MDLR Complainant's Commentary

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In a busy first quarter of 2019, the Commission issued eight employment decisions: three decisions by Hearing Officers and five decisions of the Full Commission. Of the Hearing Officer decisions, two were in favor of Complainants. Both of these decisions featured substantial emotional distress damages awards, and we therefore review them briefly below. Four of the Full Commission decisions serve as a useful reminder of best billing practices, which we highlight in a Practice Note. Finally, the Commission also released its first proposed update to its procedural regulations since 1999. Three proposed changes are highlighted briefly below.

$150,000 Emotional Distress Damages Award Issues in Race and Color Discrimination Case

In *Wiggins* v. *Land Air Express*, 41 MDLR 24 (2019), a default proceeding, the Complainant, a black man, readily established that he was subjected to hostile work environment and wrongfully terminated on the basis of his race. Complainant credibly testified that he was subjected to a barrage of racially charged comments and insults, including that his white supervisor used the "n-word" multiple times a week; consistently denigrated him, including calling him "illiterate," "ignorant," and saying "black and stupid go together;" and threatened him (making comments such as "No black son-of-a-bitch is going to tell me how to run my terminal;" "Get your black ass out of here;" and "'Ricans' and n------s who need jobs in order to pay for Cadillacs [have] to follow [my] directions or else be terminated," or words to that effect). Complainant also readily established that he was subjected to disparaging treatment when he was terminated following an accident, even though his actions to minimize its effects were lauded by the Deputy Chief of the Fire Department. In contrast, a white driver who demolished his truck was not disciplined at all (let alone terminated), and instead received a new truck.

For the financial losses Complainant suffered as a result of his unlawful termination, the Commission awarded one year of back pay (equal to $60,000), as it took him approximately one year to find another full-time position. The Commission then awarded Complainant $150,000 in emotional distress damages. The Commission reached this figure as Complainant credibly testified that his supervisor's "explicit and outrageous racist comments and attitude" distressed him to the point that he suffered from loss of sleep, frequent headaches, stress, anxiety and reminded him of living in the segregated South. The Commission also considered the distress and anxiety caused by Complainant's termination and its accompanying financial hardship. Complainant lost his apartment and his car, had to move in with his sister, could no longer take his daughter on outings to the movies and the mall, and stopped playing basketball. He also suffered frequent flashbacks, insomnia, and headaches that did not subside until he was re-employed nearly one year after his termination.

$175,000 Emotional Distress Damages Award Issues for Wrongful Termination in Disability Discrimination and Retaliation Case; Application for SSDI Benefits Did Not Foreclose Prosecution of Disability Discrimination Claim

The Complainant in *Halstead* v. *Leidos, Inc.*, 41 MDLR 38 (2019), a skilled draftsman, established that Respondents, a government contractor and Complainant's supervisor, discriminated against him on the basis of his handicap and further retaliated against him following his request for accommodations and the filing of his EEOC charge.

Complainant began working for the Respondent Company in 1990. 2010, suffered serious medical complications following surgery. Such complications included: joint pain and inflammation, altered mental status, significant weight loss, impaired memory, impaired reading skills, and fatigue. He was unable to work for approximately seven months, during which time he received speech therapy, language therapy, and physical therapy.

When Complainant was able to return to work, his neurologist recommended that he return on a part-time basis, starting with half-days, that the Company provide a quiet place for him to work, and that he be permitted to take frequent breaks. Respondent initially refused Complainant's request to return on a part-time basis, informing him that he could only return when he could work full-time. As a result, Complainant filed a Charge of Discrimination with the EEOC in late May/early June 2011. The matter settled shortly thereafter, with the parties agreeing that Complainant could return to work in July 2011 on a reduced schedule and with some other accommodations.

Over the course of the next few years, however, Respondents engaged in a pattern of adverse actions. For example, Respondents repeatedly pressed Complainant to work full time, despite his physician's recommendations that Complainant not work more than 30 hours, apparently believing his reduced hours was a "choice" as opposed to a medical necessity. Complainant's supervisor assigned Complainant's work station to a new hire, even though he knew Complainant would be returning and kept Complainant isolated. Complainant also received a much lower merit pay increase following his return to work.

In late July 2014, Complainant's entire team was informed that the government contract on which they worked was ending, and layoffs began shortly thereafter. Complainant was laid off effective August 8, 2014. Although Respondents argued that Complainant's termination was non-discriminatory/non-retaliatory and based on the loss of a government contract the Commission was not persuaded. The evidence revealed every other member of the Complainant's team was subsequently relocated, moved onto a different contract, or had their termination postponed by at least six months. (In fact, Complainant's supervisor attempted to locate assignments for other members of the team. In contrast, Complainant's supervisor declined to provide Complainant with a personal reference.) The Company rejected Complainant for an open position and, contrary to Company policy, gave Complainant no consideration for other available jobs, which were often re-advertised after he applied.

Respondents also attacked Complainant's claim by arguing that he was estopped from prosecuting a disability discrimination claim on the grounds that he had applied for SSDI benefits following his termination and in such application stated that he was incapable of working as of July 24, 2014. The Commission rejected this argument, finding that Company's insurance carrier pressured Complainant to apply for such benefits, that the statement contained in the application pertained to his inability to handle a full-time position, and that pertinent caselaw supported the decision that SSDI claims do not automatically bar discrimination suits.

As to damages, the Commission awarded Complainant back pay for the period of time between his premature layoff and when the next team member was terminated. With regard to emotional distress damages, Complainant testified that he suffered from depression, constantly argued and suffered a lack of intimacy with his wife, was angry, despondent, isolated from friends, and suffered altered sleep patterns. His wife similarly testified as to Complainant's change in demeanor and marital issues. Though noting that some of Complainant's symptoms of emotional distress may have originated from sources other than his employment, the Commission nevertheless awarded Complainant $175,000 in emotional distress damages as the symptoms were exacerbated by the disability discrimination and retaliation he suffered.

Full Commission Decisions Underscore the Importance of Keeping Detailed Contemporaneous Time Entries, And Confirm That an Award of Attorneys' Fees May Exceed A Damages Award

The Full Commission's decisions in *Sims* v. *15 Lagrange Street Corp., d/b/a The Glass Slipper Gentleman's Club*, 41 MDLR 1 (2019), *Falzone* v. *Sea View Retreat*, 41 MDLR 5 (2019), *Coburn* v. *Cuca, Inc., dba Bella Notte*, 41 MDLR 29 (2019), and *Codinha* v. *Bear Hill Nursing Center, Inc*., 41 MDLR 35 (2019), taken as a whole, provide potent reminders of the necessity of keeping appropriately detailed records to support an award of attorneys' fees.

Turning first to *Codinha*, the Full Commission found Respondent's arguments that Complainant's attorneys' fees should be reduced, as lost wages and lost benefits were not awarded and Complainant had not shown a pattern of discriminatory terminations, unpersuasive. The Full Commission awarded the full amount of Complainant's requested attorneys' fees ($53,267.50), on the grounds that the petition was supported by "contemporaneous detailed time records noting the amount of time spent on tasks." *See Codinha*, 41 MDLR at 36.

On the other hand, while noting that Complainant's counsel had kept detailed contemporaneous records, in *Sims* the Full Commission reduced the fee petition (which initially requested $42,840) by 25 percent as the Complainant had not succeeded on his retaliation claim. The Full Commission made this blanket reduction as the records did not show an itemized account reflecting work performed solely in connection with the unsuccessful retaliation claim. Similarly in *Falzone*, the Full Commission discounted the attorneys' fee sought by 25.3 hours billed (for a total of $6,370), as counsel only provided generic entries and failed to adequate describe the subject matter as to how she spent those hours. Following this trend, in *Coburn*, the Full Commission discounted a fee petition requesting an award of $22,260 by 4.8 hours of billed time because the Complainant's entries for those hours, such as "correspondence to client," were not sufficiently detailed.

Also of note in the *Coburn* decision: the Full Commission declined to reduce the attorneys' fees award even though it exceeded the damages award, noting the intent of the fee shifting provision in Chapter 151B is "to encourage suits that are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights." *See Coburn,* 41 MDLR at 32, citing *Diaz* v. *Jiten Hotel Mgmt., Inc.,* 741 F.3d 170, 178 (1st Cir. 2013).

PRACTICE TIP: To mitigate the risk of the reduction of a fee award, practitioners should keep detailed contemporaneous time records for all client work, with time entries that provide sufficient detail on the subject matter of the task described.

Commission Releases First Proposed Update To Its Procedural Regulations Since 1999

In January, the Commission released a draft update to its procedural regulations. This proposed update represents the first major overhaul to the Commission's procedural rules since 1999. Three particularly important changes for practitioners are:

- Respondents are now given a significantly increased timeframe to appeal a Probable Cause determination. While under the current regulations Respondents are required to file a motion for reconsideration within 30 days of the Probable Cause finding, the new regulations allow such a motion at any time until the Certification Conference, or within 45 days of the case being certified for Public Hearing (i.e., Respondents may now file a motion for reconsideration through discovery, almost until the date of hearing). Complainants, however, are still limited to 10 days to appeal a Lack of Probable Cause determination.

- The proposed regulations provide formal codification for the Commission's longstanding practice of accepting a Rebuttal to a Position Statement. Notably, however, the regulations do not provide for submissions to the Commission after the Rebuttal has been filed.

- The Commission will now require attorneys seeking to withdraw from a case after a Probable Cause determination first to request leave from the General Counsel to do so. ■

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In the First Quarter, the Commission issued seven employment-related decisions that were adverse to employers. Three of those decisions serve as a reminder of the importance of training management level employees on discrimination and harassment to prevent them from making allegedly harassing or discriminatory remarks, or from failing to spot discrimination or harassment in the workplace. Similarly, two decisions underscore the importance of investigating and treating seriously each and every complaint of discrimination or harassment made by an employee, even if that complaint is made on behalf of another employee. One decision reminds employers to be wary of conducting investigations of employees while they are on a protected leave, and to carefully consider the timing of any discipline if an employee has taken protected leave. Finally, one Hearing Officer applied the protections of Chapter 151B to unions, and held that bargaining units have an obligation to accommodate members' disabilities.

Commission Affirms Hearing Officer's Finding of Racially Hostile Work Environment Based On Business Owners' Mistreatment of African American Employees

In *Sims* v. *15 Lagrange St. et al*., 41 MDLR 1 (2019), Complainant Derrick Sims alleged that Respondents The Glass Slipper Gentleman's Club ("Glass Slipper") and its two owners discriminated against him based on race by creating a hostile work environment and unlawfully terminating his employment.

Complainant, an African American male, worked at the Glass Slipper as a bouncer from August 2010 until his termination in February 2011. Upon arriving for a shift in October 2010, Complainant picked up a new walkie talkie that the bouncers used for communication. Complainant was told by his supervisor that the managing owner did not like people of color using the new walkie talkies. Complainant also testified that the managing owner never addressed him by name or acknowledged him, but would greet and shake hands with other non-African American bouncers. Complainant also testified that the club had few African American dancers, and that the African American dancers were subject to different performance standards than white dancers. A dancer who formerly worked at the club testified that the managing owner subjected darker skinned dancers to racial epithets.

In February 2011, Complainant covered another bouncer's day shift and ultimately left early before the shift ended. The managing owner discovered that Complainant had left work early and told Complainant's supervisor to terminate Complainant. Following Complainant's termination, the managing owner terminated another African American bouncer for arriving late to his shift. The non-managing owner also terminated an African American employee for failing to take action against a disorderly customer.

Complainant filed a charge alleging that Respondents discriminated against him on the basis of race and created a racially hostile work environment. The Hearing Officer found that Complainant's termination was motivated by discrimination based on his race.

On appeal, Respondents first argued that Complainant failed to allege discriminatory discharge as a cause of action in his charge. The Commission disagreed, finding that Complainant's allegations of racial discrimination and unlawful termination, along with Respondents' appearance at the hearing, demonstrated that they were on notice of the issues to be heard by the Hearing Officer. Next, Respondents contended that Complainant never demonstrated that other employees were treated differently, and thus the Hearing Officer could not infer discriminatory treatment. The Commission pointed out that no white bouncers were subject to termination for arriving late or leaving their shifts early. The Commission also noted that the Hearing Officer found that the decision to terminate Complainant and another African American bouncer was made by the managing owner, who demonstrated a pervasive racist attitude. Therefore, the Commission affirmed the Hearing Officer's finding that Complainant's termination was based on race.

Respondents also contended that Complainant had failed to demonstrate pretext by a preponderance of the evidence. The Commission rejected this argument and noted that, although Respondents stated in their position statement that Complainant was terminated for leaving his shift early and soliciting dancers to perform at private events, the Hearing Officer found this reason contradicted by credible testimony from Complainant, Complainant's supervisor, and the non-managing owner. Respondents also argued that the Hearing Officer erred in finding a hostile work environment, but the Commission noted that substantial evidence, including the managing owner's use of racial epithets and mistreatment of Complainant specifically, contravened Respondent's position.

Accordingly, the Commission affirmed Complainant's award of $25,000 in emotional distress damages and $20,000 for lost wages.

This case is an important reminder for employers because it demonstrates the importance of selecting a strong and thoughtful management team. Employers must be wary of selecting managers who could potentially create a toxic or hostile work environment. Moreover, employers should be sure to implement training

on harassment and discrimination in the workplace for all management employees.

Commission Affirms Award Based on Retaliation For Internal Complaints About Harassment of Another Employee

In *Falzone* v. *Sea View Retreat Inc. et al*., 41 MDLR 5 (2019), the Complainant Michele Falzone filed a charge of discrimination against Respondents Sea View Retreat Inc., its owner, and its director of nursing, alleging that they retaliated against her for filing an internal complaint of sexual harassment on behalf of another employee. In her charge, Complainant alleged that, after she filed the internal complaint she was labelled as a troublemaker, and Respondents terminated her as a result. Respondents contended that Complainant was terminated for non-discriminatory reasons related to her performance. The Hearing Officer found that although Respondents raised legitimate issues with Complainant's performance, including the excessive time that she spent with patients, the Hearing Officer concluded that Respondent's stated reasons were either not credible or exaggerated. As a result, the Hearing Officer concluded that Respondents had retaliated against Complainant for engaging in protected activity.

On appeal, Respondents argued that Complainant failed to establish a *prima facie* case of retaliation because Respondents had good cause to terminate Complainant. The Commission disagreed, noting that the Hearing Officer credited Complainant's testimony that her coworkers treated her poorly and that Respondents "brushed off" her complaints. The Commission also recognized that the non-discriminatory reasons advanced by Respondents were unpersuasive because the Hearing Officer had discredited much of Respondent's testimony about the events surrounding Complainant's termination. Accordingly, the Commission concluded that the Hearing Officer correctly found that Complainant had established a *prima facie* case and that Respondents had failed to show a legitimate non-discriminatory reason for Complainant's termination.

The Commission also affirmed the Hearing Officer's award of $25,000 in emotional distress damages. The Commission explained that the Hearing Officer had credited Complainant's testimony that, after her termination, she experienced weight loss, was sad and cried a lot, slept most of the day, and did not take care of her house. The Commission also noted that the Hearing Officer had found that Complainant's distress was directly related to the retaliation she suffered.

Finally, Respondents argued that the owner and director of nursing could not be found joint and severally liable. The Commission noted that the Hearing Officer had found that the owner and director of nursing were directly involved in investigating Complainant's internal complaint, that they were aware of her mistreatment by her coworkers, and that the owner and director of nursing ultimately decided to terminate her. Accordingly, the Commission concluded that the owner and director of nursing's involvement in Complainant's discriminatory termination rendered them jointly and severally liable.

This decision serves as a reminder to employers that it is important to seriously consider and respond to internal complaints of harassment and retaliation. The decision further warns that the failure to address concerns about retaliation could subject supervisory staff to individual liability. Finally, an employer must not seek to retaliate against individuals for making internal complaints about harassment based on protected characteristics, even if the complaint is not about harassment that is directed at the complainant.

Hearing Officer Finds Union Liable Under Chapter 151B For Failure to Accommodate

In *Maureen Reed* v. *Pipefitters Assoc. of Boston, Local 537*, 41 MDLR 49 (2019), the Complainant, Maureen Reed, brought a charge of discrimination against her union, Pipefitters Association of Boston, Local 537 ("the Union") and its business manager for failing to accommodate her disability and retaliating against her on the basis of her disability.

Complainant, a member of the Union, was afflicted with Tinnitus. As a result of her condition, Complainant experienced approximately 85 percent hearing loss and relied on lip reading for communication. Due to her Tinnitus, Reed had difficulty hearing and participating in monthly union meetings. In November 2012, Complainant reported her disability to the Union's business manager. The business manager asked Reed to submit a proposal for an accommodation to the Union's Bylaw Committee. Complainant proposed that Union meetings have closed captioning provided by a stenographer, who would transcribe the meeting in real time so that Complainant could understand the conversations taking place and participate in the meeting. In January 2013, the Bylaw Committee recommended that the membership reject the proposal because a stenographer would have to be a non-union member and the creation of a verbatim transcript would chill frank discussions. When it became apparent that the proposal would not pass, the Union's business manager suggested, and Complainant agreed, that the Union should table the proposal and investigate possible accommodations.

From February 2013 to June 2013, Complainant asked about the status of her accommodation request at the monthly meetings and the Union provided an update. After January 2013, the Union's Finance Committee investigated several accommodations, including "assistive listening" sound systems and apps for the hearing impaired. At the June 2013 meeting, the Union's business manager suggested installing a special booth that would allow Complainant to listen to the meeting as it was occurring. Complainant rejected the offer because the sound-proof booth would not have allowed her to participate in the meeting and would have been embarrassing. The Union also offered to provide a sign language interpreter and sign language training for Complainant. Complainant also rejected that offer because she had never learned sign language and did not have anyone with whom she could practice. Complainant suggested the Union explore using Dragon Software, a computer dictation system. The Union's Finance Committee investigated the software and determined that it would be ineffective for Union meetings.

In December 2013, after receiving no accommodation, Complainant filed a charge with the MCAD. At two subsequent meetings, the Union's business manager announced that Complainant had hired an attorney and was suing the Union.

At the June 2014 meeting, Complainant again asked about her accommodation and Union members booed and heckled her. Complainant left the meeting upset, humiliated, and in tears. Following the incident, Complainant amended her charge to include allegations of retaliation against the Union.

After a hearing, the Hearing Officer first addressed the jurisdictional issue of whether a Union was required to accommodate its members disabilities under Chapter 151B. The Hearing Officer reasoned that, although the text of Chapter 151B only requires employers to reasonably accommodate employees, because other statutes had been interpreted to require non-employers to accommodate disabled individuals, it was reasonable to analogize those cases to Chapter 151B and enforce the reasonable accommodation requirement against the Union.

Next, the Hearing Officer addressed whether the Union had failed to accommodate Complainant's disability. Respondents argued that Complainant had not proven her claim because Complainant rejected two reasonable accommodations of her disability: the use of a sound-proof booth, and a sign language interpreter. The Hearing Officer found the Respondents' contention that a sound-proof booth was a reasonable accommodation unpersuasive because the booth would not have allowed Complainant to participate in the meetings, and would have caused Complainant embarrassment. The Hearing Officer also rejected Respondents' suggestion that a sign language interpreter was a reasonable accommodation because Complainant did not know sign language. The Hearing Officer further found that the Union failed to show that a stenographer was not a reasonable accommodation. As a result, the Hearing Officer found that the Union failed to offer Complainant a reasonable accommodation.

The Hearing Officer awarded Complainant $25,000 in emotional distress damages and ordered the Union to explore the feasibility of reasonable accommodations for Complainant.

This decision is most notable for the expansive view that the Hearing Officer took of liability for a failure to accommodate. First, the Commission has shown that it will take a broad view of those entities subject to Chapter 151B, despite the statute's explicit textual limitations. Second, employers and unions should be wary of the interactive process and seriously vet the feasibility of an employee's suggested accommodation.

Hearing Officer Awards $150,000 In Emotional Distress Damages, Finding Employer Liable For Race and Color Discrimination and Wrongful Discharge

In *Wiggins* v. *Land Air Express*, 41 MDLR 24 (2019), Complainant Charles Wiggins alleged that Respondent Land Air Express discriminated against him and subjected him to retaliation on the basis of race and color. A default judgment was entered against Respondent, who failed to appear at the hearing and then failed to file a timely appeal of the default.

Complainant drove a truck for Respondent from 2009 until 2015. Complainant, a black man, claimed that his manager physically intimidated him and threatened to fire him while making egregious derogatory comments about Complainant's color and race. Complainant testified that his manager regularly used the "n-word" and made negative comments about other black and Latino employees.

In June 2015, Complainant allegedly accidently drove over a spike and punctured the fuel tank of his truck. Respondent terminated Complainant the next day.

The Hearing Officer found that Complainant had established an unrebutted *prima facie* case of racial harassment and discrimination and held Respondent vicariously liable for the manager's behavior. The Hearing Officer credited Complainant's testimony that the manager made frequent derogatory comments about Complainant's race and color and found that the comments were sufficiently egregious, severe, and pervasive to constitute racial harassment.

The Hearing Officer also determined that the Complainant was discharged because of his race and color because there was no evidence that he was not satisfactorily performing his job, and Complainant presented evidence that his manager did not discipline or terminate another white employee for getting in a more severe accident, while he terminated Complainant for a relatively minor accident.

The Hearing Officer awarded $150,000 in emotional distress damages based on substantial evidence that Complainant experienced constant "explicit and outrageous racist comments and attitude" from his Manager. In doing so, the Hearing Officer credited Complainant's testimony that these comments caused him insomnia, frequent headaches, flashbacks, stress, and anxiety during his employment and until a year after his termination. The Hearing Officer also considered that Complainant lost his apartment and his car after his termination, as well as the fact that Complainant stopped taking his daughter on outings and participating in hobbies that he previously enjoyed. Complainant was also awarded $60,000 in lost wages from the time of his termination until he found full-time work almost a year later.

This decision underscores that emotional distress damage awards can be very steep in cases involving severe and egregious discriminatory remarks. Employers should regularly train managers on anti-discrimination policies and evaluate the competency of managers on their compliance with such policies.

Commission Affirms Finding of Hostile Work Environment Based on Sexual Harassment Where Employer's Decision to Rehire Harassing Employee Constituted a Continuing Violation

In *Coburn* v. *Cuca*, *Inc, d/b/a Bella Note*, 41 MDLR 29 (2019), the Commission affirmed the Hearing Officer's finding that Respondent Bella Note was liable for a hostile work environment based on sexual harassment.

Complainant worked for Respondent Bella Note as a server from 2001 until 2007. Complainant alleged that another employee ("Coworker") demonstrated a pervasive pattern of sexual harassment that included asking her questions of an inappropriate and sexual nature. When Complainant reported the incidents, the Owner and Operator of Bella Note ("Owner") allegedly stated that the

Coworker thought he was being funny and advised Complainant to ignore him. Complainant testified about a number of other incidents where the Coworker demonstrated egregious behavior, such as making sexually explicit remarks to Complainant and asking her to engage in sexual behavior. The Owner continually failed to take remedial action in response to Complainant's complaints.

In November 2006, after Complainant threatened to quit, the Owner temporarily released the Coworker from employment, assuring the Complainant that the Coworker would not be rehired. However, in May 2007, Complainant arrived at work to find that the Coworker had been rehired. Complainant threatened to quit if the Coworker continued to work at the restaurant. The Owner once again told Complainant that she should ignore the Coworker's comments. As a result, Complainant resigned.

Complainant filed a charge of discrimination on February 14, 2008. The Hearing Officer found that Respondent had created a hostile work environment based on unlawful sexual harassment, and that as a result of that hostile work environment, Complainant was constructively discharged. The Hearing Officer awarded Complainant $20,000 in emotional distress damages. Respondent appealed this ruling asserting that (1) Complainant failed to file a timely complaint; and (2) Complainant was not constructively discharged.

The Commission found that Complainant's filing was timely based on the continuing violation doctrine because Respondent's actions in rehiring the Coworker after numerous reports of sexual harassment were sufficient to anchor the unlawful conduct within the statute of limitations. In a footnote, the Commission stated that even if the continuing violation doctrine did not apply, the Complainant's filing could be viewed as timely under the doctrines of equitable tolling and equitable estoppel because Complainant did not act as she thought the Coworker's termination was permanent.

The Commission also affirmed the Hearing Officer's finding that Complainant's conditions at work forced her to resign. In particular, the Commission considered that Complainant struggled to perform her job, cried at work, and varied her work commute to avoid contact with the Coworker because she was afraid of him. The Commission found it significant that Complainant returned to work to find that Respondent had rehired the Coworker, even though Respondent promised that once the Coworker was terminated Complainant would no longer have to work with him. These actions by Respondent were sufficient to establish constructive discharge.

This decision is an important reminder that employers should promptly investigate all complaints of discrimination or harassment. Moreover, employers should be sure to follow through on any remedial action promised to the impacted employee.

Full Commission Affirms Finding That Employer Failed To Accommodate Employee And Discriminated Against Her Based On Disability And Age

In *Codinha* v. *Bear Hill Nursing Center, Inc*., 41 MDLR 35 (2019), the Commission affirmed the Hearing Officer's finding that Complainant Dorothea Codinha was disabled, arguably could have performed the essential functions of her job, and that Respondent Bear Hill Nursing Center was therefore liable for failing to engage in the interactive process. The Commission also affirmed the Hearing Officer's determination that Complainant was discharged because of her disability and age.

Complainant, a nursing assistant at a rehabilitation facility was one of the oldest employees working for Respondent, at age seventy-two. Complainant alleged that during her employment she was referred to at work as "the old one" and her supervisor asked her when she intended to retire. In November 2013, Complainant was approved for a medical leave of absence after she broke her wrist. Shortly thereafter, Complainant's doctor permitted her return to work with a five-pound lifting restriction. Respondent denied Complainant's request for an accommodation and required Complainant to extend her medical leave. Then, once Complainant was cleared to return to work with no restrictions, she was terminated. Respondent asserted that the termination was based on Complainant's conduct and work performance.

The Commission affirmed the Hearing Officer's finding that Respondent discriminated against Complainant because of her disability. First, the Commission agreed that Complainant's injury qualified as a disability, and agreed that she arguably would have been able to perform the essential functions of the job with the five-pound lifting restriction. Respondent therefore failed to engage in the interactive process by denying Complainant's request for an accommodation and forcing her to remain on medical leave. Second, the Commission agreed that Respondent's assertion that Complainant was terminated because of the results of an investigation into her conduct and work performance was pretext for discrimination. The Hearing Officer considered (1) the timing of the investigation, which occurred while Complainant was on medical leave; (2) that Complainant had not received a complaint in over five years; (3) that Complainant received favorable performance reviews; and (4) that Respondent's witnesses provided contradictory testimony regarding the reason for the investigation.

The Commission also affirmed the Hearing Officer's finding that Respondent discriminated against Complainant because of her age. The Commission agreed that Complainant had established a *prima facie* case of age discrimination because she: (1) was part of a protected class based on her age; (2) was performing her position in a satisfactory manner based on her annual reviews; (3) was terminated; and (4) was replaced by someone who was in her fifties. The Commission further agreed with the Hearing Officer that the fact that Complainant received positive performance reviews and experienced discriminatory comments regarding her age from her supervisor and co-workers provided sufficient support that Respondent's reason for the termination was pretext.

The Commission therefore affirmed the Hearing Officer's award of $35,000 in emotional distress damages.

This decision reminds employers to tread carefully when investigating employee behavior while an employee is on protected leave. It also reminds employers to think critically about the timing of employee discipline.

Hearing Officer Awards $175,000 In Emotional Distress Damages For Disability Discrimination and Retaliation

In *Halstead* v. *Leidos, Inc. and Kerrigan*, 41 MDLR 38 (2019), the Hearing Officer found Respondent Leidos, Inc. ("Respondent") liable for disability discrimination and retaliation. Complainant's supervisor, Respondent Francis Kerrigan ("Supervisor") was also held individually liable.

Complainant worked as part of Respondent's computer-aided design ("CAD") team for over twenty-four years. In 2010, Complainant underwent knee replacement surgery that resulted in severe complications, including physical and neurological problems. He took medical leave from work for seven months while he underwent speech therapy, language therapy, and physical therapy. The Hearing Officer credited Complainant's testimony that his Supervisor had harassed him about returning to work until Human Resources intervened. When Complainant requested to return to work part-time based on a recommendation from his doctor, Respondent only granted his request after Complainant filed a complaint with the EEOC. Upon his return to work, Complainant experienced harassment based on his reduced work schedule from his Supervisor and other employees. In August 2014, Respondent terminated Complainant, claiming that the reason for his termination was the end of the CAD contract. However, other members of the CAD team continued their employment through 2015.

The Hearing Officer found that Complainant had established a *prima facie* case of disability discrimination. First, Complainant's medical records and disability benefit applications established that he was disabled. Second, Complainant was qualified for the position as demonstrated by the fact that he received positive performance reviews until he went on leave. Moreover, the Hearing Office found it was not essential for Complainant to return to a full schedule. In 2011, Respondent had hired another employee to cover Complainant's responsibilities while he was on leave. This employee continued her employment after Complainant returned to work and Respondent provided no evidence that this was a financial hardship for the company. Third, Complainant's Supervisor pushed Complainant to work full-time and treated him negatively because he perceived Complainant's reduced work schedule as a "special privilege." Moreover, the Hearing Officer credited testimony that Complainant's Supervisor found work for other members of the CAD Team so that they could avoid layoffs but did not make the same efforts for Complainant, even though Respondents admitted that Complainant's skills were needed.

In addition to his discriminatory termination, the Hearing Officer also found that Complainant was subjected to a hostile work environment. For example, he was subjected to negative comments about his disability and accommodation, his work station was moved to a trailer, and Respondent denied him a meaningful merit raise. Thus, the Hearing Officer concluded that Complainant had suffered a hostile work environment.

Moreover, the Hearing Officer found that Complainant had also established a *prima facie* case of retaliation because (1) he engaged in protected activity by requesting an accommodation and filing his complaint with the EEOC; (2) he experienced a hostile work environment for three years following his protected activity; (3) he was ultimately terminated; and (4) his protected activity was directly linked to the negative treatment he received, evidenced by his Supervisor's harassing statements regarding his leave and reduced work schedule.

The Hearing Officer found that Respondent had established legitimate and non-retaliatory reasons for Complainant's termination—the termination of the CAD contract. However, the Hearing Officer found that the fact that Complainant was terminated six months before the next team member lost his position established discriminatory and retaliatory animus, and the stated reasons for Complainant's termination were pretext for discrimination and retaliation.

The Hearing Officer awarded Complainant $175,000 in emotional distress damages based on Complainant's testimony that he experienced depression, frequent outbursts, lack of interest in physical intimacy, anger, despondency, altered sleep patterns, isolation from friends, and being less outgoing. The Hearing Officer considered that some of these symptoms proceeded Complainant's layoff, but ultimately found that the discrimination and retaliation worsened his symptoms. Complainant also received back wages from the time of his termination on August 8, 2014 until the date the next CAD team member was laid off in January 28, 2015.

This case reminds employers to regularly train managers regarding their obligations under the law. In particular, managers should be made aware of anti-discrimination and harassment laws related to discrimination and medical leave. ■