

Patricia A. Washienko, Esq.  
**Freiberger & Washienko LLC**

Katherine J. Michon, Esq.  
**Shilepsky Hartley Robb Casey Michon, LLP**

Amy L. Stutius, Esq.  
**Shilepsky Hartley Robb Casey Michon, LLP**

The first quarter of 2013 saw the Commission issue twelve employment decisions: seven in favor of Complainants, five in favor of Respondents, and one a decision of the Full Commission. We review below the Full Commission decision, which confirmed an employer's duty to engage in a reasonable accommodation dialogue in connection with a job transfer; a decision in which the Hearing Officer awarded Complainant \$50,000 in emotional distress damages as a result of retaliation suffered by the Complainant after she and her husband complained of discrimination; and the decisions in the two sexual harassment cases, in which the Hearing Officer awarded \$50,000 and \$25,000, respectively, in emotional distress damages.

#### **Full Commission Confirms Breadth of Employer's Duty To Engage In Interactive Dialogue In Connection With Job Transfer**

In *Doble v. Engineered Materials Solutions*, 35 MDLR 36 (2013), the Full Commission confirmed that even in connection with a re-organization and reduction-in-force, an employer has a duty to reassign the employee to a position he is qualified for and can perform, and if it has any questions about the extent of the employee's impairment and limitation, it has an obligation to engage him in an interactive conversation about the jobs he is qualified for.

The facts are as follows. Although Complainant, a 35-year employee of Respondent metal manufacturing company (and its predecessor), suffered from debilitating osteoarthritis, he was able to perform the essential functions of his 8-hour shift job as a "roll change" operator. In 2005, however, Respondent eliminated his position and unilaterally reassigned him to a 12-hour shift position that, due to his disability, he would be unable to perform. Although Complainant never "formally" requested a reasonable accommodation or submitted medical documentation in support of same, Respondent was on notice of Complainant's disability even before the reorganization. Moreover, after the reassignment, Complainant specifically informed Human Resources personnel of his condition and his need for accommodation. Nevertheless, Respondent failed to engage in a dialogue and failed to provide any accommodation. Complainant, who was unable to perform the new job, submitted his resignation; the Commission concluded that Complainant was constructively discharged.

The Hearing Officer below had found that the decision to eliminate Complainant's position was not unlawful, but nevertheless had concluded that Respondent's knowledge of Complainant's condition gave rise to an obligation to reassign the Complainant to a position he was qualified for and could perform. The Full Commission upheld that decision, stating that a layoff "does not mean that [an employer's] duty to accommodate remaining employees who are disabled ends." According to the Full Commission decision, if an employer has any questions about an employee's limitations, it had a duty to engage in an interactive dialogue with the employee *before* reassigning him to a new position, and it certainly does so once an employee raises such concerns. The Full Commission decision also confirms that it is the employer's duty to initiate that interactive dialogue.

#### **\$50,000 Emotional Distress Damages Award Issues To Complainant Who Suffered Retaliation Following Her Own, and Her Husband's, Claims of Discriminatory Conduct**

In *Scanlan v. Department of Corrections*, 35 MDLR 52 (2013), Complainant alleged that she suffered unlawful retaliation after she filed a complaint of gender discrimination and her husband filed his own, separate complaint of discrimination against their joint employer. After review of the evidence introduced at Public Hearing, the Commission agreed.

Complainant was a corrections officer at the Concord Farm, a minimum-security prison managed by the Respondent Department of Corrections. She worked at the facility since 1991 and was regarded as one of its more capable officers. Her record was unblemished.

In March 2005, Complainant's husband was demoted and transferred. Thereafter, on June 29, 2005, Complainant's husband was investigated by the State Police for allegedly making threats against the Commissioner of the Department, which turned out to be unfounded. On July 1, 2005, Complainant learned that her assignment was being changed, even though policy dictated that female officers should not be used for that specific assignment unless staffing levels mandated that there were no other options. Complainant believed that this change was made deliberately to upset and harass her. Complainant made a formal written complaint on July 4, 2005, in which she stated her belief that Lieutenant Scott Maynard, her supervisor, was harassing her by giving her this changed assignment. Complainant heard nothing further about her complaint, despite her repeated inquiries, until August

23, 2005, when she was advised that Respondent believed no further investigation was warranted. These purported findings were not sent to the Office of Affirmative Action for review as required by Department Policy. Complainant subsequently received a written notice dated October 24, 2005, stating that her allegations were not sustained. Respondent continued to treat Complainant in a different and less favorable manner through at least the fall of 2007.

Separately, in the fall of 2005, Complainant's husband filed a Charge of Discrimination against Respondent. In late November 2005, shortly after the Respondent filed a Position Statement in connection with that complaint, the Superintendent of the Concord Farm, James Saba, sent an email to Administrative Lieutenant Robert Lennon, one of Complainant's supervisors, ordering him to monitor Complainant to ensure that she was conducting "pat frisk" searches of inmates, purportedly because contraband was flowing through her work crew. Although there was no evidence to support that allegation, Lennon did so, ordering Complainant to perform "pat frisk" searches of male inmates in front of other male inmates and male officers, publicly humiliating her. (It was established practice that female officers would not conduct "pat frisk" searches of male inmates if male corrections officers were available to do so.) When she asked to confirm the new policy with her union, Lennon confronted her in a physically intimidating manner and ordered her to go home.

On December 1, 2005, Complainant filed another incident report, stating that she believed she was being subjected to a pattern of harassment and intimidation. Respondent failed to acknowledge or investigate her complaint. Instead, on December 21, 2005, Complainant was suspended, purportedly for refusing a direct order. In February 2006, she filed the instant Charge.<sup>1</sup>

In considering Complainant's retaliation claim, the Hearing Officer concluded that Complainant engaged in protected activity when she filed a complaint on July 1, 2005 reporting that she believed she was being harassed on account of her gender. Although there was some question as to the motivation for the treatment of Complainant (i.e., there was a suggestion that Complainant was targeted not due to her gender but because of her association with her husband), the Hearing Officer found that Complainant had a good faith belief that she was targeted for harassment based on gender, as she was one of only two female corrections officers in the entire facility and she was subjected to punitive treatment.

The Hearing Officer also found that, after Complainant complained, Maynard engaged in retaliation: he consistently denied her regular assignments, and regularly gave her less desirable posts with inadequate and/or inappropriate facilities for women (indeed, female officers were not assigned to those posts for precisely that reason). Whenever he was on duty, he ordered that she be given road assignments, so she was not in the same facility as

he was. He encouraged and/or ordered other supervisors to give her undesirable assignments, and threatened other corrections officers that if they swapped assignments with her, they would suffer adverse consequences. One male officer testified that it was obvious to all the corrections officers that Maynard was targeting Complainant.

In defense of its actions, Respondent could offer no legitimate, non-discriminatory reason for the treatment of Complainant, other than that all posts and assignments were routinely rotated. However, given that the evidence showed a consistent past practice from which Respondent diverged in its treatment of Complainant, the Hearing Officer concluded the actions taken were in retaliation for Complainant's complaint of gender harassment.

The Hearing Officer also noted that Complainant's husband had himself engaged in protected activity, and considered that the actions taken against the Complainant may have been in retaliation for his complaint of discrimination. Citing *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), the Hearing Officer found such a claim of "zone-of-interest" retaliation was cognizable. Indeed, not long after Respondent filed its Position Statement in Complainant's husband's matter, Saba targeted Complainant for further adverse treatment, pat-frisking male inmates, which was contrary to long-standing practice, and for which there was no justification. Accordingly, the Hearing Officer concluded this was unlawful retaliation directed against Complainant for her husband's complaint.

Complainant (and her husband) provided compelling testimony as to the humiliation and embarrassment she suffered from the ordered pat frisk search and unwarranted discipline / suspension imposed, the disruption to her professional advancement and personal life caused by the ongoing harassment, the physical symptoms she suffered (including migraines, back and neck problems and insomnia), and the strain on her family relationships. Based on that testimony, the Commission awarded Complainant \$50,000 in emotional distress damages.

#### **Offensive Sexual Harassment Generates Emotional Distress Damages Award of \$50,000**

In *Avila v. J&S Restaurant Enterprises, Inc.*, 35 MDLR 19 (2013), Complainant, a waitress, charged her employer and manager, individual respondent Jeffrey Abrams, with sexual harassment and constructive discharge as a result of his assault and unwelcome sexual advances toward her. After considering the evidence introduced at Public Hearing, the Commission readily found in her favor.

The facts are as follows. Complainant is an alcoholic who has struggled throughout her adult life to maintain her sobriety. In 2007, after successfully completing an alcohol rehabilitation program, she began working as a waitress for Respondent. She

1. Complainant also appealed her suspension to the Civil Service Commission. In 2009, the Civil Service Commission concluded that requiring Complainant to pat-frisk inmates under the circumstances was a deliberate breach of long-established practice and was not based on emergency or necessity, but was done to cre-

ate an opportunity to target and provoke Complainant. The suspension was overturned.

enjoyed her work there and largely successfully maintained her sobriety throughout her employ.

Throughout that same period, Abrams repeatedly engaged in inappropriate behavior with the female waitresses. Among other things, Abrams massaged the shoulders of one young waitress, smacked another on the butt, unhooked waitresses' bra straps, and made rude sexual comments and sexual innuendos to many of the waitresses, including Complainant. On one occasion, Abrams followed Complainant and another waitress into a storage closet, shut the door behind him, trapping them, and turned out the lights. This type of behavior was confirmed another waitress, who stated that Abrams would follow her into the dry storage area and shut the door behind them. This same waitress quit working at the restaurant because she was "creeped out" by Abrams. On several occasions, Abrams followed Complainant out to her car at the end of her shift and asked her to join him for a drink; he implied that doing so would give her some job security. Abrams' repeated requests made her extremely uncomfortable, not least because Complainant is married, but she declined politely because she did not want to be rude to her boss.

On June 10, 2009, at the end of the shift and after the restaurant had closed, Abrams cornered Complainant, put his arms around her, and placed a hand on her breast. In response, Complainant punched him in the stomach and wrenched away from him, but Abrams grabbed her by the arm and forced her to the floor. In response to her cry for help, a female bartender confronted Abrams with a broom, and Complainant escaped. Abrams then pushed the female bartender into a booth. After further confrontation, the bartender also managed to escape; both women left the premises together. (A male employee heard the entire altercation.)

Complainant immediately informed both her son and husband about the incident, but tried to continue to work at the restaurant. Indeed, she and her husband discussed the matter and planned that he would pick her up each night after work to ensure such an incident would not happen again. Complainant was so distraught, however, that she was only able to work two more shifts at the restaurant. Instead, Complainant began to drink heavily and "hit rock bottom." At the urging of her therapist, Complainant filed a criminal complaint against Abrams on June 22, 2009, charging him with indecent assault and battery and with assault and battery. She filed the instant matter at the MCAD at the suggestion of the police.

Abrams was found not guilty of the criminal charges against him. As for the MCAD charge, although Respondent attempted to undermine Complainant's credibility based on her struggle with alcoholism, on the fact that she made light of the criminal matter, and based on a one-time, unrelated sexual encounter with a woman, the Hearing Officer found Complainant to be forthright and honest. Based on Complainant's testimony and the testimony of other witnesses, the Hearing Officer found that the conduct about which Complainant complained had in fact occurred and that the Complainant had been subjected to unwelcome, subjectively and objectively offensive sexual conduct. The Hearing Officer found, moreover, that the events of June 10, 2009 caused Complainant to feel threatened and in fear of Abrams, and be-

cause she had no workplace remedy given Abrams' position as manager and owner, the Hearing Officer concluded that Complainant was constructively discharged.

Because Complainant secured another job almost immediately after her constructive discharge, her wage losses were modest; the Hearing Officer awarded \$6,102.40 in lost wages. In contrast, Complainant suffered considerable emotional distress; indeed, the Hearing Officer found that Abrams' actions caused Complainant to begin drinking heavily again, after her longest period of sobriety. Based on Complainant's testimony and that of her husband and son, the Hearing Officer awarded \$50,000 for her emotional distress.

### **Quid Pro Quo Sexual Harassment Garners \$25,000 Emotional Distress Damages Award**

The Commission also considered a *quid pro quo* sexual harassment case this quarter in *Dionne v. Cutter Northern Refractories, Inc.*, 35 MDLR 15 (2013). In that case, individual respondent Thomas Cutter, the sole owner and shareholder of Respondent employer, invited Complainant out for drinks purportedly to discuss Complainant's potential promotion to a managerial position. After they discussed the potential promotion for approximately one hour, respondent Cutter began to discuss personal matters, including his sex life. He repeatedly asked Complainant if she ever considered having an affair. Although Complainant stated she was happily married and never considered having an affair, when they left the restaurant, respondent Cutter grabbed Complainant and tried to kiss her. Complainant broke free.

The following workday, respondent Cutter instructed Complainant to meet him outside the office for lunch to continue their discussion about her promotion. Complainant reluctantly agreed. In the parking lot, Cutter instructed Complainant to get in his car; when she protested, he asked her: "who do you think you work for?" Instead of bringing her to lunch at a restaurant, however, Cutter picked up a take out order and brought Complainant to his condominium. When they arrived, Cutter gave Complainant \$1,000 in cash and said he would give her the same amount every ten weeks, off the books, as a salary increase. He repeatedly touched and rubbed Complainant's shoulders and put his hand on her leg. She rejected his advances, told him she wanted no more secret meetings or payments, and asked him to bring her back to the office.

The following day, Complainant found an envelope with her initials on it on Cutter's desk. The envelope contained a lurid five-page handwritten note professing his sexual obsession for her, commenting on her body, and proposing that she have an extramarital affair with him. Complainant felt disgusted and nauseous and thought she might faint. She showed the letter to a co-worker who advised her to go home because she was so upset. After making a copy of the letter and returning the original to Cutter's desk, she did so - purchasing a can of mace at a firearms store on the way because she felt so unsafe.

The following day, Complainant returned to work to find a number of voicemail messages from Cutter asking why she wasn't at

work. Cutter then came into her office and handed the letter to her, told her to read it, and told him to meet him later. Complainant opened the letter, packed up her belongings, went home, and never returned.

Based on Complainant's testimony (and on a copy of the letter, which Complainant retained), the Hearing Officer readily concluded that Respondent subjected her to quid pro quo sexual harassment. Further, given the lurid nature of the letter and proposition, the Hearing Officer also readily concluded that Complainant was subjected to a hostile work environment, and that Respondent's quid pro quo proposition and sexual obsession with her were so serious that Complainant had no option but to resign.

As for damages, the Hearing Officer awarded Complainant \$72,001 in lost wages from July 2007 through 2009, when she obtained employment as an assistant at a day care center and

changed careers. Although Complainant and her husband lost their home to foreclosure and filed for bankruptcy, Complainant did not seek compensation for the losses and without evidence regarding Complainant's family's entire economic situation, the Hearing Officer declined to attribute the subsequent foreclosure and bankruptcy to Respondents' unlawful conduct.

With regard to her emotional distress, Complainant testified that she suffered feelings of doubt, depression, guilt, insomnia and loss of appetite. She withdrew from her husband and did not want to be touched for several months. The Hearing Officer found that Complainant's distress was acute, but that some of it resulted from guilt and embarrassment from having taken money from Cutter and having to admit the entire scenario to her husband. In addition, Complainant's acute distress was short-lived and she is happy in her new career. Based on this evidence, the Hearing Officer awarded \$25,000 in emotional distress damages. ■