

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CHARLENE MILLET,
Complainants

v.

DOCKET NO. 98-BEM-3695

LUTCO, INC.,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer, Betty E. Waxman, in favor of Respondent, Lutco, Inc., and dismissing Complainant's charges that she was demoted, harassed, had her hours reduced and ultimately terminated based on her sex and sexual orientation, after informing her employer that she would be undergoing gender reassignment surgery.¹ Complainant's claims of gender discrimination and retaliation were certified for public hearing.² Following an evidentiary hearing, the Hearing Officer concluded that Respondent was

¹ Respondent filed a complaint on January 30, 1998, alleging discrimination on the basis of sex and sexual orientation, which she withdrew on April 30, 1998, stating that the harassment she had experienced had ceased. She filed a second complaint on December 2, 1998, alleging retaliation for engaging in protected activity, and asked that her first complaint be reactivated. The public hearing went forward on all claims.

² On January 22, 1999, Respondent moved to dismiss the complaint on the grounds that discrimination based on Complainant's status as a transgender person is not covered by Chapter 151B. The Full Commission denied the motion on October 10, 2001, after determining that discrimination against an individual because he or she is a transgender person violates the prohibition against sex discrimination in M.G.L. c. 151B.

not liable for unlawful discrimination (harassment or disparate treatment) on the basis of gender in violation of M.G.L. c. 151B, § 4(1), or for retaliation in violation of M.G.L. c. 151B, § 4(4), and dismissed Complainant's claims against Respondent. Complainant appealed to the Full Commission.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. Massachusetts Comm'n Against Discrimination, 365 Mass. 357, 365 (1974); M.G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. Massachusetts Comm'n Against Discrimination, 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

Complainant has appealed the decision on the grounds that the Hearing Officer's findings

were not supported by substantial evidence and that she erred as a matter of law by failing to hold Respondent liable under M.G.L. c. 151B, § 4. Specifically, Complainant claims that the Hearing Officer's own factual findings "mandated" a conclusion that Complainant's supervisor engaged in gender-based harassment, therefore rendering the Respondent strictly liable for the supervisor's unlawful conduct. The Complainant further argues that the Hearing Officer improperly "combined" the subjective and objective standards for evaluating offensive conduct and wrongly employed a "balancing test" by purportedly offsetting her supervisors' "unlawful harassment" with "supposedly empathetic conduct" of the employer and, as a result, wrongly concluded that Complainant was not the victim of gender-based harassment. The Complainant has also appealed the decision in favor of the employer on her claim of disparate treatment, arguing that various adverse employment actions, including her demotion and elimination of her job, were based on her status as a transgender person. Finally, Complainant argues that the Hearing Officer erred as a matter of law when she concluded that Complainant's letter to her supervisor did not amount to engaging in "protected activity," a necessary element of proof of her claim of retaliation.

We have carefully reviewed Complainant's grounds for appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review stated herein. We find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings which are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). We also reject the Complainant's argument that the Hearing Officer's determinations of credibility are flawed. The Hearing Officer heard the testimony and observed the demeanor of the witnesses and is therefore in the best position to evaluate and make

credibility determinations. The Full Commission will not second guess her. We note further that the Hearing Officer in this case cited numerous examples of contradictory statements by the Complainant which adversely affected her credibility and compromised her testimony.

As to the first argument, the record evidence supports the Hearing Officer's conclusion that the Complainant was not a victim of workplace harassment on the basis of her status as a transgender person. First, the Complainant is mistaken in her belief that the Hearing Officer's factual determinations inexorably lead to a conclusion that her supervisor "harassed" her within the meaning of c. 151B, and that her employer is strictly liable as a result. In her analysis of the legal issues, the Hearing officer stated that "[t]he record undeniably contains some hostile speech and conduct directed at Complainant's transgendered status." This statement was made as a commentary on the entire body of evidence presented by the Complainant in support of her claim over three years of employment, and not a finding on her supervisor's conduct. In this context, the Hearing Officer discussed three incidents and only one — the Pink Floyd incident — involved the Complainant's supervisor. This incident occurred following the Complainant's objection to the contents of one of the songs the supervisor played on the stereo in his office — specifically, a song from a Pink Floyd CD, "The Wall," which she informed him, contained the words "queer" and "coon." The Hearing Officer found that in response, the supervisor replied to Complainant, "[t]hey're singing about you in that song."³

³ While the Hearing Officer credited the supervisor's testimony that "he was just kidding around" when he made the remark, she also found that this isolated comment did not rise to the level of severe and pervasive harassment. The Full Commission recognizes that an employer is not relieved of liability because an employee accused of engaging in hostile speech or conduct claims (s)he was "just kidding." As discussed in detail in this decision, we conclude that the Hearing Officer's determination that Complainant was not the victim of harassment or an abusive work environment based on her status as a transgender person is supported by substantial evidence.

Following the incident, the supervisor removed the stereo from his office and stopped listening to music. The other two incidents involved a co-employee who on one occasion slammed a door in the Complainant's face and on another occasion refused to enter a room that she was in. Following the Complainant's complaint about this conduct, the employer met with the co-employee, who admitted that he did not want to interact with the Complainant because he was estranged from his own transgender sibling. The employer instructed the co-employee that he must treat Complainant with respect and interact with her regarding work issues. We do not find any further complaints about this co-employee in the record.

The Hearing Officer properly concluded that the supervisor's remark and the two other incidents, while possibly motivated by some "discomfort" with Complainant's status as a transgender person, were isolated in nature, followed by effective intervention by the employer, and not sufficiently severe or pervasive to have altered the terms and conditions of Complainant's employment or to have created an abusive work environment for her. Given that the Hearing Officer found that Complainant and her supervisor had been close friends prior to her change in gender and that she continued to discuss matters both personal and sexual with him, the supervisor's possible discomfort with the situation may be understandable, but discomfort is not tantamount to discrimination or hostility.

The Hearing Officer also concluded that the supervisor's other conduct—notably his decision to forgo lunches with the Complainant and decision not to sit next to her at meetings—was motivated by reasons other than discriminatory animus, including the supervisor's attempt to curb the opportunity for discussions of intimate details of the Complainant's physical anatomy and personal sex life, which had been occurring.⁴ More importantly, the Hearing Officer found

⁴ The Hearing Officer noted that at deposition, the Complainant admitted she discussed intimate

that the Complainant's "increasing interpersonal difficulties" with her supervisor were attributable "primarily" to the Complainant's "relentless criticisms" of his job performance. The Hearing Officer's finding that Complainant's criticism of her supervisor was "aggressive, hostile and public" is supported by the record. We will not disturb the Hearing Officer's conclusion that it would have undermined their relationship even if Complainant was not transitioning from male to female. Similarly, we will not disturb the Hearings Officer's conclusion that Complainant's evidence of allegedly "harassing" speech and conduct by her supervisor and co-workers arose not from discriminatory animus but from growing interpersonal conflicts she had with fellow employees following her employer's expression of dissatisfaction with her work, and the Complainant's response, which was to publicly blame others for her shortcomings. The Hearing Officer properly concluded that Complainant was not the victim of gender-based harassment within the meaning of c. 151B. As she noted, c. 151B is not a "manners" statute that penalizes employers for the rudeness of their employees, nor for fluctuations in workplace friendships, but rather a law that protects employees from an environment pervaded by discriminatory harassment and abuse, which the Complainant had failed to prove.

We are also unpersuaded that the Hearing Officer erred by merging the objective and subjective standards in determining whether the conduct complained of was actionable harassment within the meaning of the law. In arriving at her decision, the Hearing Officer noted that the subjective standard is a personal one, which is met when a Complainant is sincerely offended by conduct, and that the appropriate objective standard is an evaluation from the reasonable woman's perspective. The Hearing Officer properly applied this standard in reaching

details about her physical anatomy and sexual encounters with her supervisor, while at the public hearing she denied those discussions took place.

her conclusion that the allegedly gender-based conduct was neither sufficiently severe nor pervasive enough to have altered the terms and conditions of Complainant's employment nor to have created an abusive work environment based on unlawful harassment. We also reject the Complainant's argument that the Hearing Officer applied a "balancing test" where she offset "unlawful harassment" by Complainant's supervisor with "supposedly empathetic conduct" of her employer in reaching this decision. We have already stated that the Hearing Officer's determination that the supervisor's conduct did not rise to the level of "unlawful harassment" within the meaning of c. 151B was supported by substantial evidence, obviating the need to engage in the balancing test articulated by the Complainant in order for Respondent to prevail in this case. Moreover, there is no basis for us to believe that the Hearing Officer engaged in such an analysis.

The Hearing Officer's rejection of Complainant's claim that she was a victim of disparate treatment because of her status as a transgender person, and her conclusion that the employers' actions were lawful and "singularly devoid of gender bias" are also amply supported by credible evidence. Complainant's deteriorating performance, her vocal criticism of coworkers, her proclaimed desire to assume another career, and her announced intention to leave the company, all contributed to the employer's employment decisions during the three years of her employment. At the same time, the record supports the many efforts by Complainant's employer to help her succeed in her job and to accommodate her full-time nursing school schedule (including allowing her to work at night). Moreover, the employer granted Complainant leave for her surgeries and through its president, provided leadership in paving the way for Complainant's transitioning process, demanding that she be treated with respect. In weighing the evidence the Hearing Officer properly concluded that Respondent's decisions to reduce

Complainant's hours, downsize her position, and ultimately lay her off were motivated by legitimate job-related considerations—including the fact that she was hired to guide the Company through two audits that had been completed—and not discriminatory animus toward Complainant because of her gender identity and gender reassignment. There is also substantial evidentiary support for the Hearing Officer's conclusion that rather than being animated by discriminatory intent, the employer, through its President, was supportive of Complainant's sex change and that the President did whatever he could to ease the transition. We find no error in the Hearing Officer's conclusions and we decline to disturb her ruling.

Finally, with respect to Complainant's retaliation claim, we will not disturb the Hearing Officer's rejection of Complainant's argument that the November 24, 1998 letter to her supervisor was "protected activity" within the meaning of M.G.L. c. 151B and that a warning she received thereafter was a retaliatory act. In reaching this decision, the Hearing Officer heard testimony from various witnesses on the circumstances leading up to Complainant's decision to send the letter and reviewed the language of the letter itself. We conclude that her findings of fact and conclusions of law are supported by substantial evidence.

Specifically, the Complainant testified that the letter she sent to her supervisor was a harassment complaint against him. The Hearing Officer, however, found that the letter arose out of a specific meeting where Complainant "repeatedly argued with and disparaged" her supervisor and made "snide remarks" in an attempt to "undermine his credibility." As a result, her supervisor complained to the Plant Manager and he in turn met with Complainant and told her that she was to respect other managers and any further insubordinate behavior by her would not be tolerated. He also issued a specific directive that she was not to draft and circulate any more critical memos about fellow employees. Despite this directive, four days later the Complainant

sent the letter at issue to her supervisor, which stated at the beginning:

The reason I'm writing this memo is because of a concern I have with your behavior and the way you are treating me.

Last Thursday you accused me of making personal attacks against you because I openly criticized your draft of QSP-4.10. As you know I had criticism of this specification that I expressed to you before the meeting. I've explained to you that my criticism was of your draft not of you.

The Complainant also expressed dismay at the fact that her supervisor spoke with others, including the Plant Manager, about Complainant's "shortcomings" where "many employees feel uncomfortable with me and few speak to me..." She went on to opine that "I find this behavior not only hostile but cruel." Complainant's expressed belief that some co-workers felt "uncomfortable" around her is not tantamount to a complaint of discrimination or hostile work environment.

We conclude that the Hearing Officer's decision that this letter did not amount to "protected activity" is supported by the terms of the letter and the context within which it was written. The letter is yet another criticism by the Complainant of her supervisor; this time about his reaction to her criticism of his work at the meeting. We conclude that it was reasonable for the employer to issue a warning to Complainant about her conduct under these circumstances. The Complainant's accusation that her supervisor's behavior was "hostile" and "cruel," where the supervisor merely took steps to perform his supervisory responsibilities without being undermined, does not ring true and we will not disturb the Hearing Officer's rejection of the Complainant's claim that she was engaged in "protected activity." The letter neither accuses her supervisor (nor anyone else) of unlawful conduct, nor does it refer to discrimination. Moreover, we note the Hearing Officer's finding that the Complainant only characterized the letter as a harassment complaint after she received a final warning for insubordination for violating the

Plant Manager's directive that she not draft or circulate critical memoranda about fellow employees.

In sum, we conclude that the Hearing Officer did not err as a matter of law and that there is substantial evidence to support her findings. We concur that Complainant failed to establish a case of gender-based harassment, gender-based disparate treatment, or retaliation under M.G.L. c. 151B. We therefore dismiss Complainant's appeal and affirm the Hearing Officer's decision in its entirety.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. 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 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 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 10th day of July, 2009

Malcolm S. Medley
Chair

Sunila Thomas George
Commissioner

Martin S. Ebel
Commissioner