

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and
MARCIA E. MAYER,
Complainants

v.

Docket No. 11 WEM 03017

Boston CHILDREN'S HOSPITAL
Respondent

Appearances: Michael P. Sheridan Esq. for Complainant
Tracey E. Spruce Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 10, 2011, Marcia E. Mayer ("Complainant") filed charges of age discrimination with the Massachusetts Commission Against Discrimination ("MCAD") against Respondent Boston Children's Hospital alleging that she was terminated from employment based on age in violation of M.G.L. c. 151B, section 4 (1B). A probable cause finding was issued on May 31, 2012. The case was certified to public hearing on March 12, 2015.

A public hearing was held on October 13 and 15, 2015. The parties submitted thirty (30) joint exhibits. Complainant submitted one (1) additional exhibit and Respondent submitted two (2) additional exhibits. The following individuals testified: Complainant, Frances Damian, and Michele Morin.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Marcia E. Mayer worked as a nurse in the Emergency Department of Boston Children's Hospital for sixteen years beginning in 1995. In 2005, she was promoted to staff nurse II. Transcript at 55. Complainant was assigned, at times, to perform both charge nurse and triage nurse duties in the Emergency Department. Transcript at 113-114.
2. Respondent Boston Children's Hospital is a full service pediatric hospital in Boston that is widely recognized for its excellence in patient care and research.
3. Fran Damian has served as the Emergency Department's Director of Nursing and Patient Services since 1995. She hired Complainant as a staff nurse and promoted her to staff nurse II. Damian performed most of Complainant's performance appraisals.
4. Throughout her employment with Respondent, Complainant received an overall rating of "meets expectations" on her yearly performance appraisals except in 2005 when she received an overall rating of "exceeds." Joint Exhibits 5-12. In some specific categories, however, Complainant was only rated as "approaching standards." Some of the written comments on her appraisals expressed concern about Complainant deviating from prescribed practices, using an abrupt tone of voice, and displaying an abrupt manner. Id. In her last three annual appraisals, Complainant received "meets expectations" in all (thirty-seven) categories of review. In the last evaluation prior to her termination, Damian described Complainant as a

“competent RN” who “has done a good job as charge nurse,” “provides competent care to ED patients and their families,” is responsive to parents of special needs children, but needs to ensure that her interactions with patients and families are “reflective of the caring and compassion she intends to convey.” Id. Joint Exhibit 10.

5. Emergency Department protocol requires that a charge nurse brings patients from the waiting area into treatment rooms, assigns patients to specific teams of nurses, oversees the workloads of nurses, and collaborates with physicians. Transcript at 56. A triage nurse assesses patients who come to the Emergency Department in order to determine who must be seen immediately and who can wait. Transcript at 59, 277. Complainant testified that she made the assessment by asking the patient questions, by observing their appearance, and by taking their vital signs. Transcript at 67, 116.
6. Adults sometimes come to the Children’s Hospital Emergency Department seeking treatment. Pursuant to a federal law entitled the Emergency Medical Treatment and Active Labor Act (“EMTALA”) and to Respondent’s “Adult Care Protocol,”¹ every individual seeking treatment must be: 1) triaged (recording of vital signs, assessment of pain level and sorting of patients into categories), 2) registered (recording of personal information and medical history), 3) placed in a queue for treatment, and 4) screened by a physician who provides treatment and/or arranges for transfer to another institution. Joint Exhibits 16, 17, 18; Transcript at 191-192, 278-284.
7. The EMTALA/Adult Care Protocol policy was implemented by the Emergency Department prior to 2012. Transcript at 435-443. Emergency Department nurses

¹ The Adult Care Protocol is an extension of the EMTALA policy designed to give clarity about the treatment of adult patients who come to the Emergency Department of Children’s Hospital. Transcript at 287, 304.

were informed about the policy at staff meetings, in orientation materials, and during trainings. Joint Exhibits 17 & 18. In e-mails dated February 13 and March 3, 2011, Emergency Department Nurse Manager Michele Morin made clear that adult patients presenting to triage must be registered, have their vital signs recorded, and be medically screened by an attending physician. Joint Exhibit 17; Transcript at 180, 306. Complainant testified that as of 2011 she was aware of the Hospital's EMTALA/Adult Care Protocol policies.

8. On occasion, individuals who seek treatment from the Emergency Department may decide to leave without being seen. The Emergency Department tries to discourage departures by having nurses and/or physicians convince individuals to stay. Their efforts are successful about 99% of the time. When individuals insist on leaving, a note is made in their medical record that they have "left without being seen."
9. Complainant testified in a contradictory fashion about whether EMTALA/Adult Care Protocol policies apply to all adults seeking assistance in the Emergency Department or whether the policies only apply to individuals deemed to be "patients" following the triage and admission process. Transcript at 69, 173, 176. I credit that EMTALA/Adult Care Protocol policies apply to all adults seeking assistance in the Emergency Department. Transcript at 186, 188.
10. The Hospital's disciplinary policy sets forth various forms of corrective action including verbal coaching, written counseling, performance improvement notice ("PIN")/final written warning, investigatory suspension, and discharge. Joint Exhibit 14. Discharge may occur without prior discipline where patient safety issues are involved.

11. In 2011, Complainant voluntarily decided to return to a staff nurse I position effective March 20, 2011. Joint Exhibit 10. According to Complainant, she requested the change in order to spend more time with her family and reduce job stress. Transcript at 26-27. According to the Emergency Department's Director of Nursing Fran Damian, it was she who first raised the issue with Complainant. Transcript at 323.
12. Damian and Nurse Manager Morin spoke to Complainant on a number of occasions about her uncaring, abrupt, and cold demeanor. Transcript 128, 166, 326-328. All but one of Complainant's performance reviews between 2003 and 2011 addressed concerns about Complainant's attitude.
13. Complainant received verbal coachings on three separate occasions during the last five months of her employment for: 1) failing to properly control the pain of a sickle cell anemia patient with a pain score of 8-10; 2) failing to question a doctor's mistaken x-ray order; and 3) failing to report abnormal vital signs and discharging a patient with significant hypertension. Respondent's Exhibit 1.
14. On July 7, 2011, Complainant was working as the Emergency Department's triage nurse on the 8:00 p.m. to 8:00 a.m. shift. A twenty-four year old woman approached the triage desk and informed Complainant that she was diabetic and had been a patient at Children's Hospital as a child. According to Complainant, she visually assessed the woman who appeared well, had good color, had no respiratory issues, and walked without difficulty. Transcript at 76. Complainant testified that she asked the woman whether she had an emergency and the woman replied that she had a slight infection. Transcript at 77, 195. Complainant testified that she informed the woman that there were lots of adult hospitals and she might want to consider going to

one. According to Complainant's public hearing testimony, the woman chose to leave prior to being triaged, admitted, and becoming a patient. Transcript at 74-78, 81, 83. I do not credit this version of the incident. I credit, instead, testimony and documentary evidence that the woman told Complainant she did not feel well, had an infection, and sought treatment, whereupon Complainant ascertained the woman's age and told her that she should go to an adult facility. Transcript at 194-195. When the woman said she had been treated at Children's Hospital as a child and did not know where to find an adult facility, Complainant advised her to go to Brigham and Women's Hospital and directed her to the security guard for directions. Joint Exhibit 23.² Complainant failed to register the woman, failed to record her vital signs, failed to administer a blood sugar test, failed to arrange for screening by an Emergency Department attending physician, and failed to arrange for the woman to be escorted to Brigham and Women's Hospital through an indoor route. Transcript at 178-180, 197, 346; Joint Exhibit 20.

15. Credible evidence presented at the public hearing establishes that the woman became a "patient" as soon as she presented herself at the Emergency Department for treatment. Transcript at 203, 284, 306.

16. Complainant asserted for the first time at the public hearing that she offered the twenty-four year old woman a medical screening exam, but this assertion is not credible because Complainant failed to mention the offer to her supervisors following the incident, failed to include it in a contemporaneous e-mail about the incident, and

² I base my findings on the credible testimony of Damian and Morin and Damian's July 14, 2011 notes (Joint Exhibit 23). These accounts are more credible than Complainant's version of the contested events, notwithstanding an erroneous statement in the termination letter (Joint Exhibit 25) that the mother of the twenty-four year old woman accompanied her to the Emergency Department on July 7, 2011.

failed to reference it during her July, 2011 deposition. Transcript at 198-199, 341; Joint Exhibit 20.

17. Maggie O'Connor, the charge nurse on the evening of July 7, 2011, was contacted by the twenty-four year old woman's mother who said that the nurse on duty told the patient to "grow up and go to an adult facility." Joint Exhibit 19.
18. Complainant met with Nurse Manager Morin and Nursing Director Damian on July 14, 2011. Transcript at 338. At the meeting, Complainant stated that the twenty-four year old woman had arrived at the hospital before midnight, said that she was not feeling well, and wanted to be seen. Joint Exhibit 23. During her meeting with Morin and Damian, Complainant stated that she realized her conduct violated EMTALA. Joint Exhibit 23, Transcript 340. At the end of the meeting, Damian placed Complainant on paid administrative leave pending a final decision. Transcript at 341.
19. At the public hearing, Nurse Manager Morin cited coma, seizure, and death as potential risks of the diabetic woman not being seen at Children's Hospital. Transcript at 496.
20. Effective July 15, 2011, Morin and Damian terminated Complainant because of her failure to implement EMTALA procedures and the Adult Care Protocol. They did so based on Complainant's own account of the events. Joint Exhibits 20, 25; Transcript at 444-445.
21. Morin testified that the length of Complainant's experience performing charge nurse and triage nurse duties played a role in the termination decision because Complainant was expected to know the Hospital's rules and policies. Transcript at 552.

22. At the time of her termination, Complainant was sixty-four years old. She was earning \$65.40 per hour and was paid biweekly for fifty-five hours of work. Complainant's Exhibit 1. Complainant testified that she planned to work full-time at Boston Children's Hospital until age sixty-six and then work part-time for another year or so. Transcript at 161. Complainant collected unemployment compensation for approximately eighteen months. Transcript at 32.
23. Complainant testified that during her employment, her co-workers called her "Mama Marci" and made the following comments about her age: "I hope when I'm your age I look as good as you do," You look great for someone your age," and "How does someone your age have so much energy?" Complainant testified she was not offended by the comments at the time they were made. Transcript at 100; 220. During her employment, Complainant never complained about being treated differently because of her age.
24. Between 2008 and 2014, three emergency room nurses aside from Complainant were terminated. Respondent's Exhibit 2. Nurse "AF," born in 1981, was terminated after approximately three and one-half years of employment, with no prior discipline, for yelling obscenities and threatening a co-worker. Transcript at 502; Respondent's Exhibit 2-B. Nurse "KF," born in 1968, received a prior written counseling memo pertaining to clinical care issues and an unhelpful attitude and was terminated after seven years of employment for altering medical documentation to avoid taking a flu shot. Transcript at 498-499, 546-547; Respondent's Exhibit 2-C. Nurse "KW," born in 1970, was terminated after four and one-half years of employment following a prior written counseling and a PIN/final written warning

pertaining to clinical care issues. Transcript at 499-500, 548-549; Respondent's Exhibit 2-D. A fourth emergency room nurse, "DB," born in 1976, resigned instead of being required to serve an extended probationary period due to patient care issues. Transcript at, 500, 546-547; Respondent's Exhibit 2-A.

25. Complainant asserted that other Emergency Department nurses received discipline less severe than discharge for various types of misconduct but conceded that none were accused of violating EMTALA/Adult Care Protocol policies following the explanatory e-mails in February and March of 2011. Transcript at 222-225.
26. In the "month or so" after Complainant's termination, the Emergency Department hired five nurses. Transcript at 367. The birth years of four out of the five individuals are: 1970, 1981, 1983, and 1985. Transcript 367-368. Director of Nursing and Patient Services Fran Damian did not remember the age of the fifth nurse hired after Complainant's termination. Transcript at 368.

III. CONCLUSIONS OF LAW

Disparate Treatment Based on Age

In order to prevail on a charge of discrimination in employment based on age under M.G.L. c. 151B, section 4(1B), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667 *citing Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991). Not every remark constitutes direct evidence of discrimination. Some insignificant statements may be

characterized as stray remarks. See Wynn & Wynn, 431 Mass. 655, 667 (2000) quoting Johansen v. NCT Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). Allegations that Complainant was called “Mama Marci” and complimented on having youthful looks and energy for a person of her age fall into the category of stray remarks. Even if uttered, such remarks do not rise to the level of direct evidence of discriminatory animus. See Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34, 49 n. 24 (2005) (remarks that employee was “not adapting to the new … way of doing things” and was “part of the old guard” deemed to be too ambiguous to constitute direct evidence of age bias).

In the absence of direct evidence of forbidden bias, Complainant may attempt to establish a *prima facie* case of employment discrimination on the basis of indirect evidence which shows that Complainant: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) was terminated; and (4) was replaced by someone substantially younger. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts). Where age-based discrimination is alleged, Complainant must show that she was over age forty, was denied a condition or privilege of employment granted to someone at least five years younger or was the subject of other circumstances that raise a reasonable inference of unlawful age discrimination. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003).

Complainant satisfies the elements of a *prima facie* case in that she was a sixty-four year old employee with satisfactory performance appraisals and no prior written discipline. Following her termination, the Emergency Department hired five nurses of

whom four were between the ages of twenty-six and forty one. These circumstances satisfy the elements of a prima facie case.

Once Complainant establishes a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason(s) were not the real reason(s) but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

At stage two, Respondent notes that Complainant received "verbal coaching" on three separate occasions during the last five months of her employment for lapses in clinical performance. Such coaching is deemed to be the first step in Respondent's progressive discipline process. Subsequently, on July 7, 2011, a young woman who had previously been treated by Children's Hospital for diabetes appeared at the Emergency Department, told Complainant she did not feel well, said that she had an infection, and sought treatment. In response, Complainant asked the woman her age. Upon learning that the woman was twenty-four years old, Complainant told her to go to Brigham and Women's Hospital and directed her to the security guard for directions. Complainant failed to register the woman, failed to record her vital signs, failed to administer a blood sugar test, failed to arrange for screening by an Emergency Department attending

physician, and failed to arrange for the woman to be escorted to Brigham and Women's Hospital through an indoor route. Complainant's conduct on July 7, 2011, following three performance lapses during the prior five months, is sufficient to satisfy stage two of the *prima facie* case analysis.

At stage three, Complainant asserts that the Hospital's reasons are a pretext for age discrimination on the basis that she, alone, was terminated from the Emergency Department without prior, written progressive discipline. Complainant maintains, as well, that she committed no violation of the EMTALA/Adult Care Protocol policy because the young woman left the Emergency Department on July 7, 2011 prior to becoming a patient.

Complainant's stage-three arguments are factually and legally unpersuasive. As far as comparators are concerned, it is noteworthy that in 2008, the Emergency Department terminated a twenty-seven year old nurse ("AF") for threatening a co-worker and shouting obscenities despite the fact that the nurse had no prior discipline before being terminated. Complainant, by contrast, was the recipient of three verbal coachings in the five months preceding her termination. Such coaching, while informal, is nonetheless deemed to be the initial step of Respondent's progressive disciplinary process. Having received three such communications within a five-month period, Complainant was duly warned that her nursing practices were a concern to the administration. By declining to advance the discipline beyond step one for five months, Respondent makes the persuasive point that it showed leniency in its treatment of Complainant.

Complainant, moreover, stands alone among all Emergency Department nurses as having been disciplined for violating the Hospital's EMTALA/Adult Care Protocol. At the public hearing, Complainant attempted to refute this charge by asserting that the young woman who sought treatment on the evening of July 7, 2011 had not yet become a "patient" prior to leaving the Hospital. This assertion is contradicted by the Hospital's written policies, its practices, and Complainant's own characterization of the woman as a patient in an e-mail to Nurse Manager Morin. Rather than accept Complainant's assertion, I credit the testimony Director of Nursing and Patient Services Fran Damian who testified convincingly that any person who comes to the Emergency Department seeking care is a patient and cannot be turned away without a proper screening. Complainant's violation of this policy provided a valid job-related reason for termination.

Respondent candidly admits that Complainant's length of employment as a nurse played a role in her termination, but I am persuaded that the role it played was not discriminatory. Nurse Manager Morin testified that Complainant's lengthy experience performing charge and triage nurse duties entitled the Hospital to be able to rely upon the Complainant to capably and consistently implement its policies and procedures. While Morin held Complainant to a higher standard of performance than that imposed on less experienced nurses, such disparity does not, in my judgment, constitute age-related animus since a relatively young nurse can amass years of experience whereas an older nurse may be new at her job.

Based on the foregoing, Complainant fails to rebut Respondent's stage-two evidence. Accordingly, I conclude that Respondent did not violate G. L. c. 151B.

IV. ORDER

For the aforementioned reasons, the complaint is dismissed. This decision represents the final order of the Hearing Officer. 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 of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 24th day of March, 2016.



Betty E. Waxman, Esq.,
Hearing Officer