

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
and PAMELA MAGILL,
Complainant

v.

DOCKET NO. 97-BEM-2519

MASSACHUSETTS STATE POLICE,
ROBERT BENOIT, WILLIAM FOGARTY
and REED HILLMAN
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant, Pamela Magill. Following an evidentiary hearing, the Hearing Officer concluded that Respondents Massachusetts State Police and Robert Benoit were liable for unlawful discrimination on the basis of gender and retaliation in violation of M.G.L. c. 151B, Section 4(1) and (4).¹ The Respondents filed a timely 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, Section 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable

¹ The Hearing Officer dismissed Complainant's claim against Colonel Reed Hillman and Lieutenant William Fogarty. These rulings were not appealed.

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/or 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 1.16(f).

RESPONDENT MASSACHUSETTS STATE POLICE’S PETITION FOR REVIEW

Respondent Massachusetts State Police (“State Police”) first contends on appeal that Complainant was not entitled to relief because her claims were related to events that occurred more than six months prior to the filing of her complaint. Specifically, the State Police argues that any event that occurred prior to January 31, 1997 is time-barred by the applicable statute of limitations, since Complainant filed her complaint on July 31, 1997.

According to M.G.L. Chapter 151B, section 5, a complaint with this Commission must be filed “within six months after the alleged act of discrimination.” However, an exception to this limitation exists where the conduct is of a “continuing nature.” The continuing violation exception to the statute of limitations applies where “the alleged events are part of an ongoing pattern of discrimination, and there is a discrete violation within the six-month limitations period to anchor the earlier claims.” Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 532 (2001).

In this matter, Complainant alleged and the Hearing Officer specifically found that

Benoit engaged in several instances of harassing conduct between January 31 and July 31, 1997. These events substantially related to events that occurred prior to January 31, 1997, and they represented a continuation of a hostile work environment as contemplated by Cuddyer. Therefore, Complainant's case is one encompassing a continuation violation and is not time-barred.²

Respondent State Police's second contention on appeal is that the Hearing Officer erred in ordering the State Police to conduct a minimum of five hours of training annually for the next five years for personnel assigned to the Brookfield barracks. Specifically, Respondent State Police contends that there is no basis for this order, as it already distributes annually to every employee materials including the Commonwealth's Policy for the Prevention and Elimination of Sexual Harassment in the Workplace and conducts training for supervisors.

We do not find the State Police's contention persuasive. This Commission is granted by governing statutory authority substantial discretion in determining and fashioning appropriate remedies once liability has been established. We do not find that the Hearing Officer erred or exceeded her authority and discretion in issuing her training order to correct the established unlawful conduct in this matter.

RESPONDENT ROBERT BENOIT'S PETITION FOR REVIEW

Respondent Robert Benoit's first contention on appeal reiterates Respondent State Police's statute of limitations claim and needs no further discussion. Respondent Benoit's additional contention on appeal is that the Hearing Officer's determination that he acted in a discriminatory manner was not supported by substantial evidence. Specifically, Benoit

² We also note that Complainant filed an internal complaint with the State Police on November 14, 1996, an act that served to toll the statute of limitations pursuant to 804 CMR 1.10(2) ("The complaint may be filed by the complainant...at any time within six months after the alleged unlawful conduct; provided, however, that the six month requirement shall not be a bar to filing in those instances...when pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within six months of the conduct complained of and subsequently files a complaint within six months of the outcome of such proceeding(s)). The internal grievance proceedings concluded in December 1997.

claims that there was not sufficient evidence that his treatment of Complainant was due to her gender. We have carefully reviewed this contention 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. We find the Hearing Officer's findings of fact 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.

Finally, we note that the Hearing Officer erred in not including in her Order provision for the imposition of statutory interest on the award of emotional distress damages against Respondent Benoit. We hereby modify the Hearing Officer's award and Order to do so.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant has filed a Petition seeking attorneys' fees in the amount of \$100,745.85. Respondents have filed Oppositions thereto. Massachusetts General Laws Chapter 151B allows a prevailing complainant to recover reasonable attorneys' fees. While Complainant did not prevail on all of her discrimination claims in this case (namely the claims of aiding and abetting against Lieutenant Fogarty and Colonel Hillman), she is a "prevailing complainant" because she succeeded in proving her gender discrimination and retaliation claims. See. e.g., Sanderson v. Town of Wellfleet, 19 MDLR 60 (1997); Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989). Since Complainant did not succeed on one of her claims, the award of attorneys' fees must be reduced to reflect the partial success of Complainant's claims before the Commission. Carmichael v. Wynn & Wynn, 18 MDLR 208 (1996).

The determination of whether attorneys' fees are reasonable is subject to the discretion of this Commission. In rendering a determination of reasonable attorneys' fees, we will use the lodestar methodology adopted by the Commission for the computation of

attorneys' fees. See generally Samuelson v. Sunguard Financial Systems and Fraser Chambers, 23 MDLR 121 (2001); Baker v. Winchester School Committee, 14 MDLR 1097 (1992); Brown v. City of Salem, 14 MDLR 1365 (1992). By this methodology, we will first calculate the number of hours reasonable expended to litigate the underlying claim(s) and multiply that number by a reasonable hourly rate. We will then examine the resulting base figure, known as the "lodestar," and may adjust it depending on various factors.

Our calculation of hours reasonably expended includes eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; subtracting hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of Complainant's successful claim; and eliminating hours insufficiently documented. See Harley v. Costco Wholesale Corporation, 23 MDLR 140 (2001); Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984). In determining whether the requested hours are reasonable, we will consider contemporaneous time records maintained by counsel and will review both the hours expended and the tasks involved.

Complainant seeks reimbursement for fees charged by Robert R. Berluti, Esq. (99.1 hours at a rate of \$275.00 per hour), Karen R. Young, Esq. (132.09 hours at a rate of \$165.00 per hour), Julie E. Bruce, Esq. (1 hour at a rate of \$225.00 per hour), J. Channing Bennett, Esq. (129.53 hours at a rate of \$120.00 per hour), Gayann B. Crowe, Esq. (12.38 hours at a rate of \$150.00 per hour), Rebecca G. Pontikes, Esq. (173.32 hours at a rate of \$195.00 per hour), and Thomas F. Feeney, Esq. (.8 hours at a rate of \$195.00 per hour). The total amount of reimbursement sought for attorney time expended on this case is \$100,626.35.

Having reviewed the contemporaneous time records that support the request for attorneys' fees, we conclude that the amount of time spent on preparation and litigation of this claim is reasonable. Our review points to no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to successful prosecution of

the claim. Furthermore, all hours for work performed are sufficiently documented. We conclude that the hours for which reimbursement is sought is reasonable.

The hourly rates charged by the attorneys in this case are supported by documentation of their legal experience and expertise in the area of employment discrimination law. We conclude therefore that the rate charged by Complainant's attorney is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases. The rates are also well within the rates charged by attorneys in the market in which Complainant sought counsel with similar experience. See, e.g., Baker v. Town of Winchester School Committee, 14 MDLR 1097 (1992).

Since Complainant's billing information is not specified by a "claim" or "cause of action," we will exercise our discretion to reduce Complainant's overall attorneys' fees request by an amount that we determine was reasonably expended in pursuit of Complainant's unsuccessful discrimination claims. Marathas v. Holiday Inn, 22 MDLR 391 (2000). We find that there is some interconnectedness between Complainant's gender discrimination and retaliation claims and her aiding and abetting claims. However, the work performed on Complainant's successful claims is not so significantly interconnected with work done on her aiding and abetting claims that we can credit all time performed in pursuit of her aiding and abetting claims. For instance, we note that the prima facie cases of the aiding and abetting claims are wholly different from the other claims. See, e.g., Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000); Hudson v. Pembroke/Hanover Elks Lodge et al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043 (1995). Accordingly, we will reduce the listed hours of the lodestar equation by 20%.

We conclude that Complainant is entitled to an award of attorneys' fees in the amount of \$80,501.08, calculated as follows: \$100,626.35 (derived from the lodestar equation calculation above) reduced by 20 percent, or \$20,125.27. Finally, we find all costs requested to be reasonable.

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) Within sixty (60) days of receipt of this Order, Respondents State Police and Benoit shall pay the Complainant \$75,000.00 in damages for emotional distress. Respondent Benoit shall also be liable for statutory interest at the rate of 12% per annum on the amount of his payment 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, Respondents State Police and Benoit shall pay Complainant's attorneys' fees in the amount of \$80,501.08 and costs in the amount of \$2,442.49.
- (3) Respondent State Police shall conduct annual training of all personnel at the Brookfield barracks, including supervisors and managers, on issues of gender discrimination and hostile work environment based on gender for the next five years. These training sessions shall be at least five hours in length and no more than 25 persons shall attend each session.

Within 60 days of receipt of this decision, Respondent shall select a trainer from the list of trainers who have completed the Commission-certified discrimination prevention training program. Respondent shall submit a draft training agenda to the Commission's Director of training at least one month in advance of the initial training session and provide at least one month's notice of the dates and locations of any training sessions.

Documentation of compliance with this Order shall be sent to the Commission's director of training within one month of the completion of each session. It shall be signed by the trainer and shall identify the training

topic, the names of those in attendance and the date and time of each session. For purposes of enforcement the Commission shall retain jurisdiction over these training requirements.

- (4) 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. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint pursuant to M.G.L. c.30A, s.14 seeking judicial review in the Superior Court within thirty (30) days of receipt of this decision. Failure to file a petition in court within 30 days of the receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, section 6. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. 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, section 8.

SO ORDERED this 9th day of October, 2003.

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner