

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

HARDY JONES,  
Complainant

v.

DOCKET NO. 97-BEM-0088

WALTER GLOWACKI,  
KEN (“KIM”) GLOWACKI and  
GLOWACKI & SONS, INC.,  
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Complainant, Hardy Jones. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for unlawful discrimination on the basis of race and color in violation of M.G.L. c. 151B, section 4 in their refusal to hire Complainant to a trucking position. Respondents filed a timely appeal to the Full Commission.

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 Officer. M.G.L. c. 151B, Section 5. The Hearing Officer’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 Officer’s responsibility to evaluate the credibility of witnesses

and/or to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. 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 1.23(1)(h).

### RESPONDENTS' PETITION FOR REVIEW

Respondents contend on appeal that the Hearing Officer erred as a matter of fact and law when she found that Complainant had satisfied the elements of the prima facie case and that Respondents had failed to offer a legitimate, non-discriminatory reason for their refusal to hire Complainant. Finally, Respondents argue that the Hearing Officer's decision to find Ken and Walter Glowacki individually liable was not supported by the evidence. We affirm in part and reverse in part the Hearing Officer's decision.

With respect to the Hearing Officer's finding of liability as to the corporate respondent, we find that there was substantial evidence to support the Hearing Officer's findings of fact and conclusions of law with respect to Complainant's claim. We have carefully reviewed all of Respondents' contentions and the full record on this issue and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.

As to the finding of liability on the part of the corporate respondent, we disagree only with the Hearing Officer's statement of the fourth prong of the prima facie case.

The Hearing Officer, citing Abramian v. President and Fellows of Harvard College, 423 Mass. 104, 116 (2000), required Complainant to show that “he was treated differently from other similarly-situated persons not of his protected class.” Recognizing that the prima facie case is intended to be flexible and tailored to the factual circumstances, we still cannot agree that this was the proper standard to be applied in this case. We first note that the Supreme Judicial Court has specifically ruled that in a failure to hire case “a plaintiff is not required to establish as part of her circumstantial prima facie case that an employer filled a position with a nonprotected class member.” Wynn & Wynn v. MCAD, 431 Mass. 655, 665 n.22 (2000). In addition, we think that in this case, the Hearing Officer should have found that Complainant established a prima facie case if he showed that “after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.” Wheelock College v. MCAD, 371 Mass. 130, 135 n.5 (1976) quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Thus, the evidence of Respondents’ continuing newspaper advertisement seeking applicants with Complainant’s qualifications after Complainant was rejected was sufficient to meet the fourth prong of the prima facie case. This error was not fatal to the decision and we, therefore, affirm that part of the Hearing Officer’s decision.

We do, however, agree with Respondents’ argument that the Hearing Officer’s finding of individual liability with respect to Ken and Walter Glowacki was not supported by substantial evidence. The record does not contain sufficient factual findings to support the Hearing Officer’s conclusion that the Glowackis should be found individually liable. Moreover, the Hearing Officer’s conclusions of law do not provide a

separate legal analysis of the required proof for individual liability and there was no evidence offered to support a finding that the Glowackis should be considered the employer for purposes of liability under c.151B, s.4, p.1. Therefore, the Hearing Officer's finding as to Ken and Walter Glowacki's individual liability is hereby reversed.

### **ORDER**

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer as to Respondent Glowacki & Sons, Inc. and reverse as to Ken and Walter Glowacki, and issue the following Order of the Full Commission:

(1) Within forty-five (45) days of receipt of this Order, Respondent, Glowacki & Sons, Inc., shall pay the Complainant \$4,340 in damages for lost wages plus interest thereon at the statutory rate of 12% per annum from the date of the filing of the complaint until payment is made or the obligation is reduced to a court judgment and post-judgment interest begins to accrue;

(2) Within forty-five (45) days of receipt of this Order, Respondent, Glowacki & Sons, Inc., shall pay the Complainant \$20,000.00 in damages for emotional distress plus interest thereon at the statutory rate of 12% per annum from the date of the filing of the complaint until payment is made or this obligation is reduced to a court judgment and post-judgment interest begins to accrue;

(3) The complaint with respect to Ken Glowacki and Walter Glowacki is hereby dismissed.

(4) The parties shall notify the Clerk of 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. Any party aggrieved by this final determination may contest the Commission's

decision by filing a complaint seeking judicial review, together with a copy of the transcript of proceedings before the Hearing Officer or Commissioner (See M.G.L. c. 151B, s.6) in the Superior Court within thirty (30) days of receipt of this decision.

Failure to file a petition in court within 30 days of the receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, section 6. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. 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 noncomplying party to both civil and criminal penalties as provided in M.G.L. c. 151B, section 8.

SO ORDERED this 14<sup>th</sup> day of January, 2003.

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Walter J. Sullivan, Jr.  
Commissioner

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Cynthia A. Tucker  
Commissioner