

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
GARY R. SROKA,
Complainants

v.

DOCKET NO. 07-SEM-03324

CHICOPEE SCHOOL DEPARTMENT,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Respondent Chicopee School Department. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for handicap discrimination in violation of M.G.L. c. 151B, §4(16) and dismissed the complaint. Specifically, the Hearing Officer determined that Respondent did not discriminate against Complainant on the basis of his handicap (Bipolar Disorder II) when it terminated his employment because she concluded that Respondent would have taken similar action against a non-handicapped employee who engaged in such “egregious misconduct.” Complainant appealed the decision to the Full Commission.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission’s Rules of Procedure (804 CMR 1.00 *et. seq.*) and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing

Officer. M.G.L. c. 151B, §5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission must also review the decision for errors of law. Its role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF THE FACTS

Complainant taught Social Studies at Chicopee High School. He had a history of discipline for inappropriate unprofessional behavior. In May of 2007, the school announced that it was going to sponsor a military career day on Monday, May 21, 2007. Complainant was disciplined and ultimately terminated for actions stemming from his dissatisfaction with and disapproval of military career day. He attended the military career day wearing a newly-purchased military coat and hat, screamed and directed obscenities at the military personnel present and grew so anxious that he had to leave work and go home. On May 22nd, the Principal observed Complainant protesting in front of the local courthouse after he had called in sick to work. On May 23rd, the Principal gave Complainant a letter noticing an investigation of his inappropriate use of sick time. During lunch period that day, Complainant, feeling very anxious and agitated, left the school, took off his shoes and started to walk around barefoot outside the

school. He then went to his car, put on his military jacket and cap and started to walk around with a sign and banging on a bongo drum. The Principal walked with Complainant outside the front of the school for a while, trying to convince him to return to his classroom, but Complainant continued marching and responded, "I'm not Gary, I'm Sergeant Pepper." He proceeded into town, walking off the job. After receiving notice that he was being placed on administrative leave, that he must submit to a fitness for duty exam, and that there would be an inquiry into his insubordinate behavior and refusal to obey orders to return to the classroom, Complainant continued to protest for several days, walking back and forth in front of the high school at the end of the school day. It was this behavior in conjunction with his past record for discipline that resulted in his termination. Complainant sought treatment for depression and anxiety, received a doctor's note stating he was unable to work and was diagnosed with Bipolar II disorder. He was terminated effective June 21 for misuse of sick time and insubordination.

BASIS OF THE APPEAL

Complainant has appealed the Hearing Officer's Decision on several grounds. First, Complainant argues that the Hearing Officer's factual findings do not support her conclusion that Respondent would have terminated a non-handicapped employee with the same work record as Complainant who engaged in the same misconduct. Complainant also argues that the Hearing Officer misconstrued the standard for determining whether an employee's conduct is "egregious" and thus terminable by employing a subjective analysis rather than an objective one. Complainant further argues that the Hearing Officer erred in determining that Complainant's conduct was "egregious" and sufficiently "inimical" to Respondent's interests to warrant dismissal. He also argues that the Hearing Officer erred by failing to give due consideration and

weight to an arbitration decision and by relying on conduct for which Respondent did not discipline Complainant in deeming his conduct egregious. Lastly, Complainant argues that the Hearing Officer erred by failing to find that Respondent breached its duty to engage in an interactive process to accommodate Complainant's disability.

DISCUSSION

Complainant's grounds for appeal fails to account for ample precedent in Massachusetts that disciplinary action of a disabled employee is not discrimination, within the parameters of G.L. c. 151B, where the employer demonstrates that it would have disciplined a non-disabled employee for the same behavior and where there is an objective view that any reasonable employer would have imposed similar discipline against the employee for the misconduct at issue. Mammone v. President and Fellows of Harvard College, 446 Mass. 657, 666-667 (2006), Garrity v. United Airlines, Inc., 421 Mass. 55 (1995). Covino v. Town of Framingham, 19 MDLR 67 (1997) Accordingly, where an employee's behavior is found to be "egregious" and "sufficiently inimical" to an employer's interest, termination may be justified, even if the "egregious" conduct was a manifestation of the disability itself. Mammone relied on Garrity v. United Airlines, a case in which the employee was discharged for misconduct related to her disability (alcoholism).

Mammone instructs that an employee who has committed egregious workplace misconduct (conduct so inimical to an employer's interest that any employee would be fired for the same acts) has essentially precluded himself from availing the protections accorded a "qualified handicapped individual," and thus is not, within the meaning of the statute, an individual capable of "performing the essential functions of the position, without or without a reasonable accommodation."

