

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
COLLIN N. ALLEN,

Complainants

Against

Docket No. 96-BEM-1158

UNIVERSITY OF MASSACHUSETTS,
BOSTON,

Respondent

Appearances: Gale L. Glazer, Esq. and Louis P. Font, Esq., for Complainant
Lawrence T. Bench, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 22, 1996, Complainant Collin N. Allen filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that the University of Massachusetts-Boston Campus Police Department discriminated against him on the basis of race in violation of M.G.L. ch. 151B sec. 4. Complainant, a sixteen-year employee of the Campus Police/Department of Public Safety who was terminated from his position of Police Lieutenant for allegedly withholding information about a car

accident in which he was involved, asserts that his termination was pretextual and that he was subjected to disparate terms and conditions of employment on the basis of race and color.

The MCAD issued a probable cause finding and certified the case for public hearing on December 12, 2000.

There were thirteen days of public hearing on the following dates: October 27-30, 2003; November 5-6, 2003; December 9, 10 and 12, 2003; and January 6, 20, 21 and 29, 2004. The parties submitted six joint exhibits. Complainant submitted an additional eighty-four exhibits, and Respondent submitted an additional eighteen exhibits. The parties submitted proposed findings of fact and conclusions of law on July 16, 2004 and reply briefs on September 29, 2004.

To the extent the parties' proposed findings are not in accord with the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with my findings, such testimony is not credited. Based on all the credible, relevant evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II FINDINGS OF FACT

A. Complainant's Circumstances

1. The Complainant, Collin N. Allen ("Complainant") is an African-American male who was employed by the University of Massachusetts Boston as a police

2. The Respondent, University of Massachusetts Boston (“UMass Boston”) employed Complainant within its Department of Public Safety. At the time of Complainant’s termination, the Chief of the Department (also known as Director) was David Cella. The Deputy Chief (also known as Deputy Director) was Philip O’Donnell.
3. Complainant worked as a Patrol Officer for approximately twelve years. He was promoted to Sergeant on or about February 14, 1993.
4. Several months after Complainant became a Sergeant, the Department of Public Safety initiated a process to choose candidates for promotion to Lieutenant. Deputy Chief O’Donnell, was in charge of the promotional process. At the start of the promotional selection process, there were two Lieutenant positions to be filled on a permanent basis. The positions were occupied on an out-of-classification basis by James Wise and Patricia McBride, both Caucasians. Had a selection procedure not been required, Chief Cella testified that he “probably” would have just promoted Wise and McBride into the positions they already occupied. Transcript, Volume 4 at 72-73.
5. Gerard Gomez was Respondent’s Director of Affirmative Action from 1991-1994 and Executive Assistant Dean in the College of Public and Community Service from 1994 until August 1996. While he was Director of Affirmative Action, Gomez recommended that an additional Lieutenant’s position be created for minority recruitment purposes. He informed the Department of

Public Safety that if a third Lieutenant's position did not result in the selection of a racial minority, he would not sign off on any of the Lieutenants' promotions. Complainant's Exhibit 70; Transcript, Volume 4 at 78.

6. On March 8, 1993, Donald D. Babcock, Associate Chancellor of UMass Boston, wrote a memorandum to Gomez in which he agreed to create a third Lieutenant position and target the position for a minority candidate. Complainant's Exhibit 47.
7. At the time of the selection process for Lieutenants, Complainant, who had been a Sergeant for three months, was the highest ranking minority person in the Department. The only other minority individuals in the Department of Public Safety at that time were Lorenzo Hill and Roland McBride. Both were Patrol Officers. Transcript, Volume 4 at 83-84.
8. When Complainant reported to take the written portion of the exam, the only people in the room were other African-American police officers, namely Patrol Officers McBride and Hill. Four Caucasian candidates took the written portion of the exam earlier in the day. Transcript, Volume 1 at 176-178 and Volume 3 at 71-72. Chief Cella testified that the written portion of the exam was given at two different times to avoid paying the three African-American officers overtime. Transcript, Volume 4 at 89. I do not find this testimony to be credible. Chief Cella acknowledged that he could have arranged for overtime to be paid for the purpose of having all the candidates take the Lieutenant's exam at the same time. Transcript, Volume 5 at 51. Complainant testified credibly that only one African-American officer would have had to take the

exam on an overtime basis since the other two African-American officers were on duty when the exam was given Transcript, Volume 13 at 24.

1. On September 30, 1993, Chief Cella issued a memorandum to all sworn personnel in the Public Safety Department addressing statements by Sergeant Thomas Carey alleging that Sergeant Stanley Stewart had prior knowledge of the writing sample scenario used in the Lieutenants' selection process. Chief Cella wrote that he had conducted a lengthy investigation and found no wrongdoing on the part of Sergeant Stewart. Complainant's Exhibit 46. Chief Cella also announced that he was suspending Sergeant Carey for two days and issuing a written reprimand for Sergeant Carey's "unfounded" remarks. Id. Chief Cella conceded at the public hearing that he had not conducted any investigation. He testified that Deputy O'Donnell had conducted an investigation and reported the results to him. Transcript, Volume 4 at 115.
10. In a memorandum dated September 21, 1993, Chief Cella announced that Acting Lieutenant James Wise, Sergeant Patricia McBride, and Sergeant Collin Allen were promoted to Lieutenant. Complainant's Exhibit 17. Chief Cella included in the memorandum a description of the duties of the three Lieutenants. Lieutenant McBride was to serve as Operations Commander, supervising the day shift. Lieutenant Wise was to serve as Administrative Commander. Lieutenant Allen was to serve as Ancillary Services Commander, with responsibility for institutional security officers, the lockshop, and special projects. The supervision of security officers included scheduling shifts, determining days off, evaluating job performance, and taking disciplinary

action. Chief Cella testified that he also intended to have Complainant represent the Department of Public Safety on University committees.

2. Within several months of Complainant's promotion, the responsibility for supervising security officers was transferred from Complainant to Lieutenant McBride. Transcript, Volume 1 at 76. Lieutenant Wise was also permitted to discipline security officers. E.g., Complainant's Exhibit 3. Complainant was not permitted to discipline security officers.
12. At the time the September 21, 1993 memorandum was issued about the Lieutenants' promotions, Deputy O'Donnell was responsible for the lockshop. He never relinquished this responsibility to Complainant. Transcript, Volume 1 at 134.
3. After his promotion to Ancillary Services Lieutenant, Complainant was assigned by Chief Cella to develop an evacuation plan for the campus, make inquiries about purchasing furniture for a new Public Safety facility, and attend meetings involving other departments. Complainant went to a conference on fire extinguishers and alarms but did not receive any guidance on how to write an evacuation plan. Transcript, Volume 2 at 17-18. The Chief limited Complainant's role in purchasing furniture to getting brochures, procuring prices, interviewing people about the kind of furniture they wanted, and looking through old furniture to see what was usable. The Chief limited Complainant's responsibilities at meetings to taking notes. Transcript, Volume 2 at 6. Complainant checked fire extinguishers on campus to see if they were full or empty. Id. Complainant's involvement in bidding on a new Department of

Public Safety vehicle was limited to taking a sealed bid to an auction at the State Police barracks in Framingham. Transcript, Volume 1 at 213.

Complainant complained to Chief Cella about the fact that he wasn't getting appropriate assignments as a Lieutenant, but Chief Cella declined to give him any additional responsibilities. Transcript, Volume 4 at 176. Chief Cella testified at the public hearing that the additional responsibilities requested by Complainant related to operations which came under the responsibility of the Operations Lieutenant Patricia McBride. Transcript, Volume 4 at 176.

14. From September 1993 until the Department of Public Safety moved to new quarters in November 1995, Complainant's office consisted of an unlocked portion of an all-purpose desk in the squad room. Transcript, Volume 2 at 37 and Volume 6 at 7. Complainant's desk was used by people in need of a place to work or a place to dump things on. Transcript, Volume 2 at 40-41. The squad room was where roll call, witness interviews, and training took place. Some members of the Department ate lunch in the room, cooked, and watched television there. Transcript, Volume 2 at 39. It was a heavily trafficked area.
4. Lieutenant Wise shared a locked office with Deputy Chief O'Donnell and had a desk that locked. Transcript, Volume 2 at 38. Lieutenant McBride had a locked desk in the Sergeants' room. Id. Complainant asked Chief Cella if he could share Lieutenant McBride's desk and if the Sergeants could use the desk in the squad room, but this request was denied. Transcript, Volume 2 at 41-42.
16. After the Department of Public Safety moved to new quarters in November 1995, Complainant moved into an office with the other Lieutenants, but he still

had to use the unlocked desk he had formerly used in the squad room.

Transcript, Volume 2 at 145-146. The other Lieutenants had desks that locked.

Transcript, Volume 2 at 146.

5. On a number of occasions, Complainant was not invited to meetings that other members of the command staff attended, including meetings attended by the other Lieutenants and Detective Sergeant Stewart. Transcript, Volume 2 at 48-49, 87, and 137-140. Complainant protested to Chief Cella about not being part of the meetings, but he was told that the meetings did not concern him. Id. Once in 1995, Complainant was not invited to a breakfast meeting for the command staff that was held at Lieutenant McBride's house. Id.
18. Throughout the time that Complainant was Lieutenant, there were numerous occasions when the Detectives, Chief, Deputy Chief, and the other two Lieutenants would order out for lunch and eat together but not invite Complainant to join them. Transcript, Volume 2 at 50-52.
19. Complainant complained to Chief Cella about his assignments, but the Chief did not give Complainant any additional responsibilities. Complainant suggested to Chief Cella that the Department of Public Safety implement a bicycle patrol and asked that he be allowed to oversee it. Chief Cella approved the program but put Lieutenant McBride in charge of the bicycle patrol. Complainant recommended that the Department provide a self-defense course for women called a "Rape Defensive Course." The program was implemented under the direction of a sergeant, a Patrol Officer, and Lieutenant McBride, although Chief Cella testified that it "never really panned out." Transcript,

Volume 4 at 163.

20. Complainant was not allowed to authorize sick time or vacation time unlike the other two Lieutenants. Transcript, Volume 2 at 28-31.
6. Complainant and the other members of the command staff (i.e., the Chief, the Deputy Chief, and the Lieutenants) each had a key to all the Department of Public Safety vehicles. Transcript, Volume 2 at 70.¹ Complainant testified that only Patrol Officers and Sergeants had to report their use of vehicles. Deputy O'Donnell testified, without credibility, that Lieutenants also had to secure permission to use vehicles on an as-needed basis. Transcript, Volume 1 at 130-132; Volume 2 at 71.
22. Complainant acknowledged that as a Lieutenant he had a practice of taking a Detective's vehicle home overnight when he worked late and had to be back the first thing in the morning. Transcript, Volume 2 at 74-75. Sergeant Stewart ordered Complainant to refrain from this practice. Complainant did not follow this order because it came from a lower-ranking member of the Department. Complainant testified that he felt entitled to use a Detective's vehicle as long as it was not being used by the Detective's Division since other members of the command staff did so. Transcript, Volume 2 at 74; 136.
23. In the fall of 1995, the Director of Facilities (i.e., the Physical Plant) informed Chief Cella that Complainant had signed out cars from the Facilities Department, without authorization, and was taking them home and using them for personal matters. Chief Cella told Complainant that he was not to use

¹ Chief Cella testified inaccurately that everyone in the Department of Public Safety had a car key that fit all the cruisers. Transcript, Volume 4 at 168.

vehicles from the Physical Plant or the Department of Public Safety without authorization from the Chief or Deputy Chief. Transcript, Volume 2 at 136-137; Volume 8 at 7-11 and 117. The Chief did not give this instruction to any other individual in the Department of Public Safety. Transcript, Volume 8 at 117-118.

7. Chief Cella testified that he kept golf clubs in a Department of Public safety vehicle and used the vehicle to go to a golf course during working hours. Transcript, Volume 5 at 52-59. Chief Cella played in a golf league on Thursday afternoons. He left his office at 2:20 p.m. and used the vehicle for transportation. Deputy Chief O'Donnell occasionally went with him. Chief Cella also acknowledged that Lieutenants McBride and Wise typically took a Departmental vehicle on Friday afternoons to the bank in order to cash their pay checks and to get lunch. Transcript, Volume 8 at 11. According to the observations of Terence Delehanty, who was a Patrol Officer at U Mass Boston from 1994-1996, Sergeant Stewart, on occasion, took a Detective's vehicle home when his own car was not working. Transcript, Volume 2 at 90. Officer Delehanty also testified that Lieutenant McBride, on occasion, took a Detective's vehicle to run errands. *Id.* at 91. Former UMass Boston Sergeant Thomas Carey testified that Sergeant Stewart took a Detective's vehicle home at night whenever he attended in-service training and for "at least" a period of weeks when Stewart's personal car was involved in an accident. Transcript, Volume 12 at 29. The Chief did not instruct any members of the Public Safety Department other than Complainant that they were not to use a Departmental

vehicle without authorization. Transcript, Volume 8 at 118.

8. Complainant was involved in a motor vehicle accident in Cambridge, Massachusetts on Wednesday, December 20, 1995 while driving a Ford Taurus assigned to the Detective's Division of the Department of Public Safety. The University was closed on the 20th due to a major snowstorm. Complainant had, on his own initiative, stayed on duty at the campus overnight from Tuesday to Wednesday to secure coverage of the overnight and daytime shifts. On Wednesday afternoon he used the Detective's Division vehicle to go home to Cambridge. He intended to shower, change his uniform, attend the wake of his aunt, and return to duty on the campus.² Complainant was driving back to campus on the eastbound lane of Memorial Drive in Cambridge when he lost control of his car due to icy conditions. He swerved into the westbound lane and collided with two vehicles, one driven by Aaron Schleiffer and the other driver by Anna Kim. The damage to the Schleiffer vehicle was estimated in the state police report to be in excess of \$1,000. The damage to the Kim vehicle was estimated in the state police report to be under \$1,000. Complainant's Exhibit 65. Complainant did not inform the dispatcher about the accident or the location of the Taurus.
26. Complainant's driver's license had been suspended since 1993 as a result of non-payment of a civil court judgment arising out of a 1989 motor vehicle accident and expired in September, 1995. Respondent's Exhibit 4. Complainant was cited by the State Trooper Ahearn who responded to the

² Complainant provided contradictory evidence about whether he intended to return to campus before or after the wake. Compare Transcript, Volume 2 at 152 and 154 with Respondent's Exhibit 12 at 12 and Joint Exhibit 3 at 3

accident for operating a motor vehicle after suspension. Complainant's Exhibits 62 and 65; Respondent's Exhibit 2. I do not credit Complainant's testimony that at the time of the accident he was unaware that his driver's license had been suspended and/or expired, that he did not receive a citation by State Trooper Ahearn for driving with a suspended license, and that he thought he had only struck the Schleiffer vehicle.

27. Mr. Schleiffer told Complainant and the police at the scene that he had not been hurt. He refused medical attention. Respondent's Exhibit 4. Ms. Kim was not injured in the collision but was hit in the head by Complainant's car door when she tried to open it for him. The injury caused her head to bleed. The state police report of the accident did not list anyone as having been injured in the accident. Complainant's Exhibit 65; Transcript, Volume 1 at 108. Mr. Schleiffer went to the hospital on his own later that evening and subsequently stated that he sustained "several" broken ribs. Respondent's Exhibit 4.
28. Complainant worked the following day, Thursday December 21, 1995, and part of Friday, December 22, 1995. On December 22, he left headquarters in a vehicle driven by Patrol Officer Thomas Williams prior to the start of the command staff's Christmas party. Respondent's Exhibit 12 at 23. Complainant did not attend the party due to feelings of estrangement from the rest of the command staff.
29. Sergeant Stewart noticed that the Taurus assigned to the Detective's Division was missing on December 22, 1995, when he sought to use it to pick up food for the party. Deputy Chief O'Donnell had the dispatcher contact Complainant

about the vehicle. Complainant informed the dispatcher that he did not have the Taurus. I do not credit Deputy Chief O'Donnell's testimony that Complainant indicated that he had the Taurus and would be back shortly. Transcript.

Volume 10 at 7; Respondent's Exhibit 2.

30. Complainant did not work over the weekend (December 23-24) or on Christmas day, Monday, December 25, 1995.

9. On Tuesday, December 26, 1995, Complainant first reported the accident.³

Joint Exhibit 4. The report stated that the accident had occurred on December 22, 1995 and that that there had been no injuries. Deputy Chief O'Donnell instructed Complainant to fill out a motor vehicle accident report for the Registry of Motor Vehicles and a report for the Motor Vehicle Management Bureau.

32. Complainant testified that he had not finished filling out the accident reports when they were removed from his desk. Transcript, Volume 2 at 173. Deputy Chief O'Donnell testified that he received the reports, either slipped under his door or taped to his door, on December 26, 1995. Respondent's Exhibit 2; Transcript, Volume 1 at 99. Chief Cella testified that he was given the accident reports by his secretary, Sergeant Stewart, or Deputy Chief O'Donnell.

³ In the deposition which Complainant gave in this case on March 21, 2000, he testified that he first told Chief Cella about the accident on December 21, 1995, although elsewhere in his deposition he stated that he was not sure when he first reported the accident. Respondent's Exhibit 12 at 41-42; Transcript, Volume 3 at 126-127. At the public hearing, Complainant retracted his deposition statement that he orally reported the accident to Chief Cella on March 21st. Complainant continued to assert at the public hearing that he had reported the accident to the dispatcher on the night of the accident and assumed that the information was conveyed to Chief Cella. Transcript, Volume 3 at 124-125. According to Chief Cella, if an accident had been reported to the dispatcher, it would have been recorded in the dispatcher log. Chief Cella testified credibly that he never saw anything in the log about Complainant's accident. Transcript, Volume 8 at 15. I do not credit Complainant's testimony that he reported the accident to the dispatcher on the night of the accident.

Transcript, Volume 5 at 75-76. I credit Complainant's testimony that the motor vehicle accident reports were removed from his desk before he completed them and that he did not personally submit them to the Deputy or to the Chief.

Transcript, Volume 2 at 173.

33. On both reports and in a note to the Chief, Complainant stated incorrectly that the accident occurred on December 22, 1995. Joint Exhibits 3 and 4. The reports did not contain a diagram of the accident or mention that the vehicle driven by Complainant had also collided with a vehicle driven by Anna Kim. The Motor Vehicle Management Bureau report stated that Complainant was "in Rou" (i.e., "on route") back to the campus when the accident occurred whereas Complainant testified that he was on route to a wake at the time the accident occurred. Complainant attributed the incompleteness and inaccuracies of the accident reports to his difficulty drafting reports, ordering his thoughts, and spelling. I do not credit Complainant's explanation for all of the inaccuracies in the accident reports.
34. Complainant was not asked by the Chief or the Deputy Chief to fill in the blanks or to correct the accident reports. It was the practice of the Public Safety Department to return police reports to officers for completion and/or correction. Transcript, Volume 2 at 65, 87-90; Volume 3 at 76-77.
35. Complainant told Deputy Chief O'Donnell on December 27, 1995 that he had spoken that day to Denise Duggan in the Physical Plant about getting a check to pay Stadium Auto Body which had possession of the vehicle and about arranging to have the vehicle towed. Duggan denied having a conversation

with Complainant on December 27, 1995. Respondent's Exhibit 2. I do not credit Complainant's testimony about his alleged conversation with Duggan.

36. On January 2, 1995, Deputy Chief O'Donnell received a letter from Stadium Auto Body stating that the Detective's Division vehicle, a Taurus, had been there since December 20, 1995. Respondent's Exhibit 8.
10. Deputy Chief O'Donnell investigated the circumstances surrounding Complainant's motor vehicle accident and submitted a report dated January 5, 1996 to Chief Cella. Respondent's Exhibit 2. Deputy Chief O'Donnell's report is based on his communications with Complainant, Stadium Auto Body and Denise Duggan in the Physical Plant Department, the state police report of the accident, Complainant's accident reports, and a license check on Complainant. Deputy Chief O'Donnell also contacted State Trooper Ahearn to ask if there was anybody else in the vehicle with Complainant, if there was any evidence of drugs or alcohol, and if there were any injuries. Transcript, Volume 10 at 28. Deputy O'Donnell did not interview Complainant. Transcript, Volume 10 at 165. Deputy O'Donnell testified at the public hearing that he concluded that Complainant was not speeding and that there was no contributory negligence on Complainant's part. *Id.*; Volume 10 at 189. He did not put this conclusion in his report. Respondent's Exhibit 2.
11. Chief Cella recommended that Complainant be terminated for lying about the following matters: the date of the accident, the specifics of the accident, his license status, and his untruthful report about his communication with Duggan in the Physical Plant Department. Transcript, Volume 8 at 5-6. The Chief

testified that he also based his termination decision on omissions in Complainant's accident reports. Id. Chief Cella testified that he would not have recommended Complainant's termination "if it had been a matter of driving with a suspended license [or] . . . unauthorized use of a department vehicle." Transcript, Volume 8 at 6. He characterized the suspension of Complainant's motor vehicle license as playing a "minor part" in his decision to terminate Complainant. Transcript, Volume 9 at 59.

39. On or around January 5, 1996, Chief Cella and Deputy Chief O'Donnell recommended to UMass Boston Associate Vice Chancellor for Administration and Finance LaVerne Cawthorne, that Complainant be terminated. Transcript, Volume 7 at 18. Prior to agreeing that Complainant should be terminated, Associate Vice Chancellor Cawthorne met with the Chief and Deputy because she "wanted to know if there were any patterns of termination of either women or people of color." Transcript, Volume 7 at 19. The Chief and Deputy denied any patterns of disparate treatment. Transcript, Volume 7 at 46-48. Based on the information given to her, Associate Vice Chancellor Cawthorne, who is African American, agreed that the charges were serious enough to warrant termination. Transcript, Volume 7 at 19.
40. On January 5, 1996, after receiving approval from Associate Vice Chancellor Cawthorne to proceed with termination, Chief Cella and Deputy Chief O'Donnell met with Complainant. Chief Cella offered Complainant the options of resignation or termination. Transcript, Volume 9 at 98-99. Complainant asked for the weekend to consider the offer. I credit the testimony of the Chief

and Deputy Chief that Complainant said he didn't know why he lied about the accident, adding "I was afraid I guess." Transcript, Volume 1 at 93-94, Volume 5 at 92; Volume 8 at 24; Volume 10 at 24-27. I do not credit Complainant's testimony denying that he ever admitted that he lied. Transcript, Volume 13 at 14.

41. Complainant met with Associate Vice Chancellor Cawthorne after meeting with Chief Cella and Deputy O'Donnell. Complainant again said that he didn't know why he lied. Transcript, Volume 7 at 24.
42. After considering Chief Cella's offer, Complainant notified Chief Cella that he would not resign. Chief Cella suspended Complainant without pay and initiated termination proceedings. Complainant's Exhibit 52. Complainant testified that he received his last paycheck on January 5, 1996. Transcript, Volume 3 at 7. According to Associate Vice Chancellor Laverne Cawthorne, it was standard procedure to place an employee on paid leave, rather than unpaid leave, pending termination proceedings. Transcript, Volume 7 at 51.
43. On January 26, 1996, Anna Kim called Deputy Chief O'Donnell in response to a letter from him. She told Deputy Chief O'Donnell that the damage to her vehicle exceeded \$2,000.00. Transcript, Volume 1 at 119.
12. On January 29 and 31, 1996, Donald Babcock, Senior Associate Vice Chancellor at UMass Boston, conducted a disciplinary hearing that did not conform to the hearing practices required for the University's union employees.⁴ Complainant was not permitted counsel. He was allowed to bring

⁴ As a member of the UMass Boston Department of Public Safety command staff, Complainant was not a

“a person of [his] choosing for support” but was not allowed to confer with that person inside the hearing room. Respondent’s Exhibit 5; Transcript, Volume 1 at 105. He was not allowed to summons witnesses or to make a tape recording. Complainant’s Exhibit 24. Trooper Ahearn, who had responded to the scene of the accident and drafted the motor vehicle accident report, was not present at the hearing. Vice Chancellor Babcock issued a hearing officer’s decision dated February 14, 1996 in which he concluded that the evidence was sufficient to sustain the Chief’s recommendation that Complainant be terminated.

Respondent’s Exhibit 6.

45. Complainant appealed his termination. An appeal proceeding was conducted by Edmund Toomey, as designee of the Chancellor. Respondent’s Exhibit 6. On April 18, 1996, Hearing Officer Toomey issued a decision which upheld the termination. Respondent’s Exhibit 7.
46. After Complainant was terminated, no one was appointed to fill his position as Lieutenant of Ancillary Services. Sergeant Lorenzo Hill was interested in applying for Complainant’s position, but he was told that the position was not going to be filled. Transcript, Volume 3 at 79.
47. Officer Delehanty described Complainant as the Lieutenant who was most respected for his interaction with lower ranking officers on the Department of Public Safety and with members of the University community. According to Officer Delehanty, Complainant spent more time than other members of the command staff walking around the University and interacting with Patrol

Officers, Sergeants and individuals at the Student Center and the Gay-Lesbian Center. Transcript, Volume 2 at 95.

48. Patrol Officer Peter Bonitatibus has been employed by the UMass Boston Department of Public Safety since 1992. He described Complainant as a “very credible person. I trusted him. I could go to him for advice. I thought he was a very good supervisor.” Transcript, Volume 3 at 86.
49. Patrol Supervisor Lorenzo E. Hill has been employed by the UMass Boston Department of Public Safety since 1992. Prior to his employment with Respondent, he was a police officer in Salem, Massachusetts for nine years. He testified that he “always thought that Lieutenant Allen had a great deal of integrity. . . . He was competent, polite, respectful, nice, . . . as a supervisor I thought his behavior and attitude toward the subordinates and everybody else in the University was exemplary.” Transcript, Volume3 at 78.
50. Chief Cella testified at the public hearing that, “[Complainant] was a great people person. He was very good with the public, he was very good with students . . . Everybody liked him” Transcript, Volume 4 at 161.

B. Background Evidence

13. In 1989, prior to Chief Cella becoming Chief of the Department of Public Safety, an African-American Sergeant, Roland McBride, was pressured by the then-Chief of Public Safety James Lovett and Deputy Chief O’Donnell to accept a demotion to Patrol Officer as a result of failing to properly report a phone call from the Worcester Police Department about an individual who claimed to have been shot at UMass Boston on a Saturday night or early

Sunday morning. Transcript, Volume 12 at 60. Sergeant McBride left a telephone message about the shooting on Deputy O'Donnell's door but did not otherwise notify him or inform the other members of the shift about the shooting in a timely manner. Transcript, Volume 10 at 198; Volume 11 at 57; Volume 12 at 81. Deputy O'Donnell first learned about the shooting on the following Monday morning after the crime scene had been swept clean. Deputy O'Donnell drafted a report in the matter for Chief Lovett in which he recommended the demotion of Sergeant McBride. Id. at 199.

14. At the time of Complainant's termination, three Caucasian officers carried firearms with expired licenses but were not disciplined. Sergeant Carey's firearms license expired on January 31, 1993 and was not reissued until April 9, 1996. Complainant's Exhibit 50; Transcript, Volume 12 at 22-23. Sergeant Stewart's firearms license expired on October 23, 1994 and was not reissued until February 28, 1996. Complainant's Exhibit 50. Lieutenant McBride's firearms license expired on September 11, 1995 and was not renewed until February 29, 1996. Complainant's Exhibit 59. The Chief and Deputy Chief became aware of the firearms license expiration problem after Complainant raised the issue of disparate treatment at his termination hearing.⁵
15. During part of the time that Complainant worked as a Lieutenant, the other Lieutenants had access to office computers. Transcript, Volume 9 at 75.

⁵ In response to Complainant's allegation of disparate treatment, Chief Cella testified that when Complainant was a Patrol Officer, he left a loaded firearm in an unattended motor vehicle and had his license to carry a firearm suspended by the City of Cambridge. Transcript, Volume 8 at 43, 45. Complainant was put on desk duty until his license was reinstated, resulting in a loss of overtime, but was not punished. Id. at 44; Transcript, Volume 10 at 60; Respondent's Exhibit 10. Chief Cella characterized the steps taken with respect to Complainant as "the same . . . as has been done before and after." Transcript, Volume 8 at 44.

Lieutenant Wise visited pornographic websites on his computer on at least one occasion. Transcript, Volume 9 at 76. Chief Cella testified that Lieutenant Wise was told not to do it again but was not otherwise punished. Id.

Lieutenant McBride used her computer to go on sweepstakes sites and enter contests during work hours. Transcript, Volume 9 at 77-78. Chief Cella characterized this activity as a technical violation of rules and regulations for which she received no discipline. Transcript, Volume 9 at 78-79.

16. A Caucasian Patrol Officer in the UMass Department of Public Safety, Jeremiah Ahern, was accused of making a series of obscene and threatening phone calls in 1990 and 1991 to a former girlfriend and a man with whom she was involved. The calls included death threats and use of the “N” word. The former girlfriend had tapes of the calls. On September 20, 1991, Ahern was placed on paid administrative leave by prior Department of Public Safety Chief of Police James Lovett with input from Deputy Chief O’Donnell, pending an evaluation by a mental health professional concerning Ahern’s fitness for duty. Chief Cella, when he was appointed Chief in November 1991, offered to retain Ahern in employment, with a letter of reprimand in his file, provided Ahern agree to long-term counseling, a letter of apology, and other constraints. Transcript, Volume 8 at 83-37; Volume 9 at 70-71; Complainant’s Exhibit 63. See Ahern v. O’Donnell et al., 109 F.3d 809 (1st Cir. 1997).⁶

17. Deputy Chief O’Donnell was involved in a motor vehicle accident involving a Departmental vehicle on January 25, 2002. He did not complete a motor

⁶ Ahern refused the offer on the ground that it would constitute an admission that he had made the calls. See Ahern v. O’Donnell, et al., 109 F.3d 809 (determining that the Chief and Deputy Chief had probable cause to believe that Ahern had made the calls).

vehicle accident report until January 29, 2002. Complainant's Exhibit 72.

Deputy Chief O'Donnell was not disciplined for the four-day delay in reporting the accident.

C. Damages

18. After being terminated, Complainant was too depressed to start looking for other employment until June or July 1996. The period following his termination was the first time in his life since age thirteen that he did not have a job. Complainant described the loss of his job as "very devastating." He was particularly upset that he was no longer a role model for his children. Transcript, Volume 3 at 61. Complainant felt that he "was letting down everyone. Transcript, Volume 3 at 59.
19. Complainant's daughter testified that after his termination, Complainant was not the same person he used to be. Transcript, Volume 3 at 162.
20. Complainant's termination led to marital problems, resulting in the separation of Complainant and his wife for some time. Transcript, Volume 3 at 58.
21. Complainant testified that, "It was very important for me to be able to stand up, especially in my community where I came from where a lot of black males were not, first off, given an opportunity to succeed, but to know that I was succeeding in a field that I chose and was very important to me, so when I got fired it became a very devastating and depressing thing for me, and I lost not just income, not just finance. It appeared to me I lost my name. I lost my identity of who I was." Transcript, Volume 3 at 57-58.
22. Complainant was fearful that Respondent would take him to court and charge

him with criminal offenses. He testified credibly that this concern “devastated” him. Transcript, Volume 3 at 60.

23. Complainant’s mother said that Complainant never stopped being upset about his termination. Complainant’s family was so concerned about whether he would harm himself after his termination that they had his personal firearm disarmed by a family friend who was a Police Officer. Transcript, Volume 3 at 148-149; 161.
24. When Complainant was employed by UMass Boston, he received a salary, vacation pay, and benefits. His benefits included health insurance coverage, a dental plan, life insurance, and catastrophic illness insurance. Complainant’s Exhibits 25-27 and 41; Transcript, Volume 3 at 25. He also had educational benefits for himself, his wife and children. Transcript, Volume 3 at 25. The educational benefits covered full tuition at any state university in Massachusetts.
25. At the time of Complainant’s termination, his daughter was enrolled at Framingham State College. She received free tuition as one of her father’s employment benefits. Once Complainant was terminated, his daughter lost her tuition-free status and did not finish the semester that started in January 1996. Complainant’s daughter transferred to Bunker Hill Community College. She testified that had her father not been terminated, she would have completed her four-year degree at a state school. Transcript, Volume 4 at 7.
26. It took Complainant approximately one year from his termination in January 1996 to find alternative employment. During that year, Complainant relied on

unemployment compensation and his pension funds to help meet his financial needs. He was forced to borrow money from family members and run up credit card debt. After approximately one year, Complainant secured a job working for Northeast Security training security staff at Lesley University. His salary was less than the salary he received at UMass Boston. He applied for two police positions but did not receive interviews. At the time of public hearing, Complainant continued to work at Leslie University as the Assistant Director of Security. Transcript, Volume 3 at 33; Complainant's Exhibits 30-40.

27. Prior to Complainant's termination, his salary at UMass Boston in 1995 was \$58,337.30. Complainant's Exhibit 29. In 1996, Complainant earned \$3,234.01, received a gross distribution from the State Board of Retirement of \$33,335.59, and received \$10,410.00 in unemployment compensation. Complainant's Exhibit 33. In 1997, Complainant earned \$24,338.00. Complainant's Exhibit 34. In 1998, Complainant earned \$30,896. Complainant's Exhibit 35. In 1999, Complainant earned \$46,111.15. Complainant's Exhibit 36. In 2000, Complainant earned \$47,045.50. Complainant's Exhibit 37. In 2001, Complainant earned \$41,522.75. Complainant's Exhibit 38. In 2002, Complainant earned \$44,373.48. Complainant's Exhibit 39. In 2003, Complainant earned \$ 47,932.66. Complainant's Exhibit 40A. Since his termination from UMass Boston, Complainant has received health insurance coverage under his wife's health plan. He does not have a pension, and he does not receive educational benefits for himself and his family.

III. CONCLUSIONS OF LAW

A. Timeliness

Complainant asserts that he was subjected to numerous instances of discrimination preceding his termination, including a discriminatory selection process, promotion to a position with no meaningful responsibilities, and disparate treatment in relation to the other Lieutenants in the Department of Public Safety. Complainant's promotion to Lieutenant occurred in 1993, some two and one-half years prior to the filing of the complaint in this case. Because of the two and one-half year gap between the promotion and the filing of this complaint, Respondent contends that matters pertaining to the selection process for Lieutenant and the distribution of Lieutenant duties are barred by G.L. c. 151B, sec. 5, the six-month statute of limitations in effect when this case was filed.

A review of the circumstances surrounding Complainant's promotion to Lieutenant provides convincing support for the claim that Complainant knew or reasonably should have known that the conditions to which he was subjected were discriminatory and unlikely to improve. See Cuddy v. The Stop & Shop Supermarket Co., 434 Mass. 521, 541 (2001). During that period, Complainant took a racially segregated Lieutenant's examination, was deprived of meaningful job functions as a Lieutenant, was given an unlocked portion of a desk in the squad room as his "office," was not invited to meetings involving the other members of the command staff, was not allowed to authorize sick time or vacation time unlike the other two Lieutenants, and was

not allowed the same access to Department vehicles that other members of the command staff enjoyed. Such evidence of disparate treatment would have motivated a reasonable person to file a seasonable complaint.

Complainant's termination may have been a final act of racial discrimination, but it does not "substantially relate" to the earlier incidents so as to anchor those earlier incidents to a timely filing. Id. The termination is a disciplinary matter which stands separate and apart from issues relating to Complainant's treatment as a Lieutenant. Accordingly, I conclude that the events prior to the limitations period are barred as providing a basis for the recovery of damages on a continuing violation theory. Such evidence is admissible, however, as background evidence to assist in establishing a violation within the six-month period. See id.; Sabree v. United Brotherhood of Carpenters and Joiners, 921 F.2d 396, 401-402 (1st Cir. 1990) (holding prior acts relevant as evidence with regard to timely claim).

B. Disparate Treatment

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and/or color. In order to prevail on his claim of racial discrimination, Complainant must show that he was disciplined in a manner that deviated from the treatment accorded non-minority members of the Department of Public Safety. Absent direct evidence, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified person(s) not

of his protected class were not treated in a like manner in circumstances that give rise to an inference of race discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of prima facie case vary depending on facts).

If Complainant successfully establishes a prima facie case, the burden then shifts to the second stage of proof in which the Respondent must articulate a legitimate, nondiscriminatory reason for its action. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If the Respondent asserts such a reason, Complainant bears the burden to persuade the factfinder, by a preponderance of the evidence, that the Respondent's articulated justification is not the real reason, but a pretext that permits a finding of unlawful discrimination. See Abramian, 432 Mass. at 117-118. Complainant must ultimately prove by a preponderance of the evidence that the Respondent was motivated by discriminatory animus. See Lipchitz v. Raytheon, 434 Mass. 493 (2001). Complainant may meet this burden of proof by circumstantial evidence such as the inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the Respondent is false. See id. at 504.

Turning to the elements of his prima facie case, Complainant is African-American and, thus, a member of a protected class. Complainant had no record of being disciplined prior to his discharge. He was twice promoted in 1993, first to Sergeant and subsequently to Lieutenant. Chief Cella testified at the public hearing that,

“[Complainant] was a great people person. He was very good with the public, he was very good with students . . . Everybody liked him . . .” Officer Delehanty described Complainant as the Lieutenant who was most respected for his interaction with lower ranking officers on the Department of Public Safety and with members of the University community. Patrol Officer Peter Bonitatibus described Complainant as a very good supervisor. Patrol Supervisor Lorenzo Hill testified that Complainant “had a great deal of integrity. . . . He was competent, polite, respectful, nice, . . . I thought his behavior and attitude toward the subordinates and everybody else in the University was exemplary.” There is no evidence in the record that prior to the car accident on December 20, 1995, Complainant’s performance as a Lieutenant was deficient. Based on these factors, I conclude that Complainant was performing his job in a satisfactory manner at the time of the adverse employment action.

Turning to the third and fourth elements of a prima facie case of disparate treatment, Complainant suffered an adverse employment action when Respondent terminated him from the Department of Public Safety after he had a car accident during a snowstorm while driving without a license, failing to promptly report the collision, and lying about some of the circumstances. In contrast to the action taken against Complainant, little or no discipline was imposed on non-minority members of the Department who committed other types of misconduct. For instance, Chief Cella offered Patrol Officer Jeremiah Ahern the opportunity to return to work after he made a series of obscene and threatening phone calls which included a death threat and the “N” word. Chief Cella imposed no punishment on Lieutenant Wise who was observed visiting

pornographic websites on his office computer on at least one occasion. Chief Cella took no action against Deputy Chief O'Donnell when he, like Complainant, was involved in a motor vehicle accident involving a Departmental vehicle and delayed reporting the accident for several days. To be sure, none of these incidents involved precisely the same circumstances as the ones at issue in this case. Collectively, however, they demonstrate a more lenient approach to discipline than the harsh and unforgiving treatment which Complainant experienced. The disparity in treatment is sufficient to give rise to an inference of race discrimination.

At the second stage of proof, Respondent offers as legitimate, nondiscriminatory reasons for discharge the fact that Complainant took a Department vehicle without permission, totaled the vehicle in a car accident, damaged two other cars and injured the drivers of those cars, drove without a valid driver's license, delayed almost one week in reporting the accident, and failed to report some of the salient points relating to the accident in his motor vehicle accident reports. At the second stage of analysis, these actions constitute legitimate, nondiscriminatory reasons for termination.

Although Respondent's grounds for termination are facially valid, I conclude, for the reasons discussed below, that they were not the real reasons for Complainant's termination, but, rather, a pretext for unlawful discrimination. See Lipchitz v. Raytheon, 434 Mass. 493 (2001).

1. The Accident and Report

Chief Cella testified that he recommended Complainant's termination for lying about the date and the specifics of the accident, for driving without a license, and for lying about his communications with Denise Duggan in the Facilities Department. The Chief's recommendation rests on the following uncontested facts: Complainant was involved in a motor vehicle accident on Wednesday, December 20, 1995 caused by snowy and icy conditions. Complainant collided with two vehicles. The damage to the Schleiffer vehicle was estimated in the state police report to be in excess of \$1,000 and the damage to the Kim vehicle was estimated in the state police report to be under \$1,000. Mr. Schleiffer told Complainant and the police at the scene that he had not been hurt and he refused medical attention. Ms. Kim was not injured in the collision itself but was hit in the head by Complainant's car door when she tried to open it. The state police report of the accident did not list anyone as having been injured in the accident.

A preponderance of the evidence also establishes that Complainant delayed in reporting the accident until Tuesday, December 26, 1995 and that he mischaracterized the accident as having occurred on December 22, 1995. Complainant's failure to report the action in a timely fashion appears to have been due to his concern about the ramifications of driving with a suspended/expired license. Although Complainant testified that at the time of the accident he was unaware that his license had been suspended and subsequently expired, this assertion is simply not credible. When Complainant finally did report the accident, he stated inaccurately that he only hit one car, not two. Even though Anna Kim received only minor damage to her car and was not injured by the

collision itself, Complainant's failure to mention her suggests an attempt to minimize the scope of the accident. Complainant was similarly untruthful when he told Deputy Chief O'Donnell on December 27, 1995 that he had spoken to Denise Duggin in the Physical Plant Department that day about getting a check to pay Stadium Auto Body and having the vehicle towed. In sum, the evidence demonstrates that Complainant delayed six days in reporting a car accident caused by hazardous driving conditions, failed to inform his superiors that he did not have a valid license at the time of the accident, misrepresented the date of the accident by two days, neglected to mention one of the victims, and lied about arranging to pay the auto body shop in order to have the vehicle towed.

On the other hand, Complainant ultimately came forward on his own to report the accident on December 26, 1995 and was in the process of filling out motor vehicle reports when they were removed from his desk. This six-day delay is only two days longer than the time taken by Deputy Chief O'Donnell to fill out a motor vehicle accident report about his own accident in a Departmental vehicle on January 25, 2002. Further, Deputy Chief O'Donnell accused Complainant of telling the dispatcher on December 22, 1995 that he had the Department's Taurus and would return it to campus shortly, but Complainant credibly denied this communication. As far as the content of Complainant's accident reports is concerned, some of the omissions and inaccuracies may be due to the fact that the reports were not finalized when they were taken off of Complainant's desk by an unidentified individual on or about December 26, 1995. Complainant's failure to mention any injury to Aaron Schleiffer is consistent with the police report which indicates that Schleiffer was not injured. Complainant's failure to mention Anna Kim as

a victim of the crash is more troubling, but she, too, was uninjured by the collision (as opposed to hitting her head when she opened Complainant's car door) and sustained only minor damage to her car.

In evaluating Complainant's misconduct, I recognize that there is a strong public policy against the continued employment of police officers who demonstrate egregious dishonesty and abuse of official position. See City of Boston v. Boston Police Patrolmen's Association, No. SJC-09297 (Mass., April 4, 2005). In the City of Boston case, an arbitrator's modification of the discharge of a police officer to a one-year suspension without pay was overturned by the SJC where the police officer pulled along side a double-parked car and exhibited a demeaning, derisive, and discourteous attitude toward the individuals inside the car, calling the front passenger a "bitch." The police officer placed the couple in the front seat under arrest, transported them to the police station, handcuffed the man to a wall, threatened the man with physical violence, falsely accused the couple of assault, and drafted an untrue incident report.

However, the City of Boston case draws its authority from a collective bargaining agreement and Police Department regulations not Chapter 151B. There was no allegation in the City of Boston case that the terminated officer was treated differently from other officers not in his protected class. The police officer in the City of Boston case behaved abusively, made a false arrest, and filed false charges against members of the public. Complainant, by contrast, drafted an accident report which was, for the most part, accurate although it contained some misstatements. Unlike the police officer in the City

of Boston case, Complainant did not make false accusations of misconduct against members of the public.

This Commission is not authorized to second guess the level of discipline imposed on Complainant except where that discipline constitutes disparate treatment in relation to other members of the Department of Public Safety who are not in Complainant's protected class. I conclude that the termination of the Complainant falls into this discriminatory category for several reasons. First, it was the practice of the Department of Public Safety to return police reports to officers for completion and/or correction. Such courtesy was denied in this case. Second, Deputy Chief O'Donnell deprived Complainant of the opportunity to discuss the accident prior to recommending termination and the Chief suspended Complainant without pay on January 5, 1996 as soon as termination proceedings were initiated. According to Associate Vice Chancellor Laverne Cawthorne, it was standard procedure to place an employee on paid leave, rather than unpaid leave, pending termination proceedings.

Third, Complainant was treated in a disparate manner with respect to the severity of discipline imposed for the alleged misconduct. As the Chief acknowledged, the primary basis for discharge was not driving with a suspended/expired license or using Departmental vehicles without authorization. According to the Chief, these matters played only a "minor part" in his decision to terminate Complainant and would not, alone, have justified termination. The Chief's tolerant attitude is undoubtedly related to his acknowledgement that three Caucasian officers carried weapons for extended periods

of time even though their firearms licenses had expired. Unlike Complainant, these officers were not subjected to any discipline.

Numerous officers also used Department vehicles without authorization. The Chief used his Department vehicle to go to a golf course on Thursday afternoons during working hours. Deputy Chief O'Donnell occasionally went with him. Lieutenants McBride and Wise typically took a Departmental vehicle on Friday afternoons to the bank in order to cash their pay checks and to get lunch. Lieutenant McBride, on occasion, took a Detective's vehicle to run errands. Sergeant Stewart, on occasion, took a Detective's vehicle home when his car was not working, whenever he attended in-service training, and for "at least" several weeks when his personal car was involved in an accident. The Chief did not instruct any members of the Public Safety Department other than Complainant that they were not to use a Departmental vehicle without prior permission.

Aside from issues involving invalid licensure and unauthorized use of vehicles for which other members of the Department were not disciplined, the sole grounds for Complainant's termination consist of filing an accident report six days late, failing to report the involvement of the Kim vehicle in the accident, and falsely claiming to have made towing arrangements. There is no evidence that equivalent misconduct resulted in the termination of any Caucasian officers. Complainant was held to the letter of the law whereas Caucasian officers who committed other types of misconduct were treated less harshly. Chief Cella offered Caucasian Patrol Officer Jeremiah Ahern the opportunity to

return to work after he made a series of obscene and threatening phone calls which included a death threat and the “N” word, provided Ahern agreed to long-term counseling, a letter of apology, and other constraints. The Chief took no action against Deputy Chief O’Donnell even though he waited four days to report an accident involving a Departmental vehicle. Similarly, the Chief imposed no punishment on Lieutenant Wise for visiting pornographic websites on his office computer or on Lieutenant McBride for using her office computer to go on sweepstakes sites and enter contests during work hours.

If Complainant’s conduct had been evaluated by a Department which adhered to objective standards of conduct, I would have no basis for concluding that the discharge was discriminatory. Rather than adhering to objective standards set out in a written disciplinary policy, however, the Chief took a subjective approach to discipline. Respondent offered no guidelines or policies for identifying situations in which counseling was warranted or when progressive discipline would be considered in lieu of termination.

Had Complainant been a Union member at the time of the car accident, he might have been protected by the terms of a Collective Bargaining Agreement. As a member of the Command Staff, however, his continued employment appears to have been wholly discretionary on the part of Respondent. The Chief exercised this discretion in a remorseless manner when evaluating Complainant’s misconduct, while treating Caucasian officers in a forgiving and lenient manner. The evidence indicates that no one

but Complainant was fired for misconduct even though at least one other officer, Jeremiah Ahern, committed infractions which were more serious. The contrast between Complainant's treatment and the treatment accorded to non-minority members of the Department convinces me that the accident was a pretext for unlawful discrimination.

2. Promotion to Lieutenant

Complainant's history of employment provides additional circumstantial evidence from which an inference of discriminatory animus may be drawn. From the outset, the Ancillary Services position which Complainant occupied as a Lieutenant lacked legitimacy. It was designated as a minority slot and was required to be filled as a prerequisite for the promotion of two Caucasian candidates into positions they already occupied on an acting basis. Chief Cella testified that he would "probably" have just promoted the two Caucasian candidates had it not been for the intervention of the Director of Affirmative Action and Associate Chancellor of UMass Boston. The written portion of the exam was conducted in two sessions with Caucasian candidates taking it earlier in the day and African-American candidates taking it in the afternoon. Although Chief Cella testified that the written portion of the exam was given at two different times to avoid paying three African-American officers overtime, his testimony in this regard was not credible. The Chief acknowledged that it would have been preferable to give the Lieutenant's exam at one sitting and arrange for overtime. According to Complainant's credible testimony, the amount of overtime would have been de minimus.

Once promoted, Complainant found himself a Lieutenant in title only. In

announcing the promotions of Complainant, Sergeant McBride and Acting Lieutenant Wise, the Chief drafted a memorandum outlining the duties of the three Lieutenants. The Chief announced that Complainant was being given responsibility for security officers, the lockshop, and special projects. Within several months of Complainant's promotion, however, the responsibility for supervising institutional security officers was transferred away from Complainant to Lieutenant McBride. In an effort to acquire meaningful duties, Complainant suggested to Chief Cella that the Department of Public Safety implement a bicycle patrol for the campus. Complainant asked that he be allowed to oversee the patrol. Chief Cella approved the program but put Lieutenant McBride in charge of it.

The responsibility for the lockshop was never transferred to Complainant since Deputy Chief O'Donnell never relinquished responsibility for the lockshop. Complainant was instructed to develop an evacuation plan for which he received no guidance. He was told to make inquiries about purchasing furniture for the office, but his role in purchasing furniture was limited to getting brochures, procuring prices, interviewing people about the kind of furniture they wanted, and looking through old furniture to see what was usable. Complainant's involvement in bidding on a Departmental vehicle was limited to taking a sealed bid to an auction at the State Police barracks in Framingham. Complainant complained to Chief Cella about the fact that he wasn't getting appropriate assignments as a Lieutenant, but Chief Cella declined to give him any additional responsibilities. After Complainant was terminated, the Ancillary Services position which he had occupied was not refilled.

During the two and one-half years that Complainant occupied the position of Ancillary Services Lieutenant, there were occasions when Complainant was not invited to meetings that other members of the command staff attended. Complainant protested to Chief Cella about not being part of the meetings which included the Chief, the Deputy Chief, and the other two Lieutenants but he was told that the meetings did not concern him. Once in 1995, Complainant was not invited to a breakfast meeting for the Command Staff that was held at Lieutenant McBride's house. Throughout the time that Complainant was Lieutenant, there were occasions when the Chief, Deputy, the other two Lieutenants, and the Detectives would order out for lunch and eat together but not invite Complainant to join them.

The foregoing circumstances indicate that from the outset, Chief Cella did not support Complainant in his role as Lieutenant. The Chief did not initiate the creation of the third Lieutenant's position, but, rather, arranged for a minority promotion solely at the behest of Respondent's Director of Affirmative Action and Associate Chancellor Babcock. The Chief undermined Complainant's attempts to function as a legitimate member of the Command Staff. Chief Cella never refilled the third Lieutenant's slot after Complainant's departure. These facts support an inference that the events surrounding the car accident provided Chief Cella and Deputy Chief O'Donnell with an opportunity to return to the status quo immediately preceding the 1995 promotion of Complainant when there were no African-American members on the Command Staff. I conclude that this motive played a significant role in their decision to terminate

Complainant.

3. Working Conditions

The evidence supports Complainant's contention that his working conditions were markedly inferior to those of his fellow Lieutenants. From September 1993 until the Department of Public Safety moved to new quarters in November 1995, Complainant's office consisted of an unlocked portion of an all-purpose desk in the squad room. Complainant's desk was used by people in need of a place to work or a place to dump things on. The squad room was where roll call, witness interviews, and training took place. Some members of the Department ate lunch in the room, cooked, and watched television there. Lieutenant Wise, by contrast, shared a locked office with the Deputy Chief and had a desk that locked. Lieutenant McBride had a locked desk in the Sergeants' room. Complainant asked Chief Cella if he could share Lieutenant McBride's desk and if the Sergeants could use the desk in the squad room, but this request was denied. After the Department of Public Safety moved to new quarters in November 1995, Complainant moved into an office with the other Lieutenants but he still had to use the unlocked desk he had formerly used in the squad room. The other Lieutenants had desks that locked. The conditions under which Complainant was forced to work provide contextual support for his claim of disparate treatment in relation to discipline.

4. Conclusion

What emerges from the evidence is that other members of the UMass Department of Public Safety received the benefit of the doubt in disciplinary situations while Complainant's treatment was unyielding and harsh. His positive record of prior employment did not count for him. Alternatives to termination were not even considered. Complainant was immediately removed from the payroll as soon as disciplinary action was contemplated even though Respondent's practice was to suspend employees with pay pending a hearing and final decision. Other procedural red flags include the fact that Complainant was not permitted to have counsel at his disciplinary hearing, not allowed to summons witnesses, and not permitted to make a tape recording of the proceedings.

Had Complainant been an employee with a troubled history in the Department, it might be possible to reconcile his termination with the lenient treatment accorded other individuals. Such was not the case. The evidence contains no history of prior disciplinary infractions. Officer Delehanty described Complainant as the Lieutenant who was most respected for his interaction with lower ranking officers on the Department of Public Safety and with members of the University community. Patrol Officer Peter Bonitatibus described Complainant as a "very credible person. I trusted him. I could go to him for advice. I thought he was a very good supervisor." Patrol Supervisor Lorenzo Hall testified that always thought that Lieutenant Allen had a great deal of integrity. . . . He was competent, polite, respectful, nice, . . . as a supervisor I thought his behavior and attitude toward the subordinates and everybody else in the University was exemplary." Chief Cella testified at the public hearing that, "[Complainant] was a great people person.

He was very good with the public, he was very good with students . . . Everybody liked him”

Buttressing the evidence of disparate treatment in the handling of Complainant’s motor vehicle accident and its aftermath is evidence of disparate treatment in Complainant’s promotion to Lieutenant, his duties as Lieutenant, and his working conditions as a Lieutenant. Altogether, this evidence paints a vivid picture of the discriminatory manner in which the Department of Public Safety treated the sole African-American member of its command staff.

C. Damages

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. c. 151B and to render the injured Complainant whole. Remedies include damages for lost wages and benefits and for emotional distress Complainant has suffered as a direct result of Respondent’s discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Insofar as lost wages are concerned, Complainant’s salary at UMass Boston in 1995 was \$58,337.30. In 1996, Complainant earned \$13,644 (\$3,234.01 plus \$10,410.00 in unemployment compensation). In 1997, Complainant earned \$24,338.00. In 1998, Complainant earned \$30,896. In 1999, Complainant earned \$46,111.15. In 2000,

Complainant earned \$47,045.50. In 2001, Complainant earned \$41,522.75. In 2002, Complainant earned \$44,373.48. In 2003, Complainant earned \$ 47,932.66. Since his termination from UMass-Boston, Complainant has received health insurance coverage under his wife's health plan. He does not have a pension, and he does not receive educational benefits for himself and his family.

Had Complainant not been terminated, his daughter would have attended four years of undergraduate education under the tuition waiver program available to Complainant as a UMass Boston employee. Using in-state tuition figures from the spring of 1996 through the spring of 1998, the loss of the tuition waiver amounts to \$4,522.00.

Turning to the issue of emotional distress damages, Complainant's entitlement to an award of monetary damages does not need to be based on expert testimony; it can be based solely on the Complainant's testimony as to the cause of his distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Complainant testified credibly that after being terminated, he was too depressed to start looking for other employment until June or July 1996. Complainant described the loss of his job as “very devastating.” In being terminated, Complainant felt that he “was letting down everyone.” He testified that, “When I got fired it became a very devastating and depressing thing for me, and I lost not just income, not just finance. It appeared to me I lost my name. I lost my identity of who I was.” Transcript, Volume 3 at 57-58.

Complainant’s daughter testified that after his termination, Complainant was not the same person he used to be. Complainant’s termination led to marital problems, resulting in the separation of Complainant and his wife for some time. Complainant’s mother said that Complainant never stopped being upset about his termination. Complainant’s family was so concerned about whether he would harm himself after his termination that they had his personal firearm disarmed by a family friend who was a police officer.

Based on the foregoing description of Complainant’s emotional injury, I conclude that Complainant is entitled to \$100,000.00 in emotional distress damages.

IV. ORDER

M.G.L. ch. 151B, sec. 5 states, in part, “If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in any amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory

practice; (b) in an amount not to exceed \$25,000 if the respondent has been adjudged to have committed one other discriminatory practice during the 5 year period ending on the date of the filing of the complaint. . . .”

In 1998 this Commission determined that Respondent UMass Boston engaged in racial harassment of a maintenance worker on its grounds crew during the period from late 1991 to 1992. See Beldo v. University of Massachusetts Boston, 20 MDLR 105 (1998). The present complaint was filed on May 22, 1996. Thus, Respondent engaged in discriminatory acts prior to the ones at issue here but was not “adjudged” to have done so until after the filing of the present complaint. Thus, I shall analyze Respondent’s conduct under part (a) of M.G.L. ch. 151B, sec. 5 rather than under part (b). I find that Respondent’s conduct towards Complainant was so egregious as to merit a civil penalty under M.G.L. ch. 151B, sec. 5 (a) in the amount of \$10,000.00.

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under M.G.L. ch. 151B, sec. 5, Respondent is ordered to immediately cease and desist from further acts of discrimination. Respondent shall pay Complainant, within sixty (60) days of receipt of this decision:

- (1) a sum in lost wages consisting of \$170,834.86;
- (2) a sum in lost tuition costs for his daughter in the amount \$4,522.00; and
- (3) The sum of \$100,000.00 in damages for emotional distress.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

- (4) Respondent shall conduct basic annual training sessions concerning disparate treatment based on race for all employees and supervisors.
 - a. All training sessions must be at least four (4) hours in length. All employees and supervisors are required to attend. Respondent shall repeat this training at least one time for all new supervisors and employees who were hired or promoted after the date of the initial training session.
 - b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The training may be provided by the Commission, or may be provided by a trainer who is a graduate of the MCAD's certified "Train the Trainer" course.

Alternatively, Respondent may submit a resume of a potential trainer to be approved by the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
 - c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval and provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides

to send a representative to observe the training session(s), Respondent will provide the Commission representative with unfettered access to the training.

- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic(s), the names of persons required to attend the training, the names of persons who attended the training, and the date and time of each training session.
- e. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 6th day of July, 2005.

BETTY E. WAXMAN
Hearing Officer

