COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ANNETTE WHITEHEAD-PLEAUX,
Complainants

v. DOCKET NOS. 04-BEM-01593
06-BEM-01307

SHRINERS HOSPITAL FOR
CHILDREN,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Commissioner Malcolm Medley on November 5, 2010 in which he determined that Respondent Shriners Hospital for Children ("Shriners") discriminated against Complainant Annette Whitehead-Pleaux on the basis of her sexual orientation, in violation of G.L. c.151B, §4(1). The Hearing Commissioner awarded Complainant Whitehead-Pleaux compensatory damages for emotional distress in the amount of $30,000. He also ordered Shriners to cease and desist from engaging in discrimination based on sexual orientation in the future with respect to its non-ERISA employee benefit plans and to take necessary steps to ensure that its Massachusetts employees are notified of their right to obtain spousal coverage in Shriners' non-ERISA benefit plans regardless of their sexual orientation.

Respondent has appealed to the Full Commission pursuant to 804 CMR 1.23 asserting that the Hearing Commissioner erred as a matter of law in concluding that

Respondent discriminated against Complainant. In its Petition, Respondent asserts that the Hearing Commissioner made four alleged errors of law: 1) referring to an ERISA dental plan in his analysis of Complainant's prima facie case of sexual orientation discrimination; 2) considering a seven-week delay in providing HMO coverage as a materially-adverse employment action; 3) using the wrong comparator class in determining that Complainant met her prima facie burden; and 4) failing to conclude that Complainant's non-ERISA claims "relate to" Respondent's ERISA plans for federal preemption purposes.

The responsibilities of the Full Commission are outlined by statute (M.G.L. c. 151B, § 5), 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 Commissioner in order to determine whether his decision and order are constitutional, comport with statutory authority and jurisdiction, apply correct legal analysis, conform to applicable procedure, are supported by substantial evidence, and are not arbitrary, capricious, or an abuse of discretion. 804 CMR 1.23 (h). Substantial evidence is defined as "…. such evidence as a reasonable mind might accept as adequate to support a conclusion." M.G.L. c. 30A, sec. 1(6); Bournewood Hospital, Inc. v. MCAD, 371 Mass. 303, 317 (1976).

To the extent that the decision is based on witness credibility, the full Commission defers to the conclusions of the Hearing Commissioner. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Hearing Commissioner, rather than the Full Commission, heard all of the witnesses' testimony first-hand and observed their demeanor while testifying. See

Vaspourakan, Ltd v. Alcoholic Beverages Control Commission, 401 Mass. 347, 352 (1987). Thus, he was in the best position to weigh conflicting evidence and to make credibility determinations.

Turning to the facts set forth in the record, it is undisputed that at the time when Complainant sought medical coverage for her same sex spouse in May of 2004 (upon the eve of her marriage), Respondent offered its employees various PPO and HMO health benefit plans as health insurance options. The PPO (preferred provider organization) medical benefit plan was a national, self-insured plan with claims administered by Blue Cross Blue Shield (Shriners Hospitals National PPO Medical Plan). The PPO dental benefit plan was also a national, self-insured plan; the claims were administered by Aetna Life Insurance Company (Shriners Hospitals for Children PPO Dental Plan). The Hearing Commissioner determined that these two plans offered by Respondent were employee welfare benefit plans established or maintained by Shriners and regulated by the federal Employee Retirement Income Security Act ("ERISA"). See 29 U.S.C. §§ 1144(a), 1002(3).[1]

The Respondent also offered its Massachusetts employees two HMO (health maintenance organization) medical benefit plans: the Harvard-Pilgrim HMO[2] and the Tufts HMO, as well as a Davis Vision Discount Plan. In contrast to the PPO plans, these plans were not maintained or established by Shriners within the meaning of ERISA. See, 29 C.F.R. § 2510.3 – 1(j) (excluding from definition of employee welfare plan for

[1] The existence of an ERISA plan is a question of fact, to be answered in light of the surrounding facts and circumstances. Plymouth and Brockton Street Ry. Co. v. Leyland, 422 Mass. 526, 529 n.3 (1996). Cf, Johnson v. Watts Regulator Co., 63 F.3d 1129 (1st Cir. 1995) (whether ERISA applies to a particular plan or program requires an evaluation of facts combined with an elucidation of law). Complainant and Respondent do not dispute the Hearing Commissioner's findings as to whether or not particular employee benefit plans offered by Respondent were ERISA plans.

[2] Effective December 31, 2005, Shriners ceased offering the Harvard-Pilgrim HMO plan to its employees.

purposes of ERISA certain group-type insurance programs offered by an insurer to employees (safe harbor exception)). Accordingly, the Hearing Commissioner determined that these three benefit programs were not governed by ERISA. See, Johnson v. Watts Regulator Co., 63 F.3d 1129 (1st Cir. 1995) (ERISA did not apply to group insurance program offered by insurer to employees where not established or maintained by employer).

In conformity with his application of ERISA federal preemption jurisprudence, Hearing Commissioner Medley did not undertake to adjudicate the denial of same-sex family coverage under PPO health insurance plans subject to ERISA jurisdiction. Instead, Hearing Commissioner Medley limited his rulings under state law to the non-ERISA insurance products offered by Respondent. In this regard it is noteworthy that he ordered Respondent to "[c]ease and desist from engaging in discrimination based on sexual orientation in the future with respect to its **non-ERISA** employee benefit plans" and to "[t]ake the necessary steps to ensure that its Massachusetts employees are notified of their right to obtain spousal coverage in Shriners' **non-ERISA** benefit plans regardless of their sexual orientation." [emphasis supplied] In light of the foregoing, we conclude that Commissioner Medley's incidental references to Shriners' dental plan (an ERISA governed benefit plan) in his discussion of non-ERISA matters constituted a de minimis oversight having no impact on the validity of his otherwise careful analysis and resulting in no prejudice to Respondent.

Respondent next argues that the delay in providing family coverage for Complainant under non-ERISA benefit plans did not constitute a material disadvantage sufficient to support a case of disparate treatment discrimination. Based on the allegedly

insignificant nature of the delay, Respondent asserts that Complainant failed to prove that she suffered an adverse employment action that was not imposed on similarly-situated individuals outside of her protected class. See Blare v. Husky Injection Molding System Boston, Inc., 419 Mass. 437, 441 (1995) (setting forth elements of prima facie case, including an adverse employment action). Respondent maintains that the delays which Complainant experienced and the additional steps she had to undertake in order to obtain family medical coverage for her same-sex spouse were minor inconveniences necessitated by a change in law rather than a material disadvantage amounting to an adverse employment action.

In support of its position that no material disadvantage occurred, Respondent notes that Complainant was permitted to add her spouse to her health insurance plan approximately seven weeks after coverage was questioned; that during the seven-week period of confusion, coverage was only questioned rather than actually denied; that the qualification for coverage was made retroactive to May 17, 2004 (the date of Complainant's marriage); that Complainant's spouse incurred no health care costs during the intervening delay; and that the extra steps Complainant was required to undertake to arrange for coverage (one meeting and three emails) were minimal. Respondent argues that since the seven-week period of confusion resulted in no actual denial of coverage, there was no actual harm. It compares such delay to an office reorganization which has no impact on an employee's job duties or compensation and, thus, does not constitute an adverse employment action. See Romero v. UHS of Westwood Pembroke, Inc., 72 Mass. App. Ct. 539, 545 (2008).

There is no dispute that following the initial period of confusion about Complainant's right to family coverage under Respondent's benefit plans, the matter was ultimately resolved to permit Complainant's spouse coverage under its non-ERISA plans. Respondent focuses on the temporary nature of the confusion to argue that the situation is comparable to minor administrative matters found to fall short of an "adverse employment action." The facts, however, do not support this argument.

