COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MICHELE FALZONE,
Complainants

v. DOCKET NO. 11-BEM-02816

SEA VIEW RETREAT, INC.,
STEPHEN B. COMLEY, II &
ACEDA ABORGAH,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant Michele Falzone. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were jointly and severally liable for retaliation, in violation of M.G.L. c. 151B, § 4, when they terminated Complainant from her employment after she made an internal complaint of sexual harassment. Respondents have appealed to the Full Commission. For the reasons provided 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.

BASIS OF THE APPEAL

Respondents have appealed the decision on the grounds that the Hearing Officer's findings were factually and legally erroneous and not supported by substantial evidence. Respondents argue that the Hearing Officer erred in (1) determining that Complainant was subjected to a retaliatory termination, (2) awarding Complainant $25,000 in emotional distress damages, and (3) finding that Stephen B. Comley, II and Aceda Aborgah were both individually liable for discrimination pursuant to M.G.L. c. 151B, § 4. Many of Respondents' arguments challenge the Hearing Officer's credibility determinations and findings of fact.

We have carefully reviewed Respondents' 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. We find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings of that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. Substantial evidence is such evidence that a "reasonable mind" would accept as adequate to form a conclusion. M.G.L. c. 30A, § 1(6); Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984).

Respondents argue that the Hearing Officer erred in finding that Complainant was subject to retaliatory termination after making an internal complaint of sexual harassment. Specifically, they argue that Complainant did not establish a prima facie case of retaliatory termination, Complainant did not engage in a protected activity, and that Respondents had good cause to terminate Complainant. We disagree and conclude that the Hearing Officer's determination that Respondents terminated the Complainant in retaliation for her internal complaint of sexual harassment is fully supported by the evidence.

The Hearing Officer credited Complainant's testimony she was treated poorly by her co-workers following her internal complaint of sexual harassment and that Respondents "brushed off" her complaints of poor treatment. The Hearing Officer found that Complainant was terminated two months after making her internal report of sexual harassment. The Hearing Officer found that Respondent's stated reasons for terminating the Complainant were either not credible or overly exaggerated. Thus, the Hearing Officer did not err in concluding that Complainant was subject to retaliatory termination. Further, the Hearing Officer discredited much of Respondents' testimony regarding the events leading up to Complainant's termination

and the reasons for Complainant's termination. Respondents nonetheless argue that the Hearing Officer should have credited the testimony of Respondents' witnesses over the testimony of Complainant. Because the Hearing Officer is in the distinct position to hear testimony first hand, to observe the demeanor of the witnesses, and to evaluate the reliability and trustworthiness of the testimony, her credibility determinations generally should not be disturbed and are entitled to deference. See MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR at 14; Quinn v. Response Electric Services, Inc., 27 MDLR at 42.

Respondents next argue that the Hearing Officer's award of $25,000.00 in emotional distress damages is unsupported by substantial evidence, based upon an error of law, and in excess of MCAD statutory authority. The Hearing Officer is authorized to award damages to Complainant for emotional distress suffered as a direct and probable consequence of Respondents' discriminatory acts. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Such an award must be supported by substantial evidence and the record must be clear with respect to the factual basis of such damages as well as the causal connection between the unlawful act and the emotional distress. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004); see MCAD and Tara Leary v. James F. Braden & Joan G. Braden, 26 MDLR 234, 240-241 (2004).

The Hearing Officer credited Complainant's testimony that following her termination, for the next several months, she experienced weight loss, was sad and cried a lot, she slept most of the day, and did not take care of her house as she had before her termination. The Hearing Officer found that Complainant suffered from "moderate distress" that was not long-lasting, but recognized that it was "clear that she suffered emotionally as a direct result of discriminatory treatment and constructive discharge by Respondents." The Hearing Officer is in the best

position to observe Complainant's testimony and demeanor, and her credibility determinations generally should not be disturbed. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). Thus, we will not disturb the Hearing Officer's award of $25,000.00 in emotional distress damages where it reflects her objective assessment of Complainant's credibility.

Respondents next argue that the Hearing Officer erred in determining that the individual Respondents, Stephen B. Comley, II and Aceda Aborgah, are jointly and severally liable for unlawful discrimination pursuant to M.G.L. c. 151B. This Commission typically concludes 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). Joint and several liability ensures that all legally responsible parties who are found to have engaged in unlawful conduct are liable for the full extent of the damages to Complainant. MCAD and Tiffany Schillace v. Enos Home Oxygen Therapy, Inc., et al., 39 MDLR 59 (2017). The Hearing Officer concluded that as a result of Complainant's internal report of sexual harassment, Respondents viewed the Complainant as a trouble maker who disrupted staff and that this "marked her for termination." The Hearing Officer found that the owner and administrator of Sea View Retreat, Comley, and the director of nursing and assistant administrator at Sea View Retreat, Aborgah, were directly involved in investigating Complainant's internal report of sexual harassment, were made aware of Complainant's poor treatment by other staff members following her report of sexual harassment, and were ultimately involved in the decision to terminate Complainant's employment. We conclude that the Hearing Officer did not err in finding Respondents jointly and severally liable for unlawful retaliation.

PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorneys' Fees and Costs on September 18, 2014 to which Respondents filed an Opposition and a subsequent Supplemental Opposition. Complainant's Petition seeks attorneys' fees in the amount of $42,130.00 and costs in the amount of $1,763.50. The total amount sought represents a total of 157.90 hours of compensable time at hourly rates of $100.00 for paralegal services, $250.00 for legal services from 2011-2012, and $300.00 for attorney services from 2012-2014. The petition is supported by contemporaneous 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 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).

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 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 has filed an Opposition to the fee petition arguing that counsel's affidavit is insufficient to justify the attorneys' fees sought. Specifically, Respondent argues that the amount of attorneys' fees sought must be reduced because counsel's affidavit provides no subject matter reference for the bulk of her entries. Additionally, Respondent argues that counsel provided no justification for her hourly rate, counsel's affidavit contains entries that have no connection to the case, counsel's time spent on voice mail messages is excessive, and the fees requested by counsel are excessive given the lack of complexity of the case.

Having reviewed Respondent's Opposition we determine that the fee request should be reduced to reflect the fact that counsel's time records are insufficiently detailed to allow for adequate review. An attorney fee petition may be discounted where the time records are considered too vague or generic. Walsh v. Boston University, 661 F. Supp.2d. 91, 106-108 (D. Mass. 2009). Time records require specificity in order for the Commission to determine whether the work performed was excessive, unproductive, duplicative or otherwise unnecessary. The nature of the work performed is an important detail to be included in each entry. Id. Entries that simply reflect an email or telephone call to opposing counsel or client absent an explanation of the nature or subject matter of the task may be deemed insufficient and may be refused. Id.; Stokes v. Saga International Holidays, Ltd., 376 F.Supp.2d 86, 94 (D. Mass. 2005) ("the party requesting attorneys' fees has the duty to provide adequate records . . . record of a telephone call without describing the reason for the call is insufficient.").

For each time entry provided in counsel's affidavit, counsel identified the date, the

professional service, the hours expended, the hourly rate charged, and the equivalent dollar amount. However, the descriptions of each professional service for which counsel billed ranged from generic entries such as "revise and edit correspondence" and "telephone call from Attorney Beatrice" which failed to describe the subject matter, to more detailed descriptions like "several phone calls with Attorney Beatrice regarding changing the date of the Pre-Hearing" and "draft e-mail to Attorney Beatrice regarding taking Michelle's deposition" which permit our adequate review. In this case, although counsel has itemized her time entries, the description of the professional service rendered at times lacked a sufficient level of detail to permit the Commission to determine whether it was necessary and if the amount of time expended was reasonable. Id.; MCAD and Lulu Sun v. University of Massachusetts, Dartmouth, 36 MDLR 85 (2014). These generic descriptions accounted for 25.3 hours billed, totaling $6,370.00 in fees. Therefore we discount the attorneys' fees by $6,370.00.

We therefore conclude that an award of $35,760.00 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 $1,763.50 for the listed 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:

1. Respondents shall immediately cease and desist from all acts that violate M.G.L. c. 151B, § 4(4).
2. Respondents shall pay to Complainant the amount of $25,000 in damages for emotional distress with interest thereon 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. Respondents shall pay to Complainant the amount of $6,940 in damages for back pay with interest thereon 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. Respondents shall pay to Complainant attorneys' fees in the amount of $35,760.00 and costs in the amount of $1,763.50, with interest thereon 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.

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[1] this 31st day of December, 2018.

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner

[1] 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).