

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

CARMELA VERO,
Complainant

v.

DOCKET NO. 05-BEM-00933

AMERICA WEST AIRLINES,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Respondent, America West Airlines. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination based on disability in violation of G.L. c.151B, § 4 (16). The Hearing Officer found that Complainant failed to establish that she was disabled under the applicable statute as she did not prove that she was substantially limited in performing any major life activities, including working, as a result of an arm injury or a bleeding ulcer, and failed to provide credible or corroborating evidence that she sustained a disabling shoulder injury at work. The Hearing Officer further concluded that even if Complainant were to be considered handicapped, she could not prove that her termination was for reasons relating to her disability. She found that Respondent articulated legitimate, non-discriminatory reasons for terminating Complainant's employment, namely Complainant's numerous infractions of work rules and policies. The Hearing Officer also concluded that Complainant failed to establish that her discharge was a pretext for discrimination.

Complainant appealed to the Full Commission asserting that the Hearing Officer erred in finding that she was not disabled and that the reasons for her termination were not a pretext for discrimination.

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). The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the 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.

Complainant argues in her appeal that the Hearing Officer erred in finding that she was not disabled within the meaning of the statute. Specifically, Complainant argues that she sustained a work-related arm injury that substantially limited her ability to care for herself in that she had difficulty performing such daily tasks as washing her hair, drying her hair, cleaning her house and making her bed. Complainant also asserts that

the Hearing Officer erred in failing to conclude that her injury substantially limited her ability to lift and forced her to tuck her arm into her pants and otherwise immobilize her arm while at work.

Our review of the record demonstrates that the Hearing Officer carefully considered Complainant's testimony and ultimately determined that her testimony was not credible. With respect to Complainant's claim that she was disabled by a work-related arm injury, the Hearing Officer found that this assertion was not credible or corroborated. The Hearing Officer found that Complainant never reported any such injury despite a workplace rule requiring such reports within twenty-four hours. She also found credible the testimony of Complainant's supervisor, Tsirigotis, and that of numerous co-workers who all stated they never witnessed Complainant immobilize her arm at work, and that she did not appear to be impaired in performing any of the duties of her position. The Hearing Officer concluded that Complainant's assertion was further undermined by the fact that she opted to attend a three-day meeting in Phoenix in June 2004, rather than seek medical attention for her alleged injury and that she spent a day in New York City several days after the alleged incident at which time she evinced no sign of visible pain or discomfort. In addition, the Hearing Officer noted that Complainant did not mention any arm injury or impairment to her physician until September 2004, some three months after the alleged injury, at which time she attributed the difficulties not to any specific injury but to regular lifting activities at work. With respect to Complainant's claim that she was disabled by a bleeding ulcer, the Hearing Officer similarly found that Complainant was not impaired in any major life activities and could fully perform her job, despite the fact that she claimed to vomit frequently at work. While the Hearing

Officer acknowledged that Complainant may have vomited frequently and complained of arm pain due to her ulcer, she noted the credible testimony of numerous other witnesses to the contrary, that Complainant had no difficulty performing her job, that she did not tuck her arm into her pants as alleged, and that she did not immobilize her arm in any fashion. The Hearing Officer also found that Complainant's refusal to use sick time or short-term disability leave undermined her claim that she was disabled.

We defer to the Hearing Officer's findings with respect to Complainant's credibility, particularly where her testimony was contradicted by numerous other witnesses, including her own. Given the inherent weaknesses in Complainant's testimony regarding the effects of her alleged impairments and the attendant lack of corroboration, the Hearing Officer had good reason to find her allegations suspect and to conclude that Complainant was not disabled.

Respondent also contends that the Hearing Officer erred in finding that Respondent provided legitimate, non-discriminatory reasons for terminating Complainant's employment that were not a pretext for discrimination. Complainant argues that Respondent fabricated the assertion that she was stealing company time by leaving early for physical therapy appointments, while noting her regularly scheduled departure time, because Complainant believed she was authorized to do this, and because the time discrepancy was minimal.

We find that Complainant's argument unpersuasive. The Hearing Officer directly addressed this very same contention, noting that Complainant ignored a clear directive from her supervisor to record her departure time accurately when she left early for

physical therapy appointments. The Hearing Officer determined that Complainant's assertion to the contrary was not credible.

It is the sole responsibility of the Hearing Officer to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. Mere objections to, or disagreements with, the Hearing Officer's credibility determinations, absent evidence that the facts as found are unsupported are not grounds for disturbing the Hearing Officer's decision. Complainant offers no evidence to impeach the testimony of the witness she identifies.

In addition, the Hearing Officer did not rely solely on Complainant's failure to properly record her departure time, but considered the numerous other performance issues raised by Respondent in concluding that the reasons for Complainant's termination were legitimate, non-discriminatory reasons and not a pretext for discrimination. Hence, Complainant's significant reliance on this one issue to demonstrate pretext is not persuasive. The Hearing Officer specifically found that Complainant's failure to follow her supervisor's directive regarding time sheets was merely the latest failure in a series of performance-related offenses and "the final straw in Complainant's deteriorating work performance." We conclude that the Hearing Officer's decision properly rests upon detailed evidence demonstrating that Complainant's termination resulted from "numerous instances of misconduct" in the areas of "conducting ramp audits, giving out cash bags, filling out attendance sheets, maintaining security of cash, transferring baggage, and monitoring ramp workers from other offices who were not licensed to drive on the ramp."

Complainant also argues that she demonstrated disparate treatment with respect to discipline between her and a non-disabled co-worker as further evidence of pretext. However, the Hearing Officer expressly rejected this argument and found that the supervisor declined to discipline a co-worker for an alleged infraction of rules because she believed his denial of wrongdoing and relied on his spotless employment record. It is within the Hearing Officer's province to make determinations of witness credibility, and a mere disagreement with those determinations, absent more is not grounds for disturbing her decision.

Having carefully reviewed Complainant's Petition and the full record in this matter and having weighed all the objections to the decision in accordance with the standard of review articulated therein, we find no material errors of fact or law and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. Therefore the decision of the Hearing Officer should be affirmed in its entirety. We therefore deny the appeal and affirm the decision below.

ORDER

Complainant's appeal to the Full Commission is hereby dismissed and the decision of the Hearing Officer is confirmed 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 appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a

petition in court within 30 days of receipt 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 4th day of June , 2010.

Malcolm Medley
Chairman

Sunila Thomas-George
Commissioner