

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & BENJAMIN CORTES,
Complainants

v.

DOCKET NO. 08-SEM-01586

MASSACHUSETTS DEPARTMENT
OF CHILDREN¹ & FAMILIES, MARTA
MEDINA & NANCY PROSTAK,
Respondents

Appearances:

Lisa Smyth, Esq. for Benjamin Cortes
Brian B. Pariser, Esq. for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 27, 2008, Complainant Benjamin Cortes, a then 58-year-old man Hispanic man of Columbian national origin, filed a complaint with this Commission charging Respondents with discrimination on the basis of his age, gender, national origin and retaliation. 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 June 25-26, 2014. After careful consideration of the entire record before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

¹ Previously known as the Department of Social Services

II. FINDINGS OF FACT

1. Complainant Benjamin Cortes, who is a Hispanic man of Columbian national origin, was born in 1949. He began working for Respondent, Department of Children and Families (“DCF”) as a Social Worker in 1980 in the DCF Worcester office. A social worker is responsible for investigating allegations of child abuse and neglect, assessing the service needs of families and monitoring families’ compliance with recommended services to address the issues of child abuse and neglect.

2. DCF is the Commonwealth’s child welfare agency and is responsible for protecting children from abuse and neglect by their caretakers.

3. Upon receiving a report of child abuse or neglect (“51A”), DCF is obligated to begin an investigation within two hours of receiving the initial report and complete the investigation within 24 hours if the child is in immediate danger of further abuse or neglect. Otherwise the investigation must be commenced within two days and completed within 10 working days. The investigation includes a home visit at which the child is viewed. If investigation shows a certain threshold is met, DCF assigns an investigator to the case. (“51B”) Thereafter a care and protection (“C &P”) petition is filed in the juvenile court, and if custody is assigned to DCF, it commences its child placement and approval process. (Ex. R-1)

4. In 1986, Complainant was promoted to a supervisory position. Around 2005, the Worcester office split into Worcester East and Worcester West. At that time, Area Program Manager (“APM”) Marta Medina, who is Puerto Rican, became Complainant’s direct supervisor. Medina’s supervisor was Area Director Nancy Prostack, who is white. From 2005 to 2008, Complainant was responsible for supervising four to five social workers in the adolescent unit within DCF’s Worcester East Area office. Each social worker had an average of 20-23 cases.

Complainant did not routinely visit homes under DCF's care, but was responsible for reviewing his supervisees' cases and had access to an electronic system that contained their case notes and files. From 2005 to 2008 there were approximately 20 supervisors in the Worcester East Area Office.

5. The Worcester East office was staffed predominantly by females, as was DCF generally. Complainant was one of three male supervisors and one of two Hispanic supervisors. He was the only male Hispanic supervisor.

6. Nancy Prostack was hired by DCF as a social worker in 1973. After promotions to supervisor and Area Program Manager (APM), she was promoted to Area Director in 2000. She transferred to the Worcester office and when the Worcester offices split she became Area Director of Worcester East. As Area Director, Prostack oversaw the operational needs of the area office, handled hiring and disciplinary issues, insured that clinical practice and policies and procedures were followed and performed community work. Prostack's supervisor was the regional director. Prostack retired in 2010. (Testimony of Prostack)

7. Marta Medina began working at DCF in 1988 as a social worker. She became a supervisor in 1997 and an APM in 2000. Medina has known Complainant for 25 years from the time they worked at the Worcester office. On November 2, 2005, Medina became Complainant's supervisor. Medina supervised five supervisors, including Complainant. Medina currently works as an APM in DCF's Lowell office.

8. Matthew Lefebvre, who is a white man, has worked for DCF since 2007. In 2007 and 2008, Lefebvre worked in the East Worcester adolescent unit under Complainant's supervision. He currently investigates incoming cases in the SDS unit.

Alleged Disparate Treatment

9. Complainant testified that Medina had a camaraderie and friendship with his co-workers from which he was excluded and that she organized office parties to which he was not invited. Medina denied excluding Complainant from office events and stated that he participated in many office events, monthly meetings and outings with supervisors.

10. Complainant claimed he was not allowed to participate in trainings. Medina disputed his testimony in this regard. She testified that Complainant participated in the "colors" training which involved team building activities; she and Prostack selected Complainant and other male employees to participate in the nurturing fathers' group as male role models for in-office training for fathers involved with DCF. She encouraged Complainant to participate in a multi-day training on racism and recommended he take a supervisors' training called Learning Circles.

11. Complainant believed difficult cases were assigned to him because he was a Hispanic male, although he acknowledged that he supervised a specialty unit and that cases involving adolescents were assigned to his unit.

12. Complainant testified that on occasion, some of his supervisees sought advice from Medina instead of him, a practice that undermined his authority. Medina testified that she never encouraged workers to come to her directly. She stated that in 2006 or 2007, she supported Complainant when one of his supervisees sought reimbursement for unwarranted travel and was otherwise insubordinate to Complainant. Medina admonished the worker for acting in an unprofessional manner. (Testimony of Medina)

13. Complainant stated that Medina did not meet with him on a weekly basis for formal supervision as scheduled and that when he sought her assistance she often dismissed him in a

disparaging tone by saying, "Can't you see I'm busy? It's not your duty day." (Testimony of Complainant)

14. Complainant testified that on one occasion, Medina denied the request of his supervisee to meet with him and Medina on an urgent case matter because it was not his duty day. (Testimony of Complainant) However, the documentary evidence shows that the worker's original request, dated Tuesday, August 7, 2007, was to meet sometime that week. Complainant's follow-up request stated that he wished to meet that same day, Tuesday, because it was the supervisee's duty day. Neither request indicated that the matter was urgent. Medina responded that she could not meet with them on Tuesday and indicated they could discuss the matter on Thursday during Complainant's scheduled supervision. (Ex. C-2; Testimony of Medina)

15. Medina testified that although she and Complainant were scheduled to meet weekly, on occasion they would not be able to meet because of scheduling conflicts. She took notes of their formal meetings. (Ex. R-6) She stated that Complainant also came to her two or three times daily for informal supervision and needed more guidance than other supervisors with his level of experience. She testified that Complainant's subordinates appeared to be frustrated with him. I credit her testimony.

16. Complainant testified that when he told Medina that it was necessary to find a placement for a dog left behind when children were removed from a home by Respondent, Medina mockingly called out that Complainant wanted to place the dog in foster care and this embarrassed Complainant. (Testimony of Complainant)

17. Lefebvre testified that Complainant was an effective and supportive supervisor. He observed that Complainant was very nervous when they discussed cases with Medina and he

observed that some of Complainant's interactions with Medina were strained and that she was tough on him. I credit his testimony.

18. Khrystian King, a black man who has worked at DCF since 1998 as an adolescent social worker at Worcester East, observed tense interactions between Medina and Complainant and he once observed Medina and Prostack commenting about Complainant's lack of competence. I credit his testimony.

19. Medina denied ever publicly or privately disparaging Complainant.

20. In Complainant's performance review of 2006-2007, Medina noted that Complainant "needs to work on decision making in regards to cases that might need special attention... needs to be consistent with policy," and ... "has made some clinical decisions on cases and issues that have put children at risk. She further noted: "This is unacceptable and needs immediate correction." Although she gave him an overall rating of "meets expectations," she noted that the rating was subject to change and that Complainant's performance had to improve. (Ex. 10)

21. On his 2009 performance review, Medina wrote that Complainant had difficulty following protocol regarding the placement of children (Ex. C-9)

Case B

22. DCF's long-standing policy was that, prior to placing a child in DCF's custody with relatives who had not been approved as foster parents, DCF had to run a CORI check and a department background check on the relative and have a social worker view the home to make sure it met DCF's physical standards. (Testimony of Complainant) This was also known as a "temporary home study." It was possible to perform all of these tasks within one business day. (Testimony of Prostack; Testimony of Lefebvre)

23. On September 10, 2007, a social worker under Complainant's supervision received notice that a care and protection petition had been filed with regard to an adolescent boy and the Juvenile Court had scheduled a temporary custody hearing regarding the family's children to take place on September 14, 2007. (Testimony of Complainant)

24. On September 13, 2007, the day before the scheduled temporary custody hearing, Complainant discussed the children's case with Medina and she instructed Complainant that if DCF received custody of the children he would need to follow the DCF's policy regarding their placement. (Ex. R-2; Testimony of Medina)

25. The temporary custody hearing was covered by Lefebvre because the worker assigned to the case was on vacation. On the afternoon of September 14, Lefebvre informed Complainant that DCF received custody of the children and they were placed with family members who had not been studied and approved by the agency. Complainant did not discuss the matter with Medina on that day. (Testimony of Complainant; Testimony of Medina)

26. Complainant stated that he sent notice to the worker, after the fact, to do a CORI check and a home visit when she returned from vacation. (Testimony of Complainant)

27. On September 24, Complainant advised Medina that one of the children in Case B was with a relative without previous approval by DCF, another child was at home and had not been seen since the filing of the C&P on September 10 and that a third child already in the DCF's custody and her newborn were living with a relative without DCF's approval. He informed her that the social worker assigned to the case was on vacation and that Complainant did not follow through. (Testimony of Complainant)

28. On September 24, Medina immediately met with Prostack and advised her that three children who had been in DCF's custody for 10 days had been not been assessed. Complainant

met with Medina and Prostak on September 24 and told them he did not comply with the policy because the children's court-appointed attorney had told him that the placements were satisfactory. He acknowledged that he allowed the placements to continue without checking the criminal records or prior history of involvement with DCF of the children's caretakers. Prostak directed him to immediately conduct the study and background check. (Testimony of Complainant, Medina and Prostak)

29. Prostak testified credibly that the policy regarding temporary home studies was discussed regularly in supervisors' meetings. She testified credibly that Complainant was aware of the policy, as she had previously met with him and one of his workers on a case where a child in DCF custody had visited an aunt overnight without a prior home study or background check having been done. Prostak admonished Complainant to make sure this did not happen again.

30. Prostak testified that Complainant's actions with regard to the B case demonstrated a blatant disregard for DCF's policies and placed the children in the case at risk of harm. Therefore, in November 2007, Prostak suspended Complainant from work for three days without pay. The social worker was not disciplined. Prostak testified that she had never disciplined anyone else for a violation of such policy. She believed that the suspension was appropriate because the policy had been discussed with supervisors many times and DCF was responsible for ensuring that children are placed in safe environments. (Testimony of Complainant; Testimony of Prostak; Ex. R-2)

Promotions

31. In early 2008, Complainant sought to apply for three vacant APM positions. As part of the application process, all internal applicants must first submit to the Human Resources Department ("HRD") an application and a Supervisor's Reference Form, which provides a place

for the signature of the applicant's supervisor, who can recommend the applicant or not, and may make comments. Regardless of whether the supervisor recommends the applicant, the supervisor's reference form must be submitted in order for the application to be considered.

(Testimony of Complainant)

32. One of the APM positions was located in the Worcester East office. The application deadline for this position was February 28, 2008.² (Testimony of Complainant; Ex. C-3)

33. Complainant testified that after several attempts to obtain Medina's signature on the supervisor's reference form, she told him that she would not sign the form because he was not qualified for the position. Therefore, his application was rejected as incomplete. (Ex. C-4; Testimony of Complainant) I do not credit his testimony.

34. Medina testified that she did not refuse to sign the form. She stated that Complainant came to her office close to the application deadline and asked for a recommendation for the position of APM. She explained that she could not recommend him for the position and set forth the reasons why she deemed him unqualified for the position. She stated that Complainant never asked her to simply sign the form and stated that he left her office without requesting her signature on the form. I credit her testimony.

35. On March 4, 2008, after the February 28 deadline, Complainant submitted, absent a supervisor's reference form, an Internal Job Application and cover letter to ("HRD") indicating his interest in three available APM openings. One of the positions was in the Worcester East office.³ (Ex. C-4)

² The posting describes the Area Program Manager as a senior management position that provides, inter alia, supervision to supervisors.

³ Although Complainant listed three job postings on his application, the email correspondence between Complainant and HRD concerns only one APM position in the Worcester Central Office.

36. On March 5, 2008, HRD emailed Complainant requesting the supervisor's reference form. After office hours on Friday, March 7, 2008, Complainant emailed HRD that his supervisor had refused to complete the reference form. On Monday, March 10, 2008, HRD informed him that completed applications had already been sent to the hiring manager and HRD could not refer his incomplete application for consideration. (Ex. C-5)

37. Medina recommended a white, female employee under her supervision for promotion to an APM position in the East Worcester office and that employee was promoted to the APM position by Prostack. (Testimony of Medina)

38. Prostack recalled Complainant applying for an APM position but stated that he was not the most qualified applicant and that the successful applicant was a white woman whose qualifications fit the open position.⁴ (Testimony of Prostack)

Case "C"

39. On Sunday May 4, 2008, Prostack received a call from her Regional Manager about a case that had come to the attention of DCF's Commissioner, who was inquiring about children living in a home under poor conditions. DCF had received a 51A report from a local police department after officers entered a home and found children living under deplorable conditions. The children had been removed from the home by emergency response workers on the night of Friday, May 2, 2008. At the time of the children's removal, the family had had an open case with DCF for over a year that was assigned to one of Complainant's social workers, a white female with 25 years employment with DCF. (Testimony of Complainant, Prostack and Medina)

40. Jermaine Johnson, one of the emergency response workers who removed the children, testified that the conditions in the home were the worst he had ever seen during his 14

⁴ It is not clear from the record whether Medina and Prostack are referring to the same position. The evidence of record references one position in Worcester East for which Complainant's application was incomplete and thus it would not have reached Prostack.

year career as a social worker and emergency response worker for DCF. He stated that the first floor smelled of animal feces and there were rooms that could not be opened because they were blocked by trash. There was a hole in the bathroom ceiling and no running water on the second floor and there were no beds for the children. Johnson stated that it was a “clear cut” call to remove the children from the home. The case remains open. (Testimony of Johnson)

41. After receiving the call from the Regional Manager, Prostack met with Medina and the Regional Manager on the same day to review the family’s case record. Prostack found the record to be inadequate. It contained limited, sparse dictation, few service plans, and limited current information on the children. (Testimony of Prostack and Medina)

42. On Tuesday, May 6, 2008, Prostack met with Complainant and the assigned social worker. On the following day, Prostack placed Complainant on administrative leave with pay until further notice because of Complainant’s improper supervision of the assigned worker, who neglected her duties and exposed children under their supervision to serious neglect. Medina had no involvement in the disciplinary process. (Testimony of Prostack and Medina)

43. Prostack testified that upon further investigation all of the worker’s case records it was discovered that Complainant had failed to adequately and effectively supervise her work. In cases assigned to her, the worker maintained limited dictation that rarely documented the presenting problems identified for the families and documented no evidence that she contacted “collaterals” or service providers. In many cases the worker did not see the parents for months at a time and indicated that she had made home visits on days that she was scheduled to be off from work or on a weekend. In addition, she failed to maintain a current, signed service plan and closed out siblings’ cases when no services had been provided, even after a supported report of abuse or neglect. (Testimony of Prostack; Ex. R-4; Ex. R- 5)

44. Complainant acknowledged that he had difficulty with the worker's record keeping and reporting regarding her cases and that he had written her up previously for poor record keeping. However, he continued to rely on her reporting of situations to him. (Testimony of Complainant)

45. As a result of their investigation into this case, DCF notified Complainant that it would schedule a hearing to provide him with an opportunity to respond to the charges and possible disciplinary action.

46. A hearing was held on August 1 and August 6, 2008. As a result of the hearing, the regional director found just cause to discipline Complainant. Complainant was suspended for 10 days without pay and was demoted from the position of supervisor to social worker and transferred to the North Central Area Office in Leominster and placed on a performance improvement plan, effective September 29, 2008. (Ex. R-5; Testimony of Complainant)

47. The social worker was suspended for four weeks and reassigned to another supervisor and was required to undergo training. (Testimony of Prostack)

48. Complainant appealed the discipline imposed on him in both November 2007 and September 2008 to the Civil Service Commission. The Civil Service found that DCF had just cause to discipline Complainant on both occasions and to impose the specific discipline that it did. (Ex. R-1)

49. Since September 29, 2009, Complainant has continued to work as a social worker for DCF at the North Central Area Office where he performs his duties well. (Ex. C-11; Ex. C-13) Since that time, Complainant had not applied for a promotion to the position of supervisor.

50. Prostack testified credibly that Complainant's age, gender and national origin were not factors in his discipline.

51. Prostack estimated that from 2005 to 2007, she had disciplined approximately seven men and women, the majority of whom were white, one was African-American and one was in his or her 50s.

52. Prostack testified credibly that she has promoted one white male into an APM position during the period of 2005 to 2008 and three bicultural women to supervisory positions. She encouraged male social workers, including Khrystian King and Jermaine Johnson, to seek supervisory positions.

