

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MARC KOGUT,
Complainants

v.

DOCKET NO. 08-SEM-01239

THE COCA-COLA COMPANY,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Commissioner Sunila Thomas George in favor of Complainant Mark Kogut on charges of discrimination for Respondent's refusal to hire Complainant for a full-time Machine Operator position because of a handicap in violation of G.L. c. 151B, §4(16). Following an evidentiary hearing, the Hearing Commissioner concluded that Complainant proved that he was an otherwise qualified handicapped person capable of performing the essential functions of the position for which he received a conditional offer of employment assuming he passed a physical examination. The Hearing Commissioner concluded that Respondent's reasons for terminating Complainant's temporary employment and refusing to hire him for the full-time position amounted to unjustified considerations of and misconceptions about his handicap.

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 Commissioner/Officer. M.G.L. c. 151B, §5. The Hearing Commissioner's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." *Katz v. Massachusetts Comm'n Against Discrimination*, 365 Mass. 357, 365 (1974); M.G.L. c. 30A. While a reviewing body "may not ignore evidence in the record that detracts from the weight of the evidence upon which [Complainant] relied," *Cohen v. Brd. Of Reg. in Pharmacy*, 350 Mass. 246, 253 (1966) we are "not permitted to displace the [fact-finder's] choice between two fairly conflicting views," even though we might have made a different choice. *Labor Relations Commission v. University Hospital, Inc.*, 359 Mass. 507, 512 (1971). The standard does not permit us to substitute our judgment for that of the Hearing Commissioner even if there is evidence to support the contrary point of view. *See, O'Brien v. Director of Employment Security*, 393 Mass. 482, 486 (1984).

It is the Hearing Commissioner's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Hearing Commissioner remains in the best position to observe the testimony of witnesses and their demeanor and to assess credibility. *Quinn v. Response Electric Services, Inc.*, 27 MDLR 42 (2005). The Full Commission defers to these determinations of the Hearing Officer. *See, e.g., School Committee of Chicopee v. Massachusetts Comm'n Against Discrimination*, 361 Mass. 352 (1972); *Bowen v. Colonnade Hotel*, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF FACTS

Complainant began working for Respondent (“Coca-Cola”) as a temporary employee in a Machine Operator position in Coca-Cola’s Northampton bottling production plant in July of 2007. When Complainant worked at the plant, he reported to Production Supervisor Bill Dermody. In January of 2008, Mr. Dermody asked Complainant if he was interested in applying for a full-time Machine Operator position. Complainant applied, and was recommended by Mr. Dermody for the position. On January 18, 2008, Coca-Cola offered Complainant the full-time entry-level position as a Machine Operator conditioned upon his passing a post-offer physical examination, drug and alcohol screening and a criminal background check. On January 22, 2008, Complainant underwent a post-offer physical examination. During the physical examination, Complainant informed the physician that he is blind in his left eye due to a car accident. Complainant’s loss of sight in that eye is permanent and uncorrectable. Upon learning of Complainant’s disability, without consulting Complainant, the Production Supervisor or the General Manager of the Northampton plant, Respondent terminated his temporary employment and revoked its offer of employment for a full-time position. Respondent determined that Complainant’s disability prevented him from performing the essential functions of any of three Machine Operator positions because all purportedly included forklift driving. Respondent asserted that as a Machine Operator driving a forklift, Complainant would pose a risk of future injury to himself and to others.

Drawing upon evidence presented at the hearing, the Hearing Commissioner determined that forklift driving is not an essential function of the entry-level (Level 3) Machine Operator position. She determined that Respondent failed to engage in an interactive discussion with Complainant as a qualified handicapped individual to identify possible accommodations prior to

terminating his temporary employment and rescinding the offer of permanent employment. The Hearing Commissioner further held that Respondent failed to render an individualized assessment of Complainant's capabilities, relying instead on unjustified assumptions about Complainant's disability. The Hearing Commissioner awarded damages to the Complainant in the amounts of \$75,000 for emotional distress and \$45,636 for lost wages. She declined to limit or waive the back pay award based on Respondent's contention that it ultimately would not have hired Complainant because of negative information it acquired during the course of litigating this matter.

BASIS OF APPEAL

Respondent appeals to the Full Commission; challenging the Hearing Commissioner's conclusion that Respondent violated M.G.L. c. 151B when it terminated him and rescinded the offer of employment. Respondent challenges her findings that forklift operation is not an essential function of the Level 3 Machine Operator position and that Complainant is a qualified handicapped individual. Respondent also asserts that the Hearing Commissioner did not adequately consider its defense that Complainant's employment posed a direct threat to health and safety and erred in failing to apply the doctrine of after-acquired evidence.

Respondent admits that Complainant's disability (his left-eye blindness) is the reason it terminated Complainant and rescinded its offer of full time employment. Accordingly, the Hearing Commissioner utilized the framework set forth in *Nagle v. City of Boston Fire Dep't*, 18 MDLR 221, 223 (1996) and *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) to analyze the handicap discrimination claim. The *Pushkin* framework requires Complainant to demonstrate that he is an otherwise qualified person apart from his handicap and that he was rejected under circumstances that give rise to the inference that his rejection was

based solely on his handicap. Once Complainant establishes his prima facie case, Respondent must then show either that Complainant was not an otherwise qualified handicapped person or that his rejection was for reasons other than his handicap. Complainant then has the burden of proving, with rebuttal evidence, that Respondent's reasons for rejecting him were based upon misconceptions or unfounded factual conclusions and that the reasons articulated for the rejection encompass unjustified consideration of the handicap itself. Respondent argues that pursuant to this analysis, Complainant failed to establish any of the requisite elements cited in *Pushkin*. Our review demonstrates that the Hearing Commissioner properly utilized the *Pushkin* analysis in reaching her conclusions and contrary to Respondent's assertion, the evidence supports her analysis.

The Hearing Commissioner found that Complainant established that he is a handicapped person within the meaning of the statute, that he was not hired because he has no sight in his left eye and that he was qualified to perform the essential functions of the position with or without accommodation. Her decision rested on her finding that, aside from the fact that Complainant had been performing satisfactorily in his position for seven months, forklift driving is not an essential function of the entry-level (Level 3) Machine Operator position Complainant applied for and was offered. She based this finding on the documentary evidence and testimony presented at hearing: the Physical Demands Analysis and Job Descriptions for all three Machine Operator positions, Complainant's testimony about the actual requirements of the job based on his seven month tenure and observations on the plant floor, and the testimony of Complainant's supervisors about the staffing requirements on each shift on the factory floor, including the number of forklift drivers available and required to get the job accomplished. Respondent's managers testified that ordinarily only one, and occasionally two, forklift drivers are required per

shift. Complainant testified that he was not expected to drive a forklift and that his supervisor, Mr. Dermody, rotated among three non-temporary employees to drive a forklift. The Hearing Commissioner relied on both the Physical Demands Analysis (PDA) and the Job Descriptions, reading the requirements of both in concert. When read together, these documents provide an outline of the essential functions required for each Machine Operator position. The PDA documented the physical demands and tasks of the Machine Operator position accompanied by photographs of the Machine Operators performing the detailed functions of their specific jobs. The PDA illustrates that forklift driving is not essential to Level 2 or Level 3 Machine Operators. Despite testimony from Respondent's witnesses that all three Machine Operator positions require some forklift driving, given evidence to the contrary, the Hearing Commissioner did not find their testimony dispositive on this issue. She considered that the Job Descriptions for Level 2 and 3 Operators do not include operation of a forklift under "Operator Essential Functions," and that only the job description for a Level 1 Operator includes the words "Operate lift truck" among the list of essential functions for that position. Further, only the Level 1 job description lists a "valid forklift license" as a job requirement.

The Hearing Commissioner weighed evidence to the contrary in arriving at her conclusion that forklift operation was not an essential function of the position of Level 3 Machine Operator, but went on to find that "even if forklift driving would have been required of Complainant on occasion, Respondent was obliged to engage in "an interactive process with Complainant to determine whether there might be a reasonable accommodation that would allow him to perform that duty safely or to exempt him from that duty." Instead of engaging in that dialogue, the decision to terminate Complainant and rescind its offer was based upon a conference call with upper level managers and staff who did not work directly with Complainant.

There was neither consideration nor discussion about any reasonable accommodation to permit Complainant to continue to work. Nor was there any evidence that Complainant's supervisor was consulted about Complainant's job duties or potential accommodations before the termination decision. Given the evidence upon which she relied, we find no reason to disturb her findings.

The Hearing Commissioner found that Complainant satisfied his burden of proving that Respondent's reasons for rejecting him were based upon misconceptions or unfounded factual assumptions about his disability and ability to do the job. She concluded that the reasons offered for the rejection encompassed unjustified considerations of Complainant's disability. She based this decision on evidence that upper-level management engaged in a single telephone conference call off-site made the determination that Complainant did not meet Respondent's visual acuity requirements because of his left-eye blindness and that this disqualified him from operating a forklift. The participants did not consult with Complainant's on-site supervisors to discuss his abilities or limitations, did not consider whether Complainant was a "qualified handicapped individual" who could perform the essential functions of the job with a reasonable accommodation, and did not consider the feasibility of a reasonable accommodation.

In short, the evidence demonstrates a failure to conduct an individualized assessment of Complainant's capabilities. Rather, Respondent made unjustified assumptions about Complainant's disability based on generalized guidelines regarding visual acuity and forklift operation. Respondent's failure to conduct an individualized assessment of Complainant's capabilities support the Hearing Commissioner's conclusions. We concur that Complainant met his burden of proof under *Pushkin's* requirements and will not disturb the Hearing Commissioner's ruling.

Respondent argues that the Hearing Commissioner erred in dismissing Coca-Cola's safety concerns which led to Complainant's termination, alleging that its decision to terminate Complainant and revoke his offer was permissible based upon a "direct threat defense." *See, Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002). Respondent argues that its obligation to provide a safe workplace for its employees did not permit Complainant to operate a forklift, and this was the reason for his rejection. As the U.S. Supreme Court recognized, however, the defense does not permit "the kind of workplace paternalism the ADA was meant to outlaw." Instead, "[t]he direct threat defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. *Id.* at 86. The Hearing Commissioner considered this defense, and specifically recognized that Respondent failed to conduct the individualized factual inquiry that the analysis requires. In addition, she recognized that Respondent's argument about the imminence of the risk was belied by evidence that incumbent employees and temporary employees operating forklifts were not required to meet the visual acuity standards applied to Complainant. There is sufficient evidence to support the Hearing Commissioner's dismissal of this fact specific defense. *See, Gil v. Vortex, LLC*, 697 F. Supp. 2d 234 (D. Mass. 2010) (denying motion to dismiss where employer argued that press operator with monocular vision was not qualified because direct threat to safety).

Respondent also argues that the Hearing Commissioner's award of damages is excessive because Complainant found other work shortly after Respondent terminated his temporary employment and because Respondent's discovery of misconduct by Complainant at a previous

job during the course of this litigation might have resulted in their refusal to hire him permanently. Our review demonstrates that the Hearing Commissioner considered interim earnings from Complainant's subsequent employment and deducted those amounts in mitigation of Complainant's back pay damages, rendering this argument moot. Respondent asserts that had it discovered Complainant's misconduct, it would not have continued to employ him and would not have hired him for a full-time position and that this should limit or bar his recovery of damages. The Hearing Commissioner declined to limit her award of back pay damages on these grounds, ruling that she did not believe that Respondent would have revoked Complainant's offer based on information that, but for the litigation, Respondent would not likely have acquired. She concluded that Complainant's good performance for seven months and the positive recommendations of his supervisor would have likely outweighed any such negative information and would not have resulted in termination or revocation of the offer. She recognized that concluding that Respondent would have acted otherwise, would be "highly speculative." There was sufficient evidence for her to conclude that the Respondent did not establish that the discovered misconduct was of such severity that Complainant would have been terminated on those grounds alone. Further, the Hearing Commissioner did not award front pay or require reinstatement of Complainant. We concur with the Hearing Commissioner's decision and decline to reduce or limit the award of back pay damages based on after-acquired evidence.

In sum, having considered Respondent's grounds for appeal and the record below and weighing all of the objections to the decision in accordance with the standard of review stated herein, we defer to the Hearing Commissioner's findings of fact, which are supported by substantial evidence and find no material errors of law. We thus affirm the Decision of the Hearing Commissioner in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Commissioner'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. See M.G.L. c. 151B, § 5.

The determination of what constitutes a reasonable fee is within the Commission's discretion. In exercising this discretion, the Commission considers the complexity of the litigation and the time and resources required to litigate such claims in the administrative forum. The Commission utilizes the lodestar method for fee computation. *Baker v. Winchester School Committee*, 14 MDLR 1097 (1992). This method requires the undertaking of 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 considered to be reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or not at all depending on relevant factors.

The Commission's efforts to determine the number of hours reasonably expended involves a thorough review the Complainant's submission and it does 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 considers contemporaneous time records maintained by counsel and reviews both the hours expended in light of the tasks involved.

Complainant's counsel has filed a petition seeking attorneys' fees in the amount of \$87,400, based upon an hourly rate of \$250 for attorneys, and for costs of \$3,528.50 incurred in prosecution of this action. The request is supported by detailed affidavits and contemporaneous time records. Notably, the Respondent did not dispute that the fees sought by Complainant are reasonable. The contemporaneous time records support attorneys' fees in the amount of \$79,425.¹ Having reviewed the contemporaneous time records that support the attorneys' fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation and litigation of this claim by Complainant is reasonable. The hours for which compensation is sought do not appear to involve work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. Further, the hourly rate is reasonable, particularly given the experience of Complainant's counsel. We therefore award attorney fees totaling \$79,010 and costs of \$3,528.50 to Complainant.

ORDER

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

(1) Respondent shall pay Complainant damages for lost wages and benefits in the amount of \$45,636.00 plus interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

¹ The difference between the amount requested in the Fee Petition and the contemporaneous time records is due to the lower hourly rates associated with paralegal work which are reflected in the contemporaneous time records. Our award is based upon the contemporaneous time records.

(2) Respondent shall pay Complainant damages in the amount of \$75,000.00 for emotional distress, with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

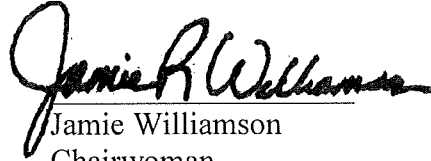
(3) Respondent shall pay Complainant attorneys' fees in the amount of \$79,425.00 and costs in the amount of \$3,528.50, with interest thereon at the rate of 12% per annum from the date the petition for attorney's fees and costs was filed until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

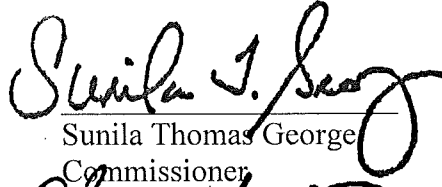
(4) The Training Provisions set forth in the Decision of the Hearing Commissioner are incorporated herein.

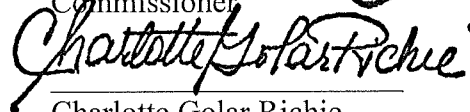
This Order represents the final action of the Commission for purposes of M.G.L. c.30A. Failure to comply with this Order will result in the Commission's initiation of enforcement proceedings, pursuant to 804 CMR 1.25, which may subject the non-complying party to both civil and criminal penalties as provided in M.G.L. c.151B, §8. 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 service of this Order and must be filed in accordance with M.G.L. c.30A, c.151B, §6, and Superior Court Standing Order 96-1. Failure to file a petition in court within thirty (30) days of service of this Order will constitute a waiver of the aggrieved

party's right to appeal pursuant to M.G.L. c.151B, §6.

SO ORDERED this 29th day of September , 2015.


Jamie Williamson
Chairwoman


Sunila Thomas George
Commissioner


Charlotte Golar Richie
Commissioner