

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
BRENDA PATTERSON,
Complainant

v.

DOCKET NO. 12-BEM-02939

AHOLD USA, INC.,
Respondent

Appearances:

Kevin C. Merritt, Esq. and Paul F. Kelly, Esq. for Brenda Patterson
Daniel B. Klein, Esq. and Kelsey P. Montgomery, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 24, 2012, Brenda Patterson, who is African-American, filed a complaint with this Commission charging Respondent with discrimination on the basis of her race and color, in violation of M.G.L.c.151B sec.4(1) The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on March 7-10 & 14, 2016. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Brenda Patterson resides in Boston, Massachusetts. Complainant graduated from high school in 1969 or 1970. In 1971 she began working for Stop & Shop as a data processing clerk in what was then known as the personnel department. At the time, Stop and Shop operated a food business (Stop & Shop) and a retail business (Bradlees).¹ (T. 65, 250) For the majority of her 40 year tenure with Stop & Shop, Complainant worked at the corporate headquarters in Quincy, Massachusetts.

2. Respondent Ahold, a multi-national food retailer, acquired Stop & Shop sometime before 2004. (T. 379)

3. The personnel department later became known as Human Resources (“HR”) and Complainant worked in a sub-division of the department called Human Resources Information Systems (“HRIS”) that dealt with HR data management. (T. 288, 319, 453)

4. In approximately 1975, Complainant was promoted to the position of “191 Processor,” where she processed promotions, demotions and similar changes in employees’ status. (T. 66-67)

5. In the 1990s, Complainant was promoted to the position of “Group Head,” which involved non-supervisory oversight of processors, vacation clerks, sick leave clerks and bereavement clerks as well as some processing. Complainant was able to perform the duties of all the positions she oversaw and performed the processing duties when the clerks were on vacation. (T. 67-70). Complainant processed changes in employee status for the employees under her and provided feedback on their performance to management. (T. 139-140)

¹ Bradlees was sold by Stop & Shop in the 1990s.

6. In the 1990s, Complainant processed the employment promotions, demotions and similar changes for store detectives, and in that position, she trained on the PeopleSoft system (T. 70-71)

7. In 2005, Respondent underwent one of many re-organizations. At that time, Complainant began processing changes in employee status for the corporate employees and clerical employees of Stop and Shop New England. (T. 72-73)

8. As a result of the 2005 reorganization, processors' pay grade increased from seven to eight and they received a one dollar increase in pay. Complainant did not receive a grade or pay increase at the time. Complainant raised the issue with her then manager, who agreed to look into the matter, but then left the company. Complainant's new manager promoted Complainant to Grade 8 in 2009, but without a pay increase. When Complainant questioned her then manager about a raise, the response was, "One battle at a time." This manager left Respondent and Complainant never received an increase in pay. (T.76)

Early 2010

9. Prior to 2010, Stop & Shop and Giant of Carlisle, two separate companies, were subsidiaries of Respondent. Stop & Shop was the parent company of Giant of Landover, a grocery retailer based in Landover, Maryland. (T. 323) Giant of Landover was unrelated to Giant of Carlisle. (T. 323, 466) Stop & Shop's corporate headquarters were located in Quincy, Massachusetts. Giant of Carlisle's corporate headquarters were located in Carlisle, Pennsylvania.

10. As of 2010, Complainant was a corporate processor in HRIS in Quincy, MA, where she utilized a computer system called Cyborg and processed the employment changes of employees in the Stop & Shop corporate offices. (T. 288, 319, 453) Complainant received an

overall rating of “2” or “Above Expectations” in her performance appraisals for 2008, 2009 and 2010. Complainant was a good worker and easy to work with. (Testimony of MacDougall at 302-303)

11. Other employees of HRIS in Quincy in 2010 included Lisa Martignetti, R. C.², Anna MacDougall, Heather Drake and Donna Vallatini,³ all of whom are white.

12. Martignetti was a verifications clerk and performed some processing. She also compiled some earnings reports, performed filing and scanning. (T. 384-385; 803-805)

13. Roseanne Carlo and Anna McDougall were processors who processed the job changes for Stop & Shop New England store employees.

14. M. C. (white) was the director of HRIS. Judi Whitten (white) was an HRIS manager and was Complainant’s direct supervisor.

15. Maria Silvestri (white) has worked for Respondent since 2009. She has been Vice President of Human Resources since 2007.⁴ She handles all compensation and benefits issues, training, development and staffing. In 2010-2011, Silvestri reported directly to the Executive Vice President of Human Resources, Kathy Russello (white). Four HR directors, including Taunya Williams-Garrett (black), reported to Silvestri.

16. Anna MacDougall was a longtime employee who had previously processed job changes for unionized store employees and managers. Complainant trained MacDougall with regard to processing the pay of certain employees and when MacDougall was out, Complainant also assisted a secretary to perform certain of McDougall’s duties. (T. 80-82)

² With some exceptions, employees who did not testify at the public hearing are identified by their initials for privacy reasons.

³ Vallatini has worked for Respondent since 2001. In 2010 she was a database administrator. In this position she reviewed reports and performed research and troubleshooting of discrepancies in a program used by HRIS. She also did auditing and ran weekly reports and worked with Cyborg. Vallatini held the database administrator position until the reorganization, when her position was eliminated. (T. 641-643)

⁴ Silvestri is currently responsible for all of Respondent’s corporate entities in Quincy and Carlisle, PA and its IT organization in Greenville, North Carolina. (T. 440-450)

17. Alex Vespa (white) worked in Respondent's benefits department from October 2007 until he was laid off in early 2011. (T. 715-17) Vespa did not work in HRIS and did no processing while employed in the benefits position.

Reorganization 2010-2011

18. During 2010 and 2011, Respondent underwent another re-organization.⁵ The CEO of Stop & Shop resigned and the Giant-Carlisle CEO assumed oversight of Carlisle and Stop & Shop. (T. 466-7) Respondent removed corporate support functions, such as HRIS, from Stop & Shop and Giant-Carlisle, and Respondent assumed those functions. (T. 325, 466-7) Respondent then provided consolidated support services to four newly formed divisions: Stop & Shop New England; Stop & Shop New York Metro; Giant-Carlisle and Giant-Landover. (T. 323) Respondent retained its two corporate headquarters in Carlisle, Pennsylvania and Quincy, Massachusetts. (T. 325)

19. Prior to the reorganization, Stop & Shop assigned two processors to perform data entry for each market's store associates; two for New England, two for New York Metro, and two for Giant-Landover and two for Stop and Shop corporate employees (Complainant and Martignetti). Giant-Carlisle also had five processors (called HRIS Specialists), assigned to both its corporate office employees and store employees for a total of 13 processors. (Jt. 20 at 4)

20. During the reorganization, Complainant's workload increased and she was busy processing voluminous job changes as employees transferred between locations or were terminated.

21. Silvestri was a member of the steering committee which established the process Respondent would be using for reorganizing and a timeline for the process. Silvestri testified

⁵ Since 2004, the company has reorganized every 18 months to two years. (Testimony of Williams-Garrett at 380-381)

that the steering committee updated Respondent's Executive Board on their progress. (T. 453-454)

22. The steering committee drew up job descriptions and every position in Respondent (approximately 2,000) was reviewed to determine whether it should be eliminated, downgraded, upgraded, relocated or maintained. (T. 327, 332, 454-455)

23. The criteria used by Respondent to determine which current employees would fill the positions were: skills and abilities, mobility, incumbency and a numerical assessment determined by the employees' supervisor by taking the individual's last two years' overall performance appraisal rating and the most recent year's competencies and rating them on a scale of 1 to 5, with 1 being the best. Seniority was not a factor. (Testimony of Silvestri at T. 454-7)

24. In late 2010 or early 2011, as part of the reorganization Respondent decided to switch from the Cyborg HRIS system to PeopleSoft, a more advanced, web-based and flexible system whereby employees entered their own human resources information directly into the system. (T. 333, 515-19) Stop & Shop had been using Cyborg for approximately 20 years, while Giant-Carlisle used another system.

25. In approximately March 2011, while the reorganization was on-going, Respondent recruited and hired Anne Bastianelli as Director of HRIS in order to implement a transition of Respondent's HR data from the Cyborg system to PeopleSoft. Bastianelli had been in charge of a transition to PeopleSoft at a prior position. The PeopleSoft system would require certain HRIS employees to perform more analytical work to ensure the information was entered correctly. (Testimony of Bastianelli at 518-519, 524-6; T. 82-3; 279-281, 333, 382, 458-459)

26. HRIS was the last department to reorganize. (T. 519) Within a month of her hire, Bastianelli was informed by upper management that she would have to reorganize HRIS and lay off approximately 10 of the 33 people she supervised. (T. 522-524; 571-579)

27. As part of the reorganization process, employees received surveys asking whether they were willing to relocate. Complainant indicated on the survey that she was not willing to relocate because her direct supervisor Judi Whitten had reassured her that her job would remain in Quincy.⁶ (T. 85-87)

28. Bastianelli and Russello made the decisions regarding the number of HRIS employees needed and which jobs would be located in Quincy and which were going to Carlisle. (Testimony of Silvestri)

29. The re-organized HRIS group would consist of 10 processors and five analysts, in addition to several supervisory positions. (Jt. Ex. 20 at 2; T. 521, 524-27) The newly created analyst positions were to be filled by subject matter experts in the systems that supported HRIS who would analyze data trends and process requests for data analysis and reports, among other duties. (Jt. Ex. 20 at 2)

30. After an organizational design was adopted and job descriptions were created, renewed or revised, Respondent selected current employees to fill the positions within the new organizational design. Management decisions were then communicated to employees. (T. 327-28) Bastianelli and Williams-Garrett were primarily in charge of carrying out the reorganization within HRIS, which completed its “staffing and selection” process in July 2011. (T. 337-38)

31. Bastianelli testified that she “held Taunya’s hand” (referring to HR director Williams-Garrett) through the staffing and selection process because she would not otherwise

⁶ Complainant testified that she received two surveys, one before and one after Bastianelli was hired. On the first survey, Complainant checked off that she was willing to relocate, but left blank the portion of the survey that asked specifically whether she would relocate to Carlisle or any other of Respondent’s locations.

have known how to gather and interpret the staff's surveys and assessments in order to follow Respondent's process for reorganizing. (T. 587)

32. Bastianelli and Williams-Garrett decided to assign the 10 processors as follows; two processors for each new division's store employees (two for Stop & Shop-New England, two for Stop & Shop-New York Metro, two for Giant-Landover and two for Giant-Carlisle) and two corporate processors to be based in Carlisle, where most of the corporate and HR positions would be located after the reorganization, including the new supervisor of corporate processing. (Jt. Ex. 20 at 4. T. 341-44; 406, 531; 601) As a result, Respondent eliminated three processor positions.

33. The two Quincy-based corporate processing positions held by Complainant and Lisa Martignetti⁷ were eliminated and their responsibilities were incorporated into two new corporate processor positions located in Carlisle.

34. S. A. and V. C. (both of whom are white) were selected for the two corporate processor positions based in Carlisle because they were incumbents, had the best assessment scores and were located in Carlisle. (T. 436, 534; Jt. 20 at 4) A third HRIS specialist for Giant-Carlisle, who is white, was not selected because her assessment score was lower and she was ultimately terminated from Respondent. (Id; T. 339-41, 530, 534-5)

35. For the Giant-Landover Division, Respondent selected processors based on incumbencies. Because there were three incumbents, the two with the best assessment scores, T. W. (black) and C.S., (white) were chosen and the third person, C. W. (white) was not selected and later obtained another job within Respondent (Jt. 20 at 4-6; Garrett-Williams at 376-77; Bastianelli at 562)

⁷ Complainant stated that Martignetti was not a corporate processor. Her title was verifications clerk and she did some processing.

36. Roseanne Carlo, one of the two processors assigned to Stop & Shop-New England, remained in one of the New England processor positions because she was an incumbent. (Jt. 20 at 5; T. 354-56) The other New England processor, Anna MacDougall, planned to retire at the end of August 2011. (T. 599-601)

37. In July 2011, Heather Drake,⁸ a database administrator/auditor whose position had been eliminated,⁹ was placed in the New England processor position to be vacated by MacDougall. According to Respondent's witnesses, Drake was selected for the position because she had the best assessment score among the pool of candidates and had relevant experience and systems skills. (Jt. 20 at 5; T. 356-57; 759-61;764)

38. In late July 2011, Bastianelli and Williams-Garrett met with each associate to inform them whether they were selected for a position. (T. 334-38, 528-29) Five HRIS associates were told that their jobs were eliminated, that they had not been placed in other jobs and that they would be terminated unless they found another job within Respondent. (T. 335-37, 339, 357-58, 529-30; Jt. 20 at 4-5) The five HRIS associates who were "displaced" after completion of the "staffing and selection process" were Complainant, a processor; Lisa Martignetti, a verification clerk; J. C. and Donna Vallatini, a database administrator, all in Quincy and Terry Wilson in Carlisle. (T. 96-97; 680-681)

39. On Thursday, July 21, 2011, Bastianelli and Williams-Garrett met with Complainant and informed her that her position was being eliminated and her duties were to be transferred to Carlisle, PA. She was told that she was not selected for one of the Carlisle positions because she did not wish to relocate. They told her that her employment would terminate on December 30, 2011. (Stip. Fact. No. 7; T. 148, 345, 535-37) Williams-Garrett presented Complainant with a

⁸ Drake worked for Stop & Shop and Respondent for 38 years in various positions, including as a processor from 1999-2003. She retired in 2015. (T. 753; 755-758; 760-761; T. 766-767; 770; 772-773)

⁹ Her job responsibilities were moved to a new analyst position staffed by Pam Bayliss in Carlisle.

letter detailing the elimination of her position and her separation date. The letter stated that she would not be eligible for severance pay if she left Respondent prior to December 30, 2011.

Bastianelli and Williams-Garrett encouraged Complainant to apply for posted positions and said they would support her through the process. (T. 349; 150-151;536-7; J-3)

40. After learning that her job had been eliminated, Complainant asked Bastianelli if she could move into MacDougall's position and was told that she could not apply for the position. Complainant had long known that MacDougall was retiring and did not know that Drake had already been selected for the position as part of the reorganization. (Testimony of Complainant)

41. On Friday, July 22, 2011, Complainant told Bastianelli that she would be willing to relocate to Carlisle. (T. 91, 152; 537-38) Bastianelli told her there was no open corporate processor position and to speak with Williams-Garrett. (T. 537-38) The same day Complainant told Williams-Garrett that she would be willing to relocate. Williams-Garrett told her that it was too late because they had already made all the staffing and selection decisions and Bastianelli was traveling to Carlisle the following Monday, July 25, to tell S. A. and V. C that they had been selected for the corporate processor positions. (T. 350-52, 538-39)

42. According to Bastianelli, Complainant would not have been selected over S. A. or V. C. even if she had been willing to relocate to Carlisle because her performance assessment score was lower than theirs. (Jt. 20 at 4; T. 439, 539-40) Williams-Garrett told Complainant that if she wanted to relocate to Pennsylvania she could apply for another open position there. Complainant did not want to go to Carlisle for any position other than her present position and she did not apply for another position in Carlisle.¹⁰ (T. 93; 350-52, 538)

¹⁰ Following the selection of S.A. and V.C., Complainant was sent to Carlisle to train them on the Cyborg system; S.A. and V.C. also came to Quincy for training with Complainant.

43. In the month before MacDougall's retirement, MacDougall trained Drake with regard to processing for union contracts and provided her with written notebooks she kept that contained information specific to the job functions. (Testimony of MacDougall)

Payroll Positions

44. Respondent had kept two payroll positions open until the HRIS employees learned of their status. The two open positions were lower paying than the processor positions and would be located in Freetown, MA, about 30 miles away from Quincy. (T. 93-4, 161-65, 359-60; 543-44)

45. Martignetti and J. C. applied and were hired for the payroll positions.¹¹ After their hire, they remained in Quincy until approximately mid-October, when the jobs moved to Freetown, MA. (Testimony of Vallatini at 682-683)

46. Complainant and Vallatini did not apply for the payroll positions. Complainant testified that she did not to apply for a payroll position because she assumed Martignetti and J. C. would get the positions. She assumed she would not be hired for a payroll job that she had never performed, as she had already been rejected in favor of Drake for a processing job that she had performed for 40 years. (T. 98-99)

47. Williams-Garrett testified that she encouraged Complainant to apply for a payroll position and believed she would have been selected because Complainant worked closely with payroll and was familiar with its operation. Williams-Garrett did not discuss any other open positions with Complainant. (T. 360-61)

Analyst Positions

48. Of the five newly created analyst positions, the three non-PeopleSoft positions were filled with existing employees, including Judi Whitten,¹² (Jt. 20 at 2-3) The credible testimony of

¹¹ The record does not reflect the date of their application and hire.)

Complainant and Bastianelli was that while Whitten was purportedly “staffed” into an analyst position, she did not want the position and never actually performed the job because she was “transitioning” and “looking for another job.” (T.174-175; T. 631-633) Six months later, in around January 2012, Whitten took another position within Respondent, creating an open analyst position. (See Finding of Fact #64)

49. The two remaining analyst positions requiring PeopleSoft skills were externally posted. (Jt. 20 at 2-3. T. 361-3; 421, 423;526-27; 541-42) In August, 2011, Bastianelli told her team that she was seeking to fill the two analyst vacancies with external candidates because no internal candidates had the necessary PeopleSoft skills and she told Complainant and the others not to apply for the positions. (T. 282-83, 541-3; Jt. 20 at 2; T. 362-63; 550-51)

50. Complainant nevertheless asked Bastianelli about applying for the analyst position. She told Bastianelli that many years earlier she had trained for a year on PeopleSoft and performed data entry using PeopleSoft. (T. 141, 145, 282-83, 545-46) Bastianelli testified that PeopleSoft had changed significantly over the more than 20 years since Complainant last used it and her experience was not current or analytical in nature. Complainant offered to attend training on PeopleSoft, however, according to Bastianelli, training would not have provided Complainant with the subject matter expertise needed to perform the analyst role. (T. 545-547) Complainant testified that she also asked recruiter S. D. (black) about the analyst job and S. D. told her she couldn’t apply for it and sent her back to Bastianelli. (T. 106-7)

51. On a Friday night in early September 2011, Russello called Bastianelli to inform her that Respondent had decided not to switch its HRIS system to PeopleSoft after all. Bastianelli

¹² The others were Trisha Loring and Pam Bayliss. Bayliss went to Carlisle where she assumed Drake’s former duties. (T. 764)

was not happy with the decision. (T. 547-48)¹³ The following Monday, at a weekly meeting, Bastianelli informed her team that the changeover to PeopleSoft was not going forward.

52. Respondent then reduced the number of open analyst positions from two to one and dropped the PeopleSoft requirement from the posted analyst job description.¹⁴ (T. 549-551) Bastianelli did not inform her team that the PeopleSoft requirements for the position had been dropped. (Jt. 20 at 2, T. 362, 364-65, 421-23, 549-51) Complainant testified credibly that she was not aware of the re-posted analyst position and did not submit an application for the position.

53. Donna Vallatini,¹⁵ whose job was to end in mid-October, testified that she searched the Respondent's job postings daily, discovered the analyst posting online and decided to apply. She did not have PeopleSoft skills, and did not recall whether the job posting contained a requirement of PeopleSoft skills at the time of her application. Vallatini told no one at work that she was applying for the position, even though she and Martignetti had been close friends for ten years and she had previously told Martignetti that she was not applying for the position. Vallatini was the only internal candidate to apply for the analyst position.

54. On September 13, 2011, Vallatini brought her completed application to Bastianelli for her signature and verification of her most recent performance rating¹⁶ and she was offered the analyst position on September 29, 2011. (T. 366,552-55; 641-643; 650-53; J. 2; Jt. 22.)

55. On Friday, September 30, Complainant and Martignetti learned that Vallatini received the analyst job because Complainant had processed the paperwork for her job change.

¹³ Bastianelli, who had been recruited and hired specifically for her expertise in PeopleSoft, called Respondent's decision to abandon the planned conversion to PeopleSoft a "bait and switch" by Respondent.

¹⁴ The only analyst position posting in the record states a "people soft" requirement. (J-20)

¹⁵ Vallatini testified that she did not apply for one of the payroll positions because it was too far from home.

¹⁶ The signature of a supervisor and the latest evaluation rating were required on an internal job application

Martignetti,¹⁷ who had been best friends with Vallatini for a decade, felt betrayed by Vallatini for not telling her about applying for the job. When Vallatini came to work on September 30, Martignetti angrily confronted her about having gone behind her back to get the position. Complainant and Martignetti testified that Vallatini responded that Bastianelli told her to apply for the position. I credit their testimony.

56. Bastianelli denied telling Vallatini to apply for the position. Bastianelli and Vallatini each testified that they had never discussed the position before Vallatini applied for it. (T. 551-553; 652-653) I do not credit their testimony. I find that Bastianelli told Vallatini about the position and draw the reasonable inference that Bastianelli intentionally did not disclose the change in the analyst position to her team in order to prevent Complainant, who was the only remaining laid off HRIS employee, from applying and to preserve the position for Vallatini.

57. On November 17, 2011, Complainant met with Williams-Garrett who provided her with a final copy of the Separation and Release Agreement and the Older Workers Benefits Protection Act check-list and an Estimated Severance Benefits Information form. (Stip. Fact No. 8; T. 186; 369-71) Respondent was offering Complainant 12 weeks' severance pay totaling \$11,424. (Jt. Ex. 4)

58. On December 19, 2011, Complainant completed an application for the position of Merchandising Administrative Support within the merchandizing department. (Jt. 17; T. 108-11; 372; 559) Bastianelli signed off on the application and incorrectly verified Complainant's last performance rating, by initially checking off the category "Meets Job Requirements." Complainant, whose last rating was "Exceeds," brought the error to the attention of Bastianelli, who corrected her mistake. (T. 110-13, 189, 559-61) Complainant submitted the application to recruiter S.D.

¹⁷ Martignetti had already accepted the payroll position, but was still working out of Quincy.

59. Complainant testified that another HR recruiter asked her to submit her signed severance agreement. Complainant told the recruiter that she did not approve of the agreement and would not sign it. She stated that she told the recruiter that she was somewhat dubious about her chances for a obtaining an alternate job because Bastianelli did not even know her rating and had turned her down for positions she had asked about. (T. 115-117)

60. Complainant took a week's vacation from December 21 to 28. She worked on December 29 and December 30, 2011.¹⁸ (T. 192-93; 195-96)

61. On December 29 or 30, 2011, Complainant contacted the recruiter and explained that she had submitted an application for a merchandizing position to S.D. and was waiting to hear back regarding this position. I find that Complainant was indicating that she still had a reasonable expectation of employment with Respondent and held out hope that her employment would not end. December 30 was Complainant's last day of work.

62. According to Williams-Garrett, who was not involved in the interview process for the merchandizing position, the successful candidate had previous merchandising experience, which Complainant did not have. (T. 371-372) Bastianelli was not the hiring manager for the position. (T. 188, 561)

63. In around mid-January, 2011, Williams-Garrett called Complainant to follow up because she had not received a copy of Complainant's signed separation agreement. Complainant testified that Williams-Garrett told her, "You know the drill. We'll call you if something comes up." Williams-Garrett denied making such a statement and testified that Respondent had no policy of calling back laid off employees to their prior or similar roles. (T. 374-376) Complainant told Williams-Garrett that she would not sign the papers because it was not about the money; she needed a job. (T. 116-118)

¹⁸ Complainant filed her MCAD complaint 300 days after December 30, 2011.

64. Complainant testified credibly that she was aware of numerous instances where Respondent recalled employees back from lay-off and named an individual from HR who had been recalled after a lay-off, but did not return to Respondent. I credit Complainant's testimony.

Analyst Position Opens Up

65. In late January 2012, Judi Whitten left the analyst job after six months for another position on Respondent's Oracle team. (Jt. 20; T. 631-32) Whitten's move created an open analyst position which Respondent then posted internally and externally. (T. 563; 630-631) The unrebutted testimony of Complainant and Bastianelli was that Whitten never performed the analyst job and I find that Whitten was essentially a place-holder for the position until transferring to the Oracle team.

66. Drake, who in August 2011 had been placed in the New England processor position vacated by MacDougall, testified that a manager from Giant-Landover called to tell her about the analyst opening vacated by Whitten and urged her to apply. Drake applied for the analyst position after exactly six months in the New England processor position and was offered the analyst position in February 2012. Employees of Respondent were required to remain in a position for at least six months before transferring to another position. (T. 563, 773-75, 776-77; 791; T. 6)

Stop and Shop New England Processor Position Opens Up

67. Drake's transfer to an analyst position in February, 2012 created an opening for the Stop & Shop New England processor position (previously performed by MacDougall) In February 2012, Respondent posted the New England processor position internally and externally. (Jt. 20 at 6; T. 563-64) Multiple internal and external candidates applied for the job. While the

job remained open, Drake performed both the processor and analyst jobs.¹⁹ (Jt. 20 at 6-7; T. 564-65, 778)

68. In February 2012, Complainant learned of the New England processor position. (T. 120, 132; T. 201-05)

69. On February 28, 2012, in an email exchange, Martignetti asked Complainant whether she was going to apply for the processor position or another vacant position, and Complainant responded that she did not think so. (T. 12-21; 201-02; Jt.Ex. 10) Complainant did not apply for the position.

70. In April 2012, Alex Vespa, who had stayed in touch with former colleagues in Respondent's benefits department since his lay-off a year earlier, received a call from a former co-worker informing him about the open New England processor position. Vespa had no processing experience at Respondent, but had done some processing at a subsequent job. Vespa was interested in returning to full-time employment at Respondent. Vespa applied online for the position in around mid-April 2012, interviewed in early May²⁰ and submitted a hard copy application on May 30, 2012. (Jt. 7; Jt. 8; T. 714-21) In June 2012, Respondent offered Vespa the position, which he began on June 12, 2012. He continued to work in the position at the time of the public hearing.

71. Bastianelli testified that she was not the hiring manager for the processor position, did not know Vespa beforehand and stated they had never spoken prior to his starting the job. (T. 565-566)

¹⁹ Drake testified that employees were required to remain in the same job for at least six months before moving to another position. Her application for the analyst position was dated six months after she was placed in the processor position.

²⁰ At his deposition, Vespa testified that he interviewed with Bastianelli. At the public hearing, he testified that his deposition testimony was incorrect and he had interviewed with someone else.

72. Vespa testified that he had a “learning curve” and needed training to perform the processing position, and relied on more senior employees. In addition, Respondent flew in an employee from New York in order to train him. (T. 743-744)

73. Complainant later learned from MacDougall, who kept in touch with her former co-workers after her retirement, that Vespa was going to get the job or was already performing the job.

74. MacDougall testified that she later visited the Quincy location and observed Vespa working at the processor position and told Complainant he had been hired.

75. At the time of her termination, Complainant earned approximately \$51,496 per year. (Jt. Ex. 17)

76. Following her termination, Complainant collected unemployment compensation for one year, totaling \$28,600. (T. 221)

77. In 2013, Complainant began working on an as-needed basis at Kit Clark Senior Services, an adult day health care program. The position subsequently became permanent and for the past two years, Complainant has worked 30 hours per week at a current rate of \$10.40 per hour. She continued to be employed at Kit Clark at the time of the public hearing.

78. In 2013, Complainant’s gross earned income was \$9,509. In 2014, Complainant’s gross earned income was \$17,163. In 2015, Complainant’s gross earnings were \$16,614. From January 1, 2016 through March 14, 2016 (approximately 10 weeks) Complainant’s gross earnings were \$3,120, based on 30 hours per week @\$10.40 per hour. (30 hours x \$10.40 x 10 wks.) (T. 223; Jt. Exs. 11, 17, 18, 19) Complainant’s total gross earnings from 2013 to the time of the public hearing equal \$46,406. ($\$9,509 + 17,163 + 16,614 + 3,120 = \$46,406$)

79. Complainant, who was 59 at the time of her lay-off, testified that she continued to inquire about a job with Respondent because she had "seven years left." (T. 238) I find this statement indicates Complainant's intention to work until age 66.

80. Had Complainant remained at her position at Respondent, assuming a salary of 51,496 and 3% increase in wages each year she would have earned, through the date of the public hearing the sum of \$231,853.

81. Had Complainant remained at her job at Respondent until the age of 66 in June 2018, assuming a salary of \$51,496 and assuming a 3% increase in yearly wages from the date of the public hearing until June 2018, her front pay totals \$117,764.06.

82. Complainant testified that despite her hard work, the people she worked with for 40 years did not treat her as worthy. She processed documents on a daily basis containing the words "equal opportunity" and but felt Respondent did not provide her with equal opportunity. She stated that while Respondent turned down her offer to pay for her own training, the company was willing to re-hire Vespa and to train him. (T. 125-126) Complainant testified that over the many years she was employed by Respondent she had seen the company find jobs for other people and knew that Respondent could find a job for her. She believed up until the end of her employment that Respondent would find a job for her. Complainant was upset that Drake, who did not want the processing job, was given the job instead of her. She was upset that Vespa, who left Respondent prior to his scheduled last day and did not honor his commitment, was hired into a job that she could have performed. She testified that in view of her 40 years of hard work and loyalty to the company, she expected, at the very least, that Respondent would have told the truth about its hiring process. She felt she was treated adversely by Respondent in relation to a number of her white co-workers. I credit her testimony.

83. Paulette Mañon, a nurse educator, has been close friends with Complainant since 1969. Mañon testified that she and Complainant vacationed together for many years with their children and grandchildren and owned a time-share together in Florida. They planned to retire simultaneously and move to Alabama where Mañon grew up. They communicated almost daily and often went out to lunch together and took turns paying. Mañon testified that before her termination, Complainant was vivacious and fun to be around and laughed loud and often. She testified that Complainant is a very proud person, was proud of her job at Stop & Shop and enjoyed her job which she had held since her teens. (T.497-511)

84. Complainant told Mañon that her job was moving to Pennsylvania and she was asked to train people in Pennsylvania. (T. 504-506) Mañon testified that during the reorganization, Complainant constantly worried and that was all she talked about. She testified that Complainant was very upset when she lost her job and would cry when they spoke. Mañon observed that over time, Complainant gained a lot of weight and began to lose her hair and she is not as outgoing and laughs less now. She testified that Complainant's financial status changed once she lost her job and she could not contribute as much to their lunches, so they went out less frequently. They no longer vacation together because Complainant cannot afford it, even though Mañon offers to pay. Mañon pays the taxes on the timeshare whereas before they used to alternate years paying the taxes. For the first two years after her termination, Complainant and Mañon talked constantly about her termination. Within the past year, Complainant has told Mañon that she no longer wants to talk about it. They continue to talk frequently and attend religious services together. (T. 297-511) I credit the testimony of Mañon in its entirety.

III. CONCLUSIONS OF LAW

A. Timeliness

A Complainant must file a discrimination complaint with the Commission within 300 days of the last alleged discriminatory act. M.G.L.c.151B§5. The statutory period for filing a complaint of discriminatory termination does not begin to run until the employee has sufficient notice of that specific alleged discriminatory act. Respondent asserts that the instant complaint should be dismissed in its entirety for lack of jurisdiction because it was filed on October 24, 2012, more than 300 days after Complainant was informed in July 2011 that she was to be laid off on December 30, 2011. Respondent asserts that notice of the adverse action was unequivocal. Respondent further argues that the only job vacancy that occurred within the 300 day period after December 30, 2011 was for a processor position which Complainant knew about and for which she chose not to apply. Therefore, it asserts that the posting and availability of the processor position should not be considered

I find this argument to be unpersuasive because I do not believe that the July 2011 notice of job elimination constituted unequivocal notice of the termination of Complainant's employment with Respondent. In reality, Respondent held out the possibility of other employment within the company, it encouraged Complainant to apply for other positions, and accepted her application for a job as late as December 2011. I conclude that Complainant continued to have a reasonable expectation of employment with Respondent up to end of December and beyond. She declined to sign the severance agreement because she believed a job would become available and needed to work. In the interim, a number of positions opened up or were altered, employees jockeyed for those positions, and Complainant held out hope that she would be considered for alternate jobs.

Since I conclude that Complainant did not receive unequivocal notice of termination of employment with Respondent in July 2011, this event did not trigger the 300 day filing period. Wheatley v. American Telephone & Telegraph Co., at al., 418 Mass. 394 (1994) (filing deadline may be tolled where Complainant's termination was contingent on his finding another job and he did not learn that others not in his protected class were performing his duties until after his termination); See also, Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination & another, 431 Mass. 655 (2000) (The statute of limitations does not begin to run until the employee becomes aware of facts that would point to the termination as discriminatory) Bastianelli and Williams-Garrett represented to Complainant and others whose jobs were eliminated that they would assist them in finding new jobs. Seeing co-workers receive jobs over the ensuing weeks reinforced Complainant's belief that Respondent would find a job for her. Further, when Complainant applied for a merchandizing position on December 19, 2011, Respondent never communicated the status of her application for this position, leaving her to hold out hope that Respondent would find a position for her even after December 30, 2011. She told HR Manager Garrett-Williams in January, 2012 that she would not sign the severance agreement and wanted a job. I conclude that Complainant's claim is timely, pursuant to the principles articulated in Wheatley, supra. I conclude that the statutory filing period did not start to run until Complainant learned that Respondent had hired Vespa, who is white, into a processing position for which Complainant was well qualified and had sought to fill before her layoff. Wynn & Wynn, P.C., supra. When Complainant discovered that Vespa, someone white and less experienced, was hired into a processing job in April 2012, she then became aware of facts that would point to her termination being discriminatory. The event was also the last in a series of layoffs, hirings, transfers and job alterations that were ostensibly part of the re-

organization that continued after Complainant's termination and, when viewed as a whole, support the notion that the notice of July 11, 2011 was not the final adverse action for purposes of the statute of limitations.

B. Race Discrimination

M.G.L.c.151B §4(1) prohibits discrimination in employment on the basis of race and color. Complainant alleges that Respondent discriminated against her based on her race and color. In order to establish a prima facie case of race and color discrimination, Complainant must show that she was a member of a protected class, that she was qualified and adequately performing her job and that she was treated differently from similarly situated employees not in her protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). See also, Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005). Complainant is a member of a protected class, by virtue of her race and color, black. Complainant performed her job quite ably, was well-liked and had good interpersonal skills. When Respondent eliminated Complainant's corporate processing position in Quincy, her duties were transferred to two corporate processing positions in Carlisle, Pennsylvania, both of which were filled by white employees. At the same time, a processing position in Quincy that Complainant was qualified to perform and about which she inquired was filled by a white woman.

In addition, Complainant inquired about applying for newly created analyst positions that initially required PeopleSoft skills and was advised not to apply for the positions, because she lacked the requisite skills, despite offering to pay for her own training. However, when Respondent eliminated the PeopleSoft requirement and the remaining analyst position no longer

required these skills, Complainant was not made aware that the position had become available and the position was filled by a white employee who was advised to apply for it.

Respondent did not respond to Complainant's application for a merchandizing position, and finally, when the same processor position again became vacant in February 2012, Complainant was not contacted about the position and it was given to a white man who had also been laid off in 2011. I conclude that Complainant has established that she was treated differently from similarly situated persons not of her protected class with respect to the several vacant positions and has established a prima facie case of discrimination on the basis of her race and color.

Once Complainant has established a prima facie of discrimination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its actions. Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986) An employer that seeks to reorganize its workforce is not free to make its employment decisions on impermissible grounds: "even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons. [citations omitted]." Sullivan, supra. at p. 41-42.

Respondent's articulated reasons for its various assignments of positions to white employees are as follows: With respect to the elimination of Complainant's corporate processing position and moving the position to Carlisle, PA, Respondent asserts that it had already made the determination to assign the positions to two employees in Carlisle based on Complainant's prior indication that she did not want to move, that it was too late to alter that

plan and that Complainant would not have been placed in Carlisle in any event, because her rating was not as good as that of the incumbents. Respondent also asserts that the fact that it retained a black employee who was a processor in the Giant-Landover division is further evidence that it did not discriminate on the basis of race in the course of its reorganization.

Respondent's legitimate, non-discriminatory reasons for selecting Drake for the position of New England processor were that Drake had the best assessment score among the pool of qualified candidates and was more than qualified than Complainant due to her past experience as a processor and an analyst and her familiarity with Cyborg and other HRIS systems. Respondent asserts that while Complainant was qualified for the position, Drake's superior assessment score was the determining factor in her selection over Complainant, as well as the two white candidates, Vallatini and Martignetti.

With respect to the five analyst positions, three of the positions were filled by current employees, including Judi Whitten and two other positions required PeopleSoft skills, which Respondent intended to fill by external candidates, because no internal candidates had the requisite skills. Respondent asserted that Complainant did not have the requisite PeopleSoft skills and training would not provide such skills. With respect to the analyst position that ultimately did not require PeopleSoft skills, Respondent asserts that it was incumbent upon Complainant to review internal job postings, that she had the opportunity to apply for the position, did not do so, and therefore has no standing to claim that the failure to consider her for the analyst position was discriminatory.

With respect to the payroll positions, Respondent asserts that Complainant's employment would likely not have been terminated, had she applied for one of the payroll positions and that her failure to do so was a factor in her employment being terminated.

Respondent asserts that because Complainant did not apply for the processing position that became available in February 2012 that was filled by Vespa, she is precluded from claiming that Respondent's failure to hire her was based on discriminatory animus. Respondent further asserts it was under no obligation to contact Complainant regarding an open position after her separation from employment. Given all of the above, I conclude that Respondent has articulated legitimate, non-discriminatory reasons for its conduct.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. A fact finder may, but need not, infer that an employer is covering up a discriminatory intent, motive or state of mind if one or more of the reasons identified by the employer are false. Lipchitz v. Raytheon Company, 434 Mass. 493, 498, 507 (2001). The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, only that "discriminatory animus was a material and important ingredient in the decision making calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

Complainant asserts that Respondent's articulated reasons are a pretext for unlawful discrimination. She argues that Respondent's reliance on the "incumbency" of the two white corporate processors in Carlisle, S. A. and V. C., to justify their remaining in their positions, was pretextual because Complainant was actually "the" incumbent, having performed the position for many years. However, because Complainant had previously indicated that she was not willing to move to Carlisle and Respondent reasonably relied on that information in filling the positions, I do not find pretextual Respondent's rejection of Complainant's offer to relocate to Carlisle as untimely.

Complainant asserts that the New England processor job filled by Drake was a position with which she was familiar and for which she was admittedly qualified, since she had trained MacDougall. The processor job was substantially similar to the job performed by Complainant. She should have been considered an incumbent whose 40 years of experience as a processor qualified her to perform the job without training. In addition, Respondent placed Vallatini and Martignetti in the "pool of people considered for the position" although Vallatini was not a processor, a factor which Respondent purported to be a preferential in determining who should be placed in an open position.

With respect to the analyst position that was filled by Vallatini, Complainant has established that Respondent withheld the information that the position no longer required PeopleSoft experience. Given this scenario, coupled with Respondent's knowledge that Complainant continued to seek a position to avoid being laid off, I draw the reasonable inference that Respondent deliberately precluded Complainant from applying for the position by withholding information about the altered job requirements and steered Vallatini to the position.

While Respondent purports to have utilized a legitimate process of reorganization, that considered factors such as incumbency, performance rating, skills and abilities and mobility, to select employees for placement in available positions, it is quite clear from the evidence that Respondent exercised significant, if not complete, discretion in selecting employees for lay-off and preserving positions for favored employees, while discouraging Complainant from applying for a number of available positions. In addition to steering Vallatini to an analyst job, the extent to which white employees such as Drake and Whitten were protected and given preferential

consideration becomes clearer when viewed in the context of the events that occurred in early 2012, after Complainant was dismissed. In around January 2012, Whitten transferred from an analyst position to another position within Respondent's Oracle Team, resulting in an available analyst position. I conclude that Whitten's earlier placement in that analyst position, which Whitten had never actually performed, was held for her and that she was protected for a period of six months while she "transitioned" and "looked for another job," while she nominally remained an analyst. In the meantime, Drake was protected and given favorable consideration as well. Drake performed the processor position for a period of six months from August 2011 until January 2012, when she was "tipped off" to the analyst opening created by Whitten's move. Drake was hired into the analyst position six months to the day from the start of her processor job, which was the minimum amount of time required before an employee was permitted to transfer to a new position. Drake continued to perform the duties of the processor and analyst positions until Vespa was hired back to fill the processor job several months later, in June 2012. Given the circumstances, I conclude that Complainant's failure to apply for the position awarded to Vespa was justifiable and not fatal to her claim. Complainant's affirmative attempts to obtain employment had proved futile and at some point she became discouraged and consumed by self-doubt. I conclude that Complainant reasonably believed that continuing to apply for open positions would not result in her securing a position but instead, it would be incumbent upon Respondent to call her for a position. This was Respondent's practice, as she had observed it first hand, having processed job changes for many years.

In addition to formal job postings, there existed at Respondent an informal, less transparent network for hiring and promoting employees based on relationships and word of mouth, which, while not unique to Respondent, often relies on subjective criteria that have been

acknowledged as suspect by a number of courts, and deserving of close scrutiny because of the "capacity for masking unlawful bias." Sklenar v. Central Bd. of Ed. of Sch. Dist., 497 F. Supp. 1154, 1160 (E.D. Mich. 1980), quoting Davis v. Calitano, 613 F.2d 957, 965 (D.C. Cir. 1980). Moreover, with respect to the newly available analyst position, Complainant was not even made aware of the altered requirements for the position that would have rendered her qualified. I draw the inference that discriminatory animus prevented her from even being made aware of the opportunity. Emma Harrison vs. Boston Financial Data Services, Inc., 37 Mass. App. Ct. 133 (1994)

There is scant evidence in the record that Respondent's agents acted with blatant or conscious bias based on Complainant's race. However, where the Complainant provides evidence of disparate treatment, the fact that the decision-maker may not have been aware of the motivation at the time, yet was acting with unconscious bias, neither alters the fact of its existence nor excuses it. "Unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination." See, Thomas v. Eastman Kodak Company, 183 F.3d 38 (1st Cir. 1999); citing Hopkins v. Price Waterhouse, 825 F.2d 458, 469 (D.C. 1987) Given Complainant's decades of experience in her job and her knowledge of any number of positions in her department, I conclude that the reasons asserted by Respondent for the failure to consider her for several available positions were essentially a pretext for discrimination. Establishing that Respondent's stated reasons for its actions were pretextual permits an inference of unlawful discrimination. Abramian, supra. 432 Mass 107. This conclusion is bolstered by the fact that Respondent's manager actively discouraged Complainant from applying for open positions and on one application mistakenly cited her evaluation rating as "meets" when it was, in fact, "exceeds." I conclude that Respondent's refusal to consider

Complainant for available positions, its affirmatively discouraging her from making applications, its failure to transfer her to any one of a number of positions for which she was qualified, and its refusal to recall her for an open processor position, were actions motivated by unlawful considerations of her race and color in violation of G.L. c. 151B.

IV. DAMAGES

A. Lost Wages

Chapter 151B provides for monetary restitution to make a victim whole, including lost wages and damages for emotional distress. See Stonehill College, 441 Mass at 586-587, *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976). The Commission is authorized to award front pay as well as back pay as part of a compensatory damage award. See Beaupre v. Smith & Associates, 50 Mass. App. Ct. 480 (2000) *citing* Conway v. Electro Switch Corp., 402 Mass. 385, 387-388 (1988); Madden v. Town of Falmouth Harbormaster Waterway Dept., 15 MDLR 1949 (1993). Front pay is appropriate where the discriminatory act occurs near an individual's retirement date and/or where comparable positions would be difficult to find. See Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, at 104-6 (2009) (front pay award appropriate where plaintiff planned to work for defendant until retirement, where few comparable employment opportunities existed, and where plaintiff's ability to obtain employment was undermined by defendant's harm to her reputation); Fitzpatrick v. Boston Police Department, 18 MDLR 29, 30 (1996); Madden, 15 MDLR at 1967-68.

I conclude that Complainant is entitled to lost wages from January 2012 to the time of the public hearing, based on her annual salary of \$51,496 and anticipating a 3% annual increase, minus her interim earnings and unemployment compensation for a total of \$156,847. (\$231,853-46,406-28,600=\$156,847)

I also conclude that Complainant is entitled to front pay from the time of the public hearing up until her 66th birthday in June 2018 in the amount of \$117,764.06, based on her annual salary plus 3% increase from April 2016 through June 2016. This amount shall be discounted by the rate that is deemed currently reasonable and acceptable after the parties' consultation with a financial expert.

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, supra. at 576.

Complainant testified credibly that she felt Respondent treated her as unworthy and unequal to those co-workers for whom Respondent provided jobs. She clearly felt great distress that her years of loyal and competent service were not valued. Complainant's good friend of many years, Mañon testified credibly that Complainant gained significant weight, started losing her hair and talked constantly of her termination for a two period. She testified that Complainant, was once outgoing, fun to be with and quick to laugh, but has changed and is no longer the same. Complainant does not enjoy socializing the way she used to due in part to her altered financial circumstance. She no longer goes to frequent lunches with Mañon or takes vacations with her, occasions they enjoyed with their children and grandchildren.

I conclude that Complainant's emotional distress can be attributed to Respondent's unlawful termination of her employment and failure to reassign her to positions for which she was qualified. Complainant's employment future was placed in limbo for a considerable period of time causing her anxiety and trepidation since she relied on her income and needed to continue working. I am persuaded that she suffered considerable emotional upset and conclude that she is entitled to damages for emotional distress in the amount of \$75,000.00.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondent immediately cease and desist from engaging in discrimination on the basis of race and color.
2. Respondent pay to Complainant the sum of \$75,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondent pay to Complainant the sum of \$156,847 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
4. Respondent pay to Complainant damages for front pay from the time of the public hearing until Complainant's 66th birthday in 2018 in the amount of \$117,764.06, which shall be

discounted at a rate to be determined by the parties after consultation with a financial expert regarding a currently acceptable discount rate at the time of payment.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 23rd day of August, 2016


JUDITH E. KAPLAN
Hearing Officer