

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
EDWARD C. BURLEY,
Complainants

Docket No. 00130611

V.

BOSTON SCHOOL COMMITTEE,
Respondent¹

Appearances: Paul L. Nevins, Esq. for Complainant Burley
Sonia L. Skinner, Esq. for Respondent

I. INTRODUCTION

On March 9, 2000, the Complainant, Edward C. Burley, filed a charge of discrimination on the basis of age and disability in violation of M.G.L. Chapter 151B, sec. 4. Complainant is a diabetic who was age fifty-seven in September 1999 when he began his thirty-fourth year teaching in the Boston public school system. At that time, he was assigned to teach four classes in three different classrooms and was not provided with a storage area for his materials.

The Commission entered a finding of probable cause on the charges of age and disability discrimination. A certification conference was held and three issues were certified for public hearing: 1) whether Complainant was discriminated against based on disability when Respondent failed to accommodate Complainant with respect to the scheduling of classrooms; 2) whether Complainant was discriminated against based on age when Respondent failed to treat him in the same fashion as similarly situated younger

¹ The Boston School Committee was substituted for Boston English High School in a ruling dated December 12, 2002. On the same date, the parties stipulated to the dismissal of Respondent Gerald Sullivan.

teachers with respect to the scheduling of classrooms; 3) and whether Complainant was retaliated against by being constructively discharged.

A public hearing was held on February 9 and 10, 2004. The parties submitted post-hearing briefs on May 14, 2004. At the public hearing, the parties agreed that fourteen stipulated facts would be incorporated into the hearing record. They are incorporated into the findings of fact below except where contradicted by credible evidence presented at the public hearing.

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

II. FINDINGS OF FACT

1. Complainant, Edward C. Burley, was born on May 14, 1942. He was employed at Boston English High School as an English teacher from September 1965 to May 2000. At the start of the 1999-2000 school year, he was the most senior teacher at Boston English High School. The parties have stipulated that Complainant's performance evaluations were satisfactory.
2. Respondent Boston School Committee is a department of the City of Boston. Boston English High School is a secondary school under the jurisdiction of the Boston School Committee.
3. Complainant has a history of adult-onset diabetes. Complainant also has other medical conditions including hypertension accompanied by atrial fibrillation, hyperthyroidism, and gout.
4. Complainant was first diagnosed with diabetes in 1992 or 1993. In 1995 or 1996, Complainant informed the headmaster of Boston English High School, Gerald

Sullivan, that he suffered from diabetes. At that time, Complainant did not make a request for a special accommodation relating to his diagnosis.

5. In the 1990's, Headmaster Sullivan had discussions with Complainant about his attendance. Transcript, Volume I at 55; Volume II at 98-99. The headmaster was concerned about the impact of Complainant's absences on Complainant's students and sent him at least one note about his attendance. Sullivan testified that Complainant's absenteeism "got to be a real problem for me" but Sullivan never disciplined Complainant for abuse of sick leave. *Id.* at 48; 99-100. Complainant reported to his physician, Dr. Richard Sperling, on March 14, 1997 that he felt like the headmaster was trying to "document things in order to get rid of him." Complainant's Exhibit 1 (report of 3/14/97). The headmaster, himself, was absent for an extended period in the spring of 1999 because of a heart condition and from March to the end of the 2001 school year because of a broken ankle. Transcript, Volume II at 102-105.
6. In 1997 and 1998, Complainant's diabetes was under fairly good to good control with diet and exercise. Complainant's Exhibit 1 (physician reports of 3/14/97; 8/24/98; 12/7/98).
7. Prior to the 1999-2000 school year, Complainant taught four classes in a single classroom -- room 518. In the spring of 1999, he received a course schedule for the following school year which again assigned him to a single classroom.
8. On a student holiday during the latter part of the 1998-1999 academic year, Complainant objected to an assignment by the headmaster that teachers grade standardized tests during an "in-service" day. As a former union representative at Boston English High School, Complainant helped to get the Boston Teachers Union to oppose the assignment. Transcript, Volume I at 103.
9. In August 1999, Complainant received a letter from the headmaster reassigning him to two adjacent rooms in which to teach four English classes for the 1999-2000 school year.
10. In preparation for the 1999-2000 school year, Headmaster Sullivan wanted teachers to return to school a week prior to their contractual starting date of Tuesday,

September 7, 1999. Complainant refused to begin work at the earlier time because it was not mandated by the parties' contract.

