STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 17, 2014)

STATE OF RHODE ISLAND, DEPARTMENT OF MENTAL HEALTH, RETARDATION AND HOSPITALS (MHRH)	:	
vs.	:	**C.A. No. PC 07-7048**
RHODE ISLAND COMMISSION FOR HUMAN RIGHTS, AND THE ESTATE OF DR. JOHN SATTI, JULIA SATTI CONSENTINO, ADMINISTRATRIX	:	

DECISION

MATOS, J., Before the Court is an appeal filed by the State of Rhode Island, Department of Mental Health, Retardation and Hospitals (MHRH) from a Decision and Order issued by the Rhode Island Commission for Human Rights (Commission) in favor of the Complainant, Dr. John Satti (Dr. Satti).[1] In its Decision and Order, the Commission concluded that MHRH had retaliated against Dr. Satti for filing previous charges of discrimination and that it also had discriminated against him on the basis of age. Jurisdiction is pursuant to G.L. 1956 § 28-5-28 and G.L. 1956 § 42-35-15.

I

Facts and Procedural History

The controversy giving rise to this litigation had its genesis on August 18, 1987 when Dr. Satti, born May 16, 1926, filed his first charge against MHRH before the Commission (Satti I).

[1] The Complainant, Dr. John Satti, died in August 2003. Thereafter, he was substituted by the Estate of Dr. John Satti, Julia Satti Consentino, Administratrix; however, for ease of reading, the Complainant/Appellee will be referred to as Dr. Satti in this Decision.

In that complaint, Dr. Satti accused MHRH of age discrimination. At the time, he had been working as a physician consultant at MHRH since 1986. On March 26, 1992, while Satti I was pending, Dr. Satti filed a second charge against MHRH, this time for discrimination with respect to hire and in retaliation for filing the previous charge (Satti II). In November 1993, the Commission issued a Complaint and Notice of Hearing in the Satti I matter, and on March 28, 1994, it issued a Complaint and Notice of Hearing in Satti II. On March 30, 1995, the Commission concluded in Satti I that MHRH had discriminated against Dr. Satti on the basis of age.

Meanwhile, in 1995, Dr. Satti was approved for appointment and clinical privileges at the Eleanor Slater Hospital. In accordance with practice, such appointments and privileges are reviewed every two years by another physician, by the Chief of Medical Staff, and by the Executive Committee of the Medical Staff (Executive Committee).

In March 2001, Dr. Satti's clinical privileges at the Eleanor Slater Hospital were renewed after his regular biennial review. At the time, Dr. Satti, who was categorized as a Physician II (General), worked on the third floor of the Virks building (Virks III), where he was responsible for all of that floor's patients. The Virks building housed psycho-geriatric patients, who generally were long-term patients over fifty-five years of age with psychiatric issues. Dr. Satti's renewal was supported by his direct supervisor, Dr. Marco Calvo (Dr. Calvo), as well as by the Chief of Medical Staff, Dr. Edward Martin (Dr. Martin). Dr. Calvo was a primary-care physician who had been Dr. Satti's direct supervisor for several years. He rated Dr. Satti as "Good" in every category, while Dr. Martin rated him as "Meets Standard" or "Exceeds Standard" in every category.

In May 2001, Dr. Satti voluntarily agreed to a request from Dr. Calvo and Dr. Alex Andronic (Dr. Andronic) to switch floors with Dr. Andronic in order that Dr. Andronic avoid a conflict that he had been having with a nurse on the first floor (Virks I). Accordingly, Dr. Satti moved to Virks I and assumed responsibility for Dr. Andronic's twenty-two patients. This responsibility required him to review each patient's medical chart, some of which were sizeable.

According to MHRH policy, medication orders should be reviewed on a monthly basis. It is undisputed that between May 2001 and August 2001, Dr. Satti did not adjust the then-existing medication orders of certain patients.

On July 12, 2001 and August 24, 2001, the Commission conducted a hearing on the Satti II matter. Before the hearing concluded, Dr. Satti returned from vacation to find that, during his absence, Dr. Calvo had changed medications and ordered endocrine tests on some of his patients. Dr. Satti was upset with the changes and, on August 21, 2001, he spoke to Dr. Martin about Dr. Calvo's actions. Dr. Satti threatened to report the incident to the Board of Medical Licensure and Discipline (Medical Board). However, Dr. Martin advised him against pursuing such course of action. Dr. Satti took Dr. Martin's advice and also asked him for a second medical opinion with respect to Dr. Calvo's measures. Accordingly, Dr. Martin conducted a review of Dr. Satti's patients during the end of August 2001 and made some recommendations for changes in treatment. Dr. Satti duly accepted and adopted said recommendations.

On August 24, 2001, the Satti II hearing concluded. Meanwhile, sometime between August 21 and August 29, 2001, Dr. Satti received a quarterly peer review relating to one patient. The review raised an issue with respect to the dispensing of a salt tablet and diuretic combination of medications. On August 29, 2001, Dr. Martin wrote a memorandum to Dr. Satti requesting him to respond to the peer review comments by September 7, 2001. One day later, before Dr.

Satti responded to the peer review comments, Dr. Martin informed Dr. Satti that he was transferring him to the Adult Psychiatric Services facility (APS) to serve as an adjunct physician to psychiatrist/primary-care physicians. The position involved a diminution of authority from his then-current position of Physician II (General). Dr. Martin made his decision to transfer Dr. Satti without consulting with Dr. Calvo or seeking his input. At the time, Dr. Martin was aware that the last physician who was transferred involuntarily to APS had resigned rather than take the position.

Dr. Satti strongly objected to the transfer and requested Dr. Martin to memorialize the transfer in writing. Accordingly, on September 6, 2001, Dr. Martin issued a written memorandum detailing the transfer in which he stated: "I believe your expertise in substance abuse can be put to good use with the many dual diagnosis patients." (Mem. from Dr. Martin, dated Sept. 6, 2001.)

Dr. Satti commenced work at APS in September 2001, and was replaced by a younger physician at Virks I. Shortly thereafter, Dr. Satti went out on sick leave. While on sick leave, Dr. Satti was terminated, effective November 30, 2001, for failure to provide adequate sick leave documentation. Dr. Satti filed a union grievance with respect to his transfer to APS and his termination. The matter duly went to arbitration and resulted in an arbitration ruling in Dr. Satti's favor on July 1, 2002. In that ruling, the arbitrator found that MHRH had violated the collective bargaining agreement when it transferred Dr. Satti. The arbitrator further found that, although Dr. Satti had provided insufficient sick leave documentation, MHRH had neither given Dr. Satti sufficient notice that it was a disciplinary matter nor had it given him sufficient time to rectify the problem before terminating him. As a result, the arbitrator ordered MHRH to reinstate Dr. Satti to his former position at Virks I.

One week later, on July 8, 2002, Dr. Martin urged the Executive Committee to recommend to the Department Director, A. Katherine Power (the Director), that she suspend Dr. Satti's hospital privileges at the Eleanor Slater Hospital on an emergency basis. He took this action without the benefit of the advice of legal counsel. That same day, the Executive Committee voted to recommend the emergency suspension of Dr. Satti's privileges, and, on the following day, July 9, 2002, Dr. Martin informed the Director of the Executive Committee's recommendation. At the same time, Dr. Martin also referred Dr. Satti to the Medical Board for review.

In his letter to the Medical Board, Dr. Martin stated that the Executive Committee had recommended the suspension of Dr. Satti's privileges and that said recommendation had been forwarded to the hospital's governing body for final action. Dr. Martin further informed the Medical Board that he had questions about Dr. Satti's patient management skills and willingness to accept clinical supervision. He also raised concerns about Dr. Satti's medical judgment and ability to safely practice medicine. In so doing, Dr. Martin mentioned Dr. Satti's use of salt tablets with diuretics; his transfer to APS; and the arbitrator's subsequent order of reinstatement. Dr. Martin wrote this letter without the advice of legal counsel and before the Director had acted upon the Executive Committee's recommendation to suspend Dr. Satti's hospital privileges.

On July 12, 2002, the Medical Board replied to Dr. Martin's letter of complaint by notifying him that it would look into the matter. It then informed Dr. Martin that, should an investigation be warranted, the Medical Board would forward an unedited copy of the letter to Dr. Satti and provide him with the opportunity to respond.

On the same day, July 12, 2002, Dr. Martin sent an inter-office memorandum to the Director informing her that, according to legal counsel, Dr. Satti's return was not imminent

because he had not submitted an acceptable medical certification of his fitness for duty and that, consequently, no immediate action was warranted. Dr. Martin further stated that, in the event that Dr. Satti were to provide acceptable certification, the Executive Committee intended to consider immediate suspension of Dr. Satti's privileges, but that, in the meantime, it would follow the procedures set forth in the Medical Staff Bylaws.

