

2005 WL 1183011 (MCAD)

Massachusetts Commission against Discrimination

MCAD & KARL E. HANSEN, COMPLAINANTS

v.

MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

Docket No. 01BEM2202

May 4, 2005

APPEARANCES:

William F. Smith, Esquire for Complainant Karl E. Hanson

Brian Pariser, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 21, 2001, Complainant Karl Hanson filed a complaint with this Commission charging Respondent Department of Social Services with discrimination for inquiring about his arrest record in the context of employment, in violation of M.G.L.c.151B §4(9). The Investigating Commissioner issued a finding of probable cause. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on December 8, 2004. After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Karl Hanson resides in Haverhill, Massachusetts.
2. After graduating from Lowell High School 1972, Complainant performed manual labor. He worked at General Electric in a factory position for ten years and earned an Associate's degree in criminal justice from Middlesex Community College in 1985. In 1988 he received a degree in Legal Services Education from UMass Boston. Complainant obtained a Master's degree in Criminal Justice from Suffolk University in 1999.
3. Complainant has been employed as a special police officer at the Massachusetts General Hospital since 1988. He has also worked as a substitute teacher in the Haverhill Public Schools on an as needed basis for six years. Complainant testified that he viewed his current position at Mass General as a "stepping stone" to a position in the field of social services.
4. Complainant testified that since childhood he has been interested in working with children in the field of social services. Complainant attributed this desire in part to his upbringing as one of six children of a single parent on welfare. Complainant testified that he never forgot the social workers who assisted him and his family during difficult times. I credit this testimony.
5. Complainant testified that he first applied for a position with Respondent DSS as a social worker in

around 1999, but never heard back from the agency.

6. On or about April 20, 2001, Complainant submitted a resume to the recruitment unit of Respondent's Office of Human Resources. Shortly thereafter, his resume was forwarded to four of Respondent's area offices in Essex County. At the time, Complainant was 47 years old.

7. On May 1, 2001, Complainant interviewed with Lori Balduc in Respondent's Salem office for a position of entry-level social worker. At the time, Balduc was the Assistant Administrative Manager for Respondent's Cape Ann Area office. At the close of his interview, Complainant signed a release form allowing Respondent to request a Board of Probation criminal record check ("CORI").

*2 8. On May 16, 2001, Complainant reported to Respondent's Lawrence office to interview for a social worker position that was available at that location. Complainant testified that while waiting to be interviewed, Balduc approached him in the waiting area. She informed him that he was the leading candidate for a social worker position and would have his choice of locations in either Salem or Lawrence. I credit this testimony.

9. While in Lawrence, Complainant was interviewed by Area Director Jacqueline Gervais, and also by a supervisor for the Children in Need of Services unit. Following the interviews, Complainant was asked to provide additional information, including a copy of his Social Security card, college transcripts and references.

10. Subsequent to the interview, Jacqueline Gervais was notified that a search of the Board of Probation Records revealed that Complainant had a sealed juvenile record. Gervais, who is now deceased, was never told the nature of the offense in that record.

11. Complainant testified that on May 18, 2001, Gervais telephoned him and told him he was the top candidate for a social worker position, but she could not hire him because a CORI criminal records check had revealed the existence of a sealed juvenile record. According to Complainant, Gervais asked him to reveal the contents of his sealed juvenile record. Complainant believed that Gervais' request was illegal, as he had undergone previous CORI checks that had never revealed the existence of the sealed record. He also received an e-mail from Gervais regarding the existence of the sealed juvenile record. I credit his testimony.

12. After the telephone call from Gervais, Complainant contacted the office of the Commissioner of Probation, an attorney in DSS' office and someone at the Criminal Offender Records Board to ascertain whether he was obligated to reveal the contents of his juvenile record. Based on the information he received, he decided not to reveal the contents of his juvenile record to Respondent.

13. On or about May 21, 2001, Complainant telephoned Gervais to inquire about his status as a candidate for the position of social worker. Gervais informed Complainant that the position had been filled by another candidate. I credit this testimony.

14. In a letter dated May 18, 2001, Lori Bolduc wrote to Complainant the following: "...due to recent CORI issues the Department is unable to hire you as an employee at this time. If this issue is able to get resurrected in the near future the Department will keep you in mind for future employment options and will hold your resume on file. If you have any further questions please feel free to contact me..." (Exh. C-2)

15. Complainant testified that he desired to work as a social worker for Respondent. He testified that upon realizing that he was not likely to become a social worker for Respondent, he felt that the "bottom had fallen

out” of his life and he was devastated. He felt as though someone had died in his family and he did not know what to do. Complainant testified that he is not as sociable as he used to be. He stated that it really hurts to know that he is not employed in the field of social work, because that was his desire for many years. I credit this testimony.

*3 16. Complainant testified that after Respondent rejected him for the position, he consulted with a psychiatrist who increased his medication, Zoloft, in September of last year. According to Complainant, the side effects of the medication include fatigue, insomnia and lack of sex drive. Complainant acknowledged that he has a history of depression pre-dating his application for employment with Respondent. He did not seek treatment for two years after having been denied the position with Respondent. I credit his testimony.

17. Complainant receives a salary of approximately \$36,000 per year as a special police officer at Massachusetts General Hospital. In addition, he receives \$80 per day as a substitute teacher, usually working about three days per week.

18. As an entry-level social worker, Complainant would have made \$35,829.30 per year. Since 2001, Complainant has not sought another social work position involving working with children.

III. CONCLUSIONS OF LAW

Massachusetts General Laws, Chapter 151B §4(9) prohibits an employer from requesting of any applicant information regarding (i) an arrest, detention or disposition regarding any violation of law in which no conviction resulted or ... (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, which ever date is later, occurred five or more years prior to the date of such application for employment. Complainant argues that Respondent’s inquiry about the nature of his sealed juvenile record constitutes a violation of the statute because proceedings under the juvenile justice system in Massachusetts are not criminal in nature and do not result in criminal convictions and, further, any juvenile proceedings would have occurred more than five years previous to his application, as Complainant was 47 at the time of his application and juvenile proceedings apply to those 17 years of age or younger.

Respondent argues that the Commission lacks jurisdiction over this matter, because Ch. 151B §4(9) is silent on the issue of juvenile records and therefore an inquiry regarding such records is not controlled by G.L.c.151B §4(9). Respondent further argues that even if the allegations contained in the complaint were subject to the Commission’s jurisdiction, the statute merely prohibits an employer from inquiring of the prospective employee regarding certain criminal activity; it does not prevent the employer from obtaining the same information through other sources. Bynes v. School Committee of Boston, 411 Mass. 264, 268 (1991). Thus, Respondent argues, it did not violate the statute by obtaining the information indirectly via the CORI check.

M.G.L.c.151B §4(9) has been interpreted narrowly by this Commission and the narrow interpretation has been adopted by the Supreme Judicial Court. Bynes v. School Committee of Boston, supra. The statute prohibits the employer from inquiring about certain criminal matters only and is silent on the issue of sealed criminal records. The statute is not violated when the employer learns of the criminal record through another source. Bynes, supra. Here, Complainant’s sealed juvenile record was revealed through a “CORI” check, pursuant to which certain employers are authorized to obtain criminal record information about job applicants or employees that would ordinarily be unavailable to them.¹ Apparently the existence of a sealed record was revealed to Respondent in error by the criminal board².

*4 The Commission's Regulations at 804 CMR 3.02 set forth permissible questions regarding a job applicant's criminal record and require that "any inquiry into the criminal record of an applicant must also contain language pursuant to M.G.L.c.276§100A", the statute governing sealed records. That statute in turn requires employment applications to include the statement that:

"An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution." Id.

The credible evidence showed that Complainant was rejected for the position of social worker because of his refusal to reveal the nature of his sealed juvenile record. Although it is not within this Commission's purview to determine whether criminal record information was inappropriately released to Respondent in this case, I conclude that once Respondent obtained the information about Complainant's sealed juvenile record, it was prohibited by c. 151B §4(9) from asking Complainant about the circumstances surrounding the record and further, that Complainant's refusal to answer the question about his sealed juvenile record should not have disqualified him for the position. Therefore, I conclude that Respondent violated M.G.L.c.151B §4(9) by asking Complainant to reveal the substance of his sealed juvenile record³.

III. REMEDY

A. Emotional Distress

The Commission is authorized to award damages for emotional distress resulting from unlawful discrimination. Stonehill College v. Massachusetts Comm'n Against Discrimination 441Mass. 549 (2004); Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303(1976); Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Court 172(1985). Such emotional distress damages should be fair and reasonable, and proportionate to the distress suffered. Stonehill, supra, at 576. Some of the factors to be considered are; the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has suffered and reasonably expects to suffer and whether the complainant has attempted to mitigate the harm. Id. The Complainant must show a sufficient causal connection between the Respondent's unlawful act and the Complainant's emotional distress. Id.

*5 I conclude that Complainant suffered emotional distress as a result of Respondent's unlawful discrimination against him. Complainant testified that he felt "devastated" as though there had been a "death in the family" and sought psychiatric help for his feelings regarding the rejection for the position. However, the evidence does not support the Complainant's assertion that he had a life-long desire to work specifically as a DSS social worker that was crushed by Respondent. The evidence showed that Complainant did not even seek a position with DSS for at least a decade after receiving his college degree. Further, although Complainant sought treatment for depression, he did not do so until two years after the events that are the subject of his claim. Thus while Complainant is entitled to be compensated for the emotional distress

resulting from his unlawful rejection, I am not convinced that the distress he suffered was severe or long lasting. Therefore, I conclude that an award of \$20,000.00 is sufficient to compensate him for the emotional distress he suffered.

B. Back Pay

The evidence showed that Complainant would have made less money as an entry-level social worker at Respondent than he did at his present position as a special police officer and a substitute teacher. Therefore Complainant is not entitled to damages for back pay.

IV. ORDER

For the reasons stated above, Respondent is hereby ordered to:

- I. Cease and Desist in making unlawful inquiries about the criminal records of job applicants.
- I. Pay to Complainant Karl Hanson the sum of \$20,000.000 in damages for emotional distress.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If any Respondent fails to comply with the terms of this Order within the time period allotted, Complainant shall notify the Clerk of the Commission.

This constitutes the final order of the hearing officer. Any person aggrieved by this decision may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 4th day of May, 2005.

Judith E. Kaplan, Hearing Officer

Footnotes

1. Although there was no evidence in this regard, DSS was apparently authorized to seek criminal record information about job applicants.
2. MGL Ch 276§100B states, in part. "When records of delinquency appearances and delinquency dispositions are sealed by the commissioner in his files. . . Such sealed records of a person shall not operate to disqualify a person in any future examination, appointment or application for public service under the government of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards of commissioners, except in imposing sentence for subsequent offenses in delinquency or criminal proceedings."
3. I acknowledge the anomaly created by this ruling: If Respondent had simply rejected Complainant for the position without inquiring about the sealed criminal record, it would not have violated the statute. However, since Respondent did inquire directly of Complainant, the statute was violated.