Respondent's attempt to minimize the disadvantages experienced by Complainant overlooks the reality that health insurance is an employment benefit designed to provide peace of mind in regard to the possibility, rather than the certainty, of incurring future medical expenses. The withholding of such coverage fosters anxiety and stress even in the absence of an actual medical catastrophe. We conclude that Respondent's Harvard-Pilgrim HMO and Davis Vision Plans were substantial employment benefits subject to protection under state law. Thus, Respondent's failure to provide Complainant with access to those benefits to the same extent it provided coverage to other employees legally married in Massachusetts constituted a material disadvantage to Complainant. Although the Respondent ultimately permitted Complainant to enroll her spouse in certain benefit plans, it cannot be said the Hearing Commissioner's characterization of the extended process required to obtain coverage as an adverse employment action was an error of law. The process was not so trivial as to be merely inconvenient. See, King v. City of Boston, 71 Mass.App.Ct. 460, 468 (2008) ("adverse employment action" refers to material effects on working terms, conditions or privileges as opposed to "those effects that are trivial").

Another ground for reconsideration is the contention that the Hearing Commissioner used an overly-broad comparator class insofar as he focused on all heterosexual married employees of Respondent whose spouses qualified for family insurance coverage. Respondent maintains that the correct comparator class should have been heterosexual employees of Shriners who were affected by a recent change in the law but did not experience denials, delays and extra steps in securing an employee benefits. We reject Respondent's description of the comparator class because such a claim, if adopted, would have the effect of defining the comparator class so narrowly as to be essentially non-existent. The more reasonable approach is to recognize as comparators those individuals who are similarly-situated to Complainant except for the gender of their spouses. When viewed in this manner, the comparator class is precisely what the Hearing Commissioner defined it to be: employees of Respondent who applied for and received medical insurance for themselves and their heterosexual partners.

We also have difficulty characterizing the prohibition of discrimination on the basis of sexual orientation and the recognition of same-sex marriage in Massachusetts as "recent" changes in the law as of May, 2004. Massachusetts law has prohibited discrimination on the basis of sexual orientation since 1989. M.G.L. c. 151B, § 4. By June of 2004, when Complainant was notified that her spouse was ineligible for medical benefits coverage under any of the Respondent's medical plans, Massachusetts law prohibiting sexual orientation discrimination had been codified for fifteen (15) years. The Massachusetts Supreme Judicial Court issued its decision recognizing the Constitutional right of same sex couples to choose to marry in November of 2003. Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003). While Respondent may

have been beset by some initial confusion as to how to apply the holding in Goodridge to its ERISA plans, this does not abrogate its responsibility to enact policies that comply with the law. Nor does it explain why Complainant was treated differently from heterosexual employees when Respondent required her application for benefit coverage for her spouse under the non-ERISA benefit plans to be subjected to special review.

Finally, Respondent argues that the non-ERISA HMO medical plans (Harvard-Pilgrim and Tufts) and the Davis Vision Plan offered by Respondent to its employees are "inextricably entwined" with its ERISA medical and dental PPO plans. On that basis, Respondent takes the position that the non-ERISA products "relate to" the ERISA products and the discrimination claims should have been preempted. The term "relate to" as used in ERISA, however, cannot be interpreted to extend to its furthest stretch of its indeterminacy. If it did so, "then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere'" and to do so would "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (citations omitted). To the extent that Respondent provides employee benefits that are not regulated by ERISA, the application of state antidiscrimination laws to activity concerning such non-ERISA benefits is not preempted. See Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77, 93 (D. Me. 2004). The non-ERISA plans offered by Respondent in this case constituted independent insurance products. The fact that ERISA plans were also offered by Respondent as a benefit option to certain employees does not protect it from challenge under state laws of general applicability prohibiting discrimination of the basis of sexual

orientation. See, Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171 (1st Cir. 1998) (state law claims for disability discrimination and sexual harassment not preempted although accommodation sought included extension of time to apply for benefits under ERISA plan) There is no basis for concluding that the sexual orientation discrimination inherent in the Respondent's activities relative to its non-ERISA plans so "relates to" ERISA matters as to prevent the application of Massachusetts law to the non-ERISA plans. Accordingly, Respondent's preemption argument is rejected.

Further, even if all of the Respondent's benefit plans were governed by ERISA, the U.S. Supreme Court's determination that the definition of "spouse" in Section 3 of the federal Defense of Marriage Act (DOMA) - relied upon by Respondent in defining "spouse" under its ERISA plans to exclude Complainant's spouse - is unconstitutional undermines any argument that the Respondent's discriminatory activities were permissible because preempted by ERISA. It also undermines the argument that ERISA should preempt Massachusetts from enforcing its anti-discrimination laws to prohibit unconstitutional activity. See, U.S. v. Windsor, 133 S. Ct. 2675 (2013) and U.S. Department of Labor Technical Release 2013-04 (explaining that "spouse" under ERISA governed plans shall include same-sex spouses where marriage recognized by state law); See also, Radtke v. Misc. Drivers and Helpers Union Local #638 Health, Welfare, Eye and Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012) (ERISA plan wrongfully terminated the health insurance of an employee's transgender spouse where marriage recognized under Minnesota law). ERISA preemption arguments are generally grounded on the proposition that state law should not interfere with the uniform administration of ERISA plans by imposing inconsistent regulation of such plans. Here, the U.S.

Department of Labor has recognized that defining "spouse" as including same-sex spouses – even in ERISA governed plans - is consistent with the goal of a uniform body of benefits law. The Hearing Commissioner considered and properly rejected Respondent's argument for wholesale preemption.

Based on the foregoing analysis, 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.[3] Having affirmed the Hearing Officer's decision in favor of Complainant we further 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. See Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires the Commission to undertake a two-step

[3] Respondent did not challenge the award of $30,000 in emotional distress damages so it is not necessary to address this matter other than to recognize that Complainant suffered substantial emotional distress as a result of Shriners' unlawful discriminatory conduct. There is credible evidence in the record that the denial of family coverage made Complainant feel like a second class citizen. She became anxious, nervous, frustrated, and angry after she and her spouse failed to qualify for family coverage. Complainant became a very emotional person who experienced headaches in the mornings before work, was reluctant to go to work, often cried, and showed visible signs of stress, and had difficulty sleeping. She was described by a co-worker as becoming more withdrawn, more solemn, and serious following the denial of coverage. Complainant sought professional help to assist her with the stress related to Shriners' discriminatory conduct. Based on the foregoing, we conclude that Complainant suffered emotional distress that was caused by Shriners unlawful conduct and that the award of damages in the amount of $30,000 was supported by the evidence.

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. See 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 filed a petition for attorney fees on March 24, 2011 in the amount of $13,648.28. Work performed by Attorney Cassidy was billed at $200 per hour, well below that which is suggested in the Massachusetts Law Reform Institute's Fee Schedule for an attorney of comparable experience. Given the experience of counsel as outlined in the petition, we find the hourly rates to be entirely reasonable. Having reviewed the contemporaneous time records that support the 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 was appropriate, given its complexity and breadth. We note that no time was charged for work performed by volunteer attorney Andrea Haas and that no costs were requested.

ORDER

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

(1) Respondent shall cease and desist from engaging in discrimination based on sexual orientation with respect to its non-ERISA employee benefit plans.

(2) Respondent shall take the necessary steps to ensure that its Massachusetts employees are notified of their right to obtain spousal coverage in Shriners' non-ERISA benefit plans regardless of their sexual orientation.

(3) Respondent shall pay to Complainant the sum of $30,000.00 in damages for emotional distress 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.

(4) Respondents shall pay Complainant attorneys' fees in the amount of $13,648.28 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 service 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 after service 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 7th day of August, 2014.

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Jamie R. Williamson
Chairwoman

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Sunila Thomas-George
Commissioner

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Charlotte Golar Richie
Commissioner