



THE COMMONWEALTH OF MASSACHUSETTS
 COMMISSION AGAINST DISCRIMINATION
 ONE ASHBURTON PLACE, BOSTON, MA 02108-1518



Deval L. Patrick
 Governor

Timothy P. Murray
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Malcolm S. Medley
 Chairman

Sunila Thomas-George
 Commissioner

Martin S. Ebel
 Commissioner

1/3/08

Robert J. Smith, Esq.
 Assistant General Counsel
 Mass-C Department of Mental Retardation
 500 Harrison Ave
 Boston, MA 02118

David Conforto, Esq.
 Conforto Law Group
 8 Faneuil Hall, Suite 300
 Boston, MA 02109

RE: Sherwood v. Mass-C Department of Mental Retardation
MCAD Docket Number: 06 13 03136
EEOC/HUD Federal Charge Number: 16C-2007-00488

PROBABLE CAUSE FINDING

Dear Parties/Counsel:

You are hereby notified that I have found probable cause to credit the allegations in the above-referenced complaint. A copy of the disposition is enclosed.

The Commission is charged by statute (G.L.c.151B, § 5) to try to enforce compliance with the Commonwealth's anti-discrimination laws without resort to a public hearing. To this end, **parties and counsel** are required to attend a conciliation conference at the Commission's office on WED February 13, 2008 @ 1pm.

Conciliation is difficult or impossible unless persons with authority to settle the case are present. The officer designated to appear for a business or other entity must be familiar with the case and authorized to offer an appropriate settlement.

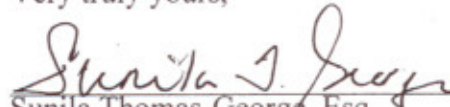
Complainant's counsel should send a written proposal of settlement to Respondent's counsel not less than 10 days before the scheduled meeting. We also require that parties hold preliminary settlement discussions at least five days before the conciliation date.

Be prepared to spend one to two hours at the conciliation session. **Failure to attend the session may result in immediate certification to public hearing and/or imposition of sanctions for costs incurred by the Commission and the opposing party. Furthermore, Complainant's failure to attend may result in dismissal of the case.**



No continuances will be granted except upon written motion to the Conciliation Clerk with notice to the opposing party and upon a showing of good cause. Please direct correspondence to Vanessa Davila via fax at (617) 994-6024.

Very truly yours,


Sunila Thomas-George, Esq.
Investigating Commissioner

Cc: Laurie Sherwood
351 Hildreth Street, #24
Lowell, MA 01850

**MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
INVESTIGATION FACT SHEET**

To: Robert J. Smith, Esq.
Assistant General Counsel
Department of Mental Retardation
500 Harrison Ave
Boston, MA 02118

Fr: Commission Against Discrimination
One Ashburton Place, Room 601
Boston, MA 02108-1516

Case: Laurie Sherwood v. Mass-C DMR

Docket No: 061303136

EEOC No: 16C 2007 00488

Investigator: Katherine M. Martin, Esq.

Recommendation for Finding of Probable Cause

Investigation Summary:

On December 19, 2006 the Complainant filed a complaint with this Commission alleging that she had been discriminated against because of her disabilities, cervical, lumbar, and gastrointestinal conditions. The Complainant asserts that she became disabled as a result of an assault by a client in 1992. The Complainant asserts that the Respondent employer and Catherine Collette, individually, have denied her requests for reasonable accommodations, subjected her to a hostile work environment based on disability and retaliated against her with progressive disciplinary actions all in violation of Massachusetts General Laws, Chapter 151B, section 4, paragraphs 16, 4, 4(4)(a) and the ADA of 1990 as amended.

Issues Investigated:

Whether the Respondent employer failed to provide the accommodations that the Complainant requested.

Whether the Respondent subsequent to the denial of the accommodation request failed to engage in an interactive dialogue to determine what if any other accommodations would have enabled the Complainant to work.

Whether Catherine Collette acted outside the scope of her employment in denying the Complainant's accommodations.

Whether Collette by her refusal to honor the said accommodation subsequent to the negotiated settlement agreement, created a hostile work environment in retaliation for the Complainant's exercise of rights pursuant to MGL, c. 151B, Massachusetts Executive Order 246¹ and the ADA of 1990 as amended.

¹ Executive Order 246, requires that all state agencies elicit data on employees with disabilities. The disclosure is voluntary. An employee may choose to self identify even if he /she does not require a

Whether the progressive disciplinary action administered by the individually named Respondent Collette was in retaliation for the Complainant's pursuit of both internal and union based grievance procedures.

