

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JOANNE BERARDI,
Complainant
v.

DOCKET NO. 97-BEM-1193

MEDICAL WEIGHT LOSS CENTER
And ANDREW RUDNICK
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Kenneth Grooms in favor of Complainant, Joanne Berardi. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for sexual harassment and unlawful discharge in violation of M.G.L. chapter 151B, section 4, paragraphs 1 and 16A. The Respondents 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, 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 he found that Respondents sexually harassed and discriminated against Complainant on the basis of her sexual orientation and gender. In addition, Respondents contend that the Hearing Officer failed to follow proper default procedures in this matter. Specifically, Respondents contend that: (1) the Hearing Officer erred in its decision to deny Respondents' Petition to Vacate Default; (2) the Hearing Officer erred in finding unlawful discharge and awarding back pay; (3) the Hearing Officer erred in awarding Complainant business losses as part of back pay; and (4) the Hearing Officer's award of emotional distress was excessive.

Respondents' chief contention on appeal is that the Hearing Officer's decision not to vacate the default against Respondents was erroneous. Respondents claim that they never received any notice of the Certification Conference or the Public Hearing and,

therefore, should not be held in default. However, the Hearing Officer found that Respondents did receive proper notice.

The Hearing Officer determined that the Notice of Certification Conference was sent on July 28, 1999 to Respondents at the address provided by Respondents to the Commission, which address was the business address of Respondent Medical Weight Loss Center. Respondent Rudnick was the owner, president and sole shareholder of Respondent Medical Weight Loss Center. On August 18, 1999, Complainant's counsel sent a letter to Respondent Rudnick seeking his cooperation in drafting the joint conference memorandum and participating in settlement discussions, as was directed by the July 28 order. In response to this letter, Respondent Rudnick telephoned Complainant's counsel on August 24, 1999, during which call the individuals discussed settlement, the upcoming Certification Conference on September 8, 1999, and the fact that Respondent Medical Weight Loss Center was going out of business. The Hearing Officer credited the testimony outlining the events described above, as provided by Complainant's counsel in an Affidavit filed with Complainant's Opposition to Respondents' Motion to Vacate Default Judgment on August 18, 2000. Respondent Rudnick's statement in his appeal that he "does not recall the telephone conversation regarding the Certification Conference" and that Complainant's counsel merely "alleged" the conversation to have occurred directly contradicts the testimony provided in the Complainant's counsel's Affidavit. Respondent's Rudnick's statement is belied by the fact that Complainant's counsel did not merely "allege" but, rather, swore as an attorney and an officer of the court in an Affidavit that the conversation occurred, and that he

wrote a follow-up letter to Respondent Rudnick memorializing the conversation and its specific contents.

Similarly, Respondent Rudnick's contention that he never received notice of the public hearing is not supported by credible evidence. During the August 24, 1999 telephone conversation, Complainant's counsel, upon hearing that Respondent Medical Weight Loss Center had gone out of business, asked Respondent Rudnick specifically for his new address. Respondent Rudnick pointedly refused to provide such information and directed Complainant's counsel to continue to send all correspondence to Respondent Medical Weight Loss Center's address, namely 1244 Boylston Street, Chestnut Hill, Massachusetts. Respondent Rudnick specified that all mail would be forwarded to him at his home address. Likewise, Respondent Rudnick never provided the Commission with an address different from the 1244 Boylston Street address, even after Medical Weight Loss Center went out of business.

On April 12, 2000, the Commission sent written notice of the Public Hearing via certified mail to Respondents at their last known address, and signed receipt of that notice was returned to the Commission on August 18, 2000. The Hearing Officer found that the Commission was entitled to rely on that signed receipt. He found that the evidence demonstrated that Respondents did receive notice of the Certification Conference and the public hearing, yet they failed to attend either. We have previously noted that:

[p]arties appearing before the Commission bear the burden of notifying the Commission of a change of address. *See* Mass.R.Civ.P. 11(d). Furthermore, service by the Commission to a party's last known address is considered proper service regardless of whether the party actually receives the document.

See Ragwar v. Lewis, 9 MDLR 1057, 1068-69 (1987) *citing* Mass.R.Civ.P. 5(b).

Pendarivs v. Roseland One Realty Trust, 24 MDLR 247, 248 (2002). We find that the Hearing Officer correctly ruled that service on Respondents was proper. We further find that the Hearing Officer did not err when he refused to remove the default judgment entered against Respondents.

Respondents also contend on appeal that the Hearing Officer made errors in his findings and award of back pay, business losses and emotional distress. They are set forth as follows.

Finding of Unlawful Discharge and Award of Back Pay

Respondents claim that the finding of unlawful discharge and award of back pay was “not justified in this matter, because the Complainant’s claims are unrelated to the discontinuation of her employment at MWLC.” Complainant claimed in her charge of discrimination that she had been the victim of a hostile work environment and terminated on the basis of her sexual orientation. The Hearing Officer found that Complainant had been subjected to sexual harassment, specifically a hostile work environment, and unlawful discharge based on her sexual orientation. Further, the Hearing Officer’s findings are supported by substantial evidence on the record. Such violations are related to the discontinuation of her employment and clearly justify an award of back pay under M.G.L. chapter 151B, section 5.

Business Losses as Part of Back Pay

Respondents claim that the Hearing Officer erred in including in his award of back pay certain business losses incurred by Complainant in her efforts to mitigate the damages following the termination of her employment from Respondents. Chapter 151B,

sections 5 and 9 confer upon the Commission broad authority to fashion appropriate remedies in awards for damages. These sections are to be construed liberally for the accomplishment of the section's purpose. See, e.g., Beaupre v. Smith & Associates, 50 Mass. App. Ct. 480, 492 (2000). Thus, the Hearing Officer appropriately concluded that Complainant's business losses, deducted from income for purposes of taxation, were to be included in the award of lost back pay.

Emotional Distress Damages

Respondents contend that we should "vacate" the award of emotional distress damages in this matter. However, it is well established in this Commonwealth that an award of emotional distress is appropriate under governing law where a Complainant has suffered unlawful harassment and discrimination. See Collegetown v. MCAD, 400 Mass. 156 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172 (1985). The Hearing Officer specifically credited Complainant's testimony that she suffered emotional distress directly related to her treatment by Respondents. He found that an award of emotional distress damages would appropriately compensate her for the discrimination she suffered and that it was supported by her credible evidentiary account.

We find that there was substantial evidence to support the Hearing Officer's decision with respect to both the procedural default and the substantive harassment and discrimination claims underlying the award of all damages in this matter. We also find that there was substantial evidence to support the Hearing Officer's decision with respect to the damages award itself. We have carefully reviewed Respondents' contentions 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. We find 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 in its entirety. Further, we DENY Respondents' Motion for Leave to Consider Additional Evidence.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant has filed a Petition seeking attorneys' fees in the amount of \$18,620.00 and costs in the amount of \$541.60. Respondents have filed an Opposition thereto.

Fees

M.G.L. c. 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. See Samuelson v. Sunguard Financial Systems, 23 MDLR 121 (2001); Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

Only those hours that were reasonably expended to litigate Complainant's retaliation claim are subject to compensation under M.G.L. c. 151B. In addition, the calculation of hours reasonably expended includes eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; subtracting hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim, and eliminating hours insufficiently documented. See Harley

v. Costco Wholesale Corp., 23 MDLR 140 (2001); Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984). In determining whether the requested hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved.

Complainant's counsel seeks reimbursement of \$18,620.00, an amount representing 106.4 hours charged at the rate of \$175.00 per hour. 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 Complainant's claim. Accordingly, we conclude that the hours for which Complainant's counsel seeks reimbursement are reasonable.

Complainant's counsel charged an hourly rate of \$175.00, a rate that is supported by documentation of his legal experience and expertise in the area of employment discrimination law. We conclude that the rate charged by Complainant's counsel is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases. It is also well within the rates charges by attorneys in the market in which Complainant sought counsel with comparable experience. See, e.g., Baker v. Town of Winchester School Committee, supra.

We therefore award fees based on the following rate submitted by Complainant's counsel: 106.4 hours x \$175.00/hour = \$18,620.00.

Costs

Complainant's counsel also seeks costs in the amount of \$541.60. These costs included expenses for photocopying, binding and deposition transcripts. We find that these costs are reasonable and award them to Complainant.

ORDER

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

(1) Within sixty (60) days of receipt of this Order, Respondents shall pay the Complainant \$45,581.00 in damages for lost wages plus interest thereon at the statutory rate of 12% per annum from the date of the filing of the complaint until payment is made or the obligation is reduced to a court judgment and post-judgment begins to accrue;

(2) Within sixty (60) days of receipt of this Order, Respondents shall pay the Complainant \$50,000.00 in damages for emotional distress plus interest thereon at the statutory rate of 12% per annum from the date of the filing of the complaint until payment is made or this obligation is reduced to a court judgment and post-judgment begins to accrue;

(3) Within sixty (60) days of receipt of this Order, Respondents shall pay the Complainant the sum of \$350.00 covering her out-of-pocket losses;

(4) Within sixty (60) days of receipt of this Order, Respondents shall pay Complainant's attorneys' fees in the amount of \$18,620.00 and costs in the amount of \$541.60;

(5) 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. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of proceedings before the Hearing Officer or Commissioner (See M.G.L. c. 151B, s.6) in the Superior Court within thirty (30) days of receipt of this decision.

Failure to file a petition in court within 30 days of the receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, section 6. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. 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, section 8.

SO ORDERED this 19th day of March, 2003.

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner