NOTIFY 121

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2084CV02310

AMY TISHELMAN

vs.

BOSTON CHILDREN'S HOSPITAL

MEMORANDUM OF DECISION AND ORDER ON POST TRIAL MOTIONS

Following a jury trial, the Defendant, Boston Children's Hospital (the "Hospital") filed a motion pursuant to Mass. R. Civ. P. 50(b) for judgment notwithstanding the verdict. Plaintiff Amy Tishelman (the "plaintiff") moved the court to award reasonable attorney's fees and costs as the prevailing party pursuant to G. L. c. 151B amounting to $674,422.79. The Hospital opposed plaintiff's motion and petitioned for the plaintiff to pay costs incurred, amounting to $225,726, after it proffered an offer of judgment on March 28, 2024, pursuant to Mass. R. Civ. P. 68. On March 11, 2025, the court held a hearing on the motions. For the following reasons, the plaintiff's motion is **ALLOWED** in part and **DENIED** in part. The Hospital's petition for costs is **ALLOWED** in part and **DENIED** in part. The Hospital's motion for judgment notwithstanding the verdict is **DENIED**.

BACKGROUND

The plaintiff worked for the Hospital for many years. After the Hospital terminated the plaintiff from her position, the plaintiff filed a civil complaint against the Hospital alleging gender discrimination, age discrimination, and retaliation pursuant to G. L. c. 151B.

Prior to trial, on March 28, 2024, the Hospital served the plaintiff with a formal offer of

judgment pursuant to Mass. R. Civ. P. 68, offering to resolve the case for $3,200,000 plus reasonable attorneys' fees and costs incurred as of the date of the offer. The plaintiff declined the Hospital's offer.

Months later, the parties tried the case before a jury. On November 7, 2024, the jury found that the Hospital had not discriminated against the plaintiff on the basis of gender or age but had retaliated against the plaintiff. The jury awarded the plaintiff $379,000 in back pay damages, $711,000 in front pay damages, and $400,000 in emotional distress damages, for a total of $1,490,000. Before interest, less than half the Offer of Judgment.

DISCUSSION

The court evaluates the impact of Rule 68 on the plaintiff's request for attorney's fees and costs[1] and the Hospital's request for costs accruing from the date of the offer of judgment.

I. Judgment Notwithstanding Verdict

Massachusetts Rule of Civil Procedure 50(b) provides that a party which has previously moved for a directed verdict "at the close of all the evidence," may serve a motion for judgment notwithstanding the verdict ("JNOV") within ten days of judgment. "[N]ullifying a jury verdict is a matter of utmost judicial circumspection." *Cahaly* v. *Benistar Prop. Exch. Trust Co.*, 451 Mass. 343, 350 (2008). The standard of review is generous to the plaintiff and asks – "whether, construing the evidence most favorably to the plaintiff, and 'without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could have returned a verdict for the plaintiff.'" *Id.*, quoting *Phelan* v. *May Dep't Stores Co.*, 443

[1] The Hospital does not dispute that the plaintiff is entitled to recover reasonable attorney's fees and costs pursuant to her successful retaliation claim up until the day of the offer of judgment on March 28, 2024. The parties dispute whether the plaintiff is entitled to attorney fees and costs thereafter.

Mass. 52, 55 (2004). The standard for obtaining a judgment notwithstanding a verdict is the same as for summary judgment, in which the Court "ask[s] whether, construing the evidence most favorably to the plaintiff, and 'without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could have returned a verdict for the plaintiff.'" *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 682 n. 8 (2016), quoting *Cahaly* v. *Benistar Prop. Exch. Trust Co.*, 451 Mass. 343, 350 (2008) and Phelan, 443 Mass. at 55. "The verdict must be sustained if the plaintiff offered any evidence from which the jury could have reasonably reached their verdict." *Zaniboni* v. *Massachusetts Trial Court*, 81 Mass. App. Ct. 216, 217-218 (2012).

