

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and EBONI  
HARRISON,  
Complainants

v.

DOCKET NO. 02-BPA-00845

ROLLER WORLD, INC.  
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Edward R. Mitnick in favor of Complainant Eboni Harrison. Following an evidentiary hearing, the Hearing Officer concluded that Respondent discriminated against Complainant by failing to reasonably accommodate her religion in violation of M.G.L. c. 272 §§ 92A and 98. Respondent has appealed to the Full Commission, and Complainant has petitioned for the award of attorney's fees and costs.

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, § 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 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.

We have carefully reviewed the Respondent's Petition and the record in this case and have weighed the objections to the decision in accordance with the standard of review summarized above. 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 note that this was a case of first impression for the Commission on the question of whether M.G.L. c. 272, §§ 92A and 98 prohibit places of public accommodation from refusing to reasonably accommodate a person's religious beliefs or practices. The Commission has held that this statute, being modeled on M.G.L., c. 151B, implies a requirement that places of public accommodation make reasonable accommodation to people's handicaps. Bachner v. MBTA, 22 MDLR 183(2000) and Bachner v. Charlton's Lounge and Restaurant, 9 MDLR 1274 (1987). Chapter 151B, § 4(1A) includes refusals to make reasonable accommodation to religion among the unlawful practices prohibited by that section. The finding here that M.G.L. c. 272 also requires reasonable accommodation of a patron's religious beliefs or practices is fully consistent with the purpose of the statute and in line with prior Commission cases.

To establish a prima facie case of discrimination based on Respondent's failure to accommodate her religious practice, Complainant must show that: (1) she had sincerely held

religious beliefs that required her to follow, or refrain from, a certain practice; (2) she informed Respondent of her sincerely held religious beliefs or practice; and (3) Respondent refused to accommodate Complainant's sincerely held religious beliefs or practice. Estabrook v. MBTA, 23 MDLR 125, 128-129 (2001) and cases cited therein. If Complainant proves her prima facie case, Respondent must then establish that it could not accommodate Complainant without incurring an undue hardship.

The Hearing Officer found that the Complainant made her prima facie case, and the factual findings are supported by substantial evidence. Those findings are that Complainant is a Muslim and that her religious beliefs are sincerely held; that she wears the hijab because of her sincerely held religious beliefs; that she told Respondent she could not remove the hijab because of her religion; and that the Respondent refused to provide an accommodation for Complainant's request to wear a hijab when it prohibited her access to its skating rink. Respondent's own testimony indicated that there was a readily available accommodation that could have been made to Complainant's religious practice (the ribbon Respondent could have offered to secure the hijab to complainant's head) but it is uncontested that this accommodation was not offered or even mentioned to the Complainant.

Respondent asserts as reversible error that there was no evidence showing that wearing a hijab is a mandate of the Muslim religion. Such a showing is not required. Estabrook v. MBTA, note 5 (and cases cited therein). It was Complainant's sincere religious beliefs, not "some sectarian common denominator," that Respondent was obligated to reasonably accommodate. Equal Employment Opportunity Commission v. Union Independiente de la Autoridad de Acueductos y Alacantarillados de Puerto Rico UIA, 30 F. Supp.2d 217 (1998). Thus Complainant was required to show that her religious beliefs were "sincerely held" and that

wearing and refusing to remove the hijab were based on her sincerely held religious beliefs. The Hearing Officer's findings that Complainant made these showings are supported by substantial evidence.

The Hearing Officer's findings that a known reasonable accommodation was not offered and that it would not have posed an undue hardship to Respondent's business are similarly supported by substantial evidence. The Hearing Officer did not make any errors of law as suggested by Respondent's petition.

Respondent raises several challenges to the Hearing Officer's award of emotional distress damages. We uphold the hearing officer's award of \$3500 to the Complainant in this case. The Supreme Judicial Court's standards for emotional distress damages awarded by the Commission are articulated in Stonehill College v. MCAD, 441 Mass. 549 (2004). The factors that should be considered in rendering such awards include the nature, character, severity, and length of the harm suffered. The Court stated that such awards should be "fair and reasonable and proportionate to the distress suffered." Id. at 576.

The Hearing Officer credited Complainant's testimony that the incident at Respondent's facility caused her to be upset and embarrassed, that she cried the entire night after leaving the facility, and that the incident has had a "profound" effect on her which has led her to hesitate before attending similar places of public accommodation. The Hearing Officer's award is fair, reasonable and commensurate with the emotional pain suffered by Complainant and consistent with the standards set forth in Stonehill.

#### **Attorney's 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 attorney's fees and costs. See M.G.L. c. 151B, § 5.

The determination of what is a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the 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. 1984); 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 M.G.L. Ch. 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.

Complainant in this case seeks attorney's fees in the amount of \$17,021 and costs in the amount of \$140.89. The attorney's fees reflect compensation for 53.3 hours of attorney McLeod's time, 6.6 hours of a second attorney's time, and 19 hours of support staff time. Attorney McLeod's hourly rate was \$250 an hour through 2004 and \$275 per hour thereafter.<sup>1</sup> The second attorney (RSM)'s hourly rate was \$185, and support staff, \$90 per hour. The hours documented in Complainant's Petition appear to be reasonable, and the hourly rates are consistent with rates customarily charged in such cases and are within the range of rates charged by attorneys in Boston of similar experience.

The hours for which an award is sought include 34 hours of attorney and support staff time prior to the finding of probable cause on the issue of religious discrimination and lack of probable cause on the race and color claims. The fees accrued to that point in May 2004 amounted to \$5,057.00. Complainant did not prevail on the allegations of race and color discrimination, calling for some reduction in the fees sought for work during that time. See Edmunds v. Modern Continental/Obayashi, 24 MDLR 51 (2002) (attorney's fees reduced because they included fees for work on claims that were dismissed in a lack of probable cause finding). A ten-percent reduction in this case reflects the fact that while some of the Complainant's claims were dismissed, those claims were closely intertwined with the ones on which she ultimately prevailed. See Hensley v. Eckerhart, 461 U. S. 424, 435 (1938).

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<sup>1</sup>Attorney McLeod's affidavit asserts that his hourly rate was \$250/hour until January 2004 and thereafter was \$275 per hour. The History Bill and amount sought reflect that the \$275/hour rate did not go into effect until January of 2005.

We therefore discount that portion of the fees accrued to the date of the Investigating Commissioner's determinations by ten percent. Complainant shall be awarded attorney's fees in the amount of \$ 16,515.30 and costs in the amount sought, \$140.89.

**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) Respondent shall henceforth cease and desist from engaging in unlawful discrimination.

(2) Respondent shall pay to Complainant the sum of \$3,500 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 judgment and post-judgment interest begins to accrue.

(3) Respondent shall pay the Complainant's attorneys' fees in the amount of \$16,515.30 and costs in the amount of \$140.89.

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 C.M.R. 1.25, which may subject the non-complying party to both civil and criminal penalties as provided in M.G. L. c. 151B, § 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, § 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, § 6.

SO ORDERED this 14th day of May, 2008.

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Malcolm S. Medley  
Chairman

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Sunila Thomas George  
Commissioner

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Martin S. Ebel  
Commissioner