

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

FRANCIS KILROY,
Complainant

v.

DOCKET NO. 04-BEM-00263

MASSACHUSETTS HIGHWAY DEPARTMENT &
RUSSELL MCGILVRAY,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant, Francis Kilroy. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for discrimination on the basis of handicap. Specifically the Hearing Officer found that Respondents were liable for creating a hostile work environment, refusing to accommodate Complainant's disability and constructive discharge. Respondents were sanctioned for failure to respond to discovery requests and, as a consequence, at the Hearing they were not allowed to present evidence in their defense. They were, however, permitted to cross examine Complainant's witnesses. The Hearing Officer awarded Complainant lost wages in the amount of \$120,439.43 from the time he left the job in 2003 until the date of the hearing, and damages for emotional distress in the amount of \$30,000.00. Respondents have appealed the decision on the ground that the Hearing Officer made errors of law and that her decision is not supported by substantial evidence. Respondents essentially challenge the

Hearing Officer's conclusion that Complainant was handicapped and challenge the facts that she found relating to the hostile work environment created by his supervisor, Respondent McGilvray.

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. Massachusetts Comm'n Against Discrim., 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 otherwise not in accordance with the law. See 804 CMR 1.23.

Respondents first contend that the Hearing Officer erred as a matter of law in finding that Complainant is a handicapped person within the meaning of the statute. Respondents' argument is unpersuasive. There was evidence presented that Complainant suffered extensive injuries to his leg and ankle in a fall in 2001 which required surgery to have steel plates inserted around the ankle area, that his recovery process was long and

painful, that he was in a cast for eight months, underwent a second corrective surgery two years later and that he endured severe damage to a series of veins and nerves in his ankle. Such nerve damage was permanent and painful, and resulted in his suffering from neuropathy in his right foot. The symptoms of the neuropathy were continuing pain, hypersensitivity, and constant throbbing. The complainant testified that this caused him to have difficulty walking and standing and that he sought workplace accommodations for that reason.

There was medical evidence in the record documenting the extent of Complainant's injury and the resulting physical difficulties. The Hearing Officer specifically relied upon medical evidence from an array of physicians, as well as Complainant's testimony, which she deemed credible, to support her finding that Complainant's neuropathy was chronic and that it substantially impaired his ability to walk and stand for long periods of time, at all times relevant to this matter. The un rebutted evidence supports her conclusion that Complainant was handicapped within the meaning of the statute and we find no error of law.

Respondents also contend that the Hearing Officer erred in finding that Respondent McGilvray subjected Complainant to a hostile work environment because of his handicap. Respondents basically challenge the Hearing Officer's Findings of Fact. They argue that when McGilvray constantly questioned Complainant as to his whereabouts, he was doing nothing more than Complainant's former supervisor, whom he described as "hands-on." Respondents also argue that since there was evidence that McGilvray followed other employees around, there could be no finding that he specifically targeted Complainant because of his handicap. Respondents' arguments are

not convincing in light of all the credible evidence to the contrary presented in this case. The Hearing Officer credited Complainant's testimony that McGilvray's acts of harassment and intense scrutiny went far beyond curiosity as to Complainant's whereabouts. The Hearing Officer found that McGilvray made harassing telephone calls to Complainant and engaged in intimidating physical conduct, such as blocking Complainant's path. She also found credible Complainant's testimony that McGilvray berated him in public and threatened others with retaliation if they socialized with Complainant. Complainant's testimony was corroborated by a co-worker who witnessed McGilvray block Complainant's path and yell and "holler" at Complainant. The Hearing Officer credited testimony that McGilvray was out to get Complainant, questioned Complainant's doctor's note and stated that Complainant was "faking his injury." She found that McGilvray's supervision over the Complainant was ended following an incident where McGilvray assigned Complainant to a job task which caused his surgical site to bleed due to excessive standing.¹ The evidence in the record supports the Hearing Officer's finding that McGilvray harbored discriminatory animus toward Complainant because of his handicap and created a hostile work environment for Complainant based on his handicap. We have carefully reviewed Respondents' Petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated herein. 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 and the award of the Hearing Officer.

¹ Complainant testified that when he showed McGilvray the bleeding, McGilvray responded by "smiling and laughing." Complainant then went to the Director of MHD's Right of Way Bureau and requested a transfer, which was denied, although the Director removed Complainant from McGilvray's supervision.

COMPLAINANT’S PETITION FOR ATTORNEY FEES AND COSTS

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

The determination of what constitutes a reasonable fee is within the Commission’s discretion and relies on consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. In determining what constitutes 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 a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. The Commission then examines the resulting figure, known as the “lodestar,” and adjusts it upward or downward, or not at all depending on various factors, including the complexity of the matter.

The Commission’s determination of the number of hours reasonably expended will involve more than simply adding all hours worked by counsel. 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. Bellotti, 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); Brown v. City of

Salem, 14 MDLR 1365 (1992). 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 considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of \$38,983.50 and costs in the amount of \$2,254.00.

Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal compensation sought for work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We further conclude that Complainant's attorney's hourly rates are consistent with rates customarily charged by attorneys with comparable expertise and experience in the field. Finally, we find that the costs requested by Complainant are adequately documented and reasonable.

We therefore award attorney fees to Complainant in the amount of \$38,983.50 and costs in the amount of \$2,254.00.

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

(1) Respondents shall cease and desist from engaging in discrimination based on handicap.

(2) Respondents shall pay Complainant damages for lost wages in the amount of \$120,439.43 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) Respondents shall pay Complainant damages for emotional distress in the amount of \$30,000.00 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.

(4) Respondents shall pay Complainant attorney fees in the amount of \$38,983.50 and costs in the amount of \$2,254.00 with interest thereon at the rate of 12% per annum from the time the Petition for fees was filed, until such time as payment is made or a court judgment is rendered in this matter.

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 seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within 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 Superior Court Standing Order on Judicial Review of Agency Actions. 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 29th day of April, 2009.

Malcolm Medley
Chairman

Martin S. Ebel
Commissioner

Sunila Thomas-George
Commissioner