The jury rendered a verdict in favor of the plaintiff on the claim for retaliation. "'In the absence of direct evidence of a retaliatory motive,' a plaintiff asserting relation must allege facts showing that [s]he engaged in a protected activity, that [s]he suffered an adverse action, and that there was a causal connection between the protected activity and the adverse action." *Sabatini* v. *Knouse*, 105 Mass. App. Ct. 174, 184 (2025), quoting *PsyEd Corp.* v. *Klein*, 459 Mass. 697, 707 (2011). "Protected activities are 'reasonable acts meant to protest or oppose [harassing conduct].'" *Sabatini*, 105 Mass. App. Ct. at 184, quoting *Verdrager* v. *Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 474 Mass. 382, 406 (2016). "To be protected, a communication must be reasonably read as raising a complaint that the supervisor or coworker engaged in harassing conduct." (Citation and quotation omitted). *Sabatini*, 105 Mass. App. Ct. at 184. The jury was instructed regarding the elements of retaliation. Thus, the Court considers "whether anywhere in the evidence from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the non-moving party." *Cambridgeport Sav. Bank* v. *Boersner*, 413 Mass. 432, 438 (1992) (internal quotes

omitted). "A jury verdict must be sustained," and a motion for JNOV must be denied, if the record contains "any evidence from which the jury reasonably could have arrived at that verdict," "view[ing] the evidence in the light most favorable" to the nonmoving party, "and disregard[ing] evidence favorable" to the moving party. *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 820-821 (1997). In other words, it is not enough for the moving party to argue that there was evidence warranting a contrary finding by the jury. *Tosti* v. *Ayik*, 394 Mass. 482, 494 (1985) ("Conflicting evidence alone does not justify judgment notwithstanding the verdict. [I]t is of no avail for the defendant to argue that there was some or even much evidence which would have warranted a contrary finding by the jury.") (internal citation and quotes omitted).

The plaintiff presented ample evidence, during the trial to support the jury's verdicts in her favor the retaliation claim. The jury heard evidence satisfying each element of each of retaliation: that the Hospital knew the plaintiff complained of discrimination both to the Hospital directly and in filing her MCAD complaint, that she was subsequently terminated from her position, and that the jury could infer from the evidence that the plaintiff was terminated from her position due to her complaints of discrimination. This standard was particularly met when viewing the evidence in a light most favorable to the plaintiff. Due to the plethora of evidence before them, the jury's verdicts were reasonably reached in favor of the plaintiff. Therefore, the Hospital's motion for judgment notwithstanding the verdict must be denied.

II. Costs and Fees

a. Plaintiff's Attorney's Fees

The plaintiff contends that as the prevailing party she is entitled to reasonable attorney's fees amounting to $531,142.47. She contends that although the jury verdict ($1,490,000) was less than the March 28, 2024, offer of judgment ($3,200,000), the court must not follow Rule 68

because it conflicts with the purpose of G. L. c. 151B. The court disagrees, as G. L. c. 151B does not conflict with Rule 68 and therefore the plaintiff's request for attorney's fees must be capped as of the date of the offer of judgment on March 28, 2024, therefore she may only recover $277,082.35.

To the greatest extent possible, the court "construe[s] the rule and the statute to constitute a harmonious whole consistent with the legislative purposes disclosed . . . to give reasonable effect to both." *Perez* v. *Department of State Police*, 491 Mass. 474, 486 (2023), quoting *Boston Police Patrolmen's Ass'n* v. *Boston*, 367 Mass. 368, 373 (1975). Under Rule 68[2], a party who rejects a formal offer of judgment and subsequently fails to obtain greater relief cannot recover fees and costs accruing after the date of rejection. The plain purpose of Rule 68 is to "encourage settlement and avoid protracted litigation." *Nortek, Inc.* v. *Liberty Mut. Ins. Co.*, 65 Mass. App. Ct. 764, 774 (2006). See *Marek* v. *Chesny*, 473 U.S. 1, 11 (1985) (regarding federal analog, stating Rule 68 is a rule which encourages the plaintiff to "'think very hard' about whether continued litigation is worthwhile").

Under G. L. c. 151B, § 9, a prevailing plaintiff is entitled to attorney's fees "unless special circumstances render the award unjust." The court is persuaded that Rule 68's provisions regarding offer of judgment provide such circumstances that would render an award of attorney's fees unjust. Here, the plaintiff rejected an offer of judgment for $3,200,000 and ultimately a jury

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[2] In relevant part, Rule 68 provides:

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment* exclusive of interest from the date of offer finally obtained by the offeree *is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer* ... [emphasis added]."

awarded the plaintiff $1,490,000. This is a lesser relief. The plaintiff's position is self-serving and specious.

The plaintiff contends that, despite the disparity in monetary awards, the ultimate jury award cannot be construed as a lesser favorable relief than the offer of judgment, because while she may have received a lesser monetary award than the offer of judgment, by proceeding to trial and prevailing on her retaliation claim, she received vindication in a jury finding the Hospital's wrongdoing. As the offer of judgment disclaimed any admission of wrongdoing by the Hospital, the jury verdict granted her greater relief. If the court followed plaintiff's reading of Rule 68, any plaintiff could claim that any offer of judgment lacking an admission of liability was invalid because it failed to provide such vindication. Such a reading of the rule would render Rule 68 toothless. At its heart, Rule 68 is a rule of compromises. It cannot be construed to only empower offers of judgments that provide plaintiffs with their every possible desire. See *Childress* v. *DeSilva Automotive Servs., LLC*, 494 F. Supp. 3d 1163, 1173 (D. N. M. 2020), citing *Simmons* v. *United Mtge. & Loan Inv., LLC*, 634 F.3d 754, 764, n.6 (4th Cir. 2011) ("A valid rule 68 offer allows judgment against the defendant, but such an offer does not require an admission of liability").

For the forgoing reasons, the court finds that as the offer of judgment ($3,200,000) was significantly greater than the ultimate jury verdict ($1,490,000), the plaintiff is not entitled to recover attorney's fees following the date of the offer of judgment on March 28, 2024. See *Bogan* v. *City of Boston*, 489 F.3d 417, 431 (1st Cir. 2007) ("The parties correctly agree, that under Rule 68, a prevailing party is not permitted to recover fees or costs incurred after an offer of judgment, where the judgment obtained is less than the offer").

Additionally, the Hospital asserts that plaintiff's attorney's fees must be reduced because

she only prevailed on one of three theories. Where claims are sufficiently interconnected, a plaintiff is warranted a full award of attorney's fees whether the plaintiff prevails on one or all theories. See *Quarterman* v. *City of Springfield*, 91 Mass. App. Ct. 254, 265 (2017), citing *Killeen* v. *Westban Hotel Venture, LP*, 69 Mass. App. Ct. 784, 792 (2007). The plaintiff's efforts expended on the unsuccessful discrimination claims are so interconnected to the retaliation claim that the claims cannot be parsed. The evidence as presented on the various theories was interconnected and presented the necessary, totality of circumstances. To suggest otherwise is contrary to the evidence as presented in this case. Additionally, the plaintiff's MCAD fees are likewise recoverable. See *Fryer* v. *A.S.A.P. Fire & Safety Corp.*, 750 F. Supp. 2d 331, 336 (D. Mass. 2010) ("Inasmuch as the filing with the MCAD was a prerequisite to the discrimination claim in this court, these hours are appropriately and reasonably included in the fee request").

The Hospital also contends that the plaintiff's request for attorney's fees is not reasonable. In calculating a fee award in a case under G. L. c. 151B, courts use a "lodestar" method, "multiplying the number of hours reasonably spent on the case times a reasonable hourly rate," then enhancing or reducing that figure based on case-specific factors. In calculating a fee award, courts should consider "(1) how long the trial lasted, (2) the difficulty of the legal and factual issues involved, and (3) the degree of competence demonstrated by the attorney." *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 324-325 (1993). The petitioning party, here the plaintiff, bears the burden of demonstrating that the attorney's fees sought are reasonable. See *Soc'y of Jesus* v. *Boston Landmarks Com.*, 411 Mass. 754, 759 (1992). A prevailing party seeking attorney's fees is also entitled to reasonable attorney's fees for work required to recover attorney's fees. See *Stratos* v. *Department of Pub. Welfare*, 387 Mass. 312, 325 (1982). This court, after a close review of the attorney's fees as submitted, find them to be reasonable.

There is no question that the plaintiff is the prevailing party on one count in this case and is thus entitled to reasonable attorney's fees and costs until the date of the Offer of Judgment. The plaintiff has submitted a petition for attorney's fees, requesting $277,082.35, representing fees for 535.3 hours of work among seven individuals, including lead counsel, associates, and support staff.[3] In support of this request, the plaintiff filed an affidavit with attached dated and itemized invoices of hours worked on the plaintiff's case. The affidavit also detailed reasons supporting the fees for each attorney working on the plaintiff's case. Again, after careful review of the plaintiff's petition, affidavit, and itemization of attorney's fees, the court finds that plaintiff may recover $277,082.35, that is the attorney's fees up until the date of the offer of judgment on March 28, 2024.

b. Plaintiff's Costs

Plaintiff requests an award for costs up to the date of trial. The plaintiff may recover taxable costs in her prevailing retaliation claim. See G. L. c. 151B, § 9 (prevailing plaintiff may recover reasonable costs); G. L. c. 261, § 1 ("[i]n civil actions the prevailing party shall recover his costs, except as otherwise provided");

The plaintiff may recover the following costs:

1. Deposition fees ($14,455.70). See Mass. R. Civ. P. 54(e); *Waldman v. American Honda Motor Co.*, 413 Mass. 320 (1992).
2. Cost for production of medical records requested by the Hospital ($106.37).
3. Dr. Peter Glick expert witness fees ($24,839.76).

[3] These numbers reflect the requested attorney's fees until March 28, 2024. The plaintiff's requested attorney's fees until the date of the jury verdict were calculated to be $531,142.47 for 1077.4 hours of work. As discussed, the court finds that the plaintiff is entitled to attorney fees only until the date of the offer of judgment, therefore the court must reduce the amount of attorney's fees requested by the plaintiff.

The plaintiff may not recover the following costs:

1. Courier services ($140). See *Styller* v. *National Fire & Marine Ins. Co.*, 95 Mass. App. Ct. 538, 544 (2019).
2. Court filing fee ($275). See *id.*
3. Delivery fees ($87.66). See *id.*
4. Parking fees for counsel ($349). See *id.*

For these reasons, the court will award the plaintiff's requested costs of $39,411.83.

c. <u>The Hospital's Costs</u>

The Hospital moves pursuant to Mass. R. Civ. P. 68, to recover $225,726.77 in costs incurred after it made a $3,200,000 offer of judgment on March 28, 2024.

Rule 68 states that where a party rejects a properly served offer of judgment: "[i]f the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Here, the jury awarded the plaintiff $1,490,000 after she rejected the Hospital's offer of $3,200,000. There is no question that an award of costs to the Hospital is appropriate. The Hospital may recover certain taxable costs. See G. L. c. 261, § 1 ("[i]n civil actions the prevailing party shall recover his costs, except as otherwise provided"); *Shorr* v. *Professional Photographers of America, Inc.*, 1997 Mass. App. Div. 61, 1997 WL 271757 at *3 (Mass. App. Div. May 14, 1997) (costs and expenses requested by defendant under Rule 68 may include taxable costs under G. L. c. 261, § 1, Mass. R. Civ. P. 54(d) and (e)).

The court concludes that the Hospital may recover the following as costs:

1. Deposition costs ($600.95). See Mass. R. Civ. P. 54(e); *Boston* v. *United States Mineral Prods. Co.*, 37 Mass. App. Ct. 933 (1994).

2. Travel expenses for defense witnesses ($3,634.58).
3. Medical records ($150.85).
4. Trial technology ($500). See G. L. c. 261, § 25A ("unless the court shall otherwise determine, the prevailing party shall be allowed a sum not exceeding five hundred dollars for expenses actually incurred for plans, drawings, photographs and certified copies of public and court records, necessary and used at the trial"). See also *Speranzo* v. *Northeastern University*, 2023 WL 2989789 (Mass. Super. Ct. Apr. 3, 2023) (Leighton, J.) (nominal recovery permitted for trial presentation).

In total, this amounts to $4,886.38.

The Hospital may not recover the following expenses:

1. Transcript costs ($95,051.50). See *DeMoulas* v. *DeMoulas*, 432 Mass. 43, 64 (2000).
2. Discovery and document maintenance system costs ($8,893.50). See *Protege Software Servs.* v. *Colameta*, 32 Mass. L. Rptr. 165, 2014 Mass. Super. LEXIS 61, *17 (Mass. Super. April 14, 2014) (Budd, J.) (normal overhead costs are not recoverable); *Admiral Metals Servicenter Co.* v. *Micromatic Prods. Co.*, 25 Mass. L. Rptr. 489, 2009 Mass. Super. LEXIS 138, *20 (Mass. Super. March 26, 2009) (Lauriat, J.) (fees otherwise part of "an attorney's overhead included in his hourly rate and cannot be separately recovered as costs").
3. Temporary workspace and/or travel and lodging for the legal team ($25,499.86). See *Protege Software Servs.*, 2014 Mass. Super. LEXIS 61, *17 (Mass. Super. April 14, 2014) (Budd, J.) (defense counsels' travel costs during trial are "normal overhead costs and are not recoverable").
4. Research ($910.60). See *Admiral Metals Servicenter Co.*, 2009 Mass. Super. LEXIS

138, *20 (fees for research "are part of an attorney's overhead included in his hourly rate and cannot be separately recovered as costs").

5. Copies, delivery, and courier services ($7,794.91). See *Evans* v. *Lorillard Tobacco Co.*, 29 Mass. L. Rptr. 226, 2011 Mass. Super. LEXIS 293, *22 (Mass. Super. November 30, 2011) (Fahey, J.) (treating expenses associated with copying and delivery as unrecoverable overhead); *Admiral Metals Servicenter Co.*, 2009 Mass. Super. LEXIS 138, *20 (fees for photocopies "are part of an attorney's overhead included in his hourly rate and cannot be separately recovered as costs").
6. Expert witness fees ($13,799). See *Styller*, 95 Mass. App. Ct. at 544 (taxable costs do not ordinarily include expert fees except as nominally allowed pursuant to statutory provision for witness fees); *Waldman*, 413 Mass. at 322.
7. Mediation fees ($593.25). See *Marengi* v. *6 Forest Road LLC*, 491 Mass. 19, 32 (2022) (no recovery where no statute, valid contract or stipulation providing for such costs).
8. Jury impact consultation fees ($22,175.94). See *Sullivan* v. *Five Acres Realty Tr.*, 487 Mass. 64, 76 (2021) (jury consultant fees are not recoverable).
9. Trial technology ($45,151.67). See G. L. c. 261, § 25A ("unless the court shall otherwise determine, the prevailing party shall be allowed a sum not exceeding five hundred dollars for expenses actually incurred for plans, drawings, photographs and certified copies of public and court records, necessary and used at the trial").

For the forgoing reasons the Hospital is entitled to recover $4,886.38 total in costs.

CONCLUSION AND ORDER

The Plaintiff's motion for award of reasonable attorney's fees and costs is **ALLOWED**

IN PART and **DENIED IN PART**. The plaintiff may recover $39,411.83 in costs and $277,082.35 in attorney's fees. The plaintiff may not recover attorney's fees following March 28, 2024.

The Hospital's petition for costs is **ALLOWED IN PART** and **DENIED IN PART**. The Hospital may recover $4,886.38 in costs.

The Hospital's motion for judgment notwithstanding the verdict is **DENIED**.

SO ORDERED.

Campo, J.

Date: April 1, 2025

Anthony M. Campo
Justice of the Superior Court