Investigation Revealed:

The Complainant was employed as a Habilitation Counselor for the Commonwealth's Department of Mental Retardation. The Complainant's primary duties were to provide instruction in daily life skills and educational programs for adults with cognitive impairments, physical and emotional disabilities. The Complainant was assigned to what is now called the Fernald Development Center in Waltham, MA.

In 1992, the Complainant was assaulted by a client. The Complainant suffered permanent damage to her neck and back. Additionally, the Complainant's gastrointestinal system was and continues to be adversely affected by the damage resulting in intermittent incontinence as well as migraine headaches. The Complainant's conditions are more acute in the early morning hours.

In 1997, the Complainant presented documentation to the Respondent that cleaning solutions used in certain buildings were caused an increase in migraine symptoms. As a result, she was accommodated by being permitted to sign in and out at an alternative location.

The Complainant asserts that commencing in 2003, she was permitted to use flex time to accommodate her disabilities. The Complainant was scheduled to work 10 am -6:30 pm Monday through Friday. The Complainant asserts that since her programmatic responsibilities began at 10 am and ended at 3 pm, her requested alteration in the unified schedule would have enabled her to perform the essential functions of the job.

The Complainant states that due to reorganization within the department as a whole and more specifically at Fernald, her schedule was unilaterally altered from 10 am-6:30pm to 9:30 am-6 pm in February 2005. The Complainant asserts that it was then further altered in February 2006 to 8:30 am-5:00 pm. The Complainant asserts that she objected to the changes in the hours because of her disabilities. The Complainant states that she was unable to meet this schedule and that this coupled with a change in the sign-in location to a building with strong cleaning fumes resulted in a documented exacerbation of migraines which interfered with the Complainant's ability to be present at work.

The Complainant asserts that in February 2006, she made a request for a reasonable accommodation to Catherine Collette, Manager. The Complainant specifically requested that she be allowed to modify her schedule as an accommodation to her disabilities. The Complainant asserts that she specifically delineated how her disabilities affected her major life functions and impeded her ability to comply with the unified schedule. The

reasonable accommodation. The order requires each agency to have an ADA coordinator and to solicit voluntary disclosure of disability status on a yearly basis.

Complainant asserts that her initial request was denied. The Complainant states that subsequent to the verbal denial, she was told by Collette to put the request in writing and provide medical documentation.

The Complainant asserts that in late February or early March 2006, she provided to human resources, medical documentation to support her need for a reasonable accommodation. The Complainant requested a modification of schedule back to 10 am - 6:30 pm and to be allowed to sign in at the Farrell building. The Complainant asserts that she was informed that the medical documentation was insufficient to justify her request for a reasonable accommodation. The Complainant further asserts that Respondent Collette refused to allow the Complainant to either use vacation time or remain additional hours to ensure that she worked a full day.

The Complainant states that subsequent to her request, she was subjected to progressive discipline by Collette for tardiness. Despite having actual knowledge that the Complainant was unable to conform to the newly administered schedules, Respondent Collette refused Complainant permission to use vacation time to cover the hours she was tardy due to her disabilities. Instead, Collette recorded all time missed as off payroll creating a financial hardship for the Complainant. The Complainant asserts that this practice continued from March - September 2006.

The Complainant asserts that she was unaware of any internal process to formally request a reasonable accommodation until May 2006. The Complainant states that once she had notice of the formal channel for self identification and process for reasonable accommodation, she completed that process. The Complainant asserts that in May 2006, she filed paperwork under Executive Order 246, which self identified her as a disabled employee. Contemporaneously, she filed a formal written request to Gerald Scott, ADA Coordinator for DMR, for a modification in her work schedule and sign-in location due to her disability.

The Complainant asserts that in June 2006, Collette began progressive disciplinary action against her for tardiness. The Complainant states that at the time of the initial discipline, she had not received any response regarding her request for accommodation from Scott.

In August 2006, subsequent to her retention of private counsel the Complainant's request for schedule modification was granted. The Complainant asserts that Collette continued to insist that the Complainant sign in at the same location as all other staff despite her knowledge that the cleaning schedule caused noxious fumes to be present at the time the Complainant was arriving and or leaving. The Complainant states that Collette willfully defied the order to provide a reasonable accommodation by unilaterally assigning the Complainant to report to Farrell Building with the explicit knowledge that the cleaning crews would be present in at the start and /or end of the Complainant's shift.

The Complainant asserts that she was denied a reasonable accommodation and was subject to a continuing hostile work environment in retaliation for exercising her rights under the statutes.

The Respondent employer and the Catherine Collette, individually named Respondent, deny all allegations of discrimination based on disability or retaliation.

The Respondent acknowledges that the Complainant was employed as a Habilitation Counselor at the Fernald Developmental Center. The Respondent acknowledges that the Complainant was injured on the job in 1992 and received worker's compensation benefits. The Respondent denies that the Complainant was ever granted flex time of 10 am to 6 pm as a reasonable accommodation. The Respondent asserts that until January 2006, the Counselors were not subject to a unified schedule.

The Respondent states that in January 2006, as a result of the downsizing of Fernald, there was a significant reorganization². Effective immediately, all Habilitation counselors were expected to engaged in program activities for a minimum of 5 hours per day and adhere to the standardized hours of 8:30 AM to 5PM.

The Respondent states that the first time it had notice of the Complainant's need for a reasonable accommodation was in February 2006. The Respondent asserts that although the Complainant made a request to her superior, Catherine Collette, the Complainant was informed that she needed to make her request in writing to human resources.

The Respondent asserts that on or about February 13, 2006, the Complainant's request for accommodation was rejected by Gail Conley, Director of Clinical Operations. The Complainant was then instructed to file a detailed request for accommodation to Donald Stevens, Employee Services Manager. The Complainant did file the written request; however, Stevens determined that the information presented was insufficient as to the nature of the Complainant's disabilities and her need for a reasonable accommodation.

The Respondent states that in March 2006, the Complainant then requested intermittent leave under the FMLA. Based on previously submitted documentation, the request was denied. The Respondent asserts that the Complainant was then subjected to progressive discipline for her consistent tardiness and inability to adhere to the Clinicians' schedule.

The Respondent states that as part of the rebuttal to a written warning, the Complainant raised the issue of reasonable accommodation again. This time, the Complainant was instructed to file a written request Gerald Scott, ADA Coordinator. Initially, the request was denied by Scott for failure to file sufficient medical documentation with the request. Ultimately, the Complainant, her counsel, and union representative and management, reached an agreement for a schedule modification on or about August 9, 2006.

The Respondent asserts that the issues surrounding the denial of a reasonable

² The Fernald Developmental Center has been a controversial state run facility for people with mental retardation. As a result of a protracted litigation between the families of the clients served and the Commonwealth, many of the residents formerly housed at Fernald have been since moved into community residences. The Commonwealth has sought to close the facility and move the remaining clients to alternative programming. Thus, the number of employees at Fernald has significantly decreased in the last decade.

accommodation were based primarily on the Complainant's failure to provide sufficient evidence of the existence of a disability and therefore the need for an accommodation. Once this information was obtained, the Respondent willingly engaged in an interactive process to determine what modifications were reasonable.

Finally, the Respondent asserts that it had no actual or constructive knowledge of the Complainant's chemical sensitivity issues until 2006. The Respondent states that the Complainant did not provide documentation of this, that she did not substantiate how the exposure substantially interfered with a major life function. The Respondent states that attempts to accommodate her sensitivity were made including suggesting that the Complainant wear a surgical mask when necessary to access the Farrell building.

The Respondent Collette denies all allegations of discrimination based on disability or retaliation. Collette asserts that the disciplinary action that was taken against the Complainant was in accordance with the Respondent's policies and procedures. Collette argues that since the Complainant did not present sufficient information to warrant a modification of the schedule as a reasonable accommodation, failure to adhere to the norms of the department resulted in the administration of progressive discipline.

The Respondent Collette denies that she interfered with the Complainant's rights or failed to implement the accommodation once it had been approved. Collette asserts that any failure to change the sign in location or otherwise modify duty was based on miscommunication.

Conclusion:

The Complainant suffered an on the job injury in 1992 which resulted in permanent cervical and lumbar damage. The Complainant received Worker's Compensation benefits as a result of these injuries and therefore is presumed to be a qualified handicap person pursuant to Massachusetts General Laws, Chapter 152 and Chapter 151B, section 4, paragraph 16. The Complainant is therefore deemed to be a qualified handicap person entitled to a reasonable accommodation without submitting any medical documentation.

Even if this were not the case, the Complainant has established a prima facie complaint for discrimination based on disability. The Complainant has presented information upon which a reasonable fact finder could believe that she has several conditions which substantially interfere with one or more major life functions. The Complainant self-identified as a person with a disability in as early as 1998 when she raised the issue of her sensitivity to chemicals being used to clean the administrative offices. At that time, the Respondent knew or should have known that the Complainant's frequency of respiratory symptoms and migraine headaches resulted from this exposure. It acknowledged such when the Complainant was permitted to sign in and out at an alternative location.

The MCAD Guidelines for Disability Discrimination state that the Respondent's duty to accommodate is triggered once the employee *notifies* the Respondent of the need for an accommodation. Neither MGL, Chapter 151B, section 4, paragraph 16, the ADA of 1990

as amended, or Massachusetts Executive Order 246, require that the initial request for accommodation be in writing or include medical documentation of the individual's disability. Once a request is made, the employer *must engage* (emphasis added) in an interactive process to determine what would constitute a reasonable accommodation.

The Respondent in the instant cases has incorrectly placed the burden on the Complainant when in its defense to the charge it blames the lack of action on the Complainant's failure to provide sufficient documentation to establish the level of her impairment or the need for an accommodation. The guidelines state that an employer may request medical documentation to determine the existence of a disability and identify effective accommodations. However, the guidelines also state that the inquiry must be appropriately focused.

In the instant case, the Respondent's inquiries were not appropriately focused. The Respondent allowed a line supervisor to determine that an accommodation was to be denied. The Respondent then engaged in a protracted and obtuse series of inquiries by various individuals who lacked the knowledge or authority to determine what if any accommodation was needed. In its answer to the complaint, the Respondent has failed to demonstrate that any of these individuals had the authority to grant and enforce the accommodation of a modified schedule and sign in location. Further, once the accommodation was denied, the Respondent failed to articulate how the accommodation would have created an undue business hardship.

There is sufficient information upon which a reasonable fact finder could believe that the Complainant was retaliated against for exercising her rights under the anti discrimination statute. The Complainant engaged in several protected activities. The Complainant self-identified as a disabled individual, the Complainant requested both informally and formally reasonable accommodations and intermittent FMLA leave due to her significant medical conditions. The Respondent knew of these activities. The Complainant was subjected to increasing levels of harassment and discipline during the period immediately after the request for a reasonable accommodation and subsequent to her retention of private counsel. The Complainant was forced to pursue her requests through multiple channels due to the Respondent's non compliance with Executive Order 246 as well as the state and federal disability statutes and accompanying guidelines, forced to sign-in at a location which the Respondent Collette knew adverse affected the Complainant's disabilities, refused intermittent FMLA leave and forced to take leave without pay due to the Respondent's failure to accommodate.


There is sufficient information upon which a reasonable fact finder could believe that the individually named Respondent, Catherine Collette, acted outside the scope of her authority in her interactions with the Complainant. It is undisputed that Collette, without consultation to the appropriate authority, initially denied the Complainant's request for an accommodation without engaging in an interactive dialogue. There is sufficient information, including Collette's own statement that she minimized the Complainant's


chemical sensitivity, and need to eliminate exposure. There is sufficient information that Collette chose to invoke progressive disciplinary action, deny the Complainant the use of personal or vacation time to cover her lost hours during the time that the Complainant was pursuing a reasonable accommodation. Finally, there is a genuine issue of material fact as to whether Collette willfully disregarded the negotiated settlement which allowed the Complainant not to sign in and out at Farrell Building because of cleaning agents.

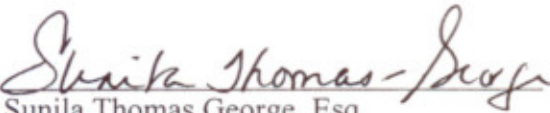
For the foregoing reasons, a finding of probable cause is recommended based on disability and retaliation against the Respondent employer and the individual Respondent.

Disposition:

Pursuant to section 5 of Chapter 151B of the Massachusetts General Laws, and in conformity with the foregoing findings, I have this day determined that **probable cause** exists for crediting the allegations of the above complaint against the Respondent employer and the individually named Respondent. Pursuant to Section 5 of Chapter 151B, the parties will be afforded an opportunity to participate in a conciliation conference at the Commission.


Katherine M. Martin, Esq.
Compliance Officer III


Marlania Bugg
Senior Supervisor


Sunila Thomas George, Esq.
Investigating Commissioner

Cc: David Conforto, Esq.
Laurie Sherwood, Complainant