COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and MAUREEN REED,
Complainants

v.

DOCKET NO. 13-BEM-03479
14-BEM-01975

PIPEFITTERS ASSOCIATION OF BOSTON, LOCAL 537 and LEO FAHEY,
Respondents.

DECISION OF THE FULL COMMISSION

After a public hearing in this matter, Hearing Officer Eugenia Guastaferri ("Hearing Officer") determined that Complainant Maureen Reed ("Ms. Reed") was discriminated against on the basis of her disability when her union, Respondent Pipefitters Association of Boston, Local 537 ("the Union"), denied her a reasonable accommodation. In a hearing decision issued on March 29, 2019, the Hearing Officer found the Union liable for disability discrimination by failing to adequately explore and provide a requested accommodation to permit Ms. Reed, who is hearing impaired, to participate in the Union's monthly meetings. The Hearing Officer dismissed the claims that Respondent Leo Fahey ("Fahey") was individually liable for discrimination in violation of M.G.L. c. 151B, § 4(5) and that the Union or Fahey retaliated against Ms. Reed in violation of M.G.L. c. 151B, § 4(4).[1] The Union appealed on the grounds that: (1) it was error for

[1] Ms. Reed did not appeal the Commission's dismissal of these claims. She did, however, intervene in the Union's appeal to the Full Commission and filed a Memorandum in Support of Notice of Intervention, requesting that the hearing decision be affirmed.

the Hearing Officer to conclude that M.G.L. c. 151B, § 4(2) requires labor organizations to provide reasonable accommodation to its disabled members, and (2) it was error for the Hearing Officer to conclude that the Union failed to prove that providing a stenographic transcription of union meetings with closed captioning would be an undue hardship. We reject the Union's arguments and affirm the Hearing Officer's decision for the reasons stated below.

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) (the Hearing Officer sees and hears witnesses and thus, 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 based on error of law, arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(10) (2020).

LEGAL DISCUSSION

The Union raises two legal issues on appeal: whether the Hearing Officer erred when she concluded that M.G.L. c. 151B, § 4(2) requires labor organizations to provide reasonable accommodations for union members with disabilities, and whether she erred when she concluded that providing a stenographic transcription of the proceedings with closed captioning would not unduly burden the Union.

The Hearing Officer's conclusion that M.G.L. c. 151B, § 4(2) requires labor organizations to provide reasonable accommodations for union members with disabilities is not in error. M.G.L. c. 151B, § 4(2) prohibits labor organizations "because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification." Labor organizations violate the statute when they discriminate against this broad array of members, employers, or individuals because of their protected class, including "because of the handicap of any person alleging to be a qualified handicapped person..." M.G.L. c. 151B, § 4(2). While the language in M.G.L. c. 151B, § 4(2) does not contain the term "reasonable accommodation," we concur with the Hearing Officer's reasoning that the statute is properly interpreted to include the duty to reasonably accommodate union members with disabilities. This determination is based on the comprehensive language in M.G.L. c. 151B, § 4(2), the remedial purpose of M.G.L. c. 151B, and the liberal construction to be

applied to the statute. The Hearing officer also properly analogized this case to those involving discrimination in places of public accommodation, where the courts and the MCAD have found a duty to reasonably accommodate despite the absence of accommodation terminology in M.G.L. c. 272, § 98. In short, when it comes to the rights of individuals with disabilities, accommodation is an essential component of any effort to eliminate barriers, allow full access and prevent discrimination based on handicap. Where an individual with a disability cannot fully participate in union meetings on equal terms as union members without disabilities, failure to accommodate the member excludes the member from essential access and is, therefore, discriminatory.

A close reading of the statute reflects the Legislature's intent to require labor organizations to make union proceedings broadly and equally accessible to their members, the employers with whom they work and "any individual" employed by an employer. M.G.L. c. 151B, § 4(2). The statute prohibits unions from excluding members, including those members with disabilities, from "full membership rights." It would be illogical to prohibit unions from excluding members from full membership rights, regardless of their gender, sexual orientation and other enumerated protected classes, but to allow unions to deny such rights to union members with disabilities when they need accommodation to enjoy full membership. Because of the unique nature of disability discrimination, inclusion of union members with disabilities in the enjoyment of full membership rights necessarily entails providing reasonable accommodation to remove barriers to access. For a union member who cannot comprehend and participate in meetings because of a hearing impairment, the promise of inclusion in full membership rights means nothing without a concomitant obligation to accommodate. See National Assoc. of the Deaf v. Harvard Univ., 2016 WL 3561622 (D. Mass. Feb. 9, 2016) (deaf and hard of hearing individuals may lack meaningful access to the aural component of Harvard's audiovisual online

content without free online captioning). Thus, the plain language of the statute prohibits exclusion from full union membership rights by failing to reasonable accommodate disability.

