

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JEAN JACKSON,
Complainants

v.

DOCKET NO. 06-BEM-00696

DEPARTMENT OF TRANSITIONAL ASSISTANCE,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman, Esq. in favor of Complainant, Jean Jackson on her complaint of disability discrimination arising from Respondent's refusal to accommodate Complainant's request to limit her in-person client contact as an intake worker after she was attacked at work in 1995 by a client and his family. The attack caused Complainant to suffer Post Traumatic Stress Disorder that was accompanied by both physical and psychological symptoms. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, §4(16) and awarded the Complainant damages for emotional distress, but not lost wages. Complainant has appealed this decision to the Full Commission. Respondent has opposed the Complainant's appeal seeking lost wages but has otherwise not appealed the finding of liability or award of emotional distress damages.

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. Massachusetts Comm'n Against Discrimination, 365 Mass. 357, 365 (1974); G.L. c. 30A.

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. Massachusetts Comm'n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

In this appeal, Complainant argues that the Hearing Officer erred as a matter of law by declining to award Complainant lost wages for a two year period she was away from work on a leave of absence, based on the Hearing Officer's determination that the record contains no evidence of Complainant's earnings while working for Respondent. Complainant contends that the Hearing Officer should have used her common knowledge to make a finding of the value of Complainant's lost wages irrespective of whether Complainant failed to present such evidence at

the public hearing, an omission that her counsel characterizes as an “oversight.” Respondent opposes the Complainant’s petition on the grounds that Complainant has offered no good reason for the failure to introduce evidence of lost wages at the hearing and that “oversight” does not constitute good cause.

Normally, absent good cause for failure to introduce evidence of damages or mitigation, a hearing will not be reopened. G.L. c. 30A §14(6); 804 CMR 1.23; See also J.C. Hillary’s v. Massachusetts Comm’n Against Discrimination, 27 Mass. App. Ct. 204, 208-09 (1989) (affirming the Commission’s refusal to accept new evidence absent good cause shown for failure to introduce evidence at hearing).

However, in this case, a review of the digital record of the hearing in this matter has uncovered that testimony is absent from the recording. This discovery is corroborated by the Hearing Officer, whose notes of the proceeding indicate that Complainant testified that she lost 26 months of income from June 17, 2005 to August 13, 2007 and that at the time she was earning \$53,584.18 annually. This information, while noted by the Hearing Officer with specificity, is missing from the digital recording. Given this discovery and the fact that the Complainant acknowledged receiving worker’s compensation for this period -- but not the amount, it is apparent that this matter should be remanded to the Hearing Officer for a full airing of the damages issue and any income received in mitigation of damages. If possible a stipulation of the damages should be arrived at by the hearing officer and the parties, and a new order issued addressing the Hearing Officers’ findings with respect to any lost income.

While we disagree with Complainant that a hearing officer has an affirmative duty to elicit evidence of lost wages or, as is suggested here, may make findings based on “her own common knowledge” instead of on the record evidence, where there is a suggestion that the

evidence was indeed introduced, but not recorded, this error must be corrected.

For these reasons, we hereby Order this matter remanded to the hearing officer for a full consideration of damages relating to lost income of the Complainant.

We will reserve judgment on Complainants Petition for Attorneys fees and costs until the proceedings on remand have been completed.

SO ORDERED this 24th day of March , 2010

Malcolm S. Medley
Chair

Sunila Thomas George
Commissioner