

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DOROTHEA CODINHA

Complainants

v.

DOCKET NO. 15-BEM-00248

BEAR HILL NURSING CENTER, INC.

Respondent

Appearances: Cheri L. Crow, Esq. for Complainant
Joseph B. Bertrand, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 5, 2015, Complainant, Dorothea Codinha, filed a complaint against her former employer, Respondent, Bear Hill Nursing Center, Inc., alleging that she had been terminated from her employment as a Certified Nursing Assistant (CNA) because of her age and disability, after she took a medical leave of absence to recover from an injury. Respondent asserted that Complainant was not permitted to return to work after her leave of absence for performance related reasons, primarily her attitude toward the work and her co-workers. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. A public hearing was held before the undersigned hearing officer on September 12 and 13, 2016. The parties submitted post-hearing briefs in

January 2017. Based on all the credible evidence that I find to be relevant to the issues in dispute and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Respondent, Bear Hill Nursing Home, Inc. is a Massachusetts Corporation located in Stoneham, MA engaged in the business of providing long and short term care and rehabilitation to approximately 170 patients. Respondent has more than 50 employees and is an employer within the meaning of G.L. c. 151B.

2. At all times relevant to this matter, William Ring, Jr. was the Administrator of Respondent. Ring has been a licensed nursing home administrator for forty years and, as of the hearing, he had been Respondent's Administrator for 23 years. Margaret Archidiacono was Respondent's Director of Nursing. She has managed the nursing department at Respondent, including the certified nursing assistants, since 1994. Respondent employs approximately 50 nurses and 94 certified nursing assistants who work on four units at the facility. Each unit has a nursing supervisor, a charge nurse, a medicine and treatment nurse, and CNAs.

3. Complainant was born in 1942 and became a licensed CNA in 1996. She began working at Respondent as a CNA in May of 1996. She worked full-time until 2007 when at age 65 she went to 32 hours per week and two years later, reduced her schedule to 24 hours per week. She worked the day shift 3 days per week from 7:00 a.m. to 3:30 p.m. on the Arbor Hill Unit.¹ As a CNA complainant's duties were to provide assistance and personal care to patients with bathing, dressing, toileting, meals, personal grooming and ambulation. Complainant received favorable annual evaluations with comments such as "competent, geriatric care giver," (Ex. 11- 2013 review) "works well with others," "dedicated and responsible," "consistently

¹ Arbor Hill is the least difficult unit in terms of the level of patient care required.

patient and kind to the residents in her care.” (Ex. 10- 2012 review), “always quick to assist the patients and her charge nurse.” (Ex. 1- 2010 review) Complainant testified that she had minimal contact with Ring and Archidiacono.

4. In late November of 2013, Complainant tripped and fell at home and broke her wrist. She was unable to work as a result and arranged for an approved medical leave from work beginning 11/25/13 with an anticipated return to work date of 2/17/14. (Ex. 12) Archidiacono testified that Respondent had no concerns with Complainant’s performance prior to her leave. Complainant continually updated Respondent about the status of her recovery in numerous emails sent to Dorna Devaney, Respondent’s Personnel Director, in December of 2013 and January and February of 2014. (Ex. 13)

5. On March 3, 2014, Complainant’s doctor wrote a note stating that she could return to work on March 23, 2014 with a 5 pound lifting restriction for one month. (Ex. 14, p. 4) Complainant’s daughter emailed the note to Respondent that same day and stated that Complainant would return to work on Sunday, March 23, 2014. Archidiacono instructed Dorna Devaney to inform Complainant that she could not return to work with the lifting restriction and that she needed another doctor’s note to extend her medical leave of absence. Complainant’s doctor wrote a note extending Complainant’s medical leave to April 19, 2014 at which time she could return to work with no restrictions. (Ex. 14, p. 5) Archidiacono testified that Respondent had previously allowed nursing staff and CNA’s with work related injuries to return to work with lifting restrictions, including a 5 pound restriction.

6. Complainant testified that based on her experience and the job description for CNA, there were any number of tasks she could have performed with a 5 pound lifting restriction, including assisting patients with grooming; serving meals and feeding; and with proper

instruction and supervision: taking and recording vital signs, recording fluid intake and output, and collecting specimens; observing and recording changes in patients physical and mental status, appetite and reactions; operating TV and radio; reading letters and cards to patients; transporting them to and from recreation; performing assigned clerical duties at the nurses station; and answering call lights. Respondent did not discuss any of these options with Complainant that might have allowed her to return with a lifting restriction for one month.

7. Archidiacono testified that she is the “injury coordinator” for Respondent and that she works with injured employees and Respondent’s insurer. She testified that it is her policy that CNAs cannot work with weight or lifting restrictions because of the nature of their duties, which include transferring patients from beds to chairs, turning patients and showering patients. She monitored Complainant’s leave and advised Ring based on Complainant’s doctor’s notes that Complainant should not return to work with a 5 pound lifting restriction because there were few duties of a CNA that could be performed with such a lifting restriction. Archidiacono admitted on cross-examination that Complainant could have been assigned to some ambulatory patients for certain tasks that did not require lifting over 5 pounds. She also testified on cross-examination that employees with work-related injuries are allowed to return to work with weight restrictions. According to Archidiacono, Respondent employed some CNA’s who were as old as 70 years of age or older.

8. After a doctor’s visit on April 14, 2014, Complainant’s doctor extended her leave until May 4, 2014. (Ex. 14, p. 6) Complainant’s daughter emailed this note to Respondent on April 14, 2014, with a note from Complainant that her doctor wanted her to take some additional time to allow a cortisone shot to take effect. (Ex. 13, p. 9) Complainant was prepared to return to work without restrictions on Sunday, May 4, 2014.

9. On Friday, May 2, 2014, Complainant received a phone call from Devaney who informed her that Archidiacono and Ring had discussed her situation and had determined that it was not feasible for her to return to work at Respondent. Complainant responded that she was fine to return to work, and asked why she could not return. Devaney told Complainant she could not discuss the matter further and offered no explanation or reason as to why Complainant was not permitted to return to work. Complainant was distraught and called her daughter to say she had just been fired from Respondent. Complainant's daughter then called Devaney asking to speak to Archidiacono as to the reasons for her mother's termination. Devaney hung up on her. Archidiacono testified that she did not believe that Complainant was entitled to a courtesy call from her regarding the termination and she delegated this task to Devaney. Respondent completed an internal Termination Notice Form stating that Complainant's termination was a lay-off, however there was no evidence offered that Respondent was experiencing financial difficulties or any operational need for a reduction in staff. (Ex. 17)

10. Complainant testified that she felt awful, very sad and like the rug had been pulled out from under her. She was a long-term employee of Respondent who loved her job and liked working with the patients. She felt terrible that she couldn't say good-bye to patients or co-workers. She testified that the more she thought about being terminated the more stressed and depressed she became and felt like she was a "piece of trash thrown out," and that Respondents did not care about her. Complainant's testimony about her emotional reaction to being fired was credible and compelling and she cried when discussing how she felt. Complainant's job was very important to her and that she enjoyed helping people and enjoyed her interaction with co-workers and patients. Her job was a very significant part of her life. Respondent sent her a fruit basket several days after the termination thanking her for her work.

11. According to Respondent, sometime in April of 2014, Ring began speaking to and soliciting statements from a number of Complainant's co-workers about her attitude towards the job and her co-workers. These statements were all typed by a third party and none of them are dated. The statements were not in Complainant's personnel file which she requested the file in June of 2014. There was no other current negative information about Complainant's attitude or job performance contained in the personnel file documents that she received. The language in the statements permits an inference that they were drawn up sometime after April of 2014.

12. None of Complainant's co-workers complained to management about her attitude or behavior prior to, or during, her medical leave. Archidiacono testified that she did not receive any complainants from the charge nurses or supervising nurses while Complainant was out on leave and she had no concerns prior to, or during, Complainant's leave. Complainant's co-workers testified that they never complained about her to anyone at Respondent prior to being called into Ring's office and stated they did not want her to be fired.

13. Complainant's co-workers testified that sometime in April of 2014 they were called into Ring's office and asked about Complainant. Their recollection of the exact time frame was vague and at least one co-worker was uncertain that this occurred in April. One Hispanic co-worker testified that in response to Ring's questions she told him she overheard Complainant use the "F"-word once in a patient's presence and that Complainant complained to her about their Haitian co-workers being lazy and not wanting to help her, stating that the Haitians stuck together and only helped each other. According to this co-worker, Complainant once stated that "she needed to be black to get any help." There is no evidence that this comment was made to anyone other than this co-worker. The co-worker was asked to sign a statement regarding Complainant a few weeks after she spoke with Ring. She testified that Complainant was never

happy, complained a lot and asked to switch patients with the other CNA's; however she never reported any of these allegations about Complainant to the charge nurse prior to being questioned by Ring. She did not ask Ring why he was soliciting information about Complainant.

Complainant admitted that she felt the Haitian CNAs helped each other out, but were reluctant to help her and they often spoke in Creole to each other.

14. A Haitian CNA who had worked with Complainant for 15 years on the same unit testified that she was called into Ring's office in April of 2014 and asked about her experience working with Complainant. She told Ring that Complainant sometimes asked her to swap heavier patients for lighter ones because of her age and that Complainant would get angry if she refused. She also testified that she heard Complainant use the "F"-word. This co-worker never reported Complainant to anyone at Respondent but just "let it go" because she did not want Complainant to lose her job. She testified that she felt bad for Complainant because of her advanced age. She also was asked to sign a statement about Complainant. She stated that she and the other CNA's discussed that they were being asked about Complainant but they did not know why they were being brought in to speak with Ring.

15. Another Haitian CNA who had worked at Respondent for some 15 years spoke English poorly and her comprehension of English was very limited. She testified that she was asked to speak with Ring in his office at some point about Complainant and signed a statement, but could not remember when, or what she told him. It was clear from her testimony that she did not understand the statement that she signed and I found her testimony to be totally unreliable.

16. Another Haitian employee stated that she was asked by a nurse to report to Ring's office in April of 2014. She testified that prior to this meeting with Ring, she had never complained about Complainant and no one asked her anything about Complainant during

Complainant's leave. She testified that Complainant called her a "bitch" or used the "f-word" and that working with Complainant was "hell" because Complainant always complained about the work, asked for help, or wanted her to swap assignments. This co-worker testified that she never complained or reported this to anyone because she doesn't like to report people and didn't want Complainant to be fired.

17. Archidiacono testified that Complainant received no discipline from 2009 to 2013. There was evidence of one or two prior warnings to Complainant or complaints about her performance dating back to 2008 and earlier, however, in 2014, Archidiacono had no concerns about Complainant's employment until she got word that Complainant was returning from leave. Archidiacono testified that only after she read the statements from Complainant's co-workers alleging Complainant asked to swap patients, did she discuss Complainant's return with the unit charge nurse, Nina Bernat. According to Archidiacono, Bernat raised a concern that assignments would be disrupted. Archidiacono stated that Respondent's philosophy is to consistently assign CNAs to the same patients and that she had concerns about continuity of care. She testified that she heard from the charge nurse and supervising nurse on the unit that CNA's were upset that Complainant asked to change assignments and she relayed these concerns to Ring in the context of Complainant returning to work. According to Archidiacono, Ring told her that they needed to speak because concerns about Complainant had arisen. While I believe that these discussions occurred, the timeline of when they occurred and who first approached whom is unclear *vis a vis* Ring's discussions with Complainant's co-workers. There is no evidence that any supervisors at Respondent were sufficiently concerned about the issue of Complainant's performance to raise it with her. No one discussed consistency of assignments or purported requests to swap patients with Complainant at any time prior to her termination. Moreover, the evidence is that

Respondent used per diem CNA's and floaters to cover for Complainant during her leave and after her termination.

