

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MELISSA DERUSHA,
Complainant

v.

DOCKET NO. 02-SPR-02272

GINO CORREA,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us by certified question of Investigating Commissioner Cynthia A. Tucker pursuant to her Order of October 15, 2003. The Investigating Commissioner has certified the following question to the Full Commission:

Do the statutory exemptions enumerated in c. 151B, s. 4(11)¹, including the exemption for a two-family, owner-occupied dwelling, apply to a claim filed pursuant to c. 151B, s. 5 for a violation of c. 111, s. 199A?²

This question raises the issue of whether landlords who, by virtue of the c. 151B, s. 4(11) exemptions, are free to refuse to rent to families with children, should nonetheless be subject to a discrimination charge pursuant to c. 111, s. 199A, the Lead Poison Prevention and Control Act (the Lead Act), if a reason for the refusal is the possible presence of lead on the premises.

¹ In relevant part, G.L. c. 151B, s. 4 (11) states that: "It shall be an unlawful practice for the owner...to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person....This subsection shall not apply to:...(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence."

² In relevant part, G.L. c. 111, s. 199A provides that "It shall be an unlawful practice for purposes of chapter one hundred and fifty-one B for the owner...of any premises to refuse to sell, rent, lease or otherwise deny to or withhold from any person...because such premises do or may contain paint, plaster or accessible structural materials containing dangerous levels of lead, or because the sale, rental or lease would trigger duties under sections one hundred and eighty-nine A to one hundred and ninety-nine B, inclusive, or regulations promulgated thereunder.... Any person claiming to be aggrieved by an alleged unlawful practice as herein defined may file a complaint pursuant to section five of chapter one hundred and fifty-one B and all provisions of said chapter shall be applicable to such complaints."

In the case prompting this question, Complainant filed a complaint against Respondent with the Commission on July 3, 2002. She alleged that Respondent discriminated against her when he refused to rent her an apartment based on her familial status (children) and receipt of public assistance in violation of c. 151B, s. 4 (4A), (5), (7B), (10) and (11). The property in question was a two-family, owner-occupied dwelling. Complainant alleged that in the course of her conversations with Respondent, he informed her that he would not rent the apartment to individuals receiving public assistance because of his uncertainty regarding the presence of lead. As a result of her conversation with Respondent, Complainant did not apply to rent the apartment.

On June 12, 2003, the Investigating Commissioner issued a finding of probable cause with regard to Complainant's public assistance claim and a finding of lack of jurisdiction on her familial status claim. On June 16, 2003, Complainant appealed the dismissal of her allegations. On August 14, 2003, Respondent exercised his right to elect judicial determination.

On October 15, 2003, an Order of the Investigating Commissioner was issued amending Complainant's charge. The Investigating Commissioner found that, despite Complainant's allegations that the presence of lead had factored into the landlord's refusal to rent to her, Complainant had failed to allege that she had been discriminated against due to the presence of lead paint. The Investigating Commissioner amended the complaint to include a charge of discriminatory refusal to rent on the basis of lead paint in violation of c. 111, s. 199A. The Commissioner's Order noted that a critical distinction existed between s. 4(11) and s. 199A: section 4(11) contains three exemptions, one of which is for two-family, owner-occupied properties, while no such exemption is found in s. 199A. Because the case presented a legal question as yet unresolved at the Commission, whether the exemptions in section 4(11) apply to

a claim filed pursuant to c. 151B, s. 5, for a violation of c. 111, s. 199A, the Investigating Commissioner certified this question to the Full Commission.

Complainant argues that the statutory exemptions enumerated in c. 151B, s. 4(11) do not apply to a claim filed pursuant to c. 151B s. 5 for a violation of c. 111, s. 199A. She relies on the language of c. 111, s. 199A(a)(1), which specifically states that its prohibition applies to owners “*of any premises.*” Complainant argues that section 199B contains enumerated exemptions to section 199A(a)(1), which specifically exempt rooming houses, hotels and vacation rentals from the purview of the Lead Act. This, Complainant posits, is further evidence that the Legislature intended those three exemptions to be the exclusive exceptions to s. 199A.

The only two court decisions to address this issue support Complainant’s argument. In Com. v. Kaufman, Superior Court Dept., Civil Action No. 96-3825A (1997), the defendant invoked her right to judicial determination in superior court after the MCAD issued a finding of probable cause that she had discriminated in violation of c. 151B, s.4 and c. 111, s. 199A(a). The court addressed the issue facing the Commission today and ruled that the exemption in section 4(11)(3) did not apply. In denying defendant’s motion for summary judgment, the court examined the legislative history behind section 199A(a) and noted:

The legislative history behind s.199A(a)(1) indicates that the Legislature enacted it specifically to remedy widespread discrimination in the housing market against families with children. See Report of the Special Commission on Lead Poisoning, 1987 House Doc.4814, at 11, par. 7, 84-86. In its report, the Special Commission on Lead Poisoning found that fear of civil liability under the Lead Act had caused owners to refuse to rent to families with young children. To remedy this discrimination and to encourage compliance with the Lead Act, the Commission recognized that the Legislature should ‘strengthen the mechanisms to penalize...property owners who engage in illegal discrimination,’ and expand the scope of the Lead Act to protect families. The Commission recommended that the Legislature adopt s. 199A(a)(1) in its present form.

The court thus concluded, “An interpretation of s. 199A(a)(1) that it applied to every owner of a residential premises, without exception, would further the legislative goal of eradicating pervasive discrimination in housing against families....Construing 199A(a)(1) to exclude two-family owner occupied dwellings would permit certain owners to discriminate against families with young children, and would also discourage owners from taking positive steps to delead their property as required by the Lead Act.”³

A recent superior court decision, McFadden v. Mole, 2003 WL 21341728 (2003), interpreting the potential application of exemption (1) – for units consisting of three apartment in which one is occupied by an elderly or infirm individual - of section 4(11) is also instructive. In granting plaintiff’s Motion for a Preliminary Injunction, the court ruled that the exemption contained in c. 151B, s. 4(11) “only applies to the statutory bar to discrimination against families with children where lead paint is not involved; it does not permit discrimination motivated by a desire not to abate lead paint.” The court reasoned that:

The difference between c. 151B, § 4(11) (families with children) and c. 111, § 199A (families with children under six where the apartment contains lead paint) is not mere hair-splitting. The owner of an apartment with lead paint has an economic disincentive to renting to families with young children, which would require him to abate the lead hazard. The Legislature recognized the potential impact of this fact on the housing stock available to such families, and so in section 199A prohibited discrimination motivated by the landlord's desire not to abate. This prohibition is more specific, in its purpose and its drafting, than the general prohibition (in c. 151B, § 4(11)) of discrimination against families with young children. The Legislature apparently determined that the policy reasons for including the elderly/infirm exemption in the latter do not apply to the former, perhaps considering the importance of having a lead-free housing stock and the risk that this goal will be undermined by pretextual assertions of the exemption.

³ The court also noted that such an interpretation would not render the language in s.199A incorporating the provisions of c.151B, s.5 meaningless, as it “serves to provide a procedural mechanism by which families can effectively challenge unlawful discrimination prescribed [sic] by G.L. c. 111, s.199A.”

The court thus concluded that the c. 151B, s. 4(11) exemptions did not apply to a c. 111, s.199A claim.

Respondent argues liability should not be imposed on those permitted to exclude families with children from tenancy pursuant to the c. 151B, s.4 (11) exemptions. He posits that the explicit reference in c. 111, s. 199A(b)⁴ to violators of c. 151B, s. 4 demonstrates that there is no mandate for imposing lead discrimination liability on those permitted to exclude families with children from tenancy on the basis of the exemptions applying to lead related discrimination. Respondent contends that the Legislature’s reference in c. 111, s. 199A(b) to c. 151B s. 4, evidences its intent to apply the ban on lead related discrimination only to those who discriminate against children “in violation” of c. 151B s. 4 and that if the Legislature had intended to apply the lead based discrimination ban to those *legally* discriminating against children it would have adopted c. 111, s. 199A(b) without any reference to c. 151B s. 4. Respondent does not cite any cases in support of its interpretation and there appear to be none. In any event, we refuse to read an implicit exception into section 199A when the Legislature explicitly enumerated its exceptions in c. 199B and did not include the one offered by Respondent.⁵

We find that, based on statutory interpretation principles, the legislative history of the Lead Act, the Commission’s mandate to construe the anti-discrimination laws liberally, and the persuasive superior court decisions on point, the proper interpretation of the two statutes is that

⁴ That section reads: “Refusing to rent to families with children in violation of paragraph eleven of section four of Chapter 151B shall not constitute compliance with the lead law and regulations.”

⁵ We interpret c. 111, s. 199A(b) to evidence the Legislature’s intent to deny an owner from offering as a defense to a lead law violation (which is a separate cause of action) a finding by the Commission that he refused to rent the premises because of children. Further evidence that subsection (b) is included to bar a defense is the presence of s.199A(c), which provides, without reference to c.151B, that “Refusing to renew the lease of or evicting families with children shall not constitute compliance with the lead law and regulations.....”

the statutory exemptions enumerated in c. 151B, s. 4(11) do not apply to a claim filed pursuant to c. 151B, s. 5 for a violation of c. 111, s. 199A.

ORDER

For the reasons set forth above, we answer the certified question in the negative and, therefore, determine that the statutory exemptions enumerated in c. 151B, s. 4(11) do not apply to a claim filed pursuant to c. 151B, s. 5 for a violation of c. 111, s. 199A.

This matter is remanded to the Investigating Commissioner for further proceedings consistent with this decision. This decision does not constitute a final order of the Commission and therefore is not subject to appeal pursuant to M.G.L. c.151B, s. 6 or M.G.L. c.30A.

SO ORDERED this 10th day of February, 2004.

Dorca I. Gomez,
Chairwoman

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner