

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
KELVIN GUDE,  
Complainant

v.

DOCKET NO. 08-BEM-02625

JENALYN, INC. and ALAN FRERICHS,  
Respondents

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**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Respondents Jenalyn, Inc. (Jenalyn) and Alan Frerichs. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were not liable for discrimination based on race and gender. The Hearing Officer found that Complainant, a telephone solicitor, was not subjected to a racially hostile work environment or disparate treatment by being paid less than his female comparator. In addition, the Hearing Officer found that Complainant was terminated by Jenalyn not based upon his race, but because of his record of deficient performance and unreliable attendance. Complainant has appealed to the Full Commission. For the reasons stated below, we affirm the Hearing Officer's decision.

**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); 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). Fact-finding determinations are the sole province of the Hearing Officer who is in best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because 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.

#### **BASIS OF THE APPEAL**

Complainant's appeal to the Full Commission asserts that the Hearing Officer erred in determining that Jenalyn did not terminate Complainant as a result of discrimination and that she erred with respect to the liability of Alan Frerichs, Jenalyn's president and general manager. 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. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The key to substantial evidence is whether a "reasonable mind" would accept the evidence as adequate to form a conclusion. M.G.L. c. 30A, s. 1(6); see Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The 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).

Complainant has appealed the decision on the grounds that the Hearing Officer erred in determining that Jenalyn did not terminate Complainant's employment as the result of discrimination. In his appeal, Complainant asserts that although Jenalyn purportedly terminated him due to misconduct, it was unable to offer any evidence in support of this proffered reason other than "vague allegations" of Complainant's poor performance, and therefore the inference is raised that Complainant's termination was "pretextual, and not based on any non-discriminatory reasons."

Yet this assertion is not accurate. As the Hearing Officer explained in her decision, the incident that ultimately led to Complainant's termination was his angry response to a private computer message from his supervisor, Michael Marchione, advising Complainant that the best way to improve his production was to be more punctual at work and not leave early. This message, which was sent after Complainant asked Marchione for a raise and Marchione then discussed the matter with Alan Frerichs, informed Complainant that he was one of the lowest producers at Respondent with an average of .49, or half a sale, per hour. After Complainant received this message, he mocked Marchione, asserting that he should have Marchione's job and essentially said

that he could do a better job than his supervisor. Marchione then discussed Complainant's work performance again with Alan Frerichs. The Hearing Officer specifically credited the testimony of both Marchione and Frerichs that the decision to terminate Complainant was made based upon this discussion, which centered on Complainant's deficient performance and his history of unreliable attendance. The determination of Complainant's deficient performance was based upon the auto-dialer system records, which tracked the number of sales made and monitored an employee's time away from the telephone. These records corroborated Respondent's witnesses' testimony that Complainant was not satisfying the requirements for the requested raise, namely averaging at least one sale per hour, and that his female comparator was exceeding his performance. The Hearing Officer noted that in the face of the documentary evidence and witness testimony, "Complainant produced no evidence other than his own self-serving testimony to show that this was untrue." Because the Hearing Officer is in the distinct position to hear testimony first hand, to observe the demeanor of the witnesses, and to evaluate the reliability and trustworthiness of the testimony, her credibility determinations should stand. Under these circumstances, the Hearing Officer's conclusion that Complainant was terminated for non-discriminatory reasons unrelated to his race or gender is well-supported by the record and thus should not be disturbed.

Complainant next contends that the Hearing Officer erred with respect to the liability of Alan Frerichs. Specifically, Complainant asserts that Alan Frerichs "was aware of the conduct of his brother, but took no action." With this statement, Complainant is presumably referring to an incident involving Paul Frerichs during

Complainant's first week of work that Complainant alleges created a hostile work environment. In that incident, Complainant accidentally short-circuited the office computers when he plugged in his cell phone charger, and Paul Frerichs, who was, unbeknownst to Complainant, Alan Frerichs' brother, called him an idiot and threatened to throw his cell phone out the window if this happened again. Complainant stated that he complained about Paul Frerichs' reaction to Marchione, who responded, "He's not over busing yet." However, the Hearing Officer found that Complainant failed to establish that he was subjected to a hostile work environment based upon his race. She noted that there was no evidence that Paul Frerichs' reaction was based upon race or that Complainant was treated any differently from how anyone else who crashed the system would have been treated. The Hearing Officer credited Marchione's testimony that when Complainant injected race into the discussion, Marchione responded that he did not know whether Paul Frerichs had not gotten over busing or just had a big mouth. In any event, the Hearing Officer found that Paul Frerichs was not Complainant's supervisor, there were no other incidents involving him and Complainant, and there was no evidence of any repercussions or ongoing hostility following the incident at issue. Since the Hearing Officer found that Respondent did not create a hostile work environment, and thus was not liable for any discrimination on this basis, she had no reason to decide whether Alan Frerichs was individually liable relating to the same alleged conduct.


Based on all of the above we conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. Therefore we affirm the dismissal of the claim.

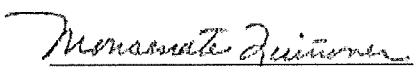
**ORDER**

Complainant's appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed.

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 the proceedings. Such action must be filed within thirty (30) days of service 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, Superior Court Standing Order 96-1. Failure to file a petition 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.

SO ORDERED<sup>1</sup> this 3rd day of December, 2018.

  
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Sheila A. Hubbard  
Commissioner

  
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Monserrate Quiñones  
Commissioner

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<sup>1</sup> Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR 1.23(1)(c).