STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 3, 2018]

CITY OF PROVIDENCE AND WOBBERSON TORCHON	:	
VS.	:	**C.A. No. PC-2014-5371**
RHODE ISLAND COMMISSION FOR HUMAN RIGHTS AND HORTENCIA ZABALA	:	

DECISION

GALLO, J. Plaintiff-Appellants—the City of Providence (Providence) and Wobberson Torchon (Mr. Torchon) (collectively, Appellants)—seek to reverse and vacate the November 24, 2014 Corrected Decision and Order (Decision) of the Rhode Island Commission for Human Rights (the Commission).[1] The Commission found the Appellants unlawfully discriminated against Hortencia Zabala (Ms. Zabala) based on her ancestral origin, in violation of the Rhode Island Fair Employment Practices Act (FEPA), Chapter 28-5 of the Rhode Island General Laws.[2] Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

[1] The Commission amended its October 1, 2014 decision by issuing a Corrected Decision and Order that corrected two errors on page 12, in the last full paragraph, last sentence of its October 1, 2014 Decision and Order.

[2] While currently represented by counsel, Ms. Zabala appeared before the hearing officer in this matter *pro se.*

I

Facts and Travel

A

Factual Background

Ms. Zabala is a woman of Bolivian ancestral origin. Ms. Zabala has been employed by Providence since or around 1996 and became a full-time, certified Limited English Proficiency (LEP) teacher at the Gilbert Stuart Middle School in 2000.

At the start of the 2005-2006 school year, Ms. Zabala moved into a non-LEP mathematics position at Central High School[3] where Principal Elaine Almagno expressed concerns regarding her ability to effectively communicate with her students. (Tr. II at 72-73.)[4] As a result, Principal Almagno initiated a Non-Evaluation Year Intervention for the 2006-2007 school year pursuant to Article 8-14.4 of the Collective Bargaining Agreement (CBA) between Providence and the Providence Teachers Union. (Resp't's Ex. A at 23.)[5]

During Ms. Zabala's Non-Evaluation Year Intervention, in September of 2006, she was evaluated by her department supervisor, Mike Lauro (Mr. Lauro). (Resp't's Ex. E.) In an evaluation endorsed by Principal Almagno, Mr. Lauro found "Ms. Zabala fail[ed] to achieve . . . teaching prerequisites necessary to deliver Algebra 1 & 2 curriculum to the benefit of her students and as expected by the Providence Public School District." (Resp't's Ex. E.) Mr. Lauro also cited Ms. Zabala for being "extremely difficult to understand when speaking and as a result is incoherent." *Id.* Following Mr. Lauro's evaluation of Ms. Zabala for the 2006-2007 school

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[3] It is not clear why Ms. Zabala was switched from an LEP position to a non-LEP position.

[4] There are four transcripts in this matter. They are dated: May, 16, 2013 (Tr. I); May 17, 2013 (Tr. II); August 28, 2013 (Tr. III); and August 29, 2013 (Tr. IV).

[5] Providence uses a Non-Evaluation Year Intervention as a tool "to improve the teacher's performance." *See* Resp't's Ex. A at 23.

year, Ms. Zabala was transferred to the DelSesto Middle School to afford her a second opportunity at an evaluation. (Tr. II at 69.) Shortly thereafter, the DelSesto Middle School closed at the conclusion of the 2006-2007 school year.

Immediately following the closure of the DelSesto Middle School, Ms. Zabala was placed at the newly created Jorge Alvarez High School for the 2007-2008 school year. Shortly after arriving at the newly created Jorge Alvarez High School, her supervisor, Principal Wobberson Torchon, had concerns regarding Ms. Zabala's delivery of instruction. Throughout the school year, Mr. Torchon provided Ms. Zabala with support and offered suggestions on how to modify her instruction. (Tr. III at 39.) On April 7, 2008, Mr. Torchon evaluated Ms. Zabala's employment performance and praised her hard work, planning, knowledge of her students, discipline, and good understanding of how to construct a lesson designed to reach all students, but noted his "main concern" that she develop her knowledge of the English language "especially [her] ability to utter speech that could be easily understood by [her] students." (Complainant's Ex. 6 at 3.) Accordingly, Mr. Torchon "encourage[d] [Ms. Zabala] to continue to take classes in English designed to enhance [her] *pronunciations and conversational ability.*" *Id.* at 2 (emphasis in original).

At the beginning of the 2009-2010 school year, Mr. Torchon received several complaints from students and parents regarding Ms. Zabala's delivery of instruction. As an instructional leader, Mr. Torchon found that during his usual visits to classes, students and parents would approach him to speak to him "because they were having difficulty with the content of the course that [Ms. Zabala] was teaching and they asked [him] to help." (Tr. III at 18.) As a result of these conversations, Mr. Torchon found that "[a]lot of her students were saying that they could not

understand the instruction[.]" *Id.* After receiving these complaints, Mr. Torchon made more frequent visits to observe Ms. Zabala's classroom.

On November 2, 2009, Mr. Torchon met with Ms. Zabala and a union representative to discuss his observations of her class. In a letter dated November 2, 2009, Mr. Torchon expressed that he had spoken with Ms. Zabala and that he had visited her classroom to observe her several times. Specifically, Mr. Torchon explained to Ms. Zabala that he "had a very difficult time . . . understanding what you were saying to the students Even with a secondary math degree and having taught Math for ten years, there were times in your class that I could not figure out what you were teaching." (Resp't's Ex. F; Tr. II at 99-100; Tr. III at 20.) Mr. Torchon further informed Ms. Zabala that "[y]our inability to verbally communicate in English to your students keeps them from unlocking the mathematics that is essential for their success." (Resp't's Ex. F.) Several weeks later, on November 23, 2009, Mr. Torchon sent another letter expressing praise that Ms. Zabala had taken some concrete steps from his previous classroom observation, but at the same time expressed concern regarding Ms. Zabala's minimal progress and advised her that "[f]ailure to make the necessary adjustments will result in further disciplinary action." (Resp't's Ex. G at 2.)

Subsequent to the two November evaluations, Ms. Zabala was absent from school for approximately three (3) months for health reasons. Shortly after Ms. Zabala's return, Mr. Torchon wrote to Nkoli Onye (Ms. Onye), the Executive Director of High Schools, on March 5, 2010 to express his continued observation of "poor instruction" from Ms. Zabala "due to her inability to communicate clearly and effectively to her students." (Resp't's Ex. N.) Mr. Torchon

then requested a meeting with Ms. Zabala and her union representative to recommend a Non-Evaluation Year Intervention.[3]

Following Mr. Torchon's request, Mr. Torchon, accompanied by Ms. Onye, Paul Vorro (Mr. Vorro) (a union representative), and Dennis Sidoti (Mr. Sidoti) (an Employee Relations Administrator), met with Ms. Zabala to take up Mr. Torchon's concerns over Ms. Zabala's ability to effectively communicate instruction in English. This meeting resulted in Ms. Onye deciding to conduct a Non-Evaluation Year Intervention of Ms. Zabala. (Tr. II at 156.)

Ms. Onye's evaluation of Ms. Zabala took place on April 8, 2010, and it was followed by a post-conference evaluation on April 16, 2010. On April 19, 2010, Ms. Onye sent a final draft of her evaluation to Dr. Tomás Ramirez (Dr. Ramirez) (Assistant Superintendent for Human Resources). In correspondence accompanying the evaluation, Ms. Onye explained that she "d[id] not feel that Ms. Zabala should be allowed to remain in our schools as students will be largely unable to meet math (and math literacy) requirements for graduation and college readiness, and/or pass state and local assessments." (Resp't's Ex. O at 1.) Among Ms. Onye's observations informing her recommendation to Dr. Ramirez were the following:

> "Although Ms. Zabala appears to understand her subject matter, she does not communicate intelligibly. There is no evidence of her ability to engage her students to think critically, analyze and assess important concepts in and between mathematics and other related subjects (Dimension 2). Ms. Zabala has attended professional development, however, there is little evidence of a transfer of knowledge and skills designed to improve instruction. Thus she is unable to engage students in the mathematical dialogue necessary for them to understand the mathematical concepts, connections, goals, and objectives (Dimension 5).

[3] Mr. Torchon only recalled recommending a Non-Evaluation Year Intervention for one other teacher (an English teacher) during the "[n]ine years going on ten years" that he had been a principal. (Tr. III at 32.) Ms. Zabala testified that during the 2010-2011 school year, Mr. Torchon recommended a Non-Evaluation Year Intervention for Ms. Garcia, who was another female Hispanic teacher. (Tr. II at 237.)

> "Ms. Zabala lacks the skills necessary to provide the instruction required to prepare students to learn the curriculum and to be prepared for the next course in the sequence as well as local and state assessments and policies." (Resp't's Ex. O at 4.)[4]

On May 28, 2010, Ms. Zabala requested a full year sabbatical leave of absence to attend Providence College and Johnson & Wales University in order "to improve [her] English skills and expand [her] knowledge in Mathematics." (Resp't's Ex. H.) The courses Ms. Zabala desired to enroll in included the following: English Composition, English Communication Skills, Introduction to Literacy Genres, Advanced Composition and Communication, Number Theory, Graphing, Calculators in the Classroom, Foundations of Mathematics and Numerical Analysis. *Id.* and Decision at 6. Ms. Zabala's sabbatical request was denied. In a letter dated June 22, 2010, Dr. Ramirez, citing Art. 5-4 of the CBA, informed Ms. Zabala that "the Superintendent was unable to approve [her] program of study" because "several classes listed in [her] sabbatical request [fell] outside [her] content area." (Resp't's Ex. I.) Ms. Zabala was also informed of her right to request an unpaid leave for her intended purposes. *Id.* Dr. Ramirez pointed out that teachers are expected, as a matter of teaching qualifications, to be fluent in English and that paid sabbatical leave is not available for someone to learn to effectively communicate in English. (Tr. IV at 28-29.)

Before the commencement of the 2010-2011 school year, a meeting was held to discuss Ms. Zabala's leave request. At this meeting were Ms. Zabala, her daughter, Dr. Ramirez, Mr. Sidoti, and Mr. Vorro. An agreement was reached that, in order to avoid termination proceedings, Ms. Zabala would take an unpaid leave of absence for the 2010-2011 school year

[4] Ms. Zabala grieved the negative evaluation, and an arbitrator in 2012 voided the evaluation on procedural grounds which, in the opinion of this Court, are not pertinent to the issues raised by this appeal.

during which she would be required to complete a course in English fluency. This agreement was memorialized in a letter from Dr. Ramirez dated October 21, 2010. (Resp't's Ex. U.) The agreement also assured Ms. Zabala that her benefits would continue until November 1, 2010 and at that time, Ms. Zabala would be eligible for COBRA benefits.[5] *Id.*

During her leave, Ms. Zabala took various English courses. At the beginning of the 2011-2012 school year, upon her return, she took an English fluency test which she did not pass. Nevertheless, Ms. Zabala was reinstated by Providence to a position at Hope High School, apparently as a result of some type of litigation settlement. (Tr. IV at 80.)

B

Proceedings before the Commission

On August 29, 2011, Ms. Zabala filed a charge with the Commission against the Providence School Department, Mr. Torchon, Dr. Ramirez, Ms. Onye, and Richard Kerbel.[6] Following an initial finding of probable cause, a complaint and notice of hearing was issued on November 20, 2012. The Complaint alleged discrimination because of Ms. Zabala's ancestral origin in violation of FEPA. On May 16 and 17, 2013, and August 28 and 29, 2013, Commissioner Camille Vella-Wilkinson conducted hearings on the matter.

On October 1, 2014, the Commission issued a Decision and Order which found that Mr. Torchon and Providence had engaged in intentional discrimination in violation of § 28-5-7 of FEPA. It ordered that (1) Providence and Mr. Torchon cease and desist from all unlawful employment practices; (2) Providence post the Commission anti-discrimination poster prominently in all of its facilities; (3) Mr. Torchon be trained with respect to state and federal

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[5] Ms. Zabala's health benefits for the 2010-2011 school year were later reinstated on hardship grounds. (Tr. II at 27.)

[6] Richard Kerbel, during the pertinent time period, was the Finance Director of the City of Providence.

anti-discrimination laws within six months of the date of this Order and that the Commission be provided within one month of the training a certification that Mr. Torchon was trained, the date of the training, the name of the trainer and a copy of the syllabus of the training; and (4) the Commission reserved decision on an "appropriate award of damages."

With respect to the instances of discrimination at issue on appeal, the Commission found that Ms. Zabala proved by a preponderance of the evidence that Providence and Mr. Torchon discriminated against her because of her ancestral origin. At the first stage of its analysis, the Commission found Ms. Zabala to be a member of a protected class and qualified for the position in which she was working. Additionally, the Commission found that Ms. Zabala suffered an adverse employment action when Providence denied her a paid sabbatical leave request, and when Mr. Torchon made adverse observations of Zabala which led to an unfavorable evaluation and a recommendation of termination. (Decision 10.) Furthermore, according to the Commission's Decision, the circumstances allowed for an inference of ancestral origin discrimination based on evidence that a "similarly-situated non-Hispanic employee . . . was allowed a paid sabbatical" to study Spanish. (Decision 10.)[8] The Commission inferred discriminatory intent in Mr. Torchon's treatment of Ms. Zabala based on what it saw as "evidence that [he] was motivated by her accent, which can constitute ancestral origin discrimination." *Id*

At the second stage of the analysis, the Commission found that Providence and Mr. Torchon met their burden of proffering legitimate, non-discriminatory reasons for their actions. *Id.* Providence satisfied its burden by producing evidence that the Superintendent denied Ms. Zabala's paid sabbatical leave because some of the courses Ms. Zabala proposed to take were not

[8] *See* Decision 7-8 (observing that a non-Hispanic guidance counselor was granted a paid sabbatical to study Spanish at the University of Buenos Aires).

in her content or subject area. The Commission also found that Mr. Torchon produced evidence that his recommendation for a Non-Evaluation Year Intervention was motivated by concerns of students' learning being impeded by Ms. Zabala's inability to effectively communicate and deliver classroom instruction.

The Commission found discriminatory animus in Providence's decision to deny Ms. Zabala's sabbatical because the (1) CBA did not specifically require that the proposed program of studies be in the teacher's subject area, and (2) evidence that a non-Hispanic guidance counselor was granted a sabbatical to study Spanish at the University of Buenos Aires. *Id.* at 11. As to Mr. Torchon, the Commission concluded that his negative assessment of Ms. Zabala's teaching performance was a "pretext to disguise his discriminatory motivation." *Id.* at 12. In so concluding, the Commission cited Ms. Zabala's tenure as a teacher and testimony from Roberto Pena (Mr. Pena), who was a teacher and colleague of Ms. Zabala, and from two students (Joshua Francis and Dulce Palma), each of whom attested to Ms. Zabala's competence as a teacher. The Commission also credited Ms. Zabala's testimony that Mr. Torchon wasn't as friendly to her as he was with non-Hispanic teachers, and that Mr. Torchon recommended a Non-Evaluation Year Intervention for another teacher, an Hispanic woman named Ms. Garcia. *Id.*

However, the Commission found Ms. Zabala did not prove that Ms. Onye or Dr. Ramirez discriminated against her on the basis of her ancestral origin. *Id.* at 13. With respect to Ms. Onye, Ms. Zabala did not convince the Commission that Ms. Onye was motivated by ancestral origin discrimination when she ordered Ms. Zabala's interim evaluation, provided a negative evaluation, and recommended her termination.[9]

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[9] The Commission cited Ms. Onye's testimony that her "parents studied English when they came to the United States. *See* Decision 13 n.7. *See also* Tr. I at 98.

With respect to Dr. Ramirez, the Commission did not find that he was motivated by discrimination. The Commission found that Dr. Ramirez was acting as a representative of the Superintendent in dealing with Ms. Zabala's leave of absence. *Id.* at 13. The Commission also noted that "Dr. Ramirez is Hispanic." *Id.* at 14.

The Appellants filed the instant appeal with this Court. They contend that Ms. Zabala was not subjected to adverse employment actions. They further argue that assuming, *arguendo,* that the negative evaluations of Ms. Zabala and the denial of her request for sabbatical leave request actually did constitute adverse employment actions, the Commission's Decision is erroneous because Ms. Zabala did not meet her burden of establishing that discrimination on the part of the Appellants was a motivating factor for those actions.

II

Standard of Review

The Superior Court's appellate review of a final administrative decision is governed by § 42-35-15; *Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I.*, 943 A.2d 1045, 1048 (R.I. 2008) (citing *Rossi v. Emps.' Ret. Sys. of R.I.*, 895 A.2d 106, 109 (R.I. 2006)). Section 42-35-15(g) delineates the applicable standard of review for administrative appeals to this Court:

> "(g) 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:
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> "(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 essence, if 'competent evidence exists in the record [to support the agency's conclusion], the Superior Court is required to uphold the agency's conclusions.'" *Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd.*, 650 A.2d 479, 485 (R.I. 1994)). In reviewing the record, this Court "shall not substitute [its own] judgment for that of the agency as to the weight of the evidence on questions of fact." *Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I.*, 824 A.2d 1282, 1286 (R.I. 2003).

However, when considering questions of law, the Court is not bound by the agency's decision, but instead may review the decision "to determine the relevant law and its applicability to the facts presented in the record." *State Dep't of Envtl. Mgmt. v. State Labor Relations Bd.*, 799 A.2d 274, 277 (R.I. 2002). Therefore, the Superior Court's review of "questions of law—including statutory interpretation—[is] . . . *de novo*." *Iselin*, 943 A.2d at 1049.

III

Applicable Law

The FEPA prohibits discrimination against the terms and conditions of employment based on, *inter alia*, ancestral origin. Section 28-5-7(1)(i-ii) provides in pertinent part:

> "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 . . . 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 . . . ." *Id.*

This statute is Rhode Island's equivalent to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.A. §§ 2000e, *et seq.* (2000). The Rhode Island Supreme Court has applied the analytical framework of Title VII actions to those cases arising under FEPA. *See Bucci v. Hurd Buick Pontiac GMC Truck, LLC*, 85 A.3d 1160, 1169 (R.I. 2014) ("'This Court has adopted the federal legal framework to provide structure to our state employment discrimination statutes.'") (Quoting *Neri v. Ross–Simons, Inc.*, 897 A.2d 42, 48 (R.I. 2006)).

As Ms. Zabala's grievance is one of employment discrimination, this Court will employ the three-part burden-shifting framework set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See Bucci*, 85 A.3d at 1169 (employing "the now familiar three-part burden shifting framework as outlined by the United States Supreme Court in *McDonnell–Douglas Corp.*, 411 U.S. at 802–04, 93 S. Ct. 1817"). The reason for applying the *McDonnell-Douglas* framework is to "'sharpen the inquiry into the elusive factual question' of the employer's motivation." *Hicks v. Johnson*, 755 F.3d 738, 744 (1st Cir. 2014) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981)).

The first prong of the *McDonnell-Douglas* framework puts the initial burden on the employee to establish a *prima facie case* of discrimination. *See Burdine*, 450 U.S. at 252-53 ("First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination.") (Citing *McDonnell Douglas Corp.*, 411 U.S. at 802). Once the employee establishes a prima facie case of discrimination, the employer is presumed to have unlawfully discriminated against the employee. *See Burdine*, 450 U.S. at 254. Thus, if Ms. Zabala succeeds in establishing her *prima facie* case, "[t]he burden of production, but not the burden of persuasion, then shifts to the defendant to offer a nondiscriminatory reason" for its employment decision. *McGarry v. Pielech*, 47 A.3d 271, 280 (R.I. 2012). An "employer 'need

only produce enough competent evidence, taken as true, to enable a rational factfinder to conclude that there existed a nondiscriminatory reason for the challenged employment action."' *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 6 (1st Cir. 2000); *see also Bucci*, 85 A.3d at 1171 (stating "a defendant need only offer affidavits supporting the nondiscriminatory reason").

If the defendant meets its burden of production, any presumption of discrimination disappears. *McGarry*, 47 A.3d at 281; *see also Rathbun v. Autozone, Inc.*, 361 F.3d 62, 71 (1st Cir. 2004) ("[s]o long as the employer proffers such a reason, the inference raised by plaintiff's prima facie case vanishes"). At this juncture, "[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 discrimination was the true motive underlying the . . . decision." *McGarry*, 47 A.3d at 281.

