COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and VIRGINIA DIIORIO,
Complainants

v. DOCKET NO. 06-BPM-01392
DOCKET NO. 06-BEM-02651

WILLOWBEND COUNTRY CLUB, INC.,
NEW WILLOWBEND GOLF & COUNTRY CLUB, INC., and
DAVID WOOD,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant, Virginia DiIorio. Following an evidentiary hearing, the Hearing Officer concluded that Respondents had violated G.L. c. 151B and were liable for unlawful discrimination and retaliation. The Hearing Officer found that Respondents terminated Complainant's employment on the basis of her age and that they retaliated against her after she filed a complaint with this Commission by effectively banning her and her husband from the Willowbend community. The Hearing Officer awarded Complainant awards of back pay and front pay, as well as $200,000 in damages for emotional distress and assessed interest on the entire award of damages at the statutory rate.

Respondents have appealed to the Full Commission, asserting that the Hearing Officer erred as a matter of law in concluding that Respondents discriminated and retaliated against Complainant. Respondents also challenge the Hearing Officer's back

and front pay awards, the award of emotional distress damages, the failure to discount future earnings and the assessment of interest on future income.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "….such evidence as a reasonable mind might accept as adequate to support a finding…" Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

Respondents assert that the Hearing Officer erred in concluding that Respondent engaged in unlawful discrimination on the basis of age. Specifically, they challenge the Hearing Officer's application of a mixed motive analysis to this case, alleging that it is not appropriate in an age discrimination case, citing Gross v. FBL Financial Services, Inc. 129 S. Ct. 2343 (2009). This Supreme Court decision holds that plaintiffs who bring claims under the federal Age Discrimination in Employment Act (ADEA) will be held to

a "but for" standard of proof and that the burden of persuasion on the issue of but-for causation does not shift to the employer in an ADEA case as it does in a Title VII mixed motive case. Respondents assert that the Hearing Officer should have followed the holding in Gross, and applied a but-for causation analysis, leaving the burden of persuasion on this issue with the plaintiff, because Chapter 151B is analogous to the ADEA and because the SJC mixed motive analysis was adopted in accordance with prior federal precedent. However, the Massachusetts Supreme Judicial Court in Haddad v. Wal-Mart Stores, Inc. 455 Mass, 91 113 n.27 (2009) , declined to rule on whether or not Massachusetts courts will retain a mixed motive analysis with respect to age discrimination cases. Given that the mixed motive analysis as articulated in Wynn & Wynn v. MCAD, 431 Mass. 655 (2000) is still good law, it was appropriate for the Hearing Officer to follow established precedent and employ a mixed motive analysis. Under the mixed motive analysis, where the plaintiff first proves that a proscribed factor played a motivating part in the challenged employment decision, "an employer may not prevail merely by showing ….a legitimate reason for its decision; the employer 'instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.'" Wynn & Wynn, supra. at 666 quoting Johansen v. NCR Comten , Inc, 30 Mass App Ct 294, 301 (1991).

Moreover, it is essential to note that the Hearing Officer did not rely exclusively upon a mixed motive analysis in this matter, but also analyzed the claim of age discrimination under the inferential method of proof adopted by this Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976), thereby providing a completely separate basis for her conclusions. Thus regardless of whether the Supreme Judicial

Court might eventually decide to reverse its holding in Wynn & Wynn and follow Gross, the Hearing Officer's ruling in this matter would, nonetheless, be sound, as the Complainant proved her case on alternative grounds.

Respondents also assert that the Hearing Officer improperly considered the financial and property holdings of Paul Fireman, Willowbend's president, in failing to credit the legitimate business reason proffered by Respondents to justify Complainant's termination, namely that Willowbend was suffering from financial difficulties. We are not persuaded by this argument. The Hearing Officer did note in a finding that simultaneous to his communications with Willowbend members about financial losses, Fireman was building a very expensive development in New Jersey. However, there is no evidence whatsoever that the Hearing Officer relied upon this fact in reaching her conclusion of pretext. Indeed, the Hearing Officer acknowledges in her decision that Willowbend was not financially profitable in 2005 and that some downsizing may well have been required for economic reasons. Notwithstanding this, she determined that there was compelling evidence that the downsizing was ultimately discriminatory because the personnel decisions were motivated by an agenda to reach a younger, affluent clientele, and to change the face of the marketing personnel. She found that this agenda which motivated Complainant's termination was "infused with age-related animus." Her finding of pretext was based not upon Fireman's financial status, but upon the fact (among others discussed herein) that the personnel changes ensuing from Complainant's termination actually increased operating costs, while decreasing significantly the average age of retained employees.

Second, Respondents assert that the Hearing Officer "painted too broad a brush of Willowbend comparators" when allowing and considering evidence about a much larger group of employees, as opposed to considering only the real estate department. They assert that employees outside the real estate department were not similarly situated to Complainant. We do not believe this was an error. The Hearing Officer specifically compared Complainant to the two other sales agents in the real estate office who were retained and whose ages were 44 and 45. At almost 60, Complainant was significantly older than these two agents. While Respondents note that all three individuals were over age 40, and therefore all members of a protected class, it is settled law that the relevant comparison need not always be between individuals over and under 40, and that persons who are retained or replace a terminated employee claiming age discrimination "need not be substantially younger, simply younger is sufficient." Knight v. Avon Products, 438 Mass. 413 (2003). In addition, in this case, not only were two younger agents retained, but two new individuals were hired, namely William Clark (mid-40s) and Laura Blair (age 40), while two administrative assistants in the real estate office, who were ages 58 and 64, were terminated and replaced by Diane McArthur (age 39). Thus the evidence regarding the real estate office alone amply supports the Hearing Officer's conclusion that personnel decisions in this department were motivated by considerations of age.

Respondents' argument that the Hearing Officer improperly considered other, not similarly situated comparators in her analysis is similarly unpersuasive. Although Respondents claim that employees outside the real estate office were not similarly situated to Complainant, applicable law does not require the universe of comparators to be so narrowly defined. While comparator evidence is generally deemed the most

probative way of establishing discrimination, having a comparator is not absolutely necessary to prove discrimination. Trustees of Health and Hospitals of the City of Boston, Inc.,449 Mass. 675 (2007) (quoting with approval the appellate court's finding in Trustees of Health and Hospitals of the City of Boston, Inc., 65 Mass. App. Ct. 329 (2005), that comparators are not even required in all cases). In this matter, the Hearing Officer compared Complainant to others in the real estate office who she determined were similarly situated, but she also noted the statistics from layoffs in other departments as supporting an overall pattern of discrimination: "The average age of the terminated employees was fifty-four and one-half years old. While some individuals who were in their fifties or older survived the layoffs, the employees who remained in the real estate, fitness and reception areas were, on average, younger than they were prior to the layoffs." Regardless of whether the analysis is limited only to the real estate office or viewed in context of the layoffs as a whole, the Hearing Officer properly concluded that Complainant experienced disparate treatment.

Respondents also contend that the Hearing Officer erred as a matter of law in concluding that Wood's refusal to allow Complainant and her husband to participate in Willowbend golf tournaments subsequent to the filing of her MCAD complaint was actionable retaliation. Respondents assert that Wood's actions did not rise to the level of retaliatory conduct under the law because they were "merely inconveniences" to Complainant and without significant consequences. However, the record demonstrates that by communicating Complainant's banishment from club property through her friends, Wood's actions caused Complainant public embarrassment and their exile from the community resulted in the loss of many friends, associates and contacts within that

community. The record also demonstrates that Respondents' actions drove Complainant to put her home on the market and relocate permanently to Florida. The Hearing Officer specifically found that "Wood's words had the effect of banning the DiIorios from the Willowbend property and separating them from their friends and social network" and that Respondents' actions caused Complainant and her husband to be "ostracized from the Willowbend community after participating as active members for decades." Given these facts, the Hearing Officer was correct in concluding that Respondents' actions in fact had significant consequences for Complainant beyond "mere inconvenience," and that their actions rose to the level actionable retaliation.

Respondents also contend that the Hearing Officer erred in admitting the testimony of Maria St. Thomas relaying a telephone conversation she overheard between her husband and David Wood to support the claim of retaliation. Respondents challenge the admission of this testimony on the ground that it was based on "multi-level hearsay that is also prohibited by the spousal disqualification." However, the conversation at issue cannot be regarded as a confidential spousal communication since the conversation was between Wood, a third party and Complainant's husband. It was not a privileged communication between two spouses. Further, even if a subsequent conversation took place between Mr. and Ms. St. Thomas about his conversation with Wood, this was not the type of communication necessarily protected by the spousal privilege as it involved third parties and no confidential information related to the communicants. To the extent St. Thomas' testimony at the hearing may have differed from her deposition testimony, Respondents had the opportunity to, and did vigorously challenge, St. Thomas on this point during cross-examination.

The resolution of the witnesses' credibility was ultimately within the province of the Hearing Officer, who explicitly credited her testimony that she rescinded the invitation to Complainant because of the phone conversation between her husband and Wood. It is also important to note that St. Thomas' testimony was not the only evidence of retaliation in this matter. The record reflects that William Allyn, a then-current member of Willowbend, invited Complainant's husband to play in a member/guest tournament, but subsequently had to rescind the invitation because Wood told Allyn it would not "be appreciated" if Complainant's husband participated in the tournament since Complainant had filed a complaint against the Club. Thus while St. Thomas' testimony was properly admitted, even if it were to be excluded, the record reflects evidence of retaliatory conduct by Respondents.

Respondents also challenge the Hearing Officer's award of front and back pay damages. Respondents cite evidence of the diminished financial circumstances of the Club in 2005, resulting in lower salaries to the real estate office employees following the layoffs. Respondents argue that the Hearing Officer's determination that Complainant would have continued to earn a base salary of $62,000 until the age of retirement was speculative and contrary to the evidence. However, the Hearing Officer's conclusions were not speculative, but based on a detailed analysis that considered a number of relevant factors. The Hearing Officer's award was based in part on the fact that Complainant was "the most talented, successful, and proactive member of the real estate department" and that she had been responsible for the bulk of consummated sales. Given her productivity, it was unlikely that Complainant's salary would have been reduced, despite the fact that another employee of the real estate office, Patrice Hovenesian had

her salary reduced. The Hearing Officer specifically found that the circumstances did not warrant a reduction in Complainant's yearly salary by an amount equivalent to the salary reduction sustained by Hovenesian at the end of 2005, because Hovenesian was not a licensed broker at the time, her salary was partially restored, other real estate agents were added to the Willowbend payroll during that time, and Hovenesian's record of selling real estate was inferior to Complainant's. The Hearing Officer was conservative in her estimate of Complainant's lost commissions. Despite Complainant having had an extremely successful sales career with Respondents, the Hearing Officer considered the downward spiral in the real estate market in 2005 and suggested "that no matter how talented Complainant was at sales, she would have sold fewer houses, club memberships, and lots after 2005 than she did previously." The Hearing Officer took this fact into account in calculating Complainant's future commissions based on her sales from January to October of 2005, (not even a full year) and then reducing that amount by half and multiplying it by the number of years until Complainant's anticipated retirement. The Hearing Officer did not consider the average of Complainant's commissions from five previous years as was she was urged by Complainant to do, which would have yielded a substantially greater figure. Instead she reached a more conservative estimate using only the commissions earned in the final ¾ year of Complainant's employment. Complainant notes that this was despite evidence that the sale of high end homes (over the one million dollar range) continued to be robust in Mashpee in the years since 2005. The fact that commissions complainant might have earned cannot be proved to a certainty, does not disentitle to a reasonable estimate based on her successful selling

history. Considering these facts, the Hearing Officer's award of front and back pay damages was conservative and not an error or abuse of discretion.

With respect to front pay damages, Respondents also contend that the Hearing Officer erred by (1) neglecting to discount the present value of the front pay award and (2) by adding interest to the front pay award. There was no evidence in the record from either party regarding the standard for discounting future earnings and what the appropriate discount should be. Such calculations generally depend on the testimony of expert witnesses. Since it is Respondent's burden to introduce evidence related to mitigation of damages, it seems to us hat Respondent cannot complain of its failure to provide evidence relating to how future earnings should be discounted. The Hearing Officer is not an economist and cannot be expected to make such determinations in the absence of supporting evidence in the record. As to the assessment of interest on any front pay awarded, this was an error as front pay is compensation for future earnings and its value is more appropriately discounted and should not be enhanced by interest. It is recommended that the Hearing Officer's award be amended to reflect this.

Respondents also contend that the Hearing Officer should have concluded that Complainant failed to mitigate her damages. Respondents argue that Complainant's efforts to secure employment following her layoff were "paltry" and that the Hearing Officer incorrectly accepted Complainant's efforts as reasonable. We do not find this argument persuasive. The Hearing Officer credited Complainant's testimony that she sought employment with a number of named employers, but her efforts were not successful. The Hearing Officer also considered the challenging circumstances surrounding Complainant's search for alternative employment: stating that her efforts

were "hampered by the fact that the real estate market had slowed down, by her understandable reluctance to pursue entry level real estate positions because she 'didn't want to start all over again,' and by her inability to accept employment opportunities in Boston" which was seventy miles from her home in markets where she had no familiarity. In addition, the Hearing Officer stated that Complainant's search was "complicated" by her part-time residence in Florida and by the fact that "prospective employers were reluctant to incur the wrath of Willowbend executives by hiring her." Given these unique circumstances, which the Hearing Officer fully discussed, she determined that "the financial loses from Complainant's inability to find alternative employment must be borne by Respondents." It was reasonable for the Hearing Officer to conclude that Complainant's job search was reasonable under the circumstances, and that Respondents did not prove failure to mitigate her damages.

Finally, Respondents challenge the Hearing Officer's award for emotional distress as excessive, not supported by substantial evidence and an abuse of discretion. However, the Hearing Officer based her award upon Complainant's credible and convincing testimony about the psychic harm she sustained as a result of her termination. She also credited the testimony of Complainant's husband, her co-worker, Patrice Hovenesian, and Dr. Lloyd Price, a clinical psychologist who was qualified as an expert on this issue, whose testimony revealed that Complainant was emotionally distraught, sad, embarrassed and depressed after her termination. The physical manifestations of her distress were disturbed sleep, headaches and upset stomach. The Hearing Officer also credited testimony that Complainant suffered a marked loss of self-confidence and energy following her termination from Willowbend. Respondents assert that Complainant

continued to play golf and bridge, and that her golf handicap remains excellent, these facts do not negate the emotional effects of her termination and exile from the Willowbend community. Respondents' assertion that Complainant remained satisfied with her life after her termination was challenged by Dr. Price's testimony that Complainant' feelings of sadness, embarrassment and humiliation lingered for a full two years after her termination and that she continued to experience lowered self-esteem and self-confidence. Respondents' assertion that Complainant's feelings of isolation and exile from her social network were caused by the fact that she and her husband voluntarily resigned their Willowbend membership at the end of 2005 is unconvincing. This assertion is overly simplistic because it fails to account for the fact that Complainant and her husband were essentially banned from Willowbend, and thus would have felt unwelcome. Complainant testified that their social life had revolved primarily around the Willowbend community and golfing for several decades, not only as members of the club but also as guests. Complainant's feelings of isolation persisted as she ceased to have contact with the members of the Willowbend as a result of her negative experiences with Respondents. The Hearing Officer found her testimony to be "sincere, credible, and utterly convincing," and concluded that she "suffered severe, debilitating, and continuing emotional distress from loss of a successful career that she loved, and loss of social friends and the community she lived and worked in. Respondents' arguments therefore do not justify a reduction of the award. The Hearing Officer considered the nature and character of the harm she suffered, the severity of the harm, and the length of time Complainant suffered or is expected to suffer. Stonehill College v. MCAD, 441 Mass. 549 (2004). Her award was not excessive or an abuse of discretion.

In sum, we have carefully reviewed Respondents' Petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein. We conclude that there are no material errors of fact or law. The Hearing Officer's findings as to liability and damages for back and front pay and for emotional distress are supported by substantial evidence in the record. We therefore deny the appeal.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5.

The determination of what constitutes a reasonable fee is 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 may adjust it 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 counsel's calculations of the number of hours expended 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 should be deducted from the total, as should time spent on work that is insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). Counsel should be compensated only for those hours reasonably expended to advance the successful claims before the Commission. In determining whether hours are compensable, the Commission reviews the contemporaneous time records maintained by counsel and considers the hours expended and tasks involved.

Complainant's counsel filed an initial petition seeking attorney fees in the amount of $387,171.50 and costs in the amount of $11,010.28, and a supplemental petition seeking fees in the amount of $ 99,147.00 and costs in the amount of $1,482.90. All told counsel seeks $486,318.50 in fees and $12,493.18 in costs. Respondent has filed oppositions to both petitions arguing that the amounts sought are excessive and specifically noting work that should not be compensated because it did not advance the claims before the Commission. Respondent also seeks an overall percentage reduction in the amount sought by some 40% for billing it believes was excessive or duplicative.

Having reviewed the contemporaneous time records that support the attorney fee request, and Respondent's opposition, we conclude that the fee request is excessive and should be modified downward. Where it is apparent that work performed did not

advance the claims before the Commission, we will deduct those hours. In addition we will take a further percentage reduction from the total to account for billing that we deem not reasonable.

Complainant seeks reimbursement for work done by two attorneys, Mark Redlich who billed at a rate of $425 per hour until November of 2008 and thereafter at an hourly rate of $475; and attorney Merle Hass who billed at a rate of $325 per hour until November of 2008 and thereafter at an hourly rate of $375. The petition also seeks compensation for work performed by a paralegal at an hourly rate of $155. At the outset, we note that Complainants' 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.

Respondent first asks the Commission to deduct hours from Complainant's fee request that were expended on separate litigation in Superior Court against Respondent's insurer and for other hours that were unnecessary to the prosecution of the claims before the MCAD. Respondent notes that when it is clear that fees requested by a Complainant are entirely unrelated to the MCAD proceeding, the Commission has deducted such charges from the fee award. See Cossaboom v. Commonwealth of Mass., 21 MDLR 76, 78 (May 1999), aff'd Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination , 439 Mass. 729 (2003) (deducting charges for entries clearly unrelated to the MCAD proceeding). The Commission has also held that "some reduction must be made to account for work" that is unnecessary to prosecute the MCAD claim. Sanderson v. Town of Wellfleet Fire Dept., 19 MDLR 60, 61 (April 1997) (fee reduced where billing records reflected hours

related to a Massachusetts Torts Claims Act, and potential litigation under s. 1983 of the Federal Civil Rights Act. Respondent also cites to Bridges v. Commonwealth, 30 MDLR 124, 126 (October 2008) where the Commission reduced the fee award based in part upon compensation sought for work "that does not appear to apply to this litigation" and unrelated state law research). Worked performed prior to the filing of a claim at MCAD that "does not appear to be related to the Complainant's charge" may be deducted from the fee amount. Joubert v. Parcel Service, 25 MDLR 11, 12 (Jan. 2003)

According to Respondent, sometime around August of 2007, counsel for Complainant began researching and preparing a Superior Court complaint against Respondent Willowbend's insurer, Travelers Insurance Company and expended significant time and resources conducting research on the issues surrounding the claims against Travelers. Counsel also drafted a complaint, motions for attachment and a demand letter to Travelers, and engaged in frequent communications with counsel for Travelers. Respondent points to pages 28 -32 and pages 91-104 of counsel Redlich's supporting affidavit and time records as evidence of billings for work related to this suit and not the MCAD matter. The earlier pages document hours purportedly spent on an undisclosed research issue, drafting a Superior court complaint, and researching tort law and attachment issues and the latter document hours relating to c. 93A and 176D demand letters and a law suit filed against Traveler's alleging unfair settlement practices. Complainant asserts that these court actions are related and were undertaken in order to prevent Respondents from transferring or alienating any of their property and to ensure an enforceable remedy in the event the Commission awarded damages for illegal discrimination. We concur with Complainant that while these time entries are not

unrelated to the litigation before the Commission and were undertaken in furtherance of preserving and ensuring security for any eventual award by the MCAD, the Commission is not authorized to award fees for actions instituted in the courts or other forums. Therefore we are compelled to deduct this amount from the award for attorney's fees in this matter. Therefore we deduct $9,350 for work which begins with the third entry on page 28 through the second entry on page 30, which entries clearly relate to matters file in court or that matters that are sufficiently vague or where the purpose of the action is deliberately redacted, so as to make it impossible to determine if the activities were related to worked performed before the Commission to advance the MCAD claim. We believe it is also appropriate to deduct a charge in the amount of $2,275 for attorney Hass to attend a seven hour MCLE seminar (pg. 67 of affidavit), and $425.50 for activities related to a wage complaint. (p. 22 of affidavit) We will also deduct $16,349 for pre-filing activity which occurred before the complaint was filed at MCAD and some of which related to a disparate treatment sex claim, and which included preparation of a settlement demand letter and discussions about whether to file in state or federal court. (pp. 1-12 affidavit)

Respondents assert that billing for case preparation and conducting the hearing is duplicative since two experienced attorneys and a paralegal were involved and the time charged for the hearing days alone, not including prior preparation was $83,027. Prior preparation included 105 hours of Attorney Redlich's time 70.3 hours of Attorney Hass's time and 43.8 hours of paralegal time. (affidavit pp. 23, 38, 44-45, 55, 66-67, 74, 81, 86; documenting meetings, conferences, telephone conferences attended and billed by both attys. Redlich and Hass) We note that attorney Hass attended nine of the twelve days of

hearing and that a paralegal attended on the days she did not. Since Attorney Redlich conducted most of the witness examinations, we deem it appropriate to reduce the hearing time billings of $83,027 by one-half or $41,503. 50 for an amount of $41,503.50. We also reduce the attorney hearing preparation time by one-third [(105 Redlich hours at $475 per hour x 1/3) for a deduction of $16,458; and (70.3 Hass hours at $375 per hour x 1/3) for a deduction of $8,700.]

Respondents also assert that Complainant's billing for some 115 hours to prepare a post-hearing brief is excessive, noting that the Commission has reduced such fees in prior decisions noting that 40 hours was deemed sufficient. (See Cheeks, 29 MDLR at 153. Given the complexity of this case and the fact that the hearing lasted 12 days, the brief was a comprehensive 71 pages long with numerous references to the audio disc record, we conclude that 80 hours is more reasonable for completion of such a comprehensive brief and will deduct some 35 hours from the total at Ms. Hass's rate of $375 per hour since the bulk of the work on the brief appears to have been performed by her, for a total of $13, 125.

The initial fee petition seeks $387,171.50; the resulting figure after all the above initial deductions is $278,986.00. This is the lodestar figure on the initial fee request. While Respondent seeks a further 40 % reduction of the lodestar figure for claims that were unsuccessful and billing it deems generally excessive, we do not concur that a further reduction of the lodestar figure is warranted. While Complainant did not prevail on a gender claim after the investigation, this was early on in the proceedings and entries for research and work related to this claim have already been deducted as part of Complainant's pre-filing entries. As to the unsuccessful damages claim, it involves a few

commissions on sales not completed prior to her termination that complainant was not awarded, but we do not deem this to be significant in terms of the overall degree of success that Complainant achieved on her claims for discrimination and the relief granted. Therefore we decline to reduce the lodestar on the initial fee petition.

Complainant's supplemental fee petition seeking the amount of $99,147 is for work performed from October 39, 2009 when the initial fee petition was filed up until March 8, 2010 and focused primarily on preparation of Complainant's Opposition to Respondent's Petition for Review to the Full Commission, Complainant's reply to Respondent's opposition to the fee petition and its successful efforts to seek and obtain security for Complainant's award in the Superior Court. Complainant also seeks additional costs in the amount of $1482.90.

Respondent points out that Complainant seeks a supplemental award of attorneys' fees for work performed outside of the MCAD in furtherance of the Superior Court action she filed seeking injunctive relief. Complainant states this suit was necessary to secure the Complainant's award by preventing the corporate Respondents or their owner form transferring, selling or alienating property of the Willowbend Respondents. While the complaint was filed pursuant to c. 151B s. 9, and is related to the MCAD action, the MCAD is not authorized to award fees for work performed in the Superior Court, but only for work before the Commission. Respondent points out that DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1 (2006), does not support the proposition that the MCAD can or should award attorneys fees to Complainant's counsel for work done in relation to a Superior Court lawsuit that Complainant brought during the pendency of the MCAD proceedings and that is not the Superior Court's

administrative review of the MCAD proceedings. DeRoche authorized attorneys fees only for the appeal of the Commission's decision to the Superior Court, and authorized the Massachusetts courts, and not the MCAD, to grant such fees. See DeRoche, 447 Mass. at 17-19.

Respondent points out that entries noted in Complainant's Exhibit A attached to its supplemental petition indicate that the hours billed from November 2, 2009 to January 22, 2010 solely relate to work that was performed in connection with the above referenced Superior Court Action that Complainant filed on December 1, 2009. (Ex. A pp. 1-5) Many of the entries thereafter involve this suit and settlement discussions emanating from the suit. On the face of the billing entries it is clear that less than half of the 233.80 hours billed over a period of four months related to work performed in the MCAD proceeding. Therefore, we deem it appropriate to reduce the supplement fee request by at least 50%.

Moreover, a review of the billing entries in fact shows that only $46,839.50 is for work directly related to petitions filed with the MCAD. This amount represents 115.5 hours of work by the two attorneys on three petitions or oppositions from 12/18/09 though 3/18/10. (Ex. A pp. 4-10) This work focused primarily on preparation of the Complainant's opposition to Respondent's Petition for review to the Full Commission, but included a reply to Respondent's Opposition to Complainant's Fee petition. We conclude that the amount of time spent on this work by two highly experienced attorneys is excessive and necessarily duplicative and deem it appropriate to reduce the amount sought by 25% or $11, 709.87. We therefore award supplemental fees in the amount of

$35,129.63. We decline to award a 10% enhancement of the fees as requested by Complainant.

Therefore we award fees as follows: from the first petition, $278,986.00 and from the second petition, $35,129.63 for a total of $314,115.63.

In her initial petition Complainant seeks costs in the amount of $11,010.28 and in her supplemental petition, she seeks costs in the amount of $1482.90 for a total of $12,493.18. Since we are unable to determine which of those costs are related to non-MCAD activity we deem it appropriate to reduce this request by 25% and award costs in the amount of $9, 369.89.

ORDER

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

(1) Respondents shall pay Complainant damages for lost wages in the amount of $62,000.00 per year from the date of her layoff for a period of 5 years ($310,000) plus additional yearly compensation equivalent to one-half of her 2005 commissions for a period of 5 years ($139,470) 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) Respondents shall pay Complainant damages in the amount of $200,000.00 for emotional distress as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum from the date the Complaint was filed, until such time as

payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Respondents shall pay Complainant attorney fees in the amount of $314,115.63 with interest thereon from the date the petition was filed until such time as payment is made and costs in the amount of $9,369.89.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED this 18th day of October, 2011.

_____
Julian Tynes
Chairman

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Sunila Thomas-George
Commissioner

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Jamie Williamson
Commissioner