COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SOMAIRA OSORIO,
Complainants

v. DOCKET NO. 15-BEM-01365

STANDHARD PHYSICAL THERAPY,
VINCENT BULEGA, AND
ROBERTSON TAMBI
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty Waxman in favor of Complainant, Somaira Osorio ("Ms. Osorio"). Following an evidentiary hearing, the Hearing Officer found Standhard Physical Therapy, Vincent Bulega, and Robertson Tambi ("Respondents") liable for sexual harassment in violation of M.G.L. c. 151B, § 4(16A) and retaliation in violation of M.G.L. c. 151B, § 4(4). The Hearing Officer also found Respondents Bulega and Tambi individually liable in violation of M.G.L. c. 151B, §§ 4(4A), (5). The Hearing Officer awarded $3,200.00 in lost wages and $50,000.00 in emotional distress damages with 12% interest per annum. Respondents appealed to the Full Commission. Ms. Osorio requests attorney's fees and costs in the amount of $18,655.32. For the reasons discussed below, we affirm the Hearing Officer's decision and grant Ms. Osorio a reduced amount for attorney's fees and costs.

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); 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). 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

On appeal, Respondents argue that the liability determinations for sexual harassment and retaliation are unsupported by credible evidence because the Hearing Officer should have believed Respondents' witnesses, and discredited Complainant's testimony. Respondents argue

that there was no causal connection between the protected activity and the adverse action to support the finding of retaliatory termination, and that the Hearing Officer failed to consider the nature of their business and how it influenced their decision to terminate Complainant's employment. Respondents also take issue with the Hearing Officer's award of emotional distress damages, arguing that it is similarly unsupported by substantial evidence.

Respondents first argue that the Hearing Officer erred in finding them liable for sexual harassment, and that the finding is not supported by credible evidence. Chapter 151B, § 4(16A) specifically prohibits sexual harassment of an employee by an employer or its agents, and M.G.L. c. 151B, § 1(18) defines sexual harassment as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when... such advances, requests, or conduct have the purpose or effect of unreasonably interfering with an individual's performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." In order to prevail on her hostile work environment claim, Complainant had to show that the alleged sexual harassment was subjectively and objectively offensive and that it was sufficiently severe or pervasive to interfere with a reasonable person's job performance. Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 296 (2016). For conduct to satisfy the severe or pervasive element of a sexual harassment hostile work environment claim, the conduct must be "so severe or pervasive as to alter the conditions of [the complainant's] employment and create an abusive working environment." Faragher v. Boca Raton, 524 U.S. 775, 786 (1998) (internal quotation marks and citations omitted). "The determination as to whether a particular work environment is hostile requires a factual inquiry into all of the circumstances, including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating or merely an offensive utterance." Perotta v. Rivkind, Baker, & Braverman, 24

MDLR 30, 33-34 (2002). See also Candeliere v. Vanson Leathers, Inc., 24 MDLR 228 (2002); Faragher, at 787-788.

The Hearing Officer found that Respondent Bulega's conduct over a 13-month period, including physical smacks and touches under the bra and dress, along with offensive comments, advances, and requests, was both objectively offensive and subjectively offensive to Ms. Osorio. Additionally, the Hearing Officer credited Complainant's testimony that she heard moaning in a separate part of Respondents' office, leading her to discover Respondents Tambi and Bulega watching pornographic videos together. The Hearing Officer believed Complainant's testimony about what happened to her at work, and thoroughly explained her determination that Complainant's testimony was credible because it was clear, sincere, straightforward, and consistent, even under cross-examination. Nothing in the record other than the uncredited testimony from Respondents (which the Hearing Officer found to be "wandering and obfuscating") undermines Complainant's account, and we will not disturb that determination. Further, the conduct detailed by Complainant was clearly of a sexual nature, unwanted, and objectively offensive. For all of these reasons, the determination of a sexually hostile work environment is supported by substantial evidence and legally sound.

Next, Respondents argue that the Hearing Officer erred by concluding that they retaliated against Complainant when they terminated her employment. In order to prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondents were aware that she had engaged in protected activity; (3) Respondents 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). If Complainant establishes a prima facie case of retaliation, the

burden shifts to Respondents to show legitimate, non-retaliatory reasons for their termination of Complainant. Mole, at 591. Finally, if Respondents meet their burden, Complainant must prove by a preponderance of the evidence that the Respondents acted with retaliatory intent, motive, or state of mind. Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001).

The Hearing Officer carefully followed the burden-shifting framework and considered Respondents' proffered legitimate reasons for the termination. The Hearing Officer determined such reasons were pretextual based on the suspicious timing of the termination which occurred the day after Complainant's sexual harassment complaint, an inadequate investigation done by an interested party, and inconsistency in the reasons given for the termination. Respondents argue on appeal that the Hearing Officer erred in making that determination because Complainant's conduct of handing out of fliers at work justified her termination given the nature of their business, and the decision to terminate her for this conduct was made before she engaged in protected activity.

However, the Hearing Officer considered these factors and discredited them. Specifically, the Complainant was terminated on February 17, 2015, just one day after she complained to Respondent Tambi, on February 16, 2015, that Respondent Bulega sexually harassed her. Respondent Tambi testified that he prepared and brought a termination letter based on the flier issue to the February 16, 2015 meeting without any knowledge of the alleged sexual harassment but failed to give the letter to Complainant or otherwise inform her that her employment was terminated prior to her leaving the meeting. The Hearing Officer did not credit this testimony. In considering the termination letter, the Hearing Officer relied on the fact that Respondent Bulega testified that he had known about the fliers at least a month prior to the February 16, 2015 but had not taken any disciplinary action. His testimony contradicted the

termination letter which said Respondents are taking "immediate" termination action upon learning of Ms. Osorio's marketing activities. This contradiction puts the sincerity of the termination letter into doubt and belies a genuine concern that the fliers promoting a health product in a licensed physical therapy office was a terminable offense. In short, Respondents' inaction indicates that the fliers were a pretext for Ms. Osorio's termination.

There are also other factors that the Hearing Officer relied on to reach the conclusion that Respondents' reasons for termination were pretextual. Respondent Tambi testified that he conducted a thorough investigation in less than 24 hours by interviewing Respondent Bulega and other employees about Complainant's allegations before terminating her employment on February 17, 2015. However, once Complainant brought the problem to Respondents' attention, Respondents were obligated to conduct a neutral investigation of the allegations. MCAD Guidelines on Sexual Harassment Laws in Employment (2017), p. 10. We see no error in the Hearing Officer's conclusion that the one-day investigation by Respondent Tambi "was wholly inadequate insofar as it was conducted by an interested party and failed to conform to procedural norms for an impartial inquiry."

The Hearing Officer's findings with respect to Respondent Tambi's credibility, the timing of the termination, and the inadequate investigation are supported by the record and amount to substantial evidence of retaliation. Moreover, at the public hearing, Respondent Bulega offered two new reasons for the termination of Complainant's employment that were not included in the original termination letter. The Hearing Officer reasonably concluded that these reasons were "contradictory and shifting," and "[t]he unconvincing nature of the proffered reasons suggests that a retaliatory rationale is the motivating cause of her adverse treatment." Based on all of the foregoing the Hearing Officer concluded that the termination of

Complainant's employment—only 24 hours after she told Respondent Tambi that she was repeatedly sexually harassed by Respondent Bulega—was retaliatory, and not because she marketed therapeutic products to Respondents' clients without Respondents' permission. We see no error in her reasoning, and her findings were supported by substantial evidence in the record.

Finally, Respondents argue that the emotional distress damages award of $50,000 is not supported by sufficient evidence and was excessive. Respondents further contend that the Hearing Officer erred in failing to consider the lack of evidence Complainant offered as to any attempt to mitigate the pain and suffering from the alleged sexual harassment 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, 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, at 576. An award of damages may be based on a complainant's own credible testimony. Id. The Hearing Officer awarded Complainant $50,000 in damages for emotional distress and based her decision on Complainant's credible testimony regarding the nature, character, severity, and duration of Respondent Bulega's sexual harassment. Complainant testified that as a result of her sexual harassment by Respondent Bulega, she struggled to eat or sleep for six or seven months. Further, Complainant testified that she constantly felt nervous,

depressed, and uninterested in physical contact with her fiancé for six or seven months after Respondent Bulega sexually harassed her. The Hearing Officer concluded that "[t]he sexually-offensive conduct of Respondent Bulega, which Complainant described in credible detail, was frequent, severe, physically-threatening, humiliating, and interfered with Complainant's ability to perform her job." 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 her award.

ATTORNEY'S FEES REQUEST

Chapter 151B, § 5 allows prevailing complainants to recover reasonable attorney's fees.[1] Ms. Osorio filed a Petition for Reasonable Attorney's Fees and Costs on May 21, 2018, along with affidavits, invoices, and contemporaneous billing records from Attorneys John W. Davis and Emily Boney. Complainant's petition seeks to recover fees in the amount of $18,655.32, based on $4,085.00 for 9.5 hours of work performed by Attorney Davis at an hourly rate of $430, $14,136.00 for 49.6 hours of work performed by Attorney Boney at an hourly rate of $285, and $734.32 in costs.[2]

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

[1] Since 804 CMR 1.00 (1999) et seq. was in effect at the time of the request for attorneys' fees, the Full Commission determines the award rather than the Hearing Officer.

[2] Complainant's Petition requests $18,655.32, which is $300 less than the total of the submitted attorney's fees and costs. The Petition includes an itemized bill showing that Complainant already paid $300 to her attorneys on September 29, 2017.

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 v. Winchester School Committee, 14 MDLR 1097 (1992).

We determine that the hourly rates sought by Attorneys Davis and Boney are consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases. Ms. Osorio'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. However, having thoroughly reviewed Complainant's Petition and attached time records, we decline to award fees and costs related to Complainant's voluntary polygraph examination. See, e.g., Diaz v. Romita, Sywak, and Oke, No. 2:05-cv-70928-VAR-DAS, 2007 WL 881509 at *5 (E.D. Mich. March 22, 2007) (regardless of lack of use at trial, plaintiff's voluntary polygraph-related expenditures not allowed where plaintiff did not explain why costs were reasonable given

significant costs and likely inadmissibility). Complainant does not offer any justification for why the significant cost of the polygraph examination was necessary. Furthermore, had a justification been attempted, the bar would be high because subjecting parties or other witnesses to polygraph examination is at best generally unnecessary and at worst contrary to the public interest. Thus, the Commission will not allow the following fees and costs which do not appear to be productive or in furtherance of Complainant's allegations:

1) Fees in the amount of $2,907.00 for 10.2 hours for Attorney Boney to schedule the polygraph, draft questions for the polygraph examiner, and send, receive, and review communications about the polygraph with Attorney Davis, Opposing Counsel, and Client on 8/17/2017, 8/25/2017, 9/12/2017, 9/14/2017, 9/18/2017, 9/19/2017, 9/20/2017, 9/21/2017, 9/22/2017, 9/26/2017, 9/28/2017, 9/29/2017, 10/2/2017, 10/3/2017, 10/4/2017, and 10/16/2017.[3]
2) Fees in the amount of $129.00 for 0.3 hours for Attorney Davis to review questions for the polygraph examiner on 9/19/2017.
3) $600 in costs for the administration of a polygraph examination at Truth Detection Laboratories on 10/6/2017.

After the aforementioned deductions, we therefore grant Ms. Osorio a reduced award of attorney's fees and costs in the amount of $15,319.32. The breakdown is as follows:

Initial Request	$18,655.32
Less polygraph-related fees	$3,036.00
Less polygraph-related costs	$600.00
Plus Complainant's September 29, 2017 payment	$300.00
TOTAL:	$15,319.3

[3] On some of these dates, Attorney Boney conducted both polygraph-related work and unrelated work. The bill does not provide sufficient detail to determine how much time was spent on which task. The Commission is not obligated to decipher lumped billing entries when a party fails to provide sufficient detailed records as to how much time was spent on each task, and the award is accordingly reduced. Grendel at 952 (holding that the absence of detailed contemporaneous time records calls for a substantial reduction in any award).

ORDER

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

1) Respondents immediately cease and desist from acts of sexual harassment;
2) Respondents pay to Complainant Somaira Osorio the sum of $50,000.00 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) Respondents pay to Complainant Somaira Osorio the sum of $3,200.00 in lost wages 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) Respondents pay to Complainant Somaira Osorio the sum of $15,319.32 in attorney's fees and costs 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
5) Respondents are directed to attend an MCAD-sponsored training pertaining to sexual harassment within ninety (90) days of this order and provide documentation of their attendance.

This Order represents the final action[4] 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 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[5] this 20th day of January, 2023.

Sunila Thomas George
Chairwoman

Monserrate Rodríguez Colón
Commissioner

[4] 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 Ms. Osorio did not intervene in the Respondents' 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).

[5] Commissioner Neldy Jean-Francois was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(6) (2020).