MDLR Complainant's Commentary 2023 Review

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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.

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.

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.]

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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MDLR Defense Commentary 2023 Review

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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-

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-

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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