

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DAWN SAWYER,
Complainants

v.

DOCKET NO. 03-BEM-02384

WIMPY'S RESTAURANT,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Judith E. Kaplan in favor of Complainant Dawn Sawyer on her claims of disability discrimination and retaliatory termination. Complainant filed a Complaint with the Commission on September 22, 2003, charging Respondent Wimpy's Restaurant with unlawful discrimination in employment on the basis of disability in violation of M.G.L. c. 151B §4(16). On May 10, 2006, Complainant amended the complaint to include a claim of retaliatory termination in violation of M.G.L. c. 151B §4(4).

Complainant had worked as a waitress at Wimpy's Restaurant for twelve years and reported directly to the restaurant's owners, Karen and Lawrence Siscoe from the time they became the owners in 1995. Complainant slipped and fell at work on two occasions: once in 1998, causing her to miss one month of work and again on June 1, 2003, causing her to be out of work until June 9, 2003, when she was cleared for light duty until return to full duty on June 16,

2003. Complainant filed claims for workers' compensation on both occasions. Following the latter injury, Mr. Siscoe confronted Complainant on two occasions, expressing his anger and irritation at having to complete the paperwork for her worker's compensation claim. Upon Complainant's return to work in June of 2003, she was given fewer shifts and was not permitted to cover her co-workers' shifts, which was a customary practice and something she had done frequently prior to her injury.

Believing that she qualified for partial unemployment benefits due to the significant decrease in her shifts, Complainant filed a claim for unemployment benefits on September 16, 2003. Upon receipt of the claim, Respondent told Complainant not to come to work for the next two weeks. On or about September 22, 2003, while she was away from work, Complainant filed a Complaint with this Commission alleging discrimination. On October 3, 2003, Mrs. Siscoe wrote a letter to Complainant stating that she had created problems for Respondent by stating on the unemployment application that Respondent was her "former employer." The letter also specifically stated that because Complainant had filed a claim for discrimination with the Commission, Respondent was advised by counsel not to schedule her for work. At the end of September, Respondent removed Complainant from its dental and health insurance for the month of October, effectively terminating her employment.

A public hearing was held on March 24, 2008.¹ Respondent has filed a Petition for Full Commission Review, challenging the decision below.

¹ Respondent was precluded from offering a defense at the public hearing of this matter as a result of sanctions imposed by the Hearing Officer for its failure to respond to Complainant's discovery requests. Upon receipt of the Hearing Officer's decision in favor of Complainant, Respondent obtained new counsel and filed, *inter alia*, a Motion for New Hearing and Other Relief, claiming ineffective assistance of counsel and fraud by their prior attorney. On or about May 5, 2010, the Commission issued an Order denying Respondent's request for a new hearing. We decline to issue a further ruling on this issue as the May 5th Order constituted a final action by the Full Commission on that request.

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, *inter alia*, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or 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 there is insufficient evidence to conclude that Complainant is "handicapped" within the meaning of the statute, that the Hearing Officer erred as a matter of law by determining that Respondent's discharge was retaliatory and that the Hearing Officer's award of damages was excessive, arbitrary, speculative, not supported by evidence or contrary to the law. We have carefully reviewed Respondent's grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We find no material errors of fact or law

with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings which are supported by substantial evidence in the record and hereby affirm her Decision. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

The Hearing Officer properly concluded that Complainant was "handicapped" within the meaning of G.L. c. 151B. While we concede that Complainant's injury may not have typically been regarded as a qualifying disability under the statute because of its temporary nature (i.e., seven days), the Hearing Officer properly deemed Complainant disabled by virtue of G.L. c. 152, §75B of the workers' compensation statute, which provides, in relevant part: "Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B." Complainant sought the accommodation of a brief leave from work which would have allowed her to resume performance of the essential functions of her job upon her return. Complainant shifts were significantly reduced after she filed for worker's compensation and the owner expressed irritation with her for having done so.

The Hearing Officer determined that Respondent's actions with respect to Complainant's employment were adverse and resulted from an unjustified consideration of Complainant's handicap. The Hearing Officer noted that Respondent assigned significantly fewer shifts to Complainant after her return from leave and did not allow her to assume extra shifts from co-workers, resulting in a loss of income to Complainant. The Hearing Officer concluded that Respondent unlawfully considered Complainant's handicap with respect to her shift assignment and we see no error in her ruling.

The Hearing Officer also correctly concluded that Respondent is liable for retaliation for terminating Complainant's employment as a result of her filing a claim for discrimination. A review of the record reveals direct evidence of a causal connection between Complainant's protected activity of filing her complaint with the Commission on September 22, 2003 and the adverse action Respondent took in effectively terminating Complainant's employment. Respondent owner Karen Siscoe's letter of October 3, 2003 to Complainant read: "Since you have commenced proceedings with the Commission Against Discrimination, our lawyer advises us to wait to make a decision on rescheduling you. We waited until September 30, hoping this would be resolved, before we removed you from dental and health insurance for the month of October." We find no error in the Hearing Officer's ruling that this action effectively terminated Complainant's employment and was retaliation in violation of G.L. c. 151B.

Lastly, we affirm the Hearing Officer's damage awards as based on the record evidence and find no error. The award of damages for emotional distress was based on Complainant's credible testimony about how distressed she was by her termination. Complainant testified that she was anxious, depressed, suffered from panic attacks, felt devastated and cried frequently because she had no other source of support. She had worked at the restaurant for twelve years. Complainant also testified that she saw her primary care physician at the time and that he prescribed an anti-depressant to alleviate the stress she was experiencing from the significant reduction in her shifts and the loss of her job. The Hearing Officer concluded that her distress resulted from Respondent's actions and continued for some time.

The Full Commission defers to the Hearing Officer's credibility determinations and findings of fact absent abuse of discretion, error of law, noncompliance with the law or a determination that the decision was arbitrary or capricious. School Committee of Chicopee v.

Massachusetts Comm'n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Hearing Officer remains in the best position to observe Complainant's testimony and demeanor and to assess credibility. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). In this case, the Hearing Officer was persuaded that Complainant suffered significant distress resulting from Respondent's unlawful conduct. There is no evidence that the Hearing Officer erred as a matter of law in relying on Complainant's testimony and we affirm the award.

COMPLAINANT'S PETITION FOR ATTORNEY'S FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that Complainant is entitled to an award of reasonable attorney's fees and costs. See M.G.L. c. 151B, §5. The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. In determining 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 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 which 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.

The Commission carefully reviews the Complainant's petition for fees and does not merely accept the number of hours submitted as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). 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. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d 5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that the Commission determines were expended reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and the tasks involved.

Commission counsel has filed a petition seeking attorneys' fees in the amount of \$29,875.50. Respondent filed a notice of opposition to the petition, but did not file any further papers detailing Respondent's position. Commission Counsel presented the case on behalf of Complainant in this matter and submitted an affidavit along with detailed and contemporaneous time records showing that she expended 120 hours on his matter at a rate of \$250.00 per hour. This rate is consistent with rates customarily charged by attorneys with comparable experience in the Boston area and comport with the Massachusetts Law Reform Institute fee schedule. A review of counsel's time records reveals a fair accounting of the work that she performed in furtherance of Complainant's case before the Commission. Accordingly, we grant the Petition for fees in the amount sought.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. 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 receipt 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. Failure to file a petition in court within thirty (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 19th day of October , 2011

Julian T. Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie R. Williamson
Commissioner