

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
BEVERLY M. NICKOLSON)
Complainant)
v.) Docket No. 98-BEM-1358
RESPONDENT CHUBB & SON)
Respondent)

Appearances:

Ezenwa L. Nwogu, Esq. For Complainant
Michael A. Fitzhugh, Esq., for Respondent Chubb & Son

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 1, 1998, Complainant Beverly M. Nickolson filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged Respondent Chubb & Son (hereafter: Respondent) with discrimination based on her race and color (black) in violation of G.L. Chapter 151B, §4, paragraph 1. Complainant alleged that Respondent discriminated against her when it subjected her to a more onerous workload than other similarly situated employees, denied her opportunities to transfer out of her work unit and terminated her employment on or about April 30,

1998.

Attempts to conciliate this matter were unsuccessful. On January 15, 2002, Investigating Commissioner Walter J. Sullivan, Jr., certified this case for a public hearing.

I held a public hearing in this case on May 21, 2003. At the conclusion of Complainant's case, Respondent orally moved for a directed verdict¹ on the grounds that Complainant failed to establish a prima facie case of discrimination based on her race and color. I took Respondent's motion under advisement and ordered the parties to submit written argument. On June 2, 2003, Respondent filed a memorandum with the Commission in support of its oral motion for a directed verdict. Respondent's motion included proposed findings of fact and conclusions of law.²

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable.

¹Since Respondent filed its motion for directed verdict at the conclusion of Complainant's case, I am treating it as a motion for involuntary dismissal. See STE Financial Corporation v. Popkin, 1991 Mass. App. Div. 204, 205, n.3; Madden v. Malmart Mortgage Co., 1984 Mass. App. Div. 239, 240-241 and cases cited therein; Mass. R. Civ. P. Rule 41(b)(2).

²The Commission did not receive Complainant's reply memorandum of law as of the date of this decision.

II. FINDINGS OF FACT

1. On June 6, 1994, Respondent hired Complainant, Beverly M. Nickolson, as an Auto Material Damage (AMD) adjuster at a starting annual salary of \$31,400.00. (Joint Exhibit 0002)³. At all times relevant to this complaint, Complainant worked in the Claims Unit at Respondent's Boston Branch Office.

2. Immediately prior to her employment at Respondent, Complainant worked for four years as a bodily injury claims adjuster at Aetna Life and Casualty Company. (Joint Exhibit 0002).

3. Respondent provides underwriting and other administrative services to a number of insurance companies that comprise the Chubb Group of Insurance Companies. (Joint Exhibit 0001). Respondent employs approximately 140 employees in its Boston Branch office. (Joint Exhibit 0001). At all times relevant to this complaint, Respondent was an employer within the meaning of G.L. c. 151B, §1, paragraph 5.

4. Maron Fenico, who is white, is a Regional Casualty Claim Technician, Northeast Zone, at Respondent. Mr. Fenico has worked at Respondent since 1991 and reported to William Turnbull during the time period relevant to this complaint. Mr. Fenico directly supervised Complainant from October 1994 until May 1996.

5. William Turnbull, who is white, is the Senior Vice President

³For purposes of my ruling on Respondent's motion, the hearing record includes the joint exhibits that are paginated from 0001 to 0169.

of Claims for Respondent's Eastern Claims Service Center. Mr. Turnbull was the Boston Office Claims Manager and Complainant's second-line supervisor during the time period relevant to this complaint. Mr. Turnbull participated in Complainant's interviews at Respondent and selected her for the AMD adjuster position she held from 1994-1998. In May or June 1996, Ike Barbatsoulis replaced Mr. Turnbull as the Boston Office Claims Manager.

Complainant's Job Duties and Workload

6. As an AMD adjuster, Complainant was responsible for handling first- and third-party claims relating to automobile damage or accidents arising in the New England states except Massachusetts. Complainant's primary duties required her to receive a notice of a loss, investigate the circumstances surrounding the loss, determine whether the loss was covered by insurance, properly document all information surrounding the claim, comply with all regulations and Respondent's standards and communicate effectively with all parties. (Joint Exhibit 0002). As part of her duties, Complainant contacted the insured, the claimant, took statements from witnesses and dealt with body shops, automobile rental companies and appraisers.

7. At all times relevant to this complaint, Complainant was the only AMD adjuster in Respondent's Boston Claims Office.

8. At all times relevant to this complaint, Respondent maintained a national staffing standard of 125 new "features" or "arisings" a month for one AMD adjuster. (Joint Exhibits 0145, 0147 and 0150). A "feature" or "arising" occurs when an AMD adjuster sets aside a reserve for a contingency or a potential

loss. A "feature" can be established for a vehicle, the property damage of a policyholder or any third person to whom Respondent may be liable, e.g., a claim for a rental car and for damage to the insured's car constitutes two "features." Respondent's national staffing standard is critical because it helps its managers and supervisors to accurately determine an AMD adjuster's monthly workload. (Joint Exhibits 0145, 0147 and 0150).

9. If Respondent determined that there was a third-party (not insured by Respondent) who was liable for losses it has already paid to its insured, it will attempt to recover these monies and the insured's deductible through subrogation. Subrogation is important to Respondent's policyholders because Respondent does not waive deductibles and many policyholders have very large deductibles, up to \$2,500.00.

10. When Respondent hired Complainant in 1994, it had an office in Murray Hill, New Jersey, that handled subrogation cases for some of its branch offices, including the Boston Claims Office. Mr. Turnbull was not satisfied with the recoveries by the Murray Hill Office and felt that it was not "aggressively pursuing" subrogation cases.

11. Mr. Turnbull assigned subrogation cases to Complainant sometime prior to October 1994 because he believed that she could handle subrogation cases for the Boston Claims Office more aggressively and effectively than the Murray Hill Office, based on the level of her AMD workload.⁴ (Joint Exhibit 0157).

⁴I reject Complainant's contention that Mr. Turnbull did not assign the subrogation duties until late 1995 or 1996.

12. Mr. Turnbull testified that the handling of subrogation claims is a natural adjunct to handling AMD claims because it requires the same set of skills. Mr. Fenico testified that the primary skill for subrogation is an ability to assess liability. He also testified that subrogation was a logical extension of Complainant's duties because she already assessed liability as part of her AMD duties. Complainant determined whether there was a duty, a breach of the duty, proximate cause and damages. Complainant also prepared documents for use in subrogation. I credit Mr. Turnbull's testimony.

13. Mr. Turnbull testified that subrogation claims are generally easier to manage than AMD claims. He also testified that AMD claims are "extraordinarily service sensitive" because first- and second-party customers are highly dependent on their automobiles for transportation to and from work and transporting their children. Mr. Turnbull also testified that these customers are often very demanding about the repair of their automobiles. They make more telephone calls than those involved in subrogation claims and the AMD adjusters can not always manage the AMD workload at their own pace. In subrogation cases, the AMD adjuster has more flexibility and "sets the pace" for when and what subrogation claims to pursue. I credit Mr. Turnbull's testimony.

14. Since recovery by subrogation may include the insured's deductible, Complainant received a "lot of pressure and phone calls" from individuals and other insurance companies to negotiate payment arrangements.

Complainant's Performance Appraisals in 1995-1997

15. During the time period relevant to this complaint, Respondent's performance appraisal system included six discrete performance ratings. The ratings ranged from the highest to the lowest as follows: "exceeds all," "exceeds some," "met all," "met most," "met some" and "did not meet" goals/expectations. (Joint Exhibits 0002 and 0008).

16. On June 5, 1995, Mr. Fenico assigned Complainant an overall rating of "met all goals/expectations" on her performance review for the period covering June 1994 to June 1995. (Joint Exhibits 008-0010). Mr. Fenico assigned Complainant a rating of "met all" on her goals related to inventory, service and professional development. He also assigned Complainant a rating of "met most" on her goal related to file quality. (Joint Exhibit 0008-0009). On Complainant's "professional development" goal, Mr. Fenico wrote, "Beverly has obtained a New Hampshire adjuster's license, has taken the initiative and assumed responsibility for prosecuting auto subrogation claims with excellent initial results. . . ." (Joint Exhibit 0009).

17. Based on her overall performance rating for 1994-1995, Complainant earned a 5% merit increase, effective June 5, 1995. Complainant's bi-weekly salary increased to \$1,268.09, or \$32,970.34 annually. (Joint Exhibits 0002 and 0011).

18. On July 25, 1995, Mr. Fenico met with Complainant to discuss various issues pertaining to her work performance. These issues included complaints that Complainant did not return telephone calls, maintained an unusual amount of outstanding claims, had an inordinate number of claims features that were older than

four months and had a number of files that might not pass a national audit. (Joint Exhibits 0012-0015). Mr. Fenico felt that Complainant's time management skills were below average for her position and significantly affected her ability to complete her job duties, including subrogation.

19. On October 4, 1995, Mr. Fenico sent Complainant a memorandum describing various positive and negative findings based on his audit of 10 files from Complainant's workload. (Joint Exhibits 0016-0020).

20. On November 28, 1995, Complainant met with Mr. Fenico and Donna Lucas-Griffith, then Respondent's Human Resources Manager. During the meeting, they discussed several issues related to Complainant's performance on technical claims standards and service expectations. These issues included, among other things, Complainant's failure to meet deadlines for various projects and her failure to timely respond to status requests on her activities in pursuit of subrogation in six files. (Joint Exhibits 0016-0021).

21. During the November 28, 1995 meeting, Complainant suggested that her performance issues could be resolved if Mr. Fenico removed her subrogation duties. Complainant told Mr. Fenico that the subrogation claims were negatively affecting her AMD work. Complainant also felt that her subrogation work was "incredibly overwhelming" and she was unable to effectively concentrate on her AMD duties. Complainant felt that she was unable to complete her AMD duties because of the demands of her subrogation duties; specifically, preparing claims for arbitration and responding to telephone calls from insureds seeking reimbursement and from insurance companies seeking to negotiate.

22. Mr. Fenico rejected Complainant's suggestion because he believed that her AMD workload was not onerous since it was less than AMD adjusters in Respondent's other offices. Mr. Fenico cited an AMD adjuster in Respondent's Minneapolis office who managed approximately 90 claims per month—more than twice Complainant's then workload. (Joint Exhibit 0022).

23. Mr. Fenico also discussed Complainant's concerns with Mr. Turnbull and they determined there was no basis for Complainant's assertion that she was overworked. Mr. Fenico then told Complainant that her AMD "new arisings" or "features" represented only one-third of Respondent's national standard for an AMD adjuster. (Joint Exhibits 0145-0152). He recommended to Complainant that she contact Respondent's other offices to confirm the staffing standard for other AMD adjusters. Mr. Fenico also told Complainant that he was unhappy with the subrogation activities in the Murray Hill Office and felt strongly that she should retain her subrogation duties.

24. Respondent's staffing analysis for 1995 showed that the Boston Branch, Eastern Zone, only required .32 of one staff person to handle its "new arisings" in AMD cases. (Joint Exhibits 145-152).

25. On December 13, 1995, Mr. Fenico gave Complainant a 60-day performance improvement plan (PIP) that set forth certain criteria and time frames for Complainant's handling of subrogation claims, customers calls and projects. The PIP also required Complainant to submit a list of her assigned subrogation claims by November 1, 1995, adequately prepare all subrogation files and issue subrogation demands within 30 days. As part of the

PIP, Mr. Fenico agreed to meet with Complainant biweekly to determine her compliance with Respondent's technical claims standards and service expectations. (Joint Exhibits 0021-0023 and 00036).

