COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
BRENDA PATTERSON
Complainants

v. DOCKET NO. 12-BEM-02939

AHOLD USA, INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination based on race in violation of M.G.L. Chapter 151B § 4(1). On appeal to the Full Commission, Respondent challenges the Hearing Officer's Decision based on the timeliness of the complaint and contests the findings with respect to liability, and the award of damages. Respondent asks that the Decision be vacated or the case remanded for further proceedings.

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); 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 was otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondent challenges the Hearing Officer's Decision on the grounds that the Hearing Officer erred as a matter of law by finding that the complaint was timely filed, and by concluding that Respondent was liable for unlawful discrimination, and damages, including a 3% annual raise applied to lost wages and future earnings. We have carefully reviewed Respondent's grounds for appeal and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them. As to Respondent's challenges to the Hearing Officer's credibility determinations, we reiterate that it is well established that the Commission defers to these determinations, which are the sole province of the fact finder. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

Respondent argues that the Hearing Officer erroneously concluded that the complaint was timely filed, since its notice of termination to Complainant in July of 2011 was purportedly

unequivocal. In order for a complaint of discrimination to be timely, it must be with filed with the Commission within 300 days after the alleged act of discrimination. M.G.L. c. 151B, §5. The Commission, however, can toll the limitation period when there are equitable considerations. DeRoche, et al. v. Town of Wakefield, et al., 24 MDLR 176 (2002). Until an employee has sufficient notice of a specific discriminatory act, the statutory period to file a complaint of discrimination does not begin to run. Tan v. Stonehill College, 23 MDLR 39, 46 (2001) (cause of action accrues on the happening of an unequivocal event likely to put a complainant on notice of unlawful conduct). The statute of limitations may be tolled in cases where an employee's termination date is deemed equivocal based on the particular facts of the case. Wheatley v. Am. Tel. & Tel. Co., 418 Mass 394 (1994).

On review, we affirm the Hearing Officer's finding that Respondent's notice of termination to Complainant was equivocal because it held out the possibility of other employment within the company. The Hearing Officer's determination was supported by substantial evidence. Respondent encouraged Complainant to apply for open positions, and accepted Complainant's application for a job in December 2011. The Hearing Officer found that Complainant had a reasonable expectation of employment when she explained to Respondent's recruiter that she was waiting to hear back regarding her December 2011 application. The Hearing Officer credited Complainant's testimony that she was aware of numerous instances where Respondent had recalled employees from lay-off. A number of positions became available after Complainant left work in December 2011 and other employees were re-hired, giving Complainant the reasonable expectation that she would be considered for a job. Complainant continued to have such expectation of employment with Respondent beyond her

last day of work in December 2011.[1] We decline to reverse this ruling.

Respondent next argues that Complainant, who is African-American, failed to make affirmative attempts to apply for jobs and failed to proffer sufficient evidence that applying for specific positions would have been futile based on Respondent's discriminatory actions or statements, or because of a discernable pattern or practice of discrimination. We find no error in the Hearing Officer's determination that Complainant's failures to apply for certain open positions was justifiable and not fatal to her claim. There is substantial evidence to support a finding that Complainant had been discouraged in her attempts to obtain employment with Respondent. See Rideout & Tinkham v. Hub Manufacturing Co., Inc., 10 MDLR 1001, 1034 (1988), citing International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1976) (holding consistently enforced discriminatory policy may deter job applicants due to their unwillingness to undergo humiliation of rejection making applicants victims of discrimination). There was adequate evidence to support the Hearing Officer's determination that by the time Complainant became aware of the New England (N.E.) Processor position in February of 2012, she reasonably believed that applying for the position would be futile. There was also evidence that Respondent actively discouraged Complainant from applying for certain jobs and reserved positions for certain white employees. The Hearing Officer found that in addition to formal job postings, there was an informal, less transparent network for hiring and promoting employees based on relationships and word of mouth, and that Complainant had observed this process first hand in her job with Respondent processing job changes for many years. We find no error in the ruling.

Respondent also argues that the Hearing Officer erred in determining that the reasons Respondent asserted for failing to consider Complainant for several available positions were a

[1] Complainant's charge was filed within 300 days of December 30, 2011, her last day of work.

pretext for race discrimination, and in determining that the decision-makers acted with unconscious bias. In this regard, the Full Commission defers to the determinations of the Hearing Officer which are based on her personal observations of the witnesses and the weight she assigns to proffered evidence in deciding disputed issues of fact. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). We affirm the Hearing Officer's determination that discriminatory animus played a material role in Respondent's decision-making with respect to Complainant. The Hearing Officer determined that Complainant was unjustly overlooked for the N.E. Processor position filled by a white employee, in or around July of 2011. She found that the N.E. Processor job was substantially similar to the Complainant's job, and that Complainant should have been considered for the position as an incumbent whose 40 years of experience qualified her to perform the job without training. The Hearing Officer also found that Respondent deliberately precluded Complainant from applying for the analyst position filled by another a white employee in September of 2011by telling her not to apply for the position due to particular job requirements which were later omitted from the position. The Complainant was treated differently than these two white employees who secured the positions. By examining the entire context of events surrounding Respondent's reorganization, including the subsequent hiring and re-hiring of employees, the Hearing Officer concluded that the reasons Respondent asserted for failing to consider Complainant for several available positions were a pretext for discrimination. We find this ruling to be supported by the evidence and decline to reverse. Respondent further argues that the Hearing Officer erred by failing to curtail Complainant's back pay and front pay damages because of her failure to mitigate by not applying for two positions in August or September 2011 and in February 2012. Respondent asks the Full Commission to remand the matter for the submission of further evidence to determine the exact

amount of remuneration Complainant would have received had she been hired into one of these positions and a concurrent reduction in damages. There is sufficient evidence to support the Hearing Officer's finding that Complainant's failure to apply for these open positions does not preclude a finding of liability or require a reduction in damages, particularly in light of the Complainant's reasonable and justifiable belief that continuing to apply for open positions would not result in a job. The Hearing Officer concluded that Complainant's failure to apply for these positions was justified based upon testimony and evidence presented at the hearing. We also note that Respondent did not affirmatively make an unconditional offer of employment to Complainant. See Brady v. Nestor, 398 Mass. 184 (1986) (absent circumstances making employee's rejection objectively reasonable, employer can toll accrual of back pay liability by unconditionally offering claimant a job). We reject Respondent's argument that Complainant's decision not to apply to these job openings should cut off her damages.

Lastly, Respondent argues that the Hearing Officer abused her discretion in awarding Complainant lost earnings that included 3% annual increases because these increases were speculative and unsupported and not proved with reasonable certainty. Respondent thus seeks a modification and reduction of the Hearing Officer's back pay and front pay awards to remove any annual increases. M.G.L. c. 151B authorizes the Commission to grant appropriate relief, including lost wages and benefits, damages for emotional distress and compensatory damages for loss of future earning capacity. Wynn & Wynn, P.C. v MCAD, 431 Mass. 655, 674 (2000), overruled on other grounds, Stonehill College v. MCAD, 441 Mass. 549 (2004). In granting such relief, the Commission has discretion to formulate the type of relief appropriate in a particular case. Id. We find that the Hearing Officer's decision to award annual wage increases of 3% was based on substantial evidence in the record leading her to conclude that Complainant

could have anticipated the increases had she not been terminated. On the above grounds, we deny the appeal and affirm the Hearing Officer's Decision.

PETITION FOR ATTORNEY'S FEES and COSTS

Complainant filed a Petition for Attorney's Fees and Costs on September 6, 2016, to which Respondent filed an opposition on October 19, 2016. For the reasons stated below, Complainant's Petition for Attorney's Fees and Costs is granted in part with some reductions.

Complainant's Petition seeks attorney's fees in the amount of $142,932.50. The petition is supported by detailed contemporaneous time records noting the amount of time spent on specific tasks and affidavits of counsel. M.G.L. c. 151B allows prevailing complainants to recover attorney's fees for the claims on which Complainant prevailed. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate 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 complexity of the matter.

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 will consider contemporaneous time records maintained by counsel and will review both the hours expended

and tasks involved. 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. Brown v. City of Salem, 14 MDLR 1365 (1992).

Counsel for Complainant seeks reimbursement for a total of 387.2 hours of work by Attorney Kevin Merritt, 53.1 hours of work by Attorney Paul Kelly and 12.4 hours by a paralegal. The contemporaneous time records filed in support of that request have been carefully reviewed. We conclude that the tasks performed are adequately documented and that the amount of time spent on preparation and litigation of this claim is well within reason with the exception of two entries, as discussed below. We also consider Respondent's opposition to Complainant's fee petition and adjust the award of fees in accordance with our review.

Attorney Kevin Merritt seeks reimbursement at the hourly rate of $300, a rate which is fully consistent with the rates customarily charged by attorneys with comparable experience and expertise in such cases and is well within the range of rates charged by attorneys practicing employment law in the area. Attorney Paul Kelly seeks reimbursement at the hourly rate of $475.00 for work in this case. While Attorney Kelly's hourly fee is $395.00, Complainant avers that he should be paid at the hourly rate of $475.00 because of an increase in market rates since he performed most of the work over ten years ago and the risk associated with undertaking the case on a contingency basis. Respondent opposes this fee adjustment. The Commission calculates reasonable hourly rates for attorney's fee awards by comparing the petitioning attorney's hourly rate with the rates that are customarily charged by attorneys with comparable expertise and experience in the same geographic region. See MCAD and Lulu Sun v. University of Massachusetts, Dartmouth, 36 MDLR 85 (2014) (addressing the reasonableness of

Complainant's attorney's fee petition on appeal). The Commission has declined to award attorney's fees at a higher rate than the attorney's standard rate at the time the work was performed. See David Keeling v. Wilbert Brothers Realty Co., 24 MDLR 145 (2002) (holding attorney not entitled to higher fee). Upon review of Complainant's fee petition and Attorney Kelly's affidavit, we decline to award Attorney Kelly fees at the increased rate based on the passage of time, and award fees at the hourly rate of $395.00 for the work that he performed in this case. [2]

Respondent argues that Attorneys Merritt and Kelly should not both recover fees for attending and preparing the deposition of Anne Bastianelli, when Attorney Kelly conducted the deposition, or for block-billing on their time sheets, making it difficult to tell how much time each attorney allotted to preparation and attendance. Respondent also argues that Attorney Kelly billed for attending a pre-hearing conference at which he did not participate, that both attorneys billed for attending every day of the Public Hearing and that Attorney Merritt billed for preparing all of Complainant's witnesses even though he personally questioned only one witness. With respect to Respondent's concern about block-billing, we find that because most of the items listed are clearly described and generally are of short-duration, the use of "block-billing," while disfavored, does not compel a reduction in the fee award. See Haddad v. Wal-Mart Stores Inc., 455 Mass. 1024, 1026-27 (2010).

The Commission may deduct hours from time entries that reveal duplicative billings. Leeann Williams v. Karl Storz Endovision, Inc., 26 MDLR 156 (2004). We find that both attorneys billing for preparation of the deposition of Anne Bastianelli is reasonable, but both attorneys billing for attending the entirety of the deposition, when only one conducted the

[2] We note that attorney's fees are subject to an award of interest at the rate of 12% per annum from the date the Petition for fees is filed.

questioning, is duplicative. We impose a 50% reduction to Attorney Merritt's time entry on July 15, 2015 to adjust for this duplicative billing. We also impose a 50% reduction to Attorney Kelly's entry for his attending the pre-hearing conference on September 8, 2015, since he did not actively participate in the conference. We find that Attorney Kelly's conference with Attorney Merritt and his review of the joint memo on September 8, 2015 are reasonable billings within the normal course of representation by attorneys in employment discrimination lawsuits.

Moreover, a review of counsel's billings for preparing witnesses and attending the public hearing reveals that Attorney Merritt and Attorney Kelly worked closely on and consulted with each other in the preparation of the prosecution of the matter. While the Commission has reduced fees in cases in some instances where multiple attorneys have billed for the same work, we decline to do so in this case for the reasons stated below. See MCAD & Lulu Sun v. University of Massachusetts, Dartmouth, 36 MDLR 85 (2014) (allowing two attorneys to bill for work at public hearing where both had active roles and commission found joint work on documents, preparation and participation in public hearing reasonable). In this case, Attorney Merritt's time entries and affidavit show that he performed much of the preparation work as lead counsel while consulting with his colleague, while Attorney Kelly took the reins at the public hearing as trial counsel. Where it is apparent that the two attorneys actively collaborated and relied on one another's work in their representation of Complainant, we do not find their billings for witness preparation and attendance at the public hearing to be duplicative. See Cheeks v. Dept. of Corrections, 29 MDLR 152 (2007) (recognizing not uncommon in Commission proceedings for less experienced attorney who bills at lower hourly rate to support lead counsel).

Respondent further argues that Complainant should not recover attorney's fees spent on "unproductive settlement negotiations," arguing that $7,725 in fees should be deducted. The

hours identified by Respondent as "unproductive" include hours spent on conciliation at the Commission as required by G.L. c.151B following a probable cause finding. Resolution of discrimination charges through conciliation is statutorily required and encouraged by the Commission. Such requirement manifests the legislature's support of voluntary resolution of discrimination complaints. In support of its argument, Respondent cites one case where the court deducted fees incurred in an unsuccessful mediation from a fee award. Alfonso v. Aufiero, 66 F. Supp. 2d 183 (D. Mass. 1999). The Alfonso decision simply identified these hours as "unproductive." Yet, whether or not a settlement negotiation is productive is the result of both parties' negotiations, including the Respondent's position. Where conciliation is mandated by statute, we see no reason to decline to award fees for time spent on attempted resolution of the matter, regardless of whether the attempt was fruitful.

Respondent further argues that fees incurred in settlement negotiations should be excluded because such an award might dissuade parties from attempting settlement if fees spent on resolution were later recoverable. The Commission is unpersuaded by this reasoning. We do not accept the proposition that parties would be discouraged from attempting voluntary resolution of a claim merely because fees might later be awarded for the time engaged in that endeavor. We thus decline to reduce Complainant's fee petition by hours billed for settlement attempts.

Respondent also argues that Complainant is not entitled to recover fees for non-legal or non-core work. Even where courts have addressed "non-core" work by an attorney in a fee petition, through the application of a lower rate for such work, the application of either uniform or differential rates for attorney's fees remains a matter of discretion. See Guckenberger v. Boston University, 8 F. Supp. 2d 91, 101 (D. Mass. 1998). However, such courts have still

awarded fees for "non-core" work, simply at a lower rate. In this case, the time entries contain sufficient detail to permit a conclusion that the work billed for falls within reasonable parameters of work that an attorney would be expected to perform. Thus, we decline to adjust Complainant's fee petition downward using differential rates or otherwise reducing the fee award. We therefore conclude that the fees sought by Counsel should be reduced as follows:

Total Reductions to Attorney Merritt's Fee Request and Resulting Award:

> $116,160.00 - $630.00 (duplicative billing on 7/15/15) = $115,530.00 (385.1 hours x $300/hour)

Total Reductions to Attorney Kelly's Fee Request and Resulting Award:

> 50% reduction for 9/8/15 pre-hearing conference + overall fee reduction from $475/hour to $395/hour = 52.1 hours x $395/hour = $20,579.50

Complainant also seeks reasonable fees for paralegal time at $125.00 per hour, totaling $1,550.00. Respondent has not challenged these fees, and we find them reasonable. The fees are awarded as follows: $115,530.00 + $20,579.50 + $1,550.00 = $137,659.50.

COSTS

Complainant seeks costs in the amount of $8,650.00 for deposition and hearing transcripts, mailing and delivery fees, witness fees and process server fees. We find the itemization of fees included in Attorney Merritt's affidavit to satisfy the requirements that costs be documented. We conclude that the request is reasonable and hereby award costs to Complainant in the amount sought.

ORDER

For the reasons set forth above, we hereby affirm the Decision of the Hearing Officer in its entirety and issue the following order:

(1) Respondent shall cease and desist from any further acts of discrimination on the basis of race and color.

(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 the complaint was filed until such time as payment is made, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Respondent shall pay Complainant damages in the amount of $156,847.00 for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Respondent shall pay to Complainant damages in the amount of $117,764.06 for front pay from the time of the public hearing until Complainant's 66th birthday in 2018, which amount shall be discounted at a rate to be determined by the parties after consultation with a financial expert regarding a currently acceptable discount rate at the time of payment. Such consultation shall occur within forty-five (45) days of the service of this decision, and the parties shall provide a written report to the Commission as to the applicable discount rate within sixty (60) days of the service of this decision.

(5) Respondent shall pay Complainant's attorneys' fees in the amount of $137,659.50 and costs in the amount of $8,650.00, 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 until this order is reduced to a court judgment and post-judgment interest begins to accrue.

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 service of this decision 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[3] this 23 day of January, 2018

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner

[3] Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission decision. See, 804 CMR 1.23