COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
ELENA BOROSKY and BIANCA WALLEN,
Complainants

DOCKET No. 12-SEM-03385
DOCKET No. 12-SEM-03388

v.

PROFESSIONAL FITNESS,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Commissioner Sunila Thomas George in favor of Respondent Professional Fitness ("Respondent"). Following an evidentiary hearing, the Hearing Commissioner found Respondent not liable for sexual harassment as claimed by Complainants Elena Borosky ("Borosky") and Bianca Wallen ("Wallen").[1] The Hearing Commissioner also dismissed the constructive discharge and retaliation claims Borosky brought against Respondent. Complainants filed a petition for Full Commission review. For the reasons discussed below, we affirm the Hearing Commissioner's decision.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Commissioner. M.G.L. c.

---

[1] Borosky filed complaint 12-SEM-03385 against Respondent alleging that its Regional Manager, Aaron Silver ("Silver") subjected her to a sexually hostile work environment in violation of M.G.L. c. 151B, § 4(1); that Respondent constructively discharged her based on the sexually hostile work environment in violation of M.G.L. c. 151B, § 4 (1) and (16A); and that Respondent retaliated against her for complaining about the same in violation of M.G.L. c. 151B, § 4(4). Wallen filed complaint 12-SEM-03388 against Respondent. Wallen alleged only that Respondent, through Silver, subjected her to a sexually hostile work environment in violation of M.G.L. c. 151B, § 4(1). The Commission consolidated and certified the complaints for a single public hearing.

151B, §§ 3(6), 5. The Hearing Commissioner'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, § 1 (6).

It is the Hearing Commissioner'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 Commissioner. 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 Commissioner who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Commissioner sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(10) (2020).

The Full Commission applies these standards with equal force when evaluating the record of a default hearing.[2] The failure of Respondent to appear at the public hearing in this case does not result in an automatic finding in favor of Complainants. Notwithstanding the default posture of the case, "the Commission's statutory mandate requires that a determination of liability be based upon proof of discrimination. Thus, the remedial authority of M.G.L. c.151B, § 5 may not be invoked simply to punish a recalcitrant respondent." Jean Claude Pierre, v. Salem State College,

[2] The public hearing was set for May 31, 2018, but Respondent did not appear. A Default Order entered, and a Notice of Default with consequences was sent. A default hearing was held consistent with the Commission's regulations then in effect. 804 CMR 1.23 (1999). Respondent had the opportunity to remove the default but did not do so.

26 MDLR 137, 138 (2004), citing Jabari v. Davekos d/b/a George's Landscaping Co., 17 MDLR 1599 (1995); see also, Berardi v. Medical Weight Loss Center & Andrew Rudnick, 23 MDLR 5, 9 (2001), aff'd by the Full Commission, 25 MDLR 115 (2003) (holding that the failure of respondents to appear at the public hearing "does not result in the automatic entry of a discrimination finding. Complainant must still come forward with credible evidence sufficient to establish prima facie of discrimination based on her sex and/or sexual orientation.") Here, despite Respondent's default, Complainants were required to establish their claims, which they did not do.

LEGAL DISCUSSION

Complainants root much of their appeal in a disagreement with the Hearing Commissioner's factual findings. Their disagreement does not mean the Hearing Commissioner misinterpreted or misconstrued the evidence presented, even if there is some evidentiary support for Complainants' claims. "[The appealing party's] disagreement with the Hearing [Commissioner's] determinations does not mean that the Hearing [Commissioner's] determinations were erroneous, even if there is some evidentiary support for that disagreement." Talia Lauria v. Robert W. Sullivan, Inc., 41 MDLR 101, 103 (2019) (internal quotations omitted). Complainants' appeal emphasizes facts favorable to their claims that were not persuasive to the Hearing Commissioner. However, those facts were insufficient to carry Complainants' ultimate burden to prove their case. The Full Commission may not substitute its judgment for that of the Hearing Commissioner when there is sufficient evidence in support of their decision. O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984). We see no error with respect to the Hearing Commissioner's factual findings and application of law and affirm the Hearing Commissioner's decision to dismiss both Complainants' claims of sexual harassment and Borosky's claims of constructive discharge and retaliation.

A. Sexual Harassment – Hostile Work Environment.

The Hearing Commissioner determined Complainants failed to demonstrate Respondent created a sexually hostile work environment. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such advances requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." M.G.L. c. 151B§1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987). A hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and that] 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) quoting College-Town, 400 Mass. at 162.

The objective standard of sexually unwelcome conduct considers the evidence from the perspective of a reasonable person in the Complainants' position. This inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, and ultimately whether it unreasonably interfered with the worker's performance. Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) citing Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

On appeal, Complainants rely on the Hearing Commissioner's determination that they were "subject to gender-based unwelcome verbal conduct" by Silver in arguing that the objective standard was met. The Hearing Commissioner credited Complainants' testimony that Silver advised them to wear tight fitting clothing and show off their bodies, and to target male clients to sign them up for personal training services. In Borosky's case, Silver instructed her to flirt with

male customers, and that on her second day on the job, Silver told her to go out on the floor and "shake some ass" so that she could drum up some business. In Wallen's case, the Hearing Commissioner determined Silver made gender-based statements to Wallen such as, "Wow, you are fit, aren't you?" The Hearing Commissioner also determined that on one occasion Silver told Wallen that if she spent more time with him, she would want to "leave" her husband for him, and that on one other occasion he said that Wallen should do a training session with him, and they could "sweat together." Finally, the Hearing Commissioner credited Wallen's testimony that Silver had texted her to tell her how many dates he had been on and would brag about all the women who "wanted" him. Based on these findings by the Hearing Commissioner, Complainants argue that there was substantial evidence to establish their hostile work environment claims.

However, the Hearing Commissioner determined that much of the gender-based unwelcome conduct was not explicitly sexual, and more to the point, that Complainants failed to demonstrate with substantial evidence that Silver's behavior unreasonably interfered with their work performance through the creation of a humiliating or sexually offensive work environment. "The law does not mandate polite behavior or clean language in the workplace." Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 619 (1996). The Hearing Commissioner determined that Silver's comments about Complainants having "fit bodies" were not necessarily sexual in nature and can be deemed to be related to the requirements of the job and the marketing goals of selling personal training sessions and marketing physical fitness generally.

Complainants argue that the Hearing Commissioner's decision placed undue weight on the fact that the behavior took place at a fitness club, but consideration of the type of workplace is a factor when evaluating whether the conduct complained of is objectively hostile. Whether "an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances,"

Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Thus context, including consideration of the workplace, matters. "[T]he trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." Highlander v. K.F.C. National Management Co., 805 F.2d 644, 650, (6th Cir. 1986). It was within the Hearing Commissioner's discretion to determine that Silver's comments that Complainants have "fit bodies" and that they should "show off all the hard work" was related to the job of marketing, rather than being overtly sexual in nature.

Moreover, where the Hearing Commissioner determined that Silver's comments did have a sexual component,[3] she determined that Silver's conduct was not sufficiently severe or pervasive to create a hostile work environment because the remarks were "sporadic off hand comments, casual in nature." On appeal, Complainants argue that all of Silver's comments occurred within a short timeframe, and in "rapid succession," and therefore cannot be "sporadic." The Hearing Commissioner was not persuaded that Silver's comments were as pervasive as Complainants made them out to be, and the record evidence reflects that Complainants provided scant or even shifting evidence as to how often Silver was actually present at the work site to engage in most of the conduct alleged to have occurred, which supports the Hearing Commissioner's conclusions. Notably, the Hearing Commissioner did not credit Borosky's testimony about Silver's more egregious conduct. The Hearing Commissioner was not convinced that Silver would frequently show her pictures of women and told her that he was going to "hook up" with them as she was able to recall only one example of him making this kind of statement. Moreover, the Hearing Commissioner declined to credit Wallen's testimony regarding the impact of Silver's conduct on her work performance, i.e., testimony regarding the rearranging of her training schedule and client

[3] I.e., Silver's advice to Complainants to flirt with potential male clients, telling them to wear tight fitting clothes, and to "shake some ass."

loss. The Hearing Commissioner was similarly unconvinced by Borosky's testimony regarding the impact of Silver's conduct. There is nothing in the record that requires a contrary result, and we defer to the Hearing Commissioner's credibility determinations.

In short, after a thorough review of the record we see no error of law or abuse of discretion requiring reversal of the Hearing Commissioner's decision.