III. CONCLUSIONS OF LAW

A. Discrimination

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race, gender, national origin, age and retaliation.⁵ Absent direct evidence of discrimination, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified persons not of his protected class were not treated in a like manner in circumstances that give rise to an inference of race and national origin discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Matthews v. Ocean Spray Cranberries, Inc., 326 Mass. 122, 129 (1997).

Complainant contends that Respondents discriminated against him by subjecting him to disparate treatment with regard to discipline as compared to similarly situated white, female employees. He alleges the disparate treatment included disciplining him more harshly than his

⁵ Complainant presented no evidence at the public hearing regarding his claims of age discrimination and retaliation for a previous MCAD complaint filed in 1995. Those claims were not addressed in Complainant's post hearing submission. Therefore, Complainant's claims of age discrimination and retaliation are dismissed.

supervisees and demoting and transferring him. He also alleges that he was treated in a disparaging manner by his supervisors in a predominantly female workplace.

As a Hispanic man from Columbia, Complainant is a member of a protected class on the basis of his race, gender and national origin. However, I conclude that Complainant has failed to establish that he was adequately performing his job. There was ample evidence of Complainant's failure to provide adequate supervision to social workers and to follow protocol. In one case, he failed to ensure that relatives with whom children were placed had been vetted by the agency and in another case his failure to adequately supervise a worker resulted in children living in deplorable conditions being removed from their home on an emergency basis. In each case, Complainant placed children in DCF custody in potential danger. Therefore I conclude that Complainant has failed to establish a prima facie case of gender, race and national origin discrimination.

Even if Complainant has established that he was adequately performing his job, Complainant has failed to establish that similarly situated co-workers not in his protected class were treated differently than he was. Complainant's Area Director testified that, during the time period in question, she had disciplined predominantly white supervisors, both male and female, and one African-American.

Assuming, however, that Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondents to offer legitimate, non-discriminatory reasons for their conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). Respondents 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)

Respondents' articulated reasons for suspending and demoting Complainant were his failure to adequately perform his job and his failure to follow protocol and to closely monitor a worker, resulting in placing children in the care of DCF in jeopardy. Thus, Respondents have articulated a legitimate non-discriminatory reason which I find credible.

Once Respondents have proffered evidence of legitimate, non-discriminatory reasons for their actions, the Complainant must show that Respondents' 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). He must prove that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001)

Complainant offers as evidence of pretext, unkind and critical conduct toward him by his supervisors. While there was evidence that his supervisors, particularly Medina, were curt with Complainant and perhaps openly disparaging at times, there was no evidence that their conduct resulted from discriminatory animus, but rather was the result of personality conflicts or disagreements about case handling. Thus I conclude that there is insufficient credible evidence to support a conclusion that the reasons Respondents' articulated for their actions were motivated by discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 503 (2001).

Promotion

In order to establish a prima facie case of discriminatory failure to promote, Complainant must show that he is a member of a protected class who was qualified for the position, that he was denied the position and the position was awarded to someone not of his protected class.

Alves v. Town of Freetown Police & Board of Selectmen, 18 MDLR 112 (1996); See Puckett v. Commercial Aviation Services, 24 MDLR 77 (2002) (finding evidence of race discrimination when persons outside of the Complainant's protected category were selected for promotional opportunities that were denied to the Complainant, a qualified candidate)

Complainant has established his membership in a protected class by virtue of his race, gender and national origin. Complainant has shown that, by virtue of his education and years of experience as a supervisor, he was nominally qualified for an APM position. However, I conclude that Complainant has failed to establish that he applied for an APM position as his application was incomplete and was filed late and therefore was not forwarded to DCF by the Human Resources Department. I did not credit his testimony that Medina refused to sign his supervisor's reference form. I conclude that it is more likely that Complainant falsely placed the blame on Medina for his having filed a late application with HRD.⁶

Therefore, I conclude that Complainant has failed to establish a prima facie case of failure to promote, and I conclude that Respondents did not engage in unlawful discrimination on the basis of gender, race or national origin.

⁶ Assuming, arguendo, that Medina refused to sign the form, thus removing Complainant from consideration for the position, there nevertheless exists no evidence of discriminatory animus. Moreover, it is clear that Respondents would not have promoted Complainant to the position of APM as he had already been disciplined for his poor performance regarding the B case and his supervisors did not consider him qualified for a promotion.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 21st day of May, 2015


JUDITH E. KAPLAN
Hearing Officer