

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 us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Respondent Wakefield Retirement Board had discriminated against Complainant on the basis of age in regard to the processing of Complainant's retirement in 1993 and its failure to inform him that his retirement was not mandatory upon reaching age sixty-five. She further concluded that Complainant had proven retaliation against Respondent Wakefield Municipal Gas & Light Department ("WMGLD") for assigning him to the line crew rather than the home service crew upon his May 1996 return, reasoning that reinstating him as lead line worker on the line crew rather than the home service crew constituted an adverse action in retaliation for filing a complaint with the Commission. The Hearing Officer dismissed the claim against the Town of Wakefield. Respondent WMGLD 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, 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 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 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 1.16(8)(f).

Respondent WMGLD has appealed the Decision of the Hearing Officer on the grounds that: a) the Hearing Officer erred in concluding that the lead line worker position on the line crew and lead line worker on the home service crew are functionally two separate positions; b) the Hearing Officer's conclusion that Complainant's assignment to the line crew constituted an adverse action was erroneous as a matter of law and unsupported by substantial evidence; c) the Hearing Officer's reliance on hearsay testimony was erroneous; d) the Hearing Officer's conclusion that Respondent's superintendent contradicted his deposition testimony is unsupported by substantial evidence; e) the Hearing Officer's award of emotional distress damages is excessive and

not supported by the evidence; f) the award of back pay is not supported by substantial evidence; and g) the award of front pay damages was speculative and not based on substantial evidence. WMGLD also attempts, for the first time to reserve its right to a jury trial. Complainant has appealed the decision on the ground that the Hearing Officer's decision not to impose interest on the damages award was an error of law.

With regard to the Hearing Officer's conclusions that the lead line worker position on the line crew and lead line worker on the home service crew are functionally two separate positions and that Complainant's assignment to the line crew constituted an adverse action, we find that the Hearing Officer assessed all of the evidence and ultimately found Complainant's evidence to be more persuasive. It is the responsibility of the Hearing Officer to weigh the evidence when deciding disputed questions of fact. Based on her findings, the Hearing Officer's conclusions that they are functionally two separate positions and that Complainant's assignment to the line crew constituted an adverse action are supported by substantial evidence.

With regard to Respondent's argument that the Hearing Officer relied on hearsay testimony, we note that the Commission is not bound by the formal rules of evidence and the Hearing Officer retains significant discretion in making evidentiary rulings. Hearsay and other evidence that might be excluded from a court proceeding may be admissible in a Commission proceeding. We have previously held that it is the responsibility of the Hearing Officer to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact. 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).

We also find that there was substantial evidence in the record to award emotional distress. When considering the request of a party to reduce a fact finder's award of damages for emotional distress, it is proper for the Full Commission to extend "great deference" to the hearing officer. Baldelli v. Town of Southborough, 18 MDLR 167, 170 (1996). "This is because the fact-finder had the exclusive opportunity to observe the witness and weigh the credibility of testimony based on demeanor and countless other tangible factors that occur in face to face communication." Said v. Northeast Security, Inc., 22 MDLR 315, 318 (2000). The Hearing Officer's decision to award Complainant \$50,000 in emotional distress damages against WMGLD is supported by substantial evidence and not excessive. We further find there is insufficient basis, based on the applicable scope of review, to disturb the award of back pay and front pay as issued by the Hearing Officer.

As a result of our 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 and conclusions of law made by the Hearing Officer.

With regard to the Hearing Officer's decision not to impose interest on the damages award, the basis of Complainant's appeal, we find that her decision was not an error of law. The Hearing Officer found that Respondent Town of Wakefield is a municipal corporation organized under and existing pursuant to the Constitution and the law of the Commonwealth of Massachusetts and that WMGLD was established pursuant to M.G.L. c. 164, §4, is controlled by a Board of Light Commission who appoints the Manager of the Department, and is a Department of the Town of Wakefield whose employees are paid through the Town Treasurer's office by Town-issued paychecks.

Interest on MCAD awards does not lie against the Commonwealth or its instrumentalities in the absence of express statutory authority. See Boston v. Massachusetts Comm'n Against Discrimination, 30 Mass. App. Ct. 234, 245-246 (1995). The Hearing Officer concluded that WMGLD was a municipal entity and that no interest accrues on the damage award. We affirm the decision of the Hearing Officer not to impose interest on damage award.

RESPONDENT'S ASSERTION OF A RIGHT TO A JURY TRIAL

As part of its Petition for Review, Respondent WMGLD attempts, for the first time, to reserve its right to a trial by jury pursuant to 804 C.M.R. 120(5) and Lavelle v. MCAD, 426 Mass 332 (1997). However, WMGLD, as a municipal entity, does not have a right to a jury trial pursuant to Lavelle. See Lavelle, 426 Mass. at 337, n.8 (“A governmental respondent’s right to a jury trial, if any, has implicitly been waived in G.L. c. 151B, at least where a complainant does not elect a judicial determination of her claim.”) Furthermore, even if such a right were available, WMGLD’s failure to comply with the requirement in 804 C.M.R. 120(5)(c) that a respondent must reserve its right in writing to the Commission within 30 days after certification to public hearing constitutes a waiver of any right to a trial by jury. This case was certified to public hearing on January 19, 2001. WMGLD did not attempt to reserve its jury right until July 26, 2002. As such, even if WMGLD did have an ability to receive a Lavelle jury trial after final Commission action, that right has been waived.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of the Complainant, we conclude that the Complainant has prevailed in this matter and is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, Section 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 examine the resulting figure, known as the "lodestar", and adjust it either upward or downward or not at all depending on various factors.

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). Time beyond that consistent with a standard of reasonable efficiency and productivity is eliminated. 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. 2d5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992)

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).

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. *Id.* at 1099.

Complainant's counsel has filed a petition seeking attorneys' fees in the amount of \$49,105.40 at rates ranging from \$150 to \$250 per hour, supporting the request with contemporaneous time records, and also requests \$1,626.52 in costs. Complainant's attorney also requests an enhancement of fifty percent of the attorneys' fees awarded based on its exceptional success in the case's outcome, and contingency risks assumed by counsel, including the potential obstacle of the statute of limitations barring the case.

Respondent WMGLD opposes Complainant's petition for attorney's fees on the grounds that the time expended on the case was excessive, over 400 hours for four separate attorneys, that a large part of the fee requested relates to the liability of the other Respondents,¹ that WMGLD is only liable for retaliation and not discrimination, and that fees should not be awarded for time spent on an unsuccessful Motion to Compel Production of Documents, correspondence with the media, communications with an unknown attorney, and the drafting of a demand letter on behalf of someone not a party to the hearing.

¹ A July 2002 letter from Complainant's attorney notified the Commission that Respondent Wakefield Retirement Board had paid Complainant \$21,723.10 in attorneys' fees, and the request was modified to \$49,105.40 in attorneys' fees against WMGLD. Respondent's above argument, that a large part of the fees requested relates only to the liability of the other Respondents, is therefore not applicable.

Having reviewed the contemporaneous time records that support the attorneys' fees requests, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation and litigation of this claim is reasonable with the exception of the media correspondence charge of \$45.00, as well as a reduction of \$170.00 for communication with an unknown attorney and for time spent on behalf of someone ultimately not a party to the hearing. Attorneys' fees and costs should be granted as requested, for a total award of \$48,890.40.

We further conclude that Complainant's attorneys' hourly rates are consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and are reasonable. Thus, the lodestar figure here is \$48, 890.40 for attorneys' fees and costs. We decline to enhance this figure.

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. Respondent Wakefield Retirement Board shall pay Complainant \$115,000 in damages for emotional distress and back pay within sixty (60) days of receipt of this Order;
2. Respondent Wakefield Municipal Gas & Light Department shall pay Complainant \$260,000 in damages for back pay, front pay and emotional distress within sixty (60) days of receipt of this Order;

3. Respondent Wakefield Municipal Gas & Light Department shall pay to Complainant's counsel the amount of \$48,890.40 in attorneys' fees and costs 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. 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 seeking judicial review within 30 days of receipt of this decision and 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 17th day of September, 2003.

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner