

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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EVA CEPHAS and MAMADEE KAMARA,  
and  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION,

Complainants

Against

Docket No. 96-BEM-2688  
Docket No. 96-BEM-3127

TOWARD INDEPENDENT  
LIVING & LEARNING,

Respondent

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Appearances: David O. deAbreu, Esq. for Complainants Cephas and Kamara  
Leonard H. Kesten, Esq. and Katherine Bowden, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 8, 1996, Mamadee Kamara (“Complainant”), filed a complaint of discrimination with the Massachusetts Commission Against Discrimination (“Commission”) charging Toward Independent Living & Learning (“TILL” or “Respondent”) with discrimination based on his race and color (black) in violation of M.G.L., c. 151B, sec. 4, para. 1. TILL operates residential programs for disabled individuals and employs staff to supervise and care for the residents. The charge of

discrimination alleges disparate treatment in the terms and conditions of employment based on Complainant's contention that he was singled out for discipline whereas Caucasian co-workers who violated similar policies were not disciplined.

On November 26, 1996, Complainant Eva Cephas ("Complainant") filed a complaint of discrimination charging TILL with discrimination on the basis of national origin (Liberian). She alleges that she was unfairly accused of giving a patient the wrong medication and of threatening her supervisor, forced to sign a written warning, and terminated because of her national origin.

The cases were consolidated on July 16, 1997. Efforts to conciliate the matter failed, and the case was certified for submission to public hearing on July 3, 2001. A public hearing was held on February 14, 2002. By agreement of the parties, the hearing tapes were transcribed as the official record of the hearing. The parties introduced 23 joint exhibits into evidence. Counsel submitted post-hearing memoranda on or around July 16, 2002. A second day of hearing was convened on May 17, 2004 in order to take additional evidence on allegations of disparate impact relative to the practice of allowing day shift case managers working two consecutive shifts to sleep on the night shift.<sup>1</sup>

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<sup>1</sup> The allegation of disparate impact was not included in the complainants' original charges of discrimination, but was dealt with during discovery and at trial. Evidence relative to the claim was presented during the first day of public hearing without objection from Respondent. The claim of disparate impact was fully explored during the second day of public hearing. Accordingly, there is a sufficient basis on which to evaluate the charge of disparate impact discrimination.

Based upon all the credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Mamadee Kamara is a black Liberian by birth who immigrated to the United States in the 1980's. Complainant Eva Cephas was a black Liberian by birth who immigrated to the United States in the 1980's. She died subsequent to the public hearing.

2. Respondent Toward Independent Living and Learning, Inc. ("TILL"), is an organization which runs programs, including residential group homes, for mentally disabled persons. It has approximately three hundred to three hundred-fifty employees. TILL is primarily funded by governmental contracts through the Medicaid program. According to Kevin Stock, Vice President of Operations, approximately 28% of TILL's employees in 1996 were minorities. The President of TILL is Dafna Krouk-Gordon, who was born in Africa.

3. Complainants both worked for TILL at a residential group home in Acton, Massachusetts known as Acton House. Acton House is a program for eight profoundly disabled individuals. The facility is staffed by a residence manager, case managers who work during the day, and two night managers per shift who work from 11:00 p.m. to 9:00 a.m. Daytime case managers begin to work at 2:00

p.m. or 3:00 p.m. on weekdays because residents of Acton House leave the facility to attend daytime programs between 8:30 a.m. and 3:30 p.m. On weekends, there are two daytime shifts: 9:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m.

4. Complainants worked as night managers. Complainants were expected to monitor residents, take residents to the bathroom or change them, if necessary, clean the clothing and beds of residents, wake residents in the morning, assist residents with bathing and dressing, and administer medication and feed residents breakfast. Night manager duties also include housekeeping work such as washing floors, cleaning the refrigerator, vacuuming, and dusting. Joint Exhibit 2.

5. Complainant Kamara heard about an opening for a night manager at Acton House from an employee of TILL of Liberian descent, Gus Baily. Mr. Kamara applied for the position and was hired. He began working at Acton House on December 10, 1994 at a starting salary of \$17,000.00 He received three raises, bringing his salary to \$18,200.00 by the end of his employment at TILL. Joint Exhibit 23.

6. Mr. Kamara testified that after he began working at TILL, he heard about an opening in the afternoon shift from a co-worker and applied for the position by speaking to Ms. Farina, the Residence Manager during the time Complainants were employed at Acton House. Transcript at pp. 70-71. According to

Complainant Kamara, Ms. Farina told him there were no vacancies in day manager positions but after that conversation she hired Caucasian people as day managers. Transcript at p. 71. This assertion was disputed by Alan White, Director of Residences for TILL, who testified that Mr. Kamara wanted to work at night because he had another day job. Transcript at p. 137. Mr. White testified that prospective employees applied for the specific positions they were interested in such as night or day managers. Transcript at p. 136. He was not aware of any instance in which a night manager applied for an opening on the day shift and did not get the job. Transcript at p. 137. As an example, Gus Bailey, a Liberian night manager, transferred from Acton House to a day program at a different facility. I credit Mr. White's testimony over that of Complainant Kamara.

7. After Complainant Kamara began working at Acton House, Complainant Cephas learned from him that there was another opening for a night manager at Acton House, applied for the position, and was hired. Ms. Cephas began working at Acton House on November 28, 1995. She earned \$17,750.00 throughout her employment at Acton House. Joint Exhibit 23.

8. Case managers working during the day receive a higher rate of pay than night managers. In April 1996, the differential for night and day managers was approximately \$2,000.00 Joint Exhibit 23. According to Mr. White, day managers are paid at a higher rate than night managers because they have more responsibility. Day managers communicate with the families of residents and are

members of the residents' "Individual Service Plan" team. They write annual assessments of residents, attend weekly staff meetings, and manage the finances of residents. Night managers are required to perform some household chores while residents sleep. In the morning, they help residents shower, get dressed, eat breakfast, and depart for their daytime activities. Joint Exhibit 2.

9. Occasionally in 1996, a day shift case manager filled a night shift vacancy by working a double shift. In such circumstances, the day shift manager was paid a day shift rate and was allowed to sleep while assigned to the night shift.

Respondent no longer permits employees working double shifts to sleep on the night shift.

10. Both Mr. Kamara and Ms. Cephas complained to their supervisor, Carol Farina, about the sleeping on duty practice. Ms. Cephas testified that sometimes the daytime case managers would come from home to work the night shift.

According to Ms. Cephas, even though they did not work the shift immediately preceding the night shift, they would still be allowed to sleep. Transcript at pp.

42-43. I do not credit this testimony.

11. TILL's disciplinary policy consists of progressive penalties including informal verbal warnings, documented verbal warnings, written warnings, suspensions, and termination. Employees who receive six written warnings are subjected to a suspension and a hearing, to determine whether termination or

other action is warranted. Joint Exhibit 1. Employees at TILL who receive a disciplinary memo for misconduct are required to sign the memo as acknowledgment of receipt. The form states that signing does not constitute agreement with the action. The form also states that refusal to sign the memo will result in a two-day suspension without pay.

12. In 1996, Respondent used newspaper advertisements and word-of-mouth to recruit employees for day and night case manager positions. Internal fliers were also placed in paychecks on a monthly basis to inform staff of available positions and how to apply. Complainant Kamara testified that he never received a notice of a job opening in his paycheck, but I do not credit this testimony.

13. From January 1995 throughout the period that Complainants worked at Acton House, none of the day managers was black. During the same period, all of the night managers were black Liberians except one who was Native-American. Transcript at pp. 69-70 and p. 128-131.

A. Cephas's Disciplinary History

14. Complainant Cephas received a written warning, otherwise known as an "Employee Disciplinary Memo" on May 22, 1996 for sleeping during her night shift. Joint Exhibit 3. The job description for night manager requires individuals on duty to remain alert, upright, and fully dressed while residents sleep. Ms.

Cephas denies that she was asleep, but admits that she was lying down on a sofa with a blanket over her because it was cold. Ms. Cephas testified that the light was on and she was watching TV when Ms. Farina walked in. According to Ms. Cephas, she said hello to Ms. Farina, but Ms. Farina didn't respond. Transcript at p. 15. The next morning, Ms. Farina gave Ms. Cephas a disciplinary memo for sleeping on duty. Ms. Cephas disagreed with the disciplinary memo but signed the document as an acknowledgment that she received it.

15. Complainant Cephas received a second disciplinary memo on July 5, 1996 for insubordination. Joint Exhibit 4. The memo states that Complainant, both over the phone and at the residence, "refused to follow supervisor's requests, would not listen or allow supervisor to speak to her." The circumstances leading up to the memo involved Ms. Cephas calling Ms. Farina at home on June 20, 1996 to object to the fact that Ms. Farina gave permission for another employee to sleep during the night shift. According to Ms. Cephas, she was upset that the other employee was allowed to sleep because it meant that she would have to do the work of two night managers. Transcript at p. 19. After an argument on the phone, Ms. Farina went to Acton House to instruct Ms. Cephas to leave the premises. After being sent home on June 20, 1996, Ms. Cephas did not return to work for a week. Ms. Farina claimed she told Complainant that she [Ms. Farina] would call her the day after the incident, that she left two messages with Ms. Cephas's roommate, and that she tried to reach Ms. Cephas several times the following week. Ms. Cephas claimed that she was told not to return to work until

she heard from Ms. Farina and that she never received the messages. Transcript at pp. 19-20. Mr. White refused to pay Ms. Cephas for the week that she had missed and warned her that future unauthorized failures to appear for a scheduled shift would be grounds for termination. Joint Exhibit 5. Ms. Cephas disagreed with a disciplinary memo about the incident but signed it.

16. On September 12, 1996, Complainant Cephas received a third disciplinary memo for frequent lateness. Joint Exhibit 6. Ms. Cephas admitted that she had been late and signed the memo. Ms. Cephas testified that the day staff employees were frequently late for work on the weekend but, to her knowledge, were not disciplined. Transcript at p. 22.

17. On October 3, 1996, Complainant Cephas received four more disciplinary memos. One memo states that, "C.H. [a resident] was found at 10 am, 9/25/ fully dressed and asleep in his bed. He was forgotten by overnight staff not sent off to day program at 8 am. Eva left at 9 am." Joint Exhibit 8. A second memo states that on 9/26/96 a resident was given Ativan when the medication was not ordered, that Complainant Cephas would not complete a medication error incident report form, and that she would not sign or discuss the incident. Joint Exhibit 7A. A third memo was given to Complainant Cephas on October 3, 1996 which states that: "Golytely given to D.N. when not ordered on 10/1/96. Did not read instructions on medication chart. Eva would not complete a Medication Error Incident Report Form." Joint Exhibit 7. Complainant Cephas refused to discuss

or sign the memo. A fourth memo states that, "Resident Mgr. attempted to meet with Eva to discuss medication errors and other incidents which occurred over the past week. Eva would not allow discussion. She yelled, pointed her finger, threw chairs, and accused the Res. Mgr. of conspiring against her. Res. Mgr. asked Eva to leave several times. Eva refused saying that the Res. Mg. had no right to tell her to leave. Eva attempted to escalate the situation to a physical assault. The Res. Mgr. went to telephone police. Eva left at that point." Joint Exhibit 7-B.

18. Complainant testified that she did not administer one of the medications as charged but that she signed her initials on the wrong spot in the patient's chart. According to her testimony, she explained this to Ms. Farina who said "it was fine" at the time. Transcript at p. 23-24. Ms. Cephas testified that the reason CH was not sent to his day program was that there was a message for the night staff that his mother was picking him up in lieu of attending the program. Transcript at p. 29. Ms. Cephas testified that she was not aware that she had to put residents in the van because the previous van driver had taken them from the house to the van. Transcript at p. 26. She claimed that she left a particular resident in the hall for the van driver but that a new driver was waiting outside for the resident to be brought outside. Transcript at p. 27. According to Ms. Cephas, she was accused of refusing to carry the resident to the van, and when she denied the accusation, Ms. Farina responded by saying, "you people can't be trusted." Transcript at p. 18. Ms. Cephas further testified that immediately after they exchanged words, Ms. Farina handed her four or five disciplinary memos. Ms. Cephas denies that

she threatened Ms. Farina or threw chairs. Transcript at p. 31. I do not credit Ms. Cephas's testimony.

19. Mr. White sent Complainant Cephas a letter on October 3, 1996, recapitulating events of October 3, 1996. Joint Exhibit 9. According to Mr. White, Ms. Cephas was suspended for two scheduled shifts on October 3, 1996 and October 7, 1996 because she refused to discuss and sign several of the disciplinary memos presented to her on October 2, 1996. Mr. White also states in his letter that suspension and a hearing are "required" and requests that Complainant contact him no later than October 10, 1996 to schedule such a hearing. Joint Exhibit 9. Mr. White attempted to contact Complainant Cephas on three occasions prior to October 10, 1996. Complainant did not respond to Mr. White prior to October 10, 1996, but eventually agreed to attend a hearing in his office. Transcript at p. 31.

20. An employment hearing was held on October 22, 1996. Complainant Cephas refused to sign the disciplinary memos. Following the hearing, Mr. White discharged Complainant on the same day. Joint Exhibit 11.

21. After her termination from TILL, Ms. Cephas worked for UniCare in Waltham and Life Link in Lowell in the home health care field. Complainant Cephas testified that between three and six months passed between leaving TILL

and beginning work at Life Link. She collected unemployment benefits during the period she was between jobs.

B. Kamara's Disciplinary History

22. Complainant Kamara received a "supervision record" on May 20, 1996 for coming to work on May 17, 1996 forty-five minutes late. According to Joint Exhibit 12, he refused to discuss the matter and left without signing the written record of the meeting.

23. On September 5, 1996, Complainant Kamara received an employee disciplinary memo for reporting late for his shift and not calling his supervisor or recording his reporting time accurately on the time sheet. He signed the disciplinary memo but did not agree with its contents. Joint Exhibit 13.

24. On September 9, 1996, Complainant Kamara received a "supervision record" involving, among other matters, the need for training, inaccurate time sheets, reporting late, calling residents "boy," and leaving urine on floors. He signed the record but disagreed with its contents. Joint Exhibit 14.

25. On October 7, 1996, Mr. White wrote a letter addressing concerns about Complainant Kamara: showing disrespect to his supervisor; having conflicts with co-workers; objecting to emergency staff people sleeping during the night shift,

causing people to not want to work with him; and failing to perform maintenance and household cleaning chores. Joint Exhibit 15. A supervisory meeting was held on October 7, 1996 with Complainant Kamara, Carol Farina, and Alan White. Mr. Kamara's supervisors attempted to go over his job description with him, but he claimed the job description was changed and would not discuss it even though it was the same one that had been in effect since the commencement of his employment. His supervisors also warned him to stop yelling at his co-workers. Mr. Kamara refused to sign the supervision record as required by TILL policy and was suspended for two days on October 9 and 10, 1996. His supervisor, Carol Farina, wrote to him on October 9, 1996, saying that he could return to work on October 11, 1996 only if he completed a supervisory meeting with her and Mr. White. Joint Exhibit 17. Mr. Kamara did not attend a supervisory meeting and he did not return to work on October 11, 1996. He was considered absent without leave during the remainder of October 1996. Joint Exhibit 22.

26. On October 9, 1996 and on October 31, 1996, Mr. Kamara's attorney, Cheryl Stein, contacted Kevin Stock, Program Director of TILL, to request an opportunity to discuss Mr. Kamara's suspension. Joint Exhibit 18. A meeting was held on November 7, 1996. Mr. Kamara and TILL administrators disagreed about numerous aspects of Mr. Kamara's work performance. Mr. Kamara wanted specific examples of the types of difficulties that he was allegedly having with his co-workers. Transcript at p. 151. He refused to return to work or accept a

transfer to another program. Another meeting was held on November 12, 1996, with Mr. Kamara, his attorney, Ms. Farina, Mr. White, and Mr. Stock in attendance. Mr. Stock came to the meeting with grievances by co-workers directed at Mr. Kamara. Mr. Kamara disagreed with the allegations, continued to challenge his job description, and once more refused to return to his position. As a result, he was notified in a letter of November 15, 1996, that he was terminated for abandoning his position, effective November 13, 1996.

27. From 1997 to the date of the public hearing, Mr. Kamara worked for the Commonwealth of Massachusetts. Immediately following his termination from TILL, he continued to work at the part-time job he had while working for Respondent.

### III. CONCLUSIONS OF LAW

Complainants do not allege precisely the same violation. Complainant Kamara claims that he was subject to disparate treatment in the imposition of discipline based on race whereas Complainant Cephas claims that she was subject to disparate treatment in her termination based on her Liberian national origin. I conclude that the discipline imposed on Mr. Kamara and the termination of Ms. Cephas were not based on race or national origin and, thus, their claims of disparate treatment discrimination must fail. I also conclude that there were legitimate, job-related reasons why the terms and conditions of employment at Acton House had a greater adverse impact on the

predominately black Liberian night shift managers than they did on the predominately Caucasian day shift managers.

#### A. Disparate Treatment

Pursuant to M.G.L. c. 151B, sec. (1), it is unlawful “for an employer, by himself or his agent, because of the race, color, . . . national origin, . . . of any individual to refuse to hire or employ or to discharge from employment such individual or to discriminate against such individual in compensation or in the terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification.” Absent evidence of disparate treatment discrimination,<sup>2</sup> the Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case in the context of these charges, the Complainants must show that: 1) they are members of a protected class; 2) they were adequately performing the duties of the job at issue; 3) they were subject to an adverse employment action; and 4) the job continued to be performed by others similarly situated not of the protected class. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts).

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<sup>2</sup> The only arguable direct evidence of disparate treatment is the allegation that Ms. Farina told Ms. Cephas, “you people can’t be trusted.” I decline to credit this allegation.

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainants at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext. See Blare, 419 Mass. at 444-4445. Complainants may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is pretextual, it is not required to find discrimination in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 117-118 (2000).

Complainants, who are black Liberians, are members of several protected categories – race, color, and national origin – although each Complainant asserted only one protected category apiece.<sup>3</sup> They have not established a prima facie case of disparate treatment discrimination, however, because they have failed to show that they were adequately performing their job duties at the time of their discipline and termination.

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<sup>3</sup> Complainant Kamara claimed he was discriminated against based on race/color (black). Complainant Cephas claimed she was discriminated against based on national origin (Liberian).

Insofar as Complainant Cephas's first disciplinary memo is concerned, she admits that she was lying down on a sofa with a blanket over her when discovered by Ms. Farina. Complainant may not have been asleep, but she was violating the rule that night managers be alert and upright throughout the night. Another disciplinary memo was given to Ms. Cephas for her frequent tardiness, conduct which she also acknowledged. Although she asserted at the public hearing that the day staff was frequently late for work on the weekends as well, she offers insufficient supporting evidence to support a disparate treatment claim. Four additional memos were given to Complainant Cephas on October 3, 1996, two of which involved allegations of administering medication without orders to do so. Ms. Cephas's response to the charges about medication errors was unconvincing in that she could not remember who told her to administer the medication, she could not distinguish one medication incident from the other, and she could not explain how marking the wrong spot on the medication chart absolved her of responsibility for administering medication that was not ordered. As far as the alleged altercation with Ms. Farina is concerned, Ms. Cephas did not credibly deny yelling, pointing her finger at Ms. Farina, and throwing chairs.

Complainant Cephas's lack of credibility about the specific incidents is compounded by her exaggeration about the staleness of the incidents at the time they were raised by management. Ms. Cephas claimed that Ms. Farina waited several weeks to draft the disciplinary memos and only did so after they argued about procedures for taking residents to the morning van. However, all of the incidents took place between September 25, 1996 and October 3, 1996; two of the incidents took place on October 1,

and October 3, 1996. Thus, none of the matters were stale at the time they were raised by Ms. Farina.

Even assuming that Complainant Cephas satisfied the requirement of demonstrating a prima facie case, Respondent has articulated legitimate, non-discriminatory reasons for her discipline and termination. Respondent has, therefore, succeeded in rebutting the prima facie case. See Wheelock College v. MCAD, 371 Mass. 130, 137 (1976). The facts do not establish that the disciplinary record is pretextual or that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment decision. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445.

Turning to Complainant Kamara, he has also failed to show that he was adequately performing his job duties at the time of his discipline and termination. Complainant Kamara received a “supervision record” on May 20, 1996 for coming to work on May 17, 1996 forty-five minutes late; an employee disciplinary memo on September 5, 1996 for reporting late for his shift, failing to notify his supervisor and failing to record his reporting time; an employee disciplinary memo on September 9, 1996 for maintaining inaccurate time sheets, reporting late, calling residents “boy,” and leaving urine on floors. On October 7, 1996, Complainant Kamara was warned about showing disrespect to his supervisor, having conflicts with co-workers, and failing to perform maintenance and household cleaning chores.

Mr. Kamara disagreed with the contents of the disciplinary memos, refused to address his supervisors' concerns, and declined to discuss his job description, insisting it was new even though it was the same one that had been in effect since the commencement of his employment. After Mr. Kamara was suspended for two days on October 9 and 10, 1996, he refused to attend a scheduled supervisory meeting. He did not return to work during the remainder of October 1996. After a meeting on November 7, 1996, Mr. Kamara refused to return to work or accept a transfer to another program, disagreed with allegations that he yelled at co-workers, and continued to challenge his job description. He was terminated for abandoning that position, effective November 13, 1996. I conclude that based on his employment history, Complainant Kamara has failed to establish that he adequately performed the duties of his job and therefore has failed to establish a prima facie case. Even if Complainant Kamara established a prima facie case, Respondent articulated legitimate, nondiscriminatory reasons for the disciplinary actions against him – that he was unreliable, difficult to get along with, failed to perform necessary chores, and ultimately abandoned his position. Those reasons are supported by credible evidence in the record and are sufficient to withstand any suggestion of pretext.

## B Disparate Impact

From January 1995 throughout the period that Complainants worked at Acton House, there were no day managers who were black. During the same period, all of the night managers were black Liberians except one who was Native-American. Complainants assert that this pattern is discriminatory because day manager positions are

better paid and superior in terms and conditions of employment to night manager positions. Respondent, on the other hand, explains that situation as the natural outcome of individuals communicating information about job openings to their friends.

Under M.G.L. c.151B, sec. 4(1), policies that have a disproportionate adverse impact on members of a particular protected group are unlawful even absent a showing of discriminatory intent unless justified by business necessity. See Wible v. McDonough, 10 MDLR 1497, 1510-1511 (1988); School Committee of Brockton v. MCAD, 386 N.E.2d 1240, 1245 (1979); Smith College v. MCAD, 380 N.E.2d 121, 125 (1978). In disparate impact cases, the Commission has followed the three-part burden-shifting framework set forth by the United States Supreme Court in Griggs v. Duke Power, 401 U.S. 424, 429-430 (1971). In order for Complainants to establish a prima facie case, they must show that the practice complained of has a substantial adverse impact on a legally protected class of which they are members. See Griggs, 401 U.S. at 430. Complainants may rely on statistical data to prove a prima facie case and the precise impact of the policy need not be proved to a mathematical certainty. See Bresnahan v. Route 114 Liquors, 17 MDLR 1129, 1133 (1995).

Complainants have established a prima facie case by presenting evidence that the predominately black night managers experienced different terms and conditions of employment relative to the predominately Caucasian day staff employees working at night in 1996 on a substitute basis. Whereas night managers were prohibited from sleeping on duty during night shifts, day staff working at night were allowed to sleep if

they were filling vacant positions on an emergency basis and had worked the previous shift. The result of this practice was that a night manager was forced to do the work of two employees in situations where a day worker filled in at night.

The impact of the sleeping on duty policy is compounded by the fact that the day staff receive salaries exceeded those of night managers by approximately \$2000.00 per year. This differential is justified on the basis that residents sleep at night but are active during the day. However, as a consequence of the racial breakdown of the day and night shift staffs, the salary structure of the institution, and the policy of permitting substitute staff to sleep at night, a Caucasian worker assigned to the night shift on a fill-in basis earned more and did less work than a non-Caucasian counterpart working the night shift on a full-time basis. The situation, as it existed in 1996, constituted a prima facie case of disparate impact discrimination. See e.g., Bresnahan v. Route 114 Liquors, 17 MDLR 1129, 1133 (1995) (a neutral policy, not directed at any particular group, can have an “adverse impact” on members of a particular class).

Once Complainants establish a prima facie case, the burden shifts to Respondent to demonstrate that its practices are required by business necessity. If Respondent articulates a business necessity, the Complainants must prove that a less restrictive alternative existed which would not have had the same discriminatory impact on the protected class. See Bresnahan, 17 MDLR at 1511-1522.

At step two, Respondent asserts that its practice of allowing day staff to sleep at night was permitted for a brief period in 1996 in situations where a daytime case manager was asked to work two consecutive shifts. According to Respondent, the practice was employed only “occasionally” during the 1996 period. The reason for the practice was to maintain Department of Mental Retardation-mandated staffing levels at night during a period of unusually high vacancies. This explanation is sufficient to satisfy Respondent’s burden of articulating a business necessity for the challenged practice.

At stage three, Complainants fail to prove that a less restrictive alternative existed which would not have had the same discriminatory impact. The practice of permitting daytime staff to sleep at night when working double shifts on an emergency basis was, undoubtedly, a source of resentment to nighttime case managers who were forced to shoulder the entire responsibility for evening chores while better paid co-workers slept on duty. Nonetheless, the evidence establishes that the policy was necessitated by staff shortages and state-mandated staffing requirements. It was in place for a relatively brief period. The credible evidence establishes that individuals of Liberian descent could have taken advantage of the practice favoring daytime workers had they transferred to daytime positions. For example, Gus Bailey, a Liberian night manager, transferred from Acton House to a day program at a different facility. These circumstances negate the claim of disparate impact discrimination.

IV. ORDER

Pursuant to the authority granted to the Commission under Massachusetts General Laws, chapter 151B, sec. 5, the complaint is dismissed.

Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

SO ORDERED this 12<sup>th</sup> day of July , 2004.

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Betty E. Waxman  
Hearing Officer