

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and ROBERT MURPHY III,

Complainants

v.

Docket No. 08 BEM 02933

TOWN OF WILMINGTON,¹

Respondent

For Complainant Robert Murphy: Olinda R. Marshall, Esq.

For Respondent: Daniel G. Skrip, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 1, 2008, Robert Murphy III (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that the Town of Wilmington discriminated against him on the basis of disability/perceived disability when it terminated his employment as a police cadet on June 27, 2008. Complainant claimed that the termination violated G.L. c. 151B, section 4 (16A). On November 8, 2010, the Commission issued a Probable Cause Finding and on January 18, 2011, the case was certified for public hearing.

A public hearing was conducted on April 17, 19, 20 and 23, 2012. The following individuals testified at the public hearing: Michael Patterson, Michael Begonis, Thomas Fleming, Ernest Leffler, Marisol Nobrega, Scott Sencabaugh, Michael Caira, Devon

¹ Michael Caira was removed as Respondent.

Brooks, and the Complainant. The parties introduced eight-five (85) joint exhibits into evidence. Complainant introduced a packet of exhibits designated as Complainant's Exhibit 1. Respondent introduced three additional exhibits.²

At the close of evidence, Respondent submitted a motion for a Directed Verdict which was denied.

Some evidence deemed to be irrelevant or not credible has been omitted from the findings of fact set forth below. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. The Town of Wilmington hired Complainant to be a full-time police officer on May 5, 2008. For five years prior to being hired as a full-time officer, Complainant worked sporadically for the Wilmington Police Department as an intermittent officer handling details and specialized events such as parades.
2. Town Manager Michael A. Caira testified that he selected Complainant off a civil service list of qualified candidates despite concerns that Complainant had committed misconduct in previous employment.
3. The prior incidents of misconduct which were brought to Town Manager Caira's attention involved Complainant being disciplined for lying about being sick while a police officer at Bentley College in order to get time off to coach a football game and for putting false information in an accident report regarding an incident in which he was driving a cruiser. Respondent's Exhibits 1 & 2.
4. Caira testified that despite concerns about Complainant's character, he selected Complainant because Police Chief Michael Begonis could not produce

² Respondent's Exhibit 3 was accepted for impeachment purposes only.

documentation substantiating the misconduct at Bentley and without such documentation, Caira did not believe that a bypass would survive a civil service challenge. Caira and Begonis decided to give Complainant the benefit of the doubt by hiring him.

5. Upon being hired, Complainant and another new cadet, Michael Patterson, were assigned to Lieutenant Scott Sencabaugh.³ He provided them with the Wilmington Police Department's policies and procedures which he ordered them to review during the week prior to their entry into the Lowell Police Academy. One of the Departmental policies is the Line of Duty Injury Policy. It requires an injured officer to "immediately notify his patrol supervisor" of an injury. Joint Exhibit 66.
6. Lt. Sencabaugh told the cadets that they could call him anytime for anything if they had questions or concerns, and he encouraged them to keep him updated regularly via cell phone.
7. Complainant and Patterson entered the Lowell Police Academy on May 12, 2008.
8. The Academy director was Sergeant Thomas Fleming. The Academy also had two full-time instructors -- Devon Brooks and Marisol Nobrega -- as well as per diem instructors. The Academy curriculum consists of daily activities involving academic matters and physical training.
9. The physical training curriculum consists of cardiovascular exercise on Mondays, Wednesdays, and Fridays and strength training on Tuesdays and Thursdays. A cadet missing more than one-third of physical training exercise days is not eligible to graduate and must repeat the Academy. Cadets are excused from the

³ Sencabough became a Lieutenant in 2008.

- Academy's physical curriculum if they produce a note from a medical professional. Excused cadets may be able to participate in modified physical training, but such modified training is not credited as an exercise day.
10. An Academy orientation was conducted upon the arrival of Complainant and Patterson. During the orientation, Training Director Fleming reviewed each page of the Student Officer Guide. Joint Exhibit 2. The Guide at section 3.04 requires that cadets are obligated to "immediately" report illnesses or injuries to Academy staff. Fleming testified that the immediate reporting of an injury is important so that the injury is not exacerbated by continued exercise. He stated that if an injured cadet could not get an appointment with a doctor following an injury, the Academy could arrange for a doctor to promptly see the cadet.
 11. Following his Academy orientation, Complainant began to participate in physical training on a daily basis.
 12. One of Complainant's instructors at the Academy, Marisol Nobrega, testified that she perceived Complainant to be disrespectful and lazy because unlike other cadets, Complainant would ignore her encouragement to run harder, roll his eyes at her, and shrug his shoulders when she issued him an order. Nobrega interpreted a June 11, 2008 "To/From" memo⁴ from Complainant as another example of disrespectful conduct. She characterized one of his "To/Froms" about missing hours as over-long and argumentative. Joint Exhibit 16. Nobrega relayed her concerns to Academy Director Fleming.
 13. Another staff instructor, Devon Brooks, testified that Complainant acted as if he

⁴ Academy memos are dubbed "To/From" communications and will be henceforth referred to in this manner.

did not need to be trained at the Academy because he had received similar training in the past.

14. On June 3, 2008, Complainant experienced pain in his knees during agility drills.

That evening, Complainant iced his knees and took 200 mg of Ibuprofen medication. He continued to experience pain throughout the week and continued to ice his knees and use Ibuprofen. Complainant contacted his doctor on June 9, 2008 regarding his knee pain because it was not improving. His doctor told him to take an increased amount of anti-inflammatory medication and to wrap his knees if he intended to run. Joint Exhibit 41. Complainant did not report the matter to Academy staff.

15. Complainant called Lt. Sencabaugh on June 9, 2008 to inquire about the

Department's firearms policy. In that conversation, Sencabaugh first learned about Complainant's knee injuries and that Complainant had not reported the matter to the Academy. Joint Exhibit 4. Lt. Sencabaugh testified credibly that he ordered Complainant to report the injury to the Academy. Sencabaugh also ordered Complainant to bring him all "To/From" memos which Complainant had drafted up to that point, and instructed Complainant to come to the station to complete a Town of Wilmington injury report. Id. Complainant purports to not recall Lt. Sencabaugh asking him on June 9, 2008 to produce the "To/From" memos, but Lt. Sencabaugh's testimony on this issue is more credible than Complainant's.

16. According to Complainant, Lt. Sencabaugh told him that the Wilmington Police Department "might have to recycle [Complainant] back into another Academy –

- it's not like we could get rid of you.” I do not credit this testimony.
17. Academy Director Fleming first learned about Complainant's knee injuries on June 10, 2008 when Complainant reported to physical training with ace bandages on his knees. Fleming asked for a doctor's note which Complainant did not have.
 18. On June 11, 2008, Fleming received from Complainant several “To/From” memos dated June 10th regarding the knee injuries he sustained on June 3rd and addressing his use of ace bandages. Joint Exhibits 14, 15, & 16. Fleming objected to one of the memos as too detailed and disrespectful in containing words written in all capital letters. Fleming directed Complainant to redraft the memo which he did. Joint Exhibit 17.
 19. Complainant went to see orthopedist Dr. Keith Beals on June 12, 2008. Joint Exhibit 18. Dr. Beals told him that he had tendinitis in his knees and injected both knees with Cortisone. Joint Exhibits 4, 20 & 60.
 20. Complainant left a message for Lt. Sencabaugh on June 12th and spoke to him at 8:20 a.m. on Friday, June 13, 2008 about his doctor's visit. Lt. Sencabaugh told Complainant to come to the Police Department that day. Id.
 21. Complainant met with Lt. Sencabaugh at the Police Department on June 13, 2008 at approximately 2:00 p.m., at which time they filled out injury reports. Joint Exhibit 60. Sencabaugh gave Complainant an “Attending Physician's Statement” that had to be completed by his doctor. Joint Exhibit 9. Sencabaugh instructed Complainant to have his doctor fill it out on Monday, June 16, 2008 and to bring it in that day. Id. Lt. Sencabaugh testified credibly that when he asked Complainant for his “To/From” memos, Complainant said he forgot to bring them

- so Sencabaugh directed Complainant to bring them to the station the next day, June 14, 2008, because Lt. Sencabaugh would be on duty that day. Joint Exhibit 60. According to Complainant, Lt. Sencabaugh told him to turn in the “To/From” memos “when you can.” I do not credit this testimony. Complainant also testified that Chief Begonis asked about his “boo-boo.” I do credit this testimony because it was acknowledged by Chief Begonis.
22. Complainant did not appear at the station on Saturday, June 14, 2008 to submit his “To/From” Academy memos, nor did he call Lt. Sencabaugh to say he was not coming. Complainant testified that he did not bring the “To/From” memos to the station that weekend because he “just got busy with family stuff.” CD 1 at 1:59:20. Complainant did not submit any “To/From” memos between June 14, 2008 and June 27, 2008.
23. On June 16, 2008, Complainant’s wife faxed Complainant’s physician, Dr. Beals, a request that he complete the Attending Physician’s Statement and provide a “[b]rief letter” authorizing Complainant to ride a stationary bike at the Academy. Joint Exhibit 74.
24. Lt. Sencabaugh did not hear from Complainant until June 27, 2008. According to Lt. Sencabaugh, it was highly unusual for a cadet not to submit a completed Attending Physician’s Statement within fourteen days. Lt. Sencabaugh testified that he did not remind Complainant to submit the requested paperwork because the ability to follow through on orders without prompting is an ability that is evaluated during a cadet’s training.
25. Complainant’s fellow cadet, Michael Patterson, started feeling pain in his right

- foot and ankle on Friday, June 13, 2008, during Academy exercises. When the pain worsened during exercises on Monday, June 16, 2008, Patterson considered it an injury. He reported the injury to Academy Director Fleming on June 18, 2008. Joint Exhibit 48. After reporting his injury, Patterson was placed on a modified physical training program which prohibited him from running. He eventually wore a brace to protect his ankle.
26. Patterson reported his injury to Lt. Sencabaugh on June 20, 2008. Lt. Sencabaugh told Patterson about the paperwork that needed to be completed, about his need to submit all Academy "To/Froms" regarding his injury, and admonished Patterson for not having reported his injury sooner.
27. Patterson submitted to Lt. Sencabaugh on Sunday, June 22, 2008 his Academy "To/Froms" and received an Attending Physician's Statement for his doctor to complete. Patterson handed in the completed Physician's Statement on June 24, 2008. By June 24, 2008, Patterson produced everything that Lt. Sencabaugh had requested without additional reminders or promptings. Chief Begonis, in turn, was able to submit the required paperwork to Town Manager Michal Ciara on June 24th. Thereafter, Patterson visited the Department weekly to submit "To/From" memos.
28. Chief Begonis spoke to Academy Director Fleming on or around June 20, 2008 about Complainant's failure to produce paperwork in a timely fashion. Fleming told Begonis that Academy staff considered Complainant to be lazy and arrogant.
29. On Wednesday, June 25, 2008, Chief Begonis sent a written recommendation to Town Manager Caira to terminate Complainant's employment. Joint Exhibit 5.

30. On June 26, 2008, Complainant received from his doctor a completed Attending Physician's Statement. Complainant testified that he had intended to submit the Statement and his "To/Froms" to Lt. Sencabaugh on Friday, June 27, 2008. He did not inform Lt. Sencabaugh of his intentions ahead of time to determine if the Lieutenant would be at the station on that day.
31. On June 27, 2008, Town Manager Caira terminated Complainant's employment at a meeting in Town Hall even though Complainant said during the meeting that he was cleared by his doctor to return to full duty as of Monday, June 30, 2008 and that he intended to submit on that day a completed Physician's Statement and all outstanding "To/Froms." Chief Begonis explained at the meeting that the tone of Complainant's "To/Froms," his failure to follow rules and regulations, obey direct orders and appear at scheduled meetings showed a pattern of insubordination.
32. At some point after June 27, 2009, Academy Director Fleming told Lt. Sencabaugh that Complainant would likely be unable to finish the Academy due to his multiple missed days.
33. Both Lt. Sencabaugh and Chief Begonis sustained injuries while they were cadets at the Lowell Police Academy. Joint Exhibits 36-39. Other cadets who experienced injuries at the Academy went on to successful careers on the Wilmington Police Force and one had to re-enroll in a second Academy after he broke his ankle. Joint Exhibits 26-36, 76-80.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a handicapped person who is qualified to perform the essential functions of a job with or without a reasonable accommodation. A handicapped person is one who has an impairment which substantially limits one or more major life activities, has a record of impairment, or is regarded as being impaired. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) (“MCAD Handicap Guidelines”) at p. 2.

The evidence fails to support Complainant’s contention that he was a handicapped individual while he trained at the Police Academy. Rather, he developed a case of tendonitis on or about June 3, 2008 which resolved on or around June 30, 2008. Complainant’s injury was of short duration and did not impair his ability to perform major life activities, although it did prohibit him from engaging in physical training for a period of several weeks. See Hallgren v. Integrated Financial Corp., 42 Mass, App. Ct. 686 (1997) (a knee injury from which plaintiff recovered in a month without residual disability is not a handicap); contrast Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 16-17 (1998) (work-related injuries resulting in plaintiff having multiple operations and being unable to work for over two years is sufficient for jury to decide whether condition constitutes a handicap) and Anderson v. United Parcel Service, 32 MDLR 45 (2010) (bipolar depression and anxiety disorder held to substantially limit major life activities of sleeping, working, and interacting with others because condition caused insomnia, panic attacks, fatigue, lack of concentration, and suicidal ideation). Even under the relaxed standard of recent amendments to the Americans with Disabilities Act

which favor broad coverage of individuals, Complainant's injury is not a disability. See ADA Amendments Act of 2008, Public Law # 110-325, sec. 2(b)(5), *amending* Americans with Disabilities Act of 1990, 42 U.S.C sec. 12101 et seq.

Complainant also fails to demonstrate a record of impairment or to provide evidence that he was regarded as impaired. Respondent sought a record of Complainant's injury not to designate him as impaired, but to assess when he could return to the physical activities required by the Training Academy curriculum. Respondent's witnesses testified credibly that cadets frequently sustained injuries at the Training Academy, that they had personally experienced such injuries, and that the Academy had procedures in place to deal with injuries. The evidence does not support the allegation that Respondent's actions were based on a perception that Complainant would become a physical liability to Respondent. Contrast Talbert Trading Company v. MCAD, 37 Mass. App. Ct 56 (1994) (where employee had known history of a heart condition and was regarded as someone with a heart condition at the time of hiring, the employer was deemed to have terminated him based on a perception of his handicap); Williams v. Town of Stoughton, 13 MDLR 1385, 1416-1417 (1991) (Complainant, who was prescribed Coumadin medication following a cardiac procedure, was regarded as handicapped by Police Chief who refused to reinstate him.)

Even if Complainant were a qualified handicapped individual or an individual perceived to be handicapped, there is no basis for concluding that he was terminated as a Wilmington police cadet under conditions giving rise to an inference of handicap discrimination. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 821 (1997). The credible evidence establishes that Respondent terminated Complainant because he failed

to submit “To/From” memos in a timely manner, drafted memos which Academy staff and the Wilmington Police Chief considered to be insubordinate, waited two weeks to complete and submit a Physician’s Statement, and was evaluated by the Academy Director and his staff as lazy and arrogant.

Complainant denies that he was instructed to turn in “To/From” memos on June 14, 2008, but I credit Lt. Sencabaugh over Complainant. Not only was Sencabaugh a more credible witness, he convincingly explained that he used the order to emphasize principles of organization, respect for authority, and responsiveness to commands. Complainant’s assertion that Lt. Sencabaugh told him to submit the memos “whenever he could,” is blatantly unbelievable in that such a statement defies the protocols of a paramilitary organization.

Cadet Michael Patterson, in contrast to Complainant, turned in requested To/From memos within two days of their being solicited, submitted a completed Physician’s Statement addressing his Academy injury within two days of it being solicited, and submitted all paperwork to Lt. Sencabaugh within two days of it being solicited. Both cadets – Complainant and Patterson – initially delayed reporting their injuries because of uncertainty about the extent of their impairments and concern about how the impairments would impact their status as cadets. However, the initial reporting delay by Patterson was subsequently rectified whereas Complainant’s initial delay was not. A comparison of Complainant’s conduct with that of fellow cadet Michael Patterson establishes that Complainant’s continuing poor communication skills, bad attitude, and failure to follow orders in a timely fashion were the reasons for his termination whereas Patterson, also injured, was able to graduate from the Academy.

Lt. Sencabaugh testified credibly that he, too, had been injured at the Academy and that he understood such injuries were part of rigorous physical training. Chief Begonis also sustained an injury during his cadet training. Respondent presented evidence of other cadets who sustained injuries during training without the injuries adversely affecting their careers. This evidence supports Respondent's assertion that it was the unsatisfactory manner in which Complainant communicated his injury, his failure to follow directives, and his other behavior at the Academy, not the injury itself, which resulted in his discharge.

The Town Manager admitted that he had concerns about Complainant's honesty from the outset, having been informed of Complainant's prior discipline as a police officer at Bentley College for lying about being sick and for putting false information in an accident report. To the extent that such concerns predisposed him against Complainant, they did so based on Complainant's prior employment record, not based on an actual or perceived impairment. Whether or not such predisposition was fair, it was unrelated to handicap discrimination. Likewise, if there were any technical violations by Academy staff in the manner they deal with Complainant, such violations were unrelated to handicap discrimination. See Sroka v. Chicopee School Department 32 MDLR 123 (2010) (termination of teacher may have violated teacher termination law or parties' collective bargaining agreement, but it did not constitute handicap discrimination); Stefani v. Department of State Police, 34 MDLR 6 (2012) (employer may have engaged in petty and unprofessional manner in demoting female subordinate, but such action was not gender-related).

For the aforesaid reasons, Complainant has failed to make out a prima facie case of employment discrimination on the basis of handicap and the case must be dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 29th day of August, 2012.

Betty E. Waxman, Esq.
Hearing Officer