

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
COLLIN ALLEN,
Complainants

v.

DOCKET NO. 96-BEM-1158

UNIVERSITY OF MASSACHUSETTS,
BOSTON
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant Collin Allen. Following an evidentiary hearing, the Hearing Officer concluded that Complainant had been subjected to unlawful race and color discrimination in violation of M.G.L. c. 151B. Complainant and Respondent appealed 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. 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); G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses 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. Colonade 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.

Complainant has appealed the Decision on the grounds that the Hearing Officer erred in failing to award interest as part of her damages award and in failing to award Complainant over \$100,000 in emotional distress damages, and in not permitting Complainant the benefit of the continuing violation doctrine.

The request for interest as part of a damages award against Respondent should be granted. See Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Commission Against Discrimination & others, No. 04-P-1036 (2005), holding that prejudgment interest may be properly awarded against the Commonwealth by the MCAD under G.L. c. 151B. However, the Hearing Officer's rulings regarding the award of emotional distress damages and the applicability of the continuing violation doctrine should not be disturbed.

Respondent challenges the decision on the ground that the finding of the Hearing Officer do not warrant a conclusion that Complainant's termination violated G.L. c. 151B. In her decision, the Hearing Officer concluded that although Respondent's grounds for terminating Complainant were facially valid, they were not the real reasons for his termination, but a pretext. She supported her conclusion with substantial evidence in the

record. The Hearing Officer's inference that Complainant proved discriminatory animus and causation should not be disturbed.

We have carefully reviewed both parties petitions for review and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein. As a result of our review, we find no material errors of fact or law and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. We, therefore, deny the appeal and affirm the decision below in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of the Complainant, we conclude that the Complainant has substantially prevailed in this matter and is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, Section 5.

The determination of what is a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of time and resources required to litigate a claim of discrimination in the Commission's administrative forum. In reaching a determination of what is a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097(1992). This method requires the Commission to undertake a two-step analysis. First, the Commission will calculate the number of hours reasonably expended to litigate the claim and then multiply that number by an hourly rate considered to be reasonable. Second, the Commission will then examine the resulting figure, known as the "lodestar", and adjust it either upward or downward or not at all depending on various factors.

The Commission's efforts to determine the number of hours reasonably expended will involve more than simply adding all hours expended by all personnel. The Commission carefully reviews the Complainant's submission and will not simply accept the proffered number of hours as "reasonable." *See e.g., Baird v. Belloti*, 616 F. Supp. 6 (D. Mass, 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. *Grendel's Den v. Larkin*, 749 F.2d 945 (1st Cir.); *Miles v. Samson*, 675 F. 2d5 (1st Cir. 1982); *Brown v. City of Salem*, 14 MDLR 1365 (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.

Overall, in this matter, Complainant seeks attorney's fees in excess of \$293,000. In her fee petition dated August 1, 2005, Complainant's counsel seeks attorneys' fees in the amount of \$268,320.00. Attorney Glazer seeks compensation for 660.2 hours of work she performed for an amount of \$198,060.00. Her rates are \$250.00 per hour from 1998 through 2002, and \$300.00 per hour from 2003 through 2005. Attorney Font seeks compensation for 234.2 hours and requests \$70,260.00 in fees, charging an hourly rate of \$300.00. The fee requests are supported by affidavits and time records.

Respondent opposes this request, arguing that the fees requested are excessive because there are charges for work that was unnecessary and irrelevant to the outcome of the claim, including preparation and examination of unnecessary witnesses, and time improperly spent arguing discovery matters which Complainant's counsel should have

requested and resolved prior to trial. Respondent also points out that Complainant's initial fee petition only, seeks reimbursement for what amounts to 22 weeks of work, almost one half year at a 40 hour per week basis.

We concur with Respondents and find that the amount sought for attorney's fees given the complexity of this matter is unduly excessive and unreasonable and that certain hours charged for are excessive and duplicative, particularly those hours charged during the preparation and trial of this matter in October, November and December of 2003 and January of 2004. Beginning on October 21, 2003, one week before the commencement of the public hearing through January 29, 2004, during which time there were just 13 days of public hearing, Complainant has billed for approximately 520 hours for the work of two attorneys. This represents a total of 65 days of work for which Complainant seeks compensation. We find this to be extraordinarily excessive and conclude that these 520 hours should be discounted by 50%. Therefore compensation will be awarded for 260 hours for this period of time and consequently a deduction of \$78,000 from the total fee sought is appropriate for this time period. (260 hours x \$300 per hour).

In addition Complainant seeks compensation for some 214 hours related to the review of transcripts and preparation of post-hearing briefs in this matter. We conclude that this amount is also excessive and should be discounted by 50%. Thus the total number of hours discounted is 107, which amounts to a further deduction of \$32,100 from the total fee sought.

On February 21 and 22, 2006 Complainant filed Supplemental Petitions seeking additional fees and an enhancement of fees by 50%. Complainant seeks an additional \$25,320 for fees related to the appeal of this matter to the Full Commission including

drafting petitions for review to the Full Commission and for Attorneys fees petitions. The Petition seeks compensation for 40 hours for Attorney Glazer and 44.4 hours for Attorney Font, for a total of 84.4 hours. We conclude that the amount of hours billed for this work is excessive and should be discounted by 50%. Thus we conclude that supplemental fees in the amount of \$12,660.00 should be awarded for work performed from August, 2005 until February 2006.

Given that we have concluded that a large number of hours charged for are unduly excessive given the nature and complexity of this matter, and that Complainant's fees should be discounted and not enhanced, we deny the petition for 50% enhancement of fees. The total award of Attorney's fees for those hours we have deemed excessive and duplicative is calculated as follows: \$268,320 minus \$78,000 = \$190,320 minus an additional \$32,100 = \$158,220 plus \$12,660 = \$170,880. Moreover, given that this matter was not excessively complex and that the average amount of fees sought by and awarded to prevailing parties in matters tried before this Commission has generally been some 50%-75 % less than the amount of \$170,880 we conclude the **total** amount of fees sought by Complainant is excessive and that the \$170, 880 should be discounted by an additional 20% for a total award of \$136,704.00

We conclude that costs of \$5,758.28 sought in the initial petition and \$65.40 sought in the supplemental petition should be granted as requested, for a total of \$5,823.68.

Complainant also requests that the Commission award prejudgment interest on the Hearing Officer's award of damages to the Complainant at the rate of 12% per annum from the date of the filing of the complaint, a request opposed by Respondent. The

request for interest against Respondent should be granted in light of a recent appeals court case holding that prejudgment interest may be properly awarded against the Commonwealth by the MCAD under G.L. c. 151B. See Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Commission Against Discrimination & others, 65 Mass. App Ct. 329, 337 (2005).

ORDER

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

1. Respondent shall pay Complainant damages as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum from the date of filing of the complaint, until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.

2. Respondent shall pay Complainant emotional distress damages as set forth in the Hearing Officer's decision with interest thereon at the rate of 12% per annum from the date of filing of the complaint until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.

3. Respondent shall pay to Complainant's counsel the amount of \$136,704 in attorneys' fees and costs.

4. Respondent shall conduct training as ordered by the Hearing Officer.

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 within 30 days of receipt of this decision in accordance with M.G.L. c. 30A, c. 151B, §6, and the 1996 Superior Court 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 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, §6.

SO ORDERED this 23rd day of May, 2006

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner

