

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. &  
ERVIN L. RUSSELL,  
ADMINISTRATOR,  
ESTATE OF MARGARET  
PENA-RUSSELL,  
Complainants

DOCKET NO. 08-BEM-01825

v.

AFFILIATED PROFESSIONAL  
SERVICES,  
Respondent

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Appearances:

Joseph P. Donovan, Jr., Esq. for Estate of Margaret Pena-Russell  
Steven J. Marullo, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about June 24, 2008, Margaret Pena-Russell filed a complaint with this Commission charging Respondent with discrimination on the basis of handicap (diabetes) in violation of M.G.L.c. 151B§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 2, 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 Affiliated Services is a medical billing company located in Wareham, Massachusetts. The company employed approximately 150 people at the time of Margaret Pena-Russell's employment.

2. Margaret Pena-Russell worked for Respondent, initially through a temporary agency and from April 12, 2004 to April 16, 2008 as a full-time permanent employee.<sup>1</sup> Ms. Pena-Russell was well-liked as an employee and performed her job well. (Stipulated Fact #1; Testimony of Lisa Emersen)

3. Pena-Russell was diagnosed with insulin dependent diabetes in 2004. Respondent was aware of her illness. (Testimony of Ervin Russell and Emersen; Stipulated Fact #3)

4. Lisa Emersen has worked for Respondent since 2006. She was hired as an assistant controller and became human resources manager in August 2007. Emersen was aware of Pena-Russell's diabetes.

5. Pena-Russell was initially employed in the position of call center receptionist where her duties were answering the telephone and directing calls throughout the company, labeling UPS shipments and greeting visitors. Pena-Russell worked primarily by herself in this position, which required coverage during business hours. When Pena-Russell was absent, Respondent had to find other employees to fill in for her. (Testimony of Emersen)

6. Pena-Russell had no attendance problems in 2004 and 2005. (Testimony of Emersen; Ex. R-1) She received positive employee performance reviews in 2005 and 2006. (Ex. C-4; C-5)

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<sup>1</sup> Pena-Russell died in April 2009 and her husband Ervin P. Russell was appointed administrator of her estate.

7. In 2006, Pena-Russell began to incur excessive absenteeism related to her diabetes. In 2006, she was absent 23 days, only three of which were “paid time off.” (Testimony of Emersen; Ex. R-1)

8. Emersen testified credibly that on many occasions, Pena-Russell appeared lethargic and confused at work. When co-workers tried to assist her she became combative and refused to let them contact her husband, who was listed as her emergency contact, nor would she allow them to contact Respondent’s Human Resources personnel. Emersen usually learned of Pena-Russell’s condition via calls or emails from the call center supervisor.

9. In 2007, Pena-Russell was absent 30 days for reasons related to her diabetes. Only four of these days were paid days off. In addition to days off, she was occasionally tardy or left work early. (Testimony of Emersen; Ex. R-1)

10. On February 16, 2007, Ms. Pena-Russell appeared so disoriented at work that her co-workers called an ambulance. Paramedics found her to be suffering from hypoglycemia and transported her to Tobey Hospital for treatment. (Ex. R-2)

11. On July 31, 2007, after informing Respondent that she would be hospitalized for a week, Pena-Russell entered inpatient detoxification treatment for alcoholism at Gosnold Treatment Centers. According to a note in Gosnold’s record, consumption of alcohol was causing Pena-Russell’s diabetes to be uncontrolled. Pena-Russell was discharged from Gosnold on August 5, 2007. (Exs. 1; R-5; R-10)

12. On September 4, 2007, Pena-Russell was hospitalized with high blood sugar and DKA (diabetic ketoacidosis) related to her diabetes. She was admitted to the intensive care unit, and remained in the hospital for three days. (Ex. R-1)

13. On January 21, 2008, co-workers found Pena-Russell in an “altered state” and called an ambulance. Pena-Russell was transported to Tobey Hospital where she was treated for hypoglycemia. (Testimony of Emersen; Ex. R-3) Pena-Russell was paid for that day and the following day, January 22, 2008.

