COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LINDA JOHANSSON,
Complainant

v. DOCKET NO. 92-BEM-0102

DEPARTMENT OF CORRECTIONS,
Respondent

DECISION OF THE FULL COMMISSION AFTER REMAND

This matter returns to the Full Commission following a decision of the Massachusetts Appeals Court in Johansson v. Massachusetts Commission Against Discrimination & et al, 69 Mass.App.Ct. 1113 (2007), which remanded the case to the Full Commission for further proceedings consistent with its Revised Memorandum and Order Pursuant to Rule 1:28, dated July 26, 2007. The Appeals Court concluded that the Full Commission improperly applied the holding of Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 443 (2002), when it reversed the Hearing Commissioner's finding of liability in favor of Johansson. Johansson, 69 Mass.App.Ct. 1113. The Supreme Judicial Court held in Russell, inter alia, that an employer is not obliged to create a new or different position in response to an employee's request for a reasonable accommodation. The Full Commission thereafter "disposed" of Johansson's claim against the Department of Corrections ("DOC") on the basis of the Russell decision by concluding that Johansson was seeking a new job as an accommodation.

The Appeals Court held the Full Commission erred in its decision because in Russell, unlike in Johansson, the employee asked her employer to accommodate her disability, and the

employer and employee engaged in an interactive dialogue in an effort to identify an available suitable job that satisfied the employee's restrictions, but ultimately failed. By contrast, the Appeals Court stated in this case, that while the Hearing Commissioner had "apparently" found that Johansson wished to return to work and that DOC "regarded" Johansson as a qualified handicapped person based on the results of an Independent Medical Examination, the record before the Court failed to support a finding that DOC engaged in the interactive process – a necessary step before the Full Commission could rely on Russell's holding that an employer need not create a new job as a reasonable accommodation for a disabled employee. Johansson, 69 Mass.App.Ct. at *2. The Court stated that the Russell holding applies only after "the interactive process has run its course and no reasonable accommodation is possible." Johansson, 69 Mass.App.Ct. at *2.

Having said this, the Appeals Court further concluded that the Full Commission decision did not provide a "sufficient basis for a reviewing court to determine whether [Respondent] proved her prima facie case of handicap discrimination." As a result, it remanded the case for more complete findings and rulings, directing the Full Commission to conduct a complete review of the record below while addressing the issues originally raised by the DOC's appeal from the Hearing Officer's decision, but which the Full Commission had not addressed in its initial order. Id. at *3.[1] Those issues include the threshold question of whether Johansson established a prima facie case of discrimination under M.G.L. c. 151B, § 4(16), and DOC's arguments that the Hearing Commissioner erred in finding that Johansson was a qualified handicapped individual capable of performing her duties with a reasonable accommodation; that she had requested a

[1] Specifically, the Appeals Court stated that the Full Commission failed to make findings of fact, or to state whether it had adopted or rejected the Hearing Commissioner's findings, and instead relied "solely on a perceived error of law." Johansson, 69 Mass.App.Ct. at *3.

transfer to the central office as a reasonable accommodation; that DOC prevented Johansson from returning to work by failing to reasonably accommodate her mental illness; and that the Hearing Officer violated DOC's due process rights by articulating a new cause of action for Johansson during the hearing and then failed to recuse himself from the case. Id. at *1, fn. 6. This is the task upon which we embark today.

STANDARD OF REVIEW

The Full Commission reviews the entire record developed before the Hearing Commissioner and focuses on whether the decision of the Hearing Commissioner is supported by substantial evidence in the record and is free from error of law. See Arnone v. Comm'r. of the Dep't of Social Servs., 43 Mass.App.Ct. 33, 43 (1997); Cobble v. Comm'r of the Dep't. of Social Servs., 430 Mass. 385, 390-91 (1999); M.G.L. 30A, § 14(g). As part of our review we must defer to those factual findings of a Hearing Commissioner that are supported by the record evidence. We note at the outset that it is the Hearing Commissioner's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations, absent a conclusion that the findings are not such that a reasonable mind could accept as adequate support. See Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 14(7); See also School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). We must also consider any facts in the record that fairly detract from the weight of the supporting evidence. Cobble v. Comm'r of the Dep't. of Social Servs., 430 Mass. at 390-91. If upon completion of our review, we determine that the cumulative weight of the record evidence tends substantially toward an opposite inference, we must reverse the Hearing Commissioner's decision. See

Fitchburg Gas & Elec. Light Co. v. Department of Telecommunications & Energy, 440 Mass. 625, 632 (2004). See also 804 CMR 1.23. We may also reach different conclusions based upon a correct application of the law. See e.g., School Committee of Chicopee v. MCAD, 361 Mass. at 354; Bowen v. Colonnade Hotel, 4 MDLR at 1011. See also New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456 (1981).

We have carefully reviewed the record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. We find that the cumulative weight of the record evidence is substantially contrary to the inferences and conclusions drawn by the Hearing Commissioner with respect to the issue of whether Complainant was a qualified handicapped individual capable of performing the essential function(s) of the job. Therefore, we must reverse the decision of the Hearing Commissioner and enter judgment for the Respondent.

BACKGROUND

The Complainant began her employment with the Respondent Department of Correction (DOC) as a provisional Correction Counselor/Caseworker at MCI, Concord in 1984. In 1989, Complainant suffered a work-related injury to her neck and back, and left work on industrial accident disability leave. In April, 1990, while still on leave, she began to receive anonymous, threatening, and sexually explicit telephone calls. The caller was a former inmate at MCI, Concord, who was on parole, and had been assigned to the Complainant's inmate caseload for a time during his incarceration. He was arrested and returned to MCI, Concord until December 1990, when his case was adjudicated and he was transferred to MCI-Cedar Junction.

An independent medical examiner assessed Johansson's neck and back injury, and cleared her to return to work on June 19, 1990. However, she did not return to work and instead told the Deputy Superintendent of MCI Concord that she intended to file for Industrial Accident

leave based on the severe anxiety she suffered as a result of the telephone calls, but had not yet done so. In July of 1990 she communicated with officials at MCI Concord both by letter and phone regarding her inability to return to work. Her psychiatrist diagnosed her as suffering from post-traumatic stress disorder (PTSD) and in July 1990, her doctors "strongly recommended that she avoid returning to work or dealing with the penal system when possible."

In September 1990, the Commonwealth's Department of Personnel Administration ("DPA") scheduled an open competitive civil service examination for the position of Corrections Counselor I. (Ex. R- 22). The DPA required all provisional employees in the Counselor I position, including Complainant, to "pass" the examination in order to maintain their civil service status.[2] Following the examination, the Commonwealth's civil service law requires examinees who are still interested in pursuing a position to sign a certification list and allows the hiring authority to opt for an interview of certified candidates as part of the process. The Complainant testified that she completed the Civil Service examination and certification in September of 1991, to preserve her status should she be able to return to the position at some future time.[3]

In November of 1991, an independent medical examiner reported that the Complainant could resume her usual duties as a Correction Counselor with the restriction that she not work in

[2] The examination and certification process are required by the Commonwealth's Civil Service laws. As a provisional employee, Complainant was required to take the civil service exam sometime in 1989 or 1990.

[3] Johansson filed her Complaint with the MCAD on January 22, 1992, based on DOC's alleged failure to accommodate her handicap with respect to taking the Civil Service examination. Complainant subsequently amended her complaint twice. On October 8, 1992, Johansson amended her complaint to allege that DOC failed to accommodate her handicap with respect to the location of the Civil Service certification interview, not the Civil Service examination as stated in the original complaint.

the same institution with the inmate convicted of making the threatening and obscene phone calls to her. The IME suggested that, "[i]t may be best if the patient could be assigned to work initially at the central office of the Department of Correction[ ] so that she would not immediately be dealing with inmates and that after a transitional period she could then be reassigned to work in a corrections institution".[4]

In opposition to the opinion expressed in the IME, Johansson continued to communicate to DOC that she could no longer work with inmates or in a correctional setting. In a letter to DOC dated September 30, 1991, Johansson wrote that she could "no longer tolerate either mentally, physically, or emotionally any contact with the Department of Correction. In a letter to DOC dated November 1, 1991, she stated that "it would be impossible for me to return to work at the Department of Correction. I have been deemed totally disabled by the physicians and psychologists presently treating me since the initial beginning of the industrial accident."[5]

On December 5, 1991, Complainant sent a letter to the DOC asking it to conduct the civil service connected interview at a "neutral" setting because "all of this is highly disturbing in my present state, and [ ] I am not sure of how much more I can be made to go through." Moreover, Johansson's psychiatrist opined that she was suffering from post traumatic stress disorder, a condition that is exacerbated when she is confronted by settings that remind her of the original

[4] Seven months later, in June of 1992, the same psychiatrist who conducted the November 1991 IME re-examined Complainant and concluded that she was unable to work in any capacity, and that she likely suffered from bi-polar disorder. Complainant never returned to work at the DOC but went on a disability retirement in 1994 and entered into a lump sum settlement with DOC.

[5] Also during this time, in letters to DOC dated Nov. 6, 1991 and November 12, 1991, Johansson's orthopedist and chiropractor respectively notified Respondent that Complainant was disabled from her back and neck injuries. [Exs. R-20; C-17(g).] The Hearing Officer concluded however, that Johansson's limitations associated with these injuries did not rise to the level of a handicap within the meaning of G. L. c. 151B.

trauma, e.g. prisons, and that going to the Lancaster prison for the purpose of her civil service interview would traumatize her.[6]

Johansson's original complaint filed with the MCAD on January 22, 1992, and her amended complaint filed on October 8, 1992, claimed that DOC failed to accommodate her handicap during the Civil Service examination and interview process, respectively. Johansson alleged additionally, in her third amended complaint, that DOC committed gender discrimination by refusing to transfer the male inmate accused of harassing her to another prison. None of Johansson's pleadings alleged that DOC prevented Johansson from returning to work by failing to reasonably accommodate her mental illness, or enter into an interactive dialogue. At no time prior to the hearing did Johansson assert in her pleadings that she made a request for a lateral transfer to DOC's Central Boston office as a reasonable accommodation, which was unlawfully refused.

The Hearing Commissioner held a public hearing from September 8, 1997 to September 29, 1997.

Following the hearing, the Hearing Commissioner issued a decision finding no merit to Johansson's allegations in her pleadings that she was discriminated against during the civil service examination process or as a result of DOC's failure to transfer the inmate who threatened her. Instead, the Hearing Commissioner found DOC liable for disability discrimination on a separate ground not raised in her pleadings. Specifically, the Hearing Commissioner found that DOC discriminated against Johansson by failing to engage in an interactive dialogue to determine if a reasonable accommodation was in fact achievable, once the IME cleared her to

[6] Johansson had earlier sought and been granted a reasonable accommodation from DOC to sign the certification list in a "neutral setting" – DOC's central office. DOC also granted Johansson a reasonable accommodation of the interview process for certified candidates by allowing her to interview at MCI Lancaster, instead of Concord, where the inmate was located.

return to work in a corrections institution, and awarded her lost wages and emotional distress damages of $100,000.

The Hearing Commissioner concluded that DOC perceived Johansson as able to return to work, despite all her protestations to the contrary, and had an affirmative "duty to investigate and work cooperatively with her to determine whether an accommodation was feasible." The Hearing Officer reached this conclusion in the absence of sufficient record evidence that Complainant ever sought to return to work by requesting a lateral transferor or was a qualified handicapped individual.

ANALYSIS

The protections of G.L. c. 151B, § 4 (16), prohibit an employer from discriminating against "any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with [a] reasonable accommodation" See, Mammone v. President and Fellows of Harvard College, 446 Mass. 657, 658 (2006). To state a prima facie case of discrimination based on an employers' failure to reasonably accommodate a handicap, an employee must prove that (1) (s)he is handicapped within the meaning of G.L. c. 151B, § 4 (16); (2) (s)he is qualified and able to perform the essential functions of the job with a reasonable accommodation of her handicap; (3) (s)he requested a reasonable accommodation and (4) (s)he was prevented from performing her job because her employer failed to reasonably accommodate the limitations associated with her handicap. Handicap Discrimination Guidelines of the Massachusetts Commission Against Discrimination ("MCAD Handicap Discrimination Guidelines"), § VII (B) (1998); see also, Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998). The burden of proving discrimination remains with the employee at all times.

