

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

DR. JOHN GARRISON AND  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,  
Complainants

Against

Docket No. 07 bem 00796

LAHEY CLINIC MEDICAL CENTER  
Respondent

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Appearances: Elisabeth LeBrun, Esq. for Complainant Garrison  
Robert B. Gordon, Esq. and Megan Bisk, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 27, 2007, Dr. John Garrison (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging Lahey Clinic Medical Center (“Respondent”) with a violation of G. L. c. 151B, section 4(16). Complainant alleges that Respondent failed to accommodate his chronic heart condition by refusing to excuse him from overnight on-call duty and that, as a result, he was forced to resign his position as a staff psychologist.

The MCAD issued a probable cause finding on December 8, 2008 and certified the case for public hearing on August 18, 2010. A public hearing was held on April 25 and 26, 2011.

The following witnesses testified at the hearing: Complainant, Dr. Mary Anna Sullivan and Robert Tefft. Dr. Gerry Orfanos testified via a videotaped deposition. The parties introduced ten (10) joint exhibits into evidence. Complainant introduced four (4) additional exhibits into evidence, and Respondent introduced three (3) additional exhibits. Counsel submitted post-hearing briefs dated June 23, 2011.

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. Complainant was employed as a Lahey Clinic staff psychologist from September 1, 1994 through September 1, 2006. Complainant's position was located in the Psychiatry Department.
2. Respondent Lahey Clinic Medical Center, Burlington is an acute care hospital located in Burlington, Massachusetts. It employs more than six (6) individuals.
3. Complainant's job as staff psychologist involved clinical work with Lahey patients. Complainant initially reported to Department of Psychiatry Chair, Dr. Morton Miller. When Dr. Miller retired in 2000, Complainant reported to Dr. Mary Anna Sullivan who succeeded Dr. Miller as Chair of the Department of Psychiatry.
4. At all relevant times, Robert Tefft was the Department of Psychiatry's Administrative Director.
5. Complainant enjoyed a positive working relationship with Dr. Sullivan and Mr. Tefft. Transcript II at 246-247.
6. When Complainant was hired, he understood that on-call ("call") duty was an expected part of his job per Respondent's Medical Staff Bylaws and the Psychiatry

Department's Policy Manual. Transcript I at 179-180.

**7.** Respondent's Department of Psychiatry has two types of call. The first involves physicians and clinical nurse specialists who cover in-patients experiencing psychiatric emergencies. The second involves psychologists and social workers who cover out-patients with psychiatric emergencies. Transcript II at 348, 387. Both call programs operate on weekdays from 5 p.m. until 8 a.m. and on weekends from 5 p.m. Friday until 8 a.m. Monday. Transcript II at 184-185. Although Lahey's physicians are trained in medical school to handle on-call duties, most psychologists and social workers do not receive such training. Transcript II at 190.

**8.** Complainant described his call responsibilities as requiring him to be available during overnights and on weekends for evaluations and hospital admissions of patients presenting at Respondent's emergency room with psychiatric crises. Transcript I at 116-117. Complainant described his on-call responsibilities between 1994 and 1999 as averaging between two to three shifts per month. Transcript II at 189.

**9.** Prior to 2000, it was customary for Respondent's staff psychologists and social workers to absent themselves from work on days following their scheduled call coverage. Transcript II at 193. This pattern of absenteeism proved disruptive to the Psychiatry Department because it forced the Department to reschedule numerous treatment appointments. Transcript II at 193. As a result, the Department of Psychiatry, in the late 1990s or 2000, changed the way it staffed call for non-physicians by implementing a so-called "moonlighter" system whereby the Department engaged the services of per diem clinicians to provide substitute on-call

coverage for staff psychologists and social workers so that regularly-employed staff would not have to perform on-call assignments. Transcript II at 195, 353, 389. The moonlighter system for call coverage costs Respondent approximately \$100,000.00 per year. Transcript II at 197, 390.

**10.** The Department of Psychiatry's moonlighter system lists permanent staff on an initial call schedule but then substitutes per diem workers for regular staff once the per diem workers give notice of their ability to cover specific days. As a consequence, the preliminary call schedule (the "shadow schedule") during the 2006 time frame looked different from the final call schedule. Transcript II at 199-202, 354-355, 389-392. According to statistics from the 2006 period, non-physician staff members of the Psychiatry Department only had to take call approximately 5% of the time that they were listed on the shadow schedule, i.e., once or twice a year. Transcript II at 199, 395.

**11.** Prior to 2006, Department Chairs at Lahey Clinic had unwritten discretion to excuse clinical staff from call rotations when they reached age sixty. Transcript II at 206. In December of 1999, then-Psychiatry Department Chair Miller granted Complainant's request to be exempted from the call rotation when he turned sixty years old. Transcript II at 213. Complainant testified that he sought the exemption because he did not like taking call. Complainant testified that call duty disturbed his evening plans and his sleep, and he found it increasingly undesirable as he got older. Transcript II at 206-208. Complainant testified that when he anticipated taking call, he would begin to worry and to develop feelings which he characterized as an "anticipatory stress reaction."

**12.** Complainant's internist during the late 1990s through May of 2005 was Dr. Gerry Orfanos. Dr. Orfanos treated Complainant for hypertension, elevated cholesterol, obesity, coronary artery disease, gout, and hyperlipidemia. Transcript I at 48, 89, 102. According to Dr. Orfanos, patients with coronary artery disease comprise approximately 20% of his practice. Id. at 65.

**13.** On April 19, 2000, Complainant experienced a heart attack which was described by his treating cardiologist as a "miniscule" cardiac event. Transcript II at 214-215. Complainant was admitted first to Lahey North and then transferred to Lahey Burlington where he had a cardiac catheterization procedure and a stent inserted into one of his arteries on April 20, 2000, followed by his discharge on April 21, 2000. Transcript I at 58; II at 218-219. Complainant's medical record indicates that he had a severe blockage ("thrombosis") of the right coronary artery which likely caused the heart attack. According to Dr. Orfanos, Complainant's heart muscle was not affected by the heart attack and after treatment, Complainant's heart function was normal. Transcript I at 56-57, 97.

**14.** Dr. Orfanos testified that after 2000, Complainant had no symptoms of active coronary artery disease and no limitations on his activity, although he continued to "carry" a diagnosis of coronary artery disease and hypertension. Transcript I at 98-102. Following Complainant's discharge from the hospital, he adhered to a modified work schedule during his first two weeks back to work. Transcript II at 223-225, 248-249 380-381; Joint Exhibit 10. His schedule thereafter returned to normal.

**15.** Dr. Orfanos testified that he prescribed Complainant preventive medications for elevated blood pressure and cholesterol but that Complainant did not have

“symptoms” of coronary artery disease and was not “disabled.” Id. at 53-54, 91-92.

Dr. Orfanos did not tell Complainant to avoid undue stress and did not advise Complainant to limit his activities on account of stress. Id. at 66, 84, 87, 92. Dr. Orfanos testified that Complainant had “no limitations on his activity, had no chest pain [and] had no symptoms consistent with [coronary artery] disease.” Transcript I at 100-101. According to Dr. Orfanos, Complainant was at no greater risk of heart problems on account of stress than any other man of his age. Transcript I at 93. Dr. Orfanos testified that there was no medical reason why Complainant should have been excluded from call duty. Id. at 94-95.

**16.** In his deposition testimony, Dr. Orfanos distinguished between “sustained” and “transient” elevations of blood pressure, stating that the former constituted a “significant risk factor” for heart disease whereas the latter is not a known cause of coronary artery disease. Transcript I at 64-65.

**17.** Psychiatry Chair Sullivan and Administrator Tefft acknowledged that they learned about Complainant’s cardiac episode in 2000 as a result of office “scuttlebutt.” Transcript II at 247-248, 341, 380.

**18.** Between April of 2000 and September of 2006, Complainant was completely asymptomatic. Transcript II at 239-240, 244; Joint Exhibit 1 at 114, 135-138, 158. Following his heart attack, Complainant carried out a full range of professional, personal, and recreational activities associated with a normal life. Complainant never told Dr. Sullivan that he was disabled or that he required an accommodation to perform his job. Transcript II at 341-342.

**19.** At some point, Complainant asked Dr. Sullivan and Administrator Tefft for

permission to reduce his work hours to 20-hours per week so that he could accept a part-time job at the Social Security Administration (“SSA”). The SSA job compensated Complainant at a substantially higher rate of pay than did Respondent. Transcript II at 291-293.

**20.** In the spring of 2006, Lahey’s Chief Operating Officer informed all Lahey Department heads that they could no longer exempt employees from call duty when they reached age sixty. Transcript II at 345-346. One reason for the change in policy was that a significant portion of Respondent’s medical staff had reached or was approaching age sixty. Transcript II at 345.

**21.** In 2006, the Department of Psychiatry had thirteen psychologists and social workers who shared on-call duties. Transcript II at 185. Complainant was the only Psychiatry Department employee affected by the change. Mr. Tefft told Complainant that he was going to be put back on the preliminary (“shadow”) call rotation but that efforts would be made to secure moonlighters so that Complainant would not have to take call. Transcript II at 252-254, 396. At that time, Complainant expressed displeasure about being placed back into the call rotation but made no mention of his health. Transcript II at 396.

**22.** The Department of Psychiatry call schedules for the period from January through September of 2006 reflect that most of the call assignments initially given to staff were ultimately covered by moonlighters. Joint Exhibit 7.

**23.** At some point in mid-2006, Complainant saw his name on the Department of Psychiatry’s shadow call schedule for the month of June of 2006. Transcript II at 264.

**24.** On June 25, 2006, Complainant submitted a letter expressing his intent to resign his employment effective July 21, 2006. Transcript I at 144; II at 276; Joint Exhibit 3. Complainant submitted his resignation without speaking to anyone in Lahey management about his concerns relative to taking call. Transcript II at 270, 360, 400. Complainant noted in his resignation letter that he “had become psychologically unsuited to manage the stressors associated with call duty.” Transcript II at 276-278; Joint Exhibit 3. Complainant testified that when he spoke to Dr. Sullivan about resigning, he pointed to his heart while saying, “my heart.” Dr. Sullivan denied that Complainant ever mentioned his heart condition or his health when he tendered his resignation. Transcript II at 364. I credit Dr. Sullivan’s testimony over Complainant’s regarding what transpired when Complainant resigned.

**25.** Dr. Sullivan cautioned Complainant about submitting a letter in which he stated that he was “psychologically unsuited” to function as a clinician because she was concerned that the letter might be harmful to Complainant’s career and reputation. Transcript II at 286, 362, 367 375. In response to Dr. Sullivan’s concerns, Complainant retracted his original letter and submitted a new one which referred only to his intent to retire from his position at Lahey. Transcript II at 288, 362.

**26.** One of Complainant’s colleagues, Wendell Drew, offered to cover Complainant’s call responsibilities for the month of June of 2006. Complainant did not accept the offer. Transcript II at 274-275.

**27.** Dr. Sullivan and Mr. Tefft were concerned that more time was needed to transition Complainant’s psychiatric patients to new clinicians than that provided for by Complainant’s projected retirement date of July 25, 2006. Complainant offered to



extend the date of his separation from Lahey as long as he were excused from all call duties. Transcript II at 289-291. Respondent accepted the offer.

**28.** After leaving Lahey, Complainant gradually increased his hours at the SSA to 27.2 hours per week by 2010. Between 2006 and 2010, Complainant's income from the SSA increased from \$50,900.00 to \$113,000.00. Transcript II at 295-296, 298. Complainant did not apply for unemployment benefits after leaving Lahey and applied for just one full-time job. Transcript II at 299-301.

### III. CONCLUSIONS OF LAW

To state a case of disability discrimination based on a failure to accommodate, Complainant must prove that he is a "qualified" handicapped individual capable of performing the essential functions of his job with a reasonable accommodation and that Respondent denied him the opportunity to do so by failing to accommodate his request to be excused from call duty. See Chapter 151B, sec. 4(16); Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443, 449 (2002); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Bergman v. Town of Burlington School Department, 18 MDLR 143 (1996).

An individual is considered to be "handicapped" within the meaning of Chapter 151B if that person has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having an impairment. G.L. c. 151B, sec. 1(17). Major life activities are tasks that are central to daily living such as caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working. G. L. c. 151B, sec. 1(20). Under the ADA Amendments Act of

2008,<sup>1</sup> major life activities now include major bodily functions. See ADA Amendments Act of 2008, Section 4 (a), amending section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102. The Amendments Act of 2008 also clarified Congress’s view that an impairment “substantially limits” one or more major life activities when the impairment prevents or severely restricts an individual from “doing activities that are of central importance to most people’s daily lives.” ADA Amendments Act of 2008, Section 2 (b) (4).

Complainant contends that he was a handicapped individual in 2006 as a result of experiencing a cardiac episode in 2000. According to Complainant, the cardiac episode led to a chronic heart condition which negatively impacted his ability to handle stress. See Charge of Handicap Discrimination, paragraph 18. This view is not supported by the medical evidence. The 2000 cardiac episode upon which Complainant bases his claim of disability was deemed a “miniscule” event by his treating cardiologist and took place more than six years prior to his resignation. Complainant’s internist, Dr. Orfanos, testified that the episode did not adversely affect Complainant’s heart muscle, did not permanently affect his heart function, did not produce any symptoms of active coronary artery disease after 2000, and did not cause any limitations on Complainant’s activities. When Complainant was discharged from the hospital two days after the incident, the only work-related restriction imposed on him was a two-week modification of his work schedule, after which Complainant returned to his normal work routine.

Given the limited impact of Complainant’s one cardiac episode and his

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<sup>1</sup>The ADA Amendments Act of 2008 (the “ADAAA”) became effective on January 1, 2009. In the amendments, the term “disability” was expanded to discourage extensive analysis of whether an impairment constitutes a disability. Because the ADAAA does not apply retroactively, it has no impact on the facts of this case. Even if it did, a liberal construction of the term “disability” still requires that an alleged impairment limit one or more major life activities which is not the case here.

physician's credible testimony that he has no other symptoms consistent with active coronary artery disease, I conclude that Complainant is not disabled within the meaning of Chapter 151B. See Herman v. Furniture Freight Terminal, 24 MDLR 385 (2002) (employee who had quadruple bypass surgery but thereafter returned to work was not handicapped because no limitation on a major life activity); Draper v. Cambridge Brands, Inc., 22 MDLR 25 (2000) (employee with chest pains who was cleared to work after an eleven-day absence not handicapped because no limitation on major life activities).

Complainant argues that there is precedent for recognizing heart disease as a *per se* disability under Chapter 151B, but such an assertion reads the case law too broadly. Where, in Massachusetts, non-disabling heart disease has been deemed a disability, such recognition has been premised on an employer's perception of the employee as disabled. See e.g., Talbert Trading Company v. MCAD, 37 Mass. App. Ct. 56 (1994) (Complainant regarded by his employer as someone with a heart condition even though there was no evidence of limitations in any major life activities); Bianchi v. Duchess Chemical, Inc., 24 MDLR 168 (2002) (Complainant's heart condition caused him to be perceived as incapacitated even though he was not impaired in any major life activity); 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). In contrast to these cases of perceived disability, there is no evidence here that Respondent regarded Complainant as handicapped.

