COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
FRANCIS CROKEN & JOHN TAMAYO,
Complainants

v. DOCKET NOS. 05-BEM-03048
05-BEM-03099
06-BEM-00409

HAGOPIAN HOTELS, NUBAR HAGOPIAN,
NEWBURY GUEST HOUSE, INC., AND H&H,
LLC, d/b/a HARBORSIDE INN
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Eugenia M. Guastaferri finding Respondents Nubar Hagopian, Hagopian Hotels and Newbury Guest House Inc., liable for discrimination against Complainants Francis Croken and John Tamayo. Complainant Francis Croken charged Respondents Nubar Hagopian and Hagopian Hotels with retaliation for opposing discriminatory practices pursuant to M.G.L. c. 151B s. 4(4) when he was terminated by Nubar Hagopian after he opposed Hagopian's discriminatory treatment of John Tamayo and refused to fire Tamayo. John Tamayo charged Respondents Nubar Hagopian, Hargopian Hotels, Newbury Guest House, Inc. and Harborside Inn, Inc. ("Harborside Inn") with discrimination based on his race and color in violation of M.G.L. c. 151B, §4(1) in November of

2005.[1] Mr. Tamayo filed a subsequent complaint against Respondents alleging he was terminated in retaliation for filing his previous complaint of discrimination.

The facts as summarized below were found by the Hearing Officer. Croken worked as the General Manager of the Newbury Guest House, Inc. and the Harborside Inn (collectively "Hagopian Hotels") from mid-February 2005 through November 21, 2005, when owner Nubar Hagopian terminated his employment. Tamayo, who is Hispanic, was hired by Croken and worked as Operations Manager at the Harborside Inn, from March 2005 until February 2006, when he was terminated following a change in ownership at the Harborside Inn.[2] Nubar Hagopian resided in an apartment on the top floor of the Newbury Guest House. In November of 2005, Tamayo transferred from the Harborside Inn to the Newbury Guest House as part of a cross-training program for staff at both hotels. Simultaneously, the Operations Manager at the Newbury Guest House, a Caucasian man of European descent, transferred to the Harborside Inn. During his tenure as Operations Manager at the Newbury Guest House, Tamayo had several disagreeable interactions with Nubar Hagopian, which he alleged created a hostile work environment and which form the basis of his Complaints. After falsely accusing Tamayo of a number of infractions including entering Hagopian's residence and using a guest room without authorization and stealing food from the hotel's kitchen, in November of 2005, Hagopian reported several instances of what he characterized as unprofessional behavior by Tamayo to Croken. Croken informed Hagopian that he would investigate the charges and Hagopian made it clear he did not welcome an investigation telling Croken, "Why would I want you to investigate?

[1] The initial complaint named Hagopian Hotels as Respondent and was amended before hearing to include Harborside Inn, Inc., Newbury Guest House, Inc. and Nubar Hagopian as Respondents. Complainant Tamayo also moved to add Nubar Hagopian's son, Mark Hagopian, as an additional Respondent and to add an additional claim of retaliation against Nubar Hagopian and Hagopian Hotels. The Hearing Officer granted Mr. Tamayo's motion to amend his charge to include a claim of retaliation against all party Respondents, but she denied the motion to add Mark Hagopian as a party-Respondent. At the Hearing the complaint was amended to reflect the correct name of Respondent Harborside Inn as H&H LLC d/b/a Harborside Inn ("Harborside Inn").

[2] In February 2006, Nubar Hagopian's son, Mark Hagopian, purchased the Harborside Inn from his father.

He's a wetback." When Croken insisted on investigating the matter and subsequently informed Hagopian that the accusations against Tamayo were false, Hagopian demanded Croken's resignation. When Croken refused, Hagopian terminated his employment, calling Croken rude, unprofessional and insubordinate. In early December 2005, Hagopian transferred Tamayo back to the Harborside Inn, telling Tamayo he could not fire him because of his discrimination complaint. Tamayo worked at the Harborside Inn until February 2006, when Nubar Hagopian's son, Mark Hagopian, purchased the hotel and brought in his own management team.

The Hearing Officer found Respondents Nubar Hagopian and Hagopian Hotels liable for unlawful discrimination against Tamayo on the basis of race and color, in violation of M.G.L. c. 151B, §4(1) and for unlawful retaliation against Croken and Tamayo in violation of M.G.L. c. 151B, §4(4). She dismissed Tamayo's retaliation claim against Harborside Inn, but nonetheless awarded Tamayo $112,127 in damages for back pay and $50,000 for emotional distress. She awarded Croken $195,489 for back pay and $80,000 for emotional distress. Interest was assessed at the rate of 12% per annum on all four damage awards. The Hearing Officer also imposed a $10,000 civil penalty on Respondents based on her finding that Nubar Hagopian's conduct was sufficiently deliberate and egregious. Respondents have filed a Petition for Full Commission Review, challenging the decision below.

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); 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). The Full Commission's role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondents raise several issues on appeal. First, Respondents assert that the Decision of the Hearing Officer should be set aside for errors of law, and because it is prejudicial to the substantial rights of Respondents. Respondents assert that the Hearing Officer ignored uncontested facts and reached conclusions that are unsupported by substantial evidence. Respondents also contend that the Hearing Officer's award of back pay to Croken was in error because he failed to mitigate his damages following his termination, and that the award of back pay to Tamayo was in error because the Hearing Officer concluded his termination from the Harborside Inn by Mark Hagopian was lawful and not retaliatory. Finally, Respondents challenge the awards of damages for emotional distress and the assessment of interest at the rate of 12% on these awards.

For reasons discussed below, we affirm the Hearing Officer's decision in part and reverse the award of damages in part. We concur with Respondents that the Hearing Officer erred in awarding back pay to Tamayo, since she found his termination not to be a violation of G.L. c.

151B. The Hearing Officer found that Tamayo's termination from the Harborside Inn by Mark Hagopian (Nubar Hagopian's son) was for legitimate, non-discriminatory reasons and was not retaliation for Tamayo's complaints against Nubar Hagopian. She found credible Mark Hagopian's assertion that Tamayo did not have the requisite experience, skills and education for the position of manager and that Mark Hagopian legitimately sought to assemble his own management team to run his newly-acquired hotel. Having found that Tamayo's termination was not retaliatory, the Hearing Officer had no lawful basis for awarding back pay damages to him. Accordingly, we reverse that portion of the Hearing Officer's Order awarding back pay damages of $112,127 to Tamayo.

Respondents cite several instances where the Hearing Officer purportedly erred by failing to consider testimony, to properly credit witnesses, to weigh certain evidence in favor of findings for Respondents based on record evidence. Specifically, Respondents assert that Croken's veracity was called into question because he admitted to some misrepresentations on his resume that extended his end date of a prior job and did not list his employment with Hagopian Hotels. Similarly, Respondents contend that the Hearing Officer failed to give due weight to the diverse nature of the workforce at the hotels, the alleged fact that Nubar Hagopian hired Tamayo and Nubar Hagopian's record of never settling or losing an employment discrimination claim against him. Respondents further challenge the Hearing Officer's admission and reliance on hearsay evidence of Nubar Hagopian's discriminatory animus toward other non-Hispanic racial minorities (*i.e.*, women and African Americans) and that she improperly credited testimony that Nubar Hagopian used the word "wetback" to refer to Tamayo in conversation with Croken.

We have considered Respondent's challenges and find them to be without merit. The Hearing Officer allowed Respondent's evidence on these matters and properly weighed the

evidence to reach conclusions based on her judgment as to who was more credible and by drawing reasonable inferences from the evidence she found credible. Where the evidence in a case is conflicting, the Hearing Officer is charged with the responsibility to assess credibility and resolve disputes of fact. The Hearing Officer is in the best position to observe the demeanor of witnesses and to judge their credibility. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972). The Full Commission defers to the Hearing Officer's credibility determinations. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982).

In this case, the Hearing Officer determined that Croken's misrepresentations on his resume were minor and easily explained and were not "an indictment of his overall credibility." (Decision, p. 38.) Based on her observations of his demeanor, she found Croken to be professional, courteous, and respectful, traits that were consistent with the testimony of others about his character. In addition to first hand observations, a fact finder may draw inferences about the character of witnesses based on hearsay evidence or evidence relating generally to their character and reputation. We note that the Hearing Officer credited Croken's very detailed testimony regarding specific instances and conversations where Nubar Hagopian made derogatory and offensive comments about members of other minority groups, including his use of the word "wetback" to disparage Tamayo. The Hearing Officer also credited evidence that Nubar Hagopian had raised apparently unfounded suspicions about members of minority group to employees other than Croken. In contrast, the Hearing Officer found Nubar Hagopian's denials and inability to recall any such conversations was not credible. Having the unique opportunity to observe both witnesses, the Hearing Officer is in the best position to assess credibility and to weigh the evidence presented. The Hearing Officer found Nubar Hagopian to be less credible, based upon her own observations and the testimony of others relating to his

character and reputation.

Moreover, the Commission is not bound by the formal rules of evidence and the Hearing Officer retains significant discretion in making evidentiary rulings. M.G.L. c. 151B, §5; see DeRoche and Massachusetts Comm'n Against Discrimination v. Town of Wakefield, et al., 25 MDLR 333 (2003); 804 C.M.R. 1.21(11); Baldelli v. Town of Southborough, 18 MDLR 167, 170 (1996). Here, we acknowledge the Hearing Officer's broad discretion to consider hearsay evidence together with all of the evidence before her. We find Respondents' claims amount to nothing more than a disagreement with the Hearing Officer's findings and we find no reversible error in her Decision with respect to these issues.

While the Hearing Officer may not have made a specific finding about the diverse nature of the total workforce at the hotels, the alleged diversity of the work force does not mean that the Hearing Officer's findings concerning Nubar Hagopian's conduct were unsupported by substantial evidence. It was also clear from the findings that Croken, and not Nubar Hagopian hired Tamayo, and that Nubar Hagopian's record of never settling or losing an employment discrimination case did not outweigh the direct evidence of Nubar Hagopian's unexplained and unjustified mistreatment of Tamayo.

Respondents also argue that Nubar Hagopian's termination of Croken could not have been retaliation because Nubar Hagopian did not have notice of the MCAD complaints prior to the termination. However, M.G.L. c. 151B, s.4 (4), makes it an unlawful practice for an employer to discharge or discriminate against an employee who has opposed an unlawful practice or filed a complaint with the MCAD. Opposition to unlawful practices includes informal pre-charge activity by an employee. Lincoln v. Natick Paperboard Co., 25 MDLR 304, 317 (2003). In this case, the Hearing Officer found that Nubar Hagopian terminated Croken in

retaliation for opposing Hagopian's discriminatory treatment of Tamayo. The timing of Croken's MCAD complaint is therefore not determinative of retaliatory motive. We conclude that the Hearing Officer's finding that Complainant opposed discriminatory practices prior to his termination constituted protected conduct was not in error.

Respondents also raise several issues regarding the Hearing Officer's award of back pay damages to both Complainants. First, Respondents challenge the award of back pay damages to Croken arguing that he failed to mitigate his damages by not holding onto a subsequent job and his use of "false" resumes, harmed his chances of securing subsequent employment. The Hearing Officer found that Complainant fulfilled his duty to mitigate damages by diligently seeking alternative employment and lost subsequent jobs through no fault of his own. It is Respondents burden to prove failure to mitigate and to introduce evidence of interim earnings. See Brown v. City of Salem, 4 MDLR 1369 (1982), citing Black v. School Committee of Malden, 305 Mass. 197, 212 (1974). Croken testified that he immediately sought and received unemployment in the amount of $500-$800 per week for 28 weeks and that he sought employment immediately by listing with four different placement agencies, cold calling companies, networking, answering online and newspaper advertisements, sending out numerous emails and enlisting the help of his friends. He held several temporary jobs while he was looking for full-time employment and secured a full-time job one year following his termination. He held several subsequent jobs from which he was laid off for budgetary reasons and due to organizational restructuring. The evidence supports the Hearing Officer's ruling that Croken made "valiant efforts to mitigate his damages and sought work immediately." We find no error in the Hearing Officer's award of back pay to Croken.

Respondents also challenge the awards of emotional distress damages to both

Complainants as erroneous and/or excessive, alleging a failure to prove a causal connection between Respondent's actions and the purported distress. It is well established that the Commission may award compensatory damages for emotional distress when necessary to make Complainant whole, and where there is a requisite finding of causation. Stonehill College v. MCAD, 441 Mass. 549 (2004). We conclude that the Complainants satisfied their burden to prove causation.

