

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

CAROLE BENDELL,)
Complainant) DOCKET NO. 95-BEM-0807
v.)
LEMAX, INC. and)
GASTON LEE)
Respondents)

DECISION OF THE FULL COMMISSION

This matter comes before us on appeal of the Respondents following a decision of Hearing Commissioner Douglas Schwarz in favor of Complainant. Following a four-day evidentiary hearing, the Hearing Commissioner concluded that Respondent Lemax terminated Complainant from her employment because of disability in violation of M.G.L. c. 151B, sec. 4, par. 16. The Hearing Commissioner further found that Respondent Lee was responsible as an individual under M.G.L. c. 151B, sec. 4, par. 4A for interfering with Complainant's right to work at Lemax free of unlawful discrimination. Respondents filed a timely appeal.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et. seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Commissioner. M.G.L. c. 151B,

sec. 5. 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.

It is the Hearing Commissioner's responsibility to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact. The Full Commission defers to these determinations. See e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.16(f).

Respondent's request for review rests on its assertion that the evidence was insufficient to sustain the finding of the Hearing Commissioner that Complainant's termination was because of disability, that he applied the wrong legal standards in finding Respondents liable and that his assessment of damages was not supported by the record. We have reviewed the record in this matter and conclude that there is substantial evidence to support the Hearing Commissioner's findings and conclusions that Respondents terminated Complainant because of her disability in violation of c.151B. Further, we find that that the Hearing

Commissioner applied the correct legal standards and that his assessment of damages was amply supported by the record.

Finally, we find that the Hearing Commissioner correctly held Respondent Lee individually liable pursuant to M.G.L. c. 151B, sec. 4, par. 4A, because his finding comports with our decision in Woodason v. Town of Norton, Dkt No. 98-BEM-0624 (February 19, 2003). However, we feel the need to comment upon his analysis of this issue.

In his decision, the Hearing Commissioner determined that the term “interfere” in section 4(4A) applies to, *inter alia*, “direct” denials of protected rights, such as termination. The Hearing Commissioner concluded that: “In terminating Complainant’s employment because of her disability, Respondent Lee interfered with her right to work free of unlawful discrimination in violation of G.L. c.151B, s.4, par.4A.”

We read the Hearing Commissioner’s conclusion to mean that Complainant proved Lee’s decision to terminate Complainant was motivated by discriminatory intent based on her disability. This conclusion is fully supported by the record evidence. To the extent that the conclusion could imply that an individual could be held liable simply because he or she was the decision maker or the messenger of the decision, we decline to adopt such an interpretation.

As we stated in Woodason, the term “interfere” must be interpreted in the context of the statute and, as such, requires a showing of discriminatory motive. Thus, in this case, the Hearing Commissioner

could only find Lee individually liable under section 4(4A) if the evidence demonstrated that he acted in deliberate disregard of Complainant's rights. We find that the Hearing Commissioner's factual findings and conclusions support such a finding despite the fact that he never articulated it as such.

Specifically, the Hearing Commissioner found that Lee assured Complainant that her job was secure after he had already offered her job to another individual. He then terminated Complainant immediately after her replacement began her employment at Lemax, stating that it was "due to medical reasons." The Hearing Commissioner further found that:

The termination letter also states that Complainant's termination was effective January 17, the date of Complainant's seizure, even though the letter was dated February 10. This stipulation is particularly revealing, since it indicates that Respondents considered Complainant's employment to be over when they learned of her seizure. They hired a replacement within days. Yet they waited to terminate Complainant formally until after Bailey completed her two week notice period and actually showed up for work on February 10. Respondents then finalized Complainant's termination letter on that day.

The Hearing Commissioner's findings and conclusions confirm that he determined that Lee granted Complainant's medical leave and then immediately sought to replace her, all the while deceiving her into believing that her job was secure. Once her replacement was in place, Lee terminated Complainant. Accordingly, the Hearing Commissioner properly concluded that Respondent Lee interfered with Complainant's

rights under c.151B, consistent with the standard articulated in Woodason, and was thus individually liable. We therefore deny Respondents' appeal and affirm the Hearing Commissioner's decision.

Having affirmed the decision of the Hearing Commissioner, we conclude that Complainant has prevailed on her claim. She has made a claim in the amount of \$58,126.61 for attorneys' fees and costs. The determination of whether a fee sought is reasonable is subject to the Commission's discretion. The Commission has adopted the lodestar methodology for fee computation. By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply the number by a reasonable hourly rate. Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

Having reviewed the record presented of time expended in the preparation and litigation of this claim, we conclude that it is reasonable. We find no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to successful prosecution of the claim. Attorney Daniel Finn charged an hourly rate of \$190 per hour until January of 1998 when the rate increased to \$200 per hour. We conclude that this rate is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and is well within the range of rates charged by attorneys in the area with similar experience. We therefore award attorney fees and costs in the amount of \$58,126.61

ORDER

For the reasons set forth above, we hereby affirm the findings of fact, conclusions of law and the Order of the Hearing Commissioner and issue the following ORDER of the Full Commission:

- (1) Respondents shall immediately cease and desist from engaging in discriminatory conduct in violation of G.L. 151B;
- (2) Within sixty (60) days of receipt of the Order, Respondent Lemax shall submit to the Commission a plan for training its employees concerning the legal requirements of nondiscrimination in the workplace. The Commission shall notify Respondent as to whether the training plan is acceptable. If the plan is unacceptable, the Commission will return it to Respondent for revision. If, after a reasonable period of time for revision, Respondent fails to submit an acceptable training plan, the Commission shall prescribe the details of a training plan in a supplemental order;
- (3) Within sixty (60) days of receipt of the Order, Respondents shall pay Complainant \$36,074.00 as damages for lost wages, with interest thereon at the rate of 12% per annum, from the date the complaint was filed until such date as payment is made or until such date as this obligation is reduced to a court judgment and post-judgment interest begins to accrue;
- (4) Within sixty (60) days of receipt of the Order, Respondents shall pay Complainant \$60,000 as damages for emotional distress, with interest

thereon at the statutory rate of 12% per annum, from the date the complaint was filed until such date as payment is made or until such date as this obligation is reduced to a court judgment and post-judgment interest begins to accrue;

(5) Within sixty (60) days of receipt of the Order, Respondents shall pay Complainant's attorneys' fees and costs in the amount of \$58,126.61;

(6) The parties shall notify the Commission as soon as the ordered payments have been made.

This ORDER represents the final action of the Commission for purposes of M.G.L. c.30A. Failure to comply with this Order will result in the Commission's initiation of enforcement proceedings, pursuant to 804 CMR 1.25, which may subject the non-complying party to both civil and criminal penalties as provided in M.G.L. c.151B, s.8.

Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance with M.G.L. c.30A, c.151B, §6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c.30A does not automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c.151B, s.6.

SO ORDERED this 6th day of March, 2003.

Cynthia A. Tucker, Commissioner

Walter J. Sullivan, Jr., Commissioner