

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ROSE FLANAGAN,
Complainant

v.

DOCKET NO. 03-BEM-02592

CITY OF LAWRENCE SCHOOL DEPARTMENT,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant, Rose Flanagan. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for age discrimination and retaliation in violation of chapter 151B, section 4, paragraphs 1C and 4 of the Massachusetts General Laws. Complainant, who was born in 1947, had worked as a Business Education teacher at Respondent's Lawrence High School ("LHS") from 1970 to 1987, and as a Job Placement Counselor from 1987 to 2000. During these 30 years of employment, Complainant never received any unsatisfactory evaluations, warnings, or discipline of any kind.

The Hearing Officer found that after serving three years as a counselor in the Guidance Department, in 2000, Complainant's position was changed to Facilitator, ostensibly because of a reorganization of the Department. Complainant was subsequently transferred involuntarily to a teaching position in the Computer Operations Department. In 2002 a new principal again reorganized the Guidance Department at the High School and

thereafter Complainant applied for two positions in the Department, both of which were filled by candidates who were substantially younger than she was, and who had significantly less experience. The Hearing Officer found that the Respondent's stated reason for hiring the younger candidates, that they spoke Spanish, and that Complainant's personality was unsuitable, were a pretext for age discrimination because the ability to speak Spanish was not a stated requirement or preference for the job. The Hearing Officer further found that the principal told Complainant he did not choose her for the first position because he was looking for someone "energetic and flexible," and given all of the circumstances that this raised a highly probable inference of age bias. Complainant grieved the denial of the position but did not prevail on the grievance. The Hearing Officer went on to find that the refusal to even interview Complainant for the second position was retaliation, where the principal told the screening committee members that it was not "a good idea" to interview Complainant because of the way she had responded to her earlier non-selection and stated, "we're not going to go through this again." The Hearing Officer was not presented with a claim for constructive discharge, but found that Complainant retired involuntarily in 2005 and awarded her \$111,833.00 for lost wages, consisting of back pay, front pay, and the cost of purchasing a retirement plus benefit, in addition to \$40,000 in damages for emotional distress.

Respondent has appealed to the Full Commission arguing that the decision of the Hearing Officer and her award of damages are based on errors of law and not supported by substantial evidence.

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.

The Respondent argues that there was no evidence to support the Hearing Officer's finding that age was a factor in Complainant's non-selection as a guidance counselor in 2003, and that there was no evidence to support the finding that age was the determinative factor. While there may not be direct evidence of age discrimination, the Hearing Officer properly concluded that age was a determinative factor in the hiring decision, based in part on the principal's use of the terms "energetic" and "flexible" to describe his ideal candidate. She determined that even absent an explicit reference to age, these words could be interpreted as a "veiled reference to youth" and a de facto reference to age leading to a "highly probable inference" of age bias. There was also evidence to support the Hearing Officer's conclusion that the ability to speak Spanish was a pretext, because this was not a stated qualification or preference for the job, and the screening committee was never even

advised that this was a criteria for the job. That all but one member of the screening committee recommended Complainant as the top candidate, while the lone dissenter rated her a close-second, and that the principal used the highly subjective criteria of Complainant's personality and ability to communicate as reasons for rejecting her, point to a pretext for discrimination. This was particularly so, given Complainant's unblemished record, highly satisfactory job performance, and evaluations noting she built positive relationships with students, during her career spanning 30 years as a teacher and guidance counselor at the High School.

Respondent further asserts that the finding of retaliation is based upon error of law, arguing that the Complainant is "not entitled to a position simply because she filed a grievance" and points to Complainant's "sense of entitlement." While Respondent may disagree with the Hearing Officers conclusion, the arguments it advances do not support its assertion that she erred as a matter of law or that the evidence did not support such a finding. Its argument also demonstrates a fundamental misunderstanding of the law on retaliation. The Hearing Officer properly concluded that the principal's actions in dissuading the screening committee from even interviewing Complainant for the second position because of how she reacted to the earlier rejection was clearly retaliation, and that the words he used were merely a "polite way of describing retaliatory animus."

Finally with respect to the damage awards, we accept the Respondent's argument that Complainant was not constructively discharged as a matter of law and reject the Hearing Officer's finding that Complainant's retirement was involuntary, merely because she was unhappy with her teaching job and despaired of ever getting a counseling job. Complainant made the decision to retire two years after Respondent refused to interview

her for the second counseling position. We find that in order to justify an award for back pay and front pay, the Hearing Officer must have found that Complainant was constructively discharged. We are unable to conclude that this is so, given the evidence in this case.

The standard for constructive discharge is a difficult one to satisfy. A constructive discharge is “legally regarded as a firing rather than a resignation.” GTE Products Corp. v. Stewart, 421 Mass. 22 (1995), citing Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1244-45 (1994). The Commission has held that to establish a case of constructive discharge, Complainant must show that her working conditions were so intolerable that a reasonable person in her position would have felt compelled to resign. See Holt v. Minuteman Flames Minor Hockey Association, 22 MDLR 373 (2000); Rosado v. Santiago, 562 F. 2d 114, 119 (1st Cir. 1977) (the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.”) The evidence here is that Complainant did not like teaching the Computer Operations class she was assigned to in 2000, and that after the two rejections in 2003 she despaired of ever being given a guidance position. Despite not wanting to continue teaching, Complainant continued to teach until 2005 when she made the decision to retire, presumably because she no longer wanted to teach. Other than the Hearing Officer crediting Complainant’s testimony that she would have remained at the High School until age 65 but for the events at issue, there is no other finding that Complainant’s work environment was intolerable or that she was forced to resign the teaching position that she had held for several years. We conclude, therefore, that the Hearing Officer erred as a matter of law in awarding Complainant

damages for back pay, front pay and the cost of buying an enhanced retirement package and we reverse the award of \$111,833.00.

As to the award for emotional distress, we find that it is reasonable given the evidence that Complainant was devastated by twice being rejected for guidance counselor positions after having served in the Department for many years. She testified that she suffered embarrassment and humiliation at not being chosen for either position and felt very hurt. She suffered from stress, gained weight, was sad all the time, cried a lot and didn't sleep. Her husband testified that she was devastated both emotionally and physically and that this was very hard on the family. We affirm the award for emotional distress as based upon substantial evidence.

In sum, we have carefully reviewed Respondent's 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. As a result of our review, we have concluded that the award of damages for lost wages and retirement costs constituted an error of law, but otherwise find no other material errors of fact or law. The Hearing Officer's findings as to liability and damages for emotional distress are supported by substantial evidence in the record. We therefore deny the appeal in part and grant that portion of the appeal that seeks reversal as to damages for lost wages and retirement costs, only.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of the Complainant on liability 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 within the Commission's discretion and relies on 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 considered to be 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's determination of the number of hours reasonably expended involves more than simply adding up all hours spent on the matter. The Commission carefully reviews the Complainant's submission and 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 and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of \$52,905.00 and costs in the amount of \$1,678.31.

Having reviewed the contemporaneous time records that support the attorney fees request, and based on similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal that compensation is sought for work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We further conclude that Complainant's counsel's hourly rate is consistent with rates customarily charged by attorneys with comparable expertise and experience in the field. We also find that the costs requested by Complainant are adequately documented and reasonable.

We therefore award to Complainant attorney fees totaling \$52,905.00 and costs in the amount of \$1,678.31.

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

(1) Respondent shall cease and desist from engaging in discrimination based on age and retaliation for challenging discrimination in the future.

(2) Respondent shall pay Complainant damages in the amount of \$40,000.00 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) Respondent shall pay Complainant attorney fees in the amount of \$52,905.00 and costs in the amount of \$1,678.31 with interest thereon at the rate of 12% per annum from the date the Petition for Fees and Costs was filed, until such time as payment is made or a court judgment is rendered in this matter.

(4) The Training Provisions set forth in the Decision of the Hearing Officer shall be incorporated herein, and Respondent shall comply with the Order 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 seeking judicial review, together with a copy of the transcript of 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 24th day of March , 2010.

Malcolm Medley
Chairman

Sunila Thomas-George
Commissioner

