

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
DUNG MAROTTA,  
Complainant

v.

DOCKET NO. 09-BEM-00406

NATURAL SALON,  
Respondent

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**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Respondent Natural Salon. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination based on age. The Hearing Officer found that Complainant failed to meet her burden to show that Respondent's actions were motivated by unlawful age discrimination. In addition, the Hearing Officer found that Complainant was not constructively discharged following her hospitalization and her subsequent convalescence but, rather, that Complainant was told by Respondent to return when she was ready and able to do so and that Complainant voluntarily took a leave of absence from the Salon. 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 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 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 (1) determining that Respondent did not subject Complainant to age

discrimination, (2) determining that Complainant was not constructively discharged, and (3) denying Complainant's Motion in Limine at the public hearing. We have carefully reviewed Complainant's Petition and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review stated herein. 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. Substantial evidence is such evidence that a "reasonable mind" would accept as adequate to form a conclusion. G.L. c. 30A, s. 1(6); 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 first challenges the Hearing Officer's determination that Respondent did not engage in age discrimination. Specifically, Complainant challenges the Hearing Officer's finding that any age-related references made by coworkers with respect to Complainant were "made in a non-hostile, culturally-acceptable manner." Complainant claimed in this matter that in 2005 coworkers began to call her "old lady," told her that she should retire, and told her clients that she was too old. However, the Hearing Officer declined to credit Complainant's assertions, crediting instead what she termed the "more believable" testimony of Lien Pham, Respondent's owner and manager, that she, Pham, respected Complainant "like a mother," and that while in her culture people are sometimes called "old," the term does not denote a lack of respect since older workers are

considered to have greater experience and provide superior service. Complainant argues that this testimony was not corroborated by other testimony or documentation. Yet this argument is not persuasive, as it is entirely within the Hearing Officer's discretion to credit a witness' testimony even if it is not corroborated by other witnesses or independent documentation. 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 generally should not be disturbed. See MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR at 14; Quinn v. Response Electric Services, Inc., 27 MDLR at 42.

To further support her argument on appeal, Complainant argues that the Hearing Officer failed to give weight to contemporaneous medical records showing numerous references to Complainant's workplace stress and therefore failed to conclude that these problems were the major, if not sole, contributor to Complainant's depression and anxiety. This argument is unpersuasive and ignores the record in this matter. Indeed, the Hearing Officer did give weight to the medical records, noting that Complainant's medical records spanning the period from 2005 to 2008, contained Complainant's "litany of complaints" about her coworkers, but not one mentioned any incidents that involved coworkers calling Complainant names based on age or alleged age-related conduct of any kind. Thus, the medical records supported the Hearing Officer's finding of a lack of age-related animus.

Complainant next contends that the Hearing Officer erred in determining that Complainant failed to prove constructive discharge. Complainant testified that she was hospitalized for one week in December of 2008 and convalesced at home for an

additional two weeks. Complainant testified that in January and February of 2009, she called Respondent three or four times to say that she planned to return to work at some point in February, but she was told that all of her possessions had been placed in a bag for her to pick up. Complainant stated that she then called Pham, who told her to pick up the bag and not to return to work until she was contacted about doing so. Complainant testified that she was not permitted to return to work and that she concluded by late February/early March that she had been fired. The Hearing Officer declined to credit Complainant's version of events, and instead specifically credited Pham's testimony that rather than firing Complainant, Pham merely saved Complainant's belongings in a bag for safekeeping and told Complainant to return to work when she was ready. Again, it is the Hearing Officer's province to make credibility determinations, and she was well within her discretion in crediting Pham's testimony rather than that of Complainant.

The Complainant argues that Pham's testimony should nonetheless be discredited, as her testimony at the hearing was inconsistent with her statements provided in Respondent's Position Statement. In both her testimony and her statement provided in the Respondent's Position Statement, Pham expressed to Complainant that she should come back when she was ready and able to do so following her hospital stay and recovery. In neither statement did Pham ever prohibit Complainant from returning to work, as Complainant claimed at the hearing and continues to claim on appeal.

According to the record in this matter, the Hearing Officer's conclusion that Complainant failed to establish a case of constructive discharge is reasonable and well-supported by the record.

Finally, Complainant contends that the Hearing Officer erred in denying Complainant's Motion in Limine seeking sanctions in the form of a judgment on Complainant's claim and precluding Respondent from introducing any evidence in the form of witness testimony or exhibits refuting Complainant's allegations. This motion was made in response to Respondent's failure to respond to discovery requests. The Hearing Officer declined to grant the motion, stating in her decision that the discovery sought was "overbroad, burdensome, and of minimal relevance to Complainant's claims." The Hearing Officer also stated that in addition to the "problematic breadth" of the items Complainant originally requested to be discovered, Complainant's counsel filed the motion at issue at the public hearing instead of moving to compel discovery at the expiration of the additional thirty-day period granted by the Hearing Officer at the parties' prehearing conference. Noting that the rulings requested by Complainant pursuant to the motion "would permit Complainant to prevail on her claims without the necessity of proffering any evidence," the Hearing Officer declined to allow such an outcome. Given the particular circumstances of this case, along with the liberal grant of discretion accorded to the Hearing Officer in such matters, the ruling on the Motion in Limine is reasonable and thus should not be disturbed.


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 and we discern no error in the application of law. Therefore we affirm the dismissal of the claim.

#### **ORDER**

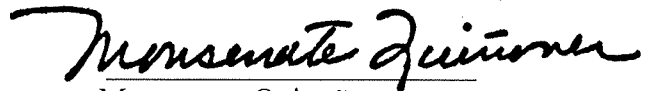
Complainant's appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed.

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 this 9<sup>th</sup> day of October, 2018



Sheila A. Hubbard  
Commissioner



Monserrate Quinoñes  
Commissioner