

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MICHELE PAVLOV,
Complainants

v.

DOCKET NO. 15-NEM-00434

HAPPY FLOORS, INC. and NEW
FLOORS, INC.
Respondents

ORDER REGARDING PETITION FOR COMMISSION COUNSEL FEES AND COSTS

After public hearing, Complainant prevailed against Happy Floors, Inc.¹ on her claim of sex (gender) and pregnancy discrimination, and was awarded damages for back pay in the amount of \$17,800.00 and for emotional distress in the amount of \$20,000.00 plus 12% interest annum by a decision of the undersigned Hearing Commissioner dated March 29, 2022. On April 11, 2022, a Petition For Commission Counsel Fees and Costs (“Petition”) was filed. In the Petition, the Commission Counsel was seeking attorney’s fees in the amount of \$57,637.68 and costs in the amount of \$130.81 for a total of \$57,768.49. Respondent Happy Floors Inc. filed an opposition to the Petition on April 20, 2022.

In this case, a Commission Counsel was appointed to assist the Complainant in the representation of her case after probable cause was found. M.G.L c.151B §3 (15) allows for an award of reasonable attorney’s fees and costs when a Commission Counsel presents a charge on behalf of a prevailing Complainant.

¹ Although the caption includes two Respondents - Happy Floors, Inc. and New Floors, Inc., the Complainant only prevailed against Happy Floors, Inc., and as such, this Order shall only apply to Happy Floors, Inc.

Respondent opposes the Petition on the grounds that (1) the Petition is not accompanied by an affidavit averring personal knowledge and signed under the penalties of perjury and (2) that the Petition seeks attorney fees for tasks in the amount of \$16,394.75 that were duplicitous, vague, excessive, and did nothing to advance the case. This Order addresses the Respondent's claim that the affidavit accompanying the Petition was not properly executed.

The Petition is supported by an affidavit signed by then Commission Counsel Simone Liebman. The accompanying affidavit is not sworn to under oath or affirmation or signed under the penalties of perjury. The Commission's Procedural Regulations state the following in relation to an Affidavit for Attorney's Fees:

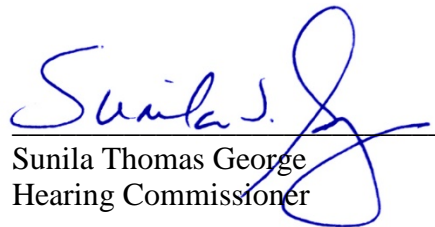
(19) Request for Award of Attorneys' Fees and Costs. Where the complainant prevails at public hearing, the complainant may, within 15 days of receipt of the hearing decision, petition the Hearing Commissioner for an award of reasonable attorneys' fees and costs. Such petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. 804 CMR 1.12(19) (2020).

The regulation's language does not state that an affidavit must be signed under the penalties of perjury or be sworn to under oath or affirmation. In contrast, a reading of paragraph (10) in the same section of the regulations, 804 CMR 1.12 (2020), regarding default hearings references an "affidavit [] under the pains and penalties of perjury". It would be reasonable to interpret the inconsistency as deliberate and believe an affidavit in support of a fee petition under 804 CMR 1.12(19) (2020) need not be submitted under the pains and penalties of perjury.

Under Massachusetts law, a document does not constitute as an affidavit unless it is either verified by oath or affirmation before an applicable official or is signed under the penalties of perjury. M.G.L. c.268, §1A; See also e.g. Galvin v. Town Clerk of Winchester, 369 Mass.

175, 177 (1975). As a matter of law, the “affidavit” submitted in support of the Petition does not constitute a proper affidavit. However, in light of the ambiguity in the Commission’s Procedural Regulations, it is reasonable and fair and consistent with justice to allow Commission Counsel to submit a revised Petition within fifteen (15) days from receipt of this Order to cure this technical defect. See 804 CMR 1.00 (The purpose of 804 CMR 1.00 is to achieve a just, speedy and fair determination of matters before the Commission in the service of the public interest). Consistent with the Commission’s regulations at 804 CMR 1.12(19) (2020), Respondent may file a written opposition within fifteen (15) days of receipt of the revised Petition.

So Ordered this 27th day of October, 2022.


Sunila Thomas George
Hearing Commissioner