COMMONWEALTH OF MASSACHUETTS
COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission Against Discrimination and Lenanetta Johnson,
Complainants

v. Docket: 16-BEM-01258

Arabic Evangelical Baptist Church, Inc. d/b/a Lighthouse Early Learning Center,
Respondent

Appearances:

For the Complainants:
Commission Counsel Caitlin Sheehan Esq.

DECISION OF THE HEARING COMMISSIONER

Lenanetta Johnson ("Ms. Johnson") filed a complaint with the Massachusetts Commission Against Discrimination ("Commission") on May 17, 2016 against her former employer, the Arabic Evangelical Baptist Church, Inc. d/b/a Lighthouse Early Learning Center ("Lighthouse"),[1] alleging that Lighthouse terminated her employment on April 14, 2016 because she was a female and/or pregnant in violation of M.G.L. c. 151B. The complaint was certified to public hearing by the Investigating Commissioner on December 14, 2021.

On March 16, 2023, I conducted a public hearing. The hearing lasted one day. Three persons testified. Neither Lighthouse nor its Duly Authorized Representative appeared at the public hearing. Pursuant to the Commission's Procedural Regulations at 804 CMR 1.12 (10)

[1] On October 21, 2022, Commission Counsel filed a Motion to Correct Misnomer of Respondent which was granted. The caption was amended to refer to the Respondent as Arabic Evangelical Baptist Church, Inc. d/b/a Lighthouse Early Learning Center.

(2020), I entered a default against Lighthouse. On March 21, 2023, written Notice of the Entry of Default was served upon Lighthouse and its Duly Authorized Representative. On March 23, 2023, and again on May 17, 2023, Lighthouse petitioned to vacate the default. Those petitions were denied.

In this decision, unless stated otherwise, where testimony is cited, I found such testimony credible and reliable, and where an exhibit is cited, I found such exhibit reliable to the extent cited. Evidence not cited within this decision was considered and does not alter my findings of fact or conclusions of law.

I. FINDINGS OF FACT

1. Ms. Johnson is a certified pre-school teacher who received her certification from the Massachusetts Department of Early Education in 2007. (Johnson; Exhibit 1)
2. Lighthouse is a daycare center that serves children from three months to six years old. Lighthouse has five classrooms: Infant, Toddler I, Toddler II, Preschool I and Preschool II. Each classroom is staffed by at least one teacher and one assistant. Lighthouse is located at 222 Spring Street in West Roxbury, MA. The top floor of the building serves as a church and the basement serves as the daycare center. (Johnson; Stockholm)
3. Ms. Johnson applied for a job at Lighthouse and interviewed with Shacorra Williams ("Ms. Williams"), Lighthouse's director ("Director") in September of 2015. Shortly thereafter, Ms. Johnson received an offer letter from Lighthouse as a full-time teacher working Monday through Friday, from 7:30AM until 3:00PM. Ms. Johnson started working at Lighthouse on September 21, 2015 as a teacher in the Preschool I classroom. (Johnson; Exhibit 2)

4. Chintia Stockholm ("Ms. Stockholm") worked at Lighthouse as a teacher in the Preschool I classroom during Ms. Johnson's employment. Ms. Stockholm worked Tuesday through Friday from 9AM to 5:00PM. Ms. Stockholm and Ms. Johnson had a good relationship, texted regularly, and socialized during work talking about friends and family. Ms. Stockholm believed Ms. Johnson was a good teacher and was well-organized. (Johnson; Stockholm)

5. Lighthouse's teachers and assistants received a 30 minute lunch break each day. Until after Amanda Miller became Director on April 1, 2016, Ms. Johnson and Ms. Stockholm decided among themselves how to ensure coverage in Preschool I during their lunch breaks. Ms. Johnson would take her 30 minute lunch break around 11AM while Ms. Stockholm watched the children, and Ms. Stockholm generally took her 30 minute lunch break from 12PM to 12:30PM while Ms. Johnson watched the children in Preschool I. Until Ms. Miller became Director, the other classroom teachers and assistants similarly decided among themselves in their respective classrooms how to ensure coverage during lunch breaks. (Johnson; Stockholm)

6. On or about February 1, 2016, Ms. Johnson found out that she was pregnant. She was about five and one half weeks pregnant at the time. The next day, Ms. Johnson told Ms. Williams that she was pregnant and provided Ms. Williams with a list of Ms. Johnson's scheduled doctor's appointments. They did not discuss time off or whether Ms. Johnson intended to return to work after her pregnancy. (Johnson)

7. Ms. Johnson had a good working relationship with Ms. Williams. Ms. Williams left her employment with Lighthouse in mid-February 2016. (Johnson)

8. During Ms. Williams' tenure as Director, there was a sufficient number of teachers and assistants in the classrooms so covering lunch breaks was not an issue. At some point after Ms. Williams left, problems with lunch breaks coverage emerged as Lighthouse began losing staff and the daycare became short staffed. (Stockholm)

9. Marina Awad ("Ms. Awad"), the accountant for the church, assisted with the daycare director's responsibilities from mid-February 2016 until April 1, 2016. At some point during this period, when Ms. Johnson was approximately two months pregnant, she told Ms. Awad about her pregnancy. During this conversation, Ms. Awad asked Ms. Johnson if she was planning to take maternity leave. Ms. Johnson told Ms. Awad that she would be taking maternity leave in September 2016 and would return to work in December 2016. Ms. Awad stated her belief that Ms. Johnson would become a stay-at-home mom. Ms. Johnson told Ms. Awad that she was not going to be a stay-at-home mom. During a subsequent conversation, Ms. Awad informed Ms. Johnson that maternity leave was unpaid. (Johnson)

10. Ms. Johnson testified that Ms. Awad asked her every week if she was going to be a stay-at-home mom and sometimes asked that question in front of others, including her co-teachers, making her uncomfortable. (Johnson) I reject this testimony. The co-worker with whom Ms. Johnson worked the most, and who would have likely observed such interactions if they had occurred, Ms. Stockholm, testified credibly that she *never* witnessed Ms. Awad interact with Ms. Johnson. Ms. Stockholm was not even aware of Ms. Johnson's pregnancy during the period that Ms. Awad was assisting with the daycare director's responsibilities. (Stockholm)

11. On April 1, 2016, Lighthouse hired a new Director, Amanda Miller ("Director Miller"). (Johnson)

12. In early April of 2016, Ms. Johnson requested that Director Miller provide her with extra help in the Preschool I classroom. Director Miller asked if Ms. Johnson wanted to transfer to the Infant classroom. Ms. Johnson declined. (Johnson) I infer that Director Miller extended this offer in response to Ms. Johnson's request for assistance. Based on Ms. Johnson's demeanor while testifying on this topic, I conclude that Ms. Johnson was not offended by this offer to transfer.

13. On Monday, April 11, 2016, Director Miller entered the Preschool I classroom and yelled at Ms. Johnson that she was not doing her job but did not explain how Ms. Johnson was not doing her job. (Johnson)

14. Ms. Johnson testified that she did not know the reason why Director Miller yelled at her on April 11, 2016 and that Director Miller had never previously told her that there were any problems with her job performance. (Johnson) I reject this testimony. An employee who was performing her job well and had not received prior criticism from her supervisor would likely have asked her supervisor to explain the admonishment. There is no evidence that Ms. Johnson asked Director Miller while she was in the classroom during this incident for the reason for the admonishment. Further, there is no evidence that Ms. Johnson went to speak to Director Miller afterwards regarding the incident.

15. Ms. Johnson has no actual knowledge of whether Director Miller knew that she was pregnant. Ms. Johnson did not inform Director Miller that she was pregnant. Ms. Johnson did not discuss her pregnancy or maternity leave with her. (Johnson)

16. Ms. Johnson assumed that during her training, Director Miller would have learned from Ms. Awad of Ms. Johnson's pregnancy. I reject this testimony as pure speculation.

17. Ms. Johnson testified that she was visibly pregnant during the time she was employed at Lighthouse and Ms. Miller was Director. (Johnson) I reject that testimony. Based on the following evidence, I infer that Ms. Johnson was not visibly pregnant during that period. Ms. Stockholm, the person with whom Ms. Johnson worked the closest, did not learn of Ms. Johnson's pregnancy until the end of Ms. Johnson's employment - the week of April 11, 2016 - when Ms. Johnson told Ms. Stockholm and a "[c]ouple of our friends at Lighthouse" that she was pregnant. Ms. Stockholm was surprised to learn of Ms. Johnson's pregnancy and asked, "[w]hy didn't you tell me?" Further, when asked at the hearing "was Ms. Johnson visibly pregnant?" at that time, Ms. Stockholm did not answer in the affirmative and instead stated that she "noticed [Ms. Johnson] was getting a little tired a little bit and stuff, so it made sense when she told me" that she was pregnant. (Stockholm)

18. There is no evidence that Ms. Johnson's pregnancy was relayed to Director Miller before she terminated Ms. Johnson's employment.

19. Director Miller instituted changes regarding lunch break coverage at Lighthouse. As noted, previously, teachers and assistants worked out the coverage themselves in their respective classrooms. Under that practice, at times, assistants were left alone in a classroom with the children. Director Miller believed that a teacher was legally required to be in the classroom with the children at all times. Director Miller instituted a break list – a written schedule of lunch break coverage. A consequence of the new lunch break coverage policy was that teachers, such as Ms. Johnson, were required to leave their

classroom more often to cover lunch breaks in other classrooms that previously would have been covered by an assistant. Ms. Stockholm and other teachers were under the impression that Director Miller and the "other bosses" would cover the lunch breaks when Lighthouse was short staffed so that teachers would not have to leave their own classrooms. However, that was not the case. Teachers were required to cover other teachers' lunch breaks. The new lunch break coverage policy caused a lot of stress for the teachers. (Johnson; Stockholm)

20. The new lunch break coverage policy caused "a lot of problems" between Ms. Johnson and Director Miller. Ms. Johnson did not like the changes made by Director Miller. Ms. Johnson and Director Miller did not get along. (Stockholm)

21. On April 14, 2016 at approximately 12PM, Gigi ("Gigi"), a teacher who worked in the Infant classroom, came to Ms. Johnson's classroom looking for Sarah ("Sarah"), a teacher who worked in the Toddler I classroom, regarding lunch break coverage. As Sarah could not be located, Ms. Johnson and Gigi went to Director Miller who informed them that she would look into the matter. About 15 minutes later, Director Miller asked Ms. Johnson and Ms. Stockholm to cover Gigi's and her assistant's lunch breaks. Ms. Stockholm covered both lunch breaks. Ms. Johnson covered neither lunch break. Ms. Johnson did not tell Director Miller why she did not cover those lunch breaks. Ms. Johnson did not cover those lunch breaks because she believed it was not her day to cover lunch breaks as she had covered lunch breaks for three hours the day before. (Johnson; Stockholm) Based on her demeanor on this topic, Ms. Johnson resented that Director Miller asked her to cover lunch breaks on April 14, 2016.

22. Subsequently that day, Ms. Johnson was asked to come to Director Miller's office. When Ms. Johnson walked in, Ms. Awad was sitting at the table with Director Miller. Ms. Johnson was informed that her employment was terminated because she had refused to cover lunch breaks. Ms. Johnson told them that she had not failed to cover lunch breaks. This meeting lasted about 10 minutes. Ms. Stockholm heard from others that there was arguing in the office. (Johnson; Stockholm)

23. After the meeting, Ms. Johnson went back to the Preschool I classroom and told Ms. Stockholm that she had been fired. Ms. Johnson left Lighthouse and never returned. (Johnson; Stockholm)

24. In that same week, but before Ms. Johnson's termination, Ms. Stockholm learned that she too was pregnant. Ms. Stockholm continued to work at Lighthouse for the remainder of her pregnancy. Ms. Stockholm was asked by Lighthouse if she was planning to take maternity leave. Ms. Stockholm believed she was asked this question so Lighthouse could plan for future coverage. (Stockholm)

II. LEGAL ANALYSIS

To prevail on her disparate treatment claim of employment discrimination under M.G.L. c. 151B, Ms. Johnson must show: (1) she is a member of a protected class; (2) she was subject to an adverse employment action; (3) Lighthouse bore discriminatory animus in taking that action – because she was female and/or pregnant;[2] and (4) that animus was the determinative cause for

[2] M.G.L. c.151B, §4, paragraph 1 makes it an unlawful practice for an employer to discriminate against an employee because of the employee's sex. An action of an employer that adversely affects an employee because of her pregnancy status or maternity leave is sex discrimination. Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160, 167 (1978) ("Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex."); Sch. Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 377 Mass. 392, 398 (1979) ("Having previously determined that pregnancy is a gender-linked classification, *Massachusetts Elec.* …, we are compelled to conclude that the Commissioner was correct in

the action.[3] Adams v. Schneider Elec. USA, 210 N.E.3d 917, 926 (Mass. 2023); Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016); Trustees of Health & Hosps. of City of Bos., Inc. v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 681–82 (2007); Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001)

Regarding the four requisite elements, Ms. Johnson proves the first two. By virtue of being a pregnant female at the time of her termination, she is a member of a protected class. Her termination of employment from Lighthouse is an adverse employment action. Scott v. Encore Images, Inc., 80 Mass. App. Ct. 661, 670 (2011) ("termination from employment is an adverse employment action"; retaliation claim)

LACK OF DISCRIMINATORY ANIMUS

Ms. Johnson must next prove that Lighthouse harbored discriminatory animus towards her based on her sex and/or pregnancy. The record is devoid of credible evidence of discriminatory animus as to sex untethered to Ms. Johnson's pregnancy status.

finding the school committee's policy of excluding pregnancy from sick leave coverage sexually discriminatory."); Torres & Massachusetts Commission Against Discrimination v. New England Sports Orthopedics, Spine & Rehabilitation, 42 MDLR 57, 61 (2020) (Hearing Officer Decision) ("Discrimination based on pregnancy has long been held to be discrimination based on gender.")

[3] "Under the plain language of G. L. c. 151B, s. 4, liability attaches when an adverse employment decision is made 'because of' discrimination." Lipchitz v. Raytheon Co., 434 Mass. 493, 505 (2001) In "indirect evidence cases the plaintiff must prove that the defendant's discriminatory animus was the determinative cause … in bringing about the adverse decision." Id. at 504 "A cause is the determinative cause if it was the active efficient cause in bringing about the adverse employment action. [Citation omitted] In other words, the plaintiff must prove by a preponderance of the credible evidence that the defendant's discriminatory animus contributed significantly to that action, that it was a material and important ingredient in causing it to happen. [Citation omitted] That a defendant's discriminatory intent, motive or state of mind is 'the determinative cause' does not imply the discriminatory animus was the only cause of that action." [Citations omitted] Id. at 506, n. 19

Regarding her pregnancy status, Ms. Johnson contends that two persons with power relative to her employment - Ms. Awad and Director Miller - made statements or took actions demonstrating animus against her pregnant status. However, the record is devoid of credible evidence of discriminatory animus as to her pregnant status.

As to Ms. Awad, Ms. Johnson testified that Ms. Awad asked her every week if she was going to be a stay-at-home mom and sometimes asked that question in front of others, including her co-teachers. However, I rejected that testimony. Regarding the assertion that there were weekly interactions between Ms. Awad and Ms. Johnson, Ms. Stockholm, the person who interacted with Ms. Johnson the most, never saw *any* interactions between Ms. Johnson and Ms. Awad thereby negating the contention that Ms. Awad and Ms. Johnson had these conversations on a weekly basis. Further, instead of the negative atmosphere relative to Ms. Johnson's pregnancy status that Ms. Johnson seeks to portray regarding Ms. Awad, the evidence reflects only a couple of common communications regarding her pregnancy. During one conversation, Ms. Johnson notified Ms. Awad that she was pregnant. Ms. Awad asked Ms. Johnson if she was planning to take maternity leave. Ms. Johnson told Ms. Awad that she would do so and planned to then return to work. Ms. Awad stated her belief that Ms. Johnson would become a stay-at-home mom. Ms. Johnson disagreed. In another conversation, Ms. Awad told Ms. Johnson that maternity leave was unpaid. This is not sufficient to establish discriminatory animus on the part of Ms. Awad regarding Ms. Johnson's pregnancy.

The evidence is similarly insufficient to establish discriminatory animus on the part of Director Miller regarding Ms. Johnson's pregnancy. It would be conjecture to infer that Director Miller was even aware that Ms. Johnson was pregnant at the time that Director Miller terminated Ms. Johnson's employment. Even Ms. Johnson's co-workers, whom she was close to, including

Ms. Stockholm, were not aware that Ms. Johnson was pregnant until a few days before her termination, and there is no evidence that this knowledge was subsequently relayed to Director Miller before the termination. Ms. Johnson admitted that she did not inform Director Miller that she was pregnant. Ms. Johnson had no actual knowledge as to whether Director Miller knew she was pregnant.

Ms. Johnson's claims of discriminatory animus based on her pregnancy is further refuted by the evidence that Ms. Stockholm was also pregnant at the same time, and she did not suffer an adverse employment action. Ms. Stockholm continued to work and remained an employee of Lighthouse throughout her pregnancy.

Discriminatory animus is also not found in Director Miller's inquiry in early April 2016 whether Ms. Johnson wanted to transfer to the Infant classroom. This inquiry was in response to Ms. Johnson's concern that she expressed to Director Miller that she did not have enough help in her current workspace, Preschool I.

Discriminatory animus is also not found in the incident between Director Miller and Ms. Johnson on April 11, 2016 when Director Miller entered Preschool I and yelled at Ms. Johnson that she was not doing her job. There is no connection between this incident and Ms. Johnson's pregnancy. While Ms. Johnson asserts that she did not know the reason that Director Miller yelled at her on April 11, 2016, presumably in search for some inference that the unexplained outburst somehow related to her pregnancy, as reasoned above, I rejected such testimony.

The failure by Ms. Johnson to establish discriminatory animus regarding her sex and/or her pregnancy is fatal to her disparate treatment claim.

LACK OF CAUSATION

Ms. Johnson's claim of disparate treatment also fails for an independent reason. There is insufficient evidence to find that the determinative cause of her termination was other than a dispute between Ms. Johnson and Director Miller regarding Ms. Johnson's failure to provide lunch break coverage. Director Miller instituted changes regarding lunch break coverage. A consequence was that teachers were required to leave their own classroom more often to cover breaks in other classrooms. The new policy caused stress for the teachers. Ms. Johnson did not like the changes made by Director Miller, and the new policy caused "a lot of problems" between Ms. Johnson and Director Miller. On April 14, 2016, their "problems" reached a climax. Director Miller asked Ms. Johnson and Ms. Stockholm to cover another teacher and her assistant's lunch breaks. Ms. Stockholm covered both. Ms. Johnson covered neither. Ms. Johnson did not tell Director Miller why she did not cover the lunch breaks. Later that day, Ms. Johnson was told Lighthouse was terminating her employment because Ms. Johnson refused to cover lunch breaks.

III. MCDONNELL DOUGLAS FRAMEWORK

Before concluding, I address the legal framework used in this case. The reader likely has recognized that I have not applied the burden-shifting paradigm set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted and amplified in Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130 (1976). In this section, I describe the *McDonnell Douglas* framework and my analysis in choosing not to use this framework.

Frequently, the employee lacks direct evidence of discriminatory animus and determinative causation and seeks to prove those two elements through indirect or circumstantial

evidence. In those cases, the Commission has historically utilized the McDonnell Douglas framework in its hearing decisions. See e.g., Eslinger v. Massachusetts Comm'n Against Discrimination, 101 Mass. App. Ct. 1104, review denied, 490 Mass. 1102 (2022) (Rule 23 Decision) at * 3 ("hearing officer analyzed Eslinger's claim using the three-stage burden shifting model set forth" in *McDonnell Douglas* and adopted in *Wheelock*).

Under the *McDonnell Douglas* framework, the employee first has to establish a prima facie case. A prima facie case eliminates the most common nondiscriminatory reasons for challenged actions and creates a presumption of discrimination. The employer can rebut the presumption by articulating a lawful reason for its decision and producing credible evidence to show that such reason was the real reason for its action. If the employer fails to meet its burden of production, the presumption created by the prima facie case entitles the employee to judgment. If the employer meets its burden, the presumption drops from the case, and the employee must show that the basis of the action was unlawful discrimination which may be accomplished by showing the proffered reason is not true. A showing that the articulated reason is untrue gives rise to an inference that the employee was a victim of unlawful discrimination, and that inference, together with the evidence establishing the prima facie case, provide sufficient basis for the factfinder to find in favor of the employee. The employer may show that, even if the articulated reason is untrue, there was no discriminatory intent, or that the action was based on a different, nondiscriminatory reason. The employee is not limited to the falsity of the articulated reasons in proving discrimination. Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 116–18 (2000)

Recently, in addressing a disparate treatment claim filed in court pursuant to Section 9 of M.G.L. c.151B, the Supreme Judicial Court stated that the "McDonnell Douglas test is not used

at trial. Instead, '[w]e encourage trial judges to craft instructions that will focus the jury's attention on the ultimate issues of harm, discriminatory animus and causation.' Lipchitz, 434 Mass. at 508." Adams v. Schneider Elec. USA, 210 N.E.3d 917, 927, n. 5 (Mass. 2023) That language was the culmination of two decades of rulings by the Supreme Judicial Court implying that the *McDonnell Douglas* framework is not applicable to jury trials. Knight v. Avon Prod., Inc., 438 Mass. 413, 420, n. 4 (2003) ("While this analysis provides a useful framework for deciding motions for summary judgment and for a directed verdict, we have recommended that it is not well suited as a model for jury instructions. See *Lipchitz*"); Lipchitz v. Raytheon Co., 434 Mass. 493, 501–04, 508 (2001) ("We see no reason to burden the jury with terms like 'mixed-motive' and 'pretext' or with rules regarding shifting burdens, all of which 'have taken on lives of their own, independent of their connection to the underlying theories of liability that gave them birth.' [Citations omitted]…. We encourage trial judges to craft instructions that will focus the jury's attention on the ultimate issues of harm, discriminatory animus and causation in accordance with this opinion.") Although I am not bound to apply the Court's logic in a case under Section 9 of M.G.L. c. 151B to a decision issued under Section 5 of M.G.L. c. 151B, the Court offers useful guidance, especially because a Hearing Commissioner or Hearing Officer in issuing a decision pursuant to Section 5 acts as a fact-finder akin to a jury issuing a verdict in a case under Section 9.

After a discrimination case is fully tried on the merits, the ultimate question of discrimination *vel non*[4] is directly before the finder of fact who has all the evidence needed to decide whether the employer unlawfully discriminated against the employee. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714, 715 (1983) After a public hearing pursuant to

[4] *Vel non* means "or not". See Meriam Webster legal dictionary

Section 5 of M.G.L. c. 151B, addressing questions inherent in the *McDonnell Douglas* framework – e.g., whether the employee established a prima facie case - distracts from what should be the focal point of the fact-finder in a disparate treatment case - did the employer discriminate against the employee because of status in a protected class. Comm. of Braintree v. Massachusetts Comm'n Against Discrimination, 377 Mass. 424, 428 (1979) ("As in all cases of employment discrimination under G.L. c. 151B, s 4, the central focus of inquiry is whether the employer penalizes some employees or prospective employees because of their race, color, religion, sex, or national origin. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-577 (1978).") Without the constraints of the *McDonnell Douglas* framework, the parties and the fact-finder can better hone in on the ultimate question of discrimination *vel non* utilizing familiar types of evidence in their analysis of the disparate treatment claim such as, for examples, qualification of the employee; job performance; availability of a position; treatment of similarly situated employees; general atmosphere of discrimination; stereotypical thinking; prior treatment of the employee; policy and practice of employer as to protected class; statistics; inconsistencies, incoherencies, and contradictions of the proffered reason for the action; deviation from standard procedure; timing of events; and whether the proffered reason was developed after-the-fact.

Further, case law from the United States Supreme Court, Massachusetts appellate courts, and all but one Federal Circuit Court of Appeals evidences that the question for the fact-finder, after a fully tried discrimination case, is whether there was discrimination *vel non* and not whether the evidence fits within the *McDonnell Douglas* framework.[5]

[5] Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142–43 (2000) (once Respondent met its burden of production, *McDonnell Douglas* framework disappeared, and sole remaining issue was discrimination *vel non*)

Cooper v. Fed. Rsrv. Bank of Richmond, 467 U.S. 867, 875 (1984) (upon employer meeting its burden, "district court is in a position to decide the ultimate question …whether the particular employment decision at issue was made on the basis of [e.g.] race.")

U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (trial and reviewing courts should not make their inquiry even "more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof,' *Burdine []* in deciding [the] ultimate question.")

Fontaine v. Ebtec Corp., 415 Mass. 309, 312, n. 6 (1993) (employer filed motion for judgment notwithstanding the verdict; "The defendants argue at some length that the plaintiff failed to show, as part of his prima facie case, that he was qualified for the position he held….The defendants' contention about the plaintiff's qualifications is in substance another side of their argument that he was properly discharged for substandard performance. This leaves the central issue on liability as stated in the text. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)")

Riffelmacher v. Bd. of Police Comm'rs of Springfield, 27 Mass. App. Ct. 159, 165–66 (1989) ("We note that the briefs discuss a question raised in various discrimination cases, What is a 'prima facie' plaintiff's case calling on a defendant to respond. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Wheelock College,* 371 Mass. at 135 [citations omitted] As indicated in *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983), the question is not likely to require attention when an action has been fully tried on the merits.")

Radvilas v. Stop & Shop, Inc., 18 Mass. App. Ct. 431, 442, n. 19 (1984) (judge directed a verdict for the defendants; "See *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711 (1983), where the court pointed out that where a case has been 'fully tried on the merits, it is surprising to find' a discussion whether a prima facie case has been proved.")

Richard v. Reg'l Sch. Unit 57, 901 F.3d 52, 56–57 (1st Cir. 2018) ("As the district court itself noted, there is some question as to whether the McDonnell Douglas analysis is even useful at the trial stage. [Citation omitted] We have noted that once a plaintiff makes out a prima facie case, 'the McDonnell Douglas framework, with its intricate web of presumptions and burdens, becomes an anachronism. The [factfinder], unaided by any presumptions, must simply answer the question of whether the employee has carried the ultimate burden of proving retaliation.' Palmquist v. Shinseki, 689 F.3d 66, 71 (1st Cir. 2012) [Citations omitted]…. In short, once a case has reached trial, the McDonnell Douglas analysis has virtually no work left to do.")

Aly v. Mohegan Council, Boy Scouts of Am., 711 F.3d 34, 47, n. 2 (1st Cir. 2013) ("Mohegan Council also argues in its opening brief that the district court erred in its memorandum and order denying judgment as a matter of law when it examined evidence without regard to the burden-shifting framework presented in *McDonnell Douglas.* However, Mohegan Council misstates the law in this Circuit when it claims that the strict, step-by-step *McDonnell Douglas* burden-shifting framework applies when reviewing the sufficiency of the evidence following a jury verdict. As stated *supra,* once an employment discrimination action has been submitted to a jury, 'the burden-shifting framework has fulfilled its function' since 'backtracking serves no useful purpose.' *Sánchez,* 37 F.3d at 720…. [T]he district court did not err when it considered the evidence presented as a whole rather than piecemeal, in a step-by-step review.")

Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 155 (1st Cir.1990) ("Courts and litigants must bear in mind that the critical determination in any Title VII suit is whether the complainant has proven by a fair preponderance of the evidence that an impermissible consideration—say, her gender—was a substantial motivating factor in the adverse employment decision. That principle requires the trial court at case's end, as well as a reviewing court, to focus not on the artificial striations of the burden-shifting framework, but on 'the district court's ultimate finding of discrimination *vel non.*' [Citations omitted]")

Coffey v. Dobbs Int'l Servs., Inc., 170 F.3d 323, 326 (2d Cir. 1999) ("Because this case has been fully tried on the merits, we need not determine whether Coffey established a prima facie case. *See United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714–15, (1983) [Citations omitted] Rather, we proceed directly to 'the ultimate question of discrimination *vel non.*' *Aikens,* 460 U.S. at 714")

Berndt v. Kaiser Aluminum & Chem. Sales, Inc., 789 F.2d 253, 257 (3d Cir. 1986) ("Since the case was tried on the merits, we believe the question of whether a prima facie case was established 'unnecessarily [evades] the ultimate question of discrimination *vel non.*' *United States Postal Services Board of Governors v. Aikens"*).

Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984) ("The *McDonnell Douglas* formula is a tool that enables the trial judge to sift through the evidence in an orderly fashion to determine the ultimate question in the case—did the defendant intentionally discriminate against the plaintiff. *Aikens,* 460 U.S. at 715–17. The presumptions and the shifting burdens are merely an aid in making that determination; they are not ends in themselves. *Id.*")

Gibson v. Old Town Trolley Tours of Washington, D.C., Inc., 160 F.3d 177, 180 (4th Cir. 1998) ("Although both appellant and appellee couch their arguments in terms of the reciprocating burdens of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), that approach is inapposite when a trial has proceeded to completion. *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714–15 (1983)…. At trial, the plaintiff shed the shifting burdens of the *McDonnell Douglas* scheme and faced, as all plaintiffs do, the ultimate burden of proving his case")

Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 575 (5th Cir. 2004) ("'The *McDonnell Douglas* formula, however, is applicable only in a directed verdict or summary judgment situation,' and 'is not the proper vehicle for evaluating a case that has been fully tried on the merits.' *Powell v. Rockwell Int'l Corp.,* 788 F.2d 279, 285 (5th Cir.1986)")

Avant v. S. Cent. Bell Tel. Co., 716 F.2d 1083, 1086 (5th Cir. 1983) (since both parties presented their case, district court was in a position to decide the ultimate issue)

Bilski v. McCarthy, 790 F. App'x 756, 762 (6th Cir. 2019) ("any error in considering *McDonnell Douglas* and Bilski's prima facie case was harmless because the district court did not focus on the prima facie elements. Instead, the court complied with *Aikens*, 460 U.S. at 714–15, by analyzing the ultimate question—whether Bilski established that Defendant's failure to promote him constituted intentional discrimination.")

Massey v. Blue Cross-Blue Shield of Illinois, 226 F.3d 922, 925 (7th Cir. 2000) ("At the trial, as we have explained before, the burden-shifting process came to an end, and the only question was whether Massey presented enough evidence to allow a rational jury to find that she was the victim of discrimination.")

Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994), cert. denied, 515 U.S. 1159 (1995) (Gehring "wanted the judge to walk the jury through the paradigm established by *McDonnell Douglas Corp.* [citation omitted]. The judge declined, for the very good reason that the Supreme Court has held that this burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial.")

Grohs v. Gold Bond Bldg. Prod., A Div. of Nat. Gypsum Co., 859 F.2d 1283, 1286 (7th Cir. 1988), cert. denied, 490 U.S. 1036 (1989) ("Once the case has been tried, however, the rules about the *prima facie* case, defendant's response and methods of proof no longer are relevant.")

Gruttemeyer v. Transit Auth., 31 F.4th 638, 647, n.6 (8th Cir. 2022) ("The well-known McDonnell Douglas burden-shifting framework plays no role at trial…. To the extent Metro bases its post-trial arguments on this burden-shifting analysis, they are unavailing.")

Yu v. Idaho State Univ., 15 F.4th 1236, 1242 (9th Cir. 2021) ("At the trial stage, 'the ultimate factual issue in the case' is 'whether the defendant intentionally discriminated against the plaintiff.' *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (citation omitted). The finder of fact should 'consider all the evidence,' *id.* at 714 n.3, and look to the 'totality of the relevant facts' to determine whether the defendant has engaged in intentional discrimination")

Whittington v. Nordam Grp. Inc., 429 F.3d 986, 993 (10th Cir. 2005) ("Nordam contends that Mr. Whittington failed both to establish a prima facie case and to establish pretext. But Nordam's reliance on the *McDonnell Douglas* framework is misplaced. In *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), the Supreme Court stated that triers of fact (and reviewing courts) should not be distracted by the legal technicalities of *McDonnell Douglas* in reaching the ultimate issue of discrimination")

Kragor v. Takeda Pharms. Am., Inc., 702 F.3d 1304, 1308, n.1 (11th Cir. 2012) ("accurate to say that once the employer offers evidence of a legitimate, nondiscriminatory reason for the adverse action, 'the *McDonnell Douglas* framework—with its presumptions and burdens—disappear[s], and the sole remaining issue [i]s discrimination *vel*

non.' *Reeves,* [citation omitted]. The opportunity provided to a plaintiff to show pretext is simply an opportunity to present evidence from which the trier of fact can find unlawful discrimination.")

Hall v. Alabama Assoc. of Sch. Boards, 326 F.3d 1157, 1166 (11th Cir. 2003) ("where, as in this case, the court has conducted a full trial and has sufficient evidence to determine whether an employee has been a victim of discrimination, the court need not go through the *McDonnell Douglas* burden-shifting process and should instead reach the ultimate issue of discrimination")

Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1333 (11th Cir. 1999) ("The *McDonnell Douglas* stages are simply a method of analysis for organizing a discrimination case in its initial stages to determine if a case has enough evidence to reach a jury in the first place…. [O]nce the *McDonnell Douglas* framework has been met by both parties in the pretrial stages, it 'simply drops out of the picture' when the jury begins its deliberations.")

Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998, 999 (11th Cir. 1983), cert. denied, 466 U.S. 929 (1984) ("when the parties have developed their full proof it is unnecessary to analyze the evidence according to 'the ebb and flow of shifting burdens' of proof under *McDonnell Douglas. []* At that point, the trier of fact must determine whether plaintiff has met the ultimate burden of showing the employer intentionally discriminated against him.")

McGill v. Munoz, 203 F.3d 843, 845 (D.C. Cir. 2000) ("Once a case has been fully tried on the merits and submitted to the jury, however, the *McDonnell Douglas* framework 'drops from the case' and only the ultimate question remains: '[whether] the defendant intentionally discriminated against the plaintiff.' *United States Postal Serv. Bd. of Governors v. Aikens"*)

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1232 (D.C. Cir. 1984) ("In a case requiring discriminatory animus, the three-step procedure is merely one method to adduce evidence relevant to the central question of intentional discrimination. Once the case has been fully tried, the court thus should not narrowly focus on a party's performance at any one stage. Each separate stage merges into the ultimate question of whether the plaintiff has established sufficiently a case of intentional discrimination.")

But see Haddon v. Exec. Residence at White House, 313 F.3d 1352, 1362–63 (Fed. Cir. 2002) ("The AJ, relying on *United States Postal Service Bd. of Govs. v. Aikens,* 460 U.S. 711 (1983), decided that once the Executive Residence produced evidence of nondiscriminatory motive, the issue of whether Mr. Haddon made a prima facie case disappeared and the focus was only on whether the act was retaliatory. *Aikens* does say that the prima facie case framework disappears after the defendant shows evidence of nondiscriminatory intent, *id.* at 715, but this does not mean that it becomes irrelevant whether the action qualified as an adverse employment action. There still must be action that is discriminatory within the meaning of Title VII, *id.,* and an adverse employment action is necessary to have discrimination within the meaning of Title VII")

IV. ORDER

As detailed above, I conclude that Ms. Johnson has failed to prove that Lighthouse violated M.G.L. c. 151B, §4, paragraph 1. The complaint is hereby **dismissed**.

V. NOTICE OF APPEAL

This decision represents the final order of the Hearing Commissioner. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal within 10 days of receipt of this decision and file a Petition for Review within 30 days of receipt of this decision. 804 CMR 1.23 (2020). If a party files a Petition for Review, the other party has the right to file a Notice of Intervention within ten days of receipt of the Petition for Review and shall file a brief in Reply to the Petition for Review within 30 days of receipt of the Petition for Review. All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other party. 804 CMR 1.23 (2020).

So Ordered this 15th day of September, 2023.

Sunila Thomas George
Hearing Commissioner