COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DERRICK SIMS,
Complainants

v. DOCKET NO. 11-BEM-02707

15 LAGRANGE STREET CORP.,
d/b/a/ THE GLASS SLIPPER
GENTLEMAN'S CLUB,
NICHOLAS ROMANO,
and MICHAEL BENNETT,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant Derrick Sims. Following an evidentiary hearing, the Hearing Officer found that Respondents were liable for discrimination based on race after creating a hostile work environment and unlawfully terminating Complainant's employment. However, the Hearing Officer concluded that Respondents were not liable for retaliation based on Complainant's reports of sexual harassment in the workplace. Respondents have appealed to the Full Commission.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et seq.*), 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, § 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.

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). The role of the Full Commission is to determine whether the decision under appeal was based on an error of law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF FACTS

Complainant, an African American man, was hired as a bouncer at The Glass Slipper Gentleman's Club in August 2010. This club is managed by Respondents Nicholas Romano and Michael Bennett, who are both white. During the relevant time period, the club employed at least three other black bouncers and an unspecified number of white bouncers.

Complainant testified that the club provided walkie-talkies to staff which they used to communicate with one another. Sometime around October 2010, Complainant arrived at work and picked up one of the new walkie-talkies in order to facilitate communications during his

shift. He stated that a white bouncer told him to put the walkie-talkie back because Romano did not like "colored people" using the new walkie-talkies. Complainant recounted this incident to Danny Wong, an Asian night-shift bouncer who assigned bouncers their posts and gave them direction, but Wong was "indifferent."

Complainant testified that Romano never addressed him by name or acknowledged him, but he greeted non-black bouncers by their names, shook their hands, and talked to them. Complainant stated that on the nights when Romano was working, he was assigned to work outdoors at the club entrance, but that on nights when Bennett was working, he was allowed to work indoors. Complainant testified about one occasion when he came inside from his outdoor post to warm up briefly, but Romano angrily ordered him to go back outside. Complainant testified that one of the other black bouncers complained to him about the way Romano treated him, saying that he was glad he worked only one night with Romano.

Complainant testified that only five of the club's thirty to thirty-five dancers were black, and that Romano would allow only two of these black dancers to work nights and they were not allowed to perform after one another. White dancers were not subjected to such restrictions. Complainant stated that on one occasion he heard Romano yell by walkie-talkie to bouncers to "get that black b**ch off the stage right now."

Tanisha Pearson, a dancer who formerly worked at the club, testified that she heard Romano call darker-skinned dancers "ni**ers" and he once told an African American dancer that he would not allow "ni**ers" to work the night shift.

On Friday, February 25, 2011, Complainant worked a night shift for another bouncer who agreed to cover Complainant's night shift on Saturday, February 26, 2011. Complainant worked his day shift on Saturday and then left for the night. While he testified that he left his day shift

because another bouncer took it over for him, the Hearing Officer did not credit this testimony, finding instead that Complainant left his day shift early without securing a replacement. When Romano arrived at the club, prior to the start of the night shift, the front door was unattended. Upon learning that Complainant could not be found, Romano became angry and told Wong to terminate Complainant's employment.

Shortly following Complainant's termination, Romano fired an African American bouncer who arrived late for his shift. Bennett testified that this action occurred after Romano, upset about employee tardiness in general, announced that he was going to fire the next person who arrived late. In addition, Bennett terminated the employment of another African American bouncer for failing to take action against disorderly customers.

On September 19, 2011, Complainant filed a complaint with the Massachusetts Commission Against Discrimination on the basis of race discrimination and for creating a racially hostile work environment and for unlawful termination of his employment in retaliation for his reports of sexual harassment. Based on the foregoing, the Hearing Officer concluded that Respondents were liable for creating a hostile work environment based upon race. While she did not credit all of Complainant's testimony concerning conduct that he believed to be racially motivated, the Hearing Officer found many of his allegations to be credible. The Hearing Officer also found that Complainant's termination was motivated by discrimination on the basis of his race. However, she concluded that Complainant did not establish a case of retaliatory termination based on his complaints of sexual harassment in the workplace, as she found Complainant's testimony on this issue to be "vague and unconvincing." The Hearing Officer awarded Complainant $20,000 in lost wages and $25,000 in emotional distress damages.

BASIS OF THE APPEAL

Respondents have appealed the decision on the grounds that the Hearing Officer erred in concluding that Respondents were liable for discrimination on the basis of race. Specifically, Respondents argue that the Hearing Officer was not permitted to make a finding that Complainant was terminated based on his race because this issue was not raised in the complaint and Respondents were not on notice that discriminatory discharge based on race was at issue. Second, Respondents assert that even if the Hearing Officer was permitted to consider the issue of discriminatory discharge, there was no evidence that Complainant was terminated based on his race. Third, Respondents argue that the Hearing Officer erred in finding that Respondents created a hostile work environment based upon race, as this finding is unsupported by the evidence. Finally, Respondents argue that the Hearing Officer's award of damages for lost wages and emotional distress is unsupported by the evidence.

We have carefully reviewed Respondents' 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. 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 of fact that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. Substantial evidence is such evidence that a "reasonable mind" would accept as adequate to form a conclusion. M.G.L. c. 30A, § 1(6); Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984).

Respondents argue unpersuasively that the Hearing Officer erred in finding that Complainant's termination was motivated by discriminatory animus based upon race. Specifically, they assert that the Complainant did not include discriminatory termination based on race as a cause of action in his complaint and this issue was not certified for public hearing. Respondents contend that the issue of discriminatory discharge was "introduced into the proceedings on the initiative of the Hearing Officer alone," and that the Hearing Officer's action was prejudicial, unfair, and impermissible as a matter of law because Respondents were not on notice of this issue and were unable to properly defend against the claim at the hearing.

Respondents concede that the issues of Complainant's unlawful termination and racial discrimination were raised in the complaint. Although Complainant believed his termination was in fact retaliation for his complaints of sexual harassment, the Hearing Officer found that Complainant was terminated based on his race. Given Complainant's allegations of racial discrimination and unlawful termination in his complaint, Respondents were on notice that a claim of racial discrimination could well encompass a claim of unlawful termination based on race. See, e.g., Riggs v. Town of Oak Bluffs, 25 MDLR 348 (2003) (Hearing Officer did not abuse her discretion when, although the initial complaint did not specifically state a claim of a violation of M.G.L c. 151B, § 4(4A) against the individual respondent, the Hearing Officer found him liable based on the evidence adduced at trial). Further, Respondents appeared at the hearing in their defense and were on notice at the beginning of the hearing that the issues to be heard by the Hearing Officer were "a hostile work environment claim based on race. And that was up until the time of the termination and that race played some role in the decision to terminate, but the second claim is also the retaliation for reporting the sexual harassment." (Tr. I, p. 8). Thus, the Hearing Officer's consideration of discriminatory termination based on race, and

her ultimate finding that Complainant was terminated based on his race, was not an error of law or an abuse of discretion.

Respondents next argue that even if the Hearing Officer did not err in considering a discriminatory discharge claim, Complainant failed to establish a prima facie case because he did not demonstrate that similarly situated persons not in his protected class were treated differently.

The Hearing Officer found that during the time leading up to Complainant's termination, Respondents were dealing with bouncer attendance issues, as bouncers were not arriving on time for their scheduled shifts. The Hearing Officer credited Bennett's testimony that bouncers were given latitude with arriving late and missing shifts and that they were not immediately terminated. The Hearing Officer nonetheless found that Complainant was let go because he left his shift early and shortly after, another black bouncer was let go because he arrived late for his shift. The Hearing Officer found that the decision to terminate Complainant and the other black bouncer were made solely by Romano, who the Hearing Officer described as having a "pervasive racist attitude" based on his comments and treatment of black employees. The Hearing Officer was permitted to draw the reasonable inference that because of Romano's racial animus he acted with discriminatory intent when he terminated the Complainant's employment. There was no evidence that any white bouncer was terminated or subjected to disciplinary actions for attendance issues. Instead, the credible testimony suggests that most bouncers were treated leniently in regards to their tardiness. We agree with the Hearing Officer's conclusion that this evidence was sufficient to meet the Complainant's burden of establishing a prima facie case of discriminatory termination based on race.

Respondents next argue that Complainant failed to meet his burden of proving by a preponderance of the evidence that one or more of the reasons advanced by Respondents for

terminating the Complainant were not the real reasons, but were pretext. The Hearing Officer found that Respondents' Position Statement, signed by Bennett, Romano, and Wong, asserted that Complainant was terminated not only for leaving his job post early on February 26, 2011, but also because he was frequently tardy and spent too much time on the second floor of the club soliciting dancers to work at private parties. The Hearing Officer found that these stated reasons were refuted at the hearing based on the credible testimony from Wong, Bennett, and Complainant that Complainant only visited the second floor to use the restroom, Wong never spoke to Complainant about tardiness issues, and Bennett had no recollection of Complainant ever being late for work. Nor did they dispute that Complainant was a reliable and serious employee. In addition, the Hearing Officer found that Romano was solely responsible for making the decision to terminate the Complainant, Romano made racially charged comments, and he did not take the allegations of racial discrimination seriously. We agree with the Hearing Officer's determination that based on the evidence, Respondents' stated reasons for terminating the Complainant were a pretext for unlawful discrimination.

Respondents next contend that the Hearing Officer erred in finding that Respondents created a hostile work environment based upon race. The Hearing Officer credited Complainant's assertions that he was ignored by Romano, who never addressed him by name or acknowledged him but, by contrast, greeted non-black bouncers by name, shook their hands, and talked to them. She also credited Complainant's testimony that Romano consistently assigned Complainant to work outdoors at the club's front entrance, instead of indoors, that Romano once angrily ordered him back outside when he came inside briefly to get warm, and that Romano refused to approve a white bouncer's offer to switch locations with Complainant on one occasion. She also credited Complainant's testimony that when he arrived at work and picked up

a new walkie-talkie in order to facilitate communications during his shift, a white bouncer told him to put it back because Romano did not like "colored people" using the new walkie-talkies. In addition, the Hearing Officer credited Complainant's testimony that Romano would allow only two black dancers to work nights and they were not allowed to perform after one another, while white dancers were not subjected to such restrictions. Complainant stated that he heard Romano yell via walkie-talkie to bouncers at the bar to "get that black b**ch off the stage right now." The Hearing Officer also credited the testimony of Tanisha Pearson, who formerly worked at the club, who stated that she heard Romano call darker-skinned dancers "ni**ers" and that he once told a dancer that he would not allow "ni**ers" to work the night shift." The Hearing Officer concluded that these comments were "of the type and severity that would make any employee in Complainant's protected class feel angry, insulted, alienated and uncomfortable." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995). We agree with the Hearing Officer. Given the nature and character of Romano's actions and racial epithets directed toward black employees, these incidents are more than sufficient to support a finding of a hostile work environment based upon race.

Finally, Respondents challenge the Hearing Officer's award of $20,000 for lost wages and $25,000 for emotional distress damages. The Hearing Officer found that Complainant's lost wages from February 27, 2011, the date of his termination, until February 2012, when he obtained full time employment, were determined by calculating what he typically earned per shift and dividing that figure by the number of hours on a shift in order to obtain an hourly rate. He then used that hourly rate to determine approximate monthly wages and an annual salary of roughly $37,000. Given that Respondents paid Complainant in cash, failed to keep records and presented no evidence on the damages issue, such a method of calculating an approximate annual

salary was reasonable under the circumstances. Complainant then subtracted his interim earnings of $17,000 in 2011 and 2012 to arrive at the $20,000 figure. The Hearing Officer did not err in concluding that Complainant was entitled to $20,000 in lost wages.

With respect to the award for emotional distress damages, Respondents argue that the evidence was limited to Complainant's "own, unsupported testimony" that could not support an award of emotional distress damages. Upon a finding of unlawful discrimination suffered as a direct result of discrimination, the Commission is authorized to award emotional distress damages. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). The Hearing Officer based her award upon Complainant's testimony regarding the substantial harm he suffered as a result of Respondents' unlawful acts. The Hearing Officer found that Complainant testified credibly that he was upset and disgusted by the racism he had to tolerate at the club. Complainant testified that the racial epithets that were used, along with Romano's overall attitude toward black employees, made him feel angry and worthless. The Hearing Officer further found that Complainant was distressed as a result of his termination. It was within the Hearing Officer's discretion to credit the testimony of Complainant in regard to these matters. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005) (providing that a Hearing Officer's credibility determinations are entitled to deference). We determine that the Hearing Officer's award of damages in the amount of $25,000 for emotional distress was sufficiently supported by the evidence.

PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorneys' Fees and Costs on March 18, 2015, to which Respondents have filed an opposition. Complainant's Petition seeks attorneys' fees in the

amount of $42,840 and costs in the amount of $4,948.29. This figure represents 142.8 hours of compensable time at an hourly rate of $300. We determine that the hourly rate of $300 is reasonable based upon the Complainant's attorney's experience and comparable rates. The Petition is supported by contemporaneous time records noting the amount of time spent on specific tasks and an affidavit of counsel.

M.G.L. 151B allows prevailing complainants to recover attorneys' fees for the claims on which the complainant prevailed. 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. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by a reasonable hourly rate. 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 the complexity of the matter. Baker v. Winchester School Committee, 14 MDLR 1097(1992).

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 prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Brown v. City of Salem, 14 MDLR 1365 (1992).

Respondents have filed an Opposition to the fee petition arguing the amount sought is duplicative and excessive and must be reduced to reflect only partial success since Complainant did not prevail on all his claims. Where different claims are involved, and the Complainant has prevailed on some claims, but not others, the Commission may exercise its discretion to reduce the overall fees requested by some amount reasonably associated with the pursuit of Complainant's unsuccessful claim. See Marathas v. Holiday Inn, 22 MDLR 391 (2000). Where, as here, the retaliation claim is separate and distinct and not entirely based on a common nucleus of facts or related legal theories, the fee award must be reduced.

Having reviewed Respondent's Opposition we determine that the fee request should be reduced to reflect the fact that Complainant did not prevail on his claim of retaliation based on his alleged report of sexual harassment in the workplace. The contemporaneous time records submitted do not permit an itemized deduction of time solely spent on the retaliation claim. Accordingly, we will discount the fee petition by 25 per cent. We therefore conclude that an award of $32,130 for attorneys' fees is appropriate given these circumstances. We find that the request for reimbursement of costs is reasonable and will award Complainant a total of $4,948.29 for the itemized expenses.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. Respondents' appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is confirmed in its entirety.

1. Respondents shall immediately cease and desist from all acts that violate G.L. c. 151B, §4(1).
2. Respondents shall pay to Complainant the sum of $25,000.00 in damages for

emotional distress with 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. Respondents shall pay to Complainant the sum of $20,000.00 for lost wages with 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. Respondents shall pay to Complainant attorneys' fees in the amount of $32,130.00 and costs in the amount of $4,948.29, with interest thereon at the rate of 12% per annum from the date the petition for attorneys' fees and costs was filed, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This order represents the final action of the Commission for purposes of M.G.L. c.30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of service of this decision and must be filed in accordance with M.G.L. c.30A, c.151B, § 6, and the 1996 Standing Order on Judicial Review of Agency Actions, Superior Court Standing Order 96-1. Failure to file a petition 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.

SO ORDERED[1] this 20th day of December, 2018.

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner

[1] Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(1)(c).