

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & LUTFIJE BAKO,
Complainants

v.

DOCKET NO. 04-BEM-03073

OMEGA FOODS,
Respondent

Appearances:

William B. Green, Esquire, Commission Counsel¹
Edward J. Musco, Esquire for Omega Foods

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about November 15, 2004, Lutfije Bako filed a complaint with this Commission charging Respondent with refusing to re-hire her because of her disability, race and color and national origin. The case was originally dismissed by the Investigating Commissioner for lack of probable cause. Complainant appealed the causal determination which was reversed on appeal. The race and color claims were withdrawn, the disability claim was amended to include perceived disability and the national origin claim was dismissed at the public hearing. Thus the sole claims before me for adjudication are those of discrimination based on disability and perceived disability. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on May 26-28, 2015.² After careful consideration of the entire record before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

¹ The post-hearing brief was written by Commission Counsel J. Lynn Milinazzo-Gaudet

² Irena Kantarges interpreted from the Albanian.

II. FINDINGS OF FACT

1. Complainant Lutfije Bako was born in Albania and came to the United States in 1997 with her husband Leonidha Bako and their three children. In the U.S., Complainant worked for a time as a motel housekeeper. T. 43-44. Complainant's first language is Albanian.

2. Respondent Omega Foods, Inc. owns a Dunkin' Donuts franchise located at 715 Boylston Street, Boston and Efharis, Inc. owns a Dunkin' Donuts franchise located within Back Bay Station. The companies' principal office is located at 715 Boylston Street and George Alepedis is an officer of both companies, which are owned by various members of the Alepedis family. George Alepedis, a native of Greece, has operated the stores for decades. Employees often transfer between the two locations and Respondent referred to the two stores interchangeably as Omega. I conclude that Respondent Omega and Efharis, Inc. are controlled and operated by the same principal, operated as one company and were co-employers of Complainant.³ T.251; 463, 465; 469-70.

3. George Alepedis was responsible for the daily operation of the two stores until about five years ago when he suffered a stroke that left him with some memory loss and limited mobility. T. 473. Since that time his daughter, Efharis Alepedis, has run the business day-to-day. T. 463-4643.

4. Abdel Soltany has worked for Respondent since 1995. In 2004 Soltany was an assistant manager in charge of both locations. He worked primarily out of his office at the Boylston Street location. T. 252, 253. He interviewed and hired employees for both locations and was responsible for scheduling of employees. T. 255-256.

³Wherever "Respondent" is referenced in this decision, the term refers to both Dunkin' Donuts businesses operated by the Alepedis family at the Boylston St. and Back Bay Station locations.

5. In 1998, Complainant was hired for the position of crew member at the Back Bay location and was paid by Omega Foods. T. 44-45; T. 339-40. She trained for two or three weeks in all aspects of the position, which including working the cash register and preparing drinks. She occasionally took out the trash when no manager was on duty. T. 75; T. 339-341.

6. Respondent employed approximately 50 people at both locations. T. 259. The Back Bay store was small and quite busy, particularly during the morning, when as many as eight employees were on duty. Two to three people were assigned to the less busy afternoon shift. T. 266.

7. Complainant worked 40 hours per week, from 1:00 p.m. to 9:00 p.m. T. 45-6. By all accounts, Complainant was a valued employee and, in 2003, she was given additional responsibilities, including helping the shift leader to cash out the registers and answer the telephone. T. 76; 282-3.

8. In January 2004, Complainant was diagnosed with breast cancer. On January 16, 2004, she notified one of her shift supervisors, Toufik, of her diagnosis and that she would be undergoing surgery the following month. She began a leave of absence on February 14, 2004 and underwent surgery on February 16, 2004. T. 46-47. It was not clear whether Complainant initially gave Respondent an estimated return-to-work date.⁴

9. Soltany testified that after Complainant went out on leave, it was necessary for Respondent to replace her at the busy Back Bay store in order to service its customers in a timely manner. T. 270. I credit his testimony.

⁴ A letter from her physician dated February 13, 2004 and attached to her MCAD complaint states that she would have surgery on February 18, 2004 and would be out of work for "at least 3 to 4 weeks" to recover.

10. Subsequent to her surgery and recuperation, Complainant underwent four months of chemotherapy. Following the chemotherapy, Complainant underwent several months of radiation. T. 47-8.

11. Complainant testified that during her leave, one of her shift leaders, Hassan, called her to ask when she was returning to work. She told him that she was still undergoing radiation and Hassan responded that he hoped she would come back. T. 48.

12. Complainant testified that she never spoke to or met with Soltany during her leave. T. 77-78. I do not credit Complainant's testimony in this regard; it is inconsistent with her signed statement to this Commission on February 18, 2005, wherein she wrote that she kept in frequent telephone contact with Soltany during her leave and visited him on April 12, 2004 when she asked him to write a letter on her behalf. Ex. R-14. Her testimony is also inconsistent with the credible testimony of Soltany that he kept in touch with Complainant, directly and through a shift manager and Complainant's Albanian co-workers, with whom she was friendly. T. 284-5.

13. On April 12, 2004 Soltany wrote a letter, "To whom it may concern," stating that Complainant has worked for Respondent from September 30, 1998 to February 10, 2004 when she took a voluntary medical leave. Ex. R-16. At the public hearing, Complainant acknowledged that the letter bore her signature but stated that she did not remember anything about it. T. 78-80. I do not credit her testimony.

14. Complainant testified that after completing her chemotherapy in late September, her physician cleared her to return to work. Complainant testified she then called Hassan to say that she was planning to return to work. Hassan told her he would speak to Soltany and would call her back. Complainant stated that she called Hassan the next day and he told her to meet with Soltany about returning to work. T. 49. I do not credit Complainant's testimony regarding the

date she received clearance from her physician to return to work. In a submission to this Commission in March 2005, Complainant stated that she was cleared for work by her physician on October 28, 2004 and went to see Soltany the same day. Ex. R-13. I find that Complainant called Hassan in late October, 2004.

15. Complainant stated that she called Respondent daily for three weeks asking to speak to a manager. She was told that the manager was not there and her calls were never returned. T.50. I do not credit her testimony that Respondent did not return her calls for three weeks. Her testimony directly contradicts the evidence that she talked to Hassan shortly after being cleared to work by her physician and was advised to meet with Soltany. Soltany denied ever refusing a telephone call from Complainant because they had a good relationship and he wanted her to come back to work. T. 49-50; T. 287. I credit his testimony.

16. Complainant testified that on October 28, 2004, she, her husband Leonidha Bako and their older daughter, who spoke English, went to the Boylston Street store. When they arrived they were directed to the basement office where Soltany and Alepedis were seated. T. 50-51. Complainant testified that she told Soltany that she had come to get her job back. Soltany responded that he would do everything possible to put her on the schedule. Complainant stated that Soltany and Alepedis showed her no respect and did not offer her a chair and she became very upset. T. 51.

17. Complainant testified that while she and her daughter spoke with Soltany, her husband spoke in Greek with Alepedis. Complainant doesn't understand Greek and did not know what they said to one other at the time. T. 51-52. Leonidha Bako testified that he told Alepedis that Complainant was ready to return to work and Alepedis responded that Complainant could not return to work because she was sick with cancer. T. 190. Mr. Bako

testified that he did not immediately tell Complainant what Alepedis said because he did not want to upset her. T. 191-192. Complainant and her husband each testified that he told Complainant about the conversation at a family meeting that evening.⁵ I do not credit the testimony of Complainant and her husband regarding his discussion with Alepedis.

18. Leonidha Bako's testimony regarding his conversation with Alepedis was inconsistent with his deposition testimony. At his deposition, he testified that Alepedis' and Soltany's stated reason for not rehiring Complainant was the lack of a vacant position. He did not remember anyone at the meeting say that Complainant would not be re-hired because of her cancer. T. 222-244.

19. Nowhere in Complainant's MCAD complaint does she claim that Respondent expressly refused to re-hire her because of her cancer. T. 90-92; Ex. R-12. Neither Complainant's written statement of March 2005 nor her interrogatory answers references such a statement. T. 99-102; Exs. R-10; R-11; R-13.

20. Complainant did not raise the allegation that Alepedis expressly refused to re-hire her because of her cancer until her deposition in 2014. T. 168-169. Even then, Complainant made no claim that the statement was made during a conversation, in Greek, between her husband and Alepedis. At the public hearing, on cross-examination, Complainant stated that "maybe she forgot to mention it." T. 170-172.

21. Soltany vehemently denied that he or Alepedis told Complainant she could not return to work because of her cancer. He stated that he had cared for his own mother through an illness and Alepedis's mother died of cancer and they were both sympathetic to the issues surrounding

⁵ Mr. Bako at first testified that this conversation took place during a second meeting with Respondent. His testimony was then refreshed that it took place at the first meeting with Respondent, which was the only meeting he attended. I attribute his confusion to the significant passage of time between the events in question and the public hearing.

family illnesses. T. 322-3. He testified that Respondent employed numerous women who returned to work following maternity leaves. Soltany testified that he is disabled and is legally blind and that the Alepedis family had been supportive of him throughout his employment and promoted him despite his deteriorating vision. T. 353-354. I credit his testimony.

22. Soltany testified that Complainant called him in November 2004 to tell him that her physician had cleared her to return to work. He told her he was glad and would see what he could do.

23. Soltany testified that the day after she called him,⁶ Complainant came to the office unannounced with her husband and her older daughter and asked for her job back. Soltany told Complainant he would be more than happy to take her back and would check the schedule for availability. T. 287-88. However, Complainant demanded to be returned to a full time position on the same shift at Back Bay that she had worked prior to her leave. Such a position was not open at the time and Complainant refused to consider an available position at the Boylston Street Store. He stated that Complainant's inflexibility made it more difficult to return her to work. T. 340-342. I credit his testimony.

24. Complainant denied ever telling Alepedis or Soltany that she would only work her previous shift. T. 61-62. I do not credit her testimony.

25. Alepedis testified that he recalled Complainant coming to his office on Boylston Street. Complainant told him she wanted to return to the same shift and location as before but he had recently hired someone and had no position for her but stated he would hire her if her old shift opened up. T. 477-478.

26. Alepedis denied telling Complainant or anyone else that Complainant could not work at Respondent because she had had cancer. He never inquired into his employees' health

⁶ Complainant testified this conversation occurred at a meeting on October 28, 2004.

histories and was only concerned that they were capable of doing the job. T. 478-479. He stated that he had never discriminated against anyone. T. 479. He did not remember talking to Complainant's husband. T. 480-481. I credit his testimony.

27. Complainant testified that in the evening of October 28, 2004 the family met in order to discuss what they could do to prove that Complainant was able to return to work. T. 55-56. They decided to obtain a letter from Complainant's physician in order to document her ability to return to work. T. 57; Ex. C-1.

28. Complainant testified that on November 7, 2004, after obtaining a physician's letter clearing her to return to work, she called Soltany and was told he was not there. She and her husband then drove to the Boylston Street store and while her husband double parked outside, Complainant entered the store and was directed to the basement office where Soltany and Alepedis were seated. She testified that Soltany and Alepedis did not get up or offer her a chair and she was very upset. She attempted to give them the doctor's letter, but they would not take it so she put it on the table and they made a copy of it. T. 57-58; Ex. C-1.

29. Soltany testified credibly that when Complainant came to the office on November 7, 2004, she asked him when he was going to put her back on the schedule and he told her he was working on it, but Complainant continued to insist on her former schedule and location. T. 318-320; 341.

30. Soltany never asked Complainant for a physician's return to work letter because Respondent never required such letters. Soltany did not recall Complainant's handing him a doctor's letter on November 7, but stated if she had, he would have placed it in her personnel file. T. 288-9. I credit his testimony.

31. At the end of the November 7 meeting, at Complainant's request, Soltany wrote a letter "To whom it may concern," stating that Complainant has been out of work since February 16, 2004 due to health issues and "unfortunately" there were no openings at Respondent. T. 300; Ex. R-17; Ex. R-23.

32. Complainant filed her MCAD complaint on November 15, 2004.

33. Soltany testified credibly that in a period of approximately one week, Complainant had twice come to the office demanding her job back and it was unrealistic for her to think it was possible for him to rearrange the entire work schedule in such a short period of time in order to place her back in her old position. T. 296; 342-343, 346.

34. Soltany testified that Respondent was going through challenging economic times because several competitors had opened stores nearby Respondent's two stores and were drawing business away from Respondent.⁷ T. 299, 306.

35. Respondent's accountant Leah Shanahan testified that Efharis' sales decreased 11.7 % from 2003 to 2004 and Omega's sales decreased 7.5% in the same time period, which she testified was a significant decrease for a company of its size. T. 442-444; Ex.R-20; R-21.

36. Respondent hired a new employee at the Boylston Street store on November 20, 2004. T. 316-7.

37. Complainant's son, Sokol Bako and younger daughter, Merita Restelica, who were children at the time of the events in question, testified regarding family meetings wherein they discussed Complainant's cancer diagnosis and treatment and Complainant's meetings at Respondent's office which they did not attend. While this was obviously a traumatic period in

⁷ In the past, Respondent had an agreement with Dunkin' Donuts Corporation to operate its franchises exclusively within a certain geographic area and Dunkin' Donuts would not license another franchise within a certain radius of Respondent's stores. That agreement was discontinued by 2004 and several other Dunkin' Donuts stores moved into the area. In addition, Starbucks stores moved into the area. The increased competition drew business from Respondent.

the family's life, I discount their testimony as completely unreliable as was based almost exclusively on double or triple hearsay and concerned events that occurred more than a decade ago when they were children. Moreover, their testimony appeared highly rehearsed and unconvincing.⁸

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, §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. 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. Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination in the Basis of Handicap-Chapter 151B, 20 MDLR Supplement (1998); Rapoza v. Ocean Spray, 21 MDLR 43(1999). Complainant alleges that Respondent refused to reinstate her to her prior employment because of her breast cancer and because she was perceived as disabled due to her nine month medical leave of absence for treatment of cancer.

Complainant and her husband testified about an exchange, in Greek, between her husband and Respondent's owner, Alepedis, wherein Alepedis is purported to have said he would not re-hire Complainant because of her cancer. However, I disbelieved the testimony regarding that exchange because it was inconsistent with Complainant's and her husband's prior statements in the matter and because Alepedis credibly denied that he ever made such a statement. I conclude that Alepedis never made such a statement. Moreover, the comment, if made, would form the core of Complainant's claim, and I find it highly improbable that such a significant piece of

⁸ Notably, the older daughter who accompanied the Bakos to the first meeting did not testify at the public hearing.

evidence would have been omitted from Complainant's complaint and her subsequent submissions to this Commission. The alleged remark was raised for the first time at her deposition, long after the events in question. I conclude that the conversation was fabricated late in the game solely to bolster Complainant's claim of disability discrimination.

Absent credible direct evidence of discrimination, Complainant must rely on the three-stage burden of proof set forth in Abramian v. Pres. & Fellows of Harvard College, 432 Mass. 107, 116 (2000). Once the Complainant establishes a prima facie case, Respondent must then articulate a legitimate non-discriminatory reason for its actions, supported by credible evidence. *Id.* at 116-117. The employer's burden is one of production and the burden of proof on the ultimate issue of discrimination remains with the Complainant. Lipchitz vs. Raytheon Co., 434 Mass. 493, 501 (2001); Wheelock College v. MCAD, 371 Mass. 130, 139 (1976).

Complainant may establish a prima facie claim of handicap discrimination by showing that she (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 her employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on her disability. Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998); Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995)

Complainant has established that she is a handicapped person within the meaning of the statute based on her diagnosis of and treatment for breast cancer. Respondent was aware of Complainant's illness because she sought an extended medical leave of absence in order to undergo surgery, chemotherapy and radiation. Complainant suffered an adverse employment action when Respondent did not immediately re-hire her upon the completion of her cancer

treatment and her receipt of medical clearance to return to work without restriction. I conclude that Complainant has established a prima facie case of discrimination based on disability. Complainant also asserts that, even if she were cancer free and no longer in need of treatment, her record of cancer also renders her disabled within the meaning of the law and Respondent acted out of a perception that she remained disabled. She has also established that a perception of disability qualifies her as disabled within the meaning of the statute.

