

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DOUGLAS SWEET,

Complainants

v.

DOCKET NO. 99-BEM-0851

MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY,

Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant Douglas Sweet. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful discrimination on the basis of disability and retaliation in violation of M.G.L. Chapter 151B. Both Complainant and Respondent 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, or was otherwise not in accordance with the law. See 804 CMR 1.16(f).

I. COMPLAINANT'S PETITION FOR REVIEW

We have carefully reviewed Complainant'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 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 Officer's decision.

II. RESPONDENT'S PETITION FOR REVIEW

Respondent's appeal relates solely to the Hearing Officer's assessment of a civil penalty in this matter. Respondent contends that the Hearing Officer erred in assessing a civil penalty because the statutory amendment to Chapter 151B, section 5, authorizing such relief, should not have retroactive effect. In this matter, the discriminatory conduct

took place in 1999 and thus occurred prior to the 2003 effective date of the statutory amendment at issue.

In the time intervening between the date of the public hearing and the issuance of this opinion, the Full Commission addressed this specific question in Poore v. Town of Harwich High School, et al., 28 MDLR 85 (2006), in which Respondents objected to the assessment of a civil penalty against them because the statute authorizing the penalty was not adopted until after both the occurrence of the discriminatory conduct and the hearing in the matter. Citing, Fontaine v. Ebtec, 415 Mass. 309 (1993) and the principles governing retroactive application of statutes discussed therein, the Commission found that “because a civil penalty is punitive in nature and is not in the nature of damages awarded to make a Complainant whole, it is not remedial in nature, and therefore does not have retroactive application.” The Commission went on to explain that “legislation authorizing a civil penalty clearly affects Respondent’s rights,” and therefore the assessment of such a penalty would “implicate the measure of Respondent’s liability by subjecting it to increased damages which were not anticipated.” Owing to the precedent established in Poore, Respondent’s Petition should be granted. Accordingly, we reverse the Order of the Hearing Officer assessing a civil penalty against Respondent.

III. ATTORNEYS’ FEES AND COSTS

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

Complainant has filed petitions seeking attorneys’ fees for a total amount of \$60,480.00 and costs in the amount of \$5,876.85. 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. A calculation of the hours expended involves separating out work done in relation to the individual doing the work (e.g., senior partner, junior associate, paralegal). Time beyond that consistent with a standard of reasonable efficiency and productivity is eliminated. Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim are subtracted, as are hours that are insufficiently documented. See generally Grendel’s Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Miles v. Samson, 675 F.2d 5 (1st Cir. 1982); Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980); Baird v. Bellotti, 616 F. Supp. (D.Mass 1984); and Brown v. City of Salem, 14 MDLR 1365 (1992).

The Commission’s efforts to determine the number of hours reasonably expended will involve more than simply adding up all hours expended by all personnel. The Commission carefully reviews the complainant’s submission and will not readily accept the proffered number of hours as reasonable. See, e.g., Baird v. Bellotti, supra. Complainant’s counsel, Disability Law Center, seeks reimbursement for 201.60 hours of

work performed at an hourly rate of \$300.00 for a total of \$60,480.00. Based upon our review of the petitions and 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 successful prosecution of the claim. Furthermore, all hours for which compensation is sought are sufficiently documented. We conclude that the number of hours for which reimbursement is sought is reasonable. We also conclude that the rate charged by the attorneys associated with the Disability Law Center 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. We therefore award attorneys' fees consistent with Complainant's request in the amount of \$60,480.00.

Complainant's counsel also seeks reimbursement for costs in the amount of \$5,876.35. We find that these costs are adequately documented and reasonable. Accordingly, we award them to Complainant.

IV. ORDER

For the reasons set forth above, we hereby affirm the Findings of Fact, Conclusions of Law of the Hearing Officer and modify her Order with respect to the Civil Penalty as follows:

(1) Respondent shall immediately cease and desist from engaging in unlawful discrimination and retaliation.

(2) Respondent shall pay to Complainant the sum of \$283,967.00 for lost wages with interest thereon at the rate of 12% per annum from the day the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.

(3) Respondent shall pay to Complainant the sum of \$35,000.00 for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.

(4) Respondent shall pay the Complainant's attorneys' fees in the amount of \$60,480.00 and costs in the amount of \$5,876.85.

(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, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Standing Order on Judicial Review of Agency Actions. 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, § 6.

SO ORDERED this 24th day of August, 2007.

Walter J. Sullivan¹
Chair

Martin S. Ebel
Commissioner

¹ Investigating Commissioner sitting by necessity to establish a quorum. *See* M.G.L. c. 6, § 56, M.G.L. c. 151 B, § 5.