COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
DONAVAN BLOOMFIELD,

Complainants,

v. DOCKET NOS. 09-SEM-01116
10-SEM-01462

MASSACHUSETTS DEPARTMENT
OF CORRECTION and
MARK MONTENERO,

Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty E. Waxman in favor of Respondents Massachusetts Department of Correction (DOC) and Mark Montenero. Complainant, Donavan Bloomfield, alleges that Respondents discriminated against him on the basis of race by creating a hostile work environment and that Respondent DOC retaliated against him after he filed charges of race discrimination. Following an evidentiary hearing, the Hearing Officer dismissed both claims.

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*. (2020)), and relevant case law. It is the duty of the

Full Commission to review the record of the 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). M.G.L. c. 30A. When determining if a decision is supported by substantial evidence "we must consider the entire record, and must take into account whatever in the records detracts from the weight" of the Hearing Officer's determinations. Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673 (2010).

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 Guinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and 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). The role of the Full Commission is to determine whether the decision under appeal was based on an error of law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23 (10) (2020).

BASIS OF THE APPEAL

Complainant has appealed the decision on the grounds that the Hearing Officer's findings were arbitrary and capricious, and not supported by substantial evidence. Complainant contends the Hearing Officer erred because 1) the preponderance of evidence at the Public Hearing

showed that Complainant was subjected to a racially hostile work environment; 2) the preponderance of evidence showed that Complainant was retaliated against by the DOC; and 3) she made fundamental errors of law which prejudiced Complainant's rights. After careful review 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 that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. This standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c.30A, §1(6). The standard is more stringent than abuse of discretion, and less than preponderance of the evidence. Duggan v. Bd of Registration in Nursing, 456 Mass. 666, 674 (2010)

Complainant challenges the Hearing Officer's discounting of allegedly racist incidents which occurred between 1990 and 2007 in support of his May 12, 2009 charge of race discrimination. Despite the three-hundred-day statute of limitations set forth in G.L. c. 151B, prior related actions in support of a hostile work environment claim may be considered even if some lie outside the limitations period if these disparate incidents, when viewed together, reveal a pattern of mistreatment creating intolerable conditions. See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 532-533 (Mass. 2001); Clifton v MBTA, 445 Mass. 611 (2005) (hostile work environment found based on "pattern of egregious racial harassment" over a nine-year period). Such a pattern might shed light on circumstances transpiring within the limitations period and, thus, may be relevant as background information.

While alleged discriminatory conduct commencing prior to the three-hundred-day

limitations period can be relevant to establish a pattern of a hostile work environment in some situations, we find no error in the Hearing Officer's determination to decline to consider certain isolated circumstances cited by Complainant during his twenty-seven year career. Complainant began working for the DOC in 1983; his employment was terminated in May of 2010. Complainant seeks to rely on testimony about activities transpiring outside the limitations period as relevant to his Charges of Discrimination filed in May of 2009 and June of 2010: a racial epithet allegedly uttered in 1990, a union dispute in 2002, and alleged non-racial name-calling in 2007. The Hearing Officer found that years separated these three allegations and the incidents pertained to activities at separate correctional facilities. She also found most of the incidents were predicated on uncorroborated hearsay and recognized that the allegations were not included in Complainant's MCAD charges of discrimination. We find sufficient evidence to support her findings. We also find no error in her determination that these alleged disparate incidents involving different individual perpetrators and issues over a seventeen-year period were not sufficiently related to establish a pattern of egregious racial harassment by Respondent Montenero and the DOC. The allegations are not sufficiently "linked together" by perpetrator, issue or location to evidence a "continuing violation." Cuddyer, 434 Mass. at 532-533, 341. They fail to establish a "prolonged and compelling pattern of mistreatment." Id. at 532-533. Therefore, we will not disturb the Hearing Officer's findings.

Complainant also contends that the Hearing Officer erred by ignoring significant evidence and failing to credit Complainant's witnesses. In this case, the Hearing Officer considered the evidence offered by the Complainant. She documented in her decision evidence that she found significant, and addressed contradictory evidence in her findings. Complainant's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer

misinterpreted or misconstrued the evidence presented, even if there is some evidentiary support for that disagreement. The Full Commission defers to the determinations of the Hearing Officer. See Guinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and 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). "While we must consider the entire record, and must take into account whatever in the records detracts from the weight of the [Hearing Officer's decision]…as long as there is substantial evidence to support the findings…we will not substitute our view of the facts." Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673 (2010). With respect to credibility determinations, it is well established that the Hearing Officer is in the best position to judge the credibility of witnesses and to make determinations regarding the weight to give such evidence. Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the hearing officer and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence). Since the Hearing Officer is in the best position to judge the credibility of witnesses and where her determinations were supported by substantial evidence, we will not disturb the Hearing Officer's findings.

More particularly, Complainant argues that the Hearing Officer erred in not crediting the testimony of his witnesses, Officer Jean-Louis and Officer DP. Complainant contends that the Hearing Officer incorrectly found that Complainant's conversation with Officer Jean-Louis regarding the events of November 12, 2008 took place a year or more after the incident based on her understanding that Officer Jean-Louis began to work for the DOC just six years prior to the 2016 public hearing, in 2010 (2 years after the incident). Public Hearing Transcript, Day 2 at 1:20. This finding appears to have resulted from inaudible testimony. Officer Jean-Louis later

testified that he started to work for the DOC in 1999 (*sixteen* years prior to the public hearing). Transcript, Day 2 at 1:28:55. Nonetheless, as the Hearing Officer declined to give weight to Officer Jean-Louis' testimony based on the fact that he was not a personal witness to the events that transpired and only heard the Complainant's version of events, we find that the Hearing Officer did not err in declining to give weight to the testimony offered by Officer Jean-Louis. Complainant also contends that the Hearing Officer erred in refusing to consider as probative the testimony of a former Officer (Officer DP) about alleged racial epithets made by Respondent Montenero. The Officer's testimony was deemed to be unpersuasive by the Hearing Officer on the basis that Officer DP was forced to resign from the DOC, yet he denied the threatened termination of employment at the Public Hearing. A Settlement Agreement[1] between Officer DP and the DOC dated May 11, 2007, describes Officer DP appealing "the termination of his employment…" Respondent's Public Hearing Exhibit 4. We defer to the Hearing Officer's credibility determinations and find no error.

In addition to declining to give weight to several of the witnesses' testimony, the Hearing Officer did not credit Complainant's own uncorroborated and inconsistent versions of the November 12, 2008 incident, as well as the alleged harassment by Sgt. Montenero on January 6, 2009 and March 9, 2009. The Complainant argues that his testimony was corroborated by his medical records and the testimony of Officer Jean-Louis. However, neither are first-hand witness accounts, instead they are a recitation of Complainant's self-reporting. Further, Complainant identified multiple individuals who allegedly witnessed Sgt. Montenero's

[1] Complainant states in his Petition for Review that the DOC did not provide a copy of the Settlement Agreement to Complainant prior to Public Hearing. If the DOC failed to produce this document in response to a valid discovery request or pre-hearing order and failed to produce it prior to hearing, the omission could be consequential. However, Complainant cites no discovery request, Motion to Compel or Motion in Limine concerning this exhibit denied by the Hearing Officer upon which to base an appeal to the Full Commission. In any event, she declined to credit Officer DP's testimony based upon his inconsistent denial at Public Hearing, not merely because of the circumstances of his employment termination.

harassment on January 6, 2009, but the purported witnesses refuted the allegations at public hearing. Complainant contends that video footage of the C2 Corridor on March 9. 2009 corroborates the alleged harassment by Sgt. Montenero. The video footage does not reveal an exchange of words or contact between Complainant and Sgt. Montenero. Public Hearing Joint Exhibits 16 and 17. There is no audio recording associated with the video footage. Complainant points to video footage tracked at 2:05 p.m. to 2:06 p.m. allegedly showing Complainant and Sgt. Montenero when no one else was visible. He contends that it was during this period when Sgt. Montenero called him a "piece of s**t" and "f****ing rat." Complainant's Petition for Review, p. 56. This assessment of the footage is inconsistent with Complainant's initial report to the DOC about the incident, where he alleged that at approximately 1:40 p.m. "in front of" inmates and other officers, Sgt. Montenero was verbally and physically abusive. See Joint Exhibit 6, p. 25. The Hearing Officer credits the other officers who were working the C2 Corridor at that time who testified there was no altercation between Complainant and Sgt. Montenero. Officer DeJesus and Sgt. McGowan testified that they were assigned to the same general area as Complainant and Sgt. Montenero, could see and hear others in this area, and that they did not observe or hear any arguments or confrontations between Sgt. Montenero and Complainant. We will not disturb the Hearing Officer's findings where, as here, they are supported by substantial evidence.

Turning to the issue of retaliation, Complainant claims that the Hearing Officer erred by not finding a temporal causal connection existed between Complainant's complaints of discrimination and his termination, and failed to appropriately consider comparator evidence. He further claims that the Hearing Officer erred in failing to find that the rationale for Complainant's termination was pre-text for discrimination.

The Hearing Officer determined that Complainant failed to establish a prima facie case for retaliation. While the Hearing Officer found that Complainant engaged in a protected activity within the meaning of G.L. c. 151B, § 5 and that the Complainant was subjected to an adverse employment action, the Hearing Officer did not find that there was a causal connection between the Complainant's complaints of racial harassment and his termination. Complainant alleges that a causal nexus was established due to the proximity in time of the protected activity and the adverse employment action. However, even when there is a close temporal proximity between protected activity and an adverse employment action it does not, by itself, establish causation. Instead, it merely permits a trier of facts to infer a causal connection. Mole v University of Massachusetts, 442 Mass. 582, 592 (2004) (If an "adverse action is taken against a satisfactorily performing employee in the immediate aftermath of the employer's becoming aware of the employee's protected activity, an inference of causation is permissible."). This is a permissible inference, but it is not required to be drawn. "Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing or threatening to file, a discrimination complaint." Id., *quoting* Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991). In this case, the Hearing Officer determined that Complainant did not meet his burden of persuasion that a causal link existed between the protected conduct and the decision to terminate the Complainant. The Hearing Officer addressed the temporal proximity between the protected activity and the adverse employment action, but found that the year between the protected activity and Complainant's termination was "too long to support an inference of causation under the circumstances of this case."

The Hearing Officer found that Respondent's actions were "valid, job-related responses

to misconduct." She determined that Complainant's termination was supported by just cause, a determination supported by an arbitrator's decision which found that his discharge was warranted and that "[G]rievant has engaged in 'an ongoing pattern of dishonest and deceptive conduct' as alleged in the termination notice." Respondent's Public Hearing Exhibit 16, p. 24.

Complainant also contends that discriminatory motive should have been inferred based on comparative evidence of Sgt. Montenero's discipline for misconduct. A discriminatory or retaliatory motive can be inferred from differences in treatment of similarly situated employees of different races, referred to as comparators. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997). When relying on comparator evidence to establish discriminatory animus the Complainant must show that he "was treated differently from another person, known as a comparator, who was not a member of his protected class, but who otherwise was similarly situated." Trustees of Health & Hosps. of Boston, Inc. v. MCAD, 449 Mass. 675, 682 (2007). To be similarly situated "a comparator's circumstances need not be identical to those of the complainant." However, the comparator's circumstances need to be "substantially similar to those of the complainant 'in all relevant aspects' concerning the adverse employment decision." Id. at 682; Matthews, 426 Mass. at 129; Smith v. Straus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995).

In this case, the Hearing Officer addressed the comparator evidence presented by both Complainant and Respondent. The Hearing Officer found that Respondent had "terminated nine (9) other employees for engaging in dishonest conduct," including white employees, therefore "comparator evidence establishes that [Respondent] has treated other employees in like manner for behaving dishonestly under similar, albeit not identical, circumstances." The Hearing Officer recognized that Sgt. Montenero had indeed been disciplined by the DOC, but not due to

untruthfulness, fraud or sleeping on duty. She reasoned that the evidence that white employees engaging in untruthful conduct were terminated despite any protected conduct undercut Complainant's argument that he was terminated in retaliation for protected conduct. Where Respondent's basis for Complainant's termination was its determination that Complainant falsely reported that he had been physically abused by Sgt. Montenero on March 9, 2009 and for being less than truthful when interviewed about allegations of sleeping on duty, we find no error in her evaluation of the comparator evidence. The comparators received comparable discipline – termination – for the same misconduct – dishonesty.

Complainant's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer misinterpreted or misconstrued the evidence presented, even if there is some evidentiary support for that disagreement. Based on the foregoing, we uphold the Hearing Officer's conclusions that the grounds for terminating Complainant were supported by evidence of misconduct and were not motivated by retaliatory animus.

Complainant further argues that the Hearing Officer erred in not finding that Respondent's articulated legitimate, non-discriminatory reasons for terminating Complainant was pre-text for discrimination. In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 792 (1973). The first part of the framework requires that Complainant establish a prima facie case of retaliation. See Mole v. University of Massachusetts, 442 Mass. 582, 591-592 (2004); Kelley. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). Once Complainant has established a prima facie case of discriminatory termination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its actions. Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000). However,

the Hearing Officer concluded that Complainant had not established a prima facie case for retaliation, because he could not show that the adverse employment actions were caused by his protected activity. Once Respondent has articulated legitimate, non-discriminatory reasons for tits conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Despite her determination that Complainant had not made out a prima facie case for unlawful retaliation, she further determined that the disciplinary actions against Complainant were based on valid, job-related reasons. We find no error.

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 herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them. On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety. This Order represents the final action of the Commission for purposes of M.G.L. c. 151B, §6 and M.G.L. c. 30A. Any party aggrieved by this Order may challenge it by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Failure to provide a copy of the transcript may preclude the aggrieved party from alleging that the Commission's decision is not supported by substantial evidence, or is arbitrary or capricious, or is an abuse of discretion. Such action must be filed within thirty (30) days of

service of this Order and must be filed in accordance with M.G.L. c. 30A, c. 151B, §6, and Superior Court Standing Order 1-96. Failure to file a complaint in court within thirty (30) days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6 and M.G.L. c.30A.

SO ORDERED[2] this 12th day of May, 2021

Sunila Thomas George
Chairwoman

Neldy Jean-Francois
Commissioner

[2] Commissioner Monserrate Quiñones previously worked at the Department of Corrections as the Director of Diversity and in that capacity reviewed Respondent's investigations regarding the incidents of November 12, 2008 (Joint Exhibit 5) and March 9, 2009 (Joint Exhibit 6); therefore, she did not take part in the Full Commission Decision.