COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & REBECCA HAMMOND,

Complainants,

v. DOCKET NO. 08-BEM-01063

CAROL O'LEARY RESIDENTIAL CLEANING SPECIALISTS & CAROL O'LEARY,

Respondents

DECISION OF THE FULL COMMISSION

This matter is before us on Respondents' appeal to the Full Commission of a decision by Hearing Officer Judith E. Kaplan holding Respondents liable for discrimination on the basis of gender/pregnancy in violation of G.L. c. 151B, §4. The Hearing Officer found that Respondents terminated Complainant's employment after she informed Respondent Carol O'Leary, owner of Carol O'Leary Residential Cleaning Specialists, that she was pregnant. The Hearing Officer awarded Complainant $6,500 for lost wages and $10,000 for emotional distress. Respondents assert that the Hearing Officer erred as a matter of law by failing to grant proper weight to their legitimate business reason for termination and challenge her findings that Complainant missed only a few days of work and was late to work only once. Respondents also challenge the Hearing Officer's awards of lost wages and damages for emotional distress. We affirm the decision of the Hearing Officer.

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's role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, is based on an error of law, is unsupported by substantial evidence, or is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondents assert that the Hearing Officer made findings that are not supported by substantial evidence in the record. They challenge the Hearing Officer's finding that Complainant "missed several days of work due to illness." They argue that Complainant was scheduled to work 32 shifts,[1] but that she missed 6 shifts, left work once after only working one hour and another time after working 2 hours. First, respondents assert that describing Complainant's attendance record as "missing several days" is a grotesque distortion of her work

[1]Respondent limited this characterization to the period after Complainant's number of work days was increased to four days per week, but did not consider the first six weeks of her employment when she worked additional shifts or when Complainant filled in for other employees.

record. They argue the Hearing Officer disregarded or distorted the record evidence in making her finding. We conclude that there was sufficient evidence to support the Hearing Officer's characterization of Complainant's attendance. Complainant was ill and provided Respondents with notice of each absence which was excused. Respondents found another worker to replace Complainant on these occasions when possible. We see no error in the Hearing Officer's characterization of Complainant's attendance record and find it was sufficiently supported by adequate evidence. We see no reason to disturb this finding merely because Respondents believe Complainant's absences should be viewed more harshly or cast in a worse light.

Second, Respondents contend that the Hearing Officer erred in finding that Complainant was late for work only one time. They argue that one cannot ascertain from a review of the time sheets in evidence if an employee arrived late at Mrs. O'Leary's home (where employees met prior to departure) and delayed the crew's departure because that information was not recorded. Respondents argue that the Hearing Officer should have relied instead on O'Leary's testimony at the public hearing that Complainant was frequently tardy.

A review of the record shows that the Hearing Officer made findings regarding Complainant's arrival time based on Respondents' own attendance records and other witness testimony at the hearing. According to Respondents' weekly time sheets, Complainant was only late to work on one occasion when O'Leary had to drive Complainant to her first job because she arrived at O'Leary's house after the van with her work crew had departed.[2] These records provide sufficient evidence to support the Hearing Officer's finding that Complainant started work later than the rest of the cleaning crew on only one occasion, even if Complainant

[2] With the exception of the van driver, the cleaning crew was not compensated for time spent travelling by van from O'Leary's house to the client's home. Instead, compensation began only when the crew members started cleaning a client's house and ended when the employees finished the last client's house. The Respondents kept no records of the uncompensated times workers arrived at or returned to O'Leary's house.

occasionally arrived late to Mrs. O'Leary's house. The records indicate that generally Complainant and the rest of the cleaning crew departed in the van at the same time and began their first job at an acceptable time on all but one occasion. The Hearing Officer made the following credibility determination with respect to Complainant's timeliness:

> I do not credit O'Leary's testimony that Complainant was late for the van on more than one occasion, as this assertion does not comport with her written time records indicating Complainant started later than the rest of the crew on only one occasion. Moreover, I find it incredible that O'Leary would not dock the pay of employees who arrived up to an hour late to their first job.

(Decision, p. 3-4.)

The Hearing Officer did credit the testimony of Barbara Palmer, the van driver for Complainant's crew, who testified that O'Leary drove Complainant to a client's house once when Complainant missed the van. Both Palmer and Paula Doonan, who also worked on the same crew as Complainant, testified that they were never disciplined by O'Leary for tardiness or absenteeism despite being late to work or absent on a few occasions. The evidence suggests that Complainant's attendance only became a significant issue once she announced her pregnancy to O'Leary.[3] The Hearing Officer could reasonably find O'Leary's testimony regarding the severity of Complainant's tardiness to be self-serving. We therefore find no error in the Hearing Officer's findings in this regard.

Respondents next argue that the Hearing Officer erred as a matter of law by failing to grant proper weight to Respondents' legitimate business reason for Complainant's termination, her tardiness and absenteeism. Respondents argue that there was substantial evidence to support a finding that Complainant's being inexcusably absent or tardy on several occasions motivated

[3] It was undisputed that when Complainant informed O'Leary of the pregnancy, O'Leary told Complainant of her concerns about Complainant working while pregnant due to work with chemicals and lifting. The anti-discrimination laws do not permit an employer to require a pregnant employee to stop working due to a "fetal-protection" policy. Int'l Union, et al. v. Johnson Controls, Inc., 499 U.S. 187, 204-6 (1991).

her termination. The Hearing Officer found that Respondents' articulated reasons surrounding Complainant's tardiness were exaggerated, but she also found that O'Leary harbored concerns about Complainant missing work and being able to arrive to work on time because she had unreliable transportation. This led the Hearing Officer to conclude that Respondent had mixed motives for terminating Complainant's employment, one legitimate and one illegitimate. The Hearing Officer was not persuaded that Respondents would have terminated Complainant's employment had she not been pregnant. Ultimately the Hearing Officer concluded that impermissible considerations of Complainant's pregnancy were the primary reason for terminating her employment.

The Hearing Officer reached this conclusion based on the facts that Complainant's absences were excused prior to her pregnancy disclosure and that other employees were never disciplined for their tardiness or absenteeism. The Hearing Officer recognized that Complainant was terminated shortly after announcing her pregnancy to O'Leary. The evidence supports a finding that Respondents treated Complainant more harshly because of her pregnancy and the issue of her attendance was exaggerated when she announced her pregnancy. We find that the Hearing Officer did not err in her weighing of the evidence on this issue and thus, we defer to her determination that Respondents terminated Complainant's employment based on impermissible considerations of her pregnancy.

Respondents also argue that the Hearing Officer's award of back pay is not supported by the evidence because Complainant's work schedule varied from week to week and thus the Hearing Officer's use of 25 hours/week as standard for purposes of determining damages was inaccurate and an error. Respondents contend that the Hearing Officer should have based her back pay award on Complainant's actual earnings during the eight weeks prior to her

termination, which included the unpaid days of her excused absences due to illness. While Complainant may have worked fewer hours some weeks, there was sufficient evidence to support the Hearing Officer's finding that the average number of hours Complainant would have worked if she had not been terminated was 25 per week. As of the sixth week of Complainant's employment, she was scheduled to work four days per week, which was considered full time. A review of Respondent's time sheets reveals that other employees (e.g. G. McNutt, A. Goucher, A. Boyle) who worked full time generally worked 27 hours per week. The award was based on Complainant earning wages (at $10.00 per hour) as if she worked an average 25 hours/week through mid-October.[4] We find no error in this computation and substantial evidence to support this award.

Lastly, Respondents argue that the Hearing Officer failed to apply the proper principles for awarding damages for emotional distress and that the award of $10,000 is excessive because the Hearing Officer failed to consider other factors causing Complainant emotional distress not attributable to Complainant's termination. Respondents point to the Hearing Officer's findings that the termination caused Complainant to move from her apartment into a housing project and Complainant's asserted humiliation at having to receive public assistance as being inconsistent with the evidence. Respondents argue that the fact that Complainant "was upset emotionally for a brief period of time after she was terminated" does not justify a $10,000 award.

The Hearing Officer properly noted that an award for emotional distress damages must rest on substantial evidence and its factual basis must be made clear. Factors such as the nature and character of the alleged harm, the severity of the harm, the length of time the complainant has suffered and reasonably expects to suffer and whether the complainant has attempted to mitigate the harm should be considered. The complainant must also show a sufficient causal

[4] The Complainant's baby was born in November of 2008.

connection between the respondent's unlawful act and her emotional distress. Importantly, the Hearing Officer also recognized that emotional distress existing from circumstances other than the respondent's actions is not compensable.

The Hearing Officer credited Complainant's testimony that she was upset and devastated by her termination which shattered the happy news of her pregnancy. She also recognized the testimony that Complainant worried that she would lose her apartment and did not know what she would do for income. After being forced to move from her apartment, Complainant testified that her first housing project placement was unsatisfactory, but her second placement was acceptable. Complainant also testified that it was embarrassing for her to have to resort to receiving public assistance. The Hearing Officer credited Complainants testimony that she "felt like O'Leary had stepped on her like a piece of dirt and she wondered how O'Leary, who had raised children of her own, could treat another woman in that manner. She suffered depression during her pregnancy..." Hearing Officer's Finding of Fact, ¶22.