Complainant initially sought an exemption from call duties in 1999, prior to his heart attack because taking call disturbed his evening plans and his sleep and he found it

increasingly undesirable as he got older. This sequence of events undermines Complainant's assertion that his 2000 heart attack rendered him unable to handle the stress of call duty. There is no credible evidence that Complainant's cardiac condition limited him from performing any aspect of his job as a Lahey staff psychologist. The lack of such evidence distinguishes his situation from other cases in which individuals were found to be afflicted with disabling heart disease. See Miller v. Northeast Security, Inc., 17 MDLR 1067, 1081 (1995) (handicapped status recognized as result of coronary artery disease which restricted Complainant's ability to physically exert himself); Mortimer v. Atlas Distributing Co., 15 MDLR 1233 (1993) (handicapped status recognized as result of progressive heart disease which formed basis for workers' compensation award based on permanent and total disability). In sum, the evidence indicates that Complainant was able to carry out all major life functions at the time he resigned and was not perceived to be disabled by his employer. The record does not support a conclusion that Complainant was handicapped in 2006.

Complainant acknowledges that he was asymptomatic between 2000 and 2006 but contends that his symptoms were held in check as a result of taking medication. He argues that such ameliorative measures should not limit his legal rights. A similar analysis was adopted in Dahill v. Police Department of Boston, 434 Mass. 233 (2001), wherein the Court held that the use of hearing aids to mitigate the effects of a severe hearing impairment did not prevent a hearing-impaired individual from being considered handicapped under G. L. c. 151B sections 1 (17) and 4(16). However, the individual in Dahill had an actual impairment – hearing loss – whereas Complainant had no such impairment between 2000 and 2006. The possibility that Complainant's condition might

have ripened into an actual ailment absent the use of preventive medication is speculative. Were Complainant to merit consideration as a handicapped individual merely on the basis of taking preventive medication, the law would have to recognize most adults as similarly disabled.

Apart from the aforementioned conclusion that Complainant was not disabled, there is no credible evidence that Complainant requested an accommodation, i.e., asked to be relieved of call obligations because of coronary artery disease and/or hypertension. The only time that Complainant asked to be relieved of call was in 1999, prior to having his heart attack. In 2006, Complainant submitted a notice of resignation stating that he was “psychologically unsuited” to working nights and weekends. He subsequently replaced that letter with a notice of retirement. Having failed to ask for an accommodation, Complainant did not put Respondent on notice that he sought to engage in an interactive process about the terms of his employment. See MCAD Handicap Guidelines at VII. A (employer’s duty to provide a reasonable accommodation is triggered when employee identifies himself as a qualified handicapped person and requests reasonable accommodation unless employer knows or should know about handicap and need for an accommodation); Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443, 354 (2002) (an employee’s request for an accommodation triggers the employer’s obligation to participate in an interactive process).

Even if Complainant had requested an accommodation based on his purported heart condition, his insistence on one solution – a blank exclusion from call – prevented a true interactive process from taking place. Complainant made clear throughout the public hearing that the only accommodation he would have accepted was wholesale relief from

call. Neither the moonlighter system developed in 2000 nor the offer by a co-worker to cover Complainant's call during June of 2006 had any impact on Complainant's stance. In June of 2006, Complainant peremptorily resigned after noticing his name on a shadow call schedule. Clearly, Complainant was open to a single outcome and was not interested in an interactive process designed to fashion a reasonable result acceptable to both sides.

Based on the foregoing, I conclude that Respondent did not engage in disability discrimination when it placed Complainant back into the call rotation. Accordingly, Complainant's decision to resign rather than take call cannot be construed as a constructive discharge. See GTE Products Corp. v. Stewart, 421 Mass. 22, 35 (1995) (claim of constructive discharge does not arise when resignation is motivated by general dissatisfaction with the workplace for reasons that do not violate chapter 151B). Complainant charges that he was "forced to resign" in response to being told that there were no exceptions to on-call duty, but the facts establish that his decision to resign was premature and voluntary. Adverse working conditions must be unusually "aggravated" or "intolerable" in order to give rise to constructive discharge. See id. at 34 (constructive discharge requires showing that working conditions are so intolerable that a reasonable person would have felt compelled to resign). Unwillingness to compromise cannot be grounds for a claim of constructive discharge. See id.

#### IV. ORDER

The case is hereby 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 11th day of August, 2011.

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Betty E. Waxman, Esq.,  
Hearing Officer

