

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
LUZ MEDINA,
Complainants

v.

DOCKET NO. 08-SEM-02111

BAYSTATE HEALTH,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Respondent Baystate Health. Following an evidentiary hearing, the Hearing Officer found that Respondent was not liable for discriminating against Complainant Luz Medina on the basis of her race, national origin, or disability when it failed to select her for a promotion to a full-time substance abuse counselor position. 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 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’s appeal to the Full Commission asserts that the Hearing Officer erred by (1) concluding that Respondent’s articulated reasons in support of its decision not to select her for a promotion to a full-time counselor position were not pretexts for discrimination, and (2) failing to consider whether discussions concerning Complainant’s absences that occurred during her interview process were improper and discriminatory, as her absences related to her disabilities. 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. 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 her prima facie case of failure to promote based on race, national origin, and disability was successfully rebutted by Respondent. According to Complainant, Respondent's articulated reasons for failing to give her the promotion were pretextual. However, we conclude that the Hearing Officer's determination that the successful candidate's educational credentials, absence of an employee disciplinary record, superior performance reviews, and superior attendance, constituted legitimate, non-discriminatory reasons supporting Respondent's decision to select her for the position over the Complainant.

Complainant argues that the only basis for Respondent's failure to select her for the full-time position was based on her absences, and that Respondent's articulated reasons for not selecting her were pretext. Specifically, Complainant argues that if her absences were eliminated from consideration, the Respondent would not have a legitimate, nondiscriminatory basis for failing to select her for the full-time counselor position. This argument is unpersuasive and ignores the record in this matter. Although Respondent did consider Complainant's absences during the hiring process, this was not its only consideration. The Hearing Officer specifically credited Respondent's testimony that the successful candidate, unlike Complainant, had a Bachelor's degree, had no record of employee discipline, had no record of any development plans based on inconsistent performance, and had superior employee evaluations. It was within the Hearing Officer's discretion to credit the testimony of Respondent in regard to these matters.

See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005) (providing that a Hearing Officer's credibility determinations are entitled to deference). Further, absent evidence of discriminatory animus and improper motive, the Commission does not substitute its judgment for that of the employer. Wheelock College v. MCAD, 371 Mass. 130, 137 (1976). We agree with the Hearing Officer's determination that Respondent's articulated reasons for its decision not to select the Complainant for the full-time position were legitimate and nondiscriminatory.

Complainant next argues that it was improper for Respondent to ask her about her absences during the interview process and that Complainant's attendance record should not have factored into Respondent's promotion decision because her absences were related to her disabilities. She argues that Respondent's questions regarding her absences during the interview process evidence its discriminatory animus. The Hearing Officer found that Respondent adhered to a time and attendance policy which imposed discipline for five or more "unplanned events" during a twelve-month period. "Unplanned events" were defined as "non-FMLA, unscheduled time off work." The Hearing Officer found that Complainant missed 241 hours, or 30 days, for unplanned events. Complainant's absences due to unplanned events did not include intermittent FMLA absences due to her disabilities, as the Complainant did not identify these unplanned events as FMLA-related.

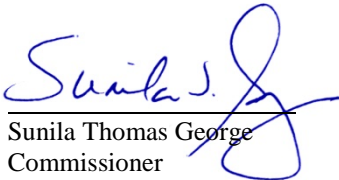
Moreover, the Hearing Officer found that there was "no dispute that consideration of the candidates' attendance records with respect to unplanned events was job-related." The Hearing Officer credited Respondent's testimony that the full-time position required alternate weekend shifts, there were only two counselors working on the weekends, and the ability to get substitute coverage for the weekends was very difficult. Thus, we agree with the Hearing Officer's conclusion that consideration of Complainant's absences due to unplanned events during the


hiring process was reasonable and nondiscriminatory, as these absences did not include FMLA absences and attendance was essential to the full-time counselor position.


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 17th day of December, 2018.


Sunila Thomas George
Commissioner


Sheila A. Hubbard
Commissioner


Monserrate Quiñones
Commissioner