COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARCUS EDDINGS,
Complainants

v. DOCKET NO. 05-BPA-03196

CAPITOL COFFEE HOUSE,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Martin S. Ebel in favor of Complainant, Marcus Eddings. The Hearing Officer decided that Respondent violated M.G.L. c. 272, §98 and was liable for unlawful discrimination in a place of public accommodation on the basis of race. Complainant, who is black, was asked to pay at a coffee shop immediately upon ordering, while a group of four of his white colleagues who entered the restaurant before him was not asked to pay immediately upon ordering. The Hearing Officer essentially determined that Respondent did not meet its burden to produce a legitimate, non-discriminatory reason for its actions, and, having reached that conclusion, drew the inference that the only reason Complainant was asked to pay immediately was because of his race. The Hearing Officer awarded Complainant $5,000.00 in damages for emotional distress and Respondent appealed the decision to the Full Commission.

A thorough review of the record below reveals that the Hearing Officer's determination of unlawful discrimination was erroneous and not supported by substantial evidence, and the Hearing Decision is set aside for the reasons detailed below.

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 the 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, §1(6).

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). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(1)(h).

LEGAL DISCUSSION

The public accommodations law, M.G.L. c. 272, § 98, prohibits "any distinction, discrimination or restriction on account of race...relative to the admission of any person to, or his treatment in any place of public accommodation," and confers a civil right to "the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation ... subject only to the conditions and limitations established by law and applicable to all persons." Chapter 151B, § 5 authorizes the Commission to

investigate and adjudicate civil complaints of violations of the public accommodations law. Ekhator v. Stop & Shop Supermarket Co., 24 MDLR 147, 149 (2002).

Where there is no direct evidence of discrimination, the Commission typically employs the method of proof used in employment discrimination cases alleging disparate treatment to analyze claims under M.G.L. c. 272, § 98. Wheelock v. MCAD, 371 Mass. 130, 134-136 (1976); Lipchitz v. Raytheon Company, 434 Mass. 493, 495 (2001); Poliwczak v. Mitch's Marina and Campground, et al., 33 MDLR 133, 136 (2011); Reese v. May Dept. Store, 24 MDLR 395, 399 (2002). To prove disparate treatment, Complainant must first prove a prima facie case of discrimination, and then the burden of production shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. If Respondent does so, Complainant must prove by a preponderance of the evidence that Respondent's reason is pretextual and that Respondent acted with discriminatory animus. Lipchitz, 434 Mass. at 502-504. To establish a prima facie case of discrimination in a place of public accommodation, Complainant must demonstrate that he was: (1) a member of a protected class; (2) denied access, restricted, or treated differently from others not in his protected class, and (3) in a place of public accommodation. Poliwczak, 33 MDLR at 136 (citations omitted).

Complainant may satisfy the third-stage burden by circumstantial evidence, including an inference of discriminatory animus that may be drawn from proof that one or more reasons offered by Respondent are false. Lipchitz, at 504; McLaughlin v. City of Lowell, 84 Mass. App. Ct. 45, 63–64 (2013). When proceeding on a disparate treatment theory of liability, Complainant has the ultimate burden of proving Respondent acted with a discriminatory intent, motive, or state of mind when it treated Complainant

differently from others not in his protected class in a place of public accommodation. Lipchitz, at 504.

Complainant established through his own testimony and that of three of his white colleagues that on the morning of September 10, 2005, he was asked to pay immediately upon ordering a meal at the Capital Coffee House while his colleagues (four in total, all white) were not. Respondent acknowledged that the Complainant and his four colleagues were treated differently in this respect on the day in question, inasmuch as Complainant was asked to pay before his colleagues were, even though his colleagues ordered first. The Capital Coffee House is undeniably a place of public accommodation under section 98, and, for all of these reasons, the Hearing Officer correctly concluded that Complainant established a prima facie case under section 98.

However, the Hearing Officer erroneously concluded that Respondent had failed to articulate a legitimate, non-discriminatory reason for the difference in treatment between Complainant and his four colleagues. Through the testimony of Raffaele Maione (hereinafter "Mr. Maione"), the employee who took orders from Complainant and his four colleagues, and Sam Maione, the owner of the Capital Coffee House, Respondent provided evidence that the restaurant does not provide table service and has a long-standing policy requiring payment upon ordering at the counter, including evidence of a long-posted sign communicating the policy stating "Please Pay When Served." However, for customers who sit at the counter (and thus in the immediate vicinity of the employees working behind the counter), as Complainant's four colleagues had initially done upon entering the restaurant, the policy is often relaxed. Mr. Maione testified that Complainant's colleagues initially sat down at the counter while placing their orders, but

before he was able to ring up their bill and present it to them at the counter, they left to sit at a table away from the counter in the back of the restaurant. Mr. Maione testified that he did not stop Complainant's colleagues to insist on payment as they walked away from the counter because he wanted to give "good service" to Complainant, who was standing at the counter, waiting for his order to be taken. Mr. Maione was one of only two employees working at the restaurant that day, and, accordingly, Mr. Maione promptly took Complainant's order after briefly checking on a couple sitting at the counter he passed by on his way to serve Complainant. In assessing this explanation, the Hearing Officer granted that requiring payment upon ordering "may in fact be Respondent's policy," but found it immaterial whether Complainant's colleagues ever sat down at the counter on the morning in question. Given the acknowledgment of Respondent's policy, this reasoning was especially unsound.

The evidence was undisputed that the Complainant's colleagues entered the restaurant several minutes before Complainant and another colleague (Michael Ross) entered, and Complainant's testimony as well as that of his own witness (Ross) supported Mr. Maione's testimony that the first group initially sat at the counter while placing orders.[1] The evidence was also undisputed and conclusive that Complainant did *not* sit at the counter when placing his order. Moreover, in an establishment like Respondent's, where up to 800 customers are served daily and there is no table service (two facts credited by the Hearing Officer), requiring payment upon ordering but also sometimes

[1] Complainant's colleagues who entered the restaurant before him testified variously that they did not sit down at the counter, or did not believe they had sat down at the counter, and that they were already seated at a table when Complainant entered the restaurant. However, this testimony conflicted with Michael Ross's testimony and sworn affidavit, as well as Complainant's testimony that his colleagues were at the counter finishing up their order when he arrived. Moreover, Complainant would never have known at the time he was asked to pay that he had received different treatment if he hadn't had an opportunity to notice his colleagues walk away from the counter without paying. Complainant also conceded that his colleagues may have been sitting at the counter when he entered the restaurant.

relaxing the immediate payment requirement for counter service where employees will not lose track of customers is facially reasonable. Here, the evidence of facially reasonable business practices in conjunction with credible factual support of their existence and operation in a particular instance was sufficient to meet the burden of production at stage two. The Hearing Officer's conclusion to the contrary couched in terms of Respondent's credibility constitutes an error of law. See Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 128 (1997) ("[t]he defendant's 'burden of production [to articulate a legitimate, non-discriminatory reason] is not onerous,'" and "[t]he defendant is not required to persuade the fact finder that it was correct in its belief"), quoting Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 442 (1995).

From there, it was Complainant's burden to prove by a preponderance of the evidence that Respondent's reason for the different treatment was a pretext for unlawful discrimination. The most probative means of establishing pretext is to demonstrate different treatment among similarly situated persons. Matthews, 426 Mass. at 129–30. Conversely, complainants fail to show pretext by different treatment alone where they and their comparators are in fact not similarly situated in all relevant aspects. See id.; Campos v. Massachusetts Bay Transportation Auth., 93 Mass. App. Ct. 1118 (2018) (Rule 1:28); Ann Hartman v. MBTA, 22 MDLR 311, 314 (2000); and Massachusetts Commission Against Discrimination and Paul V. Ramesh v. City of Springfield, et al., 38 MDLR 20, 27 (2016). Here, Complainant, who arrived after his colleagues and did not sit at the counter, was treated in accordance with Respondent's long-standing standard policy (payment upon ordering) and his comparators who sat at the counter were not,

because of Respondent's relaxed practice of not requiring immediate payment from patrons who sit at the counter. As such, Complainant was not similarly situated to his colleagues for purposes of payment. See Matthews, at 129–30 (two employees are not similarly situated where one is subject to one policy and then seeks to be compared to others who were not subject to that policy or were subject to a different policy).

Nevertheless, the Hearing Officer treated Complainant and his colleagues as though they were similarly situated in all relevant respects, and ultimately reasoned that full and equal treatment under the public accommodations law required Mr. Maione to either demand immediate payment from Complainant's colleagues as they precipitously left the counter, or allow Complainant to pay later. This reasoning was also unsound given the sequence of events and the practicalities of the situation. While the amount of time that passed between Complainant's colleagues moving from the counter to a table and the taking of Complainant's order was not clearly established, the evidence as a whole suggests it was a matter of moments. Moreover, Mr. Maione was one of only two employees working in the restaurant on the day in question. It is unreasonable to have required Mr. Maione to run to the back room to demand immediate payment from the others before serving Complainant at the counter, or else ignore standard procedure in a busy, understaffed restaurant by allowing Complainant to pay later, in order to avoid violating the public accommodations law. Requiring Mr. Maione to make such a mental calculation does not comport with the practical reality of the situation. More problematically, the Hearing Officer also inferred discriminatory animus after crediting

that Respondent initially offered to treat Complainant exactly the same as the comparators with whom he was not actually similarly situated.[2]

In short, given the Hearing Officer's acknowledgement of Respondent's policy and his failure to give credence to the fact that the comparators were not similarly situated, the Hearing Officer was incorrect in drawing the inference that Mr. Maione acted with discriminatory intent, motive or state of mind when he failed to demand immediate payment from Complainant's comparators and when he sought payment from Complainant in accordance with policy. A "reasonable mind" would not make such an inference. See Katz, 365 Mass. at 365. As a result, the Hearing Officer's determination of discriminatory animus was not supported by substantial evidence and was erroneous. Moreover, in addition to Complainant's failure to demonstrate the necessary similarity between himself and his colleagues who ordered before him while seated at the counter, he did not present any other evidence of pretext, i.e. that Respondent's pay when ordering policy was fabricated or not necessary.[3]

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[2] There was consistent testimony between Mr. Maione and Complainant's witness, Michael Ross, that Complainant, Ross and Complainant's four colleagues interacted at the counter in a manner that made it was obvious they all knew each other. Mr. Maione testified that an additional reason for not demanding immediate payment from Complainant's colleagues as they left the counter area was because he was uncertain if Complainant was on the same bill. As such, Mr. Maoine asked Complainant if he wanted his order on the same bill, and, had Complainant said yes, the group would have been presented with one bill. The Hearing Officer credited Mr. Maione's testimony that he had asked Complainant if his order was to be on the same bill, concluding that Mr. Maione gave Complainant the same opportunity for delayed payment as his comparators even though he never sat down at the counter. Once Complainant declined being on the same bill, Mr. Maione asked him to pay consistent with the pay-when-ordering policy. Inferring discriminatory animus where Respondent offered to treat Complainant exactly the same as comparators with whom he was not actually similarly situated was unreasonable.

[3] Complainant offered no such proof at the public hearing, although in his Decision, the Hearing Officer called into question the existence of such a policy by reasoning that Respondent's "Please Pay When Served" sign had to mean payment due upon being served food. Such semantic reasoning is also unavailing (taking food orders is unquestionably a service), and cannot substitute for Complainant's required burden to prove that Respondent's proffered reason is false, only then allowing for an inference of discriminatory animus. Moreover, as previously discussed, the Hearing Officer also granted that Respondent had a pay-when-ordering policy, albeit while erroneously disregarding the evidence with respect to Complainant's colleagues having sat at the counter.

We arrive at the foregoing conclusions mindful that unlawful discrimination in places of public accommodation can often be insidiously subtle. However, even considering the possibility of such subtlety, in this case the Complainant, as a matter of law, fell short of his burden of proof. The Hearing Officer credited Complainant's testimony that he had never been subjected to such treatment, that he felt "upset and awful," and that his colleagues observed his distress—we do not doubt his distress, nor do we disturb these determinations or question the apparent the sincerity of Complainant's charge against Respondent. However, what Complainant sincerely perceived to be unfair treatment did not rise to the level of unlawful discrimination absent substantial evidence that the events in question were more than a misunderstanding born of the timing and circumstances under which he and his colleagues placed their orders. Even presuming that Mr. Maione made an error in judgment and could have relaxed the standard pay-upon-ordering policy for Complainant in order to dispel any possible sense of unfairness, such a mistake in judgment is not unlawful if not motivated by an intent to discriminate. See, e.g., Hartman 22 MDLR at 314 (in deciding whether Respondent acted with discriminatory intent, the issue is not whether Respondent's actions "were fair or unfair, kind or unkind, wise or unwise, rational or irrational," as "[i]t is not unlawful to make a mistake in judgment so long as that judgment was not motivated by an intent to discriminate.) See also City of New Bedford v. Massachusetts Comm'n Against Discrimination, 440 Mass. 450, 467–68 (2003) (not every claim of workplace unfairness is a claim of unlawful discrimination).

In sum, we have carefully reviewed Respondent's Petition and the full record in this matter and have weighed the objections to the decision as to the sufficiency of the

evidence in accordance with the standard of review articulated therein. As a result of our review, we conclude that the Hearing Officer's findings as to liability are erroneous and not supported by substantial evidence in the record. We therefore reverse the decision below. Accordingly, we do not address Respondent's remaining procedural objections with respect to the timing of the issuance of the Hearing Decision and the designation of the Hearing Officer.

ORDER

For the reasons set forth above, we hereby vacate the Hearing Officer's Order dated April 26, 2013, and dismiss the Complaint. 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 contest the Commission's decision by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within 30 days of service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and Superior Court Standing Order 96-1. Failure to file a petition in court within 30 days of service 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[4] this 1st day of February, 2019.

Sunila Thomas George
Chairwoman

Monserrate Quiñones
Commissioner

[4] Commissioner Hubbard dissents. Pursuant to 804 C.M.R. 1.03(2), two members of the Full Commission constitute a quorum to decide the appeal.

I respectfully dissent from the decision of the Full Commission and vote to affirm the decision of Hearing Officer Martin S. Ebel in favor of Complainant, Marcus Eddings. I conclude that the findings of fact are supported by substantial evidence. Katz v MCAD, 365 Mass. 357, 365 (1974); M.G.L.c. 30A, §1 (6). I concur with Hearing Officer Ebel's determination that Respondent violated M.G.L. c.272, §98 and was liable for unlawful discrimination in a place of public accommodation on the basis of race as, in my view, Respondent did not meet its burden to produce a legitimate, non-discriminatory reason for its actions. Given Hearing Officer Ebel's findings of fact, I agree with the inference he drew that the only reason Complainant was asked to pay immediately was due to his race. Given this and other considerations, I do not find the Hearing Officer's decision arbitrary, capricious, or an abuse of discretion.

As the Full Commission stated, the Commission is entrusted with the responsibility of investigating and adjudicating violations of the public accommodations law pursuant to M.G.L. c. 151B, §5 to ensure persons are free from discriminatory treatment based on their race. In this matter, Complainant established the prima facie elements of discrimination in a place of public accommodation. Specifically, Complainant is a member of a protected class (i.e. Black), was in a place of public accommodation (i.e. Capitol Coffee House), and was denied access, restricted, or treated differently from others not in his protected class (i.e. asked to pay upon ordering). Respondent acknowledges Complainant was treated differently from his white colleagues on the day in question as he was asked to pay his bill before his colleagues were asked to pay.

Once the prima facie case has been proven, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. It is here that I disagree with the Full Commission's decision that Respondent articulated such a reason. The Full Commission relies heavily upon two reasons for reaching its conclusion: (1) the long-standing policy of Respondent requiring payment upon ordering, using as evidence a posted sign stating "Please Pay When Served" and (2) the policy to pay upon ordering is relaxed for customers who sit at the counter.

In regards to Respondent's policy, the posted sign "Please Pay When Served" is ambiguous as it is not the actual practice of Respondent. In fact, the "policy" is not for customers to "pay when served" but to pay when placing their order. In this matter, the practice as articulated was not enforced with Complainant's white colleagues; only Complainant was asked to pay when he ordered. I find it noteworthy that Complainant was the only black person in the establishment at the time of the incident.

In regards to the distinction drawn about whether or not a customer sits at the counter or at a table, there was not consistent testimony at the hearing as to who or when anyone sat at the counter, stood at the counter, or went immediately to a table after ordering at the time of the incident. It is clear that at some point Complainant's colleagues were seated at a table. I agree with the Hearing Officer that the issue of being seated at the counter or at a table is immaterial because, regardless of where they sat, Complainant's four colleagues were not asked to pay after placing their order and were also not asked to pay when they left the counter. Additionally, by his own admission, Mr. Maione was aware that Complainant and his four colleagues interacted in a way that demonstrated they knew each other. The question remains as to why Mr. Maione chose

not to treat Complainant in the same manner as the rest of his party, therefore, and bring Complainant's bill to the table at the time he planned to present the bill at the table to Complainant's four colleagues.

As pointed out in the Full Commission's decision "unlawful discrimination in places of public accommodation can often be insidiously subtle." I do not support the Full Commission's characterization of Mr. Maione's actions as "a misunderstanding" or "an error in judgment" that should be excused. Such a "misunderstanding" or "error in judgment" did not occur in the treatment Complainant's white colleagues received. Given the totality of the circumstances, it was reasonable for the Hearing Officer to draw the inference that Respondent's different treatment of Complainant was a pretext and that the reason for demanding immediate payment from him was due to discriminatory animus based on race.

For these reasons, I respectfully dissent.

Sheila A. Hubbard
Commissioner