

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

Richard F. Jarvis and Beverly Sellars, Complainants)	
)	
v.)	98 SEM 0627/0628
)	
The Children's Study Home Respondent)	
)	

DECISION AND ORDER OF THE FULL COMMISSION

This matter has come before us following a decision of Hearing Officer Edward Mitnick in favor of the Complainants. Following an evidentiary hearing, the Hearing Officer concluded that the Complainants were subjected to discrimination in employment on the basis of unlawful retaliation, in violation of M.G.L. c. 151B. The Hearing Commissioner dismissed the portion of the complaints that alleged that the Complainants were subject to constructive discharges in violation of M.G.L. c. 151B. The Respondent then filed a timely Petition for Review.

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. As a result of that 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 the appeal and affirm the decision below in its entirety.

Having affirmed the decision of the Hearing Officer in favor of the Complainants, we conclude that the Complainants have prevailed in this matter and are therefore entitled to an award of reasonable attorneys' fees and costs.

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. *See: 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 reasonable 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. *See generally*: 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); and 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 this matter, counsel for the Complainants has submitted extensive affidavits and attachments thereto detailing the hours expended during the course of this matter before the Commission. Based on our review we find the listed hours, the requested hourly rates, and the costs associated with litigation of this matter are reasonable. In reaching this conclusion, we note that Respondent has not objected to the request for fees and costs as presented. Therefore, we award attorneys' fees to the Complainant in the total amount of \$37,090.00 and \$2,122.95 in costs.¹

¹ We believe that the degree of interconnectedness of Complainants' successful claims of retaliation with that of the unsuccessful claim of constructive discharge is significant. That is, the work done on Complainants' successful claims is clearly the underpinning to proving that of the unsuccessful claim. The nature of constructive discharge claims is that first unlawful conduct is alleged and proved. Then, that conduct is argued to be of such a degree and intensity that no reasonable person could tolerate such conduct. That is, constructive discharge is in part dependent on how severe the finder of fact believes the discriminatory conduct to be. It being the case that the successful and unsuccessful claims are linked and interconnected, we are loathe to disqualify any of the hours expended.

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 shall pay to Complainant, Beverly Sellars, the sum of \$220.00 in reimbursement of medical expenses, and the sum of \$30,000.00 in damages for emotional distress, for a total of \$30,220.00, plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
2. Within sixty (60) days of receipt of this Order, Respondent shall pay to Complainant, Richard Jarvis, the sum of \$30,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.;
3. Respondent shall conduct basic annual training sessions for all managers, supervisors, and employees of Respondent's agency with respect to the unlawful discrimination and retaliation in employment specified in M.G.L. c. 151B, s. 4. With respect to such training:
 - a. Each training session for employees must be at least two (2) hours in length and each training session for managers and supervisors must be at least three (3) hours in length. All company employees, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next five (5) years, for all new employees who were hired after the date of the initial training session.
 - b. Within thirty (30) days of the receipt of this Order, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention training program, available from the

Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.

c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Commission's Director of Training with one-month advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.

d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

e. In the event that Respondent's agency is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's agency (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;

iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,

iv. Respondent continues to retain an interest in the successor entity.

f. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

4. Within sixty (60) days of receipt of this Order, Respondent shall pay attorneys' fees to the Complainants in the total amount of \$37,090.00 and \$2,122.95 in costs.

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. 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 20th day of May, 2003.

Cynthia A. Tucker, Commissioner

Walter J. Sullivan, Jr., Commissioner