THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

Dartmouth Hitchcock Medical Center
v.
New Hampshire Commission for Human Rights and
Patricia Gould

Docket Nos. 2012-CV-333; 2012-CV-493

ORDER

Patricia Gould brought a complaint before the New Hampshire Human Rights Commission ("HRC") alleging that her employer, Dartmouth Hitchcock Medical Center ("DHMC"),[1] failed to properly accommodate her disability. HRC held a hearing and ultimately decided in favor of Gould, awarding to her damages and attorney's fees and costs. DHMC petitioned for judicial review of both decisions—the award of discrimination damages and the award of attorney's fees and costs—naming Gould and HRC as respondents. Gould cross-petitioned for enforcement of HRC's decision. On December 13, 2012, the Court (Vaughan, J.) granted HRC's motion to dismiss. On December 18, 2012, the Court (Vaughan, J.) consolidated the two cases. The Court held a hearing on April 2, 2013, after which the Court directed the parties to file all exhibits that were included before the HRC proceeding. Based on the arguments, pleadings, exhibits, and applicable law, the Court finds and rules as follows.

I. Standard of Review

As an initial matter, the Court addresses the standard of review. The parties disagree about the standard of review applicable to the present case. Gould argues that the proper review standard requires the Court to deem HRC's findings *prima facia* lawful and reasonable. DHMC, on the other

[1] DHMC represents that Mary Hitchcock Memorial Hospital ("MHMH"), which is part of DHMC, actually employed

hand, contends that the Court has the authority to make finding, rulings, and determinations of damages, independent of HRC's conclusions.

The Court's standard of review is set out in RSA 354-A:22, providing in relevant part that any person aggrieved by a decision of HRC "may obtain judicial review of the order[.]" RSA 354-A:22, I. The statute further provides:

> II. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order or decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission, with full power to issue injunctions against any respondent and to punish for contempt of court. . . .
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> III. Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, or in the alternative to move the court to accept such additional evidence itself, provided he shows reasonable grounds for the failure to adduce such evidence before the commission. The superior court shall have the authority to make all rulings of law, findings of fact and determinations of damages and fines, if any, notwithstanding any such rulings, findings or determinations made by the commission.

RSA 354-A:22, II, III.

The scope of review, as set out in statute above, contains no presumption in favor of the lawfulness or reasonableness of HRC findings, and it gives the Court the authority to make its own rulings of law, findings of fact, and determinations of damages, notwithstanding those made by HRC. Accordingly, the Court reviews the record before it without presuming the lawfulness or reasonableness of HRC findings.

II. Facts and Procedural Background

The parties do not contest HRC's determination that DHMC did not retaliate against Gould.

Gould. For the purposes on this order, the Court refers to the petitioner generally as DHMC.

The Court considers only DHMC's claims that HRC erred in concluding that DHMC did not fully satisfy its obligations to accommodate Gould's disability. Accordingly, the Court recites only the facts necessary to determine the pending dispute.

DHMC employed Gould as a full-time, dining-room attendant from November 5, 2007, to October 8, 2009. Gould worked directly with several dining-room supervisors: Sean Schriber, Walter Ziske, and Terri Estrada. During her employment she, along with all other employees, was overseen by the general manager of the dining room, Jamie Guzman.

During her employment at DHMC, Gould suffered from severe osteoarthritis of her feet and ankles. In May 2008, she began wearing specialized braces to prevent the condition from worsening. On November 26, 2008, Gould requested DHMC, specifically Guzman, to allow her to switch from the evening shift (starting between 10:30 a.m. and 11:30 a.m. and ending at 8:00 p.m.) to the morning shift (starting between 5:30 a.m. and 7:30 a.m. and ending in the early afternoon) to alleviate her discomfort. Upon request from DHMC, she provided a notation from her treating physician indicating that she should be switched to the morning shift. (DHMC Ex. H.)

After working the morning shift, Gould realized that it was too fast-paced for her and asked to return to the evening shift. Her request was processed on approximately January 22, 2009, after Guzman returned from vacation and after Gould submitted another notation from her physician. The medical request indicated that Gould should be placed on the evening shift, and did not contain any other accommodation requests. (DHMC Ex. L.)

The parties dispute what occurred next. Gould claims that DHMC informed her that the switch to the evening shift would not be immediate and that she would work both morning and evening shifts as needed. DHMC asserts that it switched Gould to the evening shift, and that with

respect to any subsequent morning shifts she worked, she voluntarily agreed to do so beforehand. In October 8, 2009, DHMC allowed Gould to resign (although she would have been terminated if she refused) citing numerous, ongoing food safety and time management violations.

On December 17, 2009, Gould brought a HRC disability discrimination complaint against DHMC. Gould asserted that she started receiving poor performance reviews shortly after requesting shift changes. She claimed that DHMC did not comply with her special-accommodation requests and that she was disciplined and later forced to resign in retaliation for such requests. After an initial investigation, HRC found "sufficient evidence had been produced to find probable cause that discrimination had occurred" and scheduled a hearing. (HRC Decision at 1.) On April 11 and 12, 2012, HRC held an evidentiary hearing pursuant to RSA 354-A:21, II(c) and (d), and considered the following issues:

1. Did Ms. Gould request accommodation for her disability?
2. Did DHMC engage in the interactive process with Ms. Gould regarding accommodations for her disability; and
3. Did DHMC terminate her employment due to her work performance, or in retaliation for her accommodation request?

(Id.)

HRC heard testimony from Schriber, Cheryl Roberts-Robb, Henry Aldrich, Lawrence Copp, an economist, Kimberly L. Carboneau, Gould, Estrada, and Ziske. The parties also presented a plethora of exhibits documenting Gould's employment. The Court reviewed the 548-page transcript of the hearing and the exhibits presented to HRC.

Roberts-Robb, another dining-room attendant, testified that in her opinion and based on her observations, the dining-room supervisors treated Gould differently from other employees in that they reprimanded Gould more severely and for infractions for which others were not corrected.

Aldrich, a retired DHMC cook, testified that one of the supervisors indicated to him that DHMC was attempting to "get rid of" Gould. On cross-examination, however, both Roberts-Robb and Aldrich testified that they had no knowledge about Gould's requests for special accommodations or that DHMC disciplined or required Gould's resignation because of her requests to accommodate her disability.

Carboneau is a DHMC human resources employee who dealt with Gould throughout her employment. Carboneau testified that her job, in part, is to help employees and supervisors work through disputes. She explained that she attempts to be a neutral, mediating figure in that process, but that ultimately she represents the interests of the organization, not of the individual employees or supervisors. Carboneau testified that she generally communicated with Gould about Gould's concerns throughout her employment at DHMC, and specifically assisted Gould in the grievance process, when Gould grieved her written and final warnings and the decision to proceed toward a discharge.

Gould testified that she received two raises while employed at DHMC, the first in February 2008, and the second in February 2009. She testified that after asking to switch to the morning shift and working morning shifts for approximately one week, Gould realized that it was too demanding and asked Ziske to return her to the evening shift. Ziske suggested that Gould visit the Occupational Medicine Department[2] to ensure that her disability did not prevent her from performing her job. (Tr.

[2] Attorney Kaplan for DHMC represented to HRC that Occupation Medicine at DHMC "evaluates whether or not [newly hired individuals] are capable of doing the responsibilities of the job and whether or not they need accommodation to do those jobs. . . . In other situations where a supervisor is concerned . . . about the abilities of a person, physical abilities to do a job, Occupational Medicine is the place they would go to evaluate that and then to go back to the supervisor and say this is what aspects of this job this person can do and then decisions would be made about whether or not they can stay in that position with or without accommodation or whether or not they need to be moved someplace else." (Tr. Vol. 2, 249:11–250:1.)

Vol. 2, 6:21–7:5, Apr. 12, 2012.) Gould testified that Ziske's comment concerned her because it indicated that he thought she was not fit for the job. (Id. 7:6–10.) Gould did not seek occupational therapy. Ziske also indicated that Gould needed to speak with Guzman about switching shifts. (Id. 267:3–268:8.) Gould testified that when she asked Guzman to return her to the evening shift, he told her that he would have to meet with the directors of the cafeteria and that he could not guarantee her placement on the evening shift but would try his best. (Tr. Vol. 1, 274:12–24.) She testified that Guzman could have moved her completely to the evening shift but chose not to do so and instead he "just [kept] moving [her] from the morning to the evening which even made it harder for [her]" in an attempt to "get rid of [her]." (Id. 275:9–11.) Gould testified that DHMC did not accommodate her disability because she was not permitted to work exclusively on the evening shift, even though other employees maintained exclusively evening-shift schedules. (Tr. Vol. 2, 43:15–44:8.) She further testified that there was no discussion about moving her to the cashier's position, where she could sit or at the least not be required to move about during the entire shift. (Id. 44:9–15.)

Gould testified at the HRC hearing that in her deposition she mistakenly stated that she could work the morning and evening shifts as well as any other employee. (Id. 83:17–24.) She testified that she told Ziske that she wanted to return to the slower-paced evening shift, but did not specifically tell Ziske or her supervisors that she could not physically satisfy the requirements of the morning shift. Gould admitted that in an e-mail appealing her termination, she stated that she could work either the morning or the evening shifts, and that she could do so as well as any other employee. (See DHMC Ex. W at 10.) At the HRC hearing, however, Gould explained that she actually could not work the morning shift because it was too fast-paced and that the contrary statements in her e-mail contesting the resignation were untruthful. (Tr. Vol. 2, 89:8–19.) She

explained that to the extent she ever indicated that she could perform on any shift, she said that only because she was afraid of being fired. (Id. 92:1–95:20.)

Guzman testified that after Gould requested to return to the evening shift he tried to accommodate her by scheduling her in the evenings as much as possible. He testified that he could not always do so because there were not enough other sufficiently trained employees to cover the morning shift all the time. He explained that he did not always ask Gould in advance if she could work the morning shifts. (Id. 154:16–155:9.) He testified that other employees also experienced scheduling irregularities. He also testified that once scheduled to work in the mornings, Gould did not notify him that any such assignments were unacceptable.

On July 11, 2012, the HRC issued an order making numerous factual findings and legal rulings, rejecting Gould's retaliation claim, and concluding:

> It is the opinion of a majority of the Commissioners that DHMC failed to accommodate [Gould's] request for being returned to the closing shift, and did not engage in an interactive process addressing the accommodation request made by [Gould] to help her be a successful employee. This failure to accommodate ultimately resulted in [Gould's] termination. Based on the evidence presented to the Commissioners on April 11 and April 12, judgment is awarded Patricia Gould in the amount of $44,831. This judgment is a combination of her back pay ($39,381) and $5,000 in an unvested account that she lost as a result of her discharge.

(HRC Decision at 6.) In addition, HRC overruled DHMC's objections and awarded Gould $29,201.55 in attorney's fees and costs. DHMC brought the present action, seeking judicial review of HRC's adverse decision under RSA 354-A:22.

Presently, DHMC argues that HRC made numerous factual errors; legal errors; erroneous determinations of damages; and an erroneous award of attorney's fees and costs to Gould. (Pet. Damages ¶¶ 14–43.) Among DHMC's claims, it argues that HRC committed legal errors by:

(1) "concluding that DHMC did not do what it was required to do under the law to address Gould's request for accommodation" (id. ¶ 33); (2) "stating that DHMC has an obligation to meet with and discuss Gould's disability with her" (id. ¶ 34); and (3) "determining that DHMC has a duty to do more than Gould requested as an accommodation" (id. ¶ 35; see also id. ¶¶ 36–40). DHMC claims that HRC erred in awarding Gould back pay and $5,000 from an unvested benefits account. (Id. ¶¶ 41, 42.) With respect to attorney's fees and costs, DHMC argues that HRC erred as a matter of law in ordering the award before a final judgment in the case. (Pet. Att. Fees ¶ 13.) DHMC also argues that HRC erred in finding that the descriptions and costs and the submissions for attorney's fees and costs are reasonable. (Id. ¶ 14.) Gould objects, and asks the Court to uphold the decision of HRC.

III. Discussion

Gould's argued before HRC that DHMC discriminated against her by not fully accommodating her disability. Relying on RSA chapter 354-A, New Hampshire's "Law Against Discrimination" and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111–12117 (2008), HRC concluded that:

> 26. DHMC had substantial information, within [its] own files, to identify other jobs Ms. Gould was qualified for. Instead of engaging in an interactive process to address the accommodation request, DHMC viewed her request extremely narrowly and attempted to deal with her request by simply changing Ms. Gould's shift time.
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> 27. DHMC, under the law has the responsibility to explore employment alternatives that would accommodate the request made by Ms. Gould as long as the accommodation does not impose[] an undue hardship on the operation of its business . . . .
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> 29. DHMC produced no evidence to support a defense of undue hardship. DHMC produced no evidence to support a finding that [it] did anything to investigate alternative job placement for Ms. Gould (except shift change, which was never fully implemented).

> 30. DHMC was in the best position to explore alternative job placement for Ms. Gould. It was not the job of the employee, and certainly not the job of the doctor, to suggest job placement accommodations.

(HRC Decision at 4–5.)

The Court must ultimately determine if DHMC reasonably accommodated Gould's disability. See RSA 354-A:7. The Court must consider whether DHMC was required to engage in an interactive process with Gould to determine a reasonable accommodation for her disability, even though Gould submitted specific accommodation requests.

In considering the issue presented the Court relies on federal opinions interpreting the ADA and the Code of Federal Regulations accompanying the ADA for guidance. See, e.g., Madeja v. MPB Corp., 149 N.H. 371, 378 (2003) ("As this is an issue of first impression under RSA chapter 354-A, we rely upon cases developed under Title VII to aid in our analysis."); Scarborough v. Arnold, 117 N.H. 803, 807 (1977) ("In considering what constitutes proof of discriminatory failure to hire under our 'Law Against Discrimination,' RSA 354-A, as amended, (Supp. 1975), it is helpful to look to the experience of the federal courts in construing the similar provisions of Title VII of the 1964 Civil Rights Act."); Brennan v. Carvel Corp., 929 F.2d 801, 813 (1st Cir. 1991) (citing the Massachusetts Consumer Protection Act to help interpret similar language of the New Hampshire Consumer Protection Act).

In relevant part, the "Law Against Discrimination" provides:

> It shall be an unlawful discriminatory practice . . . [f]or any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

RSA 354-A:7, VII(a). The law requires an employer to make reasonable accommodations for an

employee with a disability unless making such accommodations creates an undue hardship for the employer. White Cliffs at Dover v. Bulman, 151 N.H. 251, 256 (2004) (quoting Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002) (holding that, under the ADA, "an employer is not required to provide the accommodation for a disabled employee that is ideal from the employee's standpoint, only one that is reasonable in terms of costs and benefits")).

In this case, HRC concluded that DHMC did not make reasonable accommodations because (1) it failed to switch Gould completely to the evening shift, and (2) it did not engage in an interactive process with her to determine alternative working arrangements. DHMC argues that it did reasonably accommodate Gould because it complied with her specific requests and, therefore, was not required to engage in an interactive process to seek alternative accommodations.

In some situations, an employee's request for a reasonable accommodation may require an employer to enter into an interactive process with the employee to determine an appropriate accommodation. Reed v. LePage Bakeries, Inc., 244 F.3d 254, 262 n.11 (1st Cir. 2001). "The ADA's regulations state that 'it may be necessary for the covered entity [the employer] to initiate an informal, interactive process with the qualified individual [the employee] with a disability in need of the accommodation.'" Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 108 (1st Cir. 2005) (quoting 29 C.F.R. § 1630.2(o)(3) (2005)). "As the ADA regulations themselves state, the 'interactive process' is to be 'informal' and a means of uncovering 'potential reasonable accommodations' that could overcome the employee's disability." Id. at 109 (quoting 29 C.F.R. § 1630.2(o)(3)). "Reasonable accommodations may include job restructuring, part-time or modified work schedules, reassignment to a vacant position and other similar accommodations for individuals with disabilities. A careful, individualized review of an accommodation request in light of the specific facts of the case is

needed to determine whether the request was reasonable." Calero-Cerezo v. U.S. Dept. of Justice, 355 F.3d 6, 23 (1st Cir. 2004) (citations, quotations, and ellipsis omitted).

In the present situation, DHMC was aware of Gould's disability when she first requested a specific accommodation, a shift change in November 2009. Gould and her treating physician requested that DHMC place her on the morning shift to alleviate her symptoms. DHMC complied. After Gould realized that the morning shift was not beneficial to her condition, Gould requested to return to the evening shift. Upon request, she submitted a doctor's note that indicated that she should work the evening shift. (DHMC Ex. L.) Both Gould and Guzman testified that Gould told Guzman that she needed to work the evening shift because it was easier on her feet. The testimony indicates that Gould asked for this specific accommodation and nothing else.

After her January 22, 2009 request, DHMC transitioned Gould into the evening shift, but did not schedule her exclusively on the evening shift. The record indicates that after Gould's request to be scheduled on the evening shift her bi-weekly schedules, in which Gould worked 11 days, consisted of approximately 0–5 morning shifts and 6–11 evening shifts, with the exception of the period from May 4, 2009 to May 18, 2009, in which Gould was scheduled to work 8 morning shifts and 3 evening shifts. (Gould Ex. 12.) In response to DHMC counsel's inquiry if Gould remembered that she agreed to work mornings for that time frame because another employee was absent, Gould indicated, "It's possible. I don't remember exactly." (Tr. Vol. 2, 111:9.) She then elaborated, "I did anything my supervisors asked me to do. I always listened to them, always tried to please them." (Id. 111:18–20.) In addition, Gould agreed that it is possible that in some instances when she was scheduled to work the morning shift, she actually worked the evening shift. (Id. 102:7–13.)

Schriber testified that it is not typical for an employee to always work on one shift. Schriber

and Guzman both testified that they took into account Gould's request to work only the evening shift in creating the schedules and attempted to schedule her accordingly. Guzman explained that he did not always ask Gould in advance if she could work the morning shifts before scheduling her to do so. (Tr. Vol. 2, 154:16–155:9.) Schriber testified that any time that he needed Gould to work a morning shift, he would you ask her if she could do so, and that she always agreed and never told him otherwise or complained about her proposed work schedules. (Tr. Vol. 1, 84:4–86:12.) Ziske testified that when he asked Gould to cover a morning shift, she would always agree unless she had a prior commitment, and if she did, he would not schedule her for that morning shift. (Tr. Vol. 2, 212:17–213:3.) Gould testified that she never complained when she was assigned to the morning shift after January 22, 2009, or notified any of her supervisors that she could not do so.

Furthermore, Gould gave no indication that she needed other accommodations, for example, to be switched to a cashier position or another position that required less walking or standing. She testified that she told her supervisors that she was an excellent cashier but that she never asked to work as a cashier on a regular basis to alleviate the pain in her feet. Ziske testified that when Gould asked to be returned to the evening shift because the morning was too fast-paced, he suggested that she go to the occupational medicine department. (Tr. Vol. 2, 242:1–24; 245:1–14.) He further testified, however, that Gould never asked for any additional accommodation, and did not provide a doctor's note requesting such. (Id. 244:15–21.) The record shows that Gould never contacted DHMC after January 22, 2009, to request any other specific accommodations beyond the shift changes. Furthermore, she never indicated that she needed other accommodations, in a general sense. In other words, there is no evidence in the record that during her employment Gould told her supervisors or Carboneau that she needed another solution or accommodation because the non-

exclusive switch to the evening shift was not a satisfactory or sufficient accommodation.

In fact, Gould indicated, at least to Carboneau, that she was capable of working both morning and evening shifts. In appealing her final warning and resignation Gould stated:

> The evening shift was slower paced and better for my feet but I am capable of performing all positions in the Cafeteria, and as I had more training on the morning shift, it became easier for me. I fee[l] my position as Dining Room Attendant was easy for me, and I did not feel that my being forced to resign was fair. My feet did not keep me from doing as good a job as anyone else in the Cafeteria.

(Def.'s Ex. W at 10.) And although at the HRC hearing Gould indicated that this e-mail was untruthful, considering all the circumstances and Gould's other representations at that time, DHMC had no reason to conclude that Gould was overstating or otherwise misstating her abilities and functional capacities. Carboneau testified that Gould never complained to her that she was physically unable to work the morning or the evening shifts.

In sum, Gould asked DHMC specifically for return to the evening shift; did not request other accommodations generally, or seek other specific alternatives, i.e. switching to a cashier's position; did not complain during any periods when she was assigned mostly to the evening shift and some morning shifts; and expressly indicated that she could work both the morning and the evening shift. Although Gould claims that DHMC was not accommodating her because it "could have easily put [her] back on the evening shift completely" (Tr. Vol. 2, 114:1–2), she presents no evidence to support her argument that her supervisors placed her on any morning shift despite the fact that they had other viable options to fill those morning positions. In response to her shift-change request, DHMC suggested that she consult occupational medicine; scheduled her mostly on the evening shift; and generally asked her beforehand if she could work the morning shift. "This is not an instance where the employer [DHMC] simply rejected any request for accommodation without

further discussion." Tobin, 433 F.3d at 109. These facts do not support the conclusion that DHMC failed to properly accommodate Gould. See, e.g., Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135–36 (2nd Cir. 2008) (concluding that, under certain circumstances, an employer is required to act proactively to accommodate the disability of an employee even if the employee does not request any accommodation and explaining that in the absence of a request for specific accommodation an employer should engage in an interactive process to discover an accommodation workable to both parties); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 515 (1st Cir. 1996) ("[The employee presented no evidence, aside from the initial request that the employer denied,] that he requested any other accommodations, inquired whether the [employer] had any suggestions, or otherwise indicated that he was still interested in finding a solution. While it is uncontroverted that the [employer] did not suggest any alternative accommodations after it rejected as unreasonable [the employee's] proposed accommodations, there is no evidence that the [employer] failed to consider [the employee's] requested accommodations and there is nothing in the record from which we can discern any attempt by the [employer] to sweep the problem under the rug."). The Court finds that HRC erred in finding that DHMC failed to properly accommodate Gould. Because Gould asked for specific relief and DHMC furnished her with the specific relief that she requested, the Court determines that DHMC was not required to engage in a further interactive process with Gould to determine what other reasonable accommodations would allow her to continue to perform her job despite her disability. See Enica v. Principi, 544 F.3d 328, 340 (1st Cir. 2008).[3] The Court

[3] In Enica, although the plaintiff was continually required to perform duties that she was previously medically restricted from performing, she did not complain to her supervisors. Id. "Rather, it appears that Enica continued performing her duties up until 2002, without incident or objection. As such, we agree with the district court that absent any communications from Enica regarding the inadequacy of her accommodations, no factfinder could hold the [employer] responsible for either a breakdown in the interactive process or failing to correct an inadequate accommodation since it

concludes that DHMC did not violate either RSA 354-A:7, VII(a) or the relevant accommodation provisions of the ADA. In accordance with the foregoing findings and conclusions, the Court need not consider the remainder of DHMC's arguments.

IV. Conclusion

Consistent with the analysis above, the Court VACATES HRC's decision that DHMC discriminated against Gould and SETS ASIDE HRC's awards of damages and of attorney's fees and costs.

SO ORDERED.

Dated: 6/12/13

Peter H. Bornstein
Presiding Justice

was not made aware that a deficiency existed." Id.