

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
LOUISE VERA and DONALD SALTMARSH,
Complainants

v.

91-SEM-0395, 91-SEM-0397

KENNETH FAUST,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Lindsay Byrne in favor of Complainants Louise Vera and Donald Saltmarsh. Following an evidentiary hearing, the Hearing Officer concluded that Respondent violated M.G.L. c.151B, s.4(4A) by unlawfully acting in deliberate disregard of and interfering with Complainant Vera's rights under G.L. c.151B. Further, the Hearing Officer ruled that Respondent violated M.G.L. c.151B, s.4(5) as to Complainant Vera by aiding and abetting the discriminatory conduct of his employer, Smith College. Finally, the Hearing Officer ruled that Respondent violated M.G.L. c.151B, s. 4(4) when he retaliated against Complainant Saltmarsh for supporting Complainant Vera's opposition to practices prohibited by c.151B. Respondent 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, s. 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 was otherwise not in accordance with the law. See 804 CMR 1.23.

I. RESPONDENT'S PETITION FOR REVIEW

Respondent makes several arguments on appeal; only two merit discussion. Respondent contends that the Hearing Officer erred in ruling that Complainants' complaints were timely. Specifically, Respondent argues that the Hearing Officer erred in finding a continuing violation exception to the then-applicable six-month statute of limitations in this matter. While conceding that at least one discriminatory act occurred within the six-month period and that those acts were substantially related to previous acts outside the six-month period, Respondent argues that Complainants were subjected to discriminatory acts prior to 1991, when they filed their complaints, and therefore knew or reasonably should have known that their work situation was unlikely to improve. In support of his contention, Respondent points to evidence in the record that Complainants filed numerous internal complaints with their employer, Smith College, and were thus knowledgeable about their rights. Respondent argues that this knowledge triggered a duty on the part of the Complainants to assert their rights with this Commission more than six months before they filed their complaints.

We do not find Respondent's argument persuasive. Stating at the outset of her analysis that "[t]he determination of when the Complainants believed [their] work situation was hopeless is a factual question," the Hearing Officer specifically found that until 1991, when they filed their complaints, Complainants reasonably believed that internal recourse to their employer's complaint process could lead to redress. With respect to Complainant Vera, the Hearing Officer found that Complainant Vera "continued to believe that her internal recourse to the Smith College hierarchy could produce a positive change in her work environment. The fact that she continued to rely on the College's ability to remedy her situation over a period of time is substantiated by her exercise of internal complaint procedures. That the employer failed to remedy the situation over time should not be held against her, or inure to the benefit of the Respondent." She further found that: "A reasonable person in the Complainant's position would eventually realize that internal procedures were futile and when Complainant came to this realization she filed with the MCAD in July of 1991." These findings and conclusions are entirely consistent with the continuing violation standard articulated by the Massachusetts Supreme Judicial Court in Cuddy v. Stop & Shop Supermarket Co., 434 Mass. 531, 540 (2001).

With respect to Complainant Saltmarsh, the Hearing Officer also made specific findings of fact and applied the correct legal standard. Noting that Saltmarsh had also repeatedly availed himself of internal complaint procedures, the Hearing Officer found: "Saltmarsh testified that by the Spring of 1991, he had reached the end of his rope. Witnessing the continued physical threats to his friend Vera was the last straw....That Saltmarsh would file a formal Commission complaint shortly after (and within six months) of [a co-worker's] assault on Vera in March of 1991 is entirely reasonable."

Second, Respondent contends that the Hearing Officer's awards of emotional distress damages do not comport with the standards articulated in Stonehill College v. MCAD, 441 Mass. 549 (2004). Respondent claims that because this matter was decided before the Stonehill College decision was issued, the Hearing Officer based her awards on Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172 (2002), impermissibly relying on the legal principle expressed in that case that a finding of discrimination permits the inference of emotional distress.¹

We are not persuaded by this argument. A review of the record reveals that the Hearing Officer based her decision to award emotional distress damages on the substantial evidence in the record, not simply upon an "inference." In addition, the record indicates that the Hearing Officer considered the nature, character, severity and duration of Complainants' harm in fashioning the award. *See Stonehill, supra*. In her decision, the Hearing Officer credited Complainant Vera's testimony that as a result of Respondent's treatment she experienced "depression, insecurity, self-doubt, isolation, and fear for her own [and for Saltmarsh's] safety." The Hearing Officer cited Complainant Vera's description of her work days as "torture" and noted Vera's testimony that her distress was compounded by her feelings of "guilt and responsibility" relating to the harassment and ill treatment of Complainant Saltmarsh whenever he came to her defense.

Similarly, the Hearing Officer specifically credited Complainant Saltmarsh's testimony that he felt "threatened, isolated, angry and depressed" as a result of Respondent's treatment of him. The Hearing Officer also credited Complainant Saltmarsh's testimony that the taunts and

¹ It is important to note that the factors articulated in Stonehill College as relevant to emotional distress awards are not new to the Commission. The Commission has long considered these factors in awarding emotional distress compensation. See, e.g. Baldelli v. Town of Southborough, 18 M.D.L.R. 167, 169 (1996), *aff'd*, 1998 WL 1270644 (Mass. Super. Ct. June 30, 1998); Jorge v. Silver City Dodge, Inc., 15 M.D.L.R. 1518, 1535-36 (1993) ("An award for emotional distress must be supported by evidence indicating the nature, extent, and duration of the complainant's emotional distress").

innuendoes of co-workers regarding a possible "affair" between him and Complainant Vera interfered with and caused tension in his relationship with his wife. Further, the Hearing Officer noted that Saltmarsh was so distressed by Respondent's conduct that he suffered physical symptoms, such as hyperventilation, which required him to become hospitalized.

In light of the evidence presented by Complainants, the Hearing Officer's emotional distress damages awards were based on substantial evidence and were not arbitrary or capricious. Although the Hearing Officer did not have the benefit of Stonehill College to guide her, her findings of fact and conclusions of law demonstrate that she took into consideration the factors articulated in that decision. The record demonstrates that the Hearing Officer's award of emotional distress damages was proper in all respects and comports fully with the Stonehill College decision.

We have carefully reviewed all of Respondent's contentions on appeal 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 with respect to the Hearing Officer's findings and conclusions of law. We conclude that the Hearing Officer's findings 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.

II. COMPLAINANTS' PETITIONS FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision, we conclude that Complainants are entitled to awards of reasonable attorneys' fees and costs. See M.G.L. Chapter 151B, section 5. Complainants have filed a petition seeking attorneys' fees and costs supported by detailed contemporaneous time records. Complainant Vera requests reimbursement for fees in the

amount of \$8,795.00 and costs in the amount of \$223.81. Complainant Saltmarsh requests reimbursement for fees in the amount of \$8,695.62 and costs in the amount of \$4.00

A. FEES

M.G.L. Chapter 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. Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

Only those hours that are reasonably expended are subject to compensation under 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. Id. at 1099.

With respect to Complainant Vera, the law firm of Green, Miles, Lipton and Fitz-Gibbon seeks reimbursement for 8 hours of work performed by a legal assistant at an hourly rate of \$35.00, 81.95 hours of work performed by a legal assistant at an hourly rate of \$50.00, and 29.45 hours of work performed by an attorney at an hourly rate of \$150.00.

With respect to Complainant Saltmarsh, the law firm of Green, Miles, Lipton and Fitz-Gibbon seeks reimbursement for 26.95 hours of work performed by a legal assistant at an hourly rate of \$50.00, 2 hours of work performed by a legal assistant at an hourly rate of \$80.00, 12.85 hours of work performed by an attorney at an hourly rate of \$125.00, and 36.7 hours of work performed by an attorney at an hourly rate of \$150.00.

Having reviewed the contemporaneous time records that support the attorneys' fees request, we conclude that the amount of time spent on preparation and litigation of these claims is reasonable. Our review points to no evidence that the hours spent were duplicative,

unproductive, excessive or otherwise unnecessary to the prosecution of these claims. Furthermore, all hours for work performed are sufficiently documented. We also conclude that the hourly rates of the legal assistants and attorneys involved are consistent with rates customarily charged by individuals with comparable expertise and experience in employment law cases in the same geographic region.

We therefore award Complainant Vera reimbursement of fees in the amount of \$8,795.00, which is the amount requested. We award Complainant Saltmarsh reimbursement of fees in the amount of \$8,618.75, which amount is \$76.87 less than the amount requested, but represents the exact amount supported by the records.

B. COSTS

Having found that the requests for costs are reasonable and adequately documented, we award Complainant Vera costs in the amount of \$223.81 and Complainant Saltmarsh costs in the amount of \$4.00.

ORDER

The Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety. It is hereby ordered that:

1. Respondent shall immediately cease and desist from any conduct that violates M.G.L. c. 151B.
2. Within sixty (60) days of receipt of this decision, Respondent shall pay to Complainant Vera the sum of \$100,000.00 in damages for emotional distress with interest thereon at the statutory 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, Respondent shall pay to Complainant Saltmarsh the sum of \$50,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the Complaint was filed until such

time as payment is made.

4. Within sixty (60) days of receipt of this decision, Respondent shall pay to Complainant Vera the amount of \$8,795.00 in attorneys' fees and \$223.81 in costs.

5. Within sixty (60) days of receipt of this decision, Respondent shall pay to Complainant Saltmarsh the amount of \$8,618.75 in attorneys' fees and \$4.00 in costs.

6. The parties shall contact the clerk of the Commission when payment is 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 noncomplying 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 in accordance with M.G.L. c.30A, c.151B, s.6, and the 1996 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 thirty (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 30th day of December, 2004.

Dorca I. Gomez
Chairwoman

Walter J. Sullivan, Jr.
Commissioner