

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

PAUL TROY AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 02-BEM-01278

CITY OF LYNN SCHOOL DEPARTMENT
Respondent

Appearances: William F. Green, Esq., Commission for Complainants
Kenneth w. Terrell, III, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 29, 2002, Paul M. Troy (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that he was subjected to discrimination based on his religion in violation of G.L.c.151B, sec. 4, par. 1A. The Complainant was, at that time, a school administrator employed by the City of Lynn and has since retired from the Lynn school system.

The MCAD issued a probable cause finding on May 11, 2004 with respect to the Respondent Lynn School Department and a finding of lack of probable cause with respect to the originally-named Respondent Lynn School Administrators Association. The case was certified for public hearing on July 21, 2005. A pre-hearing conference was held on February 2, 2006 at which time the parties agreed to the presentation of agreed-upon facts and written briefs. The parties also agreed to damages in the amount of \$4,853.07. Complainant filed a brief on May 9, 2006. Respondent did not file a brief.

II. AGREED UPON FACTS

1. Complainant Paul Troy is a devout Roman Catholic who resides in Saugus, Massachusetts. He was a school administrator with the Lynn School Department for thirty-five years until his retirement on June 30, 2004. During the time he served as an administrator, Complainant was an employee within the meaning of M.G.L. c. 151B, sec. 1(6).
2. The Lynn School Department is a department of the City of Lynn. It employs more than six people and is an employer as defined by G.L.c.151B, sec. 1(5).
3. The Lynn School Administrators Association (Union) is a labor organization within the meaning of G.L.c.151B, sec. 1(3). Complainant was a member of the Union while employed by the Lynn School Department. At the time Complainant filed his complaint, his employment by the Lynn School Department was governed by a Collective Bargaining Agreement (CBA) between the Lynn School Committee and the Union (August 1, 2001 through July 31, 2003). The Lynn School Department, at present, is governed by a successor CBA. The successor CBA has identical provisions with respect to paid religious holidays.

4. The 2001-2003 CBA contains a Religious Leave clause which states as follows:
 - H. Religious Leave
 1. Jewish Administrators shall be excused from three (3) days of class sessions, if necessary, without loss of pay, on Rosh Hashanah and Yom Kippur.
 2. Greek Administrators shall be excused from class sessions on Orthodox Good Friday without loss of pay.
 3. Russian Orthodox Administrators shall be excused from class sessions on Orthodox Good Friday without loss of pay.
5. In addition to the religious leave specified in the CBA for Jewish, Greek, and Russian Orthodox administrators, all administrators have paid days off from work on certain religious holidays celebrated by the Roman Catholic and Protestant faiths such as Christmas and Good Friday.
6. The Complainant requested in writing that the Lynn School Department grant him religious leave with pay for “Holy Thursday” and “Ascension Thursday,” two days which are recognized and celebrated by the Roman Catholic faith as “holy days.” The Lynn School Department did not grant his request.
7. Complainant requested that the Lynn School Administrators Association (Union) grieve the provision of the CBA regarding religious holidays. The Union refused to grieve the issue.
8. The parties have agreed that Complainant’s damages resulting from the denial of compensation for Holy Thursday and Ascension Thursday amount to \$4,857.07.

III. CONCLUSIONS OF LAW

General Laws, c. 151B, sec. 4 par. 1 prohibits discrimination on the basis of religion. Religious discrimination can take several forms, i.e., the failure to provide a reasonable accommodation, harassment, disparate treatment in the terms and conditions

of employment or the use of policies or practices that have a disparate impact on members of a particular religion. See Fleming v. Boston Public Library, 22 MDLR 8 (2000). This case presents the issue of disparate treatment in the terms and conditions of employment. Complainant may meet his burden of proving unlawful discrimination in the terms and conditions of employment by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. MCAD, 431 Mass. 655 (2000). Complainant has offered sufficient evidence of both a direct and circumstantial nature to satisfy his burden.

The pertinent facts, stipulated to by the parties, establish that the CBA grants all employees specified paid days off from work for commonly recognized religious holidays such as Christmas and Good Friday. In addition to the shared days off, the contract provides three paid days off for Jewish religious observance, one paid day off for Greek Orthodox religious observance, and one paid day off for Russian Orthodox religious observance.

Direct evidence is evidence that “if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present ...” Wynn & Wynn, PC v. MCAD, 431 Mass. 655, 665 (2000) *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 298 (1991); Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000). In a direct evidence case, a complainant does not have to adhere to the three stage burden shifting paradigm set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1972). Rather, a mixed motive analysis is applied to a complainant’s allegation of discrimination. Pursuant to this analysis, a complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. See Fountas, 22 MDLR at 269. If this initial burden is

satisfied, the burden of persuasion shifts to the respondent to prove that it would have made the same decision even if the illegitimate motive were absent. See Wynn & Wynn, 431 Mass. at 667 *citing* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989); Fountas, 22 MDLR at 269.

The stipulated facts in this case constitute direct evidence of discrimination. The parties' CBA denies Complainant paid excused time for his religious observance but allows members of other religions to receive paid excused time for their religious observance. As the Commission pointed out in the factually-similar case of Fleming v. Boston Public Library, 22 MDLR 8, 9 (2000), a respondent's discriminatory intent is established by its written religious leave policy without need for inference or presumption.

Even if there were no direct evidence of discrimination, Complainant would still prevail under the burden shifting paradigm set forth in Blare v. Huskey, 419 Mass. at 441. The stipulated facts establish a prima facie case of disparate treatment insofar as the CBA treats Complainant, a Roman Catholic, differently from administrators of different religions regarding paid, excused leave. See Fleming, 22 MDLR at 9. Respondent's refusal, pursuant to the parties' CBA, to grant Complainant paid leave for Holy Thursday and Ascension Thursday, while granting paid leave to members of the Jewish faith for Rosh Hashanah and Yom Kippur, and granting paid leave to members of the Greek Orthodox and Russian Orthodox faiths for Good Friday, raises a reasonable inference of discrimination. Id. At the second stage of proof where indirect evidence is concerned, Respondent has not come forward with a legitimate, nondiscriminatory reason for the disparate treatment of members of different faiths. Indeed, Respondent's failure to mount

an evidentiary defense or to present legal arguments in support of the CBA signals a recognition that the disputed contract term violates Chapter 151B, sec. 4, par. 1. As the Commission noted in Fleming where the City of Boston denied paid excused leave for Catholic holy days while granting such leave for Jewish holy days, “where an employer decides to compensate employees for [religious] observance, ... it must not make a blanket distinction in favor of – or against – one religion.” 22 MDLR at 10. Here, the CBA extended benefits to members of certain religions but not others and treated members of various religions differently regarding days off for religious observance. Accordingly, Complainant has proven by a preponderance of the evidence that Respondent treated members of different religious faiths in a disparate fashion and in doing so, engaged in religious discrimination.

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress Complainant has suffered as a direct result of Respondent’s discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

The parties have agreed that Complainant’s total losses resulting from the denial of compensation for Holy Thursday and Ascension Thursday for school years 00-01, 01-02, 02-03 and 03-04 amount to \$4,857.07. Complainant has waived a claim for emotional distress damages.

V. ORDER

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

1. Cease and desist from engaging in discrimination based on religious affiliation.
2. Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$ 4,857.00 in damages.

The parties shall notify the Clerk of the Commission as soon as payment has been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission. This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this decision, and a Petition for Review to the Full Commission within thirty (30) days of receipt of this decision.

So ordered this 18th day of April, 2007.

Betty E. Waxman, Esq.