

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JOANNE DOUGLAS,
Complainant

v.

DOCKET NO. 06-SEM-01748

ELECTRO-TERM, INC. and
ESTATE OF WARREN SMITH,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant, Joanne Douglas. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for discrimination on the basis of race and color in violation of G.L. c.151B, §§ 4 (4) and constructive discharge. The Hearing Officer found that Respondents discriminated against Complainant, who is African-American, by creating a racially hostile work environment. She found that the late president and owner of Elector-Term, Warren Smith, made comments to Complainant that were racially-motivated and that were sufficiently severe and pervasive to constitute racial harassment. The Hearing Officer also found that Complainant was constructively discharged. She gave credence to Complainant's determination that the working environment had become intolerable and concluded that a reasonable person in Complainant's position would have been similarly moved to resign. The Hearing Officer also found that Complainant had no recourse other than to leave, because the harasser

was her direct supervisor and the president and owner of the company. Therefore, Complainant had no way to remedy the hostile work environment other than by resigning her employment. The Hearing Officer awarded Complainant \$11,257.00 in damages for lost wages, and \$75,000.00 in damages for emotional distress with interest thereon at the statutory rate.

Respondents appealed to the Full Commission asserting that the Hearing Officer erred as a matter of law in concluding that Respondent discriminated against and constructively discharged Complainant. Respondents also challenge the Hearing Officer's awards of lost wages and emotional distress. Finally, Respondents oppose Complainant's request for attorney's fees and costs.

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.

Respondents have appealed the decision on the grounds that the Hearing Officer erred as a matter of law in finding that Complainant was subjected to racial harassment. Specifically, Respondents argue that the comments of Smith, its owner and president, made to Complainant in March of 2006 were not so severe as to create a hostile work environment based upon racial harassment. Respondents assert that the comments concerning race were a “gaffe” and were “insensitive and unwise,” but did not rise to the level of “pervasive” or “severe.”

We find Respondents’ argument unpersuasive in several respects. In determining that Smith’s conduct satisfied the requisite elements of severity and pervasiveness necessary to prove a hostile work environment, the Hearing Officer found that Smith’s comments were racially motivated and crossed the line from being merely harsh to being sufficiently egregious and offensive so as to constitute racial harassment. In support of this finding, the Hearing Officer pointed to Smith’s telling Complainant that it was inherent in her to be an “obedient servant,” which Complainant considered an offensive reference to slavery. She also noted Smith’s statement that Complainant was unable to change her character and “act white” like Michael Jackson, implying somehow that Complainant’s character was deficient because of her race. The Hearing Officer further found that Smith berated Complainant in a racially insensitive manner in the presence of others and that any reasonable person in Complainant’s position would have been offended by his conduct.

Respondents argue that the Hearing Officer erred in basing her conclusion upon one single incident which occurred in March 2006 and precipitated Complainant’s resignation. This contention is similarly unpersuasive. First, even if the Hearing Officer

had based her decision in this matter upon a single incident, which she did not, a finding of discriminatory harassment may ensue from a single incident if that incident involves remarks that are sufficiently severe and offensive. See Blue v. Aramark Corp., 25 MDLR 403 (2003); McCreath v. Elite Protective Services, 24 MDLR 154 (2002). Second, the Hearing Officer made it clear in her decision that her conclusions were based not only upon the remarks made in March 2006, but also remarks made earlier when Smith was frustrated that Complainant was not performing a task to his satisfaction and stated, “I don’t understand why you don’t understand. Where were you raised?” The Hearing Officer credited Complainant’s belief that Smith was implying that she had been raised in the ghetto and that she regarded this statement as racist. The Hearing Officer also specifically stated that Smith’s comments during the final confrontation were a culmination of a course of hostile conduct that, while not always explicitly racist in character, contained “certainly an inference of racial animus.” The Hearing Officer’s statement in this regard therefore totally belies Respondents’ assertion that her decision rested upon a sole incident.

Respondents also contend that the Hearing Officer erred as a matter of law in finding that Complainant was constructively discharged. Specifically, Respondents argue that there was no threat of physical or psychic harm and that Complainant did not exhaust all possibilities to keep working.

With respect to the first assertion, the Hearing Officer specifically found that Complainant’s conclusion that her working situation was intolerable was reasonable under the circumstances. She properly concluded that Smith’s remark that he viewed Complainant’s character to be lacking, and that this shortcoming was based upon and

inherent to her race, was sufficiently severe to compel Complainant to leave her employment. Respondents insist that the requisite level of severity was not met in this matter because the March 2006 incident was the only one involving race. Yet, as discussed supra, the Hearing Officer specifically noted that this incident was the culmination of “a series of hostile confrontations initiated by Smith toward Complainant” in which “there was certainly an inference of racial animus.” With respect to the second assertion, the Hearing Officer found that there was no alternative remedy to pursue given that Smith was Complainant’s direct supervisor and the president/owner of the company. She also noted that Smith delivered his comments in the presence of the Company’s Human Resources manager, the only other person with whom Complainant could ostensibly pursue an alternative avenue of relief, but who tacitly approved Smith’s conduct. In addition, Respondents’ assertion that the Hearing Officer failed to take into account Complainant’s exit interview comments is not persuasive. Respondents argue that Complainant failed to state in her exit interview comments that she was leaving her employment due to racial harassment or discrimination and therefore cannot sustain her constructive discharge claim. However, this argument ignores the fact that on her exit interview form Complainant cited an “uncomfortable working environment” and “unproper (sic) statements” by Smith as the main reasons she was leaving, and she advised that Smith should “take some political correction classes” in order to improve upon communicating with his employees. Complainant testified at the hearing in this matter that in using these words she was in each case specifically referring to Smith’s race-related comments. Given these facts, the Hearing Officer properly concluded that Complainant was constructively discharged.

