COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
KEVIN O'LEARY,
Complainants

v. DOCKET NO. 15-BEM-01246

BROCKTON FIRE DEPARTMENT
and DEPUTY CHIEF BRIAN NARDELLI,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty Waxman partially in favor of Complainant, Kevin O'Leary ("Mr. O'Leary"). Following an evidentiary hearing, Hearing Officer Waxman concluded that the City of Brockton Fire Department ("Fire Department") was liable for unlawful disability discrimination under M.G.L. c. 151B, § 4 in the form of a hostile work environment Mr. O'Leary suffered as a probationary firefighter, and awarded Mr. O'Leary $40,000 in emotional distress damages. Hearing Officer Waxman dismissed a claim for failure to reasonably accommodate Mr. O'Leary's disabilities and dismissed a claim of individual liability for disability discrimination against Deputy Chief Brian Nardelli. Mr. O'Leary and the Fire Department both appealed to the Full Commission. Mr. O'Leary argues that he should have prevailed on his reasonable accommodation claim, but does not appeal the dismissal of the claims against Deputy Chief Nardelli. The Fire Department argues that there was insufficient evidence and an error of law with respect to the finding of

liability for disability harassment, but it does not dispute the damages awarded. Mr. O'Leary has also filed a petition for attorney's fees and costs in the amount of $55,812.15, which the Fire Department opposes. For the reasons discussed below, we affirm the Hearing Officer's decision in full, dismiss the appeals from both parties, and award a reduced amount of attorney's fees.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), 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, §§ 3(6), 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, § 1(6).

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 within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(10) (2020).

LEGAL DISCUSSION

In order to prevail on a claim of disability discrimination based on the failure to provide a reasonable accommodation, the complainant must prove that: "(1) (s)he is handicapped within the meaning of G.L. c. 151B, § 4 (16); (2) (s)he is qualified and able to perform the essential functions of the job with a reasonable accommodation of her handicap; (3) (s)he requested a reasonable accommodation and (4) (s)he was prevented from performing her job because her employer failed to reasonably accommodate the limitations associated with her handicap." Linda Johansson v. Department of Corrections, 32 MDLR 95, 97 (2010) (citing Handicap Discrimination Guidelines of the Massachusetts Commission Against Discrimination ("MCAD Handicap Discrimination Guidelines"), § VII (B) (1998) and Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998)). The request for reasonable accommodation triggers the obligation to engage in an interactive process to explore the possibility of accommodation, and "[t]he refusal of an employer to participate in that process once initiated, or to make a reasonable accommodation once it has been identified, is a violation of our discrimination laws." Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 632, 644 (2004). Even so, substantial evidence that an interactive dialogue would have been futile may excuse a respondent's failure to engage in the interactive process. See Savage v. Massachusetts Rehabilitation Commission, 38 MDLR 105, 114 (2016), citing Massachusetts Bay Transportation Authority v. Massachusetts Comm'n Against Discrimination, et al., 450 Mass. 327, 342 (2008); and Gracia v. Northeastern University, 31 MDLR 1, 5 (2008) (also recognizing applicability of MBTA v. MCAD to employee requests for reasonable disability accommodation, and concluding that "[a]n employer is not required to engage in fruitless dialogue if it is absolutely clear no accommodation could be made without undue hardship"). We determine that

the Hearing Officer did not make an error of law when she concluded that Mr. O'Leary failed his burden of proof because there was insufficient evidence of a request for reasonable accommodation. We also agree there was substantial evidence to support her determination that an interactive dialogue would have been futile even assuming a request was sufficiently made.[1]

The evidence showed that Mr. O'Leary's time as a probationary firefighter was divided into five phases—an initial training phase at drill school, followed by four different assignments to (three) different stations, i.e., a first assignment to Station 1, followed by assignment to Station 2, then to Station 4, and finally back to Station 2 (at which point he was let go on the eve of completing his probationary period). Mr. O'Leary's training at drill school had a significant classroom component, culminating in the requirement to pass two written exams, whereas the assignments to the three stations were for hands-on training, requiring the recruits to reinforce their drill school learning by physically performing tasks using firefighter equipment, trucks, and ladders, etc. The only evidence of a request for a reasonable accommodation by Mr. O'Leary occurred eight days into drill school in January of 2014, when, after encountering some difficulty in his classroom work, he provided Deputy Chief Nardelli with a 2006 neuropsychological report containing a diagnosis of a learning disability, anxiety / depression, and ADD. The report included suggested accommodations for these disabilities relevant to the academic work Mr. O'Leary was undertaking at the time the report was prepared in 2006, which arguably applied to the classroom work Mr. O'Leary was undertaking in drill school, i.e., extended time on timed tests, a quiet environment for test-taking, and an individual tutor.[2] The Fire Department did not

[1] The MCAD cautions that Respondents will generally be unable to demonstrate that no accommodation could be made without undue hardship unless the employer has "engaged in an interactive process with the employee and ha[s] made a good faith effort to explore the options that come out of such a process." Massachusetts Bay Transportation Authority v. Massachusetts Comm'n Against Discrimination, et al., 450 Mass. 327, 353 (2008).

[2] The Hearing Officer's factual findings concerning suggested accommodations in the report also included "continued treatment for depression and inattentiveness" and "developing the habit of re-checking work for attentional errors" as additional suggested accommodations contained in the report, but these are more accurately

engage in an interactive process with Mr. O'Leary upon learning about Mr. O'Leary's disabilities and receiving the report, and it did not provide Mr. O'Leary with any of the accommodations in the report. However, Mr. O'Leary ultimately passed his drill school tests and moved on from that phase without the need for any accommodation, begging the question of whether the provision of the report was an ongoing request for accommodation. The Hearing Officer found that it was not, concluding that once the on-the-job training began at Station 1, Mr. O'Leary never requested any accommodation. The conclusion is reasonable where the request associated with academic success did not reasonably apply after drill school—more time and a quiet environment to take tests, or the provision of a tutor - do not apply to the demanding physical work of operating a fire truck and other equipment, and responding to calls on the job. There was also no evidence of a request for accommodation after Mr. O'Leary's assignment to Station 1, whether direct or as a matter of cumulative communications amounting, as a whole, to a sufficient request. See, e.g., Ocean Spray Cranberries, Inc., 441 Mass. at 650.

Moreover, even assuming the provision of the report during drill school amounted to a request to accommodate Mr. O'Leary's disabilities during on-the-job training required at Stations 1, 2 and 4, there was substantial evidence that engaging in an interactive dialogue would have been futile. The record supports the Hearing Officer's conclusion that providing Mr. O'Leary with any of the accommodations he suggested during the public hearing (i.e., more time to complete tasks, adjusting the repetition of drills, or allowing him to write out the steps he needed to take instead of performing the physical task at hand) would not have been reasonable given the inherently time-sensitive and stressful functions of a firefighter like the ability to make mathematical calculations, the ability to dress a hydrant or charge a booster line, or the ability to

characterized as a doctor's suggestions only Mr. O'Leary could execute, rather than accommodations that an employer or place of higher learning could put in place.

pump. As the Hearing Officer reasoned, the futility of an interactive dialogue was further supported by evidence that Mr. O'Leary also did not fully apply himself to the tasks at hand (i.e., by eschewing medicine for ADD, spending time studying for nursing exams while at the fire station, neglecting to memorize information crucial to making certain calculations, etc.) The record shows that Mr. O'Leary had significant difficulty with a broad range of his essential firefighter functions, particularly pump operations, all of which could be a matter of life or death if done improperly, and none of which could be executed with variation or learned without extensive hands-on practice, providing substantial evidence to support the Hearing Officer's conclusion that accommodation was unavailable.[3] Compare Savage, 38 MDLR at 114 (respondent liable for failing to explore reasonable accommodations for one essential function of working with a computer system, where complainant otherwise demonstrated competency in other functions, and there was insufficient evidence that the interactive process would have been futile). In short, we find no error with respect to the dismissal of Mr. O'Leary's reasonable accommodation claim.

Next, we affirm the Hearing Officer's finding of liability for disability harassment. In order to establish a claim of unlawful disability harassment, the complainant must establish that "(1) she is a handicapped person; (2) she was the target of speech or conduct based on her handicapped status; (3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to Complainant or

[3] Mr. O'Leary argues on appeal that his difficulties learning essential firefighter tasks were the product of the harassment he endured, and, as such, it is legally incorrect and unfair to determine from the record that the duty to engage in an interactive dialogue may be excused because no reasonable accommodations could have been made to help him succeed. However, Mr. O'Leary's testimony was clear, and credited by the Hearing Officer, that the harassment he endured all but ceased after his first assignment at Station 1. Mr. O'Leary was thereafter a probationary firefighter for another six months, at two other stations, and it is unreasonable to conclude that harassment was responsible for the inability to learn the on-the-job tasks in that timeframe.

Respondents knew or should have known of the harassment and failed to take prompt remedial action." Abrams v. Paddington's Place, 26 MDLR 149, 154 (2004), aff'd Abrams v. Paddington's Place, 27 MDLR 28 (2005) (Full Commission). The harassment in question was in the form of frequent pranking of Mr. O'Leary while he was assigned to Station 1. On appeal, the Fire Department singles out the second element, and argues that there was insufficient evidence that Mr. O'Leary was targeted for this harassment because of his disabilities.[4]

The Hearing Officer reached the legal conclusion that Mr. O'Leary was harassed because of his disabilities based on her credibility determinations and inferences supported by evidence in the record. She determined that Mr. O'Leary was subjected to cruel and unrelenting pranks when he was assigned to Station 1, a few months after disclosing his disabilities to Deputy Chief Nardelli, and that the pranks he suffered were "more and meaner than those visited upon others." We defer to the Hearing Officer's credibility determination with respect to Mr. O'Leary's estimation of his treatment being unique where the record does not refute that estimation, save for testimony from Fire Department witnesses that the Hearing Officer did not believe. Moreover, viewed in conjunction with one another, the following facts support the inference that the harassment Mr. O'Leary endured at Station 1 was because of his disabilities: Deputy Chief Nardelli had a negative reaction to Mr. O'Leary's disclosure of his disabilities; the disclosure in drill school immediately preceded the assignment to Station 1, when Deputy Chief Nardelli was still the supervisor of Fire Department trainees; and the harassment all but ceased after Mr. O'Leary left Station 1. See, e.g., Mole v. Univ. of Massachusetts, 442 Mass. 582, 592–93 (2004)

[4] The remaining elements are therefore not in dispute on appeal and are indeed supported by substantial evidence. The Fire Department does obliquely minimize the pranking in question, suggesting it was not severe. However, there is no dispute that the frequent dumping of buckets of water on Mr. O'Leary was objectively abusive. Moreover, it should go without saying that there is no place in the modern-day workplace for abusive pranking. Such cruelties may sometimes be legally excused, but they are always about targeting individuals for humiliation or worse—an extremely risky prospect for all workplaces.

(temporal proximity between two events, i.e., protected activity and adverse action, may be indirect proof in a retaliation claim that one caused the other). The record also supports the inference that Mr. O'Leary was harassed because of his disabilities given substantial evidence that Mr. O'Leary struggled right from the start of (and throughout) his on-the-job-training, thus making his learning disability likely apparent to his harassers. In fact, testimony from Fire Department witnesses is peppered with references to Mr. O'Leary being slow, and unable to grasp his tasks despite frequent drilling; there was also testimony and documentary evidence from the training director who took Deputy Chief Nardelli's place that the firefighters in Station 1 became "increasingly upset" that Mr. O'Leary was failing to learn his job. Based on all of the foregoing, the Hearing Officer's inference that Mr. O'Leary was harassed because of his disabilities was supported by the record.

Last, the Fire Department argues that the Hearing Officer made an error of law in determining a causal connection between the harassment Mr. O'Leary suffered and his disabilities by recognizing that the Fire Department was on constructive notice of Mr. O'Leary's disabilities at the time he suffered the harassment due to communication of his disabilities to Deputy Chief Nardelli, citing Cooper v. Raytheon Co., 38 MDLR 28 (2016). The citation to Cooper was unnecessary where the Hearing Officer found that the Fire Department, including the Chief, had been given actual notice of Mr. O'Leary's disabilities while he was in drill school, and where she discredited testimony by Mr. O'Leary's supervisors that they did not know about his disabilities. More to the point, however, as addressed above, the record otherwise supports the inference that Mr. O'Leary's harassers learned about Mr. O'Leary's disabilities from Deputy Chief Nardelli or inferred them via observation and that the harassment was disability-based.

REQUEST FOR ATTORNEY'S FEES AND COSTS[5]

Mr. O'Leary filed a Petition for Reasonable Attorney's Fees and Costs in the total amount of $55,812.15 where the fees requested are $51,112.50 for 136.3 hours of work at a rate of $375 per hour, and the costs requested are $4,699.65. The Petition is supported by contemporaneous time records and a breakdown of costs as well as an affidavit from Mr. O'Leary's attorney, Edward O'Brien. The Fire Department opposes the petition and argues that Attorney O'Brien's fee must be reduced by two-thirds, to $18,750, using a reduced hourly fee of $250 for 75 hours of work.

M.G.L. c. 151B allows prevailing complainants to recover attorney's fees. 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 first calculates the number of hours reasonably expended to litigate the claim and multiplies that number by a reasonable hourly rate. After applying the hourly rate to the hours expended, 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

[5] Since the request for attorney's fees and costs was filed pursuant to 804 CMR 1.00 (1999) et seq., the Full Commission determined the award.

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). Contrary to the Fire Department's arguments on appeal, Attorney O'Brien's time records do not show excessive, duplicative or unnecessary hours.

However, when multiple claims are alleged, and the complainant does not prevail on all claims, the Commission may exercise its discretion to reduce the fees requested by some amount reasonably associated with the pursuit of complainant's unsuccessful claim. See Marathas v. Holiday Inn, 22 MDLR 391 (2000). Where a complainant's successful and unsuccessful claims are inextricably intertwined and based on a common nucleus of facts, a reduction may not be required. See Cheeks v. Massachusetts Correction Officers Federated Union, et al., 27 MDLR 30 (2005); Patel v. Everett Industries, 18 MDLR 26 (1996). Based on these considerations, the Fire Department argues for a two-thirds reduction because although Mr. O'Leary succeeded in proving disability harassment, he did not prove a failure to reasonably accommodate or individual liability on the part of Deputy Chief Nardelli. However, a one-third reduction is appropriate, where Deputy Chief Nardelli's conduct was inextricable from both of the other claims, but the disability harassment claim and failure to reasonably accommodate claim were not inextricably intertwined. As we have reviewed the affidavit submitted by Attorney O'Brien and determine that the hourly rate of $375 per hour is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases, we therefore reduce the amount of fees requested by $17,037.50, for a total attorney's fees award of $34,075.

The Fire Department does not dispute the fees requested and the request for

reimbursement of costs in the amount of $4,699.65 is reasonable.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety. Both parties' appeals to the Full Commission are hereby denied, and we issue the following Order:

1. As injunctive relief, the Respondent Brockton Fire Department is directed to cease and desist from engaging in acts of disability harassment.
2. The Respondent Brockton Fire Department is liable to pay Complainant the sum of $40,000 in emotional distress damages, plus interest at the statutory 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. The Respondent Brockton Fire Department shall conduct, within 120 days of the receipt of this decision, a training of its supervisory staff. Such training shall focus on all facets of disability discrimination. The chosen trainer shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training.
4. Respondent shall pay to Mr. O'Leary attorney's fees in the amount of $34,075 and costs in the amount of $4,699.65.

This Order represents the final action[6] of the Commission for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Any party aggrieved by this Order may challenge it by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Failure to provide a copy of the transcript may preclude the aggrieved party from alleging that the Commission's decision is not supported by substantial evidence, or is arbitrary or capricious, or is an abuse of discretion. Such action must be filed within thirty (30) days of service of this Order and must be filed in accordance with M.G.L. c. 151B, § 6, M.G.L. c. 30A, and Superior Court Standing Order 1-96. Failure to file a complaint 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 and M.G.L. c. 30A.

SO ORDERED[7] this 27th day of May, 2021

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[6] The Full Commission will ordinarily delay the issuance of a final action for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A to allow a prevailing complainant time to file a petition for attorney's fees incurred as a result of litigating the appeal to the Full Commission. See 804 CMR 1.23(12) (2020) (complainant who "prevails in an appeal" to the Full Commission has fifteen days to file petition for attorney's fees after issuance of Full Commission decision) and 804 CMR 1.23(12)(e) (2020) (the Full Commission decision on complainant's petition for attorney's fees, together with the decision deciding the appeal constitutes the final order of the Commission for purposes of judicial review). No such delay is warranted here because Mr. O'Leary did not prevail in his appeal to the Full Commission as the appellant. See 804 CMR 1.23(12)(b) (2020). Moreover, as the appellee, he did not intervene in the Fire Department's petition for review and thus did not incur any costs "as a result of litigating the appeal" as required to file a petition for attorney's fees under 804 CMR 1.12(c) (2020). Without incurring fees resulting in a prevailing argument, a complainant is not entitled to supplemental attorney's fees after issuance of a Full Commission decision under 804 CMR 1.12 (2020).

[7] Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(6) (2020).