

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
& DERRICK SIMS,
Complainant

v.

DOCKET NO. 11-BEM-02707

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

Appearances:

Lana Sullivan, Esquire for Derrick Sims
Jack K. Merrill, Esquire for Respondents

AMENDED DECISION OF THE HEARING OFFICER
ON REMAND FROM THE APPEALS COURT

I. INTRODUCTION

On or about September 19, 2011, Complainant Derrick Sims, who is African-American, filed a complaint with this Commission charging Respondents with discrimination on the basis of race and color for creating a racially hostile work environment and for terminating his employment because of his race and color and in retaliation for reporting sexual harassment in the workplace. A public hearing was held before me on March 18-20, 2014. On March 3, 2015, I issued a decision in favor of Complainant, finding that Respondents subjected him to a racially hostile work environment and terminated his employment on the basis of race and color. I dismissed Complainant's charge of retaliatory termination. I awarded Complainant emotional damages in the sum of \$25,000 for emotional distress and \$20,000 for lost wages. The Full

Commission upheld the hearing decision in all respects and also determined that Complainant's counsel was entitled to attorneys' fees and costs.¹ The Superior Court, in turn, upheld the Commission's decision.

Upon further appeal, the Appeals Court upheld the Complainant's claim of a racially hostile work environment. However, the Appeals Court concluded that the Respondents had not received adequate notice of a claim of discriminatory discharge, thereby prejudicing their case and depriving them of due process. The Appeals Court thus vacated the claim of discriminatory discharge for lack of due process and remanded the case to the Commission to recalculate the emotional distress and attorneys' fees, in light of its determination that Complainant did not prevail on his discriminatory termination claim.

After a review of the record in this matter and in accordance with the Appeals Court decision, I have made certain deletions and additions to my hearing decision that are reflected in the within amended decision. Specifically, I have omitted those portions of the Findings of Fact, Conclusions of Law, Remedy and Order that supported Complainant's claim of discriminatory discharge and lost wages. Further, I have added a section entitled "Attorneys' Fees and Costs" and revised the discussion of emotional distress damages. The within Amended Hearing Decision supplants and supersedes my hearing decision of March 13, 2015.

II. FINDINGS OF FACT

1. Complainant Derrick Sims is an African-American man who resides in Boston. From August 2010 to February 27, 2011, Complainant worked as a bouncer² at The Glass Slipper

¹ At the time of the hearing decision, the Full Commission determined attorneys' fees on cases that were appealed. The revised regulations now require the Hearing Officer to determine attorneys' fees. 804 CMR 1.12(19)

² The terms "doorman" and "bouncer" are used interchangeably.

Gentleman's Club in Boston. At the time, Complainant also attended Bunker Hill Community College and was self-employed as a bodyguard.

2. Respondent 15 LaGrange Street Corp. operates the Glass Slipper Gentlemen's Club located at 22 LaGrange Street, Boston, MA. (Tr. II, p. 22); Stipulated Fact No.1.

3. The club is managed by Respondents Nicholas Romano and Michael Bennett, who are both white, and is owned by Romano and Bennett's mother, who inherited half of the business from her deceased husband William Bennett. (Tr. I, p. 46, 140, 235; Tr. II, pp. 21, 24, 69)

4. The club has four floors. (Tr. I, p. 60-62) On the first floor, there is a female dancers' stage, a bar and bathrooms plus a "cul-de-sac" in the back for private dances. (Tr. I, p. 60-61; Tr. III, P.10-11) The second floor contains a dressing room for the dancers, a DJ booth, a handicap accessible bathroom and a women's bathroom. (Tr. I, 61, 162; Tr. III, 10-11) The third floor consists of the "Champagne Room" which contains four cul-de-sacs for private dances as well as two bathrooms. On the fourth floor are Bennett's and Romano's offices. (Tr. I, p.61-2, Tr. III, p. 10-11)

5. Complainant began working as a bouncer for Respondent in August 2010. He was referred by his cousin, a former longtime employee of the club who was close to Michael Bennett's late father. (Tr. I, 42, 133-134; 226, Tr. II, p. 90, 92) Bennett hired Complainant for the position. (Tr. I, p. 43; Tr. II, p. 119)

6. There were two employee shifts at the club. The day shift ran from 12:00 p.m. to 7:30 p.m. The night shift ran from 7:30 p.m. until the club closed at approximately 2:30 a.m. (Tr. I, p. 57)

7. The club employed three black bouncers in addition to Complainant. One of the other black bouncers has worked for Respondents for 12 or 13 years, primarily on the day shift. (Tr.

III, p. 45, 48), In addition, Shawn Simmons and another black bouncer worked primarily nights. A white bouncer oversaw the "Champagne Room" on the third floor, but he did not supervise doormen. (Tr. II, p. 36)

8. Bennett testified that he was in charge of hiring the bouncers, who started out as "fill-ins" until they "proved their worth." Bennett testified credibly that bouncers who arrived late or missed shifts were not immediately terminated and were given the chance to acclimate to the job.

9. Alan Goldstein is the club's daytime general manager and he worked Monday through Friday. Goldstein performed a variety of duties, including hiring the club's dancers and acting as a day shift bouncer. Goldstein scheduled a total of three doormen on Sundays and Mondays, and four doormen the remainder of the week. (Tr. I, p. 44-45, 141; Tr. II, p. 35, 37, 112, 118; Tr. III, p. 8)

10. Danny Wong, who is Asian, was a night-shift bouncer who assigned the bouncers to their posts and gave them direction. (Tr. I, p. 63, 137-138, 141; Tr. II, p. 112, 131, 135, 137) Romano testified that while Wong would typically assign bouncers to their posts during the shift, Romano and Bennett retained the ultimate authority to designate a bouncer's work location. (Tr. II, p. 37, 131)

11. Romano worked Monday, Wednesday and Friday nights, arriving between 7:30 and 8:00. Bennett worked Tuesday, Thursday and weekends, arriving between 10:30 and 11:00 p.m. Every Friday, Romano and Bennett met at the club between 8:30 and 9:00 p.m. in order to review events that transpired during the week. (Tr. I, p. 47; Tr. II, p. 25-26, 84)

12. From August 2010 to October 2010, Complainant worked approximately three shifts per week as a fill-in for bouncers who were out. He often received a text from Wong on short

notice to come in and cover a shift. (Tr. I, p. 55, 112) Complainant testified that he was never late and never missed work. I credit this testimony.

13. Complainant's duties and responsibilities as a bouncer included confronting and removing unruly customers, protecting dancers from overzealous customers, enforcing the "no contact" with dancers rule, the Alcoholic Beverages Control Commission ("ABCC") rules and regulations and walking dancers to their cars at the end their shifts. (Tr. I, pp. 48-49, 51, 128, 22-223)

14. The club provided walkie-talkies to staff that they used to communicate with one another. (Tr. I, pp. 49, 85, 88, 158-159, 161-162) Complainant testified credibly that sometime around October 2010, he arrived for his shift and took one of the newer walkie-talkies. According to Complainant, a white bouncer told him to put it back because Romano did not like "colored people" using the new walkie-talkies. At first Complainant thought this was a joke, but when he went to pick up the walkie-talkie again, he was told again to put it back. Complainant testified that when he told Wong about the incident, Wong was "indifferent." (Tr. I, pp. 64-66; 220-221)

15. By November 2010, Complainant worked as many as 64 hours per week, including many double shifts. (Tr. I, pp. 55, 67, 119-120; Tr. III, p. 24)

16. Complainant testified that Romano never addressed him by name or acknowledged him, while he greeted the non-black bouncers by name, shook their hands and talked to them. (Tr. I, p. 70) Complainant acknowledged, however, that Romano treated Simmons well because they had known each other a long time. (Tr. I, p. 70-73) I credit his testimony.

17. Complainant testified that on the nights when Romano worked, he was assigned to the club entrance, outdoors. (Tr. I, pp. 62, 67, 127, 198-199, 221-222) When Bennett was on

duty, Complainant was permitted to work indoors on the first or third floor. (Tr. I, pp.62-63, 84-86, 92, 127, 148-149) Complainant testified that Romano re-assigned him to the front door so often that in time he began to automatically place himself at that post, even when Wong initially assigned him to another location. I credit his testimony. Simmons also testified that the owners preferred him to work at the front door. (Tr. II, p. 151) Notwithstanding, there was evidence that Simmons worked inside the club as well.

18. Complainant testified credibly that once when stationed at the front door, he came inside briefly to warm up and Romano angrily directed him to return to his post outside. (Tr. I, pp. 69, 89) On another occasion, a white bouncer offered to switch locations with Complainant, but Romano disapproved of the change and Complainant remained at the front door. (Tr. I, p. 70) Romano testified that he did not know where Complainant was stationed on any given night. I do not credit this testimony. He stated that whoever was stationed at the front door during the night shift was required to remain outside the door throughout the shift. (Tr. II, p. 48)

19. Complainant testified that at least once a week, Romano drove up to the club in a van containing trash from a flower shop he owned and directed Complainant to dispose of the trash in the club's receptacles. (Tr. I, p. 68, 129, 199, 202-3, 204-5; Tr. II, p. 53) Complainant never observed a white bouncer disposing of the flower shop's trash. (Tr. I, p. 68-69; 204-207; 109-210) However, Goldstein testified credibly that he usually disposed of Romano's trash because he worked during the day. (Tr. II, p. 127) Wong also testified credibly that he disposed of the trash on occasion. (Tr. II, p. 140) Romano stated that whoever was available disposed of the trash. (Tr. II, p. 150) I credit Romano's testimony.

20. Complainant testified that on one occasion, Romano visited the club when Bennett was working and, while seated at the bar, he began to doze and fell off his chair. (Tr. I, p. 66-67,

74, 127-128; 210-212,214) When Complainant tried to help Romano up, Romano became enraged and told Complainant not to touch him, but he allowed a white customer to assist him. (Tr. I, pp. 66-67, 74, 76) Romano testified that he rejected Complainant's assistance because he was embarrassed about falling asleep while watching one of the dancers and not because Complainant is Black. I credit Romano's testimony.

21. Complainant testified credibly that one of the other black bouncers complained to him about the way Romano treated him, stating he was glad he only had to work one night a week with Romano. (Tr. I, p. 73)

22. Complainant testified that of the club's 30 to 35 dancers, only five were black. He testified that five or six dancers worked the day shift and as many as 15 dancers worked the night shift. (Tr. I, p. 76)

23. Complainant testified that Romano would typically allow only two black dancers to work nights and they were not allowed to perform one after another, while the white dancers were not subject to such restrictions. I credit his testimony. (Tr. I, p. 76-78; Tr. II, p. 67-68) Complainant testified that on several occasions, he heard Romano yell over the walkie-talkie to bouncers to "get that black bitch off the stage right now." (Tr. I, p. 77-78, 215-217) His testimony at the hearing differed from allegations in his complaint and from his deposition testimony wherein he stated he heard the remark on only one occasion. Romano testified that he "said a lot of things" but did not recall ever making such remarks. (Tr. II, p. 45) I credit Complainant's testimony that he heard Romano make such a remark, but only on one occasion. According to Complainant, a Black dancer was fired for arguing with a white dancer, who was not terminated. (Tr. I, p. 77)

24. Tanisha Pearson, a dark-skinned³ former dancer at Respondent, testified that she worked at the club six days per week for 13 months, during which time she was allowed to work only one night shift, when the club was short dancers. (Tr. III, p. 14-15) She stated that she only worked with Complainant on four or five occasions during her employment at the club. (Tr. III, p.25) I credit her testimony.

25. Pearson testified that she heard Romano call darker-skinned dancers “n----s” and heard Romano tell another Black dancer, that he wouldn’t let “n-----s” work the night shift. Tr. III, p. 15-16. Pearson’s testimony regarding the identity of club staff and managers was hazy; however I found that the essence of her testimony regarding the poor treatment of Black dancers credible.

26. Romano testified that the latter dancer has worked exclusively nights for approximately five years. (Tr. III, p. 64) While I credit his testimony with regard to one black dancer who worked nights, Romano did not otherwise rebut Complainant’s allegations regarding the scheduling of Black dancers.

27. Complainant testified that sometime around December 2010, several dancers told him that Simmons frequently allowed customers to touch them in exchange for extra payments. In addition, Simmons patronized the club while off-duty and there were allegations that on those occasions he would sexually assault dancers. According to Complainant, dancers complained that if they refused Simmons’ request for sexual favors, he would tell them that he was friendly with the owners and if they did not comply, they would not make any money. ⁴ (Tr. I, p. 80, 171)

³ Pearson self-identified as Puerto Rican, African-American, Cape Verdean and Italian and “six other nationalities.” (Tr. III, p. 20-21)

⁴ Complainant testified that a white bouncer allowed customers on the third floor “Champagne Room” to engage in sexual acts with dancers in exchange for money. I make no findings with respect to this allegation as it is irrelevant to the issues that are before me.

Complainant could not name any of the dancers who made these complaints to him and I need not evaluate whether these allegations were truthful or whether such events occurred.

28. Complainant testified that Simmons would also follow dancers to their cars at the end of the night and proposition them for sex. Complainant claimed he often escorted dancers to their cars because they feared being assaulted by Simmons. (Tr. I, p. 81-82)

29. Complainant testified that Simmons brushed off Complainant's attempts to discuss his inappropriate conduct with the dancers. Complainant testified that he also complained to Wong and one of the white bouncers. (Tr. I, p. 94, 137-8, 142-143, 95, 195-6) I do not credit Complainant's testimony that he complained to anyone about this conduct. I found his testimony on this issue to be vague and unconvincing.

30. Complainant stated that he witnessed Simmons attempt to force a dancer to perform oral sex on him. He also alleged that another dancer told him that Simmons performed an act of digital anal sex on her while she was performing a lap dance, but that he never reported these egregious incidents to any of Respondent's managers because the dancers' feared losing their jobs for complaining. (Tr. II, p. 35)

31. Complainant testified that one night in February, 2011, Simmons sought to follow a dancer to her car, but he intervened and escorted the dancer to her car instead. Complainant stated that he and another bouncer were fed up with Simmons' inappropriate behavior and approached Bennett after the club closed. Complainant testified that he told Bennett that Simmons was "doing this and that" and started to follow a dancer to her car, and Bennett said he would take care of it. (Tr. I, p. 143-4; 188-9) Shortly thereafter, Bennett went on vacation out of the country. (Tr. I, 95, 96, 188-190; Tr. II, p.98-99) It was not clear from the record what Complainant meant to convey to Bennett about Simmons's behavior with the vague words he

claims to have used. I remain dubious that Complainant ever complained about sexual harassment of the dancers to anyone and do not credit his testimony that he specifically complained to Bennett. Complainant's testimony regarding exactly what he stated to Bennett was so vague as to not be believable, particularly given the egregious conduct he is alleging occurred. Bennett denied that Complainant ever complained to him about any inappropriate conduct by Simmons toward the dancers. I credit Bennett's testimony.

32. Complainant testified that he never complained about Simmons to Romano or to Wong. Romano testified that he knew nothing about allegations of Simmons' harassing dancers. (Tr. I, 192-3; Tr. II, p. 138) I credit his testimony.

33. 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. Wong approved the swap. (Tr. I, p. 98-99)

34. On Saturday, February 26, 2011, Complainant worked his scheduled day shift. (Tr. I, pp. 45, 99) Complainant testified that Romano arrived shortly before the night shift began, along with another bouncer who took over for the remainder of Complainant's day shift. (Tr. I, p.99-100) I do not credit Complainant's testimony that the other bouncer took over his day shift and find that Complainant left his day shift early without having secured a replacement.

35. Romano testified that when he arrived at the club at about 6:15 p.m., more than an hour before the night shift began, he found the front door unattended and was advised that Complainant was assigned to the front door and could not be located. (Tr. II, p. 5) Romano testified that he was angry that Complainant had left the front door and bar uncovered on a busy Saturday night and instructed Wong to terminate Complainant's employment. While Romano's

testimony was inconsistent⁵ as when and how he communicated with Wong, I credit his testimony that Complainant was not at his post.

36. Complainant testified that on Sunday, February 27, 2011, Wong telephoned to inform him that Wong had been instructed by Romano to fire him because he was asking too many questions about matters that were not his business. According to Complainant, Wong never mentioned Complainant abandoning his post. (Tr. I, p. 101-102, 141, 146, 197, 277) I do not credit Complainant's testimony that Wong told him Romano wanted him fired for asking too many questions.

37. Wong testified that on Sunday, February 27, 2011, Romano instructed him to terminate Complainant's employment because Complainant had abandoned his post the night before. Wong then called Complainant to terminate his employment, but he did not otherwise remember the substance of their conversation. (Tr. II, p. 134, 144-5) I credit Wong's testimony.

38. Respondent's position statement, dated November 29, 2011 and signed by Bennett, Romano and Wong, states that Complainant was terminated not only for abandoning his post on the night of his termination, but also because of his frequent tardiness, and his habit of leaving his post at the main entrance to visit the dancers' second floor dressing area to solicit the dancers to work at private bachelor parties. (Tr. I, p. 245-6; Exh. R-2) Complainant denied ever being late for work or soliciting dancers for private bachelor parties. (Tr. I, p. 51, 165-6) Wong never spoke to Complainant about tardiness and never recommended termination. (Tr. II, p. 132) Bennett testified that he could not recall Complainant being late for work and had no reason to dispute that Complainant was a serious and reliable employee. (Tr. II, p. 4, 81) I believe that

⁵ At the public hearing, Romano displayed a lack of concern, impatience and scorn for the proceedings.

Complainant had a good work record, and he had not been disciplined for any such alleged infractions.

39. Romano testified that he once questioned Complainant for being on the second floor dressing area because there was no reason for him to be there. Complainant did not dispute that he was on the second floor but stated he was there to use the bathroom. Wong testified that he observed Complainant on the second floor on only one occasion. (Tr. II, p.132)

40. Bennett testified that because too many doormen were arriving late for work, Romano told him that he was going to fire the next person who came in late. He recalled that after that conversation a Black bouncer arrived late and Romano terminated his employment. Bennett could not recall when the bouncer was terminated, but I find that it was sometime subsequent to Complainant's termination. (Tr. II, p. 78)

41. Bennett ultimately terminated Shawn Simmons' employment for failing to take action against disorderly patrons who were throwing coins at dancers. (Tr. II, p. 83, 107, 115)

42. Complainant testified that his termination upset him because he believed it was due in part to his standing up for his co-workers and keeping them safe. He also experienced anger at the racism he had been subjected to and believed he had tolerated a racially hostile work environment. His having tolerated what he viewed as continuing institutional racism made him feel disgusted and worthless. (Tr. I, p. 103-4) I credit his testimony.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondents violated M.G.L. c.151B, §4(1), by subjecting him to a racially hostile work environment and terminating his employment in retaliation for his complaining about Simmons' inappropriate sexual harassment of the dancers.

A. Hostile Work Environment

In order to establish a claim of racial harassment that creates a hostile work environment, Complainant must establish that he was a member of a protected class; that he was the target of speech or conduct based on his membership in that class; that the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and that the harassment was perpetrated by a manager or supervisor, or there is proof that Respondents knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511-1515 (11th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355, 1358-1359 (11th Cir. 1982); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

Complainant alleged the following evidence of a racially hostile work environment: Respondent Romano declined to address or acknowledge him as he did the white bouncers; Romano always stationed him to work outside the club regardless of the weather; Romano rejected Complainant's offer of assistance when he fell off a bar stool; Romano directed him to dispose of trash from Romano's flower shop; Romano told another bouncer he did not want "colored people" to use the new walkie-talkies; Romano once referred to a Black dancer as "black b---," and limited the number of black dancers working the night shift. The latter assertion was corroborated by a multi-racial dancer who claimed Romano referred to dark-skinned dancers as "n-----s" and stated he did not want them working the night shift.

I am not convinced that all of the conduct Complainant complains of was racially motivated. For example, Complainant's claim that he was the sole employee directed to remove trash was not substantiated. There was evidence that a number of others, including white and Asian employees, and even the daytime manager, Goldstein, were directed by Romano to dispose of the trash from his flower shop, and that Romano assigned this task to whoever was available when Romano arrived at the club. I also conclude that Romano's refusal to allow Complainant to assist him when he fell could fairly be attributed to Romano's embarrassment at falling asleep at the bar.

However, in the final analysis, a number of Complainant's allegations were credible, including his assertions that he was ignored by Romano; that Romano always stationed him to work outside the club; that Romano told a white bouncer that he did not want the "colored" bouncers to use new walkie-talkies; that Romano limited the number of black dancers on the night shift, and referred to the black dancers "black bitch" or "n-----s." These credible allegations support Complainant's claim of racially hostile work environment, despite the fact that not all the comments were about him or directed at him. A claim of hostile work environment may be supported by evidence of a general atmosphere of hostility toward members of a protected class, and it is appropriate to consider such evidence. See, e.g., Ziskie v. Mineta, 547 F.3d 220 (4th Cir. 2008) (Evidence that many of plaintiff's co-workers in the same protected class experienced similar adverse treatment lent credence to her claims about her own treatment, demonstrated that the harassment she alleged was indeed pervasive, and supported finding that she was subjected to adverse treatment on account of her gender); See also Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004) (Evidence of racism not witnessed by African American plaintiff was nonetheless relevant to claim of hostile work environment,

because it lent credence to plaintiff's allegations of conduct he observed.) While certain of Romano's racially hostile statements were not directed at Complainant, he was aware of them, and they were racial epithets of the type and severity that would make any employee in Complainant's protected class feel angry, insulted, alienated and uncomfortable. Romano's comments were certainly indicative of his attitude toward Black employees working at the club. This, in addition to Romano's unwillingness to address or acknowledge Complainant and his repeated assignment of Complainant to less advantageous working conditions, were sufficient to render his work environment racially hostile. I conclude that, in its totality, Romano's conduct was sufficiently egregious to alter the conditions of Complainant's employment. See Thomas O'Connor Constructors, Inc. vs. Massachusetts Commission Against Discrimination et al, 72 Mass. App. Ct. 549, 560-61(2008) Thus, Respondents are liable for subjecting Complainant to a racially hostile work environment in violation of M.G.L.c. 151B.

B. Retaliation

Pursuant to G.L.c.151B§4(4), it is unlawful for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five. Complainant has alleged that Respondents terminated his employment in retaliation for his having made an internal complaint of sexual harassment of the club's dancers by another bouncer. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in protected activity, that Respondents were aware of the protected activity, that Respondents subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41 (2003).

Complainant has engaged in protected activity if he... “has opposed any practices forbidden under this chapter [G.L.c. 151B s. 4] or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5].” In this case, Complainant alleged that he informed a club manager, Bennett, that another bouncer was engaging in acts of sexual harassment toward female dancers. However, I did not credit Complainant’s testimony that he complained to Bennett about sexual harassment not long prior to his termination. I found his testimony that he made some very vague comment to Bennett about the bouncer in question “doing this and that,” was not credible and generally lacking in specificity. Even if believed, the comment was so vague and lacking in factual support, that I cannot conclude that it constituted protected activity within the meaning of the statute. Since Complainant has failed to persuade me that he engaged in protected activity, he has not established a prima facie case of unlawful retaliation.

IV. REMEDY

Pursuant to G.L. c.151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the

complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

I conclude that Complainant is entitled to damages for emotional distress resulting from having been subjected to a racially hostile work environment. Complainant testified credibly that he was upset about the racism he was subjected to and forced to tolerate while employed by Respondent. He stated that the racial epithets and Romano’s attitude toward Black employees made him feel disgusted and worthless. He was upset that he felt compelled to endure what he referred to as “institutional racism” in the 21st century in order to keep his job. Complainant also asserted that he was distressed by his termination that he viewed as discriminatory and retaliatory. Aside from stating that he was disgusted by Romano’s conduct and felt upset and unworthy, Complainant did not discuss any physical symptoms of his distress, offered no evidence that he suffered psychological manifestations such as depression or anxiety and there was no evidence that he sought medical attention or counseling.

Having previously concluded that Complainant was entitled to damages for emotional distress in the amount of \$25,000 to compensate him for the injury he suffered, I am now tasked with determining what portion of his emotional distress was attributable to the racially hostile work environment and which resulted from discriminatory termination, a claim that has been vacated. It is clear from the record that the racially hostile work environment endured by

Complainant was a significant source of emotional upset to him. Complainant's testimony that the racism he was subjected to and forced to tolerate while employed by Respondents, including bigoted and offensive remarks to and about Black employees, particularly by Romano, made him feel "disgusted" and "worthless" and he was upset about having to endure "institutional racism" in the 21st century in order to keep his job. While the apportionment of emotional distress damages is an inexact process, a portion of Complainant's emotional distress damages was attributable to his discriminatory termination claim, requiring a deduction in the award. I conclude, therefore, that a reduction of 1/3 or \$8,3330.00, resulting in an award of \$16,667.00, is based on substantial evidence of a racially hostile work environment, is commensurate with this finding and is reasonable compensation for injury resulting from the racially hostile work environment created and perpetuated by Respondents.

B. ATTORNEYS' FEES AND COSTS

The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum and the complexity of the matter. In determining what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate that 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 the complexity of the matter.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding up all the hours for which counsel seeks reimbursement. The Commission carefully reviews the Complainant's submission and does not simply accept the submitted number of hours as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). Hours for which compensation is sought that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d 5 (1st Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that the Commission determines were expended reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and the tasks involved. As the Full Commission noted in this case, there is precedent at the Commission for reducing fee requests where a Complainant lost on claims that were not sufficiently interconnected to the claim on which she prevailed. Sanderson v. Town of Wellfleet Fire Department, 19 MDLR 60 (1997).

In the present matter, Complainant's counsel submitted to the Commission a petition for attorneys' fees in the sum of \$42,840 representing 142.8 hours of compensable time at the hourly rate of \$300.00. The attorney's fees were calculated by the Full Commission, which found counsel's hourly rate to be reasonable and the time spent supported by counsel's affidavit. The Full Commission noted that the contemporaneous time records submitted by Complainant's counsel "did not permit an itemized deduction" meaning the work spent on each claim could not be separately identified. Therefore, the Full Commission determined that because the

Complainant had not prevailed on his claim of retaliatory termination, they used their discretion in discounting the attorneys' fees by 25% to \$32,130.00.

Following the reasoning of the Full Commission and in accordance with the Appeals Court Order, given Complainant limited measure of success, I have determined that a further 25% reduction in attorneys' fees is warranted for a total of a 50% reduction in attorneys' fees, or \$21,420.00 to reflect that Complainant did not prevail on his claim of discriminatory termination. Complainant's counsel also seeks reimbursement of \$4,948.29 in costs. That amount was determined to be reasonable by the Full Commission and shall remain undisturbed.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondents immediately cease and desist from discriminating on the basis of race and color.
2. Respondents pay to Complainant Derrick Sims the sum of \$16,667.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondents pay to Complainant Derrick Sims the sum of \$21,420.00 in attorneys' fees and \$4,948.29 in costs with interest thereon at the statutory rate of 12% per annum from the date the attorneys' fees petition 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.

This order constitutes the FINAL REVISED DECISION OF THE HEARING OFFICER, which supplants and supersedes the previous Decision of the Hearing Officer in this matter.

Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 11th day of March 2022.

A handwritten signature in cursive script that reads "Judith E. Kaplan". The signature is written in dark ink and is positioned above a horizontal line.

JUDITH E. KAPLAN,
Hearing Officer