While Respondents contend that the Hearing Officer did not properly recognize the other "more pressing issues" in Complainant's life, including problems with her boyfriend, the Hearing Officer considered these factors in both her findings and her emotional distress damage award. The Hearing Officer specifically recognized the Complainant's emotional distress was short-lived and not extensive. She found that given Complainant's pre-existing precarious personal and financial circumstances and variable living arrangements, Complainant would likely have experienced financial hardship after the birth of her child. She further found that notwithstanding Respondent's actions, Complainant would have been unable to afford to continue working and paying for childcare." (Hearing Officer's Decision, p. 14.) After consideration of these factors, and relying only on the Complainant's credible testimony

concerning her distress, the Hearing Officer awarded only $10,000 in emotional distress damages. We hold that the award of $10,000 in emotional distress damages due to Respondents' discriminatory conduct is fair and reasonable, and proportionate to the distress suffered by Complainant.

ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, 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 the claim of discrimination. 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 carefully reviews the Complainant's petition for fees and does not merely accept the number of hours submitted as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). 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.); 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.

As the prevailing party, Complainant has petitioned for attorneys' fees in the amount of $24,041.25, paralegal and legal secretary fees in the amount of $1,017.00, and costs in the amount of $1,268.37, for a total of $26,326.62. Complainant's Counsel bills at the hourly rate of $225.00 for attorney time and $50.00 per hour for legal secretary or paralegal work.

Respondents oppose Complainant's petition for attorneys' fees on the grounds that certain hours spent researching and preparing pleadings and Complainant's pre-hearing memorandum were purportedly unnecessary or excessive. Respondents also contend that certain other expenses claimed are either inflated or unrelated to the prosecution of the claim at the Commission. Respondents further argue that the attorneys' fees sought are grossly disproportionate to the amount recovered in damages and that a substantial portion of the fees were incurred in connection with specific aspects of Complainant's damages claim on which she did not succeed. On these grounds, Respondents ask the Commission to reduce the number of hours claimed by at least 40% and to reduce the resulting fees sought by at least 50%.

We have reviewed Attorney Carlson's affidavit and find that her hourly rates and the hourly rates of her paralegals are consistent with rates customarily charged by attorneys and paralegals in Massachusetts in such cases. We reduce costs to exclude a Superior Court filing fee to enforce the Hearing Officer's decision in the amount of $275.00 because it was prematurely filed. All other requested costs are reasonable and fall within the range of costs awarded in these matters. With this reduction, costs are awarded in the amount of $993.37.

We concur with Respondent that billing for the pre-hearing memorandum is excessive

and determine that the twelve hours billed for the pre-hearing memorandum should be reduced by one-half to six hours. At a rate of $225 per hour this results in a reduction of $1350, reducing the attorneys' fees to $22,691.25. The total amount of fees sought including legal secretary and paralegal time is $25,058.25. The deduction of $1350 results in total fees of $23,708.25. We further determine that an overall 25% reduction in fees is appropriate to reflect both excessive hours billed for research regarding Commission procedure and Complainant's failure to prevail on her claim for back wages after her son was born in November of 2008. With this reduction, Complainant's fee award would be $17,781.19.

We decline to order a further reduction in fees because Respondent claims the request for attorneys' fees is "grossly disproportionate to the amount recovered as damages." The U.S. Court of Appeals for the First Circuit and the Massachusetts Supreme Judicial Court have appropriately recognized that fee-shifting provisions are designed "to encourage suits that are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights." Diaz v. Jiten Hotel Man't Inc., 741 F.3d 170, 178 (1st Cir. 2013) (citations omitted). Indeed, fee awards in civil rights cases are designed "to encourage attorneys to take these types of cases and are based on full compensation for the work performed." Id. Here, the Complainant was paid $10.00 an hour. The fact that the back-pay damage award reflected prospective earnings at that rate and the award of emotional distress damages was modest, does not undermine the value of Complainant's counsel's work.

We award costs in the amount of $993.37 and fees in the amount of $17,781.19 for a total of $18,774.56.

ORDER

For the reasons set forth above, we hereby affirm the decision and Order of the Hearing Officer. We further award Complainant attorneys' fees and costs in the amount of $18,774.56, with interest thereon at the statutory rate of 12% per annum from the date the Petition for Fees 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.

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 9th day of May, 2016

Jamie Williamson
Chairwoman

Sunila Thomas George
Commissioner

Charlotte Golar Richie
Commissioner