COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
KANDEE GIANNOTTI-BRAULT,
Complainants,

v. DOCKET NO. 09-NEM-02799

MHM CORRECTIONAL SERVICES,
INC. & MASSACHUSETTS DEPARTMENT
OF CORRECTION
Respondents

Appearances: Maria Mancini Scott, Esq., for Complainant
Katharine Crawford, Esq. and James F. Kavanaugh, Esq. for Respondents

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

On October 29, 2009, Complainant Kandee Giannotti filed a Complaint charging Respondents MHM Correctional Services, Inc. ("MHM") and the Massachusetts Department of Correction ("DOC") with discrimination on the basis of disability, retaliation and wrongful termination in violation of G.L. c. 151B, §4(16), §4(4) and §4(1). Complainant worked as a Licensed Practical Nurse ("LPN") at the

Bridgewater State Hospital ("the Hospital"), a maximum security psychiatric forensic facility run by the DOC. Complainant alleged that Respondents discriminated against her when they refused to provide reasonable accommodations for her allergy to psyllium, a key ingredient in Metamucil, which she dispensed and administered to patients. Complainant further alleged that Respondents retaliated against her and terminated her employment for making complaints of harassment in the workplace. Respondents denied the allegations. The Investigating Commissioner found probable cause to credit Complainant's allegations of disability discrimination, but found lack of probable cause to credit Complainant's allegations of retaliation and hostile work environment. Conciliation efforts were unsuccessful. The matter was certified for public hearing on the issue of disability discrimination and a hearing was held before the undersigned Hearing Commissioner from December 5- 10, 2012 and on January 4, 2013. Both parties submitted post-hearing briefs on March 29, 2013. Having reviewed the parties' submissions and the entire record of the proceedings, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant has been an LPN since 1979. (Tr. Vol. I, p. 19-20.)
2. Complainant began working for Respondent MHM as an LPN at Bridgewater State Hospital in August 2007. (Tr. Vol. I, p. 20.)

3. The Hospital is a psychiatric forensic facility run by DOC with an all male-patient population of approximately 185-250 patients. (Tr. Vol. I, p. 21; Tr. Vol. III, p. 86; p. 168) It is the Commonwealth's only maximum security forensic facility and receives patients from the court system for evaluation and/or treatment. Its patients have been charged with a crime, convicted of a crime or been found not guilty by reason of insanity. Approximately one-third of the patient population is charged with murder, convicted of murder or found not guilty of murder by reason of insanity. Bridgewater is run by the DOC, is the second-most violent institution in the Commonwealth and has the highest rate of patient-on-staff assaults. (Tr. Vol. 1, p. 21; Tr. Vol. III, p. 168, 170-1; p. 209)
4. DOC oversees the day-to-day operational management of the hospital. (Tr. Vol. III, p. 174.) DOC contracts with MHM as a vendor to provide medical, nursing and clinical services. MHM performs all necessary psychiatric, psychological, medical, nursing, forensic and rehabilitation services for patients at the Hospital. MHM employs hospital management, social workers, psychiatrists, psychologists, RNs, LPNs, phlebotomists and nurse managers, among others. (Tr. Vol. I, p. 21-22; Vol. III, p. 101-03.)
5. The Hospital has separate buildings located around a quadrangle consisting of a grassy area and walkways, known as "the yard." (Tr. Vol. III, p. 92-93; Ex. HH). No one is permitted to walk on the grassy area or "hang out" in the yard. (Tr. Vol. III, p.

100.) The Hospital is divided into eleven (11) different housing units and other buildings, which house the cafeteria, admissions, doctor's offices, phlebotomy, the Infirmary Unit and the Infirmary Treatment Room. Each Housing Unit has a "nurse's trap," which is a nurse's station in a secured location within the unit. (Tr. Vol. III, p. 153)

6. There is also a pharmacy in the Hospital, which is run under a separate pharmacy contract with DOC. (Tr. Vol. III, p. 103)
7. As a vendor of DOC, MHM and its employees are required to comply with all DOC rules, policies and procedures governing safety, security, operations and employee and patient behavior at the Hospital. (Tr. Vol. III, p. 114; Vol. II, p. 158-59)
8. The Hospital's Security Procedures policy includes procedures for entry into the facility and procedures for employees bringing medication into the facility. (Tr. Vol. III, p. 116; Ex. W, p. 13-19) If an individual needs to bring medication, including syringes, into the facility for personal medical use, he or she must fill out an "Authorization to Enter with Medication" form and have it approved by the DOC Superintendent. (Tr. Vol. II, p. 150-56; Vol. III, p. 117-20; Ex. W, p. 18-19) Each day, any individual entering the facility with medication is required upon entry to declare that fact to the pedestrian trap officer, and if in possession of a sharp or syringe, the individual must fill out a Tool Inventory Form. An individual authorized to enter with a syringe or sharp must proceed directly to the nurse's trap

of the unit where he or she works and secure the instrument. The individual must administer the medication in the secured nurse's trap location. (Tr. Vol. II, p. 152; Ex. W, p. 18-19)

9. DOC's Security Procedure also includes random daily searches of employees entering the facility. Employees are required to declare if they are carrying items considered contraband of any type and the DOC restricts the types of personal effects employees can bring into the facility. (Tr. Vol. II, p. 164-70)
10. The Security Procedures also set forth the proper procedures to follow during an emergency. Any medical emergency involving an individual onsite at the Hospital is considered a "Code 99 Emergency." The Hospital maintains a "code cart," which is kept in the Infirmary Treatment Room in the Medical Building and stocked with equipment that might be needed during a medical emergency. When a Code 99 is called, all movement by inmate, patient and staff is frozen during the initial response and no one is permitted to move through the yard. (Tr. Vol. III, p. 120-25)
11. The Hospital adheres to the national two-minute standard for a Code 99 response. Karin Bergeron, the Superintendent of the Hospital at the time, testified that the Hospital conducts drills of Code 99 team responses each week to ensure that staff can meet the two-minute standard. I credit her testimony. (Tr. Vol. III, p. 209-210)
12. Patients are not in lock-down at the Hospital except for designated times. (Tr. Vol. IV, p. 9) The Hospital has the highest rate of patient-on-staff assaults in the

Commonwealth. (Tr. Vol. III, p. 182.) Use of force is often necessary to control patients' explosive or disruptive behavior. Brian Frye, former Director of Security at the Hospital from September 2004 to October 2009, testified that attacks on staff often occur for absolutely no reason, which makes attacks harder to predict and prevent. I credit his testimony. (Tr. Vol. II, p. 170-73)

13. To maintain control at the facility, movement of patients is allowed only during certain times of day and is sometimes staggered by unit. Patients are scheduled to move to the cafeteria or "Chow Hall" for meals at staggered times as well. Correction Officers and Licensed Practical Nurses (LPN) escort patients to and from meals, but an officer is not always by an LPN's side. The LPN remains with patients during meals and monitors patients while they eat. (Tr. Vol. III, p. 139-41; Tr. Vol. IV p. 7-10)

14. The DOC Tool Control policy controls the use, control, accountability and movement of tools, including sharps, into and throughout the Hospital. A sharp is a syringe, needle, lancet, EpiPen, or instrument of the type that may be used as a weapon. Sharps are kept in the nurse's trap and nurses take inventory at the beginning and end of every shift. Sharps must be transported by the nurse in a locked hard plastic tackle box and at a particular time. Employees are not allowed to carry loose sharps while working at the Hospital. (Tr. Vol. II, p. 130-142; Vol. III, p. 136, 144-45; Ex. AA)

15. Medical syringes pose multiple concerns within a prison environment and are closely monitored within the Hospital. Mr. Frye and Ms. Bergeron testified that patients may use syringes to create tattoos (posing hygienic concerns), to draw their own blood and inject infected blood into another individual, to self-administer drugs, or as weapons to inflict harm on themselves or another individual. I credit their testimony. (Tr. Vol. II, p. 133-34; Tr. Vol. III, p. 182)
16. Mr. Frye testified that an EpiPen is one of the most dangerous types of sharps at the Hospital because it is spring-loaded and contains a needle that injects epinephrine, a serious medication, into the body. If epinephrine is administered improperly, it can cause death, especially if it is administered anywhere but the thigh. I credit his testimony. (Tr. Vol. II, p. 145-47, p. 174-75, p. 187-88)
17. Complainant attended a two-week orientation when she began working at the Hospital, which included training on what can and cannot be brought into the Hospital. (Tr. Vol. III, p. 17-25; Ex. EE.)
18. Complainant was assigned to the first shift, 6:30 a.m. to 3:00 p.m. in the Med West Housing Unit located in the Medical Building. (Tr. Vol. I, p. 22; Vol. III, p. 94-97)
19. At the time Complainant worked in Med West, there were sixteen (16) patients. Patients in the Med West unit are primarily elder patients, patients that are transferred from other correctional facilities because they are in the end-stage of a disease, or patients from within the complex who have been injured or become

seriously ill. Patients in Med West leave the unit for treatment and recreation, but not for meals. (Tr. Vol. I., p. 22-24.)

20. Patients who leave the unit are accompanied by mental health workers or a Correction Officer assigned to the unit. (Tr. Vol. I, p. 24; Vol. IV, p. 107). There are three (3) Correction Officers assigned to each unit. (Tr. Vol. III, p. 164)
21. As an LPN, Complainant reported to Mary Enos, the Nurse Manager, and Lori Costa, the Unit Manager. (Tr. Vol. I, p. 25)
22. Complainant's job duties were to take narcotics counts, prepare and dispense medications, write patient notes on a weekly basis or as needed during the course of the day, evaluate patients mentally and physically and generally care for patients. (Tr. Vol. I, p. 25-26)
23. Patients obtain their medication through a "med line" whereby they line up in the housing unit outside the nurse's trap and receive their medication from the LPN through a small window. A Correction Officer is required to be present during medicine distribution and is responsible for initiating and facilitating the "med line." (Tr. Vol. III, p. 145-48)
24. LPNs also administer treatments to patients as needed in the Infirmary Treatment Room of the housing unit. No equipment is stored in the Infirmary. Instead, LPNs transport the needed equipment from the nurse's trap to the Infirmary in a locked tackle box escorted or directly observed by a Correction Officer. Patient movement

is controlled during this transfer. (Tr. Vol. III, p. 149-52, 156-59)

25. Patients may approach the LPN when she is outside of the nurse's trap with any medical concerns for the nurse to assess and treat. When a nurse is interacting with patients during her shift, there is not always a Correction Officer by her side. (Tr. Vol. IV, p. 7-10)

26. Director of Nursing for MHM, Rhonda Cantelli, and Mr. Frye testified that it would be unrealistic to have a Correction Officer present whenever an MHM staff member interacts with a patient because there is insufficient staff to permit this. I credit their testimony. (Tr. Vol. II, p. 171 Tr. Vol. III, p. 164-65; Tr. Vol. IV, p. 9-10)

27. Complainant testified that she is allergic to psyllium, which makes her allergic to the medication Metamucil, a granular powder containing psyllium. She testified that her symptoms upon exposure to psyllium include shortness of breath, tingling of lips and tongue, a taste in the back of her throat, bright red skin, and coughing and sneezing. Complainant further testified that she has had an anaphylactic reaction to psyllium for which she was hospitalized. (Tr. Vol. I, p. 26-27, 95)

28. In October 2007, Complainant first discovered that she was allergic to psyllium while working on the Med West unit dispensing medications. After pouring Metamucil into a small cup to dispense to a patient, Complainant started to cough and sneeze and experienced a strange taste at the back of her throat. Her symptoms lasted throughout the day. Complainant's supervisor, Mary Enos, was present for

this exposure and reaction. (Tr. Vol. I, p. 28-30)

29. Following this incident, Complainant and Ms. Enos spoke to the MHM physician, Dr. Kahn, who agreed to alter the schedule for administering Metamucil to patients on the Med West unit to nighttime, when Complainant was not at work. (Tr. Vol. I, p. 41-43; Vol. IV, p. 32-33)
30. Two or three days later, Complainant had another reaction to Metamucil, which included shortness of breath and numbing of her lips. (Tr. Vol. I, p. 30-31) Ms. Enos and Anne Collins, an infirmary nurse who was working with Complainant, were present for this exposure and reaction. (Tr. Vol. I, p. 30-31)
31. After Complainant's second reaction, Ms. Collins removed the Metamucil from the Med West nurse's trap and moved it to the Infirmary to dispense so that Complainant no longer had to administer the medication. (Tr. Vol. I, p. 31, 38-40)
32. After the Metamucil was removed from Med West and dispensed from the Infirmary, Complainant did not experience any symptoms. (Tr. Vol. I, p. 44.)
33. In late October 2008, Ms. Bergeron directed MHM to transfer Complainant from Med West and reassign her to a different unit due to a conflict between Complainant and some DOC Correction Officers on the Med West unit. Complainant received a phone call from Ms. Collins who told her that she was being transferred and would be a floating nurse in the other units. As a floating nurse, Complainant would be assigned each day to whichever unit had a vacancy to be filled. (Tr. Vol. I, p. 44-45,