The main issues we address today are whether the record evidence supports the Hearing Commissioner's finding that Johansson sought to return to work with or without a reasonable accommodation, whether she was a qualified handicapped person under the facts of this case, and whether DOC had an affirmative obligation to enter into an interactive process with her. We conclude that the record evidence does not support the Hearing Commissioner's conclusions with respect to these issues.

Interactive Process – Employer's Affirmative Duty

Generally, it is the employee's request for a reasonable accommodation that trigger's an employer's obligation to participate in an interactive process with an employee who identifies as disabled. This is particularly so in the case of mental impairments, because the nature of the impairment, resulting limitations and potential accommodation may not always be obvious, and for this reason, a mentally impaired employee cannot remain silent, but is called upon to identify her handicap, its limitations and possible accommodations with some specificity. MCAD Handicap Discrimination Guidelines, § VII (B).

There are times, however, when an employer's duty to inquire and interact with an employee about a reasonable accommodation is triggered even though the employee has not made a request. This affirmative duty arises when an employer is aware of the employee's disability, or the disability is obvious, and the employer observes that the employee is having a difficult time on the job. MCAD Handicap Discrimination Guidelines, § VII (B). Under these circumstances, an employer has a duty to ask the employee whether (s)he is in need of an accommodation of his or her disability in order to be able to perform the essential functions of the job. The affirmative obligation imposed on the employer to initiate an inquiry is based, in part, on an underlying and reasonable factual assumption that the employee -- who is in the

workplace -- has a present interest and desire to retain his or her job.[7] In both these circumstances, the purpose of the interactive process is to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations. Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000); MCAD Handicap Discrimination Guidelines, § VII (B). See also Canfield v. Con-Way Freight, Inc., 2008 WL 4335919, 5 (D.Mass 2008); Enica v. Principi, 2008 WL 4457541, 8 (1st Cir. 2008).

When, however, an employee is out of the workplace on temporary total disability leave, it is not always clear that (s)he has a present interest, desire or ability to return to work. In fact, there can be considerable ambiguity about whether an employee on disability leave wants, or can, return to work, since information the employer has received from the employee and/or the employee's physician(s) has asserted that the employee is unable to perform some or all of the essential functions of the job due to a substantial impairment, as part of the employee's efforts to qualify for, and receive, temporary total disability-related benefits. Russell, 437 Mass. at 452-53 (a "claim for disability benefits on the basis of total disability is evidence of the plaintiff's inability to perform the essential functions"). In these circumstances, we believe that an employer's "knowledge" of a disability is not enough to trigger an affirmative duty to initiate and engage in a reasonable accommodation dialogue. This is especially so where, as here, the employee and her medical providers insist she is unable to return to work.

At the most fundamental level, we believe that an employee must communicate a clear desire to return to the workplace, "presently, or in the immediate future," and that (s)he is now able to perform the essential functions of the job, with or without a reasonable accommodation,

[7] This assumption is similarly reasonable and appropriate when the employee requests an accommodation.

or will be able soon thereafter. [8] See Russell, 437 Mass. at 456 (citing Hudson v. MCI Telecommunications Corp., 87 F.3d 1167, 1169 (10th Cir. 1996)) (adopting the principle that the term "'reasonable accommodation' refers to an accommodation 'which presently, or in the immediate future, enables the employee to perform the essential functions of the job'").[9] In Russell, for example, the employee's communication with her employer constituted a clear expression of her interest in returning to work from disability-related leave. 437 Mass. at 452-53. According to the Court, she made "full disclosure" to her employer of her "improved condition," by her "assert[ion] that she wanted to return to work" in some capacity and by obtaining a medical release from her physicians stating conditions under which she could return to work. Id.

After reviewing the record, we do not believe that Johansson ever communicated interest in returning to work that was other than hopeful of repatriation as some unspecified time in the future. [10] We reject the Hearing Commissioner's factual finding that Johansson had requested a lateral transfer to DOC's Central Office in Boston during a meeting with a DOC official on November 8, 1991.[11] Substantial record evidence, which we summarize below, contradicts this finding.

---

[8] This communication can come through medical providers and others, in addition to the employee.