At some point after the arbitrator's ruling, Dr. Martin issued an undated report to the Executive Committee recommending termination of Dr. Satti's privileges.[2] In that report, Dr. Martin referred to the subjects that had been raised at the August 2001 meeting between himself and Dr. Satti. Said subjects were: (1) Dr. Satti's plan to refer Dr. Calvo to the Medical Board; (2) Dr. Calvo's concerns about Dr. Satti's clinical management of patients with respect to his prescribing salt tablets and diuretics to two of his patients; and (3) Dr. Satti's belief that he was being singled out. Dr. Martin further stated in the report that his own review of Dr. Satti's patient records raised the same concerns that Dr. Calvo had raised and that, as a result, he had transferred Dr. Satti to APS. Dr. Martin also observed that after the transfer Dr. Satti went out on sick leave and filed a grievance, which he won.

Dr. Martin's report to the Executive Committee then concluded: "I have a serious concern about Dr. Satti's clinical competence. This is complicated by the fact that he has been very resistant to accepting clinical supervision. I do not feel that Dr. Satti can practice medicine safely. I would recommend that his clinical privileges be terminated." The report does not mention that Dr. Satti, in fact, had decided not to report Dr. Calvo to the Medical Board; that he had asked for, and implemented, Dr. Martin's recommendations; and that he had not submitted any paperwork certifying that he was medically fit to return to work.

[2] The report refers to the arbitrator's ruling, so it clearly was issued after the arbitrator's decision.

Meanwhile, on July 16, 2002, the Executive Committee voted to recommend permanent termination of Dr. Satti's hospital privileges. That same day, Dr. Martin forwarded the Executive Committee's recommendation to the Medical Board. On July 17, 2002, Dr. Martin informed the Director about the Executive Committee's recommendation and the fact that he had referred the matter to the Medical Board. Dr. Martin, however, did not notify Dr. Satti about any of these events.

On July 25, 2002, the Medical Board notified Dr. Satti that it had initiated an investigation based upon a complaint from Dr. Martin. The Medical Board required Dr. Satti to respond to the notice within twenty-one days and informed him of his right to a hearing.

On September 3, 2002, Dr. Satti filed the instant complaint with the Commission, alleging that MHRH had discriminated against him with respect to the terms and conditions of employment. Specifically, he alleged: (1) unfair transfer; (2) refusal to reinstate in accordance with the arbitrator's award; (3) termination of employment due to age; and (4) retaliation for filing previous charges of discrimination.

Three weeks later, on September 24, 2002, the Director approved the Executive Committee's July 16, 2002 recommendation to terminate Dr. Satti's privileges permanently. She explained that her delay in responding to the recommendation was because it apparently had been misplaced, and that a copy of the letter had only just come to her attention. On the same day, MHRH formally rescinded Dr. Satti's November 11, 2001 employment termination and, instead, placed him on sick leave, effective December 23, 2001. MHRH informed Dr. Satti that should he wish to claim all of his accrued sick leave and vacation time, he would be paid through June 13, 2002.

On the following day, September 25, 2002, MHRH informed Dr. Satti that his clinical privileges had been revoked due to:

> "substandard clinical practice and unwillingness to accept clinical supervision. Both the peer review process and the Medical Director himself found that you prescribed salt tablets and diuretics in combination for frail elderly patients under your care. You responded to your supervisor's suggestions about proper patient management with allegations that this oversight was retaliatory and might be unethical."

The letter concluded:

> "Because your clinical privileges have been revoked you cannot return to work in your position, but in order to comply with the arbitration award you will remain on a 'leave without pay' status until September 8, 2003, so that your health-care coverage will remain in effect until that date. Providing the health-care coverage up to September 8, 2003, will restore that benefit and 'make you whole' for the health-care coverage which you lost during the period while your employment was terminated."

The letter also notified Dr. Satti of his right to grieve the Decision and Order.

On December 9, 2005 and December 16, 2005, Commissioner Alberto Aponte Cardona (the Hearing Officer) conducted a hearing on the instant matter. The following witnesses testified on behalf of Dr. Satti: his daughter, Julia Satti Consentino; his wife, Peggy R. Satti; and expert witness Philip O'Dowd, M.D. (Dr. O'Dowd). Dr. Martin testified on behalf of MHRH.

On November 30, 2007, after reviewing the evidence and the testimony of the witnesses, the Hearing Officer found in favor of Dr. Satti. In doing so, he concluded that MHRH had retaliated against Dr. Satti as a result of filing previous charges of discrimination. He also concluded that MHRH had discriminated against Dr. Satti on the basis of age with respect to terms and conditions of his employment, his termination of employment, and for reporting him to the Medical Board.

As a result, MHRH was ordered to establish and follow certain anti-discriminatory procedures pertaining to hiring and training. MHRH additionally was ordered to formally rescind its revocation of Dr. Satti's clinical privileges and to develop a written apology to Dr. Satti for publication in the Rhode Island Medical News, the Rhode Island Medical Society newsletter, and the Providence Journal. Finally, MHRH was ordered to pay compensatory damages and attorney fees, with interest. MHRH timely appealed the Decision and Order.

Additional facts will be provided as needed in the analysis portion of this Decision.

II

Standard of Review

Chapter 35 of title 42, entitled the Administrative Procedures Act, governs the Superior Court's review of an administrative appeal. Section 42-35-15(g) provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error or law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

In reviewing a decision of an administrative agency pursuant to § 42-35-15, this Court's review is limited in scope. See Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). Accordingly, the Court must accord great deference to an agency's final decision. See R.I. Temps, Inc. v. Dep't of Labor & Training, 749 A.2d 1121, 1125 (R.I. 2000). This is true

even in cases where the Court, after reviewing the certified record and evidence, might be inclined to view the evidence differently than the agency. Berberian v. Dep't of Emp't Sec., 414 A.2d 480, 482 (R.I. 1980).

Accordingly, the Court's review is limited to an examination of the certified record to determine whether the agency's decision is supported by substantial evidence. See Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998). Substantial evidence constitutes "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897 (R.I. 1984).

It is well settled that questions of law are not binding upon the court; rather, they are reviewed on a de novo basis. See Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977). The court may reverse an administrative agency decision where "factual conclusions of administrative agencies . . . are totally devoid of competent evidentiary support in the record." Baker v. Dep't of Emp't and Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994). However, with respect to issues of fact or the credibility of witnesses, the court may not substitute its judgment for that of the agency where substantial evidence exists to support the agency's findings. See Ctr. for Behavioral Health, 710 A.2d at 684; Mercantum Farm Corp. v. Dutra, 572 A.2d 286, 288 (R.I. 1990); Baker, 637 A.2d at 363.

III

Analysis

MHRH contends on appeal that because the Hearing Officer did not require Dr. Satti to demonstrate that he had met MHRH's legitimate expectations at the prima facie stage of the case, the Hearing Officer erred in concluding that Dr. Satti had established his prima facie case

of discrimination. It further maintains that there was insufficient evidence to support findings of pretext, discrimination, retaliation, or disparate treatment. Finally, MHRH avers that the Commission, through its Hearing Officer, exceeded its authority when it ordered MHRH to develop a written apology for publication in the Rhode Island Medical News, the Rhode Island Medical Society newsletter, and the Providence Journal.

A

The State Fair Employment Practices Act

Chapter 5 of title 28, entitled the State Fair Employment Practices Act (FEPA), was established

> "to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin, and to safeguard their right to obtain and hold employment without such discrimination." Sec. 28-5-3.

To accomplish this task, the Legislature set forth a list of unlawful employment practices. See § 28-5-7. Accordingly,

> "It shall be an unlawful employment practice:
> "(1) For any employer:
> "(i) To refuse to hire any applicant for employment because of his or her race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin;
> "(ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment;
> . . .
>
> "(5) For any employer . . . to discriminate in any manner against any individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any

> investigation, proceeding, or hearing under this chapter[.]" Sec. 28-5-7.

