

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

_____)	
LEO MEDEIROS & MICHAEL DOW,)	
Complainants)	
v.)	96 BEM 0748
)	96 BEM 1461
PENSKE TRUCK LEASING)	97 BEM 0527
Respondent)	97 BEM 0548
_____)	

DECISION AND ORDER OF THE FULL COMMISSION

This matter has come before us following a decision of Hearing Officer Edward Mitnick in favor of the Complainants. Following an evidentiary hearing, the Hearing Officer concluded that Complainants, who are both male, were subjected to unlawful sexual harassment by a male co-worker in violation of M.G.L. c. 151B. The Hearing Officer specifically found that the co-worker’s sexual conduct was disgusting, embarrassing, hostile and abusive to Complainants, that his behavior was severe and pervasive enough to interfere with Complainants’ ability to do their jobs and that Respondent knew about and tolerated the inappropriate behavior. *See College-Town Division of Interco v. MCAD, 400 Mass. 156 (1987); see also Melnychenko v. 84 Lumber Co., 424 Mass. 285 (1997) (male-on-male sexual harassment falls within the protection of M.G.L. c.151B).*

The Hearing Officer also found that Complainants were each retaliated against by Respondent in violation of M.G.L. c.151B, §§ 4(4) & (4A) after they filed sexual harassment complaints with the Commission. He found that Complainant Leo Medeiros (“Medeiros”) was subjected to retaliatory harassment and termination and that Complainant Michael Dow (“Dow”) was not terminated, but was subjected to retaliatory harassment by Respondent. He awarded

Medeiros lost wages and emotional distress damages and awarded Dow emotional distress damages. In addition, he ordered Respondent to conduct a comprehensive training course on sexual harassment and retaliation for all employees, managers and supervisors.

Respondent then filed a timely Petition for Review, claiming that the Hearing Officer erred in his findings, misapplied the law, admitted fraudulent evidence and awarded improper damages inconsistent with the evidence. Respondent also challenged the Hearing Officer's determination of witness credibility, objecting to some of his findings as "irrational," and argued that one of the claims should have been barred by the statute of limitations.

Standard of Review

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 Commissioner or 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 responsibility of the hearing officer to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact, and 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 role of the Full Commission 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.

Analysis

Respondent makes several arguments on appeal for overturning the Hearing Officer's decision. We address some of them directly, but reject all of them after due consideration.

First, Respondent argues that the Hearing Officer failed to find that the unwelcome conduct by Complainants' co-worker was *objectively* offensive from the perspective of a "reasonable person" in each Complainant's position, Ramsdell v. Western Massachusetts Bus Lines, 13 MDLR 1087, 1115 (1991) (citing Gnerre v. MCAD, 402 Mass. 502, 507, 524 N.E.2d 84, 88 (1988)), but instead found that the conduct was merely *subjectively* offensive to Complainants, based on their testimony. However, the record indicates otherwise. In finding that the sexual harassment was unwelcome, the Hearing Officer noted that Complainants were "subjectively" offended by their co-worker's conduct and he then concluded that the conduct was "debasing, disgusting, repulsive, and far beyond the margin of mere sophomoric horseplay." These findings indicate that the Hearing Officer applied the objective standard as well in considering whether the conduct at issue created a hostile and abusive work environment. Id. at 1115; Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990). We uphold the Hearing Officer's conclusion regarding Complainants' sexual harassment claims.

Respondent also argues that, according to the Hearing Officer's findings, Dow's claim of retaliation should have been barred by the then-applicable six-month statute of limitations.

Respondent reasons that although the Hearing Officer found that Dow was unlawfully harassed by management employees after filing his sexual harassment complaint on May 10, 1996, the incidents of harassment must not have fallen within six months of the February 1997 filing date because the Hearing Officer failed to specify dates when each incident of harassment occurred. However, Respondent failed to raise this objection to the Hearing Officer and, as such, it has

been waived. Notwithstanding, the record indicates that Dow was subjected to daily retaliatory treatment up until his departure from Respondent. Thus, there is ample evidence in the record to conclude that Dow filed his complaint within the statute of limitations period. *See Beldo v. University of Massachusetts Boston*, 20 MDLR 105 (1998)(repeated incidents of harassment are sufficient to establish a continuing violation).

Respondent further objects to the admissibility of Medeiros' personal diary, kept in a small notebook, which detailed the specific incidents of sexual harassment. Respondent claims it was improperly denied access to the notebook, which it alleges may have been fraudulently created by Medeiros. We defer to the Hearing Officer's findings regarding the admissibility of the notebook¹ and find that Respondent was not prejudiced by the ruling. In addition, the Hearing Officer's findings relative to the sexual harassment claim were based on witness testimony, which he found to be credible, not on specific entries in Medeiros' diary.

Respondent also argues that the amount of back wages awarded to Medeiros should be reduced by the amount he would have earned at a subsequent employer, had he not been fired by that employer, and by the amount he received as settlement for "back wages" in a lawsuit against the same employer. We disagree.

