COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
CAROL A. POLIWCZAK,

Complainants,

v. DOCKET NO. 05-SPA-01155

MITCH'S MARINA AND CAMPGROUND,
MERVIL BROUSSARD, MELVIN BROUSSARD &
MICHAEL BROUSSARD,
Respondents

Appearances: John B. Flemming, Esq., for Complainant
Patrick J. Melnik, Esq., John Garber, Esq. for Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by former Commissioner Martin Ebel in favor of Complainant Carol Poliwczak on her Complaint charging Respondent Mitch's Marina and Campground ('Mitch's Marina" or "Respondent") with discrimination on the basis of handicap and retaliation in a place of public accommodation in violation of M.G.L. c. 272, §98. After the close of the Hearing, Complainant filed a motion to add Mervil, Melvin and Michael Broussard (collectively, "the Broussard brothers") as party Respondents.[1] The Hearing Commissioner granted the motion in his decision, finding that Mitch's Marina was not an independent legal entity but a facility owned and operated by the Broussards as a family enterprise. The Hearing Commissioner awarded Complainant damages in the amount of $15,000

[1] Each of the Broussards will be referred to by his or her first and last name to avoid confusion.

for emotional distress and assessed a civil penalty against Respondents in the amount of $5000. He also ordered the Respondents to offer to renew Complainant's contract for a campsite on the same terms and conditions offered to other campers.

A. Summary of the Facts

Respondent's facility consists of a marina and campsite on the Connecticut River in Hadley, MA, which is open to the public. At the time of the Hearing, Mitch's Marina was operated as a cooperative family enterprise. Complainant and her husband had rented a camp site and boat slip from Mitch's Marina for twenty-four years prior to the events in question. Melba Broussard had a life-time estate in the real property on which Mitch's Marina is located and her sons, the Broussard brothers, owned the real estate as tenants in common. Mervil and Melvin Broussard manage and operate the marina and campsite.

Complainant suffered a stroke in 2003 that left her with certain physical limitations, including minimal use of her right hand, difficulty walking without the use of a cane and lack of stability while walking, especially on stairs or uneven surfaces. On or about June 14, 2004 Melvin Broussard informed Complainant's husband that they could no longer park their vehicle in the spot that was adjacent to the boat ramp and easily accessible to their campsite, and in which they had parked for twenty-four years. Melvin Broussard directed Mr. Poliwczak to move his vehicle to a parking lot that was further away from their campsite and accessible only over hilly terrain. Mr. Poliwczak explained that he needed to park in his usual spot due to his wife's disability to allow her to access their campsite safely and refused to move his vehicle. The Broussard brothers returned to Complainant's campsite with a Hadley police officer. The police officer told Mr. Poliwczak that the vehicle had to be moved or it would be towed because the Broussards wanted it moved. The Poliwczaks were no longer permitted to park in their usual

spot for the remainder of the 2004 season. Complainant testified that during the 2004 season, she was unable to go to the campsite unassisted because she could no longer walk safely to her campsite without help. Melvin testified that he and his brothers made the decision not to allow any patrons to park on or adjacent to the boat ramp after the Marina's insurance agent advised them they should keep the area near the bottom of the ramp open for emergency vehicles and to prevent possible injuries to children who frequently ran around in that area.

Subsequent to the dispute regarding their parking space, in 2005, when Complainant did not receive campground renewal information from Mitch's Marina, she contacted Melba Broussard to question why she had not received a contract. Melvin Broussard then came to the phone, telling Complainant that he and his brothers had taken a vote and decided not to extend a renewal contract to the Poliwczaks. Respondent refused to renew Complainant's contract for a campsite for the following season. Complainant filed an MCAD charge on May 19, 2005 alleging disability discrimination and retaliation.

In response to Poliwczak's Complaint, the Broussard brothers signed and filed a Position Statement on June 14, 2005. The first sentence of the Position Statement reads as follows: "Mervil Broussard and Melvin Broussard, operators of Mitch's Marina and Campground of Hockanum Road, Hadley, Massachusetts hereby submit the following Position Statement in response to the Complaint filed by Carol A. Poliwczak." Each of the three brothers signed the Position Statement.

