

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ZEINAT IBRAHIM and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
Complainant

v.

DOCKET NO. 06-BEM-02054

NORTH END REHABILITATION
& NURSING CENTER,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan in favor of Respondent North End Rehabilitation & Nursing Center. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination based on race, color and national origin when it disciplined and terminated Complainant for violations of its privacy policy. The Hearing Officer found that Respondent articulated legitimate, non-discriminatory reasons for terminating Complainant's employment, namely that she violated Respondent's privacy policies in accessing a patient's file without permission and making an unauthorized medical appointment for him. The Hearing Officer concluded that Complainant failed to prove that Respondent's reasons for discharging her were a pretext for discrimination; therefore, the Hearing Officer dismissed the complaint. Complainant has appealed to the Full Commission. For the reasons set forth below, we affirm the Order of Dismissal.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. The Full Commission's duty is to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A §1(6).

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to the Hearing Officer's fact-finding role and credibility determinations. See, e.g., Ramsell v. W. Mass. Bus Lines, Inc., 415 Mass. 673, 676 (1993). The role of the Full Commission is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, whether the decision was arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23(1)(h); Kacavich, et al. v. Halycon Hill Condominium Trust, et al., 32 MDLR 148, 149 (2010). The key to substantial evidence is whether a "reasonable mind" would accept the evidence as adequate to form a conclusion. M.G.L. c. 30A, § 1(6); see also Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Dir. of Emp't Sec., 393 Mass. 482, 486 (1984).

BASIS OF APPEAL

Complainant's appeal to the Full Commission asserts that the Hearing Officer employed an incorrect formulation of the elements of a *prima facie* case; that the Hearing Officer erred in concluding that Complainant failed to establish pretext; that the Hearing Officer erred in evaluating comparator evidence; and that the Hearing Officer did not consider statistical evidence regarding the number of black employees in Respondent's management ranks. We have carefully reviewed Complainant's Petition and the full record in this matter, and have weighed all the objections to the decision in accordance with the standard of review stated herein. We find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record and her assessments of credibility. Quinn v. Response Electric Serv., Inc., 27 MDLR 42 (2005); DiAngelo, et al v. Pandiscio, et al. 32 MDLR 103 (2010).

Complainant has appealed the decision on the grounds that the Hearing Officer erred by requiring Complainant to demonstrate as part of her *prima facie* case that she was subjected to adverse treatment different from similarly situated comparators not in her protected class. Complainant asserts that comparator evidence is not required as an element of the *prima facie* case and, in fact, in some instances is not a requirement at any stage of the burden-shifting analysis required in a case where there is only indirect evidence of discriminatory animus and causation.

Elements to establish a *prima facie* case of discrimination are flexible and may vary depending upon the claim and the specific facts of the case. See Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107 (2000). Complainant is correct in

stating the first stage of the burden-shifting analysis in a termination case requires her to establish a *prima facie* case of discrimination by showing only that she is a member of a protected class, that she was performing her job at an acceptable level, that she was terminated, and that her employer sought to fill the position by hiring another individual with qualifications similar to hers. *Id.* at 116; see e.g., Weber v. Cmty. Teamwork, Inc., 434 Mass. 761, 772 (2001).

We concur with Complainant that she need not establish comparator evidence to advance the first stage (*prima facie* case) in the three stage order of proof set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). While providing evidence of different treatment of a similarly situated comparator, who was not a member of the Complainant's protected class, is "usually the most probative means of proving that an adverse action was taken for discriminatory reasons, it is not absolutely necessary." Trustees of Health and Hospitals of City of Boston, Inc. v. MCAD, 449 Mass. 675, 683 (2007). Evidence of a similarly situated comparator is not required in all cases. Similarly, Complainant need not prove discriminatory animus as part of her *prima facie* case, but must do so ultimately. Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001). However, the Hearing Officer's formulation of the elements required to advance a *prima facie* case is not fatal to the outcome because the Hearing Officer continued her analysis beyond the first stage. She proceeded to analyze the claim assuming that Complainant had met her *prima facie* burden, and considered whether Respondent had met its burden to articulate a legitimate non-discriminatory reason and discussed Complainant's ultimate burden of proving Respondent acted with discriminatory animus.

The Hearing Officer found that Respondent had articulated legitimate non-discriminatory reasons for Complainant's termination, and that Complainant failed to prove that her employer acted with discriminatory animus. Given that the Hearing Officer evaluated the claim thoroughly and ultimately properly applied the burden shifting analysis, the Hearing Officer's *prima facie* case articulation was not material to the case's outcome. Irrespective of the Hearing Officer's discussion of the *prima facie* case, her ultimate conclusion that Complainant failed to prove the claim of unlawful discrimination was not based on error of law.¹

Complainant next challenges the Hearing Officer's conclusion that Complainant presented insufficient credible evidence to support a finding that Respondent's articulated reasons for Complainant's discipline and termination were a pretext for unlawful discrimination. To support her challenge, Complainant notes that Respondent's own witnesses gave inconsistent testimony about which employees could authorize appointments, and stated that Respondent's witnesses' testimony that she initially lied about having authorization to view the patient's medical record and schedule the appointment was false. She argues that, because of this, the only reasonable conclusion is that discriminatory animus motivated Respondent's actions.

We disagree. Substantial evidence in the record supports the Hearing Officer's conclusion that the Respondent met its burden to articulate legitimate, non-discriminatory reasons for Complainant's termination and Complainant did not meet her burden to prove that these reasons were pre-textual. See, Lipchitz v. Raytheon Co., 434 Mass. 493, 499

¹ "On a claim of unlawful discrimination, a plaintiff must prove that she is a member of a protected class, she suffered harm as a result of an employer's adverse employment action, and the employer harbored discriminatory animus, which was the determinative cause of the adverse action." Weber v. Comty. Teamwork, Inc., 434 Mass. 761, 775 (2001)

(2001) (ultimate issue of discrimination for the fact finder after weighing the circumstantial evidence and assessing credibility). The Hearing Officer credited testimony by Respondent's witnesses, including the person who hired Complainant approximately four and a half months prior to the termination, that the decision to terminate her employment was driven by her violation of patient confidentiality and privacy rules in order to make an unauthorized appointment. Despite Respondent's witnesses' inconsistent testimony about which hospital personnel could schedule an appointment, all agreed that Complainant had no authority to make the appointment, which the Hearing Officer credited. The Hearing Officer even noted Complainant's own admission that she was unauthorized to make the patient's appointment. The Hearing Officer also recognized Complainant's admission she was not authorized to access and review the patient's medical chart.

Complainant also argues that Respondent's witness's testimony about Complainant lying about having committed the infractions without authorization should not have been credited and could not have been a basis for the termination decision because this was not articulated to Complainant at the time of the termination. Complainant's argument that this is "definitive proof of pretext" is not persuasive. The witness stated that the belief had Complainant lied about authorization to make the appointment was only one of a number of factors that drove the termination decision and was not the primary reason, to wit, the seriousness of the infractions and her unwillingness to accept responsibility that she had erred. Moreover this witness (Justin Verge) was the person who initially encouraged Complainant to apply for the Resource Coordinator position and participated in hiring her. The Hearing Officer credited the

articulated reasons for Complainant's termination: accessing a patient's file without permission and making a medical appointment without authorization. We see no reason to disturb her credibility findings.

Finally, Complainant argues that her termination was based on the same offense that she had already been disciplined for, and, therefore, was unduly harsh and unjustified, which demonstrates discriminatory animus. We are unpersuaded by this argument. While acknowledging that Respondent's disciplinary proceedings may have been "arguably harsh," the Hearing Officer held this was not evidence that Respondent's penalty was due to Complainant's race, color, or national origin. The Hearing Officer correctly stated it is not for the Commission to judge whether Respondent's personnel decisions were rational absent evidence of discriminatory motive. See Wheelock Coll. v. MCAD, 371 Mass 130, 137 (1976) (recognizing M.G.L. c. 151B protects only against unlawful discrimination and not all arbitrary action or poor managerial judgment). The Hearing Officer determined that the decision to terminate Complainant was driven by the severity of her infractions coupled with her unwillingness to accept responsibility for her actions. The Hearing Officer correctly confined her analysis to the issue of discrimination rather than evaluating the wisdom of management's decision-making.

Complainant asserts that the Hearing Officer also erred in ruling that a Caucasian nurse, also fired for violating Respondent's confidentiality policy, was a similarly situated employee to Complainant. Complainant argues that because the nurse was terminated for a violation of the Health Insurance Portability and Accountability Act (HIPAA) that they were not similarly situated employees. Yet, HIPAA is intended to protect a patient's privacy and confidentiality; the very issues involved in Complainant's

violations. That Complainant was not terminated for a specific HIPAA violation is not distinguishable because patient confidentiality was central to both terminations.

Complainant also argues that the seriousness of the nurse's offense makes them dissimilar; she alleges her offense was not committed in bad faith but the nurse's was – the nurse publicly discussed a patient's health disparagingly. However, Complainant's analysis diminishes the magnitude of her infractions. The Hearing Officer credited testimony that a manager "panicked" when she heard that Complainant had accessed a patient's file and made an appointment without authorization, because patient confidentiality was of paramount importance to Respondent. The Hearing Officer also credited another witness that described Complainant's actions as "a very serious offense" that he considered "akin to practicing medicine without a license." Both employees committed infractions that Respondent considered serious violations of its policies protecting patient privacy and confidentiality. That makes them suitable comparators.

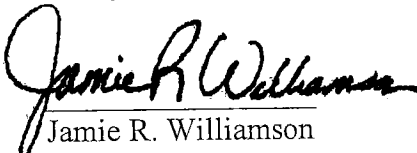
Finally, Complainant contends that the Hearing Officer erred by refusing to admit evidence that Respondent did not employ African Americans in the position of supervisor or manager. She argues that the "segregated management structure" reveals "Respondent's attitudes toward minority employees" and evinces discriminatory intent toward Complainant, citing the case of Lipchitz v. Raytheon Co., *supra*. In Lipchitz, the plaintiff alleged she was denied a promotion to a management position due to her gender, and the court found statistical evidence regarding the number of women in the management positions was relevant. This matter is clearly distinguishable. The issue being litigated was Complainant's termination and not her application for a management position. The Hearing Officer's omission of statistical evidence concerning the racial

composition of Respondent's management team did not constitute an abuse of discretion. See, 804 CMR 1.21 (11) (stating in part, the Commission shall not be bound by the rules of evidence except for the rules of privilege), M.G.L.c.30A, §11(2).

ORDER

Complainant's appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 30 days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED this 22nd day of October, 2014.²


Jamie R. Williamson
Chairman


Charlotte Golar Richie
Commissioner

² Commissioner Thomas George was the Investigating Commissioner for the matter so did not participate in the deliberations of the Full Commission pursuant to 804 CMR 1.23 (1)(c).