

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & KELLY McCLUSKEY,
Complainant

v.

DOCKET NO. 03-BEM-02517

GAP, INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Respondent, Gap, Inc. Following an evidentiary hearing on the claim of discriminatory termination, the Hearing Officer concluded that Respondent was not liable for discrimination based on gender in violation of G.L. c.151B, § 4(1). The Hearing Officer found that Respondent articulated legitimate, non-discriminatory reasons for terminating Complainant's employment, namely Complainant's violations of Respondent's sexual harassment policy and its "on notice" policy requiring managers to report complaints of discrimination or harassment. The Hearing Officer also concluded that Complainant failed to establish that her discharge was a pretext for discrimination. While Complainant identified eight male comparators whom she alleged were disciplined less harshly than she was, the Hearing Officer found that only one of these individuals was a proper comparator and distinguished the circumstances of his discipline. She found that the nature and severity of Complainant's violations merited the more harsh discipline Respondent imposed on her.

Complainant appealed to the Full Commission asserting that the Hearing Officer abused her discretion in how she evaluated evidence relating to Respondent's process for

conducting investigations and making corrective action decisions. Complainant also alleges that the Hearing Officer committed errors of law by requiring direct evidence of discriminatory intent on the part of Respondent and by overlooking material evidence related to a specific identified comparator.

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 has appealed the decision on the grounds that the Hearing Officer abused her discretion in the manner in which she evaluated the evidence relating to Respondent's process for conducting investigations and making corrective action decisions. Complainant argues that because Respondent's processes were subjective, and lacked written guidelines, the Hearing Officer should have viewed the evidence of

disparate discipline applying a “strict scrutiny standard.” The Complainant’s use of the term “strict scrutiny” does not refer to the standard of review employed by the courts when weighing constitutional rights and governmental interests; rather, she uses the term to mean “close scrutiny,” a term which the Hearing Officer employed in her decision.

The Hearing Officer addressed Complainant’s assertion that Respondent’s investigatory and disciplinary process was subjective by noting that “Respondent’s protocols for conducting investigations and issuing disciplinary decisions seem subjective” and were therefore, “ ‘deserving of close scrutiny because of their capacity for masking unlawful bias,’ ” quoting from Harrison v. Boston Financial Data Services, Inc., 37 Mass. App. Ct. 133, 138 (1994). Complainant contends that the Hearing Officer failed to apply this standard. We are not persuaded by this argument. The record in this case demonstrates that the Hearing Officer closely analyzed all eight identified comparators’ situations in eight separate findings. She also noted which six of these eight investigations were conducted by Felecia Shaw, the individual who also handled Complainant’s investigation. This analysis satisfied the standard of “close scrutiny” demanded by Hearing Officer’s recognition that Respondent’s processes “seem[ed] subjective.” Upon completing this analysis, the Hearing Officer ultimately concluded that there was “no evidence in this case that the reasons Respondent has articulated for Complainant’s termination are a pretext for unlawful gender discrimination” and that the “seemingly harsher penalty” borne by Complainant resulted not from consideration of her gender but from consideration of “the severity of her conduct, given her position.” The Hearing Officer’s analysis of the respective circumstances of the identified comparators -- particularly in light of the fact that she ultimately concluded that only one of these identified individuals was actually a

valid comparator -- demonstrates her careful study and “close scrutiny” of Respondent’s investigatory and disciplinary process to determine that there was no unlawful pretext.

Complainant next contends that the Hearing Officer required her to produce direct evidence of discrimination, and that such a requirement was an error of law.

Complainant’s argument apparently derives from that part of the decision in which the Hearing Officer states that while Respondent’s processes were deserving of close scrutiny, “there is no evidence in this case that the reasons Respondent has articulated for Complainant’s termination are a pretext for unlawful gender discrimination. Nor is there any evidence that Respondent was motivated by discriminatory intent, motive or state of mind.” Contrary to Complainant’s assertion, the Hearing Officer did not require Complainant to produce direct evidence of discrimination. Indeed, the Hearing Officer stated at the outset of her Conclusions of Law that “[a]bsent direct evidence of gender discrimination” Complainant was required to establish the elements of the prima facie case, followed by application of the burden-shifting paradigm used in cases involving only circumstantial evidence. After weighing the evidence presented by both parties, the Hearing Officer concluded that Respondent had articulated legitimate, non-discriminatory reasons for Complainant’s termination, that the asserted evidence of pretext – that males were treated less harshly- was not persuasive and did not evince any discriminatory motive based on Complainant’s gender. Complainant’s argument is based on a misunderstanding of the Hearing Officer’s analysis and of the appropriate legal standard as set forth in Lipchitz v. Raytheon, 434 Mass. 493 (2001).¹

¹ In Lipchitz the Court stated that demonstrating pretext requires proof that the employer “acted with discriminatory intent, motive or state of mind,” but that “this element of proof may be satisfied by circumstantial evidence such as the inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the employer is false.” 434 Mass. at 504

Complainant next contends that the Hearing Officer erred as a matter of law in determining who was a valid comparator. Complainant argues that the Hearing Officer should have accepted Complainant's position that all eight of the male employees she identified were comparators, and that in finding only one store manager to be a proper comparator, the Hearing Officer construed too narrowly the legal requirement that a comparator be similarly situated. First, Complainant complains that the Hearing Officer adopted Respondent's argument that, "Store Managers are held to a higher standard and subject to harsher discipline than assistant managers because of their position in the management hierarchy, their level of responsibility and more comprehensive training." This contention is inaccurate and misleading, as Complainant fails to mention that this quote from the Hearing Officer's decision was preceded by the observation that, "Complainant offered no evidence to contradict Respondent's assertion," regarding the distinction between assistant managers and store managers. Given that there was no contradictory evidence to dispute Respondent's characterization of this distinction, the Hearing Officer was well within her discretion to credit Respondent. Second, Complainant argues that the Hearing Officer drew "the line too fine" between store managers and assistant managers given the admonition in Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir, 1989), that "[e]xact correlation is neither likely nor necessary" in a comparator analysis. Yet the record demonstrates that the Hearing Officer did not require "exact correlation." The Hearing Officer quoted directly from the Dartmouth case in rejecting Respondent's argument that **none** of the individuals Complainant identified were appropriate comparators. The Hearing Officer restated Dartmouth standard that the incidents at issue must be "roughly equivalent," the

protagonists “similarly situated,” the cases “fair congeners” and that “apples should be compared to apples.” The Hearing Officer then determined that the sole proper comparator was another store manager because they were in similar positions of authority, had the same level of responsibility, had enhanced levels of training, and were held to the strict standard of behavior with regard to enforcing Respondent’s “Zero Means Zero” and “on notice” policies. The Hearing Officer’s finding in this respect comports with case law holding senior managers who possess greater responsibilities to higher standards and finding they are not proper comparators to lower level managers. See, e.g., Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23 (1st Cir. 2008) (female plaintiff not similarly situated to male employees in her department because, *inter alia*, “she was the only person with the title of Senior Project Engineer and she had different job responsibilities from the others in her department”); Rivas Rosado v. Radio Shack, Inc., 312 F.3d 532 (1st Cir. 2002) (female store manager plaintiff not similarly situated to male employees holding higher positions with different responsibilities); Melanson v. Electronic Security & Control Systems, Inc., 25 MDLR 345 (2003) (the “appropriate comparator” for plaintiff, an office manager, is not a lower level employee, but rather an office manager at another of Respondent’s locations, as her “job functions were nearly identical to Complainant’s”). The Hearing Officer’s determination that the sole male manager was a valid comparator in this matter is supported by substantial evidence and applicable law.

Finally, Complainant contends that the Hearing Officer overlooked material evidence regarding one of the identified comparators, namely assistant manager Willie Vega. Specifically, Complainant argues that the Hearing Officer did not accurately

describe Vega's circumstances, which involved a written warning following an investigation of his conduct. However, since the Hearing Officer properly concluded that Vega, an assistant manager was not a valid comparator, and was held to a different standard of conduct than Complainant, this argument must fail.

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 abuse of discretion and no material errors of fact or law. We conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. Therefore we hereby dismiss the Complainant's appeal and affirm the decision of the Hearing Officer in its entirety.

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