

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
ALLEN LINCOLN,  
Complainant

v.

DOCKET NO. 95-BEM-1379

NATICK PAPERBOARD COMPANY ET AL,  
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Kenneth B. Grooms in favor of Complainant, Allen Lincoln. Following an evidentiary hearing, the Hearing Officer concluded that Respondent Natick Paperboard Company was liable for unlawful discrimination on the basis of handicap when it failed to provide him with a reasonable accommodation in violation of M.G.L. c. 151B, s. 4(16) and retaliated against him in violation of M.G.L. c. 151B, s. 4(4).<sup>1</sup> Respondent filed an appeal to the Full Commission.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et. seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, s. 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357,

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<sup>1</sup> Also named as a respondent was The Newark Group. The Hearing officer dismissed the claim against it

365 (1974); M.G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

#### I. RESPONDENT'S PETITION FOR REVIEW

Respondent first contends on appeal that the Hearing Officer erred as a matter of law with respect to Complainant's failure to accommodate claim. Specifically, Respondent complains that the Hearing Officer conflated the standards used to analyze failure to accommodate and disparate treatment claims. In support of this contention, Respondent cites the Hearing Officer's employment of the terms "prima facie case" and "animus" in his analysis. Respondent argues that because these concepts generally relate to disparate treatment claims but not failure to accommodate claims, the Hearing Officer applied the wrong legal analysis to Complainant's claim. However, Respondent's argument on semantics fails to recognize that, despite the use of such terms, the Hearing Officer conducted the requisite analysis in reaching his conclusion.

While it is true that the Hearing Officer used the terms "prima facie case" and "animus" in his decision, we find that such use was in no way fatal to his analysis and

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and Complainant has not appealed that dismissal.

conclusion. As Respondent acknowledges in its appeal, the Hearing Officer correctly laid out the accepted standard for proving a failure to accommodate case and then systematically discussed and analyzed all five elements in light of the evidence and testimony in this matter. See MCAD Guidelines: Employment Discrimination on the Basis of Handicap, IX.A.3 (1998); D'Ambrosio v. MBTA, 23 MDLR 81 (2001); Mazeikus v. Northwest Airlines, 22 MDLR 63 (2000). Despite the fact that the Hearing Officer used the term “prima facie case,” terminology not commonly used in a failure to accommodate case, it is not dispositive of an incorrect application of the law. To the contrary, his extensive analysis of all five elements needed to prove a failure to accommodate claim, coupled with his citation to the proper authorities, belie Respondent’s claim that the Hearing Officer mistakenly followed the legal analysis used in disparate treatment cases, namely the standards and framework first applied to Title VII claims in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973).

In fact, the Hearing Officer made no such mistake. He simply used the “prima facie” term to describe Complainant’s burden to satisfy the five elements of his failure to accommodate claim, which burden Respondent admits the Hearing Officer laid out correctly and accurately. At no point did the Hearing Officer indicate that he was using the McDonnell Douglas standard, nor is it indicated anywhere in his decision that he applied this framework to Complainant’s claim. In contrast, when the McDonnell Douglas framework was appropriate, as in the discussion of Complainant’s retaliation claim, the Hearing Officer employed it explicitly in his decision.

Similarly, the Hearing Officer’s use of the term “animus” is not fatal to his decision. Only after the Hearing Officer correctly laid out the elements of a failure to accommodate claim and analyzed the evidence substantiating his conclusion that these elements had been satisfied did he “also conclude” that Respondent held a discriminatory animus toward Complainant. Respondent argues that by mentioning “animus” at all the

Hearing Officer ran afoul of Higgins v. New Balance Shoe, Inc., 194 F.3d 252 (1<sup>st</sup> Cir. 1999). However, Respondent's reliance upon Higgins is inapt. The Higgins decision stands for the proposition that a plaintiff in a failure to accommodate case need not prove animus. The Hearing Officer did not require Complainant to prove animus in this matter. Higgins does not prohibit a finding of animus; rather, it counsels that animus is not a necessary ingredient of a failure to accommodate claim.<sup>2</sup> Higgins, 194 F.3d at 263-65. Nowhere in his decision did the Hearing Officer indicate that animus was a necessary ingredient for his holding on the failure to accommodate claim. His additional conclusion in this respect regarding animus was merely dictum and not central to his finding on the failure to accommodate claim. We therefore conclude that Respondent's contention regarding the Hearing Officer's use of the "prima facie" and "animus" terminology in his decision is one of form, not substance.

Next, Respondent contends that the Hearing Officer erred when he found that Respondent failed to provide Complainant with a reasonable accommodation in December of 1994 when Complainant asked for advance notice of schedule changes so that he could adjust his diabetes treatment regimen accordingly. In particular, Respondent argues that Complainant did not prove two of the elements required to substantiate his claim, namely that Respondent did not engage in an interactive dialogue with Complainant regarding his need for an accommodation and that Respondent did not ultimately provide him with the needed accommodation. With respect to these two elements, the Hearing Officer specifically found that "Respondent did not have a meaningful and direct discussion with Complainant in December 1994 regarding his precise limitations and how he could be accommodated" and it responded to his request not with an accommodation but, rather, with a suspension without pay and a demand for a fitness-for-duty examination based upon an unfounded and unreasonable fear of

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<sup>2</sup> It is beyond cavil, however, that an employer's failure to accommodate could be motivated by discriminatory animus.

potential litigation. We have fully reviewed the record and conclude that there is substantial evidence to support the Hearing Officer's findings on this issue.

Finally, Respondent contends that the Hearing Officer erred as a matter of law in his analysis of Complainant's retaliation claim. Specifically, Respondent argues that the Hearing Officer incorrectly applied the three-stage order of proof framework articulated in the McDonnell Douglas case. Respondent has no dispute with the first stage and acknowledges that Complainant established a prima facie case of retaliation. However, Respondent claims that the Hearing Officer got "off track" on the second stage and "summarily conclude[d]" that Respondent did not have a legitimate, nondiscriminatory reason for the actions it took toward Complainant. Respondent claims that the Hearing Officer then failed to proceed to the third stage and analyze whether the reason Respondent proffered for its actions was the real reason or whether it was pretextual. Respondent cites as support for its contention St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993), specifically the Court's description of the second stage employer's burden as introducing evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." Respondent states that St. Mary's prohibits the fact finder from making any assessment of credibility regarding the reason proffered by the employer as justifying its actions.

We are not persuaded by Respondent's argument that the Hearing Officer got "off track" since we conclude that the law in this state requires more than the minimal burden of production Respondent would have us believe the St. Mary's case imposes on employers. Massachusetts law requires that "a[n] employer must not only give a lawful reason or reasons for its employment decision but also must produce *credible evidence* to show that the reason or reasons advanced were the real reasons." Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-17 (2000) (emphasis added); see also

Blare v. Husky, 419 Mass. 437, 443 (1995).

The Hearing Officer considered Respondent's proffered reasons for its two suspensions of Complainant in light of the testimony it presented and specifically found that the reasons lacked evidentiary support. That he conducted this review is underscored by the fact that the Hearing Officer found several of Respondent's reasons for certain of its actions justifiable, as he did not ultimately find in favor of Complainant with respect to several of Complainant's allegations regarding retaliation. Under Massachusetts law, the Hearing Officer had a duty to examine the credibility of the evidence presented to support Respondent's articulated reasons, rather than just accept the reasons as stated.

In this matter, the Hearing Officer did just that. The Hearing Officer's determination that Respondent's articulated reasons for its twin suspensions of Complainant were not credible permitted him to draw an inference of pretext, which taken together with Complainant's establishment of a prima facie case served as legally sufficient to permit a finding in Complainant's favor on the issue of retaliation. See Lipchitz v. Raytheon, 434 Mass. 493, 501 (2001) ("In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind.")

We have carefully reviewed Respondent's contentions on appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's factual findings were supported by substantial evidence in the

record and we defer to them. On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

## II. COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision, we conclude that Complainant prevailed on one of his claims in this matter and is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, s. 5. Complainant has filed a petition seeking attorneys' fees and expenses, supported by detailed contemporaneous time records, requesting fees in the amount of \$51,546.00 and costs in the amount of \$1,003.16. Respondent has filed an opposition thereto.

### A. FEES

M.G.L. c. 151B allows prevailing Complainants to recover attorneys' fees. The determination of whether a fee sought is reasonable is subject to the Commission's discretion. The Commission has adopted the "lodestar" methodology for fee computation. By this method, the Commission will first calculate the number of hours reasonable expended to litigate the claim and multiply that number by a reasonable hourly rate. Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

Only those hours that are reasonably expended are subject to compensation under M.G.L. c.151B. In determining whether hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099.

Complainant has filed a Petition seeking attorneys' fees for a total of 229.74 hours. This total represents work performed by two attorneys and one law clerk. The fee charged by both attorneys is \$225.00 per hour and the fee charged by the law clerk is \$75.00 per hour. Complainant's Petition is accompanied by detailed contemporaneous time records. Having reviewed the contemporaneous time records that support this

request, we conclude that the amount of time spent on preparation and litigation of this claim is reasonable. Our review points to no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to the prosecution of the claim. Furthermore, all hours for work performed are sufficiently documented. We conclude that the hours for which reimbursement is sought are reasonable. We also conclude that the expertise of Attorneys Becker and Lavin in the area of employment discrimination law was supported by accurate documentation. We conclude that the hourly rate of \$225.00 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and are well within the range of rates charged by attorneys in Boston of similar experience.

Respondent argues in its Opposition to Complainant's Fee Petition, *inter alia*, that 2.8 hours should be subtracted from the total number of hours since they relate to Complainant's union arbitration and not to claims properly before this Commission. We agree with this one contention, but reject all other arguments raised in Respondent's Opposition. Based on this one revision, the total compensable attorney time is 224.57 hours.

We therefore calculate and award attorneys' fees in the following manner:

224.57 hours x \$225.00 per hour	--	\$50,528.25
5.17 hours x \$75.00 per hour	--	<u>387.75</u>
		\$50,916.00

#### B. COSTS

Complainant's counsel also seeks reimbursement for costs in the amount of \$1,003.16. These costs include expenses related to the taking of depositions in this matter, photocopies, and postage. We find that these costs are adequately documented and reasonable. Accordingly, we award them to Complainant.

## ORDER

The Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety.

It is hereby ordered that:

- (1) Respondent pay to Complainant the sum of \$556.69 in lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed, until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (2) Respondent pay to Complainant the sum of \$35,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed, until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (3) Respondent pay to Complainant the sum of \$50,916.00 in attorneys' fees and \$1,003.16 in costs.
- (4) All ordered payments shall be made within sixty (60) days of receipt of this decision. The Parties shall notify the Clerk of the Commission as soon as the ordered payments have been made.
- (5) The Training Provisions set forth in the Decision of the Hearing Officer shall be incorporated herein.

This order represents the final action of the Commission for purposes of M.G.L. c.30A. Failure to comply with this order will result in the Commission's initiation of

enforcement proceedings, pursuant to 804 CMR 1.25, which may subject the noncomplying party to both civil and criminal penalties as provided in M.G.L. c.151B, s.8.

Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review in accordance with M.G.L. c.30A, c.151B, s.6, and the 1996 Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c.30A does not automatically stay enforcement of this order. Failure to file a petition in court within thirty (30) days of receipt of this order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c.151B, s.6.

SO ORDERED this 18<sup>th</sup> day of October , 2004.

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Walter J. Sullivan, Jr.  
Commissioner

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Cynthia A. Tucker  
Commissioner