

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
and DAVID MARQUEZ,  
Complainant

v.

DOCKET NO. 97-BEM-3223

MASSACHUSETTS BAY  
TRANSPORTATION AUTHORITY,  
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Commissioner Walter J. Sullivan, Jr. in favor of Complainant, David Marquez. Following an evidentiary hearing, the Hearing Commissioner concluded that Respondent was liable for unlawful discrimination on the basis of religion in violation of M.G.L. c. 151B, section 4 (1A). Specifically, the Hearing Commissioner concluded that Respondent failed to reasonably accommodate Complainant's religious needs when it refused to hire him due to his need for time off to observe his Sabbath. The 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 Commissioner. M.G.L. c. 151B, Section 5. The Hearing Commissioner'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 Commissioner’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 Commissioner. 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 1.16(f).

#### RESPONDENT’S PETITION FOR REVIEW

Respondent contends on appeal that the Hearing Commissioner erred when he found that Complainant’s requested accommodation would not have imposed an “undue hardship” on Respondent. The Hearing Commissioner stated in his decision that he was “not convinced that Respondent would have incurred undue hardship by allowing any of the suggested accommodations to Complainant.” Respondent argues that all of the suggested accommodations would have imposed an undue hardship. Specifically, Respondent contends that utilizing the “cover list” and/or relying on the voluntary swap system would have led to a violation of Respondent’s employee seniority system and the payment of overtime wages. Respondent contends that both of these practices constituted undue hardship for Respondent. However, the Hearing Commissioner referred in his decision to evidence that Respondent employed over 1,200 bus operators, maintained a daily list of relief drivers, allowed voluntary swaps on a regular basis, and filled occasional empty shifts with overtime operators when the need arose. Citing this

evidence, which he determined to be credible and convincing, the Hearing Commissioner found that Respondent had not sufficiently demonstrated undue hardship.

Respondent cites case law for the proposition that an employer is not required “week in and week out” to pay overtime to cover Complainant’s absence “every Friday afternoon.” Trans World Airlines, Inc. v. Hardison , 432 U.S. 63 (1977). However, Respondent did not produce any evidence that it had determined it would have had to pay overtime every week to cover the hours off that Complainant requested. The Hearing Commissioner specifically found that “Respondent offered no evidence to show what actual steps were taken to determine what accommodations were possible in Complainant’s particular case.” We find that there was substantial evidence to support the Hearing Commissioner’s decision with respect to an insufficient showing of undue hardship in this matter.

Respondent also contends that the Hearing Commissioner erred when he based his decision, in part on the fact that Respondent had not engaged in any discussions, “good faith” or otherwise, with Complainant regarding the issue of accommodation. Respondent cites case law that supports the proposition that “an employer is not required to engage in fruitless dialogue when it is clear that no accommodation [can] be made without undue hardship.” Weber v. Roadway Express, Inc., 199 F.3d 270 (5th Cir. 2000). Respondent argues under Weber that engaging in discussions with Complainant was not required in this case because it would have been “futile.” However, the Weber proposition upon which Respondent seeks to rely is inapt where, as here, undue hardship is not sufficiently established. Respondent’s contention, therefore, is not supported.

Furthermore, the Commission does not subscribe to the federal standard articulated in Weber stating that an employer need not engage in the interactive process if it believes an accommodation is futile. To the contrary, the Commission takes the position that an employer is obligated to engage in the interactive process once an employee requests an accommodation. See MCAD Guidelines: Employment

*Discrimination on the Basis of Handicap*, s.VII.C (1998); see also D'Ambrosio v. MBTA, 23 MDLR 81 (2001); Mazeikus v. Northwest Airlines, 22 MDLR 81 (2000).

The Commission has interpreted c.151B's "reasonable accommodation" requirement in the context of handicap discrimination as indicating that meaningful dialogue is necessary to carry out the intent of the statute, since otherwise an employer could reject out of hand a requested accommodation without going through all the required steps in evaluating whether an accommodation could be made. The Commission's Handicap Guidelines state: "Once an employer is on notice that a qualified handicapped employee requires accommodation to perform the essential functions of his/her job, the employer should initiate an informal interactive process with the qualified individual in need of accommodation. This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations."

Commission decisions have further clarified and reinforced this obligation. See D'Ambrosio v. MBTA, 23 MDLR 81 (2001) ("Complainant's requests for a more regular schedule were met with disdain. More importantly, there was no meaningful attempt made to engage in any dialogue with Complainant towards possible resolution of this issue. The Commission has determined that the issue of accommodation often requires an open and ongoing dialogue between employers and employees concerning the provision of a reasonable accommodation. This includes discussion of the nature and scope of any accommodation sought and an assessment of its feasibility."); Mazeikus v. Northwest Airlines, 22 MDLR 81 (2000) ("[A]n employee's request for reasonable accommodation necessarily triggers a corresponding obligation on the part of the employer to engage in a significant amount of direct and meaningful communication with the employee. The importance of this interactive process cannot be overemphasized."); see also Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997).

We apply the same rationale and impose the same obligation upon an employer in

the context of making “reasonable accommodation” to the religious needs of an individual. See M.G.L. c.151B, s.4(1A). The statutory language is the same and we see no reason to interpret it differently.

Respondent's argument that it had no obligation to engage in the interactive process because the statute does not specifically mention such an obligation is therefore unpersuasive. In both handicap and religion cases, we consider the reasonable accommodation language to give rise to a concomitant obligation on the part of an employer to engage in a meaningful dialogue with an employee in order to investigate fully whether a particular accommodation can be made.

We have carefully reviewed Complainant’s contentions 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. We find the Hearing Commissioner’s conclusions 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 Commissioner’s decision.

#### COMPLAINANT’S PETITION FOR ATTORNEYS’ FEES AND COSTS

Complainant has filed a Petition seeking attorneys’ fees in the amount of \$53,550.00. Respondent has not filed an opposition thereto.

Massachusetts General Laws Chapter 151B allows a prevailing complainant to recover reasonable attorneys’ fees. The determination of whether attorneys’ fees are reasonable is subject to the discretion of this Commission. In rendering a determination of reasonable attorneys’ fees, we will use the lodestar methodology adopted by the Commission for the computation of attorneys’ fees. See generally Samuelson v. Sunguard Financial Systems and Fraser Chambers, 23 MDLR 121 (2001); Baker v. Winchester School Committee, 14 MDLR 1097 (1992); Brown v. City of Salem, 14

MDLR 1365 (1992). By this methodology, we will first calculate the number of hours reasonably expended to litigate the underlying claim(s) and multiply that number by a reasonable hourly rate. We will then examine the resulting base figure, known as the “lodestar,” and may adjust it depending on various factors.

Our calculation of hours reasonably expended includes eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; subtracting hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of Complainant’s successful claim; and eliminating hours insufficiently documented. See Harley v. Costco Wholesale Corporation, 23 MDLR 140 (2001); Grendel’s Den v. Larkin, 749 F.2d 945 (1st Cir. 1984). In determining whether the requested hours are reasonable, we will consider contemporaneous time records maintained by counsel and will review both the hours expended and the tasks involved.

Complainant seeks reimbursement for fees charged by Gerald Katz, Esq. Complainant seeks reimbursement for 238 hours at Gerald Katz’s hourly rate of \$225.00 for a total sum of \$53,550.00. 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 successful prosecution of the claim. Furthermore, all hours for work performed are sufficiently documented. We conclude that the hours for which reimbursement is sought is reasonable.

Gerald Katz charged an hourly rate of \$225.00. This rate is supported by documentation of his legal experience and expertise in the area of employment discrimination law. We conclude therefore that the rate charged by Complainant’s attorney is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases. The rates are also well within the rates charged by attorneys in the market in which Complainant sought counsel with similar experience.

See, e.g., Baker v. Town of Winchester School Committee, 14 MDLR 1097 (1992). We conclude that Complainant is entitled to an award of attorneys' fees in the amount of \$53,550.00, calculated as follows: Complainant's request : 238 hours x \$225.00/hour = \$ 53,550.00.

### **ORDER**

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

- (1) Respondent shall immediately hire the Complainant to the position for which he was qualified in 1997, if the Complainant chooses to work for the MBTA.
- (2) Respondent shall immediately cease and desist from further acts of religious discrimination.
- (3) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant \$50,000.00 in damages for emotional distress.
- (4) Within sixty (60) days of receipt of this Order, Respondent shall pay Complainant's attorneys' fees in the amount of \$53,550.00.
- (5) The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made.

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 within thirty (30) days of receipt of this decision 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 16<sup>th</sup> day of December, 2003.

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Walter J. Sullivan, Jr.  
Commissioner

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Cynthia A. Tucker  
Commissioner