

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
MICHAEL MADERA,)
Complainant)
v.)
NARATOONE SECURITY CORPORATION,)
Respondent)

Docket No. 99-BEM-2629

DECISION OF THE FULL COMMISSION

This matter comes before the Full Commission on Respondent’s appeal of the decision issued by Hearing Officer Kenneth Grooms in favor of Complainant. Following a three-day evidentiary hearing, the Hearing Officer concluded that Respondent Naratoone retaliated against Complainant in violation of M.G.L. c151B §4, ¶4 when it refused to offer him a position for which he was qualified as a result of his participation in protected activity. Respondent filed a timely appeal.

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 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).

Respondent argues on appeal that the Hearing Officer erred in concluding that Respondent retaliated against Complainant because 1) Naratone was not the employer against whom Complainant undertook protected activity, 2) that the 28-month time span between Complainant's protected activity and the discriminatory act precludes an inference of discrimination as a matter of law; and 3) Okey Chikere was not the decision maker with respect to Complainant's employment application. Respondent further argues that the Hearing Officer erred in calculating Complainant's lost wages.

As to Respondent's first argument, we find that it must fail because there is no requirement in M.G.L. c.151B that an individual's protected activity must be directed toward the same employer who engages in the retaliatory action. Section 4(4) states that it is an unlawful:

For any person, employer...to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five. M.G.L. c.151B, s.4(4).

The statutory language is clear that the filing of a complaint with the Commission constitutes a protected activity. There is no further qualifier to this right. The Hearing Officer specifically found that Complainant's protected activity was his filing of a discrimination complaint and it was as a result of this complaint that Respondent refused to hire him. As such, the Hearing Officer's analysis and conclusion directly comports with the statute.

As to Respondent's second argument, it is erroneous in that it confuses a factor in the retaliation calculus for the ultimate inquiry. While it is true that the length of time between the protected activity and the discriminatory act is a relevant factor, the ultimate question that the hearing officer must answer is whether the respondent's actions were motivated by retaliatory animus. See e.g., Tate v. Dept. of Mental Health, 419 Mass. 356, 364 (1995). To do so, the hearing officer must find a causal link between the protected activity and the adverse employment action. See e.g., Kelley v. Plymouth County Sheriff's Office, 22 MDLR 208, 215 (2000); Ruffino v. State Street Bank and Trust Co., 908 F. Supp 1019, 1044 (D. Mass. 1995). While evidence concerning the time span between the two acts may be relevant, it is only one part of the calculus. Here, the Hearing Officer found numerous facts to support a conclusion that a causal connection existed between Complainant's protected activity and the adverse employment action taken by Respondent. We find that the Hearing Officer's conclusions were supported by substantial evidence and did not constitute an error of law.

With regard to Respondent's remaining arguments, we have carefully reviewed each and, based on the record and the Hearing Officer's detailed findings and conclusions, 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 and conclusions of law made by the Hearing Officer.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorneys' 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 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 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)

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).

Only those hours that are reasonably expended are subject to compensation under M.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 attorneys' fees in the amount of \$16,320 at a rate of \$150 per hour, supporting the request with contemporaneous time records, and also requests \$900.66 in costs. Having reviewed the contemporaneous time records that support the attorneys' fees requests, 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 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and is reasonable. Thus, the lodestar figure here is \$16,320 for attorneys' fees and \$900.66 for costs.

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 the receipt of this Order, Respondent shall pay Complainant \$107,010 as damages for lost wages with interest thereon at the rate of 12% per annum, from the date the complaint was filed until such date as payment is made or until such date as this obligation is reduced to a court judgment and post judgment interest begins to accrue;
- (2) Within sixty (60) days of the receipt of this Order, Respondent shall pay Complainant \$50,000 as damages for emotional distress with interest thereon at the rate of 12% per annum, from the date complaint was filed until such date as payment is made or until such date as this obligation is reduced to a court judgment and post judgment interest begins to accrue;

(3) Within sixty (60) days of the receipt of this Order, Respondent shall pay Complainant's attorney's fees in the amount of \$16,320 and costs in the amount of \$900.66;

(4) Respondent shall cease and desist from retaliatory conduct prohibited by M.G.L. c. 151B;

(5) Within 60 days of receipt of this Order, Respondent Naratoone shall submit to the Commission's Director of Training a written policy for reporting, responding to, and investigating complaints of discrimination and harassment. The Commission shall promptly notify Respondent Naratoone as to whether its policy is acceptable. If the Commission determines that Respondent Naratoone's policy is unacceptable, it will return the policy for revision, as appropriate. If, after 21 days for revision, Respondent Naratoone fails to submit an acceptable policy, the Commission shall prescribe the details of a policy in a supplemental order.

(6) Within 30 days of its receipt of the Commission's final action on Respondent Naratoone's written anti-discrimination and harassment policy, Respondent Naratoone shall schedule all employees, including its owners, supervisors and managers, to attend comprehensive training that addresses workplace discrimination and harassment. The training shall include, but not be limited to, definitions of discrimination and harassment in the workplace, the supervisor's role in recognizing and preventing retaliation and other forms of harassment, the appropriate methods of conducting an investigation, responding to discrimination and/or harassment complaints, and Respondent Naratoone's liability under G.L. c. 151B and federal law for unlawful discrimination and harassment. This training must be at least 4 hours in length and must be completed within 90 days of Respondent Naratoone's receipt of the Commission's action on its written anti-discrimination and harassment policy.

(7) Respondent Naratoone shall submit the training agenda to the Commission's Director of Training for approval at least 30 days prior to the proposed training session(s). The agenda shall provide that no more than 25 employees shall attend each training session held.

(8) At least three weeks prior to the training date(s), Respondent Naratoone shall inform the Commission's Director of Training, in writing, of the proposed training dates and locations so that the Commission has the option of sending a representative to attend and observe one or more of the training sessions as it is conducted.

(9) Respondent Naratoone shall select a trainer who has completed the Commission's certified discrimination or harassment prevention training courses, or shall submit another proposed trainer's resume to the Commission's Director of Training for approval at least 30 days prior to the initial training session. Respondent Naratoone shall give a copy-of this decision to the approved trainer as background information.

(10) Within 30 days after each training session, Respondent Naratoone Must submit documentation to the Commission's Director of Training of its compliance with this order. The documentation must be signed by the trainer and identify the training agenda, participants who completed the training session, the date and time of each training session, and a list of all employees as of the training date(s).

(11) Once a year for three years after completion of the initial training session(s), Respondent Naratoone shall repeat the initial training session for all employees hired and employed since the date of the previous training session. Respondent Naratoone shall also conduct a refresher course (at least two hours in duration) once each calendar year for all other employees, including managers and supervisors, for a total of three years.

(12) In the event Respondent Naratoone is sold, the successor employer must complete these training requirements within the stated time frames if any of the following conditions apply:

- a. A majority of Respondent Naratoone's managers employed as of the date of this decision continue to work for the successor employer as of the succession date;
- b. A majority of Respondent Naratoone's governing board (such as the board of directors or trustees) as of the date of this settlement continue to serve on the successor employer's board as of the succession date;
- c. The new owner is a relative of Respondent Naratoone's owner; and/or.
- d. Respondent Naratoone retains an interest in the successor entity.

(13) The parties shall notify the Commission as soon as the ordered payments have been made.

This Order represents the final action of the Commission for the 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 G.L.c.151B §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 the 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. 30A does not automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of this order will constitute waiver of the aggrieved party's right to appeal pursuant to M.G.L. c.151B §6.

So ORDERED this 18th day of March, 2004.

Cynthia A. Tucker, Commissioner

Walter J. Sullivan, Jr., Commissioner