

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
JENNIFER ACKERMAN
Complainant

v.

DOCKET NO. 96-BEM-2125

DONALD SCHWARTZ, M.D.,
DRD DILUTER CORP. & APEC, INC.
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Jennifer Ackerman. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for unlawful discrimination on the basis of gender and pregnancy in violation of M.G.L. Chapter 151B, section 4(1). Respondents filed an 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, s. 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 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.

Respondents make numerous arguments on appeal, only three of which merit discussion. Respondents contend that the Hearing Officer's award of emotional distress was not supported by substantial evidence and not in accordance with the factors articulated Stonehill College v. MCAD, 441 Mass. 549 (2004). We disagree. While, due to the timing of the decision, the Hearing Officer did not have the benefit of the Stonehill College decision to guide her, her analysis clearly indicates that she considered the nature, severity and duration of the distress suffered by Complainant and specifically found that such distress was caused by Respondents' discriminatory conduct.¹ We conclude that there was substantial evidence in the record to support the award.

Next, Respondents contend that the Hearing Officer did not make a specific finding that they employed six or more employees. However, Respondents never raised this issue at hearing and it is therefore waived. Furthermore, Respondents have offered no evidence to suggest that they did not employ six or more employees during the relevant period. In fact, the complaint, which was entered as an exhibit at the hearing, states that Respondents employed nine people. This was not disputed by Respondents.

¹ It is important to note that the factors articulated in Stonehill College as relevant to emotional distress awards are not new to the Commission. The Commission has long considered these factors in awarding emotional distress compensation. See, e.g. Baldelli v. Town of Southborough, 18 M.D.L.R 167, 169 (1996), aff'd, 1998 WL 1270644 (Mass. Super. Ct. June 30, 1998); Jorge v. Silver City Dodge, Inc., 15 M.D.L.R. 1518, 1535-36 (1993) ("An award for emotional distress must be supported by evidence indicating the nature, extent, and duration of the complainant's emotional distress").

Respondents also argue that Complainant's charges against DRD Diluter Corp and APEC, Inc. were not timely filed because they were added via amendment after the then-applicable six month statute of limitations had run. This argument also fails. Respondents DRD Diluter Corp. and APEC, Inc. were on notice when Complainant first filed her claim against their President and CEO, Donald Schwartz. In her Complaint, Complainant specifically identified Schwartz as the President of DRD Diluter Corp. and APEC, Inc., and her allegations were directed specifically to her employment with DRD Diluter Corp. and APEC, Inc., and Schwartz's actions as their agent. As such, they were on constructive notice of her claim through Schwartz as their agent. *See King v. First*, 46 Mass. App. Ct. 372, 374 (1999). Furthermore, Complainant subsequently filed an amended complaint and the Investigating Commissioner allowed it pursuant to his authority under 804 CMR 1.09(2).² Pursuant to 804 CMR 1.10(6)(a), amendments to the complaint "relate back to the original filing date." Thus, Complainant's charge against DRD Diluter Corp. and APEC, Inc. was timely.

We have carefully reviewed the petition for review 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 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 in its entirety.

² 804 CMR 1.09(2) provides: "The Investigating Commissioner, upon his/her own motion or upon motion of any party, may at any time during any proceeding or investigation make such substitution, joinder, or amendment of parties as justice or convenience may require."

ORDER

The Respondents' appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety. It is hereby ordered that:

1. Respondents Donald Schwartz, DRD Diluter Corp. and APEC, Inc. immediately cease and desist from discriminating on the basis of gender and pregnancy.
2. Respondents Donald Schwartz, DRD Diluter Corp. and APEC, Inc. pay to Complainant the amount of \$50,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made.
3. Respondents Donald Schwartz, DRD Diluter Corp. and APEC, Inc. pay to Complainant the amount of \$43,629.00 in damages for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made.
4. Respondents Donald Schwartz, DRD Diluter Corp. and APEC, Inc. pay to the Commonwealth of Massachusetts the sum of \$10,000.00 as a civil penalty. Payment shall be forwarded to the Clerk of the Commission.
5. All ordered payments shall be made within forty-five (45) days of receipt of this decision. 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. 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, 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 in accordance with M.G.L. c.30A, c.151B, s.6, and the 1996 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 thirty (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 11th day of February, 2005.

Dorca I. Gomez
Chairwoman

Cynthia A. Tucker
Commissioner