

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
RAFAEL TORRES,
Complainants

v.

DOCKET NO. 10-BEM-01679

COMMONWEALTH
WASTE TRANSPORTATION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Respondent Commonwealth Waste Transportation. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination based on race, color, or national origin. Complainant appealed to the Full Commission. For the reasons provided 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.*(2020)), 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(10)(2020).

BASIS OF THE APPEAL

Complainant has appealed the Hearing Officer's decision on the grounds that the Hearing Officer erred by finding that Complainant did not establish that Respondent's asserted reasons for failing to hire Complainant for a truck driver position were pretext. Specifically, Complainant argues that this finding is unsupported by substantial evidence in the record and that the Hearing Officer disregarded testimony and other evidence indicating Respondent's discriminatory animus. We disagree.

To establish a prima facie case of race, color, and national origin discrimination, Complainant must show that: (1) he is a member of a protected class, (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) despite his qualifications he was not hired for the position; and (4) similarly situated persons not in his protected class were hired. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Wheelock College v.

MCAD, 371 Mass. 130 (1976). Once a prima facie case is established, Respondent must articulate legitimate non-discriminatory reasons for its actions. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000). Complainant must then demonstrate that Respondent's articulated reasons are pretext for discrimination. Lipschitz v. Raytheon Co., 434 Mass. 493, 507 (2001); see Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016). Complainant need only show that discriminatory animus was a material and important ingredient in the decision-making process. See Lipschitz, 434 Mass. at 506.

The Hearing Officer found that Respondent offered legitimate, non-discriminatory reasons for failing to hire Complainant for a truck driver position. Respondent asserted that it did not hire Complainant for a trucking position because Complainant never applied for the position¹ and even if he had, he would not be considered for the position because of his poor performance as a truck driver at Riccelli Enterprises of Massachusetts ("Riccelli").² Specifically, the Hearing Officer credited the testimony of Respondent's hiring manager, Robert Langlais, that Complainant would not have been considered for a truck driver position at Respondent because he was a low revenue producer and caused severe and costly damage to trucking equipment while employed by Riccelli. The Full Commission defers to the Hearing Officer's credibility determinations and findings of fact, absent an error of law or abuse of

¹ The Hearing Officer determined that Complainant was hindered in his ability to obtain an application for a truck driving position at Respondent and was deterred from applying. However, the Hearing Officer declined to infer that this was based on any discriminatory animus.

² Riccelli's business primarily serviced a waste transportation contract with Waste Management, Inc. In June 2010, Riccelli lost its contract with Waste Management, Inc., and Respondent was awarded the contract. Thus, all of Riccelli's employees were to be laid off. Respondent decided to hire a manager with knowledge of the waste transportation operation to smooth the transition from Riccelli to Respondent. Respondent hired former Riccelli general manager Robert Langlais. Respondent determined that they needed to hire an additional eight drivers and asked Langlais to create a list of the best Riccelli drivers. Langlais divided the Riccelli drivers into two categories, higher rated "A list" drivers and lower rated "B list" drivers. Each driver's experience, safety record, and performance were taken into account. There were seven drivers on the "A list" and four drivers on the "B list." All of the "A-list" drivers were hired by Respondent. Complainant was on the B list, and Langlais testified that Complainant was one of two drivers on the "B list" that he would not recommend for employment at Respondent.

discretion. School Committee of Chicopee, 361 Mass. at 352. The Hearing Officer's determination that Respondent established legitimate and non-discriminatory reasons for not hiring Complainant is supported by substantial evidence in the record.

Once Respondent articulates legitimate, non-discriminatory reasons for their actions, the Complainant must then demonstrate that Respondent's articulated reasons are pretext for discrimination. See Lipschitz, 434 Mass. at 507. The Hearing Officer determined that Complainant failed to show that Respondent's reasons for not hiring Complainant were pretext. The Hearing Officer found that there was no dispute that Complainant caused severe and costly damage to his truck while employed by Riccelli, based primarily on his failure to follow proper protocol and his careless and reckless treatment of the truck as witnessed by a number of Complainant's co-workers. The Hearing Officer credited the testimony of Langlais that Complainant would have been disqualified for the truck driver position based on the damage he caused trucking equipment while employed by Riccelli. The Hearing Officer further pointed to evidence that Langlais hired Complainant for the truck driving position at Riccelli seven months prior to the time Complainant alleges Langlais hindered his ability to apply for a truck driver position at Respondent. Thus, the Hearing Officer inferred that it is "difficult to conceive" that Langlais acted with discriminatory animus by failing to provide Complainant with an application for a position at Respondent.

The Hearing Officer further found that Respondent's hiring of Samuel Ortiz, the only other Hispanic driver from Riccelli, was not pretextual. Complainant asserted that Respondent hired the only other Hispanic truck driver who previously worked at Riccelli after Complainant filed his discrimination complaint, and this was evidence of pretext. The Hearing Officer found that this specific worker was on the "B list" like Complainant, but that he was only placed on the

“B list” because he had taken time off from work to be in New York, raising concerns that he might not be able to maintain a regular schedule. This employee, unlike Complainant, had a solid work record at Riccelli and had no safety or performance issues. Further, the evidence shows that Ortiz was hired only after a position opened up at Respondent after another driver went out on a workers compensation claim. Based on this evidence, we agree with the Hearing Officer that Complainant failed to establish that Respondent’s reasons for not hiring Complainant for a truck driving position were pretext for discrimination.


ORDER

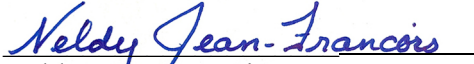
For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order. Complainant’s appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is affirmed in its entirety.

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 ORDERED³ this 14th day of February, 2020


Monserrate Quiñones
Commissioner


Neldy Jean-Francois
Commissioner

³ Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so she did not take part in the Full Commission Decision. See 804 CMR 1.23(6)(2020).