

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and)
KATHRYN DAMON) DOCKET NO. 95-BEM-2594
Complainant)
v.)
INCRE, INC. and)
JOHN ZUMAN)
Respondents)

DECISION OF THE FULL COMMISSION

This matter comes before us on appeal of the Respondents following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant. The Hearing Officer concluded that Respondent, INCRE, violated M.G.L. c.151B, s.4(16) when it terminated Complainant from her employment because of disability. The Hearing Officer further found that Respondent Zuman was responsible as an individual under M.G.L c. 151B, s.4(4A) for interfering with Complainant’s right to work at INCRE free of unlawful discrimination. Respondents filed a timely appeal.

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, sec. 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 questions of fact. 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 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’ request for review rests on their assertions that certain of the Hearing Officer’s findings of facts were not supported by the evidence and the Hearing Officer erred as a matter of law when she 1) found that Complainant was capable of performing the essential functions of the job and 2) did not find that Complainant had failed to mitigate her damages.

We have reviewed the record in this matter and conclude that there is substantial evidence to support the Hearing Officer’s findings of fact and that the Hearing Officer did not err in her conclusions of law with respect to Respondents’ specific contentions as well as the overall findings regarding Respondents’ liability.

In light of our recent decisions in Bendell v. Lemax, Inc., 25 MDLR 106 (2003) and Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003), we feel compelled to comment upon the Hearing Officer's finding that Zuman "interfered" with Complainant's rights in violation of section 4(4A). The fact that an individual acted as the decision maker in a given employment action does not relieve a complainant from having to prove discriminatory intent. See Bendell, 25 MDLR at 107. Thus, in order to prove that Zuman violated the "interference" provision of section 4(4A), Complainant was required to demonstrate that Zuman acted with "deliberate disregard" of her protected rights. See Woodason, 25 MDLR at 64. We find that Complainant met her burden.

The Hearing Officer found that Zuman terminated her when she sought to return from medical leave and specifically told her that "he was not going to pay her to lie around." Further, the Hearing Officer found that Zuman made "unwarranted assumptions about Complainant's fitness to perform the job" and "refused to explore the possibility of a reasonable accommodation." The Hearing Officer concluded that "Zuman intentionally denied Complainant's request to return to work with a reasonable accommodation and lied about the reasons for her termination." We find that such conduct rises to the level of "deliberate disregard" for Complainant's rights and therefore conclude that the

Hearing Officer properly determined that Zuman interfered with Complainant's rights in violation of section 4(4A).

Having affirmed the decision of the Hearing Officer, we conclude that Complainant has prevailed on her claim and is therefore entitled to an award of reasonable attorney's fees and costs. Complainant has filed a Petition for Attorney's Fees in which she has made a claim for 105.1 hours of time spent by Attorney John Davis at a rate of \$200 per hour, for a total of \$21,020 in attorney's fees. Complainant also seeks \$577.34 in costs. Respondents have filed an opposition.

In rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar methodology for fee computation. See Fontaine v. EBTEC Corp., 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 successful 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 will adjust it either upward or downward or not at all depending on several factors.

Calculation of hours reasonably expended involves the following. First, specifying and appropriately accounting for who has done the work (e.g., senior partner, junior associates, paralegal). Second, eliminating

billed-for-time that is beyond that consistent with a standard of reasonable efficiency and productivity. Third, subtraction of hours which appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of that portion of the claim which was successful. Fourth, elimination of 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); and, Brown v. Salem, 14 MDLR 1365 (1992).

In support of her petition for attorney's fees and costs, Complainant submitted an affidavit of counsel and an itemized record of billing hours and costs. Having reviewed the record presented of time expended in the preparation and litigation of this claim, we conclude that it is reasonable. We find no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to successful prosecution of the claim.

However, Complainant's attorney offers no support that his hourly rate is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases. In fact, it appears from the record that Attorney Davis had only just been admitted into practice at the time of the public hearing in this matter. In the absence of evidence offered by Attorney Davis to the contrary, we find that \$200 per hour is not consistent with rates customarily charged by attorneys with

comparable experience, rather the appropriate rate is \$125 per hour. See Salmon v. Costco Wholesale Corp., 23 MDLR 142 (2001); Orphin v. Donut Hole, 24 MDLR 212 (2002). We therefore award attorney's fees in the amount of \$13,137.50. We find Complainant's requests for costs reasonable and award the full amount.

ORDER

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

(1) Within sixty (60) days of receipt of this decision, Respondents shall pay to Complainant the sum of \$19,032 in damages for lost wages, with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made.

(2) Within sixty (60) days of receipt of this decision, Respondents shall pay to Complainant the sum of \$5,000 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.

(3) Within sixty (60) days of receipt of this decision, Respondents shall pay to the Complainant the sum of \$13,137.50 in attorney's fees and \$577.34 in costs.

(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 non-complying 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. Such action must be filed within 30 days of receipt of this decision and must be filed 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, s.6.

SO ORDERED this 2nd day of July, 2003.

Cynthia A. Tucker, Commissioner

Walter J. Sullivan, Jr., Commissioner