18. Ring testified that Archidiacono first raised concerns about Complainant to him in April of 2014.² Ring stated that at some point he decided to conduct an investigation of Complainant because of information Archidiacono received from the nursing staff about Complainant's attitude and propensity to change assignments with other CNAs. This conflicts with Ring's testimony that she first learned of this issue from co-worker's statements to Ring. Neither Ring nor Archidiacono met with Complainant to discuss these concerns prior to her termination.

19. Complainant testified that she heard in August of 2014, that a younger Haitian employee in her 50's replaced her on the unit. Archidiacono testified that Respondent used a per diem pool and a float list of CNAs to cover her shifts while she was out on leave and for some time after her termination, but eventually a younger Haitian CNA was reassigned from another unit to fill Complainant's position.

20. Prior to her termination, Complainant worked at Respondent for three 8-hour shifts per week. She testified that had she been allowed to return to work on March 23, 2014, with a lifting restriction, she would have continued to work at Respondent until the time of hearing. Complainant received unemployment compensation from May 2014 until October 2014. She testified that she did not begin to look for other work until about the time her unemployment benefits were ending. Around that time she contracted shingles and was unable to work until the end of December 2014. In February 2015 she contracted cellulitis and was unable to work until sometime in the spring or summer of 2014. Complainant stated that she has looked for work but it is difficult finding work as a CNA at a nursing facility because she cannot work the night shifts

² Archidiacono testified at her deposition that Ring was the one who first raised these concerns with her.

when there was more availability. She decided to apply for jobs as an in-home companion but was offered only one assignment that was one hour from her home and determined it was not worth cost in time and travel. Complainant has not been gainfully employed since her termination but testified she is still looking for work.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with or without a reasonable accommodation. It is unlawful for an employer to dismiss an individual from employment or otherwise discriminate against such individual because of their disability if they are otherwise qualified to perform the essential functions of the job. In order to establish a claim of termination from employment on account of her disability, Complainant must demonstrate 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).

The law also requires employers to provide reasonable accommodation to otherwise qualified disabled individuals who can perform the essential functions of the job unless they can demonstrate that the accommodation sought would impose an undue hardship on the employer's business. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008) (discussing reasonable accommodation in the

context of religion) In order to prevail on a claim of failure to provide a reasonable accommodation, Complainant must demonstrate that: (1) she is a “handicapped person,” (2) that she is a qualified handicapped person,” (3) that she needed a reasonable accommodation to perform her job; and (4) that the employer was aware of her handicap and the need for a reasonable accommodation; (5) that her employer was aware or could have become aware of a means to reasonably accommodate Complainant’s handicap; and (6) the employer failed to provide her with a reasonable accommodation. Hall v. Department of Mental Retardation, 27 MDLR 235 (2005); MCAD Handicap Guidelines, p. 33, 20 MDLR (1998).

Complainant’s injury was sufficiently serious to render her unable to work for a period of up to five months and to significantly limit her ability to lift over five pounds. For purposes of G.L. c. 151B, although Complainant’s disability was temporary, she is covered by the protections of the statute. See Massasoit Industrial Corp. v. MCAD, Mass. (No. 16-P-459, March 23, 2017) (Slip Opinion pp. 9-10 ft.nt. 6) (discussing temporary disabilities in the context of the ADA and its application to G.L. c. 151B)

Complainant’s claim of disability discrimination is two-fold. She first alleges that while recovering from her injury, at some point she was capable of performing the essential functions of the job of CNA with a reasonable accommodation, i.e. a five-pound lifting restriction that would remain in effect for approximately one month. She testified that there were a number of duties a CNA could perform with such restriction, including assisting patients with serving meals, feeding, grooming, toileting, recording vital signs, monitoring intake and output of fluids, assisting patients who are ambulatory, and performing administrative tasks. While Respondent rejected this assertion, and did not permit Complainant to return to work with a lifting restriction, there was evidence that a number of these tasks, arguably essential functions, could have been

performed by Complainant with her limitation. This fact would have required Respondent, at the very least, to discuss the options for accommodation with Complainant and her supervisors to determine if a sufficient number of essential job functions could be performed or if granting an accommodation would have imposed an undue hardship on Respondent's operations. While Respondent arguably could have demonstrated undue hardship, since a number of CNA duties involve some heavy lifting, and the heavier workload would have shifted to fewer CNA's, Respondent did not engage in an interactive dialogue about any accommodation and did not address the issue of undue hardship with Complainant. Instead, it merely asserted she could not return to work with any weight restriction. However, Archidiacono testified that Respondent allows employees who suffer work-related injuries to return to light duty, suggesting that Complainant was treated differently. I conclude that Respondent's failure to discuss or even consider any accommodation was motivated by a combination of concerns related to Complainant's disability, which required her to take an extended medical leave, and her age.

Assuming for purposes of argument that Respondent could have proven undue hardship, it, nonetheless, agreed to extend Complainant's leave until she could return to full duty with no restrictions. However, when some six weeks later, Complainant informed Respondent that she was cleared to return to work with no restrictions, she was told that Respondent had decided not to permit her to return to work and her employment was terminated. This leads to the second prong of Complainant's disability claim, i.e. that her employment was terminated precisely because of her disability, which includes having a record of impairment or a perception that she remained impaired and could therefore no longer perform the job. See Massasoit Industrial Corporation v. MCAD, Mass. App. Ct. (No. 16-P-459, March 23, 2017) (Slip Opinion pp.9-

11)

Respondent denies that Complainant's disability and her age were the reasons for the termination and asserts that it was instead concerns about her attitude and poor performance that drove the decision to terminate her employment. I do not credit Respondent's assertion that this was the reason Complainant was terminated. According to Respondent, while Complainant was on leave, it undertook an investigation purportedly prompted by her co-worker's assertions that Complainant frequently asked her co-workers for assistance or to swap heavy patient assignments for lighter work. Co-worker statements assert that Complainant also swore at them when they refused to swap assignments or to help her, and that she told an Hispanic co-worker that the Haitian employees stuck together, refused to help her, and that she "had to be black to get some help." Respondent asserts that the information uncovered in this investigation was the reason for Complainant's termination. Even if some of the reports about Complainant's conduct were true, I do not believe they were the real reason for her termination. The assertion that co-workers' complaints drove Complainant's termination is suspect and a pretext for discrimination for the following reasons.

First, the timing of Respondent's investigation is suspect. It is not clear from the record, what initial complaints or reports, if any, prompted Ring's concerns and precipitated his questioning of Complainant's co-workers. Ring claimed that Archidiacono raised concerns about Complainant to him, and that this prompted his investigation. However, Archidiacono testified that she spoke to the charge nurse on Complainant's unit and became aware of concerns about Complainant returning to the job only after reading or hearing the statements of Complainant's CNA co-workers. On cross-examination Ring stated he did not know why he decided to interview Complainant's co-workers. The statements of the co-workers are undated and some were uncertain of when they spoke to Ring. The conflicting testimony and vagueness

surrounding the initiation of the investigation and of the timing of the inquiry lead me to conclude it is suspect, and may have occurred even after Complainant was terminated. At the very least, the evidence suggests that Respondent undertook its investigation of Complainant after receiving notice that she intended to return to work on May 5, 2014.

Second, co-workers who made statements against Complainant upon being called into Ring's office testified that they had never complained to their supervisors or management about Complainant. They testified that they did not know why they were called into Ring's office, that they had not complained to management about Complainant prior to being questioned by Ring, and did not want her to be fired. Some believed that when they made their statements, it had already been decided that Complainant was not returning to work at Respondent, giving some credence to the likelihood that the investigation occurred after her termination. I conclude that Ring's inquiry was an after-the-fact attempt to drum up negative information about Complainant because the decision to terminate her employment had already been made for less than legitimate reasons.

Third, Archidiacono testified that she heard no reports about Complainant's attitude or performance prior to, or during, Complainant's leave of absence. She stated it was the co-workers' statements made during that investigation that prompted her to speak to the Unit charge nurse about Complainant's return. She testified this discussion was when she first became aware of the concern that Complainant frequently asked other CNA's to swap patients, and that her return would disrupt consistency of care to patients.

Fourth, Complainant's most recent evaluations stated that she was a good performer who was experienced, knowledgeable, patient and kind to the patients. She had not been disciplined or warned for several years regarding any misconduct. Finally, Respondent characterized

Complainant's termination as a lay-off and not a termination for cause. In fact Complainant's duties continued to be performed by per diem workers or floaters and later by a Haitian CNA who transferred from another unit. All of these reasons lead me to believe that Respondent's termination decision was motivated by concerns related to Complainant's disability, as well as her age, as discussed below, and that its investigation was a pretext for discrimination based on these protected classes.

Even if the concerns raised by Complainant's co-workers were true to some degree, and Respondent was aware of them prior to Complainant's stated intent to return to work, the fact that Respondent did not question or speak to Complainant about its concerns, gave her no opportunity to rebut the allegations made against her, and did not counsel her regarding compliance with its policies prior to terminating her employment, is further evidence of pretext.³ I conclude that Respondent regarded Complainant as disabled and relied on her record of disability in making the determination to terminate her employment and that her disability and advanced age were the real reasons Complainant was not permitted to return to work. Complainant has persuaded me that after deciding to terminate her employment for unlawful reasons, Respondent devised an "investigation" to solicit negative information from co-workers to justify her termination. Although the co-workers who gave negative statements testified that they had never reported any concerns about Complainant, they appeared only too willing to provide negative information about her when asked by Ring, likely believing that she was not returning to Respondent.⁴

³ Complainant testified that the Haitian CNAs spoke Creole to each other on the job, and frequently helped each other but were reluctant to assist her. She admitted that this created a difficult work environment for her, and did cause her to complain. I credit this testimony. It was apparent that one of the Haitian CNA's who accused Complainant of calling her an "f'g bitch" strongly disliked Complainant, yet never reported Complainant's comments to management.

⁴ I also draw the inference that Complainant's Haitian co-workers were inclined to provide negative information about her in anticipation that another Haitian CNA who worked on a more difficult unit would likely replace her.

M.G.L. c. 151B, s. 4(1B) makes it unlawful to discriminate against an individual based on that person's age. At age 72, Complainant was one of the oldest CNA's working for Respondent and the oldest on her Unit. There was evidence that at one point she was referred to as "the old one," and that one of the supervisory nurses asked her when she intended to retire. I believe these comments were made. While in another context, such comments could be viewed only as stray remarks that might not support an actionable claim of age discrimination, given the circumstances of this case they support a claim of age discrimination in conjunction with concerns about Complainant remaining disabled. Complainant had worked at Respondent for eighteen years and was terminated in a phone call with no advance notice, no explanation for the decision, and seemingly little courtesy. The fact that Respondent was unwilling to meet with Complainant to discuss its concerns and the purported reasons for her termination, and refused to return her phone calls, further supports the conclusion that its motives were not legitimate, but discriminatory.

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. See Stonehill College v. MCAD, 441 Mass 549 (2004).

Complainant's claim for lost wages is premised upon the belief that had she returned to work at Respondent, she would have continued working through the year 2016. Complainant testified that she did not begin to seek subsequent employment until after her unemployment benefits had ended, a period of some six months, but within a few short months thereafter she