

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DELOURIS COOK,
Complainants

v.

DOCKET NO. 02-BEM-02867

JAMES MISKEL,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a November 23, 2009 decision by Judith E. Kaplan in favor of Complainant Delouris Cook solely against the individual Respondent, James Miskel, and assessing damages for Complainant's lost wages against Miskel. Complainant's initial claim charged her employer, the Massachusetts House of Representatives, and James Miskel, a Court Officer, also employed by the House of Representatives with unlawful discrimination in employment on the basis of gender/sexual harassment, in violation of M.G.L. c. 151B, § 4 (4) and (16A). Complainant charged both Miskel and her employer, the Commonwealth of Massachusetts House of Representatives, with discrimination based on her sex and sexual harassment as a result of a sexual assault perpetrated against her by Miskel in an elevator at the Massachusetts State House, her place of employment. She also charged the House of Representatives with disability discrimination under the ADA and retaliatory constructive discharge, for refusing her request to work at a location in the district rather than at

the State House. Complainant claimed that as a result of the sexual assault she suffered from post-traumatic stress disorder and could no longer work at the State House location. She alleged that the House of Representatives denied her a reasonable accommodation for the disability, her request to work at a location other than the State House, and that the denial of her request resulted in her constructive discharge. Complainant later amended the Complaint to add Representative Christine Canavan as a party-Respondent. The Investigating Commissioner dismissed all claims against the House of Representatives and Representative Canavan. He found probable cause only with respect to the claim of sexual harassment against Miskel. It is not clear which sections of the statute the Investigating Commissioner relied on in finding Probable Cause against Miskel.

For the reasons stated below, we conclude that sole issue before the Commission Hearing Officer was whether liability lies against Miskel individually for his conduct under the language of G.L.c. 151B, § 4(4A). This section of c. 151B makes it unlawful for any person to interfere with the exercise or enjoyment of any right granted or protected by that statute. Complainant argued that Miskel is liable as an individual for interference with her right to a work environment free from sexual harassment, a right guaranteed by c. 151B's prohibitions against sexual harassment in the workplace. The Hearing Officer found that Miskel was liable pursuant to § 4(4A). She went on to conclude that his unlawful conduct led to Complainant's constructive discharge, rendering him liable for Complainant's lost wages in the amount of \$51,765 resulting therefrom.¹ Respondent has filed a Petition for Review to the Full Commission appealing the decision below.

¹ Complainant did not seek damages for emotional distress.

SUMMARY OF FACTS FOUND

Complainant was employed by the House of Representatives as an Administrative Assistant to Representative Christine Canavan from March 1990 until May 31, 2002. Respondent Miskel was employed by the House of Representatives as a Court Officer. In her complaint filed with the Commission, which is part of the record, Complainant alleged that as early as the summer of 2001, Miskel began asking her out, but she told him she was not interested. She claimed she was not intimidated or threatened by this behavior. However, on March 6, 2002, Miskel sexually assaulted her in an elevator at the Massachusetts State House. According to Complainant, Miskel pulled her hair forcing her head back, restrained her arms, rubbed his hand down her back and over her buttocks and forced his hand up under her skirt, grabbing her vaginal area. Following the assault, Complainant returned to work on March 7 and 8, but was shaken up and fearful. She reported the incident to a friend, to Representative Canavan and then to the Massachusetts State Police with whom she filed a criminal complaint against Miskel. After an internal investigation, the House of Representatives terminated Miskel's employment on March 13, 2002. On January 9, 2003, a criminal complaint was issued against Miskel and on July 22, 2003, he was convicted of indecent assault and battery and was sentenced to one year probation.

Following the assault, Complainant began commuting to work with Representative Canavan because she could not cope with the crowds on public transportation and was afraid to enter the State House alone. The assault adversely affected Complainant's emotional and physical well-being: she had trouble concentrating, no longer cared about her work, stopped taking calls and going to meetings for the Representative, and suffered from low self-esteem. She also suffered from nausea, lost her appetite, and lost weight. Complainant worked her last

day on March 13, 2002 because she felt her work environment was forever altered, and she was no longer capable of performing her job.

On April 4, 2002, Complainant applied for workers' compensation benefits and began receiving benefits on April 5, 2002, retroactive to March 18, 2002. She received weekly benefits of \$372.01 through July 3, 2002. Complainant was being treated for post traumatic stress disorder and anxiety at this time. Between March and May of 2002, Complainant was in contact with Representative Canavan, and indicated that she would be willing to return to work if she did not have to come into the State House, but this request was declined as not feasible. An Independent Medical Examiner determined that Complainant could return to work as of May 31, 2002; however, Complainant did not return to work and her employment was terminated on May 31, 2002.

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); 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. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full

Commission must also review the decision for any errors of law. Its role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR § 1.23.

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer wrongly concluded that Complainant met her burden of proving that she was subjected to a hostile work environment under M.G.L. c. 151B, § 5. Respondent's second ground of appeal is that the Hearing Officer erred in finding that Complainant's lost wages "resulted from" Respondent's conduct and assessing liability for lost wages against him.

DISCUSSION

Individual Liability under 151B, § 4(4A)

We have carefully reviewed Respondent's grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We find that the Hearing Officer did not err in concluding that the sexual assault by Respondent, Miskel, subjected Complainant to a sexually hostile work environment.

The Hearing Officer properly credited the testimony of Complainant that she perceived her workplace as threatening, hostile and intimidating after the vicious sexual assault by Miskel on the premises. The Hearing Officer concluded that Miskel's assault met the definition of sexual harassment² and was "sufficiently egregious to create an intimidating, hostile, and

² Section 1(18) of c. 151B defines sexual harassment as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when...(b) Such advances, requests or conduct have the purpose or of effect of unreasonably interfering with an individual's

sexually offensive work environment for Complainant and interfered with her ability to perform her job. The Hearing Officer credited Complainant's testimony that prior to the assault, she considered her work environment to be "pleasant and challenging and she was particularly fond of helping constituents resolve their problems." (Decision of the Hearing Officer, Finding no. 6.) The Hearing Officer found that subsequently, Complainant could no longer focus, concentrate or answer a simple question, and no longer enjoyed talking with constituents and attending hearings for Canavan. (Id.) Complainant felt threatened and intimidated by Respondent's assault, and was overwhelmed by the thought that she would have to walk past the elevator where the attack occurred. She felt she could no longer function at the premises where the assault occurred. We properly defer to these findings of the Hearing Officer which are supported by substantial evidence. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

We conclude that the appropriate articulation of liability against Miskel is for a violation of c. 151B, § 4(4A) by intimidation and interference with Complainant's right to a work environment free of sexual harassment. Section 4 (4A) prohibits intimidation, threats and interference with the exercise or enjoyment of rights protected by the statute. There is no question but that a sexual assault in the workplace, particularly one of this severity, can constitute sexual harassment. While section 4 (16A) prohibits an *employer* from sexually harassing any employee, an *individual* who perpetrates acts of sexual harassment in the workplace may also be held liable for those acts. Beaupre v. Smith & Associates, et al., 50 Mass.App. Ct. 480 (2000); Woodason v. Town of Norton School Committee, 25 MDLR 62, 64 (2003) The Hearing Officer discussed this theory of liability citing precedent for individual liability under section 4 (4A) of the statute and found that Miskel had violated the statute. We do

work performance by creating an intimidating, hostile, humiliating or sexually offensive work

not believe that this was an error of law.

Constructive Discharge and Liability for Lost Income

The more difficult issue we must confront is whether, as a matter of law, the Hearing Officer erred in finding Respondent Miskel's actions were the proximate cause of the alleged constructive discharge, thereby rendering him personally liable for Complainant's loss of income. We hold that the answer to this question is no.

The Respondent argues that he is not liable for the Complainant leaving her employment, and that the Hearing Officer's findings with respect to causation were lacking. He asserts that the Hearing Officer failed to consider evidence of other reasons why Complainant did not return to work, including problems in her personal life. He asserts that the Hearing Officer ignored evidence that Complainant wanted to work closer to home in the district because, at the time, she was in the midst of a divorce and caring for two dependent children and her aging, ill mother. Respondent also notes that Complainant had a history of anxiety and treatment for mental health issues prior to the assault and that she was cleared to return to work by an independent medical examiner. Finally, Respondent asserts that the proximate cause of Complainant's leaving her employment was Representative Canavan's refusal to allow her to work at an alternate location in the district, and not the sexual assault.

While there may be sufficient nexus between Miskel's sexual assault of Complainant in the workplace and her inability to return to work at that location due to the trauma she suffered, we conclude that Miskel had no control over Complainant's request to change her work location and whether to grant that request. If Complainant's complaint and testimony are to be believed, it was the failure of her employer to grant that request that occasioned her leaving her

environment.”

employment and she held her employer responsible for that decision. However, her claims against her employer, for failure to accommodate a disability and for constructive discharge, were dismissed by the Investigating Commissioner, and were not before the Hearing Officer. In our view, a claim for lost wages would lie only against the employer, since the employer governs the terms and conditions of employment and has the authority to terminate employment, which in this case it did. For this reason, we disagree with the Hearing Officer's ruling that the individual Respondent is personally liable for Complainant's lost income.³ We conclude that the Hearing Officer exceeded her authority in ruling that Complainant was constructively discharged by Miskel's conduct because only her employer could have discharged her. She also erred in finding Miskel liable for Complainant's lost wages, which could only have flowed from an unlawful discharge. We therefore reverse the finding of constructive discharge, and conclude that there is no viable claim for lost wages.

COMPLAINANT'S PETITION FOR ATTORNEY'S FEES AND COSTS

Having affirmed the Hearing Officer's decision that Miskel violated Complainant's rights pursuant to c. 151B, § 4(4A), we conclude that Complainant is entitled to an award of reasonable attorney's fees and costs. See M.G.L.c. 151B, § 5. 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. In determining what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14

³ We would have entertained a claim for emotional distress damages against Respondent occasioned by his unlawful conduct, but Complainant voluntarily waived her claim to such damages.

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.

Compensation is not awarded for work that appears to be duplicative, unproductive, excessive or otherwise unnecessary to 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 (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.

Complainant’s counsel has filed a petition seeking attorneys’ fees in the amount of \$12,510.14. Respondent did not file an opposition to Complainant’s petition. Commission Counsel J. Lynn Milinazzo-Gaudet represented Complainant before the Commission and she has submitted contemporaneous time records denoting the number of hours expended in this matter on Complainant’s behalf. Attorney Milinazzo-Gaudet’s records show that she spent 56.65 hours preparing for and prosecuting this matter and that she charged \$226 per hour for legal services and \$90 per hour for administrative and clerical work. Commission Counsel’s hourly rate is consistent with rates customarily charged by attorneys with comparable experience in the Boston area and comport with the Massachusetts Law Reform Institute’s Fee schedule. Commission Counsel who successfully represent complainants before the agency are entitled to fees. See

MCAD & Diana Sabella v. Boston Public Schools, 97-BEM-3309/98-BEM-2316 (2006)
(granting attorneys' fees to Commission Counsel in handicap discrimination case); MCAD & Joanne Nicklas, 96-BEM-3149 (2004) (attorneys' fees awarded where Complainant represented by Commission Counsel). Our reversal of the constructive discharge ruling along with the reversal of the award of back pay do not significantly impact the award of fees in this matter, which we find to be extremely modest. Accordingly, we grant the Petition for fees and award attorney's fees as sought in the amount of \$12,510.14.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer with respect to Miskel's liability for violation of § 4(4A) . We reverse the finding of constructive discharge and the award of damages for lost wages. 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 18th day of September, 2012

Julian T. Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie R. Williamson
Commissioner