

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
LEE D. MORRISON,

Complainants

v.

DOCKET NO. 15-BEM-00714

WILDER BROTHERS TIRE CO.,

Respondent

Appearances: Kevin B. Callanan, Esq. for Complainant
Jeffrey A. DeLisi, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 18, 2015, Complainant, Lee D. Morrison filed a charge of discrimination against Respondent, Wilder Brothers Tire Co., alleging that he suffers from a brain tumor, fatigue and chronic depression, and that Respondent terminated his employment one day after receiving a letter from a psychiatrist stating that Complainant needed a leave of absence from work due to an episode of severe depression. The complaint also alleged that he was terminated because he was regarded as disabled because of a brain tumor.

The Investigating Commissioner found probable cause to credit the allegations of the Complaint and efforts at conciliation were unsuccessful. The matter was certified for public hearing and a hearing was held before the undersigned hearing officer on April 11, 2017. The

parties submitted post-hearing briefs on June 12, 2007. Having reviewed the record of the proceedings and the post-hearing submissions, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Lee Morrison, has had attention deficit, hyperactive disorder (ADHD) and mild autism since childhood. (Ex. C-1, p.1; Ex. R-6, p.1; Morrison testimony) Since 2008, he has been treated regularly for depression by Robert Levy, M.D., a psychiatrist. Complainant has regularly taken medications such as Prozac for years. He was also treated with the medications Ativan and Aderall. (Morrison testimony; Ex. R-1, p.2) Complainant's 2014 medical records reference an MRI scan in 2012 which indicated a "suspected" pituitary lesion, initially referred to as a brain tumor, for which he was treated by an endocrinologist. (Ex. C-1, p. 2; R-1, p. 3)

2. Respondent, Wilder Brothers Tire Co., operates an automobile repair and tire service in Scituate, MA. The company is a multi-generational, small family business with approximately 10 employees that has been operating since 1907. Glenn Wilder is the owner of Respondent. (Wilder testimony)

3. Complainant began working for Respondent in December 2006 as the operations manager reporting to Glenn Wilder. As operations manager, Complainant was second in command at Respondent, acted in a supervisory capacity and had responsibilities related to all aspects of running the business. (Wilder & Morrison testimony) Complainant was known to Glenn Wilder for some three years prior to his being hired because he had worked previously as the manager of an auto parts vendor that Respondent used. Complainant and Wilder had a business and friendly relationship. (Morrison and Wilder testimony) While working for

Respondent, Complainant and Wilder had a personal friendship that went beyond work, they shared similar hobbies and both had children. During their association, Complainant performed work for Wilder unrelated to Respondent's business, including computer related work and plumbing work in apartments Wilder owns and at Wilder's home. (Morrison and Wilder testimony)

4. Complainant informed Wilder of his "brain tumor" diagnosis in 2012. Wilder was also aware that Complainant suffered from and was treated for depression, that he had a long-standing relationship with a psychiatrist and attended therapy sessions every month. Wilder accommodated Complainant's need to have time off for medical appointments and never denied him time off for medical care. Complainant testified that his medical conditions caused him to suffer from low energy, insomnia and depression, but that his conditions and related factors did not interfere with his ability to perform the essential functions of his job. He confirmed that Wilder was supportive and he was permitted to take leave time from work on numerous occasions to attend medical appointments. (Morrison testimony) Complainant continued to work for Respondent for some two years after his "brain tumor" diagnosis with no adverse consequences.