Although it is the Complainant's duty to mitigate damages, *Black v. School Committee of Malden*, 365 Mass 197 (1974), it is the Respondent's burden to prove the amount of offset due to the Complainant's subsequent earnings. *Northeast Metropolitan Regional Vocational School*

¹ Both Medeiros' personal notebook and another "dictated" version of the diary were entered into evidence at the hearing, over Respondent's objection. The Hearing Officer found that although the two documents were not identical, any changes in the dictated version were minor and "were not a self-serving memorialization of the original diary."

Distr. School Committee v. MCAD, 31 Mass. App. Ct. 84, 575 N.E. 2d 77 (1991); J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204, 536 N.E. 2d 1104 (1989); Buckley Nursing Home Inc. v. MCAD, 20 Mass. App. Ct. 172, 478 N.E. 2d 1292 (1985).

After hearing the pertinent evidence, the Hearing Officer specifically found that Respondent failed to show, as it alleged, that Medeiros filed frivolous lawsuits (including a wrongful termination claim) against subsequent employers. The Hearing Officer refused to give the lawsuits, and any subsequent settlement arising from them, any weight and also made no findings regarding the legitimacy of Medeiros' termination from the subsequent employer. Thus, he only offset the award of back wages by Medeiros' actual reported income and refused to offset the damage award by any speculative amounts. See Annie Bacon v. John Durkee, MDLR (1996) (Respondent is entitled to offset interim earnings only to the extent that earnings were proved at the hearing). We find this decision was not abuse of discretion or an error of law and we therefore defer to it.

We have carefully reviewed all of the arguments set forth in Respondent's Petition for Review and the full record in this matter and have weighed all of Respondent's objections to the decision in accordance with the standard of review articulated herein. As a result of that 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.²

Complainants' Request for Fees and Costs

Having affirmed the decision of the Hearing Officer in favor of Complainants, we conclude that Complainants have prevailed in this matter and are therefore entitled to an award of reasonable attorneys' fees and costs. 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 rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar method for fee computation. See Fontaine v. EBTEC Corp, 415 Mass. 309, 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 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 adjust it either upward or downward or not at all depending on various factors.

A calculation of the hours reasonably expended involves separating out work done in relation to the individual doing the work (e.g., senior partner, junior associates, and paralegal). Time beyond that consistent with a standard of reasonable efficiency and productivity is eliminated. Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are 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); Brown v. City of Salem, 14 MDLR 1365 (1992).

² We note a minor error of \$0.28 in the Hearing Officer's calculation of Medeiros' income. For 1996, 1997 and

In this matter, Complainants' attorneys submitted affidavits and supporting records detailing the hours expended during the course of these matters before the Commission. The expended hours total 437.54 for five attorneys over a period of seven years. We have examined the facts of this case and the law firm's itemized bill. Based upon this and similar matters before the Commission, we conclude that the hours spent were reasonable and necessary to litigate the claims.

Furthermore, we find that the hourly rates requested by each attorney (ranging from \$150 to \$250) are reasonable and well within the range of rates common to the local marketplace. See, e.g., Baker v. Town of Winchester School Committee, 14 MDLR 1097 (1992). Thus, the lodestar figure here is \$83,290.25 in attorney's fees,³ a figure that we find reasonable under the circumstances.

Complainants also provided law firm records indicating \$2,344.71 in costs associated with the litigation of these cases. We find the costs to be reasonable and award reimbursement to Complainants.

1998, his lost income for all three years should have equaled \$35,127.04. We adjust the award accordingly.

³ Although Complainants have listed the total attorney's fees as \$83,468.75, we have determined that, according to the law firm's records and Complainants' own Memorandum in Support of Attorney's Fees, Complainants made several minor multiplication errors. Instead, the correct total for fees should be \$83,290.25.

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 Order, Respondent shall pay Complainant Medeiros \$35,127.04 in damages for back wages and the sum of \$105,000 for emotional distress suffered as a result of Respondent's illegal action, plus interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until payment is made or the obligation is reduced to a court judgment.
- (2) Within sixty (60) days of receipt of this Order, Respondent shall pay Complainant Dow \$105,000 for emotional distress suffered as a result of Respondent's illegal action plus interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until payment is made or the obligation is reduced to a court judgment.
- (3) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainants' attorneys' fees in the amount of \$83,290.25 and costs in the amount of \$2,344.71.
- (4) Respondent shall conduct basic annual training sessions on sexual harassment and unlawful retaliation in employment for all managers, supervisors, and employees located at Respondent's facility in Medford, MA. This training requirement shall also apply to all management personnel who supervise employees working at the Medford facility, but are not located at the facility. With respect to such training:
 - a. Each training session for employees must be at least two (2) hours in length and each training session for managers and supervisors must be at least three (5) hours

in length. All company employees, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next five (5) years, for all new employees who were hired after the date of the initial training session.

- b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
- c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Commission's Director of Training with one-month advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.
- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

- e. In the event that Respondent's agency is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's agency (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:
 - i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;
 - ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;
 - iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,
 - iv. Respondent continues to retain an interest in the successor entity.
 - f. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.
- (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. 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 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, s.6.

SO ORDERED this 21st day of September, 2004.

Dorca I. Gomez, Chairwoman

Cynthia A. Tucker, Commissioner

Walter J. Sullivan, Jr., Commissioner