

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
LEO H. ROBERGE,
Complainants

v.

DOCKET NO. 15SEM00594

SULLIVAN, KEATING & MORAN
INSURANCE AGENCY,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Judith E. Kaplan on April 25, 2019, partially in favor of Complainant Leo H. Roberge (“Complainant”) and partially in favor of Respondent Sullivan, Keating & Moran Insurance Agency (“Respondent”).

Following an evidentiary hearing, the Hearing Officer found Respondent discriminated against Complainant on the basis of disability in violation of M.G.L. c. 151B §4(16) when it denied a reasonable accommodation to Complainant’s disability. The Hearing Officer also found that Respondent did not discriminate against Complainant on the basis of disability pursuant to M.G.L. c. 151B §4(16) when it terminated Complainant’s employment. The Hearing Officer ordered that: (1) Complainant’s claim of unlawful termination be dismissed; and (2) Respondent participate in, within 120 days of receipt of the decision, a training of Respondent’s owner focusing on discrimination based on disability, the interactive process, and negotiation of reasonable accommodations for employees with disabilities. The Hearing Officer declined to award damages for emotional distress. Respondent appealed the portion of the decision finding that Respondent discriminated against Complainant by failing to provide a reasonable accommodation; Complainant neither intervened in Respondent’s appeal nor appealed the

decision. Commission Counsel submitted a petition for fees with supporting affidavit, which Respondent opposed. For the reasons discussed below, we affirm the Hearing Officer's decision in full, and award a portion of the attorney's fees sought.

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

Respondent argues that the Hearing Officer's finding of a failure to provide a reasonable accommodation should be dismissed because: (1) there was an investigative finding of no

probable cause regarding Respondent's failure to reasonably accommodate Complainant's hearing impairment by providing a CaptionCall phone;¹ and (2) there was no substantial evidence that such claim was timely. After careful review, we find no material errors with respect to the Hearing Officer's decision.

First, Respondent argues that because the Commission found a lack of probable cause regarding the request for a CaptionCall phone, the Hearing Officer was precluded from finding liability on the failure to reasonably accommodate claim. This argument mischaracterizes the Commission's investigative disposition. The investigative disposition found probable cause regarding Respondent's failure to provide a reasonable accommodation for Complainant's multiple disabilities, and noted that allegations arising before May 27, 2014, would have been time-barred. In so doing, the investigative disposition referenced that Complainant had alleged that the request for the CaptionCall phone occurred in 2013.

In any event, an investigative disposition finding probable cause to credit a complainant's allegations is not a final determination regarding those allegations. Disputes involving genuine issues of material fact are clearly reserved for the factfinder at public hearing, and it is at public hearing that testimony is submitted under oath and the Commission's final determination is made regarding a Complainant's allegations of discrimination, including the time that relevant conduct occurred. See M.G.L. c. 151B, §5; 804 CMR 1.15 (7) (a) (1999) (relevant procedural regulation in effect at the time of public hearing in this matter); and 804 CMR 1.08 (1) (f) (1) (2020). Moreover, the certification order is the operative document identifying the issues to be considered at public hearing, not the investigative disposition. See 804 CMR 1.20 (1999) (relevant procedural regulation in effect at the time of public hearing in this matter) and 804

¹ The CaptionCall telephone is a device to assist persons with hearing impairments. It uses a captioning agent to provide written captions of callers' words, which are displayed on the phone's screen.

CMR 1.11 (2020). See also 804 CMR 1.04(8) (2020) (a complaint may be amended to include claims previously dismissed for lack of probable cause). The Investigating Commissioner waived a certification conference and certified the entire complaint to public hearing. As such, Respondent was on notice that all of the claims and issues in the complaint were certified to public hearing, including the allegation that Respondent denied Complainant's request for accommodation relating to the CaptionCall phone.

Regarding the timeliness of the allegation concerning the CaptionCall phone, Complainant filed his Complaint against Respondent on or about March 23, 2015. The Hearing Officer credited Complainant's testimony at public hearing that in 2014, he asked his boss, Respondent's president, and CEO David Mathews for permission to install the CaptionCall telephone, and that Mathews turned down his request because he believed the device would be incompatible with Respondent's existing phone system. The Hearing Officer also discredited Mathews' testimony at public hearing regarding his recollections of Complainant's request for an assistive device and his response.

Respondent may raise timeliness as an affirmative defense, but it did not raise objections to the timeliness of Complainant's allegations prior to or during the public hearing, despite having multiple opportunities to do so. Respondent did not attempt to impeach or test Complainant's testimony that the CaptionCall request was in 2014, either by pointing to the Complaint indicating that the request was in 2013, or by attempting to demonstrate that the request was untimely even if occurring in 2014. When a respondent raises the statute of limitations as an affirmative defense and demonstrates a complainant's allegations are outside the applicable 300-day statute of limitations, the burden shifts to the complainant to prove facts falling inside the statute of limitations. Silvestris v. Tantasqua Reg'l Sch. Dist., 446 Mass. 756,

766–67 (2006) (Defendant school district repeatedly raised statute of limitations as an affirmative defense, including in answer to plaintiffs’ complaints.) Respondent had an opportunity to raise timeliness as an affirmative defense as early as its position statement but did not. See 804 CMR 1.10 (8) (d) (1999); 804 CMR 1.05 (8) (d) (2020). Respondent had another opportunity to raise timeliness as an affirmative defense at the time of certification or in the joint pre-hearing memorandum but did not. See 804 CMR 1.20 (1999); 804 CMR 1.11 (2020). Respondent first raised the issue of timeliness in its post-hearing brief, which is insufficient because evidence had already been tested and reviewed before the Hearing Officer. Respondent failed to timely raise this objection to the Hearing Officer and, as such, it has been waived. See Medeiros and Dow v. Penske Truck Leasing, 26 MDLR 229 (2004).

In short, the Hearing Officer’s decision that Respondent failed to reasonably accommodate Complainant is affirmed where the issue was certified to public hearing and any objection with respect to the timeliness of the claim was waived.

PETITION FOR COMMISSION COUNSEL FEES

Chapter 151B, § 5 allows prevailing complainants to recover reasonable attorney's fees.² 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, Baker v. Winchester School Committee, 14 MDLR 1097 (1992). The Commission has adopted the lodestar methodology for fee computation. Id. By this method, the Commission will first calculate the number of hours reasonably expended litigate the claim and multiply that number by an hourly rate it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either

² Since 804 CMR 1.00 (1999) et seq, was in effect at the time of the request for attorneys' fees, the Full Commission determines the award rather than the Hearing Officer.

upward or downward or determines that no adjustment is warranted depending on various factors, including complexity of the matter. Id.

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 the 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, 952 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). The party seeking fees has a duty to submit detailed and contemporaneous time records to document the hours spent on the case. Denton v. Boilermakers Loca129, 673 F. Supp. 37, 53 (D. Mass. 1987); Baker v. Winchester School Committee, 14 MDLR at 1097. Commission Counsel's requested fees amount to \$25,714.12 (97.04 hours at an hourly rate of \$265). Respondent opposes the request arguing that because no damages were awarded to Complainant, neither Complainant nor the Commission is entitled to fees as a prevailing party. Respondent also argues that if attorney's fees are awarded, they should be reduced because Complainant failed to prove all his claims under M.G.L. c. 151B.

Where 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(s). 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 prevailed on his claim of failure to reasonably accommodate a disability but did not prevail on his claim of unlawful termination. Complainant's successful claim of failure to reasonably accommodate a disability was related to the unsuccessful claim of unlawful termination. However, because the failure to accommodate was a discrete set of acts distinct from Respondent's decision to terminate Complainant based on his performance, the two charges were not so inextricably intertwined as to merit full compensation for litigation of both claims.

Most of the testimony in the public hearing concerned Complainant's unsuccessful unlawful termination claim. While the Hearing Officer declined to award Complainant damages on that claim, citing the *de minimis* nature of Complainant's emotional distress, she did order that Respondent's owner participate in a training focusing on discrimination based on disability, the interactive process, and negotiation of reasonable accommodations. Because the prosecution was primarily focused on Complainant's unsuccessful claim of unlawful termination, we conclude that a 70% reduction in fees sought, reflecting the limited time spent on the successful claim of failure to reasonably accommodate a disability, is appropriate.

In her Petition for Commission Counsel Fees and supporting Affidavit, Commission Counsel shows that she spent 97.04 hours prosecuting this matter at a rate of \$265 per hour, for a total amount of \$25,714.12. Her hours were sufficiently documented, and the record indicates that her work was not duplicative, unproductive, excessive, or otherwise unnecessary. The rate per hour requested is consistent with the Massachusetts Law Reform Institute (MLRI) Attorneys Fees Scale for attorneys with Commission Counsel's level of experience. Commission Counsel

did not seek costs in this matter. Accordingly, the Full Commission awards \$7,714.24, or approximately 30% of \$25,714.12, in attorney's fees in this matter.

ORDER

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

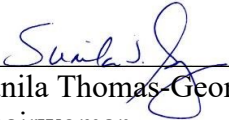
1. Respondent is to participate in, within 120 days of the receipt of this decision, a training of Respondent's owner. Such training shall focus on discrimination based on disability, the interactive process and negotiation of reasonable accommodations for disabled employees.
2. Respondent is ordered to pay the Commonwealth of Massachusetts attorney's fees in the amount of \$7,714.24, with interest thereon on 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 action³ 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.


³ The Full Commission will ordinarily delay the issuance of a final action for the purpose of judicial review pursuant to M.G.L. c. 151 B, § 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). No such delay is warranted here because Complainant did not intervene in the Respondent's petition for review or otherwise appeal and thus did not incur any costs "as a result of litigating the appeal" as required to file a petition for supplemental attorney's fees under 804 CMR 1.12(c) (2020).

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 this 14th day of August, 2023.


Sunila Thomas-George
Chairwoman


Monserrate Rodriguez Colón
Commissioner


Neldy Jean-Francois
Commissioner