COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and HAROLD B. MURPHY, Trustee of the Bankruptcy Estate of RICHARD SHANAHAN,

Complainants

v. DOCKET NO. 07-BEM-02393

S & H CONSTRUCTION,

Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferri. Following an evidentiary hearing, the Hearing Officer found that Respondent S & H Construction (Respondent or Company) was not liable for discriminating against Complainant Richard Shanahan on the basis of his disability, a hearing impairment, when it terminated him from his employment, but it was liable for retaliating against him after he brought his claim to the Massachusetts Commission Against Discrimination (MCAD or Commission). Both Complainant and Respondent have appealed to the Full Commission.

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). Fact-finding determinations are 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 hearing officer sees and hears witnesses, her findings are entitled to deference). 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.

SUMMARY OF FACTS

Complainant has been hearing impaired since birth due to nerve loss. Wearing a hearing aid improves his hearing significantly, but not completely. When equipped with a functioning hearing aid, Complainant does not need an accommodation at work.

In 1996 or 1997, Complainant commenced employment for Respondent as a carpenter and eventually became a job supervisor. Respondent's principals, Alex Slive

and Douglas Hanna, both knew that Complainant was hearing-impaired when they hired him. Complainant worked for Respondent for approximately three years, left on good terms to work for another employer with better health insurance, and then returned to Respondent's employ in March of 2003.

Complainant testified that he was subject to a number of discriminatory actions between his return in 2003 and his termination in November of 2006. His testimony was contradicted by co-workers and supervisors who, in the Hearing Officer's judgment, testified credibly that they did not utter disparaging comments to Complainant about Complainant's hearing impairment or express frustration about working with Complainant because of his disability nor did they witness others doing so. Job supervisors John Murphy and Michael Segal stated that they became frustrated with Complainant due to deficiencies in his attitude and carpentry skills. Company principal Douglas Hanna suspected Complainant of padding his work hours. Numerous co-workers/supervisors said that they found fault with Complainant's job performance for non-discriminatory reasons such as reading the newspaper on the job, not showing up for work, staying in his truck when needed on the job, painting his own truck in a homeowner's driveway, and leaving the job site without permission. These assertions were credited by the Hearing Officer.

On Monday, October 30, 2006, Complainant notified his then-job supervisor John Caruso that he was going home sick and would likely be out the next day. On Thursday, November 2, 2006, he was fired by company principal, Alex Slive, for being absent for three consecutive days absent proper notification to the Company. Complainant maintains that he complied with Company requirements regarding notice, but the Hearing

Officer rejected his claim on the basis that it differed from his initial submission to the MCAD, his communications with the Company did not comply with Respondent's policy, and his assertions were refuted by credible testimony of Company personnel.

Prior to being terminated in November of 2006, Complainant borrowed approximately $8,000.00 from Respondent for various matters, including his home mortgage payment. Respondent, as a practice, loans money to its employees. Aside from this case, the only other time that Respondent took legal action to recover an employee loan involved a criminal complaint for misappropriated funds. In all other circumstances, unpaid loans to employees have been taken as a loss for tax purposes and written off.

Respondent did not seek repayment of its loan to Complainant for more than a year following his termination. It was not until October 30, 2007, about a month after Complainant filed his discrimination complaint with the MCAD, that Respondent sued Complainant for $8,050.12 in unpaid loans. Respondent obtained a default judgment against Complainant and proceeded to execute on the judgment by taking possession of a minivan owned by Complainant and used by Complainant's ex-wife to transport their three daughters. Complainant's ex-wife called Respondent the day after her car was removed to say that she desperately needed the minivan back. Slive told her that she could have the car only if she got Complainant to drop his MCAD complaint against the Respondent.

Based on the foregoing, the Hearing Officer concluded that Complainant was not subjected to a hostile work environment or to disparate treatment based on his disability, resulting in his termination, but that retaliatory animus was the primary motivation for Respondent's suit to obtain repayment of its loans to Complainant. The Hearing Officer

awarded Complainant $25,000 in emotional distress damages with respect to his claim of retaliation. In addition, the Hearing Officer assessed a civil penalty of $5,000 against Respondent because of the egregious nature of its conduct, which she concluded was a knowing and willful violation of M.G. L. chapter 151B, section 4(4).

BASIS OF THE APPEALS[1]

Complainant's Appeal

Complainant first challenges the Hearing Officer's determination that his prima facie case of termination based on disability was successfully rebutted by Respondent. According to Complainant, Respondent's reasons for terminating Complainant were pretextual. However, we conclude that the Hearing Officer's determination that Complainant's lack of dependability, his co-workers' dissatisfaction with his job performance, and his three-day absence from work without proper notification constituted legitimate, non-discriminatory reasons for terminating Complainant's employment and was sufficiently supported by the evidence.

Complainant argues unpersuasively that the project he was assigned to at the time of termination was "at a standstill." The Hearing Officer had sufficient evidence on which to conclude that the job was at a "critical phase," that there was "a lot of finish work that needed to be done," and that another carpenter had to be pulled off another project to compensate for Complainant's absence. The Hearing Officer determined that Complainant testified inconsistently and unpersuasively about when he called the Company offices to report the reason for his three-day absence from work. It was within

[1]Both Complainant and Respondent have appealed to the Commission.

the Hearing Officer's discretion to credit the testimony of Company principal Alex Slive over Complainant in regard to these matters.

Complainant likewise disputes claims about his shoddy workmanship and poor work ethic, but his position is refuted by job supervisor John Murphy who testified that he felt Complainant was uncooperative and had a negative attitude; job supervisor Michael Segal who testified that Complainant was deficient in his carpentry skills and had a bad attitude; and co-workers Scott Ramey, Daniel Pedersen, Raymond McDonald, and Eileen Leister who testified that Complainant read the newspaper while on the job, stayed in his truck when he was needed on the job, and attended to personal matters while neglecting his work responsibilities. The Hearing Officer found these employees to be credible and determined that they corroborated Respondent's assertion that people did not want to work with Complainant because of his poor work ethic and lack of dependability rather than because of his hearing impairment. The Hearing Officer's determinations are entitled to deference. See MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR at 14; Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

Complainant argues that even if testimony regarding his work deficiencies is true, there is no credible explanation for why he was terminated when others who also violated the call-in policy were not. According to Complainant, his hearing impairment set him apart from others, thereby establishing the "but for" reason for termination. The record refutes this claim, however, because other employees were also terminated for being absent from work in violation of the call-in policy. [2] The policy may not have been enforced in every instance, but it was enforced with sufficient regularity to rebut the

[2] See, Transcript of Day Two of Public Hearing, II pp 566-571; Respondent's Exhibits 15 and 16.

claim of disparate treatment based on disability. We uphold the Hearing Officer's conclusion that Complainant failed to meet his burden to prove that Respondent was motivated by discriminatory intent when it terminated him.

Other arguments made by Complainant are likewise unavailing. While Respondent should have in place anti-discrimination/anti-retaliation policies, we do not infer from the absence of such policies that the Company had a specific intent to discriminate in this matter. We likewise decline to infer such intent based on the denial of a loan from Respondent for replacing/repairing Complainant's hearing aid since the Company had previously lent money to Complainant which was not repaid.

In sum, we uphold the Hearing Officer's conclusion that Complainant did not establish a prima facie case of a hostile work environment nor did Complainant rebut Respondent's job-related reasons for terminating his employment.

Respondent's Appeal

Respondent contends that the Hearing Officer erred in finding retaliatory animus based on the filing of a lawsuit for the return of monies loaned to Complainant and for taking possession of a vehicle owned by Complainant, but used by his ex-wife, in satisfaction of the lawsuit's judgment. According to Respondent, since the lawsuit was decided in its favor, it cannot serve as the basis for a retaliation claim under Chapter 151B. We do not agree with this assertion.

In Sahli v. Bull HN Information Systems, Inc., 437 Mass. 696 (2002), an employer filed a lawsuit against a former employee for declaratory relief to establish that a release signed by the parties absolved it from legal responsibility for not transferring the

employee into another position prior to her layoff. The laid-off employee, who previously filed a discrimination claim, proceeded to file a retaliation suit under G.L. c. 151B, sections 4(4) and 4 (4A). Even though the employer's declaratory judgment action did not succeed on the merits, the SJC declined to characterize the suit as retaliatory after balancing the employer's right to seek judicial review under the First Amendment against the right of the employee to challenge her layoff as discriminatory without fear of reprisal. Id. at 700-701. In arriving at this conclusion, the SJC looked to the Supreme Court's language in BE & K Constr. C v. NLRB, 536 U.S. 516, 534 (2002) that "[a]s long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively. (emphasis in original). Concluding that the record lacked any evidence that the employer's purpose was other than to stop conduct it reasonably believed violated the terms of the release, the SJC affirmed the grant of summary judgment for the employer.

The SJC elaborated on the issue of retaliatory litigation in Psy-Ed Corporation v. Klein, 459 Mass. 697, 709 (2011) where an employer's filing of a lawsuit against a former employee with a pending discrimination claim at the MCAD was deemed violative of G.L. c.151B's anti-retaliation provisions despite employer's right to petition on the basis that the lawsuit was "sham" rather than "reasonably based." The Court defined a "reasonably based" lawsuit as one with "a legitimate basis in law and fact" **and** as lacking "evidence that the employer's purpose [was] other than to stop conduct it reasonably believe[d] violate[d] the terms of the contract." Sahli v. Bull HN Info. Sys. Inc. 437 Mass. at 704-705 (emphasis supplied). While Psy-Ed involved a lawsuit that was unsuccessful in contrast to the employer's successful lawsuit for repayment of funds

in this case, we are persuaded that there is sufficient evidence to support the Hearing Officer's determination that the Respondent's purpose in bringing its collection action was not to enforce its "contract" with Complainant, i.e., to obtain payment of a loan, but, rather, to retaliate and pressure Complainant into abandoning his MCAD claim.

In assessing Respondent's purpose in suing Complainant, it is significant that Respondent did not pursue repayment of its loan until the Complainant filed a discrimination claim. In fact, the suit was not brought until a month after Complainant filed his MCAD complaint. Likewise, outstanding loans given to other employees were not pursued by Respondent but instead were taken as losses and tax write-offs. For these reasons we agree with the Hearing Officer that pressure, not payment, lays at the heart of Respondent's suit to recover the loan and that it was motivated by retaliatory animus. Even if the lawsuit itself was not retaliatory, the additional step of taking possession of a vehicle operated by Complainant's former wife in execution of the default judgment against Complaint appears to have been a spiteful action designed to pressure Complainant to drop his discrimination suit. The present situation thus differs from Sahli where the employer's purpose in suing the employee was to stop conduct it reasonably and in good faith believed to violate the terms of a release.

Respondent disputes the Hearing Officer's reading of Sahli and Psy-Ed, citing Du v. Sunol Molecular Corp., C.A. No. 09-11797, 2012 WL 4058057 (D. Mass. 2012). In Du v. Sunol Molecular Corp., an employer sued a former employee in an arbitration proceeding to recover moving expenses and received a default award which was affirmed by the Massachusetts Superior Court. The former employee thereafter commenced a federal court action claiming that efforts of Sunol to obtain reimbursement of the moving expenses through the arbitration

proceeding constituted malicious prosecution, abuse of process, and intentional infliction of emotional distress. The Court recognized that the former employee was unable to prove his claim of malicious prosecution requiring a prior proceeding terminating in favor of the employee *(emphasis added)* where the employer, not the employee, had been successful in the prior litigation. The Court was not addressing an unlawful retaliation claim under G.L. c. 151B, sections 4(4) and 4 (4A) in its decision. The failure to claim retaliation in Du v. Sunol Molecular Corp. obviates its relevance to the Hearing Officer's determination in this case, to wit: Respondent's efforts to procure repayment of its loan to Complainant were motivated by retaliatory animus in violation of G.L. c. 151B. .

PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Award of Attorneys' Fees and Costs, to which Respondent has filed an Opposition. Complainant's Petition seeks attorneys' fees in the amount of $96,780.00 and costs in the amount of $10,040.92. The total amount sought represents a total of 320.4 hours of compensable time at an hourly rate of $300.00. 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 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).

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).

Respondent has filed an Opposition to the fee petitions arguing that the amount sought must be reduced by 90% due to Complainant's partial success. Respondent also asserts that the hours are duplicative, and that the hourly rate is excessive.

Where different claims are involved, and the Complainant has prevailed on some claims, but not others, the Commission may exercise its discretion to reduce the overall fees requested by some amount reasonably associated with the pursuit of Complainant's unsuccessful claim. Where, as here, the retaliation claim is separate and distinct and not based on a common nucleus of facts or related legal theories, the fee award must be reduced.

Having reviewed Respondent's Opposition we determine that the fee request should be reduced to reflect the fact that Complainant did not prevail on his claim of hostile work environment disability discrimination. We also note that the retaliation

issue was particularly hard-fought and required Complainant to reply to several pre-trial motions brought by Respondent surrounding this issue. Accordingly, we will discount the fee petition by fifty per cent. We therefore conclude that an award of $48,390.00 for attorneys' fees is appropriate given these circumstances.

We find that the request for reimbursement of costs is reasonable and will award Complainant a total of $10,040.92 for the listed expenses.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. The appeals to the Full Commission are hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety.

1. Respondent shall cease and desist from all acts that violate G.L. c. 151B § 4(4).
2. Respondent shall pay to the Complainant Trustee in Bankruptcy, for emotional distress, the amount of $25,000 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 to the Commonwealth the sum of $5000 as a civil penalty.
4. Respondent shall pay to Complainant attorneys' fees in the amount of $ $48,390.00 and costs in the amount of $10,040.92, 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[3] this 11th day of October, 2018

Sunila Thomas George
Chairwoman

Sheila A. Hubbard
Commissioner

[3] Commissioner Quinoñes dissents. Pursuant to 804 C.M.R. 1.03(2), the two other members of the Full Commission constitutes a quorum to affirm the Hearing Officer's decision.