Attorney Patrick J. Melnick represented Mitch's Marina in the present matter from June 16, 2005 through September 12, 2011. Additionally, in another matter before the Commission, Ostrowski v. Mitch's Marina, Attorney Melnick filed a Notice of Appearance on behalf of "Mervil Broussard and Melvin Broussard, doing business as Mitch's Marina" on January 22,

2003. In the present case, "Mitch's Marina and Campground" remained the only named Respondent throughout the investigation, conciliation, discovery, certification, and public hearing. At the public hearing on January 3, 2008, Mervil and Melvin Broussard testified, but neither Michael nor Melba Broussard testified.

On October 7, 2009, several months after the public hearing, Complainant moved to amend her Complaint to add the Broussard brothers individually as named Respondents. The motion was granted as a part of the Decision of the Hearing Officer on August 16, 2011. The Hearing Commissioner granted Complainant's Motion to Amend the Complaint based on his finding that Mitch's Marina was not an independent legal entity, but a family-run business in which the Broussard brothers were in full control of marina operations. The Hearing Officer determined that the Broussard brothers were aware of the allegations of their direct personal involvement, and participated at the Hearing. The evidence showed that the Broussard brothers made the collective decision to deny Complainant a reasonable accommodation and to refuse to renew her contract for the next year. In his August 2011 Decision, the Hearing Commissioner found that Respondents violated G.L. c. 272, §98 by failing to provide Complainant a reasonable accommodation. He did not credit the assertion that creating a handicap parking space adjacent to the boat landing and allowing Complainant to park there would constitute a public safety hazard. He also concluded that failing to renew the Poliwczaks' contract for the next year, after their twenty-four years camping at Mitch's Marina, was in retaliation for their having asserted their rights to reasonable accommodation because of Complainant's disability. The Hearing Commissioner awarded Complainant $15,000.00 for emotional distress and imposed a civil penalty of $5,000.00 on Respondents under G.L. c. 151B, §5 for engaging in unlawful

discrimination and deliberate retaliation in a place of public accommodation. Respondents have filed a Petition for Full Commission Review, challenging the decision below.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 Mass. Code Regs. 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 Mass. Discrimination L. Rep. 1007, 1011 (1982). The Full Commission's role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 Mass. Code Regs. 1.23.

BASIS OF THE APPEAL

Respondents raise two issues on appeal to the Full Commission. First, Respondents argue that the Hearing Commissioner erred in adding the individual Broussard brothers as named Respondents after the Hearing. Complainant named "Mitch's Marina and Campground" as the sole Respondent in her original pro se Complaint, while the individual Broussard brothers are only charged with unlawful actions in the details of the Complaint. Respondents argue they

were, therefore, denied their legal right to be "specifically named" so as to afford them the opportunity of an agency hearing in violation of the Administrative Procedures Act (APA) at G.L. c. 30A, §1 et seq. Respondents also assert that they were not afforded a right to hearing as individual respondents under G.L. c. 151B, §5, which requires the named Respondent to answer charges of a Complaint at a hearing before the Commission. Second, Respondents contend that remand as to damages is necessary because one of the underlying acts of discrimination – denial of parking accommodation on June 14, 2004 – was purportedly time barred. Respondents argue that because the emotional distress award of $15,000 in damages does not distinguish the emotional distress resulting from the June 14, 2004 denial as opposed to damages resulting from the ongoing failure to accommodate the Complainant's disability during the 2004 camping season and retaliatory failure to renew the campground lease in 2015, that there should be a remand to apportion the $15,000 award.

LEGAL DISCUSSION

A. The Amendment Adding the Broussard Brothers After the Public Hearing

There was sufficient evidence to find that Mervil and Melvin Broussard were operating as a de facto general partnership doing business as Mitch's Marina in 2004 and 2005 when the discriminatory and retaliatory conduct occurred.[2] As such, they are individually and personally liable for Mitch's Marina's liabilities that arose while doing business as Mitch's Marina. "A general partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit ..." 13 Mass. Prac., Business Corporations § 2:2 (2015-2016 ed.)(citing G.L.c. 108A, § 6). In a general partnership, "[a]ll partners are jointly and severally liable for ...

[2] Mitch's Marina registered as a Limited Liability Partnership with the Secretary of State of Massachusetts on January 26, 2010, with the three Broussard brothers as partners. This has no bearing on the liability of Mervil and Melvin Broussard in 2005 when the discriminatory conduct occurred.

wrongful acts or omissions of any partner acting in the partnership's business or by its authority...." Id. (citing G.L.c. 108A, §§ 13, 14, 15). Courts in Massachusetts consider the following factors in determining if a general partnership exists: "(1) an agreement by the parties manifesting their intention to associate in a partnership[3] (2) a sharing by the parties of profits and losses, and (3) participation by the parties in the control or management of the enterprise." Fenton v. Bryan, 33 Mass. App. Ct. 688, 691 (1992).

Several facts support the conclusion that Mervil and Melvin Broussard were acting as general partners:[4] they (1) signed the Position Statement filed by Mitch's Marina, in which they identified themselves as the operators of the business; (2) took a vote not to renew the Poliwczaks' contract; (3) were present when the police arrived to make Mr. Poliwczak move the car; (4) held themselves out to the Commission as "doing business as Mitch's Marina" in 2003; (5) participated in the Commission investigation and testified at the public hearing; and (6) shared a lawyer, Attorney Melnick, who represented Mervil and Melvin Broussard in 2003 as well as "Mitch's Marina" in the present case. These actions support an inference that Mervil and Melvin Broussard had "an agreement ... manifesting their intention to associate in a partnership" and "a sharing ... of profits and losses." See Fenton, 33 Mass. App. Ct. at 691. Additionally, the Position Statement, explicitly naming Mervil and Melvin Broussard as operators of Mitch's Marina, is direct evidence that they participated "in the control or management of the enterprise." See id.

Because Mitch's Marina was not a legal entity at the time of the unlawful acts, Mervil

[3] To create a general partnership, there need not be an express agreement, written or oral, but instead, the intention to engage in a partnership is all that is required. 13 Mass. Prac., Business Corporations § 2:2

[4] The Commission notes that only Mervil and Melvin Broussard participated in the public hearing, named themselves as operators of Mitch's Marina in the position statement, and held themselves out as "doing business as" Mitch's Marina before the Commission in 2003. While Michael Broussard signed the position statement and participated in some of the discriminatory acts, we do not find enough support for his participation in the general partnership to hold him liable for the obligations of Mitch's Marina.

and Melvin Broussard are the proper respondents in this case. They were personally liable for Mitch's Marina's liabilities because Mitch's Marina was not legally distinguishable from the general partnership doing business under that name. See Rogers v. Kolman, No. 002871, 2001 WL 1525531, at *4-5 (Mass. Super. Aug. 21, 2001)("The designation [d/b/a] does not create an entity distinct from the person operating the business' because the person 'who does business . . . under one or several names remains one person, personally liable for all his obligations." (quotations and citations omitted). As general partners, Mervil and Melvin Broussard were personally liable for the obligations of the general partnership doing business as ("DBA") Mitch's Marina. See G.L.c. 108A, §§ 13, 14, 15.

It was proper to add Mervil and Melvin Broussard to correct the technical error of naming the DBA Mitch's Marina instead of the partners who were legally liable for the unlawful acts. The Commission has wide discretion to amend complaints to ensure that it achieves its legal mandate of enforcing Massachusetts' anti-discrimination laws. The Commission's regulations state,

> The Commission, through its individual Commissioners, in the interests of justice and after due notice to parties, may relax the application of 804 CMR 1.00 in a particular case. *In any situation in which 804 CMR 1.00 do not specifically apply, the Commission or any of the individual Commissioners may exercise discretion so as to achieve a just, speedy and fair determination of the issue.*

804 Mass. Code Regs. §1.01.

In the uncommon circumstances of the present case, the addition of Melvin and Mervil Broussard is most properly understood as a correction of misnomer rather than the true addition of a new party.[5] See Hennessey v. Stop & Shop Supermarket Co., 65 Mass. App. Ct. 88, 90-91 (2005)

[5] Misnomer is also a specific defense that can be raised by a defendant in a motion to dismiss, but if a defendant does not raise a defense of misnomer in the responsive pleadings, that defense is waived under Massachusetts Civil Procedure Rule 12. Mass. R. Civ. P. 12(b), (h).