[9] It is not enough for an employee to say that (s)he hopes to work at some unspecified future time. Russell, 437 Mass. at 455.

[10] The Hearing Commissioner also stated that the purpose of the meeting was to discuss Johansson's request that a Civil Service certification interview be conducted in a non-prison setting, as a result of post traumatic stress disorder.

[11] In May of 1992, four months after Complainant filed her charge at the MCAD, the Superintendant at MCI-Concord sent a memo to an Associate Commissioner of the DOC suggesting that Respondent consider transferring Complainant to an alternate prison facility because she was restricted from working at MCI-Concord. The Hearing Commissioner appears to have concluded that this memo was evidence that Complainant had previously communicated a request for transfer to the Superintendent.

First, the week before Johansson's lateral transfer request was allegedly made, on November 1, 1991, Johansson sent a letter to DOC stating that she could not "possibly ever return to work within the Department of Correction" and opined that she would have "an emotional breakdown" if she did, and further stated, "I cannot be expected to return to work within the [DOC] at this time, nor possible any time in the near future." In this letter she informed DOC that her medical and psychological problems "render me totally disabled from" performing "any type of work position," and expressed hope that with therapy, "my condition will improve."

Second, none of Johansson's medical providers ever asserted that her condition had so improved that at the relevant times, or soon thereafter, she would be cleared to return to work and perform her job, with or without an accommodation. In fact, Johansson's personal psychiatrist sent four letters to DOC which stated, according to the Hearing Commissioner, that Johansson should "avoid returning to work or dealing with the penal system 'when possible'", and that she was "totally disabled from work at present and may be permanently unable to work in the prison system or with criminals." In our view, "[b]y her conduct, [Johansson] evinced that she could not perform the essential functions" of her job. See Russell, 437 Mass. at 454.

Moreover, we are unwilling to conclude that an Independent Medical Examiner's opinion that Johansson could return to work with restrictions was sufficient to trigger an affirmative obligation on DOC's part to engage in an interactive dialogue with her, when her own statements and those of her medical providers, strongly disagreed with this opinion, and would render such dialogue futile. [12]

[12] Another IME report dated June 10, 1992, stated that Johansson is "presently impaired from gainful employment as a Counselor in a prison setting "as a consequence of the work injury of 8/28/89 and the sequel, namely the post-traumatic stress disorder." The report stated further that

We also reject the Hearing Commissioner's conclusion that Johansson spoke ("did not remain silent") through the various medical reports that were in DOC's possession.[13] We do not believe that DOC's possession of medical information about Johansson's physical and mental impairments related to her disability leave is a proxy for a clear request to return to work and clearance by her medical providers. We also note that of the eight reports from Johansson's psychiatrists and three reports from the Department's psychiatrists (IME) generated between June 13, 1990 and June 23, 1992, only one IME opined that she could resume her usual duties with restrictions, and overwhelmingly, the other reports opined she could not. [14]

Moreover, we reject any favorable inference drawn by the Hearing Commissioner from the fact that Johansson completed her Civil Service requirements. Instead, we accept Johansson's testimony that she went through the examination process in order to preserve her civil status *should she be able to return to her position at some later time,* and read no more into it. We conclude that her decision to keep current on her civil service status is evidence of no more than

---

her "ultimate prognosis is good when her fears and anxiety have been brought under control," and she could then work as a "Counselor at another setting." While the report holds out hope of Johansson's future return to work, it does not represent an opinion that she is "presently, or in the immediate future" ready to return to work, with or without a reasonable accommodation. The third IME related to Johansson's physical status with respect to her neck and back injuries for which she had been receiving Industrial Accident benefits, opined that she could return to work without restrictions.

[13] The Hearing Commissioner concluded that DOC had an affirmative duty to enter into an interactive process with Johansson because it had "extensive knowledge of [her] handicap", which consisted of eleven reports from various psychiatrists ("with "admittedly… conflicting" information).

[14] See fn. 13.

a "hope" that in the future, she would be able to return to work, and was not indicative of an ability to return to work presently, or in the immediate future. See Russell, 437 Mass. at 456.[15]

Finally, we note that Johansson's original complaint and subsequent amendments prior to the public hearing are supportive of our conclusion. Johansson never alleged that DOC discriminated against her by failing to consider a request for a transfer or by refusing to return her to work. Instead, until after the hearing began, she claimed that DOC failed to accommodate her during the Civil Service process. We believe that the pleading history in this case contradicts Johansson's assertion that she ever sought to return to work during the relevant period, or requested an accommodation of a lateral transfer.

In summary, we reject the Hearing Commissioner's factual findings and conclusion that Johansson sought to return to work and requested a lateral transfer in November, 1991, or at any other time during the relevant period. We also conclude that the Hearing Commissioner's decision to impose upon DOC a "duty to investigate and work cooperatively" with Johansson "to determine whether an accommodation was feasible" was in error.

However, even if Johansson had communicated an interest in returning to work and had she been cleared by her medical provider(s), we conclude that she still would not have prevailed. We reach this conclusion based on the evidentiary lacunae of any attempt on her part to explain, on the one hand, the "apparent contradiction" arising from statements of disability connected to her application and receipt of temporary total disability benefits for physical (neck and back) and psychological (post-traumatic stress disorder) injuries; and on the other hand, her claim during this same time period that DOC discriminated against her by failing to consider a reasonable

[15] The Hearing Commissioner characterized these actions as "consistent" with Johansson's testimony at public hearing that "she hoped and expected to be able to return to work with a reasonable accommodation."

accommodation of a lateral transfer, or engage in an interactive process. Russell, 437 Mass. at 446-54 (holding that a plaintiff must "expla[in] [ ] how her disability claims and employment discrimination claims are consistent, sufficient to warrant a reasonable juror's conclusion that the plaintiff could perform the essential functions of the job").

One of the issues raised in Russell was whether an employee's "prior pursuit, and receipt, of benefits" based on her assertion of "total disability, automatically estopped her from bringing a claim of employment discrimination on the basis of disability under G.L. c. 151, § 4(16). The Supreme Judicial Court concluded that a prior claim for disability benefits is not dispositive if the plaintiff "is able to raise a question of fact through other evidence of her ability (including her ability if provided a 'reasonable accommodation'), or through an explanation of how her disability claims and employment discrimination are consistent and sufficient to warrant a reasonable juror's conclusion that the plaintiff could perform the essential functions of the job." Russell, 437 Mass. at 453. The Court concluded that Russell met this burden by communicating with her employer about her desire to return to work, her "full disclosure" of her "improved condition," as evidenced by her physicians' clearance to return with restrictions, and the fact that she "passively received" her workers' compensation benefits, which had been applied for in September 1994, before she attempted to return to work in 1995, and not reapplied for thereafter, during the relevant time period. Russell, 437 Mass. at 452-53 (concluding that "the mere passive receipt of workers' compensation benefits . . . is not inconsistent with [Russell's] claim that she could perform her job with reasonable accommodation").

It was similarly incumbent upon Johansson to overcome the evidentiary burden created by the contradictory statements associated with her physical and mental impairments and receipt of disability benefits during the time she allegedly requested to be returned to work, and to

convince the trier of fact that she could perform the essential functions of her job, with or without an accommodation. We recognize, of course, that Johansson's receipt of industrial accident benefits on the basis of temporary total disability does not, as a matter of law, estop her handicap discrimination claim against DOC. However, Johansson "simply ignore[d] the apparent contradiction" at her own peril, and as a result, failed to meet her evidentiary burden. We find no evidence in the record that suffices to overcome the contradictions arising from the assertions made by Johansson and her medical providers in connection with her temporary total disability claims sufficient to convince us that she could perform the essential functions of her job, with or without accommodation. We conclude instead that Johansson never requested to return to work, and that she and her medical providers expressly rejected the idea of her returning to work at DOC or with a criminal population, during the relevant time period that DOC allegedly discriminated against her based on her handicap.

Our conclusions that the record evidence fails to support the Hearing Commissioner's factual finding that Johansson ever sought to return to work, and additionally, fails to rebut the contradictions arising from Johansson's assertions of total disability in connection with her disability benefits, are fatal to her claim of discrimination based on handicap against DOC.[16]

Absence of Evidence – Qualified Handicapped Individual

In responding to the Appellate Court's remand directing us to consider other issues raised by DOC in its original appeal to the Full Commission, we hold further that Johansson's claim fails because of want of sufficient record evidence to support a conclusion that she is a qualified handicapped individual within the meaning of M.G.L. c. 151B, § 4(16). See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 821 (1997); Cox v. New England Tel. & Tel. Co., 414 Mass. 375,

[16] Our conclusion renders irrelevant the issue of whether the lateral transfer to the Central Boston office would require DOC to create a new position.

383-84, (1993). This inquiry requires an initial determination of the "essential functions" of the particular job at issue.

In this case, the Respondent argues that a fundamental and therefore essential function of Complainant's job was inmate contact, and that Complainant was no longer able to perform any duties that involved contact with inmates. Complainant contends that the essential functions of her job (and of a position with the same designation of Corrections Counselor I, at the Central Office) are clerical in nature and did not require inmate contact. A review of the record uncovers ample evidence that that Complainant's job required significant inmate contact, a duty that Complainant was adamant that she could no longer perform. Based on the record evidence discussed below, Complainant did not meet her burden of proof that she was capable of performing the essential functions of the job.

Determining whether a duty is essential, is fact and case specific, and as a general rule, rests on more than a title or the employer's job description. Cargill v. Harvard University, 60 Mass.App.Ct. 585, 596 (2004); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 822 (1997). The "essential functions" of the job are those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job." [17] MCAD Handicap Discrimination Guidelines § II (B).

[17] The Hearing Commissioner seems to have concluded that Respondent had a duty to explore a transfer of Complainant from MCI Concord to a position in the Central Office, assuming such a position was available, and that the essential functions of the job were identical in both locations, in part, because the same Civil Service job designation applied to positions in both locations. However, job title alone is insufficient to support an inference that the essential functions of the positions are the same. The essence of a lateral transfer is the movement from one position to another position with the same compensation and benefits. However such transfers may often result in changes to an employee's job responsibilities and work conditions. O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004). The essential functions of the respective jobs may or may not be the same. See e.g. Norman v. Sorensen, 220 Neb. 408 (1985) (transfer from clerical position to position in warehouse where duties included lifting large boxes onto a conveyor belt, removing merchandise from the boxes, ticketing merchandise, and repacking was considered a lateral transfer in unemployment compensation case).

In this case, the most probative record evidence of Complainant's duties at MCI Concord and her ability to perform those duties is the Complainant's own testimony and the corresponding written job description. Complainant's testimony, communications to and from Respondent, and the various medical opinions of her physicians and independent medical examiners give us ample insight into the issue of her ability to perform the duties of the job.

Complainant testified, that throughout her employment she maintained an inmate caseload, requiring her to receive all reports from the probation board and superior court concerning the inmates; performed warrant checks; met with the inmates for reviews; prepared classification reports on the inmates; and sat as a member of the disciplinary board two or three times a month. Complainant's description of her job is consistent with both the job description in evidence, and with the testimony of Richard Spofford, a witness for Complainant.

We have carefully reviewed the job description. The "general" duties of the position fall within two broad categories, involving either direct inmate contact or data collection related to inmates whose cases were assigned to Complainant. Those duties were: assessing the needs and appropriate placement of inmates; devising programs plans to address inmate needs; preparation of inmate classification reports; and conducting intakes of incoming inmates. In addition to these "general" duties, a separate section of the job description lists six "specific" duties which by their terms require interaction with inmates in a prison facility. Specifically, these duties require a Corrections Counselor I to interview inmates, develop individual program plans for them, and to be present in the inmate chow hall to address and respond to inmate questions and concerns, as scheduled. The remaining "specific" duties identified, such as gathering information or data from police and the courts and reviewing inmate criminal records, based on the Complainant's testimony and when considered in the context of the job description, are

supportive of and relate to the Correction Counselor's varied responsibilities in connection with his or her assigned inmate case load.

The skill set that a Corrections Counselor I was required to have or to develop on the job also defines the essential functions of her job. In addition to general skills, such as good oral and written communication, the requisite skill sets support the primacy of direct inmate contact to the job. These skills include: "ability to deal effectively with inmates, good interviewing skills;" "working knowledge of applied correctional practices as related to the care and custody of inmates;" "ability to assess inmate needs and to identify immediate behavioral and or management problems;" and "ability to develop detailed programs plans based upon inmate needs and security concerns."

