COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JEFFREY MAY,
Complainants

v. DOCKET NO. 16BPA01670

THE PARISH CAFE, INC. and
FACTOTUM TAP ROOM, INC.,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty Waxman in favor of Complainant, Jeffrey May ("Mr. May"). Following an evidentiary hearing, the Hearing Officer found the Parish Cafe and Bar liable for sexual orientation discrimination in violation of M.G.L. c. 272, § 98, and ordered training at both of its locations bearing that name, although without formal recognition of the two corporate entities associated with both locations. The Hearing Officer awarded Mr. May $25,000.00 in emotional distress damages with 12% interest per annum. The Parish Cafe appeals to the Full Commission. Commission Counsel prosecuted this matter and filed a petition for attorney's fees and costs in the amount of $14,846.19, which the Parish Cafe opposed.[1] For the reasons discussed below, we affirm the Hearing Officer's decision and award attorney's fees and costs requested by Commission Counsel. Additionally, the complaint is amended consistent with the Hearing Officer's factual findings and conclusions of law, clarifying the issue of the joint and several liability of the named entities.

[1] Since the petition for attorney's fees and costs was filed pursuant to 804 CMR 1.00 (1999) et seq., the Full Commission determined the reward. Cf. 804 CMR 1.12(19) (2020).

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), 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, §§ 3 (6), 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(10) (2020).

LEGAL DISCUSSION

Places of public accommodation are liable for unlawful discrimination under M.G.L. c. 272, § 98 for the actions of an agent who acted within the scope of their actual or apparent authority. Sahir v. 2 Belsub Corp., 40 MDLR 81, 84 (2018). See also Brooks v. Martha's

Vineyard Transit Auth., 433 F. Supp. 3d 65, 73 (D. Mass. 2020) (recognizing the MCAD's long history of enforcing M.G.L c. 272, §98 on the theory of vicarious liability). In order to establish a prima facie case of discrimination in a place of public accommodation claim, complainant must demonstrate that they were: (1) a member of a protected class; (2) denied access, restricted, or treated differently from others not in their protected class, and (3) in a place of public accommodation. Poliwczak v. Mitch's Marina and Campground, et al., 33 MDLR 133, 136 (2011). Once a prima facie case has been established, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for their conduct that is supported by credible evidence. See Abramain v. President & Fellows of Harvard College, 432 Mass. 107, 116-17 (2000). Should respondent satisfy this stage, the burden shifts back to the complainant to show, by a preponderance of evidence, that respondent's articulated reason(s) are pretextual. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001).

Mr. May's membership in a protected class is not disputed; neither is it disputed that the Parish Cafe is a place of public accommodation, or that the conduct giving rise to liability in this case was that of one of its agents. The conduct in question occurred during an incident between Mr. May, who was a patron dining on the outdoor patio at the South End location of the Parish Cafe in the evening on May 28, 2016, and Michael Thompson, a door attendant for the Parish Cafe who was posted at the front door of the restaurant that night. As determined by the Hearing Officer, Thompson denied Mr. May full access to the restaurant on the basis of sexual orientation when he used homophobic slurs while refusing to let Mr. May enter the restroom. The Parish Cafe appeals the decision on the grounds that the Hearing Officer's findings were arbitrary and capricious and based on errors of law. Specifically, the Parish Cafe argues that the Hearing Officer's decision was arbitrary and capricious because she: (1) disregarded Mr. May's

contradictory statements about whether he used the restroom after the initial discriminatory incident; (2) disregarded Mr. May's uncredible testimony about his bruising; and (3) disregarded Mr. May's uncredible testimony about his call to Naomi Boran, the bar manager at the Parish Cafe's Boylston Street location, after the incident. The Parish Cafe also argues that the Hearing Officer erred: (4) in drawing a negative inference against the Respondent when it did not call Thompson as a witness; (5) in drawing a negative inference against the Respondent because it did not review or preserve the video evidence of the incident; and (6) by drawing a negative inference while evaluating the general manager's testimony because she did not inform Detective Maloof about an additional witness. Finally, the Parish Cafe argues that the Hearing Officer's award of emotional distress damages is unsupported by substantial evidence, and the training order for Parish Cafe's Boylston Street location was issued in error because it is a separate entity and not a party to the matter. We address each of Respondent's arguments in turn.

First, Respondent points to Mr. May's contradictory statements in his letter to Peter Culpo on June 3, 2016 (that he was granted access to the restroom after the initial denial) and his testimony at the public hearing (that he never went to the restroom after the initial denial) as being problematic for two reasons: the contradiction hurts Mr. May's credibility, and Mr. May was never denied access to a place of public accommodation because he eventually got access to the restroom. As for the latter contention, even if Mr. May was eventually granted access to the restroom, the discriminatory act had already occurred when he was first denied access to the restroom.[2] Respondent cannot eliminate the injury Mr. May suffered by ultimately granting him access once that access was denied. See Cote v. First Class Taxi, 24 MDLR 205, 207 (2002)

[2] There is no dispute that Complainant was denied access to the restroom. The parties jointly stipulated that "at some point, the complainant went inside in an attempt to use the bathroom. As he approached the bathroom, the complainant was informed by doorman Mich[a]el Thompson that he could not use the bathroom."

(taxi company discriminatorily restricted access to its public services when it first refused to drive a disabled passenger with a guide dog before eventually acquiescing and driving them to their destination). Further, even if Mr. May got access to the restroom on his second attempt, he received discriminatory treatment in a place of public accommodation because he was treated differently than other patrons who were granted immediate access to the restroom and not subjected to homophobic slurs. See Dottin v. University of Massachusetts at Amherst, 22 MDLR 404, 406 (2000) (finding university liable when its food-service worker treated an African American student differently by making a racial slur at the school dining hall).

With regard to the issue of Mr. May's credibility, we defer to the Hearing Officer's findings as they are supported by substantial evidence in the record. The Hearing Officer specifically considered the conflicting testimony within the June 3, 2016 letter and discredited it. The Hearing Officer weighed the conflicting testimony against Mr. May's testimony about the incident, as well as corroborating testimony from Ryan Lovell, Mr. May's partner; Timothy Johnson, the waiter who was serving Mr. May; and Devon Leahy, the general manager. All agreed on the key facts: there was an altercation where Thompson physically led Mr. May out of the restaurant. Lovell also corroborated Thompson's homophobic comments. Most importantly, the June 3, 2016 letter and Mr. May's hearing testimony are unified in the key facts that he was verbally accosted by Thompson with homophobic comments when he attempted to use the restroom, and that Thompson physically led him out of the restaurant by his arm, denying him access to the restroom. Accordingly, the finding that Mr. May was denied access to the restroom is not arbitrary or capricious.

Next, the Parish Cafe argues that the Hearing Officer's decision was arbitrary and capricious because she discredited Mr. May's testimony about his arm bruising and his testimony

about Naomi Boran's homophobic comments but still believed other parts of his testimony. The Hearing Officer was entitled to find Mr. May credible in part. "The fact that the Hearing Officer discredited some of Complainant's testimony… does not render all of Complainant's testimony unworthy of credence." Anido v. Illumina Media, 35 MDLR 83, 84 (2013). Also, even if there is evidence contrary to the Hearing Officer's decision, "as long as there is substantial evidence to support the findings, [the Full Commission] cannot substitute our view of the facts." Bloomfield v. Massachusetts Department of Correction, 43 MDLR 11, 12 (2021), citing Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673 (2010). The Hearing Officer carefully considered Mr. May's testimony about his bruising and his call with Boran, the bar manager at Parish Cafe's Boylston Street location. She weighed it against the remainder of Mr. May's testimony and found Mr. May's account of what happened on the night in question credible. As explained above, there is a substantial amount of evidence that corroborates Mr. May's testimony about the key elements of the case. We find no error in the Hearing Officer's determination that Mr. May proved his prima facie case without the alleged bruising or homophobic comments from Boran, and despite discrediting Mr. May's testimony on those matters. Since the Hearing Officer is in the best position to judge the credibility of the witness and her decision is supported by substantial evidence, we will not disturb her decision.

Having determined that Mr. May has proved his prima facie case, we turn to the Parish Cafe's arguments with respect to whether it satisfied its burden to provide a legitimate, non-discriminatory reason for its conduct.

The Parish Cafe argues it met its burden based on evidence that the legitimate, non-discriminatory reason for Thompson's actions was that he mistakenly thought Mr. May was not a patron. It argues that the Hearing Officer should have credited and favorably weighed evidence

that Thompson denied Mr. May access to the restroom because Thompson did not know that Mr. May was a patron,[3] and instead, she erred by drawing a negative inference against it for not calling Thompson as a witness. The Parish Cafe also complains that the Hearing Officer unlawfully shifted the burden to the respondent because it is Mr. May's burden to prove discrimination. As established above, the Hearing Officer correctly determined that Mr. May proved his prima facie case. The Hearing Officer correctly shifted the burden of production to the Parish Cafe, and the Parish Cafe failed to call Thompson to testify as to his own perceptions on the night in question. The Hearing Officer did not err in drawing a negative inference under these circumstances. See Millenium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 644 (2010) (upholding negative inference drawn against LLC member who chose not to testify in his own defense in an abuse of process counterclaim when there was evidence that he had an improper motive for bringing suit). See also In Matter of a Care and Protection Summons, 437 Mass 224 (2002); Ravesi v. Naz Fitness Group, 37 MDLR 1 (2015).

The Parish Cafe argues it "made a decision not to drag Thompson further into the Complainant's world of untruths" because Thompson had "been terminated… and endured a criminal trial" and "[e]nough was enough." The Parish Cafe's purported sympathy for Thompson rings hollow where it terminated him at the start of his first shift after the May 28, 2016 incident for his "reliability, attitude, and judgment" as the Hearing Officer found. In any

[3] Respondent's evidence in support of this contention was as follows: Leahy's hearsay deposition testimony that Thompson told her that he thought Mr. May was not a patron; general character testimony from Leahy and Johnson that they had never heard Thompson use homophobic slurs before; and the fact that Thompson started working indoors after Mr. May had already been seated on the patio. The Hearing Officer weighed this evidence and determined it was not credible or persuasive as compared to Mr. May's testimony about Thompson's homophobic threats, level of hostility, and Mr. May's considerable history as a patron of Parish Cafe before the incident occurred. Moreover, Thompson presumably would have stopped every patio customer seated after his shift began who came in to use the bathroom, but he did not—at a minimum, Lovell was able to use the restroom prior to Mr. May's attempt without being denied access. We defer to the Hearing Officer's credibility determinations on these points and see no error with respect to the Hearing Officer's reasoning in weighing the evidence.

event, regardless of the reasons, the decision not to call Thompson was a strategic choice that ran the risk of a negative inference. By not calling Thompson, Mr. May's testimony about the May 28, 2016 incident stood unchallenged. When a respondent chooses not to provide testimony that presumably rebuts the complainant's case, a negative inference can be drawn. See Sahir, 40 MDLR at 84 (drawing a negative inference against respondent when co-respondent failed to appear and give what would have allegedly been contradictory testimony to the complainant).

The Parish Cafe also argues that the Hearing Officer should have considered Mr. May's hearing testimony rebutted because Thompson had already rebutted the allegations twice: once with Detective Maloof in July 2016 and once at his criminal trial. The MCAD proceeding is separate and distinct from a criminal investigation or criminal trial. Testimony at the criminal trial is not automatically admitted for the MCAD Hearing Officer to consider, nor did the Parish Cafe request to admit evidence in the form of transcripts of Thompson's criminal testimony or the police report. The Parish Cafe cannot claim that Thompson rebutted Mr. May's testimony when there was no testimony from Thompson at the public hearing. The Hearing Officer did not err in finding that Mr. May's testimony had not been credibly rebutted.

Next, the Parish Cafe argues that the Hearing Officer erred when she made a negative inference against it and Leahy because Leahy did not preserve the video evidence of the incident. It contends that because Mr. May waited more than three weeks to report the incident to Boston Police, there is no way it could have known about the need to preserve the video before that time, and its tapes are erased automatically after fourteen days. However, not only was Leahy present on the night the incident happened and therefore did not need to receive separate notice that an incident happened, other employees of the Parish Cafe had notice of the incident within fourteen days of its occurrence. On June 3, 2016, six days after the incident, Mr. May sent a letter to

Peter Culpo, owner of the Parish Cafe, complaining of discriminatory conduct. On June 7, 2016, ten days after the incident and four days before the video got erased, Chris Rogers, manager of the Boylston Street location, called Mr. May after reviewing the letter. His call confirms that Parish Cafe had notice before the video was erased that Mr. May had experienced discrimination at its facility. The Parish Cafe should have, at a minimum, reviewed and preserved the video evidence upon notice of the incident. Preserving the video evidence would demonstrate a commitment to serious inquiry into the matter, and allowing the destruction of the video after notice of the incident amounts to spoilation of evidence that could be relevant to potential litigation. For all of these reasons, the Hearing Officer was correct to draw a negative inference against Parish Cafe and Leahy for not preserving the surveillance video. See E.E.O.C. v. Ventura Corp., 2013 WL 550550 (D.P.R. 2013) (negative inference allowed when defendants failed to preserve email evidence when it knew of potential litigation); Testa v. Wal-Mart Stores, Inc., 144 F.3d. 173, 178 (1st Cir. 1998) (negative inference permitted when evidence was destroyed in compliance with corporate record-retention policy after it had notice of a potential suit).

Finally, the Parish Cafe argues that it produced a legitimate, non-discriminatory reason for denying Mr. May access through Leahy's testimony, but the Hearing Officer erred when she drew a negative inference with respect to evaluating Leahy's testimony because Leahy did not inform Detective Maloof about an additional witness, Timothy Johnson. The Parish Cafe contends that Detective Maloof did not conduct a thorough investigation, suggesting that he should have discovered Timothy Johnson on his own. However, the quality of Detective Maloof's investigation is irrelevant, and the Hearing Officer reasonably took into account Leahy's inaction. The record shows that Detective Maloof specifically asked Leahy for other

witnesses, and Leahy had firsthand knowledge of Johnson's involvement in the matter. The fact that Leahy chose to withhold Johnson's name under these circumstances supports a negative inference that she was not motivated to have the full story of what happened that night discovered. The Hearing Officer's assessment of Leahy's credibility is generally not to be disturbed, and her assessment was not in error for having drawn this inference. For this reason and others cited above, the Hearing Officer's finding that the Parish Cafe failed to provide a legitimate, non-discriminatory reason for Thompson's action is supported by substantial evidence.

Next, the Parish Cafe argues that the emotional distress damages award of $25,000 is not supported by substantial evidence, is contrary to law, and is an abuse of discretion because the Hearing Officer failed to consider the lack of evidence Mr. May offered as to any attempt to mitigate the pain and suffering from the discrimination when calculating the emotional damages award. We disagree. Awards for emotional distress damages must rest on substantial evidence of the emotional suffering that occurred and be causally connected to the unlawful discrimination. DeRoche v. MCAD, 447 Mass 1, 7 (2006); Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Factors to consider when 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, 447 Mass. at 7. While evidence of a complainant's attempt to mitigate the harm is one of the factors that should be considered, the lack of such evidence does not preclude an award of damages based on the other factors. Stonehill College, 441 Mass. at 576. An award of damages may be based on a complainant's own credible testimony. Stonehill College, 441 Mass. at 576. The Hearing Officer awarded Mr. May $25,000

in damages for emotional distress based on Mr. May and Lovell's credible testimony about how Mr. May's personality and lifestyle changed after the discrimination. Mr. May testified that as a result of the discrimination, he was not as social or outgoing. Lovell testified that this had become an "all consuming" event for Mr. May for two years. Accordingly, Mr. May testified that he continued to pursue this matter by writing a letter to Peter Culpo, calling Parish Cafe's Boylston Street location on June 7, 2016, calling again a few days later, contacting GLAD (a non-profit legal rights organization for GLBTQ individuals), sought counseling on one occasion, and filed the MCAD complaint. The Hearing Officer concluded that the incident appeared to have "festered with" Mr. May and that his actions demonstrate that they had a "significant impact" on Mr. May's dignity and self-esteem. We find that there is substantial evidence in the record to support the Hearing Officer's award of emotional distress damages and decline to alter his award.

Finally, we address the issue of corporate liability for the damages and affirmative relief in the form of training. The Parish Cafe argues that the Hearing Officer erred by ordering training for the owners and staff at the Boylston Street location of the Parish Cafe ("Boylston Street") because it is a separate legal entity from the South End location. According to the Massachusetts Secretary of State's website, Boylston Street's corporate name is The Parish Cafe, Inc. on 361 Boylston Street, Boston. The parties stipulated that the corporate legal name of the Respondent is Factotum Tap Room, Inc. d/b/a Parish Cafe and Bar on 493 Massachusetts Avenue, Boston ("South End"). In her decision, the Hearing Officer acknowledged the parties' stipulation, but left the caption undisturbed, specifically finding that "Respondent Parish Cafe and Bar has two Boston locations," with identical ownership at the time of the incident. She found facts illustrating that the two locations acted as one (discussed below) and ordered the

Parish Cafe and Bar (a presumptively singular entity) to pay damages to Mr. May, and to conduct training at both of its locations. The Hearing Officer thus treated the two locations as one for the purposes of liability on the basis of specific factual findings, although without engaging in the legal analysis supporting the conclusions.

The question of whether a corporate entity can be held liable is a question of law, which the Full Commission reviews de novo.[4] Based on the following analysis, we conclude that the Hearing Officer did not err in treating the Parish Cafe as a singular entity for the purposes of finding liability and ordering training at both of its locations. Considering, however, that the two Parish Cafe locations are technically separate corporate entities, the caption of this case is amended to include both entities, and it is clarified herein that the two entities are jointly and severally liable.

The seminal case in Massachusetts on corporate veil piercing between two corporations is My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614 (1968). The doctrine of corporate disregard is an "equitable tool that authorizes courts to pierce the corporate veil where necessary 'to provide meaningful remedy for injuries and to avoid injustice.'" Roughneen v. Bennington Floors Inc., 32 MDLR 197, 203 (2010), citing Hutchins v. Cardiac Science, Inc., 456 F.Supp.2d 173, 194 (D. Mass 2006).[5] We acknowledge that "corporate veils are pierced only in 'rare particular situations,' and only when an 'agency or similar relationship exists between the entities.'" Scott v. NG U.S. 1, Inc., 450 Mass. 760, 767 (2008), citing My Bread, 353 Mass. at

[4] The Full Commission review is akin to a judicial review under M.G.L. c. 30A § 14(7) which reviews any questions of law de novo. See Varona v. City of Boston, 22 MDLR 108, 109 (2000) (standard of review for Full Commission decision is per M.G.L. c. 30A and Commission's Rules of Procedure); City of Springfield v. Dep't of Telecommunications and Cable, 457 Mass. 562, 568 (2010) (holding agency's question of law is subject to de novo review).

[5] In Roughneen, an MCAD Hearing Officer determined that equity required the piercing of the corporate veil in a sexual harassment case to prevent principal owner from hiding behind corporate forms. See also Roughneen v. Bennington Floors Inc., 38 MDLR 48 (2016) (affirming the Hearing Officer's decision to pierce the corporate veil and relying on second path in My Bread).

619, 620. But where there is a "common control of a group of separate corporations that are engaged in a single enterprise," failure to make clear which corporation is acting in a particular situation or a failure to observe with care the formal barriers between the corporations warrants disregard of the separate entities in order to prevent gross inequity. My Bread, 353 Mass. at 620.

My Bread offers two ways in which a corporate veil may be pierced. The first is where the representatives of one corporation exercise "some form of pervasive control in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship." My Bread, 353 Mass. at 619. The other way is "when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting." Id. There is evidence in the record with respect to both paths.

In addition to the two paths in My Bread, there are also twelve factors from Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc., 754 F.2d 10, 15-16 (1st Cir. 1985) that can be considered as part of the piercing analysis: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity, assets, or management; (4) thin capitalization; (5) nonobservance of corporate records; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud." Evans v. Multicon Const.Corp., 30 Mass.App.Ct. 728, 733 (1991). No factors are dispositive and not all factors have to be met. OMV Associates, L.P. v.

Clearway Acquisition, Inc., 82 Mass.App.Ct. 561, 567 n.4 (2012) (noting factors are not a matter of counting but for forming an opinion whether the overall corporate structure is misleading).

The Hearing Officer specifically found that Respondent Parish Cafe had two different locations, Boylston Street and South End, as evidenced by common ownership. She relied on the Employee Handbook submitted by the Parish Cafe in finding that, as of May 2016, the Cafes were owned by Gordon Wilcox, Peter Culpo, Sean Simmons, and Elaine Harrington. Furthermore, the Employee Handbook lists "Parish Cafe 361 Boylston Street, Boston, MA 02127" as the Parish Cafe address (i.e., not the South End address) and has rules, policies, safety plans, and a detailed training guide for the employees. The Boylston Street and South End locations are not truly separate entities where the Parish Cafe submitted the Boylston Street location's employee handbook as the handbook for the South End location. The detailed guide laid out in the Employee Handbook shows that the Boylston Street location was the original location and had significant influence and pervasive control over how the second location was run.

Moreover, after reviewing the website for Massachusetts corporations, Mr. May sent his letter to the Boylston Street location addressed to Peter Culpo, Gordon Wilcox, Elaine Simmons, and Sean Simmons, so Mr. May also clearly believed the two Cafes to be linked. From there, neither location made it clear to Mr. May which one was responding to him or any corporate barriers between the two locations. In response to the letter, Boylston Street's manager, Chris Rodgers, not the South End's manager, responded. The Hearing Officer found that Chris Rodgers, rather than denying any relationship between the two Cafes, invited Mr. May with his friends and family to Boylston Street for a meal "on us" in compensation for what happened at the South End location. If the two locations were truly separate corporate entities, Rodgers

would not have offered to compensate Mr. May on Boylston Street's dime. The Boylston Street location's willingness to compensate a dissatisfied customer of the South End location is significant, and is substantial evidence of an agency or partnership between the two entities, whether a matter of pervasive control or "a confused intermingling of activity… with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting." My Bread, 353 Mass. at 619. When Mr. May called the Boylston Street location again a few days later, Boylston Street's bar manager, Naomi Boran, similarly agreed to pass a message onto Peter Culpo rather than saying they have nothing to do with the South End location—further indication that the two corporate entities operated as one.

This Hearing Officer's conclusion is further supported by significant undisputed supplemental evidence in the record that the two restaurants were operated as one. When the incident occurred, the managers from both locations talked in a meeting about the original incident, Thompson's termination, Mr. May's letter, and his two calls to Boylston Street. The owner, Gordon Wilcox, instructed Boylston Street's manager, not South End's manager, to call Mr. May after getting the letter. After Mr. May's second call, Wilcox again gave instructions to Boylston Street's manager instead of directly to South End's manager. The two restaurants had joint manager meetings every other Wednesday, had the same security camera system, had the same Mug Club award program for members who drank 125 beers in six months, transferred employees between restaurants, had the same menu and beers available at both restaurants, had similar cross-training for door attendants across the restaurants, and had rules that kept things uniform between the two restaurants about "how we serve, how we plate… where salts and peppers go… all set from one restaurant to another, [the owners] wanted it to be the same."

Having established that the Boylston Street location had a pervasive influence on the South End location, we turn to look at the influence the corporate relationship had on Mr. May's injury. The two Cafes shared the same employee handbook, had the same security camera system, and had their door attendents similarly trained. Mr. May was injured by the door attendant's lack of proper training. As made obvious from the Parish Cafe's response to the incident, there is no standard operating policy for how to respond to a discrimination complaint. There was no policy to do an immediate and thorough investigation when a discrimination complaint was raised. Similarly, there is no policy to review and preserve video footage from the security camera when a discriminatory incident happens, or when a complaint is filed. Parish Cafe's lack of policies and inaction harmed Mr. May and exacerbated his injury when there was no proper investigation done, and security footage was not preserved. Accordingly, there was some injury to Mr. May as a result of the corporate relationship, and significant influence of the Boylston Street location over the South End location. The Parish Cafe also meets multiple factors under the twelve-factor test as it has common ownership, pervasive control as established above, confused intermingling of business activity as noted, and the use of Boylston Street's employee handbook at South End denotes a nonobservance of separate corporate records. For all of the foregoing reasons the corporate veil can be pierced in order to provide a meaningful remedy for injuries and to avoid injustice.

The foregoing conclusion stems from a review of the entire record in order to determine whether there is substantial evidence in support of the Hearing Officer's finding that the Respondent Parish Cafe had two locations. See Hotchkiss v. State Racing Com'n, 45 Mass.App.Ct. 684, 701 (1998) (noting substantial evidence "review involves consideration of the entire record, not merely selected portions thereof), citing New Boston Garden Corp. v.

Assessors of Boston, 383 Mass. 456, 466 (1981). In her findings, the Hearing Officer noted the joint employee handbook, common ownership, Boylston Street management's responsiveness to Mr. May's letter and call, Boylston Street's offer to compensate Mr. May, and Boylston Street's failure to distinguish itself from South End to Mr. May. Beyond that, there is undisputed supplemental evidence in the record from the Parish Cafe of joint managers meetings, the owner's instructions to the Boylston Street manager to respond to the incident, same Mug Club, same security system, same menu, transference of employees, cross-training of door attendants, and uniform rules for the staff. Clearly, there is substantial evidence to support the Hearing Officer's finding that the Parish Cafe had two locations.

Moreover, we do not assign error to the Hearing Officer for failing to engage in the corporate veil piercing analysis or making additional, related subsidiary findings considering that the Parish Cafe consistently held itself as one entity with two locations throughout the entire investigative and adjudicatory process. The joint stipulation only notes that the proper name of the respondent was Factotum Tap Room, Inc. d/b/a The Parish Cafe and Bar in the South End. The stipulation makes no mention of the second legal entity for the second location. In fact, the entire record is devoid of any mention of the Boylston Street location being incorporated under a different legal entity except a single footnote in Parish Cafe's post-hearing brief. Instead, the entire record of the two-day hearing is littered with the Parish Cafe referring to itself as having two locations. Parish Cafe's own attorney began his opening statement by saying that the "Parish Cafe currently operates two restaurants. Parish Cafe I is located in the Back Bay at 361 Boylston Street. Parish Cafe II is situated in the South End at 493 Massachusetts Avenue."[6]

[6] Counsel did immediately then say that the "sole respondent" was Factotum Tap Room, Inc., but without indicating whether Boylston Street had separate corporate ownership. From there, the two locations were then treated throughout the proceeding as "the Parish Cafe."

One of its employees, Neel Schmoll, even used counsel's "Parish Cafe I" and "Parish Cafe II" labels in his testimony. The Parish Cafe called witnesses from Boylston Street even though it argues the claims have nothing to do with the Boylston Street location.[7] In short, there is almost nothing in the record suggesting to the Hearing Officer that there might be two separate legal entities and not two locations both operating under the Factotum Tap Room, Inc. d/b/a the Parish Cafe and Bar; to the contrary, the weight of the record evidence and respondent's own actions gave the Hearing Officer good reason to believe there was no need to address any corporate divide. Thus, the depth of the Hearing Officer's findings and conclusions with respect to liability of both locations cannot be faulted where the Parish Cafe insisted on pushing the narrative of one company with two locations, after an opaque and isolated, last-minute stipulation as to corporate identification. The stipulation appears to be a thin attempt to avoid joint and several liability, and based on all the facts found by the Hearing Officer as well as the additional undisputed, uncontradicted evidence in the record, we find that that there is substantial evidence to support the Hearing Officer's finding that Respondent had two locations, one at Boylston Street and the other in the South End.

Pursuant to 804 CMR 1.15(2) (2020),[8] the Commission may *sua sponte* make a joinder or amendment of the parties at any time as justice or convenience may require. The Commission is within its authority to add the Boylston Street location as a respondent in furtherance of its mission to eradicate discrimination in the Commonwealth. See Poliwczak, 38 MDLR at 150-51.

[7] The Parish Cafe continues to sow confusion with respect to corporate identity even into this appeal, because the supposedly separate corporate entity of Factotum Tap Room, Inc., is advocating for the dismissal of that part of the hearing decision ordering training for employees of another supposedly separate corporate entity, the Parish Cafe, Inc. If the Parish Cafe, Inc. was truly a separate corporate entity, it could have intervened and filed its own petition for review requesting relief from the Hearing Officer's decision. See 804 CMR 1.23(2)(b) (2020). Instead, the advocacy by one entity on behalf of the other belies the claim that they are actually separate, in addition to supporting the point, infra, that insofar as the Parish Cafe, Inc. is a technically separate entity, it has had notice of the claim against it from the filing of the complaint through the appeal of the hearing decision.

[8] 804 CMR 1.09(2) (1999), in effect of the time of the public hearing, allows for the same.

The Commission is empowered to fashion equitable remedies designed chiefly to protect and promote the broader public interest in eradicating systemic discrimination. See, e.g., Chief Justice for Admin. & Mgt. of the Trial Court v. Massachusetts Comm'n Against Discrimination, 439 Mass. 729, 736-737 (2003). Even though the South End location has since been closed, the Boylston Street location is still in operation with the same owners doing the same kind of business. It is imperative that the owners not hide behind corporate forms and ensure that all their employees and business receive anti-discrimination training and stop discrimination from happening within their doors.

Further, the added Respondent, the Parish Cafe, Inc., has had notice of this claim and participated meaningfully in its defense throughout the investigation, conciliation, and public hearing. Mr. May made specific allegations against it, separate from the South End location, when he alleged that its bar manager, Naomi Boran, made verbal homophobic comments against him, so the Parish Cafe, Inc. was aware that it was potentially liable from the outset. As found by the Hearing Officer, not only did the two locations have the same owners, but they have conceded notice and participation by acting throughout this matter as one entity. In response to Mr. May's complaint, the Parish Cafe, not Factotum Tap Room, Inc., filed a Position Statement signed under the pains and penalties of perjury by Respondent's authorized representative.[9] The Position Statement clearly states that "Parish Cafe currently operates two restaurants. Parish Cafe I is in the Back Bay at 361 Boylston Street and Parish Cafe II is situated in South End at 493 Massachusetts Avenue." Chris Rodgers, General Manager for the Boylston Street location, attended the mandatory conciliation on behalf of the Respondent. Counsel for Respondent filed

[9] The Parish Cafe's Position Statement was not part of the public hearing record, "but the Commission takes judicial notice of its own records (see, e.g., Dwight v. Dwight, 371 Mass. 424, 426 (1976)." Quinones v. Zamani, 44 MDLR 25, 25 (2022).

his notice of appearance for "Parish Cafe" at the start of the case and never amended it. "Parish Cafe" remained the named respondent throughout the investigation, conciliation, discovery, and certification. It is only at the public hearing that the parties first submitted a joint stipulation asserting that the legal name of the Respondent was something else. Despite that assertion, Respondent Factotum Tap Room, Inc., tellingly objects to the training order directed at the Parish Cafe Inc., on appeal to the Full Commission, thus representing the interests of both locations even after asserting independence. For all of these reasons, it is proper to add the Parish Cafe Inc. as a respondent for the purpose of clarifying the Hearing Officer's Order and making it explicit that the two entities are jointly and severally liable for the damages and training obligation. See Poliwczak, 38 MDLR at 150-51 (Full Commission affirming decision of hearing officer to add business partners as respondents after public hearing when partners were involved in business operations, had notice of the allegations from when the complaint was filed, and submitted a signed Position Statement in response to the Complaint).

ATTORNEY'S FEES REQUEST

Chapter 151B, § 5 allows prevailing complainants to recover reasonable attorney's fees. Commission Counsel filed a Petition for Reasonable Attorney's Fees and Costs on August 10, 2018, along with affidavits, invoices, and contemporaneous billing records. The petition seeks to recover fees in the amount of $14,761.67 for 45.42 hours of work performed by Attorney Cassidy at an hourly rate of $340 and $84.52 in costs.[10]

Respondent objects to the award because attorney's fees and costs were not awarded by the hearing officer and not requested in Mr. May's post-hearing brief, because Mr. May was not

[10] Attorney Cassidy reduced her hourly rate in half for the hours spent observing and assessing the testimony of the witnesses in the criminal trial of Michael Thompson.

represented by counsel at any stage, because Attorney Cassidy prosecuted the case for the Commission in the course of her employment as a salaried employee, and because Respondent believes that Commission Counsel's fees should be deducted from the prevailing complainant's award.

Chapter 151B, §5 states that "the commission *shall* award reasonable attorney's fees and costs to any *prevailing* complainant" (emphasis added). Since not all complainants receive attorney's fees, the Commission expects the complainant to submit a request for attorney's fees after they have prevailed, not before in their post-hearing brief as Respondent argues, which the hearing officer then decides. This process also allows respondents to only oppose fee requests after the complainant has prevailed and not waste resources on opposing fee requests submitted in a post-hearing brief in cases where respondent would have prevailed. See 804 CMR 1.12 (19) (2020). This was the same under the previous version of the Commission's procedural regulations where the Commission expected the complainant to submit their request for attorney's fees only once they prevailed, which was then decided by the Full Commission. Since 804 CMR 1.00 (1999) et seq. was in effect at the time of the request for attorney's fees, the Full Commission is determining this award rather than the hearing officer.

Chapter 151B, §3 (15) allows for the Commission to "retain reasonable attorney's fees and costs awarded to a prevailing complainant, under section 5, when one of its attorneys presents the charge of discrimination before the commission on behalf of the prevailing complainant." Accordingly, the Commission is unequivocally entitled to attorney's fees and costs when one of its attorneys prosecutes a case.

Further, it is well-established that attorney's fees and costs allowed by statute are awarded in addition to the compensatory damages awarded, often to serve as a deterrent for the

underlying misconduct. See School Committee of Norton v. MCAD and Mary-Ann Woodason, 63 Mass.App.Ct. 839, 854 (2005) (upholding significant attorney's fees award as such awards have a "deterrent impact" on discrimination cases and provide incentive for complainant's attorneys). See also M.G.L. c. 12, §11I (Massachusetts Civil Rights Act); M.G.L. c. 62F, §7 (Taxpayer Suits); M.G.L. c. 93A §11 (Consumer Protection Act); and M.G.L. c. 149, §150 (Massachusetts Wage Act).

Accordingly, we reject Respondent's arguments opposing the attorney's fees and costs and turn to determine if the fees requested are reasonable. 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. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). The Commission has adopted the lodestar methodology for fee computation. Id. 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).

The party seeking fees has a duty to submit detailed and contemporaneous time records to document the hours spent on the case. Denton v. Boilermakers Local 29, 673 F. Supp. 37, 53 (D. Mass. 1987); Baker, 14 MDLR at 1097.

Commission Counsel's request for fees and costs is supported by an affidavit of counsel and contemporaneous detailed time records noting the amount of time spent on each task. Based upon the record in this matter, we believe that this figure represents a good value for a public accommodation case which presented disputed issues of fact at a one-day public hearing. With regard to the hourly rate, we find that the rate requested by the Commission Counsel is reasonable and is consistent with the usual and normal rate for attorneys at her level of experience practicing in public interest law at the time the services were performed.

Based on the above, Respondent is hereby ordered to pay the Commission Counsel the amount of $14,761.67 in attorney's fees and $84.52 in costs.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety. Respondent's appeal to the Full Commission is hereby denied. It hereby ordered that:

1) Both Parish Cafe locations shall immediately cease and desist from engaging in acts of discrimination based on sexual orientation;
2) Both Parish Cafe locations, jointly and severally, are to pay Complainant Jeffery May the sum of $25,000.00 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) Both Parish Cafe locations, jointly and severally, are to pay to the Commonwealth attorney's fees and costs in the sum of $14,846.19 with interest thereon at the statutory rate of 12% per annum from the date the request for attorney's fees and costs 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
4) Both Parish Cafe locations' owners and staff are directed to attend an MCAD-sponsored training pertaining to sexual discrimination within ninety (90) days of this order and provide documentation of their attendance.

This Order represents the final action[11] of the Commission for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Any party aggrieved by this Order may challenge it by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Failure to provide a copy of the transcript may preclude the aggrieved party from alleging that the Commission's decision is not supported by substantial evidence, or is arbitrary or capricious, or is an abuse of discretion. Such action must be filed within thirty (30) days of service of this Order and must be filed in accordance with M.G.L. c. 151B, § 6, M.G.L. c. 30A, and Superior Court Standing Order 1-96. Failure to file a

[11] The Full Commission will ordinarily delay the issuance of a final action for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A to allow a prevailing complainant time to file a petition for attorney's fees incurred as a result of litigating the appeal to the Full Commission. See 804 CMR 1.23(12) (2020) (complainant who "prevails in an appeal" to the Full Commission has fifteen days to file petition for attorney's fees after issuance of Full Commission decision) and 804 CMR 1.23(12)(e) (2020) (the Full Commission decision on complainant's petition for attorney's fees, together with the decision deciding the appeal constitutes the final order of the Commission for purposes of judicial review). No such delay is warranted here because neither Mr. May nor Commission Counsel intervened in the Respondent's petition for review and thus did not incur any costs "as a result of litigating the appeal" as required to file a petition for attorney's fees under 804 CMR 1.12(c) (2020). Without incurring fees resulting in a prevailing argument, a complainant is not entitled to supplemental attorney's fees after issuance of a Full Commission decision under 804 CMR 1.12 (2020).

complaint 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 and M.G.L. c. 30A.

SO ORDERED[12] this 20th day of June, 2023.

Neldy Jean-Francois
Commissioner

Monserrate Rodríguez Colón
Commissioner

[12] 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).