

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ROBERT LAZARIS,
Complainants

v.

DOCKET NO. 07-BEM-01850

MASSACHUSETTS HUMAN
RESOURCES DIVISION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Judith Kaplan in favor of Complainant, Robert Lazaris. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for aiding and abetting discrimination in violation of M.G.L. c. 151B, § 4(5) and interfering with Complainant's rights under M.G.L. c. 151B, § 4(4A) after approving the City of Lynn's request to bypass Complainant for a firefighter position based, in part, on information regarding Complainant's disability, which was improperly acquired during the interview process.¹ Both Complainant and Respondent have appealed to the Full

¹ Complainant also filed a complaint against the City of Lynn and the Lynn Fire Department for discrimination on the basis of disability and age based on their request to bypass him for appointment to a firefighter position. The Commission dismissed these claims after Complainant settled these claims with the City of Lynn and the Lynn Fire Department. Complainant additionally alleged discrimination on the basis of disability against Respondent, however, the Commission, relying on Lopez v. Commonwealth, 463 Mass. 696 (2012), determined that Respondent was not an employer with respect to candidates for public safety positions and dismissed Complainant's disability

Commission.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et seq.*), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 1(6).

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. *See, e.g., School Committee of Chicopee v. MCAD*, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. *See Quinn v. Response Electric Services, Inc.*, 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(1)(h).

LEGAL DISCUSSION

A. Interference Under M.G.L. c. 151B, § 4(4A)

Respondent argues that the Hearing Officer erred as a matter of law by concluding that it

discrimination claim against Respondent. After the dismissal of this claim, the complaint was amended to include a claim of interference pursuant to M.G.L. c. 151B, § 4(4A) against Respondent.

interfered with Complainant's exercise of his rights pursuant to M.G.L. c. 151B, § 4(4A). Specifically, Respondent argues that it did not act in deliberate disregard of Complainant's rights when it approved the City's request to bypass Complainant. We agree with Respondent that the Hearing Officer erred in concluding that Respondent was liable for interference pursuant to M.G.L. c. 151B, § 4(4A) and vacate the Hearing Officer's decision as to this claim.

M.G.L. c. 151B, § 4(4A) makes it unlawful for "any person to coerce, intimidate, threaten or interfere with another person in the exercise or enjoyment of any right granted or protected by [M.G.L. c. 151B], or to coerce, intimidate, threaten, or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by [M.G.L. c. 151B]." This provision provides for an interference claim, not merely against employers, but against all persons. Thomas O'Connor Constructors, Inc. v. MCAD, 893 N.E.2d 80, 91 (2008); see Lopez v. Commonwealth, 463 Mass. 696, 708 (2012) (providing that the Massachusetts Human Resources Division (HRD) need not be an employer to be subject to an interference claim under § 4(4A)). The Massachusetts Supreme Judicial Court has recognized that as the term "interfere" is used in M.G.L. c. 151B, § 4(4A), it "is appropriately considered with, and interpreted in light of, the words 'coerce,' 'intimidate,' and 'threaten' that precede it, and that each implies some form of intentional conduct." Lopez v. Commonwealth, 463 Mass. 696, 708 (2012).

In cases dependent upon circumstantial evidence alone, individuals may be held liable for interference if: (1) they had the authority or the duty to act on behalf of the employer; (2) their action or failure to act implicated Complainant's rights under the statute; and (3) there is evidence articulated by the Complainant that the action or failure to act was in deliberate disregard of Complainant's rights, allowing the inference to be drawn that there was intent to

discriminate or interfere with Complainant's exercise of rights. Canfield v. Con-Way Freight, Inc., 578 F.Supp.2d 235, 242 (D. Mass. 2008); Lopez v. Commonwealth, 463 Mass. 696, 708 (2012); Woodason v. Norton School Committee, 25 MDLR 62, 64 (2003). Deliberate disregard requires a showing of an intent to discriminate. Furtado v. Standard Parking Corp., 820 F.Supp.2d 261, 278 (D. Mass. 2011) (determining that plaintiff's supervisors did not act in "deliberate disregard" of his rights where there was no evidence that they said or did anything that suggested they harbored any bias against disabled persons); see Bendell v. Lemax, Inc., 22 MDLR 259, 263 (22 MDLR 259) (declining to hold that "an individual could be held liable [for interference] simply because he or she was the decision maker or the messenger of the decision" absent a showing that they had a discriminatory motive); Harmon v. Malden Hosp., 19 MDLR 157, 158 (1997) ("Negligent acts or omissions . . . do not in and of themselves operate to render [an individual Respondent] personally liable.").

In her analysis of Respondent's liability for interference, the Hearing Officer determined that Respondent acted in deliberate disregard of Complainant's rights "by accepting the [City's] improper reason for bypass and approving and validating the bypass without making further inquiry into the hiring process or otherwise challenging the use of improperly acquired medical information." However, this does not rise to the level of acting in "deliberate disregard" of Complainant's rights such that we can conclude that Respondent intended to discriminate against Complainant on the basis of disability. The evidence demonstrates that Richard Currier, a personnel analyst for Respondent, was responsible for reviewing the City's request to bypass Complainant. Currier testified that he had no specific training on medical conditions that automatically disqualified an applicant for a position and those that did not. Further, the City's request to bypass Complainant was the first bypass request that included a medical reason that

Currier had ever reviewed. There was no evidence in the record that Currier or Respondent harbored any discriminatory animus or approved the City's bypass request with the intent to discriminate against Complainant based on his disability. Although Respondent's approval of the bypass request and its failure to inquire about how the City obtained Complainant's medical information may have been negligent, we determine that there was insufficient evidence to support a finding that Respondent acted with a discriminatory motive to deliberately deprive Complainant of his right to be free from discrimination. Because the Hearing Officer erred in concluding that Respondent acted in deliberate disregard of Complainant's rights, we vacate the Hearing Officer's determination as to Complainant's claim of interference.

B. Aiding and Abetting Under M.G.L. c. 151B, § 4(5)

Respondent argues that the Hearing Officer erred as a matter of law by concluding that Respondent aided and abetted the City in violation of M.G.L. c. 151B, § 4(5). Specifically, Respondent asserts that the Hearing Officer erred as a matter of law, as Complainant failed to prove all elements required to establish a prima facie case of aiding and abetting. We agree that the Hearing Officer erred as a matter of law by concluding that Respondent was liable for aiding and abetting. Therefore, we vacate the Hearing Officer's decision as to the aiding and abetting claim.

M.G.L. c. 151B, § 4(5) makes it unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so." In order to prevail on an aiding and abetting claim, a complainant must show (1) that the Respondent committed a wholly individual and distinct wrong, separate and distinct from the main discrimination claim; (2) that the Respondent shared an intent to discriminate not unlike that of the alleged principal offender; and (3) that the

Respondent knew of his or her supporting role in an enterprise designed to deprive the Complainant of a right guaranteed to him or her under M.G.L. c. 151B. Lopez v. Commonwealth, 463 Mass. 696, 713 (2012); Harmon v. Malden Hospital, 19 MDLR 157, 158 (1997). There must be evidence that the aider or abettor possessed the requisite intent and knowledge of the unlawful enterprise in order to establish liability under M.G.L. c. 151B, § 4(5). Harmon v. Malden Hosp., 19 MDLR 157, 158 (1997).

Although the Hearing Officer determined that Complainant established the first element of his prima facie case—that Respondent committed a “wholly individual and distinct wrong, separate and distinct from the main discrimination claim”—the Hearing Officer failed to address the remaining elements necessary to establish a prima facie case of aiding and abetting. The Hearing Officer made no findings of fact that support a conclusion that Respondent acted with an intent to discriminate “not unlike that of the alleged principal offender[s],” here, the City of Lynn and the Lynn Fire Department. The Hearing Officer found that “because Respondent knew or should have known” that Complainant’s medical information was improperly acquired, Respondent was liable for aiding and abetting. However, “knew or should have known” does not rise to the level of acting with “an intent to discriminate not unlike that of the alleged principal offender[s].” The Hearing Officer also failed to make any findings that support a conclusion that Respondent “knew of his or her supporting role in an enterprise designed to deprive the plaintiff of a right guaranteed to him or her under M.G.L. c. 151B.” The Hearing Officer found that Respondent had no contact with the City concerning Complainant’s application process and never saw or requested evidence in support of the City’s bypass request. The only contact Respondent had with the City was when Respondent received the City’s request to bypass Complainant. Thus, the evidence does not establish that Respondent knew of its

supporting role in an enterprise designed to deprive Complainant of his rights. Because Complainant has failed to establish a prima facie case of aiding and abetting, we vacate the Hearing Officer's decision as to this claim.

We arrive at the foregoing conclusions mindful that, although Respondent's actions do not rise to the level of discriminatory aiding and abetting pursuant to M.G.L. c. 151B, § 4(5) or interference pursuant to M.G.L. c. 151B, § 4(4A), Respondent's actions are nonetheless concerning. We do not condone Respondent's asserted failure to train its employees on how to review bypass requests that seek to bypass individuals based on medical reasons.² We encourage Respondent to review its policies, procedures, and training materials governing the review of bypass requests and make sure that it is properly implementing the requirements of M.G.L. c. 151B in order to prevent discrimination in the hiring process. Respondent Human Resources Division is charged with direction for human resource policies and decisions for a significant number of employees and employment applicants throughout the Commonwealth. As such, Respondent holds a particularly important role in the eradication of discrimination. We expect that it will assiduously assume that role to promote equal opportunity for all residents of the Commonwealth.

In sum, after careful review of the Petitions for review and the full record in this matter, we determine that Respondent was not liable for aiding and abetting pursuant to M.G.L. c. 151B, § 4(5) or interference pursuant to M.G.L. c. 151B, § 4(4A). We therefore reverse the decision

² We note that we do not have a full understanding of Respondent's training practices as we only have Currier's testimony that he had no training on the bypass of applicants based on medical conditions. Respondent asserts that the Hearing Officer erred by denying its request to call its Deputy Director, Regina Caggiano, to provide additional information about Respondent's decision to approve the City's bypass request from a high-level managerial perspective. Although we see no error in the Hearing Officer's denial of Respondent's request to call Caggiano as a witness, Caggiano's testimony may have provided helpful background information about Respondent's practices, policies, and procedures to help us better assess whether Respondent properly trained Currier and its other employees.


below. Accordingly, we do not address Complainant's claims on appeal regarding damages. Further, because Complainant has not prevailed on any of his claims, we do not address his Petition for Attorneys' Fees and Costs.


ORDER

For the reasons set forth above, we hereby vacate the Hearing Officer's Order dated January 28, 2014, and dismiss the Complaint. This order represents the final action of the Commission for purposes of M.G.L. c. 30A.

Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of service of this decision and must be filed in accordance with M.G.L. c.30A, c.151B, § 6, and the 1996 Standing Order on Judicial Review of Agency Actions, Superior Court Standing Order 96-1. Failure to file a petition in court within thirty (30) days of service of this order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED³ this third day of September, 2019


Monserrate Quiñones
Commissioner


Neldy Jean-Francois
Commissioner

³ Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(1)(c).