

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,  
KAREN CHASE, AND  
LINDA EASON

Complainants

v.

Docket Nos. 12-BEM-02539  
12-BEM-02540

CRESCENT YACHT CLUB and  
JOHN MCCARTHY

Respondents

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**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Complainants, Linda Eason and Karen Chase charging Respondents, Crescent Yacht Club (“Club”) and John McCarthy<sup>1</sup>, with sexual harassment and retaliation, alleging that they were subjected to sexual comments and unwanted physical contact while employed by the Club and retaliated against when they complained. Following an evidentiary hearing, the Hearing Officer concluded that Respondent, Crescent Yacht Club was liable for sexual harassment and retaliation in violation of M.G.L. c. 151B, §§ 4(4) & (16A). Respondent has appealed to the Full Commission. For the reasons discussed below, we affirm the Hearing Officer’s decision, except for her damage calculation.

**STANDARD OF REVIEW**

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<sup>1</sup> John McCarthy was dismissed as a Respondent because the Hearing Officer determined that the record did not establish that he was properly served with notice of the proceedings. Complainants did not appeal that determination.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020) *et seq.*), 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, § 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 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, Crescent Yacht Club, has appealed the decision on the grounds that the Hearing Officer's findings are not supported by substantial evidence, are inconsistent, arbitrary, and not in accordance with the law. Respondent argues that the Hearing Officer erred in failing to distinguish John McCarthy's actions while engaged as an officer of the Crescent Yacht Club Executive Board as opposed to his status as a member of the Club; that the Hearing Officer erred

in finding that John McCarthy was Complainants' supervisor; and that the Hearing Officer erred in finding that the actions of John McCarthy were severe and pervasive enough to create a hostile work environment.

Respondent's argument that the Hearing Officer erred in crediting Complainant's witnesses and omitting key facts misunderstands the role of the Hearing Officer and Full Commission. 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. Complainant'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 v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (review requires deferral to administrative agency's fact-finding role, including its credibility determinations). The Hearing Officer remains in the best position to assess credibility because she hears the testimony of witnesses and observes their demeanor firsthand. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). 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 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 they are fully supported by credible testimony and evidence in the record.

Respondent argues that the Hearing Officer erred in finding that Executive Board member John McCarthy was Complainants' supervisor. An employer is strictly liable for sexual harassment committed by its supervisors, i.e., those on whom it confers authority. College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 165 (1987), The MCAD classifies individuals as supervisors for

purposes of c. 151B if they have authority to undertake or recommend employment decisions and/or the authority to direct the employee's activities. Fluet v. Harvard University, 23 MDLR 145 (2001). See also McCormick v. Modern Continental Construction Co., 27 MDLR 316 (2005) (crew foreman considered to be supervisor because he communicated directives from management, directed members of crew, and controlled what they did); Williams v. Karl Storz Endovision, Inc., 24 MDLR 91, aff'd 26 MDLR 156 (2004) (individual with no formal supervisory position, and no power to hire, fire, or discipline, nonetheless exercised supervisory authority over complainant because of authority to distribute and check work, give technical advice, give out tools and instructions, handle time cards, and let workers know about overtime); Fluet v. Harvard University, 23 MDLR 145 (2001) (finding of supervisory relationship where individual assigns work, provides direction, monitors work, and recommends hiring, promotion, salary increases and discipline).

Complainant Linda Eason was employed as an assistant bar manager at the Crescent Yacht Club. Complainant Karen Chase was employed as a "door person" Ms. Chase's responsibilities included checking identification ("carding" people) and ensuring that non-members signed the guest book when entering the Crescent Yacht Club bar. The Hearing Officer determined that "[t]he Crescent Yacht Club Executive Board has overall authority over the Club, including the bar." This is supported by the testimony of John McCarthy and the By Laws of the Club (Joint Exhibit 1). John McCarthy testified that the Executive Board "[b]asically runs the club..." Hearing Transcript, October 20, 2015, p. 38. The By Laws specifically state that the Executive Board has the authority to terminate the employment of bar employees, define the duties of the bar manager and employees, and see that those duties are carried out. As an Executive Board member, John McCarthy had authority to recommend tangible employment decisions affecting the Complainants and direct their activities. There is substantial evidence to support the Hearing Officer's determination that John McCarthy was a supervisor of Complainants in his

capacity as an Executive Board member.

Respondent argues that the Hearing Officer erred in failing to distinguish John McCarthy's actions while engaged as an officer of the Crescent Yacht Club as opposed to his status "only" as a member. McCarthy's conduct towards the Complainants occurred on the Club premises during a Club function when he was an Executive Board member. While McCarthy, as well as the Complainants, was a member of the Crescent Yacht Club, that membership did not preclude his dual role as an apparent supervisor. A supervisor's conduct which takes place outside of the work place may be actionable if it occurs at an employer-sponsored event and it adversely affects an employee's work environment. Picco v Town of Reading, et al., 38 MDLR 42 (2016). See also MCAD's Sexual Harassment in the Workplace Guidelines, (. In determining whether conduct taking place outside of the workplace may be actionable the Commission may consider factors such as whether the event at which the conduct occurred is linked to the workplace, the relationship of the complainant and the alleged harasser, and whether the conduct adversely affected the employee's work environment.) The Hearing Officer found that "McCarthy, at all relevant times, served as an Executive Board member," that the Complainants' were employees of the Club at the time of the incidents, and the fact that McCarthy harassed the Complainants when they were participating in activities as members did not negate their supervisor/employee/relationship. There was no error in the Hearing Officer's determination that McCarthy's actions toward Complainants while on the premises of the Club created a sexually hostile environment affecting Complainants' work environment.

Respondent argues that the Hearing Officer erred in finding that the actions of John McCarthy were severe and pervasive enough to create a sexually hostile work environment.<sup>2</sup> For conduct to satisfy

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<sup>2</sup> To establish a prima facie case for a hostile work environment by a supervisor based on sexual harassment, Complainants must show by a preponderance of the evidence that: (1) they were subjected to

the severe or pervasive element of a sexual harassment hostile work environment claim the conduct must be “so severe or pervasive as to alter the conditions of [the complainant’s] employment and create an abusive working environment.” Faragher v. Boca Raton, 524 U.S. 775, 786 (1998). The determination whether a particular work environment is hostile requires a factual inquiry into all of the circumstances, including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating or merely an offensive utterance. Candelieri v. Vanson Leathers, Inc., 24 MDLR 228 (2002). See also Faragher v. Boca Raton, 524 U.S. at 787-788. A hostile environment may be established based on a single incident, due to its severity, even if the conduct is not frequent or repetitive. Gnerre v. MCAD, 402 Mass. 502, 508-09 (1988); Sweeney v. K-Mart Corp., 21 MDLR 79, aff’d 24 MDLR 8 (1999). This factual inquiry should be considered on a case by case basis. Gnerre, 402 Mass. at 508. The Hearing Officer found that the evidence established that McCarthy’s offensive comments and physical contact were both objectively offensive and subjectively offensive to the Complainants. The Hearing Officer thoroughly analyzed the evidence surrounding these incidents and engaged in the fact-based inquiry necessary to determine whether this conduct was severe or pervasive. Further, the evidence she considered was not isolated to McCarthy’s offensive comments and physical contact. For example, there was testimony that following her complaint of harassment, Complainant Eason was the “subject of snickers” while individuals at the Club simulated sex acts. The Hearing Officer’s determinations are supported by substantial evidence.

We have reviewed Respondent’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

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gender based unwelcome verbal or physical conduct; (2) the unwelcome verbal or physical conduct was sufficiently severe or pervasive to alter the terms or conditions of their employment and create an abusive working environment; and (3) the harassment was carried out by an owner, manager, or someone in a supervisory position. See College-Town v. MCAD, 400 Mass. 156, 162-163 (1987).

of that review, we find no material errors of fact or law identified in Respondent's appeal with respect to the Hearing Officer's findings and conclusions of law.

We find, however, that the Hearing Officer erred in her calculation of back pay damages for Complainant Linda Eason. The Hearing Officer awarded back pay damages based upon lost earnings in 2013 and 2014 in the total amount of \$16,658. However, based upon the Hearing Officer's findings, the back pay damages for this period totals \$11,387 (\$3,567 for 2013 and \$7,820 for 2014). Accordingly, we reduce the back pay damage award for Complainant Linda Eason to \$11,387.

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision, except with respect to the back pay damage award to Complainant Eason.

#### ATTORNEYS' FEES AND COSTS

Complainants filed a Petition for Attorney's Fees and Costs on June 3, 2016, along with an affidavit and invoices. Respondent filed an "Objection" to this petition.<sup>3</sup> Complainants' Petition seeks attorneys' fees in the amount of \$80,626.26 and costs in the amount of \$2,766.97. Complainant seeks to recover fees in the amount of \$70,181.25 for 182.50 hours of work performed by Attorney Dutcher at a rate of \$375.00 for work performed between September of 2012 until January 1, 2014 and at a rate of \$400.00 from January 1, 2014, until the filing of this petition; \$4,655.01 for 11.05 hours of work performed by Attorney Kazarosian at a rate of \$475.00 for work performed between September of 2012 until January 1, 2014 and at a rate of \$500.00 from January 1, 2014, until the filing of this petition; \$4,820.00 for 15.40 hours of work

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<sup>3</sup> Respondent's Objection to Complainants' Petition for Attorney's Fees and Costs did not contain a memorandum of law or any specific detail as to the rationale for the opposition. 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.

performed by Attorney Little at a rate of \$400.00; \$900.00 for 3.75 hours of work performed by Attorney Moccia at a rate of \$250.00; \$70.00 for 0.35 hours of work performed by a paralegal at a rate of \$200.00. We determine that the hourly rates sought by Complainants' petition are consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases, as supported by affidavits by other attorneys in the same area. The petition is supported by contemporaneous detailed time records noting the amount of time spent on tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover reasonable attorneys' fees for the claims on which Complainants 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, the nature of the case and the issues presented. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). 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. Baker v. Winchester School Committee, 14 MDLR 1097 (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 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).

Having reviewed Complainant's Petition, we determine that Complainant's fee request, along with counsel's contemporaneous time records, reveal a fair accounting of the work performed in furtherance of Complainants' cases. While Complainant Chase did not prevail upon both her sexual harassment and retaliation claims, we find that the claims were substantially interconnected, and shared a common core of facts. Accordingly, we do not reduce the fee award to reflect her lack of success on the retaliation claim. Complainants also seek costs in the amount of \$2,766.97 for deposition transcripts, copying, and mailing, which were sufficiently documented. We grant Complainants' Petition and award attorneys' fees in the amount of \$80,626.26 and costs in the amount of \$2,766.97.

#### ORDER

For the reasons set forth above, we hereby affirm the Decision of the Hearing Officer in its entirety and issue the following order:

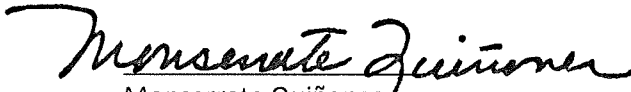
- (1) Pay Complainant Linda Eason the sum of \$11,387.00 in back pay damages plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (2) Pay Complainant Linda Eason the sum of \$10,000.00 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 Karen Chase the sum of \$7,000.00 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;
- (4) Pay Complainants the sum of \$83,393.23 in attorney's fees and costs with interest thereon at the rate of 12% per annum from the date of the filing of the Complainants' Motion for Fees and Costs, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (5) Within one hundred twenty (120) days of the receipt of this decision, Respondent shall conduct a training session for supervisors and managers employed by the Crescent Yacht Club (including its Executive Board Members) in regard to sex discrimination. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training, including the names of its Executive Board members.

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<sup>4</sup> this 6<sup>th</sup> day of February, 2020



Monserrate Quiñones  
Commissioner



Neldy Jean-Francois  
Commissioner

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<sup>4</sup> 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).