

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JAMES BLUE,
Complainant

v.

DOCKET NO. 98-BEM-1796

ARAMARK CORPORATION,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant, James Blue. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful discrimination and harassment on the basis of race in violation of M.G.L. c. 151B, section 4(1). 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 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, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.16(f).

I. RESPONDENT'S PETITION FOR REVIEW

Respondent first contends on appeal that there is insufficient evidence to support the Hearing Officer's finding that Complainant reasonably believed Floyd Eighmey was his supervisor and, therefore, the Hearing Officer erred as a matter of law when she held Respondent strictly liable for Eighmey's harassing and discriminatory conduct toward Complainant. In support of its contention, Respondent states that there was uncontroverted evidence at the hearing that Eighmey worked in a different department from Complainant and that he had no actual authority to hire or fire Complainant. The Hearing Officer specifically found that "although Eighmey worked in a different department and was not in Complainant's direct chain of command, Eighmey was a supervisory employee, and was directed by Lyons to find Complainant on that particular occasion....Complainant recognized Eighmey as a supervisory employee, and reasonably believed that Eighmey had authority to direct his work." Respondent states that in making this finding, the Hearing Officer misunderstood the law, specifically Johnson v. Plastic Packaging, Inc. 892 F. Supp. 25 (D. Mass. 1995), and made a "novel assertion that an employer is strictly liable for the discriminatory conduct of a supervisor who has no actual or apparent authority over an employee."

We disagree. The Hearing Officer clearly made a finding of apparent authority in this case. This case, as well as Johnson, involved an employee who was harassed by a

departmental supervisor who worked in a different department, was in a different chain of command, and had no direct supervisory relationship to the complainant. The evidence in this case, as in Johnson, established that even though the harassing supervisor was not Complainant's direct supervisor, Complainant had ample reason to believe this supervisor had sufficient authority and power to order him to perform certain tasks and to have him fired. Eighmey, a floor supervisor who was responsible for keeping the stadium clean, was directed by Lyons, Respondent's general manager, to find Complainant and direct him to clean one of the stadium's concourses. Indeed, Eighmey, acting upon the authority conferred upon him by Lyons, found Complainant, directed him to clean the concourse, threatened to have him fired, and took steps to carry out on his threat.

We are not persuaded by Respondent's attempt to distinguish Johnson on the ground that the supervisor in Johnson actually did have the power to fire the complainant, whereas in this matter Eighmey did not actually have such power. An employer can be held strictly liable where Complainant is "a rank-and-file employee, and clearly subordinate in the corporate hierarchy to the individual defendants who were all management personnel and supervisory employees." Morehouse v. Berkshire Gas Co., 989 F. Supp. 54 (D. Mass. 1997). An employee may be classified as a supervisor if that individual "is authorized to direct another employee's day-to-day activities." Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002), citing Fluet v. Harvard University, 23 MDLR 145, 163 (2001). In this matter, Eighmey was authorized by Lyons, the general manager, to direct Complainant to clean the concourse, one of his major day-to-day activities. "An individual who is authorized to direct another employee's day-to-day activities qualifies as a supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions." *EEOC Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002

(June 18, 1999). Thus, we conclude that the Hearing Officer's conclusion in this regard is consistent with the governing law.

Second, Respondent contends that the Hearing Officer erred as a matter of law in finding that Eighmey's conduct was sufficiently severe or pervasive to alter the terms and conditions of Complainant's employment. Respondent makes this argument despite acknowledging that one incident may be sufficiently severe to constitute unlawful harassment. See Gnerre v. MCAD, 402 Mass. 502 (1988)(declining to impose a numerosity requirement in harassment cases).

In this case, the Hearing Officer made extensive findings to support her conclusion that the conduct was severe. She found that Eighmey angrily called Complainant a "black motherfucker" and a "nigger" in front of a crowd of fans in a public venue. He then threatened to have Complainant fired and actively took steps to accomplish this end. Complainant cried uncontrollably in front of numerous fans after the incident. The Hearing Officer, while acknowledging that "there was only one incident of name calling," nevertheless found that "under the circumstances of this case, where a supervisory employee referred to Complainant as a 'nigger' and a 'black motherfucker,' in a public forum with fans all around, that this was particularly demeaning and embarrassing."

In finding the one incident "sufficiently egregious to constitute racial harassment," the Hearing Officer also noted that the Supreme Judicial Court has stated that the more offensive the comments, the fewer incidents of harassment may be required to establish the objective reasonableness of the claim at hand. Gnerre, supra at 507. Finally, this Commission has routinely recognized 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." E.g., McCreath v. Elite

Protective Services, 25 MDLR 337, 338 (2003). We, therefore, find that the Hearing Officer did not err as a matter of law in concluding that Eighmey's conduct was sufficiently severe to alter the terms and conditions of Complainant's employment.

Finally, Respondent contends that the Hearing Officer's decision to credit Complainant's testimony regarding Eighmey's offensive utterances was not supported by substantial evidence. Specifically, Respondent argues that the Hearing Officer's credibility determinations are legally insufficient because she declined to credit certain portions of Complainant's testimony but affirmatively credited others. Respondent states that the Hearing Officer's decision provided no means of analyzing her assessment of credibility and, therefore, leaves a reviewing body no alternative but to speculate as to the basis for her conclusions.

We disagree. The Hearing Officer acknowledged in her decision that she was "mindful of the Complainant's lack of consistency and credibility with respect to other aspects of his testimony," namely his account of what happened to the piece of paper he claimed to have been given by a fan who wrote down a telephone number and offered to appear as a witness. However, the Hearing Officer specifically found that "Complainant has been consistent regarding the central allegation in this matter: that Eighmey spoke the offensive terms." Further, the Hearing Officer credited corroborating evidence to support Complainant's claim. It is the Hearing Officer's discretion to make credibility determinations, and such determinations are not limited to all-or-nothing assessments of witness testimony.

We are not convinced that the Hearing Officer's reservations about Complainant's testimony concerning the piece of paper's whereabouts detract fatally from her well-supported conclusions concerning Complainant's central allegation in this matter. "An agency adjudicator does not have to make detailed findings concerning every aspect of the matter before [her]; [her] findings need only embrace those facts necessary to support

[her] decision in sufficient detail to permit judicial review.” Chief Justice for Administration of the Trial Court, et al. v. MCAD, 439 Mass. 729, 735 (2003). Contrary to Respondent’s contention in this regard, we believe the Hearing Officer’s decision sufficiently provided a means of analyzing her assessment of credibility and provided a reviewing body sufficient alternatives beyond mere “speculation” as to the basis for her conclusions.

We have carefully reviewed Respondent’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 finding of race discrimination and harassment. We find the Hearing Officer’s conclusions were supported by substantial evidence in the record and we defer to them.

Our decision would not be complete without one final comment upon the award of emotional distress damages in this case. We were disturbed to find upon review of the decision below that the Hearing Officer elected to award only \$35,000 to the Complainant in emotional distress damages for what appeared to be severe emotional distress. Given the facts found, this award seems to be at the low end of the spectrum of appropriateness. Complainant was humiliated and demeaned in front of a large crowd of people with some of the most hateful and offensive epithets in the English language. Complainant was so upset by this discriminatory conduct that he broke down crying in public while describing the incident to his manager ten minutes later. He broke down again ten days later when trying to recount the events to Respondent’s general manager and testified that the event evoked painful memories of discrimination he had suffered while growing up in the South. Given the nature, character and severity of the harm

Complainant suffered, we feel that a significantly larger award was warranted. See Stonehill College v. MCAD, 441 Mass. 549 (2004).

However, Complainant did not appeal the finding and we defer to the Hearing Officer's award in this matter. As we stated in Said v. Northeast Security, Inc., "a judge has no right to set aside a verdict merely because he himself would have assessed the damages in a different amount." Said v. Northeast Security, Inc., 23 MDLR 124, 125 (2001). Despite our misgivings, we find that there was substantial evidence in the record with respect to the award of emotional distress and therefore we will not disturb the award.¹

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision in its entirety.

II. COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision, we conclude that Complainant prevailed on one of his claims in this matter and is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, Section 5. Complainant has filed a petition seeking attorneys' fees and expenses, supported by detailed contemporaneous time records, requesting fees in the amount of \$112,750.00 and costs in the amount of \$1,133.48. Respondent has filed an opposition thereto.

¹ We note that on June 14, 2004, several months after the filing of its petition, Respondent filed a Motion to Set Aside Emotional Distress Damage Award and for Order Precluding Award of Attorneys' Fees and Expenses. We deny this motion as untimely. Respondent did not contest the Hearing Officer's emotional distress award in its original petition. Furthermore, the Supreme Judicial Court's ruling in Stonehill College did not change the law with respect to the determination of an emotional distress award other than to prospectively eliminate the inference of emotional distress that previously attached to a finding of liability. However, in this case, the Hearing Officer did not rely on that inference, rather she based her award on the evidence of distress set forth by Complainant. Furthermore, although the Hearing Officer did not have the benefit of the Stonehill College decision when considering Complainant's claim, her findings of fact and conclusions of law demonstrate that she took into consideration the factors articulated in Stonehill College, factors which the Commission has for years employed, in reaching her determination with respect to the award of emotional distress damages.

A. FEES

M.G.L. Chapter 151B allows prevailing complainants to recover attorneys' fees. However, the Commission has held that when a Complainant does not prevail on certain aspects of his case, his request for attorneys' fees must be reduced to reflect the partial success. Aubourg v. American Drug Stores, 23 MDLR 226 (2001); Carmichael v. Wynn & Wynn, 18 MDLR 208 (1996). The Commission may exercise its discretion to reduce the overall fees requested by some amount that 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 and his claim of retaliation shared some common relevant facts, such as those having to do with the incident that occurred on May 23, 1998. However, the claims do not require the same factual elements to establish a prima facie case for each and the allegations related to events occurring when Complainant was employed by Respondent during 1999, 2000 and 2001 seasons are not sufficiently linked to the harassment claim so as to compel a finding of sufficient "interconnectedness." Thus, we find that a 35% reduction in Complainant's requested reimbursement 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 attorneys' fees for a total of 496.65 hours. This total represents work performed by six attorneys, two paralegals and two legal interns. Complainant's Petition is accompanied 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 the 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. We also conclude that the expertise of Attorneys Prince, Rubin, Taylor, Knuuttila, Edwards and Caputo in the area of employment discrimination law was supported by accurate documentation. We conclude that the hourly rates charged by these attorneys, which ranged from \$175.00 to \$400.00 over the time period 1998 to 2003, are 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.

As stated above, we conclude that the reimbursement for attorneys' fees is reasonable, but the amount sought is nonetheless subject to a reduction of 35% due to Complainant's failure to prevail on his retaliation claim. We therefore award attorneys' fees in the amount of \$73,287.50.

Complainant's counsel also seeks reimbursement for costs in the amount of \$1,133.48. These costs include expenses related to the taking of depositions in this matter, photocopies, and postage. We find that these costs are adequately documented and reasonable. Accordingly, we award them to Complainant.

On April 15, 2004, Complainant filed a Supplemental Fee Petition seeking fees associated with this appeal and those incurred in preparing fee petitions. Having reviewed this Petition, we find that the fees incurred with respect to opposing

Respondent's appeal were reasonable and make a supplemental award of \$17,943.00 for a total of \$91,230.50. However, we decline to award recovery of fees for preparation of the fee petitions. We also award additional documented costs of \$442.17, for a total of \$1,580.65.

ORDER

Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer, including the award for emotional distress, is affirmed in its entirety. Respondent's request for oral argument is denied. It is hereby ordered that:

- (1) Respondent immediately cease and desist discriminating on the basis of race and color.
- (2) Respondent pay to Complainant the sum of \$35,000.00 in damages for emotional distress with interest, thereon at the statutory rate of 12% per annum from the date the complaint was filed, until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within sixty (60) days of receipt of this decision.
- (3) Respondent pay to Complainant the sum of \$91,230.50 in attorneys' fees and \$1,580.65 in costs. Payment shall be made within sixty (60) days of receipt of this decision.
- (4) 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 20th day of August, 2004.

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner