COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JACKIE RAVESI,
Complainants

v. Docket No.: 10-BEM-03164

NAZ FITNESS GROUP,
Respondent

Appearances: Joseph Sulman and David Brody, Esqs. for Complainants
John W. Davis and Suzanne Herold, Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 7, 2010, Jackie Ravesi ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that the Respondent Naz Fitness Group discriminated against her on the basis of gender (transgender) and sexual orientation by terminating her as a fitness instructor.

A probable cause finding was issued by the Investigating Commissioner on August 8, 2012. The case was certified for a public hearing on July 11, 2013. At the public hearing Complainant voluntarily dismissed her cause of action for unlawful sexual orientation discrimination. Transcript III at 134. A public hearing on the remaining issue of gender discrimination was conducted on February 24, 25, and 27, 2014.

The following witnesses testified at the public hearing: Complainant, Glenn Nazarian, Kurt Douty, James Daisey, Faith Kenyon, Dennis Avard, Thea Knust, and Sandra Taylor. The parties submitted forty-three (43) agreed-upon exhibits.

Complainant submitted six (6) additional exhibits and Respondent submitted one (1) additional exhibit.

Following the hearing, the parties submitted post-hearing briefs. Respondent attached to its brief excerpts from the depositions of Dennis Avard and Complainant. Complainant moved to strike the excerpts on the basis that they were offered as substantive evidence rather than to impeach or refresh public hearing testimony. I grant Complainant's motion.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Between November of 2009 and November of 2010, Complainant Jackie Ravesi[1] was employed as a trainer by Respondent Naz Fitness Group, d/b/a/ Get In Shape for Women. She is a biological male who identifies as a transgender female. Prior to working for Respondent, Complainant received a certification as a fitness instructor by Fitness Resource Associates, received a personal training certificate from the American College of Sports Medicine, and worked as a fitness instructor in Newton, MA for three years.

2. During the period of Complainant's employment by Respondent, the Naz Fitness Group, Inc. was a Massachusetts corporation owned by Glenn Nazarian. The corporation operated the following studios in Massachusetts between November, 2009 and November, 2010: Framingham, Wellesley, Bedford, Belmont, Winchester, and

[1] Ravesi officially changed her name from John Ravesi to Jackie Ravesi on June 21, 2011. Joint Exhibit 11. On September 23, 2011 Complainant applied for a gender designation change with the Registry of Motor Vehicles. Joint Exhibit 12. In recognition of Complainant's change in gender identity, Complainant will be referred to as she or her throughout this decision.

Westford. The studios employed a model of one trainer per group of four women and moved clients through pre-designed weight-lifting and cardio stations during half-hour sessions. Nazarian required his trainers to display energy and enthusiasm when training clients. He called these qualities the "WOW" factor.

3. Faith Kenyon, the sister of Nazarian's girlfriend, testified that Nazarian harbored no animus against androgynous or "butch" females such as herself. I do not consider this testimony to be relevant to the issues in dispute.

4. Complainant first met Nazarian at his Bedford "Get In shape" studio in late May or early June of 2009. At the time, Complainant presented as a male, wearing male work-out pants, a short sleeve t-shirt, and sneakers and sporting short, spiked hair, although she also wore earrings, face powder, and eyebrow pencil. Complainant gave Nazarian a resume, a photograph, and testimonials from Newton clients.

5. In October of 2009, Nazarian contacted Complainant to say there was a job opening at a new "Get in Shape" studio in Framingham. Nazarian asked Complainant to return for a second interview. Complainant met a second time with Nazarian at which she again presented as a male. Nazarian asked Complainant to meet with Kurt Douty who, as manager of the Framingham studio, oversaw daily operations.

6. Complainant met with Douty at the Framingham studio. Complainant wore blush on her cheeks, eyeliner, purple pants, jewelry, and short, spiked hair. Joint Exhibit 3; Transcript II at 172. Nazarian greeted Complainant and left her to speak with Douty. After the interview, Douty and Nazarian conferred about Complainant whom they both thought was a gay male. Transcript II at 173; III at 39. Douty recommended that Nazarian hire Complainant. Nazarian agreed but told Douty that Complainant would

need to "tone down" the wearing of makeup while at work. Transcript II at 174; III at 40. Nazarian testified credibly that he would have made the same request to anyone, male or female, who was wearing makeup that was not natural looking. Transcript III at 41.

7. Nazarian called Complainant and offered her a trainer position in Framingham with compensation consisting of a $45,000 annual salary and bonuses dependent on the studio revenue. Nazarian said words to the effect that even being gay, Complainant still had to "tone down" the wearing of makeup and jewelry. Nazarian gave Complainant a dress code which states that trainers must wear black pants and a black company t-shirt. The policy includes a statement that: "[E]mployees should be attired properly when clocking in for their shift." Joint Exhibit 4F at 104.

8. Complainant resigned her job at the Newton fitness center where she was then working and began her employment at Respondent's Framingham studio on November 16, 2009. Complainant wore a male haircut to work, minimal makeup, no nail polish, and a male gym uniform consisting of black male pants and a male tank top underneath a long sleeve "Get in Shape" male t-shirt.

9. Once Complainant's employment commenced, she and Douty developed a friendship. Transcript II at 176. Complainant visited Douty at his home after he had knee surgery. They exchanged beer and cards on their birthdays and worked out together. Transcript II at 177.

10. Douty testified that he told Nazarian that Complainant sometimes wore female clothing outside the gym. Transcript II at 178. According to Douty, Nazarian indicated that such clothing should not be worn in the studio. Transcript II at 178,183.

11. According to Douty, Complainant performed well during the first four months of her employment but thereafter became less energetic. Transcript IV at 144-147.
12. In December of 2009, Douty told Complainant that she was invited to a company/client holiday party hosted by Nazarian in January of 2010. Complainant informed Douty that she was more comfortable wearing female attire outside of work and expressed concern about wearing such clothing to a work party. Nazarian testified that he was a "little concerned" about Complainant attending the party in female dress because it would be awkward for clients who were attending the party as well as for Complainant but said that he still wanted Complainant to attend. Transcript III at 48-49. Complainant decided not to go to the party. Transcript II at 179.
13. In April of 2010, Complainant appeared at a work meeting wearing a suede jacket with rhinestones.
14. During April of 2010, Complainant discussed with Douty her intention to become a transgender female, to undergo laser hair removal treatments, and to attend her brother's wedding in female clothing.
15. On April 17, 2010, Douty informed Complainant that she was displaying a lack of enthusiasm at work and failing to provide a consistent level of customer service. Joint Exhibit 5, Transcript II at 200. According to Douty, Complainant was spending too much time discussing her personal interests such as music with clients and not spending enough time on coaching and training. Transcript II at 147. Douty characterized his discussion with Complainant as a verbal warning. Transcript II at 147-150. Douty testified that he spoke to Complainant three to four more times after the verbal warning about maintaining a high energy level at work. Transcript II at 153.

16. Complainant testified that she was never given a verbal warning, but that she and Douty frequently talked about how to improve the studio and about Complainant's personal life. Transcript I at 86, 95-97. I credit Complainant's testimony.

17. During April to May of 2010, Complainant suffered from a bacterial infection in her ear and missed work from May 13, 2010 to May 15, 2010 due to the bacterial infection. Transcript I at 87. She presented a note from Fenway Community Health Center to excuse her absence. Joint Exhibit 13.

18. Sandra Taylor was hired by Nazarian to work at his Wellesley and Framingham studios and eventually replaced Complainant at Framingham as its full-time trainer. Transcript I at 17. As of the public hearing date, Taylor was still employed at the Framingham studio, working for the individual who bought the gym from Nazarian. Id. Taylor testified that she had observed Complainant providing training to clients in Framingham on two to three occasions and on those occasions saw Complainant leaning against equipment, failing to "work the floor," and displaying low energy. Transcript II at 10-14. Taylor testified that during the time that she and Complainant provided alternating shifts in Framingham, more than half of Complainant's clients moved to her training sessions. Transcript I at 19, 21. I do not credit Taylor's testimony that a majority of Complainant's clients transferred to her.

19. By June of 2010, Complainant had commenced hormone therapy and was wearing female attire in non-work hours. She continued to wear all black to work but began to wear female yoga pants, a female sweat suit, a camisole, and a female haircut. Transcript I at 84-85. Douty did not speak to Complainant about her female workout clothing because he deemed it to be in compliance with Respondent's dress code.

20. In June of 2010, Nazarian held a meeting for all staff at his Bedford studio. Transcript III at 57. Most people attended the meeting in casual business attire or in their gym uniforms. Transcript II at 183. One employee wore a large Superman pendant. Transcript II at 158. Complainant wore the following women's clothing: white moccasins/slippers, khaki or white shorts, a blue belt with rhinestones, a pearl bracelet, hoop earrings, an aqua v-neck shirt, and a silk scarf. Transcript II at 185; III at 58. The meeting was held on a day when Complainant was not scheduled to work. At the time of the meeting, the Bedford studio was not open for client workouts but was open to individuals who sought to inquire about joining the program. Transcript II at 159, 184.
21. According to Nazarian, Complainant was "blatantly out of dress code" and was inappropriately and disrespectfully attired at the meeting. Transcript II at 185; III at 59. Douty spoke to Complainant about whether she used "good discretion" in attending a staff meeting attired as she was. Transcript II at 159-161. Complainant defended her dress on the basis that the meeting took place outside of her training hours. Transcript II at 160. According to Nazarian, he was "not happy" with Complainant's dress at the meeting but asserted that it had "zero" to do with her termination. Transcript III at 59. Nazarian acknowledged that Complainant complied with the company dress code when she trained customers. Transcript III at 70. I do not credit Nazarian's testimony that Complainant's dress at the meeting was unrelated to her subsequent termination.
22. After the June meeting, Douty went on a vacation. While he was away, James Daisey filled in as interim manager of the Framingham studio while waiting for the opening of a Natick studio which he was to manage. During the time that he filled in as Framingham

manager, Daisey signed up a few Framingham customers to train at the Natick studio. Transcript III at 108.

23. Nazarian asked Daisy to report his impressions of the Framingham studio because Nazarian was concerned about the studio's performance. Transcript III at 74-75.

24. Daisey wrote an e-mail to Nazarian on July 11, 2010 saying that after observing Complainant for a week, he found that she exuded no energy or "WOW" on the floor, made small talk rather than corrected the technique of clients, did not push clients during their workouts or encourage them to stick to their diets, did not greet or say goodbye to all clients, did not compliment clients on their workouts, and did not go to the cardio area to motivate clients on interval training. Respondent's Exhibit 1. Id.

25. Upon Douty's return from vacation, he issued Complainant a written warning dated July 16, 2010 after first showing a draft to Nazarian. Joints Exhibits 5 & 14; Transcript III at 134. Douty testified that he issued a written warning because the program was "flat" -- lacking energy, lacking weight loss results, and failing to achieve revenue growth. Transcript II at 154. The written warning refers to a complaint from an "unsatisfied member" -- identified at the public hearing as Patty Dilbarian -- who said that Complainant was not "motivating or nurturing" during workouts.[2] Joint Exhibit 14; Transcript II at 197.

26. Complainant spoke to Dilbarian after learning about her dissatisfaction and explained that she [Complainant] had been distracted as a result of needing to attend to another "frail" client. Transcript I at 98. According to Complainant, she resolved the situation and Dilbarian remained with the gym as a client. Transcript I at 99-100, II at 199. As a

[2] The written warning states that the customer complaint was dated July 16, 2010 but this date was corrected to July 15, 2010 at the public hearing. Transcript II at 197.

result of the written warning, Respondent reduced Complainant's hours from a full-time schedule with an income of $45,000.00 per year to a part-time schedule of approximately twenty hours per week at a rate of $20 per hour. Douty testified that he hoped that working fewer hours would allow Complainant to have more energy and enthusiasm. Transcript II at 208. Although Respondent's policy was to provide health insurance only to full-time employees, Nazarian allowed Complainant to remain on Respondent's health plan. Transcript II at 156, III at 57.

27. Complainant's reduction in hours resulted in verbal feedback from clients stating that they were disappointed that Complainant's hours were reduced. Transcript II at 204-205. One client, Laura Levensohn, e-mailed Douty to express concern that she was no longer having training sessions with Complainant. Complainant's Exhibit 5. The e-mail said that Complainant "has really gone the extra mile in addressing all of my weight loss goals . . . [and] pays close very close attention to our workouts . . . [and] takes the time to support me in my nutrition obstacles." Id.

28. Douty acknowledged that Complainant's performance improved after the warning. Transcript II at 210. Douty increased Complainant's hours when another trainer, Kerry Connolly, started missing shifts due to her father's ill health. Transcript II at 210, III at 94. Douty did not ask part-time Wellesley trainer Sandra Taylor to fill in at Framingham for Connolly even though Taylor was willing to work extra hours. Transcript III at 95.

29. By early September of 2010, Complainant's appearance had changed as a result of hormone therapy and laser hair removal. Her facial features softened, she lost muscle,

her body hair diminished, and her breasts began to develop. Nazarian learned about the changes from Douty. Transcript III at 68.

30. A mandatory staff meeting was held on November 8, 2010. Complainant expressed concern about attending the meeting because of her increasingly feminine appearance consisting of visible breasts, a female haircut, and softer skin. Douty responded by saying, "Wear your uniform, be your fabulous self and everything will be okay." Transcript II at 212. Complainant attended the meeting in a woman's black velour sweat suit, a company t-shirt, and black sneakers. Complainant testified that Nazarian didn't greet her and did not speak to her at the end of the meeting.

31. On November 16, 2010, Douty informed Complainant that she was terminated pursuant to instructions from Nazarian. Joint Exhibit 6; Transcript II at 212. Douty testified that the decision was made to terminate Complainant because her performance "wasn't 100 percent there" and "new energy" was needed. Transcript II at 164. Douty offered to be a reference for her. Transcript II at 214.

32. Nazarian testified that he decided to terminate Complainant because her "WOW" went downhill and she appeared "burnt out or lost." Transcript III at 51. Although Nazarian only occasionally visited the Framingham studio, he stated that he learned about Complainant's declining job performance from studio manager Kurt Douty who was his "eyes and ears." Transcript III at 50. According to Nazarian, Douty told him that Complainant was sitting down, not engaging people during workouts, not "touching" the cardio, and not coming into work ahead of her shift. Transcript III at 50-51. Nazarian did not present any written complaints or testimony from dissatisfied customers at the public hearing despite saying that his studios documented customer complaints and that

some customers left the Framingham studio because of Complainant's lack of enthusiasm,. Transcript III at 90-91.

33. Dennis Avard was also terminated from his position as a "Get in Shape" personal trainer at Nazarian's Nashua, New Hampshire studio. Transcript III at 10. His termination was for failing to show up on time for one or more shifts. Id.; Transcript III at 18, 21.

34. Douty resigned as studio manager of the Framingham gym in December of 2010. He went to work for Bosse City Club and Spa in Cambridge where he continues to be employed. Transcript II at 218-219. Douty testified that he learned about Complainant's MCAD case from Nazarian. In addition to informing Douty about the case, Nazarian discussed the possibility of Douty returning to work for him at a new gym in Danvers. Transcript II at 215. Douty testified that he was interested but decided to remain at his Bosse City Club and Spa. Transcript II at 216.

35. Respondent's monthly studio revenues consist of: 1) sales of new memberships; 2) "bumps" (increasing the length of memberships); and 3) re-signs (renewing memberships). Transcript III at 88-89. A comparison of monthly studio revenues during the eleven full months that Complainant worked for Respondent (December, 2009 through October, 2010) indicates that the Framingham studio had the lowest average and median revenues of the five studios for which such data are available.[3] The most successful studios were those located in communities with the highest household incomes. Transcript III at 104-105. Westford and Framingham have the lowest household incomes of the five communities. Transcript III at 104, 111-112.

[3] The five studios for which data were produced from December of 2009 to October of 2010 are: Bedford, Winchester, Westford, Wellesley, and Framingham. Complainant's Exhibit 6. Their mean and median revenue figures, rounded off by thousands, are as follows: Bedford (mean of $36,000/median of $37,000); Winchester (mean of $48,000/median of $47,000); Westford (mean of $33,000/median of $30,000); Wellesley (mean of $40,000/median of $35,000); and Framingham (mean of $27/median of $25,000). Id.

36. Nazarian testified that one of the reasons that Complainant was terminated was because there were not enough clients at the Framingham studio who bumped up or re-signed. Transcript III at 97. According to Nazarian, it's a studio manager's responsibility to sign up new clients and the responsibility of trainers to get clients to bump up their memberships and re-sign. Transcript II at 216, III at 53, 96. Nazarian testified that he had spread sheets showing bump and re-sign rates, but he did not produce the information fin discovery or at the public hearing. Transcript III at 97, 101, 107.
37. Nazarian testified that he also blamed Douty for problems at the Framingham studio but that the majority of the fault was Complainant's. Transcript III at 84. I do not credit this testimony.
38. Complainant testified that between her termination and the public hearing, she could not find work despite applying for approximately one hundred jobs in various fields such as fitness, patient services, administration, research, and sales. Joint Exhibit 10; Complainant's Exhibit 1. The record contains numerous, unsuccessful efforts by Complainant to secure alternative employment. Respondent failed to offer any credible evidence that Complainant failed to make good faith and persistent efforts to mitigate her damages. As a result of losing her job, Complainant had to vacate her apartment in Wellesley where she enjoyed living and move back into her parents' home in Canton, MA. Transcript I at 113.
39. Complainant testified that being fired was hard because she was not able to say goodbye to the women she was training and she felt that she was abandoning them. Transcript I at 115-116. Complainant described her pursuit of full-time work as exhausting and stated that she has moments of "weakness and doubt." Transcript I at 118.

40. Had Complainant's hours not been reduced in July of 2010 and had she continued to work for Respondent up to the date of public hearing, she would have earned $154,850.00 in income.

III. CONCLUSIONS OF LAW

A. Sex Discrimination

M.G.L. c. 151B, sec. 4 (1) provides that it is unlawful "for an employer, by himself or his agent, because of the . . . sex, . . . of any individual to . . . to discriminate against such individual . . . in the terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification." This prohibition against sex discrimination includes gender-based harassment (i.e., a hostile work environment) and/or gender-based disparate treatment. See Pettiford v. City of New Bedford Police Department, 26 MDLR 304, 309 (2004) (police detective subjected to gender-based harassment and gender-based disparate treatment); Nassab v. Massachusetts General Hospital, 25 MDLR 429 (2003) (radiological technologist subjected to gender-based harassment and disparate treatment); Belopolsky v. Massachusetts Bay Transportation Authority, 25 MDLR 181 (2003) (assistant mechanical engineer subjected to gender-based harassment and gender-based disparate treatment). Discrimination against an individual because he or she is transsexual constitutes a violation of the prohibition against sex discrimination. See Millett v. Lutco, 23 MDLR 231 (2001).

2. *Gender-Based Disparate Treatment*

In the absence of direct evidence of disparate treatment discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn &

Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case, Complainant must show that: 1) she is a member of a protected class; 2) she was adequately performing the duties of the job at issue; 3) she was subject to adverse treatment; and 4) she was treated differently from other employees similarly situated but not members of the protected class. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext. See Blare, 419 Mass. at 444-445. Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of discriminatory intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

As far as satisfying the elements of a prima facie case, there is no dispute that Complainant is a transgender female and, thus, a member of a protected class. In regard to the second element of the prima facie case, Respondent faults Complainant's performance as lacking in enthusiasm whereas Complainant maintains that she was adequately performing the duties of her job. Whatever her level of her enthusiasm, Complainant was, by all accounts, neither incompetent nor untrustworthy. Accordingly, her job performance was sufficient to satisfy the prima facie requirement of adequately performing the duties of her job. Complainant likewise satisfies the third element of a prima facie case in that she was terminated from her job and thus subject to adverse treatment. The final requirement -- that she was treated differently from other trainers -- is satisfied by the fact that only one other trainer, Dennis Avard, was fired at or around the time of Complainant's employment by Respondent. In Avard's case, the reason for termination was missing shifts. No trainers aside from Complainant were fired for a lack of "WOW" or a failure to grow studio membership. Based on the foregoing, I conclude that Complainant has satisfied the elements of a prima facie case.

Turning to Respondent's stage two burden to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence, Glenn Nazarian argues that Complainant exhibited a lack of the "WOW" factor that he expected to be displayed at all times by his trainers. Nazarian described Complainant as "burnt out or lost." Nazarian blamed Complainant for the fact that the Framingham studio had the lowest revenues of all the studios that he owned.

Nazarian's position is supported by testimony of Kurt Douty who justified Complainant's termination in November of 2010 on the basis that her performance

"wasn't 100 percent there" and "new energy" was needed. Douty acknowledged that Complainant performed well during the first four months of her employment but asserts that Complainant thereafter became less energetic and by April of 2010 was displaying a lack of enthusiasm at work, failing to provide a consistent level of customer service, spending too much time discussing her personal interests with clients rather than coaching and training, and failing to achieve growth in sales and "bumps."

Nazarian's position is likewise supported by trainer Sandra Taylor who claimed to observe Complainant on several occasions leaning against equipment, failing to "work the floor" and displaying low energy. Respondent's witness James Daisey also supported Nazarian's position by writing a July, 2010 e-mail in which he stated that Complainant exuded no energy on the floor, made small talk rather than corrected the technique of clients, did not push clients during their workouts or encourage them to stick to their diets, did not greet or say goodbye to all clients, did not compliment clients on their workouts, and did not go to the cardio area to motivate clients on interval training. The aforesaid testimony is sufficient to satisfy Respondent's stage two burden.

At stage three the burden shifts back to Complainant to persuade the fact finder by a preponderance of evidence that the articulated justifications for her termination are not the real reasons for the adverse action but a pretext for gender discrimination. For the following reasons I conclude that she succeeds in establishing pretext.

As a performance requirement, the "WOW" factor is disturbingly subjective and nowhere cited in the company's employee manual. I conclude that Respondent relied on this nebulous quality to justify the termination of Complainant instead of the real reason for termination, i.e., that Complainant's evolving gender identity was contrary to the

desired corporate image. Respondent justified Complainant's termination by citing anonymous clients who were allegedly dissatisfied with her performance but identified only one such client by name, Patty Dilbarian. While Dilbarian may have expressed concern about the quality of her workouts, it is also true that her concerns were resolved after speaking with Complainant. Respondent failed to identify any other dissatisfied clients, leading to the conclusion that none existed. A related accusation -- that half of Complainant's customers transferred to trainer Sandra Taylor – was utterly lacking in evidentiary support.

Complainant, for her part, produced two favorable customer letters. One letter, drafted in mid-August of 2010 described Complainant as a "great coach." Exhibit 3. The second letter expressed disappointment at no longer having training sessions with Complainant because she "had really gone the extra mile in addressing all of my weight loss goals . . . pays close attention to our workouts [and] takes the time to support me in my nutrition obstacles." Complainant's Exhibit 5.

There were, to be sure, several witnesses who testified about Complainant's shortcomings as a trainer but they are associates or former associates of Glenn Nazarian whose testimony was not convincing. To a person, they continue to have social and business relationships with Nazarian or the possibility of future business relationships with him. In the absence of corroboration from dissatisfied clients, I am not persuaded that their testimony paints an accurate picture of Complainant's capabilities as a trainer.

It is noteworthy that following Kurt Douty's written warning to Complainant on July 16, 2010 which converted Complainant to a part-time employee, Respondent increased Complainant's hours during the ensuing months. Nazarian could have arranged

for Wellesley trainer Sandra Taylor to perform the extra work, but he and Douty opted to use Complainant instead. The reliance on Complainant to perform the extra shifts does not comport with the Respondent's position that Complainant's performance had become unsatisfactory, nor does Douty's offer to serve as a reference for Complainant after firing her.

The revenue figures relied on by Respondent to show that Framingham was the worst performing studio of those owned by Nazarian during in 2009-2010 also fail to support Respondent's position because they fail to distinguish between initial sign-ups, on the one hand, and "bumps" and "re-signs" on the other. This omission is significant because studio managers are responsible for initially signing up clients whereas trainers are responsible for securing bumps and re-signs. Given this allocation of responsibility, blame for Framingham's under-performance cannot be determined without separately examining each category of income. Nazarian testified at the public hearing that a spread sheet existed which distinguished between sign-up revenues and monies received as a result of re-signs and bumps, but he failed to produce it. I draw a negative inference from this failure and assume that the data would show that the unsatisfactory income produced by the Framingham studio resulted primarily from Kurt Douty's failure to sign up new clients.

I am similarly unpersuaded that the evaluation of Complainant's performance in the James Daisey e-mail is a fair and neutral assessment of Complainant's work as a trainer rather than a statement of what Nazarian wanted to hear. Daisey devotes more than two pages of single-spaced text to criticizing Complainant without focusing on the role of studio manager Douty for whom he was filling in. Daisey blames all

shortcomings at the Framingham studio on Complainant when it stands to reason that the studio manager must bear responsibility for most of these matters. Daisey's e-mail indulges in extensive use of Nazarian's so-called "WOW" philosophy (e.g., "no wow from John … each trainer has there [sic] own type of WOW" … the ladies [should] leave saying WOW …"). Daisey's manner of expression contributes to my inference that the e-mail was solicited to achieve the pre-ordained result of easing Complainant out of the company.

Another factor which supports an inference of gender discrimination is Nazarian's characterization of Complainant as being "blatantly out of dress code" while attending a June of 2010 staff meeting in female attire. Nazarian claimed that Complainant violated the company's dress code by appearing at the staff meeting in shorts, a scarf, jewelry, and slippers. The employee manual, however, only requires that employees be attired properly when "clocking in for their shift." The meeting took place on Complainant's day off, was held at Nazarian's Bedford studio where Complainant did not work, and was scheduled during the middle of the day when the studio was closed for work-outs. Under these circumstances, it appears that the real reason for Nazarian's concern was his concern over Complainant appearing at the meeting in female clothing. It is also noteworthy that just prior to Complainant's written warning and termination, Nazarian had encountered Complainant presenting as a transgender female at staff meetings in June and November of 2010. The temporal relationship between such encounters and the ensuing discipline provides additional support for the conclusion that Respondent's discriminatory animus caused her firing.

Having considered all relevant evidence, I am persuaded that Respondent's reasons for Complainant's termination were pretextual and that the real reason for termination was Complainant's transgender status. I base my conclusion on Nazarian's alleged reliance on anonymous customer criticisms about Complainant's performance which lack documentary or testimonial support, subjective characterizations about Complainant's perceived shortcomings, the withholding of financial data, and criticism of Complainant's appearance during her off-duty hours. The termination letter refers to several prior verbal warnings but the record fails to support the claim that such verbal warnings were ever given. The written warning, which reduced Complainant's hours, was followed by a subsequent increase in Complainant's hours even though another trainer was available to fill in at the Framingham studio.

Nazarian made much of his acceptance of masculine-looking gay females both in his personal life and at his studios. There is no reason to doubt such acceptance, but it does not prove that he was equally tolerant of a female transgender employee working at one of his studios. Complainant was hired as a male trainer whom Nazarian perceived to be gay. Within a year, Complainant was presenting as a transgender female, wearing female gym attire, light makeup, and a female hairdo. The evidence establishes that it was this appearance which played the primary role in her termination.

IV. REMEDIES AND DAMAGES

A. Back Pay

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct

result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). The period between Complainant's removal from active duty on January 24, 2007 and the commencement of the public hearing on December 6, 2011 must be examined in regard to a claim for back pay damages. See Stephen v. SPS New England, Inc., 27 MDLR 249, 250 (2005) (lost back pay runs to the date of the public hearing); Williams v. New Bedford Free Public Library, 24 MDLR 171, 172 (2002) (same).

Complainant testified that between her termination and the public hearing, she could not find work despite applying for approximately one hundred jobs in various fields such as fitness, patient services, administration, research, and sales. The record contains numerous, unsuccessful efforts by Complainant to secure alternative employment. Complainant has been forced to move back in with her parents in Canton, MA. Had Complainant's hours not been reduced in July of 2010 and had she continued to work for Respondent up to the date of public hearing, she would have earned $154,850.00 in income.

It is Respondent's burden to establish that Complainant failed to mitigate her damages by producing contrary evidence. See Duso v. Roadway Express, Inc., 32 MDLR 131 (2010) *citing* Anderson v. United Parcel Service, 32 MDLR 45 (2010). Respondent failed to offer any credible evidence that Complainant failed to make good faith and persistent efforts to mitigate her damages. Accordingly, I decline to reduce the losses sustained in 2007 by Complainant.

B. Emotional Distress Damages

An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Complainant did not testify in depth about the emotional impact of losing her job other than to state that she was sorry to leave her clients in Framingham and her apartment in Wellesley. Complainant described as "exhausting" her unsuccessful efforts to find full-time work. She tied the emotional toll of her job search to her transgender status which, according to Complainant, required that she be "strong" all the time. According to Complainant, prior to transitioning she had no trouble finding employment, but after becoming a transgender female, she could not find work.

I am mindful that when assessing emotional distress damages, I must look to the impact of Complainant's termination as a trainer, not the emotional toll of experiencing the world as a transgender female. Complainant eloquently described the latter experience as a challenging journey. She was less forthcoming in regard to the impact of losing her job other than to say that her job search was exhausting and unsuccessful and that she was forced to leave an apartment where she enjoyed living.

After weighing all the factors contributing to Complainant's emotional distress, I conclude that Complainant is entitled to $25,000.00 in emotional distress caused by her termination as a trainer with the Naz Fitness Group.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

(1) Cease and desist from all acts of gender discrimination;

(2) Reimburse Complainant for back pay losses for $154,850.00 in income;

(3) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of $25,000.00 in emotional distress damages.

(4) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Naz Fitness supervisors and managers in regard to gender discrimination. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date, and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training.

Complainant shall receive interest on the damages awarded at the statutory 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.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days

after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 2nd day of January, 2015.

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Betty E. Waxman, Esq.,
Hearing Officer