51; Tr. Vol. III, p. 6-7; p. 187-88; p. 195; Tr. Vol. IV, p. 35-36)

34. Complainant testified that on or about October 22, 2008, the night before her first shift as a floating nurse, she awoke at 3 a.m. in a panic attack. She called into work sick at 4 a.m. and then saw her doctor, who gave her a note advising her to stay home that day and the next day. Complainant's doctor also prescribed anti-anxiety medication for her. (Tr. Vol. I, p. 51-54)
35. On November 4, 2008 , Complainant submitted a doctor's note to Laura Vasconcellos which read: "Kandee is my patient. She has an allergy to Metamucil. This would require someone else to pour and administer this medicine for her." After Complainant submitted this note, Ms. Cantelli met with her nurse managers to instruct them that someone else would need to pour and administer Metamucil for Complainant. (Tr. Vol. I, p. 68-69; Tr. Vol. IV, p. 40-41; Ex. C)
36. Sometime between October 22 and November 4, 2008, Complainant's doctor prescribed an EpiPen and an inhaler for her. (Tr. Vol. 1, p. 216)
37. Complainant worked outside of the Med West unit as a floater nurse from October 22, 2008 through the beginning of January 2009. (Tr. Vol. I, p. 60)
38. Complainant had three more significant reactions to Metamucil while working outside the Med West unit- one in November 2008 while she was emptying the trash, one later that month when she was in the nurse's trap and one in December 2008 when she had trouble breathing because of exposure to Metamucil. (Tr. Vol. I,

p. 61-67)

39. On December 9, 2008, Complainant wrote a letter to Lisa Lemieux requesting information about the grievance process in relation to her transfer out of Med West. (Ex. GG.)

40. Ms. Cantelli met with Ms. Bergeron to find out whether it would be possible for Complainant to transfer back to the Med West unit. (Tr. Vol. IV, p. 42-43) Ms. Bergeron approved the transfer and Complainant returned to the Med West unit in January 2009. (Tr. Vol. III, p. 194)

41. On her first day back in Med West, Complainant opened the door to the nurse's trap and began to have an allergic reaction. The LPN on duty removed Metamucil from the cart in the room, cleaned out the cart and stored the medicine in the Infirmary closet. Complainant notified her supervisors, Ms. Enos and Ms. Cantelli, and the practice of dispensing Metamucil from the Infirmary was reinstated. (Tr. Vol. I, p. 77-79)

42. Complainant had no further allergic reactions on the Med West unit where she remained working until March 10, 2009. (Tr. Vol. I, p. 79-80)

43. In March 2009, as a result of a recurring conflict between Complainant and a Correction Officer on Med West, Ms. Bergeron directed MHM to transfer Complainant and another employee out of Med West permanently. (Tr. Vol. III, p. 195-97; Vol. IV, p. 44-45)

44. Upon Complainant's transfer, Ms. Cantelli re-instated the previously-implemented restriction of having someone else pour and administer Metamucil to patients when Complainant was scheduled to work. (Tr. Vol. IV, p. 47-48)

45. On March 12, 2009, the day after Complainant's permanent removal from Med West, she experienced a reaction to Metamucil in the A-1 nurse's trap. A co-worker found and removed Metamucil from the nurse's trap, but Complainant's symptoms got progressively worse. Complainant attempted to reach her car where she stored her EpiPen, but her symptoms progressed further. Frightened, Complainant called her supervisor, Ms. Collins, who called a Code 99 because Complainant could not speak on the phone. The Code 99 team arrived and administered an EpiPen and Complainant was transported by ambulance to the hospital where she was admitted to the cardiac unit. Complainant was kept overnight and discharged the next day, March 13, 2009. (Tr. Vol. I, p. 90-95)

46. A day or two after the March 12, 2009 incident, Ms. Cantelli spoke with Complainant by phone and asked her to provide a medical certification from her doctor to return to work. Complainant provided a note from the hospital dated March 13, 2009, which read: "Admitted to Jordan Hospital 3/12/09 AM with allergic reaction, discharged 3/13/09, may return to work 3/16/09 with no exposure to allergen." (Tr. Vol. I, p. 99; Ex. E). Complainant did not return to work on 3/16/09.

