

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION  
and DOUGLAS SWEET,  
Complainant

v.

DOCKET NO. 99-BEM-0851

MASSACHUSETTS BAY  
TRANSPORTATION AUTHORITY,  
Respondent

Appearances: Jane Alper, for Complainant  
Joseph H. Aronson and Mary M. Logalbo, for Respondent

I. INTRODUCTION

On April 1, 1999, the Complainant, Douglas Sweet, filed a complaint with the Commission against Respondent, MBTA, alleging that he was discriminated against on the basis of his disability (blindness) in violation of M.G.L. Chapter 151B, § 4(16A). Complainant further alleges that, as a result of his complaints that Respondent was failing to reasonably accommodate his disability, the Respondent engaged in unlawful retaliation in violation of M.G.L. Chapter 151B, § 4(4) when it terminated his employment. The Investigating Commissioner found probable cause to credit the allegations of the Complainant and the matter was certified to public hearing. A Pre-Hearing Conference was held on March 18, 2004. A public hearing was held before me on January 25, 26, 28 and March 4, 2005.

I have considered the entire record of the proceedings, including all proposed findings of fact, conclusions of law, and supporting arguments of the parties. To the

extent the proposed findings and conclusions are not in accord with the findings therein, they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented; others have been modified to accord with my findings. Having duly considered the evidence in the record, I make the following findings of fact and conclusions of law.

## II. FINDINGS OF FACT

1. The Complainant, Douglas Sweet, is a 65 year old male who is totally blind as a result of a childhood accident.
2. From January of 1981 until he entered law school in 1993, Complainant was employed as an investigator, and a senior investigator by the Equal Employment Opportunity Commission (EEOC). From November 1997 until January 1999, Complainant was employed by the Department of Labor, Office of Federal Contract Compliance Programs, as a compliance officer, investigating discrimination complaints and conducting compliance reviews of federal contractors.
3. During all but the first three years of his employment at the EEOC and throughout his employment at the Department of Labor, Complainant was assigned a full-time reader/assistant as a reasonable accommodation to assist him with the documents he need to have read to perform his job. For the latter portion of his employment at the EEOC and throughout his employment with the Department of Labor, Complainant had a computer equipped with adaptive hardware and software as a reasonable accommodation to enable him to generate reports and documents independently.
4. In September of 1998, Complainant applied for a position with the MBTA as Project Manager for Civil Rights Compliance in the Department of Organizational Diversity.

His first interview for the position was conducted by Mary Dunderdale of the Human Resources Department and Kathleen (Casey) Ford, the Assistant Director of Organizational Diversity. A second, follow-up interview was conducted by the Director of Organizational Diversity, Diane Wong. Complainant testified that he applied for the job because he was seeking an “attorney position” and the job was compatible with his past experience and very interesting to him.

5. Complainant testified that in his second interview with Ms. Wong he offered to discuss the reasonable accommodations he would need if hired. According to Complainant, Wong replied that he had the best knowledge of what accommodations he required given his employment history and experience and that she would rely on that knowledge and experience.
6. Respondent, MBTA, is an employer within the meaning of M.G.L. c. 151B, §1(5), as it employs more than six employees. Complainant was hired by the Respondent on or about January 6, 1999 and began work on January 25, 1999.
7. Complainant worked full-time from January 25, 1999 until March 24, 1999 as the Project Manager for Civil Rights Compliance in the Department of Organizational Diversity. His primary job was to manage the personnel compliance unit, the unit that investigated internal complaints of discrimination at the MBTA. Complainant was responsible for directly supervising the Personnel Compliance Officers (PCOs) who received and processed internal complaints of discrimination from MBTA personnel. He was also charged with keeping staff informed about current developments in discrimination law and, eventually, establishing an internal alternative dispute resolution program for the MBTA.

8. Throughout Complainant's employment, his supervisors were Casey Ford, Assistant Director of the Department of Organizational Diversity, and Diane Wong, Director of the Department of Organizational Diversity.
9. According to Wong, it was an informal practice of Respondent to have a 90-day probationary period for managers. However, Complainant was never informed that he was subject to any such probationary period.
10. Prior to Complainant's start date, Wong asked him to draft a list of accommodations he required. He prepared a memorandum, dated January 14, 1999, listing three accommodations that he believed he would need to perform the essential functions of the job: a full-time assistant to help with reading and clerical tasks, an adaptive computer, and access to electronic and on-line legal resources, such as Westlaw. Exhibit 6.
11. Complainant's request for a full-time reader/assistant was denied by Ford and Wong. The primary reasons for the denial were that none of the other managers in the department had personal assistants and everyone was expected to do their own typing. Wong also testified that she believed that Complainant intended to use an assistant as a liaison between himself and the PCOs. She preferred that the PCO's receive close and continual supervision directly from Complainant. Complainant denied ever having or expressing any intent to have an assistant act as an intermediary between himself and the PCOs. Exhibits 9 and 26.
12. Complainant was informed that various staff in the office would be assigned to assist him until Respondent hired a permanent receptionist who would be assigned to assist him on a half-time basis. Wong testified that Complainant would have participated in

the hiring of the permanent receptionist. Initially, the temporary receptionist, Shelly Fortier, was assigned to provide reading services to Complainant. Complainant testified that Fortier provided assistance to him on a very limited basis for approximately one hour a day, because her primary responsibility was answering telephones and greeting people at the front desk. Complainant testified that he found it difficult to understand Ms. Fortier when she read to him and he had to frequently ask her to repeat words while she was reading. Mr. Giorgianni, one of the PCOs, confirmed that Fortier was difficult to understand at times. According to Wong, Fortier did have a speech impediment but it was insignificant and Wong never had a problem understanding her. Wong also testified that Fortier was relieved of her other duties while she was providing assistance to Complainant but she could not remember if anyone relieved Fortier and could not recall anyone else performing receptionist duties. I credit Complainant's testimony that Fortier was not relieved of her receptionist duties while she was assisting him and that her assistance was inadequate because he found it difficult to understand her.

13. The three PCOs Complainant supervised, including Giorgianni, read him materials relevant to their cases. Complainant testified that most days he spent at least two to three hours meeting with the PCOs either individually or a few at a time. Another temporary employee, Sara Berryhill, provided limited clerical assistance to Complainant. Other employees provided sporadic minimal assistance and Respondent provided Complainant with a Dictaphone. Additionally, Complainant had his own personal volunteer reader who met with him one evening a week at the workplace to read and tape record documents related to his work.

14. At one point Complainant became so frustrated with the inadequacy of the readers provided, he suggested that one of the vacant PCO slots be used to hire a personal assistant/reader for him. Ford testified that she discussed this suggestion with the ADA coordinator, Ms. Simmons, and they concluded that it would not be appropriate to do so given the PCOs' caseloads and that other people in the office would be assisting the Complainant.
15. Frank Giorgianni, one of the PCOs supervised by Complainant, testified that people in the department were willing to help Complainant but, nonetheless, complained that assisting him for an hour or two a day made them frustrated because they felt that they had enough of their own work to do.
16. Complainant's job required a significant amount of reading and producing written materials. According to Complainant, the lack of adequate and consistent help made it difficult for him to perform his job. He was unable to respond to requests, access information, or keep up with the volume of paperwork, filing, and document retrieval necessary to perform his assigned duties. I credit Complainant's testimony about how difficult it was for him to do his job. According to Wong, Complainant was provided with adequate reading and clerical assistance to enable him to do his job. I do not credit Wong's assertion that Complainant was given adequate assistance.
17. Respondent agreed to provide an adaptive computer to Complainant as a reasonable accommodation. After starting work, Complainant requested that Respondent retain a vendor that he had worked with previously as he was familiar with their product and believed that using this vendor would result in fewer problems with the necessary equipment. Respondent informed Complainant that it was obliged to use established

procurement procedures, which required soliciting bids from other vendors.

According to Mr. Calderon, the normal procurement procedures, including bid solicitation, can take approximately one month to six weeks. No one discussed with Complainant the possibility of waiving the normal procurement procedure as a reasonable accommodation. Ultimately, Respondent was able to work out an agreement with the vendor Complainant had requested.

18. Due to a pre-planned vacation, Complainant was out of the office from February 6, 1999 until February 17, 1999. He requested that the computer system not be installed until after he returned from vacation. Respondent agreed to this request but the computer was not delivered until March 11, 1999, some three weeks after Complainant returned from vacation, and just two weeks prior to his termination. Complainant testified that even after the computer was installed, he was unable to access his e-mail because he was unfamiliar with Respondent's e-mail system and had never received the training that he requested. The lack of an accessible computer during most of the short duration of Complainant's employment made it impossible for him to generate documents independently or to access e-mail.
19. Complainant's request for access to electronic and on-line legal data bases was denied because Wong did not believe that access to this information was necessary for him to do his job. Wong indicated to Complainant that up to date legal information was available in the library and in the legal department but Complainant did not avail himself of this resource. It is not clear from the record that Complainant would have been able to access this information without assistance.

20. While Complainant was away on his pre-planned vacation in February, he contracted a bad cold or flu that affected his hearing. His condition worsened on the flight home such that he had barely any hearing in his left ear and significantly reduced hearing in his right ear. This condition persisted until approximately March 22, 1999.

Complainant testified that such significant hearing loss, coupled with his blindness, resulted in a complete loss of his sense of direction and inability to localize sound. This rendered him temporarily unable to travel independently to and from work and to move around the workplace. This caused him to have difficulty interacting with co-workers, especially during meetings. Complainant never formally requested a reasonable accommodation for his hearing problem but did inform both Ford and Wong of the difficulty he was having so they would understand why he was unable to move about and meet people in other offices as they had requested him to do.

21. On or about March 2, 1999, Complainant attended a meeting to discuss the strategic planning proposals for the Department of Organizational Diversity. At some point before this meeting the managers of the Department were informed that Rod Guldenstern was the only manager whose presentation was in a format considered acceptable to Ford and Wong. Ford testified that Complainant stated at the meeting that he had revised his proposal so that it was in the form that, "Rod, spelled G-O-D," had used. Complainant testified that he meant the comment to be an amusing, albeit somewhat sarcastic, pun on the name "Rod". Complainant also testified that upon hearing that Guldenstern was offended by his comment he immediately went to his office to apologize. He testified that he had not intended to offend Mr. Guldenstern and I credit his testimony.

22. On or about the first or second week of March, at a strategic planning meeting, Kerin Deely, a manager in the Department, commented that she was pleased with Respondent's progress in employing minorities and women. Complainant responded that he, too, thought diversity in the workplace was an admirable goal, but went on to state that, in the past, when most of the drivers were white Irish men, he could understand what they were saying and the names of the stations were pronounced correctly. Both Complainant and Giorgianni testified that Complainant's comment was taken out of context and was not offensive. Complainant claimed that he made the remark in the course of his observation that Respondent had made great strides in diversifying its work force. He stated that he recalled a time when all the drivers were male, white and Irish and that he had detected a noticeable change in accents over the years. He added that, as a blind person, he had found it easier to hear and understand the announcements in the past. Complainant testified that none of his coworkers appeared to be offended by this comment and no one told him so. I credit this testimony. Mr. Calderon testified that he told Complainant after the meeting that he did not appreciate the statements Complainant had made and that he found them offensive. I do not credit Calderon's testimony. Both Calderon and Deely brought the remark to the attention of Ford and Wong stating they considered it to be racially insensitive. Ford and Wong asked Calderon to document what had happened.

Exhibit 28.

23. Calderon testified that in March of 1999, there were some boxes in Complainant's office that Complainant did not want the cleaning staff to remove. Complainant asked Calderon, in the presence of another employee, Lorraine Dowling, to write a note on

the boxes in Spanish instructing the cleaning staff not to remove them. Calderon testified that he was offended by the request because it implied that the cleaning staff could not read or understand English. Dowling and Calderon reported the comment to their supervisors. Calderon's memo to his supervisor documenting this incident is dated April 12, 1999, approximately two to three weeks after Complainant's termination. Calderon testified that he was asked in April to write this memo although he told Ford and Wong about the incident immediately after it occurred. Calderon further testified that after getting to know Complainant better from having lunch with him almost every day, he came to the conclusion that Complainant did not intend the remark to be derogatory. Complainant testified that he asked Calderon if it would be more effective to write "Do not remove" on the boxes in Spanish and that Calderon stated that it would be a good idea. I do not believe that Calderon found the remark offensive at the time it occurred and I do not credit his testimony that he was offended by the remark. I believe that, by that time, Calderon had established a friendly relationship with Complainant and knew the comment was not meant to deride anyone. Moreover, I credit Complainant's testimony about the nature of the remark, and find that on its face, it is not derogatory or offensive.

24. On or about March 10, 1999, Complainant submitted a memorandum to his supervisor, Ford, confirming an earlier conversation he had had with her, in which he stated that "the current arrangement for provision of assistance to me in reading material, organizing files, and handling administrative details is not meeting my needs." Complainant closed the memorandum by stating, "This is an urgent need. Failure to meet it will greatly limit my ability to fully function in my position."

Exhibit 23. Neither Ford nor Wong discussed this memo with Complainant and neither of them questioned him about “the stack of reports and other matters” that he claimed he had to deal with but could not because of a lack of assistance.

25. Wong responded to Complainant’s memorandum in writing on March 11, 1999, repeating her earlier statements that “none of the OD managers have personal assistants,” that the MBTA intended to meet his need for assistance by hiring a front desk person whose responsibilities would include acting as his assistant, and that she did not want him “to develop a third party approach to managing his investigative unit.” Exhibit 26.

26. On March 15, 1999, approximately a week before Complainant’s termination, Wong informed him that effective March 17, 1999, Ms. Fortier would be assigned to assist him for four hours per day at regularly scheduled times. However, Complainant testified that Fortier left for vacation before this change was implemented and never provided him with the promised assistance. This was the first attempt to provide Complainant with regularly scheduled times for assistance since his employment with Respondent began. Prior to this announcement Complainant had had to wait until other employees had available time to assist him.

27. On or about March 18, 1999, approximately six days before Complainant was terminated, Ford assigned Bob Donnelly to read Complainant’s mail to him each morning after noticing that Complainant’s mailbox was full.

28. Giorgianni testified that Complainant was a conscientious and effective supervisor. According to Giorgianni, Complainant met with the PCOs regularly and frequently from the time he took over that responsibility from Ford. Specifically, Complainant

met with all the PCOs together once a week to review cases and offer an opportunity for group input into each other's cases. Each PCO also met with Complainant separately to discuss the status of his investigations. Giorgianni testified that he also met informally with Complainant approximately once a day to receive input about writing style or discuss developments in his investigations. By contrast, Ford and Wong testified that Complainant failed to meet regularly with the PCOs. I credit the testimony of Giorgianni that Complainant met regularly with the PCOs as Giorgianni was a PCO who actually attended supervision meetings and he had no motive to fabricate testimony on this issue.

29. According to Giorgianni, Ford was a very controlling supervisor who wanted things done her way and who was hostile towards anyone who questioned her authority. He testified that she frequently asked him questions about Complainant, including how he thought Complainant was doing, whether he had ever noticed Complainant sleeping, and how long Complainant took for lunch. I credit Giorgianni's testimony and found him to be the most forthcoming witness at the hearing.
30. Giorgianni testified that at one meeting Complainant asked a question about a policy that he believed was legally incorrect. Ford reacted angrily to Complainant's inquiry and made hand gestures as if she was strangling him, appeared frustrated, and rolled her eyes. Complainant was obviously unaware of Ford's gestures and expression. I credit Giorgianni's testimony that this incident occurred and believe that it was symptomatic of Ford's attitude toward Complainant and his questioning her authority.
31. Ford, who was Complainant's direct supervisor, testified that he had a negative and critical attitude, was unwilling to complete assigned tasks, failed to manage his unit

by meeting with them regularly, failed to create any work product, and made inappropriate comments. Ford also testified that on one occasion she assigned Complainant to draft an executive performance appraisal form for his position. All executives at the MBTA were required to draft such a form by which they would ultimately be evaluated. The form was meant to outline the objectives and goals for the position. Ford found Complainant's initial draft to be unacceptable and provided him with numerous suggestions for improving it. She testified that Complainant made no changes to the revised appraisal form but simply asked a helper to retype the comments Ford had made onto the appraisal form. Complainant did not submit the appraisal form on time and when it was submitted it did not meet Ford's expectations. I credit Ford's testimony that she was frustrated with Complainant's handling of this assignment. According to Complainant, he was given very little guidance as to what to include in this appraisal form and Ford did return his first draft of the appraisal directing that some language from the Attorney General's agreement be transcribed onto the form. Complainant claimed that he gave the appraisal form with the language to be added to a typist with instructions about what to transcribe, but that she failed to follow his instructions. I credit Complainant's testimony about this assignment.

32. Calderon testified that Complainant made comments to the effect that many of the assignments he was given were not well thought out and were a "waste of time." However, Calderon also testified that when Complainant first started working he was "extremely positive" about the job but that over time, as he became more frustrated at not having a reader or a computer and as a result of this frustration, he became more

negative. I credit this testimony as it comports with Complainant's view of certain assignments and his growing frustration with his inability to work effectively.

33. Complainant testified that he never refused to perform an assignment but that sometimes he did not understand the purpose of the assignment or what was being asked of him. According to Complainant, other managers submitted projects that failed to meet with Wong or Ford's satisfaction, where that failure was born of a lack of understanding about the purpose of the assignment. Complainant testified that initially he was excited and enthusiastic about his job at the MBTA and wanted to succeed. I credit this testimony and believe that Complainant became genuinely frustrated by what appeared to be bureaucratic, "make work" assignments. While he stated that it was his intention to work there for approximately 12 years and then retire, I find this assertion to be somewhat speculative.

34. Wong testified that she was concerned about Complainant's behavior because two people had reported that he had made insensitive or racist comments. Moreover, he seemed unwilling to complete assignments, questioned the value of the work being given to him, and failed to hand in assignments in a timely manner. I credit her testimony that the "insensitive" comments were brought to her attention, but do not find that she ever discussed this issue with him. Nor did she address Complainant's alleged performance problems with him prior to his termination, a fact that I find incredulous.

35. Wong also testified that she found Complainant sleeping in his office on one occasion. Ford testified that on another occasion she found him sleeping and snoring in his office. Complainant testified that he was not sleeping on the occasion when

Wong claims he was, but was listening to a cassette recorder and with his hearing impaired from his recent illness, he did not hear her knock and enter his office.

Complainant was not aware that either Wong or Ford had encountered him sleeping in his office and neither of them ever addressed this issue with him. I credit Complainant's testimony.

36. Complainant testified that much of the documentation referencing his non-compliance with the requirements of the job or inappropriate comments were never shown to him, nor were these issues discussed with him. He was not provided an opportunity to correct any actual or perceived deficiencies in his work habits or behavior. Wong testified that it was her practice to document, or request documentation of everything that happened in the Department except for casual conversation. However, she testified that it was not her practice to share any such documents or memoranda with the employees referenced or affected by them.

37. Complainant testified that on or about mid-March 1999, he had occasion to speak with the then Chief of the Attorney General's Civil Rights Division who was attending a meeting at the MBTA. Complainant stated that the Chief voiced some concerns to him regarding Respondent's medical office and Complainant told the Chief to feel free to call him if he could be of any assistance. Wong witnessed the exchange and later admonished Complainant that any contact with the Attorney General's office must be through the legal department. I credit Complainant's testimony about this incident.

38. On March 24, 1999, Complainant was called into Wong's office. John Langan of Respondent's Human Resources Department was also present. Wong proceeded to

read Complainant a letter from Respondent's General Manager terminating his employment for failure to carry out job responsibilities "in a timely and thorough manner" and for "making statements completely inappropriate for a manager within the Department of Organizational Diversity." Complainant was shocked by this letter and asked for specific examples of his alleged deficient performance or inappropriate comments. Wong mentioned the comment he had made about his difficulty in understanding bus drivers and a request he made to a co-worker to write a note in Spanish for the cleaning staff. (Ex. 47).

39. After the meeting in Wong's office, Langan escorted Complainant to his office to collect his personal belongings and then escorted him to the lobby. From the lobby, Complainant called his wife and his coworker Calderon, whom he considered a friend. Calderon met Complainant and told him he was very sorry to hear Complainant was terminated. Complainant asked Calderon if he had been offended by his statement about the bus drivers and Calderon said that he had not been offended and that it was obvious at the meeting that Complainant supported diversity at the MBTA. Calderon offered to circulate Complainant's resume to people who might be interested in hiring him.

40. Respondent asserts that Complainant's personality, poor attitude, and his unwillingness to follow instructions and complete assignments led to his termination. I do not credit these assertions.

41. Complainant testified that during the course of his employment with the MBTA he never received any verbal or written warnings and was not informed that his job was

in jeopardy. His supervisors had never discussed his performance with him and he was never informed it was unsatisfactory. I credit Complainant's testimony.

42. Giorgianni testified that during his 90-day probationary period at the commencement of his employment with Respondent he was called into a meeting with Ms. Ford and the Deputy Director and given a written warning. At that meeting, they discussed his performance and how he could improve it. Having been given a warning and the opportunity to improve, he completed his probationary period without further incident. Wong admitted that she had not terminated any other employee without giving first giving a warning and allowing the employee to complete his probationary period. I credit Giorgianni's and Wong's testimony on this issue.

43. Complainant testified that he was devastated by the termination. He had not been fired from a job before and stated that he had no idea that his job was in jeopardy. When Complainant spoke to his wife immediately after the termination he was in tears and has cried many times subsequently. He felt a loss of energy and incentive, slept a great deal, felt depressed, and had a negative self-image about his value and worth in his new profession as a lawyer. According to Complainant, his symptoms were severe and acute for a long period of time. The first time he experienced any improvement was in December 1999 when he was offered a part-time position supervising mediators at Newton District Court. At the time of the public hearing almost six years later, he still experienced periods of lack of energy and incentive and felt terrible about the way he had been treated. I credit this testimony.

44. Complainant's wife, Doris Ann Sweet, also testified that Complainant was emotionally distraught by his termination and I credit her observations.

45. Complainant searched for employment with a number of federal agencies after his termination, including several EEOC offices, the U.S. Department of Education, and the U.S. Department of Transportation. He found job listings on the Office of Personnel Management web site and in the Chronicle of Higher Education. Complainant interviewed for jobs at the EEOC and the Department of Education but was not offered a position. At some point, Complainant decided to pursue his private mediation practice rather than continue to seek employment elsewhere. That decision was based on his failure to find work, his age, his disability, and the discrimination he had suffered in the past because of his blindness.
46. At the time of his termination Complainant's annual salary was \$58,000.00 per year. Complainant is currently self-employed as a mediator under the business name of Sweet Solutions. In 2000, Complainant's mediation practice earned gross receipts of \$5,348.00. In 2001, Complainant's medication practice earned gross receipts of \$12,545.00. In 2002, Complainant's mediation practice earned gross receipts of \$9,718.00.
47. Complainant received SSDI benefits in 1999 amounting to \$7,128.00. His 2000 tax return reflects \$6,758.00 in SSDI benefits. He received \$6,972.00 in 2001, \$7,712.00 in 2002 and \$7,872.00 in 2003.

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, § 4(16) states that it shall be an unlawful practice for an employer to refuse to hire, rehire, advance in employment or otherwise discriminate against, because of a handicap, any person alleging to be a qualified

handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation. The burden is on the employer to demonstrate that the accommodation sought would impose an undue hardship on the employer's business. *See Yates v. Mass-C.E.O.P.S.*, 117 MDLR 1503, 1514 (1995).

In order to establish a claim of handicap discrimination for failure to grant a reasonable accommodation, Complainant must prove that: (1) he was a qualified handicapped individual within the meaning of M.G.L. c. 151B; (2) he needed a reasonable accommodation due to his handicap to perform the job; (3) the employer was aware of the handicap, and was aware that the employee needed reasonable accommodation to perform his job; (4) the employer was aware of a means to reasonably accommodate his handicap, or the employer breached a duty, if any, to undertake reasonable investigation of a means to reasonably accommodate the handicap; and (5) the employer failed to provide the employee the reasonable accommodation. *Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap* – Chapter 151 B (“*MCAD Guidelines*”) p.33 (1998); *D’Ambrosio v. MBTA*, 23 MDLR 81, 85 (2001).

Massachusetts General Laws c. 151B, §1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment which substantially limits one or more of the individual's major life activities. *MCAD Guidelines* at p. 2. Complainant has established that he is a handicapped person within the meaning of M.G.L. c. 151B because he has been totally blind since childhood.

A qualified handicapped person is a handicapped person who is “capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap.” M.G.L. c. 151B § 1(16). MCAD’s Handicap Guidelines at II(B), state that “essential functions” of a job are those that are not incidental or tangential to the job in question.

Complainant alleges that he was a qualified handicapped individual capable of performing the essential functions of his job as Project Manager for Civil Rights Compliance with reasonable accommodation. The essential function of Complainant’s job was managing the PCO unit by directly supervising the PCOs and keeping them up to date on the relevant law. The accommodations he sought were an adaptive computer and a full time reader/assistant to help him with reading, generating documents and filing.

Based upon the evidence presented, Complainant has demonstrated his ability to perform the essential functions of his position with reasonable accommodations. Respondent acknowledges that Complainant had extensive experience in the areas of civil rights and employment law and required no additional training when he began working at the MBTA. Respondent asserts that the adaptive computer and informal network of assistance provided to Complainant were reasonable accommodations that should have allowed Complainant to fulfill the requirements of his job. However, Complainant asserts that Respondent failed to accommodate his disability and subsequently terminated his employment after he continued to protest his lack of accommodation.

Respondent was aware of Complainant's need for reasonable accommodation and requested that he draft a list of required accommodations prior to his start date. Complainant submitted his request for accommodations approximately eleven days prior to starting work for Respondent. Complainant's request for an adaptive computer was granted but the computer was not delivered and installed until six and a half weeks after Complainant began working. During this time, Complainant was unable to independently generate documents or access his e-mail. Complainant's request for a full-time reader/assistant was denied without discussion. The reasons advanced were that none of the other managers in the Department had assistants and Complainant's supervisors did not him to use an assistant as an intermediary between himself and the PCOs. Respondent did recognize that Complainant needed assistance with reading and generating documents and with filing, and to that end, his supervisors sought to establish an informal network of assistance within the Department. However, Complainant was not provided with regularly scheduled and consistent help dedicated to his needs until the final week of his employment with the Respondent. This made it very difficult for him to perform a job which necessitated significant amounts of reading and producing written materials.

Respondent had a duty to provide reasonable accommodation to Complainant's handicap or to otherwise demonstrate that the accommodations he sought would impose an undue burden upon Respondent's business. This Commission and the courts have held that the issue of accommodation often requires an interactive and ongoing dialogue between employers and employees. Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass 632 (2004). "It is the employee's initial request for an accommodation which triggers the

employer's obligation to participate in the interactive process of determining one.”

Russell v. Cooley Dickenson Hospital, Inc., 437 Mass. 443 457 (2002). This includes discussion of the nature and scope of any accommodation sought and an assessment of its feasibility. D'Ambrosio v. MBTA, 23 MDLR 81 (2001); *citing* Mazeikis v. Northwest Airlines, 22 MDLR 63, 68-69 (2000). The Commission Guidelines further state, “If a person with a handicap requests but cannot suggest an appropriate accommodation, the employer and the individual should work together to identify one.” *MCAD Guidelines* at 6, 24.

Despite Complainant's repeated notice to Respondent that adequate accommodation was not being provided to him, there was no discussion between Complainant and Respondent about the nature of Complainant's needs and how his request for a full-time reader/assistant would allow him to fulfill the essential functions of his position. Complainant was simply told that none of the other managers had assistants and therefore he could not have one either. This facile response ignored the fact that no other manager in the Department was blind and in need of an assistant as a reasonable accommodation to accomplish the myriad tasks Complainant could not do on his own. Moreover, Complainant was told his request was denied because of Respondent's assumption that he intended to use his assistant as a liaison between himself and the PCOs, something Respondent wished to avoid. However, no facts were presented to substantiate this concern and it could have been resolved with some discussion about how Complainant intended to utilize a personal assistant.

I conclude that Respondent failed in its duty to engage Complainant in a dialogue regarding accommodations as well as in its duty to reasonably accommodate his

disability. However, this is not to say that the only possible accommodation was one which required Respondent to hire a full-time reader/assistant for him. Complainant might very well have been able to fulfill the functions of his job with a part-time assistant or with regularly scheduled assistance as opposed to the sporadic, piecemeal assistance that was provided. While I cannot conclude that Complainant required a full time personal assistant to perform the essential functions of his job, once Complainant made it clear that the assistance he was receiving was inadequate, Respondent was obliged, at the very least, to engage him in an interactive dialogue to further assess his needs and determine how best to meet those needs and render him able to fulfill the essential functions of his position.

Respondent also failed to establish that accommodating Complainant's handicap would have been unduly burdensome. The reasons given for the denial of Complainant's request for an assistant were arbitrary, not based in fact, and not related to administrative or financial hardship. Moreover, Complainant's supervisors rejected his requests without discussing the reasons he believed a full-time reader/assistant was necessary. Given that Complainant had a long work history of being successfully accommodated with a full-time assistant, a subject he addressed in his interviews, Respondent should have had a substantive discussion with him regarding this request.

I conclude that Complainant could have performed the duties of Project Manager for Civil Rights Compliance satisfactorily with the reasonable accommodations of an adaptive computer and a more formal, organized and consistent schedule of assistance. I also conclude that Respondent failed to provide reasonable accommodations to Complainant and did not demonstrate that the accommodations he sought, specifically a

full-time reader/assistant, would have imposed an undue financial or administrative hardship on the MBTA.

### Retaliation

In addition to Complainant's claim that Respondent failed to provide him with reasonable accommodations, Complainant also alleges that Respondent terminated him in retaliation for his continuous complaints about his lack of accommodation and in retaliation for his speaking with an official of a government agency. Respondent asserts that Complainant was terminated for legitimate business reasons, including his negative and critical attitude, his unwillingness to complete assigned tasks, and inappropriate remarks.

Massachusetts General Laws c. 151B § 4 (4 ) prohibits an employer from retaliating against an employee for engaging in activity protected by the statute. The provision makes it "unlawful "[f]or any person, employer...to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." See Kelley v. Plymouth County Sheriff's Department, et al., 22 MDLR 208, 215 (2000), citing Bain v. City of Springfield, 424 Mass. 758, 765(1997). Retaliation is a separate and independent claim of discrimination "motivated at least, in part, by an intent to punish or rid the workplace of someone who complains about an unlawful employment practice." Fountas v. Medford Public Schools, 22 MDLR 264 (2000), citing, Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

Complainant may establish a prima facie case of retaliation by demonstrating that: 1) he participated in protected activity; 2) Respondent knew about Complainant's participation in protected activity prior to discharging him, 3) Respondent discharged Complainant after he participated in protected activity; 4) a causal connection exists or can be inferred between Complainant's participation in protected activity and his termination. Morris v. Boston Edison Co. 942 F. Supp. 65, 68-69 (D. Mass 1996); Ruffino, 908 F. Supp. at 1040; Kelley, 22 MDLR at 215.

Once Complainant has established a prima facie case of retaliation Respondent must articulate a legitimate, non-retaliatory reason for its action that is supported by credible evidence. Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 116, 117 (2000). If Respondent articulates a legitimate non-retaliatory reason for its conduct, the Complainant must show that the reason given by the employer is a pretext for unlawful retaliation. Id.

Complainant asserts that he was terminated because he continued to complain about the Respondent's failure to provide him with reasonable accommodations that were necessary for him to do his job. Complainant continually voiced his frustration at not being able to complete tasks required of him and 14 days prior to his termination gave Ford a memorandum stating that the current arrangement with readers/assistants was not meeting his needs and hampering his ability to function effectively in the position. I find that Complainant's charge to Respondent of failure to accommodate his disability was protected activity and that shortly after he made this charge he was discharged. Thus, Complainant has established a prima facie case of retaliation.

I find Respondent's assertion that Complainant was terminated for evidencing a poor attitude toward the job, failing to complete necessary tasks and making inappropriate remarks is a pretext for unlawful retaliation. I credited Complainant's and Calderon's testimony that Complainant was very positive and energized and became frustrated only after he did not get the necessary accommodations to do the job properly. I also credited Giorgianni's testimony that Complainant took his supervision of the PCO's seriously and met with them frequently. Furthermore, Complainant has established that two comments he made, alleged to be offensive to minorities, and cited as a reason for his termination, were, given the context, not offensive or derogatory. Neither Ford nor Wong raised any concerns about these comments with Complainant prior to his termination, nor did they give him an opportunity to explain his statements. Finally, the performance issues raised by Complainant's supervisors were proven to be blatantly false, such as the claim that Complainant failed to meet regularly with the PCOs. Moreover, the fact that Complainant may not have completed some assignments in a timely fashion was directly attributable to Respondent's failure to reasonably and promptly accommodate him, a problem he made that clear to his supervisors. I also conclude that Complainant had legitimate questions about the purpose or worthiness of certain assignments. In sum, the reasons Respondent's witnesses proffered for terminating Complainant lacked credibility and were a pretext for retaliation, which lead me to conclude that the real reason for Complainant's termination was retaliation for his complaining about Respondent's failure to effectively accommodate his disability.

Complainant also alleges that his termination was in retaliation for his speaking with an official of the Attorney General's Civil Rights Division, while he was at the

MBTA for a meeting. I conclude that Complainant was not engaged in protected activity when he had a casual conversation with the Attorney General's representative and that this is not a basis for a claim of retaliation under G.L. c.151B. Moreover, there is no evidence that Complainant was terminated as a result of that conversation.

Having found that Complainant was a qualified handicapped individual, that he sought reasonable accommodation, that Respondent failed to provide or even consider the feasibility of certain accommodations he sought, and that Complainant was subsequently terminated because he complained about his employer's failure to reasonably accommodate his disability, I conclude that Respondent violated M.G.L. c.151B § 4 pp. (4) and (16A).

#### IV. REMEDY

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies that will make the Complainant whole and eliminate the discriminatory practice, including lost wages and emotional distress damages. M.G.L. c. 151B, §5; College Town v. MCAD, 400 Mass. 156 (1987). Complainant seeks reimbursement for the wages he lost due to his inability to find a job after being unlawfully discriminated against and subsequently terminated by Respondent. In addition, Complainant seeks front pay or reinstatement. Complainant specifically waived any claim for damages for emotional distress.

##### *Lost Wages*

An award of lost wages is a calculation of the money Complainant would have earned had he remained working for the Respondent. Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182 (1985). Complainant seeks lost wages for the time period

from his date of termination, March 24, 1999, until the time of the Hearing in this matter in March of 2005. Complainant attempted to mitigate his damages by seeking employment at numerous federal agencies and starting his own mediation business. His attempts to find comparable employment were not successful. At the time of his termination, Complainant was earning approximately \$58,000.00 annually. Given that Complainant was in his late 50's at the time of his termination and given his handicap, I conclude that the likelihood of his securing comparable employment after being terminated was slight to non-existent. Thus based on the record evidence, I find that Complainant is entitled to lost wages for a period of six years, calculated as follows: \$58,000 x 6 years, minus his interim earnings from his mediation business and the Social Security Disability Income benefits he received.

Complainant argues that this award for lost wages should not be diminished by the income he received from Social Security Disability Income benefits as these are earnings from a collateral source. The "collateral source rule" which most often applies to compensation paid by insurance has also been applied to benefits conferred by the state such as welfare benefits. Buckley Nursing Home v. MCAD, 20 Mass App. Ct. 172, 183 (1985). The reasoning behind the collateral source rule which usually applies to income received from an insurance policy, is that the damages must be paid by the one who caused the insured's disability. Pursuant to this doctrine, even if the victim receives a double recovery, a deduction of benefits would allow the wrongdoer to escape full liability for its actions. See also, Quint v. Staley Mfg. Co. 172 F.3d 1, 17 (1<sup>st</sup> Cir. 1999) (interpreting Maine Human Rights Act). However, in some instances where the party from whom the plaintiff seeks damages is not responsible for the injury, the collateral

source rule has not been applied. Jones v. Wayland, 374 Mass. 249 262 (1978); Politano v. Selectmen of Nahant , 12 Mass. App. Ct. 738 (1981). While these cases tend to be about injuries incurred in the line of duty and therefore not entirely apposite, here, the Complainant receives SSDI benefits on account of his blindness a pre-existing disability not caused by Respondent's actions. It is not apparent from the evidence how long Complainant received these benefits or if he received them prior to his employment with Respondent. The record also is silent about whether Complainant was entitled to receive these benefits in addition to his other income or if he could receive them only in lieu of other income. Therefore, I decline to apply the collateral source rule and will deduct the Complainant's SSDI benefits in the amount of \$36,442.00 from his award of back pay.

Complainant also seeks front pay from the time of the Hearing up until the date of his anticipated retirement. G.L. c. 151B "authorizes an award of damages for loss of future earnings and benefits which have been proved with reasonable certainty as attributable to the employer's misconduct subject to the employee's duty to mitigate." Conway v. Electro Switch Corp. 402 Mass. 385 (1988). An award of front pay is discretionary and because of the speculative nature of front pay, such awards are made in very limited circumstances, including cases where a discriminatory act occurs near an individual's retirement date. Williams v. New Bedford Free Public Library, 24 MDLR 171 (2002). Where an employee is approaching retirement age at the time of his termination and would be unlikely to find comparable employment, an award of front pay through retirement age would generally be appropriate. See DeRoche v. Town of Wakefield, 24 MDLR 176 (2002); Tan v. Stonehill College, 23 MDLR 39, 50 (2001).

In this case, the Complainant testified that he intended to work for Respondent for 12 more years from the date of his termination and presumably retire at the age of 70. Given the short duration of Complainant's employment with Respondent, I conclude that to find he would have worked 12 more years would be entirely speculative. In this case Complainant had reached the age of 65 at the time of the public hearing and sought front pay for five more years. Given these circumstances, I decline to make such an award.

As noted earlier, Complainant specifically waived a claim for emotional distress damages on the record at the public hearing, and therefore I decline to make any such award.

#### *Civil Penalty*

Consistent with the Commission's authority to award civil penalties, I find that this matter is appropriate for the assessment of such an award against Respondent. Some of the factors to consider in assessing a civil penalty are the degree of culpability, any history of prior such conduct, and ability to pay. See. Commonwealth v. Amcan Enterprises, Inc., et al., 47 Mass. App. Ct. 330, 339 (1999). In this case Respondent's managers were directors in the Department of Organizational Diversity and were specifically charged with investigating and preventing discrimination in the workplace. They should have been well aware of the law and their legal obligations in this matter. Given these circumstances, I find the conduct of Respondent's managers to be egregious which merits the imposition of a civil penalty in the amount of \$10,000.

*Affirmative Relief*

Consistent with the Commission's authority and my findings and conclusions above, I hereby order the Respondent to take the following affirmative steps with respect to training its personnel on issues of handicap discrimination.

- 1) Respondent shall conduct a basic annual training session on issues related to handicap discrimination and providing reasonable accommodations, for all managers and supervisors in the Department of Organizational Diversity. With respect to such training:
  - a. Each training session must be at least four (4) hours in length. All managers and supervisors, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next two (2) years, for all new supervisors and managers 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 notify the Commission's Director of Training of its decision to select either the Commission or a private trainer to conduct the initial training sessions. If a private trainer is selected, the trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from 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.

- i. If Respondent has selected a private trainer to conduct the initial training sessions, 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 sessions, Respondent will provide the Commission representative with unfettered access to the training sessions. 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, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

- c. For purposes of enforcement, the Commission shall retain jurisdiction over these training and reporting requirements.

## V. ORDER

Consistent with the findings of fact and conclusions of law recited herein, Respondent MBTA is hereby Ordered to:

- 1) Cease and desist immediately from engaging in discriminatory practices relative to disability discrimination and retaliation for protected activity.
- 2) Pay to Complainant, Douglas Sweet, within 60 days of receipt of this decision, the amount of \$283,967 in damages for lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post judgment interest begins to accrue.
- 3) Pay to the Commonwealth of Massachusetts within 60 days a civil penalty in the amount of \$10,000. Payment shall be forwarded to the Clerk of the Commission.
- 4) Conduct training as outlined above.

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

This decision represents the final Order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 C.M.R. 1.23 by filing a Notice of Appeal of this decision with the Clerk of the Commission within 10 days of receipt of this Order and a Petition for Review within 30 days of receipt of this Order.

So Ordered this 20<sup>th</sup> day of September, 2005

Eugenia M. Guastaferr  
Hearing Officer

