

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

WILLIAM DEROUCHE and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Complainants

v.

DOCKET NO. 96-BEM-0558

TOWN OF WAKEFIELD,
WAKEFIELD RETIREMENT BOARD, and
WAKEFIELD MUNICIPAL GAS AND
LIGHT DEPARTMENT,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before the Full Commission on Complainant's Supplemental Petition for Attorneys' Fees and Costs. A September 17, 2003, Full Commission decision affirmed the findings of fact and conclusions of law of the Hearing Officer and ordered Respondent Wakefield Municipal Gas & Light Department ("WMGLD") to pay Complainant's counsel the amount of \$48,890.40 in attorneys' fees and costs.

On June 12, 2006, a Superior Court Judge reversed the emotional distress award, ruling that Complainant had failed to present sufficient evidence of emotional distress.

DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass.1 (2006).

Complainant had also filed a Petition in Superior Court requesting an award of fees incurred in connection with the parties' appeal of the decision to the Full Commission.

The Court concluded that the MCAD was the correct forum for Complainant to file his

claim for “fees incurred between the filing of a petition for attorney’s fees and costs and the issuance of the Decision of the Full Commission of the MCAD.” Id.

On June 23, 2006, Complainant filed his Supplemental Petition for Attorneys’ Fees and Costs against WMGLD. Complainant asserts that he is entitled to recover attorney’s fees and expenses he incurred from June 14, 2002, the date he requested an award of attorney’s fees and costs in his original Petition, through September 17, 2003, the date on which the Full Commission issued its decision. He seeks fees for work incurred in connection with this appeal and with preparing fee petitions. Respondent opposes the award of any supplemental attorneys’ fees and costs.

COMPLAINANT’S PETITION FOR SUPPLEMENTAL ATTORNEYS’ FEES AND COSTS

Having previously affirmed the Hearing Officer’s decision in favor of the Complainant, and having concluded that the Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs, we now conclude that he is entitled to an award of attorneys fees associated with this appeal. See M.G.L. c. 151B, § 5.

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 then examine the resulting figure, known as the “lodestar”, and adjust it either upward or downward or not at all depending on various factors.

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). 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.2d 5 (1st Cir. 1982); 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 contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Baker, supra., at 1099.

Complainant’s counsel has filed a petition seeking supplemental attorneys’ fees and costs in connection with his Full Commission appeal. He requests \$6,804.00 for work done on appeal, charging a rate of \$180.00 per hour, costs in the amount of \$54.00, and fees of \$1,475.00 incurred in connection with the preparation of the Supplemental Petition, charging a rate of \$250.00 per hour. He supports the request with an affidavit and contemporaneous time records.

Having reviewed the contemporaneous time records and supporting affidavit that accompany the Complainant's supplemental attorneys' fees request, and based on this and similar matters before the Commission, we conclude that the amount of time Complainant's counsel spent on preparation and litigation of this claim with regard to defending WMGLD's appeal is reasonable.

We further conclude that Complainant's hourly rate of \$180.00 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases, are within the range of rates charged by attorneys in the area with similar experience and are reasonable.

We find that as a matter of public policy, attorneys' fees awards should include work done on appeal. "In so concluding, we recognize that the obligation of the Complainant's counsel does not always end upon the issuance of the Single Commissioner's decision." Cochran v Commonwealth of Mass. Dep't of Corr., 17 MDLR 1364, 1378 (1995); see MCAD and Stephan v SPS New England, Inc., 27 MDLR 249 (2005).

However, when a Complainant does not substantially prevail on all claims, any award of attorneys' fees must be reduced to reflect the partial success. Carmichael v. Wynn & Wynn, 18 MDLR 209 (1996); Sanderson v. Town of Wellfleet Fire Dept., 19 MDLR 60 (1997); Marathas v. Holiday Inn, 22 MDLR 391(2000). The Commission may exercise its discretion to reduce the amount of fees requested by some factor which may reasonably be said to represent time expended in pursuit of Complainant's unsuccessful claims. Here, although Complainant prevailed in defending against Respondent's appeal, he did not prevail on the one issue he appealed to the Full Commission. Accordingly, we

conclude that a reduction in Complainant's requested fee of \$2, 268 for services in connection with his appeal to the Commission is fair and reasonable under the circumstances of this case.

Having reviewed this Petition, we find that the fees incurred with respect to opposing Respondent's appeal are reasonable and therefore award Complainant \$4,536.00 for defending against Respondent's appeal. However, we decline to award recovery for Complainant's appeal, as he was not the prevailing party. We also decline to award recovery for of Complainant's request for \$1,475.00 for the hours spent by counsel preparing the supplemental fee petition. See Abdur-Rashid v Clair Toyota, 95-BEM-2543(2002) (Commission finds unreasonable attorney's fee request for the hours spent preparing the fee petition). Further, the \$54.00 in costs requested should not be granted, as they were not sufficiently documented.

ORDER

For the reasons set forth above, we issue the following order of the Full Commission:

Respondent WMGLD shall pay Complainant's counsel the sum of \$4,536.00 in attorneys' fees within sixty (60) days of receipt of this Order.

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 within 30 days of receipt of this decision 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, § 6.

SO ORDERED this 15th day of, August 2007.

Walter J. Sullivan, Jr.
Chairman

Martin S. Ebel
Commissioner