26. Mr. Fenico held biweekly performance review meetings with Complainant on January 4 and 19, February 2, March 7 and May 6, 1996. (Joint Exhibits 0024-0034).

27. By March 1996, Complainant's performance improved in all areas except "claimant and other driver contact." Mr. Fenico extended Complainant's PIP for 30 days to allow Complainant to improve her performance in this area. (Joint Exhibits 0004 and 0036).

28. Complainant testified that, sometime in March 1996, she told Mr. Fenico that she was concerned about the impact of her subrogation duties on her ability to successfully perform her AMD duties. Mr. Fenico told Mr. Turnbull that Complainant did not believe that she could perform her subrogation duties without adversely affecting performance of her AMD duties. After meeting with Mr. Fenico, Mr. Turnbull reviewed Respondent's staffing standards and determined that Complainant had "plenty of capacity" to conduct her subrogation work along with her AMD duties.

29. On May 17, 1996, Mr. Fenico terminated Complainant's PIP based on her "consistent progression of positive findings over the course of the bi-weekly reviews." Mr. Fenico commended Complainant "for demonstrating a commitment to turning things around during the PIP period." (Joint Exhibit 0035). Complainant testified that she was able to improve her performance

because she "stayed in the office very, very late and came into the office very, very early."

30. On June 3, 1996, Mr. Fenico assigned Complainant an overall rating of "met some of goals/expectations" on her performance review for the period covering June 1995 to June 1996. Mr. Fenico assigned Complainant a "met some" rating on each of her performance goals that were identical to those included in her 1994-1995 performance review. (Joint Exhibits 0036-0038).

31. In Complainant's performance review, Mr. Fenico determined that her files met Respondent's national audit standards and that her subrogation claim files were prepared, subrogation demands issued and the Rhode Island Regulation 74 Project was implemented. Mr. Fenico also concluded that Complainant failed to meet her performance standards related to 24 hour contact with insureds and claimants, preparation of subrogation claim files, reservation practices on bodily injury claims and her AMD and bodily injury investigations. Mr. Fenico proposed that Complainant draft an "auto" subrogation manual with a checklist to ensure that she covered all subrogation issues. (Joint Exhibits 0036-0038).

32. Complainant disagreed with her 1996 performance ratings because she felt her subrogation duties affected her ability to perform her AMD duties. (Joint Exhibit 0039).

33. Complainant told Ms. Lucas-Griffith, sometime in 1996, that she felt her subrogation duties negatively affected her other job duties and that she was being singled out because no one had to perform subrogation duties as far as she knew.

34. In or about January 1997, Complainant began reporting to Janet Kristianson, Respondent's Property Supervisor. Between January and May 1997, Ms. Kristianson met with Complainant several times to discuss her ongoing performance issues, including customer complaints lodged with the Boston Office over her failure to return phone calls. (Joint Exhibit 0004).

35. Sometime prior to May 1997, the Boston Claims Office returned responsibility for handling new subrogation claims to the Murray Hill Office.

36. In May 1997, Ms. Kristianson, Mr. Barbatsoulis and Complainant met and discussed Complainant's ongoing performance issues. They agreed to another 90-day PIP to address the disposition of her outstanding subrogation files, the scope of the CSD dispatcher role and workflows and the reintegration (or accretion) of automobile bodily injury claims into Complainant's workload. Complainant agreed to work with and train another employee regarding certain administrative duties. (Joint Exhibits 0040-0041).

37. As part of the PIP, Ms. Kristianson and Mr. Barbatsoulis also agreed to reduce the number of new AMD "arisings" or "features" to give Complainant an opportunity to close her existing subrogation cases. Complainant agreed that she would "work off" her 70+ (approximate) subrogation claims within 30 days.

38. Mr. Barbatsoulis testified that the 90-day plan was not accomplished. He testified that Complainant did not "work off" her outstanding subrogation inventory. In addition, Mr. Barbatsoulis concluded that the level and quality of Complainant's AMD files did not improve despite her reduced

workload. I credit Mr. Barbatsoulis' testimony.

39. During 1997, Mr. Barbatsoulis used temporary employees to help manage the claims workload and avoid a negative impact on the delivery of effective customer service that was a priority for Respondent. Based on Respondent's national standard of 125 "new risings," Mr. Barbatsoulis believed that Complainant's monthly "new arisings" did not justify the need for a full-time AMD adjuster position. Mr. Barbatsoulis believed Complainant's situation was no different than his experience as a Claims Manager in Respondent's Rochester Office where he had adjusters who simultaneously handled AMD and subrogation duties.

40. On June 3, 1997, Ms. Kristianson assigned Complainant an overall rating of "met some of goals/expectations" on her performance review for the period covering June 1996 to June 1997. Ms. Kristianson assigned Complainant a "met some" rating on her performance goals related to business goals, service and collaboration and a "met none" rating on her performance goal related to "learning." Ms. Kristianson found that Complainant failed to meet Respondent's standards for "reserving" funds in anticipation of a loss, making 24 hour contact with insureds and claimants and conducting investigations. (Joint Exhibits 0042-0043).

41. Based on Complainant's 1997 performance review, Ms. Kristianson recommended a systematic audit (with detailed standards) of Complainant's files for 60 days to evaluate whether she improved her handling of case files. (Joint Exhibits 0042-0053, 0056-0069 and 0070-0078).

42. Through several memoranda, dated December 22 and 29, 1997,

Ms. Kristianson informed Complainant and other employees of Respondent's standards for AMD service, the taking of recorded statements in claim investigations and loss coverage verifying insurance coverage, reviewing appraisals and documenting cases files. (Joint Exhibits 0078-0097).

43. In January 1998, Ms. Kristianson accepted a position at Respondent's branch office in San Francisco, California. Rod LeBrew, who is black, replaced Ms. Kristianson as Complainant's direct supervisor. (Joint Exhibit 0006).

44. At some point in late 1997 or early 1998, Ms. Kristianson or Mr. LeBrew removed Complainant's subrogation duties for new claims after consulting with Mr. Barbatsoulis. Complainant testified that removal of new subrogation claims made "little real difference" because she still had to complete her open subrogation claims.

45. From March 1997 to March 1998, Respondent's monthly workload data showed that Complainant's "new risings" or "features" ranged downward from a high of 74 in March 1997 to 11 in March 1998. (Joint Exhibit 168). During the same time period, Respondent's workload data showed that Complainant's claim inventory decreased from 276 in March 1997 to 105 in March 1998. (Joint Exhibit 169). Mr. Barbatsoulis believed this data established that there was no expected proportionate decrease in Complainant's claims inventory compared to the reduction in her "new arisings," especially after May 1997.

46. On March 18, 1998, Mr. Barbatsoulis informed Complainant that her performance failed to meet Respondent's national standards set forth in the memoranda, dated December 22 and 29, 1997, and

the AMD Audit Narrative and Guidelines. Mr. Barbatsoulis' written warning also informed Complainant that she had to meet the required performance standards before April 30, 1998. (Joint Exhibits 0096-97).

47. During her 30-day performance review period, Complainant was assigned 44 files. Messrs. LeBrew and Barbatsoulis randomly reviewed and audited 22 of Complainant's files. Based on this review, they determined that Complainant failed to meet Respondent's standards for service, coverage, investigation, loss assessment and case management. (Joint Exhibits 0098-0145).

48. On April 29, 1998, Mr. Barbatsoulis informed Complainant about the audit findings. Mr. Barbatsoulis then terminated Complainant's employment, effective April 30, 1998.

49. Complainant testified that her termination from Respondent was humiliating, upsetting and demoralizing.

50. Mr. Fenico testified that Complainant never told him that she felt her treatment at Respondent was based on a racial animus.

51. Sometime during her first year of employment at Respondent, Complainant testified that she discussed her interest in transferring to another department with Mr. Fenico. Complainant testified that Mr. Fenico initially told her that she should continue to perform her AMD claims duties and that "we'll see about adding something else." Mr. Fenico did not recall Complainant requesting a transfer to a department outside of the Claims Office. Mr. Fenico testified that they had ongoing discussions about expanding Complainant's skills.

52. Complainant testified that she also discussed her desire to transfer to another department with Ms. Lucas-Griffith, with Ms. Kristianson several times and with Mr. LeBrew.⁵ I do not credit Complainant's testimony regarding her alleged requests to transfer from the Claims Office.

III. CONCLUSIONS OF LAW

Respondent contends that Complainant has shown no right to relief on the facts and the law in this case because she has not proved a prima facie case of discrimination based on her race and color. Massachusetts Rules of Civil Procedure, Rule 41(b)(2). In ruling on Respondent's motion for involuntary dismissal, I am not restricted to the standard of proof required for a directed verdict in a jury case.⁶ In my in my capacity as the trier of fact, I am permitted the discretion to assess Complainant's evidence. Accordingly, I am "free to weigh the evidence and resolve all questions of credibility, ambiguity and contradiction in reaching" my decision on Respondent's motion.⁷ See Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield, 434 Mass. 96, 107-108 (2001); DeVito v. Cellular Mobile Communications, Inc., 1993 Mass. App. Div. 48, 49-50; Delano Grower's Cooperative Winery v. Supreme Wine Co., Inc., 393 Mass. 666,

⁵Ms. Lucas-Griffith, Ms. Kristianson and Mr. LeBrew did not testify during Complainant's case at the public hearing.

⁶A hearing officer can not grant a motion for directed verdict if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [complainant]" (citations omitted). The test is the legal sufficiency of the evidence, and all evidence must be construed entirely in the [complainant's] favor for purposes of the motion disposition." Madden v. Malmart Mortgage Corporation, 1984 Mass. App. Div. 239, 241.

⁷In deciding a motion for involuntary dismissal, I am required to issue detailed findings of fact and conclusions of law. DeVito v. Cellular Mobile Communications, Inc., *supra.*; S & R Realty Corporation v. Marrow et al., 5 Mass. App. Ct. 800 (1977); Lynch v. Commonwealth of Massachusetts, Massachusetts Bay Transportation Authority (Full Commission decision), ___ MDLR ___ (2002); 804 CMR §1.21(18).

676 (1985), quoting Ryan, Elliott & Co. v. Leggat, McCall & Werner, Inc., 6 Mass. App. Ct. 686, 689 (1979); J.W. Smith & H. B. Zobel, Rules Practice, §41.10, at 59060 (1977).

General Laws Chapter 151B, §4, paragraph one, prohibits discrimination based on race and color. In the absence of direct evidence of an unlawful motive based on Complainants' race and color, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, supra. at 116; Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

To establish a prima facie case of race and color discrimination for termination from employment, Complainant must establish by credible evidence that (1) she is a member of a protected class based on her race and color; (2) she was performing the duties of her AMD adjuster position adequately or capably; (3) Respondent subjected her to an adverse employment action, i.e., her termination from employment at Respondent; (4) she was replaced by someone not of her protected class(es), or was terminated under circumstances that give rise to a reasonable inference of unlawful discrimination based on her race and/or color. Abramian v. President & Fellows of Harvard College, supra.; Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003); Adesso v. Reliable Bus Lines, Inc., 24 MDLR 28 (2002).

If Complainant establishes a prima facie case of unlawful discrimination based on her race and/or color, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason(s) for the alleged adverse employment actions. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, supra. at 116-118. If Respondent meets its burden of production, Complainant must then show by a preponderance of the evidence in the record that the proffered reason(s) was not the real reason for her termination and that Respondent acted with a discriminatory intent, motive or state of mind based on her race and/or color. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 775-776 (2001); Lipchitz v. Raytheon Company, 434 Mass. 493, 501-502 (2001); Blare v. Husky, 419 Mass. 437, 443 (1995).

The undisputed evidence in the record shows that Complainant has satisfied two elements of her prima facie case of discrimination based on her race and color. Complainant has proven by credible evidence that she is a member of a protected class based on her race and color (black). Complainant has also shown that Respondent subjected her to an adverse employment action when it terminated her from employment on April 30, 1998.

I conclude, however, that Complainant has not shown by credible evidence that she was performing her AMD adjuster job duties in an acceptable or adequate manner when Respondent terminated her on April 30, 1998. There is sufficient un rebutted evidence and documentation in the record to establish that Complainant consistently failed to meet Respondent's reasonable performance expectations and standards in 1996-1998, culminating in her termination on April 30, 1998. I also credit the testimony of Messrs. Fenico and Barbatsoulis'

regarding Complainant's performance deficiencies that led to her negative performance evaluations in 1996-1998 and her placement on two PIPs in an effort to improve her performance to an acceptable level. See Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., *supra*. In addition, Complainant did not produce any credible evidence that Respondent Chubb's negative performance evaluations in 1996-1998 were not accurate or were motivated by Respondent's unlawful desire to terminate Complainant's employment based on her race and color. Massachusetts Commission Against Discrimination & Landry v. Dana Farber Cancer Institute, Inc., 24 MDLR 214 (2002).

I also conclude that Complainant has not proven by credible evidence that she was terminated under circumstances that give rise to a reasonable inference of unlawful discrimination based on her race and/or color. Complainant failed to produce any objective evidence that she was treated differently than Respondent's other similarly situated AMD adjusters not of her race and color when she was assigned to work on subrogation claims. To the contrary, Messrs. Fenico and Barbatsoulis credibly testified that they assigned subrogation claims to Complainant based, in part, on their knowledge of other AMD adjusters, including those in Respondent's Minneapolis and Rochester offices, who handled subrogation claims along with their AMD duties. Complainant also did not produce any comparative data to support her contention that Respondent terminated her because of her race and/or color.

I further conclude that Complainant has failed to establish that she was subjected to an excessive or onerous workload in 1995-1998 because of Respondent's assignment of sub-

rogation claims. Respondent's uncontroverted staffing analysis and workload data show that Complainant's AMD "new arisings" during 1995-1997 never exceeded Respondent's national staffing standard for an individual AMD adjuster. The evidence also shows that Complainant never handled more than 33% of Respondent's national monthly standard. (Joint Exhibits 145-152).

I am not persuaded that Complainant's performance suffered because of her handling of subrogation claims. Again, the uncontroverted evidence in the record shows that Complainant's performance continued to decline in 1997 and 1998 even though her AMD workload decreased and she was not assigned new subrogation claims after May 1997. (Joint Exhibits 90040-0041). Finally, Complainant did not present any credible evidence that Messrs. Fenico, Turnbull and Barbatsoulis' made comments or remarks in 1994-1998 or behaved in a manner that established a discriminatory animus based on her race and color.

Accordingly, I conclude that Complainant has failed to establish a prima facie case of unlawful termination based on her race and/or color.⁸ Based on the totality of evidence in the hearing record, I find that Respondent terminated Complainant based on her unsatisfactory work performance in 1996-1998 and not because of her race and/or color.

⁸ Given my ruling on Complainant's prima facie case, I do not reach Respondent's contention that Complainant failed to establish that she suffered any damages that are cognizable under Chapter 151B.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby grant Respondent's motion for involuntary dismissal. I hereby order that the complaint in this matter be dismissed.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition of Review with the Full Commission within thirty (30) days of receipt of this Order.

SO ORDERED this 5th day of September, 2003.

KENNETH B. GROOMS
Hearing Officer