COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and RAPHAELA THOMAS,
Complainant

v. DOCKET NO. 20BPA02269

STASH'S PIZZA,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Jason Barshak in favor of Complainant Raphaela Thomas ("Complainant"). Following an evidentiary hearing, the Hearing Officer found the Respondent Stash's Pizza ("Respondent") liable for race discrimination and retaliation in violation of M.G.L. c. 272, § 98. The Complainant, a Black woman, alleged that she was subjected to disparate treatment by Respondent because of her race and/or color in violation of public accommodation law and was retaliated against when she complained about the discrimination. Specifically, Complainant alleged that an unnamed white male employee of Respondent[1] provided poor customer service to Complainant while inside Respondent's restaurant, and that when she called the restaurant within minutes of leaving to report the poor customer service to a manager, the same employee answered the phone and continued to answer the phone on Respondent's behalf when Complainant attempted to speak to a manager. In that series of phone calls and a text message immediately following the initial encounter, Respondent's employee subjected Complainant to a series of hateful insults, racial epithets, and traumatizing,

[1] The employee is consistently referred to by the parties on appeal as simply the "white guy" and is hereafter mostly referred to as "Respondent's employee."

race-based threats. After finding in the Complainant's favor, the Hearing Officer awarded Complainant $105,000 in emotional distress damages with 12% interest per annum.[2]

Respondent appealed to the Full Commission on the grounds that there was insufficient evidence to show that the person Complainant interacted with at the restaurant and the person she interacted with over the phone were one in the same, or that either person (whether the same or not) was in fact Respondent's employee. Respondent urges us to conclude instead that the person Complainant interacted with was a "phantom perpetrator." Presumably in the alternative, Respondent argues that such perpetrator's actions were clearly out of the scope of employment for one of its employees and were therefore insufficient to support a finding of vicarious liability. Finally, Respondent argues that the Hearing Officer committed prejudicial error in admitting evidence in the form of a police report and a supplemental police report related to the incident underlying Complainant's claim of discrimination. Complainant filed a Motion to Dismiss Respondent's Petition for Review[3] and, subsequently, a Brief in Reply to Respondent's Petition For Review. For the reasons below, we affirm the Hearing Officer's decision.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, §§ 3 (6), 5. The Hearing Officer's findings of fact must be supported by substantial evidence,

[2] In a separate decision, the Hearing Officer awarded Complainant's counsel $231,996.38 in attorney's fees and $5,641.09 in costs, with post-judgment interest at a rate of 12% per annum for the period commencing on the date of that decision. Respondent did not appeal the attorney's fees award.

[3] No action has been or will be taken on this motion as it does not comply with the requirements set forth in 804 CMR 1.13(5) (2020).

which is defined as "such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. Massachusetts Commission Against Discrimination, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 1 (6).

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. 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); Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(10) (2020).

LEGAL DISCUSSION

"Places of public accommodation are liable for unlawful discrimination under M.G.L. c. 272, § 98 for the actions of an agent who acted within the scope of their actual or apparent authority." May v. Parish Café, Inc. and Factotum Tap Room, Inc., 45 MDLR 35, 35 (2023) citing Sahir v. 2 Belsub Corp., 40 MDLR 81, 84 (2018). See also Brooks v. Martha's Vineyard Transit Auth., 433 F. Supp. 3d 65, 73 (D. Mass. 2020) (recognizing the MCAD's long history of enforcing M.G.L c. 272, § 98 on the theory of vicarious liability). To prove a claim of discrimination in a place of public accommodation, a complainant must demonstrate that they were: (1) a member of

a protected class; (2) denied access, restricted, or treated differently from others not in their protected class, and (3) in a place of public accommodation. Poliwczak v. Mitch's Marina and Campground, et al., 33 MDLR 133, 136 (2011). Retaliation is a separate and independent action requiring proof that complainant engaged in protected activity based on a reasonable belief that a place of public accommodation engaged in unlawful discrimination, and respondent took adverse action in response to the protected activity. See id. (retaliation claim actionable under M.G.L. c. 272, § 98); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405–06 (2016) (outlining elements of a retaliation claim under M.G.L. c. 151B, § 4(4) in the context of unlawful employment discrimination).[4]

Respondent does not raise any issue with respect to whether Complainant is a member of a protected class, whether Stash's Pizza is a place of public accommodation, or even whether Complainant was denied access, restricted, or treated differently from others because of her race on the night she tried to pick up a pizza she ordered from Respondent's restaurant. Neither does Respondent raise any issue with respect to whether Complainant was retaliated against. Instead, Respondent argues that it cannot be liable for the actions of the person Complainant interacted with because (1) there was insufficient evidence to support the factual finding that the person was actually a Stash's pizza employee and (2) it was legal error to conclude that such person, assuming they were an employee, acted within the scope of their employment.

Respondent's substantial evidence argument pertains to essentially a three-phase interaction between Complainant and Respondent's employee: in-person inside of the restaurant, over the phone involving the published phone number of the restaurant, and over a cell phone number after the calls with the restaurant. We reject Respondent's argument that Complainant

[4] We agree with the Hearing Officer's reasoning with respect to applying the analysis for retaliation claims under M.G.L. c. 151B, § 4(4) to claims of retaliation under the public accommodations statute.

interacted with a "phantom perpetrator" in each phase of the interaction. Respondent's argument centers on the absence of the precise identity of the employee, but the name of the employee was not essential for the Hearing Officer to determine that the person Complainant interacted with inside of the restaurant was Respondent's employee. Instead, Complainant's credited testimony and other evidence was sufficient to prove that the "white guy" inside the restaurant was in fact Respondent's employee. This evidence showed that the person Complainant and her cousins interacted with on October 4, 2020, when they came into Respondent's restaurant acted in the capacity of an employee. That person stood behind the counter of the restaurant, communicated with Complainant concerning a pizza she ordered, and when he could not locate an order in Complainant's name, offered replacement slices or a small pizza, albeit in a rude manner. Once Complainant's unrebutted testimony was credited to establish the foregoing, it strains credulity to suggest such a person was anyone other than a restaurant employee.

Further, the evidence was sufficient to prove that the person Complainant interacted with in phone calls to the restaurant after the in-person interaction was a restaurant employee. Immediately after her poor treatment inside of the restaurant, phone records and Complainant's testimony showed that Complainant called the restaurant's published phone number, looking to speak with a manager. A person answered by responding "Stash's." When Complainant stated she was dissatisfied with the service she received, the person responded, "why don't you come here" so "I can put a bullet in your head" and used a hateful racial epithet. After this call, Complainant called the restaurant back twice to attempt to speak to a manager and was again subjected to racial epithets and other threatening statements. Complainant testified that the person on the phone had the same voice as the employee behind the counter when she visited the restaurant, and the Hearing Officer reasonably concluded that the two persons were one in the

same, based on Complainant's credited testimony. The determination that Complainant interacted with a restaurant employee, and not a "phantom perpetrator," during these calls was supported by substantial evidence in the form of phone records and Complainant's credited testimony.

Immediately after these calls, Complainant received a text message from a phone number ending in 6988 repeating the racial epithet. Complainant further testified that when she called the phone number ending in 6988, it was the same voice that answered the Respondent's phone, and the person stated they were "off work" and made another hateful, race-based comment. One of Complainant's cousins, who was called as a witness, was present during these phone calls and heard them because they were on speakerphone. Complainant also showed her cousin the text message she received. Given the documented timing of the calls and text from the cell phone, Complainant's credited testimony about the voice, and corroborating testimony from her cousin, the evidence was more than sufficient to show that Complainant was interacting with the same person, i.e., the restaurant employee, over the cell phone.

Moreover, the incident in its entirety was also reported to police who investigated. There was no evidence presented concerning the ultimate outcome of the police investigation, but there was evidence entered in a supplemental police report and communications with one of the investigating detectives that one of Respondent's owners, Stavros Papantoniadis, and a manager, Gerry Skordas, had both communicated to Boston Police at different times that an (unnamed) employee had been fired in relation to the incident. Papantoniadis later denied that he fired anyone related to the incident, but the Hearing Officer did not credit this testimony. The Hearing Officer also did not find credible Papantoniadis' testimony that he did not know the employee involved in the incident at the time of the public hearing. Respondent believes this case is distinguishable from Brooks v. Martha's Vineyard Transit Auth., arguing that there was "no doubt" in that case

that the bus driver who made race-based comments and denied a ride to the plaintiff was an employee. However, there is no distinction to be made. Here, as in Brooks, it is clear that the person who interacted with Complainant was an employee. In short, we defer to the Hearing Officer's credibility determinations, none of which are contradicted by any record evidence, and Complainant's credited testimony, witness testimony, phone records, and the police report were enough support for a reasonable mind to conclude that Complainant interacted with a restaurant employee in person and over the phone on the night in question, as required by M.G.L. c.30A, § 1(6).

Having established there was sufficient evidence to find that the person Complainant interacted with was, in fact, one of Respondent's employees, we turn to Respondent's next argument that it was an error of law to find Respondent vicariously liable. Respondent, assuming arguendo Complainant did interact with one of its employees, argues that the (no longer phantom) perpetrator did not act within the scope of his employment, as required for a finding of vicarious liability. Again, the Commission has long recognized that an employer is responsible for the actions of an employee or agent who acts within the scope of their actual or apparent authority in public accommodations cases. See May, 45 MDLR at 36 (restaurant liable for conduct of door attendant who used homophobic slurs and denied access to a patron on the basis of his sexual orientation); Sahir, 40 MDLR at 85 (restaurant liable for conduct of employee purporting to be the manager of the franchise who made discriminatory comments after complainant called to complain about discriminatory treatment in store); Fiasconaro v. Aria Bridal and Formal, Inc., 35 MDLR 128 (2013) (bridal shop liable for actions of husband of salesperson deemed to be agent of store purporting to act as salesperson in his wife's absence); Floyd v. Forest Hill Cab Company, 15 MDLR 1181 (1993) (cab company was liable for actions of non-employee driver on basis that the

driver exercised apparent authority to refuse to stop for a passenger). An agent's apparent authority is what a third party reasonably believes it to be. Floyd, 15 MDLR at 1187.

The Appeals Court has also concluded that the doctrine of respondeat superior applies to violations of M.G.L. c. 272, § 98. See Pettiford v. Branded Management Group, LLC, 104 Mass. App. Ct. 287, 291 (2024) (finding the doctrine of respondeat superior applicable to employer where an employee at Dunkin' first delayed making a Black customer's food order, then threw the order at him, and then when the plaintiff objected, called the plaintiff a racial epithet). In Pettiford, the Appeals Court utilized the following standard to determine whether an employee's conduct fell within the scope of the employment: "(1) 'whether the conduct in question is of the kind the employee is hired to perform'; (2) 'whether it occurs within authorized time and space limits'; and (3) 'whether it is motivated, at least in part, by a purpose to serve the employer.'" Id. at 293, quoting Berry v. Commerce Insurance Company, 488 Mass. 633, 638 (2021).

Looking at whether the conduct in question is the kind the employee is hired to perform, here the conduct involved customer service. An employee working behind the counter at a pizza restaurant offering takeout orders is clearly expected to answer the phone and handle carry out customer service interactions in the normal scope of their employment, and Respondent does not argue otherwise. Respondent does argue that only a manager could resolve customer service complaints, while maintaining that there was no manager at the Stash's Pizza location that Complainant went to on October 4, 2020. However, Respondent's owner, Papantoniadis, testified that the store had "shift leaders" whose responsibilities included overseeing product quality, employees, cleanliness of the restaurant, and interaction with customers, whether on the phone, on the web, or in person. Respondent's employee unquestionably engaged in a conventional customer service interaction when Complainant and her cousins went to pick up the pizza they ordered, and

when he could not locate an order in Complainant's name, offered replacement slices or a small pizza. Then, when Complainant called the store to speak with a manager, Respondent's employee acted with apparent authority in answering those calls and continued to respond to Complainant's objections to her treatment using an alternate phone number after the restaurant had closed. Those calls involved a customer interaction, clearly within the scope of a restaurant employee's job duties, and though the racist comments made by the employee were outrageous and discriminatory, the context of those calls was at all times related to the service Complainant got from the restaurant. Discriminatory customer service is still customer service within the scope of employment for the restaurant employee Complainant interacted with on the night in question.

As to the second prong of the Pettiford analysis, whether the conduct occurred substantially within authorized space and time limits, the initial interaction between Complainant and Respondent's employee occurred in-person, in the restaurant, ultimately during operating hours. As of October 4, 2020, Stash's Pizza's hours of operation were 10:00 a.m. to 1:00 a.m., seven days per week. The Hearing Officer found Complainant made a call to Respondent's restaurant at approximately 12:36 a.m. on October 4, 2020, to order a large pizza. Complainant and her cousins entered Respondent's restaurant approximately 15 minutes later. Though close to closing time, Respondent's restaurant remained open and allowed customers to enter. The fact that the abusive conduct, namely the harassing commentary by phone calls and text message, continued just minutes after the restaurant closed does not absolve Respondent of liability. A customer service interaction between Respondent's employee and Complainant that started before closing time and spanned just minutes after closing time is substantially within the authorized space and time limits.

As to the third prong of the analysis, an employee's conduct "need not be solely or even predominantly motivated by a purpose to serve the employer." Id. at 294, citing Wang Lab., Inc. v. Business Incentives, Inc., 398 Mass. 854, 859-860 (1986). Here, Respondent's employee interacted with customers, namely, Complainant and her cousins when they came into the store, and answered the Respondent's restaurant phone, in the scope of his job duties. The fact that he carried out the customer interaction with Complainant in a discriminatory manner, whether for his own purposes or not, does not mean that the conduct was necessarily outside the scope of his employment. Pettiford, 104 Mass. App. Ct. at 294. Further, Respondent's employee was motivated to serve his employer when he picked up the phone at the restaurant to answer Complainant's call (indeed answering by saying "Stash's), and the phone calls and text occurring immediately thereafter were a continuation of that customer service interaction.

Lastly, Respondent argues the Hearing Officer should not have admitted two exhibits, a police report and a supplemental police report relating to the incident leading to this case, as unduly prejudicial. The Commission is not bound by the rules of evidence observed by the courts, except for the rules of privilege. M.G.L. c. 151B, § 5; 804 CMR 1.12 (13) (2020). A hearing officer has "'considerable discretion ... to admit evidence that is arguably relevant.'" Dennis Quinn v. Response Electric Services, Inc., 27 MDLR 42, 43 n.1 (2005) quoting Morris v. Board of Registration in Medicine, 405 Mass. 103, 108, cert. denied, 493 U.S. 977 (1989). However, even if the rules of evidence are applied, there was no undue prejudice in the admission of the police reports. Relevant evidence that is adverse to the party against whom it is offered is inevitably prejudicial, but exclusion of that evidence is only warranted when the prejudice is unfair. See United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("By design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."); see also, Mass. G.

Evid. § 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.") Respondent does not dispute the relevance of the police reports, which are undeniably relevant to this case. Instead, Respondent focuses on what is *not* included in the reports -- evidence that possibly could have been used in place of or in addition to the reports (e.g., testimony from the new manager or the investigating detectives). Respondent has not demonstrated how not having an opportunity to question witnesses they could have procured, but did not, was unfairly prejudicial relative to the probative value of the reports. The existence of the reports was not a surprise. Respondent was aware that the Boston Police Department investigated the incident on October 4, 2020, and composed a report related to the incident. Moreover, Respondent's counsel and owner communicated with a detective concerning the incident. It is the responsibility of the parties to present evidence at public hearings and for the Hearing Officer to assess that evidence and weigh it accordingly, rather than speculate on what could or should have been introduced by one or more of the parties instead. We see no error in the Hearing Officer's decision to admit the two highly relevant police reports into evidence and consider them in context with the other evidence and testimony presented at public hearing.

ORDER

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

1. Respondent Stash's Pizza shall pay Complainant Raphaela Thomas $105,000 in damages for emotional distress plus interest thereon at the rate of 12% per annum from

the date of the filing of the Complaint with the Commission until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue.

2. Stash's Pizza shall cease and desist from all acts of discrimination based on race and/or color.
3. Stash's Pizza shall pay Raphaela Thomas $231,996.38 in attorney's fees and $5,641.09 in costs, with post judgment interest at a rate of 12% per annum pursuant to the Hearing Officer's March 22, 2024, decision on Complainant's Petition for Attorney's Fees and Costs.

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

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

SO ORDERED this 23rd day of October 2024.

Sunila Thomas George
Chairwoman

Monserrate Rodríguez Colón
Commissioner