COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and JULIE COBURN,

Complainants

v. DOCKET NO. 08-SEM-00558

CUCA, INC., d/b/a BELLA NOTTE,

Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant Julie Coburn. Following an evidentiary hearing, the Hearing Officer found that Respondent Bella Notte was liable for discriminating against Complainant by subjecting her to a hostile work environment and failing to remedy her complainants of sexual harassment by a co-worker, which resulted in her constructive discharge. Respondent has appealed to the Full Commission. For the reasons stated below, we affirm the Hearing Officer'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 *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.

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). 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.

SUMMARY OF FACTS

In 2001, Complainant began working for Respondent Bella Notte as a server. Respondent is owned and operated by Abaz Cecunjanin. At the time Complainant was hired, Respondent also hired Dmitri Vlasenko. Complainant testified about a pervasive pattern of sexual harassment in the workplace involving Vlasenko.

Vlasenko was described as odd and had a history of making bizarre statements in the workplace. Vlasenko's odd behavior worsened after he suffered a head injury in a car accident in February of 2005 or 2006. Cecunjanin testified that despite this odd behavior, Vlasenko became one of his best workers. Cecunjanin also testified that he felt obligated to help Vlasenko because he had promised Vlasenko's mother that he would look after him.

Complainant testified that on occasion Vlasenko would ask her whether she was hot when she was younger, if she was a virgin when she graduated from high school, and whether she was a virgin when she got married. In 2005, Vlasenko told Complainant that he wanted Complainant's young daughter to lose her virginity to him when she turned sixteen. Complainant further testified that when she would sit down on a bench at the restaurant, right as she was about to sit down, Vlasenko would place his hand, palm up, on the bench so that Complainant sat on his hand.

Complainant testified that in October 2006, Vlasenko's comments became "more personal." Complainant testified that on approximately October 15, 2016, Complainant, Vlasenko, and another waiter were setting up for a large banquet when Vlasenko turned to Complainant and said, "Julie, lick my dick." Complainant was flabbergasted and appalled by his comment. Later that same evening, Complainant was preparing to leave work for the night when Vlasenko asked her, "Julie, when you do 69, do you prefer the six or the nine?" Complainant was very upset by this comment. Complainant testified that she stayed up all night crying after this incident and that she was so upset she was reluctant to return to work the next evening.

The following day, Complainant talked to Cecunjanin about Vlasenko's comments. She testified that Cecunjanin told Complainant that Vlasenko thought he was being funny and that she should not let Vlasenko's remarks bother her. Complainant threatened to contact a lawyer if something wasn't done about Vlasenko, and Cecunjanin assured her that he would speak to Vlasenko and terminate him if he made any more offensive comments.

On approximately November 17 or 18, 2006, Complainant was preparing food in the kitchen with Vlasenko and another staff member, when Vlasenko commented the he needed to have his dick licked again. Complainant became very upset and angry. She told Vlasenko that

he was already in enough trouble and his comment would cause him further trouble. As she left the room, Vlasenko said, "If you and I were in Africa, it would be different." Complainant left the kitchen and went into the bathroom in tears. Complainant then learned from co-workers that Vlasenko had been drinking alcohol from the glasses of patrons whose tables he was bussing. She told bar manager Richard Luippold about Vlasenko's drinking and about his comments in the kitchen. Luippold told her that he would ask Vlasenko to leave the premises. She later saw Vlasenko sitting on a bench in the restaurant staring at her. Complainant testified that Vlasenko's comments and behavior were so upsetting that she had trouble carrying trays and bringing her orders downstairs to the dining room. She also began varying her route through the restaurant to avoid Vlasenko.

Later that evening, Complainant again spoke to Cecunjanin and asked him what he planned to do about Vlasenko. Cecunjanin said that Vlasenko's comments in the kitchen were not directed to her and he could not control what Vlasenko said while he was intoxicated. He stated that he could not fire Vlasenko before the busy Christmas season because he was a hard worker and would be difficult to replace, but agreed to discuss the matter with Vlasenko.

The day before Thanksgiving, Vlasenko called Complainant's home several times; however she refused to talk to him. That evening, Vlasenko went to her house, tried to open her door, and told Complainant that he really needed his job. Complainant's husband went to the door and Vlasenko left a bag of candy and went away. Complainant called Cecunjanin to tell him Vlasenko had come to her house and learned that Cecunjanin had told Vlasenko to talk to her. Cecunjanin also assured Complainant that she would not have to work with Vlasenko.

Complainant worked the Saturday after Thanksgiving. Although not scheduled to work, Vlasenko appeared at the restaurant looking for work. As Complainant carried a tray into the

kitchen she observed Vlasenko leaning against a shelf, looking at her, and smiling. She testified that, at this point, she was fearful of Vlasenko. She began to shake and nearly dropped a tray. When she got home she called Cecunjanin and complained that Vlasenko had been present at the restaurant.

The next day, Complainant was scheduled to assist in decorating the restaurant for Christmas. When she arrived at work, Vlasenko was present and was also decorating for the holidays. Complainant immediately spoke with Cecunjanin, who said he would assign them to work in different rooms. Complainant responded that she could not be in the workplace at all with Vlasenko and threatened to quit her job. Cecunjanin assured her that he would handle Vlasenko. That same day, he hand delivered to Vlasenko a letter stating that he was "temporarily released of all duties…until further notice" due to his improper behavior and workplace performance.

Complainant continued to work her regular hours from December 2006 to May 2007, without incident. During this time she never saw Vlasenko in the workplace. Complainant did not see Vlasenko again until April 2007 when he appeared at the restaurant seeking work. Cecunjanin assured Complainant that Vlasenko would not be rehired.

On or about May 19, 2007, upon arriving at work, Complainant was very shocked and upset to see Vlasenko in the dining room dressed in work clothes. She was unaware that he had been re-hired and went immediately to Cecunjanin's office in order to confront him about Vlasenko's employment status. Cecunjanin explained that Vlasenko had just finished working a banquet and they would not be working the same shift. Complainant told Cecunjanin that she was quitting because of his failure to protect her from Vlasenko. Cecunjanin again told her to let

Vlasenko's comments roll off her back. Complainant walked out of the restaurant and did not return.

On February 14, 2008, Complainant filed a complaint with the Massachusetts Commission Against Discrimination on the basis of sexual harassment. Based on the foregoing, the Hearing Officer concluded that Respondent was liable for creating a hostile work environment based on unlawful sexual harassment and caused Complainant to be constructively discharged from her employment in violation of M.G.L. c. 151B. The Hearing Officer awarded Complainant $20,000 in emotional distress damages.

BASIS OF THE APPEAL

Respondent's appeal to the Full Commission asserts that the Hearing Officer erred by (1) finding that Complainant timely filed her complaint within three hundred days of an incident of discrimination and (2) concluding that Complainant was constructively discharged. Additionally, Respondent opposes Complainant's Petition for Award of Attorneys' Fees and Costs and argues that some of the fees relate to clerical services, which cannot be compensated, the fees are not reasonably related to the result achieved, and the fees include an hourly rate that the Complainant has not shown to be reasonable.

Respondent first argues that Complainant failed to file her complaint within three hundred days of an incident of discrimination. Respondent specifically argues that the continuing violation doctrine does not apply because there was no anchoring incident of sexual conduct at the workplace within three hundred days of the Complainant's filing of the complaint. Respondent asserts that allowing the co-worker responsible for sexually harassing the Complainant to return to work after a six-month suspension did not result in continued sexual harassment in the workplace. We agree with the Hearing Officer's determination that the

complaint was timely filed based on the continuing violation doctrine.

A complaint must be filed with the Commission within three hundred days of an alleged act of discrimination, unless there is a continuing violation. 804 CMR 1.10(2). For actions that occur outside of the three hundred days to be actionable, there must be at least one incident of discriminatory conduct within the statute of limitations period, which substantially relates to, or arises from, earlier discriminatory conduct and anchors the related incidents, thereby rendering the entirety of the claim timely. A plaintiff who demonstrates a continuing violation may assert claims for conduct falling outside the statute of limitations period unless she knew or reasonably should have known, more than 300 days prior to her MCAD filing that her work situation was pervasively hostile and unlikely to improve and "therefore a reasonable person in her position, armed with her knowledge would have filed a seasonable complaint with the MCAD." Clifton v. Massachusetts Bay Transp. Authority, 445 Mass. 611, 619 (2005), See Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 -3 (2001) (establishing standard for actionable continuing violation, recognizing that incidents of sexual harassment serious enough to create a hostile work environment typically accumulate over time and series of related events have to be viewed in their totality to assess discriminatory nature and impact).

In the context of a claim of sexual harassment by a co-worker, an employer with notice of the harassment, such as Respondent, violates M.G.L. c. 151B when the employer fails to take prompt and effective remedial action to correct the sexually hostile working environment. College-Town v. MCAD, 400 Mass. 156, 167 (1987). An inadequate response to a sexual harassment complaint can itself foster a hostile environment and give rise to liability. The failure to act on complaints of sexual harassment—whether the result of design or of inattention—may have a discernible impact in a hostile environment case. Chapin v. Univ. of Massachusetts at

Lowell, 977 F. Supp. 72, 80 (D. Mass. 1997) ("A deaf ear from management may contribute to and encourage the hostility of the workplace, creating an impression that employees may engage in sexual harassment or discrimination with impunity."); see Ruffino v. State Street Bank and Trust Co., 908 F.Supp. 1019 (D. Mass. 1995) (recognizing that in claims of hostile work environment based on sexual harassment, "discrimination typically is not confined to one act, directed at one individual, one time; rather, it is a composite of workplace action and inaction.").

The Hearing Officer found that Respondent initially suspended Vlasenko from his employment in November 2006 based on his sexually harassing conduct towards Complainant. When Complainant saw Vlasenko back on Respondent's premises in April 2007, Respondent assured her that he would not be rehired, creating the impression that his suspension was really a termination. On May 19, 2007, Respondent had rehired Vlasenko and, when confronted by Complainant, told her to ignore Vlasenko's behavior. Respondent's re-hiring of Vlasenko cannot be viewed in isolation, as it is substantially related to the prior incidents of sexual harassment alleged by Complainant. Further, given the specific fact that the Respondent assured Complainant that Vlasenko would not be rehired, Respondent's failure to follow through with its purported remedial measure is sufficient to serve as the anchoring event for Complainant's sexual harassment claim. The Respondent's actions and inaction in relation to Complainant's reports of sexual harassment, together with Vlasenko's sexual conduct, created a hostile work environment. Respondent continued to minimize Vlasenko's conduct and failed to adequately remedy the hostile work environment. The Hearing Officer did not err in concluding that Vlasenko's re-hire constituted the anchoring event that rendered the complaint timely.[1]

[1] Notwithstanding the application of the continuing violation doctrine, we note that the complaint could also be viewed as timely filed based on principles of equitable tolling and equitable estoppel. See Flint v. City of Boston, 94 Mass. App. Ct. 298 (2018); Tardanico v. Aetna Life & Casualty Co., 41 Mass. App. Ct. 443, 446 (1996) ("[A] statute of limitations may be tolled in cases of this kind by reason of the employer having caused the employee to

Respondent next argues that the Hearing Officer erred in concluding that Complainant was constructively discharged. Specifically, Respondent argues that the Hearing Officer's finding of constructive discharge is not supported by substantial evidence in the record. We conclude that the Hearing Officer's determination that Complainant was constructively discharged is sufficiently supported by the evidence.

In order to prove constructive discharge, Complainant must show that her employment was, in effect, terminated because the situation at her workplace became so intolerable that a reasonable person would have felt compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995). The Hearing Officer found that Complainant testified credibly that she was shocked, appalled, and upset by Vlasenko's conduct and that she had difficulty performing her job, broke into tears, and had to vary her route at work in order to avoid contact with Vlasenko as she was fearful of him. After reporting Vlasenko's sexual harassment to Respondent, Respondent suspended Vlasenko from his employment and told Complainant that Vlasenko would not be re-hired. This proved to be false. When Complainant arrived at work to discover that Vlasenko had been re-hired, she confronted Respondent and was told once again to ignore Vlasenko's behavior. Complainant had no assurance that the workplace would be free from sexual harassment, as Respondent failed to adequately remedy her complaints of sexual harassment. We determine that there is sufficient evidence to support the Hearing Officer's determination that Complainant's working conditions were so intolerable that a reasonable person would have felt compelled to resign.

PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Award of Attorneys' Fees and Costs, to which

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delay acting, i.e. an equitable estoppel. . . .").

Respondent filed an Opposition.[2] Complainant's Petition seeks attorneys' fees in the amount of $22,260.00 and costs in the amount of $798.10. The total amount sought represents a total of 84.30 hours of attorney services at hourly rates of $225.00 in 2007 and 2008, $250.00 in 2009 and 2010, and $275.00 in 2011 and 2012, and 3 hours of paralegal services at an hourly rate of $85.00. The Petition is supported by contemporaneous time records noting the amount of time spent on certain tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover attorneys' fees for the claims on which the 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. 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. After applying the hourly rate to the hours expended, 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 the 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

[2] Respondent also filed a Motion to Strike Complainant's Petition for Award of Attorneys' Fees and Costs as untimely. The Commission's notice letter of December 19, 2012, requested that the Petition for Fees be filed within ten (10) days of receipt of the Decision. The return receipt for delivery of the Decision to Complainant's attorney indicates it was received on December 24, 2012. Complainant's petition was received by the Commission on January 3, 2013, within the requisite time period as computed in accordance with 804 CMR 1.07(1). Respondent's motion is denied.

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).

Respondent filed an Opposition to Complainant's Petition for Award of Attorneys' Fees and Costs arguing that the amount sought should be reduced by deducting the cost of all work performed by the paralegal, as this work was clerical in nature, not legal. Additionally, Respondent argues that the requested fees do not reasonably relate to the result achieved and the Complainant has failed to show that the requested hourly rates are reasonable. The Commission determines that the hourly rates sought by Complainant's petition for attorney and paralegal services are consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases. See, MCAD, Poliwczak v. Mitch's Marina and Campground, et al., 38 MDLR 148 (2016) (determining that hourly rate of $300 per hour consistent with customary rates). We also determine that the paralegal work, which was billed at $85 per hour, was sufficiently associated with prosecution of the claim to be compensated.

Having reviewed Respondent's Opposition and the time records, however, we determine that Complainant's fee request should be reduced to reflect the fact that some of counsel's time records are insufficiently detailed to allow for adequate review. See Walsh v. Boston University, 661 F. Supp.2d. 91, 106-108 (D. Mass. 2009). Although counsel itemized his time entries, the description of some of the entries lacked sufficient detail to permit the Commission to determine whether the services rendered were necessary and if the amount of time counsel expended was reasonable. See MCAD and Lulu Sun v. University of Massachusetts, Dartmouth, 36 MDLR 85 (2014) ("Entries that simply reflect an email or telephone call with opposing counsel absent an explanation of the nature or subject matter of the task may be deemed insufficient and may be refused."). The descriptions of professional services which counsel billed included: "telephone call with Atty. MacNicol," "correspondence to client," "letter & fax

to Attorney Sapirstein," "letter to MCAD," "letter to client," and "phone call with Atty Sapirstein's office." These generic descriptions accounted for 4.8 hours billed, totaling $817.00. Therefore, we discount the attorneys' fees by $817.00 to account for this lack of specificity.

With respect to Respondent's challenge to the fees requested based upon the monetary result obtained, we reject reduction of the fees even though the award of attorneys' fees may be higher than the monetary damages awarded to Complainant. Complainant prevailed in her single claim for sex discrimination and sexual harassment. Applying a proportionality analysis to the fee award relative to the monetary damages obtained would run counter to the fee-shifting provision's intent "to encourage suits that are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights." Diaz v. Jiten Hotel Mgmt., Inc., 741 F.3d 170, 178 (1st Cir. 2013) (citations omitted). We decline to discourage attorneys from assisting in the fight against discrimination to uphold rights conferred by G.L.c.151B for the benefit of the public.

Accordingly, we conclude that an award of $21,443.00 for attorneys' fees is appropriate given these circumstances. We find that the request for reimbursement of costs is reasonable and will award the Complainant a total of $798.10 for expenses.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. The appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety.

1. Respondent shall cease and desist from all acts that violate M.G.L. c. 151B § 4(16A).
2. Respondent shall pay to the Complainant the amount of $20,000 in damages for emotional distress with interest thereon 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.

3. Respondent shall pay to Complainant attorneys' fees in the amount of $21,443.00 and costs in the amount of $798.10, with interest thereon at the rate of 12% per annum from the date the petition for attorneys' 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 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 15th day of February, 2019

Sunila Thomas George
Commissioner

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner