COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEVEN ST. MARIE,
Complainant

v. DOCKET NO. 04-SEM-01589

ISO NEW ENGLAND, INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following two decisions of Hearing Officer Betty E. Waxman, one on liability and the other on damages, in favor of Complainant, Steven St. Marie ("St. Marie"). The Complainant filed a charge against Respondent, ISO New England, Inc. ("ISO") for retaliatory termination in 2004. The retaliation claim stems from an age discrimination complaint that St. Marie, along with fellow employees, brought against ISO in 1996. The allegations in that complaint were supplemented in 1997, when St. Marie alone brought an additional retaliation claim. Following mediation, ISO reached a resolution in 2001 with all of the complainants except for St. Marie, who refused to join in the group settlement and continued to pursue his claims against ISO.

In September of 2003, St. Marie finally reached an acceptable settlement with ISO. Some three months later, in January 2004, St. Marie was terminated from his employment with ISO. On June 15, 2004, St. Marie filed a complaint with this Commission alleging that ISO unlawfully terminated his employment in retaliation for initiating the discrimination and retaliation claims in 1996 and 1997, and for actively continuing to pursue the matter after all the other parties had settled. Conciliation having

failed, the matter was certified to public hearing in 2006 on the issue of retaliatory discharge. In February 2007, the Hearing Officer agreed to bifurcate the issues of liability and damages and hold separate hearings.

Following an evidentiary hearing on liability, in a decision dated March 12, 2008, the Hearing Officer concluded that ISO had violated G.L. c. 151B and was liable for unlawfully terminating St. Marie in retaliation for his protected activity. The Hearing Officer found that ISO unlawfully terminated St. Marie's employment in retaliation for the original filing a complaint of age discrimination in 1996 and a charge of retaliation in 1997. She also identified other protected activities in which St. Marie engaged, namely refusing to join in a class action settlement in 2000-2001, which refusal delayed by one year the receipt of settlement funds by St. Marie's co-litigants; filing a motion in 2001 to vacate the proposed dismissal of his discrimination claim; and ultimately resolving the matter by accepting a $25,000 settlement ($5,000.00 of which was paid by ISO) in 2003.

Following a hearing on damages, the Hearing Officer awarded St. Marie back-pay, lost pension benefits, and reimbursement for living expenses he incurred while employed in California where he maintained a second residence. The Hearing Officer also awarded St. Marie $200,000.00 in damages for emotional distress, but declined to award St. Marie front pay.

ISO has appealed to the Full Commission, asserting that the Hearing Officer's factual findings are not supported by the evidence and that she erred as a matter of law in concluding that ISO retaliated against St. Marie. ISO also challenged the Hearing Officer's award of projected pension losses and her award of emotional distress damages.

In addition, ISO challenges the Hearing Officer's assessment of pre-judgment interest on the entire sum of damages awarded in this case.

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.

SUMMARY OF THE FACTS

St. Marie was employed by ISO and its predecessors for over twenty-one years prior to his 2004 termination. During the course employment, St. Marie held a variety of positions, including Hydroelectric Plant Electrician and Operator, Electrical Substation Maintenance Operator, Power Pool Coordinator, and Control Room Shift Supervisor. St.

Marie was promoted to the Control Room Shift Supervisor position in 1998 and served in that capacity until the time of his termination.

As Shift Supervisor, St. Marie was responsible for overseeing a team of Systems Operators in ISO's Control Room. The team is responsible for ensuring that the energy transmission system provides sufficient power to meet New England's energy demands. Each team works a twelve hour shift from either 7:00 a.m. to 7:00 p.m., or 7:00 p.m. to 7:00 a.m.

The instant matter stems from an age discrimination complaint against ISO brought by St. Marie and other fellow employees in 1996. The Complainant, in 1997, also filed a retaliation claim. Following mediation, in 2001, ISO reached a resolution with all complainants except for St. Marie, who refused to join the settlement and continued to pursue his claims. St. Marie ultimately reached a settlement with ISO in September of 2003.

The critical event leading to St. Marie's termination occurred on December 1, 2003, at 6:21 p.m., while he was working as Shift Supervisor on the 7:00 a.m. to 7:00 p.m. shift. At this time, Cape Cod and southeastern Massachusetts suffered an electrical outage causing a blackout lasting approximately two hours and affecting 300,000 homes. In the wake of the blackout, ISO's Senior Vice President/Chief Operating Officer, Stephen Whitley, made the decision to terminate Complainant's employment. Whitley testified that his reasons for terminating St. Marie were based upon St. Marie's (1) failure to exercise leadership in the Control Room during the power outage; (2) departure from the Control Room at 6:00 p.m. on December 1, 2003 to attend to routine matters; (3) insistence on blaming the Transmission Stability Operating Guide (for one of the

electricity transmission lines) rather than accepting responsibility for the outage; and (4) two prior performance issues that took place between 2000 and 2001.

Prior to terminating St. Marie's employment, Whitley conferred with ISO's Chief Financial Officer, Robert Ludlow. Ludlow, at the time, was aware of the earlier settlement. Both Whitley and Ludlow testified that they did not discuss the settlement agreement reached four months earlier in September 2003 resolving St. Marie's prior discrimination charges against ISO.

Whitely testified that when he terminated the St. Marie he was aware that St. Marie had earlier brought a claim against the company but knew nothing about the settlement. Ludlow testified that he had not informed Whitley of the settlement.

St. Marie was terminated on January 27, 2004. The Security Operator and the Senior Systems Operator on duty during the shift each received a one-day suspension as a result of their performance on the day of the December 2003 blackout. Both individuals grieved their suspensions pursuant to the governing collective bargaining agreement and settled their grievances. The Control Room Supervisor was not disciplined.

Following his discharge, St. Marie applied for three positions in the energy industry and in September 2004, he began working in the position of Generation Dispatcher at CA ISO in Folsom, California. St. Marie remained at CA ISO until July 2008, at which time he voluntarily resigned from his employment and accepted a position as a Reliability Coordinator with Western Electricity Coordinating Council in Loveland, Colorado. St. Marie's wife continued to reside at their primary residence in Westhampton, Massachusetts.

RESPONDENT'S APPEAL

ISO's appeal is grounded in its assertion that the Hearing Officer erred in concluding that ISO was precluded from relying upon pre-settlement events to partially justify St. Marie's termination. The events ISO refers to took place between 2000 and 2001 and involved St. Marie leaving the Control Room during a snowstorm and displaying an effigy of his supervisor in a noose.

ISO raised these incidents as part of its justification for terminating St. Marie's employment in 2004. ISO argues that the Hearing Officer misconstrued the terms of its settlement agreement with St. Marie in September 2003 and that this error ultimately prejudiced ISO. While we agree with ISO that the Hearing Officer erroneously relied on Schuster v. Baskin, 354 Mass. 137, 140 (1968), as the basis for her pre-hearing decision to bar evidence pertaining to St. Marie's discipline for two prior work-related incidents, we do not agree that ISO was prejudiced in any way. At the hearing, ISO was allowed to present testimony about these prior events and the Hearing Officer made findings accordingly.

For example, the Hearing Officer permitted Stephen Whitley to testify regarding the 2000-2001 events in order to demonstrate how they influenced his state of mind and his decision to terminate St. Marie. Additionally, she allowed other witnesses to testify about the 2000-2001 events. Thus, despite her ruling in a pre-trial order that precluded the ISO from relying upon pre-settlement conduct to support its termination decision, the Hearing Officer heard and considered Whitley's testimony about the relevance of these

events. Therefore, the pre-trial Order cannot be deemed to have prejudiced the presentation ISO's case.

Even if the Hearing Officer had adhered to her pre-trial order, the outcome of this case would not have changed substantially since she ultimately concluded that all the reasons for St. Marie's termination – even including the prior two incidents -- were a pretext for retaliation. She refused to credit ISO's assertion that the two prior events in question contributed to St. Marie's termination, specifically finding that despite these incidents, St. Marie continued to receive an overall performance rating of "meets expectations" in 2002. Further, the 2002 evaluation noted that St. Marie's overall performance had improved from the previous year. The Hearing Officer concluded that ISO's reliance upon these two earlier events to justify St. Marie's termination following the blackout in December 2003 was undermined by the noted improvement in the performance reports.

