COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and APRIL ROBAR,
Complainants

v.

DOCKET NOS. 09-NEM-03054
11-NEM-02713

INT'L LONGSHOREMEN ASSOC. LOCAL 1413-1465 and JOSEPH FORTES,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Complainant on her claim of discrimination based on gender. Following an evidentiary hearing, the Hearing Officer found that Respondents were liable for discrimination based on gender after failing to hire Complainant as a forklift operator and excluding her from full union membership rights based on her gender. The Hearing Officer further found that Respondents were not liable for retaliation. Respondent International Longshoremen Association Local 1413-1465 ("the Union") has appealed to the Full Commission.[1] For the reasons provided below, we affirm the Hearing Officer's decision.

STANDARD OF REVIEW

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

[1] Respondent Joseph Fortes did not appeal the Hearing Officer's decision.

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, § 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); MCAD and 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).

BASIS OF THE APPEAL

The Union ("Respondent") appeals the Hearing Officer's decision and argues that the Hearing Officer erred by (1) failing to make certain factual findings and improperly weighing the evidence; (2) concluding that Respondents were liable for discrimination based on gender; and (3) awarding emotional support damages in the amount of $50,000. After careful review, we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings as they are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42.

Respondent argues that the Hearing Officer erred by making findings of fact that are not supported by substantial evidence and by failing to make specific findings of fact based on the testimony of Respondent's witnesses. We have reviewed the relevant findings supporting the Hearing Officer's decision and determine that these findings are supported by sufficient evidence. The Full Commission defers to the Hearing Officer's credibility determinations and findings of fact absent an error of law or abuse of discretion. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007 at 1011. The Hearing Officer is in the best position to observe the witnesses' testimony and demeanor and her credibility determinations generally should not be disturbed. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). This review standard does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and testimony, as it is the Hearing Officer's responsibility to weigh the evidence and decide disputed issues of fact. We will not disturb the Hearing Officer's findings of fact, where, as here, they are fully supported by the record.

Respondent argues that the Hearing Officer erred in concluding that it was liable for discrimination. Specifically, the Respondent asserts: (1) that there was no direct evidence of discrimination; (2) that the Hearing Officer failed to understand industry, working conditions, union rules, or hiring when she determined that Respondents were liable for discrimination[2]; and (3) that the Hearing Officer failed to acknowledge that this complaint was brought based on a longstanding feud with Respondent Joseph Fortes.[3] We disagree with Respondent's assertions

[2] We disagree with Respondents' assertion, as the Hearing Officer properly considered the evidence presented at the hearing . For example, the Hearing Officer found that the Union President's testimony that Complainant could not operate a forklift on a fruit boat with the required skill necessary due to the unique working conditions was not credible, contradicted by the testimony of other witnesses and belied by his testimony that he never observed Complainant operate a forklift.

[3] The Hearing Officer largely discredited Respondents' witnesses' testimony and instead credited the testimony of the Complainant and her version of the disputed events. The Hearing Officer acknowledged a history of conflicts

as there was sufficient evidence for the Hearing Officer's determination that Respondents were liable for discrimination based on gender.

The Hearing Officer found that in the position statement submitted by Respondents, Union President Edmond Lacombe asserted that the union hired females who "knew their place" relative to work assignments and accepted the "outcome." This "outcome," as described by the statement attributed to union member, David Soares, when two males without forklift credentials were selected instead of Complainant [4] as forklift operators, was that women were not picked to work on fruit boats. The Hearing Officer found that no females were selected by the Union to operate forklifts on the fruit boats at New Bedford's Maritime International, Inc. Terminal. The Hearing Officer concluded that the evidence created "a highly probable inference that forbidden bias was present." The Hearing Officer further found that the union members' remarks, coupled with the fact that no females were ever selected, constituted direct evidence of gender discrimination. We see no error in this determination. However, the Hearing Officer continued in her reasoning, determining that even if these remarks did not constitute direct evidence, Respondents were liable based upon indirect evidence analysis.

Even if the union members' statements alone do not constitute direct evidence of discrimination, they nonetheless support the determination that Respondents were liable for discrimination based on an indirect evidence analysis. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (providing that in order to establish a prima facie case of discrimination based on indirect evidence Complainant must show that: (1) she is a

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between Fernandes and Fortes but discredited the testimony of Fortes who she found "was evasive and non-responsive in answering questions." Our standard of review does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and testimony, as it is the Hearing Officer's responsibility to weigh the evidence and decide disputed issues of fact. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

[4] Complainant was credentialed to operate a forklift by Maritime International, Inc. (Maritime). She also received on-the-job training as a forklift operator and obtained a forklift certification from a prior employer, Ocean Spray Cranberries, Inc. (Ocean Spray).

member of a protected class; (2) she was performing her position in a satisfactory manner; (3) she suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified persons). Specifically, the Hearing Officer found that Complainant, a long-term female dock worker with an excellent work history and a forklift certification, was not hired by Respondents as a forklift driver despite her experience and credentials. Instead, Respondent hired male forklift drivers regardless of whether they were certified forklift operators.[5] The Hearing Officer found that Respondents failed to produce credible evidence of a legitimate, nondiscriminatory reason for failing to hire Complainant as a forklift operator. The Hearing Officer concluded that the "indirect evidence of gender discrimination is buttressed by the direct evidence of gender discrimination . . . .[t]hese factors combine to establish that Complainant's gender was a material and important ingredient motivating the actions taken against her." The Hearing Officer did not err in concluding that Respondent was liable for gender discrimination.

Respondent argues that the Hearing Officer's award of $50,000 in damages was excessive. We disagree. The Hearing Officer has discretion to award damages to Complainant for emotional distress suffered as a direct and probable consequence of Respondents' discriminatory acts. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Such an award must be supported by substantial evidence and the record must be clear with respect to the factual basis of such damages as well as the causal connection between the unlawful act and the emotional distress. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004); see MCAD and Tara Leary v. James F. Braden & Joan G. Braden, 26 MDLR 234, 240-241(2004). The Hearing Officer credited Complainant's testimony that she felt targeted because of her gender

[5] Specifically, on November 24, 2009, Respondent Joseph Fortes declined to select Complainant and another female for forklift assignments, but instead selected two men who lacked forklift credentials. The Hearing Officer found that Fortes failed to credibly refute his actions or the fact that no females were ever hired to operate forklifts on fruit boats, despite female candidates seeking such assignments.

when Respondents refused to hire her as a forklift operator. Complainant testified that her failure to secure work on the fruit boats hurt her, upset her, made her feel unworthy and unqualified, and caused her to feel like a second-class citizen. The Hearing Officer did not err in awarding Complainant emotional distress damages in the amount of $50,000.

PETITION FOR ATTORNEYS' FEES AND COSTS[6]

Commission Counsel filed a Petition for Commission Counsel Fees with a supporting affidavit and Respondent filed an Opposition. Respondent argues that the request for fees must be reduced to reflect only partial success since Complainant did not prevail on her claim of retaliation. Respondent also asserts that the Petition fails to discount non-core work.

The Petition for Commission Counsel Fees seeks attorneys' fees in the amount of $56,272.75 and costs in the amount of $211.59. This figure represents 177.96 hours of compensable time at hourly rates of $300 and $325. The Petition is supported by detailed contemporaneous time records noting the amount of time spent on specific tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover attorneys' fees for the claims on which the Complainant prevailed. The Commonwealth is entitled to reasonable attorney's fees and costs expended on behalf of a prevailing Complainant pursuant to G.L. c.151B, §3(15). 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

[6] Since the Petition for Attorneys' Fees and Costs was filed pursuant to 804 CMR 1.00 (1999) et seq., the Full Commission determined the award.

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 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).

When multiple claims are alleged, and the Complainant does not prevail on all her 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 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). Here, Complainant did not prevail on her claim of retaliation. While Complainant's successful claim of gender discrimination was related to the underlying claim of retaliation, we cannot say that the two charges were so closely interconnected as to merit full compensation for litigation of both claims. However, because the prosecution was primarily focused on Complainant's successful gender discrimination claim, we

conclude that a 10% deduction in fees in the amount of $5,627.28, reflecting the limited time spent on the unsuccessful retaliation claim, is appropriate.

Respondent also argues that Complainant is not entitled to recover fees for non-legal or non-core work. Even where courts have addressed "non-core" work by an attorney in a fee petition, through the application of a lower rate for such work, the application of either uniform or differential rates for attorney's fees remains a matter of discretion. See Guckenberger v. Boston University, 8 F. Supp. 2d 91, 101 (D. Mass. 1998). In this case, the time entries contain sufficient detail to permit a conclusion that the work billed for falls within reasonable parameters of work that an attorney would be expected to perform. Thus, we decline to adjust the requested attorneys' fees downward. We find that the hourly rates requested by Commission Counsel are consistent with the prevailing market rates for attorneys with comparable qualifications. Therefore, we conclude that an award of $50,645.47 for attorneys' fees is appropriate given these circumstances.

We conclude that Complainant's request for reimbursement of costs in the amount of $211.59 is reasonable.

ORDER[7]

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

1. As injunctive relief, the Respondent Union is directed to cease and desist from any policy or action that denies dollar-a day-assignments to females based on

[7] The Commission acknowledges that the Union completed the training requirements of the Hearing Officer's decision. The Commission also recognizes that the Union agreed in its Petition for Review to comply with the terms of the cease and desist order described in ¶1. Finally, the Commission recognizes, but denies, the Union's request that Complainant be required to pay undisclosed membership dues for the period from 2009 through the date of this decision prior to conferring Complainant union membership. The Commission is given broad authority to remedy discrimination, including awards to make victims whole. College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass, 156, 170 (1987).

gender and/or which applies disparate standards to the acceptance of females as Union members. In support thereof, the Respondent Union is ordered to: a) provide notification to the Commission within thirty (30) days of receiving this decision of the gender of its current membership; and b) provide notification to the Commission within thirty (30) days of the acceptance of new members, identifying the individuals by gender. The injunction described above in subparts a) and b) shall remain in effect until lifted in response to application of the Respondent Union for good cause shown.

2. As further injunctive relief, the Respondent Union is directed to confer Union membership upon Complainant retroactive to October 1, 2009 and provide her with whatever pension, death, and other benefits accrue, on average, to members of Local 1413-1465 who joined the Union on or within three months (before or after) of that date.
3. Respondents are jointly and severally liable to pay Complainant within sixty (60) days of receipt of this decision, the sum of $50,000.00 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.
4. The Respondent Union is to pay to the Commonwealth of Massachusetts a civil penalty in the sum of $10,000.00.
5. Respondents are jointly and severally liable to pay to the Commonwealth of Massachusetts attorneys' fees in the amount of $50,645.47 and costs in the amount of $211.59, with interest thereon at the rate of 12% per annum from the

date the petition for attorneys' fees and costs was filed, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

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, Superior Court Standing Order 96-1. 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[8] this 15th day of June, 2020.

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[8] Chairwoman 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).