

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
LEON GLASMAN, on behalf of JULIA GLASMAN
Complainant,

v.

DOCKET NO. 07-BPA-03389

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us on appeal of a decision of Hearing Officer Judith Kaplan in favor of Respondent Massachusetts Department of Transportation (“Mass DOT”) dismissing Complainant’s claim under M.G.L. c. 272, § 98, which prohibits discrimination in admission to or treatment in places of public accommodation based on a physical disability. Leon Glasman brought the claim on behalf of his minor child, Julia Glasman, a person with physical and intellectual disabilities who is wheelchair-bound.¹ Mr. Glasman alleged that Mass DOT violated section 98 when it restricted his daughter’s access to Route 27 in Sharon, MA, a public highway and the only road providing access to the Glasman home, via a U-shaped driveway connected to the road. This restriction occurred as a result of Mass DOT’s re-grading of Route 27, which significantly raised the height of the road and the slope of the Glasman driveway.

Following an evidentiary hearing, the Hearing Officer found that Julia Glasman’s access to Route 27 had in fact been restricted by Mass DOT’s re-grading of the road. Prior to the re-

¹ Julia Glasman is therefore a Complainant in this case, although both she and her father are referred to herein individually by their proper names and collectively as “the Glasmans.”

grading, Julia Glasman was able to wheel herself up the Glasman driveway to the road with some assistance, and the van that took her to school could also travel down the driveway to the house year-round to pick her up. After the re-grading, however, Julia Glasman could no longer wheel herself up the driveway, nor could the van come down the driveway in snowy or rainy conditions. There was also a period of time when her wheelchair could not traverse a gap between the road and the driveway. Notwithstanding these findings of fact, the Hearing Officer decided that the Commission did not have jurisdiction over the matter under section 98, ruling that the type of activity at issue, i.e., construction activity on a private driveway, did not implicate the prohibitions of the public accommodations law. The Hearing Officer viewed the case as exclusively about the interference with private property, and thus outside of the public accommodations statute. Viewed this way, the limiting of Julia Glasman's access to Route 27 was an unfortunate consequence of a land taking, but not actionable under section 98. The Hearing Officer also concluded, however, that even assuming the Commission did have jurisdiction over the matter, Mass DOT did not violate section 98 given sufficient evidence of its attempts to remove the limitations to Julia Glasman's access to the road and thereby reasonably accommodate her.

On appeal, the Glasmans argue that the Hearing Officer committed an error of law in deciding that the Commission did not have jurisdiction over the matter. They contend that Julia Glasman's right of access to a public roadway under the circumstances of this case is protected by the public accommodations statute and distinguishable from the rights of her parents as the property owners to bring a claim for the unlawful taking of property without just compensation under the law of eminent domain. We agree, and determine that the Commission does not lack subject matter jurisdiction over the controversy in question. However, the conclusions of law in

this case were substantially correct, where the duty to reasonably accommodate was properly considered and factual findings on that point provided a sufficient basis for dismissal. As discussed below, we affirm the Order of Dismissal for those reasons and not on jurisdictional grounds.

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 Commission's review is confined to the record of the Public Hearing proceedings below unless a motion to present additional evidence is made and granted. 804 CMR 1.23(1)(f) and (g). 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 Massasoit Indus. Corp. v. Massachusetts Comm'n Against Discrimination, 91 Mass. App. Ct. 208, 210 (2017); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). 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); M.G.L. c. 30A, §§ 1(6), 14. The Commission's role is to determine, *inter alia*, 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 otherwise not in accordance with the law. See 804 CMR 1.23(1)(h).

LEGAL DISCUSSION

The public accommodations law, M.G.L. c. 272, § 98, prohibits “any distinction, discrimination, or restriction... relative to the admission of any person to, or his treatment in any place of public accommodation” based on physical or mental disability, among other protected classes, and provides for both criminal and civil penalties. Section 98 also confers a civil right to “the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation...subject only to the conditions and limitations established by law and applicable to all persons.” A “public highway” is specifically listed as a place of public accommodation within M.G.L. c. 272, § 92A(6), the statute which defines “place of public accommodation” for the purposes of section 98. Chapter 151B, § 5 authorizes the Commission to investigate and adjudicate complaints of violations of the public accommodations law. Ekhatov v. Stop & Shop Supermarket Co., 24 MDLR 147, 149 (2002).

The Commission typically employs the method of proof used in employment discrimination cases alleging disparate treatment based upon indirect evidence of unlawful discrimination to analyze claims of discrimination on the basis of disability brought under M.G.L. c. 272, § 98, as described in Wheelock v. MCAD, 371 Mass. 130, 134-136 (1976). See Poliwczak v. Mitch’s Marina and Campground, et al., 33 MDLR 133 (2011), aff’d, 38 MDLR 148 (2016); and Bachner v. Charltons's Lounge and Restaurant, 9 MDLR 1274 (1984). To prove disparate treatment, the complainant must first establish a prima facie case of discrimination, after which the respondent must articulate legitimate, non-discriminatory reasons for its actions, and, from there, the complainant must show those reasons to be pretextual in order to prevail. Wheelock at 134-136. To establish a prima facie case of discrimination in a place of public accommodation, a complainant must prove that he or she: (1) is a member of a

protected class; (2) was denied access, restricted, or treated differently from others not in her protected class; (3) in a place of public accommodation. See Charltons's Lounge, 9 MDLR at 1287.

Alternatively, liability under section 98 may be based on a failure to reasonably accommodate persons with disabilities where the failure to do so would restrict access to or prevent the full enjoyment of public accommodations. Charlton's Lounge, at 1288-1291. In Charlton's Lounge, the Commission held that an unreasonable refusal to accommodate an individual's physical or mental disability can constitute discrimination under section 98, notwithstanding the absence of reasonable accommodation language in the statute. Thus, even though complainant prevailed on a disparate treatment analysis, respondent's failure to accommodate complainant's disability was held to be an alternative basis for liability, because "some degree of accommodation must reasonably be implied in [M.G.L. c. 272, §98]..." Id. at 1291. See also Bachner v. MBTA, 22 MDLR at 185-186 (complainant prevailed by showing respondent's reasons for the discriminatory conduct were pretextual, but the duty to reasonably accommodate also recognized and applied) and Harrison v. Roller World, Inc., 30 MDLR 66, 67 (2008) (recognizing and citing with approval Charlton's Lounge and Bachner v. MBTA in the context of approving of the application of a duty to reasonably accommodate religion in places of public accommodation).

The Commission's application of a duty to reasonably accommodate persons with disabilities irrespective of intent to discriminate is consistent with SJC jurisprudence on the public accommodations law. In Currier v. Nat'l Bd. of Med. Examiners, 462 Mass. 1, 20-21 (2012), the SJC determined that liability under section 98 does not require proof of intent when only a civil remedy is sought, and it implicitly endorsed a duty to reasonably accommodate

disabilities in public accommodations.² In Currier, the court awarded summary judgment to plaintiff, a lactating mother needing accommodation during her medical board exam, after rejecting defendant's argument that its actions were outside of the scope of the public accommodations statute and taking into account defendant's failure to show it could not reasonably accommodate plaintiff without incurring undue hardship. Id. at 20-21. In reaching that result, the court deferred to the Commission's interpretations of the statute and its broad remedial purpose, and expressly authorized the advancement of plaintiff's section 98 claim under a theory that does not require intentional or purposeful discrimination (i.e., disparate impact). Id.

The Hearing Decision does not lay out the framework for analyzing a section 98 claim beyond citation to the statute. The analysis is instead couched in terms of jurisdiction, although it targets all of the elements of a section 98 claim as outlined above. The Hearing Officer reasoned that Mass DOT did not deny Julia Glasman access to a place of public accommodation where Mass DOT's actions affected a private driveway and were motivated solely by a need to re-grade a road per state and federal requirements. This reasoning fits squarely within a disparate treatment analysis, i.e., the prima facie case and the burden shift to respondent to advance legitimate, non-discriminatory reasons for its actions. By focusing on the private driveway, the Hearing Officer determined that access to "a place of public accommodation" had not been denied, as required to establish a prima facie case under section 98. Next (assuming the prima facie case had been made), Mass DOT's legitimate need to re-grade Route 27 was recognized as a legitimate, non-discriminatory reason in support of its actions, as required by the second prong of the analysis. Last, the Hearing Officer also determined that Mass DOT had not

² Although the court's application of a duty to accommodate was technically in the context of discrimination based on sex and not disability, it ultimately dealt with a duty to accommodate plaintiff's physical limitations.

intended to discriminate on account of Julia Glasman's disability, which arguably goes to the third prong, i.e., a failure to show respondent's proffered reasons were pretextual.³

Thus, the Hearing Officer found in favor of Mass DOT based on traditional analysis, although the holding was ascribed to a lack of jurisdiction. That was error, as the failure to make out an element of a case does not equate to a lack of subject matter jurisdiction. "Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought." Doe v. Sex Offender Registry Bd., 457 Mass. 53, 56-57 (2010) (internal quotes omitted) (citing Middleborough v. Housing Appeals Comm., 449 Mass. 514, 520 (2007) (quoting Black's Law Dictionary 870 (8th ed.2004)). The central question in determining subject matter jurisdiction is whether "the Legislature empowered the [agency] to hear cases of a certain genre..." Doe, 457 Mass. at 57 (quoting Wachovia Bank, Nat'l Ass'n v. Schmidt, 546 U.S. 303, 316 (2006)). Establishing predicate facts as required by statute is a matter of substance, not subject matter jurisdiction. See id.

The Glasmans' case was within the genre of cases the Commission is empowered to hear under section 98. The nature of the case was characterized below as an unlawful taking of property resulting in lost value and limitations on its use as the result of a public works project, and not as a denial of access to a place of public accommodation. However, it was both. Mass DOT's construction activities converted a sole point of access to a place of public accommodation from accessible⁴ to inaccessible by altering private property. This conduct created an injury to Julia Glasman that is separate and apart from the injury to her parents as

³ Currier had not been decided at the time of the hearing decision in this case, and therefore the Hearing Officer did not have the benefit of its explicit reasoning that section 98 does not require a showing of intentional, purposeful discrimination where only a civil remedy is sought. Even so, as discussed further herein, the Hearing Officer nevertheless correctly applied and analyzed a duty to reasonably accommodate.

⁴ In this case, "accessible" is given its ordinary meaning and does not mean accessible according to 521 CMR, the Massachusetts Architectural Access Board regulations, or ADA accessibility regulations found at 36 CFR Part 1191, 28 CFR Part 36 or 28 CFR Part 35.

property owners. As such, Mass DOT's activities could give rise to both an unlawful taking claim⁵ and a section 98 claim. To allow otherwise would potentially insulate swaths of discriminatory conduct from liability where persons with disabilities and property owners are not one and the same, and would unfairly limit section 98's protections for persons with mobility impairments. Broadly speaking, a wheelchair user's allegation that access to a public highway was impermissibly restricted is by its nature subject matter that falls under section 98. For relief to be granted, the allegation must withstand a probable cause determination and the elements of the case must ultimately be proved, but the subject matter is at all times properly before the Commission.⁶

As for whether the allegation was proved in this case, the Glasmans made a prima facie showing under section 98 but failed to prove disparate treatment. Julia Glasman is indisputably a member of a protected class, and there was sufficient evidence to show her access to a public highway, a place of public accommodation, was restricted. (Contrary to the jurisdiction discussion concluding access to a place of public accommodation was not at issue, the Hearing Officer decided as a matter of fact that there was "an unfortunate limitation of [Julia Glasman's] access to the public roadway.") We also agree with the Hearing Officer's conclusion that Mass DOT clearly had legitimate, non-discriminatory reasons for its conduct, i.e., the necessary re-

⁵ The Glasmans appear to have prevailed on their unlawful taking claim to the extent that Norfolk Superior Court Docket No. 0982CV01050 shows a partial settlement of Glasman et al. v Massachusetts Highway Department et al. in the amount of \$75,000, dated January 27, 2012.

⁶ Jurisdiction was also found to be lacking in terms of the type of relief sought, which was characterized below as relief that was available under the Americans with Disabilities Act ("ADA") but not section 98. While the Glasmans were seeking the re-grading of the driveway up to "ADA requirements", and, while it is true that the Commission does not have jurisdiction to hear federal ADA claims, the physical alteration of the driveway was at all times an available remedy in this case. The Commission has broad discretion to fashion remedies to effectuate the purposes of the statutes it enforces. M.G.L. c. 151B, § 5; Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988). Discrimination against persons with mobility impairments is often physical or architectural in nature, as recognized in M.G.L. c. 151B, § 5, where, for example, discrimination on the basis of handicap occurs when there is a refusal to permit or make reasonable modifications to housing.

grading of a public highway, as well as the conclusion, however implicit, that the reasons were not shown to be pretextual.

From there, the Hearing Officer also took the necessary next step and analyzed the duty to reasonably accommodate, albeit while assuming *arguendo* that jurisdiction did exist. Based on exhaustive factual findings regarding proposed and completed modifications to the driveway, the Hearing Officer concluded that Mass DOT had met its duty to reasonably accommodate under section 98, notwithstanding the fact that its various proposed and executed solutions had been unsatisfactory to Mr. Glasman.⁷ Among other solutions, Mass DOT offered to re-grade the driveway to its original condition, but Mr. Glasman either wanted a driveway that met much stricter slope requirements, or else one of the several highly unreasonable solutions proposed by his architect (i.e., raising of the entire house; filling the ground floor level of house to build another floor on top; building a garage level connected to the top floor of house; or demolishing the house and building a new one). We agree with the Hearing Officer's legal conclusion that, given these circumstances, Mass DOT met its duty to reasonably accommodate.

In sum, the conclusions of law in this case were substantially correct, and the Hearing Officer made the necessary factual findings to support a dismissal based on the duty to reasonably accommodate. We affirm the dismissal for these reasons and not for a lack of subject matter jurisdiction.

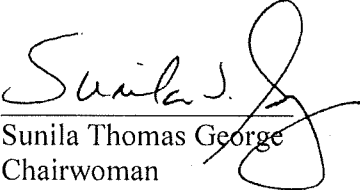
⁷ The Glasmans argue that the Hearing Officer should not have considered Mr. Glasman's rejections of any Mass DOT proposals because he was entitled to want his property fixed in a certain way even if it was above and beyond what was necessary to vindicate Julia Glasman's rights, suggesting that only Julia Glasman's interactions with Mass DOT would be appropriate to a reasonable accommodation analysis. This argument ignores the inextricable, salient fact that Mr. Glasman spoke for his daughter in multiple contexts at the time of the filing of this Complaint, as she was a minor with intellectual disabilities. Mr. Glasman's rejections of Mass DOT's proposals are, however unfortunately, properly imputed to his daughter.

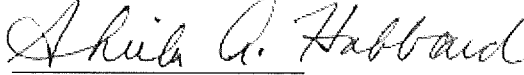
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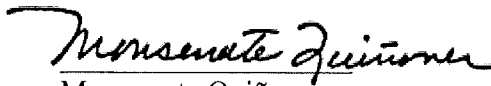
Complainant's appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 30 days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED this 12 day of February, 2018.


Sunila Thomas George
Chairwoman


Sheila A. Hubbard
Commissioner


Monserrate Quiñones
Commissioner