

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MICHELLE THIBEAULT,
Complainant

v.

DOCKET NO. 06-BEM-03137

VERIZON NEW ENGLAND, INC.
Respondent

Appearances: David E. Belfort, Esq. for Complainant
James Bucking, Esq.; Ramzi B. Ajami, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 29, 2006, Complainant, Michelle Thibeault, filed a complaint with this Commission alleging that Respondent, Verizon New England, Inc. discriminated against her in employment on the basis of disability when it declined to extend her leave of absence, refused to grant her additional leave time and terminated her employment on December 21, 2006. The Investigating Commissioner found probable cause to credit the allegations of the complainant and subsequent conciliation efforts were unsuccessful. The matter was certified for a hearing which took place before the undersigned hearing officer on March 15, 16, 18 & 19, 2010. The parties submitted post-hearing briefs in July of 2010. Having reviewed the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Michelle Thibeault, worked for Respondent Verizon for approximately nine years. She began her employment at Verizon in September of 1997 as a service representative in a call center, where she assisted clients with service and installation inquiries. (Tr. Vol. I, p.52) In 1999, she served as acting manager for service representatives at the same facility. (Tr. Vol. I, p.53) Complainant subsequently worked for a short period of time at a call center position at Verizon Security, but found that position was not challenging and transferred to another job after a short stint. (Tr. Vol. I, p. 53, 131-132) Complainant sought and was promoted to a project manager with wholesale services before making a lateral move to a VP support staff role, which she classified as a “desk job.” (Tr. Vol. I, p. 53-54, 133) Thereafter, Complainant had numerous other promotions within Verizon and each time her salary increased. (Tr. Vol. 1, p.54)

2. Respondent Verizon is an employer within the meaning of G.L. c. 151B. Verizon offers as a benefit to its employees, a variety of leave policies. If an employee is medically determined to be disabled and requires medical leave, Verizon offers up to one year of paid medical leave. Verizon’s medical leave takes effect if an employee is out of work for illness for more than five consecutive business days. (Tr. Vol. IV, p. 60) If an employee requires more than five days of medical leave, the employee may qualify for short-term disability benefits with medical approval of a disability. (Tr. Vol. IV, pp. 145-146). Shorter medical leaves are available for individuals who have intermittent or chronic problems, if they require a certain number of days off periodically, so long as the medical need for leave is documented. (Tr. Vol. IV, p. 73, 166-167) Verizon also gives

paid sick leave for absences lasting up to five days. (Tr. Vol. IV, 145-146) Time off of up to twelve weeks per year is also available under the FMLA.

3. Medical determinations regarding employee claims for disability are outsourced by Verizon to MetLife. (Tr. Vol. IV, p. 158) Only MetLife is authorized to make medical decisions justifying accommodations sought by a Verizon employee, including leave for medical reasons. (Tr. Vol. IV, p. 90) MetLife has a full-time medical director devoted specifically to Verizon, supported by nurses and caseworkers. (Tr. Vol. IV, p. 67; 158; Ex. 503 pp. 6-9) Medical decisions are made by medical personnel from MetLife who communicate with Verizon employees seeking disability, their doctors, and their managers at Verizon, but they do not relay private medical information to Verizon. (Tr. Vol. IV, pp. 70, 77-78) During the relevant time period, Dr. Desmond Ebanks, an occupational medicine specialist, was the full-time medical director for disability insurance for Verizon at MetLife. (Ex. 503, pp.6-9) As such, he was charged with making all medical determinations concerning the claims of Verizon employees, including if an employee was eligible to receive disability benefits. Id.

4. Respondent also offers employees leaves for non-medical purposes. Two types of unpaid non-medical leave discussed in this matter are Anticipated Disability Leave (ADL) and Departmental Leave. (Tr. Vol. IV, pp. 89-90) The former is a leave for employees who anticipate a disability in the future such as a scheduled surgery or delivery date for a child and need a period of time beforehand to attend to their personal affairs. (Tr. Vol. IV, p. 80 Ex. 49) ADL requests are approved by Verizon management. (Ex. 49) Departmental Leave is an unpaid non-medical leave for personal or family affairs and is expected to be less than 30 calendar days. (Tr. Vol. IV, p. 86; Ex. 2)

Departmental Leave is handled and approved by an employee's supervisor or manager because no medical determinations are required. (Ex. 2)

5. In 2002, while at a desk job in the VP support staff role, Complainant was out of work on Verizon's paid medical leave program for approximately 1-1 ½ months after she was involved in a car accident that injured her back and neck. (Tr. Vol. I, p. 58, 61, Ex. 52) Complainant was also out of work in January and February of 2004 under the Family Medical Leave Act for reasons she does not recall. Complainant was determined to be disabled by MetLife and was paid disability benefits during that time. (Ex. 307; Tr. Vol. I, pp. 136, 138-139).

6. In April of 2004, while still working at a desk job, Complainant was involved in another, more serious car accident following which she was determined to be disabled by MetLife and was out of work on Verizon's paid medical leave program for approximately 4 months due to neck, back and head injuries. (Tr. Vol. I, p. 56, 138). Complainant returned from her desk job in September of 2004 and remained in that job until July of 2005. She missed work for neck-and-back related injuries and visited her orthopedist, Dr. Joel Saperstein, three times between September and December of 2004, but missed no work due to these injuries between December 2004 and July of 2005 when she changed jobs. (Tr. Vol. I, p. 140, 147) During that period of time, upon the suggestion of her orthopedist, Complainant sought a transfer within Verizon to an outside job where she would not be sitting at a computer all day. (Tr. Vol. I, p. 157)

7. In July of 2005, Complainant transferred to a position working as a foreman in the field supervising technicians out of the Woburn garage, with a pay increase of approximately \$10,000 per year. (Tr. Vol. I, p. 133) In this position, Complainant

traveled to different worksites and supervised the work of employees who were engaged in the physical work of climbing poles or entering man-holes. Her job was to ensure effective and efficient operations in the field. (Tr. Vol. I, p. 63, 150) At the time she had an annual salary and bonuses totaling roughly \$100,000. (Tr. Vol. I, p.128)

8. During her tenure as a foreman, from July of 2005 to July of 2006, Complainant's neck and back injuries continued to be under control. During that time she saw Dr. Saperstein, once on October 27, 2005, for pain in her neck and left shoulder and missed work only once for a flare-up of her neck and back injuries. (Tr. Vol. I, p. 147, Ex. 70) Dr. Saperstein's record of that visit, reflects that Complainant had some "stiffness in her neck," and recommended a "short course of Motrin." He also noted that Complainant had "been well over the past year," and that her neck problems were "never of a surgical nature." Id. Complainant visited Dr. Saperstein again on November 14, 2005, and he determined that her condition was "definitely improved" that she was "progressing with PT and trying to work as tolerated." (Ex. 29, Tr. Vol. I, pp. 152-153). On a January 19, 2006 visit to Dr. Saperstein he reported that despite periodic occurrences of neck pain, Complainant was "able to work" and was "neurologically intact." (Ex. 30; Tr. Vol. I, p. 153)

9. During her time as a foreman, Complainant began a personal relationship with a male subordinate. Complainant claims that she informed her supervisor about this relationship prior to it becoming romantic in nature, because she was concerned about an appearance of impropriety, however I do not credit Complainant's testimony in this regard. Since Complainant was a direct supervisor, her romantic relationship with a subordinate would have been a violation of Verizon's Code of Conduct. (Ex. 32, Section

2.1.1.) Respondent introduced documentary evidence that Complainant's supervisor Debbie Roche wrote that she had confronted Complainant about the relationship first, on June 29, 2006, after hearing talk around the garage where Complainant worked and reviewing Complainant's and her subordinate's overlapping sick days. Roche noted that she told Complainant there was a great deal of gossip among everyone in the Woburn garage about this relationship, and a perception in all the garages that Complainant and her subordinate were dating. (Ex. 33) Complainant continued to deny that she had a romantic relationship with this subordinate while she was his supervisor. However, a review of telephone records from June of 2006 indicate that Complainant spent over 3000 minutes on the phone with this subordinate (around 48% of the total time she spent on the phone, and sent or received 78% of her text messages to or from him, many of which were in the very late night or early morning hours, well after work hours. (Tr. Vol. I, pp.194-198; Ex. 33;Tr. Vol. II, p. 226) In addition, in May and June of 2006 Complainant and this subordinate took the same sick days from work six times and Complainant admitted that on at least one of those days, they may have been together. (Tr. Vol. I, pp.198-200; Ex. 33) They were out of work a total of 13 of the same days from February through June of 2006. It was only after being confronted by her supervisor and told that she was going to be transferred out of her current position, that Complainant admitted that she was getting closer to her subordinate on a personal level. (Ex. 33)

10. Given Respondent's belief that Complainant was in violation of its Code of Conduct and that she could no longer be an effective leader in her current position, her manager, Tom McNabb, in consultation with another Verizon manager, John Sordillo,

made the decision to transfer Complainant to its Lowell Dispatch Center, otherwise known as a call center, which was overseen by Sordillo. (Tr. Vol. IV, pp. 150-151) Sordillo has been a Verizon employee since 1971, a third level manager since 1993, and Director of Operations since 2006. (Tr. Vol. IV, pp. 148-149) He testified that McNabb, who was his counterpart in charge of field operations, called him and discussed his need to transfer Complainant, knowing that Sordillo had openings in the call center, and having no openings in his own field services operation at that time. (Tr. Vol. IV, p. 150) Sordillo stated it was well known that the call center is a place that a lot of people don't like to work. (Tr. Vol. IV, pp. 150-151)

11. Complainant admitted she was very unhappy about being transferred to the Lowell call center and expressed her displeasure. She testified that she felt she should have been moved laterally to another garage and that her supervisor was not hearing her. (Tr. Vol. I, p. 69) Consistent with this admission, Respondent's documents indicate that on June 30, 2006, when Roche informed Complainant that she was being transferred Complainant became furious, stated that Roche was over-reacting and that everyone was not being fair to her. She again denied a romantic relationship with her subordinate and stated that she was being punished based on rumor and innuendo. (Ex. 33) Complainant then met with Tom McNabb, director of the field operations, on July 3, 2006 to discuss her displeasure at being transferred to the call center and expressed similar sentiments to him. (Tr. Vol. I, pp. 69, 70, 201; Vol. II, pp. 22-23; Ex. 33) Despite the fact that Complainant had worked at a desk job subsequent to her injury for approximately eleven months with little problem, during her discussion with McNabb, she expressed concerns about health restrictions that prevented her from sitting at a desk job all day. (Ex. 33; Tr.

Vol. I pp. 139-140, 147) McNabb assured Complainant he and others would work to ensure any ergonomic accommodations she might need and that she would have the opportunity to stand and walk around while supervising associates at the call center. Complainant acknowledged his willingness to accommodate her neck and back issues. (Tr. Vol. II, pp. 30-31; Ex. 33)

12. Complainant began working at the call center after the July 4th weekend in 2006. (Tr. Vol. II, p. 33; Ex. 33) From the start, Complainant expressed her displeasure at being assigned there to her direct supervisor and second level manager, Anthony Sisoian. Sisoian testified that Complainant told him a number of times that she was not happy to be at the call center, could not understand why she was there and that she would rather work in the field. He felt that Complainant was not putting in any effort to learn the job and he told her that she needed to remain at the call center for at least a year, wait for things to settle down, and then she could apply to transfer elsewhere. (Tr. III, pp. 26, 107-109) Complainant also discussed concerns about her neck and back problem with Sisoian and testified that he was positive about Verizon's willingness to accommodate her neck and back issues and her concerns about sitting down for long periods of time. (Tr. Vol. II, pp. 31-32)

13. On July 28, 2006 a few weeks after beginning her employment at the call center, Complainant visited her orthopedist, Dr. Saperstein. His record of this visit states that Complainant reported "mild loss of motion in her neck" but determined that she was "neurologically intact." Dr. Saperstein also reported that Complainant had discussed her "new job" that required "more sitting," and prescribed pain medication. In his deposition, Saperstein stated that he was not seriously concerned about the fact that

Complainant had a job with more sitting, he believed adjustments could be made with the employer's cooperation to allow Complainant to continue doing the job without major disruption to her life or running the office, and he did not advise Complainant to stop working. (Ex. 502, pp.32-33, 45)

14. Complainant continued to express her dissatisfaction with working at the call center. She admitted that she told other people at Verizon that she wasn't happy working there, and stated that she would have been happier at the foreman job working outside. (Tr.Vol. II, pp. 34-35) Within the first month of Complainant working at the call center, Sisoian called a meeting with Debbie Roche, who was Complainant's manager at the time, to discuss Complainant's situation and her concerns about working in the call center. According to Roche's report they also discussed her excessive phone calls to her subordinate, which Complainant claimed were only business related. (Ex. 33) Complainant admitted commencing a romantic relationship with this subordinate sometime after she ceased supervising him, and shortly thereafter she became pregnant by him. (Tr. Vol. I pp. 76-77)

15. Complainant continued to voice her displeasure to Sisoian about working at the call center. (Tr. Vol. III, p. 111) Complainant alleges that her back and neck pain flared up while working at the call-center from long hours, sometimes up to eleven hours a day, spent working there. (Tr. Vol. I, p. 77) Sisoian attempted to accommodate Complainant's stated issues with her back and neck and ordered her an ergonomic chair which arrived in early September, 2006. Complainant did not discuss other options for accommodation with Sisoian. (Tr. II, pp. 36-39) She acknowledged that she did not

need her own workstation at the call center and spent much of her time looking over the shoulder and supervising subordinates and attending meetings. (Tr. Vol. II, pp. 32-33)

16. On September 1, 2006, after working only 29 days at the call center, Complainant claimed her neck froze at work, after turning it the wrong way. She was unable to continue working and a colleague drove her home. Complainant testified that she worked at the call center until September 4, 2006 and on September 5, 2006 she began a leave of absence from work because of her neck pain. (Tr. Vol. I, p. 71; Tr. Vol. II, p. 41) Complainant saw her orthopedist, Dr. Saperstein six days later on September 11, 2006. (Tr. Vol. II, p. 45. Ex. 74) Dr. Saperstein's record states that Complainant reported aching pain in her neck that was getting worse and that she was having trouble working. Dr. Saperstein's physical exam noted that Complainant was "neurologically intact" and he made no recommendation that Complainant remain out of work. (Tr. Vol. II, p. 46; Ex. 74) He did prescribe pain medication, physical therapy and restraint. (Ex. 74) Complainant brought FMLA leave forms with her to Saperstein's office for him to complete to justify her time out of work. (Tr. Vol. II, pp. 43-45)

17. In September of 2006 Complainant began the process required for a short-term disability leave of absence through MetLife due to neck strain, a process she was familiar with from previous leaves in 2002 and 2004 and because she was a manager. (Tr. Vol. I, p. 82; Vol. II. p. 48) On October 10, 2006, Dr. Saperstein's office submitted documentation to MetLife reflecting assessments that Complainant could only sit for two hours intermittently, stand for two hours intermittently, walk for two hours intermittently, and that she was disabled. (Ex. 75) Saperstein stated in his deposition that this assessment was based on information Complainant provided to him regarding what she

felt her abilities were. (Ex. 502, p. 52, 85-86; Ex. 75) Complainant saw Dr. Saperstein again on October 12, 2006 for “recurrent neck strain” and his report indicated that Complainant still had symptoms, was unable to return to work and recommended she continue with treatment. (Ex. 216)

18. On October 17, 2006 MetLife approved Complainant for disability leave for the period from 9/4/06 until 10/22/06. (Tr. Vol. I, p. 83; Tr. Vol. II, p. 53-54; Ex. 41) From September 4, 2006 through October, Complainant continued in treatment and remained in contact with her supervisor, Sisoian. (Tr. Vol. II, p. 53-54; Tr. Vol. I, p. 83-84) On October 16, 2006, MetLife called Sisoian to discuss possible accommodations that Verizon might make for Complainant upon her return to work and Sisoian discussed a sit/stand work station, a reduced work schedule or a part time work schedule. (Ex. 40 at p. 5) Complainant never discussed these options with Sisoian because she did not believe she could return to work at this time. (Tr. Vol. II, p. 60)

19. Complainant understood that she would be required to demonstrate a medical basis to remain on leave beyond October 22, 2006, or she would be required to return to work, and she continued to send medical information to MetLife to justify an extended absence. (Tr. Vol. II, pp. 55-56) MetLife continued to consider Complainant’s request for medical leave beyond October 22, 2006. On October 18, MetLife sent Dr. Saperstein a form requesting that he clarify Complainant’s functional capabilities, in order for MetLife to determine if she were eligible for disability leave beyond October 22, 2006. (Ex. 78) Saperstein responded on October 20, 2006 only that Complainant should be able to return to work on November 1, 2006 and indicated no changes to her treatment plan. (Ex. 78) On October 25, 2006, MetLife sought clarification from Dr. Saperstein as to

Complainant's inability to work from October 22 to November 1, and notified Complainant that same day that there was no objective medical information to support a disability leave beyond October 22 and that Respondent would accommodate her with a reduced work load. (Ex. 40, p. 10)

20. Complainant's claim for disability was not approved beyond October 22, 2006 but she did not return to work. (Tr. Vol. II, p. 54) Instead, Complainant remained out of work without authorization while she continued to seek extended medical leave. For the next two months Verizon gave her the opportunity to submit additional medical documentation to justify a further medical leave of absence and MetLife continued to inform her of her responsibility to submit additional medical documentation to support an extended leave. (Ex. 44) Complainant acknowledged receipt of communication from MetLife advising her that more medical information was needed to justify a continuing disability leave. (Tr. Vol. II, p. 74-75)

21. On October 26, 2006, Dr. Saperstein drafted a final letter to MetLife stating that he had seen Complainant for neck pain, for which there is "no definite objective deficit," and he hoped she could return to work on 11/1/06, but she presented at his office "quite upset and depressed," stating she could not sit and work for any period of time. (Ex. 45) The letter noted that he would have to turn her case over to a neurologist to determine why her symptoms are so debilitating and indicated Complainant is seeing a neurologist for evaluation and treatment of her neck pain. Complainant did not return to Dr. Saperstein for treatment thereafter. (Ex. 45; Ex. 502, p. 72) Complainant admitted that she knew Dr. Saperstein's position was that she could return to work and that he was

not going to support her staying out of work beyond November 1, 2006 and that she had no intention of returning to work at that time. (Tr. Vol. II, p. 62-63)

22. Complainant testified that sometime on or around the third week in October, when her leave for neck strain and pain was not extended, she began to seek leave for migraine headaches and went to see a neurologist. (Tr. Vol. II, p. 65-66) Complainant was first evaluated for migraines by a neurologist, Dr. Michelle Sammaritano, on October 25, 2006 and she was placed on the medication Topamax and Elavil for the headaches. Dr. Sammaritano's report of Complainant's first visit states that, "her headaches are bifrontal/temporal, not sharp pains, some pressure and some throbbing. She has photophobia and nausea, but no vomiting. There was much throbbing in the past. She has pressure in the back of her head." (Ex. 52)

23. MetLife's records indicate that on the same day she visited Dr. Sammaritano, Complainant was notified by telephone voicemail that there was no objective medical documentation to justify an extension of her disability leave and benefits. (Tr. II, p. 65) While Complainant claims to have no memory of receiving that message, she contacted MetLife the same day to inform them that she had seen Dr. Sammaritano and was having neck pain and headaches that lasted an "average of three days,"¹ and that Dr. Sammaritano had ordered an EMG. (Tr. Vol. II, pp.71-72, 75, Ex. 40, p. 12) Complainant acknowledged at the hearing that her neck and back pain were no longer debilitating at that point. (Tr. Vol. I, p. 88; Vol. II, pp. 75-76)

24. Complainant testified that in the first week of November 2006 she determined that she was pregnant. She admitted that at the time she was in a romantic relationship

¹ Sammaritano's records indicate that Complainant reported migraines lasting up to 5 days.

and living with her former subordinate.² (Tr. Vol. I, p. 85) Upon discovering she was pregnant, she immediately stopped taking the medication she had been prescribed for migraine headaches. (Id.) Complainant asserts that during the first trimester of her pregnancy her migraine headaches reached a crescendo, that she was completely debilitated by headaches which lasted for up to three, five, six days at a time with short breaks in between and that she ceased all normal daily activities and mostly did not leave the house. (Tr. Vol. I, pp. 88-89, 91-92) While I credit Complainant's testimony that she suffered from migraine headaches which at times were debilitating, I do not credit her testimony that they lasted for up to weeks on end with only a day break in between (Tr. Vol. 92) and find that this is an exaggeration, for the reasons stated below.

25. In an email from Sisoian to Mary O'Leary in Human Resources, dated November 15, 2006, Sisoian reported that on that day Complainant told him that she was not returning to work because of a "stiff neck and sharp pain," but she did not mention migraines. During that same conversation, Complainant informed Sisoian that she would not be returning to work on November 27, 2006 because she could not work at the call center and sit at a desk for hours at a time, and reiterated that she never asked for the job at the call center and had informed McNabb that she did not want to work there. (Ex. 6)

26. Complainant first visited her OBGYN, Dr. Jennifer Wu on November 7, 2006. (Tr. Vol. II, p. 5, Ex. 57) Dr. Wu's report of this visit makes no reference to Complainant suffering from migraine headaches or having a migraine that day. (Tr. Vol. II, pp. 6-8) Complainant next visited Dr. Wu on November 27, 2006 as a follow-up to her initial visit and Dr. Wu made no notations of Complainant suffering from migraines or having a migraine condition. Despite Complainant's claim that she was suffering from

² As of early November 2006, Complainant had moved out of her home and put her home up for sale.

a migraine when she saw Dr. Wu on November 27, Dr. Wu noted that she had “no acute distress,” and that it was an “unremarkable exam.” (Tr. Vol. II, p. 12; Ex. 62)

27. By the end of November, 2006, MetLife had received no further medical information from Complainant’s doctors since Dr. Saperstein’s letter of October 26, 2006. Sisoian sent Complainant a return to work letter on November 27, 2006, requiring that she return to work by December 4, 2006 and informed Complainant by telephone that same day that she would be receiving the letter. (Ex. 19; Ex. 5) That same day, Mary O’Leary, from Verizon’s Human Resources office wrote to Sisoian asking him to reiterate to Complainant that Verizon could make accommodations for her if she could not sit all day, such as a sit-stand work station and that Complainant would have ample time to stand and walk around while supervising associates, as McNabb had informed her previously. (Ex. 6) Sisoian confirmed that he relayed this message to Complainant. (Tr. Vol. III, p. 139) Nonetheless, Complainant phoned Sisoian the next day and remained adamant in her refusal to return to work ostensibly because of neck pain and informed him that she had 19 ½ FMLA days remaining. She again stated that she was forced into the call center and it was unfair. (Ex. 19) Sisoian spoke to Complainant again the next day and informed her that she had no FMLA days remaining and that she was expected to report to work on December 4, 2006. At that time Complainant informed Sisoian that she would be seeking Anticipated Disability Leave, in lieu of a medical disability leave. (Ex. 19)

28. Complainant visited neurologist, Dr. Sammaritano the next day, November 30, 2006, bringing forms with her for the doctor to complete seeking a three month leave of absence. (Ex. 53) The doctor’s record of that visit noted that Complainant discussed

being stressed at her job working with computers as a foreman, the stress of long days and rising at 4:45am, how tired she was, and that she couldn't cope. Complainant had been out of work for almost three months by that time and was not working when she reported these concerns to Sammaritano. Dr. Sammaritano noted that it was Complainant who suggested that the best thing for her would be to take a leave of absence since she could not cope with the job. Sammaritano filled out the form requesting three months leave for Complainant due to her headaches. (Ex. 53) However, her report contains no objective findings of any symptoms of migraine headaches, and her only notes as to Complainant's physical condition, are that she is tired, but that sleep deprivation does not seem to be a major issue, and that she is eating regular meals. The report does not discuss any reported or suggested limitations to Complainant's daily life activities, and contains no medical opinion by Sammaritano that Complainant was disabled or required a leave of absence. The report merely reflects Complainant's own subjective statements about her unhappiness at work and desire for a leave of absence. (Ex. 53) After this visit, Complainant did not see Dr. Sammaritano again for the duration of her pregnancy. (Tr. Vol. II, p. 159; 221)

29. On November 30, 2006, the same day she visited Dr. Sammaritano, Complainant presented Sisoian with her Application for Anticipated Disability Leave which sought leave up until March 5, 2007. (Tr. Vol. 1. p. 95; Vol. III, p. 43; Ex.8) The application was accompanied by the form filled out by Dr. Sammaritano indicating that the Anticipated Disability was due to pregnancy and that Complainant was suffering from "intractable migraine headaches" precipitated and exacerbated by pregnancy. While Complainant acknowledged that her migraines were anticipated to lessen after the first

trimester of her pregnancy, the ADL request sought leave well beyond her first trimester. (Tr. Vol. I, p. 93; Vol. II, p. 143) She claims that the Verizon Human Resources hot-line advised her to apply for ADL, but she also understood that all medical information relating to medical disability leave had to go through MetLife. (Tr. Vol. II, p. 128, Ex. 7) On November 30 Complainant informed Sisoian that she was sending the medical information from Dr. Sammaritano to MetLife to re-open her short-term disability claim and that she anticipated MetLife would process the claim within 3 to 5 days. (Ex. 7) Complainant was ineligible for ADL because her leave request was for an ongoing and current medical issue, (Ex. 8) and Verizon's HR leave coordinator does not accept medical information from employees applying for ADL. (Tr. IV, p. 81, 85-86; Ex. 49) Complainant withdrew her application for ADL after learning that it was not appropriate. (Tr. Vol. II, pp. 132-133, 138)

30. Complainant did not return to work on December 4, 2006. On December 8, 2006, Sisoian spoke with Complainant's case worker at MetLife and was informed that Complainant's case was closed because she had not provided MetLife with any further medical information. (Ex. 12; Ex. 40, p. 16) Consequently, on December 11, 2006, Sisoian sent Complainant a second return to work letter, instructing her to return to work on December 13, 2006. (Ex. 17; Ex. 19) Complainant did not return to work on December 13 and on December 14, she submitted an application for Departmental Leave for "Medical Reasons (Migraines exacerbated by pregnancy)," with an anticipated return to work date of January 15, 2007. (Ex. 20) Complainant claimed she submitted this request upon purported advice from Verizon's HR hotline. (Tr. Vol. II, p. 128, 167-169) The Departmental Leave request did not include or reference any medical information.

(Ex.20) Complainant stated that she chose January 15 as her return date because one month was the maximum time permitted for such leave and the date coincided with the end of her first trimester of pregnancy. (Tr. Vol. II, p. 174) The one month Departmental Leave Request contradicted the required three month leave that Complainant had sought just two weeks earlier for the same medical reason, though nothing had occurred in the interim to justify the different estimate of when she would be able to return to work. (Tr. Vol. II, pp. 173-174) Because Departmental Leave is for non-medical reasons, an employee's director or supervisor is charged with approving the application, since there is no disability or FMLA evaluation needed and business needs are a primary consideration in granting or denying such leaves. (Tr. Vol. III, p. 187; Vol. IV, p. 81; Ex. 2)

31. Sisoian informed his level three supervisors, John Sordillo, and Human Resources Manager, Mary O'Leary, that Complainant was seeking additional time off for her migraines. (Tr. Vol. III, p. 60) Sordillo advised Sisoian that Departmental Leave was not appropriate for the medical leave that Complainant was requesting and he denied Complainant's request after consultation with HR and confirmation that leaves for medical reasons must be approved by the medical professionals at MetLife. (Tr. Vol. IV, p. 179-186) However, Sordillo did tell Sisoian to encourage Complainant to continue providing documents to MetLife in order to pursue medical leave through the proper channels. (Tr. Vol. IV, p. 179-180) Sisoian testified to his understanding that an employee out of work on an unauthorized leave of absence, and not approved for short term disability, as Complainant, does not qualify for an unpaid leave of absence. (Tr. Vol. III, pp. 60-61) He was told that because Complainant was not an active employee she

could not apply for Departmental Leave. (Id.) On December 18, 2006, Complainant informed Sisoian by email that she had not received a response from him on her Departmental Leave request and that Verizon's Leave of Absence Coordinator had not received her request. Sisoian never responded to Complainant's request for Departmental Leave and, as far as he knows, no one else at Verizon did. (Tr. Vol. III, p. 64) While acknowledging that she was seeking leave for medical reasons, Complainant insisted that it was within management's discretion and authority to grant her Departmental Leave, regardless of the reason. (Tr. Vol. II, p. 178-179; Ex. 20) I find that she was mistaken in this regard, that she knew she was seeking medical leave, and that she was not prejudiced by Verizon's the failure to notify her that she did not qualify for this type of leave.

32. On December 13, 2006, MetLife contacted Sisoian to inform him that MetLife had received additional medical documentation from Complainant. (Ex. 40 p. 17) Upon learning MetLife was reviewing the additional medical information submitted by Complainant, Verizon did not send her a job abandonment letter on December 13, 2006. (Ex. 19; Ex. 40 p. 18)

33. MetLife's medical determination as to whether Complainant continued to be disabled beyond October 22, 2006 by migraine headaches was made by Dr. Desmond Ebanks, whose deposition testimony was submitted into evidence. (Ex. 503) Dr. Ebanks testified that there are objective symptoms of migraines that evidence whether the condition is disabling, such as vomiting, inability to eat or drink, cognitive issues such as difficulty concentrating or reading, dizziness or instability, elevated pulse rate, depletion or dehydration and photosensitivity. (Ex. 503, pp. 29-33; 38-39) His review of Complainant's medical files revealed no evidence of the objective symptoms of disabling

migraines, except for her claim of photosensitivity. (Id.) There was also no indication from the records that Complainant reported that her condition was severe or constant or that she had extreme pain. This is in contrast to Complainant's testimony that the headaches were debilitating, lasted for days on end, caused a lot of fatigue, and that the pain was "like someone taking a hot dagger and sticking it behind your eyes" and "trying to poke your eyes out with it, and very sharp." (Id. p. 34-35, 76, Tr. Vol. I, pp. 88-89)

Dr. Ebanks testified that he did not contact Complainant's treating physicians, as he sometimes does, because her claim was not complex and because the doctors' notes all consistently failed to report the doctors' own medical opinion that Complainant was medically disabled due to migraines, but instead merely re-iterated Complainant's report that she was feeling stressed and unhappy at work. (Ex. 503 p. 36) He noted that the Complainant's own perception of her condition and her subjective view of pain is insufficient to justify a finding of disability. (Id., p.34) Moreover, Complainant's doctors records reflecting visits prior to October 25, 2006, make no note of migraines as a complaint. (Ex. 503, pp. 15-19) Dr. Ebanks further noted that those records of Dr. Sammaritano which do discuss Complainant's complaint of migraines beginning with Complainant's October 25th visit do not indicate that the headaches are severe, nor do they provide objective information to support on ongoing disability, but merely reflect Complainant's subjective complaints of pain. (Ex. 503, p.20-23) He also concluded that Dr. Sammaritano's letter of November 30, 2006 suggested a leave of absence for Complainant not because the doctor had concluded that it was medically necessary based on her objective findings, but because Complainant had requested she recommend a leave because Complainant did not want to return to work. (Id. at p.23) He concluded that he

found no evidence of intractable headaches that should result in a prolonged work absence, but that Complainant could have sought periodic leave, such as one or two days off for headaches that were episodic. (Ex. 503 p.69, 73) Dr. Ebanks stated that in his experience, it was uncommon for migraine headaches to last for three, four and five days in a row, but that they typically lasted for one or two days at most, for which one might take the necessary days as sick leave, FMLA, or other short-term leave. (Id. p. 75)

34. Following Dr. Ebank's assessment MetLife rejected Complainant's claim for disability leave. On December 18, 2006, MetLife informed Sisoian that there was no medical justification for Complainant's absence from work beyond October 22, 2006, and that her claim was closed. (Ex. 40, pp. 26-27) MetLife also drafted a letter to Complainant that same day informing her that her claim for extension of medical leave was denied with an explanation of the reasons and notifying her of the process for appealing the determination. (Ex. 55) On December 19, 2006, MetLife left Complainant a voicemail message notifying her that her claim had been terminated as of October 22, 2006. (Ex. 40, p. 27)

35. On December 19, 2006, Sisoian sent Complainant a third and final return-to-work letter instructing her to return to work on December 21, 2006. (Ex. 16; Ex. 19) MetLife phoned Complainant again on December 19, 2006 to re-iterate that her claim was denied and to remind her of her right to appeal. (Ex. 40, p. 27) Complainant did not appeal MetLife's denial of her disability benefits, and she did not return to work on December 21, 2006. (Tr. Vol. II, p. 88, 211) Sisoian spoke to Complainant that day and she told him she was not returning but that when she felt ready to return she would like Workforce Intervention, which assists managers at Verizon to fashion reasonable

accommodations to allow employees to return to work after MetLife approves a medical restriction. Complainant told Sisoian that she would seek restricted duty when she returned because she could not work full time. Complainant again reiterated her request for Departmental Leave. (Ex. 19; Tr. IV, p. 75, 166) Sisoian told Complainant that she was ineligible for Workforce Intervention at that time because MetLife had not approved any restriction and that her Departmental Leave request would not be granted due to business needs. (Ex. 19)

36. As a result of Complainant's refusal to return to work, John Sordillo sent her a job abandonment letter on December 21, 2006. (Ex. 18) Sordillo testified that Complainant's employment was terminated because she had refused to return to work and absent medical approval from MetLife, her absence was not authorized. (Tr. Vol. IV, pp. 52-53, 187-188) On December 29, 2006 Complainant filed her charge of discrimination with this Commission. Complainant remained out of work for years after her termination, and received unemployment compensation from 2007-2009. (Tr. Vol. I, p. 124) Complainant did not begin looking for work until August or September of 2007 and sought only part-time employment. (Tr. Vol. II, 221-222) In the fall of 2008, Complainant became a full-time law student. (Id. p. 222) She accepted her first job since leaving Verizon in March of 2009 working no more than 10 hours per week. (Tr. Vol. II, pp. 222-223)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B s. 4 (16) prohibits discrimination in employment on account of disability. The statute's prohibitions include termination of a disabled employee who is capable of performing the essential functions of the job with a reasonable accommodation. In order to prevail on a claim of handicap discrimination where Complainant alleges failure to provide a reasonable accommodation, she must demonstrate that (1) she is a "handicapped person," (2) that she is a qualified handicapped person," (3) that she needed a reasonable accommodation to perform her job; and (4) that the employer was aware of her handicap and the need for a reasonable accommodation; (5) that her employer was aware or could have become aware of a means to reasonably accommodate Complainant's handicap; and (6) the employer failed to provide her with a reasonable accommodation. *Hall v. Department of Mental Retardation*, 27 MDLR 235 (2005). MCAD Handicap Guidelines, p. 33, 20 MDLR (1998)

As a threshold matter, Complainant must prove that she was a "handicapped person" within the meaning of the statute. G.L. c.151 B, s.1(17). The statute defines a "handicapped person" as one who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of such impairment; or (c) is regarded as having such impairment.

There is no dispute that Complainant had a history of back and neck problems and that she was deemed disabled from neck strain and pain in September of 2006 when she first left her job at the call center. MetLife approved Complainant for medical leave and short-term disability benefits up until October 22, 2006, at which time she was no longer

deemed disabled. There is also no dispute that Respondent accommodated Complainant's disability caused by neck strain by granting her an extended leave of absence from her job at the call center. While Sordillo, the manager of call center operations, initially suspected that Complainant's claim for disability leave might be fraudulent because she was furious over being transferred to the call center and vehement about not wanting to work there, he withdrew this suggestion once Complainant's claim was supported with objective medical evidence from her orthopedist, Dr. Saperstein. However, as of October 20, 2006, Dr. Saperstein declined to render an opinion that Complainant continued to be disabled by back and neck problems and stated that she would be able to return to work by November 1, 2006. Since he could find no objective medical evidence that she continued to be disabled by neck and back pain, he referred her to a neurologist. Complainant acknowledged at the hearing that her neck and back pain were no longer debilitating at that point.

During the first week of November, 2006, Complainant confirmed that she was pregnant³, a complication which clearly impacted her decision about whether to return to work. Complainant claims that because of her pregnancy she was unable to continue with medication she had been prescribed for migraines and, as a result she was rendered disabled with headaches that incapacitated her for the next three months, about the first trimester of her pregnancy. Whether Complainant continued to be disabled after the end of October 2006 by migraine headaches that justified another extended medical leave of absence from work for up to three months is disputed and is the threshold inquiry in this case.

³ Complainant reported to Dr. Sammaritano that she was 7 ½ weeks pregnant as of 11/30/06.

Complainant asserts that her doctors' reports and her own testimony about the headache symptoms she was suffering support her claim that, after her neck pain resolved, she continued to be disabled by debilitating migraines beginning sometime in late October or early November of 2006. Dr. Sammaritano's report of October 25, 2006 states that, "her migraine is one of her major complaints at this time, with a duration of up to five days," and notes the medications she prescribed for Complainant's symptoms. Complainant testified that upon confirming that she was pregnant in early November and ceasing her migraine medication, she began to suffer more severe headaches that lasted up to 5 or 6 days on end, rendering her unable to function in her daily activities or to work. While the evidence supports a finding that Complainant was experiencing headaches during this time period, for all the reasons stated below, I did not find credible her testimony that the headaches lasted for up to 5 and 6 days on end with few breaks in between or that she was impaired from most daily activities, and unable to work at all.

Respondent's records reflect that on November 15, 2006 Complainant told her supervisor Sisoian that she would not be returning to work because of a stiff neck and sharp pain, and reiterated that she could not, and did not want, to work in the call center and had told McNabb she did not want to work there. In this conversation with Sisoian she did not mention that she was suffering from debilitating migraine headaches.

During the month of November, 2006, Complainant visited her OBGYN, Doctor Wu, two times on the 7th and the 27th, and the reports of these visits reflect no mention of Complainant suffering from migraine headaches. Complainant's claims that she was suffering from intractable debilitating headaches for days on end during this time period conflict with her apparent failure to report this to her OBGYN doctor. Moreover, Dr.

Sammaritano's two reports, which are the only medical reports concerning migraines that were submitted to MetLife, are largely a reiteration of the symptoms Complainant relayed to the doctor, with scant objective medical evidence justifying the need for a prolonged leave of absence. While these reports indicate that Complainant was complaining of recurring headaches, and reported some throbbing and some pressure, they do not describe her headaches as severe or debilitating. In short, they lack objective support for Complainant's claim that the headaches were debilitating or that she was unable to work because of them. Furthermore, neither of the reports indicates that Complainant was restricted from performing normal daily activities.

Complainant must establish that her migraine headaches rendered her substantially impaired in one or more major life activities. G.L. c. 151B p. 1(17); MCAD Handicap Guidelines, p. 3, 20 MDLR (1998). Such a determination depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment. (Id.) Complainant's only evidence that her headaches were so debilitating so as to impair her in the performance of daily activities was her own testimony, which I determined to be exaggerated and not credible.

Complainant did not visit her neurologist, Dr. Sammaritano, again until November 30, 2006, some five weeks after her first visit, and only after Verizon had ordered her back to work on December 4, 2006, because MetLife had no further medical information to justify a continued leave of absence. At the November 30th visit with Dr. Sammaritano, Complainant raised concerns about the ongoing stresses of her job, notwithstanding the fact that she had not reported to work for almost three months. It is

not apparent from the report that Complainant even told Sammaritano she was currently out of work and on a leave of absence and that she hadn't worked for almost three months. Sammaritano's report can be read to suggest that she believed Complainant to be still at work on November 30 when Complainant suggested to Sammaritano that a leave of absence would be the best option for her. Indeed, Sammaritano's report merely conveyed Complainant's own self-assessment that she should take a leave of absence because she couldn't cope with her job.

All of this leads me to conclude that by November 30, 2006, Complainant had made up her mind that she was not going to return to work at the call center and was making desperate attempts to forestall her return, including obfuscating the facts to prompt Dr. Sammaritano to recommend a leave and applying for leaves that she knew were not available to her.⁴ Complainant's attempts to forestall returning to work cannot be divorced from the context of her lack of forthrightness about her relationship with her subordinate, her frequently stated anger and displeasure at having been placed at the call center, and her obstinacy in declining to answer questions directly at the hearing. Consideration of all these factors leads me to conclude that her claim that she was disabled by migraines and her testimony at the hearing are largely unworthy of credence.

In addition, Verizon's Doctor Ebanks, who determined that Complainant was not disabled for purpose of requiring further leave, testified in deposition that his review of the medical files revealed scant evidence of the objective symptoms of disabling migraines, or that Complainant reported constant headaches with extreme pain. He noted that Complainant's doctor did not advance any opinion that she was medically disabled

⁴ Complainant admitted in deposition testimony that she applied for alternate leaves in response to receiving return-to-work letters from Verizon, but at the Hearing insisted the timing was merely a coincidence.

due to migraines, but merely re-iterated her complaints that she was experiencing migraines and was tired, and that she was unhappy at work and unable to cope with the stress of her job.⁵ Ultimately, much of the credible evidence suggests that it was in fact Complainant, and not her doctors, who was driving the request for continued leave, because she did not want to return to work at the call center to work long days at a job she did not like.

Dr. Ebanks found no medical evidence of intractable headaches that should result in a prolonged work absence. He noted that, in his experience, migraine headaches lasted for one or two days at most, and were episodic in nature and that Complainant could have sought periodic leave, such as one or two days off for headaches that were episodic. All of this leads me to conclude that MetLife's determination that Complainant was not disabled by migraine headaches was reasonable and justified and supported by the medical evidence then available to MetLife. *See Carroll v. England*, 321 F. Supp. 2d 58, 69 (2004) (analysis of employee's disability claim limited to the information presented to the employer at the time *only*). I conclude that Verizon properly relied on the medical opinion of its physician that Complainant was able to return to work.

However, even if a reasonable fact-finder could disagree with this determination, and were to accept Complainant's testimony as sufficient evidence that she was substantially impaired by her headaches, and thus disabled within the meaning of the law,⁶ Complainant must still establish that she was capable of performing the essential functions of her job with a reasonable accommodation and that Respondent denied her a

⁵ It is noteworthy that Dr. Sammaritano was not called to testify at the trial to contradict Ebank's assessment, nor was she deposed in the matter.

⁶ Episodic disorders that are substantially limiting may be handicaps. See MCAD Handicap Guidelines p. 4 20 MDLR (1998)

reasonable accommodation. I conclude that Complainant has not met her burden of proof on either of these issues.

Since Complainant continued to assert that she was unable and unwilling to return to work after a leave of absence approaching close to four months, and was seeking an additional one to three months of leave time, it is in fact her position that she was unable to perform the essential functions of her job at the call center for the entire time frame at issue. Indeed, she continued to insist that she could *not* do the job at the call center. Moreover, Complainant rejected out of hand every conceivable accommodation that Verizon offered her, including ergonomic furniture, a sit-stand work station, the ability to stand and walk around during work hours, and the possibility of part time work or a reduced work load, insisting that only an extended leave of absence could accommodate her disability. While there may be circumstances where an extended leave of absence is an appropriate or reasonable accommodation, including a request for a limited extension, which sets a definite time for the employee's return, each case must be evaluated on the circumstances. *Russell v. Cooley Dickinson Hospital, Inc.*, 437 Mass 443 (2002) *citing Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 1st Cir. 2000) (under the circumstances requested two-month extension was reasonable); EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA III-23("Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disabilities....where this will not cause an undue hardship.") MCAD Handicap Guidelines, p. 36 20 MDLR (1998) However open-ended and indefinite leave requests are not reasonable under c. 151B. *Russell at 455.*

Complainant argues that as of mid-December she was seeking only one additional month of Departmental Leave time with an anticipated return to work date of January 15, 2007, and that therefore her request for Departmental Leave was reasonable and not open-ended. This ignores the fact that by December 14, 2006, she had already been absent from work for over three months and that her end date continued to be a moving target (only two weeks earlier she had sought Anticipated Disability Leave up until March 5, 2007 purportedly the end of her first trimester of pregnancy)⁷ Complainant admitted that she modified her request to one month for no other reason than that 30 days was the maximum available Departmental Leave, all the while understanding that neither Departmental Leave nor Anticipated Disability Leave applied to her circumstances.⁸ By mid-December, Complainant was clearly resorting to every available means to forestall returning to work at the call center.

Respondent argues that the crux of this complaint is Complainant's failure to provide sufficient documentation to justify her purported disability of debilitating migraines, and her attempts to by-pass the MetLife medical review process by applying for non-medical leave programs directly from Verizon for expressly medical reasons. Respondent's position is that Complainant was not disabled and therefore was not entitled to a further extended leave of absence as a reasonable accommodation. Notwithstanding this position, Respondent asserts that, even if Complainant had established that she was disabled and deserving of a reasonable accommodation, the

⁷ At deposition Complainant reported her migraines did not improve until February or March, but at hearing she claimed they improved in January. In contradiction to her deposition testimony, she also admitted that the March date far exceeded the end of her first trimester of pregnancy.

⁸ Despite acknowledging that Departmental Leave was inappropriate in her circumstances, Complainant continued to insist at the hearing that she should have been granted this leave for any reason, including medical.

accommodation sought must be for what is actually necessary to accommodate the employee's condition. It argues that if Complainant suffered from periodic migraines lasting a few days, months of continuous leave would not be a reasonable accommodation and that Complainant could have requested intermittent leave for when she had a flare-up of her migraines. I concur with Respondent's position.

Ultimately, Verizon granted Complainant total leave time of nearly four months in 2006 without adverse consequences, notwithstanding the lack of medical documentation justifying her leave beyond October 20, 2006. Prior to her termination, Complainant was given an additional two months, up until December 21, 2006 to submit further medical evidence in support of her disability claim. It is also worthy of note that within a few short years, Verizon had granted Complainant several extended medical leaves of absence for months at a time for disability related reasons. Given this history, Complainant can hardly claim that Verizon has not treated her equitably with respect to leave time that was warranted, and she suffered no adverse consequences for having taken extended leaves that were medically justified.⁹ Moreover, given her favorable work history with Verizon, there is no evidence to suggest that, had Complainant returned to work in December of 2006, Verizon would have refused her sporadic leave time, as necessary, for periodic or episodic headaches that rendered her unable to work for a few days. Complainant's insistence that she should have been granted an unpaid leave for any personal reason, whatsoever, even if she could not satisfy MetLife that she qualified for a medical disability is not persuasive. I conclude that Complainant failed to establish that, even if disabled, she requested a reasonable accommodation that Respondent refused to provide.

⁹ As of 2006, Complainant had a history of promotions and was earning a six figure salary.

Since Complainant has not established that she was a qualified handicapped person capable of performing her job with a reasonable accommodation, I need not reach the issue of whether extending Complainant's leave would have posed an undue hardship on Respondent's business. Given all of the above, I conclude that Verizon's termination of Complainant's employment after she rejected the company's demands that she return to work from an unapproved leave of absence, was justified and not discriminatory. To the extent Complainant has raised the issue, I find no evidence whatsoever, that Respondent discriminated against Complainant based on her gender and conclude that there is no liability for violations of G.L. c. 151B.

V. ORDER

For all of the reasons stated above, the Complaint is hereby dismissed. This is the final decision of the Hearing Officer. Any party aggrieved by this Decision and Order may file an appeal to the Full Commission. To do so, a party must file a Notice of Appeal with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 3rd day of March, 2011.

Eugenia M. Guastaferrri
Hearing Officer