THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
RAMON DIAZ,
Complainants

v. DOCKET NO. 14-BEM-01848

ACE METAL
FINISHING, INC.,
Respondent

Appearances:
John I. Tarshi, Esq. & Jessica L. Edwards, Esq. for Ramon Diaz
Kyle J. Scandore, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 30, 2014, Complainant Ramon Diaz filed a complaint with this Commission charging Respondent Ace Metal Finishing, Inc. with discrimination on the basis of disability. Complainant alleges that Respondent terminated his employment upon his return from a medical leave of absence, in violation of M.G.L.c.151B, sec. 4(16). 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 April 12, 2016. [1] 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.

[1] A Spanish translator, William Estrada, was provided for Complainant during the public hearing.

II. FINDINGS OF FACT

1. Complainant, Ramon Diaz resides in Lawrence, Massachusetts. In 1995, he was hired as an electroplater[2] by a company in Lawrence that was Respondent's predecessor. The work required Complainant to work with metals and chemicals while standing at a production line. (T. 14-16)

2. In June 2006, Complainant sustained burns on his legs in a work-related chemical spill. He was treated for the resulting blisters and swelling and developed ulcers on his legs for which he required medical treatment. From 2006 to 2013, Complainant received intermittent treatment for his leg wounds, while continuing to work as an electroplater. (T. 18-20; 21-22)

3. In 2008, James Coskren purchased the company and renamed it Ace Metal Finishing, Inc.[3] ("Respondent") Respondent employed approximately 40 people in January 2014. Coskren is also the owner of C. I. L. Metal Finishing, which has contracts to perform electroplating functions for the aerospace and defense industries. The two companies are located within miles of each other in Lawrence MA.

4. Complainant worked with silver, copper flat, general chroming and brass nickel on the commercial line both before and after the company changed ownership in 2008. (T. 15-16; 20-21)

5. Melissa McKallagat has worked at Respondent and its predecessors since 1997. She became office manager when Respondent took over in 2008. She performed HR functions, such as handling vacation and leave requests and insurance matters.

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[2] Electroplating is a bonding of a layer of metal to a surface using chemicals and electric current on a production line.

[3] Respondent is now named C. I. L. Electroplating. For purposes of the public hearing the Respondent was referred to as Ace Metal Finishing.

6. Coskren testified that when Respondent took over, the predecessor company's production lines were used primarily for the manufacture of telecommunications components, an industry that was declining in the U.S. as manufacturing has moved overseas. Coskren testified credibly that this type of electroplating was repetitive, built on unwritten rules and common knowledge and did not require skills in reading and writing English. (T. 99)

7. Coskren planned to convert Respondent into a facility that serviced the aerospace and defense industry and was accredited by the National Aerospace and Defense Contractors Accreditation Program ("NADCAP") similar to his other company. NADCAP is composed of representatives of major defense and aerospace companies.

8. Coskren testified credibly that because mistakes in the production of aerospace and defense components could result in failure in the field and potential loss of life, achieving and maintaining NADCAP accreditation requires strict adherence to guidelines and thorough documentation.[4] Timers are calibrated by an outside agency, statistical process control is used to monitor chemistry, temperatures must be recorded and records maintained for a minimum of seven years. The ability to read and write English is vital to NADCAP certified work because each job has a router that contains information specific to that job. NADCAP performs physical and paperwork audits whereby its auditors identify and examine, at random, jobs from Respondent's files. (T. 106-107)

9. Upon acquisition and formation of Respondent, Coskren began refurbishing the plant to create an infrastructure that would pass an audit by NADCAP accreditors.

10. By approximately 2011, Respondent was operating a "small line" and a "large line," so-called because of the relative sizes of their process tanks. The small line had become

[4] Coskren gave an example of why such accreditation is necessary, stating that while an error in regular electroplating might result in a cellphone not working, an error in the process of electroplating a bolt for a military helicopter could result in a fatal crash

NADCAP accredited and the large line was commercial. Ultimately, Respondent planned to convert the large line to a NADCAP line. (T. 108-109)

11. In 2011, Complainant worked on the large, commercial line with two other electroplaters.

12. On June 22, 2012, Complainant received a written warning for failure to observe work procedures thereby creating excessive scrap metal. McKallagat testified that the warning was presented to Complainant by his supervisor and the general manager. The warning stated: "After numerous verbal warnings Ramon Diaz has warranted a written warning for creating scrap/Damage to customer's parts. If Ramon continues to do so After [sic] he is retrained we will take a far more drastic approach to discipline. These results may be termination." (T. 114-117; Ex. R-1)

13. Complainant claimed that the warning form was blank when he received it and he signed it only to go along with company policy. He also claimed that co-workers were responsible for the error but he was falsely blamed. I do not credit his testimony. He acknowledged that the warning was translated into Spanish when he received it and I find that Complainant understood and signed a completed warning. (T. 50-53)

14. Complainant testified that in July 2013, the leg wounds from his 2006 work injury became infected and extremely painful. Complainant's physician recommended that he remain out of work in order to undergo treatment. On July 22, 2013, Complainant's physician wrote that he "should stay out of work until medically cleared." On August 20, 2013, Complainant's vascular surgeon wrote that Complainant had been under his care since July 15, 2013 for bilateral leg wounds and "is unable to work until medically cleared." Complainant provided the

letters to McKallagat. (T. 34; 38; Exs. C-10; C-11) During his leave, Complainant received intravenous antibiotics and other treatments for his infections.[5] (T. 40-42; Ex. C-13)

15. McKallagat testified that she processed Complainant's request for an open-ended leave of absence. She testified that for the first couple of months Complainant and/or his wife visited the plant regularly and indicated his intent to return to work. He also received short-term disability benefits for several weeks through an insurance company policy offered by Respondent. (T. 117-118; 138-140)

16. McKallagat testified that during Complainant's leave, Respondent continued to pay his health insurance premiums, for which Complainant reimbursed Respondent. McKallagat stated that at some point Complainant stopped paying the premiums and came by the plant less frequently. Toward the end of Complainant's leave, her discussions with Complainant and his wife related primarily to the insurance payments he owed to Respondent. (T. 137-138)

17. On January 22, 2014, after six months of leave, Complainant's physician cleared him to return to work without restriction. (T. 39: Ex. C-12) Complainant testified that he called his supervisor that day to say that he was returning to work and the supervisor responded, "That's good for you and good for me because we're busy here at the factory." (T. 49-50) I do not credit Complainant's testimony regarding this phone call as it directly contradicts Complainant's testimony below that when he showed up at work his supervisor was not expecting him and he was sent home.

18. Complainant testified that on January 22, 2014 when he reported to work at 6:30 a.m., his supervisor asked him why he was there. When Complainant responded that he was returning to work, his supervisor told him to go home. Instead, Complainant said he would wait

[5] The extent of Complainant's treatment is unknown because of the paucity of medical records and Complainant's very limited testimony regarding his course of treatment.

in the cafeteria for McKallagat and would give her the doctor's note. The supervisor then approached him in the cafeteria, took the doctor's note, sent him home, and told him to return in February. (T. 21-24)

19. Complainant went home and had his wife call McKallagat. On Friday, January 24, McKallagat called Complainant's wife to say that Complainant had been laid off and could pick up a lay-off notice in order to collect unemployment benefits. Complainant retrieved the notice and his personal belongings that same day. (T. 46-47)

20. Coskren testified credibly that Respondent lost money in 2012 and 2013, particularly on the large line. He stated that the revenue generated from work on the large line fell 25% from 2012 to 2013, representing a decrease from $891,000 to $661,000. (Ex.R-2) In late 2013, he asked his production managers to evaluate the employees in order to make decisions regarding lay-offs and other ways to reduce costs. According to Coskren, the managers rated the three large line electroplaters' skills with respect to the metal finishes on which they worked. He stated that Complainant received the lowest rating for his skills at electroplating silver, a significant portion of the large line sales and, unlike the two other large line electroplaters, Complainant had received a written warning. For these reasons, Complainant was recommended for lay-off. (T. 108-110)

21. When Complainant sought to return to work the two remaining electroplaters on the large line were working primarily with silver. Coskren testified that Respondent had already begun dismantling the large line in preparation for converting it to a NADCAP line. The section of the line and the finish that Complainant had been working on prior to his leave had already been removed, the job had been eliminated and Respondent was preparing to lay Complainant off. (T. 92- 96) I credit his testimony

22. Coskren denied targeting Complainant for lay-off because of his disability or because he had been out on a medical leave. He testified that in January 2014, he was managing the day-to-day operation of his other company and was unaware that Complainant was out of the workplace until he filed his MCAD complaint. (T. 108-109) I credit Coskren's testimony that Complainant was not targeted for lay-off because of his disability or because he had been out on leave. However, I do not credit Coskren's testimony that in January 2014 he did not know Complainant was on leave. It is inconsistent with his testimony that he had his managers rate all employees in late 2013 and I find it unlikely they would not have informed him at that time that Complainant had been out of work.

23. McKallagat testified that Respondent was uncertain about whether Complainant was going to return to work, because he never provided an estimated return to work date. McKallagat did not know that Complainant had been medically cleared to return to work until he showed up at work in January. At that time, Respondent did not have anywhere to place Complainant, because the job he had been performing prior to his leave had been eliminated and that portion of the large line had been dismantled. (T. 119-120) I credit her testimony.

24. On February 3, 2014, Respondent decreased the pay of the two remaining electroplaters on the large line. [6] At the same time, Respondent's general manager was laid off. (Testimony of Coskren: Exs. R-3; R-4; R-5)

25. While Complainant was on leave, Respondent started a new, automated zinc line,[7] and moved an electroplater from the NADCAP line to that zinc line. For a time, that electroplater ran both the zinc line and worked on the NADCAP line. When business increased, in April 2014, Respondent kept that electroplater on the zinc line full time and then hired an

[6] Both continued to work in their same positions as of the public hearing.
[7] The record did not reflect exactly when the zinc line started and whether it was on the large line.

experienced electroplater for a specific aerospace contract to replace him on the NADCAP line. (Testimony of Coskren at 82-83; Testimony of McKallagat at 121-122)

26. Coskren testified credibly that Complainant was not qualified to work on the NADCAP line because the job required fluency in reading and writing English that Complainant did not possess. McKallagat testified that Complainant would have needed training to work on the automated zinc line and did not believe he was qualified to do so. (T. 123-124)

III. CONCLUSIONS OF LAW

In order to establish a prima facie case of termination of employment based on disability, Complainant must establish that he is handicapped within the meaning of the statute; that he is capable of performing the essential functions of the job with or without a reasonable accommodation; that he was terminated or otherwise subjected to an adverse action by his employer, and the adverse action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998).

Complainant established a prima facie case of unlawful termination on the basis of disability or perceived disability. He suffered long-standing injury to his legs as the result of an industrial accident in 2006. In 2013, his sores became infected and painful and he was out on a medical leave for six months. During his leave, Complainant received short-term disability benefits through an insurance company policy offered by Respondent and his health insurance premiums were continued by Respondent. After six months he was deemed medically able to return to work without restriction. However, when he appeared at Respondent seeking to return to work with his physician's clearance for work letter, he was sent home and told he was laid off. Respondent hired an electroplater three months after Complainant was laid off.

Once Complainant has established a prima facie case of discrimination, Respondent may articulate legitimate, non-discriminatory reasons for its action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000).[8] Respondent denied that Complainant's disability was a factor in its decision to terminate his employment and stated that Complainant was terminated because of a decline in Respondent's revenue that resulted in a reduction in salary of the remaining two electroplaters performing work similar to Complainant and the lay-off of Respondent's general manager. In addition, the changes in Respondent's business model and its ongoing conversion to NADCAP electroplating resulted in the elimination of the type of electroplating Complainant had been performing and the physical dismantling of the part of the line he was working on. Complainant's poor performance relative to the two remaining electroplaters who performed the type of work he had performed and Complainant's lack of qualifications for the more complex position of NADCAP electroplater were also significant factors contributing to his lay-off. Respondent has thus met its burden of articulating legitimate, nondiscriminatory reasons for its actions.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. A fact finder may, but need not, infer 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 are false. Lipchitz v. Raytheon Company, 434 Mass. 493, 498, 507 (2001). The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, only that "discriminatory animus was a material and important ingredient in the decision making

[8] Complainant also argues that he was denied a reasonable accommodation and that Respondent should have offered him training, another position or other accommodations. I do not agree. Complainant's physician cleared him to return to work without restriction and he neither requested nor required an accommodation to his disabilities. I conclude that Complainant fails to make out a prima facie case based on failure to accommodate a disability.

calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003). Complainant argues that Respondent's retaining two employees who performed Complainant's job, albeit with a pay cut, and hiring an additional employee after Complainant's termination after claiming it had no available work for Complainant, undercut Respondent's purported non-discriminatory reasons for terminating Complainant's employment and are evidence of pretext.

Complainant has not proved that Respondent's reasons for laying him off upon return from his leave were a pretext for discrimination on the basis of his disability. There is no evidence that Respondent perceived Complainant as a liability or as unable to perform the job because of his medical treatment. He was not denied a medical leave or disability insurance benefits. Respondent's failure to notify Complainant of his lay-off prior to his attempted return to work suggests that Respondent had not yet made the final determination to lay him off or was hopeful that it might not need to do so since it was unclear that he would ever return to work. The former might suggest that Respondent's purported evaluation of Complainant's performance was an ex post facto justification for terminating his employment. However, I conclude that the latter scenario is more likely, and Respondent assumed that, after being out of work for six months, Complainant was not returning and was taken by surprise when Complainant appeared at the plant with a clearance for work letter from his physician. Having been caught off-guard and unprepared for his return, Respondent then made the determination to lay him off for legitimate reasons relating to its finances and change in business model. I conclude that the credible and uncontested evidence supports Respondent's allegations that the work Complainant was performing prior to his medical leave had been substantially eliminated and that portion of the large line on which he had worked had been dismantled. Further, it was uncontested that

Respondent's revenue had declined significantly, causing Respondent to cut the wages of the two remaining large line electroplaters and to lay off Respondent's general manager.

Further, Respondent testified credibly that an electroplater hired in April 2014 had experience with NADCAP work and with the client on the NADCAP project and was proficient in English. I conclude that Respondent justifiably believed Complainant was not capable of performing the more advanced and complex work on the NADCAP line which required a higher degree of skill, attention to detail and record keeping, and that Complainant lacked the requisite language and electroplating skills to perform this work. Thus, while Respondent's decision to lay-off Complainant appears to have been precipitated by his seeking to return to work, Complainant has failed to establish that the business decisions resulting in the substantial elimination of the type of work he performed and Respondent's view that he lacked the requisite skills to perform electroplating on the NADCAP line were motivated by discriminatory animus. Instead, these decisions were consistent with Respondent's long-standing business plan to convert the entire operation to NADCAP accredited electroplating, a position for which Complainant was not qualified. Therefore, I conclude that Complainant has failed to establish that Respondent's actions were a pretext for unlawful discrimination of M.G.L.c.151B, sec. 4(16).

IV. ORDER

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

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 5th day of October 2016.

Judith E. Kaplan

JUDITH E. KAPLAN,
Hearing Officer