RAYMOND JETTE, a/k/a RACHEL JETTE v. HONEY FARMS MINI MARKET, et al.

23 MDLR 229
Docket # 95 SEM 0421

October 10, 2001

ORDER OF THE FULL COMMISSION

This matter is before us following a referral from the Investigating Commissioner, pursuant to 804 CMR 1.20(3)(b).[1] Complainant, a male-to-female transsexual, filed the instant complaint with the commission on July 13, 1995. The original complaint alleged that the Respondent discriminated against Ms. Jette because of her sex. The complaint was amended to add sexual orientation (transsexual), perceived sexual orientation (gay), and handicap or perceived handicap[2] (gender dysphoria).

The Investigating Commissioner issued a Probable Cause determination on July 31, 1998, concluding that there were genuine issues of fact and law in dispute. See 804 CMR 1.15(7). Respondent moved to dismiss the complaint, contending that transsexuals are not protected under c. 151B. Given that Respondent's motion presented an issue of first impression for the Commission, the Investigating Commissioner referred the matter to the Full Commission to determine whether transsexuals are covered under theories of sex, sexual orientation and/or disability discrimination, pursuant to M.G.L. c. 151B.

The facts alleged in the instant matter are as follows. Complainant began her employment with respondent on December 20, 1994, as a store clerk. Beginning in the first week of January 1995, complainant's supervisor began to order her to use the name she was born with, Raymond, and to dress in male clothing as stipulated in the dress code. Complainant further alleges respondent was on notice of her diagnosis of transsexuality, and of the fact of her treatment at the time of her termination, yet failed to reasonably accommodate her by allowing her to identify, by name, and otherwise, as a woman.

We have, this day, held that discrimination against transsexuals because of their transsexuality is discrimination based on "sex" within the meaning of M.G.L. c. 151B. We have also held that transsexuality is not a "sexual orientation" within the meaning of the statute. Millett v. Lutco, Inc., Docket No. 98 BEM 3695. Therefore, respondent's motion to dismiss the claim of sex discrimination is DENIED. Respondent's motion to dismiss the claim of sexual orientation discrimination (claiming transsexuality as a sexual orientation) is GRANTED.

This case presents a question not addressed in Millett: whether transsexuality is excluded from the definition of "disability" as a matter of law. Like the questions presented in Millet, this is an issue that has never been addressed squarely by Massachusetts' appellate courts. A single Massachusetts trial court has considered the issue, but only in dicta. LaFleur v. Bird-Johnson Co., 3 Mass. L. Rptr. No. 9, p. 196 (1994) (Norfolk Sup. Ct., Brady, J., No. 93-703).[3]

Our first task for the purpose of the instant motion is to determine whether the legislature intended to exclude transsexuality from the definition of disability discrimination under the statute.

We begin our analysis by looking to the plain language of the statute. Chapter 151B, s. 1(17) (a) defines a "disability" as a "physical or mental impairment, which substantially limits one or more major life activities of a person." Transsexuality is not explicitly excluded from coverage under the plain language of the statute. (compare with the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.). Given this, we next examine whether there is any evidence of legislative intent to exclude transsexuality from coverage under the statute. We conclude there is not.

In fashioning the Massachusetts statute, our legislature relied on and expressly modeled its provisions on those included in the Rehabilitation Act of 1973. See 29 U.S.C. § 701 et al. The Rehabilitation Act specifically excludes transsexuality from the definition of disability. Although the Massachusetts statute mirrors that of the Rehabilitation Act in substantial part, the Massachusetts legislature declined to include the exemptions for coverage of transsexuals. In addition, even though Congress reaffirmed its commitment to excluding transsexuality from coverage in the 1990 Americans with Disabilities Act, our legislature has never seen fit to amend M.G.L. c. 151B, § 4(16) el al to exclude transsexuality from coverage. Therefore, we can discern no legislative intent to exclude transsexuality from coverage.

This conclusion is, we believe, warranted by the Supreme Judicial Court's analysis of the legislative intent of chapter 151B, where the court held;

> "In contrast, because the language of the statute does not end our inquiry, we turn to other sources to discern the Legislature's intent. Acting Superintendent of Bournewood Hosp. v. Baker, supra at 104. The legislative history of G. L. c. 151B is instructive. In 1983, when the Legislature amended G. L. c. 151B to extend protection from unlawful employment discrimination to "handicapped" persons, St. 1983, c. 533, § 2, the Legislature explicitly patterned the definition of "handicap" on the definition of "handicap" contained in a Federal statute enacted ten years earlier, the Federal Rehabilitation Act of 1973, 29 U.S.C. §706(6) (2000). See Talbert Trading Co. v. Massachusetts Comm'n Against Discrimination, 37 Mass. App. Ct. 56, 60 (1994). At that time no court had determined, or, to our knowledge considered, whether "handicapped" referred to a person's impairment in its corrected or mitigated condition; corrective devices or other mitigating measures were simply not relevant. See, e.g., Strathie v. Department of Transp., 716 F.2d 227, 228-230 (3d Cir. 1983) (bus driver with controlled hearing impairment assumed to be "handicapped"); Davis v. Ohio Barge Line, Inc., 535 F. Supp. 1324, 1325 (W.D. Pa. 1982), vacated on other grounds, 697 F.2d 549 (3d Cir. 1983) ("controlled epileptic" assumed to be handicapped). We presume that in 1983 the Legislature was aware of the then-existing case law interpreting the Federal statute, and that it must have intended the term "handicap" in the Massachusetts statute to be interpreted in a manner that was consistent with the then-existing Federal jurisprudence. See Duarte v. Healy, 405 Mass. 43, 47 (19 89) (Legislature presumed to be aware of United States Supreme Court case interpreting 42 U.S.C. § 1983 when it patterned Civil Rights Act after § 1983). As cited in Dahill v. City of Boston, SJC 08324 (2001).

This same reasoning leads us to the conclusion that since the legislature was aware of the exemptions for coverage of transsexuals and did not include such in M.G.L.C. 151B, it must have *intended* to include such coverage.

Since the legislature has made clear that that the provisions of M.G. L. c. 151B "shall be construed liberally", we see no reason to distinguish complainant's

claim of disability discrimination from disability discrimination claims brought by any other petitioner. See Dahill supra, holding that the public policies underlying M.G.L. c. 151B, § 4(16) are designed to protect "otherwise qualified" individuals who are substantially impaired in a major life activity "from deprivations based on prejudices, stereotypes, or unfounded fear..."). Thus, if the complainant in the instant matter can establish that she is substantially impaired in a major life activity and can perform the essential functions of her position with reasonable accommodation, she will be considered disabled within the meaning the statute.[4] See M.G. L. c. 151B § 9. See also; Carla Enriquez v. West Jersey Health Systems et al 2001 N.J. Super. LEXIS 283 (July 3, 2001). Where the New Jersey Appellate Division recently held that transsexuals are protected from discrimination based on disability, under the states' anti-discrimination laws. In Enriquez, the court held;

> To establish the first element of a discriminatory discharge case under the LAD, however, an employee must submit proof that he or she was handicapped. Maher P. N.J. Transit Rail Operations, Inc., 125 N.J. 455, 480-81, 593 A.2d 750 (1991); Clowes v. Terminix Int'l Inc., supra, 109 N.J. at 596. Here, the dismissal of plaintiff's complaint was based solely on the motion judge's conclusion that gender dysphoria was not a handicap under the LAD. While we have concluded that gender dysphoria can constitute a handicap, we have problems with the proofs submitted by plaintiff during the summary judgment proceedings.

Therefore, Respondent's Motion to Dismiss the claim of disability discrimination is, hereby, DENIED, and the matter shall be REMANDED to the Investigating Commissioner for further investigation.

ORDER

1. The portion of the Complaint alleging discrimination on the basis of Sexual Orientation is DISMISSED.

2. The portions of the Complaint alleging discrimination on the basis of sex and disability are, hereby, REMANDED for completion of all appropriate investigative and or Discovery proceedings, in order to fully assess the sufficiency of complaint for further commission proceedings. These proceedings shall be expedited.

SO ORDERED this 10th day of October, 2001.

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[1] Pursuant to the Commission's Rules of Procedure at 804 CMR 1.24, which went into effect on 1/1/99, the Order of the Full Commission in the instant matter is not ripe for judicial review. 804 CMR 1.24(1) states that "for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6, the Decision of the Full Commission on appeal from the *Decision of the Hearing Commissioner* pursuant to 804 CMR 1.23(1)(h), shall constitute the Final Order of die Commission. (Emphasis added).

[2] Federal legislation now uses the term "disability" rather than "handicap." See Rehabilitation Act Amendments of 1992 (Pub. L. No. 102-569, 106 Stat. 4344 [1992], codified at 29 U.S.C. 705[20][B]) and Americans with Disabilities Act (Pub. L. No. 101-336, 104 Stat. 327 [1990], codified at 42 U.S.C. 12101 et seq. [2000]). The District Court judge noted that the change in terminology reflects "a congressional effort to use currently acceptable terminology," but that no

"distinction in substance" appears intended by the different phraseology. Dahill vs City of Boston. SJC-08324 (2001) at footnote seven. Given the Supreme Judicial Court's conclusion, the commission also finds that the two terms may be used interchangeable, and that it is appropriate to refer to a "handicap" as a "disability".

[3] In LaFleur, a claim of handicap discrimination resulting from transsexuality under M.G.L. c. 151B was dismissed because the plaintiff failed to allege handicap discrimination to the MCAD. LaFleur v. Bird-Johnson Company, 3 Mass. L. Rptr. No. 9, at 198. But see: Doe v. Boeing, 121 Wn.2d 8, 846 P.2d 531 (Wa. 1993) (Transsexuality covered by Washington state statute); Smith v. City of Jacksonville / Jacksonville Correctional Institution, (Case No. 88-5451, Fla. Com'n on Human Rels., June 10, 1992) sustaining on appeal an order mandating the re-hiring of a male-to-female transsexual Person into a correctional officer position following sex reassignment surgery.

[4] For example, a complainant who has undergone surgery or hormone therapy may be able to establish physical or psychological side effects that rise to the level of a disability.