV positive in January of 2003. However, at the Hearing, Complainant testified that he was diagnosed in 2000, and at the time he began working for Respondent, was already suffering from the symptoms of the disease and complications from several medications he was taking, including diarrhea, difficulty keeping food down and weight loss.¹
6. Mr. Keljikian had a discussion with Complainant about his hours a few weeks after Complainant was hired and advised him that Respondent needed a full time person. At that time, Complainant told Keljikian that he had some health problems and Keljikian responded that this was not a problem, that Respondent had plenty of work and that Complainant should keep him posted.
7. In late December or early January, Keljikian discussed with his son James the need for a full time detailer. As a consequence of Complainant's reduced hours and his inability to work full-time, in late December of 2002, Respondent began advertising for a full time detailer. Mike Amill was hired as a full-time detailer in early January 2003, prior to Mr. Keljikian learning that Complainant was HIV positive.
8. Complainant was not terminated when Mr. Amill was hired. According to Mr. Keljikian, there was always detail work for Complainant to do and he was paid every day that he showed up for work, and he was paid for all holidays. Complainant stated that he would call Respondent on days that he was going to be late or could not come in.
9. Mr. Keljikian testified that the space downstairs where the detailing is done is very small and only two people can work in the space. Therefore, when another full time

¹ A letter from Barbara K. Tuck, RN, MPH a nurse at Harvard Vanguard Medical Associates indicated that Complainant tested positive for HIV infection in December of 2002 and put on a regimen of anti-viral treatment. (Ex. C-2)

detailer was hired, Complainant was assigned to work upstairs due the limited amount of space downstairs. Keljikian testified that body work and painting were done in the room upstairs. I credit his testimony that Complainant was assigned to work upstairs on those days that he came to work, because of the limited space downstairs where the two other detailers were working.

10. Sometime in mid-January 2003, Complainant went to Mr. Keljikian's office and informed him that he had been diagnosed HIV positive. According to Keljikian, Complainant came to his office and said he needed to talk. Complainant revealed his HIV diagnosis and was very sad and told Keljikian he had no friends. Mr. Keljikian testified that he felt so bad for Complainant that he, Keljikian, began to cry. He testified that, to this day, he feels very bad for Complainant. He also noted that Respondent did not cut Complainant's hours, and anytime Complainant showed up to work, they would have work for him because Respondent's shop is very busy. I found Mr. Keljikian to be a very credible and compelling witness and believe that he was very sympathetic to Complainant and sought to accommodate him by allowing him to continue working whenever he was able.

11. Complainant testified that after he revealed his HIV diagnosis to Keljikian, he was forced to wear gloves on the job and was transferred to work upstairs across from Keljikian's office, having to carry his cleaning chemicals upstairs. He also stated he noticed a difference in the way Mr. Keljikian and his son James treated him. He said that James got "cold," and Mr. Keljikian was "different." Keljikian testified that none of his employees are forced to wear gloves while working, and he did not force Complainant to. He stated that he provides gloves because they are required by certain OSHA regulations

that are posted. Employees are also encouraged to wear gloves when they work with irritating solvents and chemicals or have a messy degreasing job. Keljikian stated that he brought Complainant upstairs to clean his trucks, because of the limited space downstairs and this seemed to work out fine. I found his testimony to be completely credible.

12. On January 25, 2003, Keljikian and Complainant had a dispute about a task he asked Complainant to do. When Keljikian asked Complainant to take something upstairs, Complainant refused, saying it was not part of his job. An altercation ensued and Keljikian believes that his son called the Lexington Police. Keljikian stated this was not unusual because they always call the police if there is any commotion in the shop. He stated that he had very little memory of the incident. The police report notes that the dispute was resolved without incident. (Ex. C-3).

13. On April 11, 2003, a regular customer of Respondent reported to James Keljikian that a radar detector was missing from her car after it had been in Respondent's shop. James Keljikian spoke to Jim Marazzi who had worked on the car and asked around downstairs, but no one admitted to seeing the radar detector. Later that day Marazzi approached James Keljikian and told him that Complainant had taken the radar detector and that other items were also missing. In a meeting with James and Malcolm Keljikian, Marazzi informed them that a buffer, a buffer pad, and a large shop vacuum had also been taken by Complainant and that he had seen Complainant put the items in their truck while cleaning it and then drive the items around back to his car. Marazzi told them that his own father had owned a shop and that he considered the Keljikian's good people and he couldn't live with himself knowing someone was stealing from them and not report it. When James Keljikian asked if he ever suspected Marazzi of the thefts, he stated that

Marazzi did not have a driver's license or a car, and could not have walked away with the items.

14. Upon hearing Marazzi's account of his having witnessed Complainant stealing, Keljikian contacted the Lexington Police. When the police arrived, Complainant gave them permission to search his car. A buffer pad was found in Complainant's car, but he testified that he used identical buffers in his own detailing business. None of the other missing items were found in Complainant's car.

15. Complainant did not return to work at Respondent until April 15, 2003. On that day he was asked to meet with Malcolm and James Keljikian and the General Manager of Respondent, Don Aboud. The purpose of the meeting was to discuss the missing items. According to James Keljikian, the General Manager did most of the talking and asked Complainant if he had taken any items from Respondent, and if he had, he could return them with "no questions asked." Complainant denied taking any items and things began to get heated. James Keljikian testified that Aboud came down heavy on Complainant and the two of them started arguing. Complainant did not want to speak with Aboud and insisted on speaking to Malcolm Keljikian alone. Complainant told James Keljikian to shut up, and at that point Aboud fired him. Complainant was asked to sign a document which he refused to do and was ordered to leave the premises. When he lingered outside in front of Respondent's building and refused to leave, the Lexington Police were called. Complainant testified he was waiting for the bus. When the officers advised him to leave, he left the premises peacefully.

16. Malcolm Keljikian testified that in 50 years he has never had to fire anyone. He stated that his policy on theft is to give employees the opportunity to return missing items

“no questions asked” because he understands people make mistakes and he believes in giving people a second chance. Mr. Keljikian testified that he would not have fired Complainant, but once his General Manager did, he did not countermand the decision, because he believes that, as the owner, he has to support his managers. Keljikian stated he has other employees with health problems and he allows them to keep working because he feels bad for them. I found Mr. Keljikian to be a very forthright witness and I credit his testimony.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, s. 4(16) prohibits discrimination in employment on account of handicap. This includes dismissing someone from employment or otherwise discriminating against a person because of a handicap. In order to prove a claim of discriminatory termination based on handicap, the Complainant must demonstrate that he suffers from a handicap, is a qualified handicapped person capable of performing the essential functions of the job, and was terminated, while the position he occupied remained open. Dartt v. Browning-Ferris Industries, Inc. 427 Mass. 1 (1998).

In disparate treatment cases, which this claim is, the courts employ a three-stage order of proof. Blare v. Huskey Injection Molding Sys. Boston, Inc. 419 Mass. 437 (1995); Wheelock College v. MCAD, 371 Mass 130 (1976). In the first stage, Complainant establish a prima facie case by a preponderance of the evidence. Blare supra. at 440-445.

Complainant must first establish that he his handicapped. Handicap is defined as (a) a physical or mental impairment which substantially limits one or more major life

activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment. G.L. c. 151B s. 1(17). In this case, Complainant had been diagnosed with HIV infection and was suffering from some ongoing medical issues, including diarrhea, difficulty keeping food down and weight loss. Complainant also suffered some medical complications from the various medications he was taking and was often too ill to work on account of these symptoms. He also alleges that he was perceived as handicapped once he announced his diagnosis to Mr. Keljikian.

