COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CHANI DUPUIS,
Complainants

v. DOCKET NO. 10-NEM-02161

GABRIEL CARE, LLC,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Complainant, Chani Dupuis.[1] Following an evidentiary hearing, the Hearing Officer concluded that Respondent, Gabriel Care, LLC, was liable for retaliation in violation of M.G.L. c. 151B, § 4(4) when it terminated Complainant Chani Dupuis' employment. Respondent has 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 Rules of Procedure (804 CMR 1.00 *et seq*.), and relevant case law. It is the duty of the Full

[1] The Dupuis case was one of two cases filed with the Commission involving claims against Respondent, Gabriel Care, LLC (10-NEM-02160 and 10-NEM-02161). On April 26, 2016, Hearing Officer consolidated the two cases, as the facts, testimony, and issues of law in the two cases are closely interwoven. The Hearing Officer issued one decision for both matters. Complainant Natalia Gutierrez has also appealed to the Full Commission.

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.

BASIS OF THE APPEAL

Respondent 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 also asserts that the Hearing Officer's award of emotional distress damages in the amount of $20,000.00 was arbitrary, capricious, and excessive.

To establish a prima facie case of retaliation the complainant must demonstrate 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. See Mole v. University of Massachusetts, 442 Mass. 582, 591-592 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). Respondent asserts that Complainant failed to establish that she engaged in a protected activity and failed to establish that there is a causal connection between any alleged protected activity and her termination. We will address each in turn.

Protected activity may consist of internal complaints as well as formal charges of discrimination. Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003). The Complainant must establish that she had a reasonable belief that unlawful discrimination has occurred; however, she need not prove that actual discrimination occurred as long as she acted in good faith while engaging in the protected activity. Guazzaloca v. C. F. Motorfreight, 25 MDLR 205 (claim of discrimination need not prevail in order to give rise to a viable retaliation complaint); Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995). The Hearing Officer found that Claimant was terminated for her insubordination in refusing to leave a meeting with supervisors and a co-employee who had brought Dupuis into the meeting as a witness on August 20, 2010. The Hearing Officer further found that in that meeting Dupuis stated that if the co-worker were fired and filed a discrimination lawsuit, she would "stand up" for her and be a witness. In making these findings, the Hearing Officer credited the testimony of Complainant and two witnesses who corroborated Complainant's statements at the meeting.[2] The Hearing Officer found that these actions constituted a protected activity and that they were the immediate cause

[2] These two witnesses corroborated Complainant's statement that she would be a witness if Ms. Gutierrez filed "something," but these witnesses either did not mention or did not recall if discrimination was mentioned at this time.

of her termination. The Hearing Officer also found that Complainant's belief that Gutierrez was the victim of discrimination, although misguided, was in good faith. The Hearing Officer is responsible for making credibility determinations and weighing conflicting evidence. Thus, we will not disturb the Hearing Officer's factual findings where, as here, they are supported by credible testimony in the record.

Respondent further argues that no causal connection exists between the protected activity and the adverse employment action because Complainant Dupuis was terminated for her insubordination. Respondent argues that the Hearing Officer's own findings state that "Dupuis was terminated for her insubordination in refusing to leave the August 20th meeting." This argument fails to acknowledge that the Hearing Officer found that the insubordination in refusing to leave the meeting on August 20, 2010, was a protected activity as she was "standing up in support of her good faith, if misguided, belief that fellow employee Gutierrez was the victim of discrimination."[3] On that same date, after engaging in protected activity, Dupuis was fired by the Respondent. In her decision, the Hearing Officer addresses the arguments set forth by Respondent regarding its articulated non-discriminatory reasons for terminating Complainant. The Hearing Officer cited to substantial evidence in the record when making these determinations. Respondent's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer's determinations were erroneous, 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,

[3] The Employee Handbook provides that in certain disciplinary meetings, an employee is permitted to bring a co-worker to accompany them to the meeting.

Inc., 27 MDLR 42 (2005). The review standard set forth in 804 CMR 1.23 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, as here, they are fully supported by credible testimony and evidence in the record.

Respondent also avers that the emotional distress damages award of $20,000.00 is unwarranted, excessive, and should be vacated because Complainant did not produce any medical reports. 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. 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. An award of damages may be based on a complainant's own credible testimony. Stonehill College, at 576. The Hearing Officer found that following Complainant's termination, she cried, had stomach issues, experienced diarrhea, had trouble sleeping, and experienced lost weight. Complainant saw a counselor for about six weeks, then stopped because she could not afford the gas or the co-pay. Her primary care physician prescribed an anti-depressant and ordered a colonoscopy to rule out issues related to her stomach problems. We find substantial evidence in the record to support the Hearing Officer's award of emotional distress damages and affirm the award. Therefore, we decline to modify the award.

We have carefully 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 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 Respondent'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 AND COSTS

Complainant filed a Petition for Attorney's Fees and Costs and supporting affidavit. The petition is supported by detailed time records noting the amount of time spent on specific tasks and an affidavit of counsel. Complainant seeks to recover fees in the amount of $44,707.01 for 147.30 hours of work performed by Attorney Robert Novack at an hourly rate of $300. For the reasons stated below, Complainant's Petition for Attorney's Fees and Costs is granted, with modifications.

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. 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). We have determined that Attorney Robert

Novack's hourly rate of $300 is reasonable based upon his experience and the hourly rates awarded in comparable Commission cases.

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).

Attorney Novack avers that where possible, any work devoted exclusively to the related Gutierrez case was omitted from the petition. This reduction is appropriate given the dismissal of Ms. Gutierrez's claims. Having thoroughly reviewed Complainant's Petition and attached time records, however, we find that the amount of time to perform certain tasks appears to be excessive or not in furtherance of Ms. Dupuis' retaliation claim.

We find that the following entries relate to Ms. Gutierrez's companion case and are not in furtherance of Ms. Dupuis retaliation claim:

1) 5.25 hours to attend the deposition of Client and Ms. Gutierrez on 11/19/14. This entry shall be discounted 50% to account for the Ms. Gutierrez's claims.

2) 1 hour to meet with witness Yaritza Escobar on 12/29/15, who only testified at Ms. Gutierrez hearing with regards to the discrimination of Ms. Gutierrez.

3) 3 hours to attend the deposition of Yaritza Escobar on 12/29/15, who only testified at Ms.

Gutierrez hearing with regards to the discrimination of Ms. Gutierrez.

4) 6.1 hours to summarize depositions of Client and Ms. Gutierrez on 1/7/16 and 1/8/16. This entry shall be discounted 50% to account for the dismissal of Ms. Gutierrez's claims.

5) 4.7 hours to prepare Client for the initial days of public hearing on 1/15/16, 2/2/16, and 2/19/16.[4]

6) 28 hours to prepare and attend the hearing for Ms. Gutierrez on 2/22/16, 2/23/16, 2/29/16, and 3/3/16.[5]

7) 18.9 hours to transcribe the hearing for Ms. Gutierrez on 4/9/16, 4/10/16, 4/11/16, and 4/13/16.

We find that the following entry is excessive, therefore should be discounted by 50%:

8) 1.7 hours to meet with Client to review and discuss decision on 8/31/16.

After the aforementioned deductions, we conclude that an award of $25,552.50 for attorneys' fees is appropriate given these circumstances.

Complainant seeks costs in the amount of $517.01 for deposition court reported, transcripts, and mailing. We find that this request is reasonable and the documentation is sufficient and hereby award costs to Complainant in the amount sought.

ORDER

[4] It is apparent that this was in preparation for Ms. Gutierrez hearing as there are another 3.3 hours of client preparation prior to Ms. Dupuis hearing dates for her own claims.

[5] The Hearing Officer did not consolidate Ms. Gutierrez claims with Ms. Dupuis' retaliation claim until the start of Ms. Dupuis' hearing. Although the issues of fact and law were interwoven, the Hearing Officer made it clear on several occasions during Ms. Gutierrez's hearing that she would not entertain evidence regarding Ms. Dupuis' retaliation claim during Ms. Gutierrez's hearing.

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

(1) Respondent shall cease and desist from retaliating against employees in violation of G.L. c.151B;

(2) Respondent shall pay Complainant Dupuis, within sixty (60) days of receipt of this decision, the sum of $17,500.00 in lost wages with interest thereon at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(3) Respondent shall pay Complainant Dupuis, within sixty (60) days of receipt of this decision the sum of $20,000.00 in emotional distress damages with interest thereon at the rate of twelve per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(4) Respondent shall pay to Complainant, Dupuis, the sum of $26,069.51 in attorney's fees and costs with interest thereon at the rate of 12% per annum from the date on which the petition for fees 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

(5) Respondent shall conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's managers. Such training shall focus on prohibited retaliatory acts in relation to protected activity by employees. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a

graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. 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.

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[6] this 22nd day of November, 2019

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[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(1)(c).