

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & MICHELE COSTA,
Complainants

v.

DOCKET NO. 09-BEM-00158

GABRIEL CARE, LLC.,
Respondent

Appearances:

Mary Ann Rousseau, Esq. for Michel Costa

David H. Stillman, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 20, 2009, Michele Costa filed a complaint with this Commission alleging that Respondent unlawfully terminated her employment on the basis of her disability, breast cancer and lymphedema. Complainant alleges that Respondent took adverse action against her in violation of M.G.L.c. 151B§4¶16 because of a perception that she was disabled and because she had a record of a disability. 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 November 19 & 20, 2013. After careful consideration of the entire record 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 Gabriel Care, LLC., located in Fall River, MA, provides nursing and social work services to recipients of a Medicaid funded adult foster care program. The program encourages independent living by paying caretakers to live with and care for patients in their homes. A requirement of the program is monthly home visits by a nurse and social worker to assess the well-being of the patient and caregiver. The nurses monitor patients' general health and ensure they are receiving appropriate medical care and that the caretaker is adequately caring for the patient. The nurses do not provide medical care.

2. Complainant Michele Costa is a registered nurse, who was initially diagnosed with breast cancer in 1996. Since that time she has had surgery in both breasts and developed lymphedema in her right arm. In 2008, Complainant continued to be monitored by physicians but her cancer was in remission and she required only follow-up medical appointments when she began working for Respondent. Complainant worked for Respondent from May 2008 until August 26, 2008 (Testimony of Complainant)

3. James Soule, who is a registered nurse, worked for Respondent from 2004 until October 1, 2008. Soule was hired as a caseworker and became director of the adult foster care program in 2006.

4. On May 13, 2008, Soule interviewed Complainant and hired her for the position of nurse clinician, which involved making home visits to patients and their care givers. Soule told Complainant that the position required the ability to walk up and down stairs but was not otherwise physically demanding and asked Complainant whether she had any restrictions that would prevent her from performing her tasks. Complainant told Soule that she was capable of performing all the aspects of the job. She also told him that she was a breast cancer survivor

who was not currently receiving treatment, but that she might need time off for doctors' appointments and possible surgery in the future. She also testified that she told Soule that because of lymphedema in her right arm, she would periodically have to rest her arm. (Testimony of Complainant; Testimony of Soule) Complainant also told co-workers that she was a breast cancer survivor.

5. Complainant's personal physicians and the patients to be assigned to her were located in the Boston area. Soule told Complainant that she would be a "good fit" for the position because Respondent's flexible schedule would allow her to arrange medical appointments around her patient visits. He testified credibly that Complainant told him that she had been treated unfairly by past employers because of her cancer.

6. Respondent employed approximately 18 people during the time Complainant was employed. For safety reasons, nurses and social workers who were making home visits during the work day were required to post their weekly schedules on the outside of their office doors so that Respondent would know their whereabouts at all times.

7. Nurses and social workers usually would come into the office in the morning before seeing patients and return to the office in the afternoon. On occasion, they would go directly to an early morning appointment from home, or would not return to the office in the evening if they had late appointments. Complainant worked 8:00 a.m. to 4:00 p.m.

8. As with all new hires, Complainant was required to undergo an orientation period where she shadowed nurses and social workers making home visits. Complainant testified that at first she shadowed Louise Jordan; thereafter, she sought out other co-workers, including nurses Tammy Freitas, Diane Pavao and Jim Soule, as well a social worker with whom she shared a caseload.

9. Those nurses whom she shadowed testified that Complainant appeared able to perform her duties with no restrictions. (Testimony of Freitas; Testimony of Jordan; Testimony of Soule; Testimony of Pavao)

10. Louise Jordan testified credibly that when Complainant shadowed her on a home visit, Complainant told the client that she was a breast cancer survivor and advised the client to see a surgeon about a breast lump, even though the client's condition was being monitored by a physician. Jordan later instructed Complainant not to give medical advice to a client whose condition was being followed by a physician. The client later told Jordan that she did not want Complainant to visit her again.

11. Soule testified credibly that a month into Complainant's employment, she asked for her own caseload. Soule stated that at the time Complainant's work appeared to be satisfactory and he assigned her a caseload on or about July 1, 2008.

12. Soule testified credibly that as soon as Complainant was allowed to work independently, she began complaining to staff that Soule had not adequately trained her.

13. Freitas testified credibly that she once overheard Complainant cancel two patient home visits and then offer to shadow a social worker, stating that she was bored sitting around the office. I credit her testimony.

14. Soule testified credibly that a patient called him several times to complain that Complainant had cancelled home visits with her. Soule stated that repeat cancellations were not only problematic for patients, but that Respondent would not be in compliance with requirements of the program if a patient were not seen by a nurse or case manager in over a month.

15. Soule testified that Complainant argued loudly with co-workers in a demeaning manner and complained to staff about Soule, which caused disruptions in the workplace. Complainant denied engaging in such behavior, but I credit Soule's testimony over her denials.

16. Soule testified credibly that he called Complainant into his office on several occasions in order to discuss her inappropriate conduct. When Complainant's behavior did not improve, Soule began to document their discussions in writing.

17. On July 29, 2008, Soule met with Complainant and told her that her defensive and passive aggressive behavior could create a "hostile work environment" for her co-workers. Complainant did not deny her behavior, but claimed that co-workers attacked her. Soule told Complainant that they could all work on better communication, but that she had to work with all staff and the fact that she perceived her co-workers to be behaving badly was no excuse for lowering her own professional standards. Soule documented this meeting in writing. (Testimony of Soule; Ex. R-2) I credit his testimony.

18. On August 11, 2008, Soule again met with Complainant and memorialized their discussion in writing. Soule praised Complainant's clinical and assessment skills, but noted that at times she lacked concentration and talked and laughed loudly, which was distracting to co-workers. He advised her that while her schedule allowed for time off between patient visits, Complainant was still required to account for her time. He criticized her decision to ride along with co-workers simply to get out of the office as unacceptable. Complainant told Soule that her behavior was partially due to her medical condition. Soule responded that he would support and approve any time off required for medical reasons, but that Complainant needed to conduct herself in an appropriate manner while at work. (Testimony of Soule; Ex. R-3)

19. Soule testified that on or about August 15, 2008, the office manager informed him that there was an inconsistency in Complainant's July mileage reimbursement form. The total number of miles for which she sought reimbursement exceeded the sum of her individual mileage entries by 250. Soule met with Complainant to discuss the matter. Complainant explained that she had made a math error and Soule accepted her explanation at face value. (Testimony of Soule; Ex. R-3)

20. Soule testified that on Thursday, August 21, 2008 Complainant called him at 12:30 p.m. to report that her scheduled client had cancelled their home visit and that after obtaining some work-related information for Soule, Complainant was going eat lunch and then return to the office. Soule testified that he was skeptical about the purported cancellation given Complainant's pattern of missing or cancelling appointments and not completing her work. Soule documented his concerns in writing. (Testimony of Soule; Ex. R-5)

21. Complainant testified that on Friday, August 22, 2008, Soule met with her and told her that he was terminating her employment because of concerns about her health. According to Complainant, when she responded that Soule could not terminate her for that reason, Soule offered her two weeks' severance, which she declined. I do not credit Complainant's testimony regarding Soule's stated reasons for terminating her employment.

22. Soule denied telling Complainant that he was terminating her employment for health reasons and stated that he knew of no health issue that prevented Complainant from performing her duties. He testified credibly that on August 22 he told Complainant he was terminating her employment because of the mileage issue, her unacceptable office behavior, and for deficient performance. He stated that Complainant asked him not to terminate her employment and he agreed to rescind her termination and give her another chance to further discuss his concerns.

(Testimony of Soule) I credit Soule's testimony about the nature and substance of this discussion.

23. Complainant testified that she worked on the following Monday, August 25. Soule testified that he not did see Complainant that day and that she was either absent or out making home visits. He acknowledged that, contrary to his deposition testimony, Complainant's absence from the office on August 25 was not a reason for her termination.

24. On the same day, August 25, Soule took notes of conversations with staff members. A nurse told him that Complainant had spoken to her in a demeaning manner. Freitas reported that Complainant told her she was going to seek legal action against Soule for reasons unknown, and Complainant accused co-workers of "reporting her." Another nurse told Soule that Complainant asked for training from her because she had not received adequate training. (Testimony of Soule; Ex. R-4) Soule also testified credibly that staff told him that Complainant did not want to drive alone to Boston, although her patients were located in the Boston area.

25. Soule testified that he re-examined Complainant's mileage reimbursement forms to see if they reflected her work schedule and co-workers' schedules and discovered that Complainant had sought mileage reimbursement for visits to patients that she had not actually made and for visits when a co-worker had driven and Complainant had incurred no actual cost. I credit his testimony.

26. On Tuesday, August 26, 2008, Soule called Complainant into his office, told her that things weren't working out and handed her a notice which stated her employment was terminated for her falsifying mileage reports, for creating a "hostile work environment" for other employees and for "staff splitting." Soule testified that he terminated Complainant for several reasons, including the falsified mileage report. (Ex. R-6) Complainant denied falsifying the mileage

report and stated that she had merely made a math error. I credit Soule's testimony that he terminated Complainant's employment because of unacceptable office behavior and concerns about whether she was performing her job. I credit his testimony that falsification of Complainant's mileage report was a factor in his decision.

27. Diane Roy, who works as nurse case manager for Respondent testified that in 2005, she fell and injured her ankle and foot, and required surgery and a period of rehabilitation. Respondent held Roy's job open for her for several months and allowed her to return gradually to full duty; initially she did only office paper work, then she progressed to visiting only patients living on the first floor until she was able to climb stairs and see patients on upper floors. (Testimony of Roy) I credit her testimony.

28. Freitas testified that she has breast cancer and Respondent has been very supportive and has allowed her time off for treatments and doctors' visits. (Testimony of Freitas) I credit her testimony.

29. Several nurse case managers testified that Soule was an excellent manager, who was fair, respectful, easy to talk to and very approachable. (Testimony of Diane Pavao; testimony of Roy; testimony of Jordan, testimony of Freitas) I credit their testimony.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, §4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation. 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. Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination in the Basis of Handicap-Chapter 151B at 7; Rapoza v. Ocean Spray, 21 MDLR 43(1999). Complainant alleges that Respondent terminated her employment because it perceived her as handicapped and because she has a history of breast cancer and related side-effects.

Complainant may establish a prima facie claim of handicap discrimination by showing that she (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by her employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on her disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998).

Complainant has established that she is a handicapped person within the meaning of the statute based on her history of breast cancer. Respondent was aware of Complainant's history of breast cancer and hired her with the understanding that the program's flexible schedule would permit her to arrange medical appointments around her home visits. Complainant suffered an adverse employment action when Respondent terminated her employment after a brief period of a few months. However, I conclude that Complainant has failed to establish a prima facie case of handicap discrimination because she did not prove that she was adequately performing her job and there are no circumstances to suggest that the decision to terminate her employment was based on her disability.

Assuming, nonetheless, that Complainant was able to establish a prima facie case of discrimination based on handicap, in a disparate treatment case, where there is no direct evidence of discrimination, the Commission employs a three-stage burden of proof. Abramian v. Pres. & Fellows of Harvard College, 432 Mass. 107, 116 (2000). Once the Complainant articulates a prima facie case, Respondent must then articulate a legitimate non-discriminatory reason for its actions, supported by credible evidence. Id. at 116-117. The employer's burden is one of production and the burden of proof on the ultimate issue of discrimination remains with the Complainant. Wheelock College v. MCAD, 371 Mass. 130, 139 (1976).

Respondent has articulated several legitimate, non-discriminatory reasons for terminating Complainant's employment. Respondent asserts that Complainant engaged in unacceptably divisive conduct in the workplace, including arguing with co-workers, complaining about them, and treating them in a condescending and demeaning manner, rather than focusing on her work. Respondent also asserts that Complainant repeatedly failed to schedule patient visits and canceled patient visits, potentially jeopardizing patients' health and risking Respondent's non-compliance with the foster care program. Respondent also stated that Complainant falsified a mileage reimbursement report. I conclude that Respondent has articulated legitimate, non-discriminatory reasons for Complainant's termination.

Once the employer has articulated a legitimate non-discriminatory reason for its actions, the Complainant must prove that the employer's stated reason or reasons are a pretext for discrimination. Abramian, 432 Mass. at 117. The employee may meet this burden by proving that the employer acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Co., 434 Mass 493, 504 (2001). A fact finder may, but need not, draw the inference that an employer is covering up discriminatory intent, motive or state of mind if one or more of the

reasons identified by the employer is false. Lipchitz, supra at 507. The employee need not disprove all of the non-discriminatory reasons proffered by the employer, but need only prove that “discriminatory animus was a material and important ingredient in the decision making calculus.” Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

Complainant contends that Respondent’s failure to provide her with a written warning prior to her termination is evidence of pretext. I disagree. Complainant was counseled on her office behavior on numerous occasions prior to her termination and Complainant has not convinced me that she was not on notice that Respondent had concerns about her conduct in the office and her failure to keep scheduled appointments. Given these circumstances, the failure to provide a written warning was not evidence of pretext. Complainant also identifies as evidence of pretext Respondent’s assertion that Complainant’s travel reimbursement form was fraudulent. I do not concur with Complainant that Respondent’s allegation in this regard is pretextual. The form contained an obvious math error in her favor. After confronting Complainant about the discrepancy, Soule took it at face value. After his initial termination of Complainant on August 22, which he rescinded, upon further examination Soule determined that Complainant’s travel reimbursement form contained not simply a significant math error but contained fraudulent entries. I conclude that, in view of Soule’s credible testimony regarding Complainant’s failure to complete her requisite home visits, his further examination of the form was reasonable and was a legitimate, non-discriminatory reason for terminating Complainant’s employment.

As noted above, a fact finder may, but need not, draw the inference that an employer is covering up a discriminatory intent, motive or state of mind if one or more of the reasons identified by the employer is false. Lipchitz supra at 507. Complainant must still prove that

“discriminatory animus was a material and important ingredient in the decision making calculus.” Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

I conclude that Complainant failed to prove that discriminatory animus was a “material and important ingredient” in the decision to terminate her employment. Respondent established by credible evidence that Complainant caused disruption and divisiveness in the office, that she cancelled patient visits or failed to visit patients, that on at least one occasion she cancelled a patient visit and then asked to accompany a co-worker on a visit because she was bored. Soule testified credibly that he doubted Complainant was giving an accurate accounting of her time when she was out on the road. When Complainant later asserted that her behavior was due in part to her medical condition, Soule reiterated that Complainant could take time off as needed for her medical issues, but that when at work she had to adhere to the rules. Complainant’s assertion is not credible because there is no evidence that her history of breast cancer affected in any way her ability to do the job; she did not request time off or suggest any other means of accommodation that she might need. The credible evidence is that Respondent terminated Complainant’s employment because of her disruption of the workplace and her failure to perform her job duties as required as demonstrated by her cancelling patient appointments and failing to visit patients pursuant to a designated schedule as well as her falsification of a travel reimbursement form.

It is also significant that Respondent hired Complainant with full knowledge of her history of breast cancer, and emphasized at the time that the program’s flexibility would facilitate Complainant’s scheduling of her medical appointments. When Complainant later suggested that her behavior in the work place was due in part to her health condition, Respondent

reiterated its willingness to accommodate her health issues by providing time off. Moreover, Respondent has a record of accommodating employees' handicaps, allowing a nurse time off and light duty to recover from a leg injury and currently accommodating an employee with breast cancer. Respondent's history of accommodating employees' health issues and its willingness to hire Complainant despite her history are factors that further support its position that did not discriminate against Complainant. I find it highly improbable that the individual who hired Complainant with full knowledge of her medical history and condition would terminate her employment three months later absent any evidence that her record of disability or then current state of health interfered with her ability to do the job. The facts and circumstances do not indicate that Respondent's decision to terminate Complainant's employment was motivated by discriminatory animus. I therefore conclude that Respondent did not engage in unlawful handicap discrimination in violation of c. 151B and order that the complaint in this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 23rd day of July 2014.

Judith E. Kaplan,
Hearing Officer