Our Supreme Court has declared that "[i]n employment discrimination cases, the parties must engage in the three-part burden-shifting paradigm set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." McGarry v. Pielech, 47 A.3d 271, 280 (R.I. 2012) (citing Ctr. for Behavioral Health, 710 A.2d at 685). See also Shoucair v. Brown Univ., 917 A.2d 418, 426 (R.I. 2007) (applying the burden-shifting framework to a discriminatory retaliation claim); Neri v. Ross-Simons, 897 A.2d 42, 48 (R.I. 2006) (same standard in the context of allegations of age and gender discrimination); DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13 (R.I. 2005) (gender-based disparate claim); Wellborn v. Spurwink/Rhode Island, 873 A.2d 884 (R.I. 2005) (sexual/gender discrimination allegations); Casey v. Town of Portsmouth, 861 A.2d 1032 (R.I. 2004) (age discrimination); Nicolae v. Miriam Hosp., 847 A.2d 856 (R.I. 2004) (employment-discrimination). In applying the McDonnell Douglas burden-shifting framework, it is appropriate to "look[] to the federal courts' interpretations of Title VII of the Civil Rights Act of 1964 for guidance." Shoucair, 917 A.2d at 426.

The purpose of the McDonnell Douglas burden-shifting framework is to "'allocate[] burdens of production and order[] the presentation of evidence so as progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" Neri, 897 A.2d at 48 (quoting Ctr. for Behavioral Health, 710 A.2d at 685 (internal quotations omitted). The burden-shifting framework operates as follows:

> "the employee first must make out a prima facie case of retaliation [or discrimination]. If the employee succeeds, a presumption of discrimination results, and the burden of production, not persuasion, then falls to the employer, who must respond with some legitimate, nondiscriminatory reason for the act at issue. If

> the employer carries the burden of production, the presumption of discrimination disappears, and the employee then must demonstrate that the employer's proffered explanation amounts to mere pretext." Shoucair, 917 A.2d at 426 (internal citations omitted).

An employee's burden in establishing his or her prima facie case "is not especially onerous . . . ." Ctr. for Behavioral Health, 710 A.2d at 685 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)). Once the employee satisfies this burden and establishes his or her prima facie case, "a presumption arises that the [employer] committed unlawful discrimination" or retaliation. McGarry 47 A.3d at 280. At that point, the employer must respond to the employee's prima facie case by producing a legitimate nondiscriminatory or nonretaliatory reason for the disputed actions. Harrington v. Aggregate Indus.—Ne. Region, Inc., 668 F.3d 25, 31 (1st Cir. 2012) (stating that the employer's burden at this point is "merely a burden of production, not one of proof").

If the employer successfully produces such rebuttal evidence, the employee then "must assume the further burden of showing that the proffered reason is a pretext calculated to mask [discrimination or] retaliation." Harrington, 668 F.3d at 31. It is important to remember, however, that only "the presumption of discrimination [or retaliation]—but not the elements of the prima facie case itself—disappears." McGarry, 47 A.3d at 280. Thus, "[t]he burdens of proof and persuasion fall squarely upon the plaintiff to demonstrate that the [employer's] tendered explanation is only a pretext and that discrimination [or retaliation] was the true motive underlying the [employer's] decision." Id. at 280-81. In summary,

> "although the presumption favoring the [employee] falls away once the [employer] offers a nondiscriminatory [or nonretaliatory] explanation for [the employer's actions] in accordance with the second McDonnell Douglas prong, the elements of the [employee's] prima facie case remain relevant evidence on the

> ultimate question of unlawful discrimination [or retaliation]." Id. at 281.

As a result, "the evidence submitted in support of the prima facie case remains under consideration." Id.

With these principles in mind, the Court recognizes that while an employee has "the ultimate burden of persuasion in these matters[,]" this does not mean that the employee is required to produce "evidence of the smoking gun variety." Ctr. for Behavioral Health, 710 A.2d at 685. The reason for this is that "garnering direct evidence of employment discrimination [or retaliation] inherently is a challenging task . . . ." McGarry, 47 A.3d at 281. Consequently, the employee "is not required to produce direct evidence of discrimination [or retaliation]; rather, indirect and circumstantial evidence may be sufficient to prove the [employee's] case." Id. (acknowledging "the sensitive and difficult nature of the question facing triers of fact in employment discrimination [or retaliation] cases, in which [t]here will seldom be eyewitness testimony as to the employer's mental processes") (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)) (internal quotations omitted)). That said, the employee still "must do more than simply cast doubt upon the employer's justification." Ctr. for Behavioral Health, 710 A.2d at 685.

This Court now applies that framework to the instant claims of retaliation and age discrimination.

(a)

The Prima Facie Case

In the Decision and Order, the Hearing Officer concluded that Dr. Satti established his prima facie case for both the retaliation and age discrimination claims. The Court first will address Dr. Satti's prima facie case of retaliation.

1

Retaliation

To establish a prima facie case in a retaliation claim, the employee must show that '"(1) [the employee] engaged in protected conduct; (2) [the employee] experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action.'" Shoucair 917 A.2d at 427 (quoting Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25 (1st Cir. 2004)).

It is undisputed that, prior to the instant matter, Dr. Satti filed two claims against MHRH with the Commission.[3] Section 28-5-7(5) declares it an unlawful employment practice to discriminate against an employee who "has made a charge, testified, or assisted in any manner in any investigation, proceeding, or hearing under this chapter[.]" Consequently, the Hearing Officer did not err in finding that these actions constituted protected conduct and that Dr. Satti satisfied the first prong of the prima facie case in his retaliation claim.

With respect to the second prong, it is undisputed that Dr. Satti experienced adverse employment actions; namely, he was transferred to what he perceived to be an undesirable unit where he had less authority, his employment was terminated, and his clinical privileges were revoked. Consequently, the Hearing Officer did not err in finding that Dr. Satti satisfied the second prong of his prima facie case of retaliation.

[3] In his Decision and Order, the Hearing Officer found that Dr. Satti engaged in protected activity. MHRH maintains that Dr. Martin was unaware of Satti I and Satti II when he transferred Dr. Satti to APS, thus undercutting any claim of retaliation. However, for purposes of proving the first prong of the prima facie case, an employee simply must show that he or she engaged in protected conduct. See Shoucair 917 A.2d at 427 (requiring an employee to prove that he or she was "engaged in protected conduct") (emphasis added). There is no additional requirement that the employer be aware of such activity.

The third prong of a prima facie case of retaliation—that "there was a causal connection between the protected conduct and the adverse employment action[,]"—may be demonstrated through direct or indirect evidence. See Russell v. Enter. Rent-A-Car Co. of R.I., 160 F. Supp. 236, 264 (D.R.I. 2001) ("An inference of retaliation arises when the plaintiff establishes an adverse action soon after the plaintiff engages in the protected activity."). Accordingly, "where direct evidence of causation is missing temporal proximity may provide the necessary nexus to meet the third element of the plaintiff's case." Id.; see also DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008) (stating that "temporal proximity alone can suffice to meet the relatively light burden of establishing a prima facie case of retaliation") (internal quotations omitted). In determining temporal proximity, "courts typically look to the time between protected activity and retaliation." Harrington, 668 F.3d at 32; see also Mariani–Colón v. Dep't of Homeland Sec. ex rel. Chertoff, 511 F.3d 216, 224 (1st Cir. 2007) (concluding that employee established prima facie case of retaliation where approximately two months transpired between protected conduct and adverse employment action).

In the present case, the Hearing Officer concluded that "the timing of the adverse action is sufficient to provide the causal connection." (Decision and Order at 10.) Specifically, the Hearing Officer found that:

> "Within one week of the complainant's last hearing on his previous complaint of retaliation, Dr. Martin had determined to transfer him to APS. Forensic patients were housed at APS, Dr. Satti's status would be less prestigious at APS and Dr. Martin knew that another physician had resigned earlier that year rather than be assigned to APS." Id. at 12.

The record discloses that in 1987 Dr. Satti filed an age discrimination claim in Satti I. While that case was pending, he filed Satti II, alleging discrimination with respect to hire as well as retaliation for filing Satti I. He prevailed on both claims. Shortly after the commencement of

the hearing in Satti II, Dr. Satti discovered that Dr. Calvo had changed the medications and had ordered tests on some of his patients. Dr. Satti complained about these changes to Dr. Martin on August 21, 2001 and threatened to report Dr. Calvo to the Medical Board. After some discussion with Dr. Martin, Dr. Satti agreed not to file a complaint and asked Dr. Martin for a second opinion with respect to Dr. Calvo's medical orders. Dr. Satti accepted and adopted all of the recommendations that Dr. Martin later made.

A few days later, on August 24, 2001, the Satti II hearing concluded. Around the same time, Dr. Satti received a negative peer review relating to the prescribing of diuretics and salt medications to a patient. On August 30, 2011, Dr. Martin transferred Dr. Satti to APS—just six days after the conclusion of the Satti II hearing and only one day after Dr. Martin gave Dr. Satti until September 7, 2011 to respond in writing to the negative peer review. Thus, before Dr. Satti even had responded to Dr. Martin's letter, he was transferred to APS.

It is clear from the foregoing that Dr. Satti had a history of filing employment actions against MHRH, and that he actually had an action pending before the Commission when the instant controversy arose. In light of this history and given the fact that Dr. Satti's burden was not especially onerous at this stage of the proceedings, the Court concludes that the Hearing Officer did not err in concluding that the temporal proximity of these events was sufficient to prove a causal connection between the protected conduct and the adverse action. See Shoucair, 917 A.2d at 429 (observing that temporal proximity, standing alone, may be "sufficient evidence of causality to establish a prima facie case" provided that the temporal proximity is "very close"). Consequently, it was not erroneous for the Hearing Officer to conclude that Dr. Satti satisfied the third and final prong of his prima facie case of retaliation.

2

Age Discrimination

With respect to proving age discrimination, the employee "has the burden of establishing that age was the 'but-for' cause of the employer's adverse action." Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 138 (1st Cir. 2012) (internal quotations omitted). Similar to proving retaliation, an employee "is not required to proffer direct evidence of discrimination, and may meet his burden through circumstantial evidence." Id. Establishment of the prima facie case "'gives rise to an inference that the employer discriminated due to the plaintiff's advanced years.'" Id. (quoting Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir.1991)).

The elements of a prima facie case in age discrimination claims "vary to some extent based on whether the underlying facts pertain to a termination, failure to promote . . . failure to hire." Neri, 897 A.2d at 49 n.4. In Rhode Island, an employee alleging age discrimination based upon termination must establish that"

> "'(1) [the employee] was at least forty years of age; (2) [the employee's] job performance met the employer's legitimate expectations; (3) the employer subjected [the employee] to an adverse employment action (e.g., an actual or constructive discharge); and (4) the employer had a continuing need for the services provided by the position from which the claimant was discharged.'" Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1170 (R.I. 2014) (quoting Neri, 897 A.2d at 49).

Should an employee "establish these elements, a presumption arises that the employer engaged in unlawful discrimination." Bucci, 85 A.3d at 1170.

MHRH does not dispute that Dr. Satti met three of the four prongs in his prima facie case: he was over forty when the events occurred; he was transferred and then terminated from his employment; and his position was filled by another (younger) doctor. However, it disputes the Hearing Officer's conclusion that Dr. Satti met MHRH's legitimate expectations and it

contends that Dr. Satti failed to prove this element of his prima facie case of age discrimination. Whether a plaintiff fails to meet his or her prima facie case on the basis of "not meeting legitimate expectations because employers articulate the same legitimate nondiscriminatory reasons for termination used in step two, which essentially forces the plaintiff to argue pretext at the prima facie stage" is an issue of first impression for this Court. See Bucci, 85 A.3d at 1171 n.4 (declining to address this very issue "because doing so is not necessary for us to decide this case").

In McDonnell Douglas, a case involving discriminatory hiring, one of the elements that the plaintiff was required to prove was that he was "qualified" for the position. See McDonnell Douglas, 411 U.S. at 802. Applying the McDonnell Douglas framework to a termination of employment case, the United States First Circuit Court of Appeals observed that in proving his prima facie case, the plaintiff "would be required to show he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979) (emphasis added). In addition, the plaintiff "would also have to show that his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills." Id.

The Loeb Court then concluded that:

> "A correct statement of the elements of a McDonnell Douglas prima facie case, adapted to present circumstances, therefore would have been that [the employee] had to prove that he was in the protected age group, that he was performing his job at a level that met his employer's legitimate expectations, that he nevertheless was fired, and that [the employer] sought someone to perform the same work after he left." Id. at 1014.

In reaching this conclusion, the court made the following observation: "unless the employee's

job has been redefined, the fact that he was hired initially indicates that he had the basic qualifications for the job, in terms of degrees, certificates, skills and experience." Id. at 1014 n.10.

Arguably, the meeting of an employer's legitimate expectations is synonymous with being qualified for a position.[4] Such interpretation would avoid a premature assessment of the merits of the employer's nondiscriminatory reasons for its adverse actions. See Acevedo-Parrilla, 696 F.3d at 139 ("A plaintiff is not required, at the prima facie stage, to disprove the defendant's proffered nondiscriminatory reason for taking an adverse employment action."); Meléndez v. Autogermana, Inc., 622 F.3d 46, 51 (1st Cir. 2010) (refusing to "consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case" because, to do so, "would 'bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination'") (quoting Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 574 (6th Cir. 2003).

However, rather than concluding that an employer's legitimate expectations are synonymous with being qualified for a position, the Court concludes that:

> "[w]hen assessing whether a plaintiff has met [his] employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason produced by the defense as its reason for terminating plaintiff. Quinn–Hunt v. Bennett Enters., Inc., 211 Fed. App'x 452, 457 (6th Cir. 2006) (quoting Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 660–61 (6th Cir. 2000); citing

[4] In fact, the United States First Circuit Court of Appeals has replaced the "legitimate expectations" language with that of "qualified for the position" language in the prima facie case for age discrimination. See Acevedo-Parrilla, 696 F.3d at 139 (stating that a prima facie case of age discrimination requires a plaintiff to show "[1] that he or she was at least 40 years old at the time of discharge; [2] that he or she was qualified for the position but [3] was nevertheless fired; and [4] the employer subsequently filled the position").

> Tysinger v. Police Dep't, 463 F.3d 569, 571 (6th Cir. 2006) (For purposes of the prima facie analysis, a plaintiff's qualifications are to be assessed in terms of whether he or she was meeting the employer's expectations prior to and independent of the events that led to the adverse action.); Cicero v. Borg–Warner Auto., Inc., 280 F.3d 579, 585 (6th Cir. 2002))." Hubbard v. Tyco Integrated Cable Sys., Inc., 985 F. Supp. 2d 207, 224 (D.N.H. 2013) (internal quotations omitted).[5]

In the instant matter, the Hearing Officer concluded Dr. Satti to be "qualified" for his position of employment because he:

> "possessed the same qualifications that he possessed when he had been originally assigned to the position; his clinical privileges had been renewed every two years . . . In addition, he had recently been found to be qualified by the respondent. Dr. Satti's clinical privileges had been renewed in March 2001 when Dr. Martin reviewed his qualifications and found that Dr. Satti met standards or exceeded standards in every category." (Decision and Order at 14.)

MHRH maintains that this conclusion was insufficient because Dr. Satti was required to prove that his performance met its legitimate expectations. Furthermore, MHRH claims that Dr. Satti's performance in fact did not meet its legitimate expectations because he prescribed salt tablets to certain patients who already were taking diuretics. Dr. Satti contends that this

[5] Similarly, under the "qualified for the position" requirement, instead of requiring a plaintiff to disprove the proffered nondiscriminatory reason at the prima facie stage of his or her case,

> "A plaintiff's prima facie burden under the 'qualified' prong of the prima facie case, see Cameron, 685 F.3d at 48, is met if he presents 'evidence which, if believed, prove[s] that he was doing his chores proficiently.' Freeman v. Package Mach. Co., 865 F.2d 1331, 1335 (1st Cir. 1988) (finding the second prong met despite 'defendant's adamantine insistence that plaintiff's job performance was not up to snuff'); see also Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1112 (1st Cir. 1989) (finding plaintiff's prima facie burden met where, despite employer's challenge of his account regarding the 'adequacy of his job performance,' plaintiff 'adduced a quantum and quantity of evidence of his competence . . . sufficient to prevail if a jury believed his version of the facts and disbelieved defendant's.')" Acevedo-Parrilla, 696 F.3d at 139.

allegation more appropriately should be addressed in the section dealing with MHRH's proffered nondiscriminatory reason for taking the adverse employment action rather than as part of the prima facie case. The Court agrees.

The record reveals that Dr. Satti presented evidence demonstrating that he was conducting his chores in a proficient manner. Such evidence included: (1) his job description and the fact that qualifications for the position had not changed since his hire; (2) his clinical privileges had been renewed on a regular basis; and (3) he recently had received a positive evaluation from Dr. Calvo and Dr. Martin. The Court concludes from the foregoing that the Hearing Officer properly assessed Dr. Satti's qualifications "in terms of whether he . . . was meeting [his] employer's expectations prior to and independent of the events that led to the adverse action." Hubbard, 985 F. Supp. 2d at 224. Accordingly, while the Hearing Officer did not employ the actual term "legitimate expectations" when he found Dr. Satti to have satisfied the second prong of his prima facie case of age discrimination, the Court concludes that the Decision and Order satisfied the McDonnell Douglas requirements.

Consequently, and in light of the foregoing, the Court concludes that the Hearing Officer committed no error of law when he concluded that Dr. Satti satisfied his burden of proving the elements of his prima facie case of age discrimination. The Court next will assess whether the Hearing Officer properly determined that MHRH satisfied its burden of production with respect to the second prong of the McDonnell Douglas burden-shifting framework.

(b)

The Proffered Reasons for the Adverse Employment Action

The second prong in the McDonnell Douglas burden-shifting framework requires the employer to enunciate a legitimate nondiscriminatory or nonretaliatory reason for the adverse

employment action.[6] The reason for this is that once a plaintiff establishes the elements of his or her prima facie case, "a presumption arises that the defendant committed unlawful discrimination[,] [and] [t]he burden of production, but not the burden of persuasion, then shifts to the defendant to offer a nondiscriminatory reason." McGarry, 47 A.3d at 280. MHRH contends that it transferred Dr. Satti and later terminated his employment because of concerns about his clinical competence to manage medically complex patients, as well as his resistance to clinical oversight in Virks I.

The record reveals that Dr. Satti prescribed a combination of salt tablets and diuretics to two patients who were suffering from congestive heart failure. Congestive heart failure causes fluid retention in a patient's legs (edema) and/or in the lungs (pulmonary edema). (Hr'g Tr. at 118, Dec. 16, 2005.) Diuretics generally are prescribed to help a patient's kidneys to excrete excess fluid and sodium from the body; whereas, salt tablets increase the levels of sodium in a patient, thereby opposing the therapeutic effects of diuretics. Id. at 116-17. According to MHRH, this combination of medications was a fundamental error that was especially troubling in light of the frailty and medically complex nature of Dr. Satti's patients.

MHRH asserts that while Dr. Martin could have instructed Dr. Calvo to more closely supervise Dr. Satti to prevent the repeat of any such errors, Dr. Martin properly concluded that this alternative was not feasible in light of Dr. Satti's open resentment of Dr. Calvo's clinical oversight. Consequently, MHRH maintains, Dr. Martin chose the next best alternative; namely, to transfer Dr. Satti to the less demanding assignment of treating younger, less medically

[6] MHRH does not dispute that its actions, including Dr. Satti's transfer, could be considered adverse to Dr. Satti. See Lore v. City of Syracuse, 670 F.3d 127, 170 (2d Cir. 2012) ('"The transfer of an employee from an 'elite' position to one that is 'less prestigious . . . with little opportunity for professional growth' is sufficient to permit a jury to infer that the transfer was a materially adverse employment action."') (quoting De la Cruz v. New York City Human Res. Admin., 82 F.3d 16, 21 (2d Cir. 1996)).

complex patients, coupled with close oversight by a new supervisor.

In the Decision and Order, the Hearing Officer concluded that these reasons were "sufficient to meet the respondent's burden of proffering ostensibly valid, non-discriminatory reasons for its actions." (Decision and Order at 11.) Dr. Satti does not contest this conclusion. Consequently, the Court concludes that the Hearing Officer committed no error when he concluded that MHRH satisfied its burden of producing a legitimate reason for its actions. The Court now will address the issues of pretext and disparate treatment.

(c)

1. Evidence of Pretext

Dr. Satti asserts that the reasons proffered by MHRH for taking its adverse actions simply were a pretext for retaliation. MHRH disputes this assertion, reiterating that it had legitimate reasons for transferring Dr. Satti and later terminating his employment, and it contends that there was insufficient evidence to support an inference of discrimination or retaliation. More specifically, it maintains that Dr. Satti failed to prove: (1) that MHRH's stated reasons for its actions were pretextual; (2) that he was treated disparately; (3) that Dr. Martin suggested he retire; and (4) that Dr. Martin was aware of Dr. Satti's protected activities such that he retaliated against him for protected conduct.[7]

At the outset, the Court is mindful that "[i]f the defendant proffers a nondiscriminatory explanation, the presumption of discrimination—but not the elements of the prima facie case

[7] While there is no direct evidence that Dr. Martin was aware of Dr. Satti's protected activities, the Hearing Officer observed that the timing of Dr. Martin's actions almost immediately after the hearings on Dr. Satti's previous complaint of retaliation were enough to support a finding of a causal connection between the two activities. See Decision and Order at 12. The Court is satisfied that the hearing officer's finding on temporal proximity, coupled with his finding that Dr. Martin's testimony was not credible, sufficiently supported the inference that Dr. Martin was aware of Dr. Satti's protected conduct.

itself—disappears." McGarry, 47 A.3d at 280. Instead, "[t]he burdens of proof and persuasion fall squarely upon the plaintiff to demonstrate that the defendant's tendered explanation is only a pretext and that [retaliation or] discrimination was the true motive underlying the [employer's adverse actions]." Id. at 280-81; see also Harrington, 668 F.3d at 31 (requiring employee to "show[] that the proffered reason is a pretext calculated to mask [discrimination or] retaliation").

An employee may "establish[] pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Newport Shipyard, Inc., 484 A.2d at 898 (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). Furthermore, given the difficulty in proving pretext, "in situations in which the elements of a sufficient prima facie case combine with the factfinder's belief that the basis for dismissing the employee was pretextual, particularly if 'accompanied by a suspicion of mendacity,' the factfinder is permitted 'to infer the ultimate fact of intentional discrimination [or retaliation].'" Ctr. for Behavioral Health, 710 A.2d at 685 (quoting Hicks, 509 U.S. at 511). For that reason, "the whole is sometimes greater than the sum of the parts[,] . . . [because] bits and pieces of evidence . . . taken collectively, [can] have significant probative value[,] . . . [and] irregularities in an employer's dealings with an employee who has fallen out of favor can support a reasonable inference of pretext." Harrington, 668 F.3d at 34; see also Soto-Feliciano v. Villa Cofresi Hotels, Inc., 967 F. Supp. 2d 529, 540-41 (D. Puerto Rico 2013) ("Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.") (quoting Gomez–Gonzalez v. Rural Opportunities, Inc., 626 F.3d 654,

662–63 (1st Cir. 2010).

Similar to a trial justice in a non-jury trial, it is "self-evident" that a hearing officer "must often make credibility determinations in order to arrive at the necessary findings of fact." D'Ellena v. Town of East Greenwich, 21 A.3d 389, 391-92 (R.I. 2011) (quoting B.S. Int'l Ltd. v. JMAM, LLC, 13 A.3d 1057, 1062 (R.I. 2011)). Thus, in conducting its review of a hearing officer's decision on appeal, the Court must "accord a substantial amount of deference to those [credibility] determinations, due to the fact that the [trier of fact] has actually observed the human drama that is part and parcel of every trial and . . . has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." Id. at 392. A further reason for such deference is that:

> "At best the evaluation of credibility is not an exact science. In the long run justice is more nearly approximated by allowing the trier of fact, who has the opportunity and benefit of hearing and observing the witnesses, to determine the credibility of evidence rather than an appellate court which of necessity has to operate in the partial vacuum of the printed record." Id. at n.2 (quoting Emp'rs Liab. Assur. Corp. v. Sweatt, 57 A.2d 157, 159-60 (1948)).

At the outset, the Court observes that the Hearing Officer specifically found the Commission's proffered reasons to be not credible and repeatedly rejected Dr. Martin's explanations for his actions as unworthy of credence. (Decision and Order at 12-15.) With respect to the claim of retaliation, the Hearing Officer categorically rejected one of Dr. Martin's reasons for his adverse actions; namely, that Dr. Satti resisted clinical oversight from Dr. Calvo. The Hearing Officer stated:

> "This reason is not credible for several reasons. Dr. Martin did not consult with Dr. Calvo about the transfer. Even after Dr. Martin told Dr. Calvo that Dr. Satti had been discussing filing a complaint against Dr. Calvo with the Medical Board, Dr. Calvo did not say that he did not want to supervise Dr. Satti. Dr. Calvo abstained from the Executive Board's votes that removed Dr. Satti's clinical

> privileges. The medical records of Patient AL [one of the disputed patients] show that Dr. Satti asked Dr. Calvo's advice about the patient and took his advice, indicating that the physicians had a cooperative relationship. Dr. Calvo had asked Dr. Satti to switch floors with Dr. Andronic and Dr. Satti did so. Dr. Calvo had supervised Dr. Satti for a number of years. In preparation for the renewal of Dr. Satti's clinical privileges in March 2001, Dr. Calvo's evaluation of Dr. Satti with respect to 'Communication with Fellow Physicians and Nursing Staff' was 'Good' . . . Dr. Satti asked for a second opinion on his disagreement with Dr. Calvo about the endocrine tests from Dr. Martin, and he took Dr. Martin's advice. It is not credible that Dr. Martin would make such a transfer and take the other adverse actions because of perceived problems with Dr. Satti's supervisory relationship with Dr. Calvo without consulting with Dr. Calvo. Moreover, the evidence does not support the conclusion that Dr. Satti's relationship with Dr. Calvo did not work." (Decision and Order at 12.)

The Court has reviewed the record and cannot find erroneous the Hearing Officer's factual conclusions concerning the lack of credible evidence of Dr. Satti's alleged resistance to Dr. Calvo's supervision. See Baker, 637 A.2d at 363 (cautioning the reviewing court "not [to] substitute its judgment for that of the agency in regard to the credibility of witnesses or the weight of the evidence on questions of fact"). Although Dr. Martin said that he was concerned about the unworkable relationship between the two doctors, the reliable, probative and competent evidence in the record does not support this allegation.

It is undisputed that Dr. Satti was very upset when returned from his vacation to discover that Dr. Calvo had changed medications and ordered endocrine tests on some of his patients. However, the record supports a finding that there was a cooperative and positive relationship between the two doctors before that point—as evidenced by Dr. Satti's willingness to switch floors with Dr. Andronic at Dr. Calvo's request. There is no evidence in the record demonstrating that this relationship materially deteriorated after Dr. Satti confronted Dr. Martin about Dr. Calvo's actions. There also is no evidence that Dr. Calvo requested Dr. Satti's

transfer. Conversely, there is evidence that Dr. Martin failed to consult with Dr. Calvo about whether he thought the transfer was necessary. Dr. Martin's lack of consultation on the issue, coupled with the Hearing Officer's disbelief in Dr. Martin's explanations for his actions, satisfies the Court that the Hearing Officer did not misconceive or overlook any evidence when he concluded that an alleged breakdown in the relationship between Dr. Calvo and Dr. Satti was a pretext for transferring Dr. Satti to APS. See Ctr. for Behavioral Health, 710 A.2d at 685 (approving a finding of pretext where plaintiff proved her prima facie case and the factfinder suspected the employer of fabricating its legitimate reason for taking the adverse action).

The Hearing Officer next addressed the second major justification that Dr. Martin gave for taking action against Dr. Satti; namely, that Dr. Martin had concerns about Dr. Satti's clinical competence and medical judgment as a result of his continuance of the previously prescribed salt/diuretic combination for certain congestive heart failure patients. Noting that expert witness Dr. O'Dowd testified that such a matter was a "trivial medical occurrence[,]" the Hearing Officer found that "[t]he amount of salt in a salt tablet is insignificant compared to the salt in the patient's prescriptions and unrestricted diets, which Dr. Martin did not suggest changing." (Decision and Order at 12-13).

In the Decision and Order, the Hearing Officer further found:

> "The evidence also indicates that Dr. Martin did not find the salt/diuretic combination a serious matter. Dr. Martin did not check on Dr. Andronic's new patients to determine whether Dr. Andronic was prescribing salt tablets along with a diuretic to them. He did not transfer Dr. Andronic or even recommend that he take a continuing medical education course on diuretics." Id. at 13.

In addition, the Hearing Officer observed that Dr. Martin "did not instruct Dr. Satti's new supervisor at APS to supervise Dr. Satti closely nor did he discuss the salt/diuretic prescription with him." Id. These findings are supported by the record.

Our Supreme Court has stated that "there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact[.]" Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998). The reason for this is that "'[i]t is the duty of the triers of fact to examine and consider the testimony of every witness regardless of his qualifications, and to grant to particular testimony only such weight as the evidence considered as a whole and the proper inferences therefrom reasonably warrant.'" Vicario v. Vicario 901 A.2d 603, 609 (R.I. 2006) (quoting Kyle v. Pawtucket Redevelopment Agency, 106 R.I. 670, 673, 262 A.2d 636, 638 (1970)). Consequently, just like the trier of fact "'may pick and choose among evidence presented by laypersons, he or she may do the same when dealing with evidence of experts.'" Vicario 901 A.2d at 609 (quoting Harvard Pilgrim Health Care of New England, Inc. v. Gelati, 865 A.2d 1028, 1035 (R.I. 2004)).

In this case, expert witness Dr. O'Dowd observed that "the patients in question were on unrestricted salt diets." (Hr'g Tr. at 62, Dec. 16, 2005) He then testified that the "average Western adult diet contains approximately 8,000 milligrams of sodium[,]" but that there only are "389 milligrams" of salt in a salt tablet. Id. at 64. Dr. O'Dowd further observed that despite the fact that the administration of a single salt table was considered so unsafe as to require reporting, suspending, and terminating Dr. Satti, the patients in question continued to receive unrestricted salt diets. Id. at 65. Dr. O'Dowd then opined that:

> "the amount of salt contained in a single salt tablet is so trivial compared to the amount they were taking in through their diet and through their other medications, that the salt tablet had no consequence whatever on their health . . . I detected no episodes of clinical significance that could be attributed to salt excess in my review of these patients' charts." Id. at 69.

He further opined that when a doctor took on another doctor's patients, as Dr. Satti did with Dr. Andronic's patients, particularly in a chronic care facility such as Virks I:

> "it would be imprudent for the new physician to undertake a redesign of the orders according to his or her preferences. These—if the patients have demonstrated stability on this regimen of say 15 medications, the physician's first rule of thumb is do no harm; first of all, do no harm. If the patients are stable, showing no ill affect from a medical regimen consisting of say 15 medications, there would be no requirement. On the contrary, there would be some reason to be constrained about changing the orders. They are doing fine. The record demonstrates they're doing fine. Why risk upsetting the apple cart . . . Those kinds of conservative thoughts would apply at the time of absorbing a new patient. So certainly, I would not consider it a violation on Dr. Satti's part that for some months after inheriting these patients he did not scrutinize the appearance of a trivial salt tablet among the list of medications and say, you know, doesn't make any sense, the salt tablet is only one-twentieth of the salt they're receiving in their diet." Id. at 70-71.

With respect to the finding that Dr. Martin did not consider the salt/diuretic combination to be a serious matter, the following colloquy, which took place between defense counsel and Dr. Martin, supports such a finding:

> "Q. But you'd agree with me that you did not give Dr. Disei any specific instructions to supervise Dr. Satti, isn't that correct?
> "A. Yes.
> "Q. You're agreeing that's correct"
> "A. Correct.
> "Q. And you made no provisions for close or special supervision by Dr. Disei, isn't that correct?
> "A. Correct." Hr'g Tr. at 111, Dec. 9, 2005.

Considering that MHRH justified its actions based upon Dr. Satti's alleged lack of medical judgment and clinical competence, this admission supports the Hearing Officer's finding that Dr. Martin's testimony was not credible when he claimed that he had concerns about Dr. Satti's medical judgment. (Decision and Order at 13). Based upon the foregoing, the Court concludes that the record provides competent evidence for the Hearing Officer's determination that Dr. Martin was motivated by unlawful retaliation when he transferred Dr. Satti and prevented his return to Virks.

In addition to finding pretext with respect to Dr. Satti's transfer, the Hearing Officer also found that Dr. Martin's actions after the transfer also demonstrated that he was motivated by retaliation. However, MHRH asserts that Dr. Martin was unaware of Dr. Satti's previous complaints to the Commission and, thus, his actions could not have been motivated by retaliation. The Hearing Officer rejected this argument.

At the hearing, Dr. Martin testified that he was unaware of Dr. Satti's previous complaints when he transferred Dr. Satti to APS. However, the record reflects that Dr. Martin admitted that before the arbitrator's award of July 1, 2002, he had learned from the legal department that Dr. Satti "had several cases before boards, agencies, arbitrators regarding work." Hr'g Tr. at 172-73, Dec. 16, 2005. Thus, he admitted acquiring this knowledge before he moved to have Dr. Satti's privileges revoked, wrote a referral letter to the Medical Board, and informed Dr. Satti that he could not return because his privileges were revoked. In addition, MHRH's June 23, 2003 position paper submitted to the Commission, and read into the record at the hearing, also belies Dr. Martin's assertion that he was unaware of Dr. Satti's activities before the Commission. It stated:

> "Consequently, Dr. Martin concluded that the charging party should not continue to be assigned as the attending physician on the unit VIRKS-I. The charging party objected to his reassignment to the psychiatric service, accused Dr. Martin of reassigning him in retaliation for previous charges of employment discrimination which he filed while he was working in the detox unit." Id. at 200.

In light of the foregoing, the Court concludes that the Hearing Officer was not clearly erroneous in finding that Dr. Martin knew of the previous discrimination charges against MHRH when he transferred Dr. Satti to APS. Furthermore, even if he was unaware of the charges before the transfer, the record reveals that he certainly was aware of the charges before he took his later

adverse actions; namely, moving to have Dr. Satti's privileges revoked and referring him to the Medical Board.

With respect to the salt/diuretic medication combination, Dr. O'Dowd testified that its having been prescribed to the patients at issue amounted to:

> "a minor medical dispute or discussion, whatever you want to call it; . . . where action needs to be taken at this level where consideration would be given to suspension or termination. . . I think it's outrageous that that over-response to this, I think benign, trivial prescription of a single salt tablet was reported out of house." Id. at 81.

He then opined: "I think it's a wildly disproportionate characterization of what I would consider to be in my expert opinion a trivial medical occurrence. . . ." Id.

Dr. O'Dowd further testified that, in his experience, whenever there is an alleged grievous medical error, "The Sentinel Events Committee" is called in immediately to take emergency action. In this case, however, Dr. O'Dowd observed:

> "we have a dispute; a few weeks of discussion; an order change on August 30 of 2001, as I recall; everything's fixed. Dr. Satti is not making the terrible error of prescribing a salt tablet to a person already on tons of salt. And yet, the disciplinary action and the reporting of it to the Board of Medical Licensure doesn't occur for almost a year." Id. at 83-84.

When asked if he could find "any legitimate basis for the actions taken against Dr. Satti[,]" Dr. O'Dowd then responded: "I looked very hard to try to find some justification, any justification for these actions. Certainly, the salt tablet doesn't qualify. Certainly, the failure to accept supervision doesn't qualify and I could find no other." Id. at 84.

The Court concludes that the expert evidence from Dr. O'Dowd juxtaposed against the inconsistent testimony from Dr. Martin was competent evidence for the Hearing Officer's conclusion that MHRH's proffered legitimate reasons for its adverse employment actions merely

were a pretext for retaliation. Accordingly, the Court will not disturb the Hearing Officer's conclusions regarding the retaliation claim.

2. Disparate Treatment

The Hearing Officer also found that Dr. Martin disparately treated Dr. Satti and Dr. Andronic on the issue of prescribing the salt/diuretic combination. Specifically, the Hearing Officer observed that Dr. Martin neither moved to revoke Dr. Andronic's clinical privileges nor filed a complaint against him with the Medical Board. MHRH takes issue with this finding, asserting that the factual circumstances surrounding each case were different and, thus, are not comparable.

Evidence of disparate treatment is not a necessary element of proving an unlawful employment practice. See § 28-5-7.2(a) ("An unlawful employment practice prohibited by § 28-5-7 may be established by proof of disparate impact.") (Emphasis added.) Here, the Hearing Officer already demonstrated the existence of substantial evidence to support an independent finding of pretext. Indeed, given the ample evidence of pretext in the record, as set forth above, a finding of disparate treatment was not necessary to the Hearing Officer's ultimate conclusion of the existence of unlawful employment practices. Thus, even assuming arguendo that the Hearing Officer's finding of disparate treatment was clearly erroneous, substantial rights of MHRH would not be prejudiced. Consequently, the Court need not address whether the treatment between that of Dr. Satti and Dr. Andronic was disparate.

In addition to finding retaliation, the Hearing Officer also found that MHRH had discriminated against Dr. Satti on the basis of age. In support of that finding, he observed that this was not the first time that MHRH had been found to have discriminated against Dr. Satti. In addition, he found that (1) Dr. Martin had suggested retirement as an option to Dr. Satti; (2) the

minutes from the March 2001 Executive Board meeting revealed a discussion of physician retirement age; (3) Dr. Martin had suggested to Dr. Andronic, who also was in his seventies, that he retire; and (4) Dr. Satti had been "replaced, not by someone somewhat younger but by someone thirty to forty years younger and Dr. Martin noted that he selected her because she was the 'newest' physician." Decision and Order at 15. As a result, the Hearing Officer found "that one of the factors motivating the respondent's adverse actions against Dr. Satti was his age." Id.

Section 28-5-7.3, entitled "Discriminatory practice need not be sole motivating factor," provides, in pertinent part:

> "An unlawful employment practice may be established in an action or proceeding under this chapter when the complainant demonstrates that race, color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin was a motivating factor for any employment practice, even though the practice was also motivated by other factors." Sec. 28-5-7.3.

It is undisputed that MHRH previously had been found to have discriminated against Dr. Satti on the basis of age. During the hearing in the present case, Dr. Martin was confronted with Dr. Satti's sworn complaint in which Dr. Satti stated, "I was warned that I 'could avoid transfer by retiring.'" Hr'g Tr. at 113, Dec. 9, 2005. Dr. Martin did not deny that this conversation had taken place; rather, he testified: "I don't recall the specifics of the conversation . . . ." Id. However, he also admitted that there may have been a discussion about retirement and "that certainly is always an option when faced with a move." Id. Later, when asked why he selected the particular doctor who replaced Dr. Satti, Dr. Martin responded: "Well, she was the newest physician . . . ." Hr'g Tr. at 169, Dec. 16, 2005.

Considering the foregoing, the evidence of retaliation, Dr. Martin's questionable testimony, and MHRH's previous history of age discrimination against Dr. Satti, the Court finds

that the Hearing Officer was not clearly erroneous in determining that age was a motivating factor in the treatment of Dr. Satti. Accordingly, the Decision and Order of the Commission regarding the issue of age discrimination is supported by the reliable and probative evidence in the record.

B

The Relief Granted

MHRH contends that the Commission exceeded its authority when it ordered MHRH to apologize to Dr. Satti. It contends that FEPA does not authorize the Commission to order such a remedy. The Commission avers the remedy was appropriate, particularly in light of the fact that Dr. Satti did not seek damages for pain and suffering.

Section 28-5-24, entitled "Injunctive and other remedies—Compliance," provides, in pertinent part:

> (a)(1) If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance." Sec. 28-5-24(a)(1) (emphasis added).

The Commission and Dr. Satti contend that the ordering of an apology constituted affirmative or other action designed to effectuate the purposes of the statute. The Court disagrees.

"[W]hen the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Mutual Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 328 (R.I. 2012). This is because

the ultimate goal in considering the language of a statute "'is to give effect to the General Assembly's intent,' and . . . '[t]he plain statutory language is the best indicator of [such] intent.'" Id. (quoting DeMarco v. Travelers Ins. Co., 26 A.3d 585, 616 (R.I. 2011).

In Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011), our Supreme Court explained how to discern the General Assembly's intent from statutory language:

> "That intent is discovered from an examination of the language, nature, and object of the statute. It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings. This is particularly true where the Legislature has not defined or qualified the words used within the statute. In giving words their plain-meaning, however, we note that this approach is not the equivalent of myopic literalism. When we determine the true import of statutory language, it is entirely proper for us to look to the sense and meaning fairly deducible from the context. As we previously have held, it would be foolish and myopic literalism to focus narrowly on one statutory section without regard for the broader context." Ryan, 11 A.3d at 71 (internal citations and quotations omitted).

With respect to an administrative appeal, "a well-recognized doctrine of administrative law [is] that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency." Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456 (R.I. 1993). Accordingly,

> "when a statute is susceptible of more than one meaning, [the Court] must subscribe to the canon of statutory construction that gives due consideration to the agency's interpretation. To resolve which of the two or more permissible statutory interpretations will control, [the Court] give[s] deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's construction is neither clearly erroneous nor unauthorized . . . In effect, [t]he interpretation of a statute by the administering agency is not controlling, but it is entitled to great weight. This level of deference is applied even when the agency's interpretation is not the only permissible interpretation that could be applied. Nonetheless, [the Court] do[es] not . . . afford an agency's

> statutory interpretation deference in every case. It is only when [the Court] [is] faced with an ambiguous statute and must resort to maxims of statutory construction that this Court will give weight to the agency's articulated interpretation. And of course, regardless of ambiguities or deference due, this Court always has the final say in construing a statute." In re Proposed Town of New Shoreham Project, 25 A.3d 482, 505-06 (R.I. 2011) (internal citations and quotations omitted).

In performing its statutory interpretation task, however, the Court is "mindful of the longstanding principle that statutes should not be construed to achieve meaningless or absurd results." McCain v. Town of North Providence ex rel. Lombardi, 41 A.3d 239, 243 (R.I. 2012) (internal citations omitted). Consequently, when considering a statute as a whole, "individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." Ryan, 11 A.3d at 71.

In § 28-5-3, the General Assembly declared that:

> "the public policy of this state to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin, and to safeguard their right to obtain and hold employment without such discrimination." Sec. 28-5-3.

In accordance with that policy, "[t]his chapter shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health, and peace of the people of the state." Sec. 28-5-4.

Our Supreme Court has stated that "FEPA is designed to assure equal employment opportunities for all persons by eliminating discriminatory practices . . . [by] safeguarding an employee's right to obtain and hold employment without being subjected to discrimination." Folan v. State/Dep't of Children, Youth, and Families, 723 A.2d 287, 290 (R.I. 1999). As such, FEPA is "designed to provide statutory redress for employment discrimination . . . [and to]

enforce the rights of the public and implement a public policy that the [L]egislature considered to be of major importance." Id. at 291 (internal citations and quotations omitted). In sum, FEPA '"is concerned with deterring and remedying intangible injuries which rob a person of dignity and self-esteem and with eliminating a discriminatory environment in the workplace that affects not only the victim of discrimination but the entire workforce and the public welfare."' Id. (quoting Byers v. Labor and Indus. Review Comm'n, 561 N.W.2d 678, 681 (Wis. 1997)).

In the Decision and Order, the Commission ordered MHRH to "cease and desist from all unlawful employment practices." (Decision and Order at 17). In addition to ordering MHRH to pay compensatory damages to Dr. Satti and to rescind its revocation of his clinical privileges, the Commission ordered MHRH for the next ten years to provide: (1) annual reports on "the physicians it has hired, employed and separated from employment, their ages, and if applicable, the reason for separation from service and date of separation"; and (2) "yearly training to all medical supervisory staff on the federal and state anti-discrimination laws . . . ." Id.[8]

The Commission further ordered MHRH to

> "develop a written apology for its treatment of Dr. Satti. This apology should include a statement that the respondent discriminated against Dr. Satti because of his age and in retaliation for filing charges of discrimination and that the respondent apologizes for its treatment of him, or such other language to which the complainant agrees[.]
> "9. The written apology . . . must be sent to the respondent's employees, in the respondent's newsletter if it has one, or in any other written format generally used to circulate news to employees . . .
> "10. The written apology . . . must be submitted for publication as a notice in the Rhode Island Medical News, the newsletter of the Rhode Island Medical Society, or such other medical publication that is widely distributed to Rhode Island physicians, and the

[8] It should be noted that MHRH does not contest this portion of the Commission's Decision and Order.

> Providence Journal. The notice must be at least four (4) by six (6) inches in dimension . . . ." Decision and Order at 17-18.

In Woodruff v. Ohman, 29 F. App'x 337, 346 (6th Cir. 2002), the court declared that the ordering of an issuance of an apology in a Title VII case was an abuse of discretion under its equitable powers. See Woodruff, 29 F. App'x at 346. It stated:

> "The purpose of the forced apology was undoubtedly to make [the plaintiff] whole in a sense not usually taken into account in the law. That sense is righting moral wrongs. The law, however, is not usually concerned with procuring apologies to make morally right a legal wrong done to the plaintiff. In the specific context of gender discrimination and retaliation, an apology will little serve the purposes of Title VII. The apology will not provide any remedy to [the plaintiff] for which the damages imposed have not already accounted. Neither the district court nor [the plaintiff] cites to any authority, and we have found none, that would permit a court to order a defendant to speak in a manner that may well contravene the beliefs the defendant holds." Id.

This conclusion is echoed in the case of Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881 (Pa. 1973). There, the court held that in light of the other remedies addressing discrimination in the agency's order, "[a] public letter of apology here would serve no appropriate additional purpose." Id. at 890. In a concurring opinion, Pomeroy, J, declared:

> "an agency of democratic government, is without power to order the giving of a public apology. An apology is a communication of the emotion of remorse for one's past acts. To order up that particular emotion, or any other emotion, is beyond the reach of any government; to assert the contrary is to advocate tyranny. If, perchance, the Commission, in ordering a public manifestation of remorse, should be indifferent as to whether remorse in fact exists but instead should desire only the outward act, then it would be either extracting a lie from those willing to lie ('I'm sorry', but I'm really not) or asking the courts of this State to hold in contempt those who will not lie ('I'm not sorry and I will not say that I am'). Given the choice, I would rather hold in contempt the former, not the latter. But in my view the Commission should eschew purporting to order the expression of an emotion, whether or not

> the emotion is in fact entertained by the one so ordered." Id. at 891 (Pomeroy, J., concurring).

This Court shares the sentiments expressed above.[9] The Court concludes that the cease and desist portion of the Decision and Order, combined with that portion ordering affirmative action designed to correct existing or possible future violations, was not made in excess of the statutory authority of the agency and was sufficient to effectuate the purposes of FEPA. The ordering of a letter of apology, on the other hand, "is not a proper means to effectuate any of these purposes. The writing of such a letter is calculated to humiliate and debase its writer and will succeed in producing only his resentment—an emotion not particularly conducive to the advancement of human rights." City of Minneapolis v. Richardson, 239 N.W.2d 197, 206 (Minn. 1976). Consequently, the Court further concludes that the Commission abused its

[9] The Appellees cite to State v. Storms, 112 R.I. 454, 311 A.2d 567 (1973) in support of the proposition that a public apology requirement is "not unknown in Rhode Island courts." (Mem. of the Commission in Support of Affirming the Administrative Decision at 15). The Storms case is inapposite to the instant matter because it involved a contempt matter wherein the Court ordered defense counsel to make a public apology to the Court for failure to appear. See Storms, 112 R.I. at 457, 311 A.2d at 569.

G.L. 1956 § 8-6-1 was enacted by the Legislature as "an affirmation of the inherent power of the courts of this state to punish for contempt of their authority and as a codification of the contempt powers of the courts at common law." State v. Price, 672 A.2d 893, 896 (R.I. 1996). Thus, "the courts of this state possess inherent power to impose in their reasonable discretion such penalties as they deem appropriate." Id. It is well settled that "a finding of contempt is within the sound discretion of the trial justice." Durfee v. Ocean State Steel Inc., 636 A.2d 698, 704 (R.I. 1994). In Rhode Island, "an attorney's absence or tardiness" in court constitutes an indirect contempt punishable under § 8-6-1. Peltier v. Peltier, 120 R.I. 447, 449-50, 388 A.2d 22, 24 (1978). In Storms, the Supreme Court concluded that the ordering of a public apology did not amount to bias such that the Family Court justice who issued the order was required to recuse himself upon subsequent motion. Storms, 112 R.I. at 457, 311 A.2d at 569.

However, the Court cannot conclude that in enacting FEPA, the General Assembly intended to grant similar inherent powers to punish to an agency when it allowed the Commission "to take any further affirmative or other action that will effectuate the purposes of this chapter." Sec. 28-5-24(a)(1). Indeed, the Court observes that although punitive damages may be awarded "where the challenged conduct is shown to be motivated by malice or ill will or when the action involves reckless or callous indifference to the statutorily protected rights of others," there is no evidence in the record to support any such award. Sec. 28-5-29.1.

discretion in ordering MHRH to issue an apology to Dr. Satti and reverses that portion of the Commission's Decision and Order.

IV

Conclusion

After review of the entire record, the Court concludes that with respect to the allegations of unlawful employment practices, the Commission's Decision and Order was not in violation of statutory and regulatory provisions, was not in excess of the authority granted to the Commission, and was not arbitrary and capricious. The Decision and Order also was not affected by error of law and was not characterized by an abuse of discretion. Substantial rights of MHRH have not been prejudiced. Accordingly, this Court upholds the Decision and Order.

However, with respect to that portion of the Decision and Order mandating MHRH to apologize to Dr. Satti, the Court concludes that the Decision and Order was in violation of statutory and regulatory provisions, was in excess of the authority granted to the Commission, and was arbitrary and capricious. The Decision and Order also was affected by error of law and was characterized by an abuse of discretion. Substantial rights of the MHRH have been prejudiced. Accordingly, this Court reverses that portion of the Decision and Order.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island, Department of Mental Health, Retardation and Hospitals (MHRH)**
CASE NO:	**PC 07-7048**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 17, 2014**
JUSTICE/MAGISTRATE:	**Matos, J.**
ATTORNEYS:	
For Plaintiff:	**Sue Ellen Dunn, Esq.**
For Defendant:	**John M. Roney, Esq.** **Lynette J. Labinger, Esq.** **Cynthia M. Hiatt, Esq.**