COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and THOMAS SOBOCINSKI,
Complainants

v. DOCKET NO. 05-SEM-00849

UNITED PARCEL SERVICE, INC.,
RUSSELL FORD, RONALD PETRO and
RONALD DRAPER,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant, Thomas Sobocinski. ("Sobocinski") Following an evidentiary hearing, the Hearing Officer concluded that United Parcel Service Inc., ("UPS") was liable for unlawful discrimination on the basis of sexual harassment for allowing a sexually hostile work environment to exist at its Shrewsbury facility and for an act of retaliation against Sobocinski after he lodged an internal complaint in violation of G.L. c. 151B §§ 4 and 4 (4A). The Hearing Officer also found Russell Ford ("Ford"), Ronald Petro ("Petro") and Ronald Draper ("Draper") individually liable under G.L. c. 151B § 4 (4A), for having interfered with Sobocinski's right to the exercise and enjoyment of a workplace free of sexual harassment and/or retaliation. The Hearing Officer awarded Complainant $24.00 in damages for lost wages resulting from the

retaliatory act and $50,000 in damages for emotional distress.[1] The Hearing Officer also issued a detailed training Order that the Respondents now claim is overly broad, unsupported by the evidence and infringes upon the Company's free speech rights by compelling anti-discrimination speech. We disagree.

The responsibilities of the Full Commission are outlined by statute (M.G.L. c. 151B), the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. The Full Commission's role is to review the record and to determine whether the decision under appeal, if so challenged, is supported by substantial evidence and otherwise rendered in accordance with the law, or whether the decision was arbitrary or capricious or an abuse of discretion. See 804 CMR 1.23. Here, we are called upon to review the Hearing Officer's affirmative remedy Order in this matter.

The Hearing Officer ordered that UPS conduct six hours of training on "unlawful discrimination, harassment and retaliation" for all managers and supervisors employed by UPS at any of its facilities in Massachusetts.[2] UPS objects to the "broad" scope of the training because it would cover other protected classes not at issue in this case, for which there is no evidence in the record of discrimination. UPS further contends that the MCAD can only order training that is specific to and addresses the precise violations found in a particular case, here sexual harassment and retaliation. UPS argues, however, that even sexual harassment training is unjustified because following UPS's corporate response there were no further reports of sexually inappropriate conduct by the accused

[1] UPS has not challenged the liability determination or award of monetary damages in this appeal.

[2] The Order also requires training once a year for newly hired or promoted supervisors for five years.

harasser, Russell Ford.[3] Finally, UPS argues that any training that is required should be geographically restricted to the Shrewsbury facility only and exclude part-time supervisors and managers.[4] We disagree.

The MCAD is the agency charged by the Legislature with enforcing the anti-discrimination laws of the Commonwealth. As such, the Commission has been granted "broad statutory responsibility and authority … to investigate and remedy instances of discrimination" in the Commonwealth through its administrative processes. Stonehill College v. Massachusetts Com'n Against Discrimination, 441 Mass. 549, 562-63 (2004) To this end, the "primary purpose" of an administrative proceeding before the MCAD under Section 5 of c. 151B is to "vindicate the public's interest in reducing discrimination in the workplace by deterring, and punishing instances of discrimination by employers against employees. . ." Id. In furtherance of this "primary purpose," following a finding that a respondent has engaged in any unlawful practice under c. 151B, § 4, the Commission has the authority "to take such affirmative action. . . as, in the judgment of commission, will effectuate the purposes of this chapter [151B]." G.L. c. 151B, § 5. See also 804 CMR §1.21(18).[5]

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[3] UPS also claims that if we conclude that only sexual harassment training is appropriate, the length of the training (six hours) should be shortened. Because we uphold the Hearing Officer's entire training Order, we do not address theins issue.

[4] The Order also requires that the trainer have completed the Commission's certified discrimination prevention training program, that UPS submit a draft training agenda for approval to the MCAD and that an MCAD representative be allowed to attend the training session(s). UPS claims that the MCAD's mandated training is in essence government speech and an "attempt to dictate speech and issues and legal requirements and discusses strategies for prevention that may be good ideas but are not legally mandated" and "[go] beyond what MCAD can lawfully order."

[5] See 804 CMR § 1.21(18) on Public Hearings incorporates the remedies set forth in 804 CMR § 1.18 on Conciliations, including subsection (1)(c), "Provisions Sought for the

The Hearing Officer in this case had considerable discretion in fashioning affirmative relief once she determined that UPS engaged in discriminatory practices. The Hearing Officer is in the best position to judge whether a particular employer has an effective and legally sound anti-discrimination program, and whether that program has permeated to the necessary levels to assure compliance with Chapter 151B. Here, as we will discuss in greater detail, the Hearing Officer concluded that key UPS personnel, including its corporate-level Employee Relations Manager for Eastern New England charged with investigation discrimination claims, had a fundamental misunderstanding of the law on sexual harassment and failed to conduct an effective and "neutral" investigation, both symptomatic of broader problems at UPS. While we agree that a training order should focus on the underlying discriminatory conduct at issue, Chapter 151B does not require the Hearing Officer to limit the subject matter of the training. The Commission often orders basic anti-discrimination training that covers discrimination, harassment and retaliation in an effort to "effectuate the purposes" of Chapter 151B, §5, which is to eradicate discrimination. See e.g. MCAD and Herbert Johnson v. Lojek Co., Inc. et al., 31 MDLR 74 (2009) and MCAD and Mark Griffin and Clarence Leftwich v. Eastern Contractors and S & R Constr. Co., 30 MDLR 113 (2008).

UPS next argues that the Hearing Officer had no basis for ordering sexual harassment training because only one individual -- Russell Ford -- was charged with sexually harassing Sobocinski and that his conduct was "effectively stopped" by corporate management after Sobocinski filed an internal complaint. The corporate response, however, was untimely, unsatisfactory and came only after Sobocinski's efforts

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Public Interest" which includes, inter alia, "Educational and training efforts". (Nota bene: 804 CMR § 1.18 is misprinted as 804 CMR § 1.21(18) in 804 CMR § 1.21(18)).

to obtain redress with managers at the facility itself were completely unsuccessful, and he called UPS's "hot-line" to complain. Moreover, the Hearing Officer found that Ford's sexually charged conduct was directed at other employees besides Sobocinski who had also complained to managers to no avail. Specifically, the Hearing Officer found that Ford engaged in repeated "crude, sexually offensive, unwelcome and inappropriate conduct that was directed at complainant and other employees" which contributed to a "pervasively hostile" at Sobocinski's worksite, the Shrewsbury warehouse facility that "one witness likened to a battlefield." Sobocinski and other UPS employees testified to numerous shocking sexually suggestive gestures, sexually-charged statements and physical groping of private parts (not detailed here) beginning in early 2004. For example, a UPS supervisor testified (through deposition) that Ford engaged in sexually offensive conduct which included "tapp[ing]" him on his genitals and touching his buttocks.

UPS's argument that its corporate response was effective and therefore obviates any need for sexual harassment training also ignores the Hearing Officer's findings which are supported by substantial evidence that Sobocinski and other employees complained to managers at the Shrewsbury facility about Ford's repeated sexual conduct to no avail. Specifically, Sobocinski complained to the Ronald Petro,[6] the person responsible for all three shifts at the facility, in August 2004 and the UPS Supervisor referred to above

[6] At the time (April 2004) Ronald Petro was the Division Hub Manager and responsible for all three shifts at the Shrewsbury facility. He supervised Respondents Ford and Ronald Draper, Ford's supervisor. Petro was still employed by UPS when the Hearing was held as the East New England Feeder Manager. The Hearing Officer expressly rejected Petro's testimony that Sobocinski never complained to him about Ford's conduct.

complained to Ford's supervisor, Ronald Draper.[7] Neither an investigation nor remedial steps were undertaken to correct the situation in either complaint because Ford's conduct was not considered "sexual harassment" by UPS managers for reasons discussed further within. As a result of his inability to obtain a corrective response at the facility, Sobocinski called the UPS hotline to complain about, inter alia, Ford's inappropriate workplace conduct.

As a result of his call, Mark Murphy, UPS's employee relations manager for the New England Division, until his retirement in 2008, came to the Shrewsbury facility. Murphy's duties included investigating sexual harassment complaints and he testified that he met with Sobocinski told him about Ford's sexually-charged misconduct. According to the Hearing Officer's finding, "[i]ncredibly both in that interview [with Sobocinski] and at the public hearing", Murphy "asserted that Ford's conduct, while inappropriate, was not sexual harassment *unless Complainant believed that Ford intended to act on his statements*" or, put another way, "it was sexual harassment only if Complainant believed that Ford intended to sodomize him."

Murphy's testified that he also met with Ford to discuss Sobocinski's allegations and Ford denied that he had engaged in any sexually-offensive misconduct. Murphy warned Ford that because this was the *second* such allegation made against him, he should be especially careful in his personal conduct so as not to become a "target" for

[7] Ronald Draper was the day sorter manager and reported to Petro. At the time of the Hearing, Draper worked in UPS's corporate office. The Hearing Officer rejected Draper's testimony that he had no knowledge of the genital incident.

disgruntled employees.[8] Thereafter, Murphy met with Draper (Ford's supervisor) and Sobocinski. Sobocinski testified that at this meeting, Murphy compared Ford's conduct to that of a friend passing by and "giving the finger", a comparison that led Sobocinski to conclude that his complaint at the corporate level had not been taken seriously either. Having concluded that no unlawful sexual harassment had occurred, the only action taken was that in January 2005, Murphy and his supervisor, Mike Killilea, met with Ford to "review" Sobocinski's complaint and UPS's professional conduct and sexual harassment policies. While it may be true that Ford finally stopped sexually harassing Sobocinski after almost a year of daily exposure, it was four months after his first complaint to Petro and only after elevating his complaint to the corporate level that Murphy intervened and the misconduct directed at Sobocinski finally ended in December 2004. Far from negating the need for comprehensive sexual harassment training, these facts fully support it.

Moreover, the Hearing Officer was correct to order training on the prohibition against retaliation under G.L. c. 151B. At all relevant times, Sobocinski continued to be supervised by Ford and Ford's supervisor, Draper, who, as we have just discussed, failed to act on a complaints against Ford. The Hearing Officer found that in 2006, Draper retaliated against Sobocinski by requiring him to take a test that was created solely for him in order to be placed in a new position. The Hearing Officer expressly rejected Draper's testimony that he created a test out of concern that Sobocinski could not pass

[8] A prior allegation of sexually-charged conduct against a person accused of committing a similar act should be considered for evidentiary value and credibility purposes during the investigating of the later complaint.

the standard test, finding instead that the test was created to "purposely delay" Sobocinski's entry into the new position.

In light of the totality of this evidence, we conclude that the Hearing Officer had ample justification for ordering sexual harassment and retaliation training and also basic training on the laws that forbid discrimination, harassment and retaliation. She found, and we agree, a "surprising lack of understanding of what constitutes sexual harassment under Massachusetts law" by Murphy, the UPS employee responsible for investigating discrimination complaints for the Eastern New England Division, which persisted until his retirement in March 2008 and through the date of this Hearing. It has long been recognized that harassing conduct need not be motivated by sexual desire in order to constitute sexual harassment. See Melnychenko & Others v. 84 Lumber Co., 424 Mass. 285 (1997) (true romantic overtures inspired by lust or sexual desire are irrelevant where the sexually offensive conduct of the harasser, including physical touching and sexual innuendo were unwelcome and unreasonably interfered with an employee's work by creating a hostile and offensive work environment).[9]

Not only Murphy, the corporate official charged with investigating complaints, but managers at the Shrewsbury facility labored under an incorrect understanding of the law. Petro, the Division Hub Manager, responded to Sobocinski's complaint about by advising him that Ford's conduct "was not sexual harassment if it [sex] was not wanted". Moreover, when the UPS supervisor (mentioned earlier) complained to Draper about Ford tapping on his genitals, Draper didn't do anything further because, as he told the

[9] Under c. 151B, § 3A, all employers in Massachusetts "shall promote a workplace free of sexual harassment" and every employer is required to adopt an anti-discrimination policy and provide it annually to its employees. G.L. c. 151B, § 3A. Employers are also strongly encouraged to conduct an education and training program. Id.

employee, the employee's response – kicking Ford away -- was sufficient. The next time Ford inappropriately touched him, the employee did not bother to complain because it was clear to him that nothing would be done about it.

It was reasonable for the Hearing Officer to require corporate and regional level employees to attend the training required under the Order. The fundamental misunderstanding of sexual harassment law was wide-spread, at both the corporate and facility level and not isolated to the Shrewsbury warehouse only. Requiring training of managers and supervisors in other Massachusetts' facilities who are managed by the Eastern New England District from which Murphy hails is a sensible remedy to a potentially far-reaching problem. Moreover, we find that the failure to understand the law applicable to sexual harassment raises legitimate concern about whether UPS managers and supervisors have knowledge of other substantive areas of the law. The Hearing Officer found that none of the managers (Murphy, Petro or Draper), supervisors or employees had participated in sexual harassment training or other anti-discrimination training as of the Hearing date in 2009 and that UPS did not have a preventative training program.

Finally, we are compelled to point out that the investigation process in this case was woefully inadequate at the corporate level (and non-existent at the Shrewsbury facility). The Hearing Officer noted the short-comings of the HR professionals involved in this matter and that they "should have conducted a prompt, neutral investigation into the allegations" made by Sobocinski and instead the ensuing investigation was "hardly neutral." The fact that another complaint had been filed against Ford should have set off bells and whistles and instead appears to have had no significance in the investigation.

Moreover, had Murphy interviewed other employees he would have discovered that Ford's conduct (and the failure of managers to act) at the Shrewsbury facility was wider in scope than his limited and biased investigation uncovered. Had a proper investigation of Sobocinski's complaint ensued, Murphy would likely have obtained further relevant information. Instead, he told Ford to protect himself from employees with an "axe to grind", when he should have taken steps to protect Sobocinski and others from adverse actions in retaliation for complaining about sexually-charged misconduct.

For all the reasons just discussed we find that the Hearing Officer acted within the bounds of her discretion and consistent with statutory authority and in the public interest when she included as affirmative relief basic anti-discrimination training to all UPS supervisors and managers in Massachusetts. Indeed, she could have gone further and included training for all UPS's Massachusetts employees, but did not. We are unable to conclude that the problems that have been identified are restricted to the Shrewsbury Warehouse and have not infected other facilities in Massachusetts under UPS's Eastern New England district and reject UPS's contention that the Hearing Officer should have limited the training order to the Shrewsbury facility only. The Commission's mandate is to end discrimination in the Commonwealth and where there is a basis for believing that wider non-compliance or unlawfulness exists, the Commission can order as part of the affirmative relief that an employer provide basic anti-discrimination training to its supervisors and managers in Massachusetts as the Hearing Officer has done here. We remind UPS that the Commission is empowered to issue orders upon a finding of discrimination that "effectuate the purposes" of Chapter 151B, including affirmative relief that "operates prospectively". G.L. c. 151B, § 5. 804 CMR §1.21(18). The use of

MCAD-approved trainers, review of the training syllabus and the ability of the MCAD's Director of Training to attend one or more training sessions, assures quality control, legal accuracy and effectiveness, and allows the Commission to monitor compliance with its training Order.[10]

Based upon our review of the record and the Hearing Officer's finding we conclude that the training order is appropriate and we affirm and uphold the Order as set forth in the Hearing Officer's decision in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5.

The determination of what constitutes a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the litigation and of the time and resources required to litigate a claim of discrimination in the administrative forum. In reaching a determination of what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires the Commission to undertake a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or not at all depending on various factors.

[10] We reject UPS' argument that First Amendment "free speech" rights are implicated by MCAD remedial training orders, a proposition that UPS has failed to cite a single authority for.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding all hours submitted by all personnel. The Commission carefully reviews the Complainant's submission and does not simply accept the proffered number of hours as "reasonable." See, e.g., Baird v. Bellotti, 616 F. Supp. 6 (D. Mass. 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (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.

Complainant's counsel has filed a petition seeking attorney fees in the amount of $42,012.50 (168.05 hours at $250.00 per hour) and costs in the amount of $2,843.50.

Having reviewed the contemporaneous time records that support the attorney fees request, and based on the circumstances of this case and awards in similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal that any hours for which compensation is sought are duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We further conclude that Complainant's attorney's hourly rates are consistent with rates customarily charged by attorneys with comparable expertise in such cases and are within the range of rates charged by attorneys in the area with similar experience. We find that the costs requested by Complainant are adequately documented and reasonable.

We therefore award attorney fees totaling $42,012.50 and costs in the amount of $2,843.50 to Complainant.

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 appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 30 days of receipt 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 this 26th day of June, 2012.

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Julian Tynes
Chairman

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Sunila Thomas-George
Commissioner

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Jamie Williamson
Commissioner