COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHEILA LEAHY,
Complainants

v. DOCKET NO. 09-BEM-00288

CITY OF BOSTON FIRE DEPARTMENT
and JAMES BERLO,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Complainant, Sheila Leahy, a firefighter for the City of Boston ("the City"). Following an evidentiary hearing, the Hearing Officer concluded that the City was liable for retaliation in violation of M.G.L. c. 151B, § 4(4) for certain actions in returning Complainant to work. The Hearing Officer also dismissed Complainant's other claims of retaliation against both Respondents and her claim of sexual harassment against the City and James Berlo after determining that it was untimely filed. Both Complainant and the City have appealed to the Full Commission.

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, § 1(6).

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 Quinn 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). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(1)(h).

BASIS OF THE APPEALS

Complainant's Appeal

Complainant contends that the Hearing Officer erred by dismissing her sexual harassment claim as untimely.[1] Specifically, Complainant argues that her sexual harassment claim was timely filed because she filed an internal complaint of sexual harassment with the City, which tolled the statute of limitations during the pendency of the internal proceedings. We conclude

[1] On November 2, 2018, Complainant filed a motion for reconsideration requesting that the Commission vacate the portion of the Hearing Officer's decision dismissing her sexual harassment claim as untimely. We have considered Complainant's motion and the decision issued by the Massachusetts Appeals Court in Flint v. City of Boston, 94 Mass. App. Ct. 298 (2018). For the reasons discussed in this decision, we deny Complainant's motion.

that the Hearing Officer did not err in determining that Complainant's claim of sexual harassment was untimely.

Pursuant to 804 CMR 1.10(2), the three-hundred day limitations period in which to file a complaint with the MCAD can be tolled where "pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within the three hundred days of the conduct complained of and subsequently files a complaint within three hundred days of the outcome of such proceeding(s)." The MCAD has interpreted this exception to apply only to cases involving formal grievance proceedings set forth in a collective bargaining agreement. See Shervin v. Partners Healthcare System, Inc., 2 F.Supp.3d 50, 63 (D. Mass. 2014); Hall v. FMR Corp., 559 F. Supp. 2d 120, 125 (D. Mass. 2008); Desando v. Lucent Technologies, 193 F. Supp. 2d 358 (D. Mass. 2002); but see Flint v. City of Boston, 94 Mass. App. Ct. 298 (2018) (providing that the "initiation of a process that, with an adverse outcome, could have resulted in a grievance" falls within the scope of 804 CMR 1.10(2) where the process is initiated by an employee, covered by a collective bargaining agreement).

The Hearing Officer found that Complainant testified credibly to several incidents of sexual harassment involving Captain James Berlo occurring in early 2007 and early 2008, culminating in Berlo's unwelcome profession of love to the Complainant on February 16, 2008. After February 16, 2008, they never spoke again. On February 24, 2008, Complainant filed a report about Berlo with the Boston Fire Department Personnel Division. Complainant filed her complaint with the MCAD on February 9, 2009, more than three-hundred days after any alleged incident of sexual harassment by Berlo. Although the Hearing Officer found that Complainant saw Berlo on several occasions throughout 2008—driving by the firehouse, driving past emergency calls, or driving behind her on the street— it was acknowledged that Berlo lived in

the area, and that Complainant did not interact with him on these occasions, although she found these sightings "nerve-wracking." Thus, the Hearing Officer properly concluded that these sightings alone were insufficient to anchor Berlo's prior acts of sexual harassment as to render them timely.

The Hearing Officer found that on February 20, 2008, Complainant met with the Chief of Operations Andrew O'Halloran and Chief of Personnel Michael Doherty about her sexual harassment allegations against Berlo. On February 24, 2008, Complainant filed a report of sexual harassment that went up the chain of command. On February 25, 2008, Berlo was placed on administrative leave pending an investigation into the sexual harassment allegations. A departmental hearing on the sexual harassment charges "preferred against [Berlo] by Deputy Fire Chief Michael J. Doherty" took place on April 16, 2008, resulting in Berlo's one-year unpaid suspension.[2] These were not formal grievance proceedings initiated by Complainant. Instead, these proceedings were internal disciplinary proceedings taken by the City against Berlo in response to Complainant's report of Berlo's conduct and the City's own investigation into the matter. For this reason, we agree with the Hearing Officer's determination that Complainant's claim of sexual harassment was untimely, and that it does not fall within the tolling exceptions found at 804 CMR 1.10(2).[3]

Complainant argues that the Hearing Officer erred by failing to find Berlo individually liable for retaliation. Specifically, Complainant argues that after he was suspended without pay, Berlo colluded with his sister, Susan Morrissey, to report Complainant to the Boston Residency

[2] See Joint Exhibit 7.

[3] Complainant argues that the Hearing Officer erred in failing to find Berlo individually liable for sexual harassment. However, because we conclude that the Hearing Officer did not err in dismissing Complainant's sexual harassment claim as untimely, the Hearing Officer did not err by failing to find Berlo individually liable with respect to the sexual harassment claim.

Commission for an alleged violation of the City's residency policy, and that this resulted in Complainant's likely forced resignation. As discussed below, the Hearing Officer alluded to Berlo's participation in reporting Complainant to the Residency Commission, but failed to specifically address this issue in her findings of fact or conclusions of law. Thus, we remand to the Hearing Officer for findings and a ruling on Complainant's claim that Berlo was individually liable for retaliation.

In her analysis of the City's liability for the acts of Berlo and Morrissey, the Hearing Officer, stated: "In reporting Complainant's residency violation, Morrissey acted as an independent citizen. She collaborated with her brother who also acted in his private capacity." However, the Hearing Officer made no findings of fact that address any "collaboration" between Berlo and his sister in reporting Complainant to the Residency Commission. She also neglected to make a ruling as to whether any such conduct was unlawful retaliation by Berlo, regardless of whether he was acting individually, or on behalf of the City.[4] On remand, the Hearing Officer is directed to address Berlo's individual liability for retaliation and make specific findings concerning his participation and involvement in reporting Complainant to the Residency Commission. If the Hearing Officer determines that Berlo is individually liable for these retaliatory acts, the Hearing Officer should also address whether additional damages are warranted.

Complainant also argues that the Hearing Officer erred by failing to find the City of Boston liable for the alleged retaliatory actions of Berlo and Morrissey. Complainant asserts that Berlo acted pursuant to the authority of the City in colluding with his sister to report Complainant to the Boston Residency Commission, an act that resulted in her resignation. On

[4] M.G.L. c.151B, § 4(4) makes it unlawful for *any person*, to discriminate against an individual who has opposed discriminatory practices. The retaliation need not have been carried out by an agent of the employer or on behalf of an employer.

remand, if the Hearing Officer determines that (1) Berlo colluded with his sister in reporting Complainant to the Residency Commission, (2) Berlo's actions were retaliatory, and (3) Berlo's retaliatory conduct was directly related to Complainant's resignation, the Hearing Officer should consider whether the City is liable for retaliation under the "cat's paw" theory of liability.[5] See Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011). Under the "cat's paw" theory of liability, an employer can be liable for intentional discrimination based on the conduct of its agent, usually a supervisor, who harbors discriminatory animus and influences an adverse employment decision, even if the agent does not make the ultimate employment decision. Id. As a result, an employer can still be liable even if a neutral decision maker exercises independent judgment, as this does not prevent the animus of the biased individual from tainting the adverse employment action. Id. at 419. As long as the discriminating employee's influence is a proximate cause of the ultimate adverse employment action, the employer's liability will be established. Id. On remand, the Hearing Officer should consider whether, despite the City's independent judgment, the City is nonetheless liable for retaliation because the investigation into Complainant's alleged residency violation, apparently resulting in Complainant's forced resignation, was tainted by the retaliatory animus of Berlo.

Complainant argues that the Hearing Officer erred in not ordering training on sexual harassment or a revision of the City's training curriculum. While, the Commission has broad discretion to fashion remedies to best effectuate the goals of M.G.L. c. 151B, the Hearing Officer is in the best position to determine the appropriate remedy once liability has been established. Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988); Sobocinski v. United Parcel

[5] The Hearing Officer would also need to consider whether Berlo must be an agent of the City at the time of his retaliatory acts for the "cat's paw" theory of liability to apply or whether a prior agency relationship with the City is sufficient for purposes of the "cat's paw" analysis. See Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011).

Service Inc., et al., 34 MDLR 109 (2012). Given the outcome of this case, we conclude that the Hearing Officer did not abuse her discretion by not ordering training.

The City of Boston's Appeal

The City argues that the Hearing Officer erred by finding it liable for unlawful retaliation in assigning Complainant to Ladder 15 instead of Engine 39, her former station house, upon her reinstatement as a firefighter. The City asserts that there was no evidence that Complainant's assignment to Ladder 15 was materially adverse to her.

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) the City was aware that she had engaged in protected activity; (3) the City subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003). To satisfy the third element of a prima facie case of retaliation, a Complainant must establish that she suffered an adverse employment action. This requires a showing that the employer made a change in the objective terms and conditions of employment that materially disadvantages or threatens to disadvantage Complainant. Bain v. City of Springfield, 424 Mass. 758, 765 (1997). Determining whether an action is materially adverse requires a case-by-case inquiry. Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996). We conclude that given Complainant's credible testimony about the disadvantages of being assigned to a different station house, the Hearing Officer's determination that the reassignment constituted retaliation is sufficiently supported.

The Hearing Officer found that upon Complainant's reinstatement as a firefighter in March of 2010, she was told that she was being assigned away from Engine 39 to "get a fresh

start." However, Deputy Fire Chief Michael Doherty, who was responsible for handling Boston Fire Department personnel matters, acknowledged that Complainant was not permitted to return to Engine 39 because firefighter Kevin Morrissey, Berlo's brother-in-law, worked at that firehouse. Kevin Morrissey blamed the Complainant for making a complaint of sexual harassment against Berlo. The Hearing Officer ultimately concluded that Complainant's assignment to Ladder 15 was causally-related to her complaint of sexual harassment because it resulted from the City's determination that she should not be returned to Engine 39 in deference to Kevin Morrissey.

The Hearing Officer also found that the reassignment was adverse based on Complainant's credible testimony that being assigned to an unfamiliar location without the benefit of former friends and co-workers was a hardship. She determined that Complainant was harmed because Complainant had less flexibility and more difficulty swapping shifts and found the job less enjoyable. Based on these facts, we concur with the Hearing Officer's determination that the City's reassignment of Complainant constituted retaliation.

The City also challenges the Hearing Officer's award of emotional distress damages. Specifically, the City argues that there is no causal connection between Complainant's emotional distress and the City's retaliatory acts. The Hearing Officer found that Complainant testified credibly that her assignment to Ladder 15 rather than Engine 39 made her job less enjoyable, separated her from her friends and colleagues, and contributed to her stress since she was separated from her friends and colleagues from whom she could draw support. It was within the Hearing Officer's discretion to credit the testimony of Complainant, and we defer to these credibility determinations. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972). The award of damages in the amount of $25,000 for Complainant's emotional distress,

specifically stemming from the City's retaliatory act of assigning Complainant away from Engine 39, is sufficiently supported by the evidence. We recognize that, on remand, if the Hearing Officer determines that Berlo is individually liable for retaliation she must also consider whether Berlo has any joint liability for the award of $25,000 in emotional distress damages stemming from the City's retaliatory act of assigning Complainant away from Engine 39. The Hearing Officer must also address, upon a finding of Berlo's individual liability, whether Berlo may be liable for any additional emotional distress damages suffered by Complainant.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer except with respect to Berlo's individual liability for retaliation and the City's liability for retaliation resulting in Complainant's resignation, and issue the following Order of the Full Commission:

1. The City shall immediately cease and desist from all acts that violate M.G.L. c. 151B, § 4(4).
2. The matter shall be remanded to the Hearing Officer to: (i) address Complainant's claims of liability against Respondent Berlo for retaliation; (ii) make specific findings concerning Berlo's involvement in reporting Complainant to the Boston Residency Commission and Complainant's resignation in February of 2009; (iii) determine whether Respondent City of Boston should be liable for retaliation relative to Complainant's resignation following the Boston Residency Commission inquiry pursuant to the "cat's paw" theory of liability; (iv) determine, upon any finding of Berlo's individual liability, whether or not Complainant is entitled to any additional damages and whether Berlo should be held jointly and severally liable for the

emotional distress damages awarded in association with the Complainant's assignment to Ladder 15; and (v) determine, upon a finding of Berlo's individual liability, whether Berlo should be jointly and severally liable for any attorneys' fees and costs awarded.

SO ORDERED[6] this 1st day of April, 2019

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner

[6] 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).