COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
WILLIAM J. GLYNN,
Complainant

v. DOCKET NO. 07-BEM-01534

MASSASOIT INDUSTRIAL CORPORATION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainant, William Glynn. Following an evidentiary hearing, the Hearing Officer concluded that Respondent had violated G.L. c. 151B and was liable for unlawful discrimination based on Complainant's age and handicap. Complainant's twenty-two year employment relationship with Respondent was terminated after he was absent from work for approximately one month after being hospitalized for pneumonia and a heart attack. The Hearing Officer awarded Complainant $55,650 for lost wages and benefits, as well as $35,000 for emotional distress damages. She also ordered Respondent to conduct training.

Respondent has appealed to the Full Commission, asserting that the Hearing Officer erred as a matter of law in concluding that Respondent violated G.L. c. 151B when it terminated his employment. Respondent also challenges the Hearing Officer's awards of compensatory and emotional distress damages.

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.

We have reviewed the Respondent's Petition for Review and the Complainant's opposition to the same. All objections raised to the Hearing Officer's Decision were weighed in accordance with the standard of review described above. Having carefully reviewed the record of proceedings, we find no material errors of law or fact. We also conclude that there is substantial evidence in the record to support the Hearing Officer's findings. To the extent the findings of the Hearing Officer are supported by substantial evidence in the record, they are accepted and herein incorporated by reference; to the extent they are not supported by the record, they are rejected. To the extent that testimony

of various witnesses was not in accord with the decision, we will not disturb the Hearing Officer's credibility findings as it is not our role to choose between two fairly conflicting views, so long as the record supports the Hearing Officer's findings. See, St. Elizabeth's Hosp. v. Labor Relations Comm'n., 2 Mass.App.Ct. 782, 783 (1975).

LIABILTY

Respondent asserts that the Hearing Officer erred in finding that Complainant established a prima facie case of age discrimination. It argues that Complainant could not have been found to be performing his duties at an acceptable level because he failed to call in to report his absence. We do not concur with this assertion. It ignores the undisputed fact that Complainant had never previously called in sick or missed work due to illness in his twenty-two years of employment, and Respondent's admission that he was doing a good job. The Hearing Officer properly found that this spotless record demonstrated that Complainant was performing his job at an acceptable level, and that any purported failure to notify Respondent of his illness directly is not tantamount to non-performance of job duties. Moreover, the Hearing Officer found that Complainant did report his absence and the reasons therefore, to Respondent through his daughter-in-law, Suzanne Glynn. Ms. Glynn personally appeared at Complainant's workplace on two occasions to explain his absence to William Haskell, the individual Complainant viewed as his immediate supervisor. Complainant's daughter-in-law informed Haskell that Complainant had been hospitalized first for pneumonia and then one week later for a heart attack and was assured that the information would be passed up the line of management to Russell Munies, Respondent's Outside Maintenance Supervisor. We defer to the Hearing Officer's assessment of the witnesses' credibility in evaluating this

testimony. Given these findings, there was sufficient evidence to conclude that Complainant was performing his duties at an acceptable level.

Respondent next contends that the Hearing Officer erred in finding that Respondent's purported reason for terminating Complainant because he allegedly was a "no-call/no-show" was a pretext for discriminatory animus based on age and handicap. Respondent argues that it was not on notice of Complainant's illnesses and absent notice; its purported reason for termination cannot be a pretext. It asserts that the Hearing Officer's finding that Respondent had knowledge of Complainant's illnesses and hospitalization based on Complainant's and his daughter-in-law's testimony that Haskell agreed to inform management was not supported by sufficient evidence. We disagree.

The Hearing Officer credited Complainant's testimony that when Haskell visited him at home, he asked Haskell if he had told Munies about the heart attack, and Haskell replied that he had already done so or would do so. Complainant's daughter-in-law testified that on both times she spoke personally with Haskell at the workplace; Haskell assured her he would relay the information about Complainant's hospitalization to Munies. Haskell denied saying this and testified that he told her to contact Munies directly. The Hearing Officer found vague and unconvincing Haskell's testimony that he did not believe that he told Munies about Complainant's hospitalization, but that he might have and was not positive. She refused to credit Haskell's testimony and found not only that Haskell had agreed to, but did in fact did, pass the information on to Munies. She also found "patently unbelievable" Haskell's testimony that he withheld the information about Complainant from Munies because it never occurred to him to be concerned that Complainant could lose his job, particularly given the evidence that Munies repeatedly

asked Haskell about Complainant every time he visited the worksite. Ultimately, the Hearing Officer also did not credit Munies' assertion "that he was unaware of Complainant's medical condition in April 2007." Moreover, the Hearing Officer found that even if the reason for Complainant's absences had not been reported to Respondent, it defied credulity that neither Munies nor Maintenance Facility Manager Thomas Clifford would inquire why a twenty-year plus employee with a perfect attendance record simply stopped coming to work. She found this to be particularly significant given the fact that Clifford had only seventeen individuals reporting to him directly or indirectly. The Hearing Officer noted Respondent's "cavalier attitude" in terminating Complainant's employment, in contrast to its own policy, articulated in the Employee Handbook, that management would not terminate an employee absent "a great deal of consideration."

Respondent asserts that the Hearing Officer improperly imposed a duty on the part of Respondent to locate absent employees. This was not the conclusion of the Hearing Officer. The Hearing Officer merely made an observation about why Respondent's position that it failed to inquire about Complainant's absences was not credible. From this observation she drew the reasonable inference that Haskell notified Munies of Complainant's health issues. She determined there was no other reasonable explanation for Munies' failure to inquire about the reason for Complainant's absence. Given these findings, the Hearing Officer reasonably concluded that Respondent's characterization of Complainant being a "no call/no show" was a pretext for discrimination.

Respondent next contends that the Hearing Officer's finding that Complainant was a qualified handicapped individual was not supported by substantial evidence.

Respondent asserts that Complainant's illnesses do not qualify as a handicap because they were temporary in nature and he was cleared to return to work with no restrictions. However, the Hearing Officer properly concluded that Complainant was handicapped within the meaning of the statute and entitled to its protections because he had a record of impairment or was regarded as having an impairment, notwithstanding the temporary nature of the impairment. See, Dahill v. Police Dept. of Boston, 434 Mass. 233 (2001) (recognizing that person who does not experience a "substantial limit" of a "major life activity" when using a corrective device still protected by G.L. c. 151B). One who suffers from heart disease, even without physical manifestations at the time of termination, is considered disabled within the meaning of the statute. Auger v. Crown Cork & Seal, Inc., 28 MDLR 181 (2006) (history of heart disease qualified complainant as having a record of a major life impairment). Thus, the Hearing Officer's conclusion that "as a result of having had pneumonia and a heart attack, Complainant had a record of impairment and/or was regarded as having an impairment," was not an error.

DAMAGES

Respondent also challenges the Hearing Officer's award of compensatory and emotional distress damages, as not supported by substantial evidence. As to compensatory damages, Respondent argues that Complainant failed to mitigate his damages because he looked for jobs only in the newspapers. The Hearing Officer considered Complainant's age and the fact that he had been in the same job for over twenty-two years in determining that the likelihood of him finding a comparable position at age seventy-four, was "at best, remote." Given these circumstances, her conclusion that Complainant satisfied his duty to mitigate damages by searching newspapers for

comparable work with similar hours was reasonable. We will not disturb her conclusion that Complainant is entitled to damages for lost wages and benefits for a period of five years. However, Respondent correctly points out that the amount of this award was improperly calculated to be $55,600, and that the correct amount is $54,600.00.

Respondent argues that the Hearing Officer's award of damages for emotional distress was excessive and not supported by substantial evidence. The Supreme Judicial Court articulated standards for the Commission to consider in rendering damage awards for emotional distress in Stonehill College v. MCAD, 441 Mass. 549 (2004). The relevant factors include the nature, character, severity and length of the harm suffered. The award should be "fair and reasonable and proportionate to the distress suffered." The Hearing Officer credited Complainant's testimony that he felt disappointed, lost, alone, and that he felt like he had nothing after he lost his job of twenty-two years. She acknowledged that Complainant was "terse" in describing his emotions, but noted that "his pain was communicated by his demeanor," which she found particularly "compelling." She appropriately recognized the relationship between Complainant's emotional distress and the employer's unlawful discriminatory acts. It is the role of the fact finder to assess the demeanor and reliability of witnesses. We conclude that the Hearing Officer's award of emotional distress damages of $35,000 is both modest and consistent with the standards set forth in Stonehill .

In sum, we have carefully reviewed Respondent's Petition and the 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 and award are supported by substantial evidence in the

record. We will however, correct the mathematical calculation as to lost wages and benefits, but otherwise affirm the decision.

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 Complainant filed a Petition for Costs and Attorney's Fees in the amount of $51,730.86 on October 5, 2010.

The determination of what constitutes a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of 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 calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. Second, the Commission examines the resulting figure, known as the "lodestar", and adjusts it either upward or downward or not at all depending on various factors.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding up all hours expended by all personnel. 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 reviews contemporaneous time records maintained by counsel and considers both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of $48,660.00 and costs in the amount of $3,070.86. Having reviewed the affidavits and detailed, contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal that time spent was duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We further conclude that Complainant's attorney's hourly rate of $300 is consistent with rates customarily charged by attorneys with comparable expertise in such cases and within the range of rates charged by attorneys in the area with similar experience. We also find that the costs requested by Complainant are adequately documented and reasonable, with the exception of two charges for lunch with the client amounting to a total of $46.93. Accordingly, we award costs of $3,023.93.

We therefore award Complainant attorney fees totaling $48,660.00 and costs in the amount of $3,023.93, for a total amount of $51,683.93.

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:

(1) Respondent shall pay Complainant damages for lost wages and benefits in the amount of $54,600.00, 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.

(2) Respondent shall pay Complainant damages in the amount of $35,000.00 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 attorney fees in the amount of $48,660.00 and costs in the amount of $3,023.93, 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 Officer shall be incorporated herein.

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 2nd day of June , 2014.

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Jamie R. Willliamson
Chairwoman

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Sunila Thomas-George
Commissioner