Respondents next contend that the Hearing Officer erred in calculating Complainant's lost wages for the calendar year of 2006 because she neglected to account for the wages Complainant received for the time she worked at Respondent in 2006 prior to her resignation. Complainant was paid from January 1 to March 12 of 2006, a total ten full work weeks. Since Complainant worked ten 40-hour weeks at the rate of \$13.00 per hour, Respondents assert that Complainant's damages for lost wages should be reduced by \$5,200.00. Respondents' assertion that the Hearing Officer's calculation was erroneous is justified, and the award of damages for lost wages should be modified and reduced accordingly from \$11,257.00 to \$6,057.00.

Finally, Respondents contend that the Hearing Officer erred in making her award of emotional distress damages in this matter. Specifically, they claim that there was insufficient evidence upon which to base an award, and that the award is so excessive as to constitute a punitive sanction. We reject this assertion.

The Hearing Officer based her award of damages for emotional distress upon credible testimony from the Complainant and other family members about how her life was impacted by Respondent's discriminatory conduct. Complainant testified that she sustained significant harm as a result of Respondents' unlawful acts. The Hearing Officer believed that as a direct result of her treatment by Smith, Complainant experienced the following effects for a period of approximately two months after her departure from Electro-Term: taking to her bed and not wanting to get up, stopping taking telephone calls, habitual sleeping and crying, becoming short-tempered with her children, and remaining at home wondering what she was going to do. In addition, Complainant testified that she was a "mess," that the experience "took a lot out of her,"

that she was unable to engage in the usual activities with her children, that she did not interact with friends in the same way she had prior to her employment with Respondents, that she was forced to apply for food stamps, and that she gained a significant amount of weight after her employment with Respondent ended. Complainant also testified that it took her a year to recover fully from the events that led up to her constructive discharge from Respondents, and that even though she had moved on with her life in other ways, she still wondered whether employers harbored racist thoughts. Complainant's testimony about her emotional distress was corroborated by both Complainant's mother and daughter. Ultimately the Hearing Officer concluded that there was sufficient evidence to find Complainant's emotional distress was causally connected to Respondents' conduct.

Respondents' assertions in this appeal that the nature and severity of Complainant's harm was "not that severe" and that the symptoms of taking to one's bed and habitually sleeping and crying "are shared by the general population" are conclusory, speculative, unpersuasive and not supported by the record. Respondents' assertion that Complainant suffered no physical manifestation of distress is not borne out by the facts, as Complainant experienced a substantial weight gain of 45-50 pounds. Similarly, Respondents' assertion that Complainant's return to work within several months of her departure from Electro-Term should be "indicative of minimal emotional distress damages" is undercut by Complainant's testimony that it took her a full year to recover from her experience and that she still wonders whether employers are harboring racist thoughts. Given these findings, we cannot conclude that the Hearing Officer's award was punitive, excessive or an abuse of discretion.

In sum, we have carefully reviewed Respondents' Petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein. As a result of our review, we have concluded that the amount of the award for lost wages must be modified, but otherwise find no other material errors of fact or law. 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 appeal in part and grant that portion of the appeal that challenges the award for lost wages and we grant a modification of this award only.

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 on 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 considered to be reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or

determines no adjustment is warranted depending on various factors, including the complexity of the matter.

The Commission's determination of the number of hours reasonably expended involves more than simply adding up all hours expended by counsel. 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 what 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 \$22,508.00 and costs in the amount of \$505.12.

Having reviewed the contemporaneous time records that support the attorney fees request, and considering the nature of this case, and 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 compensation sought for work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We conclude that Complainant's counsel's hourly rate is consistent with rates customarily charged by attorneys with comparable

expertise and experience in the field. We also find that the compensation for costs requested by Complainant is adequately documented and reasonable.

We therefore award to Complainant attorney's fees totaling \$22,508.00 and costs in the amount of \$505.12.

ORDER

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

(1) Respondents shall cease and desist from discriminating on the basis of race and color.

(2) Respondents shall pay Complainant damages for lost wages in the amount of \$6,057.00 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) Respondents shall pay Complainant damages in the amount of \$75,000.00 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.

(5) Respondents shall pay Complainant attorney's fees in the amount of \$22,508.00 and costs in the amount of \$505.12, with interest thereon at the rate of 12%

per annum from the date the fee petition was filed with the Commission, until such time as payment is made or this order is reduced to a court judgment.

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 4th day of June, 2010.

Malcolm Medley
Chairman

Sunila Thomas-George
Commissioner