The Hearing Officer's conclusion that Complainant did not meet the definition of otherwise qualified handicapped individual was not an error. Although Complainant would have us determine that the conduct for which he was terminated was not "egregious" and can be excused as a manifestation of his bipolar disorder, the law as it has developed does not support this contention. We note that Mammone, the leading case on this issue, was decided on Summary Judgment without benefit of testimony on the issue of egregious behavior. In this case, the Hearing Officer had the opportunity to assess witness credibility and weigh all of the evidence presented to her in a full adjudicatory hearing. She determined that Complainant's actions on May 22nd and 23rd, namely attending a court hearing and protesting outside the court house while on sick leave from his job, and abandoning his job again the next day, constituted an unjustifiable "dereliction of duty and insubordination" and a disregard for his job responsibilities. Accordingly, she determined that Complainant's actions constituted "egregious misconduct" justifying his termination and that he did not prove that he was a qualified handicapped person within the meaning of c. 151B. This supports the ultimate conclusion that any reasonable employer would have terminated an employee who behaved in a similar manner and with a similar disciplinary record. We are convinced that the Hearing Officer did consider an objective standard in reaching her conclusion, and properly concluded that such conduct would have justified termination of any employee. We also will not disturb her finding that Respondent was justified in its determination that such insubordination and job abandonment by any employee are terminable offenses.

Similarly, we find no error in the Hearing Officer's determination that Complainant's actions rose to the level of "egregious misconduct" warranting termination. We properly defer to the Hearing Officer's findings in this regard, which are supported by substantial evidence in the

record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The Hearing Officer was in the best position to observe witnesses, determine credibility and weigh the evidence before her. She found that Complainant had long disciplinary history demonstrating his inability to conduct himself in a professional manner, culminating in the actions which led to his termination. While the Hearing Officer considered an arbitrator's decision finding that Respondent lacked just cause to terminate Complainant's employment because his conduct did not rise to an "egregious" level, that decision is not determinative of the disability claim in this matter. It was within the Hearing Officer's discretion to determine the weight to accord the arbitration decision in deciding the c. 151B claim for disability discrimination before her. See City of Boston v. MCAD, 39 Mass. App. Ct. 234, (1995) (MCAD should consider arbitration decision and accord it the weight it deems appropriate, but arbitration decision has no preclusive effect). The proper inquiry in a disability claim brought pursuant to c. 151B is whether Complainant was disabled within the meaning of the law, whether he was a qualified handicapped individual, whether his termination was motivated by concerns surrounding his disability or whether Respondent had a duty to accommodate Complainant's disability. There was no error in the Hearing Officer's ruling that the arbitrator's decision need not be given preclusive effect in this matter and is not determinative of the disability claim.¹

Lastly, Complainant avers that the Hearing Officer erred by failing to find that Respondent breached its duty to engage in an interactive process to explore accommodation of Complainant's disability, because he was diagnosed with Bipolar disorder and treated with medication that would eventually stabilize his moods, prior to his discharge becoming final. Respondent notes that Mammone was silent on this issue. We note, however that the court in

¹ We note that the arbitrator's award reinstating Sroka to his former position was vacated by the Appeals Court on grounds that the arbitrator exceeded his authority. See School Committee of Chicopee v. Chicopee Education Assoc., 80 Mass. App Ct. 357 (2011).

Mammone relied on the decision in Garrity, where the termination of a disabled employee was upheld for misconduct almost one month after the conduct occurred and after she sought treatment for her disability (alcoholism). Thus, Garrity instructs us that the mere fact that a handicapped employee seeks accommodation from an employer for the first time after engaging in egregious misconduct but prior to discharge, does not insulate the employee from termination. Moreover Garrity holds that a determination of “egregious misconduct” may be made, without regard to whether the employee could at some future date conform her behavior to within acceptable limits. This argument is also defeated by the Hearing Officer’s conclusion that Complainant was not a qualified handicapped individual entitled to the protections of the law because his inability to control his conduct and behave in a professional manner rendered him incapable of performing the essential functions of the job. See Covino, supra. 19 MDLR at 72. Thus, we conclude that Respondent was under no obligation to engage in an interactive process with Complainant to work out an arrangement that would allow him to return to his job where his conduct was found to be “egregious” and did not conform to what Respondent (or any other employer) should be expected to tolerate in the workplace. The Hearing Officer did not err in this regard.

ORDER

For the reasons set forth above, we hereby deny Complainant’s appeal and affirm the decision of the Hearing Officer dismissing the complaint. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission’s decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of receipt of this decision and must be filed in accordance with

M.G.L. c. 30A, c. 151B, §6, and the 1996 Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within thirty (30) days of receipt of this order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6.

SO ORDERED this 26th day of June, 2013

Julian T. Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie R. Williamson
Commissioner