

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

ANDREW HARRIS and SPENCER TATUM

Complainants

v.

CITY OF WORCESTER
POLICE DEPARTMENT,

Respondent

NO. 94-SEM-0589
94-SEM-0590

ORDER OF THE FULL COMMISSION

This matter is before us following a decision of Hearing Officer Edward Mitnick, in favor of Respondent. The order we issue today in this matter does not constitute a final review of the Decision of the Hearing Officer for purposes of evaluating the sufficiency of the evidence in the record upon which the factual and legal conclusions were drawn.¹ For the following reasons, we have concluded that additional proceedings are necessary in order to conduct a full review as set forth in 804 CMR 1.23.² Therefore, and for the below reasons, we remand the matter to the Hearing Officer.

¹ It is the duty of the Full Commission to review the record of proceedings before the Hearing Commissioner or Officer. M.G.L. c. 151B, § 3. The Hearing Commissioner's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding..." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A.

² See in 804 CMR 1.23 (2) Review of Decisions of Hearing Officers - The Full Commission may review the final decision of a Hearing Officer sua sponte.....(a) The Commission may order oral argument, and/or order the parties or the General Counsel submit memoranda of law or fact. (b) The Commission shall, under such circumstances, take action as delineated at 804 CMR 1.23(1), or any other order it deems necessary in the interests of justice.

The procedural history indicates that complainants Andrew Harris ("Harris") and Spencer Tatum ("Tatum") both filed nearly identical complaints with the Massachusetts Commission Against Discrimination ("Commission") on September 15, 1994, alleging that the City of Worcester Police Department ("the City" or "Respondent"), had engaged in unlawful discrimination on the basis of race and color in violation of M.G.L. c. 151B, § 4(1), when it failed to promote them to the position of sergeant.³ Specifically, Harris and Tatum alleged that the City engaged in a pattern of unlawful discrimination towards them by failing, over a period of time, to promote them to sergeant.⁴

In his decision of April 26, 2002, the Hearing Officer concluded that the City was required, as a matter of law, to strictly conform its hiring decisions to the procedures as set forth in the civil service laws of the Commonwealth:

If the City of Worcester had promoted Complainants or other minority candidates ahead of the higher scoring non-minority candidates, without the existence of a consent decree, affirmative action plan or binding agreement, then the City would have violated civil service laws and would have likely ended up in the same position as the City of Boston in MAMLEO. In that case, the City of Boston attempted to achieve affirmative action goals and promote minorities to the ranks of superior officers by "bypassing" non-minority candidates with higher civil service exam scores in favor of minority officers. The bypassed non-minority candidates appealed the promotions and both the Civil Service Commission and the Superior Court found that Boston improperly bypassed the higher scoring candidates solely on the basis of race. *Id.* at 260-264. The Supreme Judicial Court affirmed and held that without the mandate of a consent decree, the bypass of higher scoring candidates based purely on race was inconsistent with basic merit principles and, thus, a violation of civil service

³ On February 14, 1996, the Commission found probable cause to credit Complainants allegations. On April 11, 2001, the Commission certified the case for Public Hearing. A Public Hearing was held beginning in July, 2001.

⁴ The Hearing Officer specifically found:

I find that the City did not promote any minority candidates to the position of sergeant following the 1992 and 1994 promotional exams because minority candidates failed to achieve a sufficiently high rank on the eligibility list as a result of their exam scores. Chief Gardella, who served as Chief of the police department from December 1991 through September 2000, testified credibly that no minority officer scored high enough on the promotional exams to be eligible for promotion to sergeant. Complainants have not submitted any credible evidence that the City's policy of simply taking the highest scoring candidates was developed or utilized for nefarious reasons. In addition, Complainants have not submitted any credible evidence that the City attempted to subvert any civil service rule or regulation and I specifically find that the City clearly complied with all applicable civil service laws and regulations in making these promotions.

law. See Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001).

It appears from a review of the entire record that the Hearing Officer analyzed these complaints exclusively under a “disparate impact” analysis, due in part, to confusion created in the way this matter was presented at public hearing.⁵ The Hearing Officer noted:

Complainants' Proposed Conclusions of Law did not contain any discussion or argument regarding M.G.L. c. 151B, s. 4(1) or cite to any decisions of the Commission on the issue of adverse impact. Rather, Complainants confined their legal arguments solely to the alleged violation of Title VII and relied almost exclusively on Federal court precedent. Complainants then merely concluded that adverse impact discrimination under Title VII constitutes an unlawful practice under M.G.L. c. 151B, § 4.

However, based on our initial review, it strikes us that the issues raised in this matter were, and, in fact, are ripe for review under a disparate treatment analysis. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001);⁶ see also Washington v. Davis, 426 U.S. 229 (1976) (United States Supreme Court asserts the significance of evidence establishing discriminatory intent even where the gravaman allegation is disparate impact).

⁵ While regrettable, it is clear that the fundamental responsibility of enforcing the provisions of M.G.L. c. 151B, lie not with private counsel retained by a complainant, but rather, with the Commission itself. See East Chop Tennis Club v. Massachusetts Commission Against Discrimination, 364 Mass. 444 (1973); see also 804 CMR 1.09, which states in pertinent part: “The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents, or, at the discretion of the Commission, by an attorney retained by the complainant.”

⁶ “In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind. See Riffelmacher v. Police Comm'rs of Springfield, 27 Mass. App. Ct. 159, 165 (1989). Permitting, but not requiring the fact finder to draw the inference strikes the proper balance by holding the plaintiff to her ultimate burden without requiring her to produce direct evidence of discriminatory animus, a form of evidence that, we recognize, rarely exists. See Wheelock College v. Massachusetts Comm'n Against Discrimination, supra at 137. Cf. Sarni Original Dry Cleaners, Inc. v. Cooke, 388 Mass. 611, 615-616 (1983). That inference, combined with the evidence adduced to meet the employee's burden of proof under the first stage of McDonnell Douglas, permits the fact finder to conclude that the employee has satisfied her ultimate burden of proving that the decision was made “because of” the unlawful discrimination as G. L. c. 151B, s. 4(l), requires. (citing Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 118 (2000)).

In particular, we note Finding of Fact 24 in the Decision of the Hearing Officer, which stated the following:

In 1988, the City of Worcester and the Commission entered into an Agreement "Relative to Equal Opportunity and Affirmative Action."

The Agreement required the City to engage in "positive, aggressive measures to ensure equal opportunity in the areas of hiring, promotion, demotion or transfer, recruitment, layoff or termination, rate of compensation, in-service or apprenticeship training programs, and all terms and conditions of employment..."

The Agreement further provided that the City:

[A]dopt and keep in place departmental hiring goals, consistent with applicable affirmative action/equal opportunity regulations, for minorities until such time as parity is reached.

In order to achieve hiring goals set forth in the City's Affirmative Action Plan, the City agrees to the Division of Personnel Administration Rules PAR 10, the Selective Certification option, and any other option reasonably designed to meet the goal of this Agreement as provided by law.

The parties have stipulated that under the Agreement's specific terms, the Agreement expired in 1991 after its initial three (3) year period, and neither the Commission nor the City of Worcester extended the agreement.

We believe that the parties failed to address a number of questions, which are central to the Commission's analysis of the gravaman allegations and which the existence of the above-referenced agreement raises including: How did the City operationalize the agreement during the period 1988-1991? What was the effect and impact of the City's efforts pursuant to the agreement? Why didn't the City seek an extension of its agreement with MCAD before it expired in 1991? Why didn't the City have an affirmative action plan on file with the Human Resources Division of the Commonwealth despite it being a requirement of the MCAD agreement? And finally, why didn't the City ever apply under Paragraph Ten of the Personnel Rules of the Commonwealth for a special certification, despite it also being a

requirement of the MCAD agreement, as well as a tool available to any public employer of the Commonwealth?

By asserting the relevance of these issues we explicitly do not intend to suggest that the City might be liable for actions dating back to the 1980s. However, it is well established under both state and federal law that a plaintiff who has a seasonable claim may use events that occurred prior to the applicable limitation period as background evidence of discriminatory animus or motive even though that plaintiff cannot recover damages for those time-barred events. See Sabree v. United Bhd of Carpenters & Joiners, Local No. 33, 921 F.2d 396, 400 n.9 (1st Cir. 1990), as cited in Cuddyer vs. The Stop & Shop Supermarket Co., 434 Mass. 521 (2001).

Based on the above, we conclude that this matter should be remanded for further proceedings before the Hearing Officer so that the parties may submit evidence responsive to the issues stated above that relate to the City's administration of its responsibilities as set forth in the 1988 Agreement. In addition, at the close of evidence, the Hearing Officer shall direct the parties to submit legal memoranda that address the questions articulated above, and in addition, responds to the following questions of law:

1. Is there sufficient evidence to establish that the City's failure (following the expiration of the Consent Decree in 1991) to create an affirmative action plan and apply for a PAR 10 special certification for its promotions in 1993, 1994, and 1995 amounts to a discriminatory animus against the hiring and promotion of racial and ethnic minorities?
2. Assuming *arguendo* that the MCAD answers question one above in the affirmative, is there sufficient evidence to establish that Complainants Harris and Tatum were harmed by the City's conduct?⁷

⁷ Even if the commission were to find discriminatory animus by the City, the Complainants still retain the burden to establish that they were personally harmed by the conduct. See Blixt v. Blixt, 437 Mass. 649 (2002):

The Hearing Officer shall issue a decision that addresses these issues and determines whether, in light of the additional evidence proffered, liability should be imposed against the City. That is to say, do the Complainants establish disparate treatment type discrimination *via* circumstantial evidence? If the Hearing Officer finds discrimination he shall then articulate what specific remedies should be imposed.

In order to expedite the completion of this next stage of proceedings and to ensure that the Commission's interests in presentation of this matter are protected, we hereby authorize the Chief of Enforcement or his designee to file a notice of appearance on behalf of the Investigating Commissioner and participate, as in his discretion, will ensure a full presentation of the issues raised in this order.⁸

“(t)he established rule, followed both in Massachusetts and Federal courts, that, “[o]rdinarily one may not claim standing . . . to vindicate the constitutional rights of some third party.” Slama v. Attorney Gen., 384 Mass. 620, 624 (1981), quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953). See New York v. Ferber, 458 U.S. 747, 767-768 & n.20 (1982); United States v. Raines, 362 U.S. 17, 21 (1960). Stated somewhat differently in Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 390 (1962), “[o]nly one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object to the statute only as applied to him.” (emphasis added)

⁸ 804 CMR 1.09(5)(b), states:

Representation by counsel of the case in support of the complaint in matters before the Commission is at the discretion and authority of the General Counsel. In cases where the complainant has retained private counsel, the General Counsel may appoint Commission counsel to remain involved in the proceedings for purposes of representing the Commonwealth's interest in assuring the policies and procedures of M.G.L. c. 151B and 804 CMR 1.00 are protected, or, may allow private counsel to also act as an agent of the Commission for purposes of presentation of the complaint at public hearing.

The Hearing Officer shall afford the parties no longer than ninety (90) days of additional discovery time. In addition, given the length of time the administrative proceedings in this matter have thus far taken, we hereby order that a public hearing shall be conducted within thirty (30) days of the end of the discovery period and that a decision of the Hearing Officer shall issue within sixty (60) days of the submission of post-hearing memoranda. This Order does not represent the final action of the Commission for purposes of M.G.L. c.30A.

SO ORDERED this 4th day of August, 2003.

Cynthia A. Tucker, Commissioner

Walter J. Sullivan Jr., Commissioner