COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS
COMMISSION AGAINST
DISCRIMINATION and
TIFFANY SCHILLACE
Complainants

v. DOCKET NO. 12-NEM-01742

ENOS HOME OXYGEN THERAPY,
INC., ET AL, Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferri in favor of Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for unlawful retaliation in violation of M.G.L. Chapter 151B §4(4). The Hearing Officer found that Complainant was given an unjustified final warning for on-the-job infractions and then terminated because her fiancé, who also worked for Respondents, had recently filed a discrimination complaint at MCAD, alleging retaliation by Respondents for his participation in a colleague's complaint. Respondents were ordered to cease and desist from engaging in any further acts of retaliation, to pay Complainant the sum of $4,000 in damages with 12% interest for lost wages, and to pay Complainant the sum of $5,000 in damages with 12% interest

for emotional distress. The Hearing Officer deducted Complainant's receipt of $4,000 in welfare benefits received during this period from the award of back pay. Complainant has appealed the portion of the Hearing Officer's decision related to back pay damages to the Full Commission and seeks a clarification of the Hearing Officer's Order concerning the joint and several liability of Respondents. Respondents did not appeal 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 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 conclusion." 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 must also 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

Complainant argues that the Hearing Officer improperly deducted $4,000 in public benefits from the award to Complainant of $8,000 for lost wages. We note at the outset that it is within the discretion of the MCAD Hearing Officer to decline to reduce the amount of a back pay award to a Complainant who has received benefits from a collateral source, including receipt of public benefits in lieu of income. Known as the collateral source rule, it "is based on the rationale that if there is to be a 'windfall,' such benefit should accrue to the injured party rather than to the wrongdoer." Jones v. Wayland, 374 Mass. 249, 262 (1978). The collateral source rule, though often applied to the receipt of insurance benefits, also encompasses other types of payments or benefits from a source other than the defendant, including welfare benefits. Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 183 (1985) *citing* Restatement (Second) of Torts Section 920A comments b and c (1977) Buckley held that the Commission acted properly in declining to offset welfare benefits from back pay award despite a "windfall" to the Complainant.

In other decisions, the Commission has applied the collateral source rule to insurance payments, welfare benefits, workers' compensation, and disability benefits on the grounds that the party who caused the injury should pay the damages and if there is a windfall, the injured party should benefit rather than the wrongdoer. See School Committee of Norton v. MCAD, 63 Mass. App. Ct. 839 849 (2005) (Hhearing Officer acted within her discretion to decline to offset unemployment benefits received by Complainant); Thompson v. Westinghouse Electric Corp., 12 MDLR 1282, 1337 (1990) (refusal to offset Social Security Disability benefits). These cases rely upon the reasoning in Buckley , including the proposition

that a deduction of lost wages would allow a respondent to escape full liability for its actions. Buckley, supra at 183-185. We concur with this reasoning and the result, adopting the position that as a general rule, the collateral source rule should be applied, absent countervailing circumstances that, in the discretion of the fact-finder, would render the application unjust. Application of the rule is particularly warranted in circumstances where the employer does not directly contribute to the benefit received by Complainant and will not be penalized twice by an award of full back pay. We see nothing in the record before us that merits non-application of the collateral source rule in this case, particularly where the award of back pay to the Complainant is very modest. We, therefore, modify the back pay award in accordance with the rule and adjust the award for back pay to Complainant to $8,000, a sum that represents the full amount of her lost wages without a deduction for the $4,000 in welfare payments that she received subsequent to her employment being terminated.

Complainant also seeks clarification of the Hearing Officer's Order insofar as it does not specify that both the corporate and individual Respondents are jointly and severally liable for the retaliation and damages. Complainant petitions the Full Commission for a modification of the Hearing Officer's Order to correctly reflect the application of joint and several liability against both named Respondents. The Hearing Officer's Order states: "*Based on the foregoing Findings of Fact and Conclusions of Law* ***Respondent*** (emphasis added) *is hereby ordered....*" (Decision, p. 21). Complainant contends that the use of the singular form "Respondent" might be read to improperly absolve R. Jonathan Enos ("Jon Enos"), the President of Enos Home Oxygen Therapy, Inc. and a named Respondent, from liability for his actions. Since the Hearing Officer concluded that the decision to terminate Complainant's employment was driven by Jon Enos and that this decision was motivated by retaliatory

animus, it is clear that she intended both the corporate Respondent and the individually named President of the company to be jointly and severally liable for the unlawful retaliation. Moreover, the Decision does not dismiss Jon Enos as a party-Respondent, as is typical in Commission Orders where the individual is not found to have liability for the unlawful conduct.

Commission decisions typically conclude that liability is joint and several as against all named Respondents, including individuals, who are found to have legal responsibility for the discrimination. See Anido v. Illumina Media, LLC, et. al. , 32 MDLR 80, 88 (2010) (holding corporate Respondent and individual owner jointly and severally liable); Magill v. Mass. State Police, et al., 24 MDLR 355, 366 (2002) (holding Respondents jointly and severally liable for sexual harassment) ; Rafferty v. Keyland Corp., 22 MDLR 125, 127 (2000) (holding corporate Respondent and individual president and owner of company personally liable) Joint and several liability ensures that all legally responsible parties who are found to have engaged in unlawful conduct are liable for the full extent of the damages to Complainant. We conclude that the Hearing Officer's reference to "Respondent" in the singular was merely a clerical omission and does not reflect intent to dismiss the individual Respondent Jon Enos as a party-Respondent or to absolve him of liability. We therefore modify the Hearing Officer's Order to specify that Respondents are jointly and severally liable for the unlawful retaliation.

PETITION FOR ATTORNEY'S FEES and COSTS

Complainant has filed a Petition for Attorney's Fees and Costs to which Respondent has filed an opposition. Complainant's Petition seeks attorney's fees in the amount of $56,898.00, and costs in the amount of $1,970.80. The petition is supported by detailed

contemporaneous time records noting the amount of time spent on specific tasks and by affidavits of counsel. M.G.L. c. 151B allows prevailing complainants to recover reasonable attorney's fees for those claims on which they prevailed. For the reasons stated below, Complainant's Petition for Attorney's Fees and Costs is granted in part.

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 firsts calculates the number of hours reasonably expended to litigate the claim and multiplies 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 complexity of the matter.

Only those hours reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved. 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).

Counsel for Complainant seeks reimbursement for a total of 240.3 hours of work performed on this matter. A number of different attorneys performed work on the case at rates

that ranged from a high of $350 per hour to a low of $90 per hour for work performed by a law clerk. The vast majority of the work was performed by Attorney Richard Burke who billed at rates of $240 or $260 per hour. We find the rates charged to be reasonable and commensurate with the experience of the attorneys who performed the work.

Respondents raise two issues in opposition to Complainant's Petition. First, Respondents contend that Complainant's fee request should be reduced to reflect the actual success achieved in this case because the relief awarded (*i.e.,* $4,000 in damages for lost wages and $5,000 in emotional distress damages) is limited in comparison to the scope of the litigation as a whole.[1] Second, Respondents argue that Complainant's request for compensation for 24.1 hours to draft an Opposition to Respondent's Motion in Limine is excessive for this pleading.

Respondents' first argument is not persuasive. Complainant prevailed on her claim of retaliatory termination and was awarded damages for back pay and emotional distress. Her claims were thoroughly prepared and litigated by her counsel. While the damage award was relatively small, this is not a reflection of the success achieved on the merits with respect to liability. Respondent's assertion seems to be a claim that the fees sought are significantly out of proportion to the relatively small damage award to Complainant, and therefore are not justified.

The proposition that a fee award must be proportional to the relief obtained has been rejected by the courts. See Diaz v. Jiten Hotel Management, Inc., 741 F.3d 170 (1st Cir.

[1] For purposes of this discussion we note that the total amended award to Complainant is now $13,000 plus interest.

2013) (award of $104,626.34 in attorney's fees and costs, for a suit obtaining a damages award of $7,650, is not so disproportionate as to constitute an abuse of discretion) The court in Diaz noted that the rules surrounding fee-shifting in civil rights cases are "based on full compensation for the work performed, " and are designed "to encourage suits that are not likely to pay for themselves, but are nevertheless, desirable because they vindicate important rights." Id. at 178 *citing* Joyce v. Town of Dennis, 720 F.3d 12, 31 (1st Cir. 2013) (reversing lower court order awarding only $30,000 in fees when $170,000 was sought) The Commission and the courts recognize that there is a public interest in vindicating these important rights. Thus, regardless of the result, it is an "error of law ...to link the amount of recoverable attorney's fees solely to the amount of ...damages." Joyce, 720 F.3d at 31. The Diaz decision stressed that "emphasis on 'proportionality' as determinative of reasonableness runs directly counter to fundamental precepts of Massachusetts law." Id. at 178 (citations omitted) Therefore, we reject Respondent's argument that Complainant achieved limited success because the damage award was relatively low when compared to the scope of the litigation; requiring a reduction in the fee award.

A review of Complainant's fee petition and time records reveals that the amount of time Complainant's counsel spent on the preparation and the litigation of this claim was reasonable. The hours billed and work performed by Complainant's attorneys does not appear to be duplicative, unproductive, excessive or otherwise unnecessary to the prosecution of this claim so as to warrant a reduction of their fees. Counsel's time records do appear to show over 24 hours spent on research and preparation of an Opposition to

Respondents' Motion in Limine. However, nearly all of this time was spent by a law clerk billing at a rate of $90 per hour. We reject the claim that this amount of time is per se excessive or unreasonable because it was primarily performed by a law clerk at a low hourly rate. We have reviewed the entire petition for fees and conclude that the fees sought by Complainant's counsel in the amount of $56,898.00 are reasonable and should be awarded.

COSTS

Complainant seeks costs in the amount of $1,970.80 for parking and travel expenses, stenographer fees, subpoena fees, and copying costs. This request is supported by documentation in the form of an invoice. We find the request for costs to be reasonable and grant costs to Complainant in the amount of $1,970.80

ORDER

For the reasons set forth above, we hereby affirm the Decision of the Hearing Officer, with modifications to the Order as follows:

Respondents Enos Home Oxygen Therapy, Inc. and Jon Enos, President, are hereby ordered, jointly and severally:

1) To cease and desist from any acts of retaliation.

2) To pay Complainant, Tiffany Schillace, the sum of $8,000 in damages for lost wages, with interest thereon at the rate of 12% per annum from the date the complaint 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.

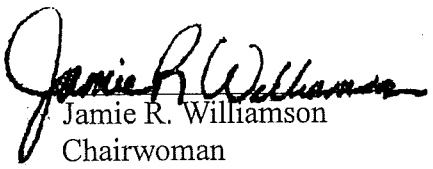
3) To pay Complainant, Tiffany Schillace, the sum of $5,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

4) To pay Complainant Tiffany Schillace's attorney's fees in the amount of $56,898.00 and costs in the amount of $1,970.80 with interest on both amounts at the rate of 12% per annum from the date the petition for fees and costs was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

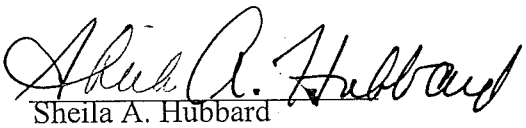
This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action 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 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[2] this 21st day of April, 2017



Jamie R. Williamson
Chairwoman



Sheila A. Hubbard
Commissioner

[2] 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