

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
NATHANIEL S. HEDVAT,  
Complainants

DOCKET NO. 08-BEM-03044

v.

JENNINGS ROAD MANAGEMENT CORP.,  
d/b/a THE HERB CHAMBERS COMPANIES  
AND HERB CHAMBERS 1172, INC., d/b/a  
HERB CHAMBERS BMW OF BOSTON,  
Respondents

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**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferrri in favor of Respondents, Herb Chambers 1172, Inc. d/b/a Herb Chambers BMW of Boston and Jennings Road Management Corporation. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were not liable for discrimination based on religion in violation of M.G.L. Chapter 151B §§ 4(1) and (1A). 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 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 providence 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.

### **SUMMARY OF FACTS**<sup>1</sup>

Complainant began his employment as a Sales Consultant with Respondent, Herb Chambers 1172, Inc., d/b/a Herb Chambers BMW of Boston, in January 1999 (“Dealership”). He worked at this location until his termination on February 15, 2008. Complainant testified that he was not religiously observant at the time he was hired. In 2004, Complainant’s fiancée Marcy Harriss, who was also employed by the Dealership, decided to convert to Orthodox Judaism. In April of 2004, Ms. Harriss and Complainant met with the

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<sup>1</sup> The Hearing Officer made findings of fact on the issues which were relevant and material to the ultimate decision reached, and set forth her reasoning. This summary is based upon our review of the administrative record and the Hearing Officer’s findings supported by substantial evidence.

Dealership's General Manager, Melissa Steffy, and requested that Complainant be allowed time off on Saturday mornings to attend synagogue with her. Ms. Steffy agreed to give Complainant time off when he requested it and never denied him any requested religious accommodation. After this meeting Complainant routinely took parts of Saturdays off to attend temple services.

In May of 2005, Complainant was promoted to the position of General Sales Manager. From May of 2005 to approximately the spring of 2007, Complainant performed his job as General Sales Manager well. In the spring of 2007, the Dealership changed its employee 401(k) contribution plan, decreasing the Dealership's percentage match of employee contributions. Complainant began expressing dissatisfaction with his income to Ms. Steffy and did so on multiple occasions. Complainant's performance, attitude, and enthusiasm for the job waned contemporaneously with this outward expression of dissatisfaction with his income. During the second half of 2007, although sales for the dealership increased, Complainant's attitude and performance continued to decline, he abdicated his leadership responsibilities and a subordinate employee began to take on many of Complainant's responsibilities. During the period of approximately December of 2007 through the beginning of 2008, Complainant continued to decline in performance, demonstrated a poor attitude and lack of enthusiasm and was largely unresponsive to other dealership employees. On or about February 15, 2018, Ms. Steffy, after contemplating the problems with Complainant and the impact on her management team and the morale of the dealership, made the decision to terminate Complainant's employment.

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

Complainant has appealed the decision on the grounds that 1) the Hearing Officer failed to consider all of the evidence presented at the hearing; 2) failed to allow the Complainant to depose a material witness; and 3) failed to apply the appropriate legal standard regarding pre-textual termination. We will address each in turn.

**1. Consideration of the Evidence Presented at the Hearing**

Complainant has appealed the decision on the grounds that the Hearing Officer erred in failing to consider all the evidence presented at the hearing. This assertion fails to consider the Hearing Officer's abundant findings of fact, here credibility determinations and the role of the Full Commission in reviewing the decision. The Hearing Officer's role is to evaluate the credibility of witnesses and to weigh the significance of evidence presented at the hearing, including the "right to draw reasonable inferences from the facts found." Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the hearing commissioner and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence). In contrast, the Full Commission reviews the record to determine whether there is sufficient evidence to support the Hearing Officer's determinations and defers to the fact-finder's determinations.

Complainant points to evidence that Melissa Steffy, the General Manager, called another dealership to inquire if there was a position available for Complainant as evidence that Respondent's reason for firing Complainant was pre-textual and that he was not terminated due to his job performance. Just because the Hearing Officer did not mention this testimony in her decision does not mean that it was not considered, nor does it mean that her findings of fact were not supported by substantial evidence. Indeed, the testimony

concerning the effort to assist Complainant in finding a new job may even bolster the Hearing Officer's determination that Ms. Steffy harbored no discriminatory animus as she sought to assist Complainant in his transition. The Hearing Officer is tasked with weighing the significance of the evidence presented. Further, where there is conflicting evidence, the Hearing Officer is charged with the responsibility of making findings of fact and remains in the best position to judge the credibility of witness. School Committee of Chicopee, 361 Mass. at 354.

Similarly, Complainant argues that the Hearing Officer primarily cited to testimony supporting the Respondent and that she incorrectly cites the transcript and/or misinterprets or misconstrues the testimony. This argument again misunderstands the role of the Hearing Officer and Full Commission. In this case, the Hearing Officer documented in her decision evidence that she found significant, she noted the testimony that she found credible, she noted when she did not credit contradictory testimony, and she explained why these determinations were made. It is logical that the Hearing Officer made reference to more testimony that supported the Respondent, as she found this evidence compelling enough to find for the Respondent. 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. Ramsdell 415 Mass. at 676 (review requires deferral to administrative agency's fact-finding role, including its credibility determinations).

In support of this argument Complainant cites to sections of testimony which he believes were incorrectly cited, misinterpreted, or misconstrued. One example Complainant discusses is testimony given by Complainant that Ms. Steffy said to him, "Nathan, I don't

know how much more of this I can deal with.” He argues that this is evidence that the Hearing Officer misconstrued the evidence that Complainant was always given the time off that he requested. Ms. Steffy made this statement while she was covering the phones one Saturday afternoon after Complainant had come back later than he normally did on Saturdays. However, there is no evidence that this statement made by Ms. Steffy was specifically referring to his need to take Saturdays off. The Hearing Officer’s decision not to interpret this testimony as evidence that he was not permitted to take Saturdays off for religious purposes was not arbitrary or capricious. There was evidence elicited from Complainant’s own witness, Marcy Harriss, who testified that Complainant was never denied time off when requested. Further, Complainant testified that he was never denied a request to take Saturdays off for religious observance.

Complainant also cited a section of the Hearing Officer’s decision stating that the Hearing Officer failed to understand the significance of Complainant’s gross compensation in 2006 and 2007, which indicated an increase in sales during that time frame and that his performance at the dealership was still good at the time of termination. Complainant fails to acknowledge that the Hearing Officer found that “From May 2005 to approximately the spring of 2007, Complainant performed his job as General Sales Manager well” and that it was not until the spring of 2007 that Complainant’s attitude and performance deteriorated. Complainant also fails to recognize that the Hearing Officer credited the testimony of Ms. Steffy, which was corroborated by two other witnesses, including one of Complainant’s own witnesses, that she “observed a notable decline in Complainant’s performance and stated that his attitude and enthusiasm for the job seemed to have waned” and that he “abdicated his leadership role.” The Hearing Officer’s determination that the Complainant’s job

performance deteriorated despite the increased sales during this time frame was supported by substantial evidence in the record.

Furthermore, Complainant misinterprets the evidentiary standards surrounding Commission Hearings, arguing that Hearing Officer should not have relied on hearsay testimony elicited from Ms. Steffy concerning Complainant's job performance. "The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity." M.G.L. Chapter 151B § 5. A Hearing Officer may consider hearsay evidence. LaPierre v. MCAD, 354 Mass. 165, 175 (1968). See School Committee of Brockton v. MCAD, 423 Mass. 7, 15 (1996) (In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value.).

After careful review, we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We find that the examples given by Complainant in his appeal regarding the Hearing Officer incorrectly citing the transcript and/or misinterpreting or misconstruing the testimony reflect Complainant's disagreement with the Hearing Officer's determinations. The Hearing Officer's determinations were based on substantial evidence; and were not arbitrary or capricious, nor an abuse of discretion. See 804 CMR 1.23. We have considered Complainant's appeal in accordance with the applicable standard of review and conclude that there is substantial evidence in the record to support the findings of fact and conclusions of law made by the Hearing Officer. Thus, we will not disturb the Hearing Officer's findings.

