

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
and ESMAIEL ALZAIN, now known as  
ALSAIF MOHAMED ALBURAHEY,

Complainant

v.

DOCKET NO. 08-BEM-03621

AMERICAN MULTI-CINEMA, INC.,

Respondent

Appearances: Elisabeth M. Le Brun, Esq. for Complainant  
Angela M. Tsevis, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On October 22, 2008, Complainant, Esmail Alzain, now known as Alsaif Mohamed Alburaey, filed a complaint with this Commission against Respondent American Multi-Cinema, Inc. alleging that Respondent discriminated against him on the basis of his race, color, religion and disability in violation of M.G. L. c. 151B, when it chose not to hire him for a film crew position. Respondent denied the allegations of discrimination. The Investigating Commissioner found probable cause to credit the allegations of the complaint and subsequent conciliation efforts were unsuccessful. The matter was certified for a public hearing, which took place before me on October 23, 2012. Having reviewed the record in this matter and the post-hearing submissions of the

parties, I make the following findings of fact and conclusions of law.

## II. FINDINGS OF FACT

1. Complainant, Esmail Alzain, now known as Alsaif Mohamed Alburaey<sup>1</sup>, is a black man, originally from the Sudan. As a child, Complainant contracted polio, and as a result of the disease, he suffers from post-polio syndrome and uses crutches to stabilize himself when walking due to chronic left leg weakness which he described as paralysis.

(C-2) Complainant immigrated legally to the United States in 2006, after winning a lottery to obtain a U.S. Visa. He attended school in the Sudan where he learned to speak English. Complainant graduated high school and has a vocational degree in business administration which he stated is equivalent to an Associate's Degree.

2. Complainant utilized the services of the Massachusetts Rehabilitation Commission, when he moved to Massachusetts. Mass Rehab assisted him with computer courses and referred him to Community Enterprises, Inc. The latter organization assisted Complainant in preparing a resume and conducting job interviews and supplied information about the job market, how to apply for jobs, and navigating the public transportation system. It provided assistance to him in securing his first job as a cashier at the Salem Parking Garage in Salem, MA. In 2007 Complainant began taking courses at North Shore Community College and worked part time at the school in a clerical job.

3. On May 5, 2008, Complainant submitted an online application for a film crew position at Respondent's AMC Liberty Tree 20 theatre in Danvers, MA. Complainant's employment coordinator from Community Enterprises, Inc. assisted him in completing

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<sup>1</sup> Complainant changed his name in March of 2012, when he became an American citizen. At the time of the public hearing, he was referred to as Esmail Alzain, and will be referred to by that name in this decision.

the on-line application and customer service assessment. The position was advertised as “part-time/ full-time” and paid an hourly wage of \$8.00. The General Manager of the Liberty Tree facility and the manager who interviewed Complainant both testified that the film crew position is part-time and primarily involves duties as a cashier at the box office, usher and ticket taker. Candidates must be available to work at least 2 out of 3 weekend shifts, on Friday, Saturday or Sunday and have some day and night time availability. The facility employs some 50- 60 employees.

4. Complainant’s application, including his customer service assessment score, was reviewed by Keith Murphy, a manager who worked at Respondent’s Danvers theatre. Murphy called Complainant for a telephone screening, and subsequently scheduled an in-person interview for May 12, 2008. Murphy interviewed some 10 or more individuals for the film crew position at that time.

5. Complainant testified that when he appeared for the interview, Murphy began by asking him questions about his middle name, Mohamed, and repeated his name while smiling and laughing, in a sarcastic, rude manner. Complainant’s middle name, Mohamed, was listed in two separate sections on his application, and while I credit Complainant’s testimony that Murphy may have recited his full name, I do not credit his testimony that Murphy mocked or made fun of his name.

6. Complainant testified that Murphy asked him questions about whether he would be able to make popcorn, handle a cup of Coca Cola, and deal with customers. These are questions that address his ability to do the job. Complainant testified that he believed he did a good job convincing Murphy that he could perform the duties required of the position. However, Complainant testified, he also got the distinct impression that

Murphy continued to be skeptical about his physical ability to perform the duties of the job.

7. Complainant testified that Murphy asked him at the interview if he had applied for other jobs, and that when he responded in the affirmative Murphy asked him what those jobs were. Complainant proceeded to tell Murphy about other job applications he'd made. Complainant believed that by asking this question Murphy was attempting to eliminate him from consideration for the job at hand. I credit Complainant's testimony that Murphy asked him about other jobs he'd applied for.

8. According to Respondent, all managers are instructed in proper hiring practices and are trained to ask the same questions of all job applicants, and to focus on job related topics throughout the course of an interview. (Ex. 17) AMC provides managers with guidance that identifies standardized topics and questions to cover in all interviews. These topics include an applicant's availability, the essential functions of the job, and five standardized job-based behavioral questions. Managers are trained to follow this strict interview format and instructed not to stray from these scripted topics during an interview. (Exs. R-18-R-20) Respondent asserts that Murphy's interview of Complainant did not deviate in any respect from this prescribed format. Complainant confirmed that Murphy read questions from a script during the interview, but asserts that Murphy deviated from this script when he asked other questions.

9. Respondent asserts that applicants are asked to provide their permanent availability at each stage of the application and the interview process, because their stated availability frequently changes, particularly when they learn of the theatre's hours of operation. The theatre's peak business hours are on evenings and weekends and an

applicant's availability to work these shifts is a crucial qualification for a film crew position. According to Respondent, Murphy did not advance Complainant in the hiring process due to Complainant's alleged statement that he had limited availability during evenings and weekends.

10. Murphy testified that Complainant just blurted out that he had applied for and been offered another job with a security company that would restrict his availability to work both evenings and weekends if he were to be offered the film crew position at Respondent. In his deposition, Murphy stated that Complainant told him only that he had applied for another job, but did not discuss having received an offer, and stated that, if he were to receive that job, his availability to work nights and weekends would be limited. Murphy claims to have written this in some notes which were lost or misplaced and are not in AMC's records. I find that Murphy had little to no actual recollection of the interview with Complainant and do not credit his testimony about Complainant not being available.

11. Complainant denied telling Murphy that he had another job offer or that if he got another job it would affect his availability to work at Respondent. Complainant stated that he was available for full-time work during the relevant time period, including all critical night and weekend shifts. I credit Complainant's testimony that he did not make statements qualifying his availability for work. At the time of his application, Complainant was working at North Shore Community College doing a work study job for approximately 20 hours per week, which he continued until the fall of 2011, but was actively applying for many other jobs and seeking full time employment.

12. Complainant testified that he did not identify, nor was he asked about, his religion and Murphy testified that he did not know Complainant's religious affiliation. Complainant also confirmed that Murphy did not comment upon or ask questions about his physical appearance or his disability aside from the questions about his ability to do the essential functions of the job.

13. Murphy interviewed approximately ten applicants for the film crew position and recommended that six applicants advance in the interview process. Two out of these six applicants were not Caucasian. According to Respondent, all six of the applicants who advanced indicated a willingness to work evenings and weekends during their interviews.

14. Murphy testified that he could not remember anything about the interviews of the other five or six applicants he met with but did not hire, but he claimed to remember details of Complainant's interview. What little recollection he had of the successful candidates' availability was aided by notes which AMC provided. I find that Murphy had little to no independent recollection of any of these interviews, but that Complainant stood out in his mind because he was a very large African man using crutches. He admitted that he did not recall much of the interview process with Complainant.

15. Documentary evidence reveals that three individuals who were initially interviewed by Murphy and eventually hired by Respondent for film crew positions indicated during their interview processes that their availability was limited. One successful female applicant stated she could work only until ten o'clock on Friday, Saturday and Sunday evenings, and was available only twenty-five hours per week. A successful male applicant stated that he would have limited availability during the

upcoming six month period following his interview. A third applicant who was hired also indicated limited availability. I do not believe that limited availability was the reason Complainant was not selected to advance in the interview process.

16. Complainant testified that he was very upset that he did not get the job at Respondent because he had hoped to secure a position near his home. However, Complainant had applied for numerous other jobs and testified that he also was upset that he was not successful in obtaining those other jobs. He filed a number of discrimination charges relating to his unsuccessful job search, including at least fifteen or more complaints filed with MCAD in 2008 and 2009, many of which were dismissed. Complainant testified that the inability to secure full time employment was cumulative and that he was exhausted from filling out applications and going to interviews. He stated that the inability to find work and dismissal of a number of his MCAD complaints left him sad and disappointed. Complainant's medical records reference other instances in which he applied for employment with companies other than AMC and the emotional distress he alleges to have suffered. (Ex. C-11) In November of 2008, Complainant saw his primary care physician and was diagnosed with depression which was gradually worsening over the previous two years and was prescribed Prozac. (C-2, p. 404) He stated that following his rejection by Respondent, his financial struggles worsened, because he had recently become a father again, and he needed to help support two children and his mother in Africa. Complainant was living with his girlfriend in 2008 and stated they argued frequently over his inability to find a job and that financial stress was the cause of these arguments. At some point in 2008, Complainant was homeless for a period of time after arguing with his girlfriend about money, and left her home because

of his inability to contribute to the household. He spent a few days at the Pine Street Inn shelter for the homeless, but moved back in with his girlfriend. He felt guilty at his inability to contribute to the household.

17. Complainant testified that he applied unsuccessfully for approximately 200 or more jobs during the period 2008 to 2010. (Ex. C-8, C-9, C-10) He filed discrimination complaints in only the 20 or so cases where he had secured an interview and the interview went well, or where he was treated badly in the interview, and felt the reason for rejection was ultimately his race or disability, or both. At the end of December 2010, Complainant began working full time as a sales specialist at Best Buy at an hourly rate of \$9.00. In April 2012, Complainant scaled back his hours from 40 to 30 in order to accommodate two college classes in his weekly schedule, but he continues to work there. Complainant's tax returns show that he earned very small amounts of money from various jobs during the years 2008 to 2010. (Ex. C-7)

18. There is scant evidence regarding how many hours Complainant would have been offered had he been hired for the part time position of film crew at AMC. Although Complainant claims he would have worked up to 50 hours per week at AMC, there is no information in the record about the number of available shifts and to conclude he would have worked full time or more than 40 hours would be entirely speculative. Given the nature of the position and the credible testimony of the General Manager that the film crew positions are part time, I conclude that the job availability was part-time. It is reasonable to assume that Complainant could have worked a minimum of thirty hours since at least two weekend shifts and some night shift availability were required. There is also evidence that Complainant continued to actively seek employment over the next two



years applying unsuccessfully for numerous jobs. He continued to work a part-time work study job at North Shore Community college 20 hours per week. Based on a calculation of \$8.00 per hour for a 30 hour week, over a period of two years and seven months, Complainant would have earned \$31,920 had he landed the job at AMC.

### III. CONCLUSIONS OF LAW

Complainant alleges that he was discriminated against on the basis of his race, color, religion and disability in violation of M.G. L. c. 151B.

#### Discrimination on the Basis of Disability

Massachusetts General Laws c. 151B, s. 4(16) provides that it is unlawful to “refuse to hire” -- a qualified handicapped individual capable of performing the essential functions of the position involved with or without accommodation. Massachusetts law makes it an unlawful practice for an employer to discriminate against an individual with respect to employment because of a handicap. G.L. c.151B s. 1(17) defines handicap as having an impairment that restricts a major life activity and includes having a record of a physical or mental impairment or being regarded as having a physical or mental impairment.

I conclude that Complainant has established a prima facie case of discrimination based upon his disability. Complainant suffers from the effects of having had polio as a child and has permanent weakness in his left leg which requires him to use crutches to assist him in walking. Complainant testified that he was able to perform the essential functions of the film crew position and had worked as a cashier previously on two occasions.

Murphy asked Complainant whether he could perform the duties of the film crew position, including if he could make popcorn, handle a cup of Coca Cola, and deal with customers. An inquiry into whether an applicant can perform specific job functions is permitted. MCAD Guidelines: Employment Discrimination on the Basis of Handicap, Part IV (C). Complainant testified that he responded that he was able to perform these duties, but got the distinct impression that Murphy had already determined that he could not perform the essential functions of the job. The questions Murphy asked related directly to Complainant's ability to perform the physical duties of the position; however, Respondent did not raise Complainant's inability to perform the job functions as the reason for not hiring him. There was no discussion of granting any accommodation to Complainant, nor did he seek a reasonable accommodation.

If an employer has specific concerns about a candidate's ability to perform the essential functions of the job, it may make an offer of employment conditioned upon the applicant submitting to and passing a physical exam, which addresses the job functions. The focus of such an examination should be whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job. MCAD Handicap Guidelines, Part V (A)& (B)

I credit Complainant's testimony that he was able to perform the job functions, despite his disability. Moreover, I have specifically discredited the reason Respondent articulated for not hiring him, that being Complainant's assertion of restricted availability. However, even if I were to believe that Complainant discussed not being available to work all shifts, there was evidence that other applicants were hired despite their limited availability. Three individuals who were initially interviewed by Murphy

and eventually hired by Respondent for film crew positions indicated during their respective interviews that their availability was limited. This fact is strongly suggestive of pretext.

I conclude that once Murphy observed Complainant's using crutches, he summarily concluded that Complainant was not appropriate for the job. The evidence suggests that Murphy perceived Complainant's physical impairment as a bar to his ability to meet the requirements of the job. He declined to accept Complainant's assertions to the contrary and began to ask Complainant about other jobs he had applied for. In deposition testimony, Murphy stated that Complainant told him "he had applied for another job and if he received it, his availability would be limited." At the hearing, Murphy testified that Complainant informed him "he had another job offer and therefore that his availability on nights and weekends would be limited." This inherent inconsistency in addition to Murphy's demeanor, which was uncomfortable and defensive throughout his testimony, leads me to believe he fabricated an excuse for not hiring Complainant and was not entirely comfortable with his stated version of the events. Murphy had little independent recall of the other interviews he conducted, particularly the interviews of other unsuccessful candidates. The fact that he claims to recall specific details of his interview with Complainant is simply not credible or convincing. I conclude that Complainant has successfully demonstrated that the assertion of his limited availability was a pretext for discrimination based on his disability. I am persuaded that Respondents acted out of unlawful concerns about Complainant's disability in violation of M.G. L. c. 151B, s. 4(16).

### Discrimination on the Basis of Race and Religion

Massachusetts General Laws c.151B, s. 4(1) prohibits discrimination in the terms and conditions of employment, including the refusal to hire, based upon an applicant's race or religion. In order to establish a claim of discrimination based on race and or religion, Complainant may rely on the inferential model of proof, which applies a three-part burden shifting analysis. See Wheelock College v. MCAD, 371 Mass. 130 (1976). In the first stage of proof the Complainant must establish a prima facie case. He may do so by demonstrating that (1) he is a member of a protected class; (2) he applied for an open position; (3) he was not hired; and (4) the employer filled the position by hiring another individual not of Complainant's protected class. See Wynn & Wynn P.C. v. MCAD, 431 Mass. 655 (2000) Once Complainant has established a prima facie case of discrimination, Respondent must articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions. If Respondent meets this burden, the burden shifts back to Complainant to show, by a preponderance of the evidence, that Respondent's articulated reasons are pretext for discrimination, that is that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001).

I conclude that Complainant has established a prima facie case of discrimination based upon race and religion. Complainant is a black man of African national origin who is Muslim and whose middle name is Mohammed. He applied and was interviewed for the open film crew position, and met the qualifications for the position, including availability, yet he was not hired. These facts are sufficient to establish a prima facie case.

At the second stage of proof, Respondent can rebut the presumption of discrimination created by the prima facie case, by articulating a lawful reason for its employment decision and supporting that reason with some credible evidence to show that it was the real reason. Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 116-117 (2000), *citing* Blare v. Huskey Injection Molding Sys. Boston, Inc., 419 Mass. 437, 442 (1995); Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 138, (1976) Respondent's reason for not hiring Complainant, namely that he advised Murphy during his interview that his availability to work was restricted during the theater's peak business hours was not credible. Complainant testified that he was looking for full time employment. He did not have another job, other than his work study position, or even a job offer at the time, as evidenced by his continuing to submit job applications to numerous employers thereafter. Given his situation, it is not believable that Complainant would have blurted out during the interview that he had just accepted another job, or might have another job and therefore would not be available for all the required shift times. I also do not believe that Murphy had any actual independent memory of the substance of his interview with Complainant. He had little to no independent recollection of any of the other interviews he conducted at the time.

A showing that the Respondent's reasons are not credible or have no reasonable support in the evidence permits an inference of discrimination. Abramian, supra. at 118. However, at the third stage, Respondent may counter the effect of this evidence by showing that even if its articulated reason for the adverse action is untrue, it acted with no discriminatory intent, or that its action was based on a different non-discriminatory

reason. Lipchitz, supra. at 504; Abramian, supra. at 118. Respondent asserts that it hired non-Caucasian applicants to fill two of the six open positions and that this is evidence that Respondent harbored no discriminatory animus toward people of color. I concur that this is evidence that Murphy did not prefer only white applicants and did not act with intent to discriminate based on race. In this case, I believe Murphy's rejection of Complainant was based on a different discriminatory reason, his disability, as discussed above.

Murphy may have surmised from Complainant's middle name which was stated prominently on his application, that he was Muslim, but there is no credible evidence that he cared about or focused on Complainant's religion. I do not credit Complainant's testimony that Murphy repeated his middle name or mocked his name. Murphy may have read Complainant's middle name off of his application, but I conclude that even if this occurred, Complainant exaggerated Murphy's reaction to his name. The suggestion that Murphy discriminated against Complainant on the basis of his name strains credulity, since the evidence establishes that Complainant had twice provided his full name on his online application. If Murphy associated this name with being Muslim, and was motivated by discriminatory animus toward Muslims, he could simply have chosen not to contact or interview Complainant. I credit Murphy's testimony that he gave no thought whatsoever to Complainant's religion and I do not believe this was a reason for his being rejected an applicant. As there is no credible evidence to suggest that Murphy acted with discriminatory intent or motive based on Complainant's race or religion, I conclude that a preponderance of the evidence does not support these claims.

#### IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; Stonehill College v. MCAD, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and for emotional distress suffered as direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent. The Commission has broad discretion to fashion remedies to best effectuate the goals of G.L. c. 151B. Conway v. Electro Switch Corp., 825 F. 2d 593, 601(1<sup>st</sup> Cir. 1987)

##### Lost Wages

Having determined that Complainant was not hired for a discriminatory reason, I conclude that he is entitled to back pay. Had Complainant been hired for the job at AMC he likely have worked at least three shifts per week in the film crew position. This conclusion is based on the part time nature of the position, the fact that at least two weekend shifts and some night shifts were available and that the facility employs a relatively large number of people. Complainant remained at his work study position for some 20 hours per week, but persisted in his active job search until the end of 2010 when he secured employment as a sales specialist at Best Buy at a higher rate of pay than the minimum wage being offered by Respondent. He continued to work at Best Buy up to the time of hearing, a period of almost two years. Given his numerous applications and difficulty securing employment, I conclude that Complainant would likely have remained

employed at Respondent for a significant period of time had he been hired. I found that had Complainant been hired to work at Respondent he would have earned at least \$31,920 from the time he applied and was rejected until the time he secured alternative employment. He is entitled to this amount for lost wages for the period of time from May 2008 until December 2010.

#### Emotional Distress

Pursuant to G.L. c. 151B, § 5, the Commission is authorized to award damages for emotional distress suffered as a direct and probable consequence of Respondent's actions. Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). An award of emotional distress must rest on substantial evidence and a factual basis clear on the record. Factors that should be considered in making such awards include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time Complainant has suffered and reasonably expects to suffer; and (4) whether Complainant has attempted to mitigate the harm. Complainant must also show a causal connection between Respondent's unlawful actions and his emotional distress. Id. at 576.

I conclude that Complainant sustained some emotional distress as a result of Respondent's conduct. Complainant testified that he was particularly upset that he did not get the job at Respondent because he had hoped to secure a position that was closer to his home. He stated that he was tearful and lost his appetite. However, he also testified that he had applied for numerous other jobs unsuccessfully and was exhausted from filling out applications and going to interviews. He claimed he suffered emotional distress from all the many rejections he faced at that time, and that his financial struggles



were exacerbated by the fact that he had just had another child. He was not contributing financially to the household and this caused arguments with his girlfriend. In 2008, Complainant became homeless for a period of time after an argument with his girlfriend about money and spent three days at the Pine Street Inn. Although he eventually moved back in with his girlfriend, Complainant continued to feel depressed about his inability to contribute to the household. Complainant also testified that he sought medical help from his primary care physician because he was very sad and disappointed at his inability to secure employment and at how his life was going. In November of 2008, he was diagnosed with depression and began to take Prozac and attend therapy sessions.

While some of his distress is attributable to Respondent's unlawful rejection of him as a candidate for employment, Complainant testified that he also was upset because he was unsuccessful in securing a number of other jobs for which he applied and for which he was qualified. He claims to have applied unsuccessfully for over 200 jobs during the period of 2008 to 2010 and many of these attempts are documented. I am therefore unwilling to attribute all of the emotional distress described by Complainant exclusively to Respondent's actions, since it is clear from the totality of the evidence, that Complainant's emotional state was affected by other factors and events occurring around the same time, including being rejected for other jobs. He clearly experienced distress from sources other than Respondent's rejection. The pain of not being able to secure employment over a long period of time was clearly cumulative and manifested in the number of complaints he filed with the MCAD, alleging the sincere belief that he continued to be the victim of unlawful discrimination. Any award of emotional distress must consider the various other causes of stress in Complainant's life during the relevant

time period. Based on the evidence, I find that Complainant is entitled to a modest award of emotional distress damages in the amount of \$ 15,000.

#### V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the Commission's authority under G.L. c. 151B, s. 5, Respondent is hereby ordered to:

(1) Pay Complainant, Esmaiel Alzain, now known as Alsaif Mohamed Alburaey, damages for lost wages in the amount of \$31,920 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 or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(2) Pay to Complainant, Esmaiel Alzain, now known as Alsaif Mohamed Alburaey, damages for emotional distress in the amount of \$15,000, with interest thereon at the rate of 12% per annum from the date the complaint was filed, until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Cease and desist from any hiring practices that constitute unlawful discrimination based on disability.

This decision 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 Order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this Order.

SO ORDERED this 20th day of November, 2013.

Eugenia Guastaferr  
Hearing Officer