COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CYNTHIA PHILLIPS,
Complainants

v. DOCKET NO. 10-SEM-02086

ELECTRO-TERM, INC.
D/B/A ELECTRO-TERM HOLLINGSWORTH,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Judith Kaplan in favor of Complainant, Cynthia Phillips ("Ms. Phillips"). Following an evidentiary hearing, the Hearing Officer found Electro-Term, Inc. d/b/a Electro-Term Hollingsworth ("Respondent") liable for a sexually hostile workplace in violation of M.G.L. Ch. 151B, § 4(16A) and retaliation in violation of M.G.L. c. 151B, § 4(4). The Hearing Officer awarded $2,880 in lost wages and $5,000 in emotional distress damages with 12% interest per annum, and ordered remedial sexual harassment training by the Respondent. The Respondent appealed to the Full Commission. For the reasons discussed below, we affirm the Hearing Officer's decision in full.

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

Respondent argues that the Hearing Officer's determinations of liability for both sexual harassment and retaliation are unsupported by substantial evidence and are based on errors of law. Specifically, Respondent argues that 1) the Hearing Officer erred by crediting Ms. Phillips' testimony; 2) the Hearing Officer erred in refusing to admit evidence regarding Ms. Phillips's separation from a previous employer; 3) the Respondent took prompt and adequate action in response to Ms. Phillips' complaints; 4) the factual findings are insufficient to prove retaliation; 5) the work environment was not so severe as to give rise to liability for constructive discharge; and 6) the Hearing Officer abused her discretion in issuing the training order.

After careful review we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. This standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support a contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984). We address each argument in turn.

Respondents argue that the Hearing Officer erred in crediting Complainant and not crediting various Respondent witnesses. With respect to credibility determinations, it is well established that the Hearing Officer is in the best position to judge the credibility of witnesses and to make determinations regarding the weight to give such evidence. Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the hearing officer and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence).

The Respondent particularly objects to the Hearing Officer's "dismissal" of the testimony of coworker Marta Rivera as discriminatory due to her limited English comprehension. Rivera testified that she did hear coworkers Jacob and Alex regularly use profanity and that she was aware that their language upset Ms. Phillips, but she did not hear them use sexually explicit language and that Ms. Phillips never asked her to join her in reporting it to management. The Hearing Officer fairly considered this witness' testimony, but failed to credit the portions of it that was at odds with Ms. Phillips' testimony. In explaining her credibility determination, the Hearing Officer cited to both testimony from Rivera's niece that Rivera had a close relationship with Jacob and Alex (suggesting bias), and to Rivera's limited comprehension of English. A fair

reading of this latter explanation is that the witness may not have fully understood the content of the overheard discussions between Jacob and Alex. We see no indication of bias and no basis to disturb the Hearing Officer's credibility determination.

The Respondent argues that the Hearing Officer erred in refusing to admit evidence regarding Ms. Phillips's previous employment. The Respondent attempted to offer written evidence from a previous employer regarding its termination of Ms. Phillips, but the Hearing Officer refused to admit it, or allow further inquiry about the alleged incident. Agencies have wide discretion in ruling on evidence in administrative proceedings subject to M.G.L. c. 30A. Rate Setting Comm'n v. Baystate Med. Ctr., 422 Mass. 744, 752 (1996). Consistent with the standard used by courts of review, the Full Commission does not disturb a Hearing Officer's decision to admit evidence absent an abuse of discretion or other legal error. See, e.g., Zucco v. Kane, 439 Mass. 503, 507 (2003). The Hearing Officer's evidentiary ruling was well within her discretion and not an error of law.

The Respondent argues that it took prompt and adequate action in response to Ms. Phillips' complaints of a sexually hostile work environment. Liability for sexual harassment by coworkers will ensue only if the Respondent knew or should have known of the harassment and failed to take prompt remedial action to stop the sexual harassment. See College-town Division of Interco. v. MCAD, 400 Mass. 156, 166-167 (1987); Comeau v. Idea Lube, Inc., 22 MDLR 5, 7 (2000). Ms. Phillips first complained to management about the sexually hostile work environment sometime between July 2 and July 6, 2010, and the behavior continued unabated until she resigned on July 20, 2020. Once Ms. Phillips brought the problem to the Respondent's attention, the Respondent was obligated to conduct a fair and expeditious investigation. MCAD Guidelines on Sexual Harassment Laws in Employment (2017), p. 10. Investigation should

generally include interviews of the complainant, the alleged harassers, and any potential witnesses. Id. Ms. Phillips' immediate supervisor's first response to her complaint was to joke about the issue with the two alleged harassers. While the Respondent's General Manager promptly issued vague warnings about the use of inappropriate language in the workplace, neither he nor any other manager inquired into the details of the offensive conduct. The Respondent did not begin any kind of formal investigatory process until July 20, 2010—Ms. Phillips' last day of work. This response can hardly be deemed an adequate response to an ongoing sexually hostile work environment.

The Respondent argues that the factual findings cannot give rise to liability for retaliation. M.G.L. c. 151B, § 4(4) prohibits an employer from terminating or otherwise retaliating against a person for opposing any practices forbidden by Chapter 151B. Retaliation is a separate claim from discrimination itself and is "motivated, at least, in part, by a distinct intent to punish or rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995). In order to establish a case of unlawful retaliation, Complainant must prove that: (1) she believed the employer was engaged in illegal discrimination; (2) she engaged in protected activity to oppose that discrimination; (3) Respondent subjected her to an adverse employment action; and, (4) the adverse action was in response to the protected activity. Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405-406 (2016). The Respondent's attendance records indicate that Ms. Phillips was never more than one minute late for work and, other than for documented medical reasons, only missed 1.75 total hours of work during the course of her employment. Despite this, on July 13, 2010—approximately a week after Ms. Phillips first complained of a sexually hostile

work environment —her immediate supervisor threatened to terminate her if she left work early for a pre-scheduled therapy appointment. The following day, her immediate supervisor and the General Manager again warned her about her attendance and reminded her that she was a probationary employee. The Hearing Officer concluded that these threats were in response to Ms. Phillips' complaints of a sexually hostile work environment and constituted unlawful retaliation. The Respondent argues that a mere threat cannot constitute an adverse employment action. To the contrary, "[t]he threat of an adverse job action […] can have as much of a chilling effect as the actual carrying out of the threat…" Farricy v. Suffolk County Sheriff's Department, 22 MDLR 27, 29 (2000).

The Respondent argues that the work environment was not so severe as to give rise to liability for constructive discharge. A constructive discharge requires a showing that the working conditions were so intolerable that a reasonable person in her position would have been compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 33-34 (1995); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997); Johnson v. Daniels Brothers Auto Sales, 18 MDLR 194 (1996). This is an objective standard. April Brown v. Feel Well Rehab Clinic, 33 MDLR 93 (2011). Complainant must further establish that she exhausted all reasonable alternatives prior to leaving her employment. See Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997); Robinson v. Haffner's Service Stations Inc., 23 MDLR 283 (2001). Here, Ms. Phillips was faced not only with an ongoing sexually hostile work environment, but escalating threats from the offenders, and retaliation by the Respondent. By the time of her resignation, Ms. Phillips had complained to three different members of management on six separate occasions. The Respondent gave Ms. Phillips no indication that it would move her work station, discipline the offenders, conduct a formal investigation, or take any other action to appropriately address

the problem. In light of these facts, the Hearing Officer's conclusion that Ms. Phillips was constructively discharged is supported and is not an error of law.

Finally, the Respondent argues that the Hearing Officer abused her discretion in issuing the training order. Chapter 151B specifically authorizes affirmative relief,[1] and the Commission is given broad authority to remedy discrimination. College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass, 156, 170 (1987). The Commission's procedural regulations also specifically identify training as relief in the public interest. 804 CMR 1.18(1)(c) (2005); 804 CMR 1.09(5) (2020). As part of this authority, the Commission routinely orders training of respondents. The specific training ordered by the Hearing Officer in this case is also consistent with M.G.L. c. 151B, § 3A(e), which states that, "[e]mployers are encouraged to conduct additional [sexual harassment] training for new supervisory and managerial employees and members within one year of commencement of employment or membership." The Hearing Officer's training order was well within her discretion. Respondent's liability for a sexually hostile work environment alone would support such training order.

We have reviewed Respondent's grounds for appeal and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law identified in Respondent's appeal with respect to the Hearing Officer's findings and conclusions of law.

[1] "If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four [...], the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice [...] to take such affirmative action [...] as, in the judgment of the commission, will effectuate the purposes of this chapter [...] and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively." M.G.L. c. 151B, § 5

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety.[2] Respondent's appeal to the Full Commission is hereby denied. It is hereby ordered that:

1. Respondent immediately cease and desist from engaging in discrimination on the basis of sexual harassment.
2. Respondent pay to Complainant the sum of $5,000.00 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. Respondent pay to Complainant the sum of $2,880.00 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and postjudgment interest begins to accrue.
4. Respondent shall conduct an initial training on unlawful discrimination on the basis of sexual harassment and conducting prompt and effective investigations for all managers and supervisors it employs at any and all of its facilities in the Commonwealth of Massachusetts. With respect to such training:
    a. Each training session for managers and supervisors must be at least three (3) hours in length. All managers and supervisors, employed in the Commonwealth of Massachusetts shall be required to attend the initial training. No more than 25

[2] The Respondent only seeks relief from the portion of the Hearing Officer's order mandating sexual harassment training for its managers and supervisors, and indicates that it reached a private settlement with Ms. Phillips in regards to monetary damages.

persons may attend each training session. Respondent shall repeat this training once each calendar year for the next five years for all new supervisors and managers who were hired or promoted after the date of the initial training session.

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

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

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

    i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;

    ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;

iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,

iv. Respondent continues to retain an interest in the successor entity.

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

This Order represents the final action[3] 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 this 29th day of November, 2021.

Sunila Thomas George Chairwoman	Monserrate Quiñones Commissioner	Neldy Jean-Francois Commissioner

[3] 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. Phillips did not appeal the underlying decision in any regard, nor intervene 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).