

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
KEISHA WILLIS,
Complainants

v.

DOCKET NO. 08-BPR-03012

ALFRED DEFAZIO,
Respondent

DECISION OF THE FULL COMMISSION¹

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferrri in favor of Complainant Keisha Willis, finding that Respondent Alfred DeFazio violated G.L. c. 151B, § 4 (7B) by making discriminatory statements to the Complainant, an African American, self-employed real estate broker who lives and works in Newton, Massachusetts, which indicated a bias against renting to African American tenants.² As part of her business, Complainant obtains real estate listings from advertisements and contacts owners to ascertain if they are willing to work with a broker. Respondent is a property owner and landlord who owns two rental properties in Newton, MA. Complainant contacted Respondent in October

¹ Commissioner Thomas George was the investigating Commissioner in this matter and pursuant to 804 CMR 1.23 (c) she did not participate in the Full Commission deliberations and did not vote on the matter.

² Complainant filed a complaint with the Commission on October 17, 2008, charging Respondent with discrimination in housing on the basis of race and color in violation of G.L. c. 151B, § 4 (6). Complainant also alleged that Respondent violated federal fair housing law by making discriminatory statements. The allegation of discriminatory statements was within the scope of the investigating commissioner's investigation and she found probable cause to credit a violation of state law, G.L. c. 151B, § 4 (7B).

2008 after seeing an advertisement for a property for rent by owner on Craigslist. The listed property was a unit in a two-family owner occupied building.³ Towards the end of their conversation, Respondent told Complainant that she could show the unit to prospective tenants but that she should not bring any of “those Africans” around because they were “loud” and it was “difficult to get them out.” Complainant thereupon told Respondent that she was African American, a professional, was not noisy and asked Respondent if he would rent to her. Respondent answered that he would have to charge her a higher rent plus first and last month’s rent and a security deposit even though earlier in the conversation he had told her he requires only the first month’s rent up front. Complainant ended her conversation with Respondent and thereafter filed a complaint with the Department of Housing and Urban Development, which was referred to this Commission for investigation. Respondent ultimately rented the unit in question to individuals from Peru.

Following an evidentiary hearing, the Hearing Officer found Respondent liable for discrimination based on discriminatory statements that he made in violation of G.L. c. 151B, § 4 (7B).⁴ The Hearing Officer ordered Respondent to cease and desist from making or causing to

³ The Hearing Officer found that Respondent has owned multiple rental properties since the 1970’s, including twenty-three units in Amesbury. At the time of the public hearing he owned the duplex in which he lived in Newton and a three-family dwelling located next door.

⁴ This section prohibits any person from “mak[ing], print[ing] or publish[ing]. . . any notice, statement or advertisement, with respect to the sale or rental of . . . other covered housing accommodations that indicates any preference, limitation, or discrimination based on race [or] color . . . or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted”. G.L. c. 151B § 4 (7B). The property at issue in this case falls within the definition of “other covered housing accommodations” which “includes all housing accommodations not specifically covered under subsections 10, 11 and 12 which are directly or through an agent made generally available to the public for sale or lease or rental, by advertising in a newspaper or otherwise, by posting of a sign or signs or a notice or notices on the premises or elsewhere, by listing with a broker, or by any other means of public offering.” G.L. c. 151B § 1 (13). As already noted in this decision, the Respondent advertised the rental unit at issue on

be made any discriminatory statements or advertising in the rental of his property and from quoting more restrictive terms for rental based on the race of a prospective tenant. She also awarded Complainant \$15,000 in damages for emotional distress. Respondent has 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. It is the duty of the Full Commission to review the record of proceedings before the Hearing Office. 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. Massachusetts Comm'n Against Discrimination, 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. Massachusetts Comm'n Against Discrimination, 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 was otherwise not in accordance with the law. See 804 CMR § 1.23.

BASIS OF THE APPEAL

Respondent raises three issues on appeal. First, Respondent asserts that the Hearing Officer erred as a matter of law by concluding that his statements showed specific intent to

exclude African Americans as tenants. There is, however, no requirement that Complainant prove specific intent in order to prevail under G.L. c. 151B, § 4 (7B). The statutory language expressly prohibits “any person” from making a statement that “indicates” any preference, limitation, or discrimination based on race “or” an “intention” to make such preference, limitation, or discrimination. Id. (See fn. 3).

Even if this was not the case, there is absolutely no question that substantial evidence supports a finding that the Respondent intended by his statements to exclude African Americans from tenancy in the available unit. The Respondent admitted at the public hearing that he made discriminatory statements. The Hearing Officer credited testimony from Complainant, Respondent and an MCAD investigator who interviewed Respondent’s daughter, that Respondent made discriminatory statements to Complainant regarding his preference for not renting to African Americans. Respondent’s assertion that he told Complainant that she could market the property and bring prospective tenants to show them the unit is completely unpersuasive. The record shows that this part of the conversation between Respondent and Complainant was followed by the Respondent’s express statement to Complainant that she should not bring prospective tenants who were African Americans to see the unit.

Moreover, the Hearing Officer found that Respondent made an additional discriminatory statement. She credited the Complainant’s testimony that following her revelation to Respondent that she was African American she asked Respondent whether he would rent to her, and he stated that if she sought to rent the apartment he would have to charge her “more” rent and get the first and last month’s rent and a security deposit. Despite Respondent’s argument to the contrary, there was sufficient evidence to support a finding that this statement by Respondent was also discriminatory and violated G.L. c. 151B, § 4 (7B), by imposing more restrictive

conditions on the Complainant as a prospective African American tenant. The Complainant's testimony fully supports this conclusion and the Commission defers to the Hearing Officer's credibility determinations. The Hearing Officer observes and hears the testimony of witnesses and is in the best position to assess the witnesses' demeanor and to assess credibility. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). Moreover, given Respondent's admissions regarding his preference for not renting to African Americans and his reasons therefore, the Hearing Officer's resolution of credibility on this matter in the Complainant's favor is eminently reasonable.

In sum, we conclude that there is substantial evidence supporting the Hearing Officer's determination that G.L. c. 151B, § 4 (7B) was violated when Respondent made discriminatory statements indicating his bias against renting to African Americans tenant and articulated more restrictive terms and conditions for renting to a member(s) of this group. We decline to disturb the Hearing Officer's ruling.

Lastly, Respondent avers that there was insufficient evidence to support the Hearing Officer's award of damages for emotional distress because Complainant did not seek any medical or psychological treatment and did not prove that she had fewer listings or diminished earnings resulting from the effects of Respondent's discriminatory statements. Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purpose of M.G.L. c. 151B and to make the Complainant whole. Bournewood Hospital v. MCAD, 371 Mass. 303, 315-16 (1976). This includes an award of damages for emotional distress that Complainant suffered as a direct and probable consequence of Respondent's unlawful treatment. Bowen v. Colonnade Hotel, 4 MDLR 1997 (1982). Here, the Hearing Officer credited Complainant's testimony that the experience left her feeling depressed and

uncomfortable and uncertain that she was welcome in her own neighborhood in Newton. She testified that the experience also impacted her ability to operate her real estate business with any confidence for some time. The Hearing Officer found that she was very shaken by the episode. We conclude that the Hearing Officer's award was modest, not excessive, and commensurate with the harm Complainant suffered as a result of Respondent's conduct. See Stonehill College v. MCAD, 441 Mass 549 (2004).

Having carefully reviewed Respondent's Petition and the full record in this matter and 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 are supported by substantial evidence in the record. We, therefore, deny the appeal and affirm the Hearing Officer's decision and Order.

Additionally, the Commission supplements the Hearing Office's Order by requiring that Respondent undergo training on the Fair Housing Laws. This portion of the final Order can be waived upon proof sufficient to the Commission that the Respondent is no longer involved in the rental of his or any other individual's property. Additionally, the Commission assesses a civil penalty against Respondent for engaging in an unlawful housing practice in the amount of \$10,000.⁵

COMMISSION COUNSEL'S PETITION FOR ATTORNEY'S FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that the Commission is entitled to an award of reasonable attorney's fee for the presentation of

⁵ Pursuant to G.L. c. 151B, § 5, if the commission finds that a respondent has engaged in any unlawful practice, "it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice."

the charge of discrimination before the Hearing Officer on behalf of the prevailing Complainant. G.L. c. 151B, § 3 (15). The determination of what constitutes a reasonable fee is based on consideration of the number of hours reasonably expended to litigate the claim of discrimination multiplied by a reasonable hourly rate.

When assessing a request for fees, the Commission carefully reviews the petition 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 for attorneys’ fees in the amount of \$3,450, accompanied by an affidavit and detailed contemporaneous time records showing that she spent 23 hours prosecuting this matter at a rate of \$150.00 per hour. A review of Counsel’s time records reveals a fair accounting of the work performed in furtherance of Complainant’s case before the Commission. Accordingly, we conclude that the attorneys’ fee request is reasonable and we grant Counsel’s petition and award attorneys’ fees in the amount of \$3,450.

ORDER

For the reasons set forth above, we hereby affirm the decision and Order of the Hearing Officer in its entirety. Consistent with our decision, Respondent is additionally Ordered to:

1. Undergo training on state and federal Fair Housing Laws within 30 days of the issuance of this Order. The training shall be conducted by a trainer certified by the Commission, whose name and credentials shall be provided to the Commission in advance, along with a proposed training curriculum. The training session shall be no shorter than three hours in duration. This portion of the Order can be waived upon proof sufficient to the Commission that the Respondent is no longer involved in the rental of his or any other individual's property.
2. Pay a civil penalty of \$10,000 to the Commonwealth.

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 4th day of June, 2013.

Julian T. Tynes
Chairman

Jamie R. Williamson
Commissioner