

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD DOCKET NO. *** **

EEOC/HUD NUMBER **** **

****,

Complainant

v.

****, ****

****, ****

and ****,

Respondents

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF RESPONDENTS ****
****** AND **** FOR SUMMARY JUDGMENT**

NOW COME respondents **** (“****”) and **** (“****”) and move for Summary Judgment.

Introduction

The Respondents’ earlier Motion to Dismiss contended that the MCAD lacks jurisdiction in this matter, because respondent **** has fewer than six employees. This Motion was denied without prejudice.

Grounds for the Entry of Summary Judgment in Favor of the Respondents

I. If the Respondent Business (“**”) is not Subject to the MCAD’s Jurisdiction, Neither is the Individual Respondent (“****”)**

II. ** is not Subject to the MCAD’s Jurisdiction Because it has Fewer Than Six Employees**

Argument and Citations to Authority

I. If the Respondent Business (“*****”) is not Subject to the MCAD’s Jurisdiction, Neither is the Individual Respondent (“*****”)

Since the denial of the Respondents’ earlier Motion to Dismiss, a key case on which plaintiff relied in her opposition has been overturned.

Specifically, on September 3, 2003, the Full Commission reversed the decision of the Hearing Commissioner in Tunstall v. Acticell H’W Cosmetics and Hiam Weizmann, found at 2003 WL 22076364.

In Tunstall, a Hearing Commissioner had ruled that a finding of sexual harassment would stand against an individual respondent, even though the complaint against the respondent business had to be dismissed because the business had fewer than six employees.

The Full Commission vacated that decision, holding:

“We reach our conclusion based on the language of the statute, which explicitly requires that the right exercised or enjoyed must be one that is granted or protected ‘by this chapter.’ **Therefore, where, as in the instant matter, the right asserted is the right to be free from sexual harassment in the workplace, it must be a workplace subject to the provisions of M.G.L.c. 151B.**

“Applying this framework to the facts in the instant matter, the substantial evidence presented at public hearing established that **Acticell H’W Cosmetics did not have the requisite six employees to constitute an “employer” as defined by the legislature. Therefore, Respondent Acticell H’W Cosmetics was not an employer within the meaning of M.G.L.c. 151B and Weizman’s conduct was not subject to the jurisdiction of section 4(4A). Therefore, we must vacate the decision of the Hearing Commissioner.**” (Emphasis supplied)

Thus, any complaint against the individual Respondent, ***** ***, must be dismissed if it is determined that ***** has fewer than six employees.

II. ***** is not Subject to the MCAD’s Jurisdiction Because it has Fewer Than Six Employees

In interpreting the Commonwealth’s employment discrimination law, Mass. Gen. L. ch. 151B,

Massachusetts courts use a common law test to distinguish employees who are covered by the statute from independent contractors who are not. Speen v. Crown Clothing Corporation, 102 F.3d 625 (C.A. 1st Cir.1996), citing Comey v. Hill, 387 Mass. 11 (1982)

In Comey, the Supreme Judicial Court held that “in the absence of any indication to the contrary, we will not assume that the Legislature intended to cover relationships outside the traditional common law employer-employee relationship.” Id., at 15.

The SJC further held that “although the Commonwealth’s employment discrimination law, G.L.c. 151B, affects a ‘broad array of employment practices’ and extensively prohibits discrimination against certain protected classes, ***we do not read the statute as intending to broaden the definition of employee to include an independent contractor.***” Id., at 15 (emphasis provided.)

The Court in Speen, supra, carefully examined Federal and Massachusetts cases on the employee / independent contractor question, concluding that “the common law test in Massachusetts, as in other states, while directed towards the question of right of control, involves the assessment of multiple factors.” Id., at 630.

It is, the Speen court held, a “multifaceted approach [that is] the applicable legal test in Massachusetts.” Id., at 630.

The Speen Court stated that the issue was controlled by the Supreme Court’s unanimous decision in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

The Darden Court summarized the operative common law test with the following language:

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment’ the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” Id., at 323-324.

UNDISPUTED FACTS:

As averred in the Affidavits of ***** and other former or current ***** instructors, the Respondents contend that the following facts are undisputed, and compel the entry of Summary Judgment in its favor:

- 1.) ***** operates a purely seasonal business, during the outdoor “***** season,” which runs for some fifteen weeks from mid- November through early March;
- 2.) instructors are paid by the class;
- 3.) if a ***** class is cancelled or the instructor doesn’t show up, the instructor is not paid;
- 4.) ***** advertises for and signs up interested students and prepares a schedule of classes;
- 5.) ***** loans ***** to the students, if necessary;
- 6.) ***** instructors determine if, when and how often they want to work; they are not obligated to teach any classes other than those for which they have submitted their names and been selected by *****;
- 7.) most instructors teach one or two classes a week, while a couple may teach three or four;
- 8.) instructors are paid \$20.00 to \$25.00 per half hour or forty-five minute class;
- 9.) no instructor is assured of getting any or a minimum number of classes;
- 10.) instructors are free to contract with ***** students or other ***** for private lessons, in which case they are paid directly by said individual students and keep all money so earned for themselves, except for a \$5.00 fee for ***** *****;
- 11.) ***** Instructors are skilled professionals;
- 12.) while teaching classes at ***** , many instructors also teach at other ***** schools or *****;

- 13.) ***** instructors are given ***** jackets to wear while instructing ***** students, but provide their own *****;
- 14.) details of the manner of instructions (games, drills, exercises) are largely left to the discretion of the individual ***** instructor; the ***** ***** ***** ***** Association Basic Skill Program is used as a guide;
- 15.) ***** instructors are told when hired that they are independent contractors;
- 16.) ***** instructors receive no benefits;
- 17.) no deductions for taxes, retirement, health coverage, etc. are taken out of ***** instructors' paychecks;
- 18.) ***** is the sole owner and employee of *****; his wife assists with the bookkeeping without compensation.

Supporting Affidavits

Appended hereto in support of the Respondents' Motion for Summary Judgment are the following:

1. Affidavit of Respondent ***** *****;
2. Affidavit of ***** ** *****;
3. Affidavit of ***** *****;
4. Affidavit of **** *****;
5. Affidavit of ***** *****;
6. Affidavit of **** *****;
7. Affidavit of **** *****;
8. Affidavit of ***** *****;
9. Affidavit of *** *****;
10. Affidavit of **** *****; and
11. Affidavit of ***** *****.

Conclusion

As the Respondent, ***** employs fewer than six persons, the Commission lacks jurisdiction in this matter; having no jurisdiction over *****, the Commission also lacks jurisdiction over Respondent ***** *****.

WHEREFORE, respondents ***** ***** and ***** move that Summary Judgment enter on their behalf and that the instant complaint against them be dismissed.

Respectfully submitted,
the respondents,
***** ***** and *****,
by their attorney:

Gregory R. Barison
Weston Patrick, P.A.
84 State Street / 11th Floor
Boston, MA 02109
(617) 742-9310 / fax: (617) 742-5734
BBO # 029340

date: ***** * *****