COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and OANA BABU,
Complainants

v. DOCKET NO. 10-WEM-00914
11-WEM-01886

ASPEN DENTAL MANAGEMENT, INC.,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Complainant, Oana Babu. Following an evidentiary hearing, the Hearing Officer concluded that Respondent, Aspen Dental Management, Inc., ("Aspen Dental") was liable for harassment based on Complainant's national origin and retaliation in violation of M.G.L. c. 151B. Respondent has appealed to the Full Commission, and Complainant has requested an additur to the award of back-pay. For the reasons discussed below, we affirm the Hearing Officer's decision and grant the Complainant's request for an additur.

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 the 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. When determining if a decision is supported by substantial evidence "we must consider the entire record, and must take into account whatever in the record detracts from the weight" of the Hearing Officer's determinations. Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673-674 (2010).

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). Fact finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Guinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). The role of the Full Commission is to determine whether the decision under appeal was based on an error of 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 (2020).

BASIS OF THE APPEAL

Respondent appeals the decision on the grounds that the Hearing Officer erred in 1) finding discriminatory and retaliatory animus; 2) determining that Complainant should prevail because there was a possibility that Aspen Dental was incorrect in its conclusion that Complainant used a drill in the patient's mouth; 3) finding that Complainant's discussion with her supervisor concerning flirting with a patient constituted protect activity; 4) finding that Complainant's supervisors were proper comparators in evaluating discipline; 5) comparing Dr. Ala's investigation of patients' complaints to that of Complainant's administrative supervisors;

and 6) finding a causal connection between Complainant's protected activity and her termination. Respondent also appeals the decision on the grounds that the Hearing Officer's findings are unsupported by substantial evidence, and are arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. Respondent protests that the Hearing Officer did not rely on the most reliable evidence, improperly permitted uncorroborated hearsay testimony, and should not have credited Complainant or Complainant's witnesses.

Respondent contends that there was no evidence that decision makers associated with Complainant's demotion and termination harbored any discriminatory or retaliatory animus.[1] It is well established that an employee need not disprove all of the non-discriminatory and non-retaliatory reasons proffered by the employer for its decision-making as long as "discriminatory animus was a material and important ingredient in the decision making calculus." Patterson v. AHOLD USA, Inc., 38 MDLR 168 (2016) *citing* Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass. 729, 735 (2003). Respondent argues that it was "incorrect' for the Hearing Officer to conclude that discriminatory animus was an important ingredient in the adverse decisions where the Hearing Officer "obtusely refers to Complainant's 'superiors,' but does not explain specifically to whom she is referring." The Hearing Officer described the supervisory structure of the Leominster office in her findings, including that Adrienne Lafond was Complainant's direct supervisor, prior to concluding that "Complainant's national origin was a material and important ingredient motivating the actions taken against Complainant" and that "retaliatory animus played a motivating role in each of the adverse actions experienced by Complainant, including her dismissal." The Hearing Officer's findings clearly include Lafond as one of Complainant's supervisors associated with the adverse

[1] Respondent points to complainant's testimony that she did not believe that Dr. Haynes had discriminatory animus towards her, however Dr. Haynes testified that she was not involved in the decision to terminate Complainant.

employment actions. Respondent appears to argue that Lafond was not one of the decision makers in these adverse actions, thus her discriminatory and retaliatory intent should not be imputed on the decision makers. Yet, Lafond signed the initial Job Performance Counseling Notice advising Complainant of her demotion. Complainant's Exhibit 14. Similarly, Lafond 's signature appears on Complainant's termination notice. Complainant's Exhibit 23.[2] Regional Manager Sarah Doyle was Lafond's direct supervisor. Complainant discussed Lafond's remarks about Complainant's accent with Doyle and Lafond. The Vice President of Human Resources testified she discussed Complainant's charge of discrimination with Doyle. Dr. Haynes testified that Lafond and Doyle were involved in the decision to terminate Complainant. Public Hearing Transcript, Vol. V, p. 866. There was sufficient evidence in the record to establish Lafond's role in Respondent's decisions to demote and terminate Complainant.

Furthermore, even if the Hearing Officer did not include Lafond as one of the decision makers it is apparent that the other decision makers, such as Regional Manager Doyle, relied on Lafond's representations of Complainant when making these decisions. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 688 (2016)("[W]here 'the decision makers relied on the recommendations of supervisors [whose motives have been impugned], the motives of the supervisors should be treated as the motives for the decision.... An employer [may not] insulate its decision by interposing an intermediate level of persons in the hierarchy of decision...' (citations omitted)"). Further, under the "cat's paw" theory of liability, an employer can be liable for intentional discrimination based on the conduct of a supervisor, who harbors discriminatory animus and influences an adverse employment decision, even if the supervisor does not make the ultimate employment decision. See Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011).

[2] Although Lafond testified that she discussed the discipline to be imposed with Doyle, and Doyle assisted with the wording, Lafond also testified that she had decision-making power in terms of issuing discipline to her subordinates. Public Hearing Transcript, Vol. IV, p. 818.

Respondent contends that the Hearing Officer misapplied the law to the extent she determined that Complainant should prevail because there was a possibility that Aspen Dental was incorrect in its perception about whether Complainant actually used a drill in a patient's mouth. This argument fails to consider the entirety of Hearing Officer's findings or reasoning. The Hearing Officer credits Complainant's testimony regarding the incident for which Complainant was terminated. She recognized that it was "possible that the patient was misled," (emphasis added), reasoning which was corroborated by Dr. Ala's testimony that "a lot of times, [patients are] misled by their perception." Public Hearing Transcript, Vol. II, p. 240. With respect to the alleged drill incident, she credited Complainant's testimony and discredited the version presented by Respondent's witnesses, leading to an inference of discrimination. She also found that "administrators jumped at the opportunity to rid themselves of Complainant at the expense of investigating what actually happened," that Respondent justified its actions by blaming complainant multiple times for the same conduct, and that "[a]fter the attempt to turn the December 2009 conversation into a first warning was retracted, another undocumented matter was substituted in its place as a prior 'warning.'" The Hearing Officer found that these inconsistencies established that Respondent's reasons for its adverse actions were in fact pretext. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56 (1st Cir. 2000) (complainant can "establish pretext by showing 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons' such that a factfinder could 'infer that the employer did not act for the asserted non-discriminatory reasons.'" (citations omitted)); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 169 (1st Cir. 1998) ("doubts about the fairness" of an employer's decision or an employer's " 'misjudg[ing]' " of an employee's qualifications, while not necessarily dispositive, " 'may be probative of whether

the employer's reasons are pretexts for discrimination.'"(citations omitted)).

Respondent also argues that Complainant's discussion with Lafond about Lafond flirting with a patient did not constitute a protected activity.[3] Protected activity may consist of internal complaints as well as formal charges of discrimination or sexual harassment. Guazzaloca v. C. F. Motorfreight, 25 MDLR 200, 204 (2003). The Complainant must establish that she had a reasonable belief that unlawful discrimination or sexual harassment has occurred; however, she need not prove that actual discrimination or sexual harassment occurred as long as she acted in good faith while engaging in the protected activity. Id. (claim of discrimination need not prevail in order to give rise to a viable retaliation complaint); Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995). The Hearing Officer found that although Lafond's flirtatious behavior was likely not sufficiently severe or pervasive to constitute illegal behavior, Complainant reasonably believed that this behavior could subject the practice to a sexual harassment claim, satisfying the requirements of a protected activity. The Hearing Officer is responsible for making credibility determinations and weighing conflicting evidence. We will not disturb the Hearing Officer's findings of fact and conclusions of law, where, as here, they are fully supported by credible evidence in the record.

Respondent further argues that the Hearing Officer incorrectly concluded that Complainant's supervisors were proper comparators. This argument misinterprets the Hearing Officer's decision. "The structure of a discrimination case will necessarily vary depending on the job involved and the [employment] decision to be made." Trustees of Health & Hosps. of City of Bos., Inc. v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 682 (2007). "[A]lthough providing a similarly situated comparator is usually the most probative means of

[3] Respondents do not challenge that Complainant's complaints to Respondent about Lafond's accent comments and Complainant's MCAD charge also constituted protected activity.

proving that an adverse action was taken for discriminatory reasons, it is not absolutely necessary." Id. at 683. A complainant may satisfy this element of her prima facie case by producing some evidence that her demotion and termination occurred under circumstances that would "raise a reasonable inference of unlawful discrimination." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 45 (2005). In this case, the Hearing Officer recognized that the "record contains no evidence of similar treatment imposed on others" with respect to discipline imposed upon Complainant. She then went on to point out the incongruency of Complainant's supervisors, who bore the ultimate responsibility for inventory and spore testing, receiving no penalties for behavior they claim so severe that it was used as a reason for Complainant's demotion and pay cut. These circumstances raise a reasonable inference of unlawful discrimination.

Respondent argues that the Hearing Officer erred by comparing Dr. Ala's patient complaint investigative process to that of Complainant's administrative supervisor concerning the incident in which Complainant allegedly used a drill on a patient. The Hearing Officer recognized Dr. Ala's testimony that he would have interviewed the patient, the accused and anyone else with knowledge about the incident to avoid a misunderstanding. She described this testimony to illustrate the lack of process taken by Respondent prior to terminating Complainant. The Hearing Officer points out this lack of investigation by Respondent was another example of indirect evidence of discriminatory and retaliatory animus stating: "It defies credulity that no supervisor would have spoken to the patient before separating a long-term employee over a single incident." Respondent argues this is merely an issue of "poor managerial management;" however, the Respondent's lack of investigation under these circumstances support an inference of discriminatory animus.

Respondent further argues that the 15-month period between Complainant's protected activity and her termination is too long for the Hearing Officer to conclude that Complainant's termination was the result of retaliation. It is well established that "temporal proximity is but one method of proving retaliation." Figueiredo v. Armur, Inc., 91 Mass. App. Ct. 1121 (2017) (Rule 1:28 decision) (citations omitted); Mole v. Univ. of Massachusetts, 442 Mass. 582, 595 (2004)(unless the termination is closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation). Furthermore, "[e]vidence of discriminatory or disparate treatment in the time period between the protected activity and the adverse employment action can be sufficient to show a causal connection." Id., 442 Mass. at 596; Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003)(despite the passage of eleven months evidence of discriminatory treatment during this time period was sufficient to show a causal connection). In regard to Complainant's termination, the Hearing Officer relied on factors other than temporal proximity to find a causal connection. She explained that several factors convinced her there was a causal connection between Complainant's MCAD complaint and her termination fourteen months later. The Hearing Officer found that although "[i]nstances of harassment initially diminished after the filing, [] they re-commenced at the end of 2010"; that Dr. Ala credibly testified upon learning of Complainant's termination that "Lafond cited Complainant's discrimination suit as a reason why he shouldn't be concerned about her situation"; and that Respondent "jumped at the opportunity to rid themselves of Complainant at the expense of investigating what actually happened." We will not disturb the Hearing Officer's findings of fact and conclusions of law, where, as here, they are fully supported by credible evidence in the record and Massachusetts law.

Respondent appeals the decision on the grounds that the Hearing Officer's findings are

unsupported by substantial evidence, and are arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. Claiming that the Hearing Officer did not rely on the most reliable evidence,[4] improperly allowed in uncorroborated hearsay testimony,[5] and should not have credited Complainant or Complainant's witnesses. Respondent argues that the Hearing Officer erred in crediting Complainant and the testimony of Dr. Ala. Respondent avers that the Hearing Officer ignored and/or mischaracterized evidence, and thus made inferences that were unsupported by the record. We disagree. It is well established that a Hearing Officer is in the best position to credit or not credit witnesses and weigh the significance of evidence presented at the hearing, including the "right to draw reasonable inferences from the facts found." Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (citations omitted). Furthermore, where there is conflicting evidence, the Hearing Officer is charged with the responsibility of weighing that evidence and making findings of fact based on their determinations of the significance of the evidence presented and the testimony elicited at the hearing. School Committee of Chicopee, 361 Mass. at 354. In this case, the Hearing Officer documented in her decision evidence that she found significant, she noted the testimony that she

[4] Respondent contends that the Hearing Officer should have relied on a patient's chart and billing records for her conclusions, citing to case law indicating that courts afford medical records additional credibility during litigation. This does not mean that a trier of facts must always base its conclusions upon medical records where there is conflicting testimony. The Hearing Officer considered the medical records and compared these to the witnesses' testimony in evaluating the purported basis for Complainant's termination. See, Findings of Fact, ¶¶ 45 – 47.

[5] Respondent contends that the Hearing Officer improperly allowed uncorroborated hearsay testimony. However, it is well established that the Commission is not "bound by the strict rules of evidence prevailing in courts of law or equity." M.G.L. Chapter 151B § 5. A Hearing Officer may consider hearsay evidence. LaPierre v. MCAD, 354 Mass. 165, 175 (1968). See School Committee of Brockton v. MCAD, 423 Mass. 7, 15 (1996) (In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value.) Respondent specifically points to Complainant's testimony that she was advised by her previous office manager that she did not have to complete every-other-day spore testing, stating that this hearsay testimony was unreliable as it was uncorroborated. However, this testimony was supported by Exhibit 16, Exhibit 11, and Exhibit H which all refer to weekly maintenance or spore testing, not every-other-day spore testing.

found credible, she noted when she did not credit contradictory testimony, and she cited to specific evidence in the record when explaining why these determinations were made. Respondent's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer misinterpreted or misconstrued the evidence presented, even if there is some evidentiary support for that disagreement. Ramsdell, 415 Mass. at 676 (review requires deferral to administrative agency's fact-finding role, including its credibility determinations). The review standard set forth in 804 CMR 1.23 (2020) does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and testimony, as long as there is sufficient evidence to support the findings, as it is the Hearing Officer's responsibility to weigh the evidence and decide disputed issues of fact. We will not disturb the Hearing Officer's findings of fact, where, as here, they are fully supported by credible evidence in the record.

We have carefully reviewed Respondent's grounds for appeal and the entire 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. With regard to Respondent's challenges to the Hearing Officer's determinations of credibility, 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).

In Complainant's Opposition to Respondent's Petition for Review by the Full Commission, Complainant avers that she is entitled to an addition to her lost wages award

because of the collateral source rule.[6] The "collateral source rule" is grounded in the theory that the party who caused the injury is responsible for the damages and any resulting windfall arising from the receipt of certain benefits should inure to the benefit of the injured party rather than the wrongdoer. Jones v. Wayland, 374 Mass. 249, 262 (1978). Unemployment benefits can fall in this category; and it is within the discretion of the Hearing Officer to decline to offset unemployment benefits received by the Complainant. School Committee of Norton v. Massachusetts Comm'n Against Discrimination, 63 Mass. App. Ct. 839, 849 (2005). We have adopted the general rule, however, that the collateral source rule should be applied to benefits received by the Complainant, absent countervailing circumstances that, in the discretion of the fact finder, would render the application unjust. Schillace v. Enos Home Oxygen Therapy, et. al., 39 Mass. 59 (2017). The Hearing Officer did not identify any countervailing circumstances which, in her discretion, rendered application of the collateral source rule unjust. Nor can we identify any from the record, particularly where Complainant was required to appeal the Respondent's challenge to her claim for unemployment benefits, delaying receipt of the money. We determine that the Complainant will be further prejudiced if the unexplained offset remains unaddressed by the Full Commission. Accordingly, we grant the Complainant's request for an additur of $29, 832 to the back-pay damages award.

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision, except with respect to the offset of unemployment benefits.

[6] Complainant did not specifically appeal the Hearing Officer's decision but raised that she was "entitled" to an Additur in Complainant's Notice of Intervention and Opposition to Respondent's Petition for Review. Respondent did not challenge Complainant's legal position regarding the collateral source rule but argued that the Full Commission "decline to review" this issue because it was not specifically appealed. Nor did Respondent challenge the amount of unemployment benefits ($29,832) apparently offset by the Hearing Officer. The Full Commission is permitted to modify a decision if it determines that the substantial rights of a party have been prejudiced due to an error of law or abuse of discretion. 803 CMR 1.23(10) (2020).

ATTORNEY'S FEE PETITION[7]

M.G.L. c. 151B allows prevailing complainants to recover reasonable attorneys' 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. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). The Commission has adopted the lodestar methodology for fee computation. Id. 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. Id.

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. Id. at 1099. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the 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, 952 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). The party seeking fees has a duty to submit detailed and contemporaneous time records to document the hours spent on the case. Denton v. Boilermakers Local 29, 673 F. Supp. 37, 53 (D. Mass. 1987); Baker v. Winchester School Committee, 14 MDLR 1097 (1992).

[7] Since the Petition for Attorneys' Fees and Costs was filed pursuant to 804 CMR 1.00 (1999) et seq., the Full Commission determined the award.

Complainant submitted a Petition for Attorney's Fees and Costs on September 11, 2017, along with affidavits, exhibits, and invoices. Complainant's Petition seeks attorneys' fees in the amount of $206,110 and costs in the amount of $2,528.15. The total amount of fees sought in this Petition represents a total of 288.1 hours of compensable time at an hourly rate of $300 for Attorney Kavaja and 299.2 hours of compensable time at an hourly rate of $400 for Attorney Nevins. In addition, Complainant seeks attorneys' fees associated with responding to Respondent's Opposition to Complainant's Petition for Fees in the amount of $7,310, representing 5.7 hours at $300 for Attorney Kavaja and 14 hours[8] of compensable time at an hourly rate of $400 for Attorney Nevins. The total attorneys' fees sought is $213,420. Complainant's counsel avers that this amount does not include numerous hours spent communicating with Complainant or conducting clerical tasks, and represents time required to respond to the manner in which Respondent litigated the case. Respondent filed an Opposition to the initial fee petition arguing that the amount sought must be reduced because Complainant's counsels' rates are excessive, Complainant was unsuccessful on one of her claims, and numerous times entries appear to be duplicative and excessive.

We determine that the hourly rates sought by Complainant's counsel are consistent with the prevailing hourly rate for attorneys with comparable skill, experience and reputation. The requested hourly rates are supported by affidavits, including from another experienced employment attorney, market survey information published in Massachusetts Lawyers Weekly, a schedule of rates provided by the Civil Division of the United States Attorney's Office for the District of Columbia and Massachusetts court decisions. The information and averments demonstrate that the hourly fees are within the range of fair market rates for similar work by

[8]The Affidavit of Paul Nevins for Additional Attorneys' Fees reflects 14 hours, although it requests an award based upon 13 hours.

attorneys with comparable experience in this area. Where suitable, the MCAD has applied an hourly rate of over $400 when awarding attorneys' fees. Sun v. UMass Dartmouth, 36 MDLR 85 (2014) (hourly rate of $435 awarded); DiLorio v. Willowbend Country Club, Inc., 33 MDLR 166 (2011) (hourly rates of $425 and $475 awarded); Bridges v. Alcoholic Beverages Control Commission, 30 MDLR 124 (2008) (hourly rate of $475 awarded). The Complainant has met her burden to establish that the hourly rates sought are appropriate for these attorneys.

The fee petition will be reduced due to Complainant's unsuccessful claim for retaliation based on the allegation that Respondent gave out poor references to prospective employers. Complainant, who was unrepresented at the time, amended her pending MCAD charge based upon her termination to include the allegation that Respondent provided poor references to prospective employers. The Hearing Officer found no evidence that prospective employers received negative references from Respondent. However, Respondent's request that the award be discounted by 20% or 25% is unwarranted. The testimony elicited regarding this issue comprised less than 4% of the hearing testimony (approximately 50 pages out of 1,322), and Complainant prevailed on the claim for retaliation based upon her termination and other adverse action. Reflecting the very limited time spent by her attorneys on this unsuccessful claim, we reduce the requested attorneys' fees by 5% to account for the time spent pursuing the claim at public hearing and preparing to address the issue.

We also deduct hours from time entries that reveal duplicative billings. Leeann Williams v. Karl Storz Endovision, Inc., 26 MDLR 156 (2004). We find the following instances of excessive or duplicative billing by Attorney Kavaja and Attorney Nevins:

1. Attorney Nevins billing for 3.2 hours of compensation for preparing Complainant Babu for testifying generally on 12/09/16, 13.6 hours for hearing preparation for

days 1-3 on 12/17/16 and 12/19/16, 9.9 hours for hearing preparation for day 4 on 1/25/17 and 1/26/17, 12.7 hours for hearing preparation for day 5 on 2/23/17, 2/24/17, and 2/25/17, and 28.9 hours for hearing preparation for day 6 on 5/17/17, 5/18/17, 5/19/17, 5/20/17, and 5/22/17, for a total of 68.3 hours. These hours were also billed by Attorney Kavaja who conducted most of the examinations of the parties and witnesses. We deduct 34 hours of Attorney Nevins' compensable time to reflect this duplication.

2. Attorney Kavaja spent 1.8 hours on 11/19/16 and 0.5 hours on 11/21/16 for preparing for and attending the second pre-hearing conference, while Attorney Nevins also billed for these hours. We deduct 1.1 hours of Attorney Kavaja's compensable time as it is duplicative.
3. Attorney Kavaja billed 25.9 hours billed from 7/24/17 to 8/14/17 to review the post hearing brief drafted by Attorney Nevins. We deduct 20 hours of Attorney Kavaja's time as we determine this amount of time to review an experienced employment attorney's work product was excessive and duplicative.
4. Attorney Nevins and Attorney Kavaja both billed at a professional rate for tasks that apparently could have been performed by a single non-attorney. Both attorneys billed 1.2 hours on 2/28/17 to visit the Division of Unemployment Assistance and obtain records. Similarly, both attorneys billed .3 hours on 6/15/17 to travel to the MCAD to copy a hearing transcript. We deduct 1.5 hours from each attorney's compensable time to account for performing this administrative work. See Hutchinson ex rel. Julien v. Patrick, 636 F.3d 1, 15 (1st Cir. 2011)(although there is no hard-and-fast rule establishing what percentage of an

attorney's standard billing rate is appropriate for travel time, travel time is ordinarily calculated at a lower hourly rate).

5. Attorney Nevins seeks 89.7 hours for drafting the post- hearing brief. We view this as excessive given his level of experience and because the brief was reviewed by Attorney Kavaja. Attorney Nevins' compensable time will be reduced by 30 hours. See Cheeks v. Massachusetts Dept. of Corrections, 29 MDLR 152, 153 (2007) (62.2 hours billed for a "detailed and lengthy" post hearing brief deemed excessive and reduced to 40 hours).
6. Attorney Nevins seeks 14 hours for responding to the Opposition to the Petition for Fees, and Attorney Kavaja seeks 5.7 for this same opposition. We determine that this amount is excessive, and deduct 10 hours from Attorney Nevins' compensable time, and 3 hours from Attorney Kavaja's time associated with this opposition.

Accordingly, we conclude that an award of $170,563 for attorneys' fees, ($80,460 for Attorney Kavaja and $99,080 for Attorney Nevins, discounted by 5%), is appropriate given these circumstances. In making this award, we are mindful of the complexity of the facts of the case and the length of the public hearing. We also recognize the important public interest satisfied with the award of fees required for successful vindication of Complainant's claim by private counsel. We further find that Complainant's request for reimbursement of costs is reasonable and award Complainant a total of $2,528.15 for expenses.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. Respondent's appeal to the Full Commission is hereby

dismissed and the decision of the Hearing Officer is confirmed, except for the amount of the back-pay damages award which is increased in accord with the collateral source rule.

Respondent Aspen Dental Management, Inc. is ordered to:

1. Pay Complainant, within sixty (60) days of receipt of this decision, the sum of $108,700 in back pay damages plus interest at the statutory 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. Pay Complainant within sixty (60) days of receipt of this decision, the sum of $150,000 in emotional distress damages, plus interest at the statutory 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. Pay Complainant attorneys' fees in the amount of $170,563 and costs in the amount of $2,528.15, with interest thereon at the rate of 12% per annum from the date the petition for attorneys' fees and costs was filed, until paid, 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 the 1996 Standing Order on Judicial Review of Agency Actions, 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 June, 2020

Sunila Thomas George
Commissioner

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner