COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and KRISTEN
DIANGELO,
Complainants

v. DOCKET NO. 05-SEM-02133

JOSEPH PANDISCIO, JR. and
JOSEPH'S BISTRO & PUB, INC.
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Kristen DiAngelo. Following an evidentiary hearing, the Hearing Officer concluded that Respondents discriminated against Complainant by terminating her employment because she was pregnant in violation of M.G.L. c. 151B, § 4(1). The Complainant was awarded back pay in the amount of $1550.85 and damages for emotional distress in the amount of $35,000. Respondent has appealed to the Full Commission asserting that the Hearing Officer's determination that Complainant was fired because of her pregnancy is not supported by substantial evidence, that Complainant failed to mitigate her damages and that the evidence does not support and award of damages for emotional distress. Complainant has petitioned for an award of attorney's fees and costs.

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). 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 1.23.

We have carefully reviewed the Respondents' Petition and the record in this case and have weighed the objections to the decision in accordance with the standard of review summarized above. 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 made by the Hearing Officer.

At the outset, we note that Respondents dispute many of the factual findings made by the Hearing Officer, and argue that their evidence supports a finding that Complainant was terminated for poor performance. We have reviewed Respondents' objections to the Hearing Officer's findings and determine that, in essence, they are disagreements with her credibility determinations. As discussed below, we find that the Hearing Officer's findings are supported by the evidence.

In this case, Complainant presented direct evidence of discrimination in the form of a memorandum in her personnel file dated shortly before her termination and in records from the Massachusetts Division of Unemployment Assistance (DUA). In these documents, as well as Respondents' position statement provided to the Commission during the investigation, Respondents state that Complainant's employment was terminated[1] due to their concerns about her health and the safety of her unborn child. The Hearing Officer properly found this to be direct evidence of an unlawful motive. It is well settled law that an employer may not terminate a pregnant employee because of its concern about the safety of the fetus. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 204, 205 (1991).

The Hearing Officer also found circumstantial evidence of Respondents' discriminatory motive. In particular, the Hearing Officer credited the testimony of a witness who testified that Mr. Pandiscio said he did not want Complainant working for him because she was too moody due to her pregnancy. She also credited the testimony of another employee that two co-workers made offensive sexist comments relating to her pregnancy, and found this was evidence of an atmosphere of sexism within the restaurant. We also note that the timing of Complainant's termination about two weeks after Respondents learned of her pregnancy, is suspect, and supports an inference of a causal connection between her pregnancy and her termination. See, e.g., Rice v. City of Cambridge Historical Commission, 4 MDLR 1138, 1148 (1982).

Since the Hearing Officer found that Respondents had produced some evidence of a legitimate, non-discriminatory reason for their action, she relied on a "mixed motive" analysis in reaching her conclusions. In mixed motive cases, once Complainant has met her initial burden of

[1] While the terms "leave of absence" and "medical leave" are used by Respondents in the documents, the evidence is clear, and Respondents do not dispute, that they intended to and in fact did terminate Complainant's employment.

showing that an unlawful consideration was a motivating factor in her termination, the burden shifts to the Respondents to persuade the fact finder that it would have made the same decision absent the unlawful motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000). As outlined above, Complainant established a prima facie case that her pregnancy was a significant factor in Respondents' decision. Respondents articulated reason for the termination was that Complainant's performance was substandard. In particular, Respondents testified that Complainant sometimes failed to complete all of her cleaning responsibilities, disregarded Respondents' instructions regarding where to take breaks and sometimes sat down while she was working.

While the Hearing Officer credited some of the testimony suggesting that Complainant's performance suffered somewhat due to pregnancy-related fatigue and nausea, she discredited most of Respondents' testimony regarding poor performance by Complainant. There was credible evidence that Respondents permitted hostesses to sit while working, and there is no evidence that Respondents told Complainant she should not do so. Similarly, there was substantial evidence that numerous employees disregarded management instructions regarding break areas, and that they did so with Respondents' knowledge and apparent acquiescence. The Hearing Officer concluded that Respondents' descriptions of Complainant's shortcomings were exaggerated. The Hearing Officer noted that several managerial employees had the authority to warn, discipline or fire Complainant throughout her employment but that there was no evidence of any such warnings or discipline, and Complainant testified credibly that Respondents did not criticize her work performance. The Hearing Officer noted, in fact, that there was evidence in the form of positive notes on her pay stubs that Respondents were pleased with Complainant's work at a time they alleged at hearing her performance was poor. Respondents' "acceptance of [Complainant's] work without express reservation and or complaint" suggest that Complainant was performing her job satisfactorily.

Gross v. Mattapan Square Mobile, 17 MDLR 1423, 1427 (1995). The Hearing Officer's conclusion that Respondents would not have terminated Complainant based solely on performance and that Complainant's pregnancy was the motivating reason for her termination is thus supported by substantial evidence.

Respondents argue that the documentary evidence (DUA statement and internal memo) regarding Complainant's medical leave of absence should be disregarded because it was Complainant who requested medical leave, and that it would therefore be unfair to use those documents against Respondents. The Hearing Officer did not decide who first raised the idea of a medical leave, and we concur with her conclusion that the issue is immaterial. Medical leave only became an issue after Respondents informed Complainant that she was being removed from the schedule, or effectively terminated. It should be noted also that the Respondents' internal memorandum stating that Complainant was being placed on medical leave because Respondents "feel for the safety of her and her unborn child" was dated *before* she was notified of her termination and therefore before Complainant could have initiated any discussion of medical leave. Respondents are not immune from the consequences of their actions simply because it may have been Complainant who requested that they clarify and document their reasons for her termination in order to determine or protect her right to unemployment insurance.

Damages

The Hearing Officer awarded Complainant $35,000 in emotional distress damages and $1550.85 in back pay. Respondents argue that Complainant is barred from receiving an award for back pay because she failed to mitigate her damages. The burden of proving a failure to mitigate damages falls on the Respondents. Conway v. Electric Switch Corp., 402 Mass. 385

(1988); J.C. Hillary's v. MCAD, 27 Mass App. Ct. 204 (1989). Respondents must prove that 1) comparable employment opportunities were available to Complainant in a location as or more convenient than the job she lost; 2) Complainant unreasonably made no attempt to apply for those opportunities; and 3) it was reasonably likely that Complainant would have been hired for one of those jobs. Thompson v. Westinghouse, 12 MDLR 1282, 1335 (1990). Respondents' argument that Complainant failed to mitigate her damages is based primarily on the fact that not long after her termination, she obtained a letter from her doctor clearing her to work, but that Complainant did not bring that letter to Respondents' attention. This argument must fail where there is no doubt that Respondents terminated Complainant's employment in such a way that made it clear she was not welcome to return. Moreover, Complainant attempted to discuss her termination with Respondents on at least one occasion but that they did not take or return her phone calls.

Despite the fact that Complainant did not obtain employment for eight months after her termination, the Hearing Officer found that Respondents did not show that she failed to mitigate her damages. The Hearing Officer credited the Complainant's testimony that she had applied for other positions, although she could not recall the names of places she had applied by the time of the hearing. Moreover, it was not disputed that Respondents' was the only restaurant in town, and that because of her childcare obligations Complainant needed employment near her home where she could work when her husband was available for child care. The Hearing Officer found that Respondents produced no evidence at hearing of the existence of comparable jobs during the relevant time period for which Complainant failed to apply, or that it was reasonably likely that Complainant would have obtained one of these jobs. Therefore, their claim regarding mitigation must fail.

Respondents also challenge the Hearing Officer's award of $35,000 in emotional distress damages. The Supreme Judicial Court's standards for emotional distress damages are articulated in Stonehill College v. MCAD, 441 Mass. 549 (2004). The factors that should be considered in rendering such awards include the nature, character, severity, and length of the harm suffered. The Court stated that such awards should be "fair and reasonable and proportionate to the distress suffered." Id. at 576.

The Hearing Officer credited Complainant's testimony that she was upset about losing a job that she enjoyed and one that was convenient in terms of location and hours given her need to be available to care for her children. Complainant testified, and the Hearing Officer credited the testimony, that she felt "horrible, destroyed and lost all self-confidence" as a result of her termination by Respondents. The Hearing Officer credited Complainant's and her husband's testimony about the financial hardship that resulted from her loss of her job, including the testimony that they had to take a loan against their home to survive during that time. She also credited the testimony that Complainant's job loss caused her to suffer migraine headaches and anxiety and that there were times she could not get out of bed or accomplish daily tasks. In particular, Complainant testified that what began as a joyful event - her third pregnancy - became a stressful and anxious time because of the loss of her job. She continued to suffer emotional distress at the time of the public hearing more than two years after her termination. We conclude that in light of this credible testimony, the Hearing Officer's award is fair, reasonable and commensurate with the emotional pain suffered by Complainant and consistent with the standards set forth in Stonehill.

Attorney's Fees and Costs

Having affirmed the Hearing Officer's decision in favor of the Complainant, we conclude that the she is entitled to an award of reasonable attorney's fees and costs. See M.G.L. c. 151B, § 5.

The determination of what is a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the time and resources required to litigate a claim of discrimination in the Commission's administrative forum. 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 then examine the resulting figure, known as the "lodestar", and adjust it either upward or downward or not at all depending on various factors.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding all hours expended by all personnel. The Commission carefully reviews the Complainant's submission and does not simply accept the proffered number of hours as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass, 1984). 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. 1984); Miles v. Samson, 675 F. 2d5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (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 reviews contemporaneous time records maintained by counsel and considers both the hours expended and tasks involved.

Complainant in this case seeks attorney's fees in the amount of $18,695.25 and costs in the amount of $4,460.25. The attorney's fee request reflects compensation for just over 80 hour of Attorney Arroyo's time at a rate of $200 per hour in 2005, $225 per hour in 2006 and $250 per hour in 2007. The hours documented in Complainant's Petition are reasonable given the complexity of the case, the number of witnesses, and the length of the hearing. The hourly rates are consistent with rates customarily charged in such cases and are within the range of rates charged by attorneys in the area of similar experience.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law and the Order of the Hearing Officer and issue the following ORDER of the Full Commission:

(1) Respondents shall henceforth cease and desist from engaging in unlawful discrimination.

(2) Respondents shall pay to Complainant the sum of $35,000 in emotional distress damages with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Respondents shall pay the Complainant the sum of $1550.85 in damages for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint

was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Respondents shall pay the Complainant's attorneys' fees in the amount of $18,695.25 with interest thereon at the rate of 12% per annum from the date the fee petition was filed, until such time as payment is made, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(5) Respondents shall pay the Complainant costs in the amount of $4,460.25.

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 within thirty (30) days of receipt of this decision in accordance with M.G.L. c. 30A, c.151B, § 6, and the 1996 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 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 3rd day of June , 2010.

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Malcolm S. Medley
Chairman

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Sunila Thomas-George
Commissioner