2006 WL 372574 (MCAD)

Massachusetts Commission Against Discrimination

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION AND KARL HANSON, COMPLAINANTS
v.
MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

01 BEM 2202
February 7, 2006

DECISION OF THE FULL COMMISSION

***1** This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Karl Hanson. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful discrimination when it denied him employment in violation of M.G.L. c. 151B, § 4(9). Respondent filed an appeal to the Full Commission.

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. M.G.L. 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); M.G.L. c. 30A.

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). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. *See* 804 CMR 1.23.

I. RESPONDENT'S PETITION FOR REVIEW

Respondent first contends that the Hearing Officer erred in asserting jurisdiction over this matter, stating that Complainant's complaint did not allege a violation properly before the Commission. Specifically, Respondent argues that because M.G.L. c. 151B, § 4(9) does not mention juvenile records, Respondent's inquiry into the content of Complainant's juvenile record is not controlled by the statute and, further, that any interpretation of the statute as including juvenile records within its ambit "cannot stand scrutiny." In support of its argument, Respondent asserts that juvenile records are not criminal in nature (citing M.G.L. c. 119, § 52 et seq.), but that chapter 151B, § 4(9) is commonly referred to in certain cases and regulations with the phrase "criminal records" and therefore the two are at odds. However, we do not find this argument persuasive.

***2** The fact that the term "criminal records" has been used in reference to section 4(9) in case law and regulations does not conclusively establish that the provision is necessarily and solely limited to inquiries regarding "criminal records" in the strictest sense of the term. Nowhere in the statute in general or the provision in particular do the words "criminal records" appear, and therefore such a limited interpretation

should not apply. That the provision is sometimes referred to in a shorthand manner with the broad, identifying phrase "criminal records" should not be viewed as a dispositive limitation or an exclusion of juvenile offenses.[1]

We further believe that public policy compels a finding of jurisdiction in this matter. The Commonwealth of Massachusetts has enacted a series of laws designed explicitly to protect the confidentiality of juvenile court proceedings and probation records, at least in part to protect individuals from being discriminated against because of such a record. In a similar vein, the Legislature enacted chapter 151B, section 4(9) in order to protect employees from being forced to reveal information that could be used in a discriminatory manner and to impede the opportunity for employment. See Bynes v. School Committee of Boston, 411 Mass. 264 (1991) ("the original purpose of the statute . . . was to protect employees from discrimination for their failure to provide their employers with restricted criminal history information."). In this matter, Complainant was flatly denied that protection when he was asked point blank to reveal the contents of his sealed juvenile record. We are convinced that this kind of direct inquiry is exactly the type of inquiry the Legislature sought to prohibit. To deny jurisdiction in this instance would be to eviscerate the intent of the statute and to deny the very protection the Legislature has sought to provide to those with records carrying with them the potential for discrimination. Moreover, a determination that the Commission lacks jurisdiction in this instance would deny protection to all those with juvenile records, a class of individuals the Legislature has expressly deemed more vulnerable and entitled to greater protection than adult offenders. Such a ruling would subvert both legislative intent and public policy rationales for sealing juvenile records.

Accordingly, Respondent's direct inquiry in this matter about juvenile offenses should be seen as falling squarely within the scope of the statute's prohibition against inquiries concerning "(i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted.…" Such a finding not only comports with a common-sense reading of the provision at issue, but is also supported by the well-established principle that the Commission's interpretation of its governing statute is entitled to substantial deference. *See, e.g.*, Rock v. MCAD, 384 Mass. 198, 204 (1981). Finally, though not specifically stated in the statutory text, we firmly believe that the Legislature intended that a violation would occur in the instance when an employer automatically rejected an applicant from employment simply because he possessed a criminal record, the exact contents of which the applicant refused to reveal. To find otherwise would be to perpetuate, likely, the most heinous stereotype that individuals with criminal records are, as a group, unemployable.

***3** Respondent next contends that even if jurisdiction is proper, the Hearing Officer's finding of liability on the part of Respondent is not supported by substantial evidence. Specifically, Respondent argues that Complainant failed to demonstrate that the inquiry made of him about his sealed record violated section 4(9) because the contents of that record were never revealed. Respondent goes on to argue that the Hearing Officer could not have concluded that the statute was violated "[a]bsent assumptions or speculations" on her part. While Respondent is correct in stating that the substance of Complainant's sealed record was not revealed, we do not find its argument persuasive. Considering the comprehensive nature of subsection (i) of the statutory provision, which encompasses arrests, detentions and dispositions regarding violations of the law short of conviction, we believe it was reasonable for the Hearing Officer under these circumstances, especially given that the record was revealed as a result of a CORI check, to assume that the inquiry reached one of those broad categories. Indeed, given the inclusive nature of the terms "arrest, detention or disposition regarding violations of the law," it is difficult to imagine what offenses would not be included therein. And if the record contained information regarding a conviction of a misdemeanor in a juvenile matter, this inquiry would be prohibited under subsection (iii) of the provision, as any such conviction would have occurred "five or more years prior to the date of such application for employment or such request for information,"

given that Complainant was 47 years of age at the time he applied for a job with Respondent.

We have carefully reviewed all of Respondent's contentions on appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.[2]

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

II. COMPLAINANT'S REQUEST FOR ATTORNEYS' FEES

Having affirmed the Hearing Officer's decision, we conclude that Complainant prevailed on his claim in this matter and is entitled to an award of reasonable attorneys' fees. See M.G.L. c. 151B, § 5.

Complainant has filed a petition seeking attorneys' fees, supported by detailed contemporaneous time records, requesting fees in the amount of $3,037.50.

M.G.L. c. 151B allows prevailing Complainants to recover attorneys' fees. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and its understanding of the litigation of a claim of discrimination in the administrative forum. In rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar methodology for fee computation. *See* Fontaine v. EBTEC Corp., 415 Mass. 309, 324 (1993). By this method, the Commission will first calculate the number of hours reasonable expended to litigate the claim and multiply that number by a reasonable hourly rate. Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

***4** Only those hours that are reasonably expended are subject to compensation under M.G.L. c.151B. In determining whether hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099.

In this matter, Complainant's attorney, William Smith, filed an affidavit in support of Complainant's Petition for Award of Attorneys' Fees, requesting a total of $3,037.50 in attorneys' fees for a total of 20.25 hours. Attorney Smith has requested that these hours be compensated at the hourly rate of $150.00. Having reviewed the contemporaneous time records that support this request, we conclude that the amount of time spent on preparation and litigation of this claim is reasonable. Our review points to no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to the prosecution of the claim. Furthermore, all hours for work performed are sufficiently documented. We conclude that the reimbursement requested is reasonable and therefore award the fees to Complainant.

III. ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law and the Order of the Hearing Officer and issue the following ORDER of the Full Commission:
(1) Respondent shall immediately cease and desist from making unlawful inquiries about the criminal records of job applicants.

(2) Respondent shall pay to Complainant Karl Hansen the sum of $20,000.00 in damages for emotional

distress within forty-five (45) days of receipt of this Order.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Failure to comply with this Order will result in the Commission's initiation of enforcement proceedings, pursuant to 804 CMR 1.25, which may subject the non-complying party to both civil and criminal penalties as provided in M.G.L. c. 151B, § 8.

Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint seeking judicial review within 30 days of receipt of this decision and in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

***5** SO ORDERED this 7th day of February, 2006.

Cynthia A. Tucker, Commissioner
Walter J. Sullivan, Jr.[3], Commissioner

Footnotes

1. Even under a reading of section 4(9) as a "criminal records" provision, the offenses underlying juvenile/delinquent children adjudications may yet fairly be considered sufficiently "criminal" so as to include them within the statute's jurisdiction. Respondent refers to chapter 119, chapter 53 ("Liberal construction; nature of proceedings"), which states that chapter 119, sections 52 to 63, should be liberally construed "so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings." While this provision clearly evinces the intent as a matter of public policy not to treat delinquent children in the same manner as adult criminals with respect to process, it does not convey the intent to erase the essential criminal nature or substance of the offenses they may have committed. That is, even though juveniles may not have to submit to the same criminal proceedings as adults, they may well have committed the same or similar offenses which, if committed by adults, would indeed be treated as criminal in every sense. Such a truth is borne out by the fact that Complainant's juvenile record in this matter was discovered in the context of a CORI check, which is, after all, a check that uncovers Criminal Offender Complainant's juvenile record in this matter was discovered in the context of a CORI check, which is, after all, a check that uncovers Criminal Offender Record Information.

2. We note that, effective June 30, 2005, the Criminal History Systems Board adopted 803 C.M.R. 6.11, which affords an individual the opportunity to dispute a CORI report if a certified agency is inclined to make an adverse decision based upon such report. The regulation, in pertinent part, states: (1) Unless otherwise provided by law, agencies certified pursuant to M.G.L. c. 6, §§ 172(b) or

172(c), that are inclined to make an adverse decision based upon receiving CORI, shall before making a final decision, afford the individual with an opportunity to challenge the accuracy or relevance of the CORI.

In our opinion, an employer may comply with this new regulation without necessarily running afoul of § 4(9). As we have discussed, supra, the intent of § 4(9) is to protect individuals from adverse employment decisions as a result of their compelled production of criminal history information or their refusal to disclose such information. The CHSB regulation makes clear that an employer must first decide that a CORI report will effectuate an adverse employment determination before affording an individual the opportunity of provide information relevant to the report. The regulation operates to protect individuals against the effects of inaccurate or irrelevant criminal history information. As such, adherence to the regulation's protocol will, in general, not contravene § 4(9). We note further, that in this case, Complainant would not have had the benefit of the new regulation. Here, after being denied access to Complainant's sealed juvenile record, Respondent then sought to compel Complainant to produce the information, a practice specifically prohibited by § 4(9), and then refused to hire him when he asserted his § 4(9) rights.

3. Investigating Commissioner sitting by necessity to establish a quorum. See M.G.L. c.6, § 56, M.G.L. c.151B, § 5