

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
and JEAN TOLLY VOLTAIRE,  
Complainant

v.

99-BPA-2452

MASSACHUSETTS DIVISION  
OF EMPLOYMENT AND  
TRAINING JOBNET PROGRAM  
Respondent

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**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 a place of public accommodation on the basis of his national origin (Haitian), in violation of M.G.L. c. 272, §§ 92A, 98.

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Specifically, the Hearing Officer found that an employee of Respondent refused to fax a document, which was in fact a writing sample for a job Complainant was applying for, based on the erroneous assumption that it was a personal political statement regarding the government of Haiti and therefore not related to a job search. The Hearing Officer concluded that the employee made the erroneous assumptions about the writing sample based on Complainant's national origin and ruled that Complainant was unlawfully discriminated against in a place of public accommodation. She awarded Complainant \$3,500 in emotional distress damages. The Respondent then filed a timely Petition 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/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).

We have carefully reviewed the Petition 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. As a result of that review, we find no material errors of fact or law, with one exception, and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. The one exception is that the Hearing Officer erroneously awarded interest against Respondent, which is an agency of the Commonwealth. 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. The Commission, however, 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 the appeal and affirm the decision below in its entirety, with the one exception noted above.

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.

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 78.75 hours during the course of nearly three years of litigation of this matter before the Commission, including discovery and a one-day hearing. 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 \$225 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 \$17,718.75 in attorney's fees. Because Complainant only prevailed on one of his claims,<sup>1</sup> which was based on a single, brief incident, his attorney's fees should be reduced by 40% to reflect that partial success. See Sanderson v. Town of Wellfleet Fire Dept. (April 8, 1997 FC decision) (where the Full Commission reduced attorney's fees by 40% due to partial success of Complainant's claims and the lack of novel issues presented by her claim). Therefore, we award Complainant \$10,631.25 in attorney's fees.

Complainant's attorney submitted an affidavit attesting to his expenditure of \$121.25 in costs associated with litigation of Complainant's claim, including postage, photocopying, facsimile and telephone costs. 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) Within forty-five (45) days of receipt of this Order, Respondent shall pay the Complainant \$3,500 in damages for emotional distress suffered as a result of the Respondent's unlawful conduct.
- (2) Within forty-five (45) days of receipt of this Order, Respondent shall pay the Complainant's attorney's fees in the amount of \$10,631.25 and costs in the amount of \$121.25;

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<sup>1</sup> Complainant made several claims of discrimination against Respondent based on other incidents of poor service he received by Respondent. However, the Hearing Officer declined to find that he was discriminated against on any of those other occasions.

(3) The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made.

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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.

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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.

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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.

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SO ORDERED this 24<sup>th</sup> day of August, 2004.

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Cynthia A. Tucker, Commissioner

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Walter J. Sullivan, Jr., Commissioner