The finder of fact must find that the employer's actions were motivated by discrimination. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 519 (1993) ("It is not enough . . . to disbelieve the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") (Emphasis in original). Accordingly, the "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" but does not compel such a finding. *Id.* at 511 (emphasis in original). "The core inquiry in such disparate treatment cases is whether the defendant intentionally discriminated against the plaintiff because of her [ancestral origin]." *Rathbun*, 361 F.3d at 71. Importantly, at all times "plaintiff bears the ultimate burden of proof on the issue of discrimination." *Casey v. Town of Portsmouth*, 861 A.2d 1032, 1036 (R.I. 2004); *see also McGarry*, 47 A.3d at 281 (this third prong "constitutes the crux of proving a discrimination case"). "To satisfy this third prong,

a plaintiff must do more than simply cast doubt upon the employer's justification." *Yangambi v. Providence School Bd.*, 162 A.3d 1205 (R.I. 2017) (quoting *Resare v. Raytheon Co.*, 981 F.2d 32, 42 (1st Cir. 1992)).

A

Ms. Zabala's Prima Facie Case

A *prima facie* case based upon disparate treatment consists of four elements: "(1) the plaintiff must be a member of a protected class; (2) she must be qualified for her job; (3) she must suffer an adverse employment action at the hands of her employer; and (4) there must be some evidence of a causal connection between her membership in a protected class and the adverse employment action . . ." *Bhatti v. Trustees of Boston Univ.*, 659 F.3d 64, 70 (1st Cir. 2011). The burden of establishing a *prima facie* case "is not especially onerous." *Casey*, 861 A.2d at 1037; *see also Kosereis v. Rhode Island*, 331 F.3d 207, 213 (1st Cir. 2003) (describing "the prima facie case as a small showing, that is not onerous, and is easily made") (internal citations and quotations omitted); *Bucci*, 85 A.3d at 1171 ("We consistently have agreed with the United States Supreme Court that a plaintiff's burden to establish a prima facie case of discrimination is not especially onerous.") (Internal quotations omitted). Thus, the threshold necessary to establish a prima facie case is "relatively low." *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 155-56 (1st Cir. 1998).

It has been held that "[i]n a Title VII disparate-treatment suit where . . . an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not-*and should not*-decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). The court in *Brady* explained that "by the time the district court considers an employer's motion for

summary judgment or judgment as a matter of law, the employer ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision-for example, through a declaration, deposition, or other testimony from the employer's decisionmaker." *Id.* at 493. In that case, "whether the employee actually made out a prima facie case is 'no longer relevant' and thus, 'disappear[s]' and 'drops out of the picture.'" *Id.* (quoting *Hicks*, 509 U.S. at 510 and 511). As a result, the inquiry should move to whether the employer '"intentionally discriminated against"' the employee. *Brady,* 520 F.3d at 494 (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)).

In the instant matter, there was a full hearing on the merits before the Commission. The Appellants asserted legitimate, nondiscriminatory reasons for taking the alleged adverse employment actions against Ms. Zabala; namely, that her continued failure to competently communicate in English to her students materially interfered with her ability to teach mathematics and that her requested sabbatical fell outside her content area. *See Fragante v. City & Cty. of Honolulu*, 888 F.2d 591, 596–97 (9th Cir. 1989) ("There is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance."). Thereafter, the Commission found that Ms. Zabala had set forth her *prima facie* case. Thus, the focus of the Court's inquiry becomes the sufficiency of the evidence to support Ms. Zabala's claim of intentional discrimination, not whether she proved her *prima facie* case. This Court will consider any comparative evidence "as part of the pretext analysis, and not as part of the plaintiff's prima facie case." *Kosereis*, 331 F.3d at 213 (citing *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 19 (1st Cir. 1999)).

B

Pretext

As previously stated, Appellants asserted legitimate nondiscriminatory reasons for their adverse employment actions. Accordingly, the third and final prong of the *McDonnell-Douglas* framework "shifts the burden back to [Ms. Zabala] to focus on 'the ultimate question of discrimination *vel non*.'" *Bucci*, 85 A.3d at 1173 (quoting *Neri*, 897 A.2d at 50). Under this prong, Ms. Zabala must prove that the real reason for Appellants' action was due to Appellants' unlawful animus toward Ms. Zabala. *See Bucci*, 85 A.3d at 1173 ("To prove discrimination, a plaintiff need not provide a 'smoking gun,' but rather must prove that '[the] defendants' legitimate, nondiscriminatory reason for . . . [its decision] was merely pretext (which would mean that the real reason . . . was unlawful animus).'" (quoting *Casey*, 861 A.2d at 1038). In other words, Ms. Zabala must prove that the alleged legitimate nondiscriminatory reasons offered by Appellants were "merely pretext" for discrimination. *Casey*, 861 A.2d at 1038 (citing *Ctr. For Behavioral Health, R.I., Inc. v. Barros*, 710 A.2d 680, 685 (R.I. 1998)).

There are two distinct approaches in establishing 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.'" *Bucci*, 85 A.3d at 1173 (quoting *Barros*, 710 A.2d at 685). Regardless of which method a plaintiff chooses to establish pretext, he or she is required to demonstrate "that discrimination was the real reason" for the employer's actions. *Id.* (quoting *McGarry*, 47 A.3d at 281). In situations where the employer's actions are surrounded by a "suspicion of mendacity," then the inference of discrimination is strengthened. *Barros*, 710 A.2d at 685.

Ms. Zabala's primary argument—that the legitimate nondiscriminatory reasons proffered by Appellants for the adverse employment actions were merely pretext for discriminating against her—is that Appellants treated non-Hispanic comparators more favorably than she. *See García v. Bristol-Myers Squibb Co.*, 535 F.3d 23, 31 (1st Cir. 2008) (recognizing that "[a] plaintiff can demonstrate that an employer's stated reasons are pretextual . . . by producing evidence that [the] plaintiff was treated differently from similarly situated employees"). For Ms. Zabala to establish pretext in such a manner, she must be similarly situated to the comparators "'in all relevant respects.'" *Lockridge v. The Univ. of Maine Sys.*, 597 F.3d 464, 471 (1st Cir. 2010) (quoting *Kosereis*, 331 F.3d at 214); *see also Conward*, 171 F.3d at 20 (observing that comparison cases "must closely resemble one another in respect to relevant facts and circumstances").

1

Mr. Torchon

Ms. Zabala and the Commission assert that Mr. Torchon's negative evaluations and arranging her Non-Evaluation Year Intervention were adverse employment actions motivated, at least in part, by her ancestral origin.[6] According to the Commission, those actions led to Ms. Zabala's subsequent woes: Ms. Onye's negative evaluation and recommendation that she be terminated; denial of Ms. Zabala's request for a paid sabbatical; her leave of absence without pay; and ultimately, her move from Alvarez High School to Hope High School.[7] However,

[6] *See Russo v. State, Dep't of Mental Health, Retardation & Hosps.*, 87 A.3d 399, 409-10 (R.I. 2014) (stating "when an employee was required to undergo [an evaluation] which was designed to assess [his or] her fitness for duty, that requirement was not an adverse employment action but rather it was 'designed to gather facts to form the basis for an employment decision'") (quoting *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir.1998)).
[7] The connection between Mr. Torchon's negative evaluation of Ms. Zabala and the denial of her request for sabbatical and subsequent personal issues is tenuous at best; however, it is

Appellants contend that even if Mr. Torchon's observations and evaluations of Ms. Zabala constituted adverse employment actions, she has not met her burden of establishing that discrimination was a motivating factor in the observations or evaluations. In response, Ms. Zabala alleges that Mr. Torchon's adverse observations of Ms. Zabala were motivated by her accent, which she contends is a form of ancestral origin discrimination.

