

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

RONALD BRIDGES,  
Complainant

v.

MCAD DOCKET NO: 02-BEM-01551  
DALA # MC-06-194

COMMONWEALTH OF MASSACHUSETTS,  
ALCOHOLIC BEVERAGES CONTROL COMMISSION,  
Respondent

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DECISION OF THE FULL COMMISSION

This matter comes before the Full Commission following a decision of Joan Freiman Fink, Esq., an Administrative Magistrate with the Commonwealth of Massachusetts Division of Administrative Law Appeals in favor of Complainant Ronald Bridges. The Hearing Decision issued on May 31, 2007.

Following an evidentiary hearing, and the submission of post hearing briefs by the parties, the Magistrate concluded that Respondent was liable for discrimination based on race in violation of M.G.L. c. 151B § 4 (1). The Magistrate awarded Complainant \$43,486 in back pay, emotional distress damages of \$50,000 and counsel fees in the amount of \$351,250.10. Respondent appealed to the Full Commission, filing a timely notice of appeal on June 8, 2007 and petition for review on July 3, 2007.

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 Magistrate's findings of fact must be supported by substantial evidence, 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 Hearing Officer's responsibility to evaluate the credibility of witnesses and 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 1.23.

We have carefully reviewed Respondent's contentions on appeal and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. Our review has uncovered no material errors of fact or law with respect to the Magistrate's findings and conclusions of law. We find that the Magistrate's conclusions are supported by substantial evidence in the record and we defer to them.

## BACKGROUND

Ronald Bridges filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) against the Alcoholic Beverages Control Commission (ABCC) on May 7, 2002, contending that he was subject to discrimination (failure to hire) because

of his age, 47, and race (black). The Investigating Commissioner issued a probable cause determination on January 3, 2003. After attempts to conciliate the matter were unsuccessful, the Investigating Commissioner certified the case for public hearing and referred the matter to the Division of Administrative Law Appeals (“DALA”), because of a potential conflict of interest.

Ronald Bridges is a Marine veteran, who during his service completed military police/corrections specialty training. Bridges graduated from Northeastern University in 1982 with a B.S. degree in Criminal Justice after which he was employed as a correctional counselor by the Massachusetts Department of Correction and as a Parole Officer II with the Commonwealth. In July 2001, Bridges hand delivered his application for the position of Special Investigator to the ABCC.

The Administrative Magistrate made extensive findings of fact regarding the hiring and application process, generally, and as applied to the Complainant.(Decision Findings of Fact 12-40) These findings include, inter alia: that after the initial acknowledgment of his application he received no further response; that after phoning the ABCC twice over a period of several weeks he was told he was not on the list of those to be interviewed; that after informing the ABCC that he was a Vietnam era Veteran and entitled to preference in hiring, he was told to resubmit his application because it had been thrown away; that he was subsequently interviewed and an ABCC Commissioner gave him a score of 10 on a scale of 1-10; that this same Commissioner told him it was likely the ABCC wanted to hire a woman for the position in question but there would soon be two additional Special Investigator positions available for which he would be strongly considered; that he was told to contact a Ms. Foley to arrange for a second

interview, and that after calling Ms. Foley twice he was told that he was not on the list for a second interview, that he contacted the H.R. person at ABCC and received a call back stating that his name had been on a list that was “lost,” but now found, and was scheduled for a second interview; that he had a second interview with the Chief Investigator at ABCC, one Frederick Mahoney who took few notes during the interview and asked no questions about Complainant’s prior employment or law enforcement background; that Complainant’s name was not among the six submitted to the Commissioners for further consideration and that Mr. Mahoney rejected Complainant for having used profanity in his interview, an allegation which Complainant vigorously denied. The Complainant was subsequently told by the H.R. person that the two additional positions for which he had interviewed had been frozen for budgetary reasons and that he would be contacted if that changed. The Complainant never heard back about the positions but later saw an internet posting for the two positions.

The Magistrate also considered that from at least 1994 on, Respondent filled all special investigator positions (8) with white applicants; and that at all relevant times, all ABCC investigators were white. The Magistrate also considered that despite being under a statewide directive to implement affirmative action in state agencies, Respondent had no plan on file from 1999 through 2000, and that when Respondent ultimately signed a plan in October 2000, it failed to maintain any records demonstrating enforcement, or to take any steps to hire minority applicants.

Based on these extensive findings, and upon other evidence the magistrate made credibility determinations and drew inferences in favor of Complainant. She concluded that the Complainant did not receive the “normal” application and interview procedure

followed by the ABCC, and further, that he was treated differently than other similarly situated individuals, who were not members of a protected class,” from the time he applied to Respondent. She concluded that Complainant established that Respondent’s asserted non-discriminatory reason was not the actual reason, but a pretext for unlawful race discrimination.

The Magistrate awarded Complainant \$43,486 in back pay and \$50,000 in emotional distress damages. She also awarded attorney fees to Complainant’s counsel in the amounts of \$279,375.10 and \$71,875.00.

#### RESPONDENT’S PETITION FOR REVIEW

a. Liability

Respondent contends on Appeal that the Administrative Magistrate erred by concluding that the reason given by the Respondent for not hiring Complainant (alleged use of inappropriate language during his interview) was a pretext for discrimination. Respondent further contends that the Magistrate’s decision is flawed because she considered only one of two “legitimate non-discriminatory reasons” put forth by Respondent for failing to hire the Complainant. Specifically, Respondent states in its appeal that in addition to the alleged use of inappropriate language, it did not hire Complainant because the applicants it hired had political sponsors (relatives of Legislators); and that the two positions would not have been funded by the Legislature, had it not hired the two politically sponsored candidates.<sup>1</sup>

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<sup>1</sup> Respondent did not affirmatively proffer evidence of the political nature of its hiring process as a legitimate non-discriminatory reason for rejecting Complainant. In its post hearing submission Respondent, argued that that political sponsorship was one

Even so, administrative judges need not explicitly reject each and every nondiscriminatory reason offered by a Respondent, nor is the adjudicator required to make detailed findings concerning every aspect of the matter. *Chief Justice for Admin. and Management of Trial Court v. Massachusetts Com'n Against Discrimination*, 439 Mass. 729, 735 (2003). (Hearing commissioner was not obligated to make findings regarding each of the nondiscriminatory reasons advanced by employer in holding county clerk of court liable for sex-based hiring discrimination where commissioner's findings acknowledged successful candidates' qualifications and their political connections to clerk) The Magistrate in this matter made sixty-five findings of fact, which, contrary to Respondent's contention, include the qualifications and political connections of the applicant's hired. (Facts 44-51).

Respondent next contends that if the Magistrate had considered the "disregarded evidence," Complainant would have failed to establish a causal link between Respondent's discriminatory animus and its hiring decision. In support of this contention, Respondent states that it articulated two nondiscriminatory reasons: 1) Complainant's use of inappropriate language and 2) the political sponsorship of the two successful applicants, a reason it asserts the Magistrate ignored. However, the Respondent fails to recognize that by making express findings of fact on this issue (Facts 44-51); the Magistrate hardly ignored its contention. Respondent also fails to

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criteria among others (qualifications) that it considered when making its hiring decision and that the then Commissioner "would have been irresponsible not to give serious consideration to referred applicants", and "even if Mr. Bridges had advanced to the final rounds of the interview process despite swearing in front of Mr. Mahoney, he was competing against other qualified applicants who had political referrals, which helped tip the scales in their favor..." We note that the argument made by Respondent in its current appeal, that funding for the positions was contingent on their hiring two specific applicants is different from its earlier argument.

acknowledge that it did not affirmatively advance political sponsorship as a reason for its actions until post-hearing briefs were filed.

As to Respondent's challenge of the Magistrate's conclusion that its proffered reason was not credible and was simply a pretext for discrimination, it is well established that the Full Commission defers to findings of fact of the Hearing Officer, so long as they are supported by substantial evidence. Such determinations remain within the sole province of the fact finder. *Quinn v. Response Electric Services, Inc.*, 27 MDLR 42 (2005). We conclude that there is substantial evidence to support the Magistrate's finding of pretext.

As to Respondent's assertion that the Complainant must prove that *all* of the employers articulated reasons are not true, this is simply not the case. It is well established that a violation of G.L. c. 151B may still occur even if a nondiscriminatory reason played some part in the decision. *Chief Justice for Admin. and Management of Trial Court*, 439 Mass. at 735. While a Complainant must ultimately prove by a preponderance of the evidence that Respondent was motivated by discriminatory animus, the inference of discriminatory animus may be drawn from proof that one or more of the reasons advanced by the employer is false. *See Lipchitz v. Raytheon*, 434 Mass. 493, 504 (2001). Here the reasons advanced by the Respondent were found to be not credible by the Hearing Officer. Given that determinations of credibility fall exclusively within the province of the Hearing Officer, we conclude that the Magistrate's finding of discrimination is based upon substantial evidence and free from error of law.

b. Emotional distress damage award

An award for emotional distress damages must rest on substantial evidence and its factual basis must be made clear on the record. *Stonehill College v. Massachusetts Com'n Against Discrimination*, 441 Mass. 549, 576 (2004).

Respondent argues that the emotional distress award should be set aside or reduced because: (1) the Magistrate's reliance on a medical evaluation done in November of 2002 is erroneous where the evaluation does not mention rejection by the ABCC as the cause of Complainant's depression, and (2) the Magistrate failed to consider other stressors in Complainant's life when making the award.

There is no precise formula for the award of emotional distress damages or for the calculation of such award. Indeed, the Court has directed that each award of emotional distress damages be case specific *and should not be determined by formula or by precise reference points*. *Stonehill College v. Massachusetts Com'n Against Discrimination*. 441 Mass. 549, 576 (2004).

The Magistrate's conclusions regarding the Complainant's emotional distress were supported by specific findings of fact based on the Complainant's testimony and corroborated by testimony from his former girlfriend. Even if reliance on medical records was misplaced, there is sufficient evidence in the record that Complainant became withdrawn and depressed and suffered a loss of self-esteem as a result of the events surrounding his unsuccessful attempt to secure employment with Respondent and his belief that race was the reason. His girlfriend corroborated the adverse effect these events had on Complainant emotionally. However, to the extent the Magistrate relied on medical records that do not support causation and did not consider a number of other

stressors in Complainant's life at the time, we conclude that the award must be reduced by some factor and therefore reduce the award to \$25,000.

c. Back Pay

Respondent argues that the back pay award should be reduced to reflect the fact that all but three special investigators were laid off based on seniority in March 2003 for a period of six or seven months. In this instance, the record supports that these layoffs occurred, however, the same record testimony shows that a more senior special investigator voluntarily took a layoff so that a less senior employee could remain on the job. Since it is not certain that Complainant would have been laid off had he been working for Respondent, we find the award of back pay is reasonable. The calculation of back pay may necessarily involve some degree of approximation and imprecision since it is often impossible to recreate circumstances that would have existed absent discrimination. *See Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 769 (1976).

The Magistrate awarded Complainant back pay in the amount of \$43,486. This award is based upon substantial evidence in the record, is free from error of law, and is therefore affirmed.

d. Attorney Fees

Massachusetts General Laws c.151B § 5 authorizes a prevailing Complainant to recover reasonable attorney's fees and costs. As a general practice, once a hearing decision issues, the Commission notifies the parties of Respondent's right to appeal and Complainant's right to petition for Attorney's Fees. As a result, the Full Commission normally addresses requests for fees, since a party is not deemed to have prevailed at the

Commission until the Full Commission reviews and decides the appeal. In this instance, where the Commission referred the case to DALA for adjudication, Complainant included a request for Attorney's Fees and costs with his post-hearing brief and the Magistrate ruled on that request pre-maturely.

We have been asked to review the Magistrate's May 31, 2007 award of attorneys' fees to Attorney Barshak in the amount of \$279,375.10 and to attorney Maslow-Armand in the amount of \$71,875.00. Respondent opposed the request for attorney fees on June 21, 2007 when it filed a Motion asking the Commission to vacate or reduce the award, to which Complainant filed a response.

Having affirmed the Magistrate's decision in favor of the Complainant, we conclude that the Complainant has substantially prevailed in this matter and is 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 time and resources required to litigate a claim of discrimination in the Commission's administrative forum. 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).

The Commission first calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered reasonable. In doing so, the Commission carefully reviews the Complainant's submission and does not simply accept the proffered number of hours as "reasonable." *Grendel's Den v. Larkin*, 749 F.2d 945 (1<sup>st</sup> Cir.); *Miles v. Samson*, 675 F. 2d5 (1<sup>st</sup> Cir. 1982); *Brown v. City of Salem*, 14 MDLR 1365 (1992). 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). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours insufficiently documented. *Baird v. Belloti*, 616 F.Supp. 6 (D.Mass 1984); *Brown v. City of Salem*, 14 MDLR 1365 (1992).

Complainant sought attorney's fees of \$269,641.50 for Attorney Barshak and \$71,875.00 for Attorney Maslow-Armand. Attorney Barshak seeks compensation for 597.8 hours for work performed by his firm from 2005 through the filing of the post hearing brief in May 2007. Attorney Barshak billed 406.8 hours at an hourly rate of 475.00 per hour and 142 hours at \$500 per hour. Attorney Maslow-Armand seeks compensation for 287.50 hours at the hourly rate of \$250.00. Both attorneys support their fee requests with affidavits and time records.

Respondent argues that the hourly rates charged by Attorney Barshak (\$475-500) and Attorney Maslow-Armand (\$250) are excessive. Complainant submitted Attorney Barshak's qualifications, and affidavits from attorney Barshak, James R. DeGiacomo, Richard W, Renehan, and J. Owen Todd stating that the rates charged are well within the norm for attorneys of comparable experience and expertise to Attorney Barshak's.

However, because Attorney Barshak's submissions provide only the total number of hours billed at each rate, without further explanation or documentation of the rate increase, we conclude that \$475.00 per hour is the reasonable hourly rate for Attorney Barshak's services in this instance.

Complainant submitted a summary of Attorney Maslow-Armand's qualifications and an affidavit from Attorney Maslow-Armand in support his petition for attorneys'

fees. Her hourly rate of \$250 conforms to the fee scale of the Massachusetts Law Reform Institute<sup>2</sup> for attorneys with Attorney Maslow-Armand's level of experience. We conclude that \$250.00 per hour is the reasonable hourly rate.

Respondent further opposes the fee award, arguing that it is excessive because there are charges for work that was duplicative, unproductive, excessive, or otherwise unnecessary; and that the fees should be reduced by 50% because Complainant did not prevail on his disparate impact argument. Respondent additionally argues that the hourly rate should be reduced for administrative tasks.

In deciding whether the documented time was reasonably expended the Commission considers the interests at stake, the nature of the case and issues presented, the time and labor required, the amount of damages involved, and the result obtained. *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979). In appropriate cases attorneys fees may be awarded to a prevailing party even if the award includes fees for work on unsuccessful claims or issues. See *Clifton v. Massachusetts Bay Transportation Authority*, 445 Mass. 611, 624 (2005) (awarding plaintiff appellate attorneys fees attorney fees even though he did not prevail on all of his claims on appeal); *Wynn & Wynn v. Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 675-76 (2000) (commission's award of attorneys fees permissible because the "interrelationship of the successful failure to hire claim and the unsuccessful sexual harassment claim was substantial"); *School Committee v. Massachusetts Comm'n Against Discrimination*, 63 Mass.App.Ct. 839, 854 (2005) (attorneys fees should not be reduced even though some of

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<sup>2</sup> Generally, the Commission's counsel follows this fee schedule.

plaintiff's claims were dismissed because "these claims were based on a common core of factual investigation and related legal theories").

Where different claims are involved, and the petitioner has prevailed on some but not others, the Commission may exercise its discretion to reduce the overall fees requested by some amount reasonably associated with the pursuit of Complainant's unsuccessful claim. In making such a determination, we may examine the "degree of interconnectedness" between the two claims. In this case, Complainant's disparate treatment claim shared some common relevant facts with his disparate impact claim. For example, statistical evidence that a policy or practice has a disproportionate impact on members of a protected class sometimes may help establish a prima facie case of discrimination, even in a disparate treatment case. *See, e.g., Lipchitz v. Raytheon Co.*, 434 Mass. 493, 508-509 (2001) (statistical evidence may support inference that particular decision was made because of discriminatory animus). In some cases, an inference of discrimination may also be drawn from affirmative action and other statistics, or the lack thereof. Additionally, we note that Complainant's attempt to obtain statistical evidence may have been frustrated, in part, by Respondent's failure to maintain records demonstrating enforcement of its affirmative action obligations. However, where Complainant has not prevailed on one of his claims we conclude that some reduction of the fee request is warranted, but where the claims were somewhat interrelated, a 50% reduction would be excessive. We conclude that in this instance a 25% reduction is appropriate. Therefore, Attorney Barshak's attorney fee award is further reduced by 25% to \$206,953, and the award to Attorney Maslow-Armand is reduced to \$53,906.25.

Lastly, we agree with Respondent that the fee award should be reduced because there are some duplicative and excessive charges. Upon consideration of the time sheets, we conclude that a reduction of an additional 15% is warranted for duplicative efforts (e.g. review of discovery, excessive; time spent on file review/organization excessive; 50 hours to respond to a motion for summary judgment is excessive) (Attorney Barshak); research conducted on state pensions, veterans status (Attorney Maslow-Armand), or work that does not appear to apply to this litigation (summarizing depositions from DeCarlo litigation, Attorney Maslow-Armand). The reduction is also warranted, given that this matter was not excessively complex. We therefore award Attorneys' fees to Complainant in the amount of \$186,257.70 for the work performed by Attorney Barshak, and \$48,515.63 for the work performed by Attorney Maslow-Armand.

e. Costs

We award the Complainant costs in the amount of \$8,325.54 expended on his behalf by Attorney Barshak and 179.86 expended by Attorney Maslow-Armand.

ORDER

For the reasons set forth above, we hereby affirm the Findings of Fact, Conclusions of Law of the Magistrate but modify her Order with respect to the emotional distress damages and attorneys' fees as follows:

- (1) Respondent shall immediately cease and desist from engaging in unlawful discrimination and retaliation.
- (2) Respondent shall pay to Complainant the sum of \$43,486 in back pay for lost wages

with interest thereon at the rate of 12% per annum from the day the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.

(3) Respondent shall pay to Complainant the sum of \$25,000 for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.

(4) Respondent shall pay the Complainant attorneys' fees in the amount of \$186,257.70 for the services performed by Attorney Barshak, and \$48,515.63 for the work performed by Attorney Maslow-Armand.

(5) Respondent shall pay costs in the amount of \$8,325.54 expended on his behalf by Attorney Barshak and \$179.86 expended by Attorney Maslow-Armand.

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 in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (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. 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, § 6.

So Ordered this 28<sup>th</sup> day of October, 2008

Malcolm S. Medley  
Chairman

Sunila Thomas-George  
Commissioner

Martin S. Ebel  
Commissioner