

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and M'LISSA and
TERRY BRENNAN,
Complainants

v.

Docket No. 06 BPR 01464

OKHEE HONG
Respondent

Appearances: Caitlin A. Sheehan, Esq., for Complainants

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 19, 2006, M'Lissa and Terry Brennan ("Complainants"), filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that Respondent Okhee Hong ("Respondent") discriminated against them on the basis of family status, non-compliance with the lead paint requirements, and retaliation. Complainants contend that after they inquired about whether their rental unit had a lead paint certificate, they were informed that the unit was being sold and that they had to vacate within ninety days.

The MCAD issued a probable cause finding on October 24, 2006 and certified the case for public hearing on October 2, 2008.

A public hearing was conducted on October 27, 2008. Respondent Okhee Hong did not appear for the hearing. A default was entered in the record and a Notice of Entry of Default was sent to Respondent but was “refused” and returned to the Commission.

The Complainants introduced five exhibits into evidence. Complainants testified on their own behalf. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainants, Terry and M’Lissa Brennan, are married¹ with two children under four years old. At the time of the events at issue, they had one child under two years old, and M’Lissa Brennan was pregnant with the couple’s second child.
2. At the beginning of 2006, Complainants rented an apartment from Respondent Okhee Hong consisting of the upstairs unit of a two-family home located at 105 Ripley Street, Newton, MA, 02459. The lease ran from May 1, 2006 until August 31, 2007. The rent was \$2,200.00 per month. Complainant’s Exhibit 2.
3. Because the property had a “for sale” sign on the yard when Complainants first saw the property, they sought assurance that it had been taken off the market and that it wasn’t going to be sold during the fifteen-month lease period.
4. Complainants and Respondent signed a lease addendum on May 2, 2006 stating that if Respondent should decide to sell the property, Respondent would give Complainants three months’ notice and \$1,500.00 in moving expenses.

Complainant’s Exhibit 3.

¹ M’Lissa and Terry Brennan were separated at the time of the public hearing but both participated in the proceedings.

5. On or about May 14, 2006, Complainants asked Respondent if she knew whether the property had a lead paint certificate.
6. On or about May 18, 2006, Respondent sent Complainants, via her attorney, a notice pursuant to the parties' lease addendum informing them that they needed to vacate the property within ninety days because the unit was being sold.
Complainants' Exhibit 4.
7. Tenants on the first floor of the property, whose lease also began in May of 2006, were not notified that Respondent intended to sell the first floor unit, and they were not given a notice to vacate. Previously, Respondent had advertised both units for sale.
8. On May 25, 2006, a hearing was held in Newton District Court pursuant to a request for a temporary restraining order which Complainants sought against Respondent. The judge determined that Complainants' lease would terminate August 31, 2006 and that Respondent would pay Complainants the amount of \$5,050.00 in moving expenses and finder fees.
9. Prior to moving, Complainants arranged for a lead paint inspection of their unit by the City of Newton. According to M'lissa Brennan, the inspection resulted in a finding of lead. Complainants' Exhibit 5.
10. Complainants remained in the unit until July of 2006. According to M'Lissa Brennan, it was stressful to be nine months pregnant and looking for a new place to live. M'Lissa Brennan described herself as "overwhelmed." She testified that she experienced cramping as a result of the stress and had difficulty packing and unpacking because it was hard for her to bend over. Her husband had to pack and

unpack while she watched their toddler. The couple's new apartment was bigger than the Ripley Street unit but was also \$300.00 per month more expensive.

III.. CONCLUSIONS OF LAW

The Massachusetts lead paint law states, in relevant part, that it shall be an unlawful practice under M.G.L. ch.151B for an owner of any premises to refuse to rent such premises because they do or may contain lead paint. See M.G.L. ch. 111, section 199A (a)(b)(c). The lead paint law applies to "any premises." Id. Thus, there are no exemptions for two-family residences, whether owner-occupied or not. Id. Under this law, the eviction of families with children "shall not constitute compliance with the lead law and regulations." M.G.L. ch. 111, section 199A(c). I conclude that, pursuant to this provision, it is a violation of law to retract a rental agreement where the professed reason for the retraction is a smokescreen for a landlord's noncompliance with the Massachusetts lead paint law.

In order to prove a case of lead paint housing discrimination, Complainants must show that: 1) they were members of a protected class at the time of the alleged discriminatory act; 2) they sought to rent housing; 3) they were objectively qualified to rent the housing; and 4) they were deterred from renting and/or refused tenancy because of the membership in a protected class. See Wheelock College v. MCAD, 371 Mass. 130 (1976) (setting out general requirements for a *prima facie* case of discrimination), Smith v. Cao, 29 MDLR 179 (2007) (setting out *prima facie* elements of lead paint discrimination case); Garay v. Soumas, 13 MDLR 1065, 1081-81 (1991) (setting out *prima facie* elements of housing discrimination case).

Complainants have met their burden of establishing a *prima facie* case of unlawful housing discrimination relative to Respondent's alleged refusal to comply with the Massachusetts lead paint law. In May of 2006, Complainants were the parents of one child under age six and were expecting another child. After executing a rental agreement with Respondent for a lease running from May 1, 2006 until August 31, 2007 and moving into the rental unit, they sought a lead paint certificate establishing the absence of lead paint from the unit. Immediately after seeking the certificate, they were informed that they had to move within ninety days. These factors establish a *prima facie* case of housing discrimination based on the lead paint law.

Complainants also allege that they were forced to move in retaliation for inquiring about the presence of lead paint in their apartment. In order to establish a *prima facie* case of retaliation through indirect evidence, Complainants must show that they engaged in a protected activity, that Respondent was aware of that activity, that Complainants were subsequently subjected to an adverse employment action, and that, absent other evidence of retaliatory intent, the adverse action followed the protected activity within such time that retaliatory intent can be inferred. See Mole v. University of Massachusetts, 442 Mass. 582 (2004); Cimino v. BUT Electronics, 18 MDLR 197 (1996).

The uncontroverted evidence in this case establishes that on or about May 14, 2006, Complainants asked Respondent if she knew whether the unit had a lead paint certificate. Approximately four days later, Complainants received a notice to vacate the premises within ninety days. This evidence is sufficient to establish a *prima facie* case of retaliation.

Once Complainants establish a *prima facie* case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for her action. See Wheelock College, 371 Mass. at 136. Respondent failed to appear for the hearing in order to rebut the *prima facie* case. Had Respondent appeared, she would, no doubt, have asserted her intention to sell the unit as a purported non-discriminatory reason for abrogating the lease. If such a claim had been made, it would have been suspect because: 1) the notice to quit came on the heels of Complainants' inquiries about lead paint; 2) the notice to quit was communicated just seventeen days into the lease; and 3) the notice to quit only pertained to Complainants' unit and not to the unit on the first floor of the property. The fact that Respondent had previously advertised both units for sale but only notified Complainants of the need to vacate their premises suggests that the real reason for the notice to vacate was Complainants' inquiry about lead paint. In any event, Respondent's default at the public hearing forfeits her right to rebut Complainant's *prima facie* case. Based on the foregoing, I conclude that Respondent violated M.G.L. ch. 151B, section 4(4).

As far as damages are concerned, it appears that Complainants have already been reimbursed, per court order, for the out-of-pocket losses associated with their relocation. Accordingly, this damage award will focus exclusively on the emotional distress caused by Complainants' involuntary relocation. Such an award may be based on Complainants' testimony concerning the emotional harm they experienced, provided it is causally-connected to the unlawful act of discrimination. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Factors to be considered are the nature, character, severity, and duration of the harm and whether Complainants have attempted to mitigate the harm. Id.

According to the credible testimony of Complainant M'Lissa Brennan, it was stressful and overwhelming to be nine months pregnant and looking for a new place to live. Complainant and her husband were forced to pack their belongings and relocate after just having moved into Respondent's apartment. Complainant had difficulty packing and unpacking because it was hard for her to bend over. She testified that she experienced cramping as a result of the stress. Her husband described feeling powerless about the situation. I conclude that having to find a new place to live and moving their belongings within a few short months after settling into a new residence and while expecting another child imminently was extremely stressful and difficult for Complainants. Based on the foregoing, I conclude that Complainants are entitled to \$15,000.00 in emotional distress damages.

IV. CIVIL PENALTY

M.G.L. ch.151B, section 5 provides that in the event the Commission finds that a Respondent has engaged in unlawful conduct prohibited by this chapter, "it may, in addition to any other action which it may take ... assess a civil penalty." A civil penalty is appropriate in this case given the egregiousness of Respondent's actions with respect to Complainants and her disregard of the MCAD proceedings. As far as Respondent's statutory violation is concerned, the foregoing findings of fact and conclusions of law establish that Respondent evicted Complainants and their children notwithstanding the fact that Complainant M'Lissa Brennan was nine months pregnant at the time and the eviction constituted a violation of the lead paint law. Respondent also flouted the Commission's adjudicatory process by failing to participate in either the MCAD

prehearing conference or the MCAD public hearing. As a result of Respondent's non-participation, a default order has been entered against her.

With respect to the amount of the sanction, pursuant to chapter 151B, section 5(a), the Commission may assess a civil penalty in an amount not to exceed \$10,000.00 provided that the Respondent has not been adjudged to have committed any other prior discriminatory practice. Under the circumstances, I conclude that a civil penalty of \$10,000.00 should be imposed on Respondent in this case.

V. ORDER

This decision represents the final order of the Hearing Officer. Respondent is hereby ORDERED to:

- (1). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$15,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (2). Pay to 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.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 19th day of August, 2009.

Betty E. Waxman, Hearing Officer