

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and LUZ MEDINA,  
Complainants

v.

Docket No. 08 SEM 02111

BAYSTATE HEALTH,  
Respondent

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For Complainant Medina: Randy J. Milou, Esq.  
For Respondent: Jay M. Presser, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 10, 2008, Luz Medina (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) against Respondent Baystate Health. Complainant alleges that she was subjected to discrimination on the basis of race/color, national origin, and disabilities when she was not selected for a vacant full-time position.

On September 30, 2009, the Commission issued a Probable Cause Finding. The Commission certified the case for public hearing on June 21, 2011.

A public hearing was held on November 14 and 15, 2011. At the hearing, the following individuals testified: Complainant, Frank C. Halloran, Stephen D. Faniel, Jennifer Curtis, and Robert Azeez. The parties submitted forty-six exhibits.

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 born in Puerto Rico. Her race and ethnicity are Hispanic and her first language is Spanish.
2. Respondent Baystate Health is an integrated health care system that consists of three hospitals and a number of primary care and specialty practices located throughout western Massachusetts. Baystate Health has approximately one hundred employees. Transcript I at 36.
3. In 1993, Complainant was hired by Alcoholism and Drug Services of Western Massachusetts, Inc. as a substance abuse counselor. In 1997, Respondent Baystate Health took over the program, offering inpatient detoxification services and an intensive outpatient program to patients suffering from drug and alcohol problems.
4. When Respondent took over the Alcoholism and Drug Services program, it hired Complainant as a substance abuse counselor. Complainant's job title was subsequently changed to case manager. Complainant's duties and hours remained the same as they had been at the Alcoholism and Drug Services program, i.e., 32-hours per week, Tuesday through Friday. Throughout her tenure with Respondent, Complainant continued to work the same schedule and continued to perform the same job duties.
5. Beginning in 2008, Complainant reported to Robert Azeez, supervisor of Respondent's substance abuse treatment services. Transcript II at 117. According to Azeez, Complainant worked in the inpatient detoxification unit which was staffed with five counselors on weekdays and two counselors on weekends. Transcript II at 119-120, 125-

126.

6. Complainant had been considered a full-time employee at Alcoholism and Drug Services of Western Massachusetts, Inc. and contributed the same amount for her health insurance as did 40-hour per week employees. As a 32-hour per week employee of Respondent, however, Complainant was considered part-time. She paid for her health insurance pursuant to a two-tier system in which employees who worked between 16 and 36 hours contributed a greater percentage of their health care costs than did employees who worked between 36 and 40 hours. Transcript II at 90-91.
7. In 2001, Complainant applied for, but was not selected for, a full-time substance abuse counseling position. The decision was made by then-Program Director James Leyden who left Respondent's employ two or three years later.
8. Complainant did not apply for any other positions until the May of 2008 position at issue in this case. She testified that she "wasn't interested" in applying for full-time jobs during that period because she thought she wouldn't get them. Transcript I at 89-90.
9. Respondent adheres to a time and attendance policy which imposes discipline for five or more "unplanned events" within a rolling a twelve-month period. Joint Exhibit 23. Unplanned events are defined as non-FMLA, unscheduled time off work. Transcript II at 44. Multiple consecutive days out of work are considered to be a single unplanned event. Joint Exhibit 23 at IV; Transcript I at 130, II at 44-45. FMLA-approved absences are not considered unplanned events as long as an employee with approved intermittent FMLA leave calls in to report the absence as FMLA leave. Transcript I at 129.
10. Discipline for non-attendance/non-tardiness matters is governed by Respondent's

disciplinary policy. Joint Exhibit 21. The levels of discipline are: verbal warning, written warning, final written warning, and termination. Id. In 2006, a violation of Respondent's confidentiality policy typically called for a final written warning for a first offense. Transcript II at 39; Joint Exhibit 21, p. 3. Patients must provide written consent in order to waive confidentiality restrictions. Transcript II at 136-137.

11. Respondent's performance evaluation system uses the following ratings to measure employee performance: "Inconsistent Contributor," "Proficient Contributor," and "Extraordinary Contributor." An employee who receives an overall Inconsistent Contributor rating is generally placed on a six-month development plan after which the employee is re-evaluated. Failure to improve to a satisfactory level, i.e., Proficient Contributor, generally results in termination.
12. Complainant had a variety of physical ailments and other issues which impacted her attendance, including migraine headaches beginning in adolescence, back pain beginning in 2000 or 2001 due to a herniated disc, and depression beginning around 2001. Transcript I at 32-33. Complainant also had to miss work, on occasion, to care for one of her sons who suffers from autism and pervasive developmental delay. Complainant informed Respondent Baystate Health of these matters. Transcript I at 35.
13. In 2004, Complainant received a verbal warning in connection with six unplanned events over an eight-month period. Joint Exhibit 27; Transcript I at 127. She thereafter requested and was granted intermittent FMLA leave for migraines, back pain, and the care of her son. Transcript I at 124-126.
14. Complainant never achieved an Extraordinary Contributor rating. In calendar year 2005, she received a Proficient Contributor rating. It was noted in that evaluation that

she had decreased her number of unplanned events from the previous evaluation.

Transcript I at 50.

15. In 2005, Complainant married Stephen Faniel. Since that time, Complainant has been covered under her husband's health insurance plan. Transcript I at 109. As a result of switching to family health care coverage, Faniel's insurance premium increased by approximately one hundred dollars per pay period. Transcript II at 20.
16. In calendar year 2006, Complainant was given an overall Inconsistent Contributor rating as a result of a Final Written Warning for failing to complete online educational competency requirements, for which she was placed on a six-month development plan, and an August 16, 2006 Final Written Warning for breaching confidentiality by allowing her son to attend a group therapy meeting at work without obtaining written releases from all of the participating clients in conformity with Respondent's Policy BH-HR 110. Joint Exhibits 6, 7, 21; Transcript I at 53-54, 137; II at 133-137, 164-169. Supervisor Azeez testified that he had previously warned Complainant in June of 2006 not to bring her son onto the detox unit of Respondent's facility. Transcript II at 142-143.
17. An employee who receives an Inconsistent Contributor rating is not generally allowed to apply for other positions within the organization until the issues identified as problems have been addressed. The waiting period typically lasts twelve months from the imposition of a warning. Transcript II at 51, 57, 169.
18. Complainant completed her online educational competency requirements in 2007 and was thereafter rated as Proficient in October of 2007 and again in March of 2008. Joint Exhibits 9 & 35; Transcript II at 167. Complainant had four unplanned events in calendar year 2007, the same as she had the previous calendar year. Transcript I at 51,

59. According to Complainant, she was getting migraine headaches almost every week in 2007, and during some of those episodes, she used intermittent FMLA leave.

Transcript I at 156.

19. In May of 2008, Respondent posted an internal job opening for a full-time substance abuse counselor position. Except for being full-time and requiring work on alternating weekends, the job was the same as the position occupied by Complainant. Transcript II at 209.
20. The job description and job posting reflect a preference for candidates with Bachelor's Degrees and a "strong preference" for candidates who speak Spanish. Joint Exhibits 11.
21. Respondent's Policy BH-HR-301, effective May 1, 2005, provides that in circumstances where job applicants are "qualified" in regard to posted requirements, have satisfactory job performance and appear to be "relatively equal" candidates, preferential consideration will be given in the following order to: 1) race or sex if such consideration "would help to correct a situation of under-utilization" and 2) length of service with Baystate. Joint Exhibit 12, p. 3; Transcript II at 84.
22. Respondent received five internal applicants for the position, including Complainant. All five applicants were interviewed by Program Supervisor Robert Azeez and Program Director Philip Day. Complainant and applicant Kim Aiken were the only candidates to receive a second interview.
23. The interviewers determined that Aiken, a caucasian female, was the best candidate for the position and that Complainant was the second best candidate. Transcript II at 52. Aiken has a college degree but is not bilingual. Complainant does not have a college degree but is a bilingual, Spanish-speaker.

24. At the public hearing, Azeez characterized Complainant as a “good” counselor and Aiken as a “superior” counselor in terms of paperwork, documentation, and treatment. Transcript II at 214, 218-219. He noted that Complainant had received prior discipline whereas Aiken had no disciplinary history. Transcript II at 163. Azeez expressed concern that Complainant had a significant number of absences in conjunction with non-FMLA, unplanned events. His concern was based on the following factors: 1) the full-time position in question required alternate weekend shifts, 2) during the weekends the residential detox unit only had two counselors on duty, 3) weekend absences required substitute coverage whereas weekday absences did not, and 4) the ability to locate substitute coverage for weekend shifts was difficult to arrange. Transcript I at 117, 121; II at 127-128, 130, 178-179, 216-217.
25. The number of unplanned events taken by an employee does not indicate the actual number of days that the employee is absent. Transcript II at 216-217.
26. According to Complainant, she sought the position of full-time substance abuse counselor because her husband was available on weekends to stay with their disabled son and she had waited a very long time to get full medical benefits. Transcript I at 61, 68.
27. Complainant testified that Program Supervisor Azeez told her that she wasn’t selected for the position because it would be difficult to find substitute coverage on the weekends if she were absent due to a migraine. Complainant testified that Program Director Day told her that she appeared to be in so much pain at times that she should be at home. Transcript I at 71-72.
28. Robert Azeez, testified that Respondent has other Spanish-speaking personnel who are

available on weekends such as bilingual counselor Nancy Arroyo, per diem employees, and individuals who can be hired on a contractual basis as interpreters. Transcript at 221-226. Azeez characterized bilingual capability as “helpful” and “important” but not essential. He estimated that staff members only needed to use bilingual skills approximately 15% of the time. Transcript II at 221.

29. Aiken started working for Respondent in 2000. She became a full-time Resident Assistant in November of 2000 and a full-time Counselor/Case Manager in 2006. Aiken’s 2008 performance evaluation states that she did a great job managing the detox unit on weekends. Joint Exhibit 46. The full-time Counselor/Case Manager position which Aiken attained in 2006 was one for which Complainant did not apply.
30. Immediately prior to receiving the contested position in 2008, Aiken was given an Extraordinary Contributor evaluation in March of 2008 which noted that she was an exemplary performer who did a great job coordinating psychiatric consults on the weekends. Joint Exhibit 46. Aiken had never been on a performance develop plan and had never received an evaluation below proficient. Transcript II at 170-171.
31. In January of 2007, supervisor Robert Azeez presented Complainant with a “Baystate’s Best” award for volunteering to change her schedule in order to assist a patient. Joint Exhibit 1; Transcript I at 84. Forms on which to nominate an employee for such recognition are available throughout Baystate’s facilities for completion by patients, staff, and colleagues who wish to recognize something “above and beyond” that an employee has done. Transcript II at 217-218.
32. Between May 1, 2007 and May 31, 2008, Complainant missed 178 hours on FMLA leave and another 241 hours (i.e., 30 days) for non-FMLA reasons, i.e., unplanned

events. Transcript II at 180; Joint Exhibit 38. According to Azeez, the number of days that Aiken was absent in conjunction with unplanned events was not “even close.”

Transcript II at 217.

33. In June of 2008, a few weeks after Complainant learned that she did not receive the contested position, she told Azeez that she was not feeling well and went out of work on a continuous, twelve-week FMLA leave beginning in July of 2008 followed by extended medical leave through 2009. Transcript I at 97-99; Joint Exhibit 36. In late July of 2008, Complainant filed for Social Security Disability benefits which were approved in January of 2009 retroactively to the date of application. Joint Exhibit 33; Transcript I at 29, 101. Complainant also applied for long-term disability benefits from Respondent based on lower back pain and migraine headaches. Joint Exhibits 20; 32. Complainants’ doctors supported her application with notes addressing her back and migraine conditions but the application for long-term disability was denied. Joint Exhibits 18, 20, 32.
34. Complainant testified that after she learned that she had not received the contested position, she became “tired of fighting” and felt “humiliated” and “beat.” Transcript I at 73. She said that she felt like she was “going to explode.” *Id.* at 74. She discussed her feelings with her primary care physician, Dr. Eugene Boss, who suggested that she go to therapy for stress and depression. Transcript I at 76. Complainant also spoke to her neurologist, Dr. Mohammad Hazratji.
35. Program Supervisor Azeez testified that at the end of June of 2008, he received a voice mail from Complainant stating that she was leaving her position because she “couldn’t take this anymore.” Transcript II at 184. Azeez and Director Day periodically

telephoned Complainant after that to inquire about her plans. When they were told that Complainant wasn't likely to return anytime soon, they filled her 32-hour a week position. Transcript II at 185-186.

36. After Complainant stopped working for Respondent, she began to spend large amounts of time in bed and did not seek other employment. Transcript I at 79, 100. There is no record, however, of Complainant seeking treatment for depression. Joint Exhibit 18; Transcript I at 171-172; 177-178.

37. In June of 2009, Complainant received an "Outstanding Achievement In Recovery Award" from the Western Massachusetts Substance Abuse Providers Association in recognition of her work with clients who have substance abuse problems. Joint Exhibit 1; Transcript I at 39.

### III. CONCLUSIONS OF LAW

#### A. Disparate Treatment Based on Race, Color and/or National Origin

In order to prevail on a charge of discrimination in employment based on race, color and/or national origin under M.G.L. c. 151B, s. 4(1), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace" and played a motivating part in the employment decision. Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) and at 670. Absent direct evidence, as is the situation here, Complainant may alternatively establish a prima facie case by showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory

manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not in the protected class(es). See Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

Complainant identifies herself as Hispanic, states that she was born in Puerto Rico, and describes her first language as Spanish. These factors qualify her as a member of protected classes based on race, color, and national origin. She performed her job in a satisfactory manner as evidenced by Supervisor Robert Azeez's characterization of her as a "good" substance abuse counselor, by her proficient rating in October of 2007, and by the fact that she was one of only two applicants interviewed in 2008 for the vacant full-time substance abuse counselor position. An adverse action occurred when she was not selected for the full-time position. The sole remaining question in regard to the elements of a *prima facie* case is whether Complainant was treated differently from caucasian candidate Kim Aiken based on Complainant's membership in one or more protected classes.

Complainant argues that she was subjected to a more rigorous standard of review than was Aiken. According to Complainant, she did not receive sufficient credit for her seniority and for her Spanish-speaking ability in accordance with Respondent's human resource guidelines. She alleges that Respondent applied less rigorous standards to Aiken, who had less seniority and did not speak Spanish. These assertions are sufficient to satisfy the final element of the *prima facie* case.

Once Complainant establishes a *prima facie* case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a

legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Respondent asserts that it selected Aiken over Complainant for legitimate, nondiscriminatory reasons relating to Aiken being a better counselor than Complainant, having a Bachelor's Degree, having a better record of attendance than Complainant (excluding FMLA-condoned absences), having no record of discipline, having no record of any development plans, and having superior employee evaluations. Respondent notes that just prior to her selection, Aiken received an "Extraordinary Contributor" evaluation which describes her as an exemplary performer who did a great job managing the detox unit and coordinating psychiatric consults on the weekends.

Supervisor Azeez acknowledged at the public hearing that Aiken did not speak Spanish, a skill which the job description and job posting list as a "strong preference," but he testified that Baystate Health has other Spanish-speaking personnel who were available on weekends, making bilingual capability "helpful" and "important" but not essential. As far as Company Policy BH-HR-301 mandating consideration of race, sex, and seniority is concerned, Respondent notes that such policy only comes into play if the candidates are "relatively equal." According to Respondent, race, sex, and seniority were irrelevant in this

case because the candidates were not “relatively equal.” In any event, the policy stipulates that consideration of race and sex only apply in situations of “under-utilization” of particular racial groups or of a particular sex and there is no evidence of such under-utilization in this case.

Turning to attendance, Complainant argues that the number of unplanned events she incurred prior to applying for the full-time position did not substantially exceed those incurred by Aiken. It is misleading, however, to compare the number of unplanned events accrued by each candidate since unplanned events vary in length. A single unplanned event may consist of only one day’s absence or it may consist of multiple days off. Rather than compare the number of unplanned events taken by each candidate, it is the total number of hours or days absent which determines the more reliable employee. In this regard, Aiken’s record was superior to Complainant’s. Between May 1, 2007 and May 31, 2008, Complainant missed 241 hours (i.e., 30 days) for non-FMLA reasons, i.e., unplanned events. According to supervisor Robert Azeez, the number of days that Aiken was absent in conjunction with unplanned events was not “even close.”

There can be no dispute that consideration of the candidates’ records regarding unplanned events was job-related. The full-time position in question required alternate weekend shifts. During such weekend shifts, the residential detox unit was staffed with only two counselors. Because of the minimal staffing on Saturdays and Sundays, absences by either of the two counselors necessitated substitute coverage whereas absences on the weekdays did not. Respondent presented credible evidence that locating such substitute weekend coverage was difficult to arrange. Accordingly, it was legitimate for Respondent to concern itself about the candidates’ attendance records in regard to unplanned events.

See Smith v. Bell Atlantic, 63 Mass. App. Ct. 702, 712-713 (2005) (whether attendance is an essential job function requires an individualized inquiry).<sup>1</sup>

Complainant, at stage three, attempted to show that Respondent's articulated reasons were invalid by emphasizing that her husband was available on weekends to care for their disabled son and arguing that her husband's availability reduced the need for her to take time off from work. Such availability, however, would not have diminished Complainant's need to take time off from work due to migraines and back pain and, thus, does not serve as an adequate rebuttal to Respondent's concerns. Accordingly, Complainant has failed to sustain her burden of proving that Respondents' adverse actions were the result of discriminatory animus based on race, color and/or national origin.

#### B. Disparate Treatment Based on Handicap

G. L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a handicapped person who is qualified to perform the essential functions of a job with or without a reasonable accommodation. A handicapped person is one who has an impairment which substantially limits one or more major life activities, has a record of impairment, or is regarded as being impaired. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) (“MCAD Handicap Guidelines”) at p. 2. See e.g., Anderson v. United Parcel Service, 32 MDLR 45 (2010) (bipolar disorder and depression held to substantially limit major life activities of sleeping, working, and interacting with others because such conditions cause insomnia, panic attacks, fatigue, lack

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<sup>1</sup> In contrast to its reliance on unplanned events, Respondent denies that it gave any consideration to Complainant's FMLA usage in evaluating her candidacy for a full-time counselor slot. Even if Respondent did consider FMLA usage, the evidence does not establish that it constituted an independent basis for non-selection.

of concentration, and suicidal ideation); Lagasse v. South Shore Hospital, 29 MDLR 157 (2007) (chronic or episodic disorders that are substantially limiting may constitute a handicap).

Complainant was disabled at the time she applied for the full-time counselor position in 2008 as a result of experiencing severe migraines and back pain. Both conditions independently qualified her for intermittent FMLA. Complainant was, nonetheless, capable of performing the essential functions of her part-time job with the accommodation of intermittent FMLA leave. Her ability to function as a contributing member of Respondent's workforce was recognized in several evaluations that characterize her as a valued and effective substance abuse counselor and as a "proficient" part-time employee. Respondent recognized her abilities, as well, by selecting her as one of the top two candidates for the full-time position.

In the absence of direct evidence of handicap discrimination as is the case here, Complainant must allege and provide evidence that she suffered an adverse employment action as a result of her disability which was not experienced by a similarly-situated, qualified person(s) not of her protected class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts). Complainant asserts that this occurred when she did not receive the full-time counselor position in 2008, allegedly due to disability-related absences. Such an assertion is sufficient to establish a *prima facie* case.

Once a *prima facie* case of discrimination is established, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate,

nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondents' adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Respondent presented credible evidence at stage two that it selected Aiken over Complainant because of Aiken's superior educational credentials, absence of discipline, impressive performance reviews, and superior attendance (discounting intermittent FMLA usage). At stage three, Complainant attempts to show that these reasons were a cover-up for a discriminatory concern about Complainant's handicap status, but I do not find this to be the case. Respondent had a legitimate basis for doubting Complainant's reliability based on her problematic attendance involving "unplanned events," i.e., non-FMLA leaves. Given the difficulty of obtaining substitute weekend coverage, reliable weekend attendance was an essential quality for the full-time counselor to possess and the lack of this quality would have posed an undue hardship for Respondent. *Compare* Thompson v. Department of Mental Health, 76 Mass. App. Ct. 586 (2010) (no handicap discrimination found where Complainant with Crohn's disease was denied accommodation of a four-hour work day because position was a supervisory one with responsibility to oversee eight to ten-hour shifts) *with* Smith v. Bell Atlantic, 63 Mass. App. Ct. 702, 712-713 (2005) (handicap discrimination found to exist where Complainant with post-polio syndrome was denied

permission to work at home even though evidence indicated that she could successfully do so) *and Demears v. City of Chicopee Highway Department*, 13 MDLR 1365 (1991) (handicap discrimination found to exist where Complainant with amputated foot was denied a promotion because record lacked any evidence that Complainant would have been hindered in his ability to handle a promotional position).

In sum, the evidentiary record demonstrates that Respondent had legitimate concerns about Complainant's ability to function as a reliable weekend employee as well as legitimate grounds for preferring Aiken over Complainant as a candidate for the full-time counselor position. I therefore conclude that Respondent's selection of Aiken over Complainant was for legitimate, job-related reasons and was not a cover-up for a discriminatory motive. Accordingly, the case must be dismissed.

#### IV. ORDER

For the aforementioned reasons, the complaint is 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 9th day of April, 2012.

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Betty E. Waxman, Esq.  
Hearing Officer