Given these facts, we find that it was within the Hearing Officer's discretion to discredit or assign little weight to ISO's testimony that the 2000-2001 incidents partially justified St. Marie's termination. Since the Hearing Officer considered the subject events, wholly independent of her construction of the settlement agreement, and discredited their relevance in the decision to terminate St. Marie's employment, any purported error in the Hearing Officer's interpretation of the settlement agreement was harmless. See Zabin v. Picciotto, 73 Mass. App. Ct. 141, 153 (2008) ("If relevant evidence is erroneously excluded, the appropriate test to determines if the exclusion created reversible error is whether the proponent has made a plausible showing that the

trier of fact might have reached a different result if the evidence has been before it.") (internal citations omitted).

Another ground for ISO's appeal is that the Hearing Officer erred in finding that the St. Marie established a prima facie case of retaliation. ISO argues that the Hearing Officer improperly determined that St. Marie satisfied two elements of the prima facie case, namely notice and causation.

ISO argues that the Hearing Officer erred in concluding that Whitley had notice of the settlement agreement prior to terminating St. Marie. It asserts that this conclusion is based "solely on her disbelief of Ludlow and Whitley" and that disbelief of witness testimony, with nothing more, is insufficient to provide an evidentiary basis for drawing the opposite conclusion. We are not persuaded by this argument as it mischaracterizes the Hearing Officer's analysis and is too pat. It ignores the context which caused her to discredit the testimony. While it is true that the Hearing Officer did not find the witnesses credible on this point, her determination of their credibility was made in the context of other evidence in this case. Given that Ludlow admitted notifying ISO's President and CEO, General Counsel and Senior Counsel about the settlement, she then reasonably queried, "Why would he refrain from likewise informing Whitley, the Chief Operating Officer/Senior Vice President, during conversations in which he [Ludlow] was giving Whitley feedback about the proposal to fire [St. Marie]?" She also noted Ludlow's admission that he talked to Whitley "all the time" and he believed a retaliation lawsuit would "likely" follow from Whitley's termination decision. Given this context, the Hearing Officer found it patently unconvincing that Ludlow would not have discussed St. Marie's settlement occurring just four months prior with Whitley and drew the

inference both "from circumstantial evidence" and "the witnesses' lack of credibility" that Whitley knew ISO had paid monetary compensation to St. Marie in September of 2003 to settle his longstanding age discrimination claims.

With respect to causation, ISO argues that the Hearing Officer focused only on the temporal proximity of the settlement to St. Marie's termination, and no other relevant factors, to establish causation. ISO argues that the Hearing Officer "ignored" the fact that Whitley had treated St. Marie favorably in 2002 when he tried to secure a bonus for him. We are not persuaded by this argument. The Hearing Officer weighed the evidence and determined that Whitley's favorable treatment of St. Marie on one occasion prior to the settlement did not outweigh his harsh decision to terminate four months after the settlement under circumstances that were otherwise suspect. She did not "ignore" the evidence; she just clearly did not find it dispositive of the issue of retaliatory motive. ISO again gives short shrift to the Hearing Officer's analysis. While she found that the four month time period between St. Marie's protected activity in September 2003 and his termination in January 2004 was "sufficiently brief" to support an inference of causation, her analysis did not stop there.

The Hearing Officer gave due consideration to the fact that other employees who worked in the Control Room and had responsibility for the outage on December 1, 2003, including St. Marie's supervisor, received little to no discipline for their roles in the incident and decided that this also supported the inference of causation. None of these employees had a history of protracted litigation with ISO over issues of discrimination. While acknowledging that the differences in rank and duties could arguably justify disparate levels of discipline, the Hearing Officer concluded that they did not justify the

"enormous disparity which exists in this case." We concur that all of these circumstances supported the Hearing Officer's inference of causation and her finding that St. Marie had established a prima facie case of retaliation.

ISO also asserts that the Hearing Officer erred in her conclusion that ISO's articulated reasons for its actions were a pretext for retaliation in this matter, advancing a number of arguments in support of this contention.

ISO argues that the Hearing Officer impermissibly substituted her judgment for that of ISO in concluding that discipline St. Marie endured was "unduly harsh." ISO cites to Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 45 (2005), in which the court defined its role in assessing discrimination cases: "Our task is not to evaluate the soundness of [the employer's] decision but to ensure it does not mask discriminatory animus."

We are not persuaded that the Hearing Officer overstepped her bounds in contravention of Sullivan. In Sullivan, the employee was one of eleven employees discharged in the context of a reduction in force. After she established a prima facie case of age and sex discrimination, her employer rebutted the presumption of discrimination by demonstrating that it engaged in a legitimate reduction of force and selected Sullivan for termination based on her sub-par performance evaluations and customer complaints. The Court rejected Sullivan's assertions that the factors used by her employer in selecting her for termination were "subjective" and "unreliable" and therefore a pretext for discrimination and went on to say that even if the allegations were true and Liberty Mutual had acted unfairly, Sullivan has still failed to present sufficient evidence to support a finding that the defendant had acted in a discriminatory fashion. 444 Mass. at

45 ("Sullivan's evidence does not permit a reasonable inference that Liberty selected her for layoff for any reason other than her own performance"). Id.

In contrast to the plaintiff in Sullivan, where a reduction in force impacted many employees, in this case St. Marie was the only individual terminated, while others received little to no discipline. In this case, St. Marie was treated much more harshly than other employees involved in the power outage incident and he attacked the veracity of the explanation for his termination on the specific ground that it masked a discriminatory animus that was unique to him i.e. that he was fired in retaliation for protected activity related to filing and settling a discrimination complaint.

Moreover, the Hearing Officer did not characterize ISO's actions as "unduly harsh" in a vacuum; nor did she label its actions simply unfair; rather, she examined ISO's actions in the context of how it dealt with the events of December 1, 2003, against the backdrop of St. Marie's protracted legal dispute with ISO over issues of discrimination and retaliation. She determined that in terminating St. Marie, ISO acted in a manner so disproportionate to the circumstances as to render its motivations suspect and ultimately probative of pretext for retaliation.

In support of her conclusion that St. Marie satisfied his burden of proving that his termination "was motivated primarily -- although not solely" by his protected activity, the Hearing Officer considered a number of factors, including the unconvincing denials that Whitley had notice of the settlement, the undisputed fact that Ludlow did have such knowledge, the fact that other employees involved in the outage, including St. Marie's supervisor, received little to no discipline for their role in the incident, and her crediting of St. Marie's testimony about the technical details of the outage demonstrating that his

conduct was at least partially justified under the circumstances. She credited his testimony that he lacked sufficient documentation to make certain decisions and that certain specific technical directions did not exist at the time of the outage. This was supported by ISO's acknowledgement that its written Guide was "confusing," and by the fact that ISO changed this Guide after the power outage. In addition, the Hearing Officer found that St. Marie was held responsible for mistakes that should have been attributed to David Cyr, ISO's Security Operator and specifically cited the areas where Cyr was derelict in his duties.

The Hearing Officer believed that ISO's harsh criticism of St. Marie ignored crucial roles played by others in the Control Room, such as the Senior Systems Operator, Dennis McGroarty, who failed to execute his duties properly, yet did not receive any discipline whatsoever. Moreover, the Hearing Officer noted that it was not St. Marie who bore ultimate responsibility for the Control Room but, rather, Seamus McGovern, Respondent's Control Room Supervisor and the individual to whom St. Marie reported, who left the Control Room shortly after learning that a line was out of commission. The Hearing Officer observed that McGovern failed to exercise any oversight during the power emergency, and considered Whitley's admission that he should not have left the Control Room during the outage. Despite these facts, McGovern was not disciplined.

While believing that St. Marie should not have been held blameless for the events of December 1, 2003, the Hearing Officer concluded ISO acted unduly harshly in terminating his employment. In the context of St. Marie's twenty-one years of experience in the industry and performance evaluations that repeatedly "recognized his

strengths," the Hearing Officer concluded that the decision to terminate St. Marie's employment "was so unduly harsh as to render it suspect and therefore discriminatory."

