

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
RUFUS CHEEKS,
Complainants

v.

DOCKET NO. 94-BEM-0180

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant Rufus Cheeks. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for unlawful discrimination on the basis of race, the creation of a racially hostile work environment, and unlawful retaliation in violation of chapter 151B, sections 4(1) and 4(4) of the Massachusetts General Laws. Both Respondent and Complainant filed appeals 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, § 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 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, or was otherwise not in accordance with the law. See 804 CMR 1.16(f).

We have carefully reviewed both Respondent's and Complainant's contentions on appeal 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 with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.

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 on certain of his claims and is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, § 5.

Complainant has filed a petition seeking attorneys' fees and expenses, supported by detailed time records, requesting fees in the amount of \$117,300.00 and costs in the amount of \$924.25. Respondent has filed an opposition thereto. For the following reasons we must reduce the amount of attorney's fees sought by Complainant.

A. FEEES

M.G.L. c. 151B allows prevailing Complainants to recover attorneys' fees. The determination of whether a fee sought is reasonable is one that the Commission approaches utilizing its discretion and its understanding of the litigation and of the time and resources required to litigate a claim of discrimination in the administrative forum. In reaching a determination of what is a reasonable fee, the Commission has adopted the lodestar methodology for fee computation. See Fontaine v. EBTEC Corp., 415 Mass. 309, 324 (1993). By this method, the Commission will first calculate the number of hours reasonable expended to litigate the claim and multiply that number by a reasonable hourly rate. Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

The Commission's efforts to determine the number of hours reasonably expended will involve more than simply adding all hours expended by all identified personnel. The Commission carefully reviews the submission by Complainant's counsel and will not merely accept the proffered number of hours as "reasonable." See, e.g., Baird v. Bellotti, 616 F. Supp. 6 (D. Mass. 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim are subtracted, as are hours that are insufficiently documented. See, e.g., Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992).

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 the time records maintained by counsel and will review both the hours expended and tasks involved.

In this matter, Complainant's attorneys, Gale Glazer and Louis Font, filed affidavits in support of Complainant's Petition for Fees and Costs, requesting a total of \$117,300.00 in attorneys' fees for a total of 391 hours of work performed. Their request is supported by contemporaneous time records denoting the number of hours expended in

this matter on Complainant's behalf before the Commission. Both Attorneys Glazer and Font are experienced employment attorneys who have requested that their hours be compensated at the hourly rate of \$300.00.

At the outset, we conclude that the expertise of Attorneys Glazer and Font in the area of employment discrimination law is amply supported by their affidavits. We conclude that the hourly rate of \$300.00 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and are well within the range of rates charged by attorneys in Boston of similar experience.

Respondent opposes the request for fees, arguing, *inter alia*, that because Complainant did not prevail on his constructive discharge claim, his recovery of attorneys' fees should be reduced accordingly. We agree with Respondent's contention in this regard. We find that Complainant's constructive discharge claim and his other, successful claims of hostile work environment, disparate treatment, and retaliation are not sufficiently intertwined to warrant reimbursement as if he had prevailed on all his claims. While the constructive discharge claim centered mainly upon incidents and events alleged to have occurred later in Complainant's tenure, the Hearing Officer specifically found that the successful claims of disparate treatment, hostile work environment, and retaliation involved the period of time from 1993 to 1995. Given this finding, we believe that the work performed in pursuit of Complainant's unsuccessful claim of constructive discharge was not necessary to proving his other claims. The successful claims were not so significantly interconnected with the constructive discharge claim, as to merit compensation for time expended on his constructive discharge claim. 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 Dept. of Employment and Training, 17 MDLR 1043 (1995)). We must therefore determine a reduction that fairly reflects the fact that Complainant did not

prevail on his constructive discharge claim. See, e.g., Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655 (2000).

Accordingly, we reduce the number of compensable hours in the lodestar equation by a factor of 25%, as Complainant did not prevail on one of his four claims, and a significant one, at that. This reduction of 25% will be taken off the total number of compensable hours which we further reduce, as follows.

Upon a thorough review of the time records supporting the request for fees, we further conclude that certain of the hours billed for are duplicative. Complainant's lead counsel, Attorney Glaser, seeks compensation for 58.1 hours of work she did preparing for hearing and conducting the hearing and further compensation for 47.9 hours of work by her co-counsel preparing for and conducting the hearing. They seek compensation for a total of 106 hours for preparation and conducting the hearing, at a rate of \$300 per hour for each attorney. There is no further description or detail of the separate duties performed by each in furtherance of preparation for trial. In addition, although it is not uncommon in Commission proceedings for there to be an attorney present during litigation whose function is to support lead counsel, the second chair is frequently a less experienced attorney or para-professional who bills out at a lower hourly rate. That is not the case here, where two highly experienced attorneys are billing at the same rate. We therefore must consider certain of these hours as duplicative and excessive and will reduce the number of compensable hours for preparing and conducting the hearing by one-third, or 35 hours for a total of 71 hours that are compensable for this work.

We also conclude that a further reduction is merited for the amount of time expended in drafting post the hearing brief. Complainants' counsel seeks compensation

for a total of 62.2 hours, which amounts to over \$18,000 for the preparation of a post-hearing brief. We consider this to be excessive. We conclude that a more reasonable amount of time for preparing a post hearing brief, even one as detailed and lengthy as Complainants, to be 40 hours or five work days, assuming 8 hours of work each day. Therefore, we will reduce the compensable hours for work associated with the post-hearing brief to 40 hours.

Given all of the above, we award attorneys fees as follows:

A deduction of 35 hours from the total of 391 plus a further deduction of 20 hours for a total of 336 hours. We will reduce this total of 336 hours further by 25% or 84 hours as indicated earlier, because Complainant did not prevail on his constructive discharge claim. The resulting number is 252 hours for which we consider compensation reasonable. Therefore, we award attorneys fees in the amount of \$75,600.00.

B. COSTS

Complainant's counsel also seeks reimbursement for costs in the amount of \$924.25. These costs include expenses related to photocopies, postage, messenger services, facsimile transmissions, and tapes. We find that these costs are adequately documented and reasonable. Accordingly, we award them to Complainant.

CIVIL PENALTY

In this matter, the discriminatory conduct took place prior to 1999, prior to the effective date of the statutory amendment allowing for the assessment of civil penalties, which was July 1, 2003. While Respondent has not addressed this issue, in light of recent precedent, we feel compelled to modify this assessment.

The Commission has recently issued two decisions reversing the assessment of a civil penalty. The issue of whether a civil penalty may be applied retroactively was discussed in Poore v. Town of Harwich High School, et al., 28 MDLR 85 (2006), and Sweet v. MBTA (Dec. of Full Comm'n 8/ /07). In Poore, the Respondents objected to the assessment of a civil penalty against them because the statute authorizing the penalty was not adopted until after both the occurrence of the discriminatory conduct and the hearing in the matter. Citing Fontaine v. Ebtec, and the principles governing retroactive application of statutes discussed therein, the Commission found that "because a civil penalty is punitive in nature and is not in the nature of damages awarded to make a Complainant whole, it is not remedial in nature, and therefore does not have retroactive application." Fontaine v. Ebtec, 415 Mass. 309 (1993) The Commission went on to explain that "legislation authorizing a civil penalty clearly affects Respondent's rights," and therefore the assessment of such a penalty would "implicate the measure of Respondent's liability by subjecting it to increased damages which were not anticipated." Id. In Sweet, we reversed the award of a civil penalty because the discriminatory conduct had occurred prior to the amendment to the statute authorizing civil penalties. Owing to the precedent on this issue, we feel compelled to reverse the assessment of the civil penalty in this case. Accordingly, we reverse the Order of the Hearing Officer assessing a civil penalty against Respondent.

For the reasons set forth above, we hereby affirm the findings of fact and 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 Department of

Correction shall pay to Complainant Rufus Cheeks the sum of \$100,000 in emotional distress damages, 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 judgment and post-judgment interest begins to accrue.

(2) Within sixty (60) days of receipt of this Order, Respondent shall pay the Complainant's attorneys' fees in the amount of \$75,600.00 and costs in the amount of \$924.25.

(3) The parties shall immediately notify the Clerk of the Commission when Respondent makes the required payments. Complainant shall also notify the Commission if Respondent fails to comply with the terms of this Order within the prescribed time period.

(4) The Training Provisions set forth in the Decision of the Hearing Officer shall be incorporated herein.

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 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, § 6.

SO ORDERED this 30th day of October, 2007.

Walter J. Sullivan, Jr.
Chairman

Martin S. Ebel
Commissioner