If we were to base our conclusion about the essential functions of a Corrections Counselor I job on the Complainant's testimony and job description alone, we would be compelled to conclude that working with inmates in a prison facility was, in fact, the essence of the job, and clearly an essential function of the Complainant's job. There is however additional evidence in the record to support this conclusion.

Richard Spofford, whose tenure as a Corrections Counselor at MCI Concord, overlapped with Complainant's for a time, testified that his duties during that time ranged from performing intake with prisoners, addressing inmates' personal issues, developing individual programs and participation plans for inmates, and in a general sense, being responsible for the care and custody of inmates. Spofford also testified that he personally did not do some of the duties described in the job description, because he was not a very good typist, suggesting that at least for him, duties of a "clerical" nature were of less import to the job than working directly with inmates. Spofford's testimony is inconsistent with the Complainant's testimony that the job was mostly

clerical, and more consistent with the job description for the position which as discussed, is centered on the inmate and inmate contact.

The Complainant's testimony that she could no longer work with prisoners or in a prison setting was consistent throughout the hearing, as were letters to the Respondent stating the same. This evidence supports the findings of fact made by the Hearing Commissioner. The Hearing Commissioner noted that, on "July 20, 1990, Complainant's personal psychiatrist wrote that . . . I have therefore strongly recommended that she [Complainant] avoid returning to work or dealing with the penal system when possible. He cites to letters dated September 14, 1990, October 19, 1990, and March 15, 1991,[18] in which the same psychiatrist "diagnosed her [Complainant] with Post-Traumatic Stress Disorder (DSM-IIIR 309.89) and reiterated that she is 'totally disabled from work at present, and may be permanently unable to work in the prison system or with criminals'." The vast majority of the information Respondent had regarding Complainant's ability to do the essential functions of the job indicated that she could no longer do the job. While the November 1991 IME's report stated that Complainant could return to the job, but not to a prior prison setting, all the information Respondent was receiving from Complainant and her psychiatrist at the time contradicted the assertion that Complainant could return to work or wanted to return.

Despite the overwhelming weight of the record evidence indicating that Complainant was no longer able to perform the essential functions of her job in a prison setting, the Hearing Commissioner concluded that Complainant had met her burden to establish a prima facie case of discrimination. We find that this conclusion was not supported by the evidence and constituted an error of law.

---

[18] An IME report issued on May 6, 1991, found Complainant disabled from work as a Corrections Counselor due to Post Traumatic Stress Disorder; and determined that her prognosis for return to work in a correctional setting was poor. C-12(a).

Generally, an employer need not engage in an interactive process concerning reasonable accommodation unless and until the employee has demonstrated that she is a "qualified handicapped person." If this threshold proof is met, then the employer must make reasonable adjustments or adaptations to permit a qualified handicapped person to perform the essential functions of a particular job, absent proof of undue hardship. We have already noted that the purpose of the interactive process is to identify the precise limitations associated with the employees' disability, and the potential adjustments to the work environment that could overcome those limitations. MCAD Handicap Discrimination Guidelines, § VII (B). Where as here, the Complainant's limitations go to the very essence of the job, which is counseling and providing assistance to inmates, and she was unable to perform any of these duties, we conclude that the dialogue would have been futile. Having failed to establish a prima facie case of discrimination as a threshold matter, the Complainant cannot prevail and we are compelled to dismiss this matter.[19]

ORDER

For the reasons set forth above, we hereby reverse and vacate the Decision of the Hearing Commissioner and hereby Order the complaint dismissed.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance

[19] Even if the record evidence supported Complainant's contention that the essential function of her position at MCI Concord was clerical, and inmate contact was not a significant part of her job, the record evidence does not support the Hearing Commissioner's conclusion that Respondent "considered Complainant capable of returning to her position," or that Complainant indicated any desire or ability to return to work.

with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

So Ordered this 28th day of May, 2010.

Malcolm S. Medley
Chairman

Sunila Thomas George
Commissioner