

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. AND NANSHENG KE,
Complainants

v.

DOCKET NO. 11-BEM-00504

NEW ENGLAND BAPTIST HOSPITAL,
MAUREEN BROMS AND MARY SMITH,
Respondents

Appearances:

Ellen Messing, Esq. and James Weliky, Esq. for Nansheng Ke
Jeffrey Rosin, Esq. and Christopher M. Pardo, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 4, 2011, Nansheng Ke filed a complaint with this Commission charging Respondents with unlawfully terminating her employment on the basis of her age, disability, race and national origin. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on September 28-30 and October 1-2, 2015. After careful consideration of all the evidence before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.¹

¹ Gar Chiang, a certified court translator in Mandarin, interpreted for the Complainant from day 2-6 of the public hearing.

II. FINDINGS OF FACT

1. Complainant Nansheng (“Nancy”) Ke resides in West Roxbury. Complainant is an Asian woman of Chinese national origin who was born in 1940. Prior to coming to the United States in 1983, Complainant was a physician specializing in cardiology. (T. 49-50)

2. Respondent New England Baptist Hospital, (“NEBH”) located in the Mission Hill section of Boston, is a hospital specializing in orthopedic care.

3. In May 2010 Respondent Maureen Broms² was Vice President of Health Care Quality, Informatics and Research at NEBH, a position that included handling patient complaints.³ Maria Butay⁴ worked in Broms’ unit as a quality improvement specialist dealing with patient complaints. (T. 599-601; T. 917, 919-910)

4. In May 2010, Respondent Mary Sullivan Smith was a Director of Patient Care Services.⁵ (T. 701-702)

5. Linda Thompson has been NEBH’s Vice President of Human Resources and Service Excellence since 2005. Thompson has overall responsibility for recruitment, retention, training, HRIS, benefits, compensation, workforce development and executive compensation, as well as some non-human resource related matters. (T. 810-812)

6. Sharon Connelly has been a nurse at NEBH since 1983. In 2010, she was a nurse manager of the telemetry and intensive care units, where she supervised 50 to 55 employees. (T. 568-569, 571) The majority of the nursing staff on telemetry was Caucasian. (Testimony of Butay at 650)

² Now known as Maureen Mulkerrin, she will be referred to as Maureen Broms for consistency.

³ Broms is currently NEBH’s Chief Information Officer and Vice President of Innovation and Technology.

⁴ Butay, a native of the Philippines, worked at NEBH from 1988 to 2011.

⁵ Sullivan Smith is currently NEBH’s Senior Vice President, Chief Operating Officer and Chief Nursing Officer.

7. Jane Kelly, who is Caucasian, worked at NEBH from 1994 until her retirement in July 2011. In 2010, Kelly managed several departments, including the Non-Invasive Cardiology unit. Complainant, Lyudmila Birbrayer, several cardiologists and a part-time nurse worked in this unit. Kelly's office was located on the 2nd floor. (T. 387) Kelly was Complainant's direct supervisor. In Kelly's absence, Complainant was supervised by Carol Kale, manager for the Ambulatory Care Unit (T. 71-2) Complainant is still friendly with Kelly and they socialize on occasion. (T. 210)

8. Lyudmila Birbrayer, who is Caucasian, was born in Russia in 1963. Birbrayer was employed by NEBH from 1991 to 2014. (T. 319) In 2010, Birbrayer worked as a non-invasive cardiology technician. She administered EKGs, exercise and nuclear stress tests and other cardiac tests. (T. 314-315)

9. Frederick Basilico has worked at NEBH since 1978. He is the chairman of the department of medicine, chief of cardiology and president. In 2010, Basilico was chairman of the department of medicine and chief of cardiology and oversaw the invasive and non-invasive cardiology units and had seven cardiologists reporting to him. (T. 498-500)

10. Thompson testified concerning NEBH's long-standing "ROSE" philosophy, which stands for "Respect," "Ownership," "Superior Service" and "Excellence." (T. 814; Ex. R-2) In 2005, NEBH instituted a "Legendary Service" program consisting of 12 service standards, in which all managers and employees were trained. (Thompson at T. 828-829; Connelly at 570-571) One of the programs emphasized "service recovery," to help address complaints by patients and family members. The service recovery concept included standards of behavior towards patients such as, "recognizing concern, showing empathy, active listening skills, how to apologize, thanking the patient, making sure you close the loop, take responsibility, explain[ing]

what you're going to do and then do it." (Testimony of Thompson at T. 825) NEBH sought to reinforce and teach every staff member how to exceed expectations and "wow" a patient or family member. (Thompson at T. 829-830)

11. Complainant came to the U.S. in 1983 to conduct research on hypertension at Boston University where she learned how to perform an echocardiogram, which was then a new, non-invasive procedure that uses ultrasound to produce live images of the heart. (T. 500)

12. After receiving training, Complainant worked for five years as an echocardiographer at Boston City Hospital and B.U. Medical School. She subsequently worked at Boston Children's Hospital for two years in the same field, and thereafter worked for 10 years at Navix, a company that outsources sonographers to various locations. (T. 50-52)

13. During the course of her employment at Navix, Complainant was assigned to work for a group of cardiologists, including Dr. Basilico, at an office then located at One Brookline Place. Complainant also worked at NEBH through Navix for approximately five months.

14. In January 2005, when a full-time echocardiographer position opened up at the non-invasive cardiology unit at NEBH, Jane Kelly hired Complainant for the position, after consulting with Dr. Basilico. (T. 390-392) Basilico approved Complainant's hire because of her superior skills as an echocardiographer. (T. 502-503; 510-513)

15. Kelly testified that Complainant was an excellent echocardiographer who reported her findings to the cardiologists in a timely manner and willingly stayed late in order to read echocardiograms. Kelly performed yearly evaluations of Complainant with input from the cardiologists. Her evaluations were always positive and the cardiologists were pleased with Complainant's work performance. Kelly testified that Complainant did an extraordinary job

helping the hospital obtain ICAEL (echocardiogram) accreditation by reviewing many echocardiograms. (T. 393; Ex. C-2)

16. In 2010, the “echo” lab was located on the 4th floor of NEBH. The lab contained echocardiogram equipment, an EKG machine, a bed, a treadmill and a supply closet. Complainant shared the room and a nearby office with Birbrayer and a part-time nurse. A suite of cardiologists’ offices, including Dr. Basilico’s, was located in the same area. Birbrayer and Complainant coordinated their test schedules and worked very well together. (T. 321-322) NEBH’s telemetry unit is also on the fourth floor.

17. Birbrayer provided a list of the day’s scheduled non-invasive cardiac patients to the cardiologists’ receptionist, who would notify her when a patient arrived. Birbrayer would greet the patient, bring him/her to the echo lab and explain the procedure. Birbrayer always helped Complainant lift and position patients and never saw Complainant treat a patient poorly. (Testimony of Birbrayer at T. 326-327)

18. An echocardiogram must be performed in a quiet, dark room to allow the echocardiographer to hear the sound of the patient’s blood flow and view the heart on a monitor. While undergoing the procedure, the patient is turned on the left side with the left arm raised. The echocardiographer puts an arm around the patient and holds a transducer against the patient’s chest in order to view the heart on a monitor. The process involves repositioning the patient and moving the transducer to obtain different views of the heart. (Testimony of Complainant; Testimony of Basilico at T. 503-4)

19. Echocardiograms were sometimes performed outside the echo lab in a patient’s hospital room, for example, when a patient was immobile or on a respirator. Procedures performed in a patient’s room took longer because heavy portable equipment had to be moved

into the room and the furniture and lighting had to be rearranged. (Testimony of Complainant; Testimony of Basilico at T. 507-508) There was some tension between the nursing staff who desired to keep the patient in the nursing environment in the ICU or telemetry unit and the lab's desire to do the test in the ideal environment of the echo lab. Kelly asked Sharon Connelly, the nurse manager of ICU and the telemetry unit, to have patients brought to the echo lab whenever possible and Complainant preferred to perform echocardiograms in the lab. (Connelly at 651-652)

20. Complainant and Connelly had a strained relationship. According to Complainant, Connelly and the other Caucasian nurses treated her coldly but were friendly with Caucasian technicians. Complainant stated her only friends on the telemetry unit were two African-American aides. Connelly acknowledged having a poor relationship with Complainant, but denied that it had to do with her race and national origin. Connelly testified that she did not get along with Complainant because of Complainant's non-collaborative, unfriendly and intimidating manner and her unwillingness to educate staff regarding the echocardiogram process. Connelly also did not get along with Kelly, who, in Connelly's view, always sided with her own staff over Connelly's staff. According to Connelly, Kelly viewed Connelly's staff as doing nothing right. (Testimony of Connelly at T. 573-4; 576)

21. On April 15, 2010, Complainant injured her back while conducting an echocardiogram and was out of work for approximately three weeks. Complainant returned to work on a temporary reduced 6-hour per day schedule. (T. 105-108; 110-113; Agreed Ex. 3) The part-time nurse and Birbrayer assisted her with positioning and lifting patients, as they had even before her back injury. (Testimony of Complainant at T. 114-115; Testimony of Kelly at T. 400-401)

Incident of May 20, 2010

22. On May 20, 2010, Complainant had an 8:00 a.m. dental appointment and arrived at work at 10:00 a.m. Birbrayer was present in the medical area when Complainant arrived. (T. 115) The nurse in the unit was off that day.

23. At approximately 11:00 a.m., Complainant received a faxed order from a cardiologist for a full echocardiogram for Ms. M⁶, an 84-year-old patient on the telemetry unit.⁷ (T. 124) The order noted a particular concern with Ms. M's left ventricular function and her pulmonary artery systolic pressure. (T. 550-552; Ex. A-4)

24. Complainant arranged for the immediate transport of Ms. M to the echo lab because Complainant was in a hurry and sought to finish the test on Ms. M prior to Complainant's 12:00 p.m. appointment with the doctor treating her back injury. (T. 118)

25. Before Ms. M. arrived at the echo lab, Complainant reviewed and took notes on Ms. M's medical record and observed that Ms. M may have suffered from post-operative or peri-operative delirium after a surgery in 2000. (T. 124- 25; T. 520-522) The nurse's notes from May 20, 2011 indicated that Ms. M.'s mental status was good. (T. 523-525)

26. While Ms. M was being transported to the echo lab, Complainant received a call from Ms. M's nurse, informing Complainant that she had just given Ms. M Lasix, a diuretic which causes the patient to urinate, and that Ms. M would need a bed pan.⁸ The nurse also

⁶ In order to maintain patient confidentiality, the patient at the center of this case has been referred to as Ms. M by the parties throughout the litigation in this matter.

⁷ Ms. M originally came to NEBH for scheduled shoulder surgery; however that operation was cancelled because she developed an infection and was found to have an irregular heartbeat. She was admitted to the telemetry unit in order to resolve her medical issues.

⁸ Ms. M had actually been given several diuretics in order to reduce the fluid in her body caused by congestive heart failure.

asked Complainant to send Ms. M to radiology after the echocardiogram was completed.

Complainant testified that she asked the nurse if the test could be postponed until later in the day given that the Lasix would cause Ms. M. to urinate but the nurse responded that Ms. M. was already en route to the echo lab. (T. 126-127; 248-249)

27. Complainant asked Birbrayer to assist her with Ms. M. Birbrayer had just been paged to conduct an EKG, however, and told Complainant she would return in 10 minutes and would be back in time to help Complainant provide Ms. M with a bed pan. (T. 329-331)

Complainant was concerned about being left alone with Ms. M and repeatedly asked Birbrayer what to do if Ms. M needed to urinate. Birbrayer became frustrated with Complainant repeating her concern and because Birbrayer needed to leave to perform an EKG, she told Complainant that if Ms. M. could not hold it, to let her urinate in the bed and Birbrayer would clean everything up. (Testimony of Birbrayer at T. 363-364)

Birbrayer testified that because Complainant told her Ms. M had dementia, she believed Ms. M might have trouble holding her urine or following instructions, and therefore she told Complainant to let her go in the bed. Birbrayer testified credibly that she would never intentionally tell a patient to urinate in her bed and she never thought Complainant would directly instruct Ms. M. to urinate in the bed. (T. 168; 298; 332; 341)

28. Complainant testified that she knew to call Carol Kale or Birbrayer for assistance if Ms. M needed to urinate during the test. Complainant stated that when Ms. M arrived at the echo lab, she did not need to urinate. Complainant determined that she could save time by using Ms. M's measurements from a normal echocardiogram a year earlier rather than retaking Ms. M.'s measurements, since she needed only to look at the two areas of concern to the cardiologist.

She stated that by using this method, she completed the echocardiogram in 10 minutes instead of the usual 45 minutes.⁹ (T. 132-133; T. 295-296)

29. Basilico testified that an echocardiogram is recorded on digital video and can be stopped at any time and then resumed without having to start over. Reasons for stopping an echocardiogram could include a medical problem, the patient's need to shift positions or use the bathroom, or if the technician was otherwise interrupted. (T. 507-8)

30. Complainant testified that Ms. M was upset that the nurse had given her Lasix before the echocardiogram and Complainant explained to her that she was following the doctor's order. According to Complainant, Ms. M responded that the doctor was a man and did not care about women. Complainant told Ms. M to calm down and that she would be done in ten minutes. I credit the Complainant's testimony that Ms. M expressed concern about having been given the Lasix. I do not credit her testimony regarding what Ms. M said about the doctor.

31. Complainant testified that she explained the procedure to Ms. M and told her that she would stop the test if Ms. M. needed to urinate, and then resume the test. (T. 135-136) I do not credit her testimony that she told Ms. M she would interrupt the test.

32. Complainant testified that after completing the echocardiogram in 10 to 15 minutes, Ms. M asked her for a bedpan. (T. 137-138; Jt. Ex. 1) Complainant told Ms. M that she had no bedpan available and, in any case, could not lift Ms. M without assistance because of a back injury. She also testified that she did not look for a bedpan because she was in a hurry to find Birbrayer, whom she then called for assistance. (T. 129) Ms. M then told Complainant that she needed a bed pan right away and could not wait. Complainant testified that she told Ms. M to

⁹ Basilico, who was not Ms. M's cardiologist, reviewed the order for her echocardiogram and the written results. He stated that Ms. M's cardiologist ordered a complete echocardiogram that would normally take 45 minutes and if Complainant had performed the test in 10 minutes it would have been rushed. He also stated that it would have been inappropriate to take measurements from a previous echocardiogram. (Testimony of Basilico at T. 506-507)

urinate in the stretcher if she was really in pain and had to go, not to be embarrassed because it happened all the time in the hospital and they would change the sheets and pad.¹⁰ Complainant testified that she said this to Ms. M so that she would not suffer and to calm her down. (T. 139-141)

33. Birbrayer testified that when she returned from conducting the EKG, which took 10 minutes, she looked into the echo lab and observed that Complainant performing the test on Ms. M. (T. 343-4) After another 15 minutes passed, Complainant called for her assistance and Birbrayer hurried to the echo lab, got a bedpan from the supply closet and assisted Ms. M to urinate in the bed pan. When she took Ms. M off the bed pan, Birbrayer believed that Ms. M and the bed were dry. (T. 345-34; 142) Birbrayer placed a clean bedpan in the stretcher with Ms. M and told her that she was going to be transported to the radiology department. (T. 345-346) Birbrayer saw Complainant cup Ms. M's cheeks and ask her, "Are you okay now?" Ms. M responded, "Don't touch me" and repeatedly said, "I cannot believe it." (T. 348-352)

34. Complainant testified that she helped Ms. M. put on her robe and told Ms. M., "Hopefully, you can get better." She may have accidentally brushed Ms. M.'s face when helping her put on her robe, but she denied patting or cupping Ms. M.'s cheeks and did not call her "honey" or "good girl." (T. 144) I do not credit Complainant's testimony that she did not deliberately touch Ms. M.'s cheeks as this portion of her testimony contradicts her original statement to the administrators who interviewed her, as well as the credible testimony of Birbrayer. (See Finding of Facts #46)

35. Complainant instructed Birbrayer to call the transportation unit to take Ms. M. to the radiology department. She testified that she did not call the radiology department to inform them

¹⁰ A plastic disposable pad, used for patients who may be incontinent or have drainage from a wound, had been placed under Ms. M. (T. 732)

that Ms. M was coming because that was the responsibility Ms. M's nurse. Complainant testified that when the transport arrived Ms. M was calm and thanked her. (T. 144-145) I do not credit Complainant's testimony that Ms. M was calm and appreciative.

36. Ms. M was transported to the radiology unit, where she remained for approximately 45 minutes. She then asked to be transported to her hospital room because she was wet and cold. She arrived at her room soaking wet from having urinated and upset about her experience in the echo lab. The nurse changed her and informed Connelly about her complaint.

Patient Complaint

37. Connelly testified that on May 20, 2010, nursing staff informed her that Ms. M had complained about her treatment earlier that day. (T. 581-582) Connelly reviewed Ms. M's chart and informed the healthcare quality department that she was going to interview a patient about a serious complaint.

38. Connelly found Ms. M sitting in a chair in her hospital room. She asked Ms. M. to tell her what had occurred and apologized to Ms. M in keeping with the concept of "service recovery." Ms. M. told Connelly that she was very concerned about having to urinate during the echocardiogram and when she arrived she told Complainant she might need to go to the bathroom soon. According to Ms. M, Complainant mumbled to herself during the process and asked Ms. M to remain still. Ms. M had to urinate urgently during the exam and Complainant told her to just urinate in the bed. Ms. M told Connelly that when the exam was completed Birbrayer entered the room and after arguing back and forth with Complainant, Birbrayer located a bedpan and gave it to Ms. M, but by that time she had urinated in the bed.¹¹ Ms. M reported

¹¹Birbrayer denied having a disagreement with Complainant in Ms. M's presence. (T. 356-357) I do not credit her testimony in this regard.

that when the exam was completed, Complainant put her hands on Ms. M's face and said, "What a good girl." (T. 588-589) Ms. M told Connelly that she was humiliated by Complainant's unprofessional and unacceptable behavior and her refusal to attend to Ms. M's personal needs. (Ex. 20) Connelly told Ms. M that she would report her complaint to the Healthcare Quality Department.

39. Connelly testified that Complainant's conduct stood out because it was inappropriate to tell a patient to urinate in a bed, and because there were other individuals who Complainant could have called for assistance with Ms. M. She stated that Complainant did not provide "legendary service" to Ms. M and caused her to suffer a loss of dignity. (Testimony of Connelly) Connelly contacted quality improvement specialist Butay and a patient advocate and provided her interview notes to the Healthcare Quality Department and to Mary Sullivan Smith, Director of Patient Care Services. Connelly told Butay and the patient advocate about her interview with Ms. M and told them that there were prior staff and patient concerns about Complainant.¹² (Ex. A-19; T. 668-9) Connelly testified that she had no further involvement in the matter and was not consulted as to whether Complainant should be disciplined. (Testimony of Connelly at 596) Smith testified that she first heard of the complaint from Connelly. She stated this was a serious complaint and that telling a patient to urinate in the bed and putting her hands on a patient's face were incredibly disrespectful, belittling and degrading to the patient and that she considered the actions egregious. (T. 703-704)

40. Butay testified that on May 20, following Connelly's interview with Ms. M, she and the patient advocate¹³ interviewed the patient. Butay testified that Ms. M was upset and

¹² Connelly testified that prior to the incident of May 20, she had received two patient complaints about Complainant's rough treatment, failure to display empathy and failure to explain the echocardiogram procedure. (T. 576-577) Connelly testified that she discussed these complaints with Complainant and with Kelly. (T. 578)

¹³ The patient advocate no longer works at NEBH and did not testify at the public hearing.

emotional as she related how she could no longer hold her urine during an echocardiogram, was told by Complainant that there were no bedpans and to urinate in the bed. Ms. M told Butay and the patient advocate that she urinated in the bed and when the test was completed, Birbrayer arrived and gave her a bedpan for use in radiology. (T.603-607) When Ms. M was leaving for radiology, Complainant put her hand on Ms. M's face and said "Good girl," or words to that effect. (T. 604-605) Butay testified that Ms. M felt degraded and demeaned by Complainant's actions. Ms. M also told them that she was given no call light to page for assistance in the radiology department and waited there, wet, for a long time.

41. After a discussion with Butay and the patient advocate, Broms and the then Senior Vice President for Patient Care Services¹⁴ interviewed Ms. M on the afternoon of May 20. (T. 920-923) Broms testified that Ms. M related in a very emotional manner that when she told Complainant that she needed a bed pan, Complainant told her there was no bedpan and directed her to urinate in the bed. (T. 923-924) Ms. M cried as she described trying to move her robe out of the way to keep it dry and having no other option, she urinated in the bed. She told Broms and the senior manager that Complainant then patted her face and said "You're a lovely girl," which she found degrading. Ms. M told them she was wet when she left the echo lab and was transported to the radiology department, where she waited for an extended period of time, after which she asked to return to her room without receiving an x-ray. (T. 923-925) Broms testified that she had handled a large number of patient complaints and had she had never witnessed a patient so humiliated as Ms. M.

42. Broms told Smith about her interview with Ms. M, which was consistent with Connelly's interview. Smith testified that she felt that it was a serious complaint and she was curious to hear Complainant's version of events. T. 705-6.

¹⁴ The former Sr. V.P. for Patient Care Services is now retired and did not testify at the public hearing.

May 21, 2010

43. On Friday May 21, 2010, Butay and the patient advocate interviewed the transportation staff, who followed protocol by handing Ms. M. off to a technician in radiology. They also interviewed the radiology manager and the radiology technician, a Caucasian woman in her 50s. (T. 607-608)

44. The technician told Butay and the patient advocate that the radiology department was very busy when Ms. M arrived and she had to wait for her x-ray.¹⁵ (Agreed Ex. 19; Ex. C-11) The technician told Ms. M that she would be with her as soon as possible. Shortly after arriving, Ms. M told the technician that had used the bedpan and was finished. The technician observed that Ms. M had placed herself on the bedpan although she did not know how. When she removed the bedpan, she noticed that Ms. M was wet and offered to clean her up. Ms. M. refused to be cleaned up, did not want to wait any longer for an x-ray, asked to be returned her to her room and the technician complied. (Tr. 940-941) Butay and the patient advocate relayed the results of their interviews to Broms and had no further involvement in the matter. (Testimony of Broms; Testimony of Butay)

45. Smith testified that there were no call lights available in the area where Ms. M waited in radiology, but that Ms. M was attended to by the technician and another aide who gave her a blanket. (T. 402-403; 962-964) It was subsequently determined that call lights would be provided to patients in that area. (Testimony of Smith at 605-606)

46. On May 21, 2010 Complainant met with Broms and Smith, who were later joined by Linda Thompson, VP of HR and Service Excellence. Complainant testified that Broms informed

¹⁵ To prevent long waits, the radiology department often calls to the patient's unit when it has openings for a patient to come to radiology, or the unit or lab calls radiology to let them know a patient is coming. In this case, no one called radiology to inform them that Ms. M was coming.

her about Ms. M's complaint. (T. 148) Broms, who led the meeting, testified that Complainant affirmed that she *did* tell Ms. M to urinate in the bed and then patted her face and said, "I hope you feel better, honey." (T. 934; Ex. A-18) According to Broms, at the meeting Complainant deflected responsibility by asserting that the nurse was at fault for giving Ms. M Lasix before sending her to the echo lab, that Birbrayer refused to help her with Ms. M. and that another employee had failed to stock bedpans weeks earlier. Complainant also admitted that she did not look for a bedpan, but that Birbrayer came and put Ms. M on the bedpan. (T. 707-709; T. 937-8) Only after Broms told Complainant that Ms. M was offended by Complainant's touching her face, did Complainant say that she may have accidentally brushed against Ms. M's face while helping with her robe. (T. 723-724) Smith felt that Complainant demonstrated a lack of accountability and responsibility. (T. 721) Smith testified that when Complainant admitted telling Ms. M to urinate in the bed, she was concerned because no one should ever instruct a patient in this way and should do everything possible to help the patient. Smith told Complainant that she was deflecting responsibility for her actions by blaming others who had nothing to do with Complainant's interaction with Ms. M.

47. Thompson testified that Broms and Smith were frustrated by Complainant's unwillingness to respond directly to their questions about her own interaction with Ms. M and her deflection of responsibility to the nurse, Birbrayer and the radiology department. Thompson was also struck by Complainant's failure to apologize or take personal responsibility for her conduct. The administrators all felt that Complainant could have done more for Ms. M. (T. 843-5) At the end of the meeting, Thompson placed Complainant on administrative leave and instructed her to collect her personal items, leave for the day and wait for them to call her. (T. 848-9) Complainant was in shock, upset and concerned by Respondents' decision. (T. 153; 849-

850) I credit the testimony of Broms, Smith and Thompson regarding their difficulty getting Complainant to respond directly to their questions and her deflecting of responsibility to others. Their testimony in this regard was consistent with my observation of Complainant's testimony at the public hearing which was quite evasive. I also credit their testimony that Complainant admitted telling Ms. M to urinate in the bed and touched her cheek, which Smith characterized as "infantilizing" a patient and a "violation of boundaries," with patients. (Testimony of Smith at 722)

48. Thompson, Broms and Smith interviewed Birbrayer on May 21, after interviewing Complainant. Smith testified that Birbrayer was forthcoming and stated that she told Complainant she would help with Ms. M when she returned from performing an EKG. Birbrayer was frustrated because Complainant kept asking her what would happen if she were alone with Ms. M and she needed to urinate, which only served to delay Birbrayer's departure. Birbrayer finally told Complainant that if the patient had to urinate in her absence, she could urinate in the bed and they would clean her up. Birbrayer stated that when she returned, she provided a bedpan to Ms. M. and changed her pad whose edge was wet. (T. 850-851) Birbrayer also left a bedpan on Ms. M's stretcher if needed for later use. She found Ms. M to be pleasant and reasonable and stated the pad under Ms. M was dry when she left for radiology. (T. 935-936) Birbrayer testified that she was shocked and hurt when Broms told her that Complainant accused her of refusing to help with Ms. M because she had assisted Complainant with countless patients and had put a great deal of effort into their relationship. (T. 362; 366-367)

49. Birbrayer received a written reprimand for telling Complainant that it was ok for Ms. M to urinate in the bed. Birbrayer testified that she did not believe she deserved the reprimand

because she did not believe that Complainant would actually tell a patient directly to urinate in the bed. Smith testified that she believed that Birbrayer did not refuse to help Complainant. (T. 733-734) Thompson testified that Birbrayer was given a lesser discipline than Complainant because although she told Complainant to let Ms. M void in the bed if she could not hold her urine, she did not intend for Complainant to direct Ms. M to do so. In contrast, Complainant directly told Ms. M. to urinate in the bed, held her face and told her that she was “ a good girl,” which demonstrated poor judgment and did not support NEBH’s core values. (T. 854-6)

50. On May 23, 2010, Complainant wrote a letter to NEBH’s president and CEO, Trish Hannon, asking for help in investigating Ms. M’s complaint and telling Respondent to investigate the actions of the nurse in telemetry and the radiology department. In the letter she wrote that she was sorry that the patient had such a difficult time and felt bad for her. (T. 169-170; Agreed Ex.10) On May 28, 2010, Hannon responded that she had asked Thompson to review the matter and that she supported the decision to terminate Complainant’s employment. (Agreed Ex. 11)

51. Thompson testified that the following Monday, May 24, she discussed the matter with Trish Hannon, who was “outraged” by the patient complaint and told Thompson that Complainant’s employment should be terminated. Thompson also examined Complainant’s personnel and work injury files (T. 851-852) The decision to terminate Complainant was reviewed with Basilico who concurred with the decision. (T. 531-532) Thompson testified that Basilico believed that Complainant could have taken measures to ensure that Ms. M was properly cared for and Basilico was aware of past patient complaints concerning Complainant’s rough treatment of patients.¹⁶ (T. 852-4)

¹⁶ Basilico testified that through the years, patients complained about Complainant’s rough treatment of them during the echocardiogram.

52. Smith testified that telling a patient to urinate in the bed is disrespectful, belittling and degrading and not within the normal standards of care in a non-urgent situation and that touching a patient without permission is a violation of the patient's boundaries. (T. 703-705) She stated that Complainant had acted irresponsibly, accepted no accountability or responsibility for her actions and expressed no concern for the patient. (T. 709-710; 727-728) Smith, Thompson, Basilico and Hannon jointly made the decision to terminate Complainant's employment. Smith testified that the decision to terminate Complainant's employment for violation of core values was driven by Complainant's telling the patient to urinate in the bed and her touching the patient inappropriately, acts which Complainant admitted. (T. 789-790) Smith testified that Complainant failed to provide respectful care, acting in a manner that was humiliating to the 84-year old Ms. M. (T. 735-736; 740-741) Smith also believed that termination was appropriate because when confronted with the complaint against her, Complainant failed to take ownership or responsibility for her actions. (Smith at T.759-760) The administrators decided before a subsequent meeting with Complainant on May 27, 2010 that her employment would be terminated.

