

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
JULIANNA McCORMICK,
Complainants

v.

DOCKET NO. 98-BEM-0584

MODERN CONTINENTAL
CONSTRUCTION COMPANY,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for sexual harassment but was liable for certain acts of retaliation in violation of M.G.L. c. 151B, Section 4(4). Respondent appealed 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 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. Colonade 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 1.23.

Respondent's request for review rests of the grounds that the Hearing Officer erred in concluding that Complainant was the victim of unlawful retaliation, that the Hearing Officer's award of emotional distress damages is not supported by substantial credible evidence or the law, and that the Hearing Officer's imposition of affirmative relief was not supported by the record.

We have carefully reviewed both the Respondent's petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein. As a result of our review, we find no material errors of fact or law and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. We therefore, deny the appeal and affirm the decision below in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision, we conclude that Complainant has prevailed in this matter on one of her two charges. The attorneys' fees award should take into account that Complainant prevailed on the retaliation claim but not her sex discrimination claim. When a Complainant does not substantially prevail on all claims, any award of attorneys' fees must be reduced to reflect the partial success. Carmichael v.

Wynn & Wynn, 18 MDLR 209 (1996); Sanderson v. Town of Wellfleet Fire Dept., 19 MDLR 60 (1997); Marathas v. Holiday Inn, 22 MDLR 391(2000). The Commission may exercise its discretion to reduce the amount of fees requested by some factor which may reasonably be said to represent time expended in pursuit of Complainant's unsuccessful claims. In making such a determination, the Commission may examine the "degree of interconnectedness" between the claims. Here, Complainant's proof of the retaliation claim involved a number of overlapping and a number of different facts than her sex discrimination claim, a level of connectedness that merits some reduction in the award of attorneys' fees. We conclude that a 33% reduction in Complainant's requested fee is fair and reasonable under the circumstances of this case.

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 reaching a determination of what is a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097(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 then examine the resulting figure, known as the "lodestar", and adjust it either upward or downward or not at all depending on various factors.

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 stated number of hours as “reasonable.” See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D.Mass, 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel’s Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (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. Baker, supra., at 1099.

Complainant’s counsel has filed a petition seeking attorneys’ fees and costs in the amount of \$32,725.00, charging a rate of \$250.00 per hour, and costs of \$420.96, supporting the request with contemporaneous time records.

Having reviewed the contemporaneous time records and supporting affidavit that accompany the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation and litigation of this claim by is reasonable.

We further conclude that Complainant’s attorney hourly rate of \$250.00 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases, are within the range of rates charged by attorneys in the area with similar experience and are reasonable. Applying the 33% reduction, we conclude that the total award for attorney’s fees should be \$21,817.00 and we assess costs of \$420.96.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact, conclusions of law and Order of the Hearing Officer. Respondent’s appeal to the Full Commission is hereby dismissed.

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 non-complying 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 within 30 days of receipt of this decision 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 9th day of August, 2007.

Walter J. Sullivan, Jr.¹
Commissioner

Martin S. Ebel
Commissioner

¹ Investigating Commissioner sitting by necessity to establish a quorum. See M.G.L. c .6, § 56; M.G.L. c. 151B, § 5.