

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CAROL CONNORS,
Complainants

v.

DOCKET NO. 04-BEM-02607

LUTHER AND LUTHER ENTERPRISES, INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Eugenia M. Guastaferrri in favor of Complainant Carol Connors. Complainant filed a Complaint with the Commission charging Respondent Luther and Luther Enterprises, Inc. with unlawful discrimination in employment on the basis of age and disability in violation of M.G.L. c. 151B. The Hearing officer found that Complainant was subjected to a hostile work environment and terminated on account of her age and disability and awarded Complainant lost wages in the amount of \$183,071 and damages for emotional distress in the amount of \$200,000. She also ordered the Respondent to conduct training. The Respondent has appealed the award of damages for emotional distress only.

Summary of the Facts

Complainant, who was 62 years old at the time of the events at issue, has a long history of medical impairments beginning in her childhood with the paralysis of her right leg and an eventual right knee fusion. She is unable to bend her right knee and she wears a brace that

extends from her knee to her toe, causing her to drag her right leg. Complainant worked in an office position for Respondent, an auto appraisal firm. The other office employees were young women in their twenties who were either related to each other or were close friends. The office environment was informal, as were certain practices such as time-keeping. Complainant was instructed on how to report her hours on hand-written weekly time sheets when she began working. Complainant often worked more than 40 hours a week, but was not paid for overtime. She ate lunch at her desk and did not take breaks, unlike her coworkers who often left the office at lunchtime and took cigarette breaks. She was singled out for receiving personal phone calls at work, contacted at home when she called in sick and made to feel uncomfortable with the frequent sexual banter that took place in the office. Additionally, several incidents occurred involving the younger women in the office that showed great insensitivity toward Complainant's disability and age, leaving Complainant to feel isolated and unwelcome at work. While Complainant reported these occurrences and behavior to the owner of the company, he did nothing. When the office manager realized that Complainant had signed in at 8:30 a.m. on her time sheet one morning when in fact she arrived to work at 9:00 a.m., Complainant's time was monitored by office staff unbeknownst to her and she was ultimately fired, ostensibly for stealing time and she was not extended an opportunity to explain the discrepancies. The Hearing Officer found that that Complainant was treated differently at work, that her coworkers harassed and ridiculed her because of her age and disability, and that Respondent terminated her employment for discriminatory reasons. Respondent has filed a Petition for Full Commission Review, challenging the award of emotional distress damages to Complainant.

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 Officer. M.G.L. c.151B §5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding..." Katz v. MCAD, 365 Mass. 357, 365 (1974); G.L. c. 30A.

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

BASIS OF THE APPEAL

The sole issue that Respondent has raised on appeal is the appropriateness of the Hearing Officer's award of \$200,000 for emotional distress damages. Specifically, Respondent has asked the Full Commission to review whether the Hearing Officer's award is supported by the facts and based on credible evidence of causation, relevance and a reasonable degree of medical certainty. We have carefully reviewed Respondent's grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We find no material errors of fact or law with respect to the Hearing

Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings which are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

We find that the hearing officer based her award for emotional distress damages on credible testimony from the Complainant and her daughter which she found to be compelling and persuasive. We also find that she properly adhered to the criteria and legal standards for awarding emotional distress damages set forth in the relevant case law. The SJC has articulated the criteria to be considered in rendering damage awards for emotional distress. These include the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). The Hearing Officer credited the testimony of both Complainant and her daughter that she had suffered great humiliation, embarrassment and emotional suffering as a result of being subjected to a hostile work environment, Respondent's failure to remedy the hostile work environment and her ultimate termination. The Hearing Officer noted that Complainant "cried frequently in the office, felt worn down and fatigued by the harassment, and was deliberately ostracized and made to feel unwelcome and uncomfortable at work." (Decision of Hearing Officer, p. 31.) The Hearing Officer also found that Complainant continued to suffer emotional distress from these events, and that she "cried frequently during the hearing when asked to describe the stress and humiliation she underwent." (Decision of Hearing Officer, p. 31.) The Hearing Officer credited Complainant's testimony that she had trouble sleeping, suffered from anxiety because she felt no longer welcome at work and feared losing her job. Complainant was prescribed medications for sleep and for stress and anxiety, which she continued to take at the time of the hearing. The Hearing Officer further credited the testimony of Complainant's daughter who described how her

mother's emotional health deteriorated in 2003 and 2004 as a result of her co-workers' conduct. We find that the hearing officer's findings are supported by evidence in the record.

Respondent also challenges the Hearing Officer's award of emotional distress damages as lacking sufficient evidence of causation. The Stonehill Court held that complainants must show a "sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress." 441 Mass. at 576. The Court noted that while evidence of some physical manifestation of the emotional distress or expert testimony is beneficial, they are not necessary to justify an award. Id. Here, the Hearing Officer credited the testimony of Complainant and her daughter regarding Complainant's emotional distress and considered the evidence of physical manifestations of distress and medications Complainant was prescribed to treat her symptoms. We conclude that there was ample evidence that Complainant's emotional suffering was related to the incidents of discrimination in the workplace, and that the standard articulated in Stonehill was met. We agree that the evidence in this matter supports a finding that Respondent's actions caused Complainant's emotional suffering. Moreover, it is the fact-finder who heard the testimony and observed the demeanor of the witnesses who is in the best position to assess the injury and the appropriate amount of compensation for that injury.

Complainant notes that it is not uncommon for the MCAD to award emotional distress damages based on witness testimony alone. See Kealy v. City of Lowell, 21 MDLR 19 (1999) (finding unlawful sexual harassment and retaliation caused Complainant to suffer great personal and professional embarrassment and humiliation); see also Dalrymple v. Town of Winthrop, 50 Mass. App. Ct. 611 (2000) (upholding \$200,000 award for emotional distress based on Complainant's testimony of emotional suffering stemming from Respondent's unlawful conduct) Whereas Respondent does not dispute any specific findings in the Hearing Officer's decision that

comprise the basis of the award; and whereas the damage award is supported by ample evidence in the record, we find no reason to disturb the Hearing Officer's award of damages in the amount of \$200,000, and conclude that the amount is commensurate with other awards, and is within the discretion of the hearing officer. Accordingly, we affirm the Decision of the Hearing Officer in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEY'S FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that Complainant is entitled to an award of reasonable attorney's fees and costs. See M.G.L. c. 151B, §5. The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. In determining what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate which it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including the complexity of the matter.

The Commission carefully reviews the Complainant's petition for fees and does not merely accept the number of hours submitted as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). Compensation is not awarded for work that appears to be duplicative, unproductive, excessive or otherwise unnecessary to prosecution of the claim. Hours that are

insufficiently documented may also be subtracted from the total. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d 5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that the Commission determines were expended reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and the tasks involved.

Complainant's counsel has filed a petition seeking attorneys' fees in the amount of \$32,437.50. Respondent did not file an opposition to Complainant's petition. The Petition filed on Complainant's behalf notes that Attorney Michael M. Kramer represented Complainant before the Commission and is supported by an affidavit and detailed and contemporaneous time records showing that Attorney Kramer spent 129.75 hours on his matter and charged a rate of \$250.00 per hour. Mr. Kramer's rates are consistent with rates customarily charged by attorneys with comparable experience in the Boston area. A review of the time records reveals a fair accounting of the work that he performed in furtherance of Complainant's case before the Commission. Accordingly, we grant the Petition and award Complainant \$32,437.50 for attorney's fees.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. 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 17th day of November , 2011

Julian T. Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie R. Williamson
Commissioner