COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
GRISELDA CANTON,
Complainants

v. DOCKET NO. 10-BEM-03156

BIGA WHOLESALE, INC., BIGA BREADS, LTD.,
WILDFLOUR WEST PRODUCTS, INC.,
WILDFLOUR CATERING, INC.
(collectively D/B/A BIGA BREADS),
DEANA MARTIN, AND KEITH MARTIN,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Complainant, Griselda Canton. Following an evidentiary hearing, the Hearing Officer concluded that Respondents, Biga Wholesale, Inc., Biga Breads, LTD, Wildflour West Products, Inc., Wildflour Catering, Inc. (collectively "Biga Breads") and Deana Martin, were liable for sexual harassment and retaliation in violation of M.G.L. c. 151B, § 4(4), (4A), (5), and 16A. [1] Respondents have appealed to the Full Commission. For the reasons discussed below, we affirm the Hearing Officer's decision.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's

[1] The Hearing Officer found no evidence that individual respondent Keith Martin had substantial involvement in matters involving Complainant.

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.

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); 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

Respondents appeal 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. Respondents contend that the Hearing Officer erred by making inferences that were unsupported by the record; by not crediting Respondents' witnesses' testimony; by mischaracterizing evidence; and by awarding excessive emotional

distress damages and excessive back pay. Respondents further argue that Deana Martin should not be held individually liable for the actions of an employee. After careful review we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law.

Respondents argue that the Hearing Officer erred in crediting Complainant and not crediting Deana Martin. Respondents aver 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). 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 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. Respondents' 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.

Respondents also contend that the Hearing Officer erred in finding Deana Martin individually liable. We disagree. Individuals may be liable under M.G.L.c.151B for interference with a Complainant's right to be free from discrimination in the workplace. Where there is only circumstantial evidence of discrimination, in order to establish interference with a protected right, Complainant must show that the individual had the authority to act on behalf of the employer; their action or failure to act implicated rights under the statute; and there is evidence that the action or failure to act was in deliberate disregard of the complainant's rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant's exercise of rights. Woodason v. Town of Norton School Committee, et al. 25 MDLR 62, 64 (2003). This liability is not limited to the primary actor who committed the harassment; where another person's actions interfered with a protected right that person can also be held liable. See Casoni v. Edgewater Kitchen & Bath, Inc., et al. 34 MDLR 167 (2012) (owner of the corporation found individually liable for aiding and abetting supervisor's offensive behavior where her inaction permitted and condoned the perpetration of an abusive and sexually hostile work environment); Nagle v. Fairfield Financial Mortgage Group, Inc., et al. 32 MDLR 179 (2010) (president of the company was held liable, who was on notice of the harassment, had a duty to act, and failed to do so); Sobocinski v. United Parcel Service, et al., 31 MDLR 158, aff'd 34 MDLR 109 (2009) (managers who either failed to conduct an impartial investigation of complaints of sexual harassment or retaliated against the complainant were held individually liable). There was sufficient evidence in the record to support the Hearing Officer's

determination that "the evidence establishes a deliberate and blatant disregard of Complainant's rights by Deana Martin, who supervised Mendoza [Complainant's supervisor] and functioned as the company's personnel officer." The Hearing Officer supported this determination by evidence in the record including Deana Martin's failure to conduct a prompt and neutral investigation of Complainant's sexual harassment allegations concerning Mendoza. There was sufficient evidence to support the Hearing Officer's conclusions that "[Deana] Martin erected procedural barriers to a fair investigation," "accepted at face value [the perpetrator's] claim that his relationship with Complainant was consensual," "undertook the inquiry into Complainant's allegations with a 'blame the victim' mentality," "relied on innuendo to challenge Complainant's credibility and to disparage her character," and "declined to remove [Mendoza] from his supervisory role over Complainant." We find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. 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 are aligned with MCAD and Massachusetts case law precedent.

Respondents aver that the emotional distress damages award is disproportionate and not supported by sufficient evidence. Respondents also argue that the Hearing Officer erred in finding Deana Martin liable for the emotional distress caused by an employee's actions. We disagree. Awards for emotional distress must rest on substantial evidence of the emotional suffering that occurred and be causally-connected to the unlawful act of discrimination. DeRoche v. MCAD, 447 Mass 1, 7 (2006); Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Factors to consider in awarding emotional distress damages include "the nature and character of the alleged harm, the severity of the harm, the length of time the complainant has suffered and reasonably expects to suffer, and whether the complainant has attempted to mitigate the harm."

DeRoche, at 7. Also, an award of damages may be based on a complainant's own credible testimony. Stonehill College, at 576. The Hearing Officer awarded Complainant $125,000 in damages for emotional distress, basing her decision on the credible testimony of Complainant. The Hearing Officer concluded that as a result of Complainant's victimization by her direct supervisor and Deana Martin's response to her report of sexual harassment "Complainant suffered emotional distress from both a sexually-hostile work environment and from retaliation for speaking out against her treatment." The Hearing Officer found that Complainant became depressed and angry after reporting Mendoza to the Martins and finding out that they supported him and accused her of flirting with Mendoza, Keith Martin, and others. Complainant testified about frequent nightmares she experienced about Mendoza accosting her. She described herself as feeling fearful, nervous and panicky when she saw someone that reminded her of her former Biga Breads supervisor. Complainant testified that as a result of her experience with the perpetrator, she doesn't trust men and stopped going to the gym where there are men. We find that there is substantial evidence in the record to support the Hearing Officer's award of emotional distress damages and decline to alter her award.

We also conclude that the Hearing Officer did not err in finding Respondents Biga Breads and Deana Martin jointly and severally liable. Although the perpetrator of the sexual harassment, Complainant's direct supervisor, was a significant factor in Complainant's emotional distress, this does not absolve Biga Breads or Deana Martin from liability for their discriminatory conduct. This Commission typically holds that liability for discrimination is joint and several, as against all named Respondents, including individuals, who are found to have legal responsibility for the discrimination. See Anido v. Illumina Media, LLC, et al., 32 MDLR 80 (2010) (holding corporate respondent and individual owner jointly and severally liable);

Magill v. Mass. State Police, et al., 24 MDLR 355 (2002) (holding respondents jointly and severally liable for sexual harassment); Rafferty v. Keyland Corp., 22 MDLR 125 (2000) (holding corporate respondent and individual president and owner of company jointly and severally liable). Joint and several liability ensures that all legally responsible parties who have engaged in unlawful conduct are liable for the full extent of the damages to Complainant. Schillace v. Enos Home Oxygen Therapy, Inc., et al.39 MDLR 59 (2017).

Respondents also contend that the award for back pay is excessive. Back pay is calculated from the termination date to the public hearing date, with consideration for post-termination earnings. . Geraldino v. Mobile Alliance LLC, et al. 33 MDLR 142 (2011); Stephan v. SPS New England, Inc., 27 MDLR 249 (2005); Williams v. New Bedford Free Public Library, 24 MDLR 171 (2002). "The calculation of back pay may necessarily involve some degree of approximation and imprecision since it is often impossible to recreate circumstances that would have existed absent discrimination." Bridges v. Alcoholic Beverages Control Comm'n, 30 MDLR 124, 126 (2008). Respondents' later move of their operations to Providence, Rhode Island does not negate their unlawful actions or their duty to make Complainant whole, to find otherwise would obfuscate the intent in awarding compensatory damages. See Stonehill College v. Mass. Comm'n Against Discrim., 441 Mass. 549, 563-64 (2004) (reaffirming that broad liberal construction of the statute supports Commission's authority to award compensatory damages and is consistent with the Commission's overarching mission to eliminate unlawful discrimination). In this case, the Hearing Officer calculated back pay from two months after Complainant's termination date (the Hearing Officer excluded lost wages for the two months Complainant did not look for work immediately after she was terminated) until she left her subsequent employment in January of 2016, when she gave birth and was no longer looking for work. The

Hearing Officer conservatively based her lost wage calculation upon the Complainant's earnings from Respondent in 2010, and appropriately deducted Complainant's earnings from other jobs after her termination. The back pay award is based upon substantial evidence in the record, is free from error of law, and is therefore affirmed.

We have carefully reviewed Complainant'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. With regard to Complainant'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).

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

ATTORNEYS' FEES[2]

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

[2] 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

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). The failure to provide adequate documentation for a fee request may justify a drastically reduced award. Id.; see also Waite v. Associated Heating Corp., 18 MDLR 38 (1996)(Commission reduced the hours because no itemization was provided by counsel and due to the Commission's understanding of the time requirements for this type of litigation)**;** Pendarvis v. Roseland one Realty Trust, 24 MDLR 247 (2002) (Attorney did not provide contemporaneous time records, only provided time totals spent on each task, Commission reduced attorney's fees because there was insufficient information to determine if fees were duplicative, excessive, or otherwise unnecessary).

In this matter, Complainant filed a Petition for Attorney's Fees and Costs on May 17, 2017, along with an affidavit, exhibits, and invoices. Complainant's Petition seeks attorneys'

fees in the amount of $40,081.25 and costs in the amount of $7,497.75. The total amount of fees sought represents a total of 32 hours of compensable time at an hourly rate of $350 for Attorney Richardson; 29.5 hours of compensable time at an hourly rate of $400 for Attorney Browne; and 227.75 hours of compensable time at an hourly rate of $75 for work completed by Rule 3:03 law students. [3]

Respondents filed an Opposition to the fee petitions arguing that the amount sought must be reduced because Complainant's counsel did not keep contemporaneous time records and the fees requested are excessive and duplicative. Having reviewed Complainant's Petition for Fees and Costs, Respondents' Opposition, and the time records, we determine that the attorneys' fees requested should be awarded.

We determine that the hourly rates sought by Complainant's petition are consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases, and supported by affidavit. We recognize that the affidavit in support of the petition did not contain contemporaneous time records, which are preferable. Instead, the time records are a reconstruction of the hours spent working on the case. These reconstructed time records contain a detailed description of the hours spent working on specific tasks by each attorney and/or law student, and are estimates of the time spent on each task documented in one quarter hour increments. Sufficient information is provided in these records to permit us to evaluate whether the hours recorded. These time records are represented as conservative relative to the time spent on this matter and the affidavit of counsel indicates that hours were reduced where duplicative, excessive or unrelated to the prosecution of this matter at the MCAD. Based upon our review of

[3] Services performed by law students may be assessed in an award of legal fees; however, these entries must be carefully assessed to make sure that the students' efforts are not unproductive tasks or duplicative work of the supervising attorney. Darmetko v. Bos. Hous. Auth., 378 Mass. 758, 765 (1979).

these records, we decline to impose a reduction of time as this case involved complex factual issues and was well litigated. Based on the Commission's experience with the time requirements for this type of litigation the Commission finds that the time estimates were reasonable.

Furthermore, 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 Attorney Browne and two law students billing for attending certain days of the hearing, was not duplicative, as Attorney Browne and the two law clerks all participated in the litigation of this complex sexual harassment case. We also recognize, and appreciate, the review conducted by Supervising Attorney Constance Browne[4] of the time records resulting in self-imposed deductions for duplicative work.

Respondents also argues that the time billed of 73.5 hours for drafting the post hearing brief is excessive; however, due to the complexity of this matter we decline to reduce the fee award for the time to draft the extensive brief. We recognize in this determination that Attorney Browne did not include any hours for her work on the post-hearing brief, although she avers that she spent more than ten additional hours on the brief.

Accordingly, we conclude that an award of $40,081.25 for attorneys' fees is appropriate given these circumstances. We also find that the request for reimbursement of costs is reasonable and award Complainant a total of $7,497.75 for the listed expenses.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. We further order Respondents Biga Breads and Deana Martin to:

[4] Attorney Browne, Associate Clinical Professor of Law at Boston University School of Law, supervised the work of the Rule 3:03 law students who worked on the case.

(1) Pay Complainant Griselda Canton, within sixty (60) days of service of this decision, the sum of $47,992 in back pay damages plus interest at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(2) Pay Complainant Griselda Canton, within sixty (60) days of service of this decision, the sum of $125,000 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; and

(3) Pay Complainant Griselda Canton, within sixty (60) days of service of this decision, the sum of $40,081.25 for attorneys' fees and $7,497.75 in costs.

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 8th day of June, 2020

Sunila Thomas George Commissioner	Monserrate Quiñones Commissioner	Neldy Jean-Francois Commissioner