

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & RUSS BAKER,
Complainants

v.

DOCKET NO. 09-NEM-03338

3Js, D/B/A
WHITE HEN PANTRY,
Respondent

DECISION OF THE HEARING OFFICER

Appearances:

Kevin B. Callanan, Esq. for Russ Baker

I. PROCEDURAL HISTORY

On or about December 18, 2009, Russ Baker filed a complaint with this Commission charging Respondent with discrimination on the basis of handicap. Specifically, Complainant alleges that Respondent terminated his employment because he used a cane at work following a non-work related knee injury. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing.

The parties were notified via first class mail of a pre-hearing conference on November 28, 2012. Respondent's notice was sent via first class postage to its last known addresses at 143 Palmer Avenue, Falmouth MA and 620 Palmer Avenue Apt B, Falmouth, MA. The notices were not returned to the Commission. Complainant's counsel appeared for the pre-hearing conference

and represented to the undersigned that he wrote to Respondent at both of the above addresses via first class mail with respect to preparing a joint pre-hearing conference memorandum. On January 3, 2013, his letter to Respondent was returned with the label: “Return to Sender Not Deliverable as Addressed Not Able to Forward.”

The matter was set for a public hearing on January 11, 2013. Hearing notices were sent to the parties via certified mail, return receipt requested. Respondent’s notices were sent to the following two addresses: 3J’s Inc. d/b/a White Hen Pantry Attn: Scott Jaspon, Owner, 143 Palmer Avenue, Falmouth MA and 3J’s Inc., d/b/a White Hen Pantry Attn: Scott Jaspon, Owner, 620 Palmer Avenue, Falmouth, MA. The hearing notices to Respondent were returned to the Commission with a label affixed : “RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD.”

On January 11, 2013, Complainant and his counsel appeared before me at the public hearing. Respondent did not appear at the public hearing and its default was entered into the record and the hearing proceeded as a default public hearing, pursuant to the Commission’s regulations at 804 CMR 1.21(8). The default notices which had been sent to Respondent via certified mail, return receipt requested, were returned to the Commission with the affixed label: “RETURN TO SENDER NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD.

On January 31, 2013, Scott Jaspon appeared at the Commission’s Boston office and was advised by the hearings clerk to file with the Commission a written request to remove the default stating all the reasons that it should be removed.

On February 12, 2013, the Commission received a letter from Respondent owner Scott Jaspon that essentially set forth Respondent’s version of events and is deemed to be a request to remove the default. In the letter, Jaspon stated: “I did not receive this notice [presumably the

notice of default] and did not open the last one [presumably the hearing notice] because I was just avoiding the stress of it all and was worried about my health. Now I have overcome the fear and want my own justice.”

Pursuant to the Commission’s hearing default rules, at 804 CMR 1.21 (8) (b) Within ten (10) days of receipt of the notice of entry of default, the party in default may petition the Commission to vacate the entry of default, remove the consequences of the default and reopen the case for good cause shown.

In this matter Respondent’s owner stated that he ignored the hearing notice and did not receive the notice of default. His statement comports with the notices affixed to the certified letters returned to the Commission. Assuming that Jaspon did not receive notification of the default until he came to the Commission office on January 31, 2013, his written request to remove the default was received by the Commission more than 10 days from that date as required by the default rules and is therefore untimely. Even assuming that Respondent filed a timely request to remove the default, it has not stated good cause for its removal. By his own admission, Respondent’s owner deliberately chose to ignore many of the Commission’s notices and cannot now claim good cause for removing the default. Therefore, Respondent’s request to remove the default is denied.

II. FINDINGS OF FACT

1. Complainant Russ Baker resides in Falmouth, MA with his wife and child. He is a high school graduate. Complainant is a recipient of Social Security Disability benefits. As a recipient of such benefits, Complainant is required to report to the Social Security Administration whenever he works in excess of 20 hours per week.

2. Respondent 3Js is a corporation owned by Scott Jaspon, Dave Johnson and Steve Johnson. In 2009, 3Js was doing business as White Hen Pantry located at 352 Main Street in Falmouth, MA.¹ The store's hours were 5:30 a.m. until 11:00 p.m. During the summer the store's hours were extended to 24 hours per day.

3. In April 2009, Scott Jaspon hired Complainant for the position of store clerk/cashier at the White Hen Pantry. Jaspon was present at the store nearly every day and was Complainant's direct supervisor. Complainant worked approximately 20 hours per week at the rate of \$9 per hour, for an average weekly wage of \$180.

4. Complainant's duties included opening the store at 5:30 a.m., preparing breakfast sandwiches, insuring the coolers were full, making coffee and preparing the deli for lunch. A total of four people worked the day crew. Five people worked the night crew and an "overnight crew" worked during the summer, when the store's hours expanded to 24 hours per day.

5. Complainant testified that he hoped to eventually take on enough responsibilities and hours to get off Social Security.

6. On November 12, 2009, Jaspon left for a two-week vacation to the Ukraine. The day before he left, Jaspon gave Complainant instructions for ordering supplies, a responsibility that was normally Jaspon's. (Ex. C-1).

7. On November 13, 2009, Complainant injured his knee at home and suffered a partially torn meniscus.² His physician advised him to take Advil or Tylenol and use a cane. He was

¹3Js Corporation is still in existence; however it no longer operates a White Hen Pantry, which ceased operation at that location in or about August 2010.

² This injury is unrelated Complainant's Social Security Disability benefits.

given no work restrictions. He never missed a shift and the use of a cane did not interfere with his work in any way.³

8. While Jaspon was away, Complainant opened the store every morning. During this time, 3Js owners Dave and Steve Johnson came to the store daily to do the banking. On one occasion Steve Johnson asked Complainant about his cane and Complainant explained that he had injured his knee. Steve asked him whether he needed assistance with any duties, but otherwise the Johnsons expressed no concerns about Complainant's knee.

9. When Jaspon returned to the store on November 25, 2009, he immediately commented negatively to Complainant about his cane. He told Complainant that it made him look like a fool and an idiot and he wanted to kick the cane out from under him. He told Complainant that he was a problem and a liability.

10. Later that day, Jaspon told Complainant that he had discussed the matter with someone at White Hen's corporate office and was advised that Complainant was a liability because he could trip and injure himself or others.

11. On November 26, 2009, Jaspon called Complainant and asked him to come in to the store. Complainant thought he was going to receive a bonus for the extra work he had done in Jaspon's absence. Instead, Jaspon told him he was not going to give him any more hours and to start looking for another job because he was a liability and looked like an idiot.

12. Complainant testified that he was shocked and angered at being fired and was in disbelief. He felt stressed and demeaned by Jaspon's comments. He was distraught and unsure

³ Complainant underwent successful surgery on his knee in February 2010.

of what he was going to do because his whole world had collapsed. I credit Complainant's testimony that he was very upset by his termination.

13. Complainant testified that after his attorney wrote Jaspon a letter advising him of Complainant's intent to file a discrimination complaint against Respondent, Jaspon contacted Complainant and told him that he had videotape of Complainant stealing items from the store. Complainant denied stealing from the store and told Jaspon to take him to court if he thought he could prevail. Jaspon then filed a criminal complaint of larceny against Complainant. The matter went to trial at Falmouth District Court on March 12, 2011. According to Complainant, after the prosecution rested its case, the judge told the prosecutor that the evidence was insufficient to support a guilty finding and acquitted Complainant without sending the case to the jury. Complainant stated that Jaspon also unsuccessfully attempted to bring a civil suit against him.

14. S. Malissa Hallenbeck, a friend of Complainant's family, testified that sometime around January 2010, she was a customer in the White Hen Pantry where she often bought coffee, when Jaspon approached her and told her to warn Complainant that it might not be a good idea to bring a complaint of discrimination against him. Hallenbeck viewed this statement as a threat and was shocked.

15. Hallenbeck testified that Jaspon had posted newspaper clippings regarding the legal cases against Complainant near the cash registers in plain view of customers.

16. Hallenbeck stated that before losing his job, Complainant was feeling well and hoped to receive a promotion for the work he had done while Jaspon was away. She stated that Complainant called her the day he lost his job and could not understand why he was terminated

because he had been performing his job ably with the use of his cane. She stated Complainant was angry, upset, sad, and depressed by Respondent's actions. I credit Hallenbeck's testimony in its entirety.

17. Complainant testified that to this day, he occasionally encounters Jaspon in Falmouth. He saw Jaspon in Wal-Mart shortly after Christmas 2012. He testified that Jaspon yelled at him, "There's the piece of s**t that's pressing charges against me. You are the lowest life on earth." He also encountered Jaspon in Radio Shack around the same time, but Complainant walked out to avoid a confrontation with him.

18. Complainant testified that he has filed two police reports regarding Jaspon's conduct, once after Jaspon followed his wife home from work and on another occasion when Jaspon drove by his son's school.

19. Complainant testified that his attempts to find employment after his termination were unsuccessful. He went to every convenience store in the Falmouth area, he applied to Wal-Mart and Shaw's and posted on-line ads offering to do yard work. He and his son tried unsuccessfully to start a scrap metal business. He stated that Jaspon ruined his reputation in the community and that makes it difficult to find a job. I credit Complainant's testimony in its entirety.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, §4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation. A prima facie claim of handicap discrimination may be proved by showing that the Complainant: (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential

functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by his employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998).

Massachusetts General Laws c. 151B §1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination in the Basis of Handicap-Chapter 151B at p. 7; Rapoza v. Ocean Spray, 21 MDLR 43(1999).

In the present case, Complainant has established an unrebutted prima facie case of handicap discrimination. Complainant has proved that he was disabled within the meaning of the law, because it is clear that his employer regarded him as disabled because of his injury and his use of a cane in the workplace. Notwithstanding his injury, Complainant was successfully performing the essential functions of his job with no restrictions and required no accommodation. Complainant has established that immediately after observing him using a cane, Respondent's owner, Jaspon, made insulting and crude remarks about his use of the cane, and stated that he wanted to kick the cane out from under him, and he did not want to see him using the cane. Jaspon also expressed concern about Respondent's liability and thereafter terminated Complainant's employment. Complainant has thus presented direct evidence of discrimination based on the perception that he was disabled because of the injury to his knee and the need to use a cane. See Talbert Trading Company v. MCAD, 37 Mass. App. Ct. 56 (1994) (employee with known heart condition was perceived by employer to be handicapped); Keenan v

Town of Weymouth Fire Department, 28 MDLR 199 (2006) (disc injuries, chronic pain and addiction to prescription pain killers did not cause impairment in major life function but established a record and perception of impairment)

In this case, Complainant testified credibly that despite working without restriction, Respondent terminated his employment.⁴ Respondent did not appear at the hearing to answer Complainant's charge of discriminatory termination, so there is no evidence of a legitimate non-discriminatory reason motivating its actions. Therefore, Complainant has established an un rebutted prima facie case of discrimination on the basis of perceived handicap.

Since Jaspon was a company owner and manager, there is no question but that Respondent is liable for his conduct which violated M.G.L. c. 4(16A).

IV. REMEDY

Pursuant to M.G.L. c. 151B s. 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his termination by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

⁴ An employer may inquire of an employee as to whether s/he has a handicap or disability, and may ask the employee about the nature and extent of the handicap or disability, if the inquiry is job-related and consistent with business necessity. An employer may also make inquiries into the ability of an employee to perform any job-related functions. In all instances, the purpose of the inquiry must be one of business necessity, and the scope of the inquiry must be limited to job-related functions. Examples of circumstances justifying such inquiry by the employer may include, but are not limited to, the following: a. the employer becomes aware of evidence of a direct threat to health or safety that it reasonably believes may be caused by an employee's handicap or disability. MCAD Handicap Guidelines, IV.B. 1. In the present case, Respondent did not make such an inquiry.

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549 (2004). “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id.

Based on Complainant’s credible testimony, I am persuaded that he suffered emotional distress upon being terminated and that his distress was a direct result of Respondent’s unlawful conduct. Complainant testified credibly that he was hoping to receive a promotion for taking on additional responsibilities in Jaspon’s absence and had aspirations of eventually working sufficient hours so as to no longer require disability benefits. Instead, he was shocked and angered to learn that his employment was being terminated because of Respondent’s perceptions about his injury and use of a cane in the workplace. Complainant testified persuasively that he felt his world had turned upside down by the termination. In addition to the stress of losing his job, his life was made more difficult by the extreme acts of retaliation undertaken by Jaspon designed to impugn his character. Jaspon pursued criminal and civil complaints against Complainant, posted information regarding these legal matters in the store where they were visible to patrons, publicly humiliated Complainant in local stores and appeared to be stalking

his family members. In addition, Jaspon conveyed a message to Complainant through Complainant's friend that could be construed as an implied threat not to pursue a claim of discrimination. All of these actions caused Complainant additional stress, embarrassment and humiliation. I conclude that Complainant is entitled to an award of \$35,000 for the emotional distress he suffered as a result of Respondent's unlawful conduct.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. The evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). As Respondent defaulted and failed to establish mitigation of damages, I conclude that Complainant is entitled to those wages that he would have earned from the date his employment was terminated until the store closed in August 2010. I conclude that given his average weekly wages of \$180, Complainant is entitled to lost wages in the amount of \$7,020 (\$180/wk. x 39 wks.)

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

- 1) Respondent immediately cease and desist discriminating on the basis of handicap.
- 2) Respondent pay to Complainant the sum of \$35,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was

filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3) Respondent pay to Complainant the sum of \$7,020 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4) Respondent cease from any further retaliatory actions against Complainant.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 13th day of March 2013.

JUDITH E. KAPLAN,
Hearing Officer