COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MYTCHELL LOW,
Complainant

v. DOCKET NO. 04-BPA-00422

COSTCO WHOLESALE CORPORATION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant, Mytchell Low. Following an evidentiary hearing, the Hearing Officer concluded that Respondent violated G.L. c. 272, §§ 98A and 98 and was liable for unlawful discrimination. The Hearing Officer found that Respondent denied Complainant, a handicapped individual, access to a place of public accommodation when it refused to allow him to remain on the premises of its Avon warehouse store with his service animal. The Hearing Officer awarded Complainant $8,000.00 in damages for emotional distress with interest thereon at the statutory rate.

Respondent has appealed to the Full Commission, asserting that the Hearing Officer erred as a matter of law in concluding that Respondent discriminated against Complainant. Respondent also challenges the Hearing Officer's award of emotional distress damages. Complainant has also appealed to the Full Commission, asserting that the Hearing Officer erred in limiting the award for emotional distress damages to the amount of $8,000.00.

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 otherwise not in accordance with the law. See 804 CMR 1.23.

RESPONDENT'S PETITION FOR REVIEW

Respondent has appealed the decision on the grounds that the Hearing Officer erred in finding that Respondent violated Chapter 272, section 98A because there was no evidence that Complainant ever demonstrated to Respondent that his dog was a service animal. Specifically, Respondent argues that Complainant impeded the efforts of Front End Manager, Michael Donahue, to determine if his dog was a service animal by failing to provide Donahue with information verifying the dog's status as such. However, the record shows that Donahue acknowledged that Complainant described his dog, Ozzie, as

a service animal trained to alert Complainant to the onset of a panic attack and produced an ID card indentifying Ozzie by picture and name, and discussing the laws relative to service animals and providing a website address for Delta Society National Service. While Respondent claims on appeal that the Hearing Officer "did not address' this issue, it is clear that she did, taking note of all of the above. Respondent argues that Donahue could not have assessed whether Ozzie was a service dog, based on Complainant's statement that Ozzie was trained to lick his hand to alert him to a panic attack, because this was demonstrably false. This assertion is based on the fact that Ozzie was inside a pet carrier and could not physically have performed the task of licking Complainant to alert him to panic attack. Respondent contends that Complainant should have communicated or "properly stated" to Donahue that Ozzie was trained to bark to alert him to ensuing panic attack. The record demonstrates, however, that having rejected Complainant's assertion that the dog was trained to lick his hand, Donahue failed to pursue any further inquiry about the dog's status and proceeded to order Complainant off the premises. Indeed, the Hearing Officer stated that "had Donahue questioned Complainant, he would have learned that Ozzie was trained to perform several critical tasks for Complainant." In arguing that the Hearing Officer improperly placed the burden of inquiry upon Donahue, Respondent cites Grill v. Costco Wholesale Corp., 312 F. Supp. 2d 1349 (W.D. Wash. 2004). Grill involved a challenge to that aspect of an employer's policy that allowed it, in the absence of visual evidence establishing a service animal's status, "to inquire of the animal's owner what tasks or functions the animal performs that its owner cannot perform." Grill held that the employer's policy directing that personnel "inquire" into the tasks a service animal is trained to perform did not run

afoul of either the Americans with Disabilities Act or the state's anti-discrimination statute. Thus Grill affirmed the very kind of proactive questioning, which the employer in that case recommended in its service animal policy, and that the Hearing Officer in this case deemed advisable under the circumstances. The holding in Grill thus supports the Hearing Officer's decision in this case.

Respondent also asserts that the Hearing Officer erred as a matter of law in not crediting Respondent's assertion that it had a legitimate non-discriminatory reason for its action, because Ozzie was not "visually identifiable" as a service animal. More specifically, Respondent argues that the Hearing Officer's determination that the identification card produced by Complainant was acceptable proof that Ozzie was a service dog was incorrect. Respondent asserts that "unless the ID card specified the task or function that the animal performed on behalf of Complainant, there was no basis to conclude that the animal [was] a service animal." Yet Respondent's contention in this regard is at odds with its own policy, which provides that a service animal's status is "visually identifiable" by an "apparel item, apparatus or other visual evidence," that constitutes "external evidence" that it is a service animal. Respondent's policy does not require that the visual evidence denote the task or function performed by the animal. Under the policy, the issue of task or function comes into play as an alternative form of proof only where the animal's status is not visually identifiable. In this case, the Hearing Officer noted Donahue's acknowledgment at the hearing that "Complainant produced an ID card identifying Ozzie by picture and name, identifying Complainant by name and address, discussing laws relative to service animals, and providing a website address for the Delta Society National Service." Despite these documents, Donahue nonetheless

refused to allow Complainant to remain on Respondent's premises with Ozzie. The Hearing Officer noted that "Respondent's assertion that Ozzie was not visually identifiable as a service animal is negated by Complainant producing an ID card that could have been attached to Ozzie's carrier," specifically citing Donahue's acknowledgement that "he probably would have admitted Ozzie if his pet carrier had been accompanied by an envelope designating it as a service animal carrier." The Hearing Officer found that Ozzie's ID was sufficient visual evidence, regardless of the fact that it was in Complainant's wallet rather than attached to the pet carrier, and that this was not a legitimate reason to deny Complainant access to the store. In addition, the Hearing Officer specifically found that the pre-2004 requirement of c. 272 s. 98A that a handicapped individual display, upon request, written evidence of a guide dog's status "was fulfilled by the ID presented by Complainant."

Respondent further asserts that the Hearing Officer committed error when she awarded damages for emotional distress. Respondent argues that Complainant failed to establish that his emotional distress was causally connected to Respondent's actions. Respondent argues that because the Hearing Officer concluded that Donahue made a good faith effort to implement Respondent's policy under difficult circumstances and credited Donahue's version of the subject interaction, that his actions could not have been the cause of Complainant's distress. Respondent argues because the Hearing Officer rejected Complainant's version of the tenor of the discussion, including testimony that Donahue initiated a hostile, loud, angry and demeaning confrontation, she improperly attributed Complainant's subsequent panic attack and any ensuing emotional distress to Respondent. We find Respondent's argument unpersuasive. The fact that the interaction

between Donahue and Complainant may not have been loud, angry or demeaning, does change the fact that Complainant was injured by refusal to acknowledge his service animal or to allow him and his dog access to the store. The tenor of the interaction does not, in and of itself, preclude an award of emotional distress damages to Complainant where the entire event was sufficiently disturbing to send him into a panic attack with ensuing distress. The Hearing Officer clearly credited Complainant's testimony that he endured a twenty-minute panic attack in the parking lot after his ejection from the store, during which he was crying, shaking and experiencing a racing heart. She attributed this attack to the episode and found that Complainant was sufficiently upset to call his psychiatrist from the parking lot, and that she instructed him to take a double dose of medication and remained on the telephone with him until the panic attack waned.

The Hearing Officer also found that Respondent's actions caused Complainant some additional emotional distress following the December incident, that he had future panic attacks stemming from the incident, which gradually tapered off, and that he experienced a temporary regression of skills and mobility. However the Hearing Officer carefully evaluated Complainant's claim of emotional distress in relation to other sources of stress in his life and apportioned her award of damages accordingly. She did not attribute the totality of Complainant's claimed distress to this one incident with Respondent and found that other stressors in his life contributed to his emotional state. It is clear that the Hearing Officer engaged in careful and detailed analysis of causation and considered a number of factors in arriving at the damages award. Given the circumstances, we find the Hearing Officer's award was proper and did not constitute an abuse of discretion.

COMPLAINANT'S PETITION FOR REVIEW

Complainant has appealed the decision solely on the basis that the Hearing Officer erred in limiting her award for emotional distress damages to $8,000.00.

Complainant first contends that the Hearing Officer erred by not identifying other independent causes for the emotional distress reportedly experienced by Complainant in the wake of the December 31 incident. Complainant argues that because the Hearing officer found that Complainant experienced emotional distress from sources other than the incident with Respondent, and limited her award as a result, she was obligated to identify the "particular stressors…or…episodes of distress" that Complainant suffered from those sources after the incident. We are not persuaded by this argument. The Hearing Officer found that Complainant's emotional state in early 2004 was fragile and affected in large part by "factors other than the Costco incident," and she specifically listed these factors. She noted that: Complainant's physical health had been deteriorating for a number of years and that he begun as early as 1999, to experience "ongoing anxiety, PTSD, depression, cognitive difficulties, and immobilizing panic attacks." She also found that Complainant's physical and emotional deterioration had caused him to cease working prior to the December 2003 incident, and that the state of his physical and mental health was due, in part, to a history of child abuse, loss of housing, destructive relationships, and by his evolving sexual identity. Complainant also suffered from symptoms of chronic Lyme Disease. In addition to identifying the particular stressors in Complainant's life, the Hearing Officer noted that they were "ongoing, multi-faceted and substantial." The fact that they were "ongoing" implies that they continued to be a factor in Complainant's emotional health after the incident as well as before.

Complainant also contends that by limiting her award for emotional distress damages, the Hearing Officer implicitly endorsed discrimination "against those suffering from emotional disabilities as opposed to physical handicaps." This contention is without merit in light of the Hearing Officer's finding that in this case that "the incident is minor in comparison to trauma from other sources." The Hearing Officer amply supported her finding that Respondent's refusal to allow Complainant to enter its store with his dog was minor relative to the other emotional stressors in Complainant's life. She gave full consideration to those additional stressors, the fact that they were "ongoing" and "substantial," and the testimony that Complainant's panic attacks after the incident gradually tapered off, and that any mobility regression Complainant experienced was temporary. She also noted the fact that Complainant failed to mention the incident to his primary care physician during an appointment one week after the incident. Complainant claims that the Hearing Officer treated Complainant's ongoing physical and emotional difficulties "as a reason to minimize recovery," yet the record does not support this contention. The record demonstrates that the Hearing Officer carefully analyzed the evidence in this matter, understood that Complainant's distress derived from numerous sources and apportioned damages accordingly. There is no evidence that the Hearing Officer sought "to minimize recovery." Instead, her decision evinces an intent to fairly determine causation and to apportion damages commensurate with her findings. Complainant had the burden to prove his damages and to establish a nexus to Respondent's actions. Given the Complainant's history, it was reasonable for the Hearing Officer to find that a significant portion of his emotional distress was unrelated to, or not directly caused by, the December 2003 incident.

Finally, Complainant contends that the Hearing Officer erred in finding that one of the factors affecting Complainant's emotional state in early 2004 was his "evolving sexual identity." Complainant contends that this finding was against the weight of the evidence, because both he and his psychiatrist testified that Complainant's "sexual ambiguity was not a cause of distress to him at all, and that he was not aware of it until well after the events of December 31, 2003." This assertion is belied by the evidence that prior to December 2003, Complainant petitioned for a legal change of name from Marci Rose to Mytchell Epstein Low, and that his name change was granted in early 2004. Moreover, the Hearing Officer considered that Complainant contradicted himself on this issue and at the hearing, "Complainant both acknowledged and denied that the change in gender identity was a source of emotional turmoil in 2003 and immediately thereafter." The Hearing Officer's task is to assess a witnesses' credibility. Given Complainant's contradictory statements about the emotional impact of his gender identity, it was reasonable for the Hearing Officer to conclude that Complainant's evolving sexual identity contributed to his emotional distress.

In sum, we have carefully reviewed Respondent's and Complainant's Petitions and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated herein. We conclude that there are no material errors of fact or law and that the Hearing Officer's findings as to liability and damages for emotional distress are supported by substantial evidence in the record. We therefore deny the appeals.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that 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 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 and the degree of success achieved, which may include the relief awarded. 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.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding up all the hours expended by all personnel. The Commission carefully reviews the Complainant's submission and will 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 considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of $107,875.00 for 266. 5 hours of work devoted to this case. Work performed by Attorney Fried was billed at $300.00 per hour; work done by an associate attorney was billed at $150.00 per hour; and work done by a paralegal was billed at $75.00 per hour. Counsel also seeks costs in the amount of $3,123.42. Given the experience of counsel as outlined in the petition, we find the hourly rates reasonable and well within the rates charged by experience employment counsel in the area.

With respect to adjustment of the lode star figure, we note at the outset that "the Supreme Court has identified results obtained as a preeminent consideration in the fee-adjustment process." Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 338, (1st Cir 1997). (*citing* Hensley v.Eckerhart, 461 U.S. 424, 440, (1983). The term results obtained can have variety of meanings and can "refer to a plaintiff's success claim by claim, or to the relief actually achieved, or the societal importance of the right which has been vindicated, or to all of these measures in combination." Coutin, supra. at 338. The Court went on to note that "all three types of 'results' potentially bear on the amount of an ensuing fee award." Id.at 338.

Recently our own Supreme Judicial Court reduced a fee request by almost one-half from $290,516 to $154,912 for work performed during appellate proceedings, where the award to plaintiff in a gender based employment discrimination case was just shy of two million dollars. Haddad v. Wal-mart Stores, Inc. (No. 2), 455 Mass.1024, 1025

(2010). The Court noted that determining the reasonableness of a fee request involves consideration of "the nature of the case and the issues presented, the time and labor required, **the amount of damages involved** (*emphasis added*), the result obtained," and other factors. Id. at 1025; *citing* Linthicum v. Archambeault, 379 Mass 381, 388-389 (1979). The SJC went on to note that it must examine the time reasonably expended to obtain the results achieved in the end. Id. at 1025 .

This Commission has held that fee requests may be examined in light of the degree of success that is achieved, including the damage award obtained and has considered the reasonableness of fee requests in relation to the amount of damages awarded. Rottenberg v. Massachusetts State Police 32 MDLR 90 (2010). In another case, the Full Commission justified a fee reduction based solely on the fact that the fee sought was excessive in relation to the damages, noting, "though the award of fees is not grossly disproportionate to the overall recovery, it represents a figure which is in excess of 60% of the amount awarded." Patel v. Everett Industries, 18 MDLR 182, 184 (1996).

Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation and litigation of this claim, given its lack of complexity and limited award of damages, is excessive and the lode star figure must be adjusted downward. The average fee award granted by the Commission in employment discrimination claims is significantly less, some 50% less, than the six figures sought in this case. Employment discrimination cases are generally more complex than public accommodations cases, frequently involve events occurring over a period of months, if

not years, are often document intensive, and require the testimony of numerous witnesses and much more extensive preparation.

In this case, Complainant prevailed upon a straightforward claim involving a single episode where he was denied access to place of public accommodation because of questions regarding the authenticity of his service animal. It is fair to say that this matter was not excessively complex. It involved disputed accounts of a very brief one-time event involving Complainant and the Costco store manager. While there was testimony from Complainant's psychiatrist, the issues were not extraordinarily difficult or complex. The damage award to Complainant of $8,000 is relatively minor, even by Commission standards, for emotional distress in public accommodations cases involving service animals. A.G. & Sten Clanton v. Fung Wah Bus Transportation, Inc., 29 MDLR 95 (2007) ($25,000 and $35,000 emotional distress damage awards) (appeal on jurisdictional issues pending); Bruneau v. G&G Lamberts, Inc., 26 MDLR 43 (2004) ($15,000 emotional distress award, $10,000 civil penalty, $1,634 attorneys fee award)

Where the damage award in this case was $8000, the fee request, in excess of $107,000, is more than thirteen times the monetary value of the relief obtained. We believe the fee request to be grossly disproportionate to the monetary recovery achieved and the complexity of the case. It is within the Commission's discretion to reduce the overall figure to some amount which may reasonably be said to have been expended in pursuit of a claim that was neither complex nor difficult, and where the damages award is minor. We are compelled to exercise our discretion to achieve a result that is fair and reasonable, but that will not discourage attorneys from pursuing those claims which, although not significant monetarily, vindicate important rights.

As noted by Complainant's attorney, at the time this complaint was brought, the protected status of persons assisted by "psychiatric service dogs" was an open question under both federal and state law, and thus this case addresses a significant heretofore unresolved right of individuals with psychiatric disabilities. We have considered this factor in rendering our decision on attorney's fees.

In our discretion, given the nature of this case, the rights vindicated and the nature of the relief obtained, we have determined that a reduction of 50% of the lodestar figure is appropriate. This results in an attorney's fee award of $53,937.50 to Complainant, which we deem fair and reasonable given the circumstances.

We therefore award attorney fees in the amount of $53,937.50 and costs in the amount of $3,123.42 to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer and issue the following Order of the Full Commission:

(1) Respondent shall cease and desist from engaging in discrimination based on admission of service animals to its place of public accommodation.

(2) Respondent shall pay Complainant damages in the amount of $8,000.00 for emotional distress as set forth in the Hearing Officer's decision, 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 this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) The training provisions ordered in the Hearing Officer's decision are incorporated by reference herein.

(4) Respondents shall pay Complainant attorneys fees in the amount of $53,937.50 and costs in the amount of $3,123.42 with interest thereon at the rate of 12% per annum from the date the petition for attorneys fees 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.

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 3rd day of August, 2011.

_____
Julian Tynes
Chairman

_____
Sunila Thomas-George
Commissioner

_____
Jamie Williamson
Commissioner