5. Wilder testified that Complainant was a good employee and a very effective manager up until December of 2013 when he went into a "downward spiral." In December of 2013, Complainant separated from his long-time companion, also referred to as his common-law wife, with whom he resided and has two children. By all accounts, the separation was not amicable and occurred after Complainant began a romantic relationship with another woman. There were contested issues surrounding their separation and a court proceeding related to visitation and custody of Complainant's children. Wilder testified that on two occasions during

work hours he was called upon to bail Complainant out of jail for arrests related to his difficult domestic situation. Complainant also missed work or was late on a number of occasions in February, April, May and June of 2014 for court appearances related to his domestic issues. (Wilder testimony; Ex. R-9)

6. Complainant ultimately had to sell his house, as a result of the separation from his family. Wilder testified that following Complainant's separation from his common-law wife and the disputes that ensued, Complainant's job performance went into a steady decline. Complainant was tardy multiple times and absent several days in the summer of 2014. Wilder counseled Complainant about his attendance on two occasions in the summer of 2014. (Wilder testimony; Ex. R-10) Complainant's psychiatrist notes were admitted into evidence. They confirm that Complainant's emotional problems during that time frame were largely related to his domestic conflicts and the multiple losses he sustained, including disputes about seeing his children and having to pack up and sell his house. The notes from visits on 7/23/14 and 8/18/14 indicate that Complainant was experiencing conflict at work and was "afraid of going off on his boss," and that he felt paralyzed and unable to work. (Exs. R-2 & R-4) The notes from an August 14, 2014 visit mirror Wilder's testimony that Complainant's attitude at work had deteriorated, that "things were going badly" at work and he was "confronted with nothing but conflicts." (Ex. R-2) However, his complaints to his psychiatrist largely related to the stress and anger caused by his personal and family problems which began in December of 2013. (Ex. R-2, R-2, R-4) Complainant expressed to his psychiatrist that his common-law wife's "behavior was contemptible," that he was unable to see his children, had had no verbal contact with them for one month and that he had "refused to go to a visitation center to see his kids." (Ex. R-3)

7. Wilder testified that he also was undergoing some personal problems in the summer of 2014, including the recent death of an immediate family member and some health issues. He stated that he relied heavily on Complainant's support as the operations manager and second in command of the business. (Wilder testimony) Complainant relayed the importance of his position to his psychiatrist. Notes of their August 12th visit reflect that Wilder had recently suffered a death in his family and had his own health issues, that there was "no one to run the business," and that Complainant had "been put in charge." (Ex. R-3) Wilder testified that in addition to Complainant working shorter hours and taking more time off for his personal problems, Complainant was disinterested, his attitude had soured, he was not relating well to customers, and his attitude was "toxic" to other employees and the workplace atmosphere of a small business with only five to ten employees. On one occasion he had to admonish Complainant for drinking after hours on the premises with his fiancée. He stated that Complainant was bitter and angry about the demise of his relationship with his "wife" and not being able to see his children and was very vocal about it. Wilder stated that previously Complainant had been an exceptionally good employee and was a great guy and he spent months trying to get him back on track.

8. The weekend of August 16 & 17, 2014, was a sales tax holiday in Massachusetts. Respondent's business remained open on Saturday and Sunday for tire sales. (Morrison and Wilder testimony) Wilder had a conversation with Complainant and assistant manager, David McGinn, on Friday, August 15th, regarding the work schedule for the tax free weekend. Wilder testified that he planned to work eight hours on both Saturday and Sunday and asked McGinn to work four hours on Saturday and Complainant to work four hours on Sunday. (Wilder and McGinn testimony) Wilder reminded Complainant had had missed four hours of work on a

previous Friday and told Complainant he could make up the time that Sunday. McGinn testified that he overheard Complainant state on Friday evening, "that's not gonna to happen," in reference to Complainant's showing up to work on Sunday, but McGinn did not know whether to take him seriously. (McGinn testimony)

9. Complainant testified that on the tax free weekend he had to pack up and clean out his house in preparation for an impending sale and that Wilder understood he might not be able to work. (Complainant testimony) He claims to have told Wilder he would not be able to work. I do not credit this testimony. Complainant testified that on August 17th while packing up his children's belongings at his home in the early afternoon, he suffered an emotional breakdown. He testified that he had symptoms of a panic attack and went into a catatonic state. Complainant's fiancée was with him at the time and she testified that she called Wilder to inform him that Complainant would not be coming to work on Monday. According to Wilder, Complainant's fiancé called him for advice on Sunday evening because she was concerned that Complainant was withdrawn and acting strangely. He advised her to take Complainant to the emergency room and to contact his psychiatrist. Wilder denied that she informed him during that conversation that Complainant would not be coming to work on Monday. Wilder asked to speak to Complainant but his fiancée stated he could not come to the phone. I credit Wilder's version of this conversation.

10. Wilder was very upset that Complainant did not come in to work on Sunday August 17th and that he did not call to inform Wilder he was not coming in. Wilder testified that heading into that weekend, Complainant had been pushing the limits with his attendance and poor attitude. Given the deterioration in Complainant's performance and attitude over a period of many months, his failure to report to work on August 17th was the last straw for Wilder.

Wilder testified that in twenty-one years he had never had occasion to discipline a management employee and none had ever not shown up for a scheduled shift without calling in. He claims to have made the decision on that Sunday to terminate Complainant's employment. He testified with great emotion that the decision to terminate Complainant's employment was not made lightly and made him feel horrible, because Complainant was a friend and a long term employee. He stated he should have terminated Complainant's employment months sooner, and had this been any other employee, he would have, but he was trying to support Complainant through the difficulties in his personal life.

11. McGinn testified that Wilder called him on Sunday to say that Complainant had not shown up to work and that Wilder had made the decision to let him go. McGinn testified that he was not overly surprised by this. Although McGinn considered Complainant a friend and felt bad about the termination, he confirmed that Complainant's performance and efforts were not what they should have been and that he seemed to "not be into" work. McGinn testified that given the situation, termination seemed like "a very real possibility."

12. On Monday August 18th, Complainant saw his psychiatrist, Dr. Levy, who wrote a note that Complainant was suffering from major depressive disorder and could not work because of the scope and severity of his symptoms. (Ex. C-2) Complainant told his psychiatrist on that date that he was concerned that he would be fired. (Ex. R-4) It is likely that he expressed this fear because he understood the repercussions of his failure to show up for work on August 17th and his failure to advise Wilder that he would not be coming to work.

13. On Monday August 18th Complainant's fiancée called Wilder to advise him that Complainant had seen his psychiatrist and that Complainant was emailing a letter from his psychiatrist to Wilder. Wilder received the letter by email while he was on the phone with her.

Complainant contacted Wilder on Tuesday, August 19th around mid-afternoon to discuss his status, and Wilder told him they were going to have to part ways professionally. He told Complainant that he would designate the termination as a lay-off so that Complainant could collect unemployment.

14. At Complainant's request, his psychiatrist cleared him to return to work with no restrictions as of August 28, 2014, some 10 days after being diagnosed with major depressive disorder. (Ex. C-9) He did not work from August of 2014 until April of 2015. Complainant secured employment as a customer service manager with Truck Guys in April of 2015, but remained employed there for only nine days when he was terminated as "not a fit." His subsequent attempts to find employment were unsuccessful and he underwent back surgery in August of 2015 and was determined to be totally disabled from work. He currently receives SSDI benefits. Complainant claimed that his termination caused him great emotional distress because losing his job was just the last in a string of losses and because he was fired by a boss who he thought was a friend.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, § 4(16) makes it an unlawful practice for an employer to dismiss from employment or otherwise discriminate against a qualified handicapped individual who can perform the essential functions of the job with or without a reasonable accommodation. Employers are also required to provide reasonable accommodation to disabled individuals who are capable of performing 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)

Complainant alleges that Respondent terminated his employment because of his disabilities, a brain tumor/lesion and his psychiatric disabilities which included fatigue and chronic depression. He also asserts that his termination constituted a refusal to grant him the reasonable accommodation of a medical leave of absence prescribed by his psychiatrist for major depressive disorder.

In order to establish a claim of termination from employment on account of his disabilities, Complainant must demonstrate that he (1) is handicapped within the meaning of the statute; (2) was 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 his employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998).

Complainant has established that he was disabled within the meaning of the statute both by virtue of his physical and mental disabilities. He suffered from what was initially diagnosed as a brain tumor and later a brain lesion and from chronic depression and related symptoms. His medical records establish that he was in treatment for these illnesses, and was regularly seeing a psychiatrist and taking multiple medications for depression. He claims that because of these disabilities he was impaired in his ability to concentrate and focus on working, and became completely emotionally overwhelmed by his personal problems. For purposes of establishing a prima facie case, Complainant has demonstrated that, but for his emotional unraveling, he would likely have been capable of resuming the essential functions of the job, although there is

a serious dispute about whether he was in fact performing the job adequately. (See Discussion infra.) Complainant was terminated immediately after he submitted to Wilder a letter from his psychiatrist indicating that he needed a medical leave of absence due to major depressive disorder. For purposes of arguing that his termination was made with discriminatory intent, he has established sufficient evidence at stage one to permit the inference that his termination was because of his mental disabilities.

Once Complainant has established a prima facie case, it is incumbent upon the employer to articulate a legitimate non-discriminatory reason for the termination. Blare v. Husky Injections Molding Sys. Boston Inc., 419 Mass. 437, 441 (1995). Respondent asserts that Complainant's performance and attitude had been deteriorating for some time due to problems in his personal life and that Wilder could no longer rely on Complainant to be the second in command of the business. Complainant was responsible for the nuts and bolts of the daily operations and had been working fewer hours, coming in later, and was absent with greater frequency, largely due to personal problems. Respondent granted him time off for medical appointments and court appearances. According to Wilder and McGinn, Complainant's attitude toward the job had also soured and Wilder described it as toxic to the other employees and the workplace environment. Complainant's psychiatrist's observations support the notion that Complainant was angry, disgruntled, bitter, and unable to handle the conflicts in his personal life which then mushroomed into conflicts at work. When Complainant failed to show up for work on a tax free weekend for a short stint of four hours, and did not inform Wilder that he was not coming in, Wilder made the decision to fire him. Complainant did not inform Wilder that he would not be coming to work on the Sunday in question due to his emotional state. Instead Complainant testified he informed Wilder the reason he needed the day off was to pack up his house, a reason

not directly related to his disabilities. Notwithstanding this testimony, I credited Wilder's assertion that Complainant never informed him he would not be coming in to work. Given these facts, I conclude that Respondent has articulated a legitimate non-discriminatory reason for Complainant's termination.

Once Respondent has articulated a facially non-discriminatory reason for the adverse action, Complainant must then provide evidence that the articulated reason is not true, but a pretext. Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 681 (2016) *citing* Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 443 (1995). While the timing of Complainant's termination on the day he requested a medical leave for depression would suggest that Complainant's mental health and psychiatric disability were the reasons for the termination, there is credible evidence to suggest otherwise. Complainant has not produced evidence of pretext. Wilder had been aware of and accommodated Complainant's disabilities for some time prior to the events of 2014. I conclude that Wilder's decision to terminate Complainant was not motivated by discriminatory animus related to his disabilities or the need for a medical leave, but rather was born of Wilder's frustration with Complainant's performance and attitude at work. For years Wilder was aware of Complainant's medical and mental health issues, knew that Complainant saw a psychiatrist regularly and knew that he took medication for depression and other problems. Wilder always accommodated Complainant's requests for time off for medical problems or treatment. It was only after Complainant's personal life began to unravel, presumably as a result of Complainant's infidelity to his long-time partner, that his performance and attendance began to suffer and his attitude toward work deteriorated. He was involved in a contentious custody battle over his children and was subject to restraining orders.

Throughout this ordeal, Wilder was sympathetic and supportive, even twice bailing Complainant out of jail after he had been arrested.

Wilder felt Complainant betrayed their friendship and professional relationship at a time when he needed Complainant's assistance running the business because of difficulties in his own life. For some eight months Wilder had tolerated Complainant's deteriorating attitude, attendance and performance. He twice warned Complainant verbally about attendance problems. The unraveling of Complainant's personal life ultimately interfered with his ability to do his job in the manner that was required and expected by Wilder. According to Wilder, Complainant continued on a course of self-destruction which culminated in his failure to report to work because his personal life was a shambles. I conclude that Complainant justifiably feared losing his job knowing that he had made a serious error and would likely be fired. Indeed, Complainant's failure to appear for work on a very busy tax holiday weekend was the final straw for Wilder. I credit Wilder's testimony that it was this dereliction of duty that resulted in his decision to terminate, and that he made the decision on that Sunday, prior to being informed that Complainant had suffered an emotional breakdown and prior to his request for a leave of absence. Thus, Complainant has failed to prove that he was terminated because of his disabilities.

The question of whether Respondent was obligated to provide Complainant with the reasonable accommodation of a medical leave of absence is a more difficult. Having determined that Complainant's termination was not motivated by any discriminatory bias related to his disabilities, but rather by Wilder's frustration at Complainant's poor attitude and his failing performance, I must address whether Complainant was entitled to the additional accommodation of a leave to recuperate from an emotional breakdown.

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

There is a strong argument to be made that Complainant was no longer an otherwise qualified handicapped individual because, despite meeting minimal requirements, he was not performing his job consistent with Respondent’s expectations, in large part due to difficulties in his personal life. Respondent had remained sympathetic to the problems Complainant was experiencing for several months and supported Complainant’s need for time off and shorter work hours. However, during the summer of 2014, Wilder had begun to counsel Complainant about attendance and tardiness issues and needed Complainant to step up as the second in command of business operations, because Wilder was undergoing his own personal problems. Complainant argues that he was satisfying the basic requirements of the job, but the evidence suggests that he lacked enthusiasm and energy for the job and was no longer performing consistent with his prior standards and Respondent’s expectations. Complainant’s position carried with it a great deal of responsibility and the success of the company’s day to day operations depended on him. Respondent, a small family-owned business, has demonstrated that Complainant had become incapable of managing the operations at the level required given the demands and dysfunction of his personal life. Ultimately, his failure to appear for a

scheduled work shift on a busy weekend without notice could be considered egregious misconduct. See Mammone v. President and Fellows of Harvard College, 446 Mass. 657, 679 (2006) (employee who engaged in egregious misconduct sufficiently inimical to employer's interests that it would result in termination of a non-handicapped employee, found not to be a qualified handicapped person within meaning of c. 151B). The nature and extent of the employee's misconduct is an issue for the fact-finder to determine. Id. at 680.

While I am not entirely unsympathetic to Complainant's claim that he needed a leave of absence to treat and recover from an emotional breakdown, by the time he sought this accommodation he had burned all his bridges with Wilder. Having determined that Complainant's ongoing failure to satisfy the job requirements and his no call-no show justified his termination, I conclude that Respondent no longer had an obligation to accommodate his disabilities by granting him a leave. Wilder testified credibly that the negative situation with Complainant was harming the business, the morale of other employees and customer relations. It was clear that their professional association was no longer beneficial to the business and could not continue. When Complainant failed to come to work on that Sunday Wilder believed Complainant had essentially forsaken his job and Wilder's trust. Wilder denied receiving any advance notice that Complainant would not be coming to work. He believed that by requesting a leave, Complainant sought to avoid the consequences of not showing up to work on Sunday. In fact Complainant was fully aware of the potential repercussions and told his therapist he felt guilty about not showing up to work and feared he would be terminated for this dereliction of duty. Respondent has persuaded me that granting a further accommodation to Complainant in the form of a leave would have been an undue hardship and was unreasonable given Complainant's past conduct and the importance of his position to the operation of the business.

Given these circumstances Respondent was justifiably absolved of any further obligation to provide reasonable accommodation to Complainant and its actions did not violate G.L. c. 151B.

IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, I hereby Order that the complaint in this matter be 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 pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 21st day of July, 2017.



Eugenia M. Guastaferrri
Hearing Officer