47. On March 20, 2009, Complainant provided a second note naming the specific

allergen, which read: "Kandee was admitted to Jordan Hospital 3/12/09 and discharged 3/13/09. Work restriction: may return 3/16/09 with no exposure to Metamucil." (Tr. Vol. I, p.103; Ex. F)

48. MHM's policy mandated that if an employee is absent for five (5) days for an alleged work-related illness or injury, a worker's compensation claim would be opened. Accordingly, upon Complainant's fifth consecutive absence, on March 20, 2009, a worker's compensation claim was initiated. (Tr. Vol. IV, p. 55) Complainant did not return to work thereafter.

49. On April 1, 2009, Complainant's doctor referred her to an allergist for testing. (Tr. Vol. I, p. 106; Ex. G)

50. After Complainant provided MHM with the March 20th note, MHM began internal discussions to determine whether it was possible to comply with Complainant's "no exposure to Metamucil" restriction. Sue Lantagne, MHM's Hospital Administrator, testified that she discussed alternative products with the pharmacist and it was determined that Citrucel would be an appropriate replacement medication at a nominal cost difference. I credit her testimony. (Tr. Vol. IV, p. 124-25; p. 55-56)

51. MHM received another doctor's note from Complainant dated June 10, 2009 which read: "Treatment plan- no contact with psyllium, EpiPen on person, can only work in psyllium-free environment." (Tr. Vol. I, p. 107-08, Ex. H)

52. Upon receiving Complainant's June 10th note stating that she was to carry an EpiPen

on her person, MHM spoke to DOC representatives because the carrying of a "sharp" is regulated by DOC's security policies. (Tr. Vol. IV, p. 57-8, p. 124)

53. Ms. Bergeron testified that if a person needed an EpiPen in an emergency, he or she could be treated within two (2) minutes or less because the medication is readily available throughout the Hospital. I credit her testimony. (Tr. Vol. III, p. 204)

54. Ms. Bergeron testified that she denied Complainant's request to carry an EpiPen on her person because it was against the DOC's sharps policy. (Tr. Vol. III, p. 205-209, 242) I credit her testimony.

55. Another LPN employed by MHM at the Hospital from September 2007 to January 2010, testified that she used an insulin pump, a glucometer and lancets because of her diabetes. She testified that she wore two insulin pumps under her clothing while employed at the Hospital and the second pump contained a needle that would penetrate and retract into her skin. To access the needle within the pump, an individual would need to reach under her clothes, rip the pump from her skin and break the pump, which was made of hard plastic. (Tr. Vol. II, p. 9-12, 14, 46-7, 94-6) Ms. Bergeron testified that she routinely granted permission to individuals with diabetes who sought to bring insulin pumps into the Hospital. Bergeron distinguished between wearing an insulin pump from carrying a loose sharp or EpiPen on one's person because an insulin pump is physically attached to a person's body, remains under clothing and the device that attaches to the skin through which

the insulin travels is not steel, but plastic. Ms. Bergeron explained that employees who bring lancets or syringes to work for medical purposes most often enter the Hospital during a shift change when patient movement is severely restricted and they walk directly to the nurse's trap to secure the item. (Tr. Vol. III, p. 237-58) I credit her testimony.

56. On July 3, 2009, Complainant received a letter dated July 1, 2009, from claims adjuster, Wang Lee, who worked for Broadspire, the Worker's Compensation insurer, stating that MHM would substitute Metamucil with a psyllium-free product at the Hospital but that a psyllium-free environment could not be guaranteed. Further, the letter stated that the DOC could not, for security reasons, permit Complainant to carry an EpiPen on her person within the Hospital, but that EpiPens were available throughout the institution, in the nurse's stations and on the crash cart. (Exhibit I)

57. On July 9, 2009, MHM's HR Business Partner, Susan Walker, sent a letter to Complainant which read: "This letter serves as written notice of your termination of employment with MHM effective July 9, 2009. The reason for your termination is inability to return from a leave. This termination is "FOR CAUSE." (Ex. J)

58. Complainant testified that she was on an FMLA leave after the March 12, 2009 incident until her termination. (Tr. Vol. III, p.78-79)

59. Complainant's Union filed a grievance on her behalf following her termination and

a hearing was held on July 23, 2009. (Tr. Vol. II, p. 242-43; Vol. III, p. 75; Vol. IV, 131-32)

At the hearing, the parties discussed the restrictions listed in the notes from Complainant's doctor, specifically, the requirement that Complainant work in a psyllium-free environment and that she carry an EpiPen on her person at all times. Ms. Lantagne confirmed that it would be possible to perform a sweep of the entire institution and replace Metamucil with Citrucel in all of the housing units, but Complainant would not be allowed to carry an EpiPen on her person per DOC security policies. The meeting ended with the parties hopeful that Complainant's doctor would be able to modify her medical restriction for carrying an EpiPen, because an EpiPen would be available to her in every nurse's station and on the Code 99 cart. (Tr. Vol. IV, p. 124-25, 127-29, 131-132, 135-36; Ex. QQ)

60. On August 12, 2009, Complainant consulted with her doctor regarding his medical restriction for carrying an EpiPen and he refused to modify his opinion. (Tr. Vol. IV, p. 137) Complainant submitted a note to Respondents following this appointment, which read: "Anaphylactic reaction to psyllium on 3-12-09; Work Restrictions: must work in psyllium free environment, must carry EpiPen on person at all times." (Ex. K). Complainant did not submit any other medical notes to Respondents.
61. Complainant testified that since her doctor would not change his orders concerning carrying the EpiPen on person, she understood that her employment with MHM

would be terminated. (Tr. Vol. III, p.76)

62. Complainant testified that she was uncomfortable going back to work without having her EpiPen on her at all times and did not contact anyone at MHM once her doctor refused to alter his prescription. (Tr. II Vol. p.262-263). Complainant understood that her union would not be pursuing any further action when her union representative stated to her at the July 2009 meeting that "we won your grievance . . . it's up to you now. If you want your job back, you can't have an EpiPen." (Tr. Vol.II, p.255-256).

CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, s. 4 (16) prohibits discrimination in employment on account of disability. The statute's prohibitions include failure to reasonably accommodate a disability. In this case, Complainant's claims of termination because of her disability and failure to accommodate her disability are inextricably intertwined, because Complainant's termination ultimately resulted from her allergy to psyllium. The question remains whether her termination violated c. 151B because Respondent declined to provide the accommodation Complainant sought.

In order for Complainant to establish a prima facie case that she was terminated because of her disability, she must provide credible evidence that she was handicapped

within the meaning of the statute, that she was qualified to perform the essential functions of the job with or without a reasonable accommodation, and that she was terminated or otherwise subject to an adverse action by her employer and the position she occupied remained open Dartt v. Browning-Ferris Industries, Inc. 427 Mass. 1 (1998). Once Complainant has established a prima facie case of handicap discrimination, the burden shifts to Respondents to articulate a legitimate, non-discriminatory reason for the termination by producing credible evidence to show that the reasons they advanced were the real reasons. Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 11 (1998); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 443 (1995). The burden of proof remains with Complainant to prove by a preponderance of the evidence that Respondents' articulated non-discriminatory reasons were not the real reasons for their actions, but that Respondent's acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon, 434 Mass.493, 504 (2001).

As a threshold matter, Complainant must prove that she is a "handicapped person" within the meaning of the statute. G.L. c. 151B, s.1 (17). The statute defines a "handicapped person" as one who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment. Complainant has established that she is a handicapped person within the meaning of the statute by virtue

of her allergy to psyllium, which has caused her to have an anaphylactic reaction which untreated, can be life-threatening, and which substantially limits her in the major life activity of breathing and working in her chosen profession as a nurse given the likelihood of exposure to psyllium, an ingredient in a common treatment product. Her allergy also prevents her from working generally in any medical facility that uses products containing psyllium. The evidence shows that Complainant had several severe allergic reactions at work after exposure to psyllium, which is found in Metamucil, including an anaphylactic reaction that resulted in an overnight hospital stay. Complainant also provided several notes from her doctor indicating that she was allergic to psyllium and could not be exposed to it. The evidence further shows that Respondent MHM learned of Complainant's allergy shortly after she was hired when Complainant experienced her first allergic reaction to Metamucil at work and MHM provided accommodations to limit her exposure to the medication. It is apparent that but for her allergy to psyllium, Complainant would not have been terminated.

Respondent terminated Complainant's employment because of her failure to return to the workplace over a period of several months after it offered certain accommodations to prevent her exposure to psyllium. Complainant claims she could not, and did not, return to work for fear of having another life-threatening reaction to psyllium without an EpiPen on her person. Thus the sole issue that remains to be decided is whether Respondents declined to provide Complainant with a reasonable

accommodation in violation of the statute when they denied her doctor's demand that she be required to carry an EpiPen on her person at all times while at work in a DOC facility. Respondents assert that allowing Complainant to do so would contravene DOC's safety and security rules and protocols that ensure the safety of all staff and inmates at the hospital. There was credible testimony that the hospital staff experience a significant number of assaults by patient/inmates, and that they must constantly remain on guard and follow the security protocols in this potentially dangerous environment. There was credible evidence that the carrying and storing of all items that might be used as potential weapons within the facility is strictly regulated and controlled. The evidence demonstrates that Respondents denial of the accommodation sought was justified by the DOC rules and regulations regarding safety and security. I conclude that these safety rules prevented her employer from granting the specific accommodation she sought, as discussed further below.

To prove that Respondents failed to reasonably accommodate Complainant's handicap, Complainant must prove that (1) she was a qualified handicapped individual within the meaning of G.L. c. 151B; (2) she needed a reasonable accommodation due to her handicap to perform her job; (3) the employer was aware of the handicap and was aware that Complainant needed a reasonable accommodation to perform her job; (4) the employer was aware of a means to reasonably accommodate the handicap, or the employer breached a duty, if any, to undertake a reasonable investigation of a means to

reasonably accommodate the handicap; and (5) the employer failed to provide Complainant the reasonable accommodation. MCAD Handicap Guidelines, 20 MDLR (1998); Johansson v. Department of Correction, 32 MDLR 95, 97 (2010) (Decision of Full Comm'n)

The case law supports the importance of an interactive dialogue between employees and employers regarding the provision of reasonable accommodation. When an accommodation is sought by a qualified handicapped individual, the employer is required to make a reasonable effort to determine the appropriate accommodation… through a flexible interactive process. See Russell v. Cooley Dickinson, 437 Mass. 443, (2002) citing 29 C.F.R. § 1630 App. (2001) The goal is to accommodate the needs of qualified handicapped individuals, while satisfying the legitimate business interests of employers. See MCAD Handicap Guidelines, 20 MDLR (1998). The public policy behind G.L. c. 151B s. 4(16) is "to protect handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding exposing others to significant health and safety risks. " Carleton v. Commonwealth, 447 Mass. 791, 808 (2006) *citing* Dahill v. Police Dep't of Boston, 434 Mass. 233, 240 (2001)

I conclude that Respondents did engage in good faith in an interactive dialogue with Complainant in an attempt to accommodate her disability and allow her to continue working. During the course of Complainant's employment, Respondents

provided several accommodations in response to Complainant's allergic reactions to psyllium. These accommodations allowed Complainant to continue performing the essential functions of her job at the Hospital. After Complainant experienced her first allergic reaction to Metamucil in the Med West unit in October 2007, MHM changed the time for Metamucil administration to the night shift, when Complainant was not at work. When Complainant experienced her second allergic reaction to Metamucil a few days later, MHM removed Metamucil from the Med West nurse's station and moved it to the Infirmary to dispense. After Complainant submitted a note from her doctor on November 4, 2008, MHM's Director of Nursing met with nurse managers to instruct them that someone other than Complainant must pour and administer Metamucil when Complainant was working. When Complainant was moved back to the Med West unit, MHM reinstated the practice of dispensing Metamucil from the Infirmary and then re-implemented the restriction of having another employee pour and administer Metamucil. I conclude that these actions on the part of MHM constitute the type of reasonable accommodation contemplated by the statute.

