

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and MEREDITH MODEL,
Complainants

v.

DOCKET NO. 07-BEM-00781

OWEN O'LEARY'S INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri partially in favor of Complainant, Meredith Model. Following an evidentiary hearing, the Hearing Officer concluded that Respondent violated G.L. c. 151B and was liable for unlawful discrimination on the basis of sexual harassment, but dismissed Complainant's constructive discharge claim.¹ The Hearing Officer found that Respondent allowed a sexually hostile work environment to exist in its restaurant and did not take action to remedy the situation, even after Complainant complained to her manager of such harassment. The Hearing Officer found Respondent liable for the sexual comments and unwelcome touching by Complainant's co-worker, because it was on notice of the unwelcome conduct. She awarded Complainant \$20,000 in damages for emotional distress and required the Respondent to conduct training.

Respondent has appealed to the Full Commission, asserting that the Hearing Officer erred in concluding that the evidence supported Complainant's claim of sexual

¹ Complainant did not appeal the dismissal of her constructive discharge claim.

harassment based upon a hostile work environment. Respondent also challenges the Hearing Officer's award of emotional distress damages.

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 first contends that the Hearing Officer erred in finding that Complainant was subjected to a hostile work environment. Specifically, Respondent argues that Complainant failed to make out two critical elements of a hostile work environment claim. First, Respondent contends that because Complainant and co-worker Gregory Howe, the alleged harasser, worked together during "only seven shifts" over a ten day period, the conduct complained of could not have been sufficiently severe and

pervasive to support an actionable claim. However, this argument is not persuasive, because the law does not require a requisite time period or a threshold number of incidents to establish a hostile work environment claim. See, e.g., Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673 (1993); Gnerre v. MCAD, 402 Mass. 502 (1988). See also Trinh v. Gentle Communications, L.L.C., 71 Mass. App. Ct. 368, 374 (2008) (in case involving “sexually suggestive comments” and action of rubbing up and brushing against Complainant in a sexual manner, comments and actions were “sufficiently severe” to create hostile work environment); Ruidiaz v. City Car Rental, et al., 29 MDLR 149 (2007) (hostile work environment found in case where Complainant was employed for period of less than two weeks and was subjected to leering and unwelcome touching) In this case, the Hearing Officer’s conclusion that, “Complainant established by credible testimony that Howe’s inappropriate and offensive sexual comments and touching, particularly rubbing against her breasts, occurred on numerous occasions and were continuous,” satisfies the element that the conduct was “severe and pervasive.”

Second, Respondent argues that even if the harassment occurred, it did not interfere with Complainant’s work performance. This argument is similarly unpersuasive. In determining whether speech or conduct creates a hostile work environment, the standard is whether a reasonable person in the employee’s position would interpret the behavior “as offensive and an interference with full participation in the workplace.” Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995). Here, the Hearing Officer found that Complainant “felt demeaned, disrespected, and embarrassed by Howe’s comments and conduct, as would any reasonable female in her position.” Indeed, Complainant was so upset by Howe’s conduct that told him it was

unwelcome and she also complained to management on at least two occasions. The Hearing Officer determined that her actions support a conclusion that Howe's behavior caused a "disruption in the workplace," for Complainant since she was uncomfortable and upset enough to entreat her manager "to take action to ensure that the conduct ceased." Such evidence comports with past cases in which a hostile work environment claim has been established. See, e.g., Trinh v. Gentle Communications, L.L.C., 71 Mass. App. Ct. 368, 374 (2008) (hostile work environment found in case where Complainant "testified to her discomfort about the comments and physical contact").

Respondent next contends that the Hearing Officer committed error in awarding damages for emotional distress. Respondent argues that Complainant failed to establish that her emotional distress was causally connected to Respondent's actions, because she had a history of depression and anxiety. Respondent contends that her claimed emotional distress resulted from other sources and not from Respondent's actions in this matter. However, Complainant's medical history of depression and anxiety does not in and of itself preclude an award of emotional distress damages for suffering caused by Respondent's actions. The Hearing Officer specifically credited Complainant's testimony that she suffered embarrassment and humiliation as a result of Howe's unwelcome sexual comments and touching, and that both the existence of a hostile environment and Respondent's failure to take action, exacerbated her depression and anxiety. The Hearing Officer thus found a direct causal relationship between Complainant's state of emotional upset following her employment at Respondent and the sexual harassment she endured. However, the Hearing Officer did not attribute the totality of Complainant's claimed distress to Respondent, finding that Complainant

suffered distress from other sources unrelated to the sexual harassment at work. In so concluding, the Hearing Officer engaged in a careful and detailed evaluation of a number of other relevant factors which may have contributed to Complainant's emotional state and arrived at an award that was deemed proportionate to the stress caused by Complainant's situation at work. While acknowledging and giving due consideration to Complainant's medical history, the Hearing Officer concluded that Complainant was still "entitled to damages for the emotional distress resulting from her being subjected to a humiliating, demeaning and discriminatory work environment, albeit for a relatively short time." Accordingly, the award for emotional distress was "a modest award" that takes into account the fact that Respondent's actions were not the sole source of Complainant's emotional distress. We conclude that the Hearing Officer's award was proper and in accordance with the guidelines set forth in Stonehill College v. MCAD and did not constitute an abuse of discretion.

Finally, Respondent contends that the Hearing Officer erred by refusing to accept as evidence, affidavits from two of Complainant's co-workers, namely Cynthia Aga and Whitney Bartlett. Respondent claims that the statements in these affidavits would have refuted Complainant's testimony and substantiated the testimony of manager Bob Slaney that Complainant never complained to him about sexual harassment. Respondent asserts that the Hearing Officer's refusal to admit these affidavits into evidence was arbitrary and capricious. While the Commission is not bound by the formal rules of evidence, and a Hearing Officer retains significant discretion in making evidentiary rulings, there is no requirement that a hearing officer accept affidavits in lieu of live testimony absent a showing that witnesses are unavailable, and we find no reversible error in her refusal to

accept affidavits in this case, particularly on an issue as significant as whether the employer had notice of the harassment. We conclude that the Hearing Officer was within the bounds of her discretion to refuse to consider the affidavits at issue, and her ruling was not arbitrary or capricious.

In sum, having Respondent's Petition and the record in this matter and having weighed all the objections to the decision in accordance with the standard of review articulated herein, we conclude that the Hearing Officer's decision should stand.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

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.

The determination of what constitutes a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the litigation and of the time and resources required to litigate a claim of discrimination in the administrative forum. In reaching a determination of 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 the Commission to undertake 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 considered to be reasonable. Second, the Commission then examines the resulting figure, known as the "lodestar," and adjusts 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 will involve more than simply adding all hours expended by all personnel. The Commission carefully reviews the Complainant's submission and will 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 that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of \$11,925.00 (53 hours at \$225.00 per hour) and costs in the amount of \$21.00.

Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal that compensation is sought for work that was duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We further conclude that Complainant's attorney's hourly rates are consistent with rates customarily charged by attorneys with comparable expertise in such cases and are within the range of rates charged by attorneys in the area with similar experience. We find that the costs requested by Complainant are adequately documented and reasonable.

While Complainant did not prevail on her claim of constructive discharge and was not entitled to back pay, we nonetheless conclude that her attorney's fees should be awarded in full. One factor to be considered in results obtained is the number of claims on which success was achieved. However, claims for relief may "involve a common core of facts or will be based on related legal theories," and it is sometimes "difficult to divide hours expended on a claim-by-claim basis." Hensley v.Eckerhart, 461 U.S. 424, 435-436 (1983) We conclude that in this cases the claims were sufficiently inter-related so as make it difficult to separate out the work required to prove one claim and not the other. We therefore award attorney fees totaling \$11,925.00 and costs in the amount of \$21.00 to Complainant.

ORDER

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

(1) Respondent shall immediately cease and desist from sanctioning any conduct occurring in the operation of its restaurants that constitutes sexual harassment.

(2) Respondent shall pay to Complainant damages in the amount of \$20,000.00 for emotional distress as set forth in the Hearing Officer's decision, 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) Respondent shall pay to Complainant attorney's fees in the amount of \$11,925.00 and costs in the amount of \$21.00 with interest thereon at the rate of 12% per annum from the date the Petition for Fees was filed.

(4) The Training Provisions set forth in the Decision of the Hearing Officer shall be incorporated herein.

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 appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 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 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 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 October , 2011.

Julian Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie Williamson
Commissioner