

Part 6

MCAD CITATOR 2005–2006

MCAD YEAR IN REVIEW 2005–2006

OBSERVATIONS BY DIANE M. SAUNDERS

A review of the 2005–2006 cases reported in this edition of the *Massachusetts Employment Law Sourcebook & Citator* reveals several new developments and trends at the Commission with regard to both liability and damages issues. These new developments should be of importance to employers in the Commonwealth and their counsel as they provide insight into what they can expect at the Commission.

Significant Liability Developments

The most significant lesson for employers from the cases before the Commission from 2005–2006 is the overarching importance of engaging in the “interactive process” with disabled employees. Once an employer is placed on notice that a disabled employee needs an accommodation in the workplace, the employer has an affirmative duty to engage in an “interactive process” in order to determine if accommodations can and should be made. This “interactive process” requires an employer to “make a reasonable effort to determine the appropriate accommodation . . . through a flexible . . . process that involves both the employer and the qualified individuals with a disability.” *Russell v. Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 457 (2002). The “interactive process” is intended to “identify the precise limitations associated with the employee’s disability, and the potential adjustments to the work environment that could overcome those limitations.” *Mazeikus v. Northwest Airlines*, 22 M.D.L.R. 63, 68–69 (2000). Notwithstanding this requirement, in five cases before the Commission during the 2005–2006 period the Commission found liability against employers for, inter alia, failing to engage in the interactive process.



* Complications such as remands and consideration of decisions by the full Commission in the same year mean that numbers reported may vary slightly depending on how cases are counted.

In *Sabella v. Boston Public Schools*, 27 M.D.L.R. 90 (2005), the Commission noted that the duty to engage in the interactive process is a continuing one and then faulted the Boston Public Schools for not doing more to help a disabled teacher find a part-time teaching post over several academic years. Among the reasons supporting the Commission's ruling in this regard was its finding that several of the school administrators had taken an "intolerant and short-sighted position" that the complainant could not work part-time in their schools due to stereotypical attitudes about part-time teaching and job sharing.

In *Helmuth v. Harvard Vanguard Medical Associates, Inc.*, 27 M.D.L.R. 177 (2005), the employer was found to have failed in its obligation to engage in the interactive process as a result of the failure of the human resources representative to sit down with the complainant and her supervisor to discuss accommodations and ensure that accommodations would be made. The complainant had spoken previously with the human resources representative about her concern that her supervisor would not make accommodations. Although the human resources representative assured her that accommodations could be made, she apparently did not follow up with the complainant or make sure that the complainant's supervisor knew accommodations needed to be considered. As a result, the Commission found that the complainant was justified in quitting her position.

In *Hall v. Department of Mental Retardation*, 27 M.D.L.R. 235 (2005), the Commission found several shortcomings in the employer's efforts to meet its obligation with regard to the interactive process. First, the Commission found that the employer waited too long to initiate a dialogue with the complainant over whether accommodations could be made and instead made a decision that she could not perform her old position because of her disability. Second, the Commission found that the employer had not acted in "good faith" when it attempted to obtain more information about the complainant's medical condition. Specifically, the employer threatened the complainant with disciplinary action, up to termination, if she failed to provide updated medical information. While the Commission agreed with the respondent that it had a legitimate business need for requesting updated medical information, it held that it could not do so through threats, intimidation, or coercion.

In both *Sweet v. MBTA*, 27 M.D.L.R. 252 (2005), and *Burley v. Boston School Committee*, 27 M.D.L.R. 289 (2005), the employer had made significant accommodations to the disabled complainants in the past. However, in both cases, the employer failed to engage in an ongoing dialogue with the complainants to discuss additional or alternative accommodations. Both of these cases, as well as the other cases on this issue from the 2005–2006 time period, highlight the need for employers to follow up with the complainants on all requests for accommodation and to engage in a continual dialogue with disabled employees about whether the accommodations they are making are effectual. The Commission is clearly expecting employers to go "above and beyond" what most employers probably believe is a reasonable level of communication with their disabled employees over possible accommodations.

Significant Damages Developments

Impact of Stonehill College

In *Stonehill College v. MCAD*, 441 Mass. 549 (2004), the Supreme Judicial Court held that an award of emotional distress damages cannot be awarded to a prevailing complainant as a matter of course or out of a desire to punish the respondent for its behavior. Rather, an award must be based on substantial evidence of harm that is causally connected to the discrimination and must take into account the following factors: the nature and character of the alleged harm, the severity of the harm, the length of time the complainant has suffered or expects to suffer, and whether the complainant has tried to mitigate the harm.

Contrary to what some legal observers may have predicted and respondents' counsel certainly hoped, the Supreme Judicial Court's decision in *Stonehill College* does not appear to be causing the full Commission to overrule hearing officers' emotional distress damage awards as excessive. Instead, the primary impact of *Stonehill* on the Commission's awards appears to be that hearing officers are taking greater care in setting out the factual bases for their awards. While respondents have continued to challenge the Commission's emotional distress awards as excessive, in the decisions reported in this edition the full Commission has affirmed all of the awards as based on substantial evidence.

Emotional Distress Awards

As in past years, the Commission's emotional distress awards for the 2005–2006 time period continue to be significant. Indeed, in one case, the hearing officer awarded one of the highest emotional distress awards that has ever been issued by the Commission. However, overall, the awards in the cases from 2005–2006 were significantly lower than the awards from the 2004–2005 period. Unlike the awards from the 2004–2005 period, the higher awards during this period are supported by medical evidence. Moreover, there were far fewer awards in the \$100,000 range, and the majority of awards were in the \$25,000 to \$50,000 range.

In *Helmuth v. Harvard Vanguard Medical Associates, Inc.*, 27 M.D.L.R. 177 (2005), the hearing officer (Guastaferrri) awarded the complainant \$350,000 in emotional distress damages based on her findings that the complainant had been subjected to age and disability harassment and discrimination during her employment for the respondent and that she had been constructively discharged. In support of her emotional distress damages, the complainant offered her own testimony and that of family members and friends. From the decision, it does not appear that she offered any live treating physician or expert testimony. However, she offered several medical reports from treating physicians and a report from a psychiatrist/neurologist who examined the complainant as an impartial physician for the Department of Industrial Accidents and who opined that the complainant suffered from a total and permanent mental disability. (Note that the hearing officer's award in this case was affirmed by the full Commission. *Helmuth v. Harvard Vanguard Med. Assocs., Inc.*, 28 M.D.L.R. 78 (2006).)

In another significant case, *Sabella v. Boston Public Schools*, 27 M.D.L.R. 90 (2005), the hearing officer (Mitnick) awarded the complainant \$195,000 in emotional distress damages as a result of his finding that the respondent had failed to accommodate her disability for a period of several years. As in *Helmuth*, this award was supported by medical documentation, although again the complainant apparently did not offer live treating physician or expert witness testimony. Instead, the hearing officer relied on records from the complainant's treating physicians and therapists that detailed the complainant's depression and anxiety. As in *Helmuth*, the hearing officer also relied on the testimony of the complainant and of a friend. Unlike in *Helmuth*, however, the hearing officer noted that the complainant suffered from a multitude of other outside stressors in her life, and perhaps that influenced his decision making in awarding \$195,000 in emotional distress damages.

In the remaining decisions, the hearing officer's awards ranged from highs of \$105,000 and \$100,000 in two cases (*Hall v. Department of Mental Retardation*, 27 M.D.L.R. 235 (2005), and *Allen v. Univ. of Mass. Boston*, 27 M.D.L.R. 165 (2005), respectively) to a low of \$8,000 in one case, with most of the awards falling in the \$25,000 to \$50,000 range. Note that in the *Hall* case the complainant had sought psychiatric treatment and offered related records at the public hearing.

Civil Penalties

As in recent years, the Commission has continued to assess civil penalties frequently. In the following four cases, the Commission awarded the complainants civil penalties in the amount of \$10,000, the maximum allowable penalty for a first offense:

- *Sabella v. Boston Public Schools*, 27 M.D.L.R. 90 (2005);
- *Allen v. University of Massachusetts, Boston*, 27 M.D.L.R. 165 (2005);
- *Sweet v. MBTA*, 27 M.D.L.R. 252 (2005); and
- *McCormick v. Modern Continental Construction Co.*, 27 M.D.L.R. 316 (2005).

Two full Commission cases from this period offer important clarifications on the issue of civil penalties. In *Poore v. Town of Harwich High School*, 28 M.D.L.R. 85 (2006), the full Commission reversed the hearing officer's award of a civil penalty on the ground that the events at issue in the case, and the public hearing as well, occurred after the enactment date of the statute authorizing the Commission to award civil penalties. Finding that the statute was nonretroactive, the full Commission found that the hearing officer's award of a civil penalty was inappropriate.

In *Strothers v. Massachusetts Department of Correction*, 27 M.D.L.R. 155 (2005), the full Commission provided important clarification on the issue of when a respondent will be adjudged to have committed a prior discriminatory act during a five-year period, thus authorizing the Commission to award civil penalties of up to \$25,000 pursuant to G.L. c. 151B, § 5(b). In *Strothers*, the full Commission found that an amplified award was inappropriate because the purported "prior" discriminatory act was a voluntary settlement entered into after an adverse decision of the hearing officer and while the case was on

appeal before the full Commission. Thus, the final adjudication was found to be that of the hearing officer over five years before, and not the voluntary settlement. The full Commission rejected the respondent's argument that no civil penalty was appropriate and instead awarded a penalty in the amount of \$10,000, the maximum allowable for a first offense, finding such a penalty was justified based on "Respondent's egregious conduct and 'repeated bad faith in addressing Complainant's legitimate issues.'"

Training Orders

As in recent years, the Commission is continuing to order mandatory antidiscrimination training with vigor. In the following seven cases, the Commission ordered remedial training:

- *Sullivan v. Jimbo's South*, 28 M.D.L.R. 57 (2006);
- *Sabella v. Boston Public Schools*, 27 M.D.L.R. 90 (2005);
- *Allen v. University of Massachusetts, Boston*, 27 M.D.L.R. 165 (2005);
- *Helmuth v. Harvard Vanguard Medical Associates, Inc.*, 27 M.D.L.R. 177 (2005);
- *Hall v. Department of Mental Retardation*, 27 M.D.L.R. 235 (2005);
- *Sweet v. MBTA*, 27 M.D.L.R. 252 (2005); and
- *McCormick v. Modern Continental Construction Co.*, 27 M.D.L.R. 316 (2005).

In most of these cases, the Commission ordered that managers and supervisors of the particular work location, job site, or department involved undergo training. However, in several of these cases, the training orders were particularly far-reaching and thus onerous for the employers. For example, in *Sabella v. Boston Public Schools*, 27 M.D.L.R. 90 (2005), the hearing officer (Guastaferrri) ordered that all principals, administrators, and supervisors throughout the Boston Public Schools receive training. In *Allen v. University of Massachusetts, Boston*, 27 M.D.L.R. 165 (2005), the hearing officer (Waxman) ordered that all employees and supervisors at the university undergo basic annual training sessions even though the events at issue involved the university's department of public safety. And in *Sullivan v. Jimbo's South*, 28 M.D.L.R. 57 (2006), the hearing officer (Guastaferrri) ordered that the entire staff of the Jimbo's South restaurant undergo annual sexual harassment training for the next five years.

Attorney Fees

In the 2005–2006 cases reported in this year's edition, there were ten full Commission decisions awarding attorney fees to the complainant's counsel. Surprisingly, in four of those cases (i.e., almost half), the full Commission significantly reduced the time claimed by counsel on the grounds that the time was excessive, duplicative, and/or unnecessary to the result obtained. Those cases and the reductions approved are as follows:

- *Sullivan v. Jimbo's South*, 28 M.D.L.R. 73 (2006) (25 percent reduction overall on fees sought due to lack of adequate documentation of time spent and excessive time);
- *Pettiford v. City of New Bedford Police Department*, 28 M.D.L.R. 91 (2006) (25 percent and 50 percent

reduction in time spent on certain tasks due to excessive time);

- *Poore v. Town of Harwich High School*, 28 M.D.L.R. 85 (2006) (25 percent reduction in time spent on certain tasks due to duplication and excessive time); and
- *Stephan v. SPS New England, Inc.*, 27 M.D.L.R. 249 (2005) (15 percent reduction overall on fees sought due to the complainant's failure to succeed on one claim).

The full Commission approved an enhancement of a fee award in only one case—*McTernan v. Boston Public Schools*, 28 M.D.L.R. 88 (2006). In *McTernan*, the full Commission approved a 15 percent enhancement on the overall fees claimed by the complainant's counsel. In doing so, the full Commission noted that the issues litigated in the case had wider significance for all Boston Public School teachers and, as such, implicated a broader "public interest." The full Commission also seemed influenced by the fact that the complainant's counsel was a solo practitioner who carried the overhead on the case for over six years and fought a tough battle with respondent's counsel in a complicated case.

The hourly attorney's fees rates approved by the full Commission ranged from a low of \$115 per hour to a high of \$360 for an initial consultation (total time for the consultation not specified in the decision) in *Sabella v. Boston Public Schools*, 28 M.D.L.R. 93 (2006). The full Commission in most of the cases approved hourly rates ranging from \$200 to \$275 per hour.

In *Sabella* the full Commission approved an hourly rate for Commission counsel of \$140 per hour. And in *Poore v. Town of Harwich*, 28 M.D.L.R. 85 (2006), the full Commission approved rates of \$75 per hour for paralegal work and \$75 and \$40 per hour for the work of law students.

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