B. Constructive Discharge.

Borosky alone claimed to have been constructively discharged. A "[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." GTE Products Corp. v. Stewart, 421 Mass. 22, 33- 34 (1995) (quoted case omitted). The standard for constructive discharge is whether the working conditions were so intolerable due to unlawful conduct that a reasonable person under the circumstances would have felt compelled to resign. To be intolerable, conditions must be unusually aggravated. Pertinent inquiries also include whether all possibilities to continue working have been exhausted, leaving resignation as the only alternative and whether the threat of physical or psychic harm is so great as to preclude remaining at work. Daly v. Codman & Shurtleff, Inc., 32 MDLR 18, 27 (2010); Citron and Massachusetts Commission Against Discrimination v. G-2 Systems, et. al., 31 MDLR 49, 56 (2009). As discussed above, we find no error with regard to the Hearing Commissioner's decision that the evidence was insufficient to establish a sexually hostile work environment. Accordingly, there was no unlawful, discriminatory conduct sufficient to create conditions so intolerable that Complainants were forced to resign. Borosky's claim for constructive discharge therefore fails and no further analysis is necessary.

C. Retaliation.

Borosky also claimed retaliation. M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discriminate against a person because she has opposed any practices forbidden under M.G.L. c. 151B. To prevail on a retaliation claim, Borosky must prove that: (a) she reasonably and in good faith believed that Respondent was engaged in wrongful discrimination under M.G.L. c. 151B; (b) she acted reasonably in response to that belief through reasonable action meant to protest or oppose such discrimination (protected conduct); (c) Respondent took adverse action against her; and (d) the adverse action was in response to the protected conduct. See, Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405–06 (2016); see also, Mole v. University of Massachusetts, 442 Mass. 582, 591-592 (2004).

The Hearing Commissioner determined that the only evidence of an adverse employment action was Silver "yelling" on a single occasion during a meeting, which was insufficient. On appeal, Borosky argues that Silver became highly aggressive and hostile towards Borosky immediately after she confronted him about his comments and conduct. Contrary to the Hearing Commissioner's finding, Borosky urges that Silver's conduct actually constituted an adverse action. We find no reason to disturb the Hearing Commissioner's finding.

To establish adverse action requires a showing that the employer made a change in the objective terms and conditions of employment that materially disadvantages or threatens to disadvantage Complainant. Yee v. Mass. State Police, 481 Mass. 290, 297 (2019); Bain v. City of Springfield, 424 Mass. 758, 765 (1997); Psy–Ed Corp. v. Klein, 459 Mass. 697, 707–708 (2011). Whether an employee has suffered an adverse employment action is determined on case-by-case basis. Yee, 481 Mass. at 297. The creation and perpetuation of a hostile work environment itself may comprise a retaliatory adverse employment action. But in order to establish retaliation on this theory, Borosky would have to demonstrate that she was subject to severe or pervasive harassment

in retaliation for engaging in protected activity. Noviello v. City of Bos., 398 F.3d 76, 92 (1st Cir. 2005). Based on Silver's generalized hostility following Borosky's complaint, the evidence is lacking in this regard. We agree with the Hearing Commissioner that by presenting evidence of a single incident where Silver yelled at her, Borosky has failed to meet this standard.

For the reasons set forth above, we hereby affirm the decision of the Hearing Commissioner in its entirety.

ORDER

This Order represents the final action of the Commission for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Any party aggrieved by this Order may challenge it by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Failure to provide a copy of the transcript may preclude the aggrieved party from alleging that the Commission's decision is not supported by substantial evidence, or is arbitrary or capricious, or is an abuse of discretion. Such action must be filed within thirty (30) days of service of this Order and must be filed in accordance with M.G.L. c. 151B, § 6, M.G.L. c. 30A, and Superior Court Standing Order 1-96. Failure to file a complaint 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 and M.G.L. c. 30A.

SO ORDERED this 14th day of February 2024.

Sunila Thomas-George
Chairwoman

Monserrate Rodríguez Colón[4]
Commissioner

[4] Commissioner Rodríguez Colón was the Investigating Commissioner in the cases captioned herein, and serves on the Full Commission in this matter to create a quorum, pursuant to 804 CMR 1.23(6) (2020).