(noting that in true misnomer cases, the proposed party to be added is not new but simply misidentified by the complaint). While Massachusetts always liberally allows the addition of parties, it is particularly liberal in adding parties to correct misnomer errors. G. L. c. 231 §51 ("In all civil proceedings, the court may at any time, allow amendments adding a party, . . . which may enable the plaintiff to sustain the action for the cause or for recovery for the injury for which the action was intended to be brought, or enable the defendant to make a legal defense."); Hennessey, 65 Mass. App. Ct. at 90-91(noting that in cases of misnomer, a new summons need not be issued when the complaint is amended). "Two factors distinguish misnomer cases: first, the complaint clearly indicates the intended defendant; and second, the plaintiff effectuates service upon the intended defendant or his agent." Id. Federal law is similarly liberal in allowing the addition of parties who knew or should have known that they were the intended defendant in a suit.[6] Fed. R. Civ. P. 15(c); see Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 553-55 (2010) (holding that it was proper to add new defendant under rule 15 though statute of limitations had run because new defendant had notice of lawsuit and knew or should have known that it was intended defendant).

The adopted amendment is properly understood as a correction of misnomer rather than an addition of truly new parties. Complainant indicated her intent to name as Respondents those responsible for her discrimination and retaliation by listing Mervil and Melvin Broussard's actions in the particulars of her Complaint. See Hennessey, 65 Mass. App. Ct. at 90-91. In naming Mitch's Marina as the Respondent, the "complaint identified the intended defendant in 'a

[6] Under Federal Rules of Civil Procedure 15(c) an amendment adding a party relates back to the date of the original pleading when 1) "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading;" 2) "the party to be brought in by amendment ... received such notice of the action that it will not be prejudiced in defending on the merits" and 3) the party to be added "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

manner as would make it ... reasonable to conclude that [she] meant to sue ... whichever was the owner.'" Id. at 92. Complainant effectuated service on the intended Respondents, evinced by the fact that the Mervil and Melvin Broussard signed the Position Statement and participated fully in the investigation and public hearing. See id. at 91-92. The fact that Mitch's Marina, Melvin, and Mervil Broussard shared an attorney, like the defendants in Hennessey, further demonstrates that they were on notice of the allegations in the Complaint. See id. at 90-91.

Although the Commission's regulations do not specifically contemplate amendments that correct errors of misnomer, the Massachusetts state courts have long held that such corrections are essential to ensure fairness. See Hennessey, 65 Mass. App. Ct. at 91("[T]o dismiss the case would be unfair to the plaintiff and would allow the defendant to avoid its rightful obligation through a technical error on the part of plaintiff's counsel, in a situation where it has had notice of the plaintiff's claim from the outset.")(citations and quotation marks omitted); Langmaid v. Puffer, 73 Mass. 378, 380 (1856) ("[I]t would be of the worst consequence, if defendants should be permitted, instead of pleading in abatement, to lie by and increase expenses, and then move to set aside the proceedings.").

In the interest of fairness, we uphold the grant of the amendment to add Mervil and Melvin Broussard in order to ensure that they do not escape liability through operation of Mitch's Marina as a DBA and camouflaging the responsible Respondents. See Hennessey, 65 Mass. App. Ct. at 92; Langmaid, 73 Mass. at 380; see also Drummer Boy Homes Ass'n, Inc. v. Britton, 474 Mass. 17, 21 (2016) (holding it proper that an appellate court allowed a change in party name during the appeals process when the original party was not a legal entity with authority to sue). This unusual case of true misnomer is one of the rare cases in which "804 CMR 1.00 do[es] not specifically apply. " 804 Mass. Code Regs. §1.01. For this reason, the

Commission may "exercise discretion so as to achieve a just . . . and fair determination of the issue." Id. Such a just and fair determination of the issue requires the addition of Mervil and Melvin Broussard as individually named Respondents to ensure that they do not "avoid [their] rightful obligation through a technical error." Hennessey, 65 Mass. App. Ct. at 91. Because the Commission does not find sufficient support to determine that Michael Broussard was also acting as a general partner with Mervil and Melvin Broussard, doing business as Mitch's Marina in 2004 and 2005, the decision to grant the amendment to add him as a Respondent is reversed.

B. Discrimination Claims Are Not Time-Barred

We find Respondents' assertion that Complainant's discrimination claim is time-barred warranting a remand of the emotional distress award unpersuasive. M.G.L. 151B, §5 provides that a complaint must be filed within 300 days after the alleged act of discrimination, unless there is a continuing violation. Respondents recognize that the retaliation claim, based on the later non-renewal of the campground lease, was timely. However, Respondents argue that because the Complaint was filed 323 days after the initial denial of accommodation on June 14, 2004 and the emotional distress findings do not distinguish between the initial denial and later retaliation, there must be a remand concerning the award of $15,000 in emotional distress damages.

For discriminatory conduct that occurs 300 days prior to the filing of a complaint to be actionable, there must be at least one incident of discriminatory conduct within the statute of limitations period which substantially relates to, or arises from, earlier discriminatory conduct and anchors the related incidents, thereby rendering the entirety of the claim timely. Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001). To establish a continuing violation, Complainant must show that the alleged discriminatory acts substantially relate to and arise out

of earlier untimely conduct. Id.; 804 Code Mass. Regs. s.1.10(2). Here, Respondents denied Complainant a reasonable accommodation on or about June 14, 2004 and continued to deny her such accommodation throughout the 2004 camping season, which lasted into October. See, Hearing Commissioner Finding ¶24. Accordingly, Respondents denied Complainant a reasonable accommodation on July 23, 2004 (300 days prior to May 19, 2005). Thus, it is arguable that for each day of the season a new and separate violation accrued and that the denial of an accessible parking space constituted a continuing violation, sufficient to bring the earlier, initial act within the 300-day statute of limitations.

Further, there was sufficient evidence to support the emotional distress damage award of $15,000 resulting from the clearly timely acts of retaliation which followed the prior acts of discrimination. The Hearing Commissioner's findings reveal that the vast majority of Complainant's emotional distress arose from the fact that she and her husband were denied a contract for a campsite and boat slip for the following season, a recreational activity they had enjoyed for some twenty-four years. Complainant testified that she cried when she learned in 2005 that the Poliwczaks' contract would not be renewed. She testified that in 2005, when she learned of the refusal, she was "down and depressed." She described how she missed her friends at the campground and the enjoyment of being at Mitch's Marina. In her words, she was down and depressed "[b]ecause that was my whole world." Hearing Transcript, p.43. Complainant testified that in 2005, after renting a campsite and boat slip at Mitch's Marina for twenty-four years, she and her husband sold their camper. For these reasons, we reject Respondent's argument that a remand is required to determine from which unlawful acts Complainant's emotional distress damages flowed.

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 the Hearing Officer's Decision is in accordance with the law and the Hearing Commissioner's findings as to liability and damages are supported by substantial evidence in the record. We therefore deny the appeal.

ATTORNEYS' 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. Complainant filed two Petitions for Fees. Complainant seeks attorneys' fees in the total amount of $15,750.00 and $1,738.70 in costs. Respondents did not file an opposition to the Petitions for fees and costs. 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 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 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.); Miles v. Samson, 675 F. 2d 5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). The Commission will compensate only for time that it determines was reasonably expended on a particular task. 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.

We conclude that Complainant is entitled to an award of reasonable attorneys' fees and costs. See M.G.L. c. 151B, §5. We have reviewed Attorney John B. Flemming's affidavit and find that it supports his expertise in the area of employment discrimination law and conclude that his hourly rate of $300 per hour is consistent with rates customarily charged by attorneys in with comparable experience and expertise in such cases. We have also reviewed Counsel's contemporaneous time records and we find the amount of time spent to be fair and reasonable and sufficiently documented. Counsel's records show that he spent 37.50 hours on Complainant's case for a total of $11,250 and an additional 18 hours at a cost of $4,500 to prepare and file the Memorandum of Support of the Decision of the Hearing Commissioner for a total of $15,750 in attorneys' fees.

Lastly, we find that the costs requested by Complainant are adequately documented and reasonable. Accordingly, we award Complainant costs in the amount of $1,738.70 and attorneys' fees in the amount of $15,750 for a total of $17,488.70.

ORDER

For the reasons set forth above, we hereby affirm the Decision and Order of the Hearing Officer in its entirety, except with respect to the addition of Michael Broussard as an individual

respondent, and further order that the Respondents:

(1) Pay Complainant the amount of $15,550 in attorneys' fees with interest thereon at the rate of 12% per annum from the date the Petition was filed until such time as payment is made.

(2) Pay Complainant the amount of $1,738.70 in costs with interest thereon at the rate of 12% per annum from the date the Petition was filed until such time as payment is made.

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 12th day of July, 2016

Jamie Williamson
Chairwoman

Sunila Thomas George
Commissioner

Charlotte Golar Richie
Commissioner