

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
TALIA LAURIA,
Complainant

v.

DOCKET NO. 09-BEM-00673

ROBERT W. SULLIVAN, INC.,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan dismissing Complainant Talia Lauria's complaint charging Respondent Robert W. Sullivan, Inc. with retaliatory termination. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable under M.G.L. Chapter 151B § 4(4) for retaliatory termination in response to Complainant's internal complaint of sexual harassment. Complainant 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 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.

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.

BASIS OF THE APPEAL

Complainant has appealed the decision on the grounds that the Hearing Officer’s findings were factually and legally erroneous and not supported by substantial evidence. Complainant argues that the Hearing Officer erred in finding that Complainant failed to establish a prima facie case for retaliation; that the Hearing Officer improperly considered the testimony of Christian Scourletis; and that the Hearing Officer erred in failing to find that Respondent’s legitimate, nondiscriminatory reason for terminating Complainant was pretext.

Prima Facie Case for Retaliation

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 complaint of sexual harassment and her termination. Complainant alleges that a causal nexus was established due to the proximity in time of the protected activity and the adverse employment action. The Complainant fails to acknowledge that 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 retaliatory termination cases, the complainant must prove that the respondent's desire to retaliate was a determinative factor in the decision to terminate her employment. Tate v. Dep't of Mental Health, 419 Mass. 356, 362, (1995). In this case the Hearing Officer made it clear that Complainant did not meet her 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 there was no credible evidence of a causal connection between the Complainant's complaint of sexual harassment and her termination. The Hearing Officer recognized there was ample evidence of performance problems that predated the protected activity. She also found that there was credible evidence that the decision to terminate Complainant occurred prior to the protected conduct.¹ Where problems with an employee or adverse employment actions predate any knowledge that an employee has engaged in protected activity "...it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation. Mole v. Univ. of Massachusetts, 442 Mass. 582, 594-95 (2004). Finally, the Hearing Officer recognized that even if Complainant had established a prima facie case of retaliation, the Respondent met its burden of production to articulate credible evidence of a legitimate, nondiscriminatory reason for its actions.

Testimony of Christian Scourletis

Christian Scourletis is the owner of a company that provided information technology support to Respondent, and testified at the public hearing. Scourletis testified about the results of several monthly reports quantifying Complainant's internet usage. The Hearing Officer found that Scourletis' company, TCom, provided information technology support to Respondent during the time of Complainant's employment and that they had installed the "content-filtering" software programs that monitored employees' internet usage at Respondent, documenting the foundation of his knowledge regarding the usage reports. Scourletis' testimony provided evidence that the Internet Protocol (IP) address identified on the internet usage report was unique

¹ The Hearing Officer found that Paul and Mark Sullivan made the decision to terminate the Complainant on September 9 or 10, 2008, and began to discuss when the termination would be least disruptive to the company. Hearing Decision, Finding of Fact ¶22. Ultimately, they decided to terminate the Complainant's employment on October 17, 2008. Hearing Decision, Finding of Fact, ¶31.

to Complainant's computer. Complainant contends that Scourletis' testimony "lacked the requisite foundation" and did not support the Respondent's decision to terminate Complainant for lack of workplace productivity and "excessive" internet usage. Complainant further asserts that his testimony "should have been excluded by the Commission."

The Hearing Officer credited Scourletis' testimony. 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 commissioner and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence). 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). Further, the Commission is not "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.).

Complainant's argument that the internet usage reports do not support Respondent's decision to terminate Complainant because not all of the documented internet usage was initiated by Complainant ignores the Hearing Officer's recognition that "[w]hile the total number of hits to internet websites reflected in the internet activity reports far exceeded the actual number of sites visited by Complainant for the reasons cited by Scourletis, he nonetheless

testified credibly that, even discounting the activities not initiated by Complainant, the reports show an amount of internet usage by Complainant far exceeding the time she was allotted for breaks, indicating excessive use of her computer for personal reasons during work hours.”

Supporting Scourletis’ testimony, there was circumstantial evidence supporting that the internet usage report was for Complainant’s computer as daily visits to rock climbing websites were reported. Several witnesses, including the Complainant herself, testified that she was a rock climbing enthusiast. There was no error in the Hearing Officer’s crediting Scourletis’ testimony.

Complainant also ignores the Hearing Officer’s determination that Respondent proffered a legitimate, nondiscriminatory reason for terminating Complainant which did not rely solely on the testimony of Scourletis or the internet usage reports. The Hearing Officer also credited the testimony of Complainant’s supervisors who complained about her excessive internet usage, as well as her performance. The Hearing Officer considered the ample evidence that Respondent produced to support its decision to terminate Complainant such as “Complainant’s excessive use of the internet for personal matters, poor work ethic, lack of initiative and motivation and apparent lack of interest in the job, all of which were repeatedly discussed with her.”

Excessive Internet Usage as Common Practice

Complainant argues that Respondent wrongfully singled out Complainant amongst its employees for alleged excessive internet usage. In support of this argument Complainant relies on testimony of a former manager who stated that she had been singled out and that, excessive internet use was a problem with other employees who were not disciplined. This argument fails to consider the Hearing Officer’s numerous findings of fact, her role to weigh the evidence offered and determinations of credibility, and the role of the Full Commission.

When a Respondent has proffered a non-discriminatory reason for an adverse employment action “whether the reason given was the real reason or merely pretextual, may involve questions of credibility, but ... the burden of persuasion rests on the employee.” Wheelock Coll. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 136–37, (1976). Again, the Hearing Officer is in the best position to credit or not credit witnesses and 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 commissioner and not for the reviewing court, and that fact-finder’s determination had substantial support in the evidence). Where there is conflicting evidence, the Hearing Officer is charged with the responsibility of weighing that evidence and making findings of fact based on their determinations of the significance of the evidence presented and the credibility of witnesses. School Committee of Chicopee, 361 Mass. at 354.

In this case, the Hearing Officer made determinations that address each of the arguments set forth by Complainant that the Respondent’s articulated non-discriminatory reasons for termination were pretext for her termination. The Hearing Officer cited to substantial evidence in the record when making these determinations and discussed the significance and weight of the contradictory evidence. Complainant’s disagreement with the Hearing Officer’s determinations does not mean that the Hearing Officer’s determinations were erroneous, even if there is some evidentiary support for that disagreement. Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (review requires deferral to administrative agency’s fact-finding role, including its credibility determinations). Further, an employer's reasons for its decision to terminate “may be unsound or even absurd, but if they are not discriminatory and if the plaintiff

does not prove they are pretexts, the plaintiff cannot prevail.” Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 766, (1986).

We have carefully reviewed Complainant’s grounds for appeal and the 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. With regard to Complainant’s challenges to the Hearing Officer’s determinations of credibility, we reiterate that it is well established that the Commission defers to these determinations, which are the sole province of the fact finder. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005).

On the above grounds, we deny the appeal and affirm the Hearing Officer’s decision.

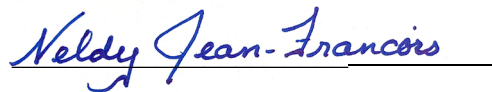
ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. 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 ORDERED² this first day of July, 2019



Monserrate Quiñones
Commissioner



Neldy Jean-Francois
Commissioner

² 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).