Croken testified that he was emotionally distraught and humiliated after losing his job and that following his termination, he felt depressed, withdrawn, embarrassed and "just felt horrible." He testified that he experienced physical manifestations of distress, having difficulty sleeping for months and worrying about his future and re-establishing his career. He had negative thoughts about whether he would ever find work again which caused him great stress and anxiety. Croken was living with and caring for his elderly father at the time of his termination and worried about his financial ability to continue to care for his elderly father. The Hearing Officer credited this testimony, observing that Croken was still overcome with emotional pain while testifying and revisiting this difficult period in his life. She noted that, "the suffering he continues to endure was visibly apparent in his demeanor as he discussed these trying events." (Decision, p. 22.) Tamayo testified that Nubar Hagopian's hostile and unfair treatment caused him to feel intimidated, anxious and insecure about his job. Hagopian's rude and disrespectful treatment made Tamayo feel uncomfortable, embarrassed and humiliated. He felt "horrible" about the way Hagopian spoke to him and fearful about his employment situation. Tamayo testified that he felt Hagopian picked on him. After he was transferred back to the Harborside Inn, he had no interaction with management and felt isolated and insecure. With Croken gone, and no support from management, he found himself working longer hours and had

less time to spend with his family.

The Hearing Officer credited the testimony of both Complainants and concluded that they suffered emotional distress as a direct result of Hagopian's discriminatory and retaliatory conduct. The Commission affords "great deference" to the Hearing Officer's findings because the fact finder is in the unique position to observe the demeanor of witnesses and "countless other tangible factors that occur in face to face communication." Said v. Northeast Security, Inc., 22 MDLR 315, 318 (2000). We conclude that the award of emotional distress damages to Complainants is supported by substantial evidence of the emotional suffering that occurred and that Complainants' distress was sufficiently linked to Respondent's unlawful conduct. We do not believe the awards are excessive given the circumstances and will not disturb them.

Lastly, Respondents argue that interest assessed at the rate of 12% is excessive and unconstitutional as a matter of law because it penalizes Respondents and results in an improper windfall as it is significantly above the market interest rate. Respondents argue that the Commission should calculate interest using a rate that is reasonably related to the market rate. The Commission has routinely awarded 12% interest on emotional distress damages, attorneys' fees and lost wages pursuant to G.L. c. 231, §6B. Interest accrues from the filing date of the complaint. The Massachusetts Supreme Judicial Court has consistently affirmed the Commission's authority to award interest at the rate of 12% per annum from the date the complaint was filed. DeRoche v. MCAD, 447 Mass. 1, 14-15 (2006); New York and Ma. Motor Service, Inc. v. MCAD, 401 Mass. 566, 583 (1988). The Commission is empowered to award prejudgment interest in order to "further the purpose of eradicating the evil of discrimination." DeRoche, 447 Mass. at 14. Thus we decline to alter this ruling because it continues to serve this important purpose and assists in making victims of discrimination whole.

ATTORNEYS' FEES AND COSTS

Complainant's counsel has filed a petition apparently seeking attorneys' fees in the amount of $60,100 (150.25 x $400) for the Croken matter and $61,560 (153.90 x $400) for the Tamayo matter for a total of $121,660. Complainants also seek reimbursement for costs in the amount of $9,388.60 ($8,754.32 for Croken's case and $634.28 for Tamayo's case). Respondents filed an opposition to Complainants' petition asserting that Complainants' counsel double billed for hearing time and block-billed for certain work while also billing for other work in separate entries during the same period of time and petitioning the Commission to strike or reduce the block billings by 50%. Respondents also contend that Complainants' Counsel's hourly rate of $400 is excessive, and object to the payment of any hourly rate above $300.

Complainants are entitled to an award of reasonable attorneys' fees and costs for the claims on which they prevailed. See M.G.L. c. 151B, §5. The determination of what constitutes a reasonable fee is within the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. 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 which 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 carefully reviews the Complainant's petition for fees and does not merely accept the number of hours submitted as "reasonable." See, e.g., Baird v. Belloti, 616 F.

Supp. 6 (D. Mass. 1984). 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. 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.

Counsel's affidavit supports his significant experience and expertise as a trial lawyer. His advocacy skills were well demonstrated in the proceedings and support an hourly rate above $300. We conclude, however, that Counsel has not demonstrated that the hourly rate of $400 is consistent with the usual rates for charged in Boston by attorneys with comparable experience for services in the area of employment discrimination law. Instead, we determine that a customary hourly rate of $350 is appropriate. See, Haddad v. Wal-Mart Stores, Inc., 455 Mass. 1024 (2010).

We have also reviewed Counsel's contemporaneous time records and the correction of a billing error submitted in response to Respondent's objections. We find the amount of total time spent in preparing these matters to be fair and reasonable. Counsel's records show that he and his staff spent 150.25 hours working on the Croken matter and 153.9 hours working on the Tamayo matter. We agree with Respondent that the fee award should be reduced because the charges associated with the five days of public hearing are duplicative. Allowing Counsel to double bill for time spent at the hearing is not reasonable. We therefore approve a total of 29 hours for Counsel's hearing time on June 7, 8, 9, 10 and 30, 2010, thereby reducing the hours Counsel

spent on each matter by 14.5 hours, adjusting the hours to 135.75 and 139.4 respectively. However, the time records do not appear to separate work conducted personally by Counsel from work which was or could have been conducted by paralegal staff. A review of Counsel's affidavit and the time records reveals that many of the entries could have been performed by a paralegal rather than Counsel. Accordingly, we reduce the time entries by 25% to account for apparent paralegal work.

We also determine that a further reduction should be taken in Tamayo's case for failure to prevail on his claim of discriminatory discharge and the reversal of the award of back pay to him. Where the petitioner has prevailed on certain claims but not others, the Commission may exercise its discretion to reduce the overall fees requested by some amount that is reasonably associated with the pursuit of Complainant's unsuccessful claim. See Ronald Bridges v. Commonwealth of Massachusetts, Alcoholic Beverages Control Comm'n, 30 MDLR 124 (2008). In making this determination, we examine the degree of interconnectedness between the two claims. While Tamayo's retaliation claim against the Harborside Hotel/owner Mark Hagopian, was alleged to have flowed from his and Croken's discrimination claims against Nubar Hagopian, the Hearing Officer found otherwise. The retaliation claim against Harborside Hotel was, in large part, a separate claim against a different potential Respondent, involving a different adverse action. Moreover, Mr. Tamayo's retaliation claim against the Harborside Hotel was not complex and involved a more limited set of facts relative to his other two claims. Accordingly, we conclude that a 30% reduction of the fee request for Tamayo is appropriate for failure to prevail on his retaliation claim.

In sum, Complainants' counsel kept time records for and appears to seek 150.25 hours or $60,100.00 total for the Croken matter with costs of $8,754.32, for a total of $68,854.32. We

reduce these hours by 14.5 hours for the double-billed public hearing, for a total of 135.75 hours. These hours are further reduced by 25% because of work which was not apportioned to paralegals, to 101.8 hours. Applying the $350.00 rate to these hours results in total attorneys' fees of $35,634.38. With costs, the attorneys' fees and costs total $44,388.70 relative to the Croken matter.

Complainants' counsel provided time records supporting 153.90 hours and appears to seek $61,560.00 total for the Tamayo matter. We similarly reduce these hours by 14.5 hours for the double-billed public hearing, for a total of 139.4 hours. These hours are further reduced by 25% to 104.55 for apparent paralegal work. This results in fees of $36,592.50. Factoring a 30% reduction for the unsuccessful retaliation claim, brings fees associated with the Tamayo case to $25,614.75. Tamayo incurred costs of $634.28. We award these respective amounts for fees and costs (totaling $26,249.03) relative to Tamayo's discrimination claim.

ORDER

For the reasons set forth above, we hereby rescind that portion of the Hearing Officer's Order granting back pay in the amount of $112,127 to Tamayo, but otherwise affirm the decision and Order of the Hearing Officer in all respects. We award a total of $61,249.13 for attorneys' fees and an additional amount for costs in the amount of $9,388.60. 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 receipt 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. Failure to file a petition in court within thirty (30) days of receipt 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 this 4th day of October, 2013

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Julian T. Tynes
Chairman

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Sunila Thomas George
Commissioner

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Jamie R. Williamson
Commissioner