

**THE NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS**  
**Patricia Gould v. Dartmouth Hitchcock Medical Center**  
**16D-2010-00041**  
**ED(R) 0059-10**

**Decision on the Merits After Public Hearing Held April 11 & April 12, 2012**

**Procedural Background**

Patricia Gould filed a Charge of disability discrimination in employment against Dartmouth-Hitchcock Medical Center on December 17, 2009.

After investigation, based on document production, interviews, and legal analysis, on November 9, 2011, the Investigating Commissioner found sufficient evidence had been produced to find probable cause that discrimination had occurred. The issues to be determined at hearing were:

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?

Commissioner William E. Brennan, as Chair, Commissioner Joshua Boynton and Commissioner Catherine Hackett were assigned to hear the case at a public hearing held on April 11 and April 12, 2012. Attorney R. Peter DeCato appeared on behalf of Patricia Gould; Attorney Edward Kaplin appeared on behalf of DHMC.

**Agreed Facts**

1. The parties agreed that Ms. Gould was hired by DHMC on October 17, 2007 as a full-time Dining Room Attendant in the Food and Nutrition Department and that she began work on November 5, 2007 (Petitioner's Exhibit 3).
2. The Parties stipulated that Ms. Gould suffered from a disability and that DHMC was aware of Ms. Gould's disability (See Pre-Hearing Conference Report/Order dated March 9, 2012).
3. The Parties agreed that Ms. Gould was discharged from her employment on October 8, 2009. (Respondent Exhibit V).

**Findings of Fact by a Majority of the Commissioners**

1. That Ms. Gould's initial work assignment was to work the evening shift from approximately 11:00 a.m. to 9:00 p.m. (the hours would vary) as a Dining Room Attendant.
2. That Ms. Gould's first supervisor was Shawn Schreiber.
3. That as part of DHMC's employment process a new employee would go through a 90 day performance evaluation.
4. That Ms. Gould underwent the 90 day evaluation on or about February 6, 2008, and that she was found to meet expectations in most areas, but was having difficulty fully meeting expectations in an important area. (Petitioner-Exhibit 2).
5. That Ms. Gould, at the end of the Fiscal Year 2007, was found to improve her work performance and her evaluation document indicated that she met or exceeded expectations in all major areas. (Petitioner-Exhibit 2).
6. Mr. Schreiber did testify that during the time he supervised Ms. Gould, he did provide oral coaching to her in areas that he felt she needed direction.
7. Mr. Schreiber testified that Ms. Gould responded appropriately to the oral directions that he gave her.
8. Mr. Schreiber found that she met or exceeded expectations in all major areas.
9. In the year 2008-2009, once again Ms. Gould received the highest performance appraisal of meeting expectations and was also found to exceed expectations in one or more major components of her job. (Petitioner-Exhibit 2).
10. That with guidance and direction, Ms. Gould seemed, for at least the first year of her employment with DHMC, to meet her employment expectations and, at times, exceeded those expectations. (See testimony of Mr. Schreiber and Petitioner-Exhibit 2)
11. That on or about June 28, 2009, Ms. Gould received a 4.10% pay increase as a result of the impact of the 2009 Merit Performance program (Petitioner-Exhibit 3).
12. That up to and including June 27, 2009, Ms. Gould seemed to meet all expectations concerning her employment at DHMC.
13. That in December of 2008, Walter Ziske became Ms. Gould's supervisor.
14. That on December 16, 2008, Mr. Ziske submitted the first written documentation of a coaching session in Ms. Gould's employment file which outlined, for the first time since

the beginning of her employment on November 5, 2007, criticism of Ms. Gould's work performance. (Petitioner-Exhibit 7).

15. That Jamie Guzman, Manager of the Food and Nutrition Service for DHMC, on or about January 22, 2009, prepared and submitted a written warning concerning Ms. Gould which contained further criticism of her work performance. (Petitioner-Exhibit 8).
16. That on May 18, 2009, Mr. Guzman provided to Ms. Gould a Final Warning again outing criticism of her work performance. (Petitioner-Exhibit 9).
17. That on October 8, 2009, Mr. Guzman recommended that Ms. Gould be discharged from her employment because of poor work performance. (Petitioner-Exhibit 10).
18. That the only difference between the moment in time when Ms. Gould was exceeding her work expectation and receiving financial reward for her Merit Performance was a change in her supervisor from Mr. Schreiber to Mr. Ziske.
19. That Ms. Gould's employment record is replete with medical reports from her doctors requesting adjustments to her work:
  - (a) June 17, 2008 – that she be allowed to sit down at work (Respondent-Exhibit F).
  - (b) November 28, 2008 – that she would benefit greatly with working during the day shift (Respondent-Exhibit H).
  - (c) January 23, 2009 – that she needs to work the evening shift (Respondent-Exhibit L).
20. That Ms. Gould's employment record contained numerous positive recommendations of her work performance prior to her employment with DHMC:
  - (a) Dr. Ronald Green commented on her work at the check-out line at Au Bon Pain. That she took her job seriously and "couldn't be more helpful."
  - (b) Mark Dantos – General Manager of Au Bon Pain gave her high employment recommendations. He indicated that she was an excellent employee. Mr. Dantos indicated that she was a Customer Service Representative and a Shift Supervisor. That she assisted in ordering inventory, cash-handling procedures, food preparation, and weekend employee supervision. That she was intelligent and personable and had fantastic sale skills.
  - (c) Martha Candon, Vice President of Fleet Bank, praised her work as a Teller.

- (d) Robyn Mosher, Olga Kay, and Michele A. Holmes, all submitted letters of praise and recommendation for Ms. Gould, all indicating that she treated customers with respect, that she had a positive attitude and that she was a dedicated and a hard-working team player; a person with an excellent work ethic. (See generally, Petitioner-Exhibit 1).
21. That these recommendations and descriptions are all consistent with the work performance evaluations contained in Ms. Gould's file from November 5, 2007 to December 15, 2008.
  22. It is apparent that Mr. Scheiber recognized Ms. Gould's disability and was able to positively work with her so that she could be successful. Unfortunately, Mr. Ziske and Mr. Guzman did not have his skill.
  23. As it became apparent to Ms. Gould that her job was at risk, she did what all employees do trying to keep their job in these economic times; she told her Supervisors and Managers what she thought they wanted to hear.
  24. DHMC did not do what was required under the law to try to address Ms. Gould's request for accommodation.
  25. DHMC had an obligation to meet with and discuss with Ms. Gould the impact of her disability.
  26. DHMC had substantial information, within their 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.
  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 imposed an undue hardship on the operation of its business. (RSA 354-A: 7; ADA, as amended, 42 USC §12; §112(b)(5); §102(b)(5).)<sup>1</sup>
  28. RSA 354-A and the ADA, as amended, require an employer to make reasonable accommodation unless it "can demonstrate that the accommodation would impose an undue hardship on the operations of the business." (ADA, as amended, 42 USC §12; §102(b)(5)(A); 112(b)(5)(A).

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<sup>1</sup> The NH Supreme Court frequently looks to and follows federal law when interpreting antidiscrimination statutes. See, e.g. *Madeja v. MPB Corp.* 149 N.H. 371 (2003).

29. DHMC produced no evidence to support a defense of undue hardship. DHMC produced no evidence to support a finding that they 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.
31. A majority of the Commissioners found that Ms. Gould made a request for accommodation for her disability and that DHMC did not engage in an interactive process following the accommodation request.
32. A majority of the Commissioners found that the failure of respondent to accommodate Ms. Gould's disability negatively affected her performance, which ultimately led to her termination. Had the respondent either fully accommodated the shift change, placing Ms. Gould back on the closing shift schedule, or had changed or modified her position within the dining room, or found another suitable placement within the hospital campus complex, she would have succeeded as an employee as she did her entire first year of employment with the respondent.
32. Ms. Gould produced evidence on the issue of retaliation which was compelling:
  - (a) The testimony of Henry Aldrich and Cheryl Roberts-Robb produced insight that appeared to indicate that the management of the Food and Nutrition Service Department of DHMC was attempting to gather evidence directly designed for the purposes of terminating Ms. Gould.
  - (b) Respondent's Exhibit BB is further evidence of what appears to be a concerted effort by Mr. Guzman and Mr. Ziske to document and analyze any error, no matter how minor, on a daily basis, committed by Ms. Gould. This Exhibit, alone, raised substantial questions in some of the Commissioners' minds concerning the retaliation issue.
  - (c) Nevertheless, the testimony of Mr. Guzman, Mr. Ziske and Theresa Estrada appears to indicate that the scrutiny that was applied to Ms. Gould was not unusual.
  - (d) It appeared, from the testimony of the witnesses produced by the Respondent, that the culture of DHMC requires supervisors and managers to continuously report negative actions performed by their employees. From the testimony, it appears that this culture and attitude applies to all employees, at least in the Food and Nutrition Service Division of DHMC.

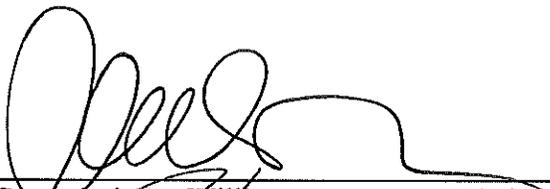
- (e) A majority of the Commissioners found that Petitioner did not carry her burden in proving that the termination action taken by DHMC, although creating significant stress in the Petitioner, was not done in retaliation for her accommodation request.

**Conclusion**

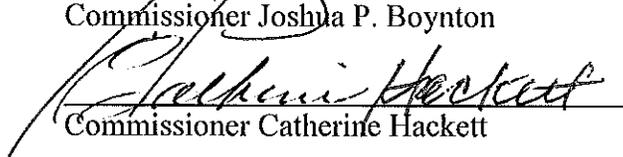
1. It is the opinion of a majority of the Commissioners that DHMC failed to accommodate her request for being returned to the closing shift, and did not engage in an interactive process addressing the accommodation request made by Petitioner to help her be a successful employee. This failure to accommodate ultimately resulted in Petitioner's termination. Based on the evidence presented to the Commissioners on April 11 and April 12, judgment is awarded to 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. In addition to this judgment, Petitioner is awarded reasonable attorney's fees and costs. Mr. Decato, would you please submit a detailed outline of your attorney's fees and costs. Please forward that information to Director Esperian at the Commissioner's Office. Please provide a copy of that information to Attorney Kaplan. Mr. Kaplan, if you have an objection to Mr. Decato's bill, please provide your objection to Director Esperian within 10 days of receiving Mr. Decato's bill.

**SO ORDERED.**

6/21/2012  
Date  
6/28/2012  
Date  
7/5/12  
Date

  
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Commissioner William E. Brennan, Chair

  
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Commissioner Joshua P. Boynton

  
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Commissioner Catherine Hackett