COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

RENEE MCFAIL,
Complainant

v. DOCKET NO. 04-BEM-01224

SYLVANIA LIGHTING SERVICES,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Complainant, Renee McFail. Following an evidentiary hearing, the Hearing Officer concluded that Respondent violated the Massachusetts Maternity Leave Act, G.L. c. 149, § 105D and was liable for discrimination on the basis of Complainant's sex/pregnancy in violation of G.L. c.151B, 4(1). The Hearing Officer found that Respondent's action of terminating Complainant's employment prior to the birth of her child on account of her pregnancy related disability, resulted in a denial of her right to eight weeks of unpaid maternity leave and the right to return to her same or a similar position as granted by the Massachusetts Maternity Leave Act ("MMLA"). The Hearing Officer found that Respondents actions also constituted a violation of Chapter 151B, and that Respondent applied its twenty-six week job retention policy in a harsh and unyielding manner based upon Complainant's sex and pregnancy.

The Hearing Officer awarded Complainant $25,000 in damages for emotional distress with interest thereon at the statutory rate of 12%. The Hearing Officer did not award any damages for back pay, having concluded that Complainant had failed to mitigate her damages. The Complainant has filed petitions for attorney's fees in the amount of $159,254.00 and for costs in the amount of $8,012.26.

Respondent appealed to the Full Commission asserting that the Hearing Officer erred as a matter of law in concluding that Respondent discriminated against Complainant. Respondent also challenges the Hearing Officer's award of emotional distress damages. Finally, Respondent opposes Complainant's request for attorney 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 otherwise not in accordance with the law. See 804 CMR 1.23.

Respondent has appealed the decision on the grounds that the Hearing Officer erred in considering Complainant's sex discrimination claim. Respondent states that Complainant waived this claim at the pre-hearing conference in this matter and that the Hearing Officer noted at the conference that the only claim to be tried was the MMLA claim. We find Respondent's contention unpersuasive in light of the fact that the first point in the "Contested Issues of Law" section of the Revised Joint Pre-Hearing Memorandum was whether "[t]his matter arises exclusively under the MMLA." In any event, contrary to Respondent's assertion, it is clear from the Hearing Officer's decision that she did not consider the sex discrimination claim to have been waived and she concluded that the evidence presented warranted a finding on that claim. Moreover, there is no indication from the parties opening statements on the record that any claims had been waived. Even if the parties had made some reference to this issue at the pre-hearing conference, the Hearing Officer's ultimate conclusion that a violation of the MMLA may also constitute sex discrimination in violation of Chapter 151B, section 4(1) is correct as matter of law. Indeed, the Hearing Officer specifically noted ample precedent in her decision that "[s]ince pregnancy and childbirth are sex-linked characteristics, actions by an employer which 'unduly burden' an employee because of pregnancy or childbirth may amount to sex discrimination" under the statute. *See, e.g.*, Croteau v. The Salvation Army, 21 MDLR 111 (1999); White v. Michaud Bus Lines, 19 MDLR 18 (1997).

Respondent has also appealed the decision on the grounds that the Hearing Officer erred as a matter of law in finding that Respondent subjected Complainant to disparate treatment on account of her pregnancy related disability. Respondent argues that while the Hearing Officer based her conclusion on three purported omissions by Respondent in applying its job retention policy, the Hearing Officer's own factual findings did not support her conclusion.

We will address Respondent's claims regarding the Hearing Officer's findings which we conclude support her decision. The Hearing Officer specifically found that with respect to Complainant, Respondent was lax in its notification of its leave policy and exceptions to that policy. While Respondent informed Complainant that it would not hold her job open beyond a twenty-six week leave period for disability, Respondent never informed her of the exact date that her leave would expire. This is particularly crucial since Complainant was allowed to work part-time from home for period of time after she physically did not report to the workplace. The Hearing Officer concluded that the informal projections of Respondent's Human Resources Manager, Michelle Farrell, regarding when Complainant's sick time and short term disability pay might run out, which were in response to Complainant having raised concerns about the matter, were not tantamount to formal notice of a date certain as to when Complainant's job retention rights would expire. The Hearing Officer went on to find that Respondent failed to inform Complainant that she could seek an extension of the twenty-six week leave policy and that it had previously granted such extensions to others. Respondent relies on the testimony of Linda McNeely, Complainant's supervisor in the Billing Department, that she was not aware that any exceptions had

been made to the policy, but the Hearing Officer relied on the testimony of the HR manager, Michelle Farrell, that there was some flexibility in the policy and who stated, "if someone comes and requests an exception to the policy, we'll review it and see if it makes sense for that specific situation." Farrell did not inform Complainant that she could seek an exception to the leave policy, and that Respondent had granted exceptions to the leave policy.

Finally, the Hearing Officer found that Respondent's failure to be forthright with Complainant when she returned home in early July of 2003 after a period of hospitalization, and could have resumed working, led to her losing her maternity leave rights. Despite Complainant having informed both the company nurse and her direct supervisor that she had returned home and that her doctor had allowed her to resume working from home, she did not resume working in the two weeks leading up to her due date, in mistaken reliance upon the belief that Respondent would extend her a maternity leave and it made more sense to resume working after her leave. Complainant had been working from home prior to her hospitalization and had arrangements been made for her to resume doing so, Complainant's job retention rights would have extended through the end of her pregnancy. While the decision not to resume working at this point, with her due date a few short weeks away, was partly Complainant's, she made this decision in reliance upon the fact that she would be granted a maternity leave and resume working after that leave. Instead Respondent terminated Complainant's employment ten days short of her giving birth and commencing a maternity leave.

The Hearing Officer concluded that Respondent's omissions constituted "a disparate application" of its job retention policy with respect to Complainant' s pregnancy related disability. She found that the result was an unduly inflexible implementation of the policy as compared to others, "harsh in relation to Complainant's pregnancy, flexible in relation to others," and "wholly at odds with Respondent's description of the policy in relation to others."

Finally, Respondent contends that even if the Hearing Officer was correct about unfairness of Respondent's omissions, she erred nonetheless in her conclusion of discrimination, because there was not sufficient evidence that similarly situated employees were treated differently from Complainant. This argument ignores Farrell's acknowledgment that Respondent's leave policy had been applied in a more flexible, *ad hoc* manner if an employee sought an exception, that Respondent had informed at least two employees of the right to seek an exception, and that it had granted exceptions on at least two separate occasions. Thus there was undisputed evidence that with respect to extension of its leave policy, Respondent treated other employees differently from the manner in which it treated Complainant. Moreover, while comparator evidence is generally deemed the most probative way of establishing discrimination, contrary to Respondent's assertion, it is not always required. "Although providing a similarly situated comparator is usually the most probative means of proving that an adverse action was taken for discriminatory reasons, it is not absolutely necessary." Trustees of Health and Hospitals of the City of Boston, Inc. v. MCAD, 449 Mass. 675 (2007) (quoting with approval the appellate court's finding in Trustees of Health and Hospitals of the City of Boston, Inc. v.

MCAD, 65 Mass. App. Ct. 329 (2005), that comparators are not required in all cases). Given the facts and circumstances of the matter, the Hearing Officer properly concluded that Complainant was subjected to disparate treatment.

Respondent has also appealed the decision on the grounds that Hearing Officer erred in finding that Respondent violated the MMLA. Specifically, Respondent takes issue with the Hearing Officer's conclusion that Respondent violated Complainant's right to a maternity leave under the statute when it assumed that Complainant did not intend to return to work full-time after the birth of her child. However, the evidence demonstrates that Respondent terminated Complainant's employment during the final weeks of her pregnancy thereby extinguishing her right to a maternity leave and job restoration pursuant to the MMLA. The Hearing Officer specifically noted in her decision that Complainant complied with the statute by giving Respondent sufficient notice of her anticipated departure date and of her intention to return to work. While the Hearing Officer did not credit Complainant's after-the-fact testimony that upon giving birth Complainant planned to return to work on a full-time basis within eight weeks, this does not negate the fact that the Complainant gave the required notice, but was denied maternity leave because she was terminated just prior to giving birth. The MMLA mandates only that Complainant had the intent to return to work during her pregnancy, and the Hearing Officer specifically determined that Complainant expressed such intent to the appropriate individuals at Respondent. The Hearing Officer's decision properly rested upon evidence demonstrating that Complainant satisfied her obligations under

the MMLA, yet Respondent denied her the statutory right to eight weeks of leave with the right to return to her same or a similar position.

Finally, Respondent contends that the Hearing Officer erred in her award of emotional distress damages in this matter, asserting that Complainant is not entitled to any damages for emotional distress. Specifically, Respondent argues that the Hearing Officer failed to heed her own findings that Complainant was elated after the birth of her child and that the majority of her distress was due to factors unrelated to Respondent's actions of terminating her employment, including the history of numerous miscarriages and a stillbirth. It is clear from our reading of the Hearing Officer's decision that the she considered the emotional impact of Complainant previous problems with childbearing, and the stress resulting from her infant's premature birth and difficulty gaining weight. The Hearing Officer explicitly noted that these "circumstances, plus Complainant's ambivalence about returning to work, suggest that factors other than her discharge played a significant role in her emotional state" during the relevant time period. Notwithstanding, the Hearing Officer concluded that Respondent's actions also contributed to Complainant's distress in some significant measure, causing her to have trouble eating and sleeping, and resulting in her crying and being irritable with her husband. Noting that "[t]he presence of other stressors in a complainant's life does not absolve a respondent from liability for the distress caused by its actions," we conclude the Hearing Officer assessed the impact that the loss of Complainant's employment had on her emotional state, while giving due consideration to other possible sources of her distress, and awarded a measure of damages commensurate with that assessment. The award of

damages was based upon the credible testimony from Complainant and was not disproportionate to the harm suffered. We conclude that the Hearing Officer's award was not excessive or an abuse of discretion.

In sum, we have carefully reviewed Respondent's Petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein. We conclude that there are no material errors of fact or law and that the Hearing Officer's findings as to liability and damages are supported by substantial evidence in the record. We therefore deny the appeal.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Attorney's Fees

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5. Complainant seeks attorneys' fees in the amount of $159,254 and costs in the amount of $8,013.52.

The determination of what constitutes a reasonable fee is within the Commission's discretion and relies on 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 MDLR 1097 (1992). This method requires a two-step analysis. First, the Commission determines the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable.

The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines no adjustment is warranted depending on various factors, including the complexity of the matter and the degree of success achieved.

The Commission's determination of the amount of time reasonably expended in furtherance of the claim involves more than simply adding up all hours expended by counsel. 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. Bellotti, 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); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours deemed reasonably expended are subject to compensation under M.G.L. c. 151B. In determining the amount of time that is compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's initial petition seeks attorney's fees in the amount of $155,013.50 and costs in the amount of $8,012.26. In a supplemental petition, Complainant seeks additional fees in the amount of $4,240.50 for preparation of the Opposition to Respondent's Petition for Review and additional costs in the amount of $1.26. In sum, Complainant's counsel requests reimbursement for 513.7 hours of attorney time, with Attorney Michon seeking recovery for 192.4 hours at rates

ranging from $250 to $375 per hour, and Attorney Freiberger seeking recovery for 321.3 hours at rates ranging from $250 to $275 per hour.

Complainant's counsel seeks reimbursement for work performed by Attorney Katherine Michon at the following rates:

66.3 hours at the rate of $250 per hour and

126.1 hours at the rate of $375 per hour;

For work performed by Attorney Marc Freiberger:

194.2 hours at $250 per hour and

127.1 hours at $275 per hour;

For work performed by various paralegals,

79.7 hours at $110 per hour.

The total amount requested is $159,254.

Despite Respondent's protest, we find that the hourly rates charged by both attorneys are reasonable and within the range charged by attorneys of similar experience practicing in this field in the Boston area. We therefore decline to modify the hourly rate as we do not deem it excessive or unsupported.

The U.S. Supreme Court has stated that the "most critical factor in determining the reasonableness of a fee award is the degree of success obtained." Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). The Court acknowledged that claims for relief may "involve a common core of facts or will be based on related legal theories," and that it is sometimes "difficult to divide hours expended on a claim-by-claim basis," however, it went on to note that "a reduced fee award is

appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 435, 440.

We note at the outset that the Commission has modified fee requests to conform in some measure to the degree of success achieved, which may be measured in part by the nature of the relief awarded and the amount of overall recovery. Commensurate with this view, the Full Commission noted in one case, "though the award of fees is not grossly disproportionate to the overall recovery, it represents a figure which is in excess of 60% of the amount awarded." It then proceeded to reduce the fee by 20%. Patel v. Everett Industries, 18 MDLR 182, 184 (1996).

Based upon our review of the petitions in this case, we conclude that the number of hours expended upon the litigation of this claim is excessive, not only relative to the degree of success achieved, but also when measured against the range of previous Commission fee awards for similar cases. As Respondent correctly notes, the reasonableness of the fee request must be viewed against the back-drop of a case with limited discovery, limited motion practice, and a 3 day hearing where Complainant relied primarily on her own testimony, and called only two other witnesses. Moreover, Attorneys Michon and Freiberger appear to have duplicated efforts on a number of tasks and charged for both attorneys to perform these tasks. We also note that Complainant brought a claim for back pay, upon which she did not succeed and that she received only a modest award for emotional distress.

While we agree with Respondent that Complainant seeks compensation for certain work which seems excessive and or duplicative, it is not possible to ascertain from Respondents records precisely how much time was apportioned to each task.

Many of the entries note that 2 or 3 tasks were performed in given time period. We do, however, note that the number of hours of attorney time spent in the fall of 2007 on hearing preparation and conducting the hearing is 173.4 hours (85 hours for Attorney Michon and 88.4 hours for Attorney Freiberger) seems to be duplicative. This is not so complex a matter so as to have required the full time attention of two attorneys to prepare for and litigate the case.

Given all of the above, we conclude that Complainant's request for fees should be reduced by 30%. Such a reduction would amount to a deduction of $47,776. We conclude that the resulting figure of $111,478 constitutes a fee award that is reasonable and fair for this matter, given the level of complexity and degree of success achieved. Complainant cites to the case of Blue v. Aramark Corp., 27 MDLR 73 (2007) for the proposition that fees may be well in excess of the relief awarded. However in Blue, the Complainant was awarded damages only for emotional distress in the amount of $35,000 while receiving an attorney's fee award of $91,230.50. We find this case to be a fair comparator. The Respondent references other cases where the Commission reduced fee requests as a result of modest damage awards. See Harley v. Costco Wholesale Corp., 23 MDLR 140, 141 (2001) (reducing fees by 20% because they were more the six times the actual damages); Salmon v. Costco Wholesale Corp., 23 MDLR 142, 143 (2001) (reducing fees by 10% because they were more than three times the actual damages award). In this case where the fee sought is more than four and one-half times the damages awarded we conclude that a downward modification is warranted.

Costs

Complainant seeks costs in the amount of $8,012.26 broken down as follows:

In-house photocopying	$ 967.80
Courier services	$ 64.00
Facsimile	$ 4.05
Postage	$ 53.24
Deposition Transripts	$ 5,804.77
Outsource copy services	$ 201.81
Westlaw Research	$ 47.62
Cab Fares	$ 50.00
Parking	$ 42.00
Meals	$ 21.89
Flights	$ 669.71
KBM Costs	$ 85. 37

Respondent challenges Complainant's petition for costs as excessive and not adequately documented. We have reviewed the request for costs and Respondent's objections and find as follows.

We concur with Respondent's assessment that request for meals, cab fare, and/or parking reimbursement on 10/12/07 and 10/19/07 should be deducted since nothing in Complainant's corresponding time records indicates any activity in the case on those dates. Therefore the amounts of $36.00 for cab fare, $24.00 for parking and $21.89 for meals should be deducted. Complainant also seeks $967.80 for photocopying in-house and $201.81 for outsourced copying. The documentation

contains nothing more than dates and amounts but no indication of what was copied or for what reason. Respondent notes that some of copying appears to take place on dates when there was no reported activity on the case. It also notes that the $ 64.00 sought for courier service also does not correspond to any dates in which activity in the case took place that would justify the use of courier service. Given that copying expenses appear excessive and are not sufficiently documented we feel compelled to reduce the request for re-imbursement of in-house copying by one-half to $483.90 and decline to award the entire $201.81 for outsource copying, since there is no explanation of the need for this additional service. We also deduct the request for courier services in the amount of $64.00. We also deduct the $85.37 labled Kimball Brousseau & Michon Costs, with no further explanation. We allow the costs for deposition transcripts in the amount of $5804.77 and the remainder of the costs for Westlaw Research and Travel.

Taking into account the above deductions, we award costs in the amount of $7095.29 which we deem to be reasonable.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer and issue the following Order:

1. Respondent shall pay to Complainant damages for emotional distress in the amount of $25,000 as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum form the date of filing of the complaint, until such time a payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.

2. Respondent shall pay to Complainant attorney's fees in the amount of $111,478, with interest thereon at the rate of 12% per annum from the date the petition for fees was filed until such time as payment is made or a court judgment is rendered in this matter.

3. Respondent shall pay to Complainant costs in the amount of $7095.29.

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 19th day of March , 2011

Julian Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie Williamson
Commissioner