

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
NELCI MARIA DE LARA,  
Complainant

v.

DOCKET NO. 06-BEM-01042

GILBERTO DA SILVA D/B/A  
SAMBA CLEANING SERVICE,  
Respondents

**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision by Hearing Officer Eugenia M. Guastaferrri in favor of Complainant Nelci Maria De Lara. The Complainant charged Respondents Samba Cleaning Services and its owner, Gilberto DaSilva, with sexual harassment resulting in a hostile work environment and unlawful termination of her employment in violation of G.L. c. 151B, §4(16A). Complainant worked cleaning houses for Respondents and alleged that DaSilva sexually assaulted her on one occasion and made other sexual advances and propositions during the course of her employment. Complainant alleged that she feared losing her job if she broke her silence about his sexual advances and ultimately was fired for rejecting DaSilva's advances. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for both quid pro quo and hostile work environment sexual harassment in violation of M.G.L. c. 151B, §4(16A). The Hearing Officer determined that even if DaSilva

had not fired Complainant, her separation from employment could reasonably be viewed as a constructive discharge because she was effectively forced to leave her employment to avoid a sexually abusive work environment. The Hearing Officer found that Complainant suffered lost wages and significant emotional distress as a result of Respondents' actions and awarded her back pay in the amount of \$14,700 and damages for emotional distress in the amount of \$150,000. Respondents have appealed the decision 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. The role of the Full Commission is 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); 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 must 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

Respondents have appealed the decision on the grounds that the Hearing Officer did not fairly assess Complainant's credibility, that she improperly shifted the burden of proof to Respondents and that she improperly attributed discrepancies in Complainant's testimony to a language barrier. Respondents argue that this case rests mainly on credibility and that the Hearing Officer did not fairly assess Complainant's credibility, by failing to acknowledge the significance of inconsistencies in Complainant's testimony and that Complainant denied suing a dentist in Brazil for a faulty implant procedure in the face of documents indicating the contrary. Respondent also asserts that the Hearing Officer did not properly consider Complainant's inability to remember certain details. However, there is nothing in the record or the Hearing Officer's decision that supports Respondents' challenges to the Hearing Officer's credibility assessments. In fact, we find that the Hearing Officer properly addressed Respondents' credibility concerns in her decision as follows:

I found these inconsistencies or lapses of memory to be relatively insignificant and not fatal to Complainant's credibility. Given my observations of Complainant and her demeanor as a witness, these inconsistencies appear to be more the product of the passage of time and the fact that she was called upon to recount the traumatic events numerous times. I do not believe these inconsistencies resulted from any intent of Complainant to mislead or fabricate. Moreover, every account of the events in question had to be translated and I cannot discount the language barrier and the fact that errors in translation may have occurred or that a particular nuance may have been lost in translation. Contrary to Respondent's assertion, I found Complainant's testimony to be remarkably consistent and detailed given the time that had passed, the various translations of events, and the trauma she suffered as a result of the horrific acts of harassment.

Decision of Hearing Officer, p. 16.

Where the evidence in a case is conflicting, the Hearing Officer is charged with the responsibility of making findings of fact and she remains in the best position to judge the credibility of witnesses. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972). The Full Commission defers to these determinations. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Under the standard of review, the Commission's role is to determine, inter alia, whether the findings of the Hearing Officer are based on substantial evidence and whether her conclusions are based on error of law, are arbitrary and capricious, or are an abuse of discretion. See 804 CMR 1.23. Based on our review of the record, we are unable to conclude that the Hearing Officer abused her discretion or made errors of fact or law in this matter. Instead, the Hearing Officer made factual determinations based on her assessment of the credibility of witnesses, whose testimony and demeanor she was able to observe first hand. We conclude that those factual determinations support the legal conclusion that Complainant was subjected to sexual harassment that was sufficiently severe and pervasive to alter the terms or conditions of her employment and create an abusive working environment.

Respondents also argue that the Hearing Officer improperly shifted the burden of proof to Respondents. A review of the Hearing Officer's decision does not support this argument, which is essentially another challenge to the Hearing Officer's credibility determinations, under the guise of an alleged burden shifting error. Respondents essentially do not accept the Hearing Officer's credibility findings, but argue that certain language in the Hearing Officer's decision evidences an improper shifting of the burden of proof to Respondents. However, this language is nothing more than the Hearing Officer's explanation of why she found Complainant credible with respect to the allegations of sexual harassment. The Hearing Officer simply explains her reasoning and how she weighed the credibility of the parties giving some additional insight into

her thought processes and how she arrived at her decision as follows:

Respondent DaSilva denies all the allegations of sexual harassment and asserts that Complainant fabricated the incidents of alleged harassment as revenge against Respondents and to secure a financial windfall. However, DaSilva contends that he did not fire Complainant but just told her to take a few days off. This assertion renders hollow his claim that Complainant filed a charge of discrimination as revenge for her termination. I find it incredulous that Complainant would fabricate such stunningly detailed accounts of egregious harassment, put herself and her husband through the excruciating exercise of pursuing both criminal and civil complaints, and deceive her social worker about her emotional state for over a two year period, merely as pay back for being told her work was not satisfactory and she should take a few days off for being insubordinate.

Decision of Hearing Officer, p. 15.

This reasoning does not support Respondent's assertion that the Hearing Officer improperly shifted the burden of proof to Respondent. The language cited was nothing more than the Hearing Officer's explanation of her reasoning in determining the relative veracity of the parties' positions.

Respondents further argue that the Hearing Officer improperly disregarded discrepancies in Complainant's testimony finding that they may have been explained by a language barrier and numerous different translations of the events into English. In fact, the Hearing Officer addresses the existence of some discrepancies in Complainant's testimony and in prior reports of the incidents, and quite reasonably considered the language barrier and the numerous translations that occurred in Complainant's reports of these incidents. Contrary to Respondents' assertion, the Hearing Officer did not question the accuracy of the certified reporter who appeared at the hearing, but acknowledged that the inconsistencies in prior reports could be explained by a language barrier and the number of different translations of the events in question. More importantly, she also attributed some minor memory lapses which she characterized as

insignificant and not fatal to Complainant's overall credibility, to the passage of time (some four years) and the fact that Complainant was called upon to relay the traumatic events numerous times. There is nothing in the record or in the Hearing Officer's decision to indicate that this possible explanation of minor inconsistencies was so speculative as to constitute a reversible error or an abuse of discretion. In sum, we conclude that the Hearing Officer's decision is not arbitrary and capricious, but a reasoned analysis and careful determination of credibility based on all the evidence.

Finally Respondents assert that Complainant is not credible because she could not recall every detail of a long distance phone call with her mother in Brazil wherein she told her mother that she had been sexually assaulted, and specifically could not recall if her mother told her to stop working for Respondents. Respondents also assert that after an alleged sexual assault by DaSilva, Complainant sought assistance from him to compose a letter to her attorney in Brazil detailing the pain she suffers from the dental procedure gone awry, and that no credible or rational person would have sought such assistance from her abuser. The Hearing Officer clearly considered these arguments and dismissed them as a serious challenge to Complainant's overall credibility.

Our review of this matter leads us to conclude that there is substantial evidence to support the Hearing Officer's findings of fact and conclusions of law and that Respondents raise no significant grounds upon which challenge her credibility assessments. We therefore deny Complainant's appeal and affirm the Hearing Officer's decision in its entirety.<sup>1</sup>

#### COMPLAINANT'S PETITION FOR ATTORNEY'S FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude

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<sup>1</sup> Respondents Petition to the Full Commission does not address or challenge the award of damages to Complainant

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.

Complainant's Counsel filed a petition seeking attorneys' fees in the amount of \$16,290.00 and costs in the amount of \$763.56. The request is supported by contemporaneous

time records detailing the number of hours expended in this matter before the Commission. Respondent did not file an Opposition to the petition. A review of Complainant's Counsel's time records reveals that the time expended in this matter and corresponding fees are reasonable. Complainant's attorney is an experienced litigation attorney who has requested compensation at an hourly rate of \$180. We find that his hourly rate is consistent with and even below the rates customarily charged by attorneys with similar experience and expertise in such cases. We deem Complainant's request for attorneys' fees and costs to be reasonable and award fees as sought in the amount of \$16,290.00. Complainant also seeks reimbursement for costs in the amount of \$763.56. These costs include expenses related to photocopies, deposition transcripts and tapes. We find that these costs are adequately documented and reasonable. Accordingly we award full costs in the amount of \$763.56 to Complainant.

#### ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and order the payment of attorneys fees and costs as noted above. 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 4<sup>th</sup> day of April, 2012

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Julian Tynes  
Chair

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Sunila Thomas George  
Commissioner

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Jamie Williamson  
Commissioner