COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JEAN FLOYD,
Complainants

v. DOCKET NO. 09-BEM-00392

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Complainant Jean Floyd, a Corrections Officer for Respondent Department of Correction. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for engaging in one incident of unlawful discrimination based on Complainant's race, color, and gender in violation of M.G.L. c. 151B, § 4(1). The Hearing Officer also dismissed Complainant's claims of discriminatory and retaliatory terminations against Respondent. Both Complainant and Respondent have appealed to the Full Commission.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et seq.*), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is

defined as "....such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. 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). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference).

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). When determining whether a Hearing Officer's decision is supported by substantial evidence, "we examine the entirety of the administrative record and take into account whatever in the record fairly detracts from the supporting evidence's weight." Cobble v. Comm'r of Dep't of Soc. Servs., 430 Mass. 385, 390 (1999). If upon completion of the review "we determine that the cumulative weight of the record evidence tends substantially toward an opposite inference, we must reverse the Hearing Commissioner's decision." Johansson v. Dep't of Corrections, 32 MDLR 95, 96 (2010).

LEGAL DISCUSSION

M.G.L. c. 151B, § 4(1) prohibits discrimination in employment on the basis of gender, race, and color. In the absence of direct evidence, in order to establish a prima facie case of

gender, race, and color discrimination, Complainant must show that: (1) she is a member of a protected class, (2) she was performing her position in a satisfactory manner, (3) she was subjected to adverse treatment, and (4) similarly situated persons not of her protected class were treated differently. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997). Once a prima facie case is established, Respondent must articulate legitimate non-discriminatory reasons for its actions. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000). Complainant must then demonstrate that Respondent's articulated reasons are pretext for discrimination. Lipschitz v. Raytheon Co., 434 Mass. 493, 507 (2001); see Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016).

In order to satisfy the fourth prong of Complainant's prima facie case—that similarly situated persons not in her protected class were treated differently—the Complainant must "identify and relate specific instances where persons similarly situated in all relevant aspects were treated differently." Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989), *overruled on other grounds by* Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004). To be similarly situated "a comparator's circumstances need not be identical to those of the complainant." Trustees of Health & Hosps. of Boston, Inc. v. MCAD, 449 Mass. 675, 683 (2007); see Smith v. Straus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995). However, a comparator must be "similarly situated in terms of performance, qualifications, and conduct, without such differentiating or mitigating circumstances that would distinguish their situations." Smith, 40 F.3d at 17; see Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 130 (1997). A comparator employee must have engaged in the "same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or [their] employer's treatment of them for it." Perkins v.

Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996), *citations omitted.* Although the offenses of two employees need not be identical, the offenses must be of comparable seriousness. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated . . . Exact correlation is neither likely nor necessary, but the cases must be fair congeners." Dartmouth Review, 889 F.2d at 19.

The Hearing Officer determined that "with respect to the incident of January 25, 2009, which resulted in Complainant's three-day suspension . . . Complainant has established a prima facie case of discrimination on the basis of her gender, race, and color." Specifically, the Hearing Officer found that on January 25, 2009, Complainant was slouching in her chair and appeared to be sleeping when her supervisor, Lieutenant Michael Jeghers, called out to her and directed her to sit up. Complainant proceeded to argue with Lieutenant Jeghers and told him that he could not tell her what to do. Lieutenant Jeghers directed her to write an incident report for this interaction, which she initially refused to do, but later complied and wrote an incident report. The Hearing Officer found that there was "no question that Complainant appeared to be sleeping and behaved in an insubordinate manner . . . [and] that the matter would not have been reported had Complainant complied with Jeghers' direction initially and that she escalated the incident." Complainant received a three-day suspension for this conduct, which was upheld on appeal to Respondent's Commissioner. The Hearing Officer determined that the Complainant's receipt of a three-day suspension for this incident was much more severe than the discipline imposed on Garry Moriarty, a white male officer, for a similar incident of misconduct.

Specifically, on March 3, 2008, Moriarty was involved in a verbal altercation with a nurse whom he felt was not following proper hygiene procedures. Lieutenant Jeghers attempted

to calm Moriarty down, but Moriarty began yelling at Lieutenant Jeghers. Moriarty was instructed to write an incident report regarding this incident, which he initially refused to do. He falsely represented to Lieutenant Jeghers that the computer was not working. Moriarty eventually complied and wrote an incident report. Moriarty received a letter of reprimand for this misconduct. The Hearing Officer determined that this comparator evidence established that Complainant was subjected to disparate treatment because Complainant's three-day suspension was much more severe than Moriarty's written reprimand for his similar incident of misconduct involving Lieutenant Jeghers.[1] We conclude that this determination was erroneous.

Although we agree with the Hearing Officer that Complainant's misconduct on January 25, 2009, and Moriarty's misconduct on March 3, 2008, are incidents of comparable seriousness with regard to their insubordination, we conclude that Complainant and Moriarty are not "similarly situated" because Complainant's disciplinary history is a "differentiating or mitigating circumstance" that distinguishes Respondent's treatment of Complainant and Moriarty for their similar misconduct. Lindeman v. Saint Luke's Hosp. of Kansas City, 899 F.3d 603, 606 (8th Cir. 2018) (providing that to be similarly situated, a complainant must show that he and the more leniently treated employee have comparable disciplinary histories); Goldstein v. Brigham & Women's Faulkner Hosp., Inc., 80 F. Supp. 3d 317, 327 (D. Mass. 2015) (providing that two individuals not "similarly situated" where one had no prior disciplinary actions and the other individual had two prior disciplinary actions).

The evidence in the record shows that Respondent had a policy of progressive discipline for disciplinary infractions. See Respondent's Exhibit 70. In accordance with Respondent's disciplinary policy, prior disciplinary actions are taken into account in Respondent's

[1] The Hearing Officer determined that Moriarty was the only similarly situated comparator to Complainant, as Moriarty's disciplinary matter was most analogous to Complainant's, and both incidents involved argumentative behavior and insubordination toward Lieutenant Jeghers.

determinations as to the discipline that should be imposed on an employee for their misconduct.[2] Here, Complainant had thirteen prior disciplinary incidents, including eight prior suspensions, before receiving the three-day suspension for the January 25, 2009 incident. Moriarty testified that he had no prior discipline and the receipt of his letter of reprimand for the March 3, 2008 incident was the first time he was disciplined for any misconduct. See Audio Transcript Day 7, 1:51:40 to 1:52:30. Because disciplinary history is a relevant factor that Respondent considers when imposing discipline, the Hearing Officer erred in concluding that Complainant and Moriarty were similarly situated "in all relevant aspects." See Dartmouth Review, 889 F.2d at 19; Trustees of Health & Hosps. of Boston, Inc., 449 Mass. at 683. Because Complainant and Moriarty are not similarly situated, the Hearing Officer's determination that Complainant was subjected to disparate discipline when she received a three-day suspension for the January 25, 2009 incident must be vacated.

Addressing Complainant's remaining claims, Complainant argues that the Hearing Officer erred in determining that Respondent was not liable for unlawful discrimination and retaliation when it imposed other discipline and terminated Complainant on June 8, 2009 and terminated her again on November 22, 2011.[3] Complainant asserts that the Hearing Officer ignored substantial evidence in the record supporting a determination that Respondent's terminations of Complainant were discriminatory and retaliatory and that Respondent subjected Complainant to disparate discipline. We disagree with Complainant's assertions.

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[2] Respondent's Superintendent, Raymond Marchilli, testified regarding Respondent's disciplinary policy and stated that when imposing discipline on an employee Respondent considers the severity of the misconduct and the disciplinary history of the employee. See Audio Transcript Day 9, 54:19-56:15.

[3] The majority of Complainant's arguments on appeal focus on the Hearing Officer's factual findings, her credibility determinations, and the weight she gave to the evidence. Complainant argues that the Hearing Officer erred by making findings that are not supported by substantial evidence and crediting the testimony of certain witnesses over others in making her findings of fact. We reiterate that absent an abuse of discretion, error of law, or a determination that the decision was arbitrary or capricious, the Full Commission defers to the Hearing Officer's credibility determinations and findings of fact where there is substantial evidence to support the finding. . School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972).

The evidence in the record supports the Hearing Officer's determination that Complainant was not subjected to disparate discipline or retaliation when she was terminated on June 8, 2009 and again on November 22, 2011. Specifically, the severity of Complainant's underlying misconduct, which resulted in her receipt of Commissioner Hearings, lengthy suspensions, and terminations, supports the Hearing Officer's determination that Respondent had legitimate, non-discriminatory reasons for taking disciplinary action against Complainant. The record reflects that Complainant's first termination, which was ultimately reduced to a 60-day suspension, was based on her unreported association with a former DOC inmate and her unreported contact with law enforcement officials concerning an investigation into Complainant's possible involvement in an alleged shop-lifting incident.[4] Complainant's second termination was based on several matters including: Complainant's tardiness and her violations of Respondent's sick leave policy, an incident where Complainant was watching television instead of guarding a dangerous inmate and for a serious incident where Complainant observed a co-worker drop his keys, which she subsequently picked up and discarded down an elevator shaft. The loss of these keys was a significant security breach and it resulted in the entire building being locked down and inmates and staff being searched for the keys, as no one was aware that Complainant had picked up the keys and discarded them. The Hearing Officer did not err in determining that Respondent had legitimate, non-discriminatory reasons for terminating Complainant's employment.

Further, the comparator evidence in the record does not show that Complainant was subjected to harsher discipline than white male officers for her misconduct. Instead, the

[4] When Complainant appealed her June 8, 2009 termination to an arbitrator, the arbitrator, in her decision reducing Complainant's termination to a 60-day suspension, specifically noted that Complainant "is firmly on notice that future misconduct may end her career." See Complainant's Exhibit 12.

evidence reflects that comparable white male officers who engaged in similarly serious incidents of misconduct were disciplined with lengthy suspensions and/or terminations. There was no error in the Hearing Officer's determination that race, gender, or retaliatory animus did not provide the motivation for Respondent to take disciplinary action against Complainant.

In sum, after careful review of the Petitions for review and the full record in this matter, we determine that Respondent was not liable for discrimination or retaliation. We therefore reverse the decision below as to the discrimination claim and affirm the dismissal of Complainant's discriminatory and retaliatory terminations claim. Accordingly, we do not address Complainant's claims on appeal regarding emotional distress damages. Further, because Complainant has not prevailed on any of her claims, we do not address her Petition for Attorneys' Fees and Costs.

ORDER

For the reasons set forth above, we hereby vacate the Hearing Officer's decision as to Complainant's claim of discrimination based on race, color, and gender and dismiss this claim. We also affirm the Hearing Officer's dismissal of Complainant's claim of retaliatory and discriminatory terminations. 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 thirty (30) days of service of this decision and must be filed in accordance with M.G.L. c.30A, c.151B, § 6, and the 1996 Standing Order on Judicial Review of Agency Actions, Superior Court Standing Order 96-1.

Failure to file a petition in court within thirty (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[5] this 19th day of November, 2019

Sunila Thomas George
Chairwoman

Nelldy Jean-Francois
Commissioner

[5] Commissioner Monserrate Quiñones did not participate in the Full Commission deliberations concerning this matter. The Investigating Commissioner, Chairwoman Sunila Thomas George, participated in this matter in order to create a quorum. See 804 CMR 1.23(1)(c).