We also do not agree with ISO's argument that the Hearing Officer was constrained from finding evidence of pretext based on the considerably less harsh discipline accorded St. Marie's subordinates, David Cyr, and Dennis McGroarty, who were ISO's Security Operator and Systems Operator, respectively. "Although providing a similarly situated comparator is usually the most probative means of proving that an adverse action was taken for discriminatory reasons, it is not absolutely necessary." Trustees of Health and Hospitals of the City of Boston, Inc., 449 Mass. 675 (2007). Moreover, there is no "mechanical formula" for proving pretext which "is the type of inquiry where everything depends on the individual facts." Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 39 (1st Cir. 2003).

Here, the Hearing Officer found that St. Marie was held responsible for mistakes that were not attributable to him, but to the Security Operator. She specifically noted the duties that the Security Operator was derelict in on the day in question. In addition, the Hearing Officer believed that ISO's criticism of St. Marie ignored crucial roles played by others in the Control Room, such as the Senior System Operator, Dennis McGroarty, who failed to execute his duties properly, yet did not receive any discipline whatsoever. Moreover, the Hearing Officer noted that it was not St. Marie who bore ultimate responsibility for the Control Room but, rather, Seamus McGovern, ISO's Control Room Supervisor and the individual to whom St. Marie reported, who left the Control Room shortly after learning that a necessary line was out of commission. The Hearing Officer observed that despite McGovern's failure to exercise any oversight during the power

emergency, and the fact that he should not have left the Control Room during the outage, McGovern was not disciplined by ISO.

Given these facts, Hearing Officer was justified in concluding that St. Marie had been unduly singled out for blame. While explicitly acknowledging that other individuals did not occupy the "same position as Complainant" and that the difference in rank and duties might have justified some disparate discipline, given that the other employees also had "crucial roles in maintaining day-to-day operations of the bulk power system in New England" the differences in rank could not possibly justify the "enormous disparity which exists in this case." The Hearing Officer noted that while Whitley referred to the events of December 1, 2003 as a "black mark" on the entire ISO, and repeatedly referred to the fact that the Control Room functioned as a "team," St. Marie nevertheless was the *only* individual on the team to suffer the serious consequence of losing his job.

In summary, the Hearing Officer concluded that the reasons ISO articulated to justify St. Marie's termination were not the real reasons, and that it was St. Marie's protected activity, rather than his conduct on December 1, 2003, that motivated his termination. We find the Hearing Officer's decision with respect to liability to be supported by substantial evidence and not based on any legal error.

DAMAGES

ISO has also appealed the Hearing Officer's decision on damages. ISO asserts that the Hearing Officer erred in failing to consider in mitigation of his lost pension benefits, the income and benefits St. Marie lost when deciding to leave his job in California to accept a new position in Colorado. ISO claims that the Hearing Officer

should not have refused to calculate this offset based on her belief that "[p]otential compensation of this nature is too speculative to offset the financial losses which Complainant will reasonably be expected to incur" as a result of his termination from ISO. We agree with the Hearing Officer's determination that offsets from the second job St. Marie took in Colorado following his firing were indeed speculative and that the appropriate comparison was with his California job. As the Hearing Officer observed, the 2008-2013 value of the St. Marie's California 401(k) would have depended entirely upon St. Marie's contributions, which likely would have been far less than what he contributed when he was employed by ISO, since he incurred the added expense of maintaining a second household in California. Under these circumstances, the Hearing Officer could not presume what monies St. Marie might have contributed to the California 401(k) plan, and found any attempt to value its worth would have been hypothetical and speculative. In addition, an individual's 401(k) earnings cannot be predicted with any reasonable precision, as investment profitability depends upon an individual's choices in self-directing his investments, which variable is difficult to track. By contrast, ISO's retirement plan was a defined benefit plan, with certain benefits accruing regardless of market fluctuations. Under this plan, St. Marie was guaranteed a certain amount of money, which was calculated by ISO's own expert, Dr. Thomas Barocci, to be a total of $330,693.00. We agree with the Hearing Officer's statement that: "The damages attributable to [ISO] are forecast on the basis of an almost twenty-two year career that was abruptly terminated. They should not be minimized by attempting to predict what [St. Marie] would have earned in income and in employer 401(k) contributions at a job where [St. Marie] no longer works, where potential 401(k) benefits

are linked to matching employe[r] contributions and are subject to investment losses, and where [St. Marie's] lack of tenure carries an ever-present risk of layoff." During his tenure at the California job, St. Marie was a relatively new hire in a fragile economy, relevant considerations which were in the discretion of the Hearing Officer to rely on in reaching her conclusions. Given that the Hearing Officer substantially adopted the figures of ISO's own expert in this matter, ISO has little reason to challenge her damage award.

ISO has also appealed the Hearing Officer's award of $200,000.00 in emotional distress damages. First, ISO argues that the Hearing Officer erred in finding that St. Marie was forced to postpone diagnosis and treatment of diverticulitis due to an interruption in medical coverage resulting in emotional distress. ISO states that St. Marie was enrolled immediately in his wife's insurance plan following his termination and that he received treatment within months after leaving ISO's employ. Nonetheless, we accept the Hearing Officer's reliance on St. Marie's testimony that he experienced uncertainty about whether he was covered for this medical condition and that this contributed to his anxiety and distress. The Hearing Officer specifically credited his testimony that notwithstanding being covered by his wife's health insurance policy, he was still forced to delay diagnosis and treatment of a painful condition. It was within the Hearing Officer's discretion to credit St. Marie's testimony and to base her award, in part, upon this consideration.

Second, ISO argues that by not seeking counseling, St. Marie failed to mitigate his emotional distress damages. There are many reasons why a person in St. Marie's position might not obtain counseling, including the costs associated with it, or, as the Hearing Officer specifically found in this case, an individual's decision to mitigate

emotional distress through self-help. The Hearing Officer concluded that St. Marie, "[r]ather than pursue psychological counseling or medication to assuage the humiliation and depression associated with his termination, [] appears to have focused his efforts on resurrecting his career." She credited St. Marie's testimony that he regained a measure of self-esteem by taking the job in California. We agree with the Hearing Officer's conclusion that St. Marie appropriately mitigated his emotional distress by seeking and obtaining meaningful employment and that this finding is supported by substantial record evidence.

Third, ISO argues that the Hearing Officer erred in finding that St. Marie suffered compensable emotional distress arising from his separation from his wife when he chose to take a job in California following his termination. Essentially, ISO argues that any emotional harm due to St. Marie's relocation was not proximately attributable to the termination but instead, to a decision it had no control over. We disagree with this characterization and conclude that the Hearing Officer properly concluded that St. Marie's decision to move to California was not "a lifestyle choice," but one he was forced to make because he was jobless as a direct a result of his retaliatory discharge. The Hearing Officer described St. Marie's decision as a "a personal sacrifice for a professional goal," and called it the "the decision of a stoical individual to rehabilitate his career and reputation by making the difficult choice to accept the best possible job, in a highly specialized field, regardless of location." While we have agreed with the Hearing Officer that St. Marie's active job search which resulted in his move to California helped mitigate some of the negative effects of his termination, this did not change the fact that to obtain a job in his specialized field, he had to physically separate from his wife and his

home, with attendant emotional pain and suffering. The Hearing Officer found that St. Marie "endured years of loneliness in order… to achieve the professional stature and financial remuneration that he enjoyed prior to his retaliatory discharge." We believe that this was an appropriate basis for awarding St. Marie emotional distress damages.

As for ISO's contention that St. Marie could have pursued a position he applied for in New York, the Hearing Officer found that the potential New York employer did not offer a pre-employment screening until after St. Marie had been offered the California position, and there was no guarantee of a position even if St. Marie passed the pre-screening test. As for ISO's general contention that St. Marie should have pursued employment opportunities closer to Massachusetts, the Hearing Officer specifically credited St. Marie's testimony that following his termination by ISO he was unable to secure comparable work locally due to his having sued ISO and because he had reached a level of specialization in his field that necessarily limited the number of comparable, available positions. The Hearing Officer was not persuaded by the testimony of Stephanie Krupp, an energy industry recruiter who testified on behalf of ISO regarding evidence about comparable positions within commuting distance, as the Hearing Officer believed that Krupp failed to take into account these relevant aspects of St. Marie's circumstances. She noted that Krupp's testimony also lacked specificity regarding salary, benefits, job description, location and job availability in the relevant 2004 time frame, and because it focused upon positions that a computer search had generated "months and/or years" after St. Marie's discharge.

Finally, ISO has appealed the Hearing Officer's assessment of pre-judgment interest on the entire award of damages. Settled law establishes that St. Marie is entitled

to pre-judgment interest for back pay and other compensatory damages. However, with respect to the award of projected pension losses, it is established law that St. Marie is not entitled to pre-judgment interest on these damages. Salvi v. Suffolk County Sheriff's Dept., 67 Mass. App. Ct. 596 (2006). We conclude that this was an error and that the Hearing Officer's Order should be amended to deduct any assessment of interest on the projected pension losses.

We therefore affirm the Hearing Officer's award of damages subject to the change noted above with respect to interest on projected pension losses.

COMPLAINANT, ST. MARIE'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of St. Marie we conclude that St. Marie 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 one that the Commission approaches utilizing its discretion and its understanding of the litigation and of the time and resources required to litigate a claim of discrimination in the administrative forum. 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 will calculate the number of hours reasonably expended to litigate the claim and then multiply that number by an hourly rate considered to be reasonable. Second, the Commission will then examine the resulting figure, known

as the "lodestar", and adjust 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 will involve more than simply adding all 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 will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved.

St. Marie's counsel has filed a petition seeking attorney fees in the amount of $264,346.25 and costs in the amount of $27,238.90. The petition is supported by an affidavit from lead counsel Mark Bluver and by contemporaneous time records. It seeks compensation for worked performed over a five year period and two lengthy hearings by several attorneys and para-professionals.

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, litigation and appeal of this claim by St, Marie's counsel is reasonable. We see no evidence of billing for work that was excessive, duplicative, unproductive, or otherwise unnecessary to the prosecution of the claim. The

amount sought appears reasonable given the complexity of the matter, its longevity, and the degree of success achieved. We further conclude that the attorneys' hourly rates are consistent with rates customarily charged by attorneys with comparable expertise in such cases and are within the range of rates charged by attorneys in the area with similar experience. The hourly rate charged by Attorney Mark Bluver, lead counsel on the case ranged from $270 per hour in 2004 to $335.00 in 2008. The request for costs is also adequately documented and reasonable.

We therefore find that an award of attorney fees to St. Marie's counsel in the amount of $264,346.25 is reasonable and that the request for costs in the amount of $27,238.90 is also reasonable.

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) ISO shall pay St. Marie back pay damages in the amount of $4,493.00 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.

(2) ISO shall pay St. Marie damages for projected pension losses in the amount of $330,693.00.

(3) ISO shall pay St. Marie damages for living expenses in the amount of $88,045.55[1] 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) ISO shall pay St. Marie damages for emotional distress in the amount of $200,000.00 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.

(5) ISO shall pay attorney fees in the amount of $264,346.25 and costs in the amount of $27,238.90 with interest thereon at the rate of 12% per annum from the date the attorney's fee petition was filed until such time as payment is made or post-judgment interest begins to accrue.

(6) Additionally, and consistent with out statutory obligations under G.. c. 151B, § 5, ISO is ordered to immediately cease and desist from engaging in acts of unlawful retaliation.

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

[1] We have considered Respondent's argument that the award of damages for living expenses Complainant incurred while working out of state is inappropriate, but find that these are foreseeable consequential damages that flowed from Complainant's obligation to mitigate his damages by seeking comparable employment, wherever that may have been. We reject any argument that because Complainant found comparable employment well beyond Massachusetts, that Respondent should not be liable for his additional living expenses. We are loath to conclude that he had an obligation to uproot his wife from the family home and sell that home in order not to incur additional living expenses.

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 24th day of October, 2011.

_____
Julian Tynes
Chairman

_____
Sunila Thomas George
Commissioner

_____
Jamie Williamson
Commissioner