

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

KEVIN MCKENNA,
Complainant

v.

DOCKET NO. 03-BEM-01131

BOSTON HOUSING AUTHORITY,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant, Kevin McKenna. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for retaliation, and discrimination based on disability in violation of G.L. c.151B, §§ 4 (4) and (16). The Hearing Officer found that Respondent refused to return complainant to his position as a patrol officer in its internal police department after he took an extended medical leave of absence for post traumatic stress disorder resulting from the Chief's harassment. The Hearing Officer found that the refusal to reinstate complainant was motivated by retaliation for Complainant's having filed a prior discrimination claim against the Chief of the department, and for assisting two other employees with their discrimination complaints. She also found that the refusal to return Complainant to work was discrimination based on a perception that he continued to be disabled, despite significant medical opinions to the contrary. The Hearing Officer awarded Complainant \$122,

944.00 in damages for lost wages, and \$50,000.00 in damages for emotional distress with interest thereon at the statutory rate.

Respondent appealed to the Full Commission challenging the Hearing Officer's failure to credit its primary witness and asserting that the Hearing Officer erred as a matter of law in concluding that Respondent discriminated against Complainant. Respondent also opposes Complainant's request for attorney's fees and costs.

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, § 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 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, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

Respondent has appealed the decision on the grounds that the Hearing officer failed to give due consideration to Respondent's primary witness, Joyce Tognacci, Acting Director of Human Resources, who testified that after conferring with Respondent's

counsel and reviewing Complainant's medical documentation, she could not authorize his return to the position. Respondent asserts that the Hearing Officer should have credited Tognacci's assertion that her decision was based on two doctor's reports that he was unable to perform the essential functions of the job and that an accommodation was therefore impossible.

We find that the record demonstrates that the Hearing Officer carefully considered Tognacci's testimony and ultimately did not credit the reasons she articulated as being the real reasons for the Respondent's actions. The Hearing Officer made this conclusion based on the fact that in deciding not to return Complainant to work, Respondent relied almost entirely on the letter of one physician, who was not Complainant's treatment provider and who complainant had met only once. This letter contradicted a number of other expert opinions from treatment providers, two of whom were independent, that Complainant was fit to return to work. The Hearing Officer concluded that Respondent discounted these reports and that Tognacci determined that Complainant could not perform the essential functions of the job based on her own personal opinions and biases rather than on a dispassionate view of the medical evidence. The Hearing Officer found that she inappropriately substituted her judgment for that of the medical experts. Given the obvious and inherent weaknesses of Tognacci's testimony, the Hearing Officer was well within her discretion to discredit it, and to conclude that unlawful reasons motivated the decision. In concluding that retaliation was part of the unlawful motive, The Hearing Officer also considered ample evidence of the Chief's abusive treatment of Complainant.

Respondent also contends that the Hearing Officer failed as a matter of law by failing to follow the law as articulated in Carleton v. Commonwealth, 447 Mass. 791

(2006). Respondent cites that case for the proposition that the prohibition against discrimination based upon disability does not preclude a determination that an accommodation is unreasonable where such accommodation would impose an undue hardship upon the employer and present a risk to public safety. However, Respondent's reliance upon this case is inapposite where there was ample evidence of, and extensive reference by the Hearing Officer to letters and reports from physicians stating that Complainant was fit to return to duty as a police officer without any restrictions. The Carleton case applies to situations where the medical and occupational experts in the relevant field have made a determination that a particular accommodation is unreasonable in light of the risks posed to public safety. No such determination was presented in this case; in fact, substantial the evidence supported the opposite conclusion, namely that Complainant was able to perform his job without any accommodations or restrictions. Given the evidence, the Hearing Officer reasonably discredited Respondent's assertions that Complainant would present any risk to public safety or that returning him to work would impose a hardship upon the operation of Respondent's business.

Having carefully reviewed Respondent's Petition and the full record in this matter and having weighed all the objections to the decision in accordance with the standard of review articulated therein, 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. Therefore the decision of the Hearing Officer should be affirmed in its entirety. We therefore deny the appeal and affirm the decision below.

COMPLAINANT’S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer’s decision in favor of the Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5.

The determination of what constitutes a reasonable fee is within the Commission’s discretion and relies on consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. In determining what constitutes 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 a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. The Commission then examines the resulting figure, known as the “lodestar,” and adjusts it either upward or downward or determines no adjustment is warranted depending on various factors, including the complexity of the matter.

The Commission’s determination of the number of hours reasonably expended involves more than simply adding up all hours expended by counsel. The Commission carefully reviews the Complainant’s submission and does not simply accept the proffered number of hours as “reasonable.” See, e.g., Baird v. Bellotti, 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. 1984); 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 what hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of \$22,137.50 and costs in the amount of \$542.51.

Having reviewed the contemporaneous time records that support the attorney fees request, and considering the case at hand, and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal compensation sought for work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We conclude that Complainant's counsel's hourly rate is consistent with rates customarily charged by attorneys with comparable expertise and experience in the field. We also find that the compensation for costs requested by Complainant is adequately documented and reasonable.

We therefore award to Complainant attorney's fees totaling \$22,137.50 and costs in the amount of \$542.51.

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) Respondent shall cease and desist from engaging in retaliatory actions and discrimination based on a record or perception of disability in the future.

(2) Respondent shall pay Complainant damages for lost wages in the amount of \$122,944.00 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 this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Respondent shall pay Complainant the value of his pension contributions for the period of five years and credit him with five additional years of service for retirement purposes.

(4) Respondent shall pay Complainant damages in the amount of \$50,000.00 for emotional distress as set forth in the Hearing Officer's decision, 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 this order is reduced to a court judgment and post-judgment interest begins to accrue.

(5) Respondents shall pay Complainant attorney's fees in the amount of \$22,137.50 and costs in the amount of \$542.51, with interest thereon at the rate of 12% per annum from the date the fee petition was filed with the Commission, until such time as payment is made or this order is reduced to a court judgment.

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 appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. 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. 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 30th day of December, 2008.

Malcolm Medley
Chairman

Martin S. Ebel
Commissioner

Sunila Thomas-George
Commissioner