

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D &
KATHLEEN THOMPSON,
Complainants

v.

DOCKET NO. 09-BEM-00523

PREMIER DIAGNOSTIC
SERVICES, INC.,
Respondent

Appearances:

Thomas P. Delmar, Esq. for Kathleen Thompson
Aviva Jeruchim, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 11, 2009, Kathleen Thompson¹ filed a complaint with this Commission charging Respondent with discrimination on the basis of disability, carpal tunnel syndrome and tendonitis, in violation of M.G.L.c.151B, sec. 4(16). Specifically, Complainant alleges that Respondent failed to accommodate her disability and terminated her employment because of her disability. 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 February 24- 27, 2015. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

¹ Formerly known as Kathleen Zuckerman.

II. FINDINGS OF FACT

1. Respondent Premier Diagnostic Services, Inc., located in Avon, Massachusetts, is in the business of contracting with medical offices and hospitals to provide mobile medical imaging services. Respondent's president is William McCurdy and its vice president is Bryon Becker. In 2008, Respondent employed approximately 75 sonographers.

2. Complainant Kathleen Thompson resides in Andover, Massachusetts. She worked as a medical sonographer for approximately 11 years. She was hired by Respondent in 2005 and was assigned primarily to the office of an obstetrician-gynecologist ("OB") in the Andover area where she performed sonograms primarily on pregnant women. She also worked at the Lowell Community Health Center. Performing a sonogram required Complainant to hold a probe or wand in her right hand and guide it over a patient's body for an extended period of time. T. I, 48-49.

3. Complainant worked Mondays, Tuesdays and Fridays at the OB's office and every other Wednesday at Lowell Community Health Center. She worked from 40 to 43 hours every two weeks. T. I, 34-35. At the OB's office she performed approximately 10 sonograms per day. T. IV, 43. Another employee of Respondent performed sonograms at the OB's office on Wednesdays and Thursdays.

4. Respondent provides benefits to employees who work more than 40 hours every two weeks, including health insurance, short-term disability (for which Respondent is self-insured) and long-term disability. For work-related injuries, employees are referred to Respondent's workers' compensation insurer.

5. Lynne Aiken has been a clinical manager for Respondent since June 2004. She oversaw several sonographers and performed sonograms for sonographers who were sick or on

vacation and for new clients. Aiken became Complainant's manager in March 2008. T. II, 115-117.

6. Susan Secord supervised the clinical managers and was Respondent's business manager.

7. Kayle Martino has worked for Respondent since the company's inception 17 years ago and is Respondent's business and human resources manager. Complainant and Martino communicated frequently regarding matters such as time sheets, hours, scheduling and insurance. T. I, 36.

8. In addition to the regularly scheduled sonograms in the OB practice, sonographers were referred other patients, whom they fit into their schedule, as "add-ons." Complainant regularly performed sonograms for patients who were "add-ons."

9. Complainant testified credibly that she performed her job well. She took no sick days for three years and treated her patients well. She loved her job and her profession. T. I, 37.

10. Complainant's prior clinical manager conducted annual performance reviews of Complainant in 2006 and 2007.

11. In her 2006 performance review, Complainant's manager wrote that the OB's office was "extremely happy with her professionalism and that they "can't say enough great things about her...she has been a huge asset to Premier and we wish we had more sonographers like her." Ex. C-1

12. In Complainant's 2007 performance review, her manager stated that Complainant was "an outstanding employee. She covers [OB's] office... and is extremely flexible with [him] in adjusting the schedule to accommodate the patients and his needs. The patients request her to

do their ultrasounds. Kathleen is extremely courteous and professional at all times...they are also very happy with her.” [at Lowell Community Health Center] Ex. C-1.

13. On March 13, 2008, Aiken wrote in Complainant’s performance review that Complainant was professional, conscientious, personable, and liked by the physicians and office staff where she worked. Aiken wrote that it was a pleasure working with Complainant. T. I, 41-42; Ex. C-1.

14. Dawn Bibeau worked for the OB from 1999 to 2010 and was his office manager in 2008. Bibeau was the contact person between Complainant and Respondent. Bibeau was on friendly terms with Complainant. T. IV,

15. Bibeau testified credibly that through April 2008, Complainant was a pleasure to work with and very accommodating and that patients requested her personally to perform their sonograms. T.IV, 8.

16. The OB was remunerated for every sonogram performed in his office. While Respondent billed the patient’s insurance carrier for the sonographer’s work, the doctor interpreted the results and billed the insurance carrier for interpreting each exam. When the OB’s office had no available sonographer, patients would be sent to a local hospital where a radiologist would interpret the results and bill the insurance carrier for the sonogram. T. I, 91-92.

17. Complainant testified credibly that the OB was argumentative and sometimes drove his staff to tears. She stated that Bryan Becker once commended her for her ability to work with the OB, as prior sonographers had difficulty working for him. T. I, 38. 43.

18. Bibeau testified credibly that there was “no love lost” between Complainant and the OB, and Bibeau acknowledged that she also became frustrated with him at times. T. IV, 28 -31.

19. Complainant testified credibly that in late March or early April 2008, she began to experience pain and numbness in her right hand, shooting pain up to her elbow and tingling in her fingers. She lost her grip, dropped things and had difficulty writing. T.1, 48.

20. Complainant testified that she told the OB and Bibeau about her pain and asked Bibeau to leave some time between sonogram appointments in order to give Complainant time to rest her hand. She also asked Bibeau to help her write reports. Bibeau attempted to give Complainant more breaks but the OB would direct her to schedule patients in between appointments. I credit her testimony. T. I, 52-54.

21. Bibeau testified credibly that Complainant told her that her hand was “killing her” and she had trouble writing because of the pain. Bibeau helped Complainant to fill out forms and staggered appointments or left appointment times unfilled in order to accommodate Complainant’s request for time to rest her hand between patients. T. IV, 66.

22. Complainant testified that the OB had a very high, stationary examining table for patients receiving sonograms. She stated that it was difficult to perform sonograms on the table and that she was required to stand all day. She asked her previous supervisor and Lynn Aiken for an adjustable table and but they said the OB would never agree to such a request. T. I, 130-140. I do not credit Complainant’s testimony that she asked her supervisors for an adjustable table. Aiken denied that Complainant ever made such a request and I credit Aiken’s testimony. Aiken testified credibly that Complainant never informed her about any injury or requested an accommodation before June, 2008. T. II, 138-40.

23. Bibeau testified credibly that in April 2008, she began to receive complaints about Complainant’s attitude and performance.

24. Bibeau stated that two patients told her that Complainant rushed and no longer took time with them and patients who had previously requested Complainant began to request the other sonographer, which created scheduling problems for the office. T. IV, 9; 14-15.

25. According to Bibeau, on one occasion an overweight patient left the office in tears and later told Bibeau that Complainant refused to help her off the examining table after her sonogram and believed it was because of her weight. T. IV, 17.

26. Bibeau testified that Complainant stopped accommodating unscheduled patients and the OB became very frustrated by Complainant's inflexibility. T. IV, 20-22.

27. Bibeau testified that Complainant came in to the office 10 to 15 minutes late on a couple of occasions, but instead of adding on patients at the end of the day, she left work on time, which caused a scheduling backup. T. IV, 26.

28. Bibeau testified that Complainant talked on her cell phone between patients, which displeased the OB. T. IV, 27-28.

29. Bibeau told Complainant about these concerns because she hoped it would change her behavior. It appeared to Bibeau that Complainant no longer cared about her job, which Bibeau surmised was due to Complainant's impending marriage to a wealthy man and the fact that she might no longer need to work. T. IV, 25.

30. On June 1, 2008, Complainant requested July 14, 15 and 18 as vacation days because her son would be away at camp that week. T. II, 133; T. IV, 10. Aiken denied the request because the time was no longer available. According to Aiken, Complainant insisted she wanted those days off, as well as another week in July which was also unavailable. Aiken offered Complainant two different weeks that Complainant refused. T. IV, 150-151. Complainant testified that she did not care which vacation week she was given. I do not credit her testimony

in this regard, as she previously testified that she requested July 14, 15 and 18 for a particular reason.

31. Bibeau testified that Complainant told her that she had already made plans for the time she had requested off and that, despite the denial of her vacation request, she intended to take her vacation “one way or another.” Upon hearing this, Bibeau became concerned that Complainant would simply not show up at work and the OB’s office would have no coverage on those days.

32. Bibeau told Aiken and the OB about Complainant’s comment and Aiken assured her that Respondent would provide coverage if Complainant did not come to work. T. IV, 35-37, 10; T. II, 154.

33. On June 6, 2008, at the OB’s direction, Bibeau informed Aiken about the issues that had arisen concerning Complainant’s work performance and poor attitude.

34. Following her discussion with Bibeau, Aiken wrote a memorandum² dated June 6, 2008 listing the complaints from the OB’s office about Complainant’s poor attitude, rudeness to patients, including a heavy patient and the fact that patients were asking for another sonographer. The memo also noted that Complainant was refusing to take add-ons and to re-schedule patients who were late, her confrontations with office staff, her tardiness and her time spent on personal cell phone calls between patients. Ex. C-8; T. II, 141-2.

35. Complainant denied rushing or being rude to patients and co-workers. She testified that all of the incidents the OB’s office complained of occurred on the same day, June 6, a day she had requested the day off because her husband was recovering from surgery and needed her assistance. Since Aiken denied her request for the day off and she was calling her husband in between patients to check on him.

² It was not clear to whom the memorandum was directed or where it was placed.

36. Complainant testified that on June 6, she was asked to perform a sonogram at the end of the day on an unscheduled patient who was having twins. The sonogram was difficult and took 90 minutes. T. I, 88-90. I do not credit Complainant's testimony that all these incidents occurred on June 6 or that they were related to her husband's surgery.

37. Aiken testified that after the call from Bibeau, she called Complainant three times during the month of June to schedule a meeting with her but she was unable to get Complainant to commit to a meeting. T. II, 149,151-152.

38. On June 12, 2008, Complainant first saw an orthopedic specialist, Dr. Czarnecki, for her right wrist pain. Dr. Czarnecki's notes indicate that Complainant had suffered from "atraumatic" right wrist pain for about a year which had become increasingly symptomatic and painful in the last month. He indicated that there was "no one injury to precipitate" her condition, and that the pain was worse at work. Czarnecki also diagnosed Complainant as suffering from right wrist extensor, deQuervain's tendonitis and possible carpal tunnel syndrome. He provided Complainant with a splint, arranged for a nerve conduction study, advised her to ice the wrist and continue taking anti-inflammatory medicines and to begin occupational therapy.³ Ex. C-5.

39. Complainant testified that when she wore the splint to work, the OB asked her if she had purchased the splint at Wal-Mart in order to appear injured. T. I, 141-142. I credit her testimony.

40. Complainant testified that she told Bibeau that she might have to take medical leave and to make sure that the OB's office would arrange to have someone else perform ultrasounds

³ Complainant testified that she had begun occupational therapy in April 2008, at which time she told Secord and Aiken that she was having difficulty performing sonograms because of her hand and wrist pain. T. I, 51-52. I do not credit Complainant's testimony regarding the timing of these events because it contradicts the evidence that she did not begin occupational therapy until after seeing the orthopedic specialist in June 2008 and the credible evidence of Aiken that Complainant did not inform her of any medical issues until June 2008.

while she was out. T. I, 61. Bibeau believed that Complainant was faking an injury in order to take a vacation.

41. On June 17, 2008, Complainant informed Secord that she had a nerve conduction study scheduled for June 20. Ex. C-2

42. On the same day, Secord informed Becker and Aiken that Bibeau believed Complainant most likely would not show up to work for the time she had requested vacation in July and that Respondent was "OK the week of her vacation but screwed after that if we want to get rid of her. If we let her come back we are in a bad place." Ex. C-3. I infer from Secord's email that she was concerned about finding someone to replace Complainant if terminated, but also concerned about the consequences of having Complainant remain in the workplace and having to accommodate her injury.⁴

43. On Friday, June 20, 2008, Complainant had a nerve conduction test. On the following Friday, June 27, Complainant called Becker to report that she was in treatment for wrist pain, was receiving occupational therapy and was awaiting the results of the nerve conduction test that was expected on Monday, June 30.

44. Becker notified Martino, Aiken and Secord about the call from Complainant. Secord responded: "This was predicted. Check mate on us. We can hold her hours but do not have to hold her site or times." Ex. C-7.

45. On Sunday, June 29, 2008, Aiken emailed Complainant to remind her to select another week of vacation as her previous request had been denied. Ex. C-7

46. On June 30, 2008, Complainant had a follow-up visit with Dr. Czarnecki, who advised her to go out on leave the next day because the damage to her hand and wrist could

⁴ Secord did not testify at the public hearing.

become permanent if she did not rest it. Czarnecki referred Complainant to a hand specialist in his practice, Dr. Alessandro, to address her carpal tunnel syndrome. T. I, 70; Ex. C-5

47. Following her June 30 medical appointment, Complainant advised Aiken that her medical providers had recommended she take time off from work and she was trying to work around the OB's schedule for the next day. Ex. C-7.

48. Complainant testified that on the evening of June 30 she informed Bibeau and another employee of the OB's office that she was going out on medical leave the following day. T. I, 76-77. On July 1, 2008, Complainant provided Respondent with a note from Czarnecki stating: Please be advised that [Complainant] has an injury of the right wrist and will be out of work until July 21. Ex. C-6.

49. On the morning of July 1, 2008, Complainant called Bibeau to see whether the OB's office had arranged coverage for her patients. She stated that Bibeau begged her to come in because there were patients scheduled for sonograms with no coverage. Complainant came in that morning, despite her pain, and worked until the afternoon. T. I, 77-78.

50. On the afternoon of July 1, 2008, Aiken and Becker met with the OB and Bibeau at the OB's office in order to discuss Complainant's performance and attitude problems. The OB was concerned about losing patients due to Complainant's behavior and told Aiken and Becker that he no longer wanted Complainant to work in his office. However, he did not want Complainant to know that the decision to terminate her services was his, because he and his wife had friends in common with Complainant and he was concerned that she would speak poorly of him in their social circle. T. IV, 39-42.

51. Complainant testified that as she was leaving work on the afternoon of July 1, 2008, she saw Aiken sitting in the OB's waiting room and assumed that Aiken had come to fill in for her. She did not speak to Aiken. T. I, 78-80.

52. On July 7, 2008, Aiken sent Complainant an email inquiring about her return to work date and informing her that she would need a doctor's letter clearing her to return to work on July 21. T. I, 96; Ex. C-10. She requested that Complainant call her so that they could "go over everything." T. III, 4-5. Aiken testified that she was skeptical about Complainant's claim that she needed time off from work for medical reasons and thought that she wanted to go on vacation and was "gaming the system." T. II, 194-5.

53. On July 9, 2008, Complainant saw Dr. Alessandro, who diagnosed her with carpal tunnel syndrome with a possible component of radial tunnel syndrome. He gave her a shot of cortisone to see whether it would alleviate the pain. Ex. C-5.

54. On July 9, 2008, Complainant advised Aiken that she had seen a hand specialist, had a possible nerve problem and was waiting to see whether a cortisone shot would alleviate the pain. She advised Aiken that she could not give her a definite return to work date until after she spoke to the hand specialist again.

55. On July 9, Aiken wrote to Martino, Secord, McCurdy and Becker that "[Complainant] is probably going to a different doctor because she does not like what the last one said" and wondered: "is there a way for us to cut our ties with [Complainant] before she goes out on disability." T. III, 198-99; Ex. C-11.

56. In a series of emails in July 2008, Martino, Aiken, Secord and the company's owners discussed a claim by Bibeau that Complainant was fudging her time sheets and might be working fewer than requisite 40 hours bi-weekly to qualify for benefits. Martino wrote that all employees

on “benefit status” were eligible for short-term disability, for which Respondent is self-funded, and she observed that this was going to be a problem for Respondent, whose “aging employee base” was prone to Complainant’s type of injury. Ex. C-11.

57. Martino requested further and more detailed medical information from Complainant on July 15, 2008. She received no medical documentation from Complainant as requested. On July 15, Martino emailed Complainant that the only written medical documentation in her possession was the doctor’s letter stating she was returning to work on July 21, 2008. She did not state that Complainant’s employment was in jeopardy at that time. On July 19, Complainant responded that she might not be able to return on July 21, and would obtain a letter from her orthopedic surgeon upon his return from vacation on Monday, July 21. T. 108-109; Ex. C-14; C-19. Respondent did not contact Complainant on July 21 and Complainant did not contact Respondent.

58. Martino wrote Complainant a termination letter dated July 22, 2008, 9:06 a.m. stating:

The letter we have on file states that you were to return to work on 7/21/2008. You did not return to work as scheduled. The information requested in an email dated 7/15/2008 has also not been received. Your employment with Premier is terminated effective 7/21/08 at 5PM. Your insurance will be paid through the end of July. You will receive information from the insurance broker regarding the Cobra option.

The letter instructed Complainant to contact Martino with any questions. Ex. C-19.

59. Martino testified that she mailed the letter to Complainant’s home address. Complainant denied receiving the letter in the mail.

60. On the evening of July 22, 2008, Complainant faxed to Martino a note from Dr. Alessandro stating that Complainant was unable to return to work at that time and would be re-evaluated on August 15, 2008. T. 111-112; Ex. C-15.

61. Martino believed that Complainant had faked the letter from Dr. Alessandro because it came from Complainant's home fax number. Aiken also believed that the letter was phony. T. III, 72-4. Upon receipt of this letter Martino did not inform Complainant that she had been sent a letter terminating her employment. T. III, 74-75; Ex. C-15.

62. Aiken was on vacation the week before Complainant's return to work date and was not involved in the decision to terminate her employment. T. III, 9-10.

63. On July 24, 2008, Complainant and Martino continued to exchange emails regarding the possibility of Complainant obtaining short-term disability benefits. T. III, 116; Ex. 31.

64. On July 30, 2008, Martino advised Complainant by email that she had referred her claim for workers' compensation based on the information she had received from Complainant's physician. Martino testified that the information tied the onset of Complainant's pain to the OB's receipt of new equipment. T. III, 56-57. Martino did not identify the information she received, however, Dr. Alessandro's notes from Complainant's July 9, 2008 visit state that the pain in Complainant's right hand and forearm "may have coincided with the use of a new machine at work." Ex. C-5; C-17. Martino did not tell Complainant that her employment had been terminated.

65. On August 6, 2008, Complainant's health insurance company advised her that her benefits had ended on July 31 because of her termination. Around the same time, her insurance was rejected when she attempted to fill a prescription for her son. Complainant was concerned about the denial of insurance because her son required expensive medication for a seizure

disorder. Complainant testified that she did not understand why her benefits had ended because she believed she was still employed by Respondent and she emailed Martino to ask why she had received such a notice. T. I, 120. Martino responded with an explanation about the Cobra benefits but did not explicitly state that Complainant's employment had been terminated. Ex. C-17.

66. On August 8, 2008, Complainant met with Aiken and Martino at a restaurant in North Andover to discuss her job issues. T. I, 124-125. Complainant testified that when she sat down with Martino and Aiken, Martino angrily tossed a copy of the termination letter across the table at Complainant and told her that she had been terminated on July 21 for failing to appear for work on that day. T. I, 125; Ex. 19. Complainant told Martino and Aiken that she never received the termination letter in the mail. Martino testified that Complainant asked some questions about insurance and said that they would be hearing from her attorneys. T. III, 70.

67. Aiken testified that she has received at least two requests yearly for accommodations from sonographers and that Respondent has never turned down a request for accommodation during her 11 years with the company. She testified that accommodations for sonographers included temporary reduction in hours, providing additional monitors, and on one occasion providing an adjustable bed for a sonographer with back and neck problems. T. II, 137-138. She denied that Complainant had ever asked her for any accommodation in April or May 2008. I credit her testimony.

68. Martino testified that Respondent has provided 50 to 60 accommodations for sonographers. Such accommodations included scheduling changes and shorter hours. In 17 years with Respondent, she has processed 10 long-term disability claims and 40 to 50 short-term disability claims. T. III, 30-33. Martino testified that if an employee filed a claim for disability,

Respondent would determine eligibility based solely on written information from the treating physician and would determine whether it was a short-term disability, long-term disability or a workers' compensation injury. T. III, 18-22.

69. Martino testified that Respondent had never terminated someone while they were on leave prior to Complainant and acknowledged that it was common for employers to encounter delays in obtaining medical information from physicians.

70. Complainant testified that she felt "ambushed" and like she had been "punched in the stomach," when she learned she had been terminated. She felt embarrassed to have been terminated in the restaurant where she knew the owner. She did not know what to do because she had planned surgery in September and no longer had health insurance. T. I, 142-143.

71. As of August, 20, 2008, Complainant continued to attempt to have her health insurance reinstated. She told Respondent that she had incurred expenses for her son's medications. Ex. C-15. Her testimony was vague as to whether she was ever reimbursed for any medical expenses. She did not produce any documentation of out-of-pocket expenses.

72. In September 2008, Complainant began receiving workers' compensation benefits retroactive to July 2, 2008, pursuant to the claim filed by Respondent on her behalf.

73. Complainant had surgery on her right wrist in September 2008, which was paid for by workers' compensation. Complainant underwent ulnar nerve surgery in 2009. T. I, 137-138.

74. In December 2010, Respondent's insurance company filed a complaint for discontinuance of Complainant's workers' compensation. On January 26, 2012, an administrative judge of the Industrial Accident Board found that Complainant was totally incapacitated from July 2, 2008 to June 25, 2009 and partially incapacitated from June 26, 2009 and continuing. Ex. C-24.

75. Complainant has not attempted to work at any job since 2008 and she has allowed her sonographer's license to lapse. She testified that she receives \$300 per month in workers' compensation benefits. T. II, 96.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent unlawfully failed to accommodate her disability and terminated her employment because she suffered from carpal tunnel syndrome. In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) that she is a "handicapped person within the meaning of the statute;" (2) that she is a "qualified handicapped person" capable of performing the essential functions of her job; (3) that she needed a reasonable accommodation to perform her job; (4) that Respondent was aware of her 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 her 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 Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX (A) (3) 20 MDLR Supplement (1998)

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities.

In order to establish that she is a qualified handicapped person, Complainant must prove that she is capable of performing the essential functions of her job, with or without a reasonable

accommodation. I conclude that Complainant has established that she is disabled within the meaning of the statute. Complainant suffered from carpal tunnel syndrome that caused her severe wrist and hand pain that diminished her capacity to perform her job as a sonographer and ultimately required two surgeries. During a three-week period from July 1-21, 2008, Complainant was unable to perform her job, asked for a leave, and Respondent granted her a three-week medical leave of absence. Thus, I conclude that Complainant was a qualified handicapped person within the meaning of the statute, as she was, at the time, able to perform the essential functions of her job with the accommodation of additional leave time.

Once Complainant has identified her disability and requested an accommodation from her employer, it is incumbent on the employer to engage in an interactive dialogue with Complainant and to determine if the accommodations sought are reasonable. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008) A leave of absence may be a reasonable accommodation under some circumstances, if it does not create an undue hardship for the employer. Thibeault v. Verizon New England, Inc., 33 MDLR 39, 47 (2011) 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 generally not reasonable under c. 151B. Russell at 455.

The factors in determining undue hardship include: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and (3) the nature and costs of the accommodation needed. MCAD Guidelines: Employment Discrimination on the Basis of Handicap, at II, B. (1998)

I conclude that an extension of Complainant's leave of absence would have been reasonable accommodation in this case. At the conclusion of her three-week leave, rather than engage in an interactive dialogue with Complainant about the feasibility of extending the leave for a few more weeks, Respondent summarily terminated Complainant's employment. Respondent took such action notwithstanding the fact that Complainant had advised its managers that she continued to be evaluated by a physician and would provide further medical information as soon as it became available. She provided the requested information on July 22, 2008, only one day after the date initially set for her return to work. Moreover, Respondent indicated at one point its willingness to find work for Complainant at an office other than the OB's which suggests that Respondent did not find the problems caused by her disability to be insurmountable. All of this leads me to conclude that the accommodation Complainant sought was reasonable.

Massachusetts General Laws c. 151B, §4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of

performing the essential functions of the job with or without a reasonable accommodation.

Complainant may establish a prima facie claim of handicap discrimination by showing that she: (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by her employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on her disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998)

As stated above, Complainant has established that she was disabled within the meaning of c. 151B, because of her carpal tunnel syndrome. Respondent had knowledge of her disability and terminated her employment.

Respondent asserts that Complainant's failure to provide Respondent with medical documentation as of July 21, 2008, the last day of her approved leave was the reason for her termination. I find this assertion to be disingenuous and false. The evidence showed that Complainant was in touch with Respondent throughout her leave and reported to Respondent that she was undergoing further evaluation and I conclude that she met her obligation to notify Respondent of her ongoing medical issues.

While there was evidence that Complainant's attitude and performance at the OB's office had declined, these issues, such as her unwillingness to take on extra patients and work late, were largely related to and consistent with Complainant's severe wrist pain. Moreover, there was some evidence of enmity between Complainant and the OB, who were members of the same social circle, suggesting a different motive for the OB to exaggerate her problems at work.

The OB's office manager led Respondent's supervisors to believe that Complainant was

faking an injury in order to “game the system,” causing Respondent to view Complainant’s actions with skepticism, even doubting the veracity of a legitimate doctor’s letter. While Complainant may have fully intended take off the week she had planned for vacation, she simultaneously was suffering from a disabling condition that ultimately required her to be treated and to be out of work during this time. The fact that her worsening disability coincided with the time she otherwise sought to be out of the office without permission does not render Respondent’s actions legitimate. However justified Respondent may have been in doubting Complainant’s true motives, I am unable to conclude that this was a legitimate non-discriminatory reason for her termination, since Complainant did not take the time off as vacation and her worsening disability was communicated to Respondent’s managers and borne out by the medical reports and the need for subsequent surgeries.

There is other evidence to indicate that Respondent sought to avoid paying benefits to an aging employee base likely to suffer from repetitive motion injuries. I conclude that Respondent’s concern that if Complainant continued to be employed she would utilize Respondent’s self-funded short-term disability benefits was the primary motive for her termination.

When Respondent terminated Complainant’s employment, she was in the process of obtaining medical documentation, which Respondent acknowledged was often a prolonged process. I conclude that in this case, Complainant sought a leave of absence because of her disability and that this was clearly communicated to Respondent’s managers; that the leave coincided with her desired vacation does not make her request illegitimate. Respondent’s obligation under these circumstances was not to determine Complainant’s motives, but to engage

in the interactive process regarding her accommodation request, rather than terminate her employment.

Given these circumstances, I conclude that Respondent violated M.G.L. c.151B 4(16) by terminating Complainant's employment after three weeks of medical leave and unreasonably refusing to extend her medical leave for a brief period of time as a reasonable accommodation.

IV. REMEDY

Pursuant to M.G.L. c. 151B s. 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 her termination by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

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, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. Stonehill College vs. 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.

Complainant provided testimony regarding her emotional distress. She was stunned and felt like she was punched in the stomach when she was terminated. She was also concerned about her loss of health insurance, possibly having to pay for her son’s expensive medication out-of-pocket and having to pay for surgery that she had already planned for the month after her termination (which was covered by workers’ compensation benefits). I believe that Complainant was distressed by her loss of insurance and unlawful termination. However there was no medical evidence to substantiate her allegations and given the limited evidence regarding her emotional distress, including the absence of testimony regarding its nature, severity and duration, I am constrained by the guidelines set forth in the Stonehill case to make an award of damages for emotional distress in the amount of \$10,000.00.

B. Back Pay

Complainant seeks back pay from the time she left her employment up to the time of the hearing on the grounds that Respondent’s failure to accommodate her requests for time off between patients and an adjustable table caused her to become permanently disabled. Complainant has not sought any work since she was terminated and she continues to receive workers compensation benefits. I decline to award Complainant back pay because I did not credit her testimony that she requested any accommodations from Respondent before her condition was advanced to the point of requiring a leave and subsequent surgeries. The evidence in the record demonstrates that Complainant’s condition had become totally incapacitating by the time of her leave of absence and in retrospect, after her termination she was no longer a qualified handicapped person within the meaning of the statute. Complainant received workers’

compensation benefits from the time she was terminated and I cannot speculate as to how the circumstances surrounding her permanent incapacitation might have differed even if her disability had been accommodated in April, as she claimed to have requested. Nor am I able to conclude that Complainant would have been entitled to Respondent's short-term disability benefits or that those benefits would have been more beneficial to her than worker's compensation. There is insufficient evidence as to when such benefits would have been paid, if at all, and it is unclear how or if the receipt of workers' compensation would have impacted receipt of short-term disability benefits. This issue was not explored and is unknown, since Respondent began to process Complainant's claim as a workers compensation claim shortly after her termination and those benefits were approved shortly thereafter. Therefore, I conclude that Complainant is not entitled to an award for back pay.


V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

- 1) Respondent immediately cease and desist from discriminating on the basis of handicap in the arbitrary termination of employees on or at the expiration of a medical leave absent an interactive dialogue and individual assessment regarding reasonable accommodation.
- 2) Respondent pay to Complainant the sum of \$10,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 2nd day of October, 2015


JUDITH E. KAPLAN,
Hearing Officer