

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
CHERYL POORE,  
Complainants

v.

DOCKET NO. 98-BEM-1091

TOWN OF HARWICH HIGH SCHOOL,  
VINCENT P. BRESNAHAN and  
GLENN A. ROSE,  
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Kenneth B. Grooms in favor of Complainant Cheryl Poore. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for unlawful discrimination on the basis of gender when they twice failed to select Complainant for the position of varsity softball coach and that their actions were in violation of M.G.L. Chapter 151B section 4(1). Both Respondents and Complainant filed appeals 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, Section 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,

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. RESPONDENTS' PETITION FOR REVIEW

We have carefully reviewed Respondents' 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 with respect to liability. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.

#### EMOTIONAL DISTRESS DAMAGES

Respondents contend that the Hearing Officer's emotional distress award of \$100,000 is not supported in the record and is excessive under the circumstances. We disagree. The Hearing Officer considered the evidence in light of the factors in Stonehill College v. MCAD, 441 Mass. 549 (2004) and made detailed, specific findings in support of his award. The Hearing Officer found that Complainant suffered substantial emotional and physical distress following her non-selection as coach in 1998 and 1999, including loss of weight, frequent migraine headaches, and the exacerbation of her heart arrhythmia

leading to required increases in medication and treatment regimen, as well as feelings of embarrassment, loss, sadness, self-doubt, and frequent crying bouts. We find that the record fully supports the emotional distress award in this case.

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision with respect to emotional distress damages.

#### CIVIL PENALTY

Respondent, Harwich High School also objects to the assessment of a civil penalty against it in the amount of \$10,000. Respondent requests that the Full Commission set aside this penalty as the statute authorizing such penalty was not adopted until July 1, 2003 and that, both the actions in question, and the hearing in this matter, occurred prior to that time, and thus the hearing officer acted outside of his statutory authority. We concur with Respondent's objection but for a different reason.

It has been held that "in the absence of an express legislative directive, the general rule applied by the court is that "all statutes are prospective in their operation," unless an intention otherwise is expressed or can be inferred by necessary implication. Fontaine v. Ebtec, 415 Mass. 309, 318 (1993). Those statutes "relating to remedies and not affecting substantive rights are commonly treated as operating retroactively..." Id. at 318 (citing City Council of Waltham v. Vinciullo, 364 Mass. 624, 626 (1974) [*further citations omitted*]). In Fontaine the SJC held that Amendments to General Laws c. 151 B s. 9 authorizing the recovery of punitive damages in a discrimination case and multiple damages in an age discrimination case did not have retro-active application in the absence of language mandating such application. We conclude that because a civil penalty is punitive in nature and is not in the nature of damages awarded to make a Complaint whole, it is not remedial in nature, and therefore does not have retroactive application.

Moreover in Fontaine the SJC recognized that "legislation limiting or increasing

the measure of liability, while arguably remedial in the broad sense of that word, generally is considered to impair the substantive rights of a party who will be adversely affected by the legislation,” and has been held not to apply to “claims arising prior to the enactment.” *Id.* at 319 [*citations omitted*]. In this case, legislation authorizing a civil penalty clearly affects Respondent’s substantive rights. The assessment of such penalty implicates the measure of Respondent’s liability by subjecting it to increased damages which were not anticipated . Therefore we reverse the Order of the Hearing Officer assessing a civil penalty against Respondent.

## II. COMPLAINANT’S PETITION FOR REVIEW

Complainant’s appeal relates solely to the Hearing Officer’s decision not to assess interest against the Town of Harwich in this matter. At the time of the Hearing Officer’s decision in this matter, the Commission relied on the Appeals Court decision in City of Boston v. Massachusetts Commission Against Discrimination, 39 Mass. App. Ct. 234, 245 (1995), with respect to the issue of interest against a municipality. In City of Boston, the Appeals Court held that the Commission was precluded from imposing interest on damage awards against public employers by principles of sovereign immunity. *Id.* at 245. While the Commission has always believed that City of Boston was wrongly decided, it considered itself bound by the ruling.

Recently the Appeals Court has reversed itself on this issue. Trustees of Health and Hospitals of the City of Boston, Inc. v. MCAD, 65 Mass. App. Ct. 329,337 (2005). The Appeals Ct. held that the SJC has made it clear that prejudgment interest is authorized by G.L. c. 151B and that this broad authorization is sufficient to constitute a waiver of sovereign immunity. *Id.* at 338-339. The court accepted the reasoning adopted by the SJC in Bain v. City of Springfield, 424 Mass. 758, 763 (1997) recognizing that sovereign immunity with respect to punitive damages may be waived by necessary

implication. We concur with the Appeals Court's most recent conclusion in the Trustees case and firmly believe that a prohibition against imposing interest on awards to public employees who are victims of discrimination runs contrary to legislative intent, deprives complainants of make-whole relief, and undermines the Commission's "authority to fulfill its mandate of protecting citizens of the Commonwealth from discriminatory employment decisions and punishing unlawful discrimination in the workplace." See Stonehill College v. Massachusetts Commission Against Discrimination, 441 Mass. 549, 562 (2004).

Therefore, we conclude that interest is properly assessed against all Respondents in this case and that the Hearing Officer's award should be modified to include an assessment of interest on all the damages awarded, and we hereby modify the Hearing Officer's Order accordingly.

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

Having determined that Complainant has prevailed in this matter, we find that she is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, Section 5.

Complainant has filed a petition seeking attorneys' fees and expenses, supported by detailed contemporaneous time records, requesting fees in the amount of \$93,803.00 and costs in the amount of \$3,863.38. Respondent has filed an opposition thereto.

#### A. FEES

M.G.L. Chapter 151B allows prevailing Complainants to recover attorneys' fees. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and its understanding of the litigation of a claim of discrimination in the administrative forum. In rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar methodology for fee computation. See Fontaine v.

Ebtec Corp., 415 Mass. 309, 324 (1993). 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 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.

In this matter, Complainant's attorney, Howard Friedman, filed an affidavit in support of Complainant's Petition for Fees and Costs, requesting a total of \$93,803.00 in attorneys' fees for a total of 589.3 hours. He also attached a detailed time log that details the hours expended by himself, another attorney, several paralegals, and two law students during the six-year litigation of this matter before the Commission. Attorney Friedman has requested that his 155.4 hours be compensated at the hourly rate of \$275.00, and that the 260.4 hours expended by Attorney Myong J. Joun be compensated at the hourly rate of \$150.00, the three paralegals' 133.3 hours be compensated at the hourly rate of \$75.00, and the two law students' 40.2 hours be compensated at the hourly rates of \$75.00 (for 11.5 hours) and \$40.00 (for 28.7 hours). The expertise of Attorneys Friedman and Joun in the area of employment discrimination law was supported by affidavits. We conclude that the hourly rates of \$275.00 and \$150.00, respectively, are 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. We find that the hourly rates charged are reasonable.

Respondent has filed an opposition to the Fee Petition asserting that the fees sought are excessive. Having thoroughly examined counsel's attached time records, and based upon this and similar matters before the Commission, we find that the amount of

time to perform certain tasks appears to be excessive and or duplicative and should be discounted. Having reviewed the time records submitted we find that the following are hours for which compensation is sought are either excessive or duplicative:

- 1) 30.10 hours of paralegal time related to drafting a rebuttal to Respondent's position statement at the rate of \$75.00 per hour.
- 2) Some 21.35 hours of Attorney Joun's time to drafting and researching a Probable Cause memorandum at rate of \$150.00 per hour.
- 3) Some 18.4 hours of Attorney Joun's time related to drafting and researching a settlement brochure at a rate of \$150.00 per hour.
- 4) 53.30 hours of Attorney Joun's time related to drafting Proposed Findings at a rate of \$150.00 per hour.
- 5) 27.80 hours of paralegal time to edit Proposed Findings at a rate of \$75.00 per hour.

We conclude that the hours billed for in numbers 1-4 above are excessive and should be discounted by 25%. We further conclude that the hours billed for in number 5 are duplicative and should be discounted in their entirety. We therefore discount the total amount of fees referenced in nos. 1-5 above by the amount of \$6, 138.74. In doing so we also take into consideration that litigation of this matter in the administrative forum took only 3 days, and the matter was not excessively complex. Thus we discount the total amount of fees to which Complainant is entitled to \$87,664.26.

#### B. COSTS

Complainant's counsel also seeks reimbursement for costs in the amount of \$3,863.38. These costs include expenses related to the taking of depositions in this matter, photocopies, postage, travel expenses, parking, sheriff/constable fees, messenger services, facsimile transmissions, and tapes. We find that these costs are adequately

documented and reasonable. Accordingly, we award them to Complainant.

### III. ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law and the Order of the Hearing Officer and issue the following ORDER of the Full Commission:

(1) Respondents Town of Harwich High School, Vincent P. Bresnahan and Glenn A. Rose shall immediately cease and desist from engaging in unlawfully discrimination because of an individual's gender in violation of G.L. c. 151B.

(2) Within sixty (60) days of receipt of this Order, Respondents shall pay to Complainant the sum of \$7,984.00 in lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed until payment is made or the obligation is reduced to a court judgment.

(3) Within sixty (60) days of receipt of this Order, Respondents shall pay to Complainant the sum of \$100,000 in emotional distress damages with interest thereon at the rate of 12% per annum from the date the complaint was filed until payment is made or the obligation is reduced to a court judgment.

(4) Within sixty (60) days of receipt of this Order, Respondents shall pay the Complainant's attorneys' fees in the amount of \$87,664.26 and costs in the amount of \$3,863.38.

(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. 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 12<sup>th</sup> day of May, 2006.

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Walter J. Sullivan, Jr.  
Commissioner

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Cynthia A. Tucker  
Commissioner