THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. & GARY GILBERT,
Complainants

v.

DOCKET NO. 08-BEM-02196

EPIC ENTERPRISES, INC.,
WANDA J. BELANGER,
MCHAEL ZWICKER &
BRIAN RAND,
Respondents

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Appearances:
Jeffrey A. Gorlick, Esq. for the Complainant
Richard K. Muser, Esq. for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about July 21, 2008, Gary Gilbert filed a complaint with this Commission charging Respondent Epic Enterprises, Inc. with discrimination based on his disability, high blood pressure, in violation of M.G.L. c.151B §4¶4 and16. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on March 14 & 15, 2013. After careful consideration of the entire record before me and the post hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Epic Enterprises, Inc. ("Epic") cans and ships Pepsi Cola beverage products from its plant located in Ayer, Massachusetts. The plant consists of five connected warehouses with three assembly lines and two shifts running daily. The plant is shut down, cleaned and sanitized nightly. In 2008, Epic employed approximately 100 people, the majority of whom worked at assembly lines. As a "food plant," Epic must comply with both state and federal sanitary requirements. Epic is subject to unannounced FDA and state inspections at any time and that having an employee urinate on himself is a major concern because if such conduct was observed by an inspector, the plant could be shut down. (Testimony of Michael Zwicker)

2. Complainant Gary Gilbert resides in Shirley, MA and has worked for Epic for 27 years. Complainant has had hypertension for 10 years, for which he takes a prescription diuretic medication. Complainant also has cerebral palsy, which impacts his ability to walk.

3. Complainant operates a depallitizer ("depal") machine containing empty Pepsi cans. His job is to pick out and discard any dented and discolored empty cans from the machine before they are filled with soda. Complainant's machine is elevated off the plant floor and is accessible by stairs.

4. Respondent Wanda Belanger has worked for Respondent for 26 years and is the company's Human Resources Manager. She has a good working relationship with Complainant and had dealt with him on many occasions over the years.[1] (Testimony of Belanger; Testimony of Complainant)

[1] In approximately 1998 and 1999, due to mental health issues, Complainant was out on leave for nearly one year. (Ex. J-1) During this time, Belanger communicated with Complainant's mother with respect to Complainant's health insurance benefits and related matters. Between 2001 and 2003, Belanger was involved in disciplining Complainant, who received three written warnings for coming to work in a dirty uniform. (Exs. J-9; J-10; J-11)

5. Respondent Michael Zwicker has worked for Respondent for 37 years and has been its production supervisor for 27 years. He has been Complainant's supervisor throughout Complainant's employment.

6. Respondent Brian Rand has worked for Epic for 20 years and has been the assistant production supervisor since 1997. Rand is also a supervisor of Complainant.

7. Barbara Threadgould, a 25-year employee of Epic, currently works as a janitor. In 2008 she was a depal operator.

8. In 2008, Complainant worked a 5:45 a.m. to 2:30 p.m. shift, with a 15-minute break between 7:00 and 7:30 a.m. and a 30-minute lunch break at 11:00 a.m. During Complainant's scheduled breaks, someone was assigned to relieve him in order to keep the production line running. If Complainant needed to take an unscheduled break, he would page one of several co-workers over a PA system that was heard plant-wide. However, Complainant could also call Zwicker privately on the telephone if he needed relief. Because of the stairs and his difficulties walking, it took Complainant five to seven minutes to reach the nearest rest room.[2]

9. Employees were allowed to drink unlimited free soda during their breaks. Several witnesses testified credibly that Complainant drank numerous cans of Diet Pepsi daily and Complainant acknowledged he was a "Diet Pepsi-holic." Complainant stated that he drank only two cans of soda per day, but I do not credit his testimony. (Testimony of Complainant, Zwicker, and Belanger.)

10. Complainant testified that he often needed to take up to four additional breaks in a given day in order to use the bathroom.

11. On occasion, Complainant would request a replacement shortly after returning from his morning or lunch break and employees who replaced him complained to Zwicker that they

[2] The plant has since undergone renovations and there is now a bathroom closer to Complainant's station.

had no sooner finished covering for Complainant when they were called back to his station again. After Zwicker told Complainant's co-workers that they were obliged to relieve Complainant, their complaints ceased. Zwicker stated that company policy has always permitted employees to take breaks whenever needed. I credit his testimony. (Testimony of Zwicker)

12. Zwicker testified that around 2006 he had several private discussions with Complainant about taking excessive bathroom breaks and he told Complainant that if he reduced his soda consumption he would not have to go so often. Complainant told Zwicker that he would try to drink less soda and did not give Zwicker any other reasons for his frequent urination. I credit his testimony. Zwicker testified credibly and without contradiction that Complainant was always allowed to take any requested breaks, as were all employees of Respondent.

13. Complainant testified that Zwicker told him that he was paging too often and to use the phone instead of the pager. Complainant testified that after Zwicker talked to him about taking excessive breaks, he believed that Zwicker was keeping track of his breaks, causing him to resist calling for a substitute for fear of losing his job. However, it is undisputed that Zwicker never refused Complainant a break; he never disciplined Complainant for taking breaks and never threatened him with discipline or the loss of his job for taking too many breaks.

14. On Wednesday May 12, 2004, Zwicker learned that Threadgould had told Belanger that Complainant was "grossing everyone out" by grabbing himself and rocking back and forth as though he needed to use the bathroom. Zwicker told Threadgould to let him know the next time Complainant engaged in such conduct.

15. On May 21, 2004, Threadgould told Zwicker that Complainant was "at it again." Zwicker approached Complainant and asked him if there was an issue. After initially denying something was wrong, Complainant admitted that he needed to use the bathroom and he was

given a break. Zwicker reminded Complainant that he worked with open cans in a food plant and that he should call Zwicker for a substitute when he needed to go. (Testimony of Zwicker; Testimony of Belanger; Ex. J-2)

16. On Wednesday, December 28, 2005, Zwicker learned that Complainant was once again jumping around as if he had to go to the bathroom. As the line had shut down for unrelated reasons, Zwicker called Complainant into Belanger's office and observed that Complainant had wet his pants. Zwicker reiterated that Complainant should call him if he had to use the restroom and Zwicker would send a replacement. Zwicker testified that Complainant told him he did not call because he did not want to bother anybody. Zwicker told Complainant that such behavior in a food plant was "disgusting." Complainant testified that Zwicker and Belanger blamed his accident on his drinking soda and he agreed just to go along with them. Zwicker sent Complainant home for the day and informed him that another incident would result in three days off without pay, and after that, possible termination. (Testimony of Zwicker, Belanger, and Complainant; Ex. J-3)

17. On March 25, 2008, Complainant needed to use the rest room and paged a co-worker; however, before his replacement arrived, he wet his pants and was summonsed to Belanger's office where he met with Belanger and Brian Rand.[3]

18. At the March 25 meeting, Belanger told Complainant that working in a food plant required cleanliness and that he drank too much soda. Complainant testified he went along with Belanger and Rand when they blamed excessive soda drinking for his urinating in his pants and did not offer any other reason. Belanger told Complainant that he was a "grown man" and should be ashamed of himself and that he would be terminated if it happened again. Complainant was suspended for three days for this incident.

[3] Rand was in charge while Zwicker was on vacation.

19. Belanger testified credibly that on more than one occasion she asked Complainant whether there was another reason for his frequent urination besides his consumption of soda and Complainant said there was not.

20. On March 27, 2008, Complainant's brother Mark Gilbert called Belanger in an angry manner and questioned Respondents' disciplining Complainant. Belanger explained the company's position; however, according to her, Gilbert became threatening and demeaning and she discontinued the telephone call. (Testimony of Mark Gilbert and Belanger; Ex. J-5)

21. On March 31, 2008, Complainant provided Respondent with a letter from his primary care physician's office stating simply that Complainant was on a diuretic[4] for control of high blood pressure. (Ex. J-6) It is undisputed that Complainant did not tell Respondents about his treatment for high blood pressure until after his three-day suspension.

22. On April 9, 2008, Complainant saw an urologist for "urgency" and "frequency" of urination. On that date, the urologist wrote a note stating that Complainant "should have full and unlimited access to nearby restroom facilities." (Ex. J-7) Complainant provided the note to Respondents. Tests performed by the urologist on May 2, 2008 showed no underlying cause for Complainant's frequent urination.

23. After receiving the urologist's note, Belanger called his office to inquire as to what was expected of Respondent, because Complainant already had unlimited access to the restroom. The secretary told Belanger that she could not discuss Complainant without his permission. (Ex. C-3)

24. Since the incident of March 26, 2008, there have been no further incidents of Complainant urinating at work. He is allowed to take as many breaks as needed and on the advice of his sister, wears a pad in case of an accident.

[4] Enalapril

III. CONCLUSIONS OF LAW

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. Complainant asserts that he is a handicapped person within the meaning of M.G.L. c.151B because of hypertension.

Complainant alleges that Respondent discriminated against him based on his handicap in violation of G.L. c. 151B §4¶16 by failing to accommodate his need for frequent bathroom breaks and by creating a hostile work environment for him.

To establish a prima facie case of discrimination based upon Respondents' failure to accommodate his handicap, Complainant must demonstrate that he is a handicapped person within the meaning of the statute, that he is qualified for the position and is able to perform the essential functions of the job with reasonable accommodation, that he requested a reasonable accommodation and was prevented from performing his job because Respondent failed to reasonably accommodate his handicap. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1(1998).

Complainant was taking a prescribed diuretic for treatment of the hypertension. While there was no evidence that Complainant's high blood pressure was symptomatic, courts have ruled that the side effects of medication may render an individual disabled for purposes of the Americans with Disabilities Act (ADA), even though the underlying condition for which the medication was prescribed does not. See, e.g., Sulima v. Tobyhanna Army Depot, et al., 602 F.3d 177 (3rd Cir. 2010); Christian v. St. Anthony Medical Center, Inc., 117 F. 3d 105 (7th Cir. 1997.) ("If a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a

disability within the meaning of the Act") The medical evidence of record is scant in this case, and there is no medical document explicitly linking the prescription diuretic to Complainant's need for frequent urination. In addition to taking a prescription diuretic, Complainant consumed large quantities of Diet Pepsi, also a diuretic. However, assuming for the sake of argument that Complainant's use of a prescription diuretic resulted in frequent urination, a major life activity, one could reasonably conclude that he suffered from a handicap. Complainant would be a qualified handicapped person because he was capable of performing the essential functions of his job, with the accommodation of frequent bathroom breaks. See Sulima, supra.

Even assuming that Complainant is a qualified handicapped person, he cannot establish a prima facie case of discrimination, because Respondents did not know and could not reasonably have known that Complainant was being treated for hypertension and that the treatment was a cause of his frequent urination. Respondents reasonably believed that Complainant's drinking excessive amounts of soda and his hesitancy to call for a replacement were the direct cause of his wetting his pants. Complainant did not tell Respondents otherwise; on the contrary, he agreed with his supervisors that reducing his consumption of Diet Pepsi might decrease his need for frequent breaks. Finally, even if Complainant had identified a disability to Respondents and requested the accommodation of frequent bathroom breaks, Respondents were *already providing* Complainant with frequent bathroom breaks and continued to do so. Zwicker urged Complainant to immediately request a substitute when he needed to take a break and Respondents had never denied Complainant a break.

Complainant states that Zwicker's telling him he took too many breaks caused him to fear losing his job and thus he delayed requesting substitutes until he wet his pants. In addition, Complainant states that Respondents' disciplining him for conduct beyond his control was punitive and he argues that these actions by Respondents created a hostile work environment for him.[5] Complainant's arguments are unavailing. Even if Complainant perceived Zwicker's discussing excessive breaks as threatening and a three-day suspension as inappropriately punitive, Respondents did not know of Complainant's medical condition, and therefore could not have acted out of discriminatory animus toward his asserted handicap. Therefore, Complainant's hostile work environment claim based on his disability must also fail. Once it was made aware of Complainant's medical issues, Epic continued to accommodate Complainant's needs.

For the reasons stated above, I conclude that Respondents did not engage in unlawful discrimination based on handicap in violation of M.G.L.c.151B, §4¶4A[6] and16 and I conclude that the complaint in this matter shall be dismissed.

[5] In order to establish a claim of unlawful disability harassment Complainant must establish that (1) he is a handicapped person; (2) he was the target of speech or conduct based on his handicapped status; (3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondents knew or should have known of the harassment and failed to take prompt remedial action. MCAD and Kilroy v. Mass. Highway Dept., et al, 30 MDLR 69,73 (1998); MCAD and Helen Abrams v. Paddington's Place, et al, 26 MDLR 149,153-4 (2004) See Beldo v. University of Massachusetts Boston, 20 MDLR 105, 111 (1998).

[6] The complaint in this matter alleges a violation of c.151B§4(4A) but that claim was not asserted during the hearing or in the post-hearing brief.

IV. ORDER

For the reasons set forth in this decision, the complaint in this matter 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 10 days after the receipt of this Order and a Petition for Review within 30 days of receipt of this Order.

SO ORDERED, this 23rd day of July, 2013.

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JUDITH E. KAPLAN,
Hearing Officer