MASSACHUSETTS DISCRIMINATION LAW REPORTER

Massachusetts Commission Against Discrimination
Administrative Law Decisions

VOLUME 45
2023

MCAD Hearing Commissioners / Year Appointed

Sunila Thomas George, Chairwoman	2017
Monserrate Quiñones, Commissioner	2017
Neldy Jean-Francois, Commissioner	2019

MCAD Hearing Officers / Year Appointed

Jason Barshak, Senior Hearing Officer	2021
Simone R. Liebman, Hearing Officer	2022

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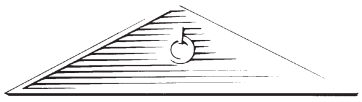

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Volume 45 **Year-End 2023**

Massachusetts Commission Against Discrimination–Administrative Law Decisions

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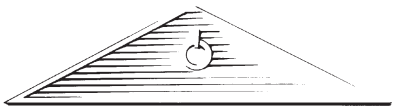

MASSACHUSETTS DISCRIMINATION LAW REPORTER

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Alphabetical Listing–Complainant v. Respondent

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Cumulative Decisions Reported–January-December 2023

Alphabetical Listing–Respondent; Complainant v.

Cumulative Decisions Reported–January-December 2023

Listing by MCAD Hearing Commissioner / Officer

The outcome of each decision appears immediately after the citation within [ ].
Full Commission Reviews do not appear in this index.

R = Decision in favor of Respondent
C = Decision in favor of Complainant

Jason Barshak

➤*Employment—Race and Color Discrimination*
Ambroise v. Law Office of Howard Kahalas, 45 MDLR 67 (2023). [R]

Simone R. Liebman

➤*Employment—Handicap Discrimination*
Gurnett v. Organogenesis, Inc., 45 MDLR 17 (2023). [C]
Jenson v. Rockdale Care & Rehabilitation Center, 45 MDLR 54 (2023). [C]

➤*Housing—Sex Discrimination or Sexual Harassment*
Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc., 45 MDLR 79 (2023). [C]

Sunila Thomas-George

➤*Employment—Handicap Discrimination*
Joseph v. Massachusetts Department of Children and Families, 45 MDLR 5 (2023). [C]
Joseph v. Massachusetts Department of Children and Families, 45 MDLR 53 (2023). [M]

➤*Employment—Sex Discrimination or Sexual Harassment*
Johnson v. Arabic Evangelical Baptist Church, Inc., 45 MDLR 47 (2023). [R]

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Cumulative Decisions Reported–January-December 2023

Listing by General Classification

The outcome of each decision appears immediately after the citation within [ ].
Full Commission Reviews do not appear in this index.

R = Decision in favor of Respondent
C = Decision in favor of Complainant

Employment—Handicap Discrimination

➤*Simone R. Liebman*
Gurnett v. Organogenesis, Inc., 45 MDLR 17 (2023). [C]
Jenson v. Rockdale Care & Rehabilitation Center, 45 MDLR 54 (2023). [C]

➤*Sunila Thomas-George*
Joseph v. Massachusetts Department of Children and Families, 45 MDLR 5 (2023). [C]
Joseph v. Massachusetts Department of Children and Families, 45 MDLR 53 (2023). [M]

Employment—Race and Color Discrimination

➤*Jason Barshak*
Ambroise v. Law Office of Howard Kahalas, 45 MDLR 67 (2023). [R]

Employment—Sex Discrimination or Sexual Harassment

➤*Sunila Thomas-George*
Johnson v. Arabic Evangelical Baptist Church, Inc., 45 MDLR 47 (2023). [R]

Housing—Sex Discrimination or Sexual Harassment

➤*Simone R. Liebman*
Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc., 45 MDLR 79 (2023). [C]

Cumulative Decisions Affirmed by the Full Commission–January-December 2023

NOTE: The following decisions were affirmed without substantial comment and do not appear in this Reporter.

None

Appeals to Full Commission Dismissed on Procedural Grounds–January-December 2023

***NOTE:** The following decisions were appealed to the Full Commission, dismissed on procedural grounds, and do not appear in this Reporter. The date is the date of dismissal.*

None

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Cumulative Subject Matter Index–January-December 2023

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Cumulative Subject Matter Digests–January-December 2023

NOTE: Material appearing within square brackets [ ] as part of a citation indicates the Hearing Commissioner / Officer authoring the decision and the outcome. For example, *Osorio v. Standhard Physical Therapy (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 1 (2023), indicates a decision affirmed by the Full Commission.

[R] = Respondent
[C] = Complainant
[A] = Affirmed by Full Commission
[M] = Affirmed with Modifications
[V] = Reversed

Attorney's Fees

Commission Counsel

The Full Commission affirmed the 2018 decision of Hearing Officer Betty E. Waxman awarding $25,000 in emotional distress damages to a gay male patron of a South End restaurant who was refused access to the bathroom and then subjected to gay slurs and manhandling by the restaurant doorman. The decision granted the award of attorney's fees in the amount of $14,761 for the services of the Commission Counsel who represented the Complainant in this matter. *May v. Parish Cafe, Inc. and Factotum Tap Room, Inc. (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 35 (2023).

De Minimis Damages

The Full Commission rejected an employer's claim that it was not responsible for attorney's fees related to disability discrimination because no emotional distress damages were awarded as these were found to be *de minimis. Roberge v. Sullivan, Keating & Moran Insurance Agency (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 43 (2023).

Reasonableness

The Full Commission scaled back an attorney's fee award from $19,389 to $15,319 to eliminate reimbursement for time and expense related to a voluntary polygraph by the Complainant. Such tests are viewed by the Commission as unnecessary and contrary to public interest. *Osorio v. Standhard Physical Therapy (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 1 (2023).

Unsuccessful Claims

The Full Commission reduced the attorney's fee award for the Commission Counsel who represented a Petitioner in a handicap discrimination complaint by 70% from $25,714 to $7,714 to account for the Petitioner's unsuccessful claim of unlawful termination, although he prevailed on his failure to provide accommodation claim. *Roberge v. Sullivan, Keating & Moran Insurance Agency (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 43 (2023).

The Full Commission declined to award the entire amount of requested attorney's fees of $25,714 and reduced them to $7,714 to account for the Petitioner's unsuccessful claim of unlawful termination. The Complainant had prevailed on his reasonable accommodation claim. In so doing, the Commission noted that the failure to accommodate claim was based upon a discrete set of facts from the unlawful termination claim and so the two charges were not inextricably intertwined so as to merit full compensation. *Roberge v. Sullivan, Keating & Moran Insurance Agency (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 43 (2023).

Damages and Remedies

Back Pay/Lost Wages

– Computation

Hearing Officer Simone R. Liebman awarded just three weeks back pay to a New Bedford nurse found to have been wrongfully discharged in a handicap discrimination case where the Complainant quickly found a new, and higher paying job. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

A DCF social worker denied reasonable accommodation for her Cushing's Disease and then constructively discharged was entitled to $101,567 in lost wages for periods of unemployment after her discharge. The Complainant was not required to offset the award with the unemployment compensation that she had received but neither was she given the monetary value of any employments benefits she forwent absent sufficient evidence of these benefits being presented to the Hearing Commissioner. No deduction for a failure to mitigate her damages with sufficient job-seeking activities was allowed in light of DCF's failure to present any evidence to prove this claim. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

Civil Penalty

Hearing Officer Simone R. Liebman fined a Fall River real estate broker $10,000 in the form of a civil penalty where she blatantly disregarded laws barring discrimination in rental housing against families with young children. The broker was renting apartments that had not been deleaded. *Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 79 (2023).

A Fall River real estate broker was found liable for housing discrimination to a fair housing nonprofit employing testers where she refused to show rental apartments to two of its testers because they stated they had children under six. Compensatory damages in the amount of $2,270 were awarded to reimburse the nonprofit for the cost of the investigation, as well as a $10,000 civil penalty for blatantly disregarding laws that prevent landlords from refusing to rent apartments to families because they are not deleaded. *Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 79 (2023).

Having cited the "woeful failures" and "preposterous defenses" of the Department of Children and Families, Commission Chair Sunila Thomas-George imposed a $10,000 civil penalty on the agency payable to the Commonwealth in the case of a social worker at DCF denied reasonable accommodation for her Cushing's Disease. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

Compensatory

Hearing Officer Simone R. Liebman awarded compensatory damages in the amount of $2,270 to a housing nonprofit that investigated landlords refusing to rent to families with children. The damages were intended to cover the costs of the investigation that found that a Fall River real estate agent repeatedly refused to show unleaded apartments to families with small children. *Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 79 (2023).

Discrimination Prevention Training

– Handicap

Acting on a Motion to Reconsider from the Department of Children and Families, Chair Sunila T. George granted, in part, a modification to her previous orders relating to training and policy requirements under the remedies section in her original decision. Chair George ruled in May of 2023 that DCF was liable for discrimination in the case of a social worker formerly in its employ who had suffered a constructive discharge due to

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the agency's failure to reasonably accommodate her Cushing's Disease. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-M]* 45 MDLR 53 (2023).

After finding that a regenerative medicine company had wrongfully denied reasonable accommodation to a purchasing agent suffering from fibromyalgia, Hearing Officer Simone R. Libman ordered her immediate former superior, as well as company managers and human resource professionals, to undergo MCAD "Accommodation Request 201" training within 90 days of the receipt of her decision. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

In the case of a former social worker denied reasonable accommodations for her Cushing's Disease, Commissioner Sunila Thomas-George issued sweeping five-year discrimination-prevention training orders to DCF requiring it to review its current policies and participate in hostile-work environment and retaliation trainings, as well as reasonable accommodation trainings. The DCF personnel required to attend these trainings are the Commissioner, ADA Coordinators, Diversity Officers, employees performing a human resource function, Area Directors, and legal counsel who participate in employee accommodation requests. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

Emotional Distress

– Handicap Discrimination

Hearing Officer Simone R. Liebman awarded only $10,000 in emotional distress damages in the case of a New Bedford nurse found to have been wrongfully discharged in a handicap discrimination case where the Complainant quickly found a new, and higher paying job, and grossly exaggerated his mental suffering when testifying at hearing. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

A purchasing agent for a regenerative medicine company denied reasonable accommodation in the form of permission to work two days remotely to help her cope with her fibromylagia was awarded $75,000 in emotional distress damages where the denial led to acute anxiety and stress and impacted her marital relationship. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

A former social worker whose Cushing's Disease DCF failed to accommodate and who then suffered harassment at the hands of DCF personnel to the point of constructive discharge was entitled to $35,000 in emotional distress damages where the conduct of her superiors left her distraught, overwhelmed, and ostracized, and it took her no less than four years to get back to a "place of happiness." *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

– Sexual Orientation Discrimination

The Full Commission affirmed the 2018 decision of Hearing Officer Betty E. Waxman awarding $25,000 in emotional distress damages to a gay male patron of a South End restaurant who was refused access to the bathroom and then subjected to gay slurs and manhandling by the restaurant doorman. The damage award was found to be correct given the testimony about the negative changes that the homophobic incident had on the victim's personality and lifestyle. *May v. Parish Cafe, Inc. and Factotum Tap Room, Inc. (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 35 (2023).

– Stress

A purchasing agent for a regenerative medicine company denied reasonable accommodation in the form of permission to work two days remotely to help her cope with her fibromyalgia was awarded $75,000 in emotional distress damages where the denial led to acute anxiety and stress and impacted her marital relationship. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

Publicity

As part of her damage award in a case involving housing discrimination on the part of a Fall River real estate broker refusing to rent apartments to families with small children, Hearing Officer Simone R. Liebman required the broker to include in future advertising language that stated "Families Welcome". *Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 79 (2023).

Discharge

Constructive

A purchasing agent for a regenerative medicine company was unable to show that her employer's refusal to accommodate her request for two days of remote work constituted a constructive discharge where there was insufficient evidence of any kind of disability-based harassment or other aggravating factors that would have forced the Complainant to resign. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

Citing the "woeful failures" and "preposterous defenses" of the Department of Children and Families, Commission Chair Sunila Thomas-George found the agency liable for lost wages of $101,567 and $35,000 in emotional distress damages in the case of a former social worker whose Cushing's Disease it failed to accommodate. The agency was found to have constructively discharged the Complainant by subjecting her to a hostile work environment and working conditions so intolerable and dangerous to her fragile health that any reasonable person would have chosen to resign. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

Evidence

Burden of Persuasion or Proof

In a decision by Commission Chair Sunila T. George, a complaint alleging disparate treatment due to pregnancy was dismissed where no discriminatory animus was shown as to the Complainant's pregnancy status on the part of the day care center's management. The decision also includes a discussion as to why the Hearing Commissioner did not rely on the *McDonnell Douglas* burden shifting framework for the use of indirect evidence to prove discrimination. *Johnson v. Arabic Evangelical Baptist Church, Inc. (Decision of the Hearing Commissioner), [Thomas-George-R]* 45 MDLR 47 (2023).

Indirect Evidence

In a decision by Commission Chair Sunila T. George, a complaint alleging disparate treatment due to pregnancy was dismissed where no discriminatory animus was shown as to the Complainant's pregnancy status on the part of the day care center's management. The decision also includes a discussion as to why the Hearing Commissioner did not rely on the *McDonnell Douglas* burden shifting framework for the use of indirect evidence to prove discrimination. *Johnson v. Arabic Evangelical Baptist Church, Inc. (Decision of the Hearing Commissioner), [Thomas-George-R]* 45 MDLR 47 (2023).

Full Commission Review

Damages

The Full Commission affirmed the 2018 decision of Hearing Officer Betty E. Waxman awarding $25,000 in emotional distress damages to a gay male patron of a South End restaurant who was refused access to the bath-

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room and then subjected to gay slurs and manhandling by the restaurant doorman. The damage award was found to be correct given the testimony about the negative changes that the homophobic incident had on the victim's personality and lifestyle. *May v. Parish Cafe, Inc. and Factotum Tap Room, Inc. (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 35 (2023).

Emotional distress damages in the amount of $50,000 in a sexual harassment case were affirmed by the Full Commission given the testimony as to the severity and duration of the harassment that interfered with the Complainant's ability to do her job and left her humiliated and depressed. *Osorio v. Standhard Physical Therapy (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 1 (2023).

Handicap Discrimination

The Full Commission affirmed a 2019 ruling of former Hearing Officer Judith E. Kaplan dismissing a disability discrimination claim from a discharged insurance agency worker suffering from diabetes and other ailments. The Hearing Officer found that his discharge was not discriminatory and arose from his insubordination and lack of gratitude to his employer, but went on to find that the insurance agency had failed to reasonably accommodate his hearing disability with the installation of a CallCaption telephone. No emotional damages were awarded, as these were found to be *de minimis,* but the employer was ordered to participate in MCAD disability-discrimination training. Legal fees for the Commission Counsel who represented the Petitioner were requested in the amount $25,714 but these were reduced by 70% to $7,714 because of the Petitioner's unsuccessful claim of unlawful termination. *Roberge v. Sullivan, Keating & Moran Insurance Agency (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 43 (2023).

Retaliation

The Full Commission affirmed a 2019 decision of Hearing Officer Eugenia M. Guastaferri dismissing a complaint filed by the former Director of Inpatient Services at MSPCA's Angell Memorial Hospital who claimed that her discharge was retaliatory for her reporting obnoxious conduct by a male technician who engaged in acts directed at a colleague that could be construed as sexual harassment and which led to his termination. The Full Commission agreed that there was no causal link between the Complainant's termination and this protected activity and that she was discharged for inappropriate conduct, declining performance, and not being a team player. The Complainant argued on appeal to the Full Commission that the employer's grant to her of a raise before she was fired proved these reasons were pretextual, but the Full Commission found that these 3% raises were routine and not dependent on good performance. *Suomala v. Massachusetts Society for the Prevention of Cruelty to Animals (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 63 (2023).

A 2018 ruling by former Hearing Officer Betty E. Waxman awarding damages to a wrongfully terminated manager of a physical therapy firm who was fired after complaining about sexual harassment was affirmed by the Full Commission which noted the shifting and unconvincing non-retaliatory reasons offered by her employers in defense of their actions. They were found to be pretextual. *Osorio v. Standhard Physical Therapy (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 1 (2023).

Sex Discrimination or Sexual Harassment

The Full Commission affirmed a 2018 decision by former Hearing Officer Betty E. Waxman finding a physical therapy firm and its two managers liable for $50,000 in emotional-distress damages to a former female manager subjected to relentlessly crude sexual harassment. The decision rejects the managers' arguments that the evidence of harassment was not credible and reaffirms the Hearing Officer's conclusion that the Complainant's discharge was retaliatory in view of the shifting and unconvincing reasons offered by her employers in defense of their actions. Also affirmed was the amount of $50,000 in emotional distress damages given the testimony as to the severity and duration of the harassment that interfered with the Complainant's ability to do her job and left her humiliated and depressed. The attorney's fee and demand for costs was paired back from $19,389 to $15,319 to eliminate reimbursement for time and expense related to a voluntary polygraph by the Complainant. *Osorio v. Standhard Physical Therapy (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 1 (2023).

Sexual Orientation Discrimination

The Full Commission affirmed the 2018 decision of Hearing Officer Betty E. Waxman awarding $25,000 in emotional distress damages to a gay male patron of a South End restaurant who was refused access to the bathroom and then subjected to gay slurs and manhandling by the restaurant doorman. The decision rejected the Appellant's arguments attacking the Hearing Officer's witness credibility determinations and found these to be supported by substantial evidence in the record. The emotional distress damages award was ruled to be correct given the testimony about the changes the homophobic incident had on the victim's personality and lifestyle. Finally, the decision affirms the piercing of the corporate veil in finding the ownership of the cafes by two separate entities under common control met the various requirements for combining them for purposes of liability and discrimination prevention training. *May v. Parish Cafe, Inc. and Factotum Tap Room, Inc. (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 35 (2023).

Training Order

The Full Commission affirmed a discrimination prevention training order imposed on two Boston cafes as the result of a homophobic encounter of the Complainant with one of the cafe's employees at one of the locations. Given the Commission's piercing of the corporate veil analysis, and the essential fact that this was one company operating in two locations, the decision found it to be reasonable that employees from both locations undergo the trainings. *May v. Parish Cafe, Inc. and Factotum Tap Room, Inc. (Decision of the Full Commission), [Full Commission-A]* 45 MDLR 35 (2023).

Handicap Discrimination

Defenses

– Pretextual

A New Bedford nursing home's defense of a wrongful termination complaint that cited the discharged nurse for sending a patient for outside medical care after a fall was pretextual, and the employer went so far as to fabricate evidence supporting this contention. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

Disabilities

– Cushing's Disease

A DCF social worker was a disabled person under the statute where a brain tumor had impacted the function of her pituitary gland causing it to produce excessive cortisol leading to Cushing's Disease. Her medical complications therefrom included hypertension, diabetes, weight gain, and adrenal insufficiency. The disease also provoked nausea, weakness, fatigue, dizziness, and unconsciousness. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

– Headaches

Hearing Officer Simone R. Liebman found that a nurse working at a New Bedford nursing facility who suffered from migraines was a handicapped person with a qualified disability. The Complainant suffered from Post

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Concussive Syndrome, which results in migraines and mildly blurred vision. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

Discriminatory Animus

A New Bedford nursing home's discharge of a nurse suffering from migraines was rooted in discriminatory animus amply demonstrated by the conduct and attitude of his supervisor toward him when he was unable to serve as many double shifts as she hoped. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

Prima Facie Case

The cause of the discharge of a New Bedford nurse suffering from migraines was routed in discriminatory animus and was amply demonstrated by the conduct and attitude of his supervisor toward him when he was unable to serve as many double shifts as she hoped. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

Qualified Handicapped Person

Hearing Officer Simone R. Liebman found that a nurse working at a New Bedford nursing facility who suffered from migraines was a qualified handicapped person where he was perfectly capable of performing his routine duties but was only limited in his ability to perform an excessive number of double shifts. *Jenson v. Rockdale Care & Rehabilitation Center (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 54 (2023).

– Asthma

A purchasing agent employed for five years by a regenerative medicine company specializing in skin substitutes was a qualified handicapped person where her fibromyalgia and neurological issues did not prevent her from performing the essential functions of her position, provided she could be reasonably accommodated with permission to work remotely for two days a week. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

– Back Injury

A DCF social worker suffering from Cushing's disease was a qualified disabled person under the statute where, contrary to the agency's contention, the ability to drive clients was not an essential function of her job and her inability to drive could be accommodated with public transportation. Also, her job description did not prevent her from performing client transportation duties without doing the driving herself. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

Reasonable Accommodation

– Cushing's Disease

DCF was found to have failed to reasonably accommodate a social worker suffering from Cushing's Disease when refusing to limit her caseload to 10 as requested by her doctor, and then claiming without justification that such a reduction would impact the workload of other social workers. The request for a reduced caseload was only five cases under the maximum caseload permitted by the collective bargaining agreement and was minute when compared to the fluctuating total of 700-900 cases that the office managed at the time. As such, the request would not have caused the agency a hardship. Also undermining DCF's claim of hardship was its failure to participate in any kind of interactive dialogue as to the request or make any kind of individualized consideration of it. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

– Fibromyalgia

A regenerative medicine company wrongfully denied a reasonable accommodation to a purchasing agent in the form of permission to work remotely two days a week. The Complainant's lengthy commute exacerbated her fibromyalgia and neurological issues and the company's concerns with on-site teamwork, live participation in special events, and supervision of her work could be addressed during the three days she would be working on-site. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

– Interactive Dialogue

A regenerative medicine company was unable to show that providing two days of remote work to an employee suffering from neurological issues exacerbated by her commute would cause the enterprise undue hardship where the reality of the workplace did not require 100% on-site work for its purchasing agents and the vast majority of the Complainant's job could be performed remotely. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

A regenerative medicine company offered ineffective accommodations to an employee suffering from fibromyalgia that was exacerbated by her lengthy commute. The accommodations offered were a conference room in which to stretch, a stand-up desk, and the opportunity to change her work hours, but these did not address the aggravation of her symptoms caused by sitting in her car during her lengthy commute. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

A regenerative medicine company failed to enter into an interactive dialogue to discuss remote work for an employee with neurological issues exacerbated by a long commute where the human resources department was "in transition" and struggling to understand the role of the interactive process. Moreover, rather than engage in any kind of dialogue, her supervisor simply rejected her request for remote work and worked to encourage her separation from the company. *Gurnett v. Organogenesis, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 17 (2023).

DCF's claim that a social worker's request for a reduced case load constituted a hardship for the agency was undermined both by its failure to participate in any kind of interactive dialogue as to the request or make any kind of individualized consideration of it. *Joseph v. Massachusetts Department of Children and Families (Decision of the Hearing Commissioner), [Thomas-George-C]* 45 MDLR 5 (2023).

Housing Discrimination

Children

A Fall River real estate broker was found liable for housing discrimination to a fair housing nonprofit employing testers where she refused to show rental apartments to two of its testers because they stated they had children under six. Compensatory damages in the amount of $2,270 were awarded to reimburse the nonprofit for the cost of the investigation, as well as a $10,000 civil penalty for blatantly disregarding laws that prevent landlords from refusing to rent apartments to families because they are not deleaded. *Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 79 (2023).

Testers

A Fall River real estate broker was found liable for housing discrimination to a fair housing nonprofit employing testers where she refused to show rental apartments to two of its testers because they stated they had children under six. *Southcoast Fair Housing Center, Inc. v. Krishna Priya, Inc. (Decision of the Hearing Officer), [Liebman-C]* 45 MDLR 79 (2023).

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CUMULATIVE CASES CITED–JANUARY-DECEMBER 2023

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SOUTHCOAST FAIR HOUSING CENTER, INC.
and MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

v.

KRISHNA PRIYA INC. and SUSHMA CHOPRA, aka SUSAN CHOPRA

20-NPR-00872

December 1, 2023
Simone R. Liebman, Hearing Officer

Brittany Perdigao, Esq. for Complainants

Housing Discrimination-Aggrievement-Testers-Legal Services Organization-Refusal to Rent to Person with a Child Under the Age of Six-Lead Paint-Civil Penalty—A Fall River real estate broker was found liable for housing discrimination to a fair housing nonprofit employing testers where she refused to show rental apartments to two of its testers because they stated they had children under six. Compensatory damages in the amount of $2,270 were awarded to reimburse the nonprofit for the cost of the investigation, as well as a $10,000 civil penalty for blatantly disregarding laws that prevent landlords from refusing to rent apartments to families because they are not deleaded.

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On January 6, 2020, Complainant, Southcoast Fair Housing Center, Inc. ("SCFH") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD" or "Commission") charging Respondents Krishna Priya, Inc. and Sushma Chopra, aka Susan Chopra (collectively referred to as "Respondents") with housing discrimination. The complaint was based on testing data collected by SCFH through four testers and alleged that Respondents discriminated against the SCFH testers on the basis of familial status, sex, gender identity and status as a recipient of public assistance. On October 17, 2022, the Investigating Commissioner certified three issues: (1) whether SCFH testers were discriminated against when Respondents refused to rent to the SCFH testers and their child under the age of six in violation of lead paint laws of the Commonwealth's anti-discriminations laws; (2) whether SCFH testers were discriminated against when Respondents refused to rent to SCFH testers after they disclosed that they are recipients of Section 8 vouchers in violation of the Commonwealth's anti-discriminations laws; and (3) whether SCFH testers were discriminated against when Respondents refused to rent to an SCFH tester after requesting whether the tester's roommate was male or female in violation of the Commonwealth's anti-discriminations laws.

On July 19, 2023, I conducted a public hearing ("hearing"). Respondents did not appear at the hearing, nor did counsel or a duly authorized representative representing either Respondent appear at the hearing. A default was entered on the record at the hearing, and a default hearing was held pursuant to 804 CMR § 1.12 (10) (2020). SCFH called one witness, Kristina da Fonseca, and eight (8) exhibits were marked. On July 20, 2023, the Commission sent Notice of Entry of Default Against Respondent Krishna Priya, Inc. and Respondent Sushma Chopra, aka Susan Chopra ("Notice of Default").[1] On July 20, 2023, I issued an order requiring SCFH to file an Affidavit of Kristina da Fonseca ("Affidavit") by August 4, 2023. The order required the Affidavit to include: (a) the date that Ms. da Fonseca reviewed SCFH's electronic database and/or cloud based storage system ("electronic filing system") for purpose of complying with the order; (b) the date that each of the Rental Test Report Forms, entered as Exhibits 5, 6, 7 and 8 at hearing, were first entered into the electronic filing system; and (c) electronic confirmation of the same. SCFH did not submit the Affidavit until September 29, 2023. I accept the Affidavit despite its late filing. Also on September 29, 2023, SCFH filed a post-hearing brief. To date, no post-hearing brief has been received from either Respondent.

Unless stated otherwise, where testimony is cited, I find the testimony credible and reliable, and where an exhibit is cited, I find it reliable to the extent it is cited. Having reviewed the record of the proceedings, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

SCFH

1. The Complainant, SCFH, was founded in 2012 with a mission to eliminate housing discrimination and increase equal housing opportunities in its service area. (Testimony of da Fonseca)

2. In 2019, SCFH's service area was Plymouth and Bristol Counties in Massachusetts, and Rhode Island ("service area"). (Testimony of da Fonseca)

3. Kristina da Fonseca ("Ms. da Fonseca") was a member of the founding board of directors of SCFH and in 2014 or 2015, she transitioned from the SCFH board of directors to the role of Executive Director, a position Ms. da Fonseca held at the time of hearing. (Testimony of da Fonseca)

4. In 2019, SCFH received funding from the United States Department of Housing and Urban Development to perform enforcement work in the state of Rhode Island, and in Bristol County in Massachusetts. (Testimony of da Fonseca)

5. In 2019, SCFH employed three methods to achieve its goals of eliminating housing discrimination and increasing equal housing opportunities in its service area. They were: (1) Education

1. The Notice of Default stated that a default was entered on the record against each of the Respondents for failure to appear; that a default hearing was held and that liability would be determined and that, where appropriate, damages and/or other relief would be ordered. The Notice of Default stated that each Respondent had ten (10) calendar days from receipt of the Notice of Default to petition the Commission to remove the entry of default and reopen the case for good cause shown. 804 CMR 1.12 § 10(d) (2020). The Commission has not received a petition from either Respondent seeking to vacate the entry of default or reopen the case.

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and Outreach; (2) Policy/Advocacy; and (3) Investigations/Case Advocacy. Education and Outreach involved educating the public about its rights and obligations under fair housing laws and attending community events, providing training and/or interacting in other ways with other organizations to offer information about the fair housing assistance available through SCFH. Policy/Advocacy involved working with non-profit organizations and state governmental entities to identify policies that may be creating barriers to opportunities for fair housing, and advocating for policy change that aims to eliminate these barriers. Investigations/Case Advocacy included fair housing testing, such as the testing conducted in this case. (Testimony of da Fonseca)

SCFH TESTING

6. The testing project at SCFH entailed hiring testers who would be given a testing assignment. Generally, the test assignment involved contacting a realtor, landlord or housing provider. The testers would follow instructions provided by SCFH, write a report about their experience during the test, and debrief with the SCFH Testing Coordinator. SCFH would then review the test reports to determine whether there was evidence of discrimination. (Testimony of da Fonseca)

7. From 2018 to the time of hearing, SCFH employed a Testing Coordinator named Carmen Torres ("Ms. Torres"). (Testimony of da Fonseca)

8. At all relevant times, Ms. Torres reported directly to the Executive Director, Ms. da Fonseca, and in 2019, Ms. Torres and Ms. da Fonseca met between one and three times per week. (Testimony of da Fonseca)

9. In calendar year 2019, SCFH testers collectively completed approximately one hundred (100) Rental Test Report Forms. (Testimony of da Fonseca)

10. Within forty-eight (48) hours of completing a test, the tester was required to complete and sign a Rental Test Report Form ("test report"). (Testimony of da Fonseca)

11. SCFH also required that within forty-eight (48) hours of the completion of the test report, the Testing Coordinator would meet with the tester, debrief about the test, review the test report completed by the tester and ensure that the test report did not need to be modified. (Testimony of da Fonseca)

12. When Ms. Torres accepted a test report, she would upload it to SCFH's electronic filing system. (Affidavit; Testimony of da Fonseca)

13. The test reports were uploaded to SCFH's electronic filing system "around the time" that the tester submitted the test report to the Testing Coordinator. (Testimony of da Fonseca)

SCFH TESTER TRAINING

14. In 2019, SCFH trained its testers using training videos, a testing manual and a practice test. The video shown to testers as part of SCFH's tester training in 2019 depicted testers engaging in the testing process, explained why testing was used, and showed interviews of testers after the testing had been conducted. (Testimony of da Fonseca)

15. As part of SCFH's tester training, testers were required to read a testing manual ("SCFH Testing Manual") which included basic information about fair housing laws, an explanation of the tester's role, and the importance of testing in SCFH's work. (Testimony of da Fonseca)

16. The SCFH Testing Manual emphasized the importance of accurate reporting and accurate test reports and discussed the importance of preparing the testing reports as soon after the testers' experiences as possible. The SCFH Testing Manual described the process that the Testing Coordinator used to debrief the testers, and the process testers were to use in providing the test reports to the Testing Coordinator. (Testimony of da Fonseca)

17. SCFH's tester training also included a practicum in which testers conducted a practice test. The practice test required the testers to receive a testing assignment, complete a test, prepare a test report and debrief with the Testing Coordinator. (Testimony of da Fonseca)

18. Once SCFH's tester training (video, SCFH Testing Manual, and practice test) was completed, it was SCFH's practice to meet with the potential tester to "see how they feel about doing this work" and decide whether SCFH would keep them on their list of available testers. (Testimony of da Fonseca)

TESTING PROJECT

19. In 2019, SCFH engaged in a testing project which included investigating rental property advertisements which contained indicia of potential fair housing law violations including language that indicated there was lead paint on the rental property. As part of this testing project, Ms. Torres reviewed and evaluated advertisements for available rental properties in SCFH's service area. (Testimony of da Fonseca)

20. Ms. da Fonseca was aware of the scope of the overall project. (Testimony of da Fonseca)

21. On or about June 12, 2019, WickedLocal.com listed an apartment for rent at the location of 147 18th Street, Fall River, Massachusetts ("the subject property"). The subject property had six units. (Testimony of da Fonseca; Exhibit 4)

22. WickedLocal.com posted an advertisement for an apartment at the subject property (referred to herein as "the Wicked Local ad") and listed it as a two-bedroom, one bathroom, 650 square foot apartment; built in 1900; with a rent of $950/month. (Exhibit 4) The Wicked Local ad states that it was updated on June 12, 2019, that it is "courtesy of Primus Realty", and that the listing agent was Susan Chopra at (781) 888-1991. (Exhibit 4)

23. Respondent Sushma Chopra, aka Susan Chopra ("Ms. Chopra"), is a Massachusetts licensed real estate agent or broker. (Testimony of da Fonseca)

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24. The description of the subject property in the Wicked Local ad states:

> Vacant Now! This is a Second floor apartment. This apartment has double parlor living room, dining room, two bedrooms or could be used as three bedrooms, one kitchen and one bathroom. All hardwood floors. It has gas heat with space heater. Good quiet neighborhood. There is no laundry in the building. This is a cozy apartment on the first floor.The apartment is in a six family house. Tenant pays Electricity and gas heat. **There is no lead paint certificate in hand for this apartment.** Please call for showings. (Exhibit 4) (Emphasis added).

25. Ms. Torres identified the subject property and the Wicked Local ad as meeting the criteria of the testing project because the Wicked Local ad stated that there was "no lead paint certificate in hand" for the subject property. (Exhibit 4; Testimony of da Fonseca)

26. In 2019, SCFH's practice was to save advertisements that met its testing project criteria as a PDF file on SCFH's electronic filing system. (Testimony of da Fonseca)

27. On June 12, 2019, SCFH saved a copy of the Wicked Local ad on its electronic filing system. (Testimony of da Fonseca; Exhibit 4)

28. Ms. da Fonseca reviewed material from the Bristol County Registry of Deeds ("Registry") and concluded that the owner of the subject property at material times was Respondent Krishna Priya, Inc. (Testimony of da Fonseca). Ms. da Fonseca testified vaguely that Ms. Chopra "is either an owner or otherwise related to Krishna Priya, Inc." (Testimony of da Fonseca) SCFH did not submit any documents from the Registry, nor was there any indication in the Wicked Local ad or any of the Rental Test Report Forms (or attachments thereto), indicating that Krishna Priya, Inc. owned the subject property during the relevant time-period. While I credit Ms. da Fonseca's testimony that she conducted research at the Registry, under the circumstances in this case, Ms. da Fonseca's testimony alone is not sufficient to establish that Krishna Priya, Inc. owned the subject property or that Ms. Chopra had an ownership interest in or agency relationship with Krishna Priya, Inc.

TESTING OF THE SUBJECT PROPERTY

29. Based on the Wicked Local ad, SCFH conducted four tests of the subject property (Tests 1, 2, 3 and 4) which respectively involved Testers 1, 2, 3 and 4. Testers 1, 2, 3 and 4 underwent SCFH tester training prior to conducting Tests 1, 2, 3, and 4. (Testimony of da Fonseca)[2]

30. Testers 1, 2, 3 and 4 were paid by SCFH and did not work for SCFH in any other capacity. (Testimony of da Fonseca)

31. Testers 1, 2, 3 and 4 each completed a test report and submitted it to the Testing Coordinator, Ms. Torres, who uploaded it to SCFH's electronic filing system. (Testimony of da Fonseca; Affidavit)

32. Tester 1 completed a Rental Test Report Form referred to herein as Test Report 1. (Exhibit 6) Tester 2 completed a Rental Test Report Form referred to herein as Test Report 2. (Exhibit 7) Tester 3 completed a Rental Test Report Form referred to herein as Test Report 3. (Exhibit 8) Tester 4 completed a Rental Test Report Form referred to herein as Test Report 4. (Exhibit 5)

33. In assessing the reliability of Test Reports 1, 2, 3, and 4, I have taken into account the following: Each test report was signed but there was no place on the test report to indicate the date that it was signed and/or completed. (Exhibits 5-8) For each test report, there was no evidence: (a) which reflected the date on which the test report was completed and signed; (b) which showed whether the test report was completed within 48 hours of the completion date of the test; and (c) of whether or when the applicable tester debriefed with the Testing Coordinator. None of the four testers testified. Their names were not referenced at the hearing and were redacted from the test reports (Exhibits 5-8) pursuant to a protective order.

TEST 1

34. Prior to the hearing, Ms. da Fonseca was ordered to, and did review the unredacted Test Report 1. At hearing, Ms. da Fonseca confirmed that she knew the identity of Tester 1, and previously reviewed the signature of Tester 1. (Exhibit 6; Testimony of da Fonseca)

35. Test Report 1 identifies Tester 1 as a white female, and the date of the contact between Tester 1 and an individual who identified herself as Susan Chopra as June 15, 2019. (Exhibit 6)

36. SCFH uploaded Test Report 1 to SCFH's electronic filing system on June 24, 2019, nine (9) days after Tester 1's last contact with Susan Chopra. (Exhibit 6; Affidavit)

37. I find Test Report 1 reliable and credit the following account depicted in this and the next paragraph: On June 15, 2019, at 11:31 a.m., Tester 1 contacted Ms. Chopra by telephone at 781-888-1991. Tester 1 confirmed that she was speaking to Susan Chopra. Tester 1 asked, and Ms. Chopra confirmed that the advertised apartment at the subject property was available. Tester 1 told Ms. Chopra that she was interested in the apartment and would like to view it. When Ms. Chopra asked Tester 1 how many people would live in the apartment, Tester 1 stated, "two." Ms. Chopra asked Tester 1 who would be living at the apartment, and Tester 1 responded: "My daughter." Ms. Chopra asked how old Tester 1's daughter was, and Tester 1 responded: "Two years old." Ms. Chopra responded: "the apartment is not de-leaded. I'm sorry." Tester 1 said, "Okay, thank you" and the call ended. (Exhibit 6)

38. A little over an hour later, at 12:44 p.m. on June 15, 2019, Tester 1 called 781-888-1991 a second time, and a person who confirmed that she was Ms. Chopra answered the phone. Tester 1

2. Ms. da Fonseca did not participate in designing or administering the tests of the subject property. She was not aware of which testers would be assigned, when the assignment was issued, or when the testers would conduct the tests of that property. (Testimony of da Fonseca)

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stated that she liked the apartment and that Ms. Chopra "had mentioned that it was not de-leaded but I wonder if, perhaps, the landlord is in the process of de-leading the apartment?" Ms. Chopra responded: "No, the landlord won't de-lead the apartment—it's too expensive." Tester 1 asked to schedule a visit to view the apartment, and Ms. Chopra responded: "No, there's no way to rent the apartment—it's a waste of your time." Tester 1 said, "Oh, okay" and the call was discontinued. (Exhibit 6)

39. In finding Test Report 1 reliable, I have relied on the following: Test Report 1 does not contain language evidencing any lack of memory or recollection by Tester 1 regarding the interactions with Ms. Chopra. SCFH uploaded Test Report 1 to SCFH's electronic filing system within a relatively short period—nine (9) days—after Tester 1's last contact with Susan Chopra. Test Report 1 does not contain any internal inconsistencies.[3] (Exhibit 6; Affidavit)

TEST 2

40. Prior to the hearing, Ms. da Fonseca was ordered to, and did review the unredacted Test Report 2. At hearing, Ms. da Fonseca confirmed that she knew the identity of Tester 2, and previously reviewed the signature of Tester 2. (Exhibit 7; Testimony of da Fonseca)

41. Test Report 2 identifies Tester 2 as a Caucasian female, and the dates of contact as June 15, 17 and 22, 2019. (Exhibit 7)

42. Test Report 2 lists the address of the subject property as 147 18th St, Fall River, MA. (Exhibit 7)

43. I find Test Report 2 reliable and credit the following account set forth herein in ¶¶ 44-53.

44. On June 15, 2019, Tester 2 called and left a voice message asking "Susan" to return Tester 2's call regarding renting an apartment at 147 18th Street in Fall River. (Exhibit 7)

45. Later, on June 15, 2019, Tester 2 received a call from 781-888-1991 but was unable to pick up the call and one minute later, received a text from 781-888-1991, asking Tester 2 to call regarding the rental at 147 18th Street in Fall River. (Exhibit 7)

46. On June 15, 2019, at 1:38 p.m., Tester 2 called 781-888-1991 and confirmed that she was speaking with Ms. Chopra. Tester 2 then asked if "the 2-bedroom at 147 18th Street" in Fall River was still available, and the woman who identified herself as Susan Chopra, confirmed that both the first and second floor apartments were available. (Exhibit 7)

47. During this phone call on June 15, 2019, Tester 2 asked if she could see the first and second floor apartments. The woman who identified herself as Susan Chopra asked Tester 2 how many people would be living in the apartment. When Tester 2 said that there would be two people, the woman who identified herself as Susan Chopra asked Tester 2 who they were, and Tester 2 replied that they were Tester 2 and Tester 2's grandson. The woman asked Tester 2 how old the grandson was, and Tester 2 said five (5) years old. The woman told Tester 2 that there was no lead certificate for the apartments and said that "the landlord wanted her to tell people that." Tester 2 asked what that meant. The woman said that the apartments are not de-leaded and there needs to be a certificate for any child under age 7 living there, and then restated "that there is no certificate." The woman stated that Tester 2 could see the apartment and fill out an application, but there is no certificate. Tester 2 stated that she did not want to waste anyone's time by looking at the apartment if she would not be able to rent it. The woman stated that Tester 2 "could come see it, but there is no certificate." Tester 2 thanked the woman and the call ended. (Exhibit 7)

48. On June 15, 2019, at 1:53 p.m., Tester 2 called 781-888-1991 again, confirmed that the woman who answered was "Susan",[4] stated Tester 2's name and asked to view the apartment at the subject property. The woman who identified herself as Susan asked Tester 2 when she wanted to see it and Tester 2 said, "this coming Monday." When the woman asked what time, Tester 2 proposed 1:30 or 2:00 p.m. The woman said, "I can't be there at that time." Tester 2 said that she was flexible and asked what time would be convenient for her. The woman said, "Let me call you back." Tester 2 said "ok", and the call ended. (Exhibit 7)

49. Tester 2 did not receive a call back from the woman who identified herself as Susan and on June 17, 2019, Tester 2 called 781-888-1991 and left a message stating her name and phone number, and asking if Susan would call her back to schedule a viewing of the subject property. (Exhibit 7)

50. As of June 22, 2019, Tester 2 had not received a call back from the woman who identified herself as Susan. (Exhibit 7)

51. On June 22, 2019, Tester 2 called 781-888-1991 and received a voice message stating the mailbox was full. Tester 2 could not leave a message. (Exhibit 7)

52. As of June 24, 2019, Tester 2 had not received a call back from the woman who identified herself as Susan. (Exhibit 7)

53. SCFH uploaded Test Report 2 to SCFH's electronic filing system on June 28, 2019, four (4) days after Tester 2 last recorded that she had not received a call back from Ms. Chopra (June 24, 2019). (Affidavit; Exhibit 7)

54. In finding Test Report 2 reliable, I have relied on the following: Test Report 2 does not contain any internal inconsistencies. Test Report 2 does not contain language which indicates that Tester 2 questioned her memory or recollection of the interactions with Ms. Chopra. SCFH uploaded Test Report 2 to SCFH's electronic filing system within four (4) days after Tester 2 last recorded that she had not received a call back from Ms. Chopra. Prior to con-

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3. At one point, Test Report 1 states the subject property was in NB, which I infer was New Bedford. (Exhibit 6) Based on my review of Test Report 1 in its entirety, I have concluded that the reference to NB was inadvertent and does not constitute an internal inconsistency.

4. Based on paragraph 47, I infer that the "Susan" referenced in paragraph 48 was Susan Chopra.

ducting Test 2, Tester 2 had performed approximately 50 tests for SCFH. (Testimony of da Fonseca)

TEST 3

55. Prior to the hearing, Ms. da Fonseca was ordered to, and did review the unredacted Test Report 3. At hearing, Ms. Da Fonseca confirmed that she knew the identity of Tester 3, and previously reviewed the signature of Tester 3. (Exhibit 8; Testimony of da Fonseca)

56. Test Report 3 identifies Tester 3 as a white female, and the dates of contact between Tester 3 and the woman with whom she had contact as June 21, 22 and 23, 2019. (Exhibit 8)

57. Test Report 3 lists the address of the property as 147 18th Street, Fall River, MA. (Exhibit 8)

58. Tester 3 was known to Ms. da Fonseca and had worked as a tester for SCFH at least twenty (20) times prior to completing Test 3. (Testimony of da Fonseca)

59. Test Report 3 states that it was completed by Tester 3, and that on June 21, 2019, Tester 3 called 781-888-1991. Test Report 3 states that on June 21, 2019, a woman answered the phone, but this entry does not state the woman's name or whether Tester 3 asked the woman for her name. (Exhibit 8).

60. Under the heading "On Friday, June 21, 2019", Test Report 3 states: "This is a reconstruction of our conversation as best as I can remember it." (Exhibit 8) Test Report 3 recounts a conversation during which Tester 3 identified herself as a potential renter who would be living with her 18-year-old daughter, had no pets, worked at Southcoast Health, and was currently living in Somerset and paying $950/month for rent. Test Report 3 recounts that Tester 3 and the woman who answered the phone arranged to meet the next day at the property. (Exhibit 8)

61. Test Report 3 states that on June 22, 2019, Tester 3 went to the subject property, waited for ten minutes, and then texted the landlord. Tester 3 did not include in the June 22, 2019 entry of Test Report 3 the telephone number she texted, or the name of the person Tester 3 texted. (Exhibit 8)

62. Test Report 3 states that on June 23, 2019, Tester 3 went to the subject property. Test Report 3 states as follows:

> At 9:55am, the landlady (I didn't get her name) met me and took me to a 2d floor apartment at the back of the building to show me. She showed me each of the rooms. **The following is part of our conversation as best as I can remember it**. Me: I do work but I have a housing voucher that pays part of it and helps me pay. Her: Oh, how much is it Me: $300. I pay the rest. Her: You said you work? Me: Yes, at Southcoast Health. Her: How much do you make? Me: about $1200 a month. Her: Then you can make $650. What program is your voucher? Me: Section 8. Her: Oh, I don't think it's going to work out. They inspect places. I went through this once before. Then she took me to the back porch and said that they told her she had to get the back porch fixed and the garage. She showed me the back porch and she pointed to the garage and said I don't think it's going to work out. I said thank you anyway and she replied by saying sorry. (Exhibit 8) (emphasis added)

63. Test Report 3 was uploaded to SCFH's electronic filing system on July 9, 2019, sixteen (16) days after Tester 3 recorded her last contact with "the landlady." (Exhibit 8; Affidavit)

64. I do not credit Test Report 3 because I find it lacking in reliability based on internal fallibilities within Test Report 3 and evidence that Test Report 3 substantially diverged from SCFH's practices. First, Tester 3 did not ask for, and record in the test report, the identity of the individual to whom she was speaking. SCFH's training program trained the testers to ask for, and record in the test report, the identity of the person to whom they were speaking. (Testimony of da Fonseca) In contrast to her training, Tester 3 stated that a "woman" answered the phone on June 21, 2019, did not identify the name of the "landlord" whom Tester 3 texted on June 22, 2019, and stated that on June 23, 2019 she met "the landlady (I didn't get her name). . . " (Exhibit 8) Identifying the subject of a test is a critical component of testing and this lapse is noteworthy. Secondly, Tester 3 twice indicated in Test Report 3 that she had concerns about her ability to remember the conversations she had during the test. In describing her conversation with the woman who answered the phone on June 21, 2019, Tester 3 stated: "This is a reconstruction of our conversation as best I can remember it." When Tester 3 went to the subject property on June 23, 2019, Test Report 3 states "The following is part of our conversation as best as I can remember it." (Exhibit 8) Tester 3's statements reflect her uncertainty about her memory of the conversations she had with the woman. This could be Tester 3's writing style, but I cannot draw a reasonable inference that these statements were simply a manner of speech, without testimony from Tester 3 or other evidence to that effect. Third, Test Report 3 was not uploaded to SCFH's electronic filing system until 16 days after the last contact referenced in Test Report 3 in significant contrast to SCFH's practice to upload test reports to the electronic filing system in four, or slightly more than four, days. Taking this substantial departure from SCFH practice relative to uploading test reports in conjunction with Tester 3's own stated concerns about her ability to reconstruct conversations and her failure to record the subject contact's name, I do not find Test Report 3, or the contents thereof reliable. In making this determination, I have considered the fact that Tester 3 worked as a tester for SCFH at least twenty (20) times prior to completing Test 3.

TEST 4

65. Prior to the hearing, Ms. da Fonseca was ordered to and did review the unredacted Test Report 4 and confirmed the identity of Tester 4. (Exhibit 5; Testimony of da Fonseca)

66. Test Report 4 identifies Tester 4 as white and "Transmasculine/Genderfluid," and the dates of the contacts between Tester 4 and the individual who identified herself as "Susan", were June 18, 19, 20, 21 and 22, 2019. (Exhibit 5)

67. Test Report 4 lists the address of the subject property as 147 18th St, Fall River, MA 02723. (Exhibit 5)

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68. Test Report 4 was uploaded to SCFH's electronic filing system on July 3, 2019, eleven (11) days after Tester 4 recorded her last contact with the woman who identified herself as "Susan." (Exhibit 5; Affidavit)

69. I find Test Report 4 reliable and credit the account described herein at ¶¶ 70-74.

70. On June 18, 2019, Tester 4 called 781-888-1991 and confirmed that the woman who answered was "Susan."[5] Tester 4 answered "a long series of questions" from Susan including if her roommate was a boy or girl. Tester 4 responded girl. Tester 4 was asked if Tester 4 and her roommate were working. Tester 4 confirmed that they were working, and Susan said, "Okay, I'll show it to you." (Exhibit 5)

71. On June 19, 2019, Tester 4 received a voicemail from 781-888-1991 which said, "Hi, I'm calling you regarding the rental at 147 18th St. Please call me back. Thank you." (Exhibit 5)

72. On June 19, 2019, Tester 4 received a text message from 781-888-1991 that read, "Please call me regarding the rental at 147 Eighteen St Fall River. Thanks." Tester 4 called back and arranged to see the apartment the following day, on June 20, 2019. (Exhibit 5)

73. On June 20, 2019, Tester 4 arrived at the subject property and called Susan who told her that the door to the apartment was open and that she should go up to the third floor of the subject property. Tester 4 viewed the third floor of the subject property and took photographs, which were attached to Test Report 4. Tester 4 then called Susan, who said she was not going to be able to make it, and that she had another unit, Apartment 1, that Tester 4 could view. Tester 4 went to Apartment 1 in the subject property and took photographs, which were attached to Test Report 4. (Exhibit 5)

74. On June 21, 2019, Tester 4 texted 781-888-1991, which appears as Primus Realty on the text exchange attached to Test Report 4, to confirm the rental amount. On June 22, 2019, Tester 4 received confirmation from 781-888-1991 confirming that the rent for the apartment at the subject property was $950. (Exhibit 5)

DAMAGES

75. Based on the testing results regarding the subject property, Ms. da Fonseca concluded that a licensed real estate professional in SCFH's service area was preventing families with children from renting property in SCFH's service area. To counteract what Ms. da Fonseca viewed as unlawful conduct by a licensed real estate professional, SCFH expanded its educational outreach efforts directed toward licensed real estate professionals. (Testimony of da Fonseca) The outreach focused on re-training real estate brokers and agents on fair housing laws and emphasizing the anti-discrimination laws that pertain to the presence of lead paint/a child under age 6. (Testimony of da Fonseca)

76. SCFH incurred costs of "almost $250" in terms of this directed outreach to real estate agents and brokers. (Testimony of da Fonseca)

77. SCFH incurred total costs of paying Testers 1, 2, 3, and 4 regarding the subject property of "at least $270." (Testimony of da Fonseca)

78. Ms. da Fonseca's time "to work with our Testing Coordinator and review the public records and review the overall testing files [for the subject property] was at least $1,000." (Testimony of da Fonseca)

79. The cost of the Testing Coordinator's time to test the subject property was $750. The "Testing Coordinator provided [Ms. da Fonseca with] an estimate of the time she spent on this investigation," and Ms. da Fonseca used the Testing Coordinator's hourly wages at the time of the tests to calculate the cost to SCFH of the Testing Coordinator's time regarding the test the subject property. (Testimony of da Fonseca)[6]

80. Based on paragraphs 75-79, I find that SCFH incurred costs of $250, $270, $1,000, and $750 ($2,270 in total) as a result of its testing of the subject property.

III. CONCLUSIONS OF LAW

SCFH alleges that Respondents Krishna Priya Inc. and Ms. Chopra discriminated against SCFH testers on three bases: (1) refusing to rent to SCFH testers who had a child under the age of six; (2) refusing to rent to SCFH testers after they disclosed they are recipients of Section 8 public assistance; and (3) refusing to rent to SCFH testers after requesting whether the tester's roommate was male or female.

A. Standing

For over 30 years, the Commission has issued decisions in cases in which testing evidence has been entered to prove housing discrimination violations. This is the first housing testing case that this Hearing Officer is aware of, tried at the Commission and filed solely by a legal services organization (and not with an individual victim of discrimination, such as a tester or a renter, filing as a charging party) alleging injury suffered by the legal services organization as a result of the discriminatory conduct uncovered while conducting discrimination testing.[7] SCFH is an incorporated legal

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5. Based on Test Report 1 and Test Report 2 and the Wicked Local ad, I infer that the person referenced as "Susan" in paragraphs 66, 68, 70 and 73 was Susan Chopra.

6. I base this finding on Ms. da Fonseca's testimony that she reviewed SCFH's records in advance of hearing to arrive at these figures. Best practice would have been for SCFH to have provided contemporaneously kept documentation of these expenditures, evidence of the 2019 hourly, annual and/or, or per project compensation rate for Ms. da Fonseca, Ms. Torres and the testers, and evidence of the number of hours that any of them performed relative to the testing of the subject property.

7. With the exception of a case filed solely by the MCAD, which had conducted housing discrimination testing in the mid-1980s, *MCAD* v. *Willard D. Hoyt and Cape Home Finders,* 11 MDLR 1095 (1989), housing discrimination cases with testing evidence have been brought by individual victims of discrimination at the MCAD. These claims were supported by testing evidence, including testimony by testers. *White* v. *Cosmopolitan Real Estate, Inc*., 37 MDLR 137 (2015); *MCAD & DeRusha* v. *Federal Square Properties & Pacific Land LLC*, 34 MDLR 76 (2012); *MCAD & Gardner* v. *A-Team Realty, Inc. & Williams*, 33 MDLR 139 (2011); *Gardner* v. *Pianka*, 28 MDLR 189 (2006); *Leveille* v. *Cherry Hill Estates*

services organization with a mission to eradicate housing discrimination and to increase equal housing opportunities. MGL c. 151B expressly gives standing to seek relief to "*[a]ny* person claiming to be aggrieved" by practices made unlawful by the statute. MGL c. 151B, § 5 (emphasis added). MGL c. 151B defines "person" to include "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof." MGL c. 151B, § 1(1). As a corporation, SCFH is a "person" under MGL c. 151B.

As to the question of whether SCFH is "aggrieved", the Commission has recognized the right to bring a housing discrimination case even when the party seeking to establish that they were "aggrieved" was not personally seeking housing. *Willis* v. *DeFazio*, 33 MDLR 146 (2011). In *Willis*, a landlord made racially discriminatory statements to a broker who was seeking to list, but not rent, the property. The Commission concluded that the broker was "aggrieved" by the landlord's discriminatory statements based on the critical role that brokers play in determining the availability of housing rentals, connecting landlords with potential renters, and ensuring that landlords comply with anti-discrimination laws. In addition, the Commission concluded that as a member of a protected class, the broker herself suffered damages resulting from the landlord's racially discriminatory statements.

Testers are similarly "aggrieved" due to their role evaluating the availability of housing, ensuring that the law is complied with and in some cases, incurring damages or suffering injury flowing from discriminatory conduct. *Barrett and Graham* v. *Realty World/Dana Realty*, 17 MDLR 1665, 1678 (1995), *citing Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1981) (white tester awarded emotional distress damages based on evidence that she felt humiliated, was surprised that "there really was discrimination out there", and became less trusting of people). SCFH, a legal services corporation that hires testers to ensure that brokers, agents, and owners do not discriminatorily deny housing to qualified applicants in its service area, plays a critical part in rooting out discriminatory conduct that may not be identified without testers. SCFH diverted the time of its Testing Coordinator and Executive Director and paid testers in an effort to identify and address any discriminatory conduct. After it concluded that a real estate agent or broker in its service area was engaging in discriminatory conduct, it devoted more resources to expanding educational efforts to licensed real estate professionals in its service area. Under these circumstances, SCFH is "aggrieved" and has standing in this action.

B. Refusing to Rent to Person with a Child

SCFH alleges that its testers were discriminated against when Respondents refused to allow Testers 1 and 2 to view or rent the subject property because Testers 1 and 2 intended to live there with their children under the age of six. This claim implicates two anti-discrimination statutes: MGL c. 151B, § 4(11) ("Section 4(11)") and MGL c. 111, § 199A ("Section 199A").

Section 4(11) prohibits owners, agents and real estate brokers of "publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations" from refusing to rent or otherwise to deny or withhold from any person accommodations because such person has a child or children who shall occupy the premises with them. It further prohibits discrimination against any person in the terms, conditions or privileges of such accommodations or the acquisition thereof because such person has a child or children who occupy or shall occupy the premises with such person. Section 199A makes it "an unlawful practice for purposes of MGL c. 151B for the owner . . . real estate broker, assignee, or managing agent of any premises to refuse to sell, rent, lease or otherwise deny to or withhold from any person or to discriminate against any person in the terms, conditions or privileges of the sale, rental or lease of such premises, because such premises do or may contain [lead paint]." MGL c. 111, § 199A(a).

SCFH must first prove that these statutes apply to the Respondents and the subject property. Section § 4(11) applies to a broad range of persons and organizations including but not limited to owners, real estate brokers and agents of "publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations." Multiple dwellings include dwellings to be occupied as the residence or home of three or more families living independently of each other. MGL c. 151B, § 1(11). The subject property is a six-family house, which falls under the definition of "multiple dwelling." There was no evidence that any of the three exclusions from coverage in Section 4(11) applied in this case.[8] Section 4(11) applies to Ms. Chopra, as a real estate broker or agent of a multiple dwelling. Similarly, Section 199A applies to Ms. Chopra, as a real estate broker "of any premises."

As set forth in Finding of Fact 28, SCFH did not establish that Krishna Priya, Inc. was an owner of the subject property. As a result, the claims against Krishna Priya Inc. under Section 4(11) and Section 199A are **dismissed.**

Having found Section 4(11) and Section 199A applicable to Ms. Chopra, I also find that the facts support a finding of liability against Ms. Chopra pursuant to these statutes. Test Reports 1 and 2 are credible, reliable and persuasive. When Tester 1 told Ms. Chopra that she had a daughter who would be living with her, Ms. Chopra asked how old the daughter was, and when Tester 1 told Ms. Chopra that the daughter was two years old, Ms. Chopra stated: "the apartment is not de-leaded. I'm sorry." Tester 1 called back to ask if the landlord was in the process of de-leading the

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Condominium et. al, 25 MDLR 191 (2003); *Barrett & Graham* v. *Realty World/Danca Realty*, 17 MDLR 1665 (1994) (awarding damages for emotional distress to both the actual prospective tenant and the tester engaged by a civil rights advocacy group)

8. The subject property was not the temporary leasing or subleasing of a single-family dwelling; did not consist of a dwelling with three apartments or less occupied by an elderly or infirm person for whom the presence of children would constitute a hardship; or a single dwelling unit in an owner-occupied 2 family dwelling. MGL c. 151B, § 4(11)

apartment. Ms. Chopra responded: "No, the landlord won't de-lead the apartment—it's too expensive." When Tester 1 asked to schedule a visit to view the apartment, Ms. Chopra said: "No, there's no way to rent the apartment—it's a waste of your time." Less than an hour after Ms. Chopra stated that to Tester 1, Tester 2 contacted Ms. Chopra. When Tester 2 told Ms. Chopra that her five-year-old grandson would be living with her, Ms. Chopra told Tester 2 that there was no lead certificate for the apartments and that "the landlord wanted her to tell people that." When Tester 2 asked what that meant, Ms. Chopra said that the apartments are not de-leaded and there needs to be a certificate for any child under age 7 who was living there. Ms. Chopra re-iterated that "there is no certificate" and told Tester 2 that she could see the apartment and fill out an application "but there is no certificate." Ms. Chopra said she was not available at the time Tester 2 proposed to view the apartment, and when Tester 2 said she was flexible and asked Ms. Chopra what time would be convenient for her, Ms. Chopra said she would call Tester 2 back. Ms. Chopra did not call Tester 2 back. Tester 2 called Ms. Chopra two days later and left a message requesting an appointment to view the subject property. Ms. Chopra never called Tester 2 back to arrange for Tester 2 to view the subject property.

Despite Ms. Chopra's statement that Tester 2 could view the apartment, I find that Ms. Chopra had no intention of arranging an opportunity for Tester 2 to view the property based on her failure to do so or to respond to Tester 2's message. Within an hour of flatly refusing to rent to Tester 1 because the landlord "would not de-lead the apartment" and viewing the apartment was "a waste of [her] time," Ms. Chopra told Tester 2 that the apartment she sought was not de-leaded and there was no lead certificate. Ms. Chopra did not schedule a time for Tester 2 to view the apartment even when Tester 2 told Ms. Chopra that she was flexible. While Ms. Chopra told Tester 2 that she would call her back, Ms. Chopra never did so. Even when Tester 2 left a voice mail message, Ms. Chopra did not return her call. Further, three days after Ms. Chopra told Tester 2 that she would call her back with a time to view the apartment, Ms. Chopra scheduled a time for Tester 4, who did not disclose an intention to live with children, to view an apartment in the subject property. Ms. Chopra subsequently arranged for Tester 4 to see the property and engaged in texting with her about renting an apartment at the property. Based on these facts, I do not believe Ms. Chopra intended to show the property to Tester 2.

I find that the reason Ms. Chopra refused to show—and thus refused to rent—an apartment at the subject property to Testers 1 and 2 was because Testers 1 and 2 intended to live in an apartment with a two-year-old daughter and a five-year-old grandson, respectively. I base this conclusion on the facts evidenced by Tests 1 and 2, as set forth herein, and the Wicked Local ad stating there is "no lead paint certificate in hand for this apartment." Ms. Chopra's conduct and statements in both Test 1 and Test 2 constitute direct evidence of Ms. Chopra refusing to show and thus rent to potential renters (Testers 1 and 2) because they would be occupying the premises with a child and because of the potential of lead paint in the subject property. As the agent or broker for the subject property, Ms. Chopra is liable for violating MGL c. 151B, § 4(11) and MGL c. 111, § 199A. Based on the findings of fact, SCFH incurred compensatory damages of $2,270 relating to its work regarding the subject property, and as such, Ms. Chopra is liable to SCFH in the amount of $2,270.

C. Refusing to Rent to Recipient of Section 8

Test Report 3 was offered by SCFH in support of a claim that Respondents Ms. Chopra and Krishna Priya Inc. violated MGL c. 151B, § 4(10) by refusing to rent to Tester 3 based on her receipt of public benefits. The only evidence in support of this claim was Test Report 3. I do not credit Test Report 3 because, as described in the Findings of Fact, I find Test Report 3 lacking in reliability. In the absence of credible evidence in support of this claim, I dismiss the claim that Respondents discriminated against a SCFH tester based on her receipt of Section 8 benefits.[9]

D. Refusing to Rent to SCFH Tester Who Disclosed Gender of Roommate

SCFH offers Test Report 4 in support of a claim that Ms. Chopra and Krishna Priya Inc. violated MGL c. 151B, § 4(6) by refusing to rent to Tester 4 based on her sex/gender identity. The only evidence offered in support of this claim was Test Report 4. Nothing in Test Report 4 suggests that there was a refusal to rent to Tester 4. On the contrary, Test Report 4 supports the conclusion that Ms. Chopra was ready and willing to rent to Tester 4.[10] Based on this,

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9. I take this opportunity to make some general observations about best practices in testing cases. First, a testing organization should consider naming a tester as a complaining party and/or calling a tester or testers as witnesses. Even without naming a tester as a complaining party, SCFH could have, but did not, call any testers as witnesses to testify as to the nature of the interaction with the testing subject, answer questions about their testing report, and/or provide the date that their report was completed. Testimony from a tester permits a better understanding of the facts set forth in the test report and information regarding consequential damages. It also permits the accused party to cross-examine and test the accuracy and veracity of the tester. Second, particularly in cases where testers are not called as witnesses, the Testing Coordinator should testify. The Testing Coordinator in this case was employed by SCFH at the time of the hearing, but, inexplicably, did not testify which she could have done, upon request, from a remote location. The Testing Coordinator could have verified the training background of the testers, provided detailed information about how the test was designed and how each tester was trained, testified about the debriefing meeting including discussions about the test reports, and provided information about the Testing Coordinator's prior experiences with the specific testers, including their general reliability and reporting capabilities. Third, SCFH provided no training materials, such as the SCFH Training Manual or the training video, to show how their testers were trained. While I appreciate that these materials may contain confidential information, SCFH could have sought to redact the SCFH Training Manual or moved to submit these materials *in camera*. Fourth, Ms. da Fonseca did not explain why the test reports were un dated and testified that SCFH test report forms do not contain a line to date the reports. Testers should date and sign all completed test report forms on the date that the form is completed. Dating the test report, assuming it is dated shortly after the test is conducted, bolsters the reliability of the test report. Here, some concerns about some of the test reports' reliability were addressed by a post-hearing affidavit by SCFH's Executive Director that clarified when the test reports were uploaded into SCFH's electronic filing system. The better practice is to require testers to date test reports.

10. After reviewing Test Report 4, Ms. da Fonseca did not believe there was a sufficient basis to conclude that Tester 4 was denied the opportunity to rent an apartment at the subject property based on sex or gender identity. (Testimony of da Fonseca) Ms. da Fonseca testified that it was her view that Test Report 4 reflects a violation of MGL c. 151B's prohibition on inquiries related to sex or gender identity. See MGL c. 151B, § 4 (6)(c) Prior to hearing, SCFH was given the opportunity to seek to amend the certified issues to include whether Respondents made any

I dismiss the claim that Respondents refused to rent to an SCFH tester based on sex or gender identity.

IV. CIVIL PENALTY

MGL c. 151B, § 5 provides that in the event the Commission finds that a Respondent has engaged in unlawful conduct prohibited by this chapter, "it may, in addition to any other action which it may take ... assess a civil penalty." A civil penalty is appropriate in this case against Ms. Chopra. She is a licensed Massachusetts real estate agent or broker who exhibited blatant disregard for Massachusetts law which prohibits denying the opportunity to rent because a family has a child and/or because the property may contain lead. Based on this, a civil penalty of $10,000 shall be assessed against Ms. Chopra. MGL c. 151B, § 5

V. ORDER

For the reasons detailed above, and pursuant to the authority granted to me under MGL c. 151B, §5, I order the following.

1. As to Respondent Krishna Priya Inc., the complaint is **dismissed.**

2. Cease and Desist: Respondent Sushma Chopra, aka Susan Chopra, shall immediately cease and desist from discrimination in housing based on the presence or potential presence of lead paint and/or children.

3. Consequential Damages to SCFH: Respondent Sushma Chopra, aka Susan Chopra, is ordered to pay to SCFH $2,270 in consequential damages with interest thereon at the rate of 12% per annum from the date the complaint was filed with the Commission 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. Civil Penalty: Respondent Sushma Chopra, aka Susan Chopra, shall pay a civil penalty of $10,000 to the Commonwealth of Massachusetts within sixty (60) days of receipt of this Decision.

5. Required Language in Future Advertisements: For any advertisement of property to which MGL c. 151B, § 4(11) applies and which is placed by or on behalf of Respondent Sushma Chopra, aka Susan Chopra, or her agents, in any newsprint or on any platform, including an on-line platform, newspaper, circular or other written advertisement, shall include the following language: *Families welcome.* This requirement shall remain in effect until January 1, 2026.

6. Training: Within thirty (30) days of receipt of this Decision, Respondent Sushma Chopra, aka Susan Chopra, shall contact the Commission's Director of Training to enroll in Housing Discrimination 101: https://www.mass.gov/info-details/mcad-housing-community-trainings. Within sixty (60) days of this Decision, Ms. Chopra shall attend Housing Discrimination 101. For purposes of enforcement, the Commission shall retain jurisdiction over training requirements.

7. Notice: Pursuant to MGL c. 151B, § 4(11), a copy of this Decision will be forwarded to Director: Childhood Lead Poisoning Prevention Program, 250 Washington Street, Boston, MA 02108.

VI. NOTICE OF APPEAL

This Decision represents the final Order of the Hearing Officer. Any party aggrieved by this Order may appeal this Decision to the Full Commission. To do so, a party must file a Notice of Appeal within ten (10) days of receipt of this Decision and must file a Petition for Review within thirty (30) days of receipt of this Decision. 804 CMR 1.23(1) (2020) If a party files a Petition for Review, each of the other parties may intervene in the appeal. To do so, such party must file a Notice of Intervention within ten (10) days of receipt of the Petition for Review and must file a brief in reply to the Petition for Review within thirty (30) days of receipt of the Petition for Review. 804 CMR 1.23(2) (2020) All filings referenced in this section shall be made with the Clerk of the Commission in the Boston office, with a copy served on all of the other parties.

VII. PETITION FOR ATTORNEYS' FEES AND COSTS

Any petition for attorney's fees and costs for Complainants' Counsel shall be submitted within 15 days of receipt of this Decision. Pursuant to 804 CMR 1.12 (19) (2020), such petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. Respondents may file a written opposition within 15 days of receipt of said petition. All filings referenced in this section shall be made with the Clerk of the Commission in the Boston office, with a copy served on all of the other parties.

So ordered this 1st day of December, 2023.

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written or oral inquiry or record concerning sex or gender identity. At the hearing, Complainants initially requested to amend the certified issues to include that issue, but ultimately, withdrew their request to amend the certification order to include a claim based on written or oral inquiry or record concerning sex or gender identity.

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MDLR Complainant's Commentary 2023 Review

Allison L. Williard, Esq.
Patricia A. Washienko, Esq.
Washienko Law Group, LLC

The Commission issued nine employment decisions in total 2023 (three Full Commission decisions and six Hearing Officer decisions). Four employment decisions are discussed below.

In Two Notable Decisions, Hearing Officers Signal a Significant Departure from Analyzing Cases Under the McDonnell Douglas Framework, Focusing Instead on the Ultimate Issues of Harm, Discriminatory Animus and Causation

In *Johnson* v. *Arabic Evangelical Baptist Church, Inc.,* 45 MDLR 37 (Sept. 15, 2023), Hearing Commissioner Sunila Thomas George issued a noteworthy decision indicating that the Commission is moving away from applying the *McDonnell Douglas* framework after a public hearing because it distracts the Hearing Commissioners and Officers from the central issue in a disparate treatment case—whether the employer discriminated against the employee because of membership in a protected class. The Hearing Commissioner cited the recent Supreme Judicial Court case, *Adams* v. *Schneider Elec. USA*, 210 N.E.3d 917, 927 n. 5 (Mass. 2023), which noted that the SJC does not use the *McDonnell Douglas* test at trial, and instead encourages "'trial judges to craft instructions that will focus the jury's attention on the ultimate issues of harm, discriminatory animus and causation.' *Lipchitz*, 434 Mass. at 508." While noting that the Commission is not obligated to apply the Court's logic to MGL c. 151B Section 5 matters, the Hearing Commissioner explained that it was proper to do so because Hearing Commissioners and Officers act as a factfinder analogous to jurors deciding a case pursuant to Section 9. The Hearing Commissioner elaborated that:

> Without the constraints of the *McDonnell Douglas* framework, the parties and the fact-finder can better hone in on the ultimate question of discrimination *vel non* utilizing familiar types of evidence in their analysis of the disparate treatment claim such as, for examples, qualification of the employee; job performance; availability of a position; treatment of similarly situated employees; general atmosphere of discrimination; stereotypical thinking; prior treatment of the employee; policy and practice of employer as to protected class; statistics; inconsistencies, incoherencies, and contradictions of the proffered reason for the action; deviation from standard procedure; timing of events; and whether the proffered reason was developed after-the-fact.[1]

In the instant case, instead of applying the *McDonnell Douglas* framework, the Hearing Commissioner considered the central issues of discriminatory animus and causation and, after determining that there was no credible evidence of discriminatory animus, held that the alleged animus was not the determinative cause of Complainant's termination. The Hearing Officer noted that an interim supervisor's remark that she believed the Complainant would become a stay-at-home mom and her questions about whether the Complainant would return to work after her maternity leave, coupled with her remarks that maternity leave was unpaid, were insufficient to establish discriminatory animus regarding Complainant's pregnancy. The Hearing Commissioner rejected Complainant's testimony that her interim supervisor asked her every week if she was going to be a stay-at-home mom in front of her coworkers because the colleague with whom Complainant most often worked, never saw the Complainant and the interim supervisor interact, and held that the evidence reflected only a couple of commonplace communications between Complainant and her interim supervisor regarding her pregnancy. As for the supervisor who terminated Complainant's employment, the record was devoid of any evidence that she knew that Complainant was pregnant, and therefore the Hearing Commissioner again found the evidence similarly insufficient to establish discriminatory animus. In addition, the Hearing Commissioner noted that the Complainant's colleague, who was also pregnant at the time, did not suffer any adverse action, which further undercut Complainant's allegation of discriminatory animus. Finally, the Hearing Commissioner found the determinative cause of Complainant's termination was because she refused to provide lunch break coverage for her colleagues and that Complainant's claim of disparate treatment also independently failed for lack of causation.

In *Jenson* v. *Rockdale Care & Rehabilitation Center,* 45 MDLR 54 (Sept. 20, 2023), the Hearing Officer also did not apply the *McDonnell Douglas* framework in analyzing a disparate treatment claim on the basis of handicap. The Hearing Officer determined that Respondent nursing facility acted with discriminatory animus when it terminated a nurse who suffered from migraines and was unable to work as many double shifts as his supervisor demanded. As in *Johnson*, after determining that the Complainant was a member of a protected class and suffered adverse action, the Hearing Officer homed in on the elements of discriminatory animus and causation but did not organize the evidence according to the *McDonnell Douglas* rubric. In an explanatory footnote, the Commission explained that the use of its new analysis should not impact judicial review of past MCAD cases that have utilized the *McDonnell Douglas* framework because cases "decided under

1. The Hearing Commissioner also cited a plethora of cases from the U.S. Supreme Court, Massachusetts appellate courts, and the Federal Circuit Court of Appeals that all stand for the proposition that the ultimate question for the factfinder is not whether the evidence fits into the *McDonnell Douglas* framework, but whether there was discrimination or not.

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MGL c. 151B assessing whether legitimate and non-discriminatory reasons motivated an employer to act, or whether such reasons are pretextual, have bearing on the ultimate issues of harm, animus and causation." *Jenson, 45* MDLR at 58, n. 11.

In *Jenson*, the Hearing Officer determined that the supervisor harbored discriminatory animus against the Complainant because, among other reasons, the supervisor knew that Complainant suffered from migraines and expressed hostility and animosity when the Complainant began to cut back on double shifts because of his disability; the administrator who terminated Complainant informed him that he was terminated because he called out (of long and legally impermissible shifts[2]); and the nursing facility provided Complainant's attorney a written warning months after his termination alleging false and different reasons (that he failed to properly document a patient fall and had multiple instances of poor job performance) as justification for Complainant's termination.

The Hearing Officer found that the Respondent's discriminatory animus was the determinative cause of the Complainant's termination because he was told he was being terminated for calling out of double shifts that he could not work because of his disability. Notably, in rejecting one of the Respondent's legitimate non-discriminatory reasons for terminating Complainant, the Hearing Officer noted that the Complainant was not required to disprove *every* reason intimated in the evidence for the adverse action; nevertheless, the Hearing Officer also found that the supervisor's frustration with the additional paperwork was not the determinative cause of Complainant's termination.

Practice Note:

There are two significant practical implications from these cases. The first, of course, is that the Commission is no longer applying the *McDonnell Douglas* framework to hearing decisions.[3] Thus, when preparing for public hearings, practitioners need not organize the evidence according to the *McDonnell Douglas* framework and should focus on the ultimate issues of harm, animus, and causation instead.

The second takeaway is that practitioners should be mindful that proving discriminatory animus is a high bar. A supervisor's remarks to a pregnant employee, stating that the supervisor believed that the employee would become a stay-at-home mom and asking about the employee's return to work plans, without additional evidence, may be insufficient to establish discriminatory animus. Rather, resentment, hostility, and animosity *because of* the complainant's membership in a protected class is likely needed to establish the element of discriminatory animus. Practitioners should introduce evidence of same.

Full Commission Affirms Hearing Officer's Decision Finding Respondents Liable for Sexual Harassment, Retaliation, Aiding and Abetting, and Interference, Upholds Emotional Distress Award, and Reduces Complainant's Attorney's Fee Award for Time and Expense Related to Complainant's Voluntary Polygraph

In *Osorio* v. *Standhard Physical Therapy*, *Vincent Bulega and Robertson Tambi*, 45 MDLR 1 (January 20, 2023), Respondents appealed to the Full Commission the Hearing Officer's decision finding Respondents liable for sexual harassment and retaliation in violation of MGL c. 151B, §§ 4(16A), 4(4), and Respondents Bulega and Tambi individually liable for aiding and abetting and interference, in violation of MGL c. 151B, §§ 4(4A), (5). Respondents alleged that the Hearing Officer erred in finding Respondents liable for sexual harassment and argued that the Hearing Officer should have discredited Complainant's testimony and believed Respondents' witnesses. Respondents also argued that there was no casual connection between the Complainant's protected activity and the adverse action to uphold a finding of retaliation. Respondents further alleged that the Hearing Officer's emotional distress award was unsupported by the evidence. The Full Commission affirmed the Hearing Officer's decision in all respects.

With regard to the sexual harassment claim, the Full Commission explained that the Respondent Bulega's conduct was of a sexual nature, unwanted, and objectively and subjectively offensive, and that Hearing Officer properly credited Complainant's testimony as it was "clear, sincere, straightforward, and consistent, even under cross-examination," as opposed to the uncredited testimony of Respondents, "which the Hearing Officer found to be 'wandering and obfuscating.'" *Id.* at 2. With regard to the retaliation claim, the Full Commission affirmed the Hearing Officer's conclusion that the Respondents' purported reason for terminating Complainant, because she was handing out flyers at work, was pretextual and supported by the record. First, the Complainant was terminated one day after she reported the sexual harassment. Second, the Commission explained that even though the Respondent Bulega testified that he had known that Complainant had handed out fliers at least a month prior to her termination, such month-long inaction suggests that the alleged grounds for termination were pretextual, especially where her termination letter stated that the Respondents were taking "immediate" action to terminate her.[4] In this case, unlike in *Johnson* and *Jenson*, which were decided after this matter, the Full Commission utilized the *McDonnell Douglas* burden shifting framework in its analysis.

Respondents also argued that the Hearing Officer's award of $50,000 in emotional distress damages was excessive, particularly in light of the lack of evidence regarding Complainant's attempts to mitigate her suffering. Citing *Stonehill College* v. *MCAD*, 4441

2. "As noted, Massachusetts law prohibits nurses from working more than 16 consecutive hours and states that after 16 consecutive hours of work, a nurse is entitled to 8 consecutive hours of off-duty time. MGL c. 111, § 226(f). Despite this, there were times that Mr. Jenson worked more than 16 consecutive hours and there were times that Mr. Jenson would return to work without 8 consecutive hours of off-duty time after he had worked at least 16 consecutive hours. On some of these occasions, and as a result of his migraines, Mr. Jenson "called out" or informed Respondent that he would be arriving later than his scheduled start time.

3. Based on dicta in Johnson and Jenson, it appears that the Commission will still employ the framework in making probable cause determinations, as this stage is akin to summary judgment under MGL c. 151B Section 9 matters.

4. At the public hearing, Respondent Bulega also offered two new reasons for the termination that were not included in Complainant's termination letter, and the Commission found his shifting reasons as additional evidence of pretext.

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Mass. 549, 576 (2004), the Commission clarified that while mitigation is one of the factors to consider in determining an award of emotional distress damages, the absence of evidence of mitigation does not prohibit an award based the other factors. Here, the Commission considered "the nature, character, severity and duration of Respondent Bulega's sexual harassment" and determined that Bulega's physical touching and offensive remarks over a 13-month period, which caused Respondent to struggle to eat and sleep and avoid physical contact with her fiancé for several months, supported the Hearing Officer's award of emotional distress damages.

Finally, in considering Complainant's Petition for Reasonable Attorney's Fees and costs, the Commission reduced the attorneys' fee award for the fees and costs associated with Complainant's voluntary polygraph examination. The Commission explained that the Complainant offered no reason why the polygraph examination was necessary and expounded that a polygraph examination is "at best generally unnecessary and at worst contrary to the public interest." *Osorio*, 45 MDLR at 3.

Practice Note:

Practitioners should not subject their clients to voluntary polygraph examinations as they are not necessary to substantiate a complainant's allegations and the Commission will not likely reimburse complainants for attorney's fees and costs associated with the time and expense related to a polygraph examination.

Hearing Officer Finds Respondent Liable for Disability Discrimination, Retaliation, and Constructive Discharge, Awards Complainant Lost Wages and Emotional Distress Damages, Imposes Sweeping Discrimination Prevention Training Orders and a Civil Penalty

In *Joseph* v. *Massachusetts Department of Children and Families,* 45 MDLR 5 (May 5, 2023), the Complainant asserted claims against the Massachusetts Department of Children and Families ("DCF"), alleging that DCF: (1) discriminated against her on the basis of her disability by failing to provide her with reasonable accommodation in violation of MGL c. 151B § 4(16); (2) retaliated against her in violation of MGL c. 151B, § 4(4); and (3) constructively discharged her in violation of MGL c. 151B.

On July 11, 2016, the Complainant commenced employment at DCF. Shortly after she began working, Complainant informed her direct supervisor and the Area Director that she had a brain tumor and had been diagnosed with Cushing's disease and suffered several related medical complications. On January 24, 2017, the Complainant underwent surgery to remove her tumor and took an approved medical leave pursuant to the Family and Medical Leave Act ("FMLA"). On April 27, 2017, the Complainant was cleared to return to work with certain restrictions.

Upon her return to work, Complainant made four (4) separate accommodation requests. In her first request on April 28, 2017 (the "April 28, 2017 Accommodation Request"), Complainant faxed to the DCF Diversity Officer / ADA Disability Coordinator completed reasonable accommodation and medical inquiry forms on which Complainant's physician identified certain restrictions, which included no driving. After conferring with Complainant's supervisor, DCF denied the reasonable accommodation request on the grounds that driving was an essential function of Complainant's position. DCF did not engage in any dialog with Complainant or her physician regarding any alternative to driving. The Hearing Commissioner noted that Complainant's job description stated that the position *may* require a driver's license (but did not require it), and the record indicated that DCF had allowed no-driving restrictions as reasonable accommodations for social workers in 2016-2017, including the entire duration of one employee's pregnancy.

On June 13, 2017, Complainant emailed a second accommodation request (the "June 13, 2017 Accommodation Request") which removed the no-driving restriction. Complainant returned to work on June 19, 2017 and signed a temporary modified duties agreement, which noted that Complainant was able to drive, but restricted her caseload a maximum of 10 cases and limited her hours to 20 hours per week through July 24, 2017, when she would be reevaluated by her physician. Although Complainant's physician had requested that Complainant be given a flexible schedule, the modified duties agreement provided for a fixed schedule. After Complainant informed the Area Director that she was still suffering from headaches and dizziness, the Area Director stated that she would not assign Complainant to cases that required driving.

Also on June 19, 2017, Complainant learned that she had been reassigned to a new unit, in a different office space on a different floor, reporting to a new manager. In her new workspace, Complainant's desk was located directly under the air conditioner vent, and her desk and chair were ripped and broken. Complainant called out sick from ailments triggered by the cold temperatures from the vent. From June 19, 2017 to July 9, 2017, Complainant repeatedly complained to her current and former supervisors about her working conditions (the "Workspace Relocation Request"), but she did not complete a reasonable accommodation form. On July 10, 2017, after not receiving any feedback about a potential accommodation, Complainant emailed the ADA Disability coordinator regarding her workspace and its triggering and adverse effects on her health. On July 11, 2017, Complainant's supervisor expressed frustration to the coordinator that Complainant had "gone over [her] head" and found wrote that Complainant's conduct was "unacceptable." *Joseph,* 45 MDLR at 7. On July 12, 2017, DCF moved Complainant's office space, so she was no longer directly under the vent.

On July 24, 2017, Complainant's physician revaluated her and determined that she could increase her hours to 30 hours per week but retained her caseload limitation of no more than 10 cases (the "July 24, 2017 Accommodation Request"). On July 25, 2017, The ADA Disability coordinator denied the requested accommodation on the grounds that it would impose an undue hardship on DCF because other caseworkers would have to take on additional cases to enable Complainant to continue with her reduced caseload. The Hearing Commissioner noted, however, that the Collective Bargaining Agreement[5] ("CBA") provided several methods of

5. [See next page.]

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offloading cases that an Area Director was required to use and that the CBA also provided that part-time social workers must be assigned cases proportionate to the number of hours worked. Respondents could not state whether the office would be overburdened by Complainant's reduced course load, and the ADA Disability coordinator testified that she did not analyze or investigate the office's operational needs when assessing Complainant's July 24, 2017 Accommodation Request.

On July 26, 2017, Complainant emailed the ADA Disability coordinator for information about the denial and was informed it was with the Commissioner of DCF for review and approval. On July 26, 2017, Complainant attempted to speak with DCF's Commissioner about the ADA Disability coordinator's determination, before the Commissioner issued the final decision, but she was referred back to the ADA Disability coordinator. Complainant's attempt to contact her union representative for assistance was also ignored. On August 13, 2017, Complainant read the ADA Disability coordinator's letter that denied her accommodation request but believed that the Commissioner was still reviewing the decision.

On August 14, 2017, the Area Director informed Complainant that she needed to decide what to do about her employment, observing that she could go back to work full time, take unpaid leave, or resign, and stating that Complainant must decide that same day. Complainant emailed the ADA Disability coordinator for guidance, and subsequently emailed the Area Director to inform her that she was distraught and needed to leave work. On August 15, 2017, Complainant determined that she was unable to take unpaid leave because she would be unable to support her family, and she was unwilling to disregard her physician's recommendations and compromise her health. Complainant had lost hope and believed that her only option was to resign.

In her analysis, the Hearing Commissioner analyzed each of the four separate accommodation requests, finding that DCF discriminated against Complainant for failing to accommodate two of her requests, but dismissing the other two. For the April 28, 2017 Accommodation Request, the Hearing Commissioner found that driving was not an essential function of the position, because it was not required by the job description, DCF admitted that a social worker could perform its position without driving, and DCF had accommodated this request in the past. Thus, the Commission found that Complainant was a qualified disabled person who was able to perform the essential functions of her role with an accommodation and that DCF's denial of this request violated MGL. C. 151B § 4(16).

The Hearing Commissioner dismissed Complainant's claim that DCF had failed provided a reasonable accommodation in regard to the June 13, 2017 Accommodation Request because except for establishing a fixed scheduled for Complainant, DCF granted the accommodation request in its entirety. The Hearing Commissioner also dismissed Complainant's allegation that DCF failed to accommodate her Workspace Relocation Request, basing its decision on the fact that Complainant did not complete the request for accommodation paperwork as she had done for her previous requests.

With regard to the July 24, 2017 Accommodation Request, the Hearing Commissioner determined that the DCF's failure to accommodate Complainant's disability violated MGL c. 151B § 4(16) on two independent grounds. First, DCF failed to establish that continuing to permit Complainant to work with a reduced caseload posed an undue burden to the organization. Second, DCF utterly failed to engage in the interactive dialogue regarding Complainant's request, summarily denying it the day after it received the request.

The Hearing Commissioner also found that DCF retaliated against Complainant by creating a hostile work environment on the basis of her disability, explaining that the creation and continuation of the hostile work environment constitutes retaliatory adverse action. *See Clifton* v. *Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 616-17 (2005) (citing *Noviello* v. *Boston*, 398 F.3d 76, 89-91 (1st Cir. 2005).

Finally, the Hearing Commissioner considered whether Complainant had been constructively discharged, explaining that the standard is whether "the working conditions were so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Joseph*, 45 MDLR at 14. Here, the Commission found that the aggravated working conditions coupled with DCF's same-day ultimatum that Complainant decide whether she take unpaid leave for an extended period or return to work without restriction against her physician's recommendation, was so intolerable that a reasonable person would be left with no choice but to resign. *Contrast Gurnett* v. *Organogenesis, Inc*., 45 MDLR 17 (June 9, 2023) (noting that "more than a mere failure to provide a reasonable accommodation is ordinarily necessary to prove constructive discharge," and finding that while the offer of a severance package and the Head of Human Resources' intimidating conduct was distressing, it was not so objectively intolerable that a reasonable person had no choice but to resign).

In addition to awarding Complainant lost wages and an award of emotional distress damages associated with DCF's denial of Complainant's July 24, 2017 Accommodation Request, the Hearing Commissioner also issued a comprehensive five-year discrimination-prevention training orders to DCF, requiring it to review its current policies and require many of its employees to participate in trainings conducted by the Commissions training unit,[6] and imposed a $10,000 civil penalty for failing to accommodate Complainant on two separate occasions and for retaliating against her.

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5. Social workers at DCF, like the Complainant, were unionized and their job duties were regulated by a collective bargaining agreement.

6. On September 13, 2023, the Hearing Commissioner granted, in part, Respondent's Motion to Reconsider and Amend the Decision, modifying the training and policy requirements imposed under the May 5, 2023 decision by extending the deadline for DCF to provide the Commission with its policy regarding requests for accommodation, and narrowing the DCF personnel that are required to attend the Commission's trainings. The decision was unchanged in all other respects. *Joseph* v. *Massachusetts Department of Children and Families*, 45 MDLR 53 (Sept. 13, 2023)

Practice note:

Although the Complainant in *Joseph* prevailed on two claims, note that the Commission rejected the claim that the employer failed to accommodate when it agreed to nearly all the proposed restrictions barring one. Also note that if an employer has reasonable accommodation paperwork and/or an established process for requesting an accommodation, practitioners should instruct employees to complete the paperwork and/or follow that process as failure to do so may result in a finding that the employee did not request an accommodation, particularly if the employee had filled out the paperwork or followed the process in the past.

Finally, when assessing a potential constructive discharge claim, practitioners should advise employees that failure to provide a reasonable accommodation, in and of itself, is likely insufficient to prove constructive discharge. Instead, practitioners should look for evidence of disability-based harassment or other aggravating circumstances to establish hat the workplace was so objectively intolerable sufficient to prove constructive discharge in the disability discrimination matters. ■

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In 2023, there were five notable Commission hearing decisions in which employers were found liable for claims of discrimination based on disability, sexual harassment, and retaliation. In this report, we highlight the Commission's reasoning with respect to each of those findings and the related damages awards. We also summarize "key takeaways" for employers in light of these 2023 decisions.

Hearing Officer Finds Employer Liable for Disability Discrimination and Awards $75,000 in Emotional Distress Damages

In *Gurnett and MCAD* v. *Organognesis , Inc.*, 45 MDLR 17 (2023), the Hearing Officer found that Organognesis discriminated against Complainant based on her disability (Fibromyalgia) when it denied her "very reasonable" request to work from home two days each week as an accommodation. The Hearing Officer awarded Complainant $75,000 in emotional distress damages and ordered mandatory training for all Organognesis managers and human resources personnel in Massachusetts.

Complainant worked for Organognesis in its Purchasing Department from May 2013 to November 2017. In 2016, Complainant began experiencing pain that was exacerbated by her 1-2 hour commute driving to and from work. Complainant was diagnosed with fibromyalgia in January 2017. Between August 2016 and May 2017, Complainant notified her manager of her pain and eventual diagnosis and requested, at her doctor's suggestion, to work from home two days each week. Complainant's manager told her "no" and that the issue was "non-negotiable." In May 2017, Complainant's manager involved human resources, and human resources began corresponding with Complainant about her request. In July 2017, Organognesis offered Complainant the use of a conference room to stretch, a stand-up desk, and the opportunity to change her work hours. Organognesis did not offer Complainant any remote work accommodation. Complainant resigned her employment in November 2017.

The Hearing Officer found that Complainant could perform the essential functions of her job while working from home two days a week and noted that Complainant worked remotely ten to fifteen times in 2016 and 2017 without receiving any criticism regarding her work performance on those occasions. The Hearing Officer further found that Organognesis failed to engage in an interactive dialogue with Complainant because it never offered her an accommodation that was "effective for its purpose." The Hearing Officer noted that the Company's offers (a conference room, stand-up desk, and modified schedule) would not have served as effective accommodations in light of the root cause of Complainant's pain (the commute).

As a result of its findings, the Hearing Officer awarded Complainant $75,000 in emotional distress damages.

Key Takeaways for Employers

- Training: Employers should consider instituting reasonable accommodation training programs to ensure that managers and human resources personnel understand how to recognize and respond to requests for accommodation, including how to ensure that offered accommodations are "effective for their purpose."
- Remote Work: Employers should be mindful that the Commission may consider prior instances of remote work as evidence that an employee can perform the essential functions of their job remotely.

Hearing Officer Finds Employer Liable for Disability Discrimination and Awards $6,600 in Back Pay and $10,000 in Emotional Distress Damages

In *Jenson* v. *Rockdale Care & Rehabilitation Center*, 45 MDLR 54 (2023), the Hearing Officer found that Rockdale Care & Rehabilitation Center ("Respondent") discriminated against Complainant on the basis of his disability (Post-Concussive Syndrome ("PCS")). The Hearing Officer defaulted Respondent after it failed to appear at the hearing or to file a post-hearing brief.

Respondent employed Complainant as a nurse on the night shift from May 2016 to November 2018. Complainant had PCS which, in his case, manifested as migraines and mildly blurred vision. Complainant's supervisor, the Director of Nursing, was aware of his condition. Complainant frequently volunteered to work double shifts from 3:00 pm until 7:00 am. On some occasions after working a double shift, particularly when the nurse on the next shift arrived late, Complainant would call out of his next shift which began fewer than 8 hours later. (Under Massachusetts law, nurses cannot work more than 16 consecutive hours, and after 16 hours, nurses are entitled to 8 consecutive hours off. MGL c. 111, § 226(f).)

Complainant reported that his PCS symptoms were exacerbated if he did not have enough time to rest between shifts, and although she sometimes was understanding when Complainant "called out," Complainant's manager sometimes expressed annoyance at his request. Complainant estimated that he either called out or re-

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quested to arrive late twice per month, and he eventually reduced the number of double shifts that he volunteered to work.

In November 2018, Respondent terminated Complainant's employment. Respondent cited Complainant's "call outs" as the reason for termination.

The Hearing Officer found that Complainant did not fail to perform the essential functions of his job when he called out because of his PCS symptoms after working more than 16 consecutive hours when he was expected to return to work in fewer than 8 hours. The Hearing Officer noted that, prior to terminating Complainant's employment, Respondent never issued any disciplinary action to Complainant regarding his attendance or call outs. The Hearing Officer credited Complainant's testimony that his supervisor expressed antipathy toward him for calling out and found that Complainant's termination was motivated by discriminatory animus related to his call outs.

The Hearing Officer awarded Complainant $6,600 in lost wages and $10,000 in emotional distress damages.

Key Takeaways for Employers

- Performance Management: Employers should be mindful that the Commission may consider an employer's prior inaction with respect to performance and/or attendance concerns when assessing whether a later adverse employment action may have been motivated by discriminatory animus. As such, employers should take care to document performance and attendance concerns when they arise.

- Responding to Complaints: Employers should timely respond to complaints filed with the Commission and appear at hearings to avoid default. In the event of a default, respondents have ten calendar days to petition the Commission to vacate the entry of default and to reopen the case for good cause shown.

Hearing Officer Finds Employer Engaged In Disability Discrimination, Awards $101,567 In Lost Wages and $35,000 In Emotional Distress Damages

In *Joseph* v. *Mass. Dep't of Children And Families*, 45 MDLR 5 (2023), the Commission awarded Complainant $101,567 in lost wages and $35,000 in emotional distress damages after the Hearing Officer found that the Massachusetts Department of Children and Families ("DCF") failed to accommodate Complainant's disability (Cushing's Disease), constructively discharged Complainant, and subjected her to a retaliatory and hostile working environment. The Commission issued DCF a $10,000 civil penalty and ordered certain DCF personnel to engage in annual training for five years.

Complainant worked for the DCF as a social worker from July 2016 until August 2017. In January 2017, Complainant had surgery to remove a brain tumor, and she took a leave of absence under the Family and Medical Leave Act ("FMLA") to recover. While she was initially cleared to return to work on April 28, 2017, DCF denied Complainant's request for accommodation for a reduced schedule and case load and not to have driving duty on the basis that driving was an essential function of her job. Complainant then extended her leave of absence until June 19, 2017, and in the meantime, she submitted a new request for accommodation through at least July 24, 2017 with the same reduced schedule and case load limitations—but removing the no-driving restriction. DCF approved the request. On July 24, 2017, Complainant submitted a new request for accommodation which contained the same restrictions as the prior request, except it increased the number of weekly hours Complainant could work from 20 to 30. DCF denied the request the next day, notifying Complainant that the requested accommodation would cause DCF an undue hardship.

On August 14, 2017, Complainant's manager told Complainant that Complainant either needed to take an unpaid medical leave, return to work full time, or resign—and that Complainant had to decide that same day. On August 15, 2017, Complainant resigned her employment.

The Hearing Officer found that DCF's denials of Complainant's April 28 and July 24, 2017 requests for accommodation constituted discrimination in violation of MGL c. 151B. Specifically, the Hearing Officer found that driving was not an essential function of Complainant's job, noting that her job description did not include a driving requirement, and the Hearing Officer found that DCF could accommodate Complainant's requested reduced caseload without facing an undue hardship. The Hearing Officer further found that DCF did not engage in an interactive dialogue with respect to Complainant's July 24 request.

Moreover, the Hearing Officer found that DCF constructively discharged Complainant when it gave her a "time-pressured ultimatum" on August 14, 2017. Finally, the Hearing Officer found that, taken in combination, DCF's conduct with respect to Complainant's requests created a retaliatory and hostile work environment. The Commission awarded Complainant $101,567 in lost wages and $35,000 in emotional distress damages.

Key Takeaways for Employers

- Accommodation Requests: Employers should ensure that they engage in an interactive dialogue with employees who request accommodations. If an employer considers a particular job function "essential," it should include the job function in the relevant job description.

- Training: Employers should consider instituting anti-discrimination training programs to reduce the risk of workplace discrimination. The Commission may order employers to undertake such training in the event of a finding of discrimination.

In *Osorio and MCAD* v. *Standhard Physical Therapy, Vincent Bulega, and Robertson Tambi*, 45 MDLR 1 (2023), Respondents appealed the Hearing Officer's determination that Respondents were liable for sexual harassment and retaliation. The Commission affirmed the Hearing Officer's decision. As to the claim of sexual harassment, the Hearing Officer credited Complainant's testimony as "clear, sincere, straightforward, and consistent" when she testified about Respondent Bulega's conduct, which included physically touching Complainant and making offensive comments, advances, and requests. The Hearing Officer found that these be-

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haviors created a sexually hostile work environment. As to retaliation, the Hearing Officer found that "a retaliatory rationale [was] the motivating cause" for terminating Complainant's employment the day after she complained about sexual harassment. The Hearing Officer did not credit Respondents' "contradictory and shifting" reasons for the termination. Specifically, Respondents claimed that the Company terminated Complainant for handing out fliers at work without permission, but the Hearing Officer found that this was a pretext, noting that Respondent Bulega testified that he had known about the fliers for at least one month prior to the termination. The Commission upheld the Hearing Officer's award of $50,000 in emotional distress damages and $3,200 in lost wages to Complainant. Employers that plan to respond to employee misconduct should understand that even a several-week intervening period between the conduct and the response could compromise the employer's position if the employee engages in protected conduct in the interim.

In *Roberge* v. *Sullivan, Keating & Moran Insurance Agency*, 45 MDLR 43, Respondent appealed the Hearing Officer's determination that Respondent discriminated against Complainant on the basis of his disability (Diabetes) when it denied Complainant's accommodation request. The Commission affirmed the Hearing Officer's decision, rejecting Respondent's arguments that the finding should be dismissed because there was an investigative finding of no probable cause and because some of the allegations were untimely. The Commission addressed Respondent's first argument by stating that an investigative disposition is not a final determination, and it noted that Respondent waived the timeliness argument because Respondent failed to raise it as an affirmative defense in its position statement, at the time of certification, or in the joint pre-hearing memorandum. Respondent raised the defense for the first time in its post-hearing brief. Employers should be mindful to raise all available defenses in a timely fashion—and should understand that the Commission may not necessarily view an investigator's lack of probable cause finding as dispositive. ■

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