

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
LIZANDRO PORTES ABREU,
Complainants

v.

DOCKET NO. 05-SEM-01175

UNIVERSITY OF MASSACHUSETTS,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Respondent University of Massachusetts that it did not discriminate against Complainant on the basis of his national origin (Dominican Republic) and did not terminate his employment in retaliation for his having complained about his working conditions. The Hearing Officer concluded that Complainant had failed to establish a prima facie case of discrimination in the terms and conditions of his employment on the basis of national origin and concluded that his employment was not terminated for his having engaged in protected activity. Complainant has appealed to the Full Commission.

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. Massachusetts Comm’n Against Discrimination, 365 Mass. 357, 365 (1974); 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. Massachusetts Comm’n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine, inter alia, 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 was otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF THE FACTS

Respondent operates student dining halls on its UMass Amherst campus, employing permanent employees “FTEs” or “01s” whose jobs include benefits and union protection. Respondent also employs temporary employees or “03s” as contractors who perform the same tasks as permanent employees but receive no benefits or job protection. Contractors who work as “03s” in the dining halls from September through May must reapply for dining hall positions every September.

Complainant was born in the Dominican Republic and came to the United States in 2002. In September 2003, Complainant was hired into the temporary position of pot washer at a large dining hall on the UMass campus. After a few months in that position, Complainant was assigned as a culinary worker, a position where he was responsible for preparing meals. The

head chef at the dining hall, Donald Sabola, supervised Complainant. After working the 2003-2004 school year, Complainant was laid off in May 2004, as were all "03" workers, but he was not called back for the fall semester. After complaining to the manager of the dining hall and a human resources interviewer, and was called back to work in late September 2004 as an "03" contractor and assigned to work 20 hours per week in the kitchen. After requesting more hours, Complainant was assigned an additional 20 hours per week in the receiving area. On March 10, 2005, Complainant's employment was terminated after an incident in the kitchen wherein he made a sexually inappropriate comment about a female student employee, asking another employee if the student might give him a "blow job, in exchange for a bag of weed." His comment was reported to the student, who allegedly left the kitchen upset. Respondent believed that Complainant had made the statement directly to the student.

Complainant's employment was terminated in keeping with Respondent's initiative to be very proactive in protecting student employees in its workplace. In or around August 2005, after Complainant filed his Complaint with this Commission, Respondent offered Complainant another 03 position and some amount of back pay. Complainant rejected the offer because he wanted a permanent position and reimbursement for all of his lost wages.

During the course of his employment, Complainant had complained to Respondent's building manager regarding failure to provide him with breaks, cross-train him on various stations in the kitchen, provide him with a uniform, and convert him to a permanent employee. Complainant alleged that he was treated differently in the terms and conditions of his employment because he was a native of the Dominican Republic. Complainant also alleged that Respondent terminated his employment in retaliation for his having engaged in the protected activity of complaining about disparate treatment.

BASIS OF THE APPEAL

Complainant has appealed the decision on the grounds that the Hearing Officer failed to consider statements in the record in Complainant's favor. Complainant also attached new evidence to his appeal, but did not file the required motion to present additional evidence pursuant to 804 CMR 1.23 (1) (g). Complainant failed to demonstrate that the additional evidence was material to the issues in the case and that there was a good reason for failure to present it in the proceeding before the Hearing Officer. Since Complainant failed to make application to the Full Commission for leave to present additional evidence pursuant to the regulation and since he represented by competent counsel at the Hearing, we decline to consider additional evidence on appeal.

We begin our review with whether there is substantial evidence in the record to support the Hearing Officer's findings. As to Complainant's assertion that statements supporting his view and favorable to him were not considered by the Hearing Officer, we note that that she considered Complainant's testimony about alleged disparate treatment to be largely inconsistent, vague and contradictory. She found that he failed to establish a prima facie case of disparate terms and conditions of employment because she largely did not credit his testimony that he suffered any adverse employment actions. She did not credit Complainant's testimony that he was prohibited from performing a variety of jobs in the kitchen, because by his own testimony he performed other functions besides the grill and fryer. She further found that Complainant's testimony that he was not allowed to take breaks somewhat vague, while crediting the testimony of his supervisor and two co-worker's, one also Dominican, that disputed Complainant's assertions. With regard to Complainant's failure to receive a uniform, the Hearing Officer

credited testimony of Complainant's supervisor and the Dining Commons manager that Complainant may have been without a uniform briefly because Respondent likely ran out of its supply of uniforms, but that this was not intentional. She found no credible evidence that Complainant was purposely denied a uniform because of his national origin.

We have reviewed the Hearing Officer's credibility determinations with respect to Complainant's allegations of disparate working conditions, and find that they are supported by substantial evidence in the record, that is evidence that a "reasonable mind" would accept the evidence as adequate to form a conclusion. M.G.L. c. 30A, s. 1(6). See also, Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The credibility determinations of the fact finder are accorded deference since she observed the witnesses first hand, assessed their demeanor, and is in the best position to make judgments about the veracity and reliability of witness testimony. We see no reason to disturb those findings. We properly defer to the Hearing Officer's findings which are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). 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)

With regard to the stated reason for his termination, Complainant denied making any sexually charged remarks to the student employee and maintained that he did not understand the questions put to him by management about this incident. The Hearing Officer carefully weighed the testimony of Complainant, his supervisor, and the manager and did not credit Complainant's version of the events that led to his termination. We have reviewed the Hearing Officer's credibility findings and defer to those findings. The Hearing Officer credited the reasons for the termination articulated by Respondent, and found that they were not a pretext for retaliation.

She found no evidence that Respondent harbored intent to terminate Complainant's employment based on his having complained about disparate treatment.

We have carefully reviewed the full record in this matter and have weighed all of 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 conclude that the Hearing Officer's decision was rendered in accordance with the law and therefore we deny the appeal and affirm the Hearing Officer's order of dismissal.

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 Decision may file 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 receipt 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. Failure to file a petition in court within thirty (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, 2013

Julian Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie Williamson
Commissioner