

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MCAD & STANLEY NEMEROWSKI,
Complainant

v.

DOCKET NO. 97-BEM-2957

NORTHEAST NURSERY,
Respondent

DECISION OF THE FULL COMMISSION

This matter came before us following a decision of Hearing Officer Betty Waxman in favor of Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Respondent subjected Complainant to discrimination on the basis of a perceived disability in violation of G.L. c. 151B, § 4(16). Respondent filed a timely Petition for Review.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 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

¹ In her decision dated February 6, 2003, Hearing Officer Waxman dismissed the complaints filed against Kevin Lippson and James Connolly. Complainant has not appealed these findings, and, therefore, they are no longer parties for purposes of the instant review.

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).

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 Respondent's appeal and affirm the decision below in its entirety.

Having affirmed the Decision of the Hearing Officer, we conclude that Complainant has prevailed in this matter and is therefore entitled to an award of reasonable attorneys' fees and costs. See, e.g., Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782 (1989). In rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar methodology for fee computation. See Fontaine v. EBTEC Corp., 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 reasonably expended to litigate the successful

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 will adjust it either upward or downward or not at all depending on several factors.

Calculation of hours reasonably expended involves the following. First, specifying and appropriately accounting for who has done the work (e.g., senior partner, junior associates, paralegal). Second, eliminating billed-for-time that is beyond that consistent with a standard of reasonable efficiency and productivity. Third, subtraction of hours which appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of that portion of the claim which was successful. Fourth, elimination of 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. Salem, 14 MDLR 1365 (1992).

In support of his petition for attorney fees and costs, Complainant submitted an affidavit of counsel and an itemized record of billing hours and costs. Complainant submitted a petition seeking \$24,584.00 in fees and \$3,002.35 in costs. Respondent has not submitted an opposition to Complainant's request for fees and costs. Having reviewed the affidavit submitted, as well as the itemization costs provided, we conclude that the request is reasonable, and, therefore, allow it.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer and issue the following order of the Full Commission:

(1) Within sixty (60) days of receipt of this decision, Respondent shall pay to Complainant the sum of \$17,500.00 in compensatory and emotional distress damages 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; and,

(2) Respondent shall pay to Complainant the sum of \$24,584.00 in attorneys' fees to Complainant and \$3,002.35 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 18th day of September, 2003.

Cynthia A. Tucker, Commissioner

Dorca I. Gomez, Chairwoman