

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such 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 23.0 or 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. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1824

FEDERAL SQUARE PROPERTIES, INC., & another¹

vs.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Federal Square Properties, Inc., and Pacific Land, LLC (collectively, Federal Square) appeal from a Superior Court judgment that denied their motion for judgment on the pleadings and affirmed a decision by the Massachusetts Commission Against Discrimination (MCAD). The MCAD had affirmed a decision by an MCAD hearing officer, who determined that Federal Square had engaged in unlawful housing discrimination. We affirm.

Background. In July 2007, Melissa Derusha contacted Federal Square, a building management company, and inquired about renting an advertised apartment. When Derusha mentioned that she received a Section 8 rental subsidy, she was told that Federal Square was not accepting Section 8 vouchers "at this

¹ Pacific Land, LLC.

² Melissa Derusha.

time." She then contacted a legal aid organization, who began an investigation into Federal Square's rental practices. The legal aid organization assigned six "testers" to contact Federal Square and inquire about advertised apartments; three posed as recipients of Section 8 subsidies and three did not. All three testers who claimed to receive a Section 8 subsidy were told that Federal Square was not currently accepting Section 8.

In May 2009, Derusha filed a complaint with the MCAD alleging that Federal Square had discriminated against her on the basis of her status as the recipient of a Section 8 rental subsidy.³ Following a public hearing, an MCAD hearing officer found that Federal Square had discriminated against Derusha in violation of G. L. c. 151B, § 4 (7B), and G. L. c. 151B, § 4 (10), awarded Derusha "de minimus" emotional distress damages, and imposed a \$5,000 civil penalty against both Federal Square and Pacific Land. Derusha then filed a petition for attorney's fees and costs, pursuant to G. L. c. 151B, § 5.⁴

Federal Square sought review by the full commission of "only the [c]ivil [p]enalties," requesting a reduction in the amount of civil penalties and denying liability on the part of

³ The complaint also alleged discrimination on the basis of sex and marital status, but these claims were dismissed by the investigating commissioner for lack of probable cause.

⁴ Although the petition itself is absent from the record, the parties stipulated that it was filed on April 27, 2012.

Pacific Land. Derusha also appealed, contending that the hearing officer's finding on the extent of her emotional distress was erroneous and her damage award was "inadequate to compensate her for the distress she suffered." The full commission affirmed the decision and order of the hearing officer and awarded attorney's fees and costs, with twelve percent prejudgment interest, to Derusha. Federal Square appealed the MCAD's decision pursuant to G. L. c. 30A, § 14, and G. L. c. 151B, § 6. Judgment on cross motions for judgment on the pleadings, affirming the MCAD's decision, entered in the Superior Court.

Discussion. Our review of the MCAD's decision is limited. See Trustees of Health & Hosps. of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 681 (2007). "We shall affirm a decision and order of the MCAD unless the findings and conclusions are unsupported by substantial evidence or based on an error of law." Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 676 (1993). Deference should be given to the hearing officer's fact-finding role, "including [her] right to draw reasonable inferences from the facts found." Smith College v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221, 224 (1978).

1. Civil penalties. Federal Square does not directly dispute the MCAD's finding that it violated G. L. c. 151B by

representing to Derusha that it did not accept Section 8 rental subsidies. Instead, Federal Square argues that because its violation was based on a misunderstanding of the "statutory requirements of the voucher program" rather than discriminatory intent, and because it began accepting Section 8 rental subsidies after Derusha filed her complaint, the civil penalties were "unnecessary and punitive."⁵ This argument misconstrues the statute and the scope of MCAD's authority to remedy discriminatory conduct.

Neither ignorance of the procedural requirements of a rental subsidy program nor a remedial, "good faith" attempt to conform to those requirements shields a respondent from liability under § 4 (10). See DiLiddo v. Oxford St. Realty, Inc., 450 Mass. 66, 77 (2007) (housing discrimination statute "contains no language requiring a showing of 'animus'"). Upon a finding of discrimination, the MCAD 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. See

⁵ In its brief, the MCAD argues that Federal Square failed to preserve this argument below and is precluded from making it on appeal. We disagree. Federal Square's appeal to the full commission raised exactly this claim, and although it was less clearly articulated before the Superior Court, Federal Square's complaint and motion for judgment on the pleadings challenged the MCAD's ultimate finding of Federal Square's liability. MCAD's assessment of civil penalties is part and parcel of its finding of a statutory violation.

G. L. c. 151B, § 5. Here, substantial evidence supported the MCAD's finding that Federal Square engaged in discriminatory housing practices, including testimony by a Federal Square employee that she told prospective renters that Federal Square was not accepting Section 8 "at this time." Having found that Federal Square "rejected prospective tenants who possessed Section 8 subsidies and explicitly stated a policy of not accepting Section 8 tenants" without a legitimate, nondiscriminatory reason, the MCAD acted within its statutory authority in assessing civil penalties against Federal Square. See East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination, 364 Mass. 444, 450 (1973) ("We will not lightly interfere with that mandate by permitting the court's judgment to be substituted for the commission's on issues that lie within the latter's designated field").

2. Emotional distress damages. As to Federal Square's claim that the MCAD's decision to award Derusha emotional distress damages was unsupported by the evidence, we agree with Derusha and the MCAD that Federal Square is foreclosed from raising that issue in this appeal as Federal Square explicitly appealed only the civil penalties. Under G. L. c. 151B, § 6, "the failure of a party to present issues to MCAD which could have been raised precludes the party from arguing the issue on appeal." Boston v. Massachusetts Comm'n Against Discrimination,

47 Mass. App. Ct. 816, 819 (1999). We are unpersuaded by Federal Square's contention that it preserved the issue by including it in the brief submitted to the hearing officer after the public hearing. Although the MCAD's regulations allow for parties to submit briefs and proposed findings of fact and conclusions of law to the hearing officer, see 804 Code Mass. Regs. § 1.12(16), these documents are to be submitted prior to the issuance of the hearing officer's decision. The petition for review, filed pursuant to 804 Code Mass. Regs. 1.23(1)(b), is the procedural mechanism by which a party presents the issues before the full commission and preserves them for judicial review. Where Federal Square failed to raise this issue on appeal to the full commission, it may not do so now.

3. Attorney's fees and interest. Federal Square appeals from the assessment of interest on the MCAD's award of attorney's fees, contending that delay in the administrative proceedings "had the effect of doubling the penalty" and created an award that "shock[s] any sense of justice."

A complainant who prevails before the MCAD on a housing discrimination claim is entitled to reasonable attorney's fees.⁶ See G. L. c. 151B, § 5; DeRoche v. Massachusetts Comm'n Against

⁶ We see no abuse of discretion in the MCAD's calculation of the award of attorney's fees. See Fontaine v. Ebttec Corp., 415 Mass. 309, 324 (1993).

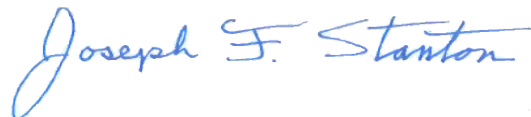
Discrimination, 447 Mass. 1, 17 (2006). Although the assessment of interest on attorney's fees is not mandated by statute, the award of prejudgment interest is "within the exercise of broad agency discretion to fashion appropriate remedies."⁷ Conway v. Electro Switch Corp., 402 Mass. 385, 391 (1988). On this record, and according due deference to the MCAD's implementation of its statutory directive, we see no abuse of discretion in the assessment of interest on properly awarded attorney's fees, particularly given that Federal Square did not request the MCAD's review of the emotional distress award to Derusha. See College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 170 (1987) (MCAD has authority to award interest).

⁷ The MCAD, in exercising its considerable discretion, should bear in mind that the specific posture of an individual case may make the assessment of interest on an award of fees more, or less, appropriate. In cases where there is delay in issuing a decision and resolution of the issue on appeal is a particularly close call, or where disposition will resolve a significant policy concern, it may be less appropriate to assess the full amount of interest on a fee award. By contrast, other considerations, such as a party's pursuit of an unmeritorious appeal, may weigh in favor of a full assessment of interest. We do not attempt to detail all of the possible factors; the MCAD should consider the equities involved in assessing interest on a fee award on a case-by-case basis. See Siegel v. Berkshire Life Ins. Co., 70 Mass. App. Ct. 318, 322 (2007), quoting USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 350 (1984) ("The matter of awarding prejudgment interest is, however, one of balancing equities").

Finally, Derusha's request for attorney's fees in the instant appeal is allowed. See DeRoche, 447 Mass. at 17. In accordance with the procedure outlined in Fabre v. Walton, 441 Mass. 9, 10-11 (2004), Derusha may file an affidavit and documentation in support of her request within fourteen days of the date of the rescript, and Federal Square shall have fourteen days thereafter to respond.

Judgment affirmed.

By the Court (Neyman, Shin & Singh, JJ.⁸),



Clerk

Entered: March 1, 2021.

⁸ The panelists are listed in order of seniority.