

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARY FLAHERTY,
Complainant

v.

DOCKET NO. 98-BEM-2686

PERINI/KIEWIT/CASHMAN,
A JOINT VENTURE,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Complainant. Following an evidentiary hearing, the Hearing Officer concluded that while Respondent was not liable for gender discrimination with respect to Respondent's termination of Complainant, Respondent was liable for gender harassment in the workplace in violation of M.G.L. c. 151B, section 4(1). Respondent filed an appeal to the Full Commission as to the Hearing Officer's finding with respect to the issue of gender harassment.

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, section 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); 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. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982).

The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.23.

I. ADDITIONAL EVIDENCE

As a threshold matter, we must decide whether to permit Complainant to introduce additional evidence into the record in this matter. In her Answer to Respondent's Petition for Full Commission Review, Complainant included photographs and written statements that were not originally in the record. Subsequently, Complainant submitted to the Commission a "Motion for Relief" stating that "the additional evidence and exhibits are in the nature of newly discovered evidence, which by due diligence could not have been discovered at the time of the hearing" and seeking admission of such evidence within the context of a re-opened hearing. In turn, Respondent moved to strike Complainant's Answer and opposed Complainant's efforts to re-open the hearing.

Pursuant to Commission regulations, a Petition for Review "shall be confined to the record." 804 C.M.R. 1.23 (1)(f). Leave to present additional evidence may be granted only if "it is shown to the satisfaction of the Commission that the additional evidence is material to the issues in the case, and there was good reason for failure to present it in the proceeding before the Hearing Commissioner or Hearing Officer...." 804 C.M.R. 1.23 (1)(g).

We note at the outset that Complainant has not filed an appeal regarding any aspect of the Hearing Officer's Decision. Therefore, the import of any additional evidence she seeks to

introduce must be assessed only as it is relevant to *Respondent's* appeal. Since Respondent appeals only with respect to the Hearing Officer's finding on gender harassment, the additional evidence must be relevant to the issue of gender harassment. However, while the thirteen photographs and the two written statements Complainant seeks to introduce may have been relevant to an appeal on her gender discrimination/termination claim, which the Hearing Officer dismissed, they are clearly not relevant to the gender harassment claim, the only issue on appeal before this Commission. Moreover, even if the additional evidence were relevant to this appeal, which it is not, Complainant has articulated no good reason why she failed to produce this evidence at the hearing. We therefore deny Complainant's motion to re-open the hearing for the purpose of allowing Complainant to introduce additional evidence.

II. RESPONDENT'S PETITION FOR REVIEW

Respondent contends on appeal that the Hearing Officer erred as a matter of law when she concluded that Complainant's supervisor at Respondent, Peter Buckjune, subjected her to a "hostile work environment." Specifically, Respondent argues that Buckjune's comments toward Complainant were not "gender-based" or "sexually charged" enough to create a hostile work environment but, rather, were part and parcel of the coarse language Buckjune admitted he used with all employees, males and females alike. In support of its contention, Respondent cites Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616 (1996), for the proposition that Chapter 151B is not a "clean language" statute intended to ban all profanity from the workplace.

While we acknowledge Prader and its progeny, we do not agree with Respondent that Buckjune's treatment of Complainant belongs within its mere "unclean language" confines. The evidence in this case demonstrates that Buckjune did not simply use "nonspecific coarse language" toward Complainant, as Respondent would have us believe. Rather, Buckjune directed frequent, gender-based, demeaning statements at Complainant, often in front of other

employees and the public. Among the many instances the Hearing Officer cited, Buckjune called Complainant a “stupid bitch,” a specific, gender-based epithet, and stated that “damn women” did not belong in construction, referring specifically to Complainant. Moreover, he refused to respond to her repeated requests to have her truck repaired, commenting that male truck drivers did not come to him with such complaints.

Noting that there was no evidence presented that Buckjune treated male supervisees in the same discriminatory, degrading fashion as he did Complainant, the Hearing Officer concluded that “his conduct toward Complainant was gender-based and [] was sufficiently severe and pervasive to adversely impact Complainant’s morale and her ability to do her job.” We conclude that the weight of the evidence supports the Hearing Officer’s findings and determination that Complainant suffered from gender-based harassment.

Next, Respondent challenges several of the Hearing Officer’s factual findings. Respondent’s chief arguments are that the Hearing Officer erred by crediting the testimony of Complainant and her corroborating witness and co-worker, Thomas Ward. Specifically, Respondent contends that Complainant was not a credible witness, since she did not prevail on one of her claims, and that Ward was not a credible witness, since he displayed an angry demeanor at the hearing. We do not find these arguments persuasive and defer to the Hearing Officer’s credibility determinations.

The balance of Respondent’s arguments do not merit discussion. We have carefully reviewed all of Respondent’s contentions on appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. We conclude that there was substantial evidence to support the Hearing Officer’s factual findings and find no material errors of fact or law with respect to the Hearing Officer’s conclusions. We also conclude that the Hearing Officer did not abuse her discretion in crediting certain pieces of testimony and/or discrediting others, especially since the record shows that Respondent failed to produce credible witness testimony or other evidence to

corroborate and support its contentions regarding the gender harassment claim at the hearing in this matter. On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

III. ORDER

The Respondent's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is confirmed in its entirety.

It is hereby ordered that:

- (1) Respondent shall pay to the Complainant within 45 days of the receipt of this decision the sum of \$15,000.00 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (2) The parties shall promptly notify the Clerk of the Commission when payment is made.
- (3) Respondent shall conduct a training for all its managerial and supervisory employees regarding issues of gender discrimination and harassment on the job. Said training session shall be conducted annually for the next five years. A training agenda shall be submitted to the MCAD's director of training for review and approval with 90 days of receipt of this decision. The agenda shall include the name and credentials of the trainer, the subjects to be covered in the training, the length of the training and the number of employees anticipated to attend each session. Written documentation that such training sessions have been conducted shall be submitted to the Commission on an annual basis along with a list of those managers and supervisors in attendance.

This order represents the final action of the Commission for purposes of M.G.L. c.30A. Failure to comply with this order will result in the Commission's initiation of enforcement proceedings, pursuant to 804 CMR 1.25, which may subject the noncomplying party to both civil and criminal penalties as provided in M.G.L. c.151B, s. 8.

Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review in accordance with M.G.L. c.30A, c.151B, s.6, and the 1996 Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c.30A does not automatically stay enforcement of this order. 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, s.6.

SO ORDERED this 9th day of November, 2004.

Dorca I. Gomez
Chairwoman

Cynthia A. Tucker
Commissioner