

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & AUDREY CROMARTIE,
Complainants

v.

DOCKET NO. 10-SEM-02824

WEST RIVER PHARMACY &
SHARON BLITCHINGTON,
Respondents

Appearances:

John G.H. Coster, Esq. for Audrey Cromartie
Jonathan A. Scharf, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about October 12, 2010, Complainant Audrey Cromartie filed a complaint with this Commission alleging that Respondents discriminated against her on the basis of her race and color (African-American) and retaliated against her for engaging in the protected activity of filing an internal complaint of race discrimination. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified to public hearing. A public hearing was held before me on December 6-10, 2016. After careful consideration of the entire record and the post-hearing submissions in this matter, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Audrey Cromartie is an African-American woman residing in Northborough, Massachusetts. Complainant was employed by Respondent West River Pharmacy as a Medical Records Technician (MRT) from January 2008 through October 18, 2010. Twelve per cent of Respondent's employees were African-American. Complainant was the only African-American MRT.

2. Wingate Healthcare, Inc. was, at all times relevant to this matter, a managing company, operating and managing nursing homes throughout Massachusetts and New York.

3. West River Services, Inc. was, at all times relevant to this matter, a holding company which owned and operated businesses ancillary to nursing home care and shared common ownership of these businesses with Wingate.

4. Respondent West River Pharmacy ("Respondent") is a pharmacy located in Marlborough, Massachusetts that was established by West River Services in 2007. Respondent is a provider of drugs and medications to Wingate and non-Wingate nursing homes. The medications for nursing homes are in pre-packaged daily "punch cards" for each resident. Respondent pharmacy also prepared and updated residents' medical records, including medical orders, treatments, drugs and other medically necessary information. Respondent did not have its own Human Resources department. However, there was a Vice President of Human Resources Department at Wingate's headquarters in Needham, MA at the time of Complainant's employment.

5. Respondent Sharon Blitchington ("Blitchington") began working at Respondent as a MRT in February 2008. Sometime around mid-2008, Blitchington became supervisor of the

Medical Records department, while continuing to perform the duties of an MRT. As a supervisor, Blitchington was responsible for managing the operations and workflow of the five to seven MRTs. At this time she became Complainant's direct supervisor.

6. From 2008 to 2010, Respondent did not have a Chief Operating Officer and relied on outside consulting companies for operational assistance. The services of both companies were terminated.

7. Joseph Cuzzupoli was the president of West River Services, Inc. and of Respondent during the course of Complainant's employment. Cuzzupoli had no prior experience running or managing a pharmacy.

8. In early 2008, Alex Spiegel was hired as the Director of Special Projects for West River Services and performed duties at Respondent. Spiegel also served as Interim Director of the Pharmacy for approximately one year. During this time, Spiegel performed some of the duties of a Chief Operating Officer and reported to Cuzzupoli. Respondent Blitchington reported directly to Spiegel.

9. Spiegel spent most of his time working with customers in the field and responding to their feedback. From 2008 when the company began operations, through August 2010, Spiegel shared managerial duties with the pharmacist and Cuzzupoli. Spiegel left the company in 2012. (Testimony of Spiegel)

10. The duties of an MRT included updating patient medical records on a daily basis, printing medical records monthly and on an as-needed basis, printing other reports, interpreting written physician orders for transcription, and other tasks. Each MRT was responsible for specific nursing homes.

11. For new patients, the MRT would create a medical record by transcribing all data from the new admission packet to Respondent's electronic database. The record included the patient's name, date of birth, diagnoses, allergies, diet, ancillary orders, treatments, drug orders and other information. (Testimony of Complainant; Testimony of Spiegel)

12. For existing patients, in a process called an "edit," the nursing home would return the medical record to Respondent on a monthly basis with any handwritten changes to the resident's data made by a physician's or nurse. The MRT would then transcribe the changes into the patient's electronic database, print a clean copy of the updated record and return it to the nursing home.

13. Prior to August 2010, there was no formal process for checking an MRT's performance for accuracy. MRTs checked each other's work for errors in a "junk run" whereby updated medical records would be printed in draft form and double-checked by another MRT before they were printed in final form and sent out. The "junk run" was not effective because it did not result in all of the medical records being double checked. MRTs made frequent data entry errors and customers frequently complained to Respondent's management about their errors.

14. Complainant testified that she was always assigned the most patient beds, that she dealt with 60 to 70 medical records per day and at times she worked overtime or brought work home. She complained to Spiegel and others about her work load and the pressure of the job. (Testimony of Complainant) She stated that all the MRTs made errors which they would discuss with one another. She testified that Blitchington spoke to her in an angry, loud manner, and talked down to her like a child, whereas she spoke to others in a whisper.

15. Blitchington testified credibly that Respondent was a poorly run organization with no managers with long term care experience. She stated that Respondent was “not a good place to work” and that she did not have strong support from managers.

16. Blitchington denied that she assigned Complainant the most patient beds and she stated that beds were assigned evenly among MRTs. She testified that Complainant was the worst MRT in terms of her work performance, based on customer complaints. She testified that Complainant had a poor attitude and was defensive when criticized. I credit her testimony. Cuzzupoli testified that Complainant made more than her share of errors. Spiegel testified that errors were a problem throughout his employment at Respondent. He did not remember whether any single person was responsible for the majority of errors. (Testimony of Spiegel)

17. Complainant and Blitchington got along at first, but their relationship worsened because of disputes over Complainant’s work performance. Their animosity toward each other was evidenced by their testimony and disparaging emails they sent to various co-workers complaining about one another. (Exs. 143-183)

18. Blitchington testified that Complainant continuously had trouble printing her monthly reports from the office printer. She typically would yell out to Blitchington for assistance and Blitchington would show her how to operate the printer. I credit her testimony.

19. In an annual review dated March 5, 2009, wherein Complainant was rated from one to five in eight separate criteria, Blitchington rated Complainant a “2” for quality of work, for performance errors, and printing problems. She rated Complainant a “2” for “Cooperation” based on her negative attitude and defensiveness when shown her errors and a “2” for adherence to policies. Complainant received “3” ratings for initiative, and self-improvement/problem solving, “4” ratings for safety awareness and customer service and a “5” for

attendance/punctuality. She received a total score of 25 out of 40. Blitchington wrote that Complainant “is a hard worker but often her work creates work for others.” She also noted that Complainant would often list medications as discontinued even though they had not been discontinued by a facility’s nursing staff. (Ex. 13; Testimony of Blitchington)

20. On December 1, 2009, Blitchington noted in a “documented verbal counseling,” which is essentially an oral warning memorialized in writing, that she had counseled Complainant for entering the wrong patient name into the data base. Complainant testified that Respondents did not know whether it was she or the pharmacy that had made the mistake but blamed her nonetheless. (Testimony of Complainant; Testimony of Blitchington; Ex. 14)

21. Complainant testified that Blitchington would yell at her and belittle her in front of the other MRTs. On one occasion, in late 2009 or early 2010, Blitchington and Complainant got into a loud argument that could be heard from an adjacent conference room. Blitchington disputed that she belittled Complainant and stated that she was frustrated by Complainant’s mistakes and hostile attitude.

22. In January 2010, Complainant told Spiegel that Blitchington had yelled at her and was assigning her more work than the other MRTs. She did not tell Spiegel that she believed her treatment was related to her race. (Testimony of Complainant) Spiegel testified that he did not recall the content of her complaint at that time, but he did not believe it was related to racial discrimination. He stated that Complainant declined his offer to further discuss her concerns. (Testimony of Spiegel; Ex. 2; Ex. 67)

23. In February 2010, Complainant obtained temporary custody of her two young grandchildren. Respondents were very supportive of her throughout the stressful process. Blitchington gave her some clothes and toys, senior managers gave her a Target gift card, and

she was allowed to take a month off work in order to arrange for childcare. When she needed a supervisor's reference for the probate court, Blitchington wrote a positive letter. (Testimony of Complainant; Testimony of Blitchington)

24. On June 1, 2010, Complainant left work without completing edits for a nursing home and failed to inform anyone that her edits did not go out. Blitchington reported this incident to Spiegel. Complainant stated that she was busy helping others and did not have time to do her own work. (Testimony of Blitchington; Testimony of Complainant)

25. On June 8, 2010, Blitchington questioned Complainant about her failure to keep up with new admissions. She noted in a "documented discussion" that Complainant failed to follow specific instructions regarding the entry of advance directives to a nursing home's records. Spiegel was aware of these matters. (Testimony of Blitchington; Exhibit 15)

26. On June 29, 2010, Blitchington recommended to Spiegel that she have another discussion with Complainant about her performance. Blitchington testified that she always consulted with Spiegel before writing up Complainant. Blitchington emailed Spiegel that she did not want to meet alone with Complainant. I credit her testimony.

27. Despite Complainant's performance deficits, Blitchington continued to invite her and others to social and work events in the summer of 2010. (Ex. 69; Ex. 70) In August 2010, Blitchington emailed family photos to Complainant and co-workers. (Ex. 85)

28. Spiegel testified credibly that Complainant continued to have performance issues which formed the basis of a conflict between her and Blitchington.

29. On July 20, 2010, Blitchington and Spiegel met with Complainant to discuss her use of the wrong procedures and forms in her edits for a nursing home in Springfield. Complainant admitted she did not use the proper procedures or forms but stated that Blitchington set up the

home the wrong way when converting it from one procedure to another and explained to Spiegel and Blitchington that it was unfair to blame her. Blitchington documented this meeting in a "Documented Discussion" form she signed that was not signed by Spiegel. (Ex. 16)

Complainant testified that she did not see the form until she went to Respondent's business office to obtain a copy of her personnel file. At that point she decided to file a complaint with Human Resources because she felt Blitchington was setting her up. "Documented Discussion" forms have signature lines for "Manager Signature" and Pharmacy Manager Signature, but not for the employee, who does not review the form. According to Spiegel's credible testimony, Documented Discussion forms were intended to go in a supervisor's file and not in the employee's personnel file.

30. On July 20 or 21, 2010, Complainant asked Blitchington to review a document before she sent it to a nursing home. Blitchington told Complainant that the printing was not lined up correctly and, according to Blitchington, Complainant became angry with her and said she was not interested in that the appearance of the document. Blitchington responded that Complainant needed to recognize her own mistakes and Complainant told her that she did not think the printing was "that bad." Blitchington documented the incident on a "Documented Discussion" form that was not signed by Spiegel (Testimony of Blitchington; Ex. 17)

31. After speaking with Spiegel, Complainant decided not to pursue the matter of her being counseled again and asked Spiegel to insure that when the next set of edits arrived, she would be assigned the same amount of work as the other MRTs.

32. On July 23, 2010, Complainant complained to Spiegel for the first time that she was being singled out by Blitchington because of her race. (Testimony of Complainant; Testimony of Spiegel) I credit her and Spiegel's testimony in this regard. Notably, Complainant's testimony

about this directly contradicts the allegations in her complaint and position statement that she had previously complained of race discrimination. Spiegel told Complainant to report her concerns to the Human Resources department at Wingate Healthcare. (Testimony of Spiegel; Testimony of Complainant) Spiegel had had no further role in investigating Complainant's allegations. (Testimony of Spiegel; Ex. 77)

33. After complaining to Spiegel, on the same day, July 23, 2010, Complainant was contacted by Peter Carabillo, who asked to speak with her about the issues she raised with Spiegel. Carabillo "helped run the pharmacy" at Respondent and had Human Resources experience in a previous job. (Testimony of Complainant; Testimony of Carabillo; Ex. 78)

34. Complainant did not know Carabillo, who was not a member of Wingate's HR department, and she asked him to explain his involvement in the matter. Carabillo responded that he had a background in human resources and had contacted her at the request of Cuzzupoli and Spiegel. Complainant did not want to speak with him, and preferred to file a complaint with Wingate Healthcare's corporate Human Resources Department. (Testimony of Complainant; Testimony of Carabillo; Ex. 78)

35. According to Complainant, when Cuzzupoli learned that Complainant did not want to speak with Carabillo, Cuzzupoli called her into a conference room. He raised his voice, swore and wanted to know why Complainant did not want to meet with Carabillo. (Testimony of Complainant) Complainant testified that she was devastated after meeting with Cuzzupoli and broke down and cried. Cuzzupoli testified that he did not recall meeting with Complainant and denied yelling or swearing at her. I credit Complainant's version of events over that of Cuzzupoli, who did not challenge Complainant's version of events in Respondent's position statement. Cuzzupoli was terminated in January 2012 under acrimonious circumstances,

followed by lawsuits between Cuzzupoli and Respondent. (Testimony of Cuzzupoli; Testimony of Spiegel)

36. On July 23, 2010, Blitchington learned that Complainant had accused her of harassment and discrimination. She was upset about Complainant's allegations and discussed the matter with other employees, as well as Carabillo and Spiegel. She also asked Complainant how she could believe that Blitchington had written her up because of her race. (Testimony of Blitchington) On the same day, Blitchington asked Complainant how the re-edit of the Springfield nursing home was coming along. According to Blitchington, Complainant responded in a belligerent manner that she was re-editing the home, even though some of what she checked was correct. Blitchington documented this conversation on a Documented Discussion" form that was not signed by Spiegel. (Ex. 18)

37. On the same date, July 23, 2010, Blitchington voluntarily resigned her position as Manager of Medical Records and returned to being an MRT. She no longer wanted to be a supervisor because of the conflict and the stress of the position.

38. On or about July 23, 2010, Complainant called Wingate's Vice President of Human Resources (herein after the "human resources manager") for Wingate and they arranged to meet on July 26, 2010. At the meeting, Complainant told the human resources manager that she felt Blitchington was discriminating against her because of her race and she described the confrontation with Cuzzupoli. During the meeting, the human resources manager showed Complainant the three most recent "Documented Discussions" that had been placed in her personnel file. Complainant testified that she had never seen these documents before. The human resources manager asked Complainant to prepare a written statement setting forth her claims.

39. On July 28, 2010, Complainant prepared a written statement, with the help of co-worker Christina Salameh, who worked in billing, entitled "Statement of Discrimination, Harassment and Retaliation" (Ex. 108) describing what she viewed as the harassment and discriminatory treatment of her by Blitchington. She wrote that she was treated unfairly and more harshly than her co-workers despite her being more experienced and more educated, having completed her work and having a good attendance record. She stated that she was cited for errors on July 21, 2010 that were partially the fault of her manager setting up a new system incorrectly. She noted that Cuzzupoli used inappropriate language with her and claimed that Blitchington backdated and placed "documented discussions" in her personnel file that she had not signed and had never before seen. She asked Respondent to investigate her claims and asked for an end to the hostile work environment. (Ex. 107; Testimony of Complainant; Testimony of Salameh)

40. After speaking with Complainant, the human resources manager spoke with Blitchington and another MRT, as well as Spiegel and DePaola. By August 4, 2010, she had completed her investigation and prepared a cursory written summary of her findings, consisting of one and one half pages of bullet points. She wrote that she found warnings in the files of every medical records department employee except one, and that the personnel files of MRT employees contained documentation of discussions not signed by the employees. She noted that Blitchington had written up an employee whom Complainant identified as a friend of Blitchington outside of work. She wrote that there was a perception that Blitchington socialized too much with MRTs (Ex. 108)

41. The human resources manager recommended reorganizing the MRT department so that Blitchington and Complainant were separated. She also recommended that documentation

be shown to employees before being placed in their files and that an error report tracking system be implemented in order to hold MRTS accountable for their performance. (Ex. 108)

42. The human resources manager reviewed her findings with Blichington and advised her to speak with all of her subordinates in the same tone and not to socialize with them. Blichington felt as though the company had treated her unfairly.

43. The human resources manager reviewed her findings via conference call with Complainant, Spiegel and Peter DePaola. The human resources manager told them that she could not establish that Blichington had discriminated against Complainant and that the matter was closed. (Testimony of DePaola) The conclusion that no discrimination occurred was not spelled out in the perfunctory summary of findings.

44. After the investigation, the medical records department was split into two "pods," with S. D. in charge of one pod and Blichington in charge of the other pod. Complainant was assigned to S. D.'s pod and S. D. became her supervisor.

45. On August 2, 2010, Peter DePaola began as Chief Operating Officer of Respondent, with the charge of providing structure and organization to Respondent and resolving ongoing issues with poor customer satisfaction and employee performance problems. DePaola's experience includes nine years as a regional manager of Pharmerica, a large institutional pharmacy. DePaola reported directly to Cuzzupoli. (Testimony of Spiegel; Testimony of DePaola) By all accounts, DePaola, who also had a military background, created a stricter atmosphere than previous managers; for example he banned music in the workplace.