The focus of this analysis, however, rests with the parties' final decisions regarding the extent of reasonable accommodation that would have allowed Complainant to return to work. After Complainant's allergic reaction to psyllium and her hospitalization on March 12, 2009, Complainant's doctor submitted a note requiring that Complainant be in a psyllium-free environment, and be permitted to

carry an EpiPen on her person at all times. The parties then entered into a discussion that necessarily involved health, safety and security concerns at the Hospital. During this discussion, MHM confirmed that it would be possible to sweep the entire facility and replace Metamucil with Citrucel in all of the housing units as an accommodation to Complainant and it offered to do so. While MHM could not guarantee an environment that was completely "psyllium-free," (because it could not monitor closely enough what individuals brought into the Hospital), it could come very close. I find that this proposed accommodation was a reasonable offer to accommodate Complainant's disability that was consistent with the safe performance of the job.

Complainant's request to carry an EpiPen on her person at work, however, was in violation of hospital safety and security protocols and triggered serious safety concerns because of the nature of the facility. As a maximum security psychiatric facility treating patients charged with crimes, convicted of crimes or found not guilty criminally by reason of insanity, it housed a volatile, unpredictable and sometimes dangerous patient population. There was credible evidence that the hospital has the highest rate of patient-on-staff assaults in the Commonwealth and use of force is often necessary to control patients' explosive or disruptive behavior. Where an employer can demonstrate that the accommodation requested would impose an undue hardship to the employer's business because of significant health and safety risks due to the dangerous type of work involved, the accommodation sought may not be reasonable.

See Dahill supra. at 240; Carleton, supra. at 809. The DOC's safety and security protocols regulating the carrying and use of sharps in the facility exists to prevent a patient from possessing a sharp and possibly causing harm to himself or to others. There is substantial evidence in the record concerning the dangerous features of an EpiPen and the harm a patient could exact were the device to fall into a patient's hands, particularly given its dual nature of a spring-loaded needle and an injectable dose of epinephrine, that wrongly administered might cause serious adverse reaction or death. Complainant asserts that other employees were able to enter the facility with sharps on their person; however, those devices were justifiably distinguished from an Epi-pen.

Comment [c1]: I inserted this sentence below.

Given the unique safety concerns attendant to the operation of a maximum-security psychiatric forensic facility, I conclude that Respondents had legitimate, non-discriminatory reasons for enforcing their security policies which they demonstrated are required to preserve order and ensure safety in their facility. I also conclude that to permit Complainant to carry on Epi-pen at all times on her person, would have posed an undue hardship on the operation of the facility from a safety and security standpoint and, as such, was not reasonable. While Respondents refused to permit Complainant to carry an EpiPen on her person, they identified another accommodation that would have allowed Complainant to return to work. Respondents guaranteed that Complainant would always have an EpiPen available to her in the secure environment of the nurse's station in the unit to which she was assigned. The Code 99 cart is also stocked with

EpiPens should an emergency arise. Respondents presented sufficient evidence demonstrating that the response time at the Hospital in a Code 99 emergency was within two (2) minutes or fewer, and that the Hospital drilled the emergency team each week to ensure that staff could meet the two-minute national standard. I find that having EpiPens available to Complainant in all of the nurse's stations and on the Code 99 cart meant that the device was readily accessible and I find that this constituted a reasonable accommodation.

I find that the Respondent met their obligations by exploring and offering various accommodations for the Complainant's disability, by implementing accommodations to Complainant's allergy in modifying the procedures and protocols for the distribution of Metamucil and by engaging in an interactive dialogue with Complainant and her Union until it became clear that Complainant's demand to carry an EpiPen on her person at all times while at work would not be modified. Respondents have demonstrated that this request was unreasonable given the safety and security concerns at the facility. Absent a modification of the restrictions governing Complainant's return to work, a modification that would conform to Respondents' security protocols with recognition that the facility was able to provide an adequate and timely medical response to Complainant in an emergency, the parties reached an impasse, and discussion regarding reasonable accommodation came to an end. This fact does not undercut the reasonable efforts that Respondents made to accommodate

Complainant's disability.

Thus, I conclude that Respondent provided a reasonable accommodation to Complainant's disability and her termination was not due to discriminatory animus based on her disability.

ORDER

For the reasons set forth above, the Complaint is dismissed. This decision constitutes the final order of the Hearing Commissioner. Any party aggrieved by this Order may file a Notice of Appeal to the Full Commission within ten (10) days of receipt of this Order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this Order.

SO ORDERED this 6th day of February, 2015.

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Sunila Thomas George
Hearing Commissioner