

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHERMAN HALL,
Complainant

v.

DOCKET NO. 99-13-0287

LAIDLAW TRANSIT, INC.
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Edward R. Mitnick in favor of Complainant, Sherman Hall. Following an evidentiary hearing, the Hearing Officer concluded that Respondent Laidlaw Transit, Inc. was liable for unlawful discrimination on the basis of handicap in violation of M.G.L. c. 151B, Section 4(16). Respondent filed a timely appeal to the Full Commission.¹

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. 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 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

¹ Recently, Respondent filed a Motion to File Supplemental Memorandum of Law based on recent decisions by

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.

I. RESPONDENT'S PETITION FOR REVIEW

Respondent contends on appeal that the Hearing Officer erred when he found that Complainant was a "handicapped person." Respondent argues that Complainant was not handicapped under any prong of the applicable law's definition of a "handicapped person." However, the Hearing Officer stated in his decision that while Complainant was not actually handicapped and did not have a "record of impairment," Complainant nevertheless "established that Respondent regarded him as having such impairment within the meaning of M.G.L. c. 151B, section 1(17)."

After reviewing the record and the decision in this matter on the issue of whether Complainant was handicapped under the law, we arrive at a conclusion that differs from the conclusions of both Respondent and the Hearing Officer. Specifically, we reject Respondent's assertion that Complainant was not handicapped and, in addition, while we agree with the Hearing Officer that Complainant was regarded as handicapped, we find that he erred in not finding that Complainant also qualified as handicapped pursuant to M.G.L. Chapter 152, section 75B(1). See Dahill v. Boston Police Dept., 434 Mass. 233, 241 & n.13 (2001)(a complainant may qualify under one or several of the statutory definitions and the three prongs are to be assessed independently).

We believe there is substantial evidence demonstrating that Complainant was handicapped according to M.G.L. Chapter 152, section 75B(1), which provides in pertinent part that “[a]ny employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodation, shall be deemed to be a qualified handicapped individual under the provisions of Chapter 151B.” In this matter, Complainant sustained several work-related injuries, of which Respondent was well aware, and Complainant suffered from these injuries during the times he required and/or requested accommodations for them. “[A]n employee who sustains a work-related injury is entitled to the protections of c. 151B during the time he is affected by that injury. Thus, an injured employee is entitled to reasonable accommodation to enable him to return to work, and is protected from discrimination based on the injury during the time he is affected by it.” Courtois v. Legal Seafoods, Inc., Docket No. 03-2752 (Fabricant, J.)(Feb. 6, 2004).²

Having concluded that Complainant falls within the ambit of Chapter 152, section 75B and is a “qualified handicapped individual” entitled to the protections of Chapter 151B,³ we proceed to the issue of whether Respondent reasonably accommodated Complainant’s disability.

² We also believe that Complainant’s history of work-related injury could establish a basis for a “record of impairment” claim under Chapter 151B, s. 1(17). However, we need not perform such an analysis, since we have proceeded on other grounds.

³ We further note that, contrary to Respondent’s claim, the Supreme Judicial Court’s decision in City of New Bedford v. MCAD, 440 Mass. 450 (2003), does not compel reversal of the Hearing Officer’s finding with respect to “perceived disability” because Respondent in this case did not perceive Complainant to be unable to perform “only a particular aspect...of a single, particular job.” Id. at 466. Rather, the record evidence revealed, and the Hearing Officer specifically concluded, that Respondent’s conduct was motivated by its perception that Complainant was significantly restricted from performing a class of jobs, namely operating school buses. In fact, on several occasions, Respondent refused to permit Complainant to bid for *any* driving job, citing his orthopedic problems, sensitivity to diesel fumes and prescribed medications as disqualifying conditions when such conclusions were not warranted. Thus, there was ample evidence in the record to support the Hearing Officer’s finding that Complainant was regarded as substantially limited in the major life activity of working.

Respondent contends that the Hearing Officer erred in finding that it failed to accommodate Complainant's injuries. Specifically, Respondent argues that the Hearing Officer ignored evidence, that his conclusions were not supported by substantial evidence, and that he erred when he stated that Respondent did not engage in the interactive process as required by law. We are not persuaded by these arguments.

The Hearing Officer's Decision demonstrates that he analyzed separately and comprehensively the facts and circumstances of each incident wherein Complainant alleged a failure to accommodate his disability. The Hearing Officer acknowledged that Respondent did accommodate Complainant on certain occasions, and he stated plainly that Complainant had acted "unreasonably" on certain occasions. However, the Hearing Officer did not ignore evidence, as Respondent would have us believe, rather he evaluated each alleged incident on its own merits. Likewise, with respect to the seven incidents wherein the Hearing Officer did find a violation of the duty to accommodate, we believe that his conclusions were supported by substantial evidence. In examining the facts and circumstances of each alleged incident, the Hearing Officer engaged in the proper legal analysis and reached conclusions that are amply supported by the evidence in the record. See, e.g., Soto-Ocasio v. Federal Express Corp., 150 F.3d 14 (1st Cir. 1998)("cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior").

Similarly, we reject Respondent's assertion that the Hearing Officer erred in finding that Respondent did not engage in the interactive process as required by law. The evidence demonstrates that on repeated occasions Respondent made unilateral decisions to refuse Complainant's requests for accommodation. Moreover, the evidence shows that Respondent neglected to investigate options for accommodating Complainant, choosing rather to place

him on leave, paid and unpaid, or refusing to allow him to bid for work. We find that the Hearing Officer's factual findings and conclusions support his decision that Respondent did not sufficiently engage in the interactive process.

Finally, Respondent contends that the Hearing Officer was arbitrary and capricious in awarding emotional distress damages to Complainant and cites to the Supreme Judicial Court's recent decision in Stonehill College v. MCAD, 441 Mass. 549 (2004) as proof. Respondent argues that there was insufficient evidence of emotional distress presented by Complainant to justify a \$75,000 award. We disagree. Our review of the record in this matter reveals that the Hearing Officer based his decision to award emotional distress damages on substantial testimony from Complainant. In his decision, the Hearing Officer relied upon Complainant's "credible compelling" testimony regarding Respondent's unlawful treatment: "It took my life [from] me" and "I thought all that was behind me when I went to work in August [2002, but] it all came back again . . . I don't wish this on nobody to go through what I went through." In addition, contrary to Respondent's assertion, Complainant did not state merely that his life had been "rough," but that Respondent's refusal to allow him to work had made it "rough" for him emotionally, particularly as a result of financial difficulties he faced due to lack of work. Finally, Complainant testified that he continued to suffer distress as a result of Respondent's continued refusal to let him work. Finally, the Complainant presented evidence, which the Hearing Officer credited, that Respondent's conduct exacerbated his preexisting anxiety for which he required medical treatment and took medication.

In light of the evidence presented by Complainant, we find that the Hearing Officer's emotional distress damages award was based on substantial evidence and was not arbitrary or capricious. Although the Hearing Officer did not have the benefit of the Stonehill College

decision to guide him, his findings of fact and conclusions of law demonstrate that he took into consideration the factors articulated in Stonehill College, factors which the Commission has for years employed, in reaching his determination with respect to the award of emotional distress damages.

We note that Respondent was afforded a full and fair opportunity to present its case on the issue of emotional distress damages and that the Hearing Officer gave Respondent's arguments full and fair consideration. We are fully satisfied that Respondent's factual and legal arguments were given proper consideration by the Hearing Officer.

We have carefully reviewed Respondent'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 that the Hearing Officer's findings of fact were supported by substantial evidence. We further find that the Hearing Officer's conclusions of law were not in error, except as addressed above. Based on the foregoing, we deny the appeal and affirm the Hearing Officer's decision, with the exceptions as noted.

II. COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's Decision, we conclude that Complainant prevailed on his discrimination claim in this matter and is entitled to an award of reasonable attorneys' fees and costs. M.G.L. c. 151B, section 5. Complainant has filed a Petition seeking attorneys' fees and expenses, supported by detailed contemporaneous time records, requesting fees in the amount of \$62,146.75 and costs in the amount of \$9,580.09.

A. FEES

M.G.L. Chapter 151B allows prevailing Complainants to recover attorneys' fees. However, the Commission has held that when a Complainant does not prevail on certain aspects of his case, his request for attorneys' fees must be reduced to reflect the partial success. Aubourg v. American Drug Stores, 23 MDLR 226 (2001); Carmichael v. Wynn & Wynn, 18 MDLR 208 (1996). The Commission may exercise its discretion to reduce the overall fees requested by some amount that may reasonably be said to have been expended in 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 prevailed on his disability claim, but did not succeed on his retaliation claim. However, we believe that the unsuccessful retaliation claim is so significantly interconnected with the disability discrimination claim as to credit all time performed in pursuit of the unsuccessful claim. Although each claim required separate evidentiary proofs, the underlying facts of both claims were nearly identical. Therefore, we decline to reduce the hours expended by Complainant's attorneys that may have been attributable to his unsuccessful retaliation claim.

The determination of whether a fee sought is reasonable is subject to the Commission's discretion. The Commission has adopted the lodestar methodology for fee computation. 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).

Only those hours that are reasonably expended are subject to compensation under G.L. c.151B. In determining whether hours are compensable, the Commission will consider

contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099.

Counsel Paul F. Kelly of Segal, Roitman & Coleman seeks reimbursement for 119.65 hours of work that he performed at an hourly rate of \$250.00, as well as reimbursement for 132.85 hours of work performed by his associate, Michael J. Doheny, at an hourly rate of \$205.00. In addition, Mr. Kelly seeks reimbursement for \$5,000, an estimate for the value of work performed by Counsel Bruce Rosen, who handled the case prior to Messrs. Kelly and Doheny. Mr. Kelly acknowledges in his affidavit that he attempted, albeit unsuccessfully, to contact Mr. Rosen to ascertain the exact amount of the fees he expended in the initial stages of this case.

We decline to award Complainant the \$5,000.00 in fees requested for reimbursement of work performed by Attorney Bruce Rosen. This request represents an amount which is admittedly an estimate by Attorney Kelly, since he has been unable to contact Attorney Rosen to obtain contemporaneous time records, hourly fees, or supporting affidavits. Without this information or sufficient documentation, the Commission believes it is inappropriate to award these requested fees.

Complainant's Petition is accompanied by detailed contemporaneous time records for the work performed by Attorneys Kelly and Doheny. Having reviewed the contemporaneous time records that support this 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 the claim. Furthermore, all hours for work performed are sufficiently documented. We conclude that the hours for which reimbursement is sought are reasonable.

We also conclude that the expertise of Attorneys Kelly and Doheny in the area of employment discrimination law was supported by accurate documentation. We conclude that the hourly rates charged by these attorneys, namely \$250.00 for Attorney Kelly and \$205.00 for Attorney Doheny, are 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.

As stated above, we conclude that the reimbursement for attorneys' fees is reasonable. We therefore award attorneys' fees in the amount of \$57,146.75.

B. COSTS

Complainant's attorneys also seek reimbursement for costs in the amount of \$9,580.09. These costs include expenses related to the taking of depositions in this matter, transcripts, fees, and postage. We find that these costs are adequately documented and reasonable. Accordingly, we award them to Complainant.

III. ORDER

The Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer, including the award for emotional distress, is affirmed as modified above.

It is hereby ordered that:

(1) Respondent immediately allow Complainant to bid on all future bus routes. Prior to operating a vehicle, Respondent may obtain necessary medical documentation from Complainant's physicians or subject Complainant to a medical examination similar to those given to other employees, to ensure that he is still capable of performing the

essential functions of the job as a school bus driver and, if necessary, for purposes of defining and investigating possible reasonable accommodations.

(2) Within sixty (60) days of receipt of this decision, Respondent shall pay to Complainant the sum of \$22,186.28 in back pay, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed, until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Within sixty (60) days of receipt of this decision, Respondent shall pay to Complainant the sum of \$75,000.00 in damages for emotional distress, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed, until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Respondent shall pay to Complainant the sum of \$57,146.75 in attorneys' fees and \$9,580.09 in costs. Payment shall be made within sixty (60) days of receipt of this decision.

(5) Respondent shall conduct basic annual training sessions on disability discrimination for all managers and supervisors employed by Respondent and working under its contract with the City of Boston, as specified in the Hearing Officer's Decision in this matter.

(6) 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. 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 within thirty (30) days of receipt of this decision 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 25th day of August, 2004.

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner