

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
and JAMES MALONE,
Complainant

v.

96-BEM-2664

CITY OF BOSTON PUBLIC
FACILITIES DEPARTMENT,
Respondent

DECISION AND ORDER OF THE FULL COMMISSION

This matter has come before us following a decision of Hearing Officer Helene Horn Figman in favor of the Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Complainant was subjected to discrimination in employment on the basis of his age in violation of M.G.L. c. 151B, § 4(1B).

Specifically, the Hearing Officer found that Respondent denied Complainant a promotion in favor of a younger, less qualified person. The Hearing Officer also concluded that Complainant was constructively discharged. She awarded Complainant damages for back pay and lost pension benefits and ordered Respondent to pay Complainant a yearly allotment to compensate him for future losses to his pension, plus \$50,000.00 in emotional distress damages. The Hearing Officer declined to award interest against Respondent, a public employer. Both Complainant and Respondent then filed timely Petitions for 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 commissioner or 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 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 1.23.

Respondent has appealed the decision of the Hearing Officer on the grounds that the Complainant failed to prove that Respondent's failure to promote him was unlawful. It contends that 1) that the Hearing Officer's conclusion that discriminatory animus caused Complainant's lay-off was based on errors of law and was not supported by substantial evidence; 2) that the Hearing Officer's award of \$50,000 in emotional distress damages was arbitrary, capricious and an abuse of discretion; and 3) that Complainant was not constructively discharged. We find that the Hearing Officer assessed all of the evidence and determined that Respondent's reasons for failing to promote Complainant were false. Upon concluding that the reasons for not promoting Complainant were false, the Hearing Officer was permitted to draw the inference that Respondent's explanation was a pretext for unlawful discrimination and did so. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). Our review of the Hearing Officer's decision indicates that her application of the burden-shifting framework was not erroneous. Further, the Hearing

Officer's conclusion that Complainant presented evidence that discriminatory animus was the determinative cause of Respondent's failure to promote him is supported by substantial evidence. It is the responsibility of the Hearing Officer to weigh the evidence when deciding disputed questions of fact.

While we conclude that the Hearing Officer properly found that Respondent discriminated against Complainant, we concur with Respondent's argument that Complainant was not constructively discharged. The Hearing Officer described Complainant as "more than uncomfortable" with having to work for someone substantially younger and less qualified than he. Constructive discharge occurs when "based on an objective assessment of the conditions under which the employee has asserted he was expected to work, it could be found that they were so difficult as to be intolerable." GTE Products Co. v. Stewart, 421 Mass. 22, 34 (1995). In order to prevail on his constructive discharge claim, Complainant had to establish that Respondent made his working conditions so intolerable that a reasonable person in his position would have felt compelled to resign. McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1240 (1992). The standard for constructive discharge "is, and should be, a strict one," and requires that an employee must demonstrate that "the threat of physical or psychic harm was so great as to preclude ever returning to work." He must also show that he exhausted all possibilities to continue working and that resignation proved to be the final and only alternative. Id. at 1241.

Complainant testified that he was embarrassed at having to work for someone younger and less qualified than he, and had to endure the pity of co-workers who thought he should have been promoted. However, there is no evidence that the conditions under which Complainant worked were intolerable. In this matter, Complainant has shown, at best, that he felt uncomfortable working for the successful candidate. We conclude that there was not sufficient

evidence in the record to support a finding that Complainant's work situation had become intolerable. Thus, the Hearing Officer erred in concluding that Complainant had been constructively discharged.

While we reverse the Hearing Officer's ruling regarding constructive discharge, we conclude that Complainant is nonetheless entitled to recover for lost back pay. In the case of a discriminatory failure to promote claim, if a complainant voluntarily resigns he is still entitled to recover lost back pay so long as he mitigates damages. *See Nobler v. Beth Israel Medical Center*, 715 F. Supp. 570,572-73 (S.D.N.Y. 1989); *Dennis v. Columbia Colleton Medical Center*, 290 F.3d 639, 651 (4th Cir. 2002). A complainant is entitled to receive the difference between the greater of his former salary and the salary he receives in his current position, and the salary he would have received had he been promoted. Thus, if a complainant accepts a job that pays him more than his previous salary but less than he would have earned had he been promoted, his lost wages amount to the difference between his subsequent salary and the salary from the job he was denied. In the present case, Complainant mitigated his damages. Despite his resignation, Complainant earned more in the following three years than he would have earned at Respondent had he remained in his position. Complainant mitigated his damages by taking early retirement, while at the same time working as a consultant. Thus, although the Hearing Officer erred in concluding that Complainant was constructively discharged, we hold that she correctly found Complainant entitled to back pay damages. Further, the Hearing Officer correctly calculated Complainant's back pay damages in the amount of \$50,021.21 by subtracting the income he actually received from October 1996 through the end of 1999 from the income he would have received had he received the promotion. We similarly find that the Hearing Officer properly

awarded Complainant lost pension benefits based on the difference between the amount he received when he retired and the amount he would have received had he been promoted.

Next, Respondent argues that the emotional distress award of \$50,000 was excessive in this matter and cites to several MCAD cases awarding lower damages. Based on this selected sample of cases, Respondent argues that the emotional distress award in this case should be reduced to \$20,000, if any are to be awarded. Respondent's argument misapprehends the standard of review, which requires that an appellate panel uphold the hearing officer's award unless it was an abuse of discretion or not supported by substantial evidence. The fact that another hearing officer in a different factual situation may have awarded lesser damages has very little relevance.

When considering the request of a party to reduce a fact finder's award of damages for emotional distress, it is proper for the Full Commission to extend "great deference" to the Hearing Officer. Baldelli v. Town of Southborough, 18 MDLR 167, 170 (1996). "This is because the fact-finder had the exclusive opportunity to observe the witness and weigh the credibility of testimony based on demeanor and countless other intangible factors that occur in face-to-face communication." Said v. Northeast Security, Inc., 22 MDLR 315, 318 (2000). Here, the Hearing Officer made specific factual findings regarding the emotional impact of Respondent's discriminatory conduct on Complainant. Despite the fact that her decision issued before the Massachusetts Supreme Judicial Court's decision in Stonehill College v. MCAD, 441 Mass. 549 (2004), the Hearing Officer applied the factors – nature, severity and duration of the harm – identified in Stonehill College as relevant. The Hearing Officer's findings and conclusions demonstrate that Complainant offered evidence of and the Hearing Officer based her conclusions upon the nature, severity and extent of the harm that Complainant suffered as a

result of Respondent's discriminatory conduct. See Stonehill College, supra. Applying the deference prescribed above, and considering the substantial evidence in the record, we affirm the Hearing Officer's award of \$50,000 in emotional distress damages.

The Hearing Officer did not award interest against Respondent, which is a municipality. See City of Boston v. Massachusetts Commission Against Discrimination, 39 Mass. App. Ct. 234, 245 (1995). In City of Boston, the Appeals Court held that the Commission could not impose interest on damages awards against public employers. 39 Mass. App. Ct. at 245. Complainant argues on appeal that City of Boston was wrongly decided, and asks the Full Commission to award Complainant pre-judgment interest. The Commission takes the position that City of Boston was wrongly decided and is currently seeking appellate review of that decision. We firmly believe that a prohibition against imposing interest on awards to public employees who are victims of discrimination runs contrary to legislative intent, deprives complainants of make-whole relief, and undermines the Commission's "authority to fulfill its mandate of protecting citizens of the Commonwealth from discriminatory employment decisions and punishing unlawful discrimination in the workplace." See Stonehill College v. Massachusetts Commission Against Discrimination, 441 Mass. 549, 562 (2004). Nevertheless, until such time as the Appeals Court or Supreme Judicial Court overturns City of Boston, the Commission will follow the City of Boston decision. We, therefore, deny Complainant's appeal in this regard.

We have carefully reviewed the Petitions for Review 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. We conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer regarding the claim of age discrimination. We also

conclude that, with one exception, the Hearing Officer did not err in her conclusions of law. We, however, rule that the Hearing Officer's decision with respect to constructive discharge was based on an error of law, and we therefore reverse the decision only as to the finding of constructive discharge.

Having affirmed the decision of the Hearing Officer in favor of the Complainant, we conclude that the Complainant has prevailed in this matter and is therefore entitled to an award of reasonable attorneys' fees and costs. Complainant has submitted a petition for attorney's fees and costs and Respondent has submitted an opposition thereto. In addition, Complainant has submitted a supplemental petition for attorney's fees for work performed in connection with his appeal to the Full Commission.

The determination of what is a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the litigation of a claim of discrimination in the administrative forum of the Commission Against Discrimination. In rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar method for fee computation. See Fontaine v. EBTEC Corp, 415 Mass. 309, 613 N.E.2d 881, 891 (1993); Baker v. Winchester School Committee, 14 MDLR 1079 (1992); Brown v. City of Salem, 14 MDLR 1365 (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 examine the resulting figure, known as the "lodestar", and adjust it either upward or downward or not at all depending on various factors.

A calculation of the hours reasonably expended involves separating out work done in relation to the individual doing the work (e.g., senior partner, junior associates, and 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 prosecution of the claim are subtracted, as are hours 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. Belloti, 616 F.Supp. 6 (D.Mass 1984); 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 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, *supra*.

In this matter, counsel for the Complainant submitted an affidavit and time records indicating that he spent 192.49 hours during the course of litigation of this matter before the Commission, including discovery, a three-day hearing and appeal to the Full Commission. After review of the supporting documentation in this case and of similar matters before the Commission, we conclude that the hours stated are reasonable. Therefore, we see no evidence to warrant a conclusion that these hours were duplicative, unnecessary or excessive.

Furthermore, we find that the \$275 hourly rate requested by Complainant's counsel is reasonable and is within the range of rates common to the marketplace within which Complainant obtained counsel and litigated his claim. See, e.g., Baker v. Town of Winchester School Committee, 14 MDLR 1097 (1992).

Thus, the lodestar figure here is \$52,934.75 in attorney's fees. Therefore, we award Complainant \$52,934.75 in attorney's fees.

Complainant's attorney submitted an affidavit attesting to his expenditure of \$2,400.95 in costs associated with litigation of Complainant's claim, including deposition and public hearing transcripts, and costs of subpoenas and service of summonses. We find these costs to be reasonable under the circumstances and order Respondent to reimburse Complainant accordingly .

ORDER

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

- (1) Respondent is hereby ordered to immediately cease and desist from further acts of age discrimination in the workplace.
- (2) Within sixty (60) days of receipt of this Order, Respondent shall pay to Complainant the sum of \$50,021.21 in back pay damages.
- (3) Within sixty (60) days of receipt of this Order, Respondent shall pay to Complainant the sum of \$41,783.52 representing the lost differential in pension for the years 2000, 2001, 2002, and 2003.
- (4) For the years 2004 and beyond, Respondent shall pay to Complainant the annual sum of \$10,445, in addition to his current retirement pension, for so long as the Complainant shall receive retirement under the current plan. Payments shall coincide with payments made to Complainant under the existing pension plan schedule, and are subject to the same rules and regulations that apply to the current "early" retirement benefits.

- (5) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant \$50,000 in damages for emotional distress suffered as a result of the Respondent's unlawful conduct.
- (6) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant's attorney's fees in the amount of \$52,934.75 and costs in the amount of \$2,400.95.
- (7) 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, § 8.

Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review 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, § 6.

SO ORDERED this 12th day of November, 2004.

Dorca I. Gomez, Chairwoman

Cynthia A. Tucker, Commissioner