COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DOROTHEA CODINHA,
Complainants

v. DOCKET NO. 15-BEM-00248

BEAR HILL NURSING CENTER, INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Eugenia Guastaferri in favor of Complainant, Dorothea Codinha, on her claims of discrimination based on disability and age. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination on the basis of age and disability in violation of M.G.L. c. 151B, §§ 4(1B) and 4(16). Respondent has appealed to the Full Commission. For the reasons discussed below, we affirm the Hearing Officer's decision.

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. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 1(6).

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. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); see MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(1)(h).

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer erred by making certain findings that are not supported by substantial evidence and determining that Respondent discriminated against Complainant based on her age and disability. After careful review we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984).

Respondent argues that the Hearing Officer erred by making certain findings of fact that

are not supported by substantial evidence. We have reviewed the relevant findings supporting the Hearing Officer's decision, and determine that these findings are supported by evidence a reasonable mind would find sufficient. Respondent argues that the Hearing Officer should have credited the testimony of certain witnesses over others in making her findings of fact. We disagree. The Full Commission defers to the Hearing Officer's credibility determinations and findings of fact, absent an error of law or abuse of discretion School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007 at 1011. The Hearing Officer is in the best position to observe the witnesses' testimony and demeanor, and her credibility determinations generally should not be disturbed. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The review standard does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and testimony, as it is the Hearing Officer's responsibility to weigh the evidence and decide disputed issues of fact. We will not disturb the Hearing Officer's findings of fact, where, as here, they are fully supported by the record.

Respondent argues that the Hearing Officer erred by determining that Respondent discriminated against Complainant based on her disability. Specifically, Respondent asserts that Complainant could not establish that she was able to perform the essential functions of her job, and thus, she could not establish a prima facie case of disability discrimination. We disagree.

To establish a prima facie case of disability discrimination the Complainant must show that (1) she was disabled under the meaning of M.G.L. c. 151B; (2) she was able to perform the essential functions of her job with or without a reasonable accommodation; (3) she was terminated or otherwise subject to an adverse action by her employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on her disability. See

Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 3 (1998).

The Hearing Officer found that in November 2013, Complainant tripped and fell at home and broke her wrist. As a result, Complainant was unable to work and was approved for a medical leave of absence. In March of 2014, Complainant was permitted by her doctor to return to work with a five-pound lifting restriction. The Hearing Officer credited Complainant's testimony that she would have been able to perform many job duties, arguably essential functions, with the five-pound lifting restriction had she been permitted to return to work in March 2014. Although other employees with work related injuries had been permitted to return to work with lifting restrictions, Respondent did not allow Complainant to return to work with the lifting restriction and informed Complainant that she would need to extend her medical leave of absence. Respondent never discussed the option for an accommodation with the Complainant to determine if she could perform essential job functions with a lifting restriction. Because Respondent failed to engage in an interactive dialogue with Complainant about an accommodation, the Hearing Officer determined that this evidenced Respondent's discriminatory animus.

Further, when Complainant was cleared to return to work on full duty with no restrictions, Respondent terminated her employment. According to Respondent, it terminated Complainant's employment after it undertook an investigation into reported concerns regarding Complainant's conduct and work performance. The Hearing Officer determined that Respondent's stated reasons for terminating Complainant were a pretext for discrimination. This determination was supported by evidence in the record that Respondent's investigation into Complainant was suspect based on: (1) the timing of the investigation, which occurred in April 2014 while Complainant was out on medical leave; (2) the lack of complaints made about the

Complainant in 2014 prior to her medical leave;[1] (3) Complainant's favorable annual performance evaluations; and (4) contradictory testimony from Respondent's witnesses as to the motivation for the investigation. The Hearing Officer did not err in determining that Respondent discriminated against the Complainant based on her disability.

Respondent argues that the Hearing Officer erred by determining that Respondent discriminated against Complainant based on age. Specifically, Respondent asserts that the age-related comments about Complainant made by her co-workers did not support a claim of age discrimination. Respondent also argues that the Hearing Officer erred by failing to apply the McDonnell-Douglas framework to Complainant's age discrimination claim. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (providing that in order to establish a prima facie case of age discrimination the Complainant must prove that: (1) she is a member of a protected class protected by M.G.L. c. 151B; (2) she was performing her position in a satisfactory manner; (3) she was terminated; and (4) she was replaced by someone substantially younger). Although the Hearing Officer did not explicitly reference the McDonnell-Douglas framework in her analysis, her findings supported by substantial evidence in the record confirm the Hearing Officer's determination that Complainant established a prima facie case of age discrimination.

The Hearing Officer found that Complainant was one of the oldest employees of Respondent, at age seventy-two, and that after she was terminated she was replaced by a woman who was in her fifties. The Hearing Officer also credited Complainant's testimony that she was referred to as "the old one" and that a supervisory nurse asked her when she intended to retire. These findings were supported by substantial evidence in the record and were sufficient to

[1] The Hearing Officer acknowledged that there was evidence of prior warnings to Complainant during her eighteen years of employment. However, the evidence indicated that Complainant did not receive any warnings after 2009, five years prior to the events at issue.

establish Complainant's prima facie case of age discrimination. The Hearing Officer found that, although Respondent asserted that Complainant was terminated based on concerns about her conduct and poor work performance, there had been no concerns raised about Complainant prior to her medical leave. Further, the Hearing Officer found that Complainant's recent annual performance reviews demonstrated that she was a "competent, geriatric care giver" who "works well with others."[2] Based on these findings, the Hearing Officer concluded that the reasons given by Respondent for Complainant's termination were a pretext for discrimination.

In sum, we agree with the Hearing Officer's determination that Respondent discriminated against the Complainant based on her age and disability.

PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorneys' Fees and Costs on April 14, 2017, to which Respondent filed an Opposition. Complainant also filed a Supplemental Petition for Attorneys' Fees and Costs on November 1, 2017, seeking fees and costs related to responding to Respondent's Petition for Review. Complainant's Petitions seek attorneys' fees in the amount of $53,267.50 and costs in the amount of $2,919.90. The total amount of fees sought represents a total of 164.5 hours of compensable time at an hourly rate of $325.00. We determine that the hourly rate sought by Complainant's petition is consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases. The petition is supported by contemporaneous detailed time records noting the amount of time spent on tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover reasonable attorneys' fees for the claims on which Complainant prevailed. The determination of whether a fee sought is

[2] See Joint Exhibits 10 and 11.

reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate 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 complexity of the matter. Baker v. Winchester School Committee, 14 MDLR 1097 (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. Id. at 1099. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992).

Respondent has filed an Opposition to the fee petition arguing that the amount sought should be reduced because Complainant was only partially successful, as she received no award of lost wages or lost benefits and failed to establish that Respondent had a pattern of terminating employees based on age and disability. Additionally, Respondent argues that the fee award should be reduced because certain hours expended and the amount of fees and costs were unnecessary and excessive.

Having reviewed Respondent's Opposition and the Petition for Attorneys' Fees we

determine that Complainant's fee request, along with counsel's time records, reveal a fair accounting of the work she performed in furtherance of Complainant's case. We do not find that the hours expended were unnecessary and excessive. Accordingly, we grant Complainant's petition for $53,267.50 in attorneys' fees and award costs in the amount of $2,919.90.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is confirmed in its entirety.

1. Respondent shall cease and desist from all acts that violate M.G.L. c. 151B, §§ 4(1B) and 4(16).
2. Respondent shall pay to the Complainant the amount of $35,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondent shall conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources director, managers, and supervisors on issues related to disability and age discrimination and reasonable accommodation. Following the training session, Respondent shall report to the Commission the names of persons who attended the training. Respondent shall repeat the training session for new personnel hired or promoted after the date of the initial training session.
4. Respondent shall pay to the Complainant attorneys' fees in the amount of $53,267.50 and costs in the amount of $2,919.90, with interest thereon at the rate

of 12% per annum from the date the petition for attorneys' fees and costs was filed, until paid, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue.

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 service 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 service 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 26th day of March, 2019.

Sunila Thomas George
Commissioner

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner