COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
YVROSE CESAR,
Complainants

v. DOCKET NO. 13-BEM-02668
14-BEM-02491

DANVERS MANAGEMENT SYSTEMS, INC.
d/b/a HUNT NURSING AND REHABILITATION CENTER
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Eugenia Guastaferri in favor of Complainant, Yvrose Cesar ("Ms. Cesar"). Following an evidentiary hearing, the Hearing Officer dismissed Ms. Cesar's claim of race and national origin discrimination under M.G.L. c. 151B, § 4(1), but concluded that Danvers Management Systems, Inc. d/b/a Hunt Nursing and Rehabilitation Center ("Respondent") was liable for retaliatory termination in violation of M.G.L. c. 151B, § 4(4), and awarded $12,000 in back pay and $15,000 in emotional distress damages with 12% interest per annum. The Respondent appealed to the Full Commission.[1] Ms. Cesar requests attorney's fees in the amount of $75,645.00 and costs in the amount of $977.41. For the reasons discussed below, we affirm the Hearing Officer's decision and award a reduced amount of attorney's fees and costs.

[1] The Complainant also filed a timely Notice of Appeal on or about July 11, 2018, but failed to perfect her appeal by filing a petition for review as required by 804 CMR 1.23(1)(a) (1999) (the procedural rules in effect at the time the Notice of Appeal was filed). As a result of the failure to perfect her appeal in accordance with Commission regulations, Ms. Cesar's appeal is hereby dismissed.

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 Officer. M.G.L. c. 151B, §§ 3(6), 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, § 1(6).

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 Quinn 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). 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).

LEGAL DISCUSSION

The Respondent challenges the sufficiency of the evidence in support of the Hearing Officer's determination of retaliatory termination. Specifically, Respondent argues that 1) it was not on notice that Ms. Cesar's complaints about her coworkers were related to her race or national origin, and 2) Ms. Cesar's termination was unrelated to her protected activity.

M.G.L. c. 151B, § 4(4) prohibits an employer from terminating or otherwise retaliating against a person for opposing any practices forbidden by Chapter 151B. Retaliation is a separate claim from discrimination based on membership in a protected class and is "motivated, at least, in part, by a distinct intent to punish or rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case of retaliation. Mole v. University of Massachusetts, 442 Mass. 582, 591-592 (2004). Once Complainant has established a prima facie case of retaliatory termination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its actions. Abramian v. President and Fellows of Harvard College, 432 Mass 107, 117 (2000). After Respondent has articulated legitimate, non-discriminatory reasons for its conduct, Complainant must prove that Respondent's reasons are a pretext for unlawful retaliation. See Lipchitz v. Raytheon Company, 434 Mass. 493, 501 (2001). To establish a prima facie case of retaliation, Complainant must show that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. Kelley, 22 MDLR at 215.

The Respondent's first argument is that it could not have retaliated against Ms. Cesar because it was not on notice that she had opposed any practices forbidden by Chapter 151B.

Respondent argues it was not aware that Ms. Cesar's complaints about name calling and bullying by coworkers were related to her race or national origin, notwithstanding that, notably, Ms. Cesar reported to the Human Resource Manager that coworkers called her "monkey," a widely-known racial slur. The Hearing Officer specifically discredited the Human Resource Manager's testimony that she did not consider Ms. Cesar's initial allegations to be about racial discrimination. We defer to the Hearing Officer's finding on this point. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

More significantly, however, the timing of Ms. Cesar's MCAD complaint precludes any argument that Respondent was not on notice of protected activity at the time of termination. On October 4, 2013, Ms. Cesar filed her complaint with the MCAD alleging race and national origin discrimination. In the complaint, she cited the same name-calling and bullying by coworkers as in her internal complaints. Even if the Respondent was unaware of the racial nature of Ms. Cesar's allegations prior to the filing of the MCAD complaint, there can be no doubt that the employer was on notice that Ms. Cesar was attempting to oppose practices forbidden by Chapter 151B after the complaint was filed. The alleged retaliatory act in question, Ms. Cesar's termination, occurred nine months later.

The Respondent's second argument on appeal is that Ms. Cesar failed to sufficiently rebut the legitimate, non-discriminatory reasons it provided for its decision to terminate her employment, such that she did not prove a causal link between her termination and her protected activity. The Respondent maintains that Ms. Cesar was terminated for refusing to accept a particular assignment on July 1, 2014, and that her prior complaints played no role in the choice of discipline. However, based on the totality of circumstances, the Hearing Officer was persuaded that Ms. Cesar would not have been terminated if it were not for her complaints.

Those circumstances were as follows: per policy, Respondent not only had a choice of lesser discipline but it had not meted out any discipline at all with regard to other instances of the same conduct; prior to her termination Ms. Cesar had an excellent work history and had never previously engaged in the conduct giving rise to the termination; and, further, the investigation did not include a meaningful interview with Complainant, an employee Respondent knew was experiencing interpersonal struggles in the workplace. All of the foregoing circumstances had sufficient evidentiary support, and the Hearing Officer's conclusion that such circumstances supported a finding of retaliation was not in error.

Regarding the first two circumstances, Ms. Cesar had a history of favorable performance reviews, and Respondent's Director of Nursing, Nursing Supervisor, and Human Resources Manager all acknowledged that Ms. Cesar was an excellent employee with no history of insubordination. Ms. Cesar testified that other CNAs refused to care for particular patients without consequence, and this was partially supported by the testimony of two other former CNAs, though the Respondent maintained that CNAs were merely allowed to swap patients. The Director of Nursing testified on behalf of Respondent that at least one other CNA had been terminated for refusing to care for a patient, though the Respondent did not provide documentary evidence in support. Moreover, while Respondent provided a list of names of employees who had previously been terminated for insubordination, that evidence did not include detail or specifics, including whether the insubordination involved a refusal to care for a patient. Therefore, the Hearing Officer's decision to credit Ms. Cesar's testimony about consequences for other CNAs' similar behavior over the Respondent's witness's testimony was a credibility determination within her purview, and not, as Respondent argues, definitively rebutted by documentary evidence. Further, the Hearing Officer could fairly infer that the choice to

terminate Ms. Cesar under these circumstances was retaliatory. See, e.g., Drigo v. City of Boston, 40 MDLR 36 (2018), aff'd by Drigo v. City of Boston, 42 MDLR 26 (2020) (retaliation found despite the proffered legitimate reason, based on evidence that Complainant had a strong work history and was disciplined more harshly than other employees for the same conduct).

As for the Respondent's investigation prior to terminating Ms. Cesar, the record supports the Hearing Officer's conclusion that the investigation was "superficial." Between the incident on July 1, 2014, and Ms. Cesar's termination on July 7, 2014, the Respondent conducted an investigation of the event and contacted witnesses to provide written statements. However, it was undisputed that Ms. Cesar was not contacted for an interview or statement. While the Respondent argues that Ms. Cesar explained her story to several supervisors during the course of the July 1, 2014 incident, that is not equivalent to reaching out to Ms. Cesar herself during a post-incident investigation. Likewise, the Respondent's offer to allow Ms. Cesar to submit a written statement occurred during the termination phone call, at which point the investigation had concluded and a decision had been made. The investigation was another apt circumstance from which to infer retaliation. See Babu v. Aspen Dental Management, Inc., 39 MDLR 111 (2017), aff'd by Babu v. Aspen Dental Management, Inc., 42 MDLR 99 (2020) (the failure of the Respondent to speak to a witness before separating a long-term employee over a single incident supported the conclusion that the Respondent jumped at the opportunity to rid themselves of the Complainant).

Having reviewed the entire record and with all due deference to the Hearing Officer's exclusive authority to make credibility determinations, we find there was substantial evidence for the Hearing Officer to conclude that the Respondent retaliated against Ms. Cesar. As discussed, the Hearing Officer's findings of fact are supported by the record and the credited testimony,

and, while Respondent did submit evidence in support of a legitimate reason for the termination, the substantial evidence standard does not permit us to substitute our judgment for that of the Hearing Officer. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984). Therefore, we deny the appeal and affirm the Hearing Officer's decision.

ATTORNEY'S FEES PETITION[2]

M.G.L. c. 151B, § 5 allows prevailing complainants to recover reasonable attorney's fees. 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

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

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).

Ms. Cesar filed a Petition for Attorney's Fees and Costs on July 9, 2018, along with affidavits, invoices, and contemporaneous billing records from Attorney Justin M. Murphy as well Attorney James E. Neyman. Attorney Murphy's requested fees amount to $72,675.00[3] (290.7 hours at an hourly rate of $250) and Attorney Neyman's requested fees amount to $2,970.00 (14.85 hours at an hourly rate of $200), for a total fees request of $75,645.00. Ms. Cesar also seeks costs in the amount of $977.41,[4] and post-judgment interest at the rate of 12% per annum from the date of the filing of the Petition.

The Respondent opposes the Petition, arguing that the attorneys' fees must be reduced because Ms. Cesar failed to prove her claim under M.G.L. c. 151B, § 4(1), alleging discrimination based on her race and national origin. Respondent also argues that Attorney Murphy's claimed hours are unreasonable, excessive, and duplicative. The rates charged by both attorneys are not disputed, and are reasonable.

Attorney Neyman represented Ms. Cesar during her initial MCAD complaint of a hostile work environment, which was ultimately not successful before the Hearing Officer. When a complainant does not prevail on all claims charged "the Commission may exercise its discretion to reduce the overall fees requested by some amount that may reasonably be said to have been

[3] The Complainant's Petition for Attorney's Fees and Costs originally requested $78,550.00 for Attorney Murphy's fees, representing 314.2 hours of work, but the Complainant's Response to Respondent's Opposition to Complainant's Petition for Attorney's Fees and Costs revised this amount, after Respondent flagged 23.5 hours' worth of fees as unaccounted for in Attorney Murphy's time records.

[4] The Complainant's Petition for Attorney's Fees and Costs originally requested $1,052.41 in costs, but this amount was later revised as well.

expended in pursuit of Complainant's unsuccessful claim. In making such a determination, we may examine the degree of interconnectedness between the two claims." Blue v. Aramark Corp., 27 MDLR 73 (2005) (internal quotations omitted). As pointed out by Respondent, only 1.3 hours of Attorney Neyman's billed time occurred after Ms. Cesar's retaliatory termination on July 7, 2014. Respondent argues that any time spent prior to this date was spent on the unsuccessful claim and therefore only the 1.3 remaining hours should be rewarded. The Respondent's argument does not take into account the interconnectedness of the two claims. Developing the underlying facts about the workplace and Ms. Cesar's internal complaints to management were necessary to the establishing Ms. Cesar's protected activity and the Respondent's history with Ms. Cesar prior to termination. In light of this, we reduce Attorney Neyman's work on the case by 50%, resulting in an award of $1,485.00.

With respect to Attorney Murphy's fees, Respondent also seeks a reduction due to the unsuccessful hostile work environment claim and argues that Attorney Murphy's claimed hours are unreasonable and excessive. Attorney Murphy asserts that the requested fees amount accounts for the unsuccessful M.G.L. c. 151B, § 4(1) claim because the entries on the billing records indicate half-days of work, and the remainder of each day was spent working on the unsuccessful claim.

Respondent seeks to reduce each of Attorney Murphy's time entries by varying percentages, depending on how much each entry is attributable to the successful retaliation claim. We recognize, however, that it is more reasonable and practical to recognize that Ms. Cesar's two claims are somewhat interrelated and that proof of her underlying complaints to management was relevant for her successful retaliation claim. Given the lack of specificity in Attorney Murphy's time records and the practical inability to assess with exactitude how much

time was spent on work directed to one claim or another, an overall 30% reduction in the total fee sought is reasonable. We reduce the revised request for $72,675.00 by 30% to $50,872.50 in compensable attorney fees.

Accordingly, we conclude that an award of $1,485.00 in fees for Attorney Neyman and an award of $50,872.50 in fees for Attorney Murphy is reasonable and appropriate given these circumstances. We also find that the entirety of Attorney Murphy's revised request for $977.41 in costs is reasonable and supported.

ORDER

For the reasons set forth above, we affirm the decision of the Hearing Officer and Respondents are hereby Ordered:

1) To cease and desist from any acts of retaliation directed at employees who engage in protected activity;
2) To pay to Complainant, Yvrose Cesar, the sum of $12,000 in damages for back pay with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue;
3) To pay to Complainant, Yvrose Cesar, the sum of $15,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a court judgment and post-judgment interest begins to accrue; and
4) To pay Complainant, Yvrose Cesar, the sum of $53,334.91 in attorney's fees and costs with interest thereon at the rate of 12% per annum from the date the petition for attorney's 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[5] 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[6] this 12th day of September, 2022.

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[5] The Full Commission will ordinarily delay the issuance of a final action for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A to allow a prevailing complainant time to file a petition for attorney's fees incurred as a result of litigating the appeal to the Full Commission. See 804 CMR 1.23(12) (2020) (complainant who prevails in an appeal to the Full Commission has fifteen days to file petition for attorney's fees after issuance of Full Commission decision) and 804 CMR 1.23(12)(e) (2020) (the Full Commission decision on complainant's petition for attorney's fees, together with the decision deciding the appeal constitutes the final order of the Commission for purposes of judicial review). No such delay is warranted here because Ms. Cesar's own appeal to the Full Commission as an appellant has been dismissed. Moreover, as the appellee, she did not intervene in the Respondent's petition for review and thus did not incur any costs "as a result of litigating the appeal" as required to file a petition for attorney's fees under 804 CMR 1.12(c) (2020). Without incurring fees resulting in a prevailing argument, a complainant is not entitled to supplemental attorney's fees after issuance of a Full Commission decision under 804 CMR 1.12 (2020).

[6] Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(6) (2020).