53. On May 27, 2010, Complainant met with Smith and Thompson and they hand-delivered a termination letter, which recounted the allegations against Complainant made by the patient which Complainant admitted. At this meeting, Complainant continued to argue that the nurse "...should have had a better plan." Complainant accused the nurse of being "like a general," and stated that she should have asked Complainant to perform the echocardiogram in the unit. (T. 752) The termination letter suggested several people whom Complainant could have asked for assistance with Ms. M. (T. 173-4; 178; Agreed Ex. 7) Complainant testified that

she could not contact any of the named people at the time for various reasons and that had she asked Birbrayer to stay with her. (T. 176-177; Jt. Ex. 7)

54. Broms testified that on May 27, 2010, Thompson told her that Complainant raised for the first time the issue that Ms. M was confused and did not urinate in the echo lab. Broms told Thompson that she had not found Ms. M to be confused, but she offered to re-interview Ms. M, who was then in a rehab facility. Broms called Ms. M. to say that she was following up on the investigation into her complaint and wanted to make sure she had her facts straight. Ms. M was adamant that Complainant told her to urinate in the bed and that is what she did and that she was wet when she arrived at the radiology department. (T. 946-7) Broms testified credibly that Ms. M had repeated the same story to several people, and was alert and oriented throughout her stay at NEBH and she had no reason to believe Ms. M was confused. (T. 946-7) Broms had dealt with many distraught patients, but the incident involving Complainant and Ms. M stood out, because she has never seen a patient experience such a great degree of humiliation and shame. She was also struck by the fact that Complainant did not appear contrite and continued to deflect blame. Although Broms was not involved in the decision to terminate Complainant, she felt it was appropriate. (T.942-)

55. Kelly was on vacation when the incident occurred and did not learn of Complainant's termination until she returned to work; she was shocked and did not understand why Complainant was terminated. Kelly met with Broms, Thompson and Smith. (T. 401-406) After the meeting, Kelley spoke with Birbrayer who told Kelly that Ms. M was dry when she gave her a bedpan. (T. 407-8) Kelly testified that the echocardiogram and x-ray could both have been performed in Ms. M's room where patient care technicians and nurses were available to assist Ms. M if she needed to urinate. (T. 407) Kelly told Broms and Thompson that Ms. M did not

urinate in the echo lab and the termination was based on misinformation, but they did not change their decision.

56. In addressing the discrepancy in testimony about when Complainant wet herself, Smith stated that ultimately, it was immaterial to Complainant's termination. Complainant and Birbrayer testified that Complainant left the echo lab dry, but she was wet when she returned to the floor. Smith testified that she did not know where Ms. M's stretcher became wet. Although stating that Ms. M waited a long time in radiology, which was not consistent with Respondents' standards of care, Smith testified this sometimes occurs. (T. 801-803) She pointed out that no one individual in radiology was singled out by Ms. M as having treated her poorly and no one in radiology instructed her to urinate in her stretcher or touched her inappropriately. (T. 759-760)

57. Smith, Thompson and Complainant met for a third time on May 28, 2010, the day after the termination. (T. 757-8) Smith testified that at this meeting, Complainant again deflected blame onto Birbrayer, whom she said refused to help her.¹⁷

58. From 2005 to 2014, NEBH terminated 24 employees for violations of core values. Those employees were of varying race and age, and some had prior disciplines while others did not. None of the twenty-four had requested accommodations for disabilities. (Exs. C-12; 13; 14 Thompson at 901-902; T. 634-638; Agreed Ex. 27) Of those 24 employees, six were terminated for reasons related to patient care or patient interactions. These terminations include a black nursing assistant, age 48, with a record of discipline for patient complaints, who was terminated after a patient complaint for deliberately refusing to respond to three separate patient requests for help; a Caucasian physician assistant, age 55, who was terminated for delivering unsafe and deficient care to three patients, after a receiving a prior warning letter; a Caucasian ultrasound

¹⁷ The purpose of this meeting was not entirely clear. It appears likely to have been in response to Hannon's request that Thompson review the matter.

technician, age 56, with a record of prior discipline, who was terminated after mistreating and being rude to a patient (her prior discipline is not specified); a Caucasian Intensive Care Unit nurse, age 38, with a record of prior discipline, who was terminated for refusing a patient admission into the ICU, in a hostile tone of voice in front of the patient (her prior discipline is not specified); and two Caucasian R.N.s, ages 36 and 39, with no prior history of discipline, who were terminated for deliberately ignoring a patient who used a call light to summons them for assistance in using the bathroom and for loudly disparaging employees. Smith was informed of a patient complaint regarding the two Caucasian nurses and was involved in the investigation of the incident that resulted in their termination. (Smith at T. 763-765; Agreed Ex. 27: Ex. C-14)

59. Kelly testified that the only prior complaint Connelly relayed to her about Complainant was from a patient's visitor whom Complainant asked to leave the room so that she could conduct an echocardiogram. The visitor refused to leave and Complainant asked her to be quiet and turn the lights off. In that instance, Kelly explained to Connelly that an echocardiogram requires a dark, quiet room. (T. 398-399)

60. Kelly hired a Caucasian man in his 40s to replace Complainant, with the approval of Basilico. (T. 414)

III. CONCLUSIONS OF LAW

M.G.L. c.151B §§ 4(1) and (1B) and (16) prohibit employers from discriminating against an employee on the basis of race, national origin, age or handicap. In the absence of direct evidence of discrimination, Complainant must establish discrimination under the McDonnell Douglas three stage burden shifting model adopted in Wheelock College v. MCAD, 371 Mass 130 (1976).

In order to prevail on a charge of discrimination in employment based on age, race, national origin or disability under M.G.L. c. 151B, s. 4(1), (1B) and (16), Complainant may establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). In order to establish a prima facie case of age, race, national origin or disability, Complainant must show that she was a member of a protected class, that she was qualified and adequately performing her job and that she was subjected to adverse treatment different from similarly situated employees not in her protected class. Sullivan v. Liberty Mutual Insurance Company, 444 Mass. 34 (2005); Knight v. Avon Products, Inc., 438 Mass. 413 (2003). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, *supra*. Complainant has established the first prong of a prima facie case by virtue of her Chinese national origin and her race, Asian, her age and her work place back injury.¹⁸ Complainant established that she was adequately performing her job, by virtue of her positive job performance evaluations and her skill as an echocardiographer. Respondents subjected Complainant to adverse treatment when they terminated her employment.

Complainant contends that there are two groups of similarly situated persons who are legitimate comparators to her and alleges that she was treated more harshly than the comparators in each group, as follows. Complainant argues that the telemetry nurse and the radiology aide should be viewed as comparators as each was involved in Ms. M's care on the date in question. Respondents argue that these two employees were not similarly situated to Complainant for

¹⁸ To the extent that Complainant argues she was denied a reasonable accommodation, I conclude that she has failed to establish a prima facie case. Complainant was provided the reasonable accommodation of a shorter work day and assistance with lifting and moving patients. The credible evidence did not establish that Complainant was denied such an accommodation; according to Complainant's own testimony, Birbrayer came and assisted her with Ms. M when she called and Complainant had a plan to call Carol Kale if Birbrayer were not available.

purposes of establishing disparate treatment because they did not engage in similarly egregious conduct and were not the subjects of the patient's complaint. However, I do not agree that they are not appropriate comparators. With respect to similarly situated individuals outside the protected class, the comparator's circumstances need not be identical to those of Complainant; they only need to be substantially similar in all relevant aspects concerning the adverse employment decision. Trustees of Health & Hospitals of the City of Boston v. MCAD, 449 Mass. 675, 682 (2007); Matthew v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997) quoting Dartmouth Review v. Dartmouth College, 889 F. 2nd 13, 19 (1st Cir. 1989) The comparators must be roughly equivalent and the "cases fair congeners." Id. I conclude that all three employees who were in charged with Ms. M's care at some point on May 20, 2010 and whose interaction with Ms. M may have contributed to her complaint of substandard care are appropriate comparators for purposes of establishing a prima facie case in this matter. Complainant does not include Birbrayer as a comparator, however, she is a person involved in Ms. M's care and got less harsh treatment than Complainant, thus I conclude that she is a comparator as well. Complainant was treated adversely as opposed to Birbrayer and the nurse and technician in question who were Caucasian women more than five years younger than Complainant with no known disability. Her employment was terminated, Birbrayer received a written warning and the others were not disciplined. Therefore, I conclude that with respect to these comparators, Complainant has established a prima facie of discrimination.

The second set of comparators consists of six employees terminated by NEBH from 2007 to 2014 for reasons related to patient care or patient interactions. These terminations include all of those employees terminated for the reasons set forth in finding of fact no. 58, all for failing to provide appropriate patient care. With respect to the six employees terminated by NEBH from

2007 to 2014 for patient related reasons, four of the six had received previous discipline and two had not, one was black and five were Caucasian, their ages ranged from 33 to 56. Thus while the majority of these comparators had been disciplined prior to their termination, the evidence does not establish that as a whole they were treated differently than Complainant. However, assuming that Complainant has established a prima facie case with respect to this group of comparators as well, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its actions. Abramian, supra; Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995).

Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986) Respondents' articulated reasons for terminating Complainant's employment were that she directed an elderly patient to urinate in a stretcher, touched her face inappropriately and talked to her in a condescending and belittling manner in violation of Respondents' policies and causing the patient to be greatly humiliated. Complainant also attempted to deflect blame for this incident to others and failed to take "ownership" of, or accept responsibility for, her own actions. I conclude that Respondents have met their burden of articulating legitimate, non-discriminatory reasons for their decision to terminate Complainant's employment.

Once Respondents have articulated legitimate, non-discriminatory reasons for their conduct, Complainant must show that Respondents' reasons are a pretext for unlawful discrimination. A fact finder may, but need not, infer that an employer is covering up a discriminatory intent, motive or state of mind if one or more of the reasons identified by the employer are false. Lipchitz v. Raytheon Company, 434 Mass. 493, 498, 507 (2001). The employee need not disprove all of the non-discriminatory reasons proffered by the employer for

its decision-making, only 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).

Complainant advances several arguments in support of her position that Respondents’ termination of her employment was a pretext for discrimination based on her race, age and disability. Complainant challenges Respondents’ assertion that she was terminated for refusing to provide Ms. M a bedpan and instructing her to urinate in her stretcher. Complainant alleges these reasons are pretextual because there is, in her view, “convincing evidence that neither of those things occurred.” Complainant argues that the only evidence that she instructed Ms. M to urinate in the stretcher is not credible because it comes from Ms. M’s unreliable and inconsistent reporting of the event to Respondent’s investigators. I do not agree with this assertion. First of all, Ms. M did not waiver and was consistent in her accounts of what occurred. The differing reports about the incident came from Complainant and other employees. Moreover, Complainant acknowledged to Respondents’ administrators that she told Ms. M she had no bed pan available, could not help her, and instructed her to urinate in the stretcher. Complainant’s subsequent attempts to characterize her statement as an attempt to comfort Ms. M were unconvincing to Respondents’ managers and to this hearing officer. Moreover, despite any inconsistent accounts from Respondents’ witnesses about when the patient wet the bed, Respondents ultimately determined that the issue of where and when Ms. M actually urinated was not germane to the decision to terminate Complainant’s employment. Respondents asserted that Complainant’s confirmation of her inappropriate actions - directing Ms. M to urinate in the bed and touching her face inappropriately- justified the decision to terminate Complainant.

Complainant argues that Respondents' acceptance of the allegation that Complainant called Ms. M a "good girl" as opposed to accepting her assertion that she stated, "I hope you feel better" after Ms. M urinated, is evidence of pretext. I do not concur. The evidence demonstrates that Respondents relied not only on Ms. M's version of events, but more importantly, her feelings of extreme humiliation resulting from Complainant's comments and actions. Respondent argues that regardless of Complainant's exact words to Ms. M, the incident in its totality was sufficiently serious and disturbing to justify its response.

Complainant also challenges Respondents' assertion that her lack of concern for Ms. M as a reason for her termination was a pretext, because Respondents' record of interviews with Complainant note that she expressed concern for the patient, as did her subsequent letter to the hospital. I do not agree that this assertion is evidence of pretext. The evidence established that Complainant repeatedly deflected blame for the incident onto others and her expression of concern for the patient came only after Respondents met with her to express their grave concern, and even then, her expression of sympathy for the patient was related to the nurse's action of sending her to the echo lab after giving her Lasix, and the radiology technician allowing her to remain wet for a long period of time while awaiting an x-ray.

Complainant also asserts that Respondents' "suggestion" that another factor justifying the termination was her history of similar patient complaints is not credible and, therefore, pretextual. I do not accept this assertion, as I found the testimony of Basilico and Connelly that they had received prior complaints of Complainant's mistreatment of other patients to be credible. While there was no contemporaneous documentation of prior patient complaints about Complainant, this may be in part to the understandable reluctance of employers to escalate minor complaints, which is not uncommon in many workplaces. The lack of documentation about

these incidents does not render the testimony suspect, nor does it support a finding of pretext for discrimination. Moreover, Complainant's assertion of pretext in this regard ignores the testimony of Kelly, which was generally supportive of Complainant, and who nonetheless recalled a complaint by a patient's visitor about Complainant.

Complainant also challenges Respondents' claim that she was terminated for failing to seek assistance from the nurse or others assistance as not credible, because it is inconsistent with Complainant's testimony that she did seek Birbrayer's assistance and had a plan to get help from another if Birbrayer were not available. Respondent's allegation is not a pretext since the facts are, that even absent the availability of certain individuals suggested by Respondent, Complainant made no attempts to seek assistance from the individual she named or from anyone else in the cardiologists' office located in the immediate area.

Complainant asserts that she was treated more harshly than the nurse who administered the Lasix to Ms. M and the radiology technician, who allowed Ms. M to wait for 45 minutes in a wet bed. Complainant argues the fact that she was terminated while these two employees who were also entrusted with Ms. M's care were not, proves that Respondents selectively enforced their legendary service standards. She asserts that Respondents focusing their investigation solely on her actions is evidence of pretext. For the reasons stated, the evidence does not support this claim. With respect to the nurse who administered the Lasix to Ms. M, I conclude that she was simply following the medication orders of Ms. M's cardiologist. The evidence showed that Complainant called the telemetry floor and asked that Ms. M be sent to the echo lab as soon as possible, and the nurse merely complied with her request. Additionally, the nurse notified Complainant that she had administered the medication and that Ms. M would likely need a bed pan. There is no evidence whatsoever that the nurse engaged in any inappropriate conduct. With

respect to the radiology technician, I conclude that she did not engage in disrespectful conduct toward Ms. M, whose complaint regarding radiology was that she was kept waiting a long time with no call light and was in discomfort because she was wet. The evidence was that when the tech discovered Ms. M was wet, she offered to change her. There was no evidence that Ms. M was distressed by the conduct of this tech or any other individual in radiology.

As further evidence of pretext, Complainant argues that Connelly, who brought the patient complaint to Respondents' attention, told investigators several untruths about Complainant, including that there were patient complaints about her, that she did not like to perform bedside echocardiograms and that she was intimidating and confrontational. Complainant suggests that Connelly's behavior, including her statements to investigators and testimony at the public hearing, was infected by bias. She argues that to the extent Respondents' considered Connelly's input during their investigation, they were also infected by bias. While there is evidence that Connelly did not like Complainant, I am not persuaded that her animus toward Complainant was based on Complainant's membership in any protected class. Connelly also testified in a negative manner about Kelly, a Caucasian woman, whom Connelly described as always defending her subordinates as "right" and Connelly's staff as "wrong." I conclude that her animosity toward Complainant and Kelly rose from the apparent tension between their respective units over the control and treatment of patients. Therefore, whatever influence Connelly's observations may have had on the decision makers, I conclude that there was no credible evidence that it was based on discriminatory animus.

Respondents' apparent decision not to resolve some discrepancies between Ms. M's complaint and Complainant's account of the incident in question are puzzling, however, there is no evidence that the disciplinary process was motivated by discriminatory animus. I find that

Respondents articulated a reasonable belief, based on a thorough investigation, that Complainant had engaged in serious breaches of policy for which she accepted no responsibility and that this justified termination.

Even if I were I to conclude that Complainant's termination was unduly harsh under the circumstances, "it is not the [Commission's] job to determine whether Respondent made a rational decision, but to ensure it does not mask discriminatory animus." Sullivan, supra, at 56 (2005); see also Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992) ("Courts may not sit as super personnel departments, assessing the merits - or even the rationality - of employers' nondiscriminatory business decisions"). While Complainant argued that Respondents' reasons were a pretext for discrimination, there is insufficient credible evidence to support the conclusion that the articulated reasons for the termination were not the real reasons, or that Respondents were motivated by discriminatory intent, motive or state of mind. Lipchitz, supra, at 503 (2001)

Surely it was shocking and disappointing for Complainant, a skilled employee who took obvious pride in her work, to have been terminated by Respondents, however, the facts and circumstances do not indicate that Respondents' decision to terminate Complainant, even if seemingly harsh or unfair, was motivated by discriminatory animus. I conclude that there is no evidence that Respondents acted out of bias against Complainant based on her race, age, disability or national origin. It is clear that the decision to terminate arose from a determination by Respondents that the severity of Complainant's misconduct coupled with her unwillingness to accept responsibility for violating important policies merited the discipline imposed.


Therefore, I conclude that Respondents did not engage in unlawful discrimination and I hereby order that this matter be dismissed.

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 29th day of June 2016


JUDITH E. KAPLAN,
Hearing Officer