46. Prior to DePaola joining Respondent, there was no formal process for auditing, monitoring or measuring MRT performance. DePaola determined that Respondent needed to create a mechanism for measuring the error rates of MRTs and he assisted in developing a job

description that included an acceptable error rate. The new job description provided that the patient medical record error rate be no more than two per admission and/or an average of two errors for all admissions. He testified credibly that errors in medical records, particularly having to do with prescription medications presented a serious risk to the health and safety of nursing home patients. (Testimony of DePaola)

47. Within weeks of his arrival, DePaola began implementing a series of Quality Improvement Initiatives throughout the pharmacy, in order to address ongoing operational and customer satisfaction concerns, including ways to measure pharmacy service levels and performance. DePaola testified that the majority of complaints came from homes assigned to Complainant. (Testimony of DePaola)

48. In addition to the above, MRTs' records would be audited for accuracy on a weekly basis. Mistakes would be tracked so that a quantitative assessment could be performed and training and education could be provided as necessary.

49. Starting in early September 2010, Blitchington and S.D. began auditing medical records prepared by the MRTs and documenting errors on worksheets and tallying the number of errors of each MRT on a spreadsheet. DePaola testified that the review process was to check one or two admissions per MRT and if the admissions contained no errors, they would conduct no more checks that week. If the admissions contained errors, they would check on or two more.

50. In the first week of audits, for the week ending September 4, 2010, Complainant made 49 errors in at least six records, for an average of more than eight errors per record. Complainant received a "Documented Written Warning" stating that her performance needed to improve and that the accepted error rate for new admissions was two errors per record. (Testimony of DePaola; Ex. 54A) S.D. counseled Complainant that the minimum number of

acceptable errors was two per record for new admissions and zero errors on edits of existing patients. (Ex. 19; Ex 199)

51. For the week ending September 11, 2010, the second week of audits, at least 10 of Complainant's records were audited and a total of 62 errors were found, for an average of 6.2 errors per record. Complainant received another "Documented Verbal Counseling" from Blitchington, despite Blitchington's no longer being her supervisor, stating that she had to reduce her error rate to two errors per record. (Exs. 54B; 21; Testimony of DePaola)

52. Complainant testified that on September 14, 2010 she called to say she would be late. She stated that when she arrived at work, she dropped off a doctor's note stating that she had to limit her typing because of a wrist injury and did not intend to work that day. She stated that even though she had come in solely to submit a doctor's note, she was reprimanded for wearing jeans and for calling in late. She refused to sign the disciplinary document that was signed by Blitchington and S.D. (Testimony of Complainant; Ex. 6) Blitchington testified that Complainant *had* come in to work for the day and the discipline was justified. DePaola testified that he sent Complainant home because she was wearing jeans to work and that he enforced a stricter workplace dress requirement. As an example, he had eliminated "casual Friday" as unacceptable in a pharmacy. I credit the testimony of Blitchington and DePaola over that of Complainant with respect to this incident. I find that had Complainant intended only to drop off a note, there would have been no reason for her to call in late.

53. By September 20, 2010, DePaola wanted to terminate Complainant's employment because her error rate had not sufficiently diminished to meet the acceptable standard, but the human resources manager insisted that he place Complainant on a 90 Day Performance

Improvement Plan (PIP). (Testimony of DePaola; Ex. 91, 92-97) DePaola testified that Cuzzupoli, Blitchington and Spiegel had no input into his decision to terminate Complainant.

54. On September 20, 2010, DePaola met with Complainant and S.D., and informed Complainant that she would be placed on a PIP. He documented this meeting in an email to the human resources representative, in which he stated that he told Complainant that every new admission that she entered recently had multiple errors and this had an impact on the medical records and ultimately the residents. He also discussed with her the negative feedback from nursing homes. He noted that Complainant had unapproved overtime and more errors than anyone else in the department. (Ex. 91) After the meeting, DePaola emailed Complainant a summary of their conversation stating that she was expected to make no more than "3" errors per new admission. DePaola testified that the "3" errors per new admission was a typo and should have read "2." I credit his testimony.

55. Complainant was given her PIP on September 29, 2010. The following day, September 30, 2010, DePaola was still determined to terminate Complainant's employment, even though her error rate had decreased to approximately four errors per record. (Testimony of Complainant; Testimony of DePaola)

56. For the week ending October 1, 2010, Complainant made 43 errors in ten audits for an average of 4.3 errors per record. (Ex. 54C) Complainant was counseled on October 7, 2010 and advised that her errors needed to be reduced to no more than "2" errors per record for new admissions and zero errors on audits of existing patients. (Ex. 23)

57. For the week ending October 8, 2010, Complainant made 26 errors in ten audits, for an average of 2.6 errors per record. (Ex. 54D)

58. For the week ending October 15, 2010, Complainant made seven errors in two audits, for an error rate of 3.5 errors per record. (Ex. 54E)

59. Blitchington testified that by the fall of 2010, she had been looking for another job for a while and when she found another job, she resigned from Respondent in October 2010, shortly before Complainant was terminated.

60. DePaola testified that at the time he decided to terminate Complainant, he was unaware of her internal complaint of discrimination, although he knew that the human resources manager had recommended a reorganization of the medical records department that included separating Complainant and Blitchington. I do not credit his testimony in this regard because DePaola interacted on a daily basis with Cuzzupoli, Spiegel and Carabillo and he spoke frequently to Blitchington and S.D. about Complainant's performance and was involved with various decisions involving Complainant, including auditing her work, overseeing the P.I.P. and sending her home for wearing jeans. Furthermore, the human resource manager's written summary of her investigation mentioned that she spoke to DePaola about the internal discrimination complaint. I find that DePaola was fully aware of Complainant's internal complaint of discrimination. (Testimony of DePaola; Testimony of Spiegel; Exs. 87, 90, 108, 240, 241)

61. On October 18, 2010, Complainant was called into the office by Spiegel who gave her a paycheck and terminated her employment. She did not remember his stated reasons for terminating her employment. (Testimony of Complainant) At the hearing, Spiegel had no specific memory of the event. (Testimony of Spiegel)

62. DePaola testified that Respondent involuntarily terminated 26 employees from August 2010 to July 2011. (Ex. 102)

63. Stacey (Caucasian), an MRT, was terminated on October 1, 2010 after discussions with Blitchington and Spiegel on July 20, 2010 and July 23, 2010 about attendance issues. The discussions were then memorialized on a "Documented Discussion" form and signed by Blitchington on July 26 and Spiegel on July 30, 2010. At another meeting with Blitchington, Stacey received a Documented Verbal Counseling by Blitchington on September 20, 2010 for attendance issues that was signed by both Stacey and Blitchington. Stacey was terminated on October 1, 2010 for attendance issues. (Exs. 34, 35)

64. Renee (Caucasian), a pharmacist, was placed on a PIP on February 2, 2011 for excessive errors and was terminated on April 25, 2011. (Ex: 42-44)

65. Anne (Caucasian) a pharmacy technician, was terminated on June 11, 2011 for being a "no call, no show," following a pattern of absenteeism after receiving warnings. (Ex. 24-32, 102);

66. Carmen, an Hispanic pharmacy technician, received a written warning for tardiness and was terminated on September 8, 2010 (Ex. 38)

67. Ryan (Caucasian) a pharmacy technician was placed on a PIP for errors on December 28, 2010 and was terminated on February 15, 2011. (Ex. 45-50)

68. Hemat (Asian), a pharmacist, was terminated on October 22, 2010 for making one error. (Exs. 51; 102)

69. Chetal, an Indian pharmacist, was terminated on June 3, 2011 for misconduct after a verbal reprimand. (Exs. 52-53; 102)

70. Conor, (Caucasian) a pharmacy technician, was terminated on October 5, 2010, for tardiness after three written warnings. (Exs.39-42; 102)

71. When DePaola began his position at Respondent in August 2010, there were seven employees in the medical records group. Ten months later in June 14, 2011, there were only three employees in the medical records group, and two years later there was one employee in the medical records group. (Ex. 103; Testimony of DePaola) After June 14, 2011, three MRTs left the company. DePaola testified that the reasons for the reduction in staff were two-fold: Respondents were responsible for the records of 2,400 residents with each MRT handling an average of 400 beds. Based on his previous relevant experience, each MRT could handle as many as 1,000 beds and in his assessment, Respondent was overstaffed. At the same time Respondent's largest customer, Wingate, began to convert to electronic records and MRTs were becoming unnecessary. DePaola stated that Complainant was not replaced and, of the two MRTs hired after Complainant's termination, one was a supervisor and the other was a per diem employee. (Testimony of DePaola; Ex 103) Respondent currently employs only one MRT. DePaola testified credibly that, for these reasons Complainant's employment would not have continued much longer, had she not been terminated.

72. Complainant applied to Salter College four days after her termination on October 22, 2010. (Ex. 140; Testimony of Complainant) She attended Salter College full-time from November 29, 2010 until June 2011, when she received a certificate in medical assisting. Complainant stated that she continued to look for work while attending school full-time. However, at her deposition she stated that she would not have dropped out of school for work even if she had found a job. After receiving her medical assistant's certification, Complainant

sought a position as a medical assistant as well as a position as an MRT. (Testimony of Complainant)

III. CONCLUSIONS OF LAW

A. Terms and Conditions

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and color. Absent direct evidence of discrimination, Complainant must establish that: (1) she is a member of a protected class; (2) she was performing her position in a satisfactory manner; (3) she suffered an adverse employment action; and (4) similarly-situated, qualified persons not of her protected class were not treated in a like manner in circumstances that give rise to an inference of race and color 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, who is African-American, contends that Respondents discriminated against her by subjecting her to disparate treatment with regard to the assignment of work as compared to similarly situated employees not of her protected class. She alleges the disparate treatment included assigning her more work than her co-workers and that she was treated in a disparaging manner by her supervisors.

As an African-American, Complainant is a member of a protected class on the basis of her race and color. However, I conclude that Complainant has failed to establish that she was adequately performing her job. There was ample evidence of Complainant's making errors in

her work. In one case, she wrote down the wrong patient's name on a document. In another instance, she failed to implement the proper procedure in a nursing home. In many cases, Complainant's errors could have placed patients in potential danger. Therefore I conclude that Complainant has failed to establish a prima facie case of race and color national origin discrimination.

Even if Complainant has established that she was adequately performing her job, Complainant has failed to establish that similarly situated co-workers not in her protected class were treated differently than she was. Respondents presented evidence that, during the time period in question, they had disciplined and/or terminated white, Asian and Latino employees for making mistakes and for attendance issues. 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, supra, at 117; 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 disciplining Complainant were her failure to adequately perform her job by making numerous errors that could adversely affect the health and safety of nursing home residents. 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). She must prove that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz, supra, at 504 (2001)

Complainant offers as evidence of pretext, critical conduct toward her by her supervisor. While there was evidence that her supervisor, Blitchington, was angry with Complainant and perhaps openly disparaging at times, there was no evidence that her conduct resulted from discriminatory animus, but rather was the result of personality conflicts or disagreements about work performance. 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, at 503.

B. Hostile Work Environment

Complainant claims that Respondents violated M.G.L. c.151B, §4(1 and 4), by discriminating against her in the terms, conditions, or privileges of employment by subjecting her to a racially hostile work environment.

In order to establish a claim of racial harassment, Complainant must establish that she was a member of a protected class; that she was the target of speech or conduct based on her membership in that class; that the speech or conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and that the harassment was carried out by an employee with a supervisory relationship to Complainant, or that Respondents knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), citing Richards v.

Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511-1515 (11th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355, 1358-1359 (11th Cir. 1982); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). Complainant contends that she was treated in a hostile manner by Blitchington, was subjected to unwarranted discipline and was ultimately terminated from her employment on the basis of her race and color, while similarly situated persons not of her protected class were not subjected to harsh treatment and were not subjected to the same discipline. In determining whether speech or conduct creates a hostile work environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Harris v. International Paper Co., 765 F.Supp. 1509, at 1512-16 and notes 11 and 12; see Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988) (sexual harassment in housing). I conclude that Complainant has failed to establish that she was targeted for speech or conduct based on her race and color. She has presented no evidence beyond her own view, which in many respects was not credible, that she was given more work and more difficult assignments than her fellow MRTs and was treated in a harsh manner by Blitchington. While there was evidence that Blitchington spoke to Complainant in an irritated manner and that they had a loud argument, these discussions were always about problems with Complainant's performance and there was no credible evidence that Blitchington's conduct was motivated by racial animus. There were no racially tinged remarks by Blitchington, even in her emails to co-workers complaining about Complainant's work product. Likewise, I do not find that Cuzzupoli's heated meeting with

Complainant was evidence of racial animus, but was a reaction to Complainant's refusing to talk to Carabillo about her internal complaint. Not every personality conflict, warning or adverse decision that is made in the workplace is evidence of discriminatory motive. The record in this matter does not support Complainant's interpretation of events as being driven by racial animus. Rather it establishes that Blitchington's conduct resulted from frustration over Complainant's persistent work errors and inability to accept criticism or blame. Thus, I conclude that Respondents' conduct did not create a racially hostile work environment for Complainant.

B. Retaliation

Complainant has alleged that Respondents terminated her employment in retaliation for her having made an internal complaint of race discrimination. Pursuant to M.G.L. c. 151B §4¶4, it is unlawful for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondents were aware of the protected activity, that Respondents subjected her to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41 (2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once

Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions. Abramian, at 116-117; Wynn & Wynn, at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. *Id.*; Abramian, at 117.

Under M. G. L. c. 151B, s. 4 (4), Complainant has engaged in protected activity if she... "has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." In this case, Complainant made an internal complaint of race discrimination by her supervisor to Respondents' senior management and its human resources department. This was protected activity within the meaning of the statute.

Within three months after Complainant's report of race discrimination, Respondents terminated her employment. While proximity in time is a factor, "the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison, 423 Mass. 652, 662, n. 11(1996), citing Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 617(1996). That Respondents knew of a discrimination complaint and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation.

Complainant contends that she has established a causal connection between her protected activity and her termination. Complainant asserts as evidence of retaliatory animus the following: After her complaint to Spiegel, Complainant was not referred to human resources but rather to a manager whom she had never met and to whom she declined to speak, whereupon she was chided by Respondent's president Cuzzupoli because she insisted on filing her complaint with corporate human resources as she had planned. Cuzzupoli's reaction suggests his displeasure with Complainant's going to Respondent's corporate parent instead of dealing with the matter within the Respondent. The following facts suggest that Complainant has established a prima facie case of retaliation. DePaola's claim that he was unaware of Complainant's internal complaint was not credible. There were several warnings to Complainant's file that she claimed she never saw and that were not signed by her supervisor; her work was subjected to auditing; she was placed on a Performance Improvement Plan and ultimately was terminated, despite her claims that her error rate was declining. I conclude that Complainant has established a prima facie case of retaliation and the burden of production shifts to Respondents to articulate and produce credible evidence of a legitimate, non-retaliatory reason for their actions.

Respondents deny that Complainant's complaint of discrimination was the reason for the decision to terminate her employment and state that Complainant was terminated because of unacceptable performance. Respondents established that Complainant made numerous errors related to nursing home patients' medical records and drug treatments throughout the course of her employment and was duly reprimanded on numerous occasions for these errors. Her error rate in the months prior to her termination was unacceptably high and presented a serious risk to the health and safety of nursing home patients. Respondents also established that several employees who had not engaged in protected activity (and were not in Complainant's protected

class) were terminated for making errors and for other reasons such as chronic absenteeism, all around the time of Complainant's termination. Respondents have articulated a legitimate non-discriminatory reason for the termination.

Notwithstanding, the other issues raised by Complainant suggest that her protected activity was also factor in Respondent's decision to terminate her employment, along with Complainant's poor performance. I conclude that Respondent had mixed motives for terminating Complainant's employment.

Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainant carries her initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" absent the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299.

Respondents have persuaded me that they would have terminated Complainant's employment, even absent her protected activity. With respect to unsigned written reprimands which Complainant alleges she never saw, it is undisputed that the underlying errors were contemporaneously discussed with Complainant and I conclude that the written follow-up documents were not after the fact fabrications. There also was evidence that Respondents did not uniformly sign off on other employees' disciplinary documents, that "Documented Discussions" in particular were not shown to employees, and that Complainant was not singled

out in this regard. Moreover, while I believe that DePaola knew of Complainant's internal complaint and had decided to terminate her employment even before her PIP was instituted, the evidence established that DePaola, who was hired to improve Respondent's operations and error rate, and to drive down customer complaints company wide, was stricter and less tolerant than previous managers. He accomplished his goal by creating an audit process to monitor errors and by terminating several underperforming employees. I therefore conclude from the entirety of the evidence that Complainant's poor performance was the primary reason for Respondents' terminating her employment and I conclude that Respondents did not terminate Complainant's employment in retaliation for her protected activity. I conclude that there was no violation of M.G.L.c.151B, sec. 4(4).

IV. ORDER

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

This constitutes the final order of the Hearing Officer. 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 10th day of August, 2017


JUDITH E. KAPLAN,
Hearing Officer