

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JILL MERCURIO,
Complainant

v.

DOCKET NO. 98-BEM-2818

ATAMIAN VOLKSWAGEN, INC., ROBERT
ATAMIAN, REED ATAMIAN, & SHERYL
ATAMIAN,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant Jill Mercurio. Hearing Officer Guastaferrri found Respondents Atamian Volkswagen, Reed Atamian and Sheryl Atamian liable for unlawful discrimination on the basis of gender, specifically pregnancy, in violation of M.G.L. c. 151B, Section 4.¹ Respondents have 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

¹ The complaint against Robert Atamian was dismissed and is not the subject of this appeal.

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 was otherwise not in accordance with the law. See 804 CMR 1.16(f).

RESPONDENTS' PETITION FOR REVIEW

Respondents contend on appeal that the Hearing Officer erred as a matter of fact and law when she found that Complainant was terminated because of her pregnancy. Respondents assert that there was no substantial evidence to support the Hearing Officer's decision. They also assert the Hearing Officer erred in concluding that Complainant satisfied her burden of proof in demonstrating discrimination on the part of Respondents. Specifically, Respondents argue that they advanced legitimate, nondiscriminatory reasons for terminating Complainant and that they supported those reasons with credible evidence. As they did at the hearing, Respondents cite as reasons for Complainant's termination her failure to control the cash at Respondents dealership, her failure to keep track of vacation and sick time, and her failure to perform the day-to-day functions of her job.

We have carefully reviewed Respondents' contentions on appeal and the full record in this matter, and we 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. The Hearing Officer specifically found that Complainant performed her job competently for almost two years, that she received no criticism whatsoever during that time period, that her competency was not called into question until she

announced she was pregnant, that she was treated adversely following the announcement, that the vast majority of her tasks were assumed by a male individual one month after the announcement, and that her employment was terminated two months after the announcement.

The Hearing Officer specifically found that Respondents' proffered reasons for her termination were "not only a pretext, but a total fabrication." She stated that Reed Atamian's testimony regarding these alleged reasons for termination were "vague, confusing, unconvincing, and entirely lacking in credibility." We do not accept Respondents' assertion that the Hearing Officer erred in rejecting their reasons for Complainant's termination as insufficient to satisfy their burden of production. It is well-established that a "fact finder may properly take into account "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons for its actions." City of Salem v. MCAD, 44 Mass App. Ct. 627, 633 (1998). We find that the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them. On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision, we conclude that Complainant prevailed in this matter and is entitled to an award of reasonable attorneys' fees. See M.G.L. c. 151B, section 5. Complainant has filed a petition seeking attorneys' fees in the amount of \$44,832.75 and costs in the amount of \$2,526.99.

A. FEES

M.G.L. Chapter 151B allows prevailing Complainants to recover attorneys' fees. 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 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 the tasks involved. Id. at 1099.

Counsel for Complainant seeks reimbursement for work performed by Attorneys Maria Luise and Frank Mondano. Attorney Luise seeks reimbursement for 32.25 hours performed in the year 1999, 22.25 hours in 2000, 31 hours in 2001, and 59 hours in 2002. Attorney Mondano seeks reimbursement for 6 hours performed in the year 1999, 15.25 hours in 2000, 4.9 hours in 2001, and 18.25 hours in 2002. 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 by both attorneys are reasonable.

Attorney Luise charged an hourly rate of \$150.00 in 1999, \$175.00 in 2000, \$200.00 in 2001, and \$225.00 in 2002. These rates are supported by documentation of her legal experience and expertise in the area of employment discrimination law. We conclude that the rates charged by Attorney Luise 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.

Attorney Mondano charged an hourly rate of \$350.00 in 1999, \$350.00 in 2000, \$375.00 in 2001, and \$400.00 in 2002. These rates are supported by documentation of his legal experience and expertise in employment discrimination law. We conclude that the rates charges by Attorney Mondano 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.

We therefore award fees based upon the following rates submitted by counsel:

Maria Luise	1999	32.25 hours	x \$150.00/hour = \$ 4,837.50
	2000	22.25 hours	x \$175.00/hour = \$ 3,893.75
	2001	31 hours	x \$200.00/hour = \$ 6,200.00
	2002	59 hours	x \$225.00/hour = \$13,325.00
Frank Mondano	1999	6 hours	x \$350.00/hour = \$ 2,100.00
	2000	15.25 hours	x \$350.00/hour = \$ 5,337.50
	2001	4.9 hours	x \$375.00/hour = \$ 1,839.00
	2002	18.25 hours	x \$400.00/hour = \$ 7,300.00
		TOTAL	\$44,832.75

B. COSTS

Complainant's counsel also seeks reimbursement for costs in the amount of \$2,526.99. These costs included expenses for photocopying, subpoena service, deposition transcripts, and mailings. We find that these costs are adequately documented and reasonable, and hereby award them to Complainant.

ORDER

For the reasons set forth above, the Respondents' appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety.

It is hereby ordered that:

(1) Respondents shall pay to Complainant the sum of \$71,292.85 in damages for lost wages, benefits and medical expenses 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 the matter is reduced to a court order and post-judgment interest begins to accrue. Payment shall be made within sixty (60) days of receipt of this decision.

(2) Respondents shall pay to Complainant the sum of \$100,000.00 in damages for emotional distress 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 the matter is reduced to a court order and post-judgment interest begins to accrue. Payment shall be made within sixty (60) days of receipt of this decision.

(3) Respondents shall pay to Complainant the sum of \$44,832.75 in attorneys' fees and \$2,526.99 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 17th day of November, 2003.

Dorca I. Gomez
Chairwoman

Cynthia A. Tucker
Commissioner