14. Pena-Russell took paid leave on January 28, 2008. (Ex. R-1)

15. Emersen testified that in late January 2008, because of the disruption caused by having to assign other employees to cover the reception desk during Pena-Russell’s frequent absences, Respondent transferred Pena-Russell to a vacant position in the scanning department at the same rate of pay. Her new job duties included verifying, pulling and scanning patient reports and occasionally covering the phones. Pena-Russell did not work alone in the scanning department and Respondent was not required to find coverage if she were absent. Her immediate supervisor in the scanning department was herself a diabetic. (Stipulated Fact #5; Testimony of Emersen)

16. Pena-Russell was absent on paid leave on March 11, 2008, she left early on March 12, and she took paid leave on March 13, 2008. (Ex.R-1)

17. On April 15, 2008, Pena-Russell appeared sick and confused at work. Emersen was informed about her condition and called an ambulance. Complainant’s supervisor meanwhile, questioned Pena-Russell about her health. Pena-Russell insisted she was okay, but the supervisor suggested she check her blood sugar, which was low. Pena-Russell then drank a soda and when paramedics arrived, her blood sugar was normal. Paramedics gave her the choice of going to the hospital or remaining at work. Her supervisor was sufficiently concerned about Pena-Russell’s health status that the paramedics transported her to Tobey Hospital where she

was treated and discharged with a diagnosis of “Acute Alcohol Intoxication/Diabetes.” (Exs. C-6; R-8)

18. Later that day, Emersen wrote a memorandum intended to clarify protocols for dealing with Pena-Russell’s condition that stated her husband should be call in a medical emergency, that employees should call an ambulance if the situation warranted and that employees should not be responsible for determining her fitness to work. (Ex. C-7; Testimony of Emersen)

19. Pena-Russell never received any written warnings regarding tardiness, her excessive absenteeism or Respondent’s concerns about safety in the workplace, because Respondent understood her absences were related to her diabetes. (Testimony of Emersen)

20. Following the events of April 15, on April 16, 2008, Emersen met with Respondent’s executives and Respondent’s counsel. As a result of the events of the preceding day and the persistent disruption of the workplace caused by Pena-Russell’s inability to monitor and control her blood sugar while at work, they determined that safety interests warranted Pena-Russell’s termination. (Testimony of Emersen)

21. On April 16, 2008, Pena-Russell reported to work. That afternoon she was called into a meeting with Emerson and her supervisor and Emersen informed her that her employment was terminated. Emersen explained to Pena-Russell that her co-workers were not equipped to handle her health problems and could not be responsible for monitoring her health, that the company was concerned about her health and the possibility that she might fall and injure herself. The company was also concerned about her co-workers’ safety, given the number of times she was drowsy, confused or appeared to be on the verge of losing consciousness. Pena-

Russell was surprised and asked if she was being let go because of her diabetes and Emerson said no, that it was primarily out of compassion. (Testimony of Emerson)

22. A termination report dated April 16, 2008 written by Emerson and signed by Emerson, Pena-Russell, and her immediate supervisor, stated that Pena-Russell had been fired for safety reasons as her condition put employees in the “uncomfortable and unsafe position” of making medical decisions on her behalf and that they should not be responsible for monitoring her well-being. The report also noted Pena-Russell’s poor attendance over the past year, despite her having been moved to a position that did not require coverage in her absence. The report concluded that Respondent was terminating her employment on the advice of corporate counsel. (Ex.C-8)

23. Emerson testified credibly that on an earlier occasion, she offered Pena-Russell the opportunity to apply for FMLA, but that Pena-Russell never applied for such a leave. She stated that Pena-Russell enjoyed coming to work and did not like to be out. At no time did Pena-Russell request a leave of absence or any other accommodation for her diabetes.

24. Emerson testified credibly that Pena-Russell provided her with medical documentation of every absence, which Emerson placed in a folder without reading out of respect for Pena-Russell’s privacy. She was unaware of any health problems other than diabetes affecting Pena-Russell’s attendance or job performance.

25. Erwin Russell, Pena-Russell’s husband, testified that prior to her termination, Pena-Russell received approval for an insulin pump which was implanted in August 2008. He testified that after receiving the pump she still required at least two hospital admissions due to hypoglycemia.

26. Mr. Russell stated that, notwithstanding her diabetes, his wife was never debilitated by the disease and was capable of driving and that she sought employment after her termination, but did not work again.

27. Mr. Russell testified that his wife collected unemployment benefits after her termination up until her death, but he did not know the amount of her benefits.

28. On April 7, 2009, Complainant suffered a seizure in her home and died en route to the hospital. According to her death certificate, the cause of her death was “endocardial left ventricular fibroelastosis, possibly in association with cardiac dysrhythmia and with diabetic ketoacidosis. (Ex. R-6)

#### Other Employee Terminations

29. On August 16, 2007, Respondent terminated an employee for excessive absenteeism. Respondent had previously cut her hours from 40 hours per week to 30 hours per week because of excessive absences (Ex. C-9). On October 9, 2007, Respondent terminated another employee for excessive absenteeism, after having placed her on “final warning” in June 2005. (Ex. C- 10) According to Emersen, their absenteeism was not health-related.

30. Emersen testified credibly that these two employees were subjected to progressive discipline by their immediate supervisors prior to their termination because their absenteeism was not health-related.

### III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, section 4, paragraph 16 prohibits discrimination in employment on the basis of handicap. Complainant must first establish a prima facie case of handicap

discrimination by demonstrating that Pena-Russell (1) was an otherwise qualified handicapped individual (2) performing the essential functions of her job (3) and was terminated under circumstances which give rise to an inference that her termination was based upon her handicap. Dartt v. Browning- Ferris Industries, Inc., 427 Mass. 1 (1998) The Supreme Judicial Court has held that "the facts necessary to establish a prima facie case of discrimination will vary depending on [the] situation." Labonte v. Hutchins and Wheeler, 424 Mass. 813 (1997) citing Beal v. Selectmen of Hingham, 419 Mass. 535, 544 (1995).

Complainant must establish that Pena-Russell was a "handicapped person" at the time of her employment. The law defines a handicapped person as "one who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment." M.G.L. Chapter 151B, section 4(16). Diabetes is a disability when it substantially limits one or more of a person's major life activities. Major life activities are activities include those such as seeing, hearing, walking, eating, working, or caring for oneself. 804 CMR 3.01(a)(3) The definition of substantially limits is whether an average person can perform the activity with little or no difficulty. MCAD Guidelines: Employment Discrimination of the Basis of Handicap, at II, A, 6, 20 MDLR Supplement (1998) (hereinafter "MCAD Guidelines") Diabetes is a condition with side effects or complications that often substantially limit one or more major life activities. See Dahill v. Police Department of Boston, 434 Mass. 233, 240(2001). I conclude that Pena-Russell, by virtue of her insulin dependent diabetes with its attendant side effects and complications, such as frequent episodes of hypoglycemia and loss of consciousness, was disabled within the meaning of the M.G.L.c.151B, sec.4(16)



It must also be established that Pena-Russell was an otherwise qualified handicapped individual capable of performing the essential functions of her job with or without a reasonable accommodation, and who was terminated under circumstances which give rise to an inference that her termination was based upon her handicap. Dartt, supra.<sup>2</sup> Respondent contends that Pena-Russell was not a qualified handicapped person because of her excessive absenteeism. I concur with this assertion and I conclude that Complainant failed to establish that Pena-Russell was a qualified handicapped person. Pena-Russell was not capable of performing the essential functions of her job because her excessive absenteeism prevented her from working on multiple occasions, sometimes up to as many as 30 days a year. Between January 2006 and April 16, 2008, Pena-Russell was absent from work a total of 46 days beyond her allotted paid leave time, she was tardy or left early on numerous other occasions, and there were several instances where she became hypoglycemic at work, and was drowsy, confused, and close to losing consciousness, including three instances where co-workers decided to call an ambulance and she required emergency room treatment. Thus I conclude that Complainant has failed to establish a prima facie case of discrimination on the basis of handicap, because Pena-Russell was essentially unable to be present at work as expected and often came to work unable to function because of her unstable blood sugar levels.

Assuming, however, that Complainant has met the initial burden of demonstrating that Pena-Russell was an otherwise qualified handicapped individual, the Respondent must demonstrate that there was no way to reasonably accommodate her disability and that its decision

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<sup>2</sup> Complainant asserts that Pena-Russell was treated worse than two other employees who were terminated for absenteeism and who were given warnings prior to their terminations. I do not agree. The other employees were terminated solely for absenteeism and were disciplined because their absenteeism was unrelated to a disability. While Pena-Russell was not given a written warning prior to her termination, neither was she disciplined for her illness and she was in fact accommodated for years precisely because her absenteeism was related to a disability. Moreover, the evidence suggests that her termination was based primarily on safety concerns, and not just her excessive absenteeism.

to terminate her employment was for reasons other than her handicap. Ryan v. Town of Lunenberg, 11 MDLR 1215, 1239 (1989).

Respondent contends that Pena-Russell's inability to control her diabetes was a safety risk to her and her co-workers, that she placed her co-workers in the position of monitoring her stability and determining her fitness for work on a frequent basis and that this was an unacceptable disruption to the workplace. An employer may defend a decision to terminate or decline to hire a handicapped individual because there is a demonstrated risk of future injury to the employee or others. In order to establish this defense, an employer must prove that there is a "reasonable probability of substantial harm" to the employee or others. MCAD Guidelines at X,B,3; MCAD & Kogut v. The Coca-Cola Co., 34 MDLR 43 (2012); Nagle v. City of Boston Fire Department, 18 MDLR 221 (1994); Gaston v. City of Springfield, et al, 23 MDLR 176 (2001); Mantolete v. Bolger, 767 F2d 1416 (9th Cir. 1985); Ryan v Town of Lunenberg, 11 MDLR 1215, 1239 (1989). In such instances the employer may engage the employee in the "interactive process" in order to determine whether there was any reasonable accommodation that Respondent could have offered to the employee to make the workplace safe. However, an employer is under no obligation to provide a reasonable accommodation if it can conclusively demonstrate that all conceivable accommodations would impose an undue hardship or burden on its business operations. G.L. c. 151B, § 4(16). See MBTA v. MCAD, 450 Mass. 327, 342 (2008)

In this matter, Pena-Russell often failed to recognize the severity of her condition, and was unable to control her diabetes, placing herself in danger of severe side effects, such as

drowsiness, dizziness, loss of consciousness, and potential serious injury.<sup>3</sup> I note that on April 16, 2008, although Pena-Russell appeared disoriented and sick, it appeared she did not recognize the severity of her condition and assured her supervisor that all was well. Only after her supervisor suggested checking her blood sugar, did Pena-Russell seem to recognize that her blood sugar was dangerously low. She required emergency medical intervention for the second time in three months and I conclude that the frequency of her hypoglycemic incidents created a danger to herself.<sup>4</sup> While Pena-Russell's condition did not present a direct safety issue to her co-workers, however, her inability to monitor and control her illness led to severe disruptions in the workplace, which impacted her co-workers adversely, as they were required to reluctantly take responsibility for monitoring and evaluating Pena-Russell's medical condition, something that is not required of an employer under M.G.L.c.151Bsec. 4(16).<sup>5</sup> This caused considerable stress for her co-workers and exposed them to inappropriate potential liability for medical issues they were not equipped to handle.

Moreover, in this case, Respondent undertook a number of measures to accommodate Pena-Russell and allow her to remain working. Respondent accommodated Pena-Russell's excessive absenteeism and tardiness for over two years, changed her job to a position that did not require her continual presence at the front desk and at one time offered Pena-Russell FMLA,

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<sup>3</sup> While often diabetics recognize that they are becoming hypoglycemic and take measures that quickly bring their blood sugar up to normal levels, some individuals over time lose the ability to recognize the early warning signs of hypoglycemia. These individuals are at increased risk for a sudden episode of severe hypoglycemia. Severe hypoglycemia, requiring the assistance of another person, is a medical emergency. Symptoms of severe hypoglycemia may include confusion or, rarely, seizure or loss of consciousness. Position Statement, Diabetes and Employment, American Diabetes Association, DIABETES CARE, VOLUME 36, SUPPLEMENT 1, JANUARY 2013 (No medical evidence regarding diabetes was offered into evidence at the public hearing. In such absence, I take judicial notice of information published by the American Diabetes Association regarding the symptoms associated with this condition. )

<sup>4</sup> Hospital discharge summaries and a partial record from Gosnold were the only evidence of record that alcoholism may have had a negative effect on Pena-Russell's diabetes.

<sup>5</sup> Employers have no obligation to monitor an employee to make sure that she is keeping her diabetes under control. Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA).

which she declined.<sup>6</sup> Where the complications and associated disruptions caused by Pena-Russell's diabetes were frequent and severe, resulting in several emergency situations that placed her health in danger and put her co-workers in the untenable position of making medical decisions on her behalf, there was no reasonable accommodation that could be extended to her. I conclude that Respondent has demonstrated that no further accommodation was reasonable and that allowing Pena-Russell to remain in the workplace would have continued to place an undue burden on its business operations and its employees. I also conclude that there was no credible evidence that Respondent's actions were motivated by discriminatory animus toward Pena-Russell based on her diabetes and furthermore, that Respondent was justified in terminating Pena-Russell's employment for safety reasons and that it did not engage in unlawful discrimination on the basis of handicap in violation of M.G.L.c.151B sec. 4(16).

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<sup>6</sup> Complainant argues that Respondent could have waited until Pena-Russell's insulin pump was implanted to see whether her condition improved. However, Complainant provided Respondent with no supporting medical documentation whatsoever from any medical providers regarding her condition and prognosis, including information as to how the pump was expected to work.

#### IV. ORDER

For the reasons set forth in this decision, the complaint in this matter is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within 10 days after the receipt of this Order and a Petition for Review within 30 days of receipt of this Order.

SO ORDERED this 16<sup>th</sup> day of September 2013

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JUDITH E. KAPLAN  
Hearing Officer