

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

THE MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JOSEPH SASSO,
Complainants

v.

DOCKET NO. 08-BEM-01588

SERVISAIR, LLC,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant Joseph Sasso. Following an evidentiary hearing, the Hearing Officer concluded that Servisair, LLC (“Servisair”) was liable for age discrimination when it refused to consider transferring Complainant into either of two available duty manager positions rather than laying him off after thirty-four years of employment with the company. Respondent appealed to the Full Commission, including a Request for Stay Pending Appeal. Following the filing of its appeal, Respondent also filed a Motion to Strike Complainant’s Reply to Respondent’s Petition for Review. The Respondent’s Request for Stay and Motion to Strike are hereby denied.

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 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.

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). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer's findings were factually and legally erroneous and not supported by substantial evidence. Specifically, Respondent argues that the Hearing Officer erred in: 1) rejecting Respondent's rationale that it did not consider Complainant for the duty manager positions because he failed to formally apply for the positions by submitting a resume and her finding that internal transfers were routinely accomplished informally; 2) crediting testimony that the decision maker (Finch) preferred

younger candidates for the positions based on her belief that they would work any shift and nights; and 3) determining that Complainant was qualified for the duty manager positions although he was deemed totally disabled by the Social Security Administration as of May 2008 and awarded disability benefits. In addition, Respondent contends that the Hearing Officer erred in awarding emotional distress damages for the denial of the duty manager positions because Complainant's receipt of Social Security Disability established that he was medically disabled from working as of May of 2008. We have carefully reviewed Respondent's grounds for appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the applicable standard of review. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's Findings and Conclusions of Law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.

The Hearing Officer's findings that Servisair employed an informal application procedure for internal transfers and that Complainant conveyed his interest to Respondent in the duty manager positions were supported by sufficient evidence, particularly in view of her credibility determinations. An employee is not barred from establishing a prima facie claim of discriminatory hiring where he has made every reasonable attempt to convey his interest in the job to the employer. See, El-Sayed v. Carda CL New England, Inc., No. 14-14724-LTS, 2016 WL 3814808, at *3 (D. Mass. July 13, 2016). Her findings that when he inquired about the openings Respondent's employees discouraged him from formally applying, telling him "that he was fine where he was" despite his anticipated termination, further supports her determination that Complainant established a prima facie claim of discriminatory failure to transfer despite a formal application.

With regard to Complainant's challenges to the Hearing Officer's determinations of credibility, we reiterate that it is well established that the Commission defers to these determinations, which are the sole province of the fact finder. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The Hearing Officer is in the best position to judge the credibility of witnesses. Here, Respondent takes issue with the Hearing Officer crediting the former Human Resources Manager's testimony that the hiring manager preferred to hire younger candidates with fewer responsibilities.¹ However, it was her role and she was entitled to make this credibility determination.

Respondent's argument that the Complainant's receipt of Social Security benefits precludes a determination that Complainant was qualified for the duty manager positions fails to consider that receipt of such benefits does not bar the Complainant from showing he could work despite the disabling condition. See Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 443 (2002). The Hearing Officer credited Complainant's testimony that he had previously performed the work of a duty manager and was capable of performing the functions of a duty manager. Complainant's testimony was corroborated by another witness who the Hearing Officer also found credible. The claim that the Hearing Officer erred in awarding emotional distress damages due to his Social Security disability status ignores her reasoning that financial circumstances may have forced Complainant to seek such benefits, that Complainant's physical symptoms may have been exacerbated by the stress of layoff on May 1, 2008, and her evidence-based determination that he suffered significant emotional distress as a result of Respondent's refusal to consider him for a transfer to positions which became available on or about April of 2008.

Based on the foregoing we deny the appeal and affirm the Hearing Officer's decision.

¹ Hearing Decision Finding of Fact, ¶14 refers to Volume II of the transcript at pp. 50, 53, 54 and 92. The reference to the Human Resources Manager's testimony on this issue should be to Volume I at pp. 50, 53, 54 and 92.

PETITION FOR ATTORNEY'S FEES and COSTS

Complainant filed an Affidavit of Fees with accompanying exhibits claiming that his counsel spent 384.3 hours working on this matter and incurred costs of \$3,152.95. Complainant's counsel seeks compensation for the hours spent on this matter at the rate of \$250.00 per hour, resulting in a claim for legal fees of \$96,075.00 for hours spent on the case. Although Complainant's submission is not designated as a Petition for Fees, it shall be deemed as such and addressed below.

M.G.L. 151B, §5 allows prevailing complainants to recover reasonable attorney's fees and costs for the claims on which the complainant prevailed. 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 will first calculate the number of hours reasonably expended to 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 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).

We find that the hourly rate of \$250.00 is a reasonable rate within the range of rates charged by attorneys practicing employment law before the Commission. Complainant's counsel was admitted to the Massachusetts bar in 2005,² and at the time of hearing had been practicing law for eight years. We have reviewed the time records submitted by counsel,

² See, www.massbbo.org/AttorneyLookup; reviewed May 2, 2018.

including both the hours expended and tasks involved. The time records do not indicate that the work was duplicative, unproductive, excessive or otherwise unnecessary to prosecution of the claim nor are hours insufficiently documented and, hence, subject to deduction. See Brown v. City of Salem, 14 MDLR 1365 (1992). We note that Complainant's counsel not only prepared for and participated in a two-day public hearing, he prepared for and participated in a conciliation conference, drafted discovery documents, performed legal research, prepared for and attended depositions and drafted a post-hearing memorandum.

We also find that the costs incurred of \$3,152.95 are sufficiently supported.

Based on the foregoing, we award Complainant attorney's fees totaling \$96,075 and costs in the amount of \$3,152.95, for a total amount of \$99,227.95.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. Respondent's appeal to the Full Commission is hereby dismissed.

1. Respondent shall cease and desist from any further acts of discrimination on the basis of age when considering employees' eligibility for alternative positions within the company.
2. Respondent shall pay to Complainant the sum of \$ 125,000.00 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.
3. Respondent shall pay Complainant attorney's fees in the amount of \$96,075 and costs in the amount of \$3,152.95, with interest thereon at the rate of 12%

per annum from the date the affidavit for attorney's fees and costs was filed until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.


4. The Training Provisions set forth in the Decision of the Hearing Officer are incorporated herein.

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 ORDERED³ this 14th day of May, 2018



Sheila A. Hubbard
Commissioner



Monserrate Quifones
Commissioner

³ Commissioner Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission decision. See, 804 CMR 1.23