The broad statutory prohibition "discriminating in any way" against union members, employers, and any other individual further supports our reading of the statute. For unions not to discriminate in any way, they must, in appropriate circumstances, accommodate their members to avoid the creation of a subclass of individuals with less access and substandard rights. In the employment context, the SJC has held that denying a disabled employee an accommodation constitutes "discrimination" because it creates unequal terms, conditions and privileges of employment. Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination, 441 Mass. 632, 648 n. 19 (2004). The Court in Ocean Spray did not rely on the term "reasonable accommodation" in M.G.L. c. 151B, § 4 (16) but instead, focused on what it means to discriminate against a person with a disability. "When a qualified handicapped individual's disability permits him to perform the essential functions of a job without accommodation **but prevents him from enjoying equal terms, conditions and benefits of employment, the failure to provide a reasonable accommodation constitutes discrimination under § 4(16).**" Id. (emphasis added). Similarly, a union's refusal to provide an accommodation to a member with a disability denies the member the full enjoyment and equal rights of membership and therefore constitutes discrimination. The Hearing Officer properly concluded that union members should be "entitled to all the rights benefits and privileges of union membership," and where union meetings are not accessible to members on equal terms, failure to accommodate may constitute discrimination under the statute.

We explicitly reject the contention that M.G.L. c. 151B, § 4 (16)'s inclusion of the words "reasonable accommodation" necessitates the conclusion that M.G.L. c. 151B, § 4(2) does not

require unions to provide such accommodations. As the Hearing Officer correctly noted, the Legislature gave the Commission comprehensive agency powers to effectuate the statute's aims and expressly directed that c. 151B "be construed liberally for the accomplishment of its purposes." Flagg v. AliMed, Inc., 466 Mass. 23, 29 (2013), citing M.G.L. c. 151B, § 9. In Flagg, an employee who alleged his employer discriminated against him based on his wife's disability, urged upon the Court an expansion of the statute to include persons who are not themselves disabled, but are associated with a person with disabilities. The employer argued that M.G.L. c. 151B, § 1(17) enumerates three categories of individuals entitled to protection—persons with disabilities, persons who are regarded as having a disability, and persons who have a record of disability—and does not include a fourth category of persons who are associated with an individual with a disability. The Court rejected this "plain language" argument, looked to the broad remedial purpose of the statute and concluded that the Legislature intended M.G.L. c. 151B, § 4(16) to prevent an employer's animus against disability from adversely affecting not just the three categories of individuals identified in the statute, but also a fourth category: employees who are associated with an individual with a disability.[2] Similarly, the broad remedial purpose of M.G.L. c. 151B, § 4(2), and the societal importance of making full membership rights equally accessible regardless of protected class, supports the conclusion that

[2] In Flagg, Ali-Med and amici submitted an argument similar to another argument made by the Union in this appeal, i.e. that the definition of "qualified handicapped person" requires that the person bringing the action must be employed. A "qualified handicapped person" is defined as a handicapped person who is capable (or would be capable) of performing the essential functions of a particular job. The Court rejected Ali-Med's argument that a spouse of a disabled employee does not fall within the scope of this definition because he or she would not necessarily be capable of performing the essential functions of a job. The Court held, instead, that the remedial purpose of the statute and the liberal interpretation accorded M.G.L. c. 151B militated against a cramped reading of the statute's definitional section, and concluded that M.G.L. c. 151B prohibits associational disability discrimination.

labor unions must provide reasonable accommodation to disabled members under appropriate circumstances, despite the absence in the statute of the term "reasonable accommodation."[3]

Moreover, the Hearing Officer did not err in her consideration of Massachusetts courts' and the Commission's review of the Massachusetts public accommodations statute, M.G.L. c. 272, § 98. Similar to section 4(2) of c. 151B, section 98 of c. 272 does not use the terms "reasonable accommodation" and "undue hardship" but grants all persons "the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation..." M.G.L. c. 272, § 98. Notwithstanding the absence of these terms, the SJC has held that even outside of the disability discrimination context, places of public accommodation must provide a reasonable accommodation to provide all persons full and equal advantages. Currier v. National Board of Medical Examiners, 462 Mass. 1 (2012). The Court's focus in Currier was not on the absence of the term "reasonable accommodation" but instead, on the exclusionary, discriminatory and demeaning effect that failure to provide an accommodation has when it serves to create an unequal playing field for a protected class. Moreover, just as the SJC rejected the Respondent's argument in Currier that there is no obligation to reasonably accommodate because the term "undue hardship" does not appear in M.G.L. c. 272, § 98, we reject the contention that the absence of the words "undue hardship" in M.G.L. c. 151B, § 4 (2) necessitates a determination that unions have no obligation to reasonably accommodate their

[3] We note several courts have required reasonable accommodations from employers even when the state statute prohibiting disability discrimination in employment does not include the term "reasonable accommodation." Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 944 A.2d 925 (2008) (failure to require reasonable accommodation would thwart the statutory purpose of full inclusion of persons with disabilities); Moody-Herrera v. Department of Natural Resources, 967 P.2d 79, 86 (Alaska 1998) (the term "discriminate" includes the failure to reasonably accommodate disabled employees); Holland v. Boeing Co., 90 Wash.2d 384, 388-89, 583 P.2d 621 (1978) (same).

members. The Hearing Officer's consideration of Currier and MCAD decisions requiring that places of public accommodation provide reasonable accommodations is not in error. [4,5]

Finally, we address the argument that permitting a stenographic transcription of the proceedings with closed captions would unduly burden the Union because it would require the participation in Union meetings of a non-union member stenographer, potentially requiring an amendment of the Union's by-laws and chilling the speech of its members. The Hearing Officer concluded that while the by-laws require that "no one but members in good standing are admitted to the meetings . . .", the Union presented no evidence that amending the by-laws would have been unduly burdensome or difficult, and the record adequately supports this conclusion. Such an amendment would make limited exception to the meeting admissions rule, permitting a stenographer who was not a union member to enter meetings for the narrow purpose of providing real-time transcription of the meeting for its hearing impaired and deaf union members.[6] Contracts, by-laws and collective bargaining agreements may be amended or overridden to

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[4] The Union argues that the Currier decision did not "state that the full interactive process" required under M.G.L. c. 151B would apply in the public accommodations context. The decision, however, details the breakdown of dialogue between Ms. Currier and the NBME, which resulted in the conclusion that the NBME did not make any showing that it could not reasonably accommodate Currier without incurring undue hardship. Currier at 7-9.

[5] We reject the Union's argument that the MCAD cases cited have insufficient legal authority or weight. See Brooks v. Martha's Vineyard Transit Auth., 433 F. Supp. 3d 65, 72 (D. Mass. 2020) (MCAD's construction of M.G.L. c. 272, § 98 warrants "substantial deference" because the Massachusetts Legislature essentially delegated to the Commission the authority in the first instance to interpret Section 98 and determine its scope); Currier v. NBME, at 18 (same). Moreover, we reject the Union's argument that the MCAD cases cited are inapposite because they involved some degree of ejection or exclusion. The refusal to provide assistance through a stenographer for a person with a hearing impairment has is just as exclusionary as refusing to allow an individual with Tourette's syndrome to use public transportation. See Bachner v. MBTA, 22 MDLR 183 (2000).

[6] We also concur with the Hearing Officer's reasoning that the Union could have explored ways of protecting the confidentiality of the union meetings, such as having any transcription or recording of the union meetings deleted after the meeting, and requiring the stenographer to sign a confidentiality agreement.

ensure compliance with M.G.L. c. 151B. MBTA v. Boston Carmen's Union, Local 589, 454 Mass. 19 (2009).[7] The speculative concern that changing the by-laws might not be approved by its membership was not tested in this case as the Union made no effort to make such a change to its by-laws. We reject the Union's argument that requiring a change to the by-laws represents a "profoundly anti-democratic impulse" inconsistent with the organizational nature of unions. Entities that require a vote to change their practices and provide accommodations are no less obligated to comply with anti-discrimination principles than those with one decision-maker. For example, condominiums, which generally have boards, are required to provide accommodation and, presumably, obtain consensus. See M.G.L. c. 151B, § 4(6). It is not per se unduly burdensome for an entity to hold a vote and find consensus to effect a change in practice. Holding otherwise would frustrate the purpose of the statute.

We also reject the Union's argument that a stenographer's presence would chill the ability of its members to engage in frank and open discussion and therefore constitute an undue burden. First, the Union's concerns about secrecy may have been over-stated as there were no restrictions requiring members to keep the meetings confidential or preventing those present at the Union meetings from recording the meetings on their phones. Second, these meetings did not generally entail highly confidential material such as details about the inner workings of collective bargaining sessions. The meetings were well-attended, with over a hundred union members, and were not intimate gatherings designed to encourage private disclosures. Moreover, as the Hearing Officer acknowledged, the Union could limit the impact of the presence of a

[7] We reject the Union's argument that Barbuto v. Advantage Sales & Marketing, LLC, 477 Mass. 456 (2017) supports the conclusion that requiring an amendment to union by-laws to accommodate a disabled union-member constitutes an undue burden. While an undue hardship might exist if an employer can prove that the off-site use of marijuana by a disabled employee violates an employer's contractual or statutory obligations, thereby jeopardizing the company's ability to perform its business, the facts in Barbuto are a far cry from those in this case.

stenographer by notifying members that the stenographer is required to keep their discussions confidential and either destroying any stenographic record after the meeting or making the transcript available only at the meeting themselves. Based on the evidence, it was not error to conclude that the Union could have accommodated Ms. Reed by providing her with transcription without undue burden or hardship.

REQUEST FOR ATTORNEY'S FEES AND COSTS[8]

Complainant's attorney has filed a Petition for Attorneys' Fees and Costs seeking $75,450.00 for 201.20 hours of work at a rate of $375 per hour, and $2,021.00 in costs. This request is supported by contemporaneously kept, detailed time records, and no opposition to the Petition was filed. Complainant is entitled to an award of reasonable attorney's fees for the claims on which she prevailed. M.G.L. c. 151B, § 5. The determination of what constitutes a reasonable fee is within the Commission's discretion and includes 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.

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

[8] Since the request for attorney's fees and costs was filed pursuant to 804 CMR 1.00 (1999) et seq., the Full Commission determines the fee award in this matter.

contemporaneous time records maintained by counsel and review both the hours expended and tasks involved. Baker, supra, at 1099. Compensation is not awarded attorneys' fees 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). Based upon our review of this record, we believe that this figure represents a reasonable number of hours necessary to litigate the claim upon which Ms. Reed prevailed. Our review points to no evidence that hours spent were duplicative, unproductive, excessive or otherwise unnecessary to the successful prosecution of the claim. Thus, the product of the hourly rate and time expended constitute the lodestar.

Based on our review, we decline to enhance or reduce the fees in this case. There are several factors supporting enhancement. The theory of liability in this case was a novel issue of first impression. The case was tried by a solo practitioner, McTernan v. Boston Public Schools, 28 MDLR 88 (2006), and was vigorously contested by the Union. Grzych v. American Reclamation Corp., 32 MDLR 238 (2010). The issues litigated in this case have significance, not only for Ms. Reed, but for a wider class of union members in Massachusetts. On the other hand, there are factors supporting reduction. While Ms. Reed prevailed on her claim of disability discrimination and failure to accommodate, she did not prevail on the claims of individual liability and retaliation. 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, 27 MDLR 30 (2005); Patel v. Everett Industries, 18 MDLR 26 (1996). The individual liability claim was inextricably intertwined and based on a common nucleus of facts with the reasonable accommodation claim. While the retaliation claim was not as intertwined with the failure to

reasonably accommodate claim as the individual liability claim, the focus of the hearing was on the failure to accommodate claim, not the retaliation claim. In addition, given the reasonableness of the fees requested in this matter and the fact that the petition for fees was uncontested by the Union, we conclude that any factors supporting reduction are balanced by the factors supporting enhancement of the lodestar.

ORDER

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

1. The Union shall immediately cease and desist from all acts that violate M.G.L. c. 151B, § 4(2), including the failure to promptly explore and provide reasonable accommodation to its disabled members who seek accommodations to be able to participate fully in Union activities.
2. The Union shall explore the feasibility of and provide options for reasonable accommodation, including stenographic transcription of its meetings as a means to permit Ms. Reed to participate meaningfully in Union meetings.
3. The Union shall pay to Ms. Reed the sum of $25,000.00 in damages for emotional distress with interest thereon at the 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.
4. The Union shall pay to Ms. Reed the attorney's fees and costs in the amount of $77,471 from the date on which the petition for fees was filed until such time as payment is made, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue.

In accordance with 804 CMR 1.24(1) (2020) and 804 CMR 1.23(12)(e) (2020), the within Order is not a final decision or order for the purpose of judicial review by the Superior Court in accordance with M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Pursuant to 804 CMR 1.23(12)(c) and (d) (2020), Complainant has fifteen (15) days from receipt of this Order to file a petition for supplemental attorney's fees and costs incurred as a result of litigating the appeal to the Full Commission, and Respondent has fifteen (15) days from receipt of the petition to file an opposition.

The Commission will issue a Notice of Entry of Final Decision and Order when either the time for filing a petition for attorney's fees and costs has passed without a filing, or a decision on the petition is rendered. The Commission's Notice of Entry of Final Decision and Order will represent the final action of the Commission for purposes of M.G.L. c. 151B, § 6 and M.G.L. c. 30A § 14(1). The thirty (30) day time period for filing a complaint challenging the Commission's Final Decision and Order commences upon service of such Notice.

SO ORDERED[9] this 22nd day of November, 2021

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

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