

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
RICKY STROTHERS,
Complainant,

v.

Docket No. 98-BEM-1803

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Edward R. Mitnick in favor of Complainant Ricky Strothers. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful retaliation in violation of M.G.L. Chapter 151B, section 4(4). Respondent 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 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 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 1.23(1)(h).

Respondent raises only one issue on appeal – the Hearing Officer’s assessment of a \$25,000 civil penalty based upon his finding that Respondent had been adjudged to have committed one other discriminatory act during the five year period ending on the date of the filing of the complaint in this matter. The Commission’s enforcement statute provides that the Commission, upon a finding of discrimination, may assess a civil penalty against a respondent. *See* M.G.L. c.151B, § 5. The maximum amount is dependent upon whether the respondent has been adjudged to have committed any past acts of discrimination. *See id.*¹

The Hearing Officer assessed a \$25,000 penalty based upon his finding that Respondent had been adjudged by the Commission to have committed a discriminatory act in Pulido v. Mass. Department of Correction, 20 MDLR 49 (1998), a decision issued a few months prior to Complainant’s filing. However, Respondent points out that Respondent appealed that case to the Full Commission and the Full Commission represented to the parties during the course of the appeal that “this case presents legal issues requiring possible reversal or remand of the hearing officer’s decision.” (Respondent’s Petition, Ex. 1). The Full

¹ The relevant language provides as follows: If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;

(b) in an amount not to exceed \$25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint...

Commission recommended alternative dispute resolution and, as a result, the parties resolved the matter in lieu of a decision by the Full Commission. (Respondent's Petition, Ex. 2). As such, the Hearing Officer's decision became the final decision of the Commission.²

In light of these events, we believe that a \$25,000 civil penalty, while technically appropriate as the Pulido judgment still stands, would be inequitable in this case. The Commission is vested with discretion in meting out civil penalties and we exercise our discretion to order a reduction of the penalty to \$10,000, the maximum allowable amount for a first offense.

Finally, Respondent placed in a footnote a *brief* argument to the effect that there was no basis for any civil penalty. First, we note that the Commission is expressly authorized by M.G.L. c.151B, § 5 to assess a civil penalty in any case in which a respondent has engaged in an unlawful practice. Second, we conclude that the Hearing Officer made specific findings to support the civil penalty and concluded that a civil penalty was appropriate given Respondent's egregious conduct and "repeated bad faith in addressing Complainant's legitimate issues." We, therefore, find that the Hearing Officer's decision to assess a civil penalty is supported by substantial evidence and contains no errors of law. *See Comm. v. Amcan Enterprises*, 47 Mass. App. Ct. 330, 338 (1999) citing *Comm. v. Fall River Motor Sales*, 409 Mass. 302, 311 (1991).

² A respondent has not been "adjudged to have committed [a] discriminatory practice" until the parties have exercised all of their administrative rights. Thus, if a party appeals a hearing officer's decision to the Full Commission and the Full Commission issues a decision, that decision serves as the final adjudication of the Commission. If a party does not appeal the hearing officer's decision, then that decision serves as the Commission's final adjudication. If, as here, the parties settle the case during the pendency of the appeal, then the appeal is moot and the hearing officer's decision becomes the final adjudication.

ATTORNEYS' FEES AND COSTS

As a result of having prevailed at hearing, Complainant is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. Chapter 151B, section 5. Complainant has filed a petition seeking attorneys' fees and costs supported by detailed contemporaneous time records. Respondent has filed an opposition. Complainant requests reimbursement for fees in the amount of \$43,166.00 and costs in the amount of \$2,651.44.

A. FEES

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).

Complainant seeks reimbursement for 238.52 hours of work performed by counsel at an hourly rate of \$150.00 and \$200.00. Having reviewed the contemporaneous time records that support the attorneys' fees request, 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 the prosecution of this claim. Furthermore, with the exception of three hours in December 1998, all hours for work performed are sufficiently documented. We also conclude that the hourly rate of Complainant's counsel is consistent with rates customarily charged by individuals with comparable expertise and experience in employment law cases in the same geographic region. We therefore award Complainant reimbursement of fees in the amount of \$42,716, which is the amount requested minus the three hours of undocumented time.

B. COSTS

Having found that the request for costs is reasonable and adequately documented, we award Complainant costs in the amount of \$2,651.44.

ORDER

The Hearing Officer's decision with respect to the civil penalty is modified as discussed herein. The remainder of the Hearing Officer's decision not being appealed, it is affirmed in its entirety as well as the Hearing Officer's remedial order. As to the civil

penalty, Respondent is hereby ordered to pay the Commonwealth of Massachusetts, within sixty (60) days of receipt of this decision, a civil penalty in the amount of \$10,000.00.

Payment shall be forwarded to the Clerk of the Commission. Finally, Respondent is ordered to pay Complainant, within sixty (60) days of receipt of this decision, attorney's fees in the amount of \$42,716.00 and costs in the amount of \$2,651.44.

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 noncomplying 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 in accordance with M.G.L. c.30A, c.151B, s.6, and the 1996 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 thirty (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 29th day of June, 2005.

Cynthia A. Tucker
Commissioner

Walter J. Sullivan, Jr.³
Commissioner

³ Investigating Commissioner sitting by necessity to establish a quorum. See G.L. c.6, s. 56 & G.L. c.151B, s.5.