

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & LEO H. ROBERGE,
Complainants

v.

DOCKET NO. 15-SEM-00594

SULLIVAN, KEATING & MORAN
INSURANCE AGENCY,
Respondent

Appearances:

Kristen Dannay, Esq., Commission Counsel

Maurice Cahillane, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about March 23, 2015, Complainant Leo H. Roberge filed a complaint with this Commission charging Respondent with unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, §4¶16. Complainant alleges that he was unlawfully terminated by Respondent because of his disabilities or perceived disabilities and denied a reasonable accommodation. 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 November 13 and 14, 2018. After careful consideration of the evidence of 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 Sullivan, Keating & Moran Insurance Agency is a small insurance company located in Springfield, MA that sells homeowners, auto, commercial and life insurance. Respondent's president and CEO is David Mathews. (T.1, p. 20) Mathews began working at Respondent in 1994 and bought the agency in 1999. (T. 1, p. 125) All of Respondent's employees reported directly to Mathews.

2. Complainant Leo Roberge resides in Springfield, MA. He learned of an opening at Respondent through a former co-worker. In April 2011, Complainant interviewed for the position of customer service representative with Mathews and was hired and began work the following day. He was terminated on December 29, 2014. (T. 1, p. 18)

3. Mathews testified that at the interview he expressed concern that Complainant was overqualified and would not remain in the entry level position because of his experience in the insurance field. Complainant explained that he needed the job because his wife was recently deceased and he had been out of work for a year prior to her death and had fallen into debt. Mathews, feeling sympathy for Complainant, agreed to hire him at a higher rate than he normally would have paid an employee in the position. (T. 1, p. 61)

4. As a customer services representative, Complainant's duties were to assist customers with changes to existing policies, provide quotes for potential new policies, write new policies and receive payments from customers at the front desk. (T. 1, p 30) Complainant's desk was located in an open area behind the front counter which ran nearly the entire width of the office. He spent his days either working at his computer or speaking to customers by phone or at the front desk. His typical hours were 9:00 a.m. to 4:30 p.m. (T. 1, p. 31)

5. Doris Poirier has been employed by the Respondent as a bookkeeper for 22 years. Poirier had an office just outside the open area. (T. 2, p. 5-6)

6. James Mathews¹, who is the brother of David Mathews, has worked part-time as a Customer Service Representative for 10 years. J. Mathews sat at a desk in the open area near Complainant. (T. 2, p. 31-33, 40-41)

7. Complainant testified that when hired by Respondent he was suffering from several medical conditions, including diabetes, high blood pressure, glaucoma, hearing loss and aortic stenosis with mitral valve lesions. (T.1, p. 39) Complainant testified that due to this constellation of impairments he suffered from occasional weakness, shortness of breath, light-headedness, difficulty walking and occasional blurred vision for which he took eye drops. He testified that he sometimes had difficulty hearing and occasionally wore hearing aids and was able to read lips. (T. 1, p. 40-42) Complainant's co-workers and Mathews were aware that Complainant was sometimes short of breath or felt ill and sometimes wore hearing aids (T. 1, p 28-30)

8. Mathews testified that employees received 15 sick days per year, in addition to vacation time. He stated that he never docked employees' pay for going to a doctor's appointment but asked them to make appointments in the early morning or late afternoon so as minimize the time out of the office.

9. Complainant occasionally had to take time off for medical appointments and was never denied time off for such appointments. Poirier testified that over the course of her employment, she has had two knee replacements, five eye surgeries and carpal tunnel surgery and has always been permitted to take sick time for medical appointments and surgeries. (T. 2, p. 15)

¹ To avoid confusion, James Mathews will be referred to hereinafter as "J. Mathews." David Mathews will be referred to as "Mathews."

10. Mathews testified to several issues with Complainant's employment. One problem was Complainant's habit of leaving up to 200 files stacked on his desk. Mathews testified that he exhorted Complainant several times to put away the files as they were in a precarious position where they could be knocked off by employees passing by Complainant's desk. In addition, this was a violation of Respondent's protocol requiring employees to return files to the file drawer when they were finished working with them; (T.1, p. 131-133) Complainant acknowledged that Mathews admonished him once or twice not to leave a large stack of files on his desk. (T. 1, p. 59-60)

11. At the time of his hire, Complainant did not have a current insurance broker's license. Although such a license was not required for the position, it was desirable because it would allow Complainant to sign for insurance applications and would entitle him to earn commissions from any business he brought into the agency. (T. 1, p.22-23) Mathews asked Complainant to renew his license and Mathews paid for refresher courses and the exam. Given these incentives, Mathews was irritated that Complainant delayed in obtaining his license until his birthday² in late 2013 in order to extend the term for a full three years and that he later let the license lapse. Complainant stated that he was never given a deadline to obtain his license and that the job did not require it in any case. Complainant testified that his license subsequently lapsed again when he underwent surgery, but only for a matter of days, and was renewed merely by payment of the renewal fee which was paid by Respondent (T. 1, p. 24)

12. Mathews testified that one on occasion, a business customer called while Mathews was on vacation and spoke to Complainant. The customer asked for a certificate of insurance and was displeased when Complainant told him that the matter would have to wait until Mathews returned. The customer later complained to Mathews, who chastised Complainant

² Licenses expire every three years on the licensee's birthday.

about the issue. Complainant denied ever being told about a customer complaint. (T.1, p. 61) I credit Mathews' version of events.

13. Complainant testified that in 2014, he asked Mathews for permission to install at his desk a CaptionCall telephone for the hearing impaired. The device uses a captioning agent to provide written captions of callers' words which are displayed on the phone's screen. Complainant had a CaptionCall phone at home that he received free of charge from a state agency and understood that he could obtain an additional CaptionCall phone for his workplace at no cost. According to Complainant, Mathews turned down his request because he believed the device would be incompatible with the company's existing phone system. (Tr. 1, p. 51-55) Complainant testified that he was disappointed and upset about Mathews' decision because the captioning system would have been beneficial since there were times he had difficulty hearing callers. (T. 1, p. 55) I credit Complainant's testimony. Mathews testified that he recalled Complainant asked him about installing some form of device on his phone to aid in hearing and he responded, "Sure. Why not?" and asked Complainant to provide him with the information needed to obtain the equipment. (T. 2, p. 135-136) I do not credit his testimony. Mathews took the position in his initial position statement to the Commission that he did not recall the request. At the Hearing, he explained that was because he did not realize at the time of his response that the incident referred to a telephone. I do not credit this testimony and believe he recalled Complainant's request for an assistive telephone device when filing his position statement, but thought that installation of the CaptionCall would be complicated and he did not want to install it for fear it would be incompatible with the existing phone system.

14. Complainant testified that sometime around 2014, he was kneeling on the floor putting files in a cabinet located behind J. Mathew's desk when J. Mathews accidentally backed

his chair into Complainant, who fell and hit his head on the cabinet. Poirier learned of the incident and came out of her office to observe Complainant sitting on the floor talking to J. Mathews. Poirier testified credibly that the Monday before this incident, Complainant told her he had suffered a heart attack over the weekend. For this reason she thought it wise to summon medical personnel and called an ambulance. By the time the EMTs arrived, Complainant had returned to his desk. Poirier told the EMTs that Complainant had recently suffered a heart attack and they checked his vital signs and said he was likely suffering from a mild concussion. According to Poirier, Complainant then denied to the EMTs that he had had a heart attack and worked for the remainder of his day. (T.1, p.56-57, T. 2, p. 8-10) J. Mathews denied backing his chair into Complainant.

15. Mathews testified that in early December, 2014, Complainant filed a claim with Arbella Insurance for injuries suffered after a car backed over him in a store parking lot. Mathews testified that Complainant requested he inform Arbella that Respondent had not paid him for his days out of work, even though this was not true. Mathews told Complainant that he would not lie to an insurance company on his behalf, an act of fraud that could cost Mathews his insurance license. Poirier testified similarly that Complainant asked her to falsely report to the insurance company that he wasn't paid for his days off. (T. 1, p. 133-135; T-2, p.10-11; Ex. R-13) I credit their testimony, which was not disputed.

16. During his employment, Complainant developed painful kidney stones and in December, 2014, he underwent surgery to remove the stones. The surgery involved the temporary insertion of a stent into his urethra. (T. 1, p. 39)

17. On December 29, 2014, Complainant was scheduled to have the stent removed at his doctor's office. On that day he arrived at work at approximately 8:00 a.m. and worked until

leaving for the doctor's office at 10:00 a.m. After the procedure, which took 20 to 30 minutes, he returned to the office at around noon. Complainant testified that he took no pain killers or anesthetic during or after the procedure but that he was very weak and in extreme pain. He told his co-workers that he was going to take his lunch break and proceeded to the kitchen where he sat down to rest.

18. Complainant testified that he was able to perform his job that day after resting and denied that his doctor had told him to go home after the procedure. I do not credit his testimony.

19. J. Mathews testified that he observed Complainant enter the office doubled over, staggering and groaning in pain, leaning against the wall and clinging to a file cabinet as he headed for his desk. J. Mathews asked him what was wrong and he responded that he had just returned from the doctor who had prescribed some medication and told him to go home and rest. (T. 2; p. 35-18) J. Mathews told Complainant to follow his doctor's orders and go home and offered to call Complainant's son or get him a ride. According to J. Mathews, Complainant refused to go home because he had exhausted his sick time and felt he was strong enough to handle the pain and would be fine after taking his lunch break. I credit his testimony.

20. J. Mathew told Poirier that Complainant looked really bad but was refusing to go home. Poirier then went to the lunch room where she observed Complainant appearing pale, drawn and exhausted. She told him that he belonged at home recuperating. She asked him what his doctor had said and Complainant responded that the doctor told him to go home and rest but that he would be okay. (T. 2, p. 12-13) I credit her testimony.

21. Meanwhile J. Mathews called his brother who was on vacation at home and told him that Complainant was debilitated but refused to go home. Mathews instructed him to direct Complainant to go home. J. Mathews relayed the message to Poirier who told Complainant that

Mathews had directed him to go home. However, Complainant told Poirier that he had exhausted his sick leave and was going to remain working at his desk. (T. 2, p. 12-13)

22. Poirier then called Mathews who told her bring Complainant into her office, where, over the speaker phone, Mathews told Complainant that he had already instructed the others to direct him to go home, and now he was directing Complainant to go home and recuperate. When Complainant again refused to go home, Mathews said, "You're done. Get your stuff. You don't work here anymore." (T. 2, p. 13-14) Mathews then directed Poirier to give Complainant a final paycheck and to take his office keys.

23. Mathews testified that he did not know the details of Complainant's condition but understood only that Complainant had undergone a procedure and was so debilitated that it alarmed other employees enough to call Mathews while on vacation. He was concerned that Complainant would injure himself or someone else if he remained at work in that condition. (T.1, p. 143) I credit his testimony.

24. Mathews testified that from the start of Complainant's employment he had tried to help him out and stated, "this is the thanks I was getting." He stated that Complainant's failure to acquire his license in a timely fashion resulted in expense to the company. Mathews stated that when he talked to Complainant on December 29 he was "trying to be a nice guy" but was getting push-back from Complainant. He stated that "everyone in the office" knew that Complainant was trying to out-manuever him, that he had had enough of such behavior and that he terminated Complainant's employment because Complainant was insubordinate to him in the presence of his employees. (T. 2, p. 138) I credit his testimony.

25. After his termination, Complainant's duties were divided between J. Mathews and another customer service representative.

26. After his termination, and in anticipation of an unemployment compensation proceeding, Complainant obtained a letter from his physician stating that he was able to work on the day his stent was removed. That letter was never submitted to Respondent. (Ex. C-2)

III. CONCLUSIONS OF LAW

A. Discriminatory Termination

Complainant alleges that he was terminated from employment on the basis of his disability or perceived disability, in violation of M.G.L. Chapter 151B, §4, ¶16. In order to prove a case of discrimination in employment on the basis of handicap, Complainant must first establish a prima facie case of handicap discrimination by demonstrating that he (1) was an otherwise qualified handicapped individual (2) performing the essential functions of his job (3) and was terminated under circumstances which give rise to an inference that his termination was based upon his handicap. Dartt v. Browning- Ferris Industries, Inc., 427 Mass. 1 (1998) The Supreme Judicial Court has held that "the facts necessary to establish a prima facie case of discrimination will vary depending on [the] situation." Labonte v. Hutchins and Wheeler, 424 Mass. 813 (1997) *citing* Beal v. Selectmen of Hingham, 419 Mass. 535, 544 (1995).

Complainant must establish that he was a "handicapped person" at the time of his employment. The law defines a handicapped person as "one who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment." M.G.L. c. 151 B, §4¶16. An impairment qualifies as a disability when it substantially limits one or more of a person's major life activities. Major life activities include those such as seeing, hearing, walking, eating, working, or caring for oneself. 804 CMR 3.01(a) (3). The definition of "substantially limits" is whether an average person can perform the activity with little or no difficulty. MCAD

Guidelines: Employment Discrimination on the Basis of Handicap, at II, A, 6, 20 MDLR

Supplement (1998) (hereinafter "MCAD Guidelines") I conclude that, during his employment, Complainant suffered from a number of physical impairments that, taken together, substantially limited the major life activities of walking and breathing and hearing. Thus, I conclude that he is disabled within the meaning of M.G.L.c.151B, §4¶16.

It must also be established that Complainant was an otherwise qualified handicapped individual capable of performing the essential functions of his job with or without a reasonable accommodation, who was terminated under circumstances which give rise to an inference that the adverse action was based upon his handicap. LaBonte, at 821. I conclude that Complainant established that he was a qualified handicapped person who was capable of performing the essential functions of his job without the requirement of any accommodation, aside from doctor's visits that were always accommodated. I further conclude that Complainant was terminated under circumstances which give rise to an inference that his termination was based upon his disability or perceived disability, since it occurred on the day that he returned to work following a medical procedure that caused him pain and weakness.

Once the Complainant establishes his prima facie case, the Respondent must then show either that the Complainant was not an otherwise qualified handicapped person or that his termination was for reasons other than his handicap. Ryan v. Lunenburg, 11 MDLR 1215 (1989) Respondent must articulate a legitimate, non-discriminatory reason for terminating his employment. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass., 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). As part of its burden of production,

Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986)

Respondent's articulated reason for terminating Complainant's employment was that Complainant's repeated refusal to leave the workplace while extremely debilitated from a medical procedure, despite several directives from Mathews, constituted insubordination and posed a danger to him and others. There was evidence that Complainant could barely stand or walk and was doubled over in pain. In addition, there was evidence that Mathews perceived his hiring of Complainant as a kindness for which Complainant was not appropriately grateful, as evidenced by Complainant's delay in obtaining his broker's license, his reluctance to adhere to company protocol and his proposing that Mathews lie to another insurance company. I conclude that these issues engendered resentment in Mathews toward Complainant over time. I accept as credible Mathew's assertion that Complainant's refusal to abide by his directive to go home when he was clearly ailing was the final straw and was the reason for his termination. Thus, Respondent has articulated legitimate, non-discriminatory reasons for terminating Complainant's employment.

Once the Respondent has articulated a legitimate, non-discriminatory reason for its conduct, Complainant must then satisfy the burden of proving, with rebuttal evidence, that the Respondent's reasons for terminating him were based upon misconceptions or unfounded factual conclusions and that the reasons articulated for the rejection encompass unjustified consideration of his handicap. Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind," and thus retains the ultimate burden of proving that Respondent's adverse action was the result of discriminatory animus. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001) Complainant may meet this burden through circumstantial evidence

including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." *Id.* at 504. If the Complainant presents such evidence, the trier of fact may, but is not compelled, to infer discrimination.

I conclude that there was no credible evidence that Respondent's actions were motivated by discriminatory animus toward Complainant based on his disability or perceived disability. Complainant argues that Respondent's not submitting him to progressive discipline as outlined in Respondent's employee manual based on one event is evidence of pretext. Mathews testified credibly that the manual permitted Respondent to terminate someone without first engaging in progressive discipline, depending upon the infraction. Here the infraction was gross insubordination despite the legitimate alarm and concern of other employees for Complainant's well-being. Further, even if I were I to conclude that Complainant's termination was unduly harsh under the circumstances, "it is not the [Commission's] job to determine whether Respondent made a rational decision, but to ensure it does not mask discriminatory animus." Sullivan v. Liberty Mutual, 444 Mass. 34, 56 (2005); see also Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992) ("Courts may not sit as super personnel departments, assessing the merits - or even the rationality - of employers' nondiscriminatory business decisions.") While Complainant argued that Respondent's reasons were a pretext for discrimination, I conclude that there is insufficient credible evidence to support a conclusion that the reasons Respondent articulated for its actions were not the real reasons for the termination, or that Respondent was motivated by discriminatory intent, motive or state of mind based on Complainant's disabilities. Lipchitz, at 503. The evidence showed that Complainant's co-workers and Mathews were aware of his impairments and he was permitted to take time off to attend medical appointments throughout his employment without

fear of discipline or any negative repercussions. Except for the accommodation request discussed below, Complainant appears not to have suffered any negative employment consequences relating to his impairments. I conclude that given these circumstances, his termination was for legitimate, non-discriminatory reasons and was not a violation of M.G.L.c.151B sec. 4(16).

B. Failure to Provide a Reasonable Accommodation

Complainant alleges that Respondent unlawfully failed to reasonably accommodate his hearing impairment by refusing to allow him to install a CallCaption telephone at his desk in order to accommodate his hearing impairment.

In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant 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 Complainant the reasonable accommodation. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, aff'd, 26 MDLR 216 (2004); See MCAD Guidelines, at s. IX (A) (3). I have concluded that Complainant is a handicapped person within the meaning of the law, by virtue of a number of impairments, including his hearing impairment for which he wore hearing aids. His impairment resulted in difficulty in hearing over the telephone, which was an essential function of his job. Mathews was aware of Complainant's hearing impairment, that he

wore hearing aids, and that he requested that Respondent install a CaptionCall telephone at Complainant's desk.

Once Complainant has identified his disability and requested an accommodation from his employer, it is incumbent on the employer to engage in an interactive dialogue with Complainant and to determine if the accommodation sought is reasonable. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008) Disability cases are by nature "difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes." Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638,650 (1st Cir. 2000). Such cases require employers to make an individualized assessment of whether an employee's accommodation is reasonable. Complainant testified that Mathews denied the request due to his concern that the technology would not be compatible with the existing phone system. Mathews did not discuss any alternative phone systems with Complainant or further explain his concerns about the system's incompatibility with Respondent's telephone system. "It is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one." Russell vs. Cooley Dickinson Hospital, Inc., & another, 437 Mass. 443 (2002) "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Id. Respondent did not explore with Complainant the possibility of a further reasonable accommodation. Figueroa v. Springfield Transit Management, 23 MDLR 17 (2001). Nor did the Respondent show that the requested accommodation would create an undue hardship. Instead Respondent took the position that it was open to the accommodation sought and merely

requested further information, an assertion I found not to be credible. I conclude that Respondent's failure to engage in an interactive process and to establish that the requested accommodation would have constituted an undue burden to its business amounted to a denial of a reasonable accommodation to Complainant's disability. Respondent's failures in this regard to accommodation constitute unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, §4¶16.

IV. REMEDY

Pursuant to M.G.L. c. 151B§5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his termination by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), *citing* Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte at 824.

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. Stonehill College v. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549 (2004). "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. The sum of Complainant's testimony regarding his

emotional distress caused by Mathews' refusal to consider the CaptionCall was that he was "disappointed and upset" because it would have been beneficial and there were times he could had difficulty hearing callers. Due to the *de minimus* nature of Complainant's purported distress, and the fact that his testimony regarding distress was not persuasive, I decline to make an award of damages for emotional distress. Respondent's actions can be better addressed by means a training session as described below.

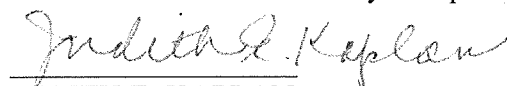
V. ORDER

For the reasons set forth in this decision, it is hereby ordered that:

1. Complainant's claim of unlawful termination is hereby dismissed.
2. Respondent is to participate in, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's owner. Such training shall focus on discrimination based on disability, the interactive process and negotiation of reasonable accommodations for disabled employees.

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 10 days after the receipt of this Order and a Petition for Review within 30 days of receipt of this Order.

SO ORDERED this 25th day of April 2019



JUDITH E. KAPLAN
Hearing Officer