

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
PATRICIA A. MCNAMARA,  
Complainants

v.

DOCKET NO. 07-BEM-01302;  
07-BEM-01303

THE GENERAL HOSPITAL CORP.,  
Respondent

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**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision of Hearing Officer Betty E. Waxman, Esq. in favor of Respondent General Hospital Corporation (“MGH”) on charges of disability discrimination and retaliation in violation of G.L. c. 151B.<sup>1</sup> Complainant alleged that MGH and its in-house placement service Bulfinch Temporary Service, Inc., discriminated against her on the basis of disability by failing to accommodate her disability and by retaliating against her when it declined to rehire her after she had resigned and executed a separation agreement

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<sup>1</sup> The Complaint filed in May of 2007 named The General Hospital Corporation, Partners Healthcare Systems, Inc., Bulfinch Temporary Service, Inc., and two individually-named employees as Respondents. In July of 2008, the Commission issued a Finding of Split Decision, dismissing Complainant’s claim against MGH for failure to provide requested accommodations to her disability during her employment in the orthopedic oncology department, finding that the claim was barred by the Statute of Limitations and a March 2006 separation agreement. The Commission also dismissed Partners Healthcare Systems, Inc. and Bulfinch Temporary Service, Inc. as Respondents and issued a Lack of Probable Cause finding as to two individually-named Respondents. Probable Cause was found against MGH on the claims of disability discrimination and retaliation only with respect to Complainant’s unsuccessful attempts to be rehired.

("Agreement") with MGH in March of 2006.

#### Summary of the Facts

Complainant wears a prosthetic eye as the result of an injury in 1981 and she suffers from a number of other health issues, including depression. Beginning in January 2003, Complainant worked as a temporary employee for Bulfinch Temporary Service, Inc. ("Bulfinch"), MGH's in-house temporary employment service that provides staff to the hospital and its affiliates on an emergency basis. In March of 2004, Complainant accepted a permanent position as a Patient Service Coordinator II in the orthopedic oncology department at MGH earning \$23 an hour. On February 2, 2006, Complainant left work on a medical leave of absence for job-related stress stemming from a deteriorating relationship with her supervisor and related physical and emotional problems. Subsequently, Complainant threatened litigation for failure to accommodate her disability and reached a separation agreement ("the Agreement") with MGH. The Agreement was reached on March 27, 2006.

In April of 2006, Complainant's medical condition improved and she contacted Bulfinch seeking a temporary position with the following requirements or accommodations: that she be paid an hourly rate of \$23; work 30 hours or less a week; have no interaction with patients and no processing of co-payments, be permitted an early departure weekly to attend a pre-scheduled medical appointment and time off for doctor's appointments on an as-needed basis; that she not be required to lift over 10-15 pounds, and not be required to work on a computer monitor continuously for eight (8) hours a day. Complainant also requested a large computer monitor, indicated that it would be difficult for her to come to work in the rain, snow or darkness and stated she lacked proficiency in scheduling software.

Bulfinch called Complainant twice in June 2006 to find out if her requirements for temporary employment remained unchanged. While Complainant adjusted some of her requirements, she remained firm about her hourly wage and not wanting to have patient contact or collect co-payments. After the second phone conversation, Bulfinch personnel concluded that Complainant's demands and restrictions were so inflexible as to preclude her from being hired into available positions in the temporary employee pool, as she could not perform many essential functions of the positions Bulfinch sought to fill, even with reasonable accommodations. Based upon her credibility findings and the evidence presented, the Hearing Officer found that none of the decision-makers at Bulfinch at any time during the relevant events in the case had any knowledge about the Agreement between Complainant and MGH or other protected conduct. (See, Hearing Officer Decision, Finding of Fact, ¶ 18).

Complainant's medical condition worsened over the summer. Complainant applied for Social Security Disability Income. In March of 2007, the Social Security Administration determined that Complainant became disabled under Social Security Administration rules on February 10, 2006.

#### Hearing Officer Decision

The Hearing Officer dismissed Complainant's claim of handicap discrimination, finding that she was not a qualified handicapped individual when she sought employment with Bulfinch in 2006 and that the multiple restrictions and limitations that Complainant sought as accommodations to her disability were not reasonable, as they precluded her from performing essential functions of the available positions. The Hearing Officer found that there was evidence of ongoing communications between Bulfinch and Complainant over the summer of 2006 to attempt to accommodate Complainant's restrictions, but that they could not bridge the gap

between Bulfinch's requirements and Complainant's demands. The Hearing Officer concluded that Complainant's demands imposed an undue hardship on Respondent because Respondent needed temporary employees with greater flexibility and had a justifiable need to limit the number of pool members to applicants who were adaptable to multiple assignments in order to avoid unnecessary unemployment insurance costs.<sup>2</sup> The Hearing Officer also dismissed Complainant's retaliation claim, determining that Complainant failed to establish a causal connection between her prior protected activity and Respondent's failure to hire her as a temporary employee in 2006, because Bulfinch's managers had no knowledge of her prior claim of disability discrimination or the resulting agreement. Complainant has appealed to the Full Commission challenging the Decision of the Hearing Officer.

#### STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et. seq.*) and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, §5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. Massachusetts Comm'n Against Discrimination, 365 Mass. 357, 365 (1974); G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. *See, e.g., School Committee of Chicopee v. Massachusetts Comm'n Against Discrimination*, 361 Mass. 352 (1972); Bowen v. Colonnade

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<sup>2</sup> In order to control administrative and training costs, Bulfinch limits the number of available employees in the temp pool to those individuals most likely to meet the hospital's needs. Employees who are part of the pool but do not

Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

#### BASIS OF THE APPEAL

Complainant asserts that the Hearing Officer erred as a matter of law by limiting testimony at the Public Hearing to events that occurred after the March 2006 Agreement. Complainant also asserts that the Hearing Officer was biased and challenges the Hearing Officer's credibility findings on a number of issues including: the job limitations Complainant requested, whether she was qualified to perform the functions of many available temporary positions, that Bulfinch managers were aware of her prior protected activity, and the Hearing Officer's finding as to when she became totally disabled and unable to work. Complainant alleges that the Hearing Officer erred as a matter of law in determining that Respondent's witnesses were credible. Lastly, Complainant asserts that the Full Commission should overturn the decision because it was unsupported by substantial evidence.

The Hearing Officer did not err by limiting testimony at the Public Hearing to events occurring after the March 2006 Agreement. In a pre-trial ruling, the Hearing Officer held that she would limit testimony on events that occurred prior to the date of the March 2006 Agreement, consistent with the Finding of Split Decision made by the Investigating Commissioner as such claims are barred by the statute of limitations and the Agreement Complainant signed with MGH with respect to her termination. As a result, only the issues as to whether Bullfinch's failure to hire Complainant was based upon disability discrimination or

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have assignments are eligible to collect unemployment benefits.

retaliation for protected conduct were certified for the Public Hearing. See, 804 CMR 1.21(11) “Evidence unrelated to the issues Certified...shall be deemed irrelevant and, therefore, inadmissible.”<sup>3</sup> Complainant argues that she should have been allowed to introduce evidence of her treatment by Respondent prior to the execution of the March 2006 Agreement for the purpose of providing “relevant circumstantial evidence” to support her claims. This argument is unpersuasive because Complainant cannot demonstrate that the time-barred events have any bearing on either of her actionable claims for Bulfinch’s failure to rehire her to the temp pool. We conclude that the Hearing Officer did not err by limiting evidence surrounding Complainant’s initial termination from Respondent. This is particularly true in light of her subsequent finding that the employees of Bulfinch had no knowledge of the prior events, or the March 2006 Agreement. Further, despite the pre-trial ruling the Hearing Officer permitted the Complainant to testify at length about her work history with Bulfinch or MGH and events which occurred prior to the March 2006 Agreement. (See, e.g. Transcript Vol. I, pp. 65 – 102). Accordingly, Complainant cannot cite any prejudice due to the ruling.

With respect to certain errors cited by Complainant regarding how the Hearing Officer classified her prior position and the time period that she became totally disabled, we find that they are harmless, because they do not materially affect that outcome of the decision. Ultimately the decision rests on credibility determinations made by the Hearing Officer that Complainant erected unreasonable barriers to her re-employment by the temp pool, by seeking numerous accommodations or requirements that were not feasible, given the available positions and Respondent’s need to create a pool of available employees who were sufficiently flexible to perform multiple positions. Complainant argues that MGH cannot have demonstrated undue

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<sup>3</sup> M.G.L. c.151B, §5 also provides in pertinent part that the Commission “shall not be bound by the strict rules of evidence prevailing in courts of law or equity.”

burden because it has so many temp jobs available that she was qualified to perform. This once again ignores the impact of Complainant's requested limitations as to hours she could work and restrictions as to which duties to she could or would perform. While Complainant disputes that she imposed these numerous restrictions as a condition of reemployment, the Hearing Officer chose to credit Respondent's witnesses. To discredit these witnesses would have required a finding that the stated restrictions and limitations were entirely fabricated by Bulfinch employees with a motive to discriminate. Complainant also suggests that there was no interactive process designed to reasonably accommodate her needs, as evidenced by the fact that she was not required to submit an application, was never interviewed and her claim that Bulfinch employees were lax in responding to her requests. The Hearing Officer did not find this to be persuasive evidence of discriminatory intent. The Hearing Officer also found that there was communication with Complainant regarding her needs and limitations and that Respondent could not identify sufficient suitable positions to meet those limitations.

The Hearing Officer's decision that there was no retaliation rests on a credibility finding that the employees at Bulfinch were not aware of Complainant's prior protected activity. The Hearing Officer is the best position to determine the veracity and reliability of witness testimony and to assess credibility. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). Complainant argues that Bulfinch managers were in a position to know about the issues surrounding her prior separation and severance agreement and that for the Hearing Officer to find otherwise was unreasonable. She asserts that the Hearing Officer erred in crediting the testimony of MGH's two witnesses on this issue. She offers no evidence to support this claim other than to state that the rulings were "suspect." This is an insufficient reason for us to disturb the Hearing Officer's credibility findings. If we accept these findings, there is no causal connection to support a claim of retaliation. Absent knowledge of Complainant's prior protected activity surrounding her prior

medical leave, her threats to sue for disability discrimination, and the resulting severance agreement, the subsequent inability of Bulfinch personnel to find a suitable position for her in the temp pool could not have been actionable retaliation. Complainant proffered no evidence to demonstrate that Bulfinch employees knew about the events prior to March of 2006, but insists it was unreasonable for the Hearing Officer not to draw the inference that they would have known. This is nothing more than taking issue with the Hearing Officer's credibility rulings. There is no evidence to support that the Hearing Officer's reliance on the testimony of Respondent's witnesses was improper.

Complainant's argument that the Full Commission should overturn the Decision of the Hearing Officer because it is unsupported by substantial evidence is similarly unpersuasive. Complainant appears to dispute forty-five (45) of the forty-nine (49) numbered findings of fact in the Hearing Officer's Decision with little or no citations to the record evidence. Complainant makes general statements that the Hearing Officer's findings are "troubling" or do not make "sense," absent contrary factual support from the record or legal argument to justify these generalizations. Complainant's appeal fundamentally is a general challenge to the Hearing Officer's findings and conclusions with which she does not agree, yet she does not provide evidence to support the challenge.

In sum, we have carefully reviewed Complainant's grounds for appeal, the parties' briefs and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We find no material errors of fact or law with respect to the Hearing Officer's findings of fact and conclusions of law and hereby affirm the Decision of the Hearing Officer in its entirety.

#### ORDER

Complainant's appeal to the Full Commission is hereby denied and the Order of

dismissal is affirmed. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the Superior Court Standing Order 1-96. Failure to file a petition in court within 30 days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED this 3<sup>rd</sup> day of December, 2014<sup>4</sup>

  
Jamie R. Williamson  
Chairwoman

  
Charlotte Golar Richie  
Commissioner

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<sup>4</sup> Commissioner Thomas-George was the Investigating Commissioner for the matter so did not participate in the deliberations of the Full Commission pursuant to 804 CMR 1.23 (1)(c).