

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & Franklin McCreath,)
Complainants)
v.) 99 BEM 3107
Elite Protective Services)
Respondent)
)

DECISION AND ORDER OF THE FULL COMMISSION

This matter has come before us following a decision of Hearing Officer Judith Kaplan in which she found that Respondent subjected Complainant to racial harassment on the job in violation of M.G.L. c.151B, but did not engage in unlawful race discrimination or retaliation when it terminated him. During the evidentiary hearing, Hearing Officer Kaplan prohibited certain proposed witnesses from testifying, as sanctions to both parties for failing to provide adequate notice of their final witness lists. She also prohibited Neil Lesman, the supervisor who Complainant alleged harassed him, from testifying as further sanction against Respondent for having acted in bad faith by refusing to produce Lesman for deposition after the Commission ordered the parties to depose him by a certain date.

The Hearing Officer concluded that although Complainant’s claim of racial harassment was based on one incident when his supervisor called him a “f---ing nigger,” that incident was significantly offensive, inflammatory and pervasive enough to constitute unlawful racial harassment under M.G.L. c.151B. She relied upon Gnerre v. MCAD, 402 Mass. 502 (1988),

noting that the Supreme Judicial Court explicitly “declined to impose a numerosity test” to determine what constitutes unlawful harassment.

However, the Hearing Officer found that Complainant failed to show that he was subjected to different treatment than his non-Black co-workers when he was terminated. The Hearing Officer further found that Complainant’s termination was for legitimate reasons and was not in retaliation for his complaint about the harassment. She awarded Complainant \$10,000 for emotional distress damages and ordered Respondent to conduct a management training program on racial harassment.

Respondent filed a Petition for Review, arguing that Hearing Officer Kaplan’s ruling prohibiting two of Respondent’s witnesses from testifying at the hearing was arbitrary, capricious and prejudicial to Respondent, as it prevented Respondent from rebutting Complainant’s version of the events surrounding the racial harassment and Respondent’s response to the internal complaint. Respondent also argued that the single incident of a racial epithet used toward Complainant was insufficient to constitute racial harassment, even under Gnerre, as it was not significant enough to alter Complainant’s conditions of employment. Complainant filed a Petition for Attorney’s Fees and Costs, requesting that the Commission award him \$31,710 in attorney’s fees and \$2,008 for costs.

Standard of Review

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 responsibility of the hearing officer to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact, and the Full Commission defers to these determinations. See e.g. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission 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(8)(f).

Respondent’s Appeal

As a preliminary matter, we uphold the Hearing Officer’s ruling prohibiting the testimony of Neil Lesman, Respondent’s employee and proposed witness, as a sanction for bad faith conduct by Respondent. In her decision, the Hearing Officer recounted with precise detail the obstreperous conduct engaged in by Respondent in direct disregard of the Commission’s Order for Certification to Public Hearing and despite the good faith attempts of Complainant’s counsel. The Hearing Officer acted entirely within her authority in denying Respondent the opportunity to present Lesman as a witness at the hearing after Respondent refused to produce him for deposition. The Commission’s regulations specifically provide that a party may be sanctioned for failure to comply with a Commission discovery order and that the Commission is empowered to “make such orders...as are just,” which includes, but is not limited to,

“prohibiting [the party] from introducing designated matters in evidence.” See 804 C.M.R. 119(5).¹ We, therefore, affirm the Hearing Officer’s ruling preventing Lesman from testifying.

We further find that the ruling prohibiting several other witnesses from testifying was appropriate, as both parties had been ordered to provide final witness lists more than two months before the hearing and each party attempted to revise those lists at the last minute. We find that the Hearing Officer acted within her authority in issuing this sanction as well.

We affirm Hearing Officer Kaplan’s finding that one occurrence of Complainant being called a “f---ing nigger” by his supervisor was sufficient to establish racial harassment. She found the word “nigger” to be so offensive and insulting as to alter Complainant’s conditions of employment, even after only one utterance. Contrary to Respondent’s argument, there is no question that the foundation of harassment law rests on the nature and effect of the harassing conduct, not the number of occurrences. As such, a hearing officer may conclude that one incident is sufficient to create a hostile work environment in violation of c.151B. Here, that is just what the Hearing Officer did and we conclude that her factual findings are supported by substantial evidence and her conclusions of law are not in error.

Complainant’s Petition for Attorney’s Fees and Costs

Having confirmed the decision of the Hearing Officer, we conclude that Complainant has prevailed on part of his claims. However, we have held that when a Complainant does not prevail on certain aspects of his case, his request for attorney’s fees must be reduced to reflect

¹ 804 CMR 119(5) provides, in relevant part:

If a party or person from whom discovery is sought fails to comply with an Order for discovery of the Investigating Commissioner, a party or Commission Counsel seeking discovery may apply to the Commission to make such Orders in regard to the failure of discovery as are just, and among others the following:

(b) An Order refusing to allow the non-complying party to support or oppose disputed claims or defenses, or prohibiting him from introducing designated matters in evidence....

the partial success. Carmichael v. Wynn & Wynn, 18 MDLR 209 (1996); Sanderson v. Town of Wellfleet Fire Dept., 19 MDLR 60 (1997); Marathas v. Holiday Inn, 22 MDLR 391 (2000). The Commission may exercise its discretion to reduce the overall fees requested by some amount, which may reasonably be said to have been expended in pursuit of Complainant's unsuccessful claim. In making such a determination, we may examine the "degree of interconnectedness" between the two claims.

In this case, Complainant's claim of racial harassment was based on a single incident of a racial epithet directed toward him by his supervisor, which Complainant himself described concisely during his testimony. Complainant's other claim, for which he did not successfully establish a prima facie case, required a more extensive showing of comparative evidence that was separate from the single incident of harassment and required corroborating witness testimony. Because Complainant was only successful on one of his claims and the successful claim was by far the more simply-proven one, we find that a 50% reduction in Complainant's attorney's fees is fair and reasonable under the circumstances of this case.

The determination of whether a fee sought is reasonable is subject to the Commission's discretion. The Commission has adopted the lodestar methodology for fee computation. By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by a reasonable hourly rate. Baker v. Winchester School Committee, 14 MDLR 1097 (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 will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099.

Complainant has filed a Petition seeking attorney's fees for 151 hours at a rate of \$210 per hour, for a total amount of \$31,710 and costs in the amount of \$2,008. Complainant's Petition is supported by detailed contemporaneous time records. 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 are reasonable, but nonetheless subject the entire award to a 50% reduction due to Complainant's failure to prevail on all claims.

Complainant's attorney, Annette Hill Green, charges an hourly rate of \$210.00, a rate that is supported by her legal experience and expertise in the area of employment discrimination law. We conclude that the rate charged by Attorney Green is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and is well within the range of rates charged by attorneys in this geographic area.

We therefore award attorney's fees in the amount of \$15,855, which represents a 50% reduction of the requested total of \$31,710. Complainant's counsel also seeks reimbursement for costs in the amount of \$2,008. These costs include expenses for deposition transcripts, subpoenas and computer-generated research. We find that these costs are adequately documented and reasonable should be awarded to Complainant.

ORDER

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

- (1) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant \$10,000 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post judgment interest begins to accrue;
- (2) Respondent shall provide at least six hours of training to its supervisors and managers, including Neil Lesman, regarding the topic of racial discrimination and harassment in the workplace. This training is to take place within six months of the date of this order. The trainer who conducts the session must be approved by the MCAD's Director of Training through submissions of resumes, or must be selected from the MCAD's list of pre-approved trainers. Within one week of the Respondent's selection of a trainer or the MCAD's approval of the trainer, a copy of this hearing decision must be mailed or faxed to the trainer for his or her review. A draft training agenda must be submitted to the MCAD Director of Training at least one month prior to the training date for approval. The Respondent must provide the MCAD with one month's advance notice of the training date so that the Commission has the option to send a representative to observe the session. Within one month after the training session the Respondent must submit documentation of compliance to the MCAD Director of Training, signed by the trainer, identifying the training topic, training

- participants, employees of the marketing department as of the training date, and the date and time of the training session;
- (3) Respondent shall immediately cease and desist from discriminating on the basis of race and color;
 - (4) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant's attorney's fees in the amount of \$15,855;
 - (5) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant's costs in the amount of \$2,008;
 - (6) 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 non-complying 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. 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. 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, s.6.

SO ORDERED this 17th day of September, 2003.

Dorca I. Gomez, Chairwoman

Cynthia A. Tucker, Commissioner