

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MARY-ANN WOODASON,
Complainant

v.

TOWN OF NORTON SCHOOL
COMMITTEE, MAURICE SPLAINE
and IRENE STANOVICH,
Respondents

Docket No.: 98 BEM 0624

DECISION OF THE FULL COMMISSION

This matter came before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of the Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Respondent, Town of Norton School Committee, discriminated against Complainant due to her disability in violation of M.G.L. c. 151B, § 4(16), when she was terminated from her position as a cafeteria assistant at the Nourse Elementary School. The Hearing Officer found in favor of the Complainant as to the employer Respondent, but dismissed the complaint as to the individual Respondents. Both the Complainant and Respondents then filed timely appeals 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 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 1.16(8)(f).

We have carefully reviewed the petition for appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated herein. Respondents assert that the decision of the Hearing Officer finding that Complainant was subjected to unlawful discrimination in employment constitutes an abuse of discretion and is not supported by substantial evidence in the record. In addition, Respondents submit that the remedial orders of the Hearing Officer constitute an abuse of discretion. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998).

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 Respondents' appeal.

Complainant has appealed the Decision of the Hearing Officer on the grounds that: a) it was error of law to not find Respondent Maurice Splaine individually liable for his actions¹; b) the determination that \$50,000.00 was a suitable compensatory award of emotional distress constitutes an abuse of discretion; and c) the failure to award statutory interest constituted an abuse of discretion and clear error of law.²

¹ Complainant did not appeal the Hearing Officer's dismissal of the complaint filed against Irene Stanovitch.

² Complainant's objection to the failure of the Hearing Officer to award interest requires no discussion, as the law in Massachusetts has been set forth in City of Salem v. MCAD, 44 Mass. App. Ct. 627 (1998):

We will address the two remaining grounds.

1. Emotional Distress Award.

In her decision, the Hearing Officer found that:

“Complainant and her husband testified credibly about the emotional distress and physical maladies Complainant suffered as a result of her termination. Complainant lost a great deal of weight which caused her to suffer hair loss and was very depressed as a result of having lost her job. She stopped socializing and just sat at home. Complainant testified that she became obsessed with the loss of her job and called Gail Scott so many times that Gail asked her to stop calling and she lost a friendship over this. There was also testimony that Complainant was so distraught over having been terminated that she threatened Rivard with the possible loss of her job, if Rivard testified against her. Complainant stated that she had just lost it at that point because she believed a school official had lied in deposition about the events leading up to her termination and this caused her to make such an irrational threat. I am persuaded that Complainant suffered significant emotional distress as a direct result of Respondent's actions and is entitled to an award of \$50, 000.00.”

We have previously held that 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. 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 on appeal was rendered in accordance with the law, or whether the decision was arbitrary, capricious, or an abuse of discretion. See, 804 CMR 1.16(8)(f). See e.g., Said v. Northeast Security, 23 MDLR 124 (2001 Order of the Full Commission).

Finally, the city challenges the imposition of interest on the damages award. Interest on MCAD awards does not lie against the Commonwealth *or its instrumentalities* (as here) in the absence of express statutory authority. See Boston v. Massachusetts Comm'n. Against Discrimination, 39 Mass. App. Ct. 234, 245-246 (1995), and cases cited. The principle of that decision presents an application of the doctrine of sovereign immunity, as explained in Onofrio v. Department of Mental Health, 411 Mass. 657, 659 (1992), a doctrine which, despite different historical bases, is normally treated as applying to the Commonwealth and to municipalities without important distinction. See Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 616-618 (1973).

As the Commission previously noted in Baldelli vs. Town of Southboro, 18 MDLR 167, 168

(1996):

A challenge to the damages awarded as against the weight of the evidence generally is a matter within the judge's discretion. As the judge here recognized, '*a judge has no right to set aside a verdict merely because he himself would have assessed the damages in a different amount.*' [Citing Bartley v. Phillips 317 Mass. 35, 40 (1944)]. The judge concluded that the jury could have reached, honestly and fairly, the award that they did based on the plaintiff's continuing permanent pain and disability, and the impairment of her earning capacity. For this reason, the judge declined to exercise his discretion and to order a remittitur or a new trial because the award was against the weight of the evidence. We find no abuse of discretion in this ruling. Maria F. Solimene v. B. Grauel & Co., & Another, 399 Mass. 790, 802 (1987) (as cited in Said supra).

In the instant matter, we find that there was substantial evidence in the record to award emotional distress. We further find there is insufficient basis, based on the applicable scope of review, to disturb the award as issued by the Hearing Officer.

2. Individual Liability

In her Decision, the Hearing Officer found:

Complainant named both Splaine and Stanovitch as individuals in her Complaint of discrimination. She seeks to hold Splaine liable as an individual under M.G.L. c. 151B, s. 4(4A) for interfering with her right to work free of unlawful discrimination. Since the individuals named in this complaint are not the employer and thus not covered by M.G.L. c. 151B, s.4 (16), the individuals would have to be found liable under alternative sections of the statute which prohibit individuals from retaliating, aiding and abetting discrimination, or threatening, intimidating, coercing or interfering with an individual's rights. See. Hudson v. Pembroke/ Hanover Elks Lodge, et al. MDLR (2002) (Full Commission found individual liable for retaliation.) In order to be held liable under these sections an individual Respondent must have undertaken some act wholly individual and distinct from, or in furtherance of, the employer's discriminatory act. Harmon v. Malden Hospital, 19 MDLR 157 (1997). I conclude that such is not the case in this matter.

While the cases relied on by the Hearing Officer address individual liability, this Commission has recently addressed this question with different results. In Bendell v. Lemax Inc. et al., 22 MDLR 259, 262 (2000), Commissioner Schwarz stated:

Complainant seeks to hold Respondent Lee liable as an individual under G.L. c. 151B, s.4, par. 4A for interfering with her right to work at Lemax free of

unlawful discrimination. Respondent argues that section 4, paragraph 4A is not intended to proscribe "direct" denials of rights. Respondent cites cases construing G.L. c. 12, s.11H and 11I (the Massachusetts Civil Rights Act) in support of its assertion. E.g., Longval v. Commissioner of Correction, 404 Mass. 325, 333 (1989).

Respondent states that the language of G.L. c. 151B, s. 4, par. 4A is "identical" to G.L. c. 12, s. 11H and 11I, and therefore the word "interfere" should be construed identically. In fact, the word "interfere" appears differently in the two statutes. In G.L. c. 12, s. 11H, "interfere" is modified by "threats, intimidation or coercion," which are the three ways a person is forbidden from interfering with the exercise or enjoyment of a protected right. *In G. L. c. 151B, s. 4, par. 4A, "interfere" stands on its own, unmodified, as an impermissible action, with no requirement of threats, intimidation or coercion.* (emphasis added)

Respondent's argument raises the question of whether the legislature intended individual liability to be imposed in the large number of circumstances implicated by the plain language of G.L. c. 151B, s. 4, par. 4A. But to interpret the statute to exempt from coverage "direct" denials of protected rights would read into the statute words it does not contain. In view of the legislative mandate that the statute be "construed liberally for the accomplishment of the purposes thereof," G.L. c. 151B, s. 9; Bournewood Hospital v. MCAD, 371 Mass. 3 03 (1976), such a reading would be unduly restrictive. In line with the broader reading of G.L. c. 151B, trial courts have concluded that the statute applies to "any person who interferes with another's right to work free of unlawful discrimination." Ruffino v. State Street Bank and Trust Co., 908 F.Supp. 1019,1048 (D. Mass. 1995); Morehouse v. Berkshire Gas Co., 989 F.Supp 54, 60 (D. Mass. 1997), regardless of whether the interference is "direct."

We would modify and amplify the analysis articulated by Commissioner Schwarz, above. In our view his construction of the language "interfere with the rights protected under this statute," because it gives no consideration of the context in which the phrase appears, requires amplification. While we agree that the word "interfere" does not necessarily require coercion, intimidation or threats, the concept of interference with one's rights must be construed with some regard for the context of the statutory language within which it appears. In construing the word "interfere," to give no import to the strong language surrounding it would be misguided. Thus, we conclude that in order for an individual to be held liable for a violation of M.G.L. c. 151B he must have, at the

very least, “interfered” with another’s rights in a manner that was in deliberate disregard of those rights.

Starting from this premise we hold that complaints alleging violations of M.G.L. c. 151B, § 4(4A) **may** appropriately name individual employees as respondents in the following circumstances:

1. Where the individuals are alleged perpetrators of unlawful harassment (sexual and otherwise), they may be named as individual respondents, without regard to whether they are supervisors or co-workers. Such individuals may be charged with “*interfering with one’s exercise or enjoyment of the right to a non-discriminatory, harassment free, workplace.*”
2. Where there is direct evidence of discrimination and the alleged perpetrator of discrimination was in a supervisory position in which he or she had direct control over complainant’s employment, the individual may be named as acting in deliberate disregard of complainant’s rights.
3. Where there is only circumstantial evidence of discrimination, employees may be named if:
 - a. They had the authority or the duty to act on behalf of the employer;
 - b. Their action or failure to act implicated rights under the statute; and
 - c. There is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant’s rights allowing the inference to be drawn that there was intent to discriminate or interfere with complainant’s exercise of rights.

The evidence in this record does not establish the requisite “*intent to discriminate*” required in order to find Maurice Splaine individually liable for unlawful discrimination.³ Therefore, we affirm the Decision of the Hearing Officer dismissing the complaint against Maurice Splaine.

Having affirmed the decision of the Hearing Commissioner, in favor of the Complainant, we conclude that the Complainant has prevailed in this matter and is therefore entitled to an award of reasonable attorneys’ fees and costs.

³ While there are circumstances where the mere “*failure to act*” may, in and of itself, constitute a sufficient basis to establish an *intent* to interfere, that is not the case here. M.G.L. c. 151B, § 4(16) has been construed to require an employer to engage in some pro-active conduct with a “*qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation.*” However, based on the facts in the instant matter, we agree with the Hearing Officer’s finding that Mr. Splaine did not act with deliberate disregard of Ms. Woodason’s rights pursuant to M.G.L.c. 151B.

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. 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 then 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. 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).

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, supra.*

In the instant matter, counsel for the Complainant has submitted extensive affidavits and attachments thereto detailing the hours expended during the course of this matter before the Commission. We have examined the facts of this case, the affidavits submitted by complainant and the billing specification of time and services. Based upon this and similar matters before the Commission, we conclude that these listed hours are reasonable. Despite Respondent's assertion to the contrary, we see no evidence to warrant a conclusion that these hours were excessive.

Furthermore, we find that the hourly rates requested by Complainant's counsel are reasonable and are within the range of rates common to the marketplace within which Complainant obtained counsel and litigated her claim *See, e.g. Baker v. Town of Winchester School Committee*, 14 MDLR 1097 (1992).

Thus, the lodestar figure here is \$74,760.80 for attorneys' fees and costs is hereby allowed. We decline to adjust this figure upward since it is in our view a reasonable award under the circumstances presented.

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, Town of Norton School Committee, shall pay to Complainant the amount of \$50,000 in damages for emotional distress.
2. Within sixty (60) days of receipt of this Order, Respondent, Town of Norton School Committee, shall pay to Complainant the amount of \$4,595.40 in damages for lost wages in the form of back pay.
3. Within sixty (60) days of receipt of this Order, Respondent, Town of Norton School Committee, shall pay to Complainant the amount of \$28,970.02 in damages for lost pension retirement benefits.
4. Respondent, Town of Norton School Committee, shall conduct a training session for all of its cafeteria managers and supervisors, and those school officials, including the Superintendent, who make determinations regarding medical leaves of absence,

use of sick time, accommodations to disabled employees and termination. This training shall be conducted within 3 months of the issuance of this Order and on an annual basis thereafter if there is over 50% turnover in the above positions resulting in new employees. The training shall be at least one-half day and shall include a review of the employer's obligations under M.G.L. c. 151B, § 4 (16). The trainer shall be an approved trainer from the MCAD trainer referral list and the MCAD shall be provided with advance notice of the training date and the training agenda for approval. The Respondent shall provide the MCAD with notice of compliance with this training session, including the date it was held and the names and titles of those in attendance.

5. The complaint against Respondents Maurice Splaine and Irene Stanovitch is hereby dismissed.
6. Within sixty (60) days of receipt of this Order, Respondent, Town of Norton School Committee, shall pay \$74,760.80 for attorneys' fees and costs to the Complainant.

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, together with a copy of the transcript of 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. 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 19th day of February, 2003.

Cynthia A. Tucker, Commissioner

Walter J. Sullivan Jr., Commissioner