

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
JOEL NIXON,  
Complainants

v.

DOCKET NO. 12-BEM-02744

TONY'S BARBER SHOP  
Respondent

Appearances: Thomas P. Delmar, Esq. for Complainant

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 5, 2012, Complaint, Joel Nixon, filed a complaint of disability discrimination against Respondent, Tony's Barber Shop, in Norton, Massachusetts alleging that he was terminated from his job as a barber because he is legally blind. The Investigating Commissioner found probable cause to credit the allegations of the complaint and attempts at conciliation were unsuccessful. Respondent did not respond to discovery propounded by the Complainant, did not appear for his duly-noticed deposition, and did not attend the pre-hearing conference. The matter was certified to hearing and a default hearing was conducted on October 20, 2015 before the undersigned hearing officer. Respondent did not appear at the hearing and was served with Notice of Entry of Default and Order of Default pursuant to 804 CMR 1.15 (11) and did not respond or seek to have the default removed. The Commission's notices of default and hearing

were sent to all known business locations operated by Respondent. The Complainant was the sole witness at the default hearing and introduced three exhibits. Having reviewed the record of the proceedings I make the following Findings of Fact and Conclusions of Law.

## II. FINDINGS OF FACT

1. Complainant, Joel Nixon, suffers from an impairment called Retinitis Pigmentosa (RI) and is legally blind. He was diagnosed with RI when he was an adolescent. RI is a hereditary condition that affects his peripheral vision. Complainant testified that the rate of deterioration in one's peripheral vision due to RI varies and that he has very limited peripheral vision and difficulty seeing at night.
2. Complainant is 29 years old. He was able to acquire a driver's license in 2004 when he was 18 years old, but had to surrender it a year later. He became registered by the Massachusetts Commission for the Blind as a person who is legally blind and possesses a Certificate of Blindness issued by that agency. (Ex. 2) Complainant resides in North Attleboro, MA and relies on others for assistance with transportation because he can no longer drive.
3. In 2008, Complainant graduated from Massachusetts School of Barbering in Quincy, MA. He completed a 1,000 hour course in 10 months, passed a written and skills test, and is a licensed barber. (Ex. 1) The fact that Complainant's peripheral vision is impaired does not impact his ability to perform the duties of a barber and he successfully performed those duties for a number of years.
4. After becoming a licensed barber, Complainant worked at Joe's Barber Shop in Norfolk, MA for two years. The shop was 45 minutes from his home and he relied on transportation from his girlfriend to get to and from work. Complainant had no difficulties

performing the duties of a barber, enjoyed his job there, and received no complaints. The 45 minute commute became more difficult as time wore on, and Complainant became aware of a job opening in his home town of Norton which is closer to where he resides.

5. In November of 2011, Complainant applied for a job at Tony's Barber Shop in Norton when he saw a help-wanted sign in the window of the newly-opened business. Respondent is an employer within the meaning of the statute. The owner of Tony's Barber Shop in Norton is Caesar Antonio Morales. (Ex. 3)<sup>1</sup> Morales operated a second barber shop at a location in S. Easton, MA<sup>2</sup> where he primarily worked. Complainant did not reveal to Morales that he is legally blind because his impairment did not affect his ability to do the job and he knew from his prior experience as a barber that he was capable of doing the job. He was hired to work as a barber at Tony's Barber Shop in Norton.

6. Complainant testified that his employment at Respondent was going well. He grew up in the Town of Norton and his parents and grandparents still lived there, so he knew a lot of people and quickly developed a clientele. Complainant worked Tuesday through Saturday from 9 a.m. to 6 p.m. He was paid a commission of 65% on each haircut, which at the time cost \$16, and was paid in cash each Saturday. Respondent never gave him a 1099 or W2 tax form to complete. Complainant testified that his earnings averaged \$500-\$800 dollars per week with tips. He never received any complaints about his work or his ability to do the job from customers or his employer.

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<sup>1</sup> There was no evidence of whether Respondent is a sole proprietorship operating as a d/b/a or as some other form of business entity.

<sup>2</sup> Complainant testified that upon information and belief, the Norton barber shop is no longer operating under the ownership of Morales.

7. At some point in January of 2012, Mr. Morales was using a ladder to put up a sign and left the ladder in the corridor at the shop. Complainant did not see the ladder and tripped over it, but was not injured. He testified that when this occurred, Morales told him to, "open your eyes."

8. Sometime in February of 2012, Morales learned that Complainant is legally blind after a client of the shop who had grown up with Complainant told a co-worker about Complainant's impairment. Complainant testified that after learning of his impairment, Morales asked some questions about it and told the female manager of the Norton shop to keep an eye on him.

9. In March of 2012, Complainant was sent to work at the S. Easton location to fill in on a Friday and Saturday for an employee who was on vacation. On March 3, 2012, Complainant tripped over the legs of a client sitting in the barber's chair adjacent to his, because the customer's legs extended into his area. Later that same day, Complainant tripped on a chair in the waiting room. Complainant testified that neither he nor anyone else was injured by these incidents, but Morales told him to pack up his things and get his wife to take him home. Complainant understood that his employment was being terminated.

10. Complainant attempted to reach Morales by phone several times over the next few days to discuss the matter, but Morales would not speak to him or return his phone calls. When Complainant finally spoke to Morales several days later, Morales told him he did not need a "blind barber" working at his shop and did not want his clientele to know Complainant was legally blind since the business was just starting up. He also claims that Morales referred to him as "you blind f--k" and texted Complainant a message that stated, "Go f--k yourself and lose my

number.” Morales also told Complainant that the manager of the Norton location did not want him working there.

11. After Complainant’s employment with Respondent was terminated, he looked for other jobs as a barber. He was hampered in his job search because he had to depend on his wife for transportation. At the time, his wife was pregnant with a high risk pregnancy and he could only apply for jobs that were close to his home. He applied in person without success to another barber shop in Norton and barber shops in Plainville and Taunton. He also contacted many other barber shops to ask if they had a chair available. He testified that many barber shops in the area are one-person operations and that this also limited his opportunities. When he was unable to secure employment as a barber, his pregnant wife had to take a job as a nanny. The birth of their child further limited the locations where he could seek work because he depended on his wife for transportation to and from work. Complainant testified that all these logistical challenges made finding another job more difficult.

12. Complainant remained unemployed for over three years occasionally doing odd jobs, but kept up his search for work as a barber. His family faced great financial insecurity during this time. He was forced to borrow large sums of money from his parents and grandparents to pay bills. His condominium was placed in foreclosure proceedings several times because of his inability to pay the mortgage although he managed to forestall two auctions of his property. Despite being some fifty-thousand dollars behind in his mortgage payments, he continues to fight to maintain ownership of his home and to seek a loan modification. He and his wife had their first child during this time which placed a further strain on their finances. They had to apply for food stamps and WIC benefits and sought charitable assistance to buy Christmas presents for

their son. Their financial situation went from stable to precarious and the resulting challenges caused Complainant great stress and anxiety.

13. Losing his job caused Complainant emotional distress in other ways. He stated that he was doing a good job working for Respondent and believes he was treated unfairly because of his disability. Being fired was a blow to his self-esteem, and he lost confidence in himself. He stated that prior to his termination he felt confident in his ability to do the job of barber, despite his impairment, but afterwards felt lost and didn't know where to turn. He was the sole provider for the family and lost confidence that he could meet this obligation. The loss of his job placed great personal strain on his marriage. Complainant was embarrassed and ashamed to have to borrow money from his family. He estimated that he owes his family many thousands of dollars.

14. In August of 2015, Complainant finally secured employment as a barber at a shop in Attleboro, MA. He earns approximately what he was earning at Respondent and is very gratified to be working in his chosen profession once again. He stated that he loves his job and the people he works with and has regained his confidence.

### III. CONCLUSIONS OF LAW

General Laws c. 151B, §4(16) makes it an unlawful practice for an employer to dismiss from employment or otherwise discriminate against an employee who is a qualified handicapped individual because of his disability.

Complainant may establish a prima facie case of discrimination based on his disability by demonstrating that he is disabled, that he was otherwise qualified, i.e., able to perform the essential functions of the job, with or without an accommodation, and that he was terminated from his employment. Russell v. Cooley Dickenson Hospital, Inc., 437 Mass. 443 (2002).

Complainant has established an un rebutted prima facie case of discrimination based on his disability. Respondent failed to respond to discovery and did not appear at the pre-hearing conference or the public hearing.

A disability/handicap is defined by G.L. c. 151B s. 1(17) as: “(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment.” See Dahill v. Police Dept’t of Boston, 434 Mass. 233 (2001); Ocean Spray Cranberries, Inc. v. Mass. Comm’n Against Discrimination, 441 Mass. 632 (2004); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) (“MCAD Handicap Guidelines”) at p. 2.

Complainant is disabled within the meaning of the statute by virtue of being legally blind. His peripheral vision and ability to see at night are significantly impaired. He is unable to drive and is registered with the Massachusetts Commission for the Blind as an individual who is legally blind. Complainant has also established that he was capable of performing the essential functions of a barber by virtue of his successful prior employment for two years and his acceptable job performance at Respondent. He testified that his performance at Respondent was never in question, that he had no difficulty with the essential functions of a barber, and had established a clientele. Finally, Complainant suffered an adverse action when his employment with Respondent was terminated.

While Complainant need not establish that he was terminated “solely” because of his disability in order to prevail, he presented credible testimony that he was terminated for reasons directly related to his disability. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998). Complainant testified credibly that after his termination, Morales stated that he did not

want a “blind barber,” indicated that if the clients discovered that Complainant was blind this would be bad for his business at the newly-opened location, and used offensive epithets when commenting on Complainant’s impairment. These comments displayed gross insensitivity to Complainant’s impairment and were directly indicative of discriminatory animus. It is Respondent’s burden to prove that Complainant posed a significant safety risk to himself or others because of his impairment. MCAD Guidelines: Employment Discrimination on the Basis of Handicap-Chapter 151B § IX (B) (3). Respondent did not appear at the hearing to rebut Complainant’s evidence or to offer a legitimate reason for his termination. Given the unrebutted credible evidence of discriminatory animus, Complainant has established that his termination was in violation of G.L. c. 151B, s. 4(16).

#### IV. REMEDY

The Commission is authorized to award damages for lost wages and benefits and other relief that will make the victims of discrimination whole. This includes damages for emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004). An award of emotional distress damages requires evidence that the distress is causally-connected to the unlawful act of discrimination. The award must also consider the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id. at 576. An award for emotional distress need not be based on expert testimony, and the fact-finder may rely on credible testimony from Complainant or others regarding the cause of the distress. Proof of physical injury or psychiatric consultation is beneficial but not necessary to support an award for emotional distress damages. Id. at 576.

For approximately three years, Complainant was unable to find work as a barber in the vicinity of his home town where he had access to transportation. He eventually secured employment as a barber in August of 2015. Complainant's employment was terminated in February of 2012 however, he testified that Tony's Barber shop ceased operations at the Norton location sometime within the last six to eight months and I cannot speculate that he would have continued to remain employed once Respondent ceased doing business at that location.

Generally, the burden to prove failure to mitigate damages rests with Respondent. See J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). Since Respondent did not participate in the proceeding there is no evidence to suggest that Complainant failed to mitigate his damages or that did not diligently seek available work as a barber. The sole evidence of Complainant's cash earnings is his testimony. According to Complainant, his earnings averaged \$500-\$800 per week. Complainant was paid \$10.40 per hair cut plus whatever tips he garnered. He did not testify about the average number of customers he saw per week. Given the lack of any documentary evidence of Complainant's earnings, including tax returns, I deem it reasonable to utilize the amount at the low end of his estimate to calculate his lost wages. Assuming Complainant earned \$500 per week for 50 weeks per year<sup>3</sup>, his earnings for one year would have been approximately \$25,000. His total lost wages for a three-year period comes to \$75,000.

Complainant's testimony regarding the emotional distress he suffered as a result of his abrupt and unlawful termination was credible. As a disabled individual, Complainant endured a great blow to his self-esteem and confidence. The comments he was subjected to by Morales directly implicated his disability and were extremely hurtful and insensitive. The feelings of being treated unfairly because he is a disabled individual have remained with him. Complainant

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<sup>3</sup> While there was no testimony about leave time granted, it is reasonable to presume that Complainant would have taken a minimum of two weeks leave during a given year.

and his wife were expecting their first child at the time and underwent great financial hardship including, on multiple occasions, the threatened loss of their home. Complainant was embarrassed and humiliated by having to borrow large sums of money from his family and to resort to receiving public assistance. Given Complainant's credible testimony, I find that he is entitled to damages for emotional distress in the amount of \$25,000.

#### V. ORDER

Given the forgoing Findings and Conclusions, Respondent is hereby Ordered:

- 1) To cease and desist from acts of discrimination based on disability in the operation of its business.
- 2) To pay to Complainant the sum of \$75,000 for lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.
- 3) To pay to Complainant the sum of \$25,000 for emotional distress with interest thereon at the 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.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of

receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees within 10 days of receipt of this decision.

So Ordered this 28<sup>th</sup> day of October, 2015.

A handwritten signature in cursive script, reading "Eugenia M. Guastaferrri".

Eugenia M. Guastaferrri  
Hearing Officer