11. When Complainant returned to school on September 7, 1999, he was informed that his schedule had been changed to four classes (three junior classes and one sophomore class) in three different classrooms on the fourth floor. Transcript, Volume 1 at 58, 61.
12. Headmaster Sullivan testified that the assignment of Complainant to three different classrooms was due to the fact that Complainant had not participated in the tenth grade "cluster initiative" during the previous year. There were two ways that teachers could be assigned to a cluster at Boston English High School: volunteering or being assigned by the administration. Transcript, Volume II at 35; 115. The initiative involved the creation of a smaller learning community for tenth graders within the larger school setting. Prior to the 1999-2000 school year, clusters had been implemented for the ninth grade and for the bilingual program. Teachers participating in clusters were assigned to classrooms next to each other in order to promote teacher collegiality and minimize the need for their students to travel in school corridors. The administration attempted to give teachers participating in clusters a single classroom in which to teach all their classes. Transcript, Volume II at 116.
13. The classroom in which Complainant taught during the 1998-1999 school year was reassigned to the ninth grade cluster for school year 1999-2000. Transcript, Volume II at 52. As of September 1999, the ninth grade cluster moved from one end of the fifth floor to the other end of the fifth floor, taking over classrooms 507, 508, 510, 511, 518, 519, 520 and 521.
14. According to Headmaster Sullivan, approximately sixty to seventy per cent of the teachers at Boston English High School experienced some change in their classroom assignment effective September 1999. He estimated that approximately one third of the teachers at the school were assigned to more than a single classroom for the 1999-2000 school year. Transcript, Volume II at 112. Only five teachers, including Complainant, were assigned to more than two classrooms. *Id.* One was Ernie Green, the second most senior teacher at the school, with over thirty

years experience and another was Carol Bynum, who also had over thirty years of teaching experience. Transcript, Volume I at 142-143.

15. Headmaster Sullivan testified that a teacher assigned to a cluster “pretty much would be guaranteed his own classroom” and that “fate” or “luck of the draw” determined which teachers were required to “float.” Transcript, Volume II at 46.
16. On Tuesday, September 7, 1999, the first day of school for returning teachers, Complainant protested his assignment to three different classrooms. Transcript, Volume II at 125. Complainant told Headmaster Sullivan that it was difficult to cope with three classrooms because of the number of books involved in teaching English. According to Complainant’s credible testimony, Headmaster Sullivan said that there was nothing he could do about the situation at that time. Transcript, Volume I at 59, 61.
17. Complainant was absent due to an unspecified illness from September 8-10, 1999. September 8, 1999 was the first day of class for students. Joint Exhibit 10.
18. During the second week of school beginning on Monday, September 13, 1999, Complainant again protested his assignment to multiple classrooms. He put the administration on notice that his diabetic condition required him to use the bathroom frequently and take snack breaks. Transcript, Volume I at 63; Volume II at 62. According to Complainant’s credible testimony, Headmaster Sullivan said that there was nothing he could do about the schedule at the time but that it might change over the course of the year. Transcript, Volume I at 61.
19. Because of his assignment to multiple classrooms, Complainant had to put his personal belongings and classroom materials on a rolling cart and push the cart through the fourth floor hallways. He did not have a cabinet or closet in which to store items. Classroom materials consisted of books, notebooks, and writing folders for each student. Complainant testified that he had to transport approximately one hundred twenty folders and seventy to eighty books. He testified that various items were stolen from the cart when he used the lavatory. Transcript, Volume 1 at 60. The hallway was crowded during class changes.
20. Complainant had little time between classes to wheel materials. He had no place to leave his materials when he went to the bathroom, ate lunch, or took a snack break.

When Complainant ate lunch, he had to take his cart on an elevator to the second floor cafeteria.

21. Headmaster Sullivan testified that Complainant was able to push his rolling cart into the bathroom with him or ask a guidance counselor to store the cart in a guidance office. Transcript, Volume II at 64-65. Sullivan testified that he suggested that Complainant leave his cart “with somebody that he knew or take it with him into the lav.” Transcript, Volume II at 67. Assistant Headmaster William Coffey acknowledged that if the Complainant could not leave his cart in a classroom where teaching was going on, in a teachers’ room, or in a guidance counselor’s office, Complainant would have had to take the cart to the cafeteria. Transcript, Volume II at 151-152. Coffey described the corridors at Boston English High School where Complainant taught as crowded. Id. at 155.
22. Teachers who taught all their classes in a single room could store their belongings in a locked cabinet or closet. Transcript, Volume II at 177.
23. Complainant testified that by the evening of Thursday, September 16, 1999, he felt like his head was going to explode due to high blood pressure. He tried to get an appointment with his physician, but Dr. Sperling couldn’t see him until the following week. Complainant did not go to work on Friday, September 17, 1999.
24. Complainant was absent Monday through Thursday, September 20-24, 1999. He saw Dr. Sperling on September 24, 1999 for high blood pressure. Transcript, Volume I at 65; Joint Exhibit 1; Complainant’s Exhibit 1 (medical record of 9/24/99). Dr. Sperling noted in Complainant’s medical chart that his hypertension was “out of control” as a result of the stress of having to wheel his belongings with him from classroom to classroom. Id. Dr. Sperling also determined that Complainant’s diabetes mellitus was seemingly well controlled at that time, but drafted a letter which stated that because of Complainant’s diabetes and the medications that he took to control it, he needed to have meals and snacks at predetermined time intervals and to avoid undue stress. Joint Exhibit 1. Dr. Sperling also stated that the assignment to multiple classrooms had interrupted Complainant’s meal and snack schedule and interfered with the control of his diabetes. Id. Dr. Sperling requested the administration to make “every effort to

accommodate Complainant by assigning him a single classroom in order to minimize interference with his snack and meal schedule and avoid undue stress.” Id.; Transcript, Volume I at 151. Complainant’s friend, Millie Murphy, gave this letter to Headmaster Sullivan on or around September 24, 1999. Transcript, Volume I at 67-68.

25. Complainant filled out a self-identification form, dated Sunday, September 26, 1999, for submission to the Boston Public School’s Office of Equity. Joint Exhibit 4. He sought to establish a record of his diabetic status and to request that he be given a single classroom as a reasonable accommodation.
26. Complainant received no response to his letter from Dr. Sperling or to his voluntary disability self-identification form.
27. Complainant was absent from school Monday, September 27 through Friday, October 1, 1999. On Sunday night, September 26, 1999, he thought he was having a heart attack. He went to the Jordan Hospital emergency room at one a.m. and was admitted with chest pains and an irregular heartbeat. He was hospitalized for three days at Jordan Hospital for observation and testing. Transcript, Volume I at 65-66. Dr. Sperling states in Complainant’s medical record that because of Complainant’s history of hypertension and diabetes, he was admitted to rule out a MI. Exhibit 1 (medical record of 10/4/99). Complainant’s cardiologist concurred in a letter dated November 24, 1999 in which he states that the presence of diabetes and hypertension placed Complainant at a higher risk for a thrombembolic event. Complainant’s Exhibit 2 (Papageorgiou letter of November 24, 1999).
28. While Complainant was absent, Headmaster Sullivan reassigned his classes to other teachers in order to enhance “continuity and consistency.” Transcript, Volume II at 70. Sullivan testified that the students and parents were complaining about Complainant’s absences and that the use of substitutes to cover Complainant’s absences had resulted in a chaotic situation. Sullivan testified credibly that he observed that students were not working, that they were not paying attention to the substitutes, and that they were making excessive noise. Transcript, Volume II at 80. Two of the classes originally assigned to Complainant were assigned to Arthur

Unobsky, a second-year teacher in his early thirties and the other two were assigned to a veteran teacher.

29. Upon returning to work on or around October 4, 1999, Complainant tried to hand Headmaster Sullivan a doctor's note regarding his absence. According to Complainant, Sullivan yelled at him for interrupting a conversation with the school registrar and referred to Complainant's attendance in a disparaging way. Transcript, Volume I at 141. Sullivan testified that he was having a discussion with the registrar during which Complainant shoved a piece of paper in his face. Sullivan testified that he told Complainant that he would talk to him when he was finished talking to the registrar. Transcript, Volume II at 84. Sullivan denied yelling at Complainant. Transcript, Volume II at 84. I find Complainant's version of the incident to be more likely true than Sullivan's.
30. Headmaster Sullivan acknowledged that Complainant did not have any classes to teach when he returned to English High School on October 4, 1999 but stated that this occurred because the administration did not know when he was coming back. Complainant testified that Assistant Headmaster William Coffey told him on his first day back that there were no classes for him to teach and that he should go to the cafeteria and read a newspaper. Transcript, Volume I at 70. Mr. Coffey denied making this statement. Transcript, Volume II at 159. I find Complainant's allegation to be more credible than Coffey's denial.
31. Complainant was subsequently assigned to teach two English classes. Both classes met in the same classroom. I credit Headmaster Sullivan's testimony that he did not give Complainant 's original classes back to him because such an action would have been disruptive to students.
32. Although Complainant was not given back the courses he was originally assigned at the beginning of the 1999-2000 school year, he was not "excessed" from Boston English High School. Transcript, Volume II at 83. "Excessing" is a process whereby a school with too many teachers in a given subject area places teachers in that subject area by reverse order of seniority in a pool for selection by another school. Transcript, Volume II at 108. I credit Headmaster Sullivan's statement that

he intended to, “find a teaching program for [Complainant]” upon his return to school. Transcript, Volume II at 140.

33. Complainant testified that his health was better after he returned to school on or about October 4, 1999 because he was no longer traveling from classroom to classroom and he had time to go to the lavatory and eat snacks at regular intervals. Transcript, Volume I at 16.
34. Complainant was absent due to illness on October 12, 1999.
35. On October 19, 1999, Complainant had an incident with the headmaster in which Complainant and the headmaster shouted at each other. According to the Complainant’s unrebutted testimony, Sullivan threatened him with suspension and firing and “charged up to [Complainant’s] desk . . . in a threatening way.” Transcript, Volume I at 77-78. Complainant testified that his heart was racing and that he had trouble breathing after the incident. *Id.* at 79. He went to the school nurse who called an ambulance. Complainant was taken to Beth Israel Deaconess Hospital. He was subsequently diagnosed with a cardiac arrhythmia. *Id.* at 78-79.
36. Complainant did not return to Boston English High School following October 19, 1999. He began an indefinite medical leave in order to prepare for a medical procedure called a “cardioversion.” Transcript, Volume I at 80. During this time he was being treated for hypertension, arrhythmias, chest pain and anxiety. Complainant’s Exhibit 1 (Sperling letter of October 27, 1999). Complainant was informed in late October 1999 or early November 1999 that he had no sick time remaining. Complainant received compensation from a sick leave bank during part or all of his medical leave. Joint Exhibit 8; Transcript, Volume I at 81, 135.
37. Complainant underwent a cardiac procedure called a “cardioversion” during the third week of April, 2000. Joint Exhibit 13; Transcript, Volume I at 80. Complainant’s cardiologist cleared him to return to work after the cardioversion.
38. Complainant retired on May 31, 2000, approximately four years short of receiving full retirement benefits. He testified that his poor health was one factor he considered in deciding to retire. Transcript, Volume I at 90. He retired with a pension amounting to 62.5% of his \$56,000 salary. Transcript, Volume I at 86. Complainant testified that had he continued teaching until June 2004, he would

have received a pension amounting to 80% of his salary. Transcript, Volume I at 87. In the year following his May 2000 retirement, Complainant began working part-time as a merchandising manager, earning \$18,000 per year. He continued to do so up to the date of the public hearing. Transcript, Volume I at 88.

39. During the 1999-2000 school year, younger, less experienced teachers were given single classrooms in which to teach their classes at the same time Complainant was given a cart and three different classrooms. A memorandum issued by the Mentor Committee of the Boston Public Schools in May, 2001 stated that novice teachers should be given their own classrooms, rather than floating classrooms.²
40. By the end of the 1999-2000 school year, veteran teacher Ernie Green had been reassigned to two classrooms and veteran teacher Ruth Bynum had been reassigned to one classroom. Transcript, Volume II at 58. Headmaster Gerald Sullivan testified that as the school year progressed and students dropped out, the administration was able to consolidate teaching assignments into fewer classrooms. Id. at 60.
41. Headmaster Sullivan acknowledged that he was upset about Complainant's attendance. He testified that there may have been a perception in the school that some older teachers were "coasting until retirement." Sullivan denied feeling this way about Complainant, but I do not credit his denial.
42. Complainant testified that in October 1999 when he returned to school and was only allowed to teach two classes, he felt like the "walking dead." Transcript, Volume I at 75. He felt like the "whole school was talking." Id. He began taking blood pressure medication for the first time in October 1999. He described losing the English classes that he previously taught as "pretty depressing and humiliating." Transcript, Volume I at 90.
43. Complainant testified that he would have returned to Boston English High School for the 2000-2001 school year had he been offered a position but that union representative Richard Stutman told him that his position had been filled. Transcript, Volume I at 86, 134.

² At the public hearing, the memorandum was labeled Complainant's Exhibit 3 for identification only. I now accept this memorandum for substantive purposes.

44. Complainant was never informed by any administrator at Boston English High School or by any employee of the City of Boston that he could not return as a teacher to Boston English High School. Transcript, Volume I at 135. He never received a written document stating that he could not go back to Boston English High School. Transcript, Volume I at 144. According to Headmaster Sullivan, Complainant continued to have a job at the school as of May 2000. Transcript, Volume II at 83, 87.

III. CONCLUSIONS OF LAW

Handicap Discrimination

M.G.L. c. 151B, sec. 4 makes it unlawful to discriminate in employment on the basis of handicap. In order to come within the protection of the statute, the Complainant must establish that he is a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, a record of having such an impairment, or is regarded as having such an impairment. M.G.L. c. 151B, sec. 1 (17); *Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B* (“MCAD Handicap Guidelines”) at p. 2. A qualified handicapped person is one 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. M.G.L. ch. 151B, sec. 4(16). It is the employer’s burden to demonstrate that the accommodation sought is unreasonable because it would impose an undue hardship on the employer. See Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995).

I conclude that Complainant is handicapped based on a combination of his adult-onset diabetes and his history of hypertension accompanied by atrial fibrillation.³

Diabetes is a disorder that involves the body's inability to metabolize sugar caused by inadequate production or utilization of insulin. Left untreated, diabetes can result in uncontrolled weight loss, diabetic coma, circulation problems and blindness. See D'Ambrosio v. MBTA, 23 MDLR 81 (2002) (holding diabetes to be a handicap and a perceived handicap).⁴ Complainant points to his hypertension accompanied by atrial fibrillation as a second impairment which, in combination with his diabetes, adversely affected his cardiac well-being. According to Complainant's cardiologist, the presence of diabetes and hypertension placed Complainant at increased risk for a thromboembolic event.

The combination of diabetes and hypertension accompanied by atrial fibrillation, in the absence of bathroom and snack breaks, rendered Complainant disabled from a broad range of jobs. The record is replete with Complainant's absences during the first month of school resulting from the stress of Complainant's position and its effect on his blood pressure. The risks associated with high blood pressure in Complainant's case were enhanced by the presence of diabetes. His cardiologist noted that the increased risk for a thromboembolic event became acute in late September 1999 when Complainant's hypertension was "out of control" and he experienced a sustained episode of palpitations consisting of fast and irregular heart beat followed by a slow pounding heart beat along

³ Complainant also testified to a history of hyperthyroidism and gout, but he did not request an accommodation for these conditions nor did he claim that they were affected by his assignment to multiple classrooms in September 