It is well-settled that "[a]n adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance." *Fragante*, 888 F.2d at 596; *see also Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (stating Hispanic employee was denied a promotion to the front desk because of her "inability . . . to articulate clearly or coherently and to make herself adequately understood in the English language"). *Cf. Carino v. Univ. of Oklahoma Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (finding plaintiff with a "noticeable" Filipino accent was improperly denied a position as supervisor of a dental laboratory where his accent did not interfere with his ability to perform supervisory tasks).

The case of *Thelusma v. N.Y.C. Bd. of Educ.,* No. 02–CV–4446, 2006 WL 2620396 (E.D.N.Y. Sept. 13, 2006) is instructive. There, the principal and vice principal of a school conducted a classroom observation of a provisional mathematics teacher. *Thelusma,* at *1. In a subsequent written evaluation and recommendation, "they commented about a number of positive features of the lesson, but also raised some critical concerns, including [the teacher's] use of language and his inability to effectively communicate with his students." *Id.* Accordingly, they "recommended that [he] 'improve [his] English skills and his pronunciation."' *Id.* The teacher filed a discrimination complaint based upon national origin with the New York

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unnecessary to address this issue in light of the Court's determination of the ultimate issue of discrimination *vel non.*

City Public School's Office of Equal Opportunity, alleging that the principal had suggested that he take "accent reduction classes." *Id.* The teacher subsequently was terminated from his position after several more evaluations noted his communication problems. *Id.* In granting defendants' Motion for Summary Judgment, the United States District Court for the Eastern District of New York noted that there was "simply nothing in the . . . evaluation . . . that contains any racially discriminatory comments about [the teacher's] accent." *Id.* at *3.

The court then stated that

> "[t]o hold otherwise would mean that any comment by an evaluator about a minority teacher's difficulty in communicating with students could expose the evaluator to a retaliation claim should that teacher thereafter be the subject of an adverse employment action. *See Manessis v. New York City Dep't of Transp.*, No. 02 Civ. 359, 2003 WL 289969, at *8 (S.D.N.Y. Feb. 10, 2003) (citing *Watt v. New York Botanical Garden*, No. 98 Civ. 1095, 2000 WL 193626, at *7 (S.D.N.Y. Feb. 16, 2000) ("it would be an inferential leap to infer that a comment about an employee's accent suggests an underlying bias against persons of that national origin.")). The Court will not place such a chill on a supervisor's responsibility to render an honest evaluation of a teacher's classroom performance." *Id.*

The court further stated that even if the principal had "recommended that [the teacher] take 'accent reduction classes,' such advice would be consistent with a beneficent design to afford him the opportunity to improve his communication skills, an absolute prerequisite for adequate job performance by a teacher, rather than evidence of discriminatory intent." *Id.* In so ruling, the court observed that although a prior evaluator "did not discern a communication problem during a previous evaluation[,]" such a situation "cannot suffice to transform the subject evaluation into one evidencing racial animus." *Id.*

In the instant matter, the record reveals that Mr. Torchon conducted observations of Ms. Zabala after students and parents expressed concerns about Ms. Zabala's ability to effectively

communicate. These concerns were that "some students who came up to [him] and talked to [him] and some parents because they were having difficulty with the content of the course that [Ms. Zabala] was teaching and they asked [him] to help." (Tr. III at 18.) Specifically, "[a] lot of [Ms. Zabala's] students were saying that they could not understand the instruction," so Mr. Torchon decided to visit her classroom to determine whether there was any "validity to their claims." *Id.*

After visiting Ms. Zabala's classroom, Mr. Torchon issued an evaluation on April 7, 2008, in which he stated:

> "**Command of the English Language:** It is not easy for students to get involved in discussions around conceptual understanding in mathematics unless their teacher guides them through. Although your lesson was designed to elicit such engagement, your lack of mastery of the English language created some confusion. I could see the frustration in your eyes and that of your students as you struggled to find the correct terminology and at times the proper pronunciation to convey difficult concepts. You tried to use synonyms and other equivalent expressions and again the language issue kept surfacing. I would encourage you to continue to take classes in English designed to enhance your *pronunciations* and *conversational ability.*
>
> . . .
>
> "You are a very hardworking teacher. You have taken your time to see how you can best service your students. I was very pleased at the pre-observation conference to see how you cared and wanted to design the best lesson possible. Additionally, you have developed many physical models to allow your 'concrete operational' and kinesthetic students the opportunity to develop the understanding necessary to access abstract mathematics. My main concern is that you continue to work harder at developing your knowledge of the English language and especially your ability to utter speech that could be easily understood by your students." (Complainant's Ex. 6 at 2 and 3) (Emphases in original).

Well over one year later, on November 2, 2009, Mr. Torchon sent a letter to Ms. Zabala expressing his concerns about her inability to effectively communicate to her students. (Resp't's

Ex. F.) Mr. Torchon informed Ms. Zabala that "[o]ver the past month, I have shared with you informally that your students were struggling with the fact that they could not understand your instruction. I suggested that you speak slowly, enunciate better and constantly check for students [sic] understanding." *Id.* Mr. Torchon then stated that he had visited Ms. Zabala's classroom several times since their conversation during which he "had a very difficult time [him]self understanding what you were saying to the students." *Id.* Although Mr. Torchon previously had taught mathematics for approximately ten years, "there were times in [Ms. Zabala's] class that [he] could not figure out what [she] w[as] teaching." *Id.* Furthermore, he asked students "about what they were learning. Very often they would look at [him] with confused eyes and responded that they had no clue." *Id.*

Based upon his observations, Mr. Torchon directed Ms. Zabala to

- "Provide clear directions at the start of your class about the learning objectives.
- "Model for the whole class what to do to meet the instructional objectives.
- "Check for students [sic] understanding before you allow them to practice independently.
- "Give students examples to practice in small groups and individually while you monitor their progress.
- "Ask students relevant and insightful questions to advance their reasoning ability instead of doing the work for them." *Id.*

Two weeks later, on November 23, 2009, Mr. Torchon returned to Ms. Zabala's classroom to ascertain how effectively she was implementing the directives that he previously had given to her. (Resp't's Ex. G.) Essentially, Mr. Torchon found that Ms. Zabala: (a) failed to adequately explain the objectives of the lesson in clear and simple terms; (b) did not make sure that students understood her explanations; (c) seemed to blame students for lack of focus when they complained that they did not understand her; (d) did not ask quality questions of her

students such that they could develop their reasoning ability; and (e) when some students did not understand the question, she solved the problem herself. *Id.* at 1-2.[8] Mr. Torchon then concluded:

> "the progress that I have observed after two weeks from these directives is so minimal that it can not (sic) positively impact the learning of your students. I am recommending that you look at the directives one more time and make some serious efforts in implementing them to a greater degree. Therefore I will give you a few more days, after which I will conduct another whole class observation. Failure to make the necessary adjustments will result in further disciplinary action." *Id.* at 2.[9]

Over three months later, on March 5, 2010, Mr. Torchon informed Ms. Onye that he "continued to observe poor instruction from Miss Zabala due to her inability to communicate clearly and effectively to her students." (Resp't's Ex. N.) He stated that in trying to explain how to evaluate a cubic function and then graph it, "[s]he struggled so much to find words to construct understandable sentences that she decided to take the pencil from two students and do the problem herself." *Id.* Mr. Torchon declared that he "barely understood" Ms. Zabala's explanation "and continue[s] to wonder how our students will learn the mathematics that is so critical to their success in school and real life." *Id.* Mr. Torchon then indicated that he wanted to

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[8] Mr. Torchon gave examples of questions that Complainant had asked of her students:

> "'How much is X? How much is Y? How much this point?' Now, this last question was in reference to the coordinates of the point. It would have been more appropriate to ask the students for the coordinate of the point rather than 'how much this point?' When some students did not get the question, [Ms. Zabala] assumed that they did not get the math . . . [She] need[s] to realize that the quality of [her] questions have a lot to do with developing the reasoning ability of our students." (Resp't's Ex. G at 2.)

[9] It is unclear as to what Mr. Torchon meant by "*further* disciplinary action[,]" as there is nothing in the record to indicate that Complainant previously had been disciplined. *Id.* (Emphasis added).

meet with Ms. Onye, Ms. Zabala, and Ms. Zabala's union representative in order to recommend a Non-Evaluation Year Intervention. *Id.*

It is clear from the foregoing that none of the evaluations or communications from Mr. Torchon contained any racially discriminatory comments about Ms. Zabala's accent or national origin. *See Thelusma,* 2006 WL 2620396, at *3 (granting summary judgment in favor of defendants because there was "simply nothing in the . . . evaluation . . . that contain[ed] any racially discriminatory comments about [the teacher's] accent"). The record reveals that Mr. Torchon received complaints from parents and students about Ms. Zabala's ability to communicate. As principal of the school, he was under an obligation to investigate the validity of said complaints; indeed, it would have been a dereliction of duty had he not so investigated.

According to Mr. Torchon, his investigation revealed legitimate concerns about Ms. Zabala's use of language and lack of ability to communicate effectively with her students. *See id.* Accordingly, it was appropriate for Mr. Torchon to recommend a Non-Evaluation Year Intervention. *See* ARBITRATOR'S OPINION AND AWARD (Resp't's Ex. Q at 9) (stating "there is no dispute that Mr. Torchon satisfied all the prerequisites in the handbook for conducting such an evaluation").[10]

In its Decision, the Commission concluded that Mr. Torchon's negative assessment of Ms. Zabala's teaching performance was a "pretext to disguise his discriminatory motivation." (Decision 12.) In support of its conclusion, the Commission pointed to testimony that the only other time Mr. Torchon recommended a Non-Evaluation Year Intervention was for another Hispanic woman. However, since there is a complete absence of evidence as to the

[10] Ms. Zabala appealed Ms. Onye's evaluation to the Arbitration Tribunal. The Arbitrator declared the evaluation to be null and void for what essentially amounted to technical reasons. *See* Resp't's Ex. Q at 9-10; Decision 6.

circumstances surrounding the other request for intervention, that evidence cannot rationally be relied upon to further the proposition that it was discrimination that motivated the request for intervention in either case.

The Commission also cited Ms. Zabala's claim that Mr. Torchon was not as friendly to Ms. Zabala as he was with non-Hispanic teachers, the Commission properly recognized that "[t]his is certainly not discrimination in itself[;]" however, it nevertheless concluded that "it is one more indication that Respondent Torchon did not treat Complainant as he treated non-Hispanic teachers." (Decision 12 n.6.) However, even if Mr. Torchon was not as friendly to Ms. Zabala as he was to non-Hispanic teachers, there is nothing in the record to suggest that he had a pattern of unfriendliness to other Hispanic teachers, or that his purported lack of friendliness to Ms. Zabala was motivated by discriminatory animus. *See Casey*, 861 A.2d at 1036 ("plaintiff bears the ultimate burden of proof on the issue of discrimination").

The Commission also found it "noteworthy that Respondent Torchon did not allow [Ms. Zabala] time to improve" between the two observations conducted in November 2009. (Decision 12.) However, this conclusion ignores the fact that on April 7, 2008, Mr. Torchon had expressed his concern to Ms. Zabala about her "ability to utter speech that could be easily understood by [her] students[,] and that he wanted her to "continue to work harder at developing [her] knowledge of the English language[.]" (Complainant's Ex. 6 at 3.) Thus, the record demonstrates that Ms. Zabala was on notice of Mr. Torchon's concern about her ability to communicate for almost nineteen months prior to the November 2, 2009 evaluation. Indeed, Mr. Torchon's April 7, 2008 evaluation was not the first time Ms. Zabala was on notice over concerns about her communication skills. Furthermore, in September of 2006, Central High School Principal Almagno initiated a Non-Evaluation Year Intervention after expressing

concerns about Ms. Zabala's ability to communicate effectively. The resulting October 16, 2006 evaluation found that Ms. Zabala "[i]s extremely difficult to understand when speaking and as a result is incoherent[,]" and that she "[l]acks communication skills and organizational skills." (Resp't's Ex. E at 2.) The same evaluation stated that Ms. Zabala had "numerous complaints from students and parents." *Id.* On very same day that Ms. Zabala received this evaluation, she was transferred to DelSesto Middle School. (Tr. II at 69.) The Court finds that Ms. Zabala was aware of concerns about her ability to communicate effectively as far back as October of 2006, and thus, does not place much weight on the Commission's conclusion that the length of time between the two November observations was "noteworthy[.]" (Decision 12.)

The Commission also found credible the testimony from a fellow teacher, Mr. Pena, and two former students, Mr. Francis and Ms. Palma. *Id.* It found that they each had testified that Ms. Zabala "had competent teaching skills."

Ms. Palma testified that Ms. Zabala conducted her class in English, but occasionally would speak in Spanish to individual students at her desk. (Tr. III at 147.) Ms. Palma also testified that before taking Ms. Zabala's class, she used "to hate math" but felt that Ms. Zabala was "the only teacher who took her time to teach [her] the subject." *Id.* at 146.

Mr. Francis, a non-Hispanic Student, testified that although Ms. Zabala had "a thick accent," she also wrote everything down on the board, so "[i]t was easy to understand." (Tr. II at 15.) He further testified that he worked at his math, but that other students in the class did not want to do the work, that "[t]hey were physically there but not mentally." *Id.* at 23. Mr. Francis stated that every so often he would look around the classroom and observe some of his fellow students "talking or texting or doing whatever, drawing in their books or whatever." *Id.* at 44.[11]

[11] Mr. Francis, who admitted that he was "not Mr. Torchon's biggest fan," also testified:

He stated that he believed Ms. Zabala to be an effective communicator, but he also acknowledged that she would speak Spanish to some of the students. *Id.* at 33. Thereafter, the following colloquy took place on cross examination:

> "Q. So just to be 100 percent clear, there were some students in the class who could not understand Miss Zabala's English, correct?
> "A. I believe so, yeah.
> "Q. So there were some students who had a problem understanding some of the teaching that she was doing because she couldn't effectively communicate in English, is that right?
> "A. I suppose, sure.
> "Q. It's fair to say that, is that correct?
> "A. It's fair to say, yes." *Id.* at 41-42.

The foregoing testimony from Mr. Francis indicates that students essentially ignored Ms. Zabala in class and that she could not communicate effectively in English.

Mr. Pena, who had worked on a team with Ms. Zabala, testified that she was "an efficient teacher" who knew her "subject matter." (Tr. I at 174.) He further testified that she was "a great teacher" who could "explain difficult concepts in simple words, in a simple way." *Id.* at 181, 182.

In its Decision, the Commission noted that Mr. Torchon had criticized Ms. Zabala's teaching skills, as well as her language usage, and stated that it "did not find his purported negative assessment of her teaching skills credible." (Decision 11.) This latter finding would

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> "The students in class, they would just talk to each other. I feel like after a while how long can you blame the teachers for what people don't want to do . . . Just some of the students just don't want to learn and I feel like – I'm not sure what approach somebody would take, but I don't feel like firing a teacher or taking a year off without pay or anything like that would be the right answer." (Tr. II at 16 and 18.)

appear to be contradicted by the testimony of Mr. Francis, who the Commission specifically found to be credible, when he stated that other students would talk, text, and doodle during class. However, even if effective discipline is not a teaching skill, effective communication is such a skill. *See Fragante,* 888 F.2d at 596 (stating adverse employment actions may be based upon an employee's accent where the accent "interferes materially with job performance").

The Commission "credit[ed] the testimony of witness Roberto Pena that he heard Respondent Torchon saying that Respondent Torchon wanted to get rid of [Ms. Zabala]." (Decision 12.)[12] However, even if Mr. Torchon expressed a desire to "get rid of" Ms. Zabala, as alleged, there is not a scintilla of evidence in the record to suggest that such desire was motivated by discriminatory animus. (Tr. I at 182-83 and 212.) Consequently, this conclusion is simply not supported by competent evidence.

There is nothing in the record in this case to indicate that Mr. Torchon expressed any racial animus toward Ms. Zabala. While he may have wanted her removed from the school, it is clear that this desire was based upon a legitimate non-discriminatory reason; namely, Ms. Zabala could not communicate effectively with her students. This difficulty has been in evidence since the Lauro evaluation of October 16, 2006. Indeed, Ms. Onye, who the Commission did not find to have discriminated against Ms. Zabala, stated in her evaluation that Ms. Zabala "does not communicate intelligibly . . . and lacks the skills necessary to prove the instruction required . . ." (Resp't's Ex. O at 4.) Consequently, the reliable, probative and substantial evidence does not support the Commission's finding that Mr. Torchon discriminated against Ms. Zabala based upon ancestral origin. Decision 12.

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[12] The Court observes that it is not inconceivable that Mr. Pena harbored a personal bias against Mr. Torchon because, at the hearing, he accused Mr. Torchon of conducting "a fake interview" of Mr. Pena for the position of teacher leader, and also for "talking bad" about Mr. Pena. (Tr. I at 177.)

2

Sabbatical Leave

The Appellants contend that the Commission erred in concluding that Providence denied Ms. Zabala's request for a paid sabbatical based, in part, on her ancestral origin. They maintain that there was a legitimate non-discriminatory reason for denying the request; namely, that the courses that Ms. Zabala proposed to take were outside her content area. In addition, they assert that the purpose of a sabbatical leave is to afford an employee the opportunity for study or independent research, not to allow the employee to undertake corrective or remedial coursework in order to meet minimum qualifications. Ms. Zabala counters that the denial of her request for sabbatical leave was based upon her ancestral origin. She contends that the legitimate reason proffered by Appellants was pretext, and that she demonstrated disparate treatment when she put forth evidence that a non-Hispanic employee was granted a sabbatical leave even though her request also fell outside her content area.

In order to meet his/her "burden of showing a prima facie case of discrimination in the denial of a paid sabbatical leave . . . plaintiff must show: that he [or she] belongs to a protected class; that he [or she] was qualified for the paid sabbatical leave; that the [school] denied his [or her] sabbatical application; and that the [school] awarded a sabbatical leave to a person with plaintiff's qualifications." *Roxas v. Presentation Coll.*, 885 F. Supp. 1323, 1328 (D.S.D. 1995), *aff'd*, 90 F.3d 310 (8th Cir. 1996) (citing *Richmond v. Bd. of Regents of Univ. of Minnesota*, 957 F.2d 595, 598 (8th Cir. 1992)). However, because Appellants proffered a legitimate, nondiscriminatory reason for the denial of Ms. Zabala's request for a sabbatical leave—that the courses were outside her content area—the Court need not determine whether she made out her *prima facie* case; instead, it will address whether this reason simply was a pretext for

discrimination. *See Brady*, 520 F.3d at 494. As this is a disparate treatment case, the Court will examine the comparators proffered by Ms. Zabala as evidence of pretext, while keeping in mind that in order to establish pretext through the use of comparators, said comparators "must closely resemble one another in respect to relevant facts and circumstances." *Conward*, 171 F.3d at 20.

Article 5-4 of the CBA governs the issue of sabbatical leave. It provides:

> "The Superintendent may grant a sabbatical leave of absence for study or independent research for one (1) year at half pay or for one-half year at half pay whenever school is in session to any regularly appointed teacher who has completed seven (7) consecutive years of service in the Providence School Department. The teacher shall have the option of selecting the period of leave. Approval of a request shall not be unreasonably withheld.
>
> . . .
>
> "FURTHER, a teacher requesting such leave must undertake a program of studies approved by the Superintendent carrying no less than twelve (12) classroom credits per semester . . . ." (Sec. 5-4 of the CBA.)[13]

In accordance with this provision, on May 28, 2010, Ms. Zabala requested "a Sabbatical Leave for study of a full year in Providence College and Johnston and Whales [sic] University; with the finality to improve my English skills and expand my knowledge in Mathematics; which will be beneficial for the school system of Providence." (Resp't's Ex. H.) The application listed four English classes (eighteen credits) and four mathematics classes (twelve credits). *Id.* By letter dated June 22, 2010, Dr. Ramirez informed Ms. Zabala that the Superintendent had denied

[13] In its decision, the Commission found that Ms. Zabala "was absent from the school for health reasons for about three months after her second November 2009 evaluation by Respondent Torchon." (Decision 5.) It later found that "[w]ith respect to the denial of a paid sabbatical, there is no question that the Complainant met the delineated qualifications for it—she had taught for more than seven consecutive years and proposed a course of study." *Id.* at 11. In making this determination, the Commission did not address whether Ms. Zabala's absences during the school year may have broken her seven years of continuity. *See* § 5-4 of the CBA ("Absences totaling more than ninety (90) school days within a teacher's school year shall be considered as breaking the continuity of seven (7) consecutive years.").

her request, stating "several classes listed in your sabbatical request fall outside your content area, and therefore the Superintendent was unable to approve your program of study." (Resp't's Ex. I.)

On October 29, 2010, Non-Hispanic guidance counselor Tawanna Edwards (Ms. Edwards) requested a sabbatical leave of absence so that she could pursue "a full year of study at the University of Buenos Aires in Argentina . . . ." (Complainant's Ex. 22.) She reasoned:

> "As a guidance counselor with 20 years of experience, I feel that becoming conversant in Spanish will enable me to better serve many of our students and their families, especially those who speak Spanish as a first language. In addition, my experiences in Argentina will broaden my perspective and teach me new lessons in diversity. Upon my return I will be able share these with my students to help them better understand and appreciate the world around us." *Id.*

On January 4, 2011, Dr. Ramirez informed Ms. Edwards that the Superintendent had approved her request for a sabbatical leave. (Complainant's Ex. 23.)

At the hearing, the following colloquy took place between Ms. Zabala, *pro se*, and Dr. Ramirez:

> "Q. . . . I want to ask what's the difference about my asking my sabbatical for improve my English, not improve my English, my pronunciation because that is the problem for help my students and study my Master about one person wanting to learn Spanish even though not necessary. They tell it's not necessary for school. They tell me they have translators.
> "A. A request for a sabbatical, ultimately the Superintendent is the only person that makes the determination whether to grant approval of that sabbatical based on the decisions and those decisions must be stated to the teacher whether it's approved or denied, the reasons for having done so. In your particular case the Superintendent reviewed your course of study, made a determination denying the course of study and explaining in writing the reasons for his denial. In the case here, if you're asking me about this particular case --
> "Q. Yeah.

> "A. -- again, this is the Superintendent's decision, but I can tell you that a guidance counsellor has a very unique role in helping to meet with families, explaining course selections to families, to students in terms of the courses they can take, and in this case the Superintendent was in the mind that it would be a value for the counsellor to be proficient in Spanish, also have that skill . . . ." (Tr. IV at 59-60.)

Ms. Zabala then asked Dr. Ramirez:

> "Q. Are you agree that there was some discrimination about my person, the guidance, about have the same problem? She have problem for -- that's not have communication with the parents and I want to improve my English for be better for -- teach better my students. They tell my English is not perfect. You think that's discrimination?
> "A. I don't believe -- there was no discrimination. The Superintendent made a decision based on the information before him and the Superintendent made a decision to deny your sabbatical and he stated the reasons for his denial." *Id.* at 61-62.

In its decision, the Commission observed that the provisions relating to sabbaticals in the CBA "requires that the Superintendent approve the course of study for sabbaticals, but says nothing requiring that the courses be solely in the content area of the teacher's classes, as opposed to relating to another aspect of teaching. Further, it states that approval should not be unreasonably withheld." (Decision 11.) It then noted that Ms. Zabala had been told to improve her speech, but concluded that

> "the same Superintendent approved the sabbatical request of a non-Hispanic guidance counselor whose proposed course of study was to study Spanish, an area which was not within her 'content' area. Providence approved a sabbatical to a non-Hispanic employee to study Spanish, but denied a sabbatical to a Hispanic employee to study English. These discrepancies cause the Commission to conclude that Providence denied a paid sabbatical to the Complainant, based at least in part, on her ancestral origin." *Id.*

The record reveals that there was a sizeable Hispanic population within the Providence school system. *See* Resp't's Ex. R (showing that in the 2010-2011 school year, sixty-three

percent of Providence students were Hispanic). Indeed, Ms. Zabala initially was hired as an LEP teacher. Given this significant Hispanic/Latino population, Dr. Ramirez testified that Ms. Edwards would have benefited from learning Spanish because it would have helped her to better communicate with these students. (Tr. IV at 113). Furthermore, by learning Spanish, she would have the ability to communicate with the parents of these students—especially those parents who speak Spanish as a first language—in order to better serve the students. (Complainant's Ex. 22.) Thus, although there is no state requirement that teachers be proficient in Spanish (Tr. IV at 114), given the size of Providence's Hispanic student population, proficiency in Spanish would be especially useful to a guidance counselor whose work involves communicating with students and parents alike.

Proficiency in English, however, *is* a requirement for teachers. (Tr. IV at 28.) The record reveals that Ms. Zabala had a long history of difficulties in effectively communicating English, and sought to improve her communication skills by requesting a paid sabbatical so that she could take various classes in English.[14] However, as Dr. Ramirez testified, teachers are expected to be fluent in English as part of their teaching qualifications and, thus, paid sabbatical leave is not available for purposes of learning to effectively communicate in English. *Id.* at 28-29. Furthermore, Ms. Zabala's union representative, Mr. Vorro, testified that "usually sabbaticals are used for teachers to further their studies, and in this case the Superintendent felt that learning English or taking English classes was not appropriate . . . ." (Tr. II at 158.)

The Court finds that Ms. Zabala failed to establish pretext through her use of the Edwards' comparator because she was not similarly situated to Ms. Edwards "in all relevant respects." *Lockridge*, 597 F.3d at 471. Specifically, Ms. Edwards sought a paid sabbatical to

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[14] The Court observes that Ms. Zabala's request for a paid sabbatical was submitted after Ms. Onye had submitted her evaluation of Ms. Zabala.

expand her qualifications so that she could effectively communicate with students and parents who spoke Spanish as a first language in order to help them make informed decisions regarding educational choices; whereas, Ms. Zabala sought a paid sabbatical so that she could meet minimum requirements of her job. Furthermore, there is no evidence in the record to suggest that the Superintendent's denial of Ms. Zabala's request was motivated by racial animus, or that his actions were surrounded by a "suspicion of mendacity[.]" *Barros*, 710 A.2d at 685. Accordingly, the Court concludes that the Superintendent legitimately denied Ms. Zabala's request for a sabbatical—at taxpayer expense—so that she could gain a proficiency in communicating in English, where such proficiency was a requirement of her job in the first instance.

IV

Conclusion

Based upon the foregoing, this Court finds that the decision of the Commission is in violation of statutory provisions, was affected by error of law, was clearly erroneous in view of the reliable, probative, and substantial evidence in the record, and was arbitrary and capricious. Furthermore, substantial rights of Appellants have been prejudiced. Accordingly, the decision of the Commission is reversed.

Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	City of Providence and Wobberson Torchon v. Rhode Island Commission for Human Rights and Hortencia Zabala
CASE NO:	PC-2014-5371
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 3, 2018
JUSTICE/MAGISTRATE:	Gallo, J.
ATTORNEYS:	
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