Once the Complainant articulates a prima facie case, Respondent must then articulate a legitimate non-discriminatory reason for its actions, supported by credible evidence. The employer's burden is one of production and the burden of proof on the ultimate issue of discrimination remains with the Complainant. Abramian, supra at 116-117. Wheelock College, supra, at 139.

Respondent has articulated legitimate, non-discriminatory reasons for not immediately rehiring Complainant. She had been on a leave for nine months and Soltany had no choice but to fill her shift. Soltany needed to determine what shifts were available at which location prior to scheduling Complainant for work. Upon learning she had been cleared to return to work after a nine-month leave, Complainant visited Respondent's place of business twice in one week insisting that she immediately be returned to her prior schedule and location. Soltany explained to Complainant that her shift had been filled but he would do his best to get her back working. She rejected outright an offer of possible placement at Respondent's Boylston Street location. Respondent asserts that it was impossible to modify the work schedules of its 50 employees within the extremely short period of time demanded by Complainant. Furthermore, a decrease in Respondent's business, resulting from increased competition in the area, necessitated scheduling changes that would require Complainant to have greater flexibility to work various schedules. I

conclude that Respondent has articulated legitimate, non-discriminatory reasons for not immediately rehiring Complainant to her prior shift.

Once the employer has articulated a legitimate non-discriminatory reason for its actions, the Complainant must prove that the employer's stated reason or reasons are a pretext for discrimination. Abramian, supra, at 117. The employee may meet this burden by proving that the employer acted with discriminatory intent, motive or state of mind. Lipchitz, supra, at 504 (2001). In order to prove pretext, the employee need not disprove all of the non-discriminatory reasons proffered by the employer, but need only prove that "discriminatory animus was a material and important ingredient in the decision making calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003). There is no evidence that Respondent acted with a discriminatory motive related to Complainant's disability. In fact, Soltany stated convincingly that Respondent wanted Complainant to return to work and offered her an available shift.

Complainant has not proved that Respondent's reasons for not rehiring her into her prior shift and location were a pretext for discrimination on the basis of Complainant's disability. There is no evidence that they perceived her as a liability or as unable to perform the job because of her cancer treatment. I found Complainant's testimony evasive and disingenuous in so many respects as to cast doubt on her credibility in general. In addition to disbelieving Complainant's purported direct evidence of discriminatory intent, I did not credit her testimony that Respondent did not contact her during her leave, or that Respondent did not return her calls for a three week period of time. Complainant gave conflicting testimony as to when she was actually cleared for work and when she contacted Respondent. I resolved these disputed issues of fact in favor of Respondent, whose witnesses' testimony was credible and consistent with the documentary

evidence of record. I conclude that Complainant contacted Respondent within days of being cleared to work in late October or early November, and subsequently visited Respondent two times and demanded her prior job back. It was impossible for Respondent to rearrange the schedule in so short a period of time, given the rigidity of Complainant's position and Respondent's economic situation. The fact that Complainant did not wait to see if and how Respondent might accommodate her return to work but instead filed a complaint with this Commission within one week of her second meeting with Respondent, creates a question as to whether her motive in meeting with Respondent was disingenuous.

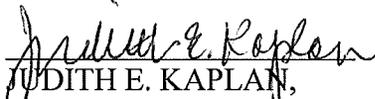
For the reasons stated above, I conclude that there is insufficient evidence to establish that Respondent's articulated reasons for its inability to immediately return Complainant to her prior shift were a pretext for unlawful discrimination or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz, supra, at 503. Therefore, I conclude that Respondent did not engage in unlawful discrimination and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with 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 11th day of March, 2016.


JUDITH E. KAPLAN,
Hearing Officer