This Commission and the Courts have held that a person who is infected with HIV, even if asymptomatic, is considered handicapped within the meaning of the statute and may also be perceived as handicapped. Snelders v. BHA, 23 MDLR 339 (2001); Murphy v. Kenmore Café, 17 MDLR 1451(1995); Richmond v. Roxbury Comprehensive Community Health Center, 15 MDLR 1562 (1993); Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226 (1992) (and cases cited therein). I conclude that, given the nature of Complainant's ailment and its multiple medical complications, Complainant was handicapped within the meaning of the statute. I also conclude that Complainant was a qualified handicapped individual who could perform the essential functions of the job with an accommodation. In the instant case, Complainant was performing his job capably when he was not too ill to be at work.

Complainant has also established that he suffered adverse action in his employment in that he was terminated. Complainant has alleged other actions by Respondent which I do not find to be adverse or harmful to him. I do not believe that assigning Complainant to work upstairs on the days he came to work was an adverse action. I also do not believe that Complainant was forced to wear gloves on account of

his illness, or that Mr. Keljikian treated him badly after he announced his diagnosis. In fact, it is clear from Keljikian's credible testimony that Keljikian did everything he could to accommodate Complainant's illness, allowing him to continue working whenever he showed up. Even prior to Complainant's HIV diagnosis, when he had significant attendance problems, Respondent accommodated his sporadic work schedule and merely hired another full-time detailer.

Once Complainant has established a prima facie case with respect to his termination, it is incumbent upon Respondent to articulate a legitimate non-discriminatory reason for its actions that is supported by credible evidence. Abramian v. Pres.& Fellows of Harvard College, 432 Mass. 107, 116-117(2000); Blare, supra. at 441-442. In this case, Respondent has articulated a legitimate non-discriminatory reason for Complainant's termination, that he was suspected of stealing items from Respondent's shop, and acted in a disruptive and insubordinate manner when asked about the missing items and told he could return them "no questions asked."

Complainant asserts that he was terminated from Respondent on account of his handicap and that the accusation of theft was a mere pretext for discrimination. In order to prove that Respondent's reasons were a pretext for discrimination he must show that Respondent acted with discriminatory intent, motive, or state of mind. Lipchitz v. Raytheon Co. 434 Mass. 493, 504 (2001). Complainant asserts that this is evidenced by the fact that no other employees were confronted with the theft and no investigation was conducted to determine if some other employee was guilty of taking the missing items. He alleges that Respondent acted solely on the word of a co-worker without further

investigation and that the police found no evidence that Complainant had taken the missing items.

However, I conclude that Respondent acted in good faith upon information it received from another employee. When asked whether they had considered Marazzi a possible suspect, the Keljikian's responded that they had considered this, but that Marazzi did not have a driver's license or a car and had no way to remove the items from Respondent's premises. Complainant also asserts that the Keljikian's change in attitude towards him after he made known his diagnosis, forcing him to work upstairs and forcing him to wear gloves, all evidence discriminatory intent. However, I did not find these allegations credible.

Finally, there is no credible evidence to suggest that Respondent treated Complainant adversely after hearing of his illness or that Mr. Keljikian or anyone else intended to discriminate against him on account of his illness. Complainant was hired to work full time, and after his first week on the job, never again worked a full week. Nonetheless, Respondent allowed him to continue working whenever he showed up, accepting the fact that he had ongoing health issues that prohibited him from working full time. There was no dispute that Mr. Keljikian allowed Complainant to work whenever he could and always paid him for work performed and even paid him for holidays. Given the fact that Mr. Keljikian felt sorry for Complainant and did what he could to keep him employed, I do not believe that Respondent used the theft of items from its shop as a pretext for terminating Complainant because of his handicap. Therefore, I conclude that Respondent did not violate G.L. c.151B when it terminated Complainant's employment.

III. ORDER

In light of the foregoing findings of fact and conclusions of law, I hereby Order the Complaint in this matter dismissed. This constitutes the final order of the Hearing Officer. Pursuant to 804 C.M.R. 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this Order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this Order.

So Ordered this 4th day of December, 2006.

Eugenia M. Guastaferr
Hearing Officer