

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
TIMOTHY BAKER,
Complainants

v.

DOCKET NO. 03-BEM-02002

PLYMOUTH COUNTY
SHERIFF'S DEPARTMENT,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Timothy Baker. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for gender discrimination for the manner in which it investigated Complainant's sexual harassment complaint and she dismissed Complainant's claims of gender discrimination and constructive discharge for lack of evidence. However, the Hearing Officer concluded that Respondent was liable for unlawful retaliation in violation of M.G.L. c. 151B, §4(4) when it failed to reappoint Complainant to the position of lieutenant and placed him on unauthorized leave after he engaged in protected activity. Respondent appealed to the Full Commission.

STANDARD OF REVIEW

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. Massachusetts Comm'n Against Discrimination, 365 Mass. 357, 365 (1974); G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and 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. Massachusetts Comm'n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine, inter alia, 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.

BASIS OF THE APPEAL

Respondent argues that the Hearing Officer erred by finding that Complainant was not reappointed to the position of lieutenant due to his expression of concerns about sexual harassment from a female co-worker. Respondent asserts there was clear, undisputed evidence in the record to obviate this finding. Respondent also argues that the Hearing Officer erred as a matter of law by failing to shift the burden of proof to Complainant once Respondent had articulated a legitimate nondiscriminatory reason for its decision not to reappoint Complainant, that of poor performance.

Complainant contends, and we concur, that the Hearing Officer's responsibility is to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of

fact and the Full Commission defers to those findings. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982).

With regard to Respondent's challenges to the Hearing Officer's determinations of credibility, we reiterate that it is well established that the Commission defers to these determinations, which are the sole province of the fact finder. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

In this case, the Hearing Officer specifically found that the evidence Respondent offered in support of its position was not credible, and that therefore it did not meet its burden to support its reason with credible evidence, as is required. Once Respondent fails to meet its burden of producing credible evidence showing that the reasons advanced for its employment decisions were the real reasons, the inquiry stops and Complainant is entitled to judgment based on the presumption created by the evidence supporting a *prima facie* case of discrimination. Abramian v. President & Fellows of Harvard College, et al., 432 Mass. 107, 117 (2000). This, along with testimony from other witnesses who supported Complainant's assertions, led her to conclude that Complainant's demotion constituted unlawful retaliation, thus she was not required to shift the burden back to Complainant to show pretext.¹ We conclude that the Hearing Officer's decision was rendered in accordance with the law, and that her findings were supported by substantial evidence. Thus we see no reason to disturb her findings.

Respondent also argues that the Hearing Officer's award of \$75,000 in emotional distress damages is unsupported by substantial evidence. As noted in the Hearing Officer's decision, the Commission is authorized to award damages to Complainant for emotional distress suffered as a direct and probable consequence of retaliation by Respondent. Bowen v. Colonnade Hotel, 4

¹ The Respondent did not challenge the Hearing Officer's conclusion that Complainant's placement on unauthorized leave was unlawful retaliation.

MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976).

An award of emotional distress damages must be supported by substantial evidence and the record must be clear with respect to the factual basis of such damages and the causal connection between the unlawful act and the emotional distress. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004). In this case, the Hearing Officer determined there was substantial evidence that Respondent's unlawful conduct was the source of emotional distress, including evidence from his treating mental health professional that Complainant suffered from extreme anxiety resulting from his recent demotion and negative work evaluation. This very same psychologist noted that Complainant was sufficiently stressed to merit a medical leave of absence. The Hearing Officer also relied on Complainant's testimony about his symptoms of depression, anxiety, migraine headaches, nausea and diarrhea resulting from the stress of the discrimination. She noted that his emotional distress continued for some time. While Respondent contends that the Hearing Officer should have attributed portions of the emotional distress to Complainant's diagnosis of Behcet's disease during the time following his non-reappointment, the Hearing Officer found a sufficient causal connection between Respondent's unlawful act (which occurred prior to Complainant's diagnosis of Behcet's disease) and Complainant's emotional distress to support her award of emotional distress damages. We conclude that the Hearing Officer's award of emotional distress damages is reasonable and proportionate to the injury proved and we find no reason to disturb her ruling.

We have carefully reviewed Respondent's grounds 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 herein, and find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. On the above grounds, we deny the appeal and affirm the

Hearing Officer's decision.

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 supported by detailed time records seeking attorneys' fees in the amount of \$86,800.00 and costs in the amount of \$2,330.86. Respondent has filed an opposition thereto. For the following reasons, we deem it appropriate to reduce the amount of attorneys' fees sought by Complainant.

A. Fees

The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum and the complexity of the matter. In determining what constitutes 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 a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate which it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including the complexity of the matter.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding up all the hours for which counsel seeks reimbursement. The Commission carefully reviews the Complainant's submission and does not simply accept the submitted number of hours as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass.

1984). Hours for which compensation is sought 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 the Commission determines were expended reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and the tasks involved.

In this matter, Complainant's attorneys, Susan Howards and Jeffrey M. Sankey, filed affidavits in support of Complainant's Petition for Fees and Costs, requesting a total of \$86,800 in attorneys' fees for a total of 348.70 hours of work performed (233 hours for Attorney Howards and 115.7 for Attorney Sankey).² The request is supported by contemporaneous time records denoting the number of hours expended in this matter on Complainant's behalf. Both Attorneys Howards and Sankey are experienced employment attorneys who have requested that their hours be compensated at the hourly rate of \$250.00.

At the outset, we conclude that the expertise of Attorneys Howards and Sankey in the area of employment discrimination law is amply supported by their experience as outlined in their affidavits. We conclude that the hourly rate of \$250.00 is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and is well within the range of rates charged by attorneys in Boston of similar experience.

Upon a thorough review of both attorneys' time records, we concur with Respondent that certain of the hours for preparation and litigation of the case by Attorney Howards are duplicative. Her contemporaneous time records list work performed from the date Complainant

² Although Attorney Howards listed a total of 231.50 hours of work that she performed on this case, a careful inspection of her billable hours reveals a total of 233 hours of work and we have, therefore, adjusted her hours accordingly.

first consulted her, on November 11, 2003, through the end of the case in March of 2009. By contrast, Attorney Sankey's records are for work performed from the time he was retained as trial counsel for public hearing and began working on the case on January 10, 2007, through completion of the matter. Attorney Sankey was lead counsel for the litigation at the public hearing, while Attorney Howards assumed the role of co-counsel and was second chair at the hearing. Together, they seek compensation for a total of 244.95 hours of work to prepare for and litigate the case. Attorney Howard seeks compensation for 129.25 hours related to the preparation and litigation at the hearing. Attorney Sankey seeks compensation for 115.70 hour of work for the same purpose. However since Attorney Howards was second chair on the case, her participation in the hearing was limited. Respondent notes that Attorney Howards conducted only the opening and limited portions of Complainant's direct exam and that all other witnesses in this five day hearing were examined by Attorney Sankey. The trial in this matter was not unduly complex or document intensive. It seems unreasonable that two attorneys would need to bill in excess of 100 hours each for the same preparation and conduct of the hearing and we conclude that Attorney Howard's billing is excessive given her limited role in the hearing. Given these circumstances we find it reasonable to reduce the number of compensable hours by Attorney Howards for the preparation and conduct of the hearing, by one-third of 129.95 hours, a reduction of 43.08 hours, for a total of 86.12 hours compensable hours. We believe this reduction fairly represents Attorney Howards' participation in the hearing and reflects duplicative work to prepare for and conduct the public hearing (*i.e.*, reviewing files, organizing files, second seat at public hearing).

We also conclude that a further reduction of fees is merited on the grounds that Complainant did not prevail on his gender discrimination or constructive discharge claims.

While we find that Complainant's gender discrimination claim shares some common facts with his successful claim of retaliation, Complainant's constructive discharge claim and his retaliation claim are not sufficiently interrelated so as to warrant reimbursement as if he had prevailed on both of those claims. The Hearing officer dismissed Complainant's constructive discharge claim because there was no evidence presented at hearing that Complainant had been separated from his employment while he was on medical leave. See Kelley v. Plymouth County Sheriff's Dept., 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)]. Accordingly, we must determine a reduction that fairly reflects these facts. See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655 (2000). We conclude that a reduction of the number of compensable hours in the lodestar equation by a factor of one-third is appropriate, because Complainant did not prevail on his constructive discharge claim, while the successful retaliation claim shared sufficient common facts with the unsuccessful gender discrimination claim so as to make separation of the hours spent on either claim impracticable. We find that Complainant's successful retaliation claim was sufficiently intertwined with his gender discrimination claim so as to merit compensation. The reduction by one-third will be made against the compensable hours of both attorneys.

Attorney Howards sought compensation for a total of 233 hours. We have reduced that by a total of 43.08 hours for the preparation and litigation of the case. Therefore a further reduction of one third will be made on the remaining 189.92 hours. In addition, we will reduce Attorney Sankey's fee request for 115.70 hours by one-third. This reduction results in a total award of fees of \$31,645 to Attorney Howards and \$19,283.33 to Attorney Sankey.

B. Costs

Complainant also seeks reimbursement for costs in the amount of \$2,330.86. These costs include expenses related to photocopies and tapes. We find that these costs are adequately documented and reasonable. Accordingly, we award them to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer and award attorneys fees as follows: \$31,645 to Attorney Howards; \$19,283.33 to Attorney Sankey. We award costs to Complainant in the amount of \$2,330.86.

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. 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 24th day of September, 2013

Julian Tynes
Chair

Sunila Thomas George
Commissioner

Jamie Williamson
Commissioner