COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MICHELLE PAVLOV,
Complainants

v. DOCKET NO. 15-NEM-00434

HAPPY FLOORS, INC. AND NEW
FLOORS, INC.,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Commissioner Sunila Thomas George in favor of Complainant Michelle Pavlov ("Complainant") and against Respondent Happy Floors, Inc. ("HFI") ("Respondent HFI").[1] Following an evidentiary hearing, the Hearing Commissioner found Respondent HFI discriminated against Complainant on the basis of sex and pregnancy in violation of M.G.L. c.151B § 4(1). Central to Respondent's appeal is the jurisdictional requirement under Chapter 151B that only employers of six or more employees are subject to claims of discrimination under the statute. Respondent maintains that it was not subject to the MCAD's jurisdiction because it did not have the requisite number of employees, and it argues on appeal that the Hearing Commissioner erred by concluding its flooring workers were employees, not independent contractors. Respondent argues that the Hearing Commissioner's findings of fact supporting that conclusion are without substantial evidence despite the Hearing Commissioner's in-depth analysis of a multitude of factors related to the nature of the employment relationship presented at public hearing. Respondent also

[1] The claim for successor liability against Respondent New Floors, Inc. was dismissed by the Hearing Commissioner.

disagrees with the Hearing Commissioner's conclusions regarding overt acts of discrimination, including the posting of a job advertisement seeking male applicants only. For all of these reasons, Respondent argues that the Hearing Commissioner did not have the authority to award Complainant remedies in the form of back pay and emotional distress damages. Respondent also appeals the Hearing Commissioner's Order granting Commission Counsel fees and costs in the total amount of $53,935.74. For the reasons below, we affirm the Hearing Commissioner's decision and order granting attorney's fees.

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 conclusion." Katz v. Massachusetts Comm'n Against Discrimination, 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. Massachusetts Comm'n Against Discrimination, 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).

To the extent that a determination relies on a question of law, the Full Commission reviews the Hearing Officer's interpretation of the law de novo. MCAD & May v. The Parish Café, Inc. and Factotum Tap Room, Inc., 45 MDLR 35, 38 (2023). Not all errors of law require the reversal of a Hearing Officer's decision. The only errors subject to redress are those where the substantial rights of a party have been prejudiced. See G.L. c. 30A, § 14(7); Amherst–Pelham Regional Sch. Comm. v. Department of Educ., 376 Mass. 480, 497 (1978).

LEGAL DISCUSSION

Respondent argues that the Hearing Commissioner did not consider the correct time period while determining whether HFI had the requisite number of employees, and second, that certain flooring workers were independent contractors, not employees for the purposes of establishing jurisdiction under M.G.L. c. 151B. Respondent also contends that it did not discriminate against Complainant, and that the Hearing Commissioner erred in her determination of remedies and the calculation of emotional distress damages where Complainant did not prove that she suffered emotional distress. In addition to these specific arguments on appeal, Respondent asserts more generally that some of the Hearing Commissioner's findings of fact were not supported by substantial evidence.

A. The MCAD's Jurisdiction

Respondent's chief argument on appeal is that HFI was not an "employer" under Chapter 151B because it employed less than six employees. Chapter 151B excludes from its coverage an entity with fewer than six persons in its employ. Thurdin v. SEI Boston, LLC, 452 Mass. 436,

440–41 (2008); M.G.L. c. 151B, § 1(5). Independent contractors are not employees under M.G.L. c. 151B. See Comey v. Hill, 387 Mass. 11, 15 (1982). Generally, an MCAD complainant has the burden of proving the respondent employer has the requisite number of employees. Zereski v. American Postal Workers Union, Central Massachusetts Local 4553, 23 MDLR 270, 277 (2001) ("Complainant has the burden of establishing that the Local met the definition of an employer by having at least six employees during the time of her employment"). For the purpose of establishing jurisdiction under Chapter 151B, the Commission examines the nature of the relationship between the employer and the putative employee, with a focus on "the extent to which the employer has the right to exercise control over the employee's work, not only to specify the final result, but also to supervise and direct the details and the means by which the result is achieved." Tunstall v. Acticell H'W Cosmetics & Weizmann, 22 MDLR 284, 287 (2000), vacated on other grounds by 25 MDLR 301 (2003) citing Marx v. South Shore Publishing Co., 2 MDLR 1115, 1119 (1980). Additional factors which the courts and the Commission consider in determining the existence of an employer-employee relationship include: "1) whether work is of a type done under supervision or by a specialist working independently; (2) the skill required; (3) whether the employer furnishes the equipment and workplace and bears the costs of operation; (4) whether payment is wages or salary for the time worked rather than profit or a set contractual fee on production of a final product or service; and (5) whether the parties have an ongoing relationship which may be terminated without notice or explanation by either party..." and "no one factor will necessarily control in every case." Id.

With respect to the time period used to determine whether Respondent had the requisite number of employees to establish jurisdiction, Respondent, relying on Terespolsky v. Law Offices of Stephanie K. Meilman, P.C., No. 2003-1077, 2004 WL 333606 at *3 (Mass. Super.

2004), argues that the Commission should have only looked at the time of Complainant's termination. Chapter 151B does not impose a time period during which an employer must employ six or more employees for the purpose of establishing jurisdiction. The Hearing Commissioner expressly addressed and rejected Respondents limiting argument concluding that such interpretation is an impediment to enforcing Chapter 151B's Legislative mandate. We agree with the Hearing Commissioner that adopting such a narrow scope runs afoul of the Commission's duty to construe Chapter 151B liberally to accomplish its purposes. M.G.L. c. 151B § 9. Given the relatively brief period of employment in this case, using the duration of Complainant's employment with HFI as the time period for assessing the number of employees was fair, and consistent with the duty to broadly construe Chapter 151B liberally to accomplish its purposes. The appropriate timeframe should be assessed on a case-by-case basis. Here, the analysis applied is consistent with Commission precedent concluding that the period of complainant's employment was the appropriate timeframe. See Tunstall, 22 MDLR at 287; Zereski, 23 MDLR at 277.

Second, Respondent argues that HFI's employees were independent contractors for the purpose of establishing jurisdiction under Chapter 151B, and in so doing urges us to reweigh the evidence on 20 different factors relevant to the nature of the employment relationship carefully considered by the Hearing Commissioner. Accordingly, Respondent's appeal begs the question of how much proof is required regarding the nature of the employment relationship. Considering the Respondent's insistence that its workers were independent contractors, regardless of the factors applied, the independent contractor statute, M.G.L. c. 149, § 148B, provides helpful

context in this case, albeit not controlling law.[2] Under the independent contractor statute, a worker is an employee unless all of the following factors are met:[3] (1) the worker is free from control and direction in connection with performing the services; (2) the worker's services are performed outside the usual course of business of the recipient of the services; and (3) the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. M.G.L. c. 149, § 148B (a) (1-3). See, e.g., Carey v. Gatehouse Media Massachusetts I, Inc., 92 Mass. App. Ct. 801, 805-811 (2018) (using the three-pronged test under § 148B, the court newspaper delivery drivers were found to be employees, not independent contractors where work was performed in employer's self-described usual course of business as a newspaper publisher).

The Attorney General's Office in addressing the second prong of the three-part test under the independent contractor statute includes as an example of a drywall installer working for a drywall company performing drywall installations. In that example, the installers are clearly performing an essential part of the employer's business, and, for that reason alone, the employee cannot be properly classified as an independent contractor. See An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, § 148B, 2008/1 ("Advisory"), at p.6. In this case, the employees at issue were flooring installers working for a flooring installation company performing flooring installations. Given these analogous circumstances, we decline to reweigh

[2] The MCAD does not enforce the independent contractor statute and there is no suggestion here that the factors used to determine employee status under Chapter 151B should be restricted to the test for independent contractor status under that statute (the so-called "ABC test"), which would be contrary to established precedent under Chapter 151B.
[3] All three criteria in the ABC test under the independent contractor statute are relevant in determining whether a worker is an employee for the purposes of Chapter 151B. As previously discussed, supra at p. 4, the first factor is the primary inquiry for the purposes of an assessment under Chapter 151B, while the third factor serves as additional consideration for the Commission in determining the existence of an employer-employee relationship. Moreover, in analyzing this matter the Hearing Commissioner also applied the second ABC test factor, taking it from the Restatement (Second) of Agency § 220 (1957), as used in Chase v Independent Practice Association, Inc., 31 Mass. App. Ct. 661, 665-666 (1991).

the evidence, and we roundly reject the argument that MCAD jurisdiction was lacking sufficient evidence.[4]

As further consideration, the Hearing Commissioner correctly acknowledged that employment status is not conclusively based on the labels given by the parties alone. See Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (holding that "'independent contractor' label" is insufficient evidence of independent contractor relationship). Finally, the Hearing Commissioner correctly applied the primary consideration of whether or not a worker is an employee under Chapter 151B or an independent contractor and determined based on the evidence that HFI had a right to control the workers' individual performance. See Silvia v. Woodhouse, 356 Mass. 119, 124 (1969). For all of these reasons, we agree with the Hearing Commissioner that the MCAD had jurisdiction in this matter.

Next, Respondent generally takes issue with many of the factual findings considered in evaluating whether the individuals in question were independent contractors in paragraphs 2, 4,

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[4] In so doing, we consider the vexing imbalance regarding proof of employee status under Chapter 151B, and proof of independent contractor status under M.G.L. c. 149, § 148B. In stark contrast with Chapter 151B, the independent contractor law presumes employee status and requires the *employer* to prove otherwise with regard to every factor in the ABC test. See Advisory at p.2, see also Ruggiero v. Am. United Life Ins. Co., 137 F. Supp. 3d 104, 112 (D. Mass. 2015) (a purported employer must satisfy the three-prong test set forth in § 148(a) to rebut the presumption an individual is an employee). But in either paradigm, the employer possesses the majority of documents and information concerning its workers' classifications, not the employee who is a victim of wage theft, denial of employee benefits, or discrimination. Moreover, both Chapter 151B and the independent contractor statute are construed liberally to accomplish their broad and presumably equally important remedial purposes, i.e., respectively, protecting employees from unlawful discrimination, and safeguarding employees' fair labor rights and entitlements "where the circumstances indicate they are, in fact, employees." Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191, 198 (2013) (the purpose of the independent contractor statute is to "protect workers by classifying them as employees"); Depianti v. Jan-Pro Franchising Intern., Inc., 465 Mass. 607, 620 (2013) ("Generally, remedial statutes such as the independent contractor statute are 'entitled to liberal construction.'") (citations omitted). Given these realities and recognizing that the burden of proof under §148B is statutorily set, while the burden under Chapter 151B is jurisdictional, the more onerous the burden is for a complainant to prove that workers are employees and not independent contractors for the purpose of jurisdiction under Chapter 151B, the more anti-discrimination protections for employees are not on equal footing with those granted by the independent contractor statute. Respondent's arguments throughout this case, up to and including this appeal, press to exploit this for absurdly unequal footing. If anything, the Hearing Commissioner's articulation and careful consideration of 20 different factors in this case was generous to the Respondent, and there was no requirement that even a majority of such factors, much less all of them, needed to weigh in favor of employee status in order for complainant to prove jurisdiction in this matter.

5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44, referring to the findings as "a gross mischaracterization of testimony," "grossly misleading," "grossly inaccurate," or without support in the record. Respondent's objections to the enumerated factual findings are similar in nature in that they substitute their own interpretation of the facts. For example, Respondent argues findings of fact Nos. 15-19 concerning flooring workers using HFI tools are "gross mischaracterizations" of the testimony and other evidence. There are several points in the testimonial and documentary evidence that illustrate HFI would provide tools and materials to flooring workers if they did not have the tools or if their tools broke. Respondent does not deny that tools and supplies were provided to flooring workers to perform the jobs they were assigned, but rather they frame these factual findings as "occasional lending a hand." However, in factual finding No. 18 the Hearing Commissioner noted that the preference was for workers to use their own tools, but some workers were paid a lower rate when HFI provided tools and materials. Evidence that HFI penalized workers when they needed tools or supplies from HFI does not support Respondent's assertion that they were merely "lending a hand."

Similarly, Respondent contends that factual finding No. 23, that HFI required its flooring workers to wear HFI branded tee shirts, is a mischaracterization of the evidence and not supported by substantial evidence. However, Siarhei Huba, one of HFI's owners, testified that flooring workers were required to wear HFI-branded tee shirts and could not use their own company names or telephone numbers as part of their marketing strategy. Respondent cannot rewrite history, and we specifically decline to disturb this factual finding.

Due to the volume and general nature of Respondent's objections, we decline to further address each factual finding separately. However, we have reviewed each objection to every

factual finding, and we have determined that each finding is supported by substantial evidence in the record. Each finding of fact included specific references to the record, and many included multiple references to the record. The Hearing Commissioner also specifically addressed where she took issue with the credibility of witnesses and evidence and noted where testimony was inconsistent or there was credible contradictory evidence. "Where there is conflicting evidence, the Hearing [Commissioner] has the responsibility of weighing the conflicting evidence and credibility of witnesses to make determinations and findings of fact as they are in the best position to make these determinations." Emile Mont-Louis, Complainants v. City of Cambridge, 41 MDLR 174, 175 (2019), citing School Committee of Chicopee, 361 Mass. at 354. The Hearing Commissioner was well within her authority to weigh the evidence presented. It is well established that the Full Commission defers to these determinations, which are the sole province of the factfinder. Quinn, 27 MDLR at 42.

B. Pregnancy Discrimination

The Hearing Commissioner correctly determined that HFI discriminated against Complainant on the basis of sex and pregnancy. In 2018, The Pregnant Workers Fairness Act (the "PWFA") amended M.G.L. c. 151B, § 4 to expressly prohibit employment discrimination on the basis of pregnancy and pregnancy-related conditions. See M.G.L. c.151B §§ 4(1), 4(1E). Even prior to enactment of the PWFA, however, Massachusetts courts consistently held that the prohibition against sex discrimination includes a prohibition against discrimination on the basis of pregnancy, childbirth and pregnancy-related medical conditions, and use of maternity leave. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 384 n.3 (2016); School Committee of Braintree v. Massachusetts Comm'n Against Discrimination, 377 Mass. 424, 430 (1979). HFI openly discriminated against Complainant when they terminated her

employment and immediately placed an ad expressly seeking male applicants for Complainant's position on Craig's List. Respondent argues there was no discrimination because Mr. Huba, who wrote the job posting seeking a male applicant, is not a native English speaker and that the position was "ultimately filled by a female employee." Neither of those arguments is convincing. The Hearing Commissioner recognized that Mr. Huba was not a native English speaker and did not find his language deficiency to be a credible justification. The fact remains that the job posting explicitly stated a preference for male candidates and perpetuates gender stereotypes i.e., that men are stronger than women, which reflects a discriminatory animus towards women in violation of M.G.L. c. 151B. Respondent's argument also ignores the Hearing Commissioner's factual finding that the candidate that immediately followed Complainant in the subject role was male and was only later replaced by a female candidate. The hearing decision included detailed findings of fact on this topic and illustrates that the Hearing Commissioner carefully evaluated the evidence presented by the parties to reach those findings. We find no reason to disturb those findings, nor the conclusions that have been drawn from them.

C. Remedies and Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of M.G.L. c. 151B; 2) damages for lost wages and benefits;[5] and 3) damages for the emotional distress Complainants have suffered as a direct result of Respondent's discriminatory actions. See, Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549 (2004); College-Town Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 169 (1987);

[5] Respondents make no specific arguments concerning the award of lost wages and there was no error of law upon review of the record. The award for lost wages in the amount of $17,800 plus interest remains unchanged.

Buckley Nursing Home v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Ct. 172, 182-183 (1988).

The Hearing Commissioner awarded Complainant $20,000 in emotional distress damages. Respondent does not argue that the award is excessive, but rather that Complainant failed to prove that she suffered emotional distress, and any of the "self-serving symptoms" she claimed were attributable to her pregnancy, not her termination. In further support of this argument, Respondent notes that Complainant did not see a doctor, psychologist, or physician as a result of her termination. Respondent's argument is based on the standard laid out for the tort of negligent infliction of emotional distress and would have the MCAD impose an overly restrictive standard for establishing emotional distress in cases of discrimination. Heraty v. Atlas Oil Co., 15 MDLR 1143, 1168 (1993), citing Bournewood Hospital v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303 (1976) ("The standards for the award of emotional distress damages are not as stringent as those which apply to actions in tort for the intentional infliction of emotional distress.")

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. Massachusetts Comm'n Against Discrimination, 447 Mass 1, 7 (2006); Stonehill College, 441 Mass. at 576. 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; see also, Sun v. University of Mass., Dartmouth, 36 MDLR 85, 86 (2011) (a substantial award for emotional distress damages was adequately supported by the testimony of the complainant's father and professional colleagues about the complainant's demeanor and attitudes before and after the discriminatory events); Heraty v. Atlas Oil Co., 15 MDLR at 1168-69 (an emotional distress award was based on the complainant's testimony that he felt ridiculed and stigmatized and that he was depressed and under financial stress), aff'd, 16 MDLR 1337 (1994).

Respondent's characterization of Complainant's experience as "self-serving" is unfounded. Here, the Hearing Commissioner heard Complainant's and Complainant's sister's testimony concerning her physical, mental, and emotional health following her termination, noting that Complainant suffered headaches, difficulty leaving bed, depression, lack of appetite, loss of sleep, among other symptoms. The Hearing Commissioner found this testimony credible and weighed it accordingly in determining emotional distress damages. For these reasons, we deny the Respondent's appeal and affirm the Hearing Commissioner's decision in its entirety.

COMMISION COUNSEL FEES

In addition to appealing the hearing decision on the merits, Respondent filed a Petition for Review of the Award of Attorney's Fees. Commission Counsel filed a revised Petition for Attorney's Fees on November 3, 2022, seeking $57,637.68 in fees and $130.68 in costs which Respondent opposed. As a threshold matter, Respondent's Petition for Review of Attorney's Fees included a technical challenge to Commission Counsel's filing that was present in their previous opposition, alleging that it was not accompanied by a timely affidavit averring personal knowledge and signed under the penalties of perjury. An Order was issued on October 27, 2022, to cure the technical defect and the revised petition was filed, therefore this issue is moot.

Respondent did not challenge the reasonableness of the hourly fee charged by Commission Counsel.[6] The Hearing Commissioner reviewed the fee petition and opposition thoroughly and awarded $53,804.93 in attorney's fees and $130.81 in costs, identifying approximately $3,82.75 in non-compensable fees that were vague or did not advance the case.

Chapter 151B, § 5 allows prevailing complainants to recover reasonable attorney's fees. 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 Hearing Commissioner correctly used the "lodestar" method in evaluating reasonable attorney's fees in this case, therefore, no further analysis is required. Respondent's Petition for Review of the Award of Attorney's Fees is essentially a resubmission of their Petition for Review on the merits with the addition of an exhibit identifying the time entries made by Commission Counsel they believe to be excessive, vague, or otherwise did not advance the case. Respondent provides no further reasoning as to why the entries are vague, excessive, or did not advance the case, nor any legal authority to support their position. Upon review of the challenged time records, we agree with the Hearing Commissioner that five of the twelve line items identified in Respondent's Exhibit A are vague or were unrelated to the advancement of the case. The remaining seven line items were not vague, excessive, and were related to the advancement of the case and decline to reduce fees any further.

Accordingly, we affirm the Hearing Commissioner's Order awarding reduced attorney's fees of $53,804.93 and $130.81 in costs.

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[6] Commission Counsel charged $325.00 per hour for a few early attorney services, a rate of $375.00 per hour for the remaining attorney services, and a paralegal rate of $125.00 per hour for approximately three hours of work considered administrative.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Commissioner in its entirety and issue the following Order directing Respondent to:

1) Cease and desist from all acts of discrimination;
2) Pay Complainant $17,800.00 in back pay plus interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue.
3) Pay Complainant $20,000 in damages for emotional distress plus interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue.
4) Pay Commission Counsel attorney's fees in the amount of $53,804.93 and costs in the amount of $130.81.
5) HFI shall comply with the following training requirements:
    a. HFI shall conduct a training on unlawful discrimination on the basis of gender (sex) discrimination, including but not limited to, pregnancy discrimination.
    b. Required attendees for the training shall be HFI's managers, supervisors, officers, and owners.
    c. The training session must be at least four (4) hours in length. The training shall be repeated once each calendar year for the next 5 years for all new supervisors, managers, and officers (i.e. hired, promoted, or designated after the date of such training).
    d. Within 30 calendar days of the receipt of this decision, HFI shall select a trainer to conduct the initial training session that shall be approved by the Commission.
    e. Within 30 calendar days after the completion of the training, HFI 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, the names of the persons who attended the training, and the date and time of the training session.
    f. In the event HFI is sold, materially changed, or taken over by new management, the successor entity shall be responsible for fulfilling the training requirements

specified in this decision - if any of the following shall apply: (a) the majority of the managers and supervisors employed by HFI as of the date of this decision continue to work for the successor entity as of the succession date; (b) the majority of HFI's governing board as of the date of this decision continues to serve on the successor entity's board as of the succession date; (c) the new owner(s) or officer(s) are relatives of HFI's owner(s) or officer(s), or previously employed by HFI as a manager or supervisor; or (d) HFI continues to retain an interest in the successor entity.

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

In accordance with 804 CMR 1.24(1) (2020) and 804 CMR 1.23(12)(e) (2020), the within Order is not a final decision or order for the purpose of judicial review by the Superior Court in accordance with M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Pursuant to 804 CMR 1.23(12)(c) and (d) (2020), Complainant has 15 days from receipt of this Order to file a petition for supplemental attorney's fees and costs incurred as a result of litigating the appeal to the Full Commission, and Respondent has 15 days from receipt of the petition to file an opposition.

The Commission will issue a Notice of Entry of Final Decision and Order when either the time for filing a petition for attorney's fees and costs has passed without a filing, or a decision on the petition is rendered. The Commission's Notice of Entry of Final Decision and Order will represent the final action of the Commission for purposes of M.G.L. c. 151B, § 6 and M.G.L. c. 30A § 14(1). The thirty (30) day time period for filing a complaint challenging the Commission's Final Decision and Order commences upon service of such Notice.

SO ORDERED this 20th day of November 2024.

Sunila Thomas George
Chairwoman

Neldy Jean-Francois
Commissioner

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and MICHELLE PAVLOV,
Complainants

v. DOCKET NO. 15-NEM-00434

HAPPY FLOORS, INC. AND NEW FLOORS, INC.,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision issued on November 20, 2024, by the Full Commission in favor of Complainant Michelle Pavlov ("Complainant"), which affirmed the March 29, 2022 decision of the Hearing Commissioner holding Respondent Happy Floors, Inc. liable for discrimination on the basis of sex and pregnancy in violation of M.G.L. c. 151B § 4(1). On December 3, 2024, Commission Counsel filed a Petition for Supplemental Attorney's Fees and Costs (the "Petition"), along with an affidavit and time records. The Petition seeks attorney's fees for work performed between April 27, 2022, and September 25, 2023, before the Full Commission.[1] Respondents did not file an Opposition to the Petition. For the reasons discussed below, we award supplemental attorney's fees in the amount of $3,187.65.

[1] The Petition refers to attorney's fees and costs, but only includes a request for fees, not costs.

LEGAL DISCUSSION

Commission Counsel seeks to recover fees of $3,187.65 for 10.28 hours of work performed by Commission Counsel at a rate of $310.00 per hour for work done in intervention on Respondents' appeal to the Full Commission. Respondents did not oppose the Petition.

Section 5 of Chapter 151B allows prevailing complainants to recover reasonable attorney's fees, and 804 CMR 1.23(12)(c) (2020) specifically provides for the award of attorney's fees and costs accrued as an appellee litigating a respondent's appeal to the Full Commission. 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 v. Winchester School Committee, 14 MDLR at 1099.

Commission Counsel's hourly rate of $310.00 is consistent with rates customarily charged by attorneys with comparable experience and expertise and is supported by the 2010 Massachusetts Law Reform Institute ("MLRI") attorney's fees scale submitted in support of this Petition. The contemporaneous time records submitted with the Petition show that Commission Counsel spent a majority of the time documented drafting and editing Complainant's Brief in Intervention (8.85 hours), and the remainder was spent communicating with the Complainant (1.21 hours) and Respondents' counsel (.22 hours). Based upon our review of this record, we believe that this figure represents a reasonable number of hours necessary to litigate the claims upon which Complainant prevailed. Our review points to no evidence that hours spent were duplicative, unproductive, excessive, or otherwise unnecessary to the successful prosecution of the claim. For these reasons, we award Commission Counsel supplemental attorney's fees in the amount of $3,187.65.

ORDER

For the reasons set forth above, in addition to the Full Commission's award ordered in its November 20, 2024 decision, Respondents are hereby ordered to pay Complainant $3,187.65 in attorney's fees with interest thereon at the rate of 12% per annum from the date of the filing of the Commission Counsel's Petition, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Pursuant to 804 CMR 1.23(12)(e) (2020), this decision on Commission Counsel's Petition together with the Full Commission's decision issued pursuant to 804 CMR 1.23(10) (2020) on November 20, 2024, constitutes the Final Decision of the

Commission for the purpose of judicial review pursuant to M.G.L. c. 151B, § 6 and M.G.L. c. 30A, § 14(1).

SO ORDERED this 22nd day of January 2025.

Sunila Thomas George
Chairwoman

Neldy Jean-Francois
Commissioner