

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION
ONE ASHBURTON PLACE, BOSTON, MA 02108-1518



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August 1, 2013

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RE: MCAD and Tara Forcellati v. Compass Group, North America
MCAD Docket Number: 08-BEM-01017

Dear Counsel:

Enclosed please find a copy of an Order issued in the above-referenced matter.

Very truly yours,


Yudelka Peña
Hearings Clerk

EMG/yp

Enclosure

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and
TARA FORCELLATI,

Complainant

vs.

DOCKET NO. 08-BEM-01017

COMPASS GROUP, NORTH
AMERICA,

Respondent

ORDER OF THE FULL COMMISSION¹

By a Notice dated December 18, 2012, Respondent seeks Full Commission review of an October 1, 2012 Order of the Hearing Officer, denying Respondent's Motion to Dismiss for Complainant's failure to file a timely and adequate complaint. A Hearing was scheduled for January of 2013 but was postponed pending a ruling on Respondent's request.

While the Full Commission does not ordinarily intercede in such matters, absent a final order of the Hearing Officer after an adjudicatory hearing, we will briefly address the matter raised because it goes to the heart of the Commission's authority to interpret the scope of its jurisdiction in the first instance.

Respondent asserts that Complainant's initial communication with the Commission which was by fax dated February 5, 2008, was not a valid charge of discrimination because Complainant did not sign or swear to the allegations contained therein pursuant to 804 CMR

¹ Commissioner Suni Thomas-George was the Investigating Commissioner in this matter and pursuant to 804 CMR 1.23 (c), she did not participate in the Full Commission deliberations and did not vote on the matter.

1.10(4). Respondent asserts that a perfected complaint that fully complied with the MCAD Regulations was not filed until March 24, 2008, some two months after the expiration of the 300 day statute of limitations for filing charges at the Commission, and was therefore untimely.

We note at the outset that the Commission's Rules of Procedure at 804 CMR 1.10 (6) provide as follows:

(6) Amendments.

(a) A complaint or any part thereof may be amended to cure technical defects or omissions, including failure to swear to the complaint, or to clarify and amplify allegations made therein. An amendment alleging additional acts constituting unlawful discriminatory practices related to or arising out of the subject matter of the original complaint may be made by Order of the Commissioner. Amendments shall relate back to the original filing date.

(b) Amendments may be made pursuant to 804 CMR 1.10(6) by the Investigating Commissioner at any time prior to Certification to Public Hearing and issuance of Commission Complaint pursuant to 804 CMR 1.20. In each instance a copy of the amended complaint shall be served upon each party.

We conclude that the Commission's regulations allow for the "cure" of such a defect, and provide that any amendment relates to the date of the original filing. We also note that the Investigating Commissioner accepted the Complaint and proceeded to investigate the matter. The investigation resulted in a finding of Probable Cause that Complainant had been denied maternity leave and was constructively discharged from her employment with Respondent. However, the Hearing Officer reviewed the request to dismiss *de novo*. She concluded that the initial faxed notice of complaint from Complainant's counsel should properly be considered the official date of filing despite its technical deficiencies, the requirement of a more definite statement of the charge and affirmation by Complainant. In doing so the Hearing Officer relied only in part on the Investigating Commissioner's acceptance of the March 24, 2008 perfected charge as timely and her subsequent investigation of the complaint. She ruled that the initial communication constituted adequate notice pleading of the charge, relying on

notions of fairness and equity as they relate to the statute's mission. She also deemed the complaint arguably timely for reasons of equitable tolling.

We concur with the Hearing Officer that the Commission has traditionally accepted deficient complaints that are later perfected as filed nunc pro tunc to the initial date of contact with the Commission. This is consistent with the Commission's mission to interpret its regulations broadly and inclusively to ensure that the statute's purpose of eliminating and preventing discrimination is achieved. See *Currier v. National Board of Medical Examiners*, 462 Mass. 1, 18 (2012). Respondent cites to the case of *Andrews v. Arkwright Mutual Insurance Co.*, 423 Mass. 1020 (1996), for the proposition that Complainant's initial communication cannot be considered a valid complaint. However, there are factors that distinguish *Andrews* from the present case. In *Andrews* counsel for the plaintiff conceded at oral argument that his initial letter of inquiry to the Commission was not a complaint. The inquiry merely stated that his client "would be" pursuing a claim against her former employer. This concession, absent a tolling of the statute of limitations was determined to be fatal to the plaintiff's c. 151B complaint. Moreover, because *Andrews* had filed a civil action in Superior court on the same set of facts, the General Counsel of the Commission declined to rule on the statute of limitations issue as the matter was then properly before the court in which the civil action was pending. The court in *Andrews* determined that a complaint had not been timely filed at the Commission as a prerequisite to the filing of the civil action and thus dismissed the case. In this case, the matter of the statute of limitations is squarely before the Commission. The Commission has been delegated the authority by the Legislature to rule on matters of its own jurisdiction including interpreting the scope of the statute, in the first instance and the courts have generally granted

deference to the Commission's interpretation of its own statute and regulations. *Currier* 462 Mass. 18, 20 .

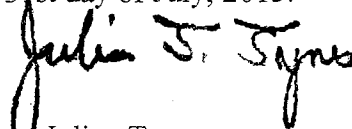
Unlike in *Andrews*, Complainant's initial February 5, 2008 communication to the Commission in this matter is identified as a "discrimination complaint" and clearly manifested the intent that it be construed as such. In addition, the claim is described as the denial of maternity leave and pregnancy leave, identifies the employer by name, address, size and location and provides the date of Complainant's termination. We conclude that such information arguably provides "sufficient detail of the act or acts of discrimination" as required by 804 CMR 1.03 and satisfies the requirement of bare bones notice pleading. In any event it was deemed to be a complaint of discrimination by the Commission per the March 6, 2008 letter of Commission employee and mail-in complaints coordinator, Carol Mosca to Complainant's counsel.

Finally, where there is a plausible argument that the statute of limitations was also subject to equitable tolling the facts must be considered by a fact-finder. Chapter 151B's filing requirements are subject to equitable tolling. *Christo v. Edward Boyle Ins. Agency*, 402 Mass. 815 (1988). Where the allegations raise a genuine issue of material fact on the issue of equitable tolling, such evidence should be heard and determined by a fact-finder. In the instant case, Complainant asserts that the statute of limitations should be tolled because of alleged representations by Respondent that Complainant's employment situation would be addressed and corrected. She alleges that she relied on those representations and was misled by Respondent when the stated promises were not acted upon. Moreover, a plausible argument could be made in this case that Complainant was misled by the actions of the Commission and its implied acceptance of the initial filing as a timely complaint, thereby justifying a tolling of the statute of limitations. We conclude that Complainant is entitled to reasonably rely on the actions of the

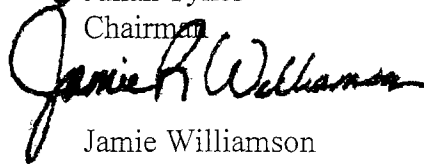
Investigating Commissioner in proceeding with and not dismissing the complaint and has the right to have her claim heard at full adjudicatory hearing. If indeed, Complainant's initial contact is found to have been on day 300 of the limitations period, we conclude that the Commission acted properly to preserve her rights by allowing the perfected filing nunc pro tunc to the date of her initial contact.

For the reasons stated above, we conclude that the interests of justice require a relaxation of the rules regarding the statute of limitations for filing a complaint in the instant matter and hereby Order that the case proceed to hearing forthwith.

So Ordered this 31st day of July, 2013.



Julian Tynes
Chairman



Jamie Williamson
Commissioner