

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
and JARVIS ALDRIDGE,
Complainants

v.

98-BEM-3762

THOMAS O'CONNOR CONSTRUCTORS,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Edward Mitnick in favor of the Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Respondent interfered with Complainant's right to a harassment-free work environment in violation of M.G.L. c. 151B, §4(4A). The Hearing Officer awarded Complainant damages for emotional distress, ordered Respondent to conduct training and imposed upon Respondent a civil penalty. The Respondent filed a timely Petition for Review.

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, §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 responsibility of the hearing officer to evaluate the credibility of witnesses and to weigh the evidence when

deciding disputed questions of fact, and 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 role of the Full Commission 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.

Respondent first argues that it cannot be liable under §4(4A) because it was not Complainant's employer. The Hearing Officer found that Respondent was not Complainant's employer as his work was controlled almost exclusively by Rustic Fire Protection.¹ However, we decline to adopt Respondent's argument because §4(4A)² does not require that there be an underlying employment relationship between the parties to impose liability. See Erewa v. Reis, 20 MDLR 36, 40 (1998). By including §4(4A) in c.151B, the Legislature intended to extend the statute's reach beyond employer-employee interactions to encompass discriminatory conduct by third parties to which an employee could be subjected. Thus, we concur with the Hearing Officer's determination that Respondent, a corporation, was a "person" within the meaning of M.G.L. c.151B, §1(1)³ for purposes of applying §4(4A) to its conduct and, in addition, was strictly liable for the conduct of its supervisory employee, Paul Daley. See Collegetown,

¹ As noted by the Hearing Officer, Complainant filed a separate complaint against Rustic (No. 98-BEM-4043) which was dismissed for lack of probable cause. From the facts found by the hearing officer, Rustic would have been liable for discrimination under M.G.L.c.151, §4(1). However at this late date it would be unduly prejudicial to Rustic to impose liability upon it.

² M.G.L. c.151B, §4(4A) provides – "It shall be an unlawful practice: For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter."

³ M.G.L. c.151B, §1(1) provides – "The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof."

Division of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156 (1987).⁴

Respondent next argues that the emotional distress award of \$25,000 should be vacated because it does not comport with the factors set forth by the Supreme Judicial Court in Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549(2004). We are mindful of the fact that "[A]n award of damages must stand unless to make it or to permit it to stand was an abuse of discretion on the part of the court below, amounting to an error of law." Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997) *citing* Mirageas v. Massachusetts Bay Transp. Auth., 391 Mass. 815, 822 (1984). An error of law is established if "the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice." Labonte, 424 Mass. at 824 *quoting* deCanto Ametek, Inc., 367 Mass. 776, 787 (1975).

In this case, we conclude that the evidence of emotional distress was so substantial that the Hearing Officer's award of \$25,000 was "greatly disproportionate" to the injury proven and must be vacated. Considering the factors articulated in Stonehill College, factors the Commission has long employed, Complainant proved that he suffered significantly greater injury than the Hearing Officer awarded.

The record reveals, and the Hearing Officer specifically credited, that Complainant suffered physical manifestations of distress and even left his job as a result of the emotional distress he suffered as a result of Daley's conduct. Complainant became "very hurt" and "angry and bitter" as a result of Daley's racial slurs and Complainant's belief that nothing was being done to stop his conduct or discipline him. Complainant was so distressed as a result of Daley's

⁴ As also noted by the Hearing Officer, the evidence would support a claim of individual liability against Daley under §4(4A). However, Daley was not named as an individual Respondent and it would be unfair to impose

conduct that he actually packed up his tools and walked off the job on the day that Daley returned to the jobsite from his honeymoon. At that point, Daley had made racist comments on four different occasions and yet was returned to the site to work beside and, in some cases, give orders to Complainant. Respondent's own project manager admitted that Complainant "clearly appeared upset, disturbed and agitated" when questioned about the incidents almost a month later; and angrily vented, "there is nothing wrong with being a black man."

Moreover, the Hearing Officer found:

Complainant also testified that Daley's remarks affected his life outside of work. Specifically, he claimed that he became withdrawn and isolated, stopped playing with his children, and ceased communicating with his wife. Complainant's wife, Lisa Aldridge, testified that before these events, Complainant was happy, content, and punctual. However, in August 1998, she observed Complainant coming home from work very disturbed and angry. She talked with him about his attitude and he told her it was in response to Daley's racial slurs. Mrs. Aldridge also corroborated her husband's testimony that he became withdrawn, claiming that he locked himself in his room and avoided contact with their children. She also observed his demeanor improve while Daley was away from the job site, and then deteriorate after he returned. In addition, Mrs. Aldridge claimed that her husband stopped communicating and interacting with her. Furthermore, she observed that her husband had lost a lot of weight and stopped sleeping well. I credit Complainant and Lisa Aldridge's testimony.

These findings – that Complainant felt compelled to leave his job, suffered physical manifestations of distress, withdrew from and ceased communicating with his loved ones, and felt as though he had to defend his race – are evidence of severe distress that is greatly disproportionate to the amount awarded by the Hearing Officer. As such, we hereby vacate the emotional distress award and remand the case to the Hearing Officer to reconsider the award in light of the evidence of significant emotional distress suffered by Complainant as a result of Respondent's unlawful conduct.

liability against him without having afforded him the opportunity to be represented in his individual capacity before

Finally, Respondent objects to the Hearing Officer's order requiring Respondent to train its employees as overly broad because it employs hundreds of employees over the course of any given year, many for only temporary assignments. We agree to the extent that the order requires the training of all employees due to the ephemeral nature of Respondent's workforce. However, we find the Hearing Officer's training order as it applies to supervisors and managers to be appropriate given the facts found and his discretion to order an appropriate remedy.

The Hearing Officer found that Respondent, through Daley, engaged in discrimination. When a hearing officer makes such a finding, M.G. L. c. 151B, s. 5, authorizes him to order affirmative action that "in the judgment of the commission, will effectuate the purposes" of the anti-discrimination statute. See Katz v. Massachusetts Comm'n Against Discrimination, 365 Mass.357, 366 (1974). The Hearing Officer has the discretion to formulate an appropriate order. See Wynn & Wynn, PC. v. Massachusetts Comm'n Against Discrimination, 413 Mass 655, 674 (2000). The Hearing Officer's decision to require training of Respondent's supervisors and managers on the anti-discrimination laws was neither unreasonably burdensome nor unrelated to the legitimate goals of discovering and deterring discrimination. See id.; see also Chief Justice for Administration and Management of the Trial Court v. Massachusetts Comm'n Against Discrimination, 439 Mass. 729 (2003).⁵

We have carefully reviewed the petition for appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated herein. As a result of that review, we find no material errors of fact or law, except as

this Commission.

⁵ "In G. L. c. 151B, the Legislature has given the commission broad powers to receive, investigate and act on complaints of discrimination. We will not lightly interfere with that mandate by permitting the court's judgment to be substituted for the commission's on issues that lie within the latter's designated field. To do so would render

noted above, and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. We therefore deny the appeal and affirm the decision below as modified.

COSTS

Complainant has filed a petition for costs in the amount of \$219.50 in connection with his claim, including the cost for purchasing tapes of the public hearing and for a deposition transcript. We find these costs to be reasonable and award them to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact, conclusions of law and the order of the Hearing Officer, except as discussed herein, and order that:

1. The Hearing Officer's award of emotional distress damages is vacated and this matter is remanded to the Hearing Officer to reconsider the award in light of the evidence of extensive emotional distress suffered by Complainant as a result of Respondent's unlawful conduct. The Hearing Officer shall issue an amended decision within forty-five (45) days of this Order.
2. Respondent shall pay the Commonwealth of Massachusetts, within sixty (60) days of receipt of this decision, a civil penalty in the amount of \$10,000.00. Payment shall be forwarded to the Clerk of the Commission.
3. Respondent shall conduct basic annual training sessions on unlawful discrimination, harassment and retaliation for all managers and supervisors employed by Respondent. With respect to such training:

meaningless the administrative scheme enacted by the Legislature." East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 364 Mass 444, 450 (1973).

- a. Each training session for managers and supervisors must be at least six (6) hours in length. All managers and supervisors, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next five (5) years, for all new supervisors and managers who were hired or promoted after the date of the initial training session.
- b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this decision must be forwarded to the trainer for his or her review.
- c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.
- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

- e. In the event that Respondent's business is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's business (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:
- i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;
 - ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;
 - iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,
 - iv. Respondent continues to retain an interest in the successor entity.

For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

4. Respondent shall pay to Complainant the sum of \$219.50 in costs within sixty (60) days of receipt of this decision.
5. The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainant is instructed to immediately notify the Clerk of the Commission.

This Order does not represent the final action of the Commission for purposes of M.G.L.
c.30A.

SO ORDERED this 21st day of January, 2005.

Dorca I. Gomez, Chairwoman

Cynthia A. Tucker, Commissioner