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The Commission issued eight employment decisions this quarter: three in favor of Complainant, including one Full Commission decision, and five in favor of Respondent. We highlight the three decisions in favor of Complainants below.

Employer's Failure To Engage In The Interactive Process During The Hiring Process Regarding A Candidate's Disability Results In A Six Figure Damage Award

In *Kogut* v. *Coca Cola Co.*, 34 MDLR 43 (2012), the Hearing Commissioner found the Respondent liable for disability discrimination based upon its decision to revoke an offer of full-time employment and terminate Complainant from his temporary position days after discovering that Complainant was blind in his left eye.

Complainant, who became permanently blind in his left eye following a car accident in 1989, began working at Coca-Cola as a temporary machine operator in July 2007. Notwithstanding his blindness, Complainant performed his job duties as a machine operator without incident for nearly seven months, and was encouraged by his direct supervisor to apply for a full-time machine operator position. In January 2008, Complainant was offered a full-time machine operator position, conditioned upon his passing a post-offer medical examination. In connection with the medical examination, Respondent learned that Complainant was blind in his left eye. Three days later, Respondent not only rescinded their offer of full-time employment, but also terminated Complainant from his temporary position.

Respondent did not contest that Complainant's blindness constituted a disability under MGL c. 151B, or that Complainant was not hired because of his disability. Rather, Respondent argued that Complainant was not a "qualified handicapped person" because operating a forklift was an essential function of the machine operator position, and Complainant's blindness rendered him unable to safely perform the essential functions of the position.

The Hearing Commissioner rejected the "essential function" argument based upon the evidence that the machine operator position at issue could be performed without the need to operate a forklift. The Hearing Commissioner also rejected Respondent's "safety" argument in light of the evidence that Complainant's work history was probative of Complainant's ability to operate machinery safely and that Respondent did not require *all* employees to undergo vision testing.

Moreover, Respondent's "mistaken" belief regarding the essential functions of the job only highlighted Respondent's complete failure to engage in the interactive process. While recognizing that the law permits employers to condition employment offers on the results of a post-offer medical examination in order to determine whether an employee is capable of performing the essential functions of the job, the Hearing Commissioner noted that neither Respondent's human resources staff nor its medical staff ever met with Complainant or his direct supervisors to evaluate the actual position for which Complainant was being hired, or discussed possible accommodations. Based upon the unilateral nature of its decisions, the Hearing Commissioner determined that Respondent revoked Complainant's job offer for "no other reason than unjustified and uninformed consideration of his handicap."

Complainant was awarded $75,000 for emotional distress. The Hearing Commissioner credited Complainant's testimony that he did not feel like himself after his termination and that he felt "sad and worthless." Complainant's spouse further testified that Complainant's termination put a strain on their marriage because Complainant began to drink more, grew more negative and distant. In sum, the Hearing Commissioner found that "the loss of the prospect of full permanent employment with job security, good wages and benefits caused Complainant to suffer emotionally, and exacerbated his insomnia and depression."

Complainant was also awarded $45,636 in lost wages. The Hearing Commissioner refused to offset this award based upon the after acquired evidence presented by Respondent that Complainant failed to disclose that he had been terminated from a previous job. The Hearing Commissioner found this evidence irrelevant to Complainant's handicap discrimination claim and noted that she did not believe that Respondent would have revoked Complainant's offer of employment given his previous performance and

1. We would like to thank our Law Clerk, Michelle De Oliveira, for her contributions in preparing this commentary.

his supervisor's satisfaction with his work as a temporary employee.

Full Commission Affirms Findings That An Employer's Preemptive Termination And Disparate Application Of Its Leave Policies Constitute Violation Of The MMLA And MGL c. 151B

In *McFail* v. *Sylvania Lighting Services,* 34 MDLR 25 (2011), the Full Commission affirmed the Hearing Officer's findings that Respondent violated the MMLA and MGL c. 151B by terminating Complainant just ten days before the birth of her child and related maternity leave. It also cited the Respondent's unyielding and disparate application of its job retention policy toward Complainant who had been required to take leave prior to giving birth because of a difficult pregnancy.

On appeal, Respondent argued that Complainant's claim of sex discrimination under MGL c. 151B had previously been waived and should not have been considered by the Commission. The Full Commission found this argument unpersuasive in light of the fact that the parties' Joint Pre-Hearing Memorandum indicated that this very issue was one of the "Contested Issues of Law." Moreover, the Full Commission found the Hearing Officer had properly determined that the "evidence presented warranted a finding" on a MGL c. 151B claim, and that the conclusion that "a violation of the MMLA may also constitute sex discrimination in violation of Chapter 151B… is correct as [a] matter of law."

With respect to Complainant's 151B claim, the Full Commission rejected Respondent's argument that there was insufficient evidence to support a finding of liability. The Full Commission found that there was ample evidence to support the Hearing Officer's finding that Complainant had been subjected to disparate treatment based upon her sex/pregnancy including the evidence that Respondent was lax in its notification of its leave policy and its exceptions; failed to inform Complainant of the date her leave would expire; failed to inform Complainant that she could seek an extension of the twenty-six week policy; failed to inform Complainant that it had previously granted extensions to other employees; and failed to be forthright with Complainant regarding her employment status following a brief pregnancy-related hospitalization before giving birth.

With respect to Complainant's MMLA claim, though the Full Commission recognized that the Hearing Officer did not credit Complainant's after-the-fact testimony that she would resume working full-time eight weeks after giving birth, the Commission noted that this did not negate the fact that Complainant had met her notice obligations (including notice of her intent to return to work) under the MMLA but was denied maternity leave given her termination just days before giving birth.

As to damages, the Commission affirmed Complainant's emotional distress award of $25,000, finding that Respondent's liability for the harm caused by its discriminatory actions is not extinguished simply because Complainant had other stressors in her life. The Full Commission awarded Complainant attorneys' fees in the amount of $111,478. While finding that the hourly rates of $250-$375 were reasonable, the total award was reduced by 30% because certain tasks appeared to be excessive and/or duplicative.

An Employer's Benevolent "Protection" Of Pregnant Employee Constitutes Unlawful Sex/Pregnancy Discrimination

In *Scaife* v. *Florence Pizza Factory Corp.*, 34 MDLR 19 (2012), Complainant alleged that she had been subjected to discrimination and terminated because of her pregnancy in violation of MGL c. 151B. Upon learning of her pregnancy, Respondent began treating Complainant with disdain, forced her to refrain from engaging in certain tasks, and eventually terminated her while she was six months pregnant.

The Hearing Officer found that Complainant, who had worked for Respondent as a cashier from April through September 2008, presented direct evidence of discrimination based on her pregnancy. Upon learning that Complainant was pregnant, Respondent's attitudes toward her immediately changed. Respondent instructed Complainant to refrain from engaging in certain tasks as she became visibly pregnant because it would "not [be] good for her or the business" if she were to continue performing such tasks. The Respondent also expressed concern about her ability to perform her duties while pregnant and decided to reduce her hours and to eventually terminate her while she was pregnant.

Though Respondent attempted to refute evidence regarding the circumstances surrounding Complainant's termination, by alleging that Complainant's hours were reduced because of a "decline in business" and that she was terminated because of a "decline in her performance," the testimony was not credited. Indeed, Respondent was unable to produce any credible evidence to document either an alleged decline in business or Complainant's performance mishaps. Further, Respondent also provided inconsistent testimony regarding the decision to terminate Complainant and with regard to its identification of the ultimate decision-maker. Accordingly, Respondent was found liable for its discriminatory conduct.

In addressing Respondents' purported concerns about the health of Complainant and her baby, the Hearing Officer emphasized that courts have rejected an employer's "fetal protection policy," and therefore, an employer may not require a pregnant employee to stop working because of its concern about the safety of the fetus. Indeed, an employer is only to consider the employee's ability to complete her assigned tasks, and it is the employee who decides whether to continue working while pregnant.

Complainant testified that she felt "embarrassed, ashamed, anxious and discouraged" because of Respondent's negative comments regarding her pregnancy. As a result, Complainant cried, suffered from insomnia, nausea and anxiety, had difficulties concentrating in the medical assistant training program in which she had been enrolled since August 2008, and experienced difficulties in her personal relationships. Complainant was awarded $20,000 for emotional distress, and $4,662 in lost wages for approximately eighteen weeks of lost income. ■