

PAUL LINDER^[1]
vs.
BOSTON FAIR HOUSING COMMISSION & others.^[2]

[No. 12-P-1757.](#)

Appeals Court of Massachusetts.

Entered: December 17, 2013.

By the Court (Fecteau, Brown, & Hines, JJ.)

Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Paul Linder, a licensed real estate broker, appeals from a Superior Court judgment affirming the Boston Fair Housing Commission's (commission) decision finding him liable for a discriminatory inquiry into the national origin of Gladys Stokel, a prospective tenant, in violation of G. L. c. 151B, § 4(6)(c), and Boston Fair Housing Commission Amended Regulations § 1.04(i) (2001).^[3] On appeal, Linder makes essentially three claims: (1) the Superior Court judge erred in upholding the commission's award for emotional damages because it is not supported by substantial evidence,^[4] (2) it was an error of law to award attorney's fees and costs, as special circumstances existed rendering the award unjust, and (3) the hearing commissioner's (commissioner) imposition of a \$7,500 civil penalty was a gross abuse of discretion.^[5] Because we agree with Linder's first contention in part, we remand for further proceedings before the commission.

Discussion.

a. Emotional distress damages.

Linder first claims that there was not substantial evidence to support the commissioner's finding that Mrs. Stokel suffered emotional distress from Linder's inquiry.

The commission's decisions are reviewed in accordance with the standards set forth in G. L. c. 30A, § 14(7). 'In reviewing the action of the commission,' [t]he judge had the limited task of examining whether there was substantial evidence in support of the commission's decision. It was not for the court to substitute its judgment on questions of fact or exercise of discretion." [*School Comm. of Brockton v. Civil Serv. Commn.*, 43 Mass. App. Ct. 486, 490 \(1997\)](#), quoting from [*McIsaac v. Civil Serv. Commn.*, 38 Mass. App. Ct. 473, 476 \(1995\)](#). 'When considering the administrative determination, the court must' give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." [*Gauthier v. Director of the Office of Medicaid*, 80 Mass. App. Ct. 777, 783 \(2011\)](#), quoting from [*Springfield v. Department of Telecommunications & Cable*, 457 Mass. 562, 567 \(2010\)](#).

In making an award of emotional distress damages, the Supreme Judicial Court has held that an agency should consider the following factors: '(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm.' [*Stonehill College v. Massachusetts Commn. Against Discrimination*, 441 Mass. 549, 576 \(2004\)](#). Additionally, the Supreme Judicial Court has made clear that 'emotional distress, to be compensable, must be proved by substantial evidence of the emotional suffering that occurred, as well as substantial evidence of a causal connection between the complainant's emotional distress and the respondent's unlawful act.' [*DeRoche v. Massachusetts Commn. Against Discrimination*, 447 Mass. 1, 7 \(2006\)](#). We note that the burden of proving emotional distress from discrimination is less stringent than the burden of establishing the tort of intentional or negligent infliction of emotional distress. See [*Bournewood Hosps., Inc. v. Massachusetts Commn. Against Discrimination*, 371 Mass. 303, 317 n.11 \(1976\)](#).

In awarding Mrs. Stokel damages for emotional distress, the commissioner found that Linder's inquiry contributed to Mrs. Stokel's 'stress, fear and anxiety' during two distinct periods of time. The first period was from July 25, 2007, the date Linder made the comment, to August 20, 2007, when the Stokels secured an apartment. The second time period ran from September, 2007, when the Stokels moved into the new apartment, to August, 2008, when the couple moved again.^[6]

As to the first period of time, we agree that the commissioner's finding that Mrs. Stokel suffered emotional distress is adequately supported by substantial evidence. The commissioner found that Mrs. Stokel 'testified credibly and sincerely about her strong emotional reaction to Linder's unlawful inquiry' and that she was 'reasonably afraid' she and her husband would not be able to secure another apartment. The commissioner also properly found that Mrs. Stokel's reaction was reasonable because Linder's inquiry was made a short time after another realty company denied the Stokels an apartment due to Mrs. Stokel's national origin and she was, therefore, 'especially sensitive to the matter' of her national origin.^[7]

However, considering the entire record, we disagree that substantial evidence exists to support the claim of emotional distress during the second time period (September, 2007, to August,

2008). Although we recognize the deference owed to the commissioner's findings, '[t]he factual basis for emotional distress damages awarded by the commission must be clear on the record, and a reviewing judge must set aside (or remit to an appropriate amount) awards that are not supported by substantial evidence.' [DeRoche, supra at 7](#). Emotional distress awards must be 'fair and reasonable, and proportionate to the distress suffered.' [Stonehill College, supra at 576](#). '[W]e are not required to affirm the [commission] merely on a finding that the record contains evidence from which a rational mind might draw the desired inference. Our determination must be made upon consideration of the entire record.' [New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 \(1981\)](#) (citation omitted).

Here, the record fails to support the commissioner's finding that Linder's single inquiry, made months previously, significantly contributed to anxiety and sleeplessness, which Mrs. Stokel also attributed to problems with her apartment's heat as well as an ongoing suit against a completely separate realty company. While one factor in awarding emotional distress damages under [Stonehill College, supra](#), is how long the complainant reasonably expects to suffer, 'there must be limits to the scope or definition of reasonable foreseeability based on considerations of policy and pragmatic judgment.' [Herbert v. Enos, 60 Mass. App. Ct. 817, 821 \(2004\)](#), quoting from [Poskus v. Lombardo's of Randolph, Inc., 423 Mass. 637, 640 \(1996\)](#). Moreover, 'emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.' [Stonehill College, 441 Mass. at 576](#).

Although we defer to the commissioner's credibility findings, a review of the entire record shows that Mrs. Stokel's testimony that she thought Linder's inquiry 'made things worse for [her]' and added stress to her life was the only other evidence that Linder's inquiry significantly contributed to Mrs. Stokel's distress after September, 2007. However, this testimony refers essentially to stress emanating from the ongoing litigation of the case against Linder, rather than his July 25 inquiry.¹⁸¹ Indeed, the commissioner specifically credited Mr. Stokel's testimony that his wife continued to suffer emotional distress after September 1, 2007, because she 'always [had] to think about [the case] and deal with it.' However, such testimony is irrelevant as it concerns Mrs. Stokel's stress caused by the continuing litigation of the case, not Mr. Linder's original inquiry. See [DeRoche, 447 Mass. at 8-9](#). Moreover, the commissioner explicitly found that 'without proof establishing a claim of intentional infliction of emotional distress, . . . Mrs. Stokel may not recover for any adverse emotional reaction from how Linder defended or litigated this case.'

Thus, Mrs. Stokel's testimony that from September, 2007, to August, 2008, her encounter with Linder continued to add stress to her life is insufficient to overcome the other overwhelming evidence that the emotional distress she suffered during that period was related to how Linder defended the case, problems with her apartment's heat, and her ongoing case against a separate realty company. See [Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 \(1966\)](#), quoting from [Universal Camera Corp. v. National Labor Relations Bd., 340 U.S. 474, 488 \(1951\)](#) ('[T]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight'). Consequently, the matter must be remanded for the commission to reconsider its award of damages for emotional distress.

b. Attorney's fees.

Section 2.09(t)(5) of the commission's amended regulations authorizes the commission to award reasonable attorney's fees and costs to the `prevailing aggrieved party unless special circumstances make the recovery of such fees and costs unjust.' See G. L. c. 151B, § 9. In spite of our conclusion on her emotional distress claim, Mrs. Stokel remains the prevailing party and, contrary to Linder's contention, no special circumstances have been shown to mitigate against the award of such fees.^[9] However, given our conclusion that the period of time for which she may recover damages for emotional distress must be limited to the period between July 25, 2007, and August 20, 2007, the commission must reconsider its award of attorney's fees.^[10]

c. Imposition of civil penalty.

The commission has the authority to assess a civil penalty against a respondent for discriminatory housing practices in an amount up to \$10,000 for a first violation. St. 1994, c. 37, § 7. It is undisputed that Linder violated G. L. c. 151B, § 4(6)(c), and § 1.04(i) of the amended regulations by asking about Mrs. Stokel's national origin, and that this was his first violation. However, we remand for the commission to reconsider whether the civil penalty, which is seventy-five percent of the maximum, is justified in light of Mrs. Stokel's reduced emotional distress award.^[11]

The judgment of the Superior Court is vacated. A new judgment is to enter affirming the commission's conclusion that Gladys Stokel is entitled to an award for emotional distress for the period July 25, 2007, to August 20, 2007, and remanding the matter to the commission for further proceedings consistent with this memorandum and order.

[1] Doing business as Prestige Rental Solutions.

[2] Gladys Stokel and James Stokel, interveners.

[3] General Laws c. 151B, § 4(6)(c), and Boston Fair Housing Commission Amended Regulations § 1.04(i) (2001) make it illegal for any licensed real estate broker `to cause to be made any written or oral inquiry or record concerning . . . national origin.'

[4] It is undisputed that Linder violated G. L. c. 151B, § 4(6)(c), and § 1.04(i) of the commission's amended regulations by inquiring into Mrs. Stokel's national origin in connection with her and her husband's application for a new apartment on July 25, 2007. While completing the application process to rent an apartment, Linder asked, `Gladys, where are you from?' to which Mrs. Stokel responded that she was from Venezuela. The Stokels believed they were discriminated against on the basis of Mrs. Stokel's national origin and found Linder's question to be insulting and upsetting. Despite the fact that Linder's comment was found to have no discriminatory animus and did not result in discrimination, his inquiry itself is a per se violation of the statute and the regulation. Therefore, on appeal Linder only challenges the amount of damages awarded.

[5] The commissioner awarded \$10,000 in emotional distress damages to Mrs. Stokel, assessed a civil penalty in the amount of \$7,500 against Linder, and awarded \$31,793.97 in attorney's fees and \$12,473.92 in costs.

[6] Although Mrs. Stokel claimed to suffer three years of emotional distress (Linder's 2007 inquiry up to the date of the hearing in April, 2010), the commissioner found a causal connection for a shorter period of time.

[7] Linder mistakenly relies on the cross-examination of Mrs. Stokel, in which she admitted that in a prior deposition, she stated she was not embarrassed, not humiliated, and not upset with regard to her conversation with

Linder. However, this deposition was not entered in evidence and in the segments of the deposition that were read at the hearing, Mrs. Stokel explained she was upset by Linder's inquiry but she was not embarrassed to be from Venezuela. Specifically, Linder's counsel read the following exchange from the deposition at the hearing: `Question: You weren't embarrassed during that exchange [with Linder], were you? Answer: No. I'm from Venezuela. I'm very proud.' Regardless, the commissioner explicitly credited Mrs. Stokel's other testimony at the hearing that she felt upset and uncomfortable after Linder's inquiry and that she cried for some nights after the inquiry because she feared her national origin prevented her and her husband from renting an apartment. Moreover, `[a] court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' [Embers of Salisbury, Inc. v. Alcoholic Bevs. Control Commn., 401 Mass. 526, 529 \(1988\).](#)

[8] Mrs. Stokel seemed particularly troubled by document requests from Linder's counsel she received in November, 2008, after the end of the second time period. Additionally, during this time period the Stokels were concerned with their discrimination case against a separate realty company. Mrs. Stokel testified that she `didn't need this case [against Linder] to add to my stress.'

[9] The commissioner explicitly found that `no special circumstances exist to find such an award unjust.' The commission's interpretation of its own regulations are entitled to deference, and it has not been made to appear that its view is unreasonable or unlawful; thus we discern no reason to overturn the commissioner's decision. See [Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 782 \(1980\).](#)

[10] In awarding attorney's fees the commissioner discounted the total fees by twenty percent because Mrs. Stokel had only prevailed on the emotional distress claims and not prevailed on a number of her other claims.

[11] The request by the commission and the Stokels for an award of appellate attorney's fees and costs is denied.