COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
TIM BARNES,
Complainants

v. DOCKET NO. 06-BEM-01275

SLEEK, INC., BURLINGTON SLEEK MEDSPA, L.L.C.,
SLEEK MEDSPA, SLEEK MEDPSA
NEWTON, L.L.C., SLEEK INTERNATIONAL
FRANCHISE GROUP, L.L.C., SLEEK TECHNOLOGIES, INC.,
BOCA SLEEK MEDSPA, L.L.C., SLEEK REALTY, INC.,
ANDREW RUDNICK, LEAH LEAHY & NORM VALINE,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant Tim Barnes on his complaint of sexual harassment and retaliation against his former employer. Respondents did not cooperate in the Commission's investigation and failed to submit a position statement. [1] Probable cause was found in June of 2009 and the finding was accompanied by an Order and Entry of Default, which sanctioned Respondents for the failure to submit a position statement. Respondents were precluded from introducing any evidence or presenting any defenses at

[1] Respondents were served with Notice of Consequences for Failure to Answer Complaint which identified the potential sanctions pursuant to 804 CMR 1.16, yet failed to respond to the allegations of discrimination and retaliation. We note that in a prior proceeding before the Commission, Respondent Andrew Rudnick was also defaulted. In the prior proceeding, the Full Commission rejected Respondent Rudnick's contention that he had not received notice of the public hearing because it was not supported by credible evidence. *Berardi v. Medical Weight Loss Center and Andrew Rudnick*, 25 MDLR 115 (2003).

the public hearing and they were barred from opposing designated claims and from supporting designated defenses at the hearing. While no party representative appeared at the hearing, counsel appeared on behalf of all Respondents and was permitted to cross-examine Complainant's witnesses.[2]

The Hearing Officer concluded that Respondents were liable for creating a sexually hostile work environment and for retaliating against Complainant in terminating his employment within 24 hours after he complained internally to a senior manager about the hostile work environment. The Hearing Officer awarded Complainant $150,000 in damages for emotional distress and $41,641.67 in damages for lost wages. She also assessed a civil penalty of $50,000 against Respondent Andrew Rudnick, individually and as owner and CEO of the Sleek Med Spa chain, pursuant to M.G.L. c. 151B, § 5. Andrew Rudnick and companies owned and operated by him had twice previously been adjudicated to have committed discriminatory practices.[3]

Respondents' appeal to the Full Commission asserts that the Hearing Officer erred as a matter of law in concluding that Respondents are liable for subjecting Complainant to sexual harassment and retaliation. Respondents also challenge the Hearing Officer's awards for emotional distress and lost wages, as well as her imposition of a civil penalty against Andrew Rudnick.

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. The role of the Full Commission is to review the record of proceedings before the Hearing Officer to ensure that her findings of fact are supported by substantial evidence, which is defined

[2] The claim against Catherine Rudnick was dismissed at hearing.
[3] *See, Berardi v. Medical Weight Loss Center and Andrew Rudnick*, 25 MDLR 115 (2003); *Saltzburg v. Medical Weight Loss Center and Andrew Rudnick*, 59 Mass. App. Ct. 1110 (2003).

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. The Full Commission must also determine whether the decision below 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. 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, et al.* 361 Mass. 352 (1972); *Bowen v. Colonnade Hotel*, 4 MDLR 1007, 1011 (1982).

Complainant was hired to be the manager of a spa in the Burlington Mall which was part of a chain of spas owned and operated by Respondents, whose business was primarily hair removal, and included procedures such as bikini waxing. Complainant was the only male employee of the spa. He alleged, and the Hearing Officer found, that during his first week in training, employees of the spa engaged in pervasive sexually inappropriate conduct and made offensive sexual comments about the clientele of the spa. The Hearing Officer specifically cited three lewd comments employee aestheticians made referring to clients' genitals and private parts, noting that other aestheticians laughed and joked about these comments.[4] She credited Complainant's assertion that numerous other remarks were made that he found "sexually demeaning and offensive." The Hearing Officer also cited an incident where Complainant's training supervisor and out-going manager of the spa flashed her breasts to a web-camera running at the facility, and commented that she hoped owner "Andrew" was watching. The Hearing Officer

[4] The aestheticians' comments included discussion about intentionally "zapping" a male client in the scrotum with a laser.

concluded from these events that Respondents' managers, including Andrew Rudnick, participated in the "inappropriate sexual behavior and the generally sexualized work environment..." The Hearing Officer concluded that the hostile work environment was sanctioned by management and impacted Complainant's ability to assume his role of manager of the facility, a role for which he was in training at the time he complained, after just one week on job. Complainant complained to area manager Leah Leahy about the conduct at the Burlington spa, including how it made him uncomfortable and unable to work in such an environment. [5] The following day - two hours after reporting to work - he was informed by Leah Leahy and Sleek Medspa's Chief Operating Officer, Norm Valine, that he was being terminated. In sum, Complainant was terminated within twenty-four hours of complaining to the area manager about the sexually hostile work environment.

Respondents contest the finding of a hostile work environment, arguing that none of the offensive, inappropriate comments cited by Complainant were directed toward him, that such behavior by employees pre-dated Complainant's employment, and that the comments were not gender-specific. Sexual harassment includes conduct that has the effect of unreasonably interfering with an individual's work performance by creating a sexually offensive work environment. M.G.L. c.151B, § 1(18)(b). The law governing hostile work environment does not require that comments be made directly to an individual to support a claim that the individual is adversely impacted by the work environment. Nor does the fact that the comments were about clients of both gender,

[5] Before reporting his concerns to the area manager Complainant obtained the advice of an attorney .In response to Complainant's concerns that he would jeopardize his job by appearing overly sensitive, he was advised that reporting a hostile work environment is a protected activity and that his employer should not retaliate against him.

render them any less abusive or offensive. The fact that the behavior existed prior to Complainant's arrival lends no support to the assertion that the environment was not hostile, but instead demonstrates that there was a history of employees working in a sexually offensive work environment which was condoned by management. The Hearing Officer found that the conduct complained of was "sexually demeaning" and offensive; she was not required to find that the comments were specifically directed toward Complainant, or that the comments targeted only his gender.

Respondents also argue that Complainant had not proven that the behavior was unwelcome to him because he did not ask the employees to cease engaging in the sexual banter. This argument ignores the fact the Complainant had just commenced his employment with Respondents and was in training to become the new manager of the facility, but had not yet assumed his managerial role. Moreover, it was within the first week of commencing his employment on the day of the "flashing" incident, that Complainant complained directly to an area manager, about both the flashing incident and the comments made by aestheticians that he considered highly offensive and inappropriate. This complaint to upper management clearly evidences Complainant's extreme discomfort with such behavior and that he found it unwelcome.

Finally, Respondents argue that the conduct complained of is insufficient to establish a hostile work environment. A hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and] poses a formidable barrier to the full participation of an individual in the workplace." *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 532 (2001) (citations omitted). The conduct alleged must be "sufficiently severe and pervasive to

interfere with a "reasonable person's work performance." This "objective" reasonable person's standard means that the evidence of sexual harassment is evaluated from the "view of a reasonable person in the [complainant's] position." *Muzzy v. Cahillane Motors, Inc.,* 434 Mass. 409, 411 (2001) In support of this argument, they state that because Complainant was employed for a very short time, the evidence does not support a finding that the conduct was sufficiently severe or pervasive to alter the conditions of his employment. The fact that Complainant was employed for a short time because his employment was terminated does not alter the fact that he was subjected to offensive and unwelcome comments several of which the Hearing Officer characterized as "grossly inappropriate." The evidence demonstrates that such comments were part of a pattern of conduct that was routine and the accepted culture of this workplace. The Hearing Officer concluded that not only was Complainant offended by such conduct, but that" any reasonable employee in his circumstances would also have been." Decision of the Hearing Officer, p. 14. We are not persuaded that "any reasonable employee" in Complainant's circumstances would have been offended by such conduct. The role of the Full Commission, however, is not to substitute its judgment for the conclusions of the Hearing Officer, but to determine whether the Hearing Officer's judgment was supported by sufficient evidence and consistent with the law. There is sufficient evidence to support the Hearing Officer's determination that a reasonable employee in Complainant's circumstances would have been offended and that the conduct rises to the level of a hostile environment. Further, the short duration of the hostile environment was caused by the Respondents' retaliatory termination – not because the conduct ceased in response to corrective action taken by the Respondents. Accordingly, we affirm the Hearing

Officer's conclusion that this was a sexually hostile work environment condoned by management which "effectively compromised" Complainant's ability to perform his job as manager.

Respondents also challenge as error the Hearing Officer's conclusion that they are liable for unlawful retaliation. Respondents argue that there is no direct evidence of retaliation and that they were precluded from testifying about the reason for Complainant's termination. They assert that given these circumstances, any evidence of retaliation is merely circumstantial. Respondents cite the Hearing Officer's statement that "there is no evidence in the record that would have justified Complainant's termination," in support of their argument that a retaliatory motive is purely speculative. However, the Hearing Officer never stated her conclusion was based on speculation; rather, she determined that Complainant established a credible *prima facie* case of unlawful retaliation, which Respondents could not rebut. Complainant established a *prima facie* case by demonstrating that he made an internal complaint to a regional manager about the sexually charged atmosphere of the workplace and was then fired within 24 hours after making such a complaint. The timing of his termination creates a strong presumption of retaliation. Respondents were precluded from offering evidence of a non-discriminatory reason to rebut this presumption as a result of their own failure to participate in the Commission's proceeding and to cooperate in the investigation; something they cannot complain about at this late juncture. See, *Lawless v. Bd. of Registration and Pharmacy*, 466 Mass. 1010 (2013) (recognizing that Pharmacy Board did not abuse discretion in entering default where petitioner failed to appear on day of

hearing and that petitioner ceded his right to present evidence in his defense due to failure to appear).

Where the adverse employment action closely follows on the heels of the protected activity, a causal relationship may be inferred. *Mole v. University of Massachusetts, et al.* 442 Mass. 582, 595 (2004), *citing Oliver v. Digital Equip. Corp.* 846 F. 2d 103, 110 (1st Cir. 1988). If there is a claim of retaliatory discharge, the termination must be "closely connected in time to the protected activity," absent additional evidence to establish causation. *Id. citing Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) Here the termination, on the very next day after Complainant spoke to Respondent's managers, so closely followed his complaint as to establish a causal connection and to justify the Hearing Officer's conclusion that it was retaliatory. We find that the Hearing Officer correctly concluded that Complainant had established causation and that his claim of retaliation was credible.

For a claim of retaliation to succeed, the Complainant must also prove that he had a reasonable and good faith belief that Respondent was engaged in unlawful discrimination and that he acted in a reasonable manner in response to his belief. *See Abramian v. President and Fellows of Harvard College,* 432 Mass. 107, 121 (2000). Respondents argue that a finding of retaliation is unsupported in this case because there was no actionable underlying claim of discrimination, and therefore Complainant could not have harbored a reasonable and good faith belief that he was the victim of discrimination. They also assert that Complainant's good faith was not directly addressed by the Hearing Officer. We disagree with this assertion. The Hearing Officer credited Complainant's testimony that the sexually offensive conduct occurred and

concluded that not only that he was offended by the conduct, but that "any reasonable employee in his circumstances would also have been." We concur that Complainant demonstrated by his complaint to management that he had a good faith and reasonable belief that Respondents were engaging in, or at the very least, condoning unlawful discrimination in the form of a sexually hostile work environment that he found offensive and that he engaged in protected activity when he complained about such.

Finally, Respondents cite Complainant's testimony that his responsibility as general manager included the sales performance of the facility overall, and his wife's testimony that he did not feel comfortable distributing promotional flyers to potential customers at the spa's mall entrance, as supporting the inference that lackluster ability to generate sales justified his termination. We decline to draw this inference. The record demonstrates that Complainant was at the job for less than one week, was in training to become the manager and was not directly responsible for making sales. Moreover, Complainant did not indicate to his employer that he was uncomfortable distributing flyers or otherwise being involved in direct marketing strategies. We conclude that the Hearing Officer's findings as to the reason for Complainant's termination are supported by the evidence and should be affirmed.

Respondents also challenge the Hearing Officer's award of $150,000 in damages for emotional distress as excessive and not supported by substantial evidence. The Supreme Judicial Court articulated the standards for Commission awards of emotional distress damages in *Stonehill College v. MCAD, et al.*, 441 Mass. 549 (2004). The relevant factors to consider include the nature, character, severity and length of the harm suffered. Awards should be "fair and reasonable and proportionate to the distress

suffered." The Hearing Officer based her award upon credible and compelling testimony from Complainant and his wife that he sustained substantial harm as a result of Respondents' unlawful acts. She noted that Complainant cried while testifying about how shocked, upset and angered he was by his termination," and how the retaliation "hurt him more than anything else." He referred to Respondents' actions as taking a "heavy toll" on him and worried about providing financially for his family, doubting his ability to be the primary breadwinner and suffering loss of self-esteem. He discussed the physical effects of his termination, such as depression, sleeplessness, weight gain, and moodiness that manifested in his being short-tempered and angry with his son. Complainant's wife corroborated his testimony, confirming that Complainant was depressed, anxious, short-tempered, disconnected from his family, and a mere "shell of himself." The Hearing Officer observed that Complainant was visibly upset as he described the negative effects of his termination visited upon himself and his family. Both Complainant and his wife addressed how his termination impacted their marriage. The couple sought marriage counseling and Complainant stated he is "surprised he is still married." The Hearing Officer credited their testimony and concluded that Complainant sustained "severe and long-lasting emotional distress" as a direct result of Respondents' actions. We conclude that the Hearing Officer's award of damages is consistent with the standards set forth in *Stonehill*, and we affirm the award.

Respondents also contend that the computation period for lost wages was in error. They argue that the Hearing Officer should have designated February 2006 as the cut-off date for calculation of lost wages rather than June 1, 2007. Complainant accepted a position in February of 2006 at an annual salary of $44,500, an amount Respondents

assert is comparable to his salary at Burlington Sleek Medspa. The Hearing Officer recognized, however, that at Medspa Complainant was earning a base salary of $50,000 and was expected to earn commissions and bonuses, for total annual compensation of $54,800. We find that it was within the Hearing Officer's discretion and not speculative to determine that Complainant would have earned at least $2000 in annual commissions and bonuses working for Respondent, in a position where his total compensation would be calculated on and significantly affected by sales at the spa. Despite his immediate efforts to mitigate his damages and find other work, he did not reach a comparable salary of $52,000 until June of 2007 when he finally began earning "a salary approaching his estimated earnings at Medspa." We see no problem with using June of 2007 as the cut-off date for back pay liability, particularly where the Hearing Officer offset his actual earnings during the same period.

Finally, Respondents challenge the assessment of a civil penalty in the amount of $50,000 against Andrew Rudnick, CEO and owner of Respondents. In addition to arguing the lack of evidence of discrimination or retaliation by Respondents, they assert that there is no evidence that Rudnick was involved in or knew about any unlawful acts, and that he should not be individually liable. The Hearing Officer found Rudnick individually liable for both sexual harassment and unlawful retaliation in this matter. She noted that Rudnick had approved Complainant's hiring, and from that fact drew an inference that as the principal and owner of the Medspa centers, Rudnick "would have been consulted and involved in the decision to terminate a general manager, just as he was in the decision to hire Complainant." She also noted that the conduct of Respondents' employees and managers demonstrated that Rudnick was aware of and

condoned the sexually inappropriate work environment that Complainant voiced his opposition to. [6] Having found Rudnick individually liable for unlawful discrimination and retaliation in this matter, she determined that on two previous occasions, in 2001[7] and 2003, Rudnick had been adjudged to have committed acts constituting unlawful discrimination. Based on this information, the Hearing Officer determined that a large civil penalty was warranted pursuant to M.G. L. c. 151B, § 5, which provides that the Commission may assess a civil penalty "in an amount not to exceed $50,000 if the Respondents have been adjudged to have committed two or more discriminatory practices." If the acts constituting the practices were committed by the same natural person, then the civil penalties set forth in the statute may be imposed "without regard to the period of time within which any subsequent discriminatory practice occurred."

We have carefully reviewed Respondents' 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. We conclude that the decision is supported by substantial evidence and that there are no material errors of fact or law. We therefore deny the appeal.

COMPLAINANT'S 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. See M.G.L. c. 151B, § 5.

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[6] In any event, Andrew Rudnick could be considered the employer of Complainant since he had control over Complainant's employment. *See*, Hearing Officer Findings of Fact, ¶¶10, 18; M.G.L. c.151B §1(5); *Cf. Barton v. Clancy*, 632 F.3d 9 (1st Cir. 2011). As the employer, Rudnick may be held vicariously liable under M.G.L. c.151B for the intentional acts of his supervisory personnel regardless of his actual notice of the acts. *College-Town, Div. of Interco, Inc. v. MCAD,* 400 Mass. 156, 163-7 (1987).

[7] The 2001 decision referenced by the Hearing Officer was affirmed by the Full Commission in 2003.

The determination of what constitutes a reasonable fee is within the Commission's discretion. The Commission considers the complexity of the litigation and the time and resources required to litigate such claims in the administrative forum. The Commission utilizes the lodestar method for fee computation. *Baker v. Winchester School Committee*, 14 MDLR 1097 (1992). This method requires the undertaking of a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or not at all depending on relevant factors.

The Commission's efforts to determine the number of hours reasonably expended involves a thorough review the Complainant's submission and it does not simply accept the proffered number of hours as "reasonable." *See, e.g., Baird v. Bellotti*, 616 F. Supp. 6 (D. Mass. 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. *Grendel's Den v. Larkin*, 749 F.2d 945 (1st Cir. 1984); *Brown v. City of Salem*, 14 MDLR 1365 (1992). Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended in light of the tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of $18,187.36, based upon an hourly rate of $275.00. Having reviewed the

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 and litigation of this claim by Complainant is reasonable. The hours for which compensation is sought do not appear to involve work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. Indeed the amount sought is well below the average attorney fee awards for similar claims. Further, the hourly rate is reasonable, particularly given the experience of Complainant's counsel. We therefore award attorney fees totaling $18,187.36 to Complainant.

ORDER

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) Respondents shall cease and desist from engaging in discriminatory practices that create a sexually hostile work environment and from acts of unlawful retaliation.

(2) Respondents shall pay to Complainant the sum of $150,000 in damages for emotional distress 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.

(3) Respondents shall pay to Complainant the sum of $41,641.67 in damages for lost wages 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 Andrew Rudnick shall pay to the Commonwealth of Massachusetts a civil penalty in the amount of $50,000.

(5) Respondents shall pay to Complainant attorney fees in the amount of $18,187.36 with interest thereon at the rate of 12% per annum from the date the attorney fee petition was filed until such time as payment is made.

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 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 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 31st day of August, 2015.

Jamie R. Williamson
Chairwoman

Sunila Thomas George
Commissioner

Charlotte Golar Richie
Commissioner