

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & CYNTHIA LEWIS,
Complainants

v.

DOCKET NO. 09-BEM-00394

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

Appearances:

Robert Johnson, Jr., Esq. for Cynthia Lewis
James F. Cavanaugh, Esq. for Massachusetts Department of Correction

I. PROCEDURAL HISTORY

On January 24, 2009, Complainant Cynthia Lewis, an African-American woman, filed a complaint with this Commission charging Respondent Department of Correction with discrimination on the basis of race, color and gender in violation of M.G.L. c.151B. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for hearing. A public hearing was held before me on January 13-15, February 7, 26 and 28 and March 10, 2014. Based on all the relevant, credible evidence and based on the reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Cynthia Lewis has worked as a Correction Officer for Respondent since 1985.
2. Respondent Department of Correction operates facilities, including the Lemuel Shattuck Correctional Unit ("LSHCU"), located within the Lemuel Shattuck Hospital, a state-run facility in Boston. Complainant began working at LSHCU in 2000. Respondent is a paramilitary organization wherein the chain of command is important and obedience to superior officers is required.
3. Correction officers are expected to comply with the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, known as the "Blue Book." (Ex. C-20)
4. In 2007 there were 41 correction staff on all three shifts on 8 North; there were 16 staff on the 7:00 to 3:00 shift, including 11 white men; 2 black men; 2 black women and 1 Hispanic woman. (Floyd v. DOC; Ex. R-51)
5. In 2008 there were 40 correction staff on all shifts on 8 North. There were 17 staff on the 7:00 to 3:00 shift, including 11 white men; 2 black men; 2 black women; 1 white woman and 1 Hispanic woman. (Floyd v. DOC; Ex. R-51)
6. In 2009, there were 47 correction staff on 8 North; On the 7:00- 3:00 shift there were 18 staff, including 9 white men; 2 black men, 3 black women, 1 Hispanic man, 1 Hispanic woman and 1 white woman. (Floyd v. DOC; Ex. R-51)

7. Inmates of Respondent receive medical care in the LSHCU and Respondent is responsible for guarding inmates while they are patients at LSHCU. Within LSHCU are two areas, 8 North and the Outpatient Department ("OPD"). 8 North operates around the clock with three shifts. OPD operates from 9:00 a.m. to 5:00 p.m. Captain Paul Craven was in charge of OPD at times relevant to this complaint.

8. From 2000 until June 2010, Complainant was regularly assigned to the 7:00 a.m. to 3:00 p.m. shift on 8 North. From 2010 to the present, Complainant has worked primarily in OPD.

9. Michael Jeghers has worked for the Respondent since 1987. He was promoted to Lieutenant in 2002 and was assigned to LSHCU in June of that year. In approximately 2006, he was assigned the 7:00 a.m. to 3:00 p.m. shift, primarily on 8 North. He became the shift commander in 2008. The shift commander is responsible for the overall safety of Respondent's employees and medical staff assigned to the shift. The shift commander also oversees the activities for the shift, including inmate medical appointments. Jeghers voluntarily transferred to a DOC facility in Plymouth in 2012.

10. Captain Paul Craven has worked at LSHCU for 34 years and oversees OPD. Complainant has worked for him for the past three years.

11. The chief administrator of LSHCU was the superintendent. From 1992 to 2010 James Walsh was superintendent. Walsh was removed from the position on March 8, 2010, at which time Brian Burgwinkle, who had been deputy superintendent since 2005, became acting superintendent. He remained in the position until his retirement on June 30, 2010. (Ex. C-18)

12. Donna Driscoll, who has been employed by Respondent since 1986, was the LSHCU administrative captain. In that role, Driscoll oversaw the operations of 8 North and five correction officers who were LSHCU superintendent's picks, who applied and were selected to perform administrative work. Driscoll was Jeghers' direct supervisor.

13. There were five fixed posts for correction officers on 8 North during the day shift; control room officer, pedestrian trap officer, outside corridor officer, gate post officer and inside corridor officer.¹

Incident of June 18, 2008

14. On June 18, 2008, Complainant and Jeghers worked the 7:00 a.m. to 3:00 p.m. shift. Complainant was assigned to the inside corridor post. Complainant was also scheduled to work the 3:00 p.m. to 11:00 p.m. shift the same day.

15. On this day, "Inmate A," a long-time patient who was known to staff as being ornery, racist, and mean-spirited, had problems with the television in his room. "Inmate A" started swearing about the officers and referred to Complainant as a "smirking bitch" who deserved a punch in the face and should "not be alive." Jeghers obtained another television for "Inmate A" in order to de-escalate the situation. (Testimony of Jeghers; Testimony of Driscoll)

16. At the end of his shift, Jeghers briefed the incoming 3:00 p.m. to 11:00 p.m. shift commander, Lt. Reardon, about his concern for Complainant's safety around "Inmate A." In order to minimize contact between them, Jeghers and Reardon agreed to reassign Complainant to the pedestrian trap for the 3:00 p.m. to 11:00 p.m. shift because it was physically farther away

¹ At some point a solarium post was added to 8 North, however, witnesses could not recall whether the post existed from 2008-2011.

from Inmate A. Deputy Burgwinkle approved the decision to re-assign Complainant to the trap.
(Testimony of Jeghers; Testimony of Burgwinkle)

17. Complainant testified that at the end of the day shift, she approached Jeghers in the lobby to ask for an explanation for her reassignment to the pedestrian trap. Complainant testified that although she spoke in a normal tone of voice, Jeghers yelled at her and humiliated her in front of other staff. She filed an incident report. (Ex. C-7) Complainant testified that prior to this incident she had no trouble with Jeghers.

18. The following day, Burgwinkle told Jeghers that Complainant had filed an incident report concerning her interaction with him the previous day and required him to file his own incident report. In his report, Jeghers stated that Complainant challenged his assignment of her to the pedestrian trap as he was going off duty. He explained that Lt. Reardon was aware of the change, which had been made for her safety. He claimed Complainant was insubordinate and pointed her finger at him stating, "Don't raise your voice at me. I am asking a question." Jeghers responded that he was not raising his voice and was giving Complainant her orders. Jeghers wrote in his report that Complainant challenged his authority and has been confrontational toward him regarding her assignments and has shown a disregard for his authority. (Testimony of Jeghers; Ex. C-8)

19. A Sergeant who observed the encounter filed an incident report supporting Jeghers' version of events. (Ex. C-8)

20. Captain Driscoll was assigned to conduct a fact-finding hearing regarding the June 18 incident. She reviewed the incident reports, viewed video of the incident and interviewed Jeghers, the Sergeant who observed the incident and Complainant. Driscoll submitted her

findings to Superintendent Walsh on August 8, 2008, which supported Jeghers' version of events and concluded that his actions were appropriate under the circumstances. She found Complainant's conduct toward Jeghers to be inappropriate and in violation of the Blue Book sections 6(a) and 19(3) (Ex. C-8; Testimony of Driscoll)

21. Upon receipt of Driscoll's findings, Superintendent Walsh issued a 3-day suspension to Complainant for her insubordinate conduct. On appeal, the Commissioner of Correction reduced the suspension from 3 days to 1 day. (Ex. C-9; C-10)

Off-site Parking

22. Due to limited parking in the main Shattuck parking area, the Shattuck campus police instituted a program requiring workers² to park off-site one day per week and provided them with a color-coded sticker that indicated their off-site parking day. On their off-site parking days, workers could park in a designated off-site parking area one mile from Shattuck where a shuttle bus would take them to the hospital.³

23. Correction officers are required to punch a time card upon arriving for their shift. Correction officers assigned to the 7:00 a.m. to 3:00 p.m. shift were required to punch their time cards by 6:50 a.m. and those who punched in by 6:50 were authorized to receive "roll-call pay."

24. Respondent had implemented a procedure allowing correction officers working the 7:00 a.m. to 3:00 p.m. shift a grace period on their off-site parking day, which permitted them extra time to arrive for the start of their shift and still be considered punctual and to collect roll call pay. LSHCU had no written policy on the matter. However, the practice was that

² The program applied to all hospital workers, not only Respondent's employees

³ The policy called for a warning for the first offense, a ticket with no charge for the second offense and towing for the third offense. Some correction staff parked in the Shattuck lot on their off-site days because they were given a break by the Shattuck police or because there was essentially no penalty until the third offense.

employees were allowed to use the grace period only if their tardiness was caused by a delay of the shuttle bus. Testimony regarding the exact grace period allowed varied from 10 minutes to 20 minutes, that is, from 7:00 to 7:10 a.m.

25. Captain Driscoll learned that the Complainant, whose off-site parking day was Thursday, had not arrived timely for her shift on Thursday, July 3, 2008 and had claimed that her late arrival was due to "off-site parking." Driscoll, whose duties included reviewing daily time cards, observed that Complainant had written "off-site parking" on her July 3, 2008 time card. Driscoll knew that the off-site parking area was closed and the shuttle bus was not operating on July 3 and July 4, 2008. (Testimony of Driscoll)

26. After confirming with Shattuck campus police that the off-site lot was closed on July 3, Driscoll and a sergeant drove to the off-site lot observing that it was closed and that Complainant's car was not parked in the lot. Driscoll reported her findings to Superintendent Walsh and Deputy Burgwinkle. (Testimony of Driscoll) They referred the case to Respondent's Internal Affairs Unit.

27. This was not the first time Complainant had been tardy on off-site parking days. Two years earlier, on October 6, 2006, Burgwinkle had advised Complainant that for the prior six Thursdays she had claimed to be tardy because of off-site parking when the shuttle bus was not running late. Complainant told Burgwinkle that on those days she typically parked at the Forest Hills T station and walked to work and did not use the shuttle bus. He informed her that her tardiness needed to cease and he made note of their discussion. (Testimony of Burgwinkle; Ex. R-15)

28. On September 12, 2008, Respondent initiated an internal investigation into Complainant's potential abuse of the grace period. The investigation was conducted by Respondent's Internal Affairs Unit. The matter was assigned to then Sgt. Harold Wilkes, (now Lt. Wilkes) who is black. Wilkes has worked for Respondent since 1987 and has handled hundreds of internal investigations. (Testimony of Wilkes; Ex. R-15)

29. On September 18, 2008, Complainant's co-worker, Sgt. Wendell Williams, gave her a ride to work, arriving after 7:00 a.m. Complainant wrote "off-site parking" on her time card for that day, as the reason for her being tardy. (Testimony of Driscoll)

30. On September 23, 2008, Wilkes interviewed Complainant. During the interview, Complainant told Wilkes that on July 3, she had borrowed a car and parked in the off-site lot. She then admitted to Wilkes that she did not park in the off-site lot on either July 3 or September 18. (Ex. R-15)

31. Wilkes observed that from January 2008 to September 2008, Complainant had marked her time cards with the notation "off-site parking" on 14 occasions and was late for 6:50 roll call on each of those occasions. Wilkes found that Complainant had fraudulently marked her time cards "off-site parking" in order to justify her tardiness even though she had not parked in the off-site lot and was not late because of the shuttle bus. He also found that Complainant was untruthful when she stated she parked in the off-site lot on July 3, 2008 when the lot was closed. (Ex. R-15)

32. Wilkes forwarded his findings to the Deputy Commissioner for executive review. The Deputy Commissioner sustained Wilkes' findings and ordered a Commissioner's Hearing to determine if Complainant should be disciplined. (Ex. R-15)

33. On February 27, 2009, Respondent conducted a hearing into Complainant's conduct with respect to off-site parking. The charges were that Complainant arrived late to work on numerous Thursdays and wrote "off-site parking" on her time card when she did not park her car off-site, in violation of Respondent policy allowing correction staff at LSHCU to be late when utilizing the off-site parking lot; That through her conduct, Complainant fraudulently collected roll call pay to which she was not entitled and did not earn; and that she was less than truthful when questioned by a Departmental Investigator regarding her conduct.

34. The hearing officer sustained the untruthfulness charge and partially upheld the fraud and the tardiness charges, noting that the policy was vague but that Complainant collected roll call pay when she did not park in the off-site lot. (Ex. C-12) On March 29, 2009, The Commissioner upheld the hearing officer's finding and issued Complainant a three-day suspension and a "final warning" that any future violations of the rules and regulations could result in her termination. (Ex. C-13) Complainant's union appealed her three-day suspension to an arbitrator who upheld the suspension. (Ex. R-16)

Incident of November 20, 2008

35. Complainant testified that on November 20, 2008, while she and three other correction officers were escorting a high-risk inmate to a medical procedure, she called Jeghers and asked to be relieved in order to go to lunch. She claimed that Jeghers denied her request, although he allowed the other officers, two white men and a Hispanic woman, to take lunch breaks. Complainant claimed that the phone connection was then lost because she stretched the phone line; however, she also stated that she hung up the phone because she and Jeghers were done speaking. Complainant's incident report regarding this matter differs from her testimony at

public hearing. In her incident report, she wrote that she had called Jeghers to request a lunch break for herself and one of the white male correction officers. (Ex. R-18)

36. Jeghers testified Complainant hung up the phone in the middle of their conversation about her request for a lunch break, which he deemed to be insubordinate. (Testimony of Jeghers) I find that Complainant deliberately hung up the phone on Jeghers.

Forced Overtime in OPD

37. Respondent's policy requires that when a female inmate arrives at LSHCU for medical treatment, female officers are required to escort that inmate whenever available. During the treatment, one correction officer is required to be in the room with the inmate and another correction officer, who is armed, is positioned just outside the room.

38. Correctional staff assigned to a medical escort must remain with that escort until treatment is completed, even if the escort extends beyond the correction officer's shift. In 2008 there was only one female correction officer regularly assigned to OPD. In 2008, the female correction officer assigned to OPD was absent for a period of time. In her absence, female correction officers from 8 North were more frequently assigned to OPD.

39. Complainant testified that she was forced to work more overtime than male correction officers in OPD during the summer of 2008.

40. Driscoll testified that on April 16, 2008, Complainant complained to her that Jeghers sent her to OPD more frequently than the other female correction officers on 8 North because she is a self-described "loud, black female." (Testimony of Driscoll)

41. Complainant was not the only female correction officer who complained to Driscoll about working forced overtime in OPD at the time. Patricia Robinson, who is white, complained to Driscoll as well. (Testimony of Driscoll; Testimony of Robinson)

42. Driscoll testified that after the complaint from Complainant, she emailed Captain Craven on April 17, 2008, asking him to inform her whenever a female correction officer was forced to work overtime in OPD, in order to ensure that overtime was being assigned in an equitable manner. After sending the email, Driscoll received no additional complaints from any female correction officer concerning forced overtime. I credit her testimony.

Denial of Requested Day Off

43. In 2008, staff were required to submit requests for time off at least five days prior to the time off. If the request were submitted fewer than five days prior, the request was granted on a first come, first served basis. A limited number of time-off requests could be granted for any particular shift and time off was dictated by seniority; the most senior correction staff member would be awarded the time off, if all requests could not be accommodated.

44. Complainant testified that once in 2008, Jeghers was given the day off while she was wrongly denied the same day off, notwithstanding that she had more seniority.⁴ However, according to Respondent, at the time, the practice was that lieutenants did not compete for time off with correction officers and sergeants; therefore lieutenants and correction officers could obtain the same day off. (Testimony of Jeghers)

⁴ It was not clear from the record whether Complainant was referring to one or two requests for time off.

45. Jeghers recalled that Complainant was mistakenly denied a day off on one occasion and he determined that the acting shift commander mistakenly approved a correction officer less senior to Complainant. Jeghers informed Driscoll about the situation, apologized to Complainant and granted her the requested day off.

Incident of March 9, 2009

46. On March 9, 2009, Jeghers observed that Complainant left her post and twice directed her to return to her post. Jeghers testified that Complainant responded with words to the effect of: "Do not single me out...Remember what I said. Do not single me out. You're going to get yours. What about the others? Better not watch only me for we're watching you."

(Testimony of Jeghers) I credit his testimony. Complainant admitted that she told Jeghers not to single her out, but denied telling him he was being watched and should be careful. (Testimony of Complainant)

47. Jeghers believed Complainant's statements constituted a threat and he reported the exchange to Driscoll and completed an incident report regarding the matter. Superintendent Walsh and Burgwinkle called Complainant into Walsh's office to discuss the matter. (Ex. R-17)

48. Complainant stated that white, male Correction Officers were permitted to leave their posts without repercussions but she was unable to provide details such as dates or specific examples. Complainant admitted that Jeghers may have spoken to her once or twice about leaving her post but he never disciplined her for leaving her post.

49. On March 25, 2009, Complainant appeared before Walsh and Burgwinkle along with a union representative. She told Burgwinkle that she did not like the way Jeghers treated her. Burgwinkle testified that prior the meeting, Complainant had never complained to him about

Jeghers. He advised Complainant to document instances of unfair treatment in an incident report and he would then investigate such matters. (Testimony of Burgwinkle)

Incident of June 14, 2010

50. On June 14, 2010, Jeghers was shift commander and Complainant was assigned to the outside corridor post on 8 North. According to various accounts, it was a very difficult day. (Testimony of Jeghers; Testimony of Driscoll)

51. On that day, "Inmate B" was a patient on 8 North. This inmate had a history of being very disruptive and self-destructive. Jeghers stated that while tending to another inmate, he walked past Inmate B's room and observed a large amount of blood on the floor behind a privacy curtain.

52. Jeghers entered Inmate B's room, drew back the curtain and observed Inmate B cutting himself with a sharp piece of metal. Inmate B then approached Jeghers and placed the metal on Jeghers' chest. Jeghers was able to get away and left the room. He then blocked the door so Inmate B could not enter the corridor and requested a "move team" or "extraction team" armed with protective equipment to confront Inmate B, remove his weapon and place him in restraints. (Testimony of Jeghers)

53. Inmate B told Jeghers that he had injected himself with a chemical. Inmate B was removed from 8 North and taken to the LSH intensive care unit, which was located on the third floor.

54. After Inmate B was removed from 8 North, Driscoll and Lt. Adams went to his 8 North hospital room where they took photographs and bagged evidence and attempted to determine what substance Inmate B had injected.

55. An hour later, a sergeant who had helped escort Inmate B to the ICU, transmitted via radio that Inmate B had removed his restraints and was attempting to harm the escorting correction officers.

56. After hearing Sgt. Wells' radio transmission, the control room officer broadcast an announcement to 8 North correctional staff notifying primary responders to immediately report to the ICU to assist the correctional staff in danger. The primary responders were the correction officers assigned to the pedestrian trap (an African-American man) the outside corridor post (a white female), and the inside corridor post (Complainant). There was a sign on 8 North indicating that the inside corridor post was a primary responder. (Testimony of Robinson)

57. Designated correctional staff have no choice as to whether to respond to an emergency code. The officers at the pedestrian trap, the outside corridor post and Sergeant Boyd responded to the emergency directive and can be seen on video footage running out of 8 North in response. (Testimony of Jeghers; Ex. R-52)

58. When Complainant did not respond, Jeghers told her that as a primary responder she was obligated to respond. Complainant told Jeghers that she was tired and he advised her to become "untired." Complainant then told Jeghers that her back was sore, but he again ordered her to respond. Complainant then told Jeghers that he could not direct her to respond and he instructed her to exit 8 North and wait for Captain Driscoll. (Testimony of Jeghers) Complainant

testified that Jeghers called her an "arrogant loser." Jeghers denied calling Complainant a loser, but he told her that her arrogance was going to hurt her in this instance.

59. Sgt. Michael Boyd was Complainant's direct supervisor on that date. Boyd testified that when he responded to the code, he ran past Complainant and said "Let's go!" and Complainant responded, "I'm all set with that." He had never before had an officer not respond to an emergency because that was part of the job. (Testimony of Boyd)

60. Complainant testified that she did not respond to the emergency code because she was attempting to "clear the unit" of non-security and medical staff from the area where the emergency had occurred. She also stated that the emergency was called off while she was preparing to respond. I do not credit her testimony.

61. According to Jeghers, Driscoll and Boyd, a primary responder such as Complainant had no obligation to clear the unit and was only obligated to respond to the incident. I credit their testimony.

62. Jeghers and Robinson testified that the emergency was still active when Complainant refused to respond to the code and that the code was called off after Complainant failed to respond. I credit their testimony.

63. Jeghers testified that he was "disgusted" by Complainant's failure to respond to the emergency code and stated that never in his career had he observed such disregard for a fellow correction officer in need. I credit his testimony.

64. Driscoll stated that it was a "cardinal rule" among correctional staff to do anything possible to assist fellow correction officers and that she was very disturbed and upset by

Complainant's failure to respond to the emergency code. She stated she was unaware of any other correction officer who failed to respond to an emergency code when obligated to do so. I credit her testimony.

65. On June 14, 2010, Burgwinkle was off and Driscoll called him at home, explained the situation with Complainant and recommended that she be sent home for the day. Burgwinkle agreed with Driscoll's recommendation. Driscoll also told Burgwinkle that the relationship between Complainant and Jeghers had become so dysfunctional that they could no longer be assigned to the same unit. (Testimony of Driscoll; Testimony of Burgwinkle)

66. When Burgwinkle returned to LSHCU the next day he re-assigned Complainant to OPD, with no change in her rate of pay, her shift or her days off. Jeghers had no input into the decision to reassign Complainant.

67. After the June 14, 2010 incident, Respondent's Office of Investigative Services initiated an internal investigation into the Complainant's conduct on that date. After reviewing the findings of Respondent's investigator, Respondent's Acting Commissioner, Karen Hetherson concluded that Complainant failed to respond to an officer in need of assistance, was insubordinate to the shift commander when he confronted her and ordered her to respond, and advised her direct supervisor that she was done for the day when he, too, ordered her to respond to the emergency. Hetherson also concluded that Complainant's counter-allegation that Jeghers called her an arrogant loser was unfounded and referred the matter for a Commissioner's hearing to determine if discipline was warranted. (Ex. R-20)

68. A Commissioner's Hearing was held on February 8, 2011. Upon all the evidence presented, the hearing officer sustained the charges against Complainant, but concluded that Sgt. Boyd had not technically ordered Complainant to respond to the emergency. (Exh. R-21)

69. On April 27, 2011, based on the hearing, the Commissioner issued a 20-day suspension to Complainant for her conduct on June 14, 2010. (Ex. R-21)

Holster Issue

70. On April 20, 2012, at a labor/management meeting, the union raised an issue of officer safety regarding the issuance of holsters. The union was concerned that left-handed officers were improperly being issued right-handed holsters and vice versa. The superintendent agreed to look into obtaining more left-handed holsters.

71. On May 8, 2012, Captain Driscoll learned that a left-handed officer on 8 North could not obtain a left-handed holster. Driscoll found that Complainant, who is right-handed, had been assigned a left-handed holster because of an injury to her right index finger. Capt. Craven was sent to ask Complainant if she needed an accommodation for her finger injury and he told her that for safety reasons she had to wear a right-handed holster. (Testimony of Complainant; Testimony of Driscoll; Testimony of Craven)

72. The union filed a grievance on Complainant's behalf, alleging that Complainant was being harassed and discriminated against because right-handed male officers were issued left handed holsters on a regular basis without being questioned. Complainant stated that she had previously used a left-handed holster on many occasions despite being right-handed.

73. The grievance was denied on June 20, 2012, because the union failed to show that Complainant was subjected to discrimination. The labor relations advisor found that there was a legitimate operational need to question Complainant about the holster, since the issuance of appropriate holsters was being scrutinized as a result of the recent union/management meeting. On the day in question, a left-handed officer was not able to obtain a left-handed holster because Complainant, who right-handed, had taken it. The advisor stated that, for safety reasons, officers should be issued the holster and weapon that appropriately corresponds to the hand with which they are qualified to shoot. (Ex. R-22)

Comparators

74. Complainant alleged that Jeghers tolerated insubordinate conduct from white, male correction officers. Only one of the two officers she identified by name is white. The other is an African-American sergeant. Complainant testified that she recalled generally more than 10 incidents when a white correction officer, Kenneth Beers, challenged Jeghers without repercussions, but Complainant could not testify to any specific incident.

75. Kenneth Beers has worked at LSHCU since 1989. He primarily works the 3:00 p.m. to 11:00 p.m. shift on 8 North. He worked with Jeghers until Jeghers became the 7:00 a.m. to 3:00 p.m. shift commander in 2006. After that time they had limited contact and neither could recall any situation where Beers challenged or became argumentative with Jeghers. Beers also never worked regularly with Complainant. (Testimony of Beers; Testimony of Jeghers) I credit the testimony of Beers and Jeghers.

76. Complainant alleged that that another white male employee, Lt. James McCormack, had come to work drunk, been tardy and slept on the job without repercussions.

77. McCormack had previously worked the 11:00 p.m. to 7:00 a.m. and 3:00 p.m. to 11:00 p.m. shifts at LSHCU. Since 2009 or 2010, he has worked the 7:00 a.m. to 3:00 p.m. shift, on 8 North and OPD. McCormack testified at the hearing and denied being drunk at work. However, he has been disciplined for tardiness and was suspended for two days for sleeping on the job. McCormack received a verbal warning from Driscoll for tardiness on June 11, 2008 and on June 24, 2008, Superintendent Walsh issued a written warning to him for continued tardiness. On July 22, 2008, McCormack received a written reprimand for tardiness. On August 22, 2008, McCormack received a one-day suspension for no call/no show on August 2, 2008. On August 23, 2008, McCormack was three hours late and received a three day suspension. (Testimony of McCormack; Ex. R-43; Ex. R-44)

78. Complainant alleges that on July 19, 2009, Correction Officer Garry Moriarty was asleep at the pedestrian gate and was awakened by someone she did not identify. Moriarty, who has worked the day shift on 8 North since 1990, denied ever being awakened on the job during his career and stated that in July 2009 he was on medical leave and was absent from work on July 19, 2009. (Testimony of Moriarty; Ex. R-30)

79. In approximately March 2008, Moriarty observed a nurse not wearing gloves and became upset. Jeghers testified that while Moriarty's concern was justified, he was insubordinate and yelled at Jeghers about the matter. Jeghers reported the incident to his supervisor and on March 3, 2008, Moriarty received a written reprimand from Superintendent Walsh for raising his voice to Jeghers. (R-28) Moriarty has had no other issues with Jeghers. (Testimony of Moriarty; Testimony of Jeghers)

80. On January 10, 2013, Correction Officer Keith Liberty was given a five day suspension with three of the five days held in abeyance for sleeping on duty on July 13, 2012 and for requesting a day off on July 24, 2012 and failing to show up for work when the request for a day off was denied. (Testimony of Liberty; Ex. R-45)

81. Correction Officer Rigaubert Aime, a black man of Haitian national origin, worked the night shift at LSHCU from 1997 to 2011. On June 25, 2010, he was not relieved at the end of the shift because his replacement did not appear. Lt. Jeghers released two other correction officers because their replacements had arrived. Jeghers had enough coverage for the next shift and after adjusting the schedule, he released Complainant between 6:52 and 6:55. Even though he was released before his shift officially ended at 7:05, Aime remained at the facility and began yelling and caused a scene. He received a 3-day suspension that was upheld by the Civil Service Commission. Aime's MCAD claim regarding this incident and others was dismissed for lack of probable cause. (Testimony of Aime; Testimony of Robinson; Testimony of Jeghers; Exh. R-1)

82. On May 19, 2011, Aime was working the 11:00 p.m. to 7:00 a.m. shift on the third floor ICU, when Lt. Heeks, told him he had to work overtime. Aime told Heeks he was sick and could not work overtime and called the control room to tell Jeghers he had to leave but Jeghers ordered him to remain at his post. After telling a sergeant that he had a medical appointment, Aime was permitted to write a letter explaining why he had to leave and was relieved at 8:00 a.m. He filed another MCAD complaint in October 2011 regarding this and other incidents and a probable cause finding was found regarding a claim of retaliation. (Testimony of Aime)

83. Following her assignment to OPD, Complainant has generally been assigned to the outer control post, which controls the ingress to and egress from OPD.

84. Sergeant Wendell Williams, who is African-American, worked for Respondent for over 26 years until his retirement in 2010. He worked at LSHCU at the same time as Complainant. Williams worked primarily on the 3:00 p.m. to 11:00 p.m. shift, but he occasionally worked with Complainant. While at LSHCU, Williams was the union's chief steward. Williams often gave Complainant a ride to work.

85. Williams testified that an "old boy network" of white officers at LSHCU "controlled everything." He did not know whether Jeghers was a member of the "old boy network" but noted that Jeghers is white. (Testimony of Williams) Williams claimed that Jeghers talked down to black officers, but never talked down to him. (Testimony of Williams)

86. Henderson testified that everyone was to get a 20 minute lunch break and he claimed that white officers got more time for lunch.

87. Many officers testified credibly that while lunch break is supposed to be 20 minutes, there are many days when it is so busy that they do not get lunch breaks. (Testimony of Robinson; testimony of Moriarty; testimony of Beers)

88. Jean Floyd⁵, a black woman, worked as a correction officer for Respondent from 1990 to 2001. She began at LSH in 2001. Floyd was terminated in 2008 and reinstated in 2010 by an arbitrator. She was terminated again in 2011.

89. Floyd testified that she was terminated the first time for having contact with law enforcement which she did not report to Respondent. Her second termination was based on

⁵ Floyd filed an MCAD complaint docket no. 09-BEM-00392. A public hearing in that matter was held before me on April 10-11, 15-16, 18, 28-30 and May 1, 2014.

Respondent's determination that she took some keys from a co-worker and abused sick and vacation time. The second termination was upheld.

90. Floyd testified that on January 25, 2009 she was in the gate position and Jeghers saw her slouched down, appearing to be asleep. Jeghers yelled to her to sit up and when she was slow to respond, he asked a sergeant to relieve her and sent her to the control room. She felt singled out and told Jeghers that he could not tell her how to sit. She was sent home and was suspended for three days by then Superintendent Walsh.

91. During discovery, Respondent created a spreadsheet or "matrix" of discipline imposed upon Respondent employees, from 2006 to 2009, for rules violations similar to those Complainant was found to have violated, regarding her 1-day and 3-day suspensions. Complainant entered the spreadsheet into evidence. (Ex. C-19) The employees were identified by rank, race, color, gender and institution, but their names were redacted.⁶

92. Post-hearing, Respondent supplemented the matrix with an additional matrix regarding employees who were disciplined for similar rules violation to those which Complainant violated in connection to her 20-day suspension. (Ex. R-55)

93. Respondent provided additional documents, including disciplinary records of some white correction officers who received discipline for rules violations similar to Complainant's. These documents established that some white correction officers statewide received discipline

⁶ The parties were advised that the matrix was of little evidentiary value because it provided only a brief description of the employees' conduct and did not include employees' disciplinary records or other related paperwork. I ordered Respondent to provide Complainant with any related documents that Complainant requested. Respondent advised the Commission that Complainant did not seek any such documents. (Letter of Respondent to the Commission dated March 24, 2014)

for similar conduct. However, the records of all possible comparators were not provided. (Ex. R-55)

94. The matrix appears to show that at LSHCU, 8 white males, 2 black males (one was Aime), 2 black females (Complainant and Floyd) and one Hispanic female were disciplined from a 1-day suspension to a 60-day suspension. Floyd was subsequently terminated. (Ex. C-19)

III. CONCLUSIONS OF LAW

General Laws c.151B s. 4(1) prohibits discrimination in the terms and conditions of employment on account of gender, race and color. In order to establish a prima facie case of gender, race and color discrimination, Complainant must show that she is a member of a protected class, that she was subjected to adverse treatment and that similarly situated persons not of her protected class were treated differently. Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). Once a prima facie case is established, Respondent must articulate a legitimate non-discriminatory reason for its actions. Abramian, supra, at p. 116. If Complainant can demonstrate that the articulated reason or reasons are a pretext for discrimination and that Respondent acted with discriminatory intent, motive or state of mind, then she will prevail. Lipschitz v. Raytheon Co., 434 Mass. 493 (2001).

In this case, Complainant, who is an African-American woman working as a correction officer, contends that she was mistreated and discriminated against on the basis of her gender, race and color. Complainant further alleges that Respondent administered discipline in a

selective manner and discriminated against her on the basis of gender, race and color.⁷

Complainant took the unusual position that similarly situated white males were subject to the same discipline as she for far worse conduct, rather than attempt to establish that she was treated more harshly than similarly situated white males for the same or similar conduct.

The ability of a correction officer to cooperate and to follow orders and to abide by the directives of superiors to ensure an orderly, safe and calm atmosphere in the correctional facility is, by all accounts, an essential function of the job. I find that Complainant's behavior during the incidents cited was often unprofessional, inappropriate and insubordinate. On a number of occasions she failed to respect and adhere to the chain of command and refused to abide by orders of her superior officers, an essential requirement of the job. She had a history of tardiness and fabricated the reasons for being tardy. Hence, a reasonable fact-finder could conclude that she failed to prove that she was performing the job adequately and the inquiry might end here.

However, the burden to prove adequate performance is not an onerous one. Assuming Complainant has established that element of the prima facie case, Complainant has failed to establish that similarly situated co-workers not in her protected class were treated differently than she was. At the public hearing, Complainant was given wide latitude to support her allegations that black female correction officers were disciplined more harshly than white male correction officers and that white male officers were granted more privileges than black female officers. Moreover, the parties were permitted to engage in limited post-hearing discovery, regarding the disciplinary record of every correction officer, identified by race, color, gender and institution, system-wide, who was subjected to the same discipline as she for a closed period of

⁷ During discovery, Respondent created a spreadsheet or "matrix" of discipline imposed upon Respondent employees for rules violations similar to those Complainant was found to have violated regarding her 1-day and 3-day suspensions. Complainant entered the spreadsheet into evidence. (Ex. C-19)

time. I conclude that the evidence before me does not establish that Complainant was subjected to harsher discipline than similarly situated male correction officers and does not support her allegations regarding disparate discipline of white male and black female officers based on race. Complainant's witnesses stated their view that there was an "old boy network" of white officers who "controlled everything," and this may have been true in terms of the race and gender of those in positions of higher authority. However, the evidence does not support the vague and unsubstantiated allegations of disparate treatment based on race and gender resulting therefrom. Instead, the evidence demonstrated that white male correction officers whom Complainant claimed were not disciplined for violations such as sleeping on the job had in fact been disciplined for these infractions. Other allegations raised by Complainant concerning infractions by white officers were factually incorrect.

Assuming, *arguendo*, that Complainant has established a *prima facie* case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian, supra.; Wheelock College, supra.; Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). 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).

Respondent's articulated reasons for its disciplinary actions against Complainant were: her insubordination, for which she received a one-day suspension; her false allegations about and repeated misuse of the off-site parking system in order to collect roll-call pay to which she was not entitled, for which she received a three-day suspension; and most egregiously, her failure to respond to an emergency involving an officer in need of assistance in an emergency situation, and refusal to obey a direct order to do so, for which she received a 30-day suspension.

I conclude that Respondent has articulated legitimate, non-discriminatory reasons for the disciplinary measures taken against Complainant and that that discipline was shown to be justified.⁸

Once Respondent has set forth evidence of legitimate, non-discriminatory reasons for its actions, the Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. Complainant need not disprove all of the non-discriminatory reasons proffered by the employer, but need only prove 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). She must prove that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001)

Complainant asserts that certain white male employees who engaged in misconduct were treated less harshly than she was for similar infractions. However, her assertions were largely non-specific, lacking in detail or unsubstantiated, and were not borne out by the record. While anecdotal evidence is often helpful in fleshing out disparate treatment based on favoritism, the general view of disparate treatment here seems largely founded on the premise that those in authority were white or male, and seeks to ignore the seriousness of or to minimize Complainant's infractions. I conclude that Complainant has failed to prove that Respondent's reasons for disciplining her and the level of discipline imposed were a pretext for discrimination. While there was evidence of a deteriorating relationship between Complainant and the shift commander, Lt. Jeghers, and of some friction between some of the black officers and

⁸ The initial June 2008 3-day suspension imposed by Jeghers for insubordination, does seem overly harsh, however it is notable that this incident was precipitated by *Complainant's* filing an incident report because Jeghers moved her to a new post for the second shift. This suspension was reduced to one day, a more appropriate discipline given the nature of the interaction.

administration, I conclude that the cause of the discord between Complainant and Jeghers was primarily of Complainant's making and her confrontational manner.⁹ The subsequent 3-day suspension for gaming the off-site parking system which was upheld throughout the appeal process, and the 20-day suspension for failing to respond to an officer in trouble, were justified given the severity of the infractions and there was no evidence that they were racially motivated. I note that even after Jeghers, whom Complainant portrayed as her nemesis, transferred to another institution, Complainant continued to challenge authority and the chain of command at LSHCU with respect to such matters such as the holster issue. Complainant has failed to prove by a preponderance of the evidence that Respondent acted with discriminatory animus toward her based on her gender, race and color resulting in disparate discipline. Nor is there any evidence that individuals in Respondent's hierarchy were motivated by discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 503 (2001). Rather the evidence suggests that Respondent acted in response to Complainant's inappropriate, unprofessional and insubordinate conduct, most importantly the severity of the matter of failing to respond to an officer in need of assistance and determined that her conduct merited the discipline imposed.

I therefore conclude that Respondent did not engage in unlawful discrimination based on gender, race and color and conclude that the complaint in this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

⁹ At the public hearing, Complainant displayed such manner in an outburst similar to those described by Jeghers and others.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with 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 15th day of May, 2015

A handwritten signature in cursive script, appearing to read "Judith E. Kaplan", is written over a horizontal line.

JUDITH E. KAPLAN,
Hearing Officer