COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CHRISTINE GAMMONS o/b/o DESEAN TOURE,
Complainants,

v. DOCKET NO. 06-BED-02366

CITY OF REVERE,
CITY OF REVERE SCHOOL COMMITTEE
and PAUL DAKIN,
Respondents,

ORDER OF THE FULL COMMISSION

This matter comes before us on interlocutory appeal of a Hearing Officer's decision denying Respondents', City of Revere, City of Revere School Committee, and Superintendent Paul Dakin's, Motion to Dismiss for Lack of Jurisdiction. Pursuant to 804 C.M.R. 1.05(5)(a) the Full Commission may entertain an interlocutory appeal of a ruling by a Hearing Officer related to jurisdiction. Respondents contend that the Commission lacks jurisdiction to adjudicate claims under G.L. c. 151C, § 2(g) relating to sexual harassment of enrolled students in non-vocational educational institutions. For the reasons stated below, the Full Commission concurs and hereby dismisses this matter for lack of subject matter jurisdiction over the specific claim.

PROCEDURAL HISTORY

On September 22, 2006, the Complainant, Christine Gammons ("Gammons"), filed a complaint on behalf of her minor son, DaSean Toure ("Toure"), alleging that the Respondents, the City of Revere; the Revere School Committee; the Superintendent of

Revere Schools, Paul Dakin; and computer teacher, Edward Winter ("Winter"), discriminated against Toure in violation of G.L. c. 151C.[1] Specifically, Gammons alleged that Winter subjected Toure to sexual harassment, gender discrimination, and sexual orientation discrimination. Following an investigation into the merits of the complaint, the Investigating Commissioner issued a Split Decision – finding Probable Cause against all the Respondents on the allegations of sexual harassment, and Lack of Jurisdiction regarding the allegations of gender and sexual orientation discrimination.[2] Conciliation efforts failed, and on June 25, 2010, the matter was certified to Public Hearing.

On October 15, 2010, Respondents moved for dismissal of this matter based on lack of jurisdiction. Citing G.L. c. 214 § 1C, Respondents argued that the complaint must be dismissed because jurisdiction over claims of sexual harassment, brought by students enrolled in an educational institution other than a vocational training institution, lies exclusively with the superior court. A Pre-hearing Conference was held on October 27, 2010, during which the parties were afforded an opportunity to address the jurisdictional issue. By endorsement order the Hearing Officer, while noting inconsistencies in the language of G.L. c. 151C, denied Respondents' motion without prejudice. Pursuant to 804 C.M.R. 1.05(5)(a), on November 18, 2010, Respondents appealed the Hearing Officer's denial of its Motion to Dismiss to the Full Commission. On February 28, 2011, Respondents' request for Full Commission review was granted.

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[1] On or about July 20, 2009, Edward Winter entered into a settlement agreement with Gammons and Toure and is no longer a Respondent in this matter.

[2] G.L. c. 151C, § 2, does not proscribe discrimination on the basis of sexual orientation. Section 2(d) provides that it is unlawful to discriminate against an individual because of their gender when that individual is either seeking admission to, or enrolled in, a program leading to a degree beyond that of bachelors. See *infra* note 5.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 C.M.R. 1.00 *et. seq.*), and relevant case law. In considering a Motion to Dismiss for Lack of Jurisdiction, in matters where no countervailing jurisdictional evidence has been presented, the Full Commission takes as true the jurisdictional facts alleged in the complaint. See Callahan v. First Congregational Church Of Haverhill, 441 Mass. 699, 709-11 (2004) (*overruled on other grounds by* Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination, 463 Mass. 472 (2012)).

ANALYSIS

The Commission has issued a number of decisions addressing the general jurisdictional limitations of G.L. c. 151C. In each case, it has consistently held that the Commission's jurisdiction in matters involving discrimination occurring at *non-vocational educational institutions* is narrow in scope.[3]

Turning our attention to the jurisdictional issue presented by the parties in this

[3] MCAD cases addressing Chapter 151C jurisdiction: Beagan v. Town of Falmouth, 9 MDLR 1209 (1987)(Female high school hockey player denied opportunity to play on boys' junior varsity team. In dicta, the Hearing Officer noted that G.L. c. 151C "prohibits discrimination only in admission ….; it does not prohibit discrimination in the treatment of students who are actually enrolled in such school."); Barrett v. City of Worcester School Dept., 23 MDLR 22 (2001)(Public high school student alleged discrimination when he was denied equal access to the baseball team based on his religion. The Hearing Officer noted that "…the commission's jurisdiction and protection afforded by this law are narrow in scope and the statute, on its face, provides no redress for discrimination against students once they are admitted to an educational institution."); Oliver v. Holyoke Comm. College, 23 MDLR 291 (2001)(Complainant alleged that she was subjected to adverse treatment on the basis of race and color in the terms and conditions of enrollment at a public college. Reviewing the matter *sua sponte* and relying on Barrett v. City of Worcester School Dept., *supra*, the Full Commission opined that "151C prohibits discrimination only in the admission to an educational institution; it does not prohibit discrimination in the treatment of students who are actually enrolled in such schools."); Adedeji v. Mass College of Liberal Arts, 25 MDLR 194 (2003) (Disabled African American female alleged that she was discriminated against when the college invited her to withdraw within one month of her admission. The matter was certified to public hearing on the theory that jurisdiction could be based on the acts being "closely associated with Respondent's admissions policy." The Hearing Officer disagreed citing Barrett, Oliver and Beagan, *supra*, and reaffirming the Commission's continued expression of its limitations to its jurisdictional authority in matters pertaining to education.

matter, we begin the analysis by examining the specific statutory language. G.L. c. 151C, §2(g) provides that "[i]t shall be an unfair educational practice for an educational institution: [t]o sexually harass students in any program or course of study in any educational institution." The statute defines an "educational institution" as "any institution for instruction or training, including but not limited to secretarial schools, business schools, academies, colleges, universities, primary and secondary schools, which accepts applications for admission from the public generally and which is not in its nature distinctly private . . ." G.L. c. 151C, § 1(b).

Without more, the Commission's analysis would end here. The statute appears plain and unambiguous, lending to an interpretation in accord with the ordinary meaning of the language. See State Bd. of Retirement v. Boston Retirement Bd., 391 Mass. 92, 94 (1984). Specifically, the statute provides that sexual harassment of a student, by an educational institution, is prohibited.[4] Our analysis, however, does not end here, as the procedural right to file a claim for a violation of c. 151C is distinct from the substantive right to vindicate unlawful actions proscribed by the statute. A review of the statute indicates that despite the broad substantive proscriptions provided by the Legislature, the procedural right to file a petition alleging an unfair educational practice adheres only to individuals "seeking admission as a student to any educational institution, or enrolled as a student in a vocational training institution, who claims to be aggrieved by an alleged unfair educational practice . . ." G.L. c. 151C, § 3(a). A plain reading of this statutory language appears to grant procedural rights to file a claim of sexual harassment in education only to persons falling within two distinct categories: (1) those seeking

[4] We recognize that the Probable Cause finding against Respondents may have been issued on this basis. However, the issue we address in this decision as to the procedural right to file such a claim at the Commission was not yet settled.

admission, or (2) enrolled as a student in a vocational training institution. It is this apparent inconsistency between these statutory provisions, which gives rise to the question of the Commission's jurisdiction in this matter.

There is no Massachusetts precedent directly addressing the contradiction between the broad language of section 2(g) and the limitations on who may file a claim at the MCAD, as prescribed in section 3 of G.L. c.151C. On two occasions, however, the U.S. District Court for Massachusetts has examined the issue.[5] On both occasions, the court held generally that while the Legislature intended G.L. c. 151C, § 2(g) to provide protections to all students from sexual harassment by an educational institution, redress at the MCAD pursuant to c. 151C is unavailable except to those who fall within one of the two narrow categories provided in section 3. See Doe v. Williston Northampton School, et al., 766 F. Supp. 2d 310 (D. Mass. 2011) (noting that limitations contained in section 3 do not impact the substantive rights contained in section 2(g), but rather effect only the procedural rights to file a petition with the MCAD). Instead, "[t]he proper vehicle for bringing claims of violations of section 2(g) by plaintiffs who do not fall under section 3(a) is Mass. Gen. Laws ch. 214, § 1C, which provides that: '[a] person shall have the right to be free from sexual harassment, as defined in chapter one hundred and fifty-one B and one hundred and fifty-one C. The superior court shall have the jurisdiction to enforce this right and to award the damages and other relief provided in the third paragraph of section 9 of chapter 151B . . .'" Doe v. Fournier, et al., 851 F. Supp. 2d 207, 216 (D. Mass. 2012)(differentiating between Chapter 151C's procedural and

[5] Each case was presented to the court on a motion to dismiss and was decided by U.S. District Court Judge Michael Ponsor.

substantive rights and holding that a claim for redress lies in the superior court).[6]

Support for the U. S. District Court's holdings can be found in a trilogy of decisions issued by the Supreme Judicial Court in May 1996, collectively interpreting the interrelationship between G.L. c. 151B and G.L. c. 214, § 1C.[7] In these cases, the Court attempted to harmonize these remedial statutes, which all provide similar substantive rights, by giving effect to each provision and rejecting duplicative remedies.

In the first of these cases, the Court considered whether an employee who failed to file a complaint with the MCAD, under G.L. c. 151B, may seek redress for sexual harassment in superior court under G.L. c. 214, § 1C. See Green v. Wyman-Gordon Co., 422 Mass. 551 (1996). In deciding the issue, the Court sought to determine "whether, by enacting G.L. c. 214, § 1C, the Legislature intended to create a secondary remedy for victims of sexual harassment, such that a plaintiff might seek relief either by filing a complaint with the MCAD, or bypass the MCAD entirely and file a suit directly in the Superior Court." Green, *supra* at 554. Examining the Legislative history, the Court noted that in 1986, the "Massachusetts Legislature enacted St.1986, c. 588, entitled 'An act prohibiting sexual harassment'." Id. at 553-54. This act simultaneously amended General Laws Chapters 151B, 151C, and 214, adding almost identical definitions of sexual harassment to both Chapters 151B and 151C. St.1986, c. 588, §§ 2, 4. The Act

[6] In a third case, Thomas v. Salem State University, 2013 WL 3404331 (D. Mass. 2013) the U.S. District Court addressed the procedural limitations contained in section 3, and the substantive rights provided under c. 151C, § 2(d). Under section 2(d), an educational institution may not discriminate against any student admitted to a program or course of study leading to a degree, beyond a bachelor's degree, in providing benefits, privileges, and placement services. G.L. c. 151C, § 2(d). Citing to Fournier, *supra*, and noting the "puzzling" statutory scheme, the Court concluded that as with section 2(g), redress at the MCAD under 2(d) is likewise circumscribed by section 3. While the Court extended the section 2(g) analysis to claims under section 2(d), the Commission does not necessarily concur with this interpretation. While the issue is not before us, the Commission notes that sections 2(d) and 2(g) are distinguishable by, among other things, the legislative history, and intent of the amendments.

[7] See Green v. Wyman-Gordon Co., 422 Mass. 551 (1996); Doe v. Purity Supreme, Inc., 422 Mass. 563 (1996); Guzman v. Lowinger, 422 Mass. 570 (1996).

also added subsection 16A to Chapter 151B, § 4, and subsection (g) to Chapter 151C, §2, which declare it to be an unlawful practice for an employer (c. 151B) or educational institution (c. 151C) to engage in sexual harassment. St.1986, c. 588, §§ 3, 5. Finally, the Act expanded the equity jurisdiction of G.L. c. 214, by adding § 1C, declaring it a "right to be free from sexual harassment, as defined in chapter one hundred and fifty-one B and one hundred and fifty-one C" and granting "the superior court jurisdiction in equity to enforce this right and to award damages." St.1986, c. 588, § 6. Id.

Applying the rules of construction for remedial statutes, the Court noted that ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to the legislative intent. See Sterilite Corp. v. Continental Gas Co., 397 Mass. 837, 839 (1986). It is "presumed [that the Legislature] understands and intends all consequences of its acts." Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n, 408 Mass. 572, 578 (1990) (quoting Rambert v. Commonwealth, 389 Mass. 771, 774 (1983)). Finally, and most importantly, the Court noted that statutes addressing the same subject matter should be interpreted harmoniously, so that effect is given to every provision in all of them. City of Everett v. City of Revere, 344 Mass. 585, 589 (1962).

Reconciling the two statutes, the Court held that Chapter 214, § 1C was not intended to circumvent Chapter 151B. Instead, Chapter 214, § 1C provides the jurisdictional basis for a superior court harassment claim where Chapter 151B is inapplicable. Green, *supra* at 555-58. The Court concluded that "where, as here, c. 151B applies, its comprehensive remedial scheme is exclusive, in the absence of explicit legislative command to the contrary." Id. at 557-58. "To do otherwise, would permit a

duplication of remedies."[8] Id. While not addressing the implications for G.L. c. 151C directly, the analysis adopted by the Court in Green can be extended to the interrelationship between G.L. c. 151C and G.L. c. 214 § 1C. In so doing, one could reasonably conclude that where the Legislature has explicitly limited the right to petition the MCAD, under c. 151C, to the categories of individuals described in section 3, the Legislature intended the remedy for all other individuals aggrieved by sexual harassment to lie in c. 214, § 1C.[9]

In 2002, a Massachusetts appellate court had the first opportunity to consider the relationship between G.L. c. 151C, § 2(g), and G.L. c 214, § 1C.[10] In Morrison v. Northern Essex Comm. Coll., 56 Mass. App. Ct. 784 (2002), two female collegiate basketball players claimed to have been sexually harassed by their coach in violation of G.L. c. 151C, §§ 1(e), 2(g), and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2000). In setting out the legal framework, and without substantial analysis, the Court "proceed[ed] on the assumption that c. 151C permits individuals in the position of the plaintiffs to make a claim for damages or injunctive relief, in the first

[8] In 2002, the Legislature amended Chapter 214, § 1C reflecting the court's holding in Green and reaffirming the exclusivity and exhaustion requirement for sexual harassment claims arising under either Chapter 151B or 151C, when the claim is otherwise actionable, at the MCAD, under the statutes.

[9] In Guzman v. Lowinger, 422 Mass. 570 (1996), a worker for an employer with less than six employees brought a claim for sexual harassment under Chapter 214, § 1C -- later attempting to join a claim under the Massachusetts Civil Rights Act, G.L. c. 12, § 11I (1994 ed.), ("MCRA"). Citing Green, *supra*, the court dismissed the MCRA claim opining that Chapter 214, § 1C is the exclusive remedy for employees not covered by Chapter 151B and no "independent and duplicative right" exists. Guzman, 422 Mass. at 572. In Doe v. Purity Supreme, Inc., 422 Mass. 563 (1996), the court again relied on Green, when it affirmed summary judgment against an employee who failed to file a claim for sexual harassment under Chapter 151B, instead asserting a claim solely under the Massachusetts Equal Rights Act, G.L. c. 93, § 102, (1994 ed.). Doe, 422 Mass. at 567.

[10] Not addressing c. 151C directly, in July 2014, the Supreme Judicial Court issued a decision in School Committee of Lexington v. Zagaeski, 469 Mass. 104 (2014) noting the numerous statutory enactments protecting children from sexual harassment in schools. In Zagaeski, a high school teacher's employment was terminated for conduct unbecoming a teacher. The offensive conduct included sexual banter between teacher and student. In its decision, without discussion, and citing to selected portions of G.L. c. 151C, the court noted that there exists "a well-defined and dominant public policy prohibiting teacher-on-student sexual harassment." *Supra*.

instance, in the Superior Court [pursuant to Chapter 214, § 1C]." Id. at 786. The Court further noted that "G.L. c. 151C, § 3(a) which describes the procedure for filing complaints with the MCAD applies only to [individuals] seeking admission... to any educational institution, or enrolled... in a vocational training institution." Id. Similar to the U.S. District Court, the Massachusetts Appeals Court distinguished between the substantive and procedural rights granted by Chapter 151C, directing those without actionable claims at the MCAD to file in the Superior Court "in the first instance." Id. Cf. Bloomer v. Becker College, et al., 2010 WL 3221969 (D. Mass 2010) (noting that the filing of a timely c. 151C complaint at the MCAD for sexual harassment is a prerequisite to an actionable claim in superior court pursuant to G.L. c. 214, § 1C, only in cases where the individual falls with the categories provided in section 3). Ten years after the Supreme Judicial Court issued the Green trilogy, the Court again had an opportunity to review the protections afforded by G.L. c. 214, § 1C. In Lowery v. Klemm, 446 Mass. 572 (2006), the issue before the Court was whether a volunteer falls within the ambit of protections provided by Chapter 214, § 1C. Applying the rules of statutory construction, the Court responded in the negative. The Court concluded that by incorporating in Chapter 214 the definition of sexual harassment contained in Chapters 151B and 151C, the legislature intended the statutory protections of G.L. c. 214, § 1C to be limited to conduct affecting an employee or student. Lowery, 446 Mass. at 578. The Court noted that c. 214 §1C was not intended to be duplicative of G.L. c. 151B or 151C, but rather "fills a gap in the statutory scheme by creating a cause of action for sexual harassment for employees [and students] who are not protected by [the statutes]." Id. at 578 (*citing* Guzman v. Lowinger, 422 Mass. 570 (1996)). The Court further noted that "General

Laws c. 214, § 1C . . . extends to . . . students protection that is not otherwise available under . . . c. 151C; it does not duplicate the relief provided by those statutes." Id. Finally, citing to Morrison, *supra*, the Court concluded that c. 214, § 1C "gives students who are sexually harassed in violation of G.L. c. 151C, § 2(g), [the additional benefit of] access to the remedial provision of G.L. c. 151B, § 9." Id.

Constrained by case precedent construing the statutory language distinguishing procedural rights from substantive remedies under Chapter 151C, we reluctantly conclude that the MCAD lacks subject matter jurisdiction in matters concerning sexual harassment against a student which occurs in a non-vocational educational institution, unless the harassment is attendant to the admissions process. While we are reluctant to limit the Commission's jurisdiction in matters of sexual harassment affecting students, an issue of grave concern, the case precedent in this area compels us to do so. We note that if the scope of Chapter 151C, § 2(g) is to be extended; it must be done through the legislative process.

ORDER

For the reasons set forth above we hereby dismiss this matter for lack of jurisdiction. This Order is issued in accord with 804 C.M.R. 1.05(5)(a) and represents the final action of the Commission for purposes of 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. Such action must be filed within thirty (30) days of service of this decision and must be filed in accordance with G.L. c. 30A and G.L. c. 151B, §6. No public hearing was held in this matter, thus no "written transcript of the record upon hearing before the commission" was created. See G.L. c. 151B, § 6. 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 G.L. c. 151B, §6.

SO ORDERED this 22nd day of October, 2014[11]

_____
Jamie R. Williamson
Chairwoman

_____
Charlotte Golar Richie
Commissioner

[11] Commissioner Thomas George was the Investigating Commissioner for the matter so did not participate in the deliberations of the Full Commission pursuant to 804 CMR 1.23 (1)(c).