

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MELISSA DERUSHA,

Complainant,

v.

DOCKET NO. 08-SPR-01116

FEDERAL SQUARE PROPERTIES &
PACIFIC LAND, LLC,

Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan. Following an evidentiary hearing, the Hearing Officer found that Respondents Federal Square Properties and Pacific Land, LLC, were liable for housing discrimination in violation of M.G.L. c. 151B, §§ 4(7B) and 4(10). The Hearing Officer found that Respondents prevented Complainant from renting an apartment because she was a recipient of public assistance in the form of a Section 8 housing subsidy. The Complainant was awarded damages for emotional distress in the amount of \$500 and the Hearing Officer also imposed a \$5,000 civil penalty on each Respondent. Both Complainant and Respondents have appealed to the Full Commission. For the reasons stated 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.

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 the sole province of the Hearing Officer who is in best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because hearing officer sees and hears witnesses, her findings are entitled to deference). The role of the Full Commission is to determine whether the decision under appeal was based on an error of law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF FACTS

The facts, as found by the Hearing Officer, are as follows. In July 2007, Complainant lived in Worcester, MA with her six-year old child. She was the recipient of a Section 8 housing voucher at the time. She had lived in her then current building since 2006, but testified that the building was sold and the new owner rented to tenants who engaged in drug use and fighting on

the premises. In March 2007, Complainant began looking for a new apartment in downtown Worcester. In July 2007, Respondent Federal Square Properties advertised apartments for rent at 590 Main Street. Federal Square Properties is a management company which manages and operates residential housing for the owners of the property, Pacific Land, LLC. Complainant called Federal Square Properties to inquire about renting an apartment and spoke to Beth Lyons, who gave her some information about the apartments. Complainant then asked to see a unit and mentioned that she had a Section 8 voucher. Ms. Lyons responded that Federal Square Properties did not accept Section 8 vouchers. During the summer of 2007, Ms. Lyons received several calls from prospective tenants with Section 8 vouchers. Her supervisor, James Soffan, President and sole owner of Federal Square Properties, advised her to tell callers that Federal Square Properties was not accepting Section 8 vouchers at that time. Mr. Soffan testified that he mistakenly believed that Federal Square Properties was ineligible to participate in the Section 8 program because he thought the management company was required to undergo a certification process with the Worcester Housing Authority before being approved to participate in the Section 8 subsidy program.

From July 2007 through October 2007, Community Legal Aid conducted an investigation of Federal Square Properties' leasing practices using testers. Six testers were assigned to pose as prospective tenants. Three testers presented as having Section 8 vouchers and the other three did not. When the testers inquired about leasing the advertised apartments for rent at Federal Square Properties, one tester with a voucher was told the apartment had been rented and the other two testers with vouchers were told that Federal Square Properties was not accepting Section 8 vouchers at that time.

Complainant testified that, as a result of being denied housing based on her participation

in the Section 8 subsidy program, she suffered from insomnia and weight loss, became depressed and reclusive, and feared for her and her daughter's safety due to the worsening situation in her building. Complainant inquired about four other advertised units in Worcester but did not move into a new apartment until July 2008.

Based on the foregoing, the Hearing officer concluded that Respondents were liable for housing discrimination in violation of M.G.L. c. 151B, §§ 4(7B) and 4(10) based on Complainant's participation in the Section 8 subsidy program. The Hearing Officer awarded Complainant \$500 in emotional distress damages. In addition, the Hearing Officer assessed a civil penalty of \$5,000 against each Respondent.

BASIS OF THE APPEALS¹

Complainant's Appeal

Complainant contends that the Hearing Officer erred by awarding the Complainant only \$500.00 for emotional distress damages. She argues that this "de minimus" award is inadequate to compensate her for the distress she suffered, unsupported by substantial evidence, arbitrary and capricious, and an abuse of discretion.

The Hearing Officer is authorized to award damages to Complainant for emotional distress suffered as a direct and probable consequence of Respondents' discriminatory acts. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Such an award must be supported by substantial evidence and the record must be clear with respect to the factual basis of such damages as well as the causal connection between the unlawful act and the emotional distress. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004); see MCAD and Tara Leary v. James F. Braden & Joan G. Braden, 26 MDLR 234, 240-241(2004).

¹Both Complainant and Respondent have appealed to the Commission.

Complainant testified that she suffered from insomnia and weight loss, depression and feared for her and her daughter's safety as a result of the worsening situation in her building. The Hearing Officer, however, largely refused to credit Complainant's testimony concerning her emotional harm and living situation, finding that the Complainant exaggerated the dire circumstances of her living situation and made little effort to find alternate housing despite her assertion that her living conditions were dangerous. Complainant contests the Hearing Officer's credibility determination and argues that the evidence supports Complainant's depiction of her living situation and emotional harm. However, absent an abuse of discretion, error of law, or a determination that the decision was arbitrary or capricious, the Full Commission defers to the Hearing Officer's credibility determinations and findings of fact. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007 at 1011. 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). The Hearing Officer is in the best position to observe Complainant's testimony and demeanor, and her credibility determinations generally should not be disturbed. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). Thus, we will not disturb the Hearing Officer's award of \$500.00 in emotional distress damages where it reflects her objective assessment of Complainant's credibility and testimony.

Respondents' Appeals

Respondents first challenge the Hearing Officer's determination that they were liable for housing discrimination. Specifically, they argue that their refusal to accept Section 8 tenants was based on a misguided understanding of the subsidy program's process and was not motivated by

discrimination. Respondents argue that they believed that an inspection of the premises by the Worcester Housing Authority was a prerequisite condition to become eligible for participation in the Section 8 program. Respondents admitted to having a policy of not accepting Section 8 tenants at the time of Complainant's inquiry. They maintain that they did not act with discriminatory intent when they told Complainant that they were not accepting Section 8 tenants at that time, but rather misunderstood the process involved with Section 8 vouchers. The Hearing Officer held that Respondents' assertion of its ignorance regarding the Section 8 process was not credible. We concur with the Hearing Officer's determination that this was not a legitimate, non-discriminatory reason for rejecting Complainant as a prospective tenant.

The refusal to accept Section 8 vouchers based on ignorance of the program's requirements, even if true, is considered discrimination within the meaning of the statute. See Lori DiLiddo v. Oxford Street Realty, 450 Mass. 66, 77 (2007). Even where a landlord does not act out of discriminatory animus it may be liable since it is "M.G.L. c. 151B, itself, and not the defendants' conception of what should or should not constitute discrimination, that delineates what is 'legitimate' and 'nondiscriminatory' under the statute." Id. at 77. More importantly, the Hearing Officer found that as experienced large property owners and managers, Respondents were or should have been aware of the requirements of the Section 8 subsidy program. The Hearing Officer did not credit the testimony that Respondents were ignorant of the program's requirements. We find no error in the Hearing Officer's ruling.

Respondents next challenge the Hearing Officer's finding of liability against Pacific Land, LLC for the acts of its agent, Federal Square Properties. Pacific Land, LLC asserts that it is a limited liability company with three members. Pacific Land, LLC maintains that Federal Square Properties has complete autonomy to advertise, rent and execute leases, terminate

tenancies, and execute notices as needed. It states that Federal Square Properties has a long-standing history of accepting rental subsidies, a very diverse tenant profile, and no prior history of discrimination complaints.

The Hearing Officer determined that Respondents are jointly and severally liable for unlawful discrimination pursuant to M.G.L. c. 151B. She cited long-standing precedent that compliance with the fair housing laws is a non-delegable duty and that a property owner may not delegate the duty to ensure equal access to housing to an individual in protected classes. See Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974); U.S. v. Real Estate Development Corp., 347 F.Supp. 776 (N.D. Miss. 1972); U.S. v. L. & H. Land Corp., 407 F.Supp. 576 (S.D. Fla. 1975); Baker v. Collazo, 4 MDLR 1421 (1982). The Hearing Officer also relied on the theory of agency to support a finding of liability against Pacific Land, LLC. See MCAD & Maryluz Rodrigues & Marta Perez v. Michael Price & Gloria Lombardi, 32 MDLR 119, 121(2010); Rome v. Transit Express, 19 MDLR 159, 160 (1997). We agree with the Hearing Officer's determination that as owner of the property at issue, Pacific Land, LLC is liable for the discriminatory acts of its agent, Federal Square Properties. Thus, Respondents are jointly and severally liable for violating M.G.L. c. 151B § 4.

PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Award of Attorneys' Fees and Costs, to which Respondents have filed an Opposition. Complainant's Petition seeks attorneys' fees in the amount of \$16,318.00 and costs in the amount of \$95.82. The total amount sought represents a total of 102.9 hours of compensable time at hourly rates of \$135.00 in 2007, \$145.00 in 2008, \$165.00 in 2009, \$170.00 in 2010, \$175.00 in 2011, and \$212.00 in 2012. The Petition is supported by detailed contemporaneous time records noting the amount of time spent on specific

tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover attorneys' fees for the claims on which the complainant prevailed. The determination of whether a fee sought is 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 the 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 prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Brown v. City of Salem, 14 MDLR 1365 (1992).

Respondents have filed an Opposition to the fee petition arguing that the amount sought should be reduced to \$1,222.00 because of Respondent's belief that certain hours were unnecessary, excessive, or duplicative. Having reviewed Respondent's Opposition we determine that the fee request, along with Counsel's time records, reveal a fair accounting of the work that she performed in furtherance of Complainant's case. Accordingly, we grant Complainant's petition for \$16,318.00 in attorneys' fees and award costs in the amount of \$95.82.

ORDER

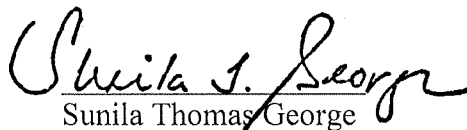
For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. The appeals to the Full Commission are hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety.

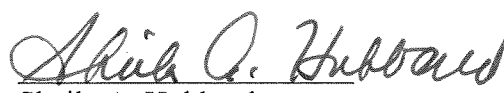
1. Respondents shall cease and desist from all acts that violate M.G.L. c. 151B, §§ 4(7B) and 4(10).
2. Respondents shall pay to the Complainant the amount of \$500.00 with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondents shall each pay to the Commonwealth the sum of \$5,000.00 as a civil penalty.
4. Respondents shall pay to the Complainant attorneys' fees in the amount of \$16,318.00 and costs in the amount of \$95.82, 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 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 12th day of October, 2018


Sunila Thomas George
Chairwoman


Sheila A. Hubbard
Commissioner


Monserrate Quinoñes
Commissioner