

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
And HERBERT JOHNSON,
Complainants

v.

DOCKET NOS. 04-BEM-03087
04-BEM-03126

LOJEK CO., INC., ALEX BANOW,
KENNY JENNINGS and CHRIS
NICE,
Respondents

AMENDED DECISION OF THE HEARING OFFICER
CLARIFYING THE ATTRIBUTION OF DAMAGES

On April 16, 2009, the undersigned hearing officer issued a decision and order finding Respondent Lojek Co. (“Lojek”) discriminated against Complainant in the terms and conditions of his employment (racial harassment) in violation of M.G.L.c. 151B sec. 4(1) and unlawfully retaliated against Complainant in violation of M.G.L. c. 151B sec. 4(4). The undersigned also found that Respondents Alex Banow, Kenny Jennings and Chris Nice interfered with Complainant’s right to be free of discrimination in the workplace, in violation of M.G.L.c. 151B sec. 4(4A) and that they were jointly and severally liable with Lojek Co. for the actions of unlawful racial harassment. The Complainant was awarded \$50,000 in damages for emotional distress caused by racial harassment and retaliatory termination.

Respondents Lojek, Banow and Jennings appealed to the Full Commission.¹ Complainant appealed the denial of back pay and petitioned for an award of attorney's fees and costs.

On July 13, 2013, the Full Commission upheld the decision of the undersigned in all respects, but remanded the matter to the hearing officer for a clarification of the apportionment of the damages for emotional distress and a discussion of what portion of the damage award for emotional distress was attributable to the harassment and what portion was attributable to the retaliatory termination. The Full Commission concluded that an apportionment of the damages for each claim is necessary where the employer Lojek was found liable on all claims including retaliatory termination but where the individual Respondents were liable only for the harassment/ failure to remedy the harassment, but not for the termination.

The Full Commission remanded the matter to the undersigned hearing officer for the sole purpose of clarifying what portion of Complainant's emotional distress award is attributable to the injury caused by Complainant's termination as opposed to injury resulting from the racial harassment he was subjected to on the job and to apportion those damages accordingly. The following clarification is issued in response to the directive of the Full Commission and the Remedy section of my initial decision is amended as follows:

¹ Nice file a notice of appeal but did not file a petition for review.

IV. REMEDY

Having concluded that Complainant is entitled to damages for emotional distress in the amount of \$50,000 to compensate him for the injury he suffered, I start with the proposition that the apportioning of emotional distress damages is a difficult and inexact process. Complainant's testimony and his counseling records demonstrate that the emotional distress he suffered as a result of racial harassment at work and his supervisors' unwillingness to remedy the situation as well as the distress caused by his termination from the company are to some extent inextricably related. While it is clear that the racial harassment upset Complainant, the evidence establishes that it was not until his termination that he went into a deep depression, and felt humiliated and embarrassed by not being able to provide for his family and ultimately entered counseling. Thus, it is reasonable to conclude that Complainant's termination compounded his distress and that he suffered more emotionally as a result of his termination. I conclude, therefore, that an appropriate apportionment of the damages commensurate with this finding will allot \$15,000 as compensation for injury resulting from the racial harassment by his co-workers and the supervisors' failure to remedy the situation, all of which are also attributed to Lojek. The remaining \$35,000 is apportioned as compensation for the distress caused by Lojek's unlawful and retaliatory termination of Complainant.

IV. ORDER

In addition to affirming my numbers 1 and 3 in my original order of April 16, 2009, the order is hereby amended as follows:

(2a) All Respondents shall pay to Complainant the sum of \$15,000.00 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.

(2b) Respondent Lojek Company shall pay to Complainant the sum of \$35,000.00 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.

This decision constitutes an amendment of the Decision and Order dated April 16, 2009 and is incorporated by reference therein. This constitutes the final Order of the Hearing Officer.

SO ORDERED, this 10th day of January, 2014.

JUDITH E. KAPLAN
Hearing Officer