

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARILYN LEWIS,
Complainant

v.

DOCKET NO. 96-BEM-2461

BOSTON PUBLIC HEALTH COMMISSION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferrri in favor of Complainant Marilyn Lewis. Following an evidentiary hearing, the Hearing Officer concluded that Respondent Boston Public Health Commission had discriminated against Complainant by terminating her on account of her race in violation of M.G.L. c. 151B, s. 4(1). 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. 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(8)(f).

Respondent has appealed the decision of the Hearing Officer on the grounds that the Complainant failed to prove her lay-off was unlawful. It contends that 1) the Hearing Officer's conclusion that Respondent's legitimate reason for Complainant's lay-off was false and a pretext for unlawful discrimination was unsupported by substantial evidence and not in accordance with the law; 2) that the Hearing Officer's conclusion that discriminatory animus caused Complainant's lay-off was not supported by substantial evidence; 3) that the Hearing Officer's use and application of comparator evidence was an error of law; 4) that the Hearing Officer's determination that it should have considered Complainant for the position of controller was an error of fact and law; 5) that the Hearing Officer's award of \$100,000 in emotional distress damages was arbitrary, capricious and an abuse of discretion; and 6) that the Hearing Officer's award of \$107,551 in back pay was an abuse of discretion and an error of fact and law.

We find Respondent's arguments unpersuasive. We find that the Hearing Officer assessed all of the evidence and determined that Respondent's reasons for Complainant's lay-off were false. Upon concluding that the reasons for terminating Complainant's employment were false, the Hearing Officer was permitted to draw the inference that Respondent's explanation was a pretext for unlawful discrimination and did so. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). Our review of the Hearing Officer's decision indicates that her application of the burden shifting law was not erroneous.

Further, the Hearing Officer's conclusion that Complainant presented evidence that discriminatory animus was the determinative cause of her lay-off is supported by substantial evidence. It is the responsibility of the Hearing Officer to weigh the evidence when deciding disputed questions of fact.

With regard to emotional distress damages, we must keep in mind that when considering the request of a party to reduce a fact finder's award of damages for emotional distress, it is proper for the Full Commission to extend "great deference" to the Hearing Officer. Baldelli v. Town of Southborough, 18 MDLR 167, 170 (1996). "This is because the fact-finder had the exclusive opportunity to observe the witness and weigh the credibility of testimony based on demeanor and countless other intangible factors that occur in face-to-face communication." Said v. Northeast Security, Inc, 22 MDLR 315, 318 (2000). In this case, the Hearing Officer found that Complainant was a very compelling witness and suffered substantial embarrassment, emotional distress and humiliation as a result of Respondent's unlawful actions. The Hearing Officer made specific factual findings regarding the emotional impact of Respondent's discriminatory conduct on Complainant. The Hearing Officer's findings and conclusions demonstrate that Complainant offered evidence of and the Hearing Officer based her conclusions upon the nature, severity and extent of the harm that Complainant suffered. See Stonehill College v. MCAD, SJC-09112 (May 6, 2004). Applying the deference prescribed above, and considering the substantial evidence in the record, we affirm the Hearing Officer's award of \$100,000 in emotional distress damages.

We have carefully reviewed 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 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 Respondent's appeal.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

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

Complainant's counsel has filed a petition seeking attorney's fees in the amount of \$29,242.00, charging a rate of \$185.00 per hour over the course of 159.2 hours, and supporting the request with an affidavit and contemporaneous time records. Respondent opposes the fee request, arguing that Complainant and her attorney entered into a contingent fee agreement in July 1996 and to award attorney's fees as requested would be unjust. The Commission does not consider contractual arrangements between a complainant and her counsel in rendering a fee award.

Having reviewed the contemporaneous time records that support the attorney's 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 is reasonable.

We further conclude that Complainant's attorney's hourly rate of \$185 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases, is within the range of rates charged by attorneys in the area with similar experience and is reasonable. Costs of \$436.06 should also be granted as requested. Thus, the lodestar figure here is \$29,678.06 for attorneys' fees and costs.

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 immediately cease and desist from discriminating on the basis of race in violation of M.G.L. c.151B.
2. Respondent shall pay to Complainant the amount of \$107,551.00 in damages for lost wages.
3. Respondent shall pay to Complainant the amount of \$7,107.00 in damages for increased health insurance costs.
4. Respondent shall pay to Complainant the amount of \$100,000.00 in damages for emotional distress.
5. Respondent shall pay to Complainant's counsel the amount of \$29,678.06 in attorney's fees and costs.
6. Payment of the above awards shall be made within sixty (60) days of the date of this decision. The parties shall notify the Clerk of the Commission of compliance or any failure to comply with this Order.

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 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 24th day of May, 2004.

Dorca I. Gomez
Chairwoman

Cynthia A. Tucker
Commissioner