**2. Complainant's Inability to Depose Herb Chambers.**

Complainant appeals the decision on the grounds that he was not allowed to depose a material witness. However, Complainant does not discuss the merits of this argument within the body of his Petition for Review. The only reference to this argument is a sentence stating “Hedvat was unable to confirm, challenge or contradict McDaniels’ testimony in [regards to a meeting between McDaniels and Herb Chambers] because the Commission did not let Hedvat depose Herb Chambers during the discovery phase of this proceeding.” There is no discussion by Complainant as to why Mr. Chambers would have relevant information, why the testimony of McDaniels should be disputed, why Complainant believes that he is a material witness, or how this testimony would have affected the Hearing Officer’s decision. Furthermore, he adds a footnote to this sentence referencing the Affidavit of Herb Chambers attached to Respondent’s Motion for a Protective Order dated March 21, 2012. This affidavit states that Mr. Chambers does not handle the day to day operations of any of his forty-three automotive franchise locations and has no personal knowledge or information concerning Complainant’s employment at the dealership or Complainant’s allegations of discrimination. There is no indication that this information is false or that Mr. Chambers has any other material evidence relevant to the Complainant’s case. We find no abuse of discretion requiring reversal of the Hearing Officer’s decision in the ruling barring the deposition of Mr. Chambers.

**3. The Appropriate Legal Standard Regarding Pre-Textual Termination**

Complainant appeals the decision on the grounds that the Hearing Officer failed to apply the appropriate legal standard regarding pre-textual termination. Although Complainant cites to case law regarding the Complainant’s burden of persuasion to prove that the Respondent’s lawful reason for termination was pre-text, he did not address how the



Hearing Officer failed to apply the law correctly.

It is well established that once a 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); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). Once Respondent has articulated legitimate, non-discriminatory reasons for their conduct, Complainant must show that Respondent's reasons are a pre-text for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Complainant must prove "by a preponderance of the evidence that Respondent's facially proper reasons given for its actions...were not the real reasons, but that Respondent acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001) (internal citation omitted).

The Hearing Officer concluded that Complainant had established a prima facie case of discriminatory termination. This shifted the burden to Respondent who articulated a legitimate, non-discriminatory reason for terminating Complainant's employment; Complainant's attitude had become negative and he was neglecting his leadership roles. The Hearing Officer referenced not only Ms. Steffy's testimony regarding the change in Complainant's attitude and behavior, but also to other witnesses that corroborated Ms. Steffy's testimony, one of which was the Complainant's own witness. The burden then shifted back to Complainant to prove that the reason proffered by Respondent was pre-text, which the Complainant was unable to do, as the Hearing Officer found that "[a]side from Complainant's and Mrs. Harriss' testimony that Steffy was hostile towards them, which I did

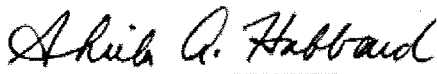
not find credible, there is no evidence of pretext.”

Complainant correctly cites to cases in his appeal indicating that a complainant *may* satisfy this burden through circumstantial evidence; that a Hearing Officer *may* take into account weaknesses or inconsistencies in the employer’s proffered legitimate reason; and that a Hearing Officer *may* infer a discriminatory intent if they find that the employer’s reason is not legitimate. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 446 (1995)(“[T]he plaintiff may, and more often than not must, carry his burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not credible.”); Fuentes v. Perskie, 32 F. 3d 759, 765 (3<sup>rd</sup> Cir.1994) ( to avoid summary judgment “plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them ‘unworthy of credence’ ...” (emphasis in original)); Lipchitz v. Raytheon Company, 434 Mass. 493, 500-501 (2001) (“[I]f the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind”). However, Complainant fails to acknowledge that the burden of persuasion to show discriminatory animus remains with Complainant, and that the fact-finder may consider circumstantial evidence or any inconsistencies, yet determine that the Complainant has not met his burden. The Hearing Officer made it clear in her decision that she was not persuaded by Complainant’s or Ms. Harriss’ testimony that Ms. Steffy was hostile towards them - the evidence presented by Complainant to rebut Respondent’s legitimate lawful reason for his termination. Therefore, this argument fails and we will not disturb the Hearing Officer’s findings.

**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 (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>2</sup> this 18<sup>th</sup> day of April, 2019



Sheila A. Hubbard  
Commissioner



Monserrate Quiñones  
Commissioner

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<sup>2</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).