COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JOHN LOEWY,
Complainants

v. DOCKET NO. 11-BEM-03430

ARIAD Pharmaceuticals, Inc.,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman dismissing Complainant, John Loewy's complaint of retaliatory termination against Respondent, ARIAD Pharmaceuticals, Inc. (ARIAD). Following an evidentiary hearing, the Hearing Officer found that Respondent was not liable under M.G.L. Chapter 151B § 4(4) for retaliatory termination of Complainant. 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. 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, 673-674 (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 (2020).

SUMMARY OF FACTS[1]

In 2005, Complainant, who is Caucasian, was hired as Respondent's Vice President of Biostatistics and Outcomes Research. His duties included the design and management of clinical trials for the development of pharmaceutical drugs. He supervised three departments: data management, statistical programming, and biostatistical analysis. At the time of Complainant's termination in 2011, Katherine

[1] This summary is based upon facts found by the Hearing Officer which are supported by substantial evidence.

Arbour, a Caucasian woman, was the Director of Clinical Data Management, Charles Jones, an African American man, was the Director of Statistical Programming and Stephanie Lustgarten, a Caucasian woman, was the Senior Manager of Biostatistics.

By December 2008, Respondent's Chief Medical Officer and Complainant's supervisor, Pierre Dodion, expressed dissatisfaction with Complainant's job performance. Dodion met with Complainant to discuss job performance. This dissatisfaction included concerns with Complainant's dealings with Averion, a vendor hired to provide data management services for a clinical drug trial. On January 2009, Dodion documented further dissatisfaction with Complainant's management of Averion. In February 2009, Complainant was placed on a performance improvement plan. This plan characterized Complainant's performance as unsatisfactory and mentioned specific issues with performance deficiencies, including Complainant's challenges with strategic leadership, behavior not aligned with corporate values, and budget over-runs. It also identified Complainant's yelling and unprofessional conduct as intimidating and faulted Complainant for failing to treat individuals under his supervision with fairness and impartiality. At this time the Statistical Programming group and Clinical Data Management group were removed from Complainant's supervision.

In September 2009, Complainant's performance improvement plan was lifted, after which the Statistical Programming group was returned to his supervision; however, the responsibility for supervising the Clinical Data Management group and certain other responsibilities were not returned to his purview.

In and around 2010, Respondent was restructuring due to the sale of one of its drugs to Merck Pharmaceutical Company. The transfer of the files with the drug's

clinical research was scheduled to be completed in November of 2010. In June of 2010, there was a leadership reorganization, and Complainant began to report directly to Timothy Clackson, President of Research and Development and Chief Scientific Officer. Pierre Dodion became Senior Vice President of Corporate Development, and Frank Haluska became Chief Medical Officer.

During the June-August 2010 timeframe, Timothy Clackson, Complainant's supervisor, observed that the three groups that had previously been under Complainant's supervision were unable to communicate effectively with each other. A new committee, the data integration group under Frank Haluska's leadership, was formed in order to facilitate better communication between the three groups. Clackson testified that the need for this new committee was a result of Complainant's inability to manage and create collaboration among individuals in general, and particularly between Jones and Arbour.

As a result of the sale of the rights to the drug, Respondent instituted layoffs in May/June and September of 2010. In September of 2010, Clackson raised the possibility of laying off Complainant to Respondent's Chief Executive Officer (CEO), Harvey Berger. Clackson testified that Complainant was not laid-off in September of 2010 because he was still needed for the drug transfer, however, Clackson had increasing concerns with Complainant's managerial and executive skills.

On November 3, 2010, Arbour filed an internal complaint against Jones for behavior that she termed bullying and harassing. The Hearing Officer found that Jones told Arbour either "that [Jones] did not belong at [Respondent] or that she did not belong in her position." After an investigation, the Human Resources department concluded that there was no conclusive proof of a policy breach or harassment by Jones, but that there

was “a clear difference in style” between Jones and Arbour which would need to be “resolved by management” if both parties were to work together in the future.

In December 2010, Complainant reviewed the performance of Lustgarten and Jones. He rated them both 4.5 out of a 5.0 scale. On December 22, 2010, Clackson sent Complainant an email expressing concern that the scores were “skewed on the high side,” and that Jones’ score did not reflect his interactions and problems working with the data management group. On January 21, 2011, Clackson told Complainant that he was lowering Lustgarten’s score to 4.0 and that he wished to discuss Jones’ score. During a meeting that same day, Clackson told Complainant that Jones lacked management skill, and faulted Complainant’s evaluation of Jones’ management capabilities. Complainant responded to such criticism by emailing Clackson examples to justify the 4.5 score he gave Jones. At a subsequent in-person meeting, Clackson told Complainant that Jones’ score should be reduced to 2.5. Complainant replied by stating that it would look “bad” to lower Jones’ score without data-driven evidence because Jones is African American. The Hearing Officer credited Clackson’s testimony that he viewed this statement as the “kind of slightly quirky comment that Complainant could sometimes make” and that he did not tell anyone else at Respondent about Complainant’s statement. Complainant testified that he later met with the Human Resources Director to describe his concerns, who informed him that she agreed with Clackson’s score of Jones.

On February 14, 2011, senior management members met to discuss the job status of Complainant and Jones. The decision was made to terminate their employment. Berger testified that he thought it made sense to terminate the employment of both Jones and Complainant at the same time so that Clackson could rebuild the department with

employees who held a "vendor mentality" and cooperated with other groups. Berger testified that Complainant was terminated due to his difficulties managing subordinates and because members of his department did not function together effectively or work well with other departments. Clackson testified that Complainant was terminated due to unresolved performance issues, the inability of his team to function in a fully integrated manner without senior management oversight and the company's needs. The Hearing Officer credited the testimony of Berger and Clackson about the reasons for Complainant's termination. The termination of both Complainant and Jones occurred on February 17, 2011.

Complainant filed a complaint under M.G.L. Chapter 151B § 4(4) for retaliatory termination alleging that he was unlawfully terminated for telling Clackson that it could look "bad" to give Jones, an African American man, a rating of 2.5 without data-driven evidence and refusing to lower the performance rating of an African American employee whom he supervised. The Hearing Officer found that Complainant established the first three elements of a prima facie case of retaliation, but that he failed to establish the fourth, and crucial, element of causation.

BASIS OF THE APPEAL

Complainant appeals the decision on the grounds that the Hearing Officer 1) erred by not finding causation; 2) misapplied the law when considering and crediting Respondent's proffered legitimate nondiscriminatory business reason for its adverse action; and 3) failed to address Complainant's "cat's paw" theory of liability. 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). We address each argument in turn.

Complainant first contends that the Hearing Officer erred in not finding causation because of errors of law, abuses of discretion, and insufficient evidence.[2] Complainant alleges that a causal nexus between the protected activity and the adverse employment action was established due to the proximity in time between his statement in January that it would look "bad" to lower the rating of a African American employee, his continuing resistance to reducing the performance rating and Complainant's termination in February. The Complainant fails to acknowledge that a close temporal proximity between protected activity and an adverse employment action 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. In the wake of the introduction of non-retaliatory reasons for Respondent's adverse action, it remains the Complainant's burden to prove that these reasons were a pretext for unlawful

[2] The Hearing Officer determined that Complainant's expression that it would look "bad" and subsequent resistance to Clackson's instruction to lower the rating were entitled to consideration as protected conduct, meeting the first requirement of a prima facie case of retaliation. She also found that Respondent was aware of Complainant's opposition and subjected to an adverse employment action.

conduct. "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).

Furthermore, where problems with an employee or adverse employment actions predate any knowledge that an employee has engaged in protected activity, as is the case here, "...it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation." Mole, 442 Mass. at 594-95. See also Mihalak v. South Hadley Hous. Auth. & Heidi Heisler, 38 MDLR 234 (2016); Lauria v. Robert W. Sullivan, 36 MDLR 92 (2014); Roye v. Massachusetts Dep't of Social Services, 28 MDLR 124 (2006). In this case, the Hearing Officer found that not only did the problems with Complainant's performance predate his protected activity, but evidence in the record indicated that Respondent was contemplating Complainant's termination as early as September of 2010, four months prior to his protected activity.

Complainant further contends that Hearing Officer erred by ignoring evidence[3] supporting the temporal proximity basis for establishing causation, crediting

[3] Complainant contends that the Hearing Officer abused her discretion in disregarding "exhibits which the parties designated as joint exhibits 14, 16, 17, 32, 33, 42, 43, 49, 50, 51, 52, 53 and 54 on the basis that they are hearsay statements from individuals whose absence from the public hearing was neither explained nor excused." This language was contained in a footnote which was inadvertently included in the decision from a prior decision. (Chase, Eason v. Crescent Yacht Club, et al. 12BEM02539, 12 BEM02540 (Hearing Decision, 5/19/16). The Full Commission conferred with the Hearing Officer, confirmed this was a scrivener's error and that the Hearing Officer considered these exhibits during her deliberative process. See, 804 CMR 1.23(6) (2020) (permitting Hearing Officer to participate in review of decision). Her consideration is evidenced by the fact that the Hearing Officer cited to one of the "disregarded" exhibits. See, Finding of Fact, ¶32.

Respondent's witnesses regarding Respondent's dissatisfaction with Complainant's performance, and failing to consider contrary evidence. In making these arguments, Complainant asserts that he "had no reason to fear for his job security at the end of 2010" and that "there is no evidence that in late 2010 [Complainant] was concerned or contacted recruiters to look for other jobs and the reliance on this unsubstantiated assertion to support [Respondent's] business justification of poor performance was improper." This argument replaces the Complainant's state of mind for that of the Respondent. It is Respondent's state of mind regarding Complainant's performance, not Complainant's beliefs about his performance, that is controlling in evaluating the motivation behind an adverse employment action. The Hearing Officer's statement in her decision that "Complainant, himself, lacked confidence in his job security" was to highlight the unresolved performance issues, which were already well documented in the Hearing Officer's decision. The Hearing Officer determined that "the evidence indicates that the primary motive for Complainant's termination was Respondent's dissatisfaction over non-technical aspects of Complainant's performance" and not a response to Complainant's comment about race or resistance to lowering a performance appraisal.

Complainant further contends that the Hearing Officer ignored evidence that Complainant's performance had improved. However, the Hearing Officer specifically addressed this contrary evidence finding that "[t]here is, to be sure, some evidence of improved performance, but Complainant presents an exaggerated picture of his rehabilitation at the company." This determination was supported by substantial evidence. The Hearing Officer credited testimony by Respondent's CEO Berger who denied telling Complainant that he had a "clean slate" as of 2010. She also found that the

fact that "Arbour continued to report to others in the company and that a new committee - the data integration group – had to be formed to facilitate communication among statistics, programming, and data management personnel" demonstrated "ongoing dissatisfaction with Complainant's ability to function in a supervisory capacity at [Respondent]and to nurture collaboration among his supervisees."

As for Complainant's contention that the Hearing Officer abused her discretion in crediting Respondent's witnesses and purportedly ignoring evidence, 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). 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. Id. (review requires deferral to administrative agency's fact-finding role). 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). This standard of review does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and deciding disputed issues of fact. We will not disturb the Hearing Officer's findings of fact, where, as here, they are fully supported by the record.

Complainant supports the argument that the Hearing Officer ignored or misconstrued evidence in regards to his job performance because he testified that after

the November 3, 2010 incident involving Jones and Arbour, he was advised by Respondent's Human Resources department to stay out of the situation aside from documenting the incident and cooperating with the department's investigation; therefore, he cannot be held responsible for not managing the situation. However, the Hearing Officer found that the November 3, 2010 incident was not the first or only incident that was problematic. She recognized the testimony of Respondent's Human Resources Director who testified that there was an "ongoing management conflict" between Jones and Arbour which Complainant failed to manage. She reasoned that this incident represented a culmination of conflict between Jones and Arbour, and "rather than acknowledge and control the drama, Complainant sought to reward Jones with a 2010 rating of 4.5 on the basis of his technical expertise." Under these circumstances, we determine that there was no abuse of discretion and substantial evidence to support the Hearing Officer's conclusion that there was not a causal connection between Complainant's protected activity and his termination.

Complainant also argues that the Hearing Officer improperly applied the law on "but for" causation. Specifically, Complainant argues that the "but for" test does not require proof that retaliation was the sole cause of Respondent's actions, but only that the adverse action, namely termination, would not have occurred in the absence of a retaliatory motive. We find no error of law in the Hearing Officer's decision. Under G.L. c. 151B, § 4, liability attaches when an adverse employment decision is made "because of" discrimination. Lipchitz v. Raytheon Co., 434 Mass 493, 505 (2001). In retaliatory termination cases, a complainant must prove that a respondent's desire to retaliate was a determinative factor in the decision to terminate his employment. Tate v. Dep't of Mental

Health, 419 Mass. 356, 362 (1995). This requires that a retaliatory motive existed. However, the Hearing Officer credited Respondent's witnesses' testimony concerning the reasons for Complainant's employment termination. The Hearing Officer concluded: "In sum, the decision to terminate Complainant was not in retaliation for warning the company about potential race discrimination, but because the company sought to improve vendor relations, personnel relations, and data integration." She also credited Clackson's testimony that he told nobody in the organization about Complainant's comment touching upon Jones' race, noting that Clarkson took Complainant's comment as the "kind of slightly quirky comment that Complainant could sometimes make." Furthermore, as previously noted, evidence in the record indicated that Respondent was contemplating Complainant's termination at least four months prior to his protected activity. We find that there was sufficient evidence to support the Hearing Officer's conclusion that a desire to retaliate was not the cause of Complainant's termination.

Complainant next contends that the Hearing Officer misapplied the burden-shifting paradigm laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), when she credited Respondent's proffered legitimate, non-discriminatory justification for terminating Complainant's employment. The McDonnell Douglas formula provides that once a complainant establishes a prima facie case, the burden then shifts to the respondent to produce a legitimate, non-discriminatory reason for its actions, whereupon the burden then shifts back to the complainant to prove that the proffered reason is, in fact, pre-textual. Id. Complainant argues that "where the Hearing Officer credits and considers the given justification, the Decision fails to consider any evidence of pretext" and that such failure requires reversal in this matter. We disagree. The Hearing Officer

was not required to continue applying the McDonnell Douglas burden shifting formula in this indirect evidence when she concluded that Complainant had not established a prima facie case for retaliation. The Hearing Officer engaged in a thorough analysis in determining if there was a causal link between the protected activity and the adverse employment action. Whether Complainant was a satisfactorily performing employee and the company's changing business needs at the time of Complainant's termination were integral to this analysis. See Mole, 442 Mass. at 595 (evidence of issues prior to protected activity undercut any inference of a causal connection); Prader v. Leading Edge Prods., Inc., 39 Mass.App.Ct. 616, 617–618 (1996) (prior performance was properly considered in evaluating if there was a causal link between plaintiff's termination and her protected activity). Analysis of the proffered business reasons for Respondent's actions was appropriate to determine causation.

Finally, Complainant contends that the Hearing Officer erred by failing to address his "cat's paw" theory of Respondent's liability as a person within the "zone of interest." 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 intended to cause an adverse employment action if the conduct is a proximate cause of the ultimate adverse action, even if the agent does not make the ultimate employment decision. See Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011). Under this theory, the discriminatory motive of a non-decision maker is imputed to the decision maker, and employer, where the discriminator has some significant influence that leads to the adverse employment action. Id.

In this case, Complainant alleges that Arbour harbored discriminatory animus towards Jones, that she intended to adversely affect Jones' employment, and this

discriminatory animus led to the termination of both Jones and Complainant; therefore, Arbour's discriminatory animus should be imputed to the decision makers resulting in Respondent's liability. This argument misunderstands the requirement to establish a causal connection in a retaliatory termination case. Complainant's claim for retaliatory termination is based upon a statement he made concerning lowering Jones' evaluation score and his refusal to comply with lowering Jones' evaluation score. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In retaliatory termination cases, the complainant must prove that the respondent's desire to **retaliate** was a determinative factor in the decision to terminate his employment. Tate, 419 Mass. at 364. Even if we assume, for argument's sake, that Arbour did have a discriminatory racial animus towards Jones and that this discriminatory animus could somehow be transferred to Complainant because he qualifies as a person within the "zone of interest," the Complainant would still be required to show that Arbour's alleged intent to harm Jones was the proximate cause of Complainant's termination. Complainant alleged that his protected conduct (challenging his supervisor's assessment of an African American employee) caused his retaliatory termination. The Hearing Officer concluded that his termination was not the result of his protected conduct. Even if Arbour harbored discriminatory animus toward Jones, this animus alone would not suffice to overcome Complainant's failure to prove that his termination was caused by Complainant's alleged protected conduct.

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. 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[4] this 8th day of June, 2020

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[4] 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(6)(2020).