COMMONWEATLH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and AMANDA LAPETE,
Complainants

v. DOCKET NO. 10-SEM-02769

COUNTRY BANK FOR SAVINGS,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Complainant Amanda LaPete. Complainant was terminated from her position as a loan coordinator after suffering post-partum depression after the birth of her son. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination on the basis of disability in violation of M.G.L. c.151B, § 4(16). Respondent 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, § 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); 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(2020).

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that: (1) the decision was based on erroneous findings of facts; (2) there were procedural errors made by the Hearing Officer; (3) the decision was based on an error of law; and (4) the decision and award of emotional distress damages were unsupported by substantial evidence. After careful review 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 that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. This 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).

Respondent first claims that the Hearing Officer's findings of facts were not supported by

and/or were contrary to the evidence presented at the hearing. Within this argument Respondent claims that the Hearing Officer erred in crediting Complainant's witnesses; relied on evidence that was speculative or not in evidence; ignored evidence; and misconstrued evidence. We disagree. 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. Respondent'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). This review standard 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 argues that the Hearing Officer's findings ignore the fact that Complainant did not provide Respondent a precise return to work date. However, the Hearing Officer does not ignore this evidence. The Hearing Officer's found that although the December 17, 2009 letter from Complainant's counsel did not provide a specific return to work date, it did request an accommodation; that this request was not for an indefinite leave of absence and that "Respondent

did not respond to Complainant's request."[1] When the Hearing Officer made the determination that Complainant's request was not open-ended and indefinite but a request for a short extension of her leave of absence to obtain a more definitive prognosis and return to work date, she cited to specific evidence in the record delineating the basis for her decision. 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 further argues that the Hearing Officer erred as a matter of law by concluding that Respondent failed to grant Complainant's reasonable request for a brief extension of her medical leave in order to re-evaluate her condition and determine a date certain for her return. Respondent argues that the request which did not provide a return to work date was not reasonable because it was a request for indefinite leave. This argument fails to recognize, however, the failure of Respondent to recognize that Complainant sought to provide a definite return to work date after further discussion with her therapist. Complainant's counsel's letter of December 17, 2009 requested that Complainant be permitted to "remain on leave for an additional few weeks, pending the next evaluation by her healthcare providers, who she was scheduled to see on January 7th and 14th." This was not a request for an indefinite leave, but a request for a few weeks to establish a return to work date. Instead of engaging in a discussion about this possibility, Respondent's reply (through its attorney's letter of December 22)

[1] Respondent contends that Respondent's counsel, by letter dated December 22, 2009, responded to the December 17, 2009 letter from Complainant's counsel requesting an accommodation, yet Complainant did not respond, suggesting that Complainant failed to engage in the interactive process. The Hearing Officer considered and rejected this contention. The Hearing Officer's findings make clear that although Respondent's counsel responded to Complainant counsel's letter dated December 17, 2009, it did not respond to Complainant's request for an accommodation. Instead Respondent's counsel's letter of December 22, 2009, explained that the Respondent was terminating Complainant's employment because Complainant was "unable to provide the Bank with any return to work date." Then, by letter of December 29, 2009, Complainant's employment was terminated "with no discussion, notwithstanding her request for a short extension to determine a return to work date in consultation with her health care providers."

explained that Complainant was being terminated because she had not returned to work by December 21 and had not provided a definite return to work date. Respondent then terminated Complainant by letter dated December 29, 2009.

The Commission has repeatedly recognized that an extension of a leave of absence is an appropriate reasonable accommodation depending upon the circumstances. See Santagate v. FSG, LLC, 36 MDLR 23, aff'd, 39 MDLR 135 (2014); Laing v. J.C. Cannistraro, LLC, 37 MDLR 85 (2015); Carta v. Wingate Healthcare, Inc., 38 MDLR 117 (2016). While it may not be reasonable for an employee's leave to be indefinitely extended as an accommodation, "[a] request for a limited extension, setting a more definite time for the employee's return to work, may, however, constitute a reasonable accommodation, under the ADA as well as G. L. c. 151B, § 4 (16), based on the circumstances." Russell v. Cooley Dickerson Hospital Inc., 437 Mass. 443, 455-456. (2002). Importantly, the Hearing Officer recognized there was no evidence presented showing that a limited extension of Complainant's leave of absence would have created an undue burden to its operation. We find no error with the Hearing Officer's determination that Complainant's request for an accommodation was a request for a short extension of her leave of absence to obtain a more definitive prognosis and return to work date and a reasonable request in these circumstances.

Moreover, employers have an obligation to engage in the interactive process to discuss possible reasonable accommodations with an employee who has requested an accommodation. Hall v. Department of Mental Retardation, 27 MDLR 235 (2005). See also Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 217, aff'd, 26 MDLR 2016 (2004)("an employer is required to engage in an open and ongoing dialogue or "interactive process" with a qualified handicapped individual about providing a reasonable accommodation."); Sabella v. Boston Public Schools, 27

MDLR 90, aff'd, 28 MDLR 93 (2005) (unilateral refusal to consider requested accommodation of job-sharing, revocation of an accommodation, and unwillingness to investigate possible reasonable accommodations is contrary to Respondent's lawful obligation to engage in an interactive dialogue with Complainant). Respondent failed in its obligation to engage in the interactive process when it unilaterally terminated Complainant's employment without investigating possible accommodations and engaging in an interactive process. If Respondent did not believe that Complainant's request was a reasonable accommodation they had an obligation to work with her to try and determine if a reasonable accommodation was feasible. See Sabella v. Boston Public Schools, 27 MDLR 90, aff'd, 28 MDLR 93 (2005) ("The Commission has broadly construed an employer's obligation, once it knows or reasonably should know that an employee needs an accommodation, to search out and define what it could do to reasonably accommodate the employee and to communicate the offer to the employee."). The Hearing Officer found that Complainant's request for an accommodation was reasonable and that Respondent "rather than engage in an interactive dialogue about the feasibility of extending the leave for a few more weeks, Respondent arbitrarily terminated Complainant's employment by letter dated December 29, 2009." Notably, the Hearing Officer also recognized that, "If by mid-January, the time frame Complainant indicated she hoped to return, she had no definitive prognosis for improvement and no date certain to return to work, Respondent's obligation to continue providing further accommodation would more likely have ceased." We find no error of law in the Hearing Officer's determination concerning the Respondent's failure to comply with its obligation to engage in the interactive process.

Respondent also contends that the Hearing Officer erred in denying Respondent's Motion to Admit Certain Deposition Testimony of the Complainant after the public hearing was

completed. We disagree. Complainant's deposition transcript was available at the public hearing, and Respondent could have used sections of Complainant's deposition to try and impeach her testimony. The Respondent did not move to enter the deposition in part or in its entirety into evidence during the hearing. Although the Commission may afford parties, after a showing of good cause, an opportunity to file evidentiary documents or exhibits after the close of the hearing; the Complainant's deposition was available to Respondent at the time of the hearing, Respondent failure to introduce the deposition transcript into evidence at the hearing does not constitute good cause. Further, admission of the deposition transcript without an opportunity for the Complainant to testify about its substance would have been prejudicial to the Complainant. We find that the Hearing Officer's decision not to allow this evidence to be admitted post hearing was neither arbitrary nor capricious nor an abuse of discretion.

Respondent avers that the emotional distress damages award is not supported by sufficient evidence. 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 of discrimination. 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. Also, an award of damages may be based on a complainant's own credible testimony. Stonehill College, at 576. The Hearing Officer awarded Complainant $50,000 in damages for emotional distress, basing her decision on the credible testimony of Complainant, Complainant's husband, and Complainant's therapist. The Hearing Officer also relied on the Complainant's therapy records. The Hearing Officer concluded, based

on this evidence that Complainant's postpartum depression was exacerbated by her termination, Respondent's actions caused Complainant's depression to worsen, and Complainant's depression continued for several months. We find substantial evidence in the record to support the Hearing Officer's award of emotional distress damages and decline to alter her award.

ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorney's Fees and Costs on February 21, 2017, along with an affidavit and invoices.[2] Respondent filed an opposition to this petition contending that Complainant Counsel's affidavit alone is not enough to satisfy the burden of establishing his requested rate. Complainant's Petition seeks attorneys' fees in the amount of $27,917.50 and costs in the amount of $1,768.79. The total amount of fees sought represents a total of 85.9 hours of compensable time at an hourly rate of $325. We determine that the hourly rate sought by Complainant's petition is consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases. The petition is supported by time records noting the amount of time spent on tasks and an affidavit of counsel. The affidavit of counsel avers that he has 25 years of experience in litigating civil matters and employment cases on behalf of employees. It also avers that he was approved for an hourly rate of $325 per hour in Hampden Superior Court in November 2016 following a successful gender discrimination/retaliation case.

M.G.L. c. 151B allows complainants to recover reasonable attorneys' fees for the claims on which Complainant prevailed. The determination of whether a fee sought is reasonable is

[2] 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.

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. 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 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 time records, reveal a fair accounting of the work he performed in furtherance of Complainant's case. Complainant also seeks costs in the amount of $1,768.79 for deposition transcripts, copying, and mailing, which were sufficiently documented. Accordingly, we grant Complainant's Petition and award attorneys' fees in the amount of $27,917.50 and costs in the amount of $1,768.79, for a total sum of $29,686.29.

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. Respondent immediately cease and desist from discriminating on the basis of disability by adhering to any policy that limits disability medical leaves to FMLA requirements. Respondent shall adopt a policy for determining reasonable accommodations for disabilities that facilitates an interactive dialogue with employees who seek accommodations for disabilities and provides for individual assessments in each case where accommodation is sought.
2. Respondent pay to Complainant, Amanda LaPete, the sum of $50,000 in damages for emotional distress with interest thereon at the statutory 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. Respondent pay to Complainant, Amanda LaPete, the sum of $12,197.57 in damages for back pay with interest thereon at the statutory 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.
4. Respondent pay to Complainant, Amanda LaPete, the sum of $29,686.29 in attorney's fees and costs with interest thereon at the rate of 12% per annum from the date on which judgment entered until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
5. Respondent shall conduct an initial training on unlawful discrimination on the basis of disability and the provision of reasonable accommodations for all managers and supervisors it employs at any and all of its facilities in the Commonwealth of Massachusetts. With respect to such training:

a. Each training session for managers and supervisors must be at least three (3) hours in length. All managers and supervisors, employed in the Commonwealth of Massachusetts shall be required to attend the initial training. No more than 25 persons may attend each training session. Country Bank for Savings shall repeat this training once each calendar year for the next five years for all new supervisors and managers who were hired or promoted after the date of the initial training session.

b. Within 30 days of the receipt of this decision, Country Bank for Savings shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training.

c. Within one month after the completion of the training, Country Bank for Savings must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

d. In the event that Country Bank for Savings is sold, or taken over by new management, any and all successor purchasers, assignees, managers, or operators of the former Country Bank for Savings (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

1. The majority of the managers and supervisors employed by Country Bank for Savings as of the date of this decision continue to work for the new owners as of the succession date;
2. The majority of Country Bank for Savings' governing board (e.g., board of directors, trustees) as of the date of this decision continue to serve on the new owner's board as of the succession date;
3. The new owners are relatives of Country Bank for Savings, or previously employed by Country Bank for Savings as a manager or supervisor; or,
4. Country Bank for Savings continues to retain an interest in the successor entity.

For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

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 22nd day of June, 2020

Sunila Thomas George
Commissioner

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner