MASSACHUSETTS DISCRIMINATION LAW REPORTER

Massachusetts Commission Against Discrimination
Administrative Law Decisions

VOLUME 41
2019

MCAD Hearing Commissioners / Year Appointed

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

MCAD Hearing Officers / Year Appointed

Eugenia M. Guastaferri	1992
Judith E. Kaplan	1994
Betty E. Waxman	1999

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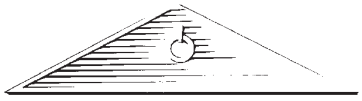

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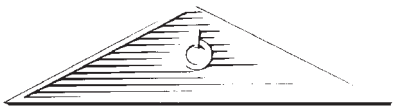

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Listing by General Classification

The outcome of each decision appears immediately after the citation within [ ].

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C = Decision in favor of Complainant

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[R] = Respondent
[C] = Complainant
[A] = Affirmed by Full Commission
[M] = Affirmed with Modifications
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Age Discrimination

Defenses

– Job Performance

The Full Commission affirmed a 2015 ruling by Hearing Officer Eugenia M. Guastaferri finding that a discharged cross-connection inspector for the City of Cambridge had not made out even a *prima facie* case of age discrimination given his failure, documented by a private detective, to perform the necessary inspections or work the required hours. The appeal by the Complainant challenged the Hearing Officer's findings that he had falsified time sheets, violated attendance rules, and generally did not perform his duties adequately. *Mont-Louis v. City of Cambridge (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 174 (2019).

Attorney's Fees

Lack of Documentation

In connection with a restaurant sexual harassment case, the Full Commission awarded attorney's fees in the amount of $21,443 after a very minor reduction of $798 for certain charges that lacked billing specificity. *Coburn v. CUCA, d/b/a Bella Notte (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 29 (2019).

The Full Commission reduced an attorney's fee award from the claimed $42,130 to $35,760 because the prevailing attorney's description of her professional services lacked sufficient detail. *Falzone v. Sea View Retreat, Inc. (Decision of the Full Commission), [Full Commission-M]* 41 MDLR 5 (2019).

Paralegal

In connection with a restaurant sexual harassment case, the Full Commission awarded attorney's fees in the amount of $21,443 that included amounts for paralegal work billed at $80 a hour—sums the Respondent sought unsuccessfully to challenge as being clerical and not reimbursable. *Coburn v. CUCA, d/b/a Bella Notte (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 29 (2019).

Reasonableness

The Full Commission affirmed a 2015 ruling of Hearing Officer Betty E. Waxman finding that a nurse was constructively discharged by Tufts Medical Center and authorized $289,581 in attorney's fees. Attorneys petitioned for $355,170 but this amount was reduced for duplicative charges, administrative matters, and a lack of sufficient billing detail. The Full Commission did not reduce the fee award for time charged by multiple attorneys billing for the same work, such as attending a public hearing. *Dalexis v. Tufts Medical Center (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 166 (2019).

The Full Commission affirmed a 2015 $50,000 emotional-distress award by Hearing Officer Eugenia M. Guastaferri in favor of a plumber who suffered a work-related back injury. The Complainant established that his employer had wrongfully terminated him based on the demands of an insurer without ever engaging in a dialogue with either the Complainant or his physician. Attorney's fees of $55,575 were also awarded at a rate of $350 per hour. *Laing v. J. C. Cannistraro, LLC (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 157 (2019).

The Full Commission affirmed a 2016 ruling of Hearing Officer Betty E. Waxman awarding $20,000 in emotional distress damages and $17,500 in back pay for the retaliation claim of a health care worker but cut back the fee petition claim from $44,707 to $26,069 after finding the amounts claimed were excessive for the work done or were properly billed to another related case. *Dupuis v. Gabriel Care, LLC (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 140 (2019).

The Full Commission awarded attorney's fees in the amount of $53,267 for a successful age and handicap discrimination matter—an amount not considered excessive for this case and at a rate of $325 an hour. The employer argued unsuccessfully that the fees should have been reduced as no award was made for lost wages or benefits. *Codinha v. Bear Hill Nursing Center, Inc. (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 35 (2019).

Unsuccessful Claims

The Full Commission affirmed an award of Hearing Officer Judith E. Kaplan in favor of an African-American bouncer at a downtown Boston "gentlemen's" club and awarded attorney's fees in the amount of $32,130 after a reduction from the $42,840 claimed amount because of an offset due to an unsuccessful retaliation claim. *Sims v. Glass Slipper Gentlemen's Club (Decision of the Full Commission), [Full Commission-M]* 41 MDLR 1 (2019).

Damages and Remedies

Back Pay/Lost Wages

– Collateral Source

A successful African-American car salesman won an award of $32,085 in lost wages and his damages were not reduced by his unemployment compensation due to the collateral source rule. *Daye v. Rte. 2 Hyundai (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 111 (2019).

Hearing Officer Eugenia M. Guastaferri awarded $43,560 in lost wages to a wrongfully discharged pregnant human resources specialist in applying the collateral source rule to justify no offsets for the unemployment benefits she received while out of work. *Serrano v. Cataldo Ambulance Services, Inc. (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 90 (2019).

– Computation

The Full Commission affirmed an award of Hearing Officer Judith E. Kaplan that included $20,000 in back pay.in favor of an African-American bouncer at a downtown Boston "gentlemen's" club who was subjected to a racially hostile workplace. Bouncers at this club were paid in cash and the Full Commission affirmed that it was reasonable to base the back pay award on an annual salary of roughly $37,000. The Respondents failed to keep accounting records and presented no evidence on the damages issue so calculating the damages based on an approximation of salary was reasonable in this case. *Sims v. Glass Slipper Gentlemen's Club (Decision of the Full Commission), [Full Commission-M]* 41 MDLR 1 (2019).

– Entitlement

A discharged Coca-Cola maintenance mechanic won an award for $500,000 in emotional distress damages and $91,373 in back pay after being fired under pretext by an employer fed up with the exorbitant costs of

paying for his wife's health care under its Blue Cross administered but self-financed health plan. The back pay award did not cover the entire six years of pay differential sought by the Complainant and excluded those periods where he was unable to retain a job or decided voluntarily to quit an employment. *Dauwer v. Coca-Cola Refreshments USA, Inc. (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 130 (2019).

– General

In a defaulted proceeding, Hearing Officer Judith E. Kaplan awarded $60,000 in lost wages to a black truck driver subject to an appalling barrage of racial insults by a coarse white supervisor leading eventually to his wrongful race-based termination. The Complainant was out of work for close to a year until he was re-employed at a higher rate of pay than what he earned at Respondent. *Wiggins v. Land Air Express (Decision of the Hearing Officer), [Kaplan-C]* 41 MDLR 24 (2019).

Discrimination Prevention Training

– Handicap

Hearing Officer Judith E. Kaplan found that an insurance agency had failed to reasonably accommodate the Complainant's hearing disability with the installation of a CallCaption telephone but that any emotional damages the Complainant suffered were *de minimis*. The employer was ordered to participate in MCAD disability-discrimination training. *Roberge v. Sullivan, Keating & Moran Insurance Agency (Decision of the Hearing Officer), [Kaplan-R]* 41 MDLR 74 (2019).

Emotional Distress

– Depression

A discharged Coca-Cola maintenance mechanic won an award for $500,000 in emotional distress damages and $91,373 in back pay after being fired under pretext by an employer fed up with the exorbitant costs of paying for his wife's health care under its Blue Cross administered but self-financed health plan. The Complainant's evidence of emotional distress included suicide ideation, depression, loss of appetite and interest in life, and distancing himself from his three children. *Dauwer v. Coca-Cola Refreshments USA, Inc. (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 130 (2019).

– Duration of Distress

The Full Commission affirmed an emotional distress award by Hearing Officer Judith E. Kaplan of $25,000 to a nursing-home housekeeper terminated two months after reporting one minor incident of sexual harassment directed at another employee where the distress was found to be "moderate" and of several months duration. *Falzone v. Sea View Retreat, Inc. (Decision of the Full Commission), [Full Commission-M]* 41 MDLR 5 (2019).

– Exaggerated Claims

The Full Commission affirmed a 2015 ruling of Hearing Officer Eugenia M. Guastaferri awarding token damages to a Complainant who claimed that a real estate agent discouraged him from applying for an apartment by telling him that he would lose his deposit were the apartment to fail inspection. The Hearing Officer had found that the Complainant presented no evidence that he suffered any kind of severe or long-lasting distress and evidence was adduced that he was known to be difficult, uncooperative, and frustrating to deal with. *White v. Cosmopolitan Real Estate, Inc. (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 103 (2019).

The Full Commission affirmed an award of $25,000 in emotional-distress damages by Hearing Officer Judith E. Kaplan in favor of an African-American bouncer at a downtown Boston "gentlemen's" club subjected to a racially hostile workplace and terminated by one of the club's white owners because of unlawful discriminatory motives. The Commission agreed with the Hearing Officer that the Complainant's testimony as to his being upset and disgusted was sufficient proof of distress. *Sims v. Glass Slipper Gentlemen's Club (Decision of the Full Commission), [Full Commission-M]* 41 MDLR 1 (2019).

– Handicap Discrimination

A discharged Coca-Cola maintenance mechanic won an award for $500,000 in emotional distress damages and $91,373 in back pay after being fired under pretext by an employer fed up with the exorbitant costs of paying for his wife's health care under its Blue Cross administered but self-financed health plan. The Complainant's evidence of emotional distress included suicide ideation, depression, loss of appetite and interest in life, and distancing himself from his three children. *Dauwer v. Coca-Cola Refreshments USA, Inc. (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 130 (2019).

Hearing Officer Judith E. Kaplan found that an insurance agency had failed to reasonably accommodate the Complainant's hearing disability with the installation of a CallCaption telephone but that any emotional damages the Complainant suffered were *de minimis*. The employer was ordered to participate in MCAD disability-discrimination training. *Roberge v. Sullivan, Keating & Moran Insurance Agency (Decision of the Hearing Officer), [Kaplan-R]* 41 MDLR 74 (2019).

Hearing Officer Eugenia M. Guastaferri ruled that a Boston pipefitters' union had a duty to accommodate a member's hearing disability at monthly meetings with a reasonable accommodation that would allow her to understand the proceedings and participate. The union's repeated failure to do so, offering up less than satisfactory accommodations, led to an award of $25,000 in a emotional distress damages. The Complainant cited the failure to accommodate her as causing depression, embarrassment, and making her feel like an outsider. *Reed v. Pipefitters Association of Boston, Local 537 (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 49 (2019).

Hearing Officer Betty E. Waxman awarded $175,000 in emotional-distress damages to a skilled draftsman working for a military contractor who was able to show evidence of marital issues, despondency, lack of physical intimacy, altered sleep patterns, and social isolation. The damages awarded reflected an unspecified reduction for certain psychological issues that preceded the Complainant's disability. *Halstead v. Leidos, Inc. (Decision of the Hearing Officer), [Waxman-C]* 41 MDLR 38 (2019).

– Housing Discrimination

A Quincy landlord's failure to engage in an interactive process of discussion to accommodate a veteran tenant's bipolar disorder yielded emotional distress damages of $10,000 where the Complainant testified to losing 20 pounds, experiencing headaches and anxiety, and ceasing her hobbies. *Martin v. Pepin (Decision of the Hearing Officer), [Waxman-C]* 41 MDLR 119 (2019).

– Insomnia

The Full Commission affirmed a 2016 ruling of Hearing Officer Betty E. Waxman awarding $20,000 in emotional distress damages, finding that the Complainant's evidence of stomach issues, diarrhea, insomnia, and weight loss was convincing. *Dupuis v. Gabriel Care, LLC (Decision of the Full Commission), [Full Commission-A]* 41 MDLR 140 (2019).

– Race and Color Discrimination

Hearing Officer Eugenia M. Guastaferri awarded $50,000 in emotional distress damages to a wrongfully terminated African-American car salesman following his testimony that that he was greatly stressed financially by his abrupt termination and was humiliated by the affront to his reputation. *Daye v. Rte. 2 Hyundai (Decision of the Hearing Officer), [Guastaferri-C]* 41 MDLR 111 (2019).

– Sex Discrimination

Hearing Officer Eugenia M. Guastaferri awarded $200,000 in emotional distress damages to a human resources specialist where her former employer, an ambulance service, had fired her after one month on the job

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ROBERT LAING and MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

v.

J.C. CANNISTRARO, LLC

Docket No. 10-BEM-00856

December 10, 2019
Monserrate Quiñones, Commissioner
Neldy Jean-Francois, Commissioner

Full Commission Review-Handicap Discrimination-Wrongful Termination-Reasonable Accommodation-Emotional Distress-Attorney's Fees—The Full Commission affirmed a 2015 $50,000 emotional-distress award by Hearing Officer Eugenia M. Guastaferri in favor of a plumber who suffered a work-related back injury. The Complainant established that his employer had wrongfully terminated him based on the demands of an insurer without ever engaging in a dialogue with either the Complainant or his physician. The employer attacked the finding that the Complainant was a qualified handicapped person, despite the fact that he was injured on duty and was receiving workers compensation, and tried to undermine the Complainant's honesty with a surveillance video showing him doing yard work.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferri in favor of Complainant Robert Laing [37 MDLR 85 (2015)]. Complainant was terminated from his position as a commercial plumber for Respondent after suffering a work-related back injury. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination on the basis of handicap in violation of MGL c.151B, § 4(16). Respondent appealed to the Full Commission. For the reasons provided below, we affirm the Hearing Officer's decision.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et seq*.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. MGL c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "….such evidence as a reasonable mind might accept as adequate to support a finding…." *Katz* v. *MCAD*, 365 Mass. 357, 365 (1974); MGL c. 30A, § 1(6).

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. *See*, e.g., *School Committee of Chicopee* v. *MCAD*, 361 Mass. 352 (1972); *Bowen* v. *Colonnade Hotel*, 4 MDLR 1007, 1011 (1982). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. *See Quinn* v. *Response Electric Services, Inc*., 27 MDLR 42 (2005); *MCAD and Garrison* v. *Lahey Clinic Medical Center*, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(1)(h).

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer erred by (1) making erroneous factual findings; (2) determining that Complainant is a handicapped individual; (3) concluding that Respondent did not engage in the interactive process; and (4) awarding Complainant $50,000 in emotional support damages. After careful review we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record. *See Quinn* v. *Response Electric Services, Inc.*, 27 MDLR at 42. This standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. *See O'Brien* v. *Director of Employment Security*, 393 Mass. 482, 486 (1984).

Respondent argues that the Hearing Officer's determination that Respondent discriminated against Complainant based on his disability was based on erroneous factual findings. Specifically, Respondent challenges two of the Hearing Officer's factual findings: (1) that the dates provided by Complainant's orthopedic doctor, Dr. Kwon, to Liberty Mutual, Respondent's workers' compensation carrier, regarding Complainant's return to work were estimates and (2) that Complainant was unaware that Dr. Kwon had provided Liberty Mutual with any return to work dates. Respondent additionally argues that the videotape evidence of Complainant performing yard work contradicted all other evidence concerning Complainant's ability to perform light-duty work in May of 2009. We disagree with Respondent's assertions, as there is substantial evidence in the record that supports the Hearing Officer's findings.

The Hearing Officer found that Dr. Kwon prescribed six to eight weeks of physical therapy for Complainant at his initial appointment on April 9, 2009 and scheduled a follow-up for May 27, 2009, to reevaluate Complainant's physical condition. Shortly after this initial visit, at the request of Liberty Mutual, Dr. Kwon filled out a form dated April 13, 2009 indicating May 15, 2009 as the date of Complainant's return to work on light duty and June 1, 2009 as the date of Complainant's return to work on full duty. The Hearing Officer credited Dr. Kwon's testimony that the dates he provided on the form he sent to Liberty Mutual were estimates of when Complainant may be able to return to work. This is further supported by the form itself which contains a header at the top of the section completed by Dr. Kwon, "Work Status (Target Dates)." The Hearing Officer also credited the testimony of Complainant that he was unaware of the form Dr. Kwon submitted to Liberty Mutual and that Complaint was unaware of any estimated dates

for his return to work. This testimony was also supported by the form submitted by Dr. Kwon as it states that Complainant was not advised of his work status. The Hearing Officer is responsible for making credibility determinations and weighing conflicting evidence. Thus, we will not disturb the Hearing Officer's factual findings where, as here, they are supported by credible evidence in the record.

Respondent further argues that the surveillance video of Complainant doing yardwork on May 19, 2009, undermines Complainant's claim that he was unable to return to work on light duty on May 15, 2009. Contrary to this assertion, the evidence supports the Hearing Officer's finding that performing yard work was consistent with Complainant's treatment plan for his back injury. Complainant was delayed in starting his six to eight weeks of physical therapy as he did not start physical therapy until May 4, 2009,[1] and was not cleared by a doctor to return to light-duty work in May of 2009. The Hearing Officer credited the testimony of Complainant that his physical therapist agreed that he could do some yard work as a physical activity to help him strengthen and improve his physical condition. The Hearing Officer also found that Dr. Kwon testified credibly that it would not have been inconsistent with Complainant's treatment plan for Complainant to do some physical activities to test his abilities. It is well established that a Hearing Officer is in the best position to credit or not credit witnesses and weigh the significance of evidence presented at the hearing, including the "right to draw reasonable inferences from the facts found." *Ramsdell* v. *W. Massachusetts Bus Lines, Inc.*, 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the commissioner and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence). Where there is conflicting evidence, the Hearing Officer is charged with the responsibility of weighing that evidence and making findings of fact based on their determinations of the significance of the evidence presented and the credibility of witnesses. *School Committee of Chicopee*, 361 Mass. at 354. The Hearing Officer's finding that doing yard work was consistent with Complainant's treatment plan was supported by credible evidence in the record.

Respondent argues that the Hearing Officer erred in determining that Respondent discriminated against Complainant based on his handicap. Specifically, Respondent argues that Complainant is not a "qualified handicapped person" as his back injury does not meet the statutory definition of "handicap" pursuant to MGL c. 151B, § 1(17). We disagree.

Pursuant to MGL c. 151B, § 1 a "qualified handicapped person" is someone who has a "physical or mental impairment which substantially limits one or more major life activities"; a "record of having such impairment"; or "being regarded as having such impairment" and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of the job with a reasonable accommodation. Additionally, pursuant to MGL c. 152, § 75(B)(1), an individual who sustains a workplace injury, receives workers' compensation benefits, and is capable of performing the essential functions of the job with a reasonable accommodation is presumed to be a "qualified handicapped person" under MGL c. 151B. Under this expanded definition of "qualified handicapped person," a person receiving workers' compensation need not show that he is handicapped pursuant to MGL c. 151B, § 1(17), "but still must demonstrate an ability to perform the essential functions of a particular job." *Canfield* v. *Con-Way Freight, Inc.*, 578 F.Supp.2d 235, 240 (D. Mass. 2008); *see Gilman* v. *C& S Wholesale Grocers, Inc.*, 170 F.Supp.2d 77, 84 (D. Mass 2001) (providing that individuals suffering work-related injuries, without more, are "deemed" handicapped persons under chapter 151B for the period of time that their status under the workers' compensation law influences their treatment by others). An employee injured at work "is entitled to reasonable accommodation to enable him to return to work, and is protected from discrimination based on the injury during the time he is affected by it." *Hall* v. *Laidlaw Transit, Inc.*, 26 MDLR 216 (2004)

The Hearing Officer determined that Complainant was entitled to the presumption that he was a qualified handicapped individual, as the parties did not dispute that Complainant was injured on the job and receiving workers compensation. *See* MG.L. c. 152, §75(B)(1); *Canfield* v. *Con-Way Freight, Inc.*, 578 F.Supp.2d 235, 240 (D. Mass. 2008). Complainant's receipt of workers' compensation benefits directly influenced his treatment by Respondent, as Respondent relied exclusively on the information that Liberty Mutual—the insurance company handling Complainant's workers' compensation claim—relayed to them information regarding Complainant's purported medical condition. Furthermore, the Hearing Officer found that the evidence established Complainant continued to be affected by the work related injury. This was supported by Complainant's orthopedic doctor who did not clear Complainant to return to work at his May 27, 2009 visit, as well as the written report dated May 5, 2009 of Dr. McGlowan, the physician hired by Liberty Mutual to conduct an Independent Medical Exam (IME), which stated that Complainant was unable to return to his prior duties at that time. Even the IME addendum report dated May 27, 2019, prepared by Dr. McGlowan after review of the surveillance video, determined that Complainant continued to be affected by the injury as the doctor continued to recommend modified duty with a lifting restriction. The Hearing Officer also determined that Complainant was capable of performing the essential functions of a plumber's job with the reasonable accommodation of a medical leave of absence to allow him to complete physical therapy.[2] The Hearing Officer did not err in determining that Complainant was a qualified handicap individual.

1. The Hearing Officer found that Liberty Mutual's delay in approving Dr. Kwon's prescription for physical therapy delayed the start of Complainant's physical therapy treatments until May 4, 2009, nearly one month after his initial appointment with Dr. Kwon.

2. Although an open-ended or indefinite leave extension is generally not considered a reasonable accommodation, *see Russell* v. *Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 455 (2002), Complainant was not requesting an indefinite leave extension at the time of his termination. Instead, Complainant informed his supervisor on May 13, 2009 that he had not yet been cleared to return to work and had

EDWIN RIVERA and MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

v.

TOP-NOTCH ABATEMENT, LLC and RUSSELL ORCUTT

Docket No. 13-SEM-02846

December 17, 2019
Betty E. Waxman, Hearing Officer

Kathryn Crouss and Meaghan Murphy, Esqs. for Complainant

Keith Minoff, Esq. for Respondents

Handicap Discrimination-Employer Defense-Unreliable Employee-Absence of Disability-Prima Facie Case—Hearing Officer Betty E. Waxman dismissed a handicap discrimination and retaliation claim from an asbestos-abatement worker whose discharge was the result of his unreliability and inability to come to work as needed or call in his absences as required. The decision also finds that the Complainant's knee injury did not rise to the level of a disability nor did his entitlement to workers compensation benefits support a claim of disability.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 7, 2013, Complainant Edwin Rivera filed a charge of discrimination based on handicap and retaliation against Respondents Top-Notch Abatement, LLC and Russell Orcutt, individually. Complainant alleges that he suffered injuries on the job, was not permitted to file for workers' compensation, was denied time off as an "accommodation" for his injuries, and was terminated from his job in violation of MGL 151B, Section 4 (1).

A probable cause finding was issued and a public hearing was held on May 31 and June 28, 2019. The following individuals testified at the hearing: Complainant Edwin Rivera, Jodi Orcutt, Respondent Russell Orcutt, and Randy Smith. The parties presented the following exhibits: Joint Exhibits 1-9, 16, 18, 19, 21, 22, 24-25, and 27-29 (some exhibits were proffered and excluded).

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Edwin Rivera ("Complainant") resides in Springfield, MA. During his employment with Respondent Top-Notch Abatement, LLC, he lived in Westfield MA. Transcript I at 37. He is a licensed asbestos abatement worker. Transcript I at 42.

2. Respondent Top-Notch Abatement, LLC ("Top-Notch") is an asbestos removal and mold remediation company with a principal place of business in Palmer, MA. The company has in excess of ten (10) employees.

3. Respondent Russell Orcutt founded Top-Notch Abatement in 1996 and is the sole owner of the company. From the start of the company until approximately 2016, his former wife Jodi Orcutt was the office and human resource manager. Transcript I at 199-200. In those roles, Ms. Orcutt was responsible for processing new hires, submitting payroll, and filing workers' compensation claims. Transcript I at 204-207.

4. On April 29, 2013, Complainant was hired by Respondent Top-Notch Abatement. Transcript I at 43. At the time of his hire, Complainant received and signed a form entitled "Personal Responsibilities for Workers and Supervisors of TNALLC (Top Notch Abatement LLC) Employees." The document states in relevant part that employees, "*MUST*" call out sick before the start of their shifts and, if possible, the night before and that for absences of more than three consecutive days due to illness, employees must bring in a doctor's note prior to returning to work. When an employee has a doctor's appointment, funeral or any necessary day off, the rules state that, "you *must notify* the office with the date as soon as possible." Exhibit 1F, p. 32; Transcript I at 136.

5. Complainant began performing asbestos abatement work for Respondents in mid-May 2013. He testified that he did not work a regular schedule. Transcript I at 48-49. According to Complainant, he commuted to work on public transportation, but he also acknowledged that Russell Orcutt or Top-Notch employees including Orcutt's son, would sometimes give him a ride to the work. Transcript I at 50, 147.

6. Complainant worked for Top-Notch Abatement until terminated approximately eleven weeks after he was hired. Complainant worked, on average, 24 hours per week. Joint Exhibit 2. According to the credible testimony of Jodi and Russell Orcutt, Complainant did not work full-time because he was unavailable, couldn't be reached, or couldn't get a ride to the job. Transcript I at 223, II at 31, 75-76. According to Russell and Jodi Orcutt, Top-Notch Abatement had full-time work available for Complainant and expected him to work full-time. Transcript I at 221-222; II at 45-46, 58; II at 69, 75.

7. Top-Notch employees were expected to inquire daily about their work schedules for the following day. Transcript II at 48, 59. Complainant testified that if he was not on a job site, he would call the Top-Notch office after 2:00 p.m. in order to get his work schedule for the next day, but if he was on a job site, he would find out from the site supervisor whether and where he was working the following day. Transcript I at 48.

8. Complainant had three different rates of pay: 1) a driving rate of $9.00 per hour; 2) an asbestos abatement rate of $14.00 per hour; and 3) a "prevailing wage" rate (applicable to public works projects) of $44.34 per hour. Transcript I at 45-46.

9. On June 3, 2013, Respondent Russell Orcutt received a report from a customer that Complainant was swearing on his phone at

the customer's property. Transcript I at 55. The swearing stemmed from an argument that Complainant was having with his brother who was also an employee of Top-Notch. Transcript I at 51. Orcutt issued Complainant a written warning for using bad language. Joint Exhibit 1-C. Complainant signed the warning and apologized for his actions. *Id*.

10. According to Jodi Orcutt's credible testimony, Complainant missed work without calling in on June 17 and 18, 2013. Transcript II at 25-26.

11. Beginning in late June 2013 and continuing for several weeks through mid-July 2013, Complainant worked primarily on a Top-Notch job known as "Ames Privilege," located in Chicopee.[1] Transcript II at 67. The assignment was a prevailing wage job which involved the removal of flooring material containing asbestos from a large factory building that was being converted into apartments and offices. The asbestos abatement project was shut down for safety issues between late May and July 15, 2013, but during that time, Top Notch employees continued to seal up the basement, monitor the site, and perform other work which kept them busy. Transcript II at 31, 75, 155-158.

12. On Tuesday, July 16, 2013, at approximately 10:45 a.m. while Complainant was removing a layer of flooring at the Ames Privilege job, he fell through a hole in the flooring up to his armpits. Transcript I at 58. His brother helped him up. Transcript I at 58, 60. Complainant testified that after he was helped out of the hole, he went to take a step but his left knee gave out. Transcript I at 58, 61, 64. He said that he also hurt his left hip and left ribs. Transcript I at 61.

13. Complainant testified in a contradictory fashion about whether he was able to continue working that day. He asserted on direct examination that he was not able to continue working because he couldn't breathe and couldn't put weight on his knee, but he asserted on cross-examination that he returned to work for the rest of the shift. Transcript I at 61-63, 112. Complainant testified that he asked his supervisor Randy Smith if he could go to the hospital. Transcript I at 62, 66, 114-115. According to Complainant, Mr. Smith spoke to Russell Orcutt over the phone, and Mr. Orcutt said that Complainant should not return to work if he went to the hospital. Transcript I at 66-67. Complainant testified that he remained on the job even though he was unable to perform heavy duties such as hauling bags of debris. Transcript I at 69-70. I credit that Complainant fell through a hole in the floor and experienced pain, but I do not credit that Complainant was discouraged from going to the hospital or that he was unable to perform his regular duties after he fell through the hole in the floor. Russell Orcutt testified credibly that if Complainant had informed Top-Notch that he needed medical attention and/or to miss work because of his injury, the Company would have submitted a workers' compensation claim and granted the request. Transcript II at 89.

14. Former Top Notch employee Randy Smith testified that he worked for Top Notch Abatement in 2013. He left Top Notch approximately six years ago and has had no contact with the Orcutts since then. Transcript I at 183. Mr. Smith was Complainant's site supervisor on the Ames Privilege job. Transcript I at 164, 166. He filled out an injury report and went over its contents with Complainant who read and signed it. Joint Exhibit 1; Transcript I at 65. Mr. Smith reported Complainant's accident to Respondent Russell Orcutt by telephone from the job site. Transcript I at 173. Mr. Smith testified that he did not see Complainant fall through the hole on July 16, 2013, but saw him immediately thereafter. Transcript I at 168-169. According to Mr. Smith, whom I found to be credible, Complainant limped around "a little bit" and appeared to be sore in the hip, rib, and knee areas after he was helped out of the hole, but declined to go to the hospital when Mr. Smith asked him if he wanted to go and went back to work after taking a twenty to twenty-five minute break. Transcript at 169-170, 172-173, 194. Mr. Smith's assertion that Complainant declined to go to the hospital is consistent with a 2013 statement that Mr. Smith gave to Top Notch's insurance carrier, AIM Mutual. Transcript II at 187; Impeachment Exhibit A.

15. Russell Orcutt testified that he asked if Complainant needed medical assistance or needed to go to the hospital and was informed by Mr. Smith that Complainant wasn't looking for medical attention right away and wanted to stay at work. Transcript II at 73-74. Mr. Orcutt credibly denied that he told Complainant that if he went to the hospital, he should not come back to his job. Transcript II at 73, 77.

16. Complainant earned a prevailing rate on the Ames Privilege job of over $40.00 an hour. Transcript II at 74. Prior to starting work on the Ames Privilege job, Complainant earned less than half the prevailing rate.

17. Complainant continued to work the rest of the day on Tuesday, July 16, 2013. According to Mr. Smith, Complainant appeared to be getting better as the day wore on. Transcript I at 174-175.

18. Complainant worked the remainder of the week, July 17, 18, and 19, 2013. Transcript I at 115-116. Complainant performed his job without restrictions and did not request any accommodations. Transcript II at 11, 87, 133, 144. I do not credit Complainant's assertion that he asked to take off work on Wednesday, July 17, 2013 in order to go to the hospital but was told by Russell Orcutt that he was "really needed" at work. Transcript I at 68. I credit that Complainant may have experienced pain and swelling in his knee as a result of his accident, but I don't credit that he was unable to perform "heavy duty" job functions or that he continued to work because Mr. Orcutt forced him to do so. Instead, I believe that Complainant continued to work because he was receiving a wage of over $40 an hour for the job and did not want to lose income. Transcript I at 72.

1. Most of Complainant's work between June 23, 2013 and June 16, 2012 involved the Ames Privilege job, but there were four days during the period when he worked on other assignments. Joint Exhibit 2, pp. 40-43.

MDLR Defense Commentary *Fourth Quarter 2019*

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Hearing Officer Awards $500,000 In Emotional Distress Damages Finding That Employer Discriminated Against Employee On The Basis Of His Wife's Disability

In *Dauwer and MCAD* v. *Coca-Cola Refreshments USA, Inc. and Mark Woodford*, 41 MDLR 130 (2019), the Hearing Officer found that the employer terminated Complainant, Paul Dauwer, because of his wife's disability and the associated medical costs for the company, awarding him $500,000 in emotional distress damages and $91,373.38 in lost wages.

Dauwer worked for Coca-Cola Refreshments as a maintenance mechanic for a year-and-a-half during which time his wife faced serious medical challenges related to her disabilities. After Dauwer exhausted his sick time and FMLA leave, he returned to work and overheard Maintenance Manager, Mark Woodford, tell an employee that the recent increase in health insurance premiums was likely attributable to Dauwer's wife's medical costs. Dauwer's union representative later told him that Woodford wanted to fire Dauwer. Shortly thereafter, Dauwer was either absent or had to leave work early to care for his wife on multiple occasions, and he received verbal and written warnings for these absences. However, when Dauwer left work one day after his eight-year-old daughter called to tell him that his wife was having a seizure and was non-responsive, the company terminated him. Although Dauwer and his children stayed on the company health insurance plan through the end of the month, the company ended his wife's coverage immediately. As a result of his termination, Dauwer and his family could not pay their mortgage and lost their home, and Dauwer testified that he considered suicide.

The Company alleged that it terminated Dauwer for excessive absenteeism—but the Hearing Officer found that the employer's stated reason was pretext for discrimination and that Dauwer "was treated differently and more harshly than certain other employees who were not closely associated with a disabled family member or incurring high medical costs for the company." Other maintenance mechanics with worse attendance records were not terminated. The Hearing Officer found some of Woodford's testimony "not at all credible," and found the employer's "disavowal of any involvement" in cancelling the wife's health insurance coverage "entirely unworthy of credence and so disingenuous as to suggest discriminatory animus." Although the Hearing Officer found that Woodford "certainly displayed discriminatory animus," it declined to hold him personally liable—but held the employer vicariously liable for his conduct.

KEY TAKEAWAYS FOR EMPLOYERS

- **Discrimination Based On Association**: This decision demonstrates that employers must take care to avoid discriminating against their employees based on their association with members of protected classes. Adverse action taken against an employee because of his association with someone living with a disability can lead to a finding of discrimination with potentially significant damages.

- **Apply Policies Consistently**: One of the biggest issues for the employer in this case is that it applied its attendance policies inconsistently—imbuing supervisors with "significant discretion" to issue warnings or terminations. The ultimate issue was not that Complainant was terminated—but that he was and others were not.

Commission Upholds $135,000 Disability Discrimination Award Based On Finding That Overtime Was Not An Essential Job Function

In *Dalexis* v. *Tufts Medical Center*, 41 MDLR 167, the Commission affirmed the Hearing Officer's conclusion that Respondent Tufts Medical Center had discriminated against Complainant Marie Lunie Dalexis on the basis of her disability when it failed to provide her with a reasonable accommodation and then constructively discharged her. The Hearing Officer awarded Complainant damages totaling $420,374.67, including of $289,581.22 in attorneys' fees, $45,000 in emotional distress damages, and $85,793.45 in back pay damages.

Throughout Complainant's employment with Tufts, Tufts nurses worked on three shifts: the day shift, the evening shift, and the night shift. In 2006, Complainant was diagnosed with rheumatoid arthritis and interstitial lung disease. Due to her conditions, Complainant took medical leave beginning May 25, 2009. When Complainant reached the end of her protected medical leave under Respondent's collective bargaining agreement, Respondent filled her position and transferred her to its "leave of absence cost center" where Complainant could apply online for vacant positions within Tufts.

When Complainant was cleared to return to work, Respondent informed her that she needed to apply for positions online because her position had been filled. Plaintiff applied for several nursing positions, but was never interviewed. During her job search, three positions that included day shifts were posted, but Respondent did not alert Complainant to those positions. Instead, Employee Relations Specialist Julie Miglietta told Complainant that the only positions available were night shift positions. Complainant

responded that she could not work night shifts due to her medical condition, and provided a doctor's note stating so. Miglietta asked Complainant if she could work day and evening shifts, and Complainant directed Miglietta to speak with her doctor. After speaking with Complainant's doctor, Miglietta learned that Complainant could not work night shifts or double shifts, and that overtime was not recommended. Miglietta concluded that overtime was an essential function of the positions for which Complainant was applying and therefore told Complainant that she should seek a position in a doctor's office instead of an inpatient position. Complainant did not return to work at Tufts.

Complainant alleged that she could have been reasonably accommodated but Respondent failed to engage in the interactive process and constructively discharged her by not offering her any of the available positions that fit within her restrictions. Respondent argued that Complainant's inability to work overtime meant she could not perform the essential functions of her job because most nurses were required to work overtime. The Hearing Officer concluded that because five percent of nurses worked no overtime in the prior year, overtime was not an essential function of the job. The Hearing Officer also found that Respondent failed to engage in the interactive process because Respondent did not follow up with Complainant after learning of her restrictions and did not ask her if she was willing to work occasional night shifts or overtime. The Hearing Officer also concluded that Complainant had been constructively discharged because she was never offered any of the several open positions at Tufts for which she was qualified, despite being cleared to return to work. The Commission affirmed the Hearing Officer's findings in their entirety.

KEY TAKEAWAYS FOR EMPLOYERS

- **Evaluating Essential Job Functions**: This decisions illustrates the importance of vetting which functions of a job are essential before deciding whether to deny an accommodation. Even if the majority of employees in a position perform a certain function, if there are several who do not, or if the position could be performed without those functions, a factfinder could determine the function is non-essential.

- **Engaging in the Interactive Process**: Another key takeaway from this decision is that engaging in the interactive process is critical. Although an employer's evaluation of a disabled employees' condition may indicate that they cannot perform the job, it is always prudent to engage the employee to determine whether a reasonable accommodation may exist.

Other Noteworthy Decisions This Quarter

In *Dupuis* v. *Gabriel Care, LLC*, 41 MDLR 140, Complainant alleged that her employer terminated her in retaliation for her refusal to leave a meeting that a colleague brought her to as a witness. The Full Commission affirmed the Hearing Officer's finding that Complainant had a good faith (though misguided) belief that her colleague was the victim of discrimination—and so her action in refusing to leave the meeting was a protected activity. As a result, the employer's decision to terminate her for this "insubordination" constituted retaliation. Employers should note that even where discrimination has not occurred, an employee's activity may be protected as long as she acts in good faith. The employer was ordered to pay Complainant $17,500 in lost wages, $20,000 in emotional distress damages, and $26,069.51 in attorney's fees and costs.

In *Lammlin* v. *Seder Foods Corp.*, 41 MDLR 178, Complainant alleged that his employer discriminated against him on the basis of age and ethnicity when it terminated him so that it could hire a "younger, more aggressive salesman who can speak Spanish." The Full Commission affirmed the Hearing Officer's finding that the Company fired Complainant because of his age and ethnicity. Respondent's CEO had told Complainant that he was being fired because Respondent needed a Spanish-speaking person in the role. Employers should take care not to engage in illegal discrimination when attempting to diversify their workforce. The employer was ordered to pay Complainant $11,000 in lost wages.

In *Laing* v. *J.C. Cannistraro, LLC*, 41 MDLR 157, Complainant, a plumber, asserted disability discrimination claims against his employer arising from his employer's decision to terminate him based on his failure to return to work. As a result of a work-related injury, Complainant received treatment for a back injury and his doctor recommended physical therapy and a "target" return to work date. Respondent then demanded Complainant return to work on the date provided, but Complainant claimed that his doctor had recommended further treatment. Respondent terminated him for failing to return to work. The Hearing Officer concluded that Respondent's failure to discuss the discrepancy between the doctor's recommendation and Complainant's understanding was a failure to engage in the interactive process. Employers should keep in mind that they are obligated to engage with employees about accommodating their disabilities before determining that the employee cannot be accommodated. ■

MDLR Complainant's Commentary

Fourth Quarter 2019

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The Commission issued eleven decisions in the fourth quarter of 2019, three of which were decided by Hearing Officers, and eight by the full Commission. Three of those decisions are discussed below. In the first, the Hearing Officer granted a large award for emotional distress damages to a Complainant whose claim was supported by compelling testimony. The second and third decisions were in favor of Respondents; in the second, the Full Commission held that the Complainant was not similarly situated to her comparator; and in the third, the Hearing Officer found that the Complainant was not a qualified individual with a disability, despite his receipt of worker's compensation benefits.

Hearing Officer Awards $500,000 in Emotional Distress Damages to a Complainant Who Was Terminated Due to His Wife's Serious Health's Problems

In *Dauwer* v. *Coca-Cola Refreshments USA, Inc.,* 41 MDLR 130, Hearing Officer Eugenia Guastaferri found the testimony of the Complainant and his wife about the Complainant's emotional harms were "heart-rending and gut-wrenching to observe," and awarded $500,000 in emotional distress damages to the Complainant (in addition to back pay) in compensation for his "immense emotional pain and suffering" incident to his associational disability-discrimination claim.

The Complainant worked as a maintenance mechanic at Coca-Cola's former bottling plant and received family health insurance coverage through his employer. The company's health plan was administered by Blue Cross Blue Shield but funded by the employer. The Complainant's wife had a number of severe health problems, including multiple sclerosis, epilepsy, and heart issues—the health care costs for which totaled over $300,000 for the employer—by the time the Complainant was terminated. The Complainant left his night shift on several occasions to attend to his wife's health emergencies. He attempted to hire a personal care assistant to be with his family at night in case of emergency so that he could stay at work, but just when he had finally secured someone's services, the Respondent fired him for absenteeism/tardiness.

The Hearing Officer found several facts supported an inference of associational disability discrimination, including that the Respondent applied its absenteeism/tardiness policies more harshly towards the Complainant than to others and refused to allow him to use vacation time for caring for his wife when it had allowed others to use vacation time outside the bounds of its policies The Complainant's supervisor was also overheard saying that the Respondent's health insurance premiums had risen (by $9/week) due to the expensive health problems of Complainant's wife. Further, the Respondent inexplicably terminated the health insurance coverage of the Complainant's wife on the day the Complainant was fired, while allowing the Complainant and his children to remain covered through the end of that month. In light of that evidence, the Hearing Officer readily concluded that "subjecting [the Complainant] to adverse employment decisions premised on the hostility towards disability of the [Complainant's] spouse…is predicated on discriminatory animus."

In issuing the significant emotional damage award of $500,000, the Hearing Officer repeatedly emphasized how powerful she found the testimony of the Complainant and his wife. They testified that prior to the Complainant's termination, he was the "rock" of the family, but that his termination "broke" him and "totally ripped [him] apart," leaving him only a "shell of a person." The Hearing Officer explained that the Complainant and his wife's testimony was "earnest and sincere," and that they spoke with a "disheartened and dispirited demeanor" and with "quiet poignancy and earnestness," leading her to find their testimony "compelling, heart-felt, gut-wrenching and entirely credible."

Full Commission Reverses Decision on Discriminatory Suspension Finding Comparator Not Similarly Situated

The Full Commission in *Floyd* v. *Massachusetts Department of Correction*, 41 MDLR 127, heard appeals from both parties as to the decision below finding the Respondent not liable for the discriminatory or retaliatory termination of the Complainant, yet liable for one act of discriminatory suspension. The Complainant, Jean Floyd, an African-American woman, received a three-day suspension for yelling at her supervisor and was later terminated for other reasons. The Hearing Officer found that a white male officer had committed a similar offense of yelling at the same supervisor the previous year yet received the less severe sanction of a written reprimand, making the Complainant's suspension discriminatory.

On appeal, the Full Commission vacated the Hearing Officer's decision. The Commission held that the Complainant and the white male officer were not similarly situated for purposes of the Complainant's *prima facie* case, since the Complainant had a very significant disciplinary history (13 prior incidents including 8 suspensions) while the white male officer had none at the time of his written reprimand. Citing *Dartmouth Review* v. *Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989), and *Smith* v. *Straus*

Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994), for the propositions that although exact correlation was not required of comparators nevertheless they must be "similarly situated in terms of performance, qualifications, and conduct, without such differentiating or mitigating circumstances that would distinguish their situations," the Full Commission held that Complainant's disciplinary history was a differentiating circumstance and the Hearing Officer erred by finding otherwise. The Commission vacated the finding of discriminatory suspension and affirmed the Hearing Officer's dismissal of the Complainant's claims relating to her termination, finding that there was ample evidence supporting her conclusion that the Complainant was fired for legitimate, non-discriminatory reasons.

Hearing Officer Finds Presumption of Disability Due to Receipt of Worker's Compensation Rebutted

The Hearing Officer's decision in *Rivera* v. *Top-Notch Abatement, LLC*, 41 MDLR 161 (2019), is notable for its finding that the rebuttable presumption that a person who receives worker's compensation benefits is handicapped for purposes of a Chapter 151B legal claim, see *Bleau* v. *Molta Florist Supply*, 35 MDLR 33 (2013), was indeed rebutted in this case. The Complainant, Edwin Rivera, worked as an asbestos-abatement worker who fell through a hole in the flooring at a worksite, injuring his knee, hips, and ribs. The Hearing Officer observed that although the Complainant no doubt experienced pain, he continued working through the rest of the week, did not inform his employer that he sought medical treatment for the injury, and did not seek any accommodations. For these reasons, the Hearing Officer found that even though the Complainant received worker's compensation benefits, he was not a qualified individual with a disability for purposes of his *prima facie* case of disability discrimination. Accordingly, the Hearing Officer rejected the Complainant's claim for disability discrimination for failure to accommodate.

This case is a good reminder to Complainant's counsel that a Complainant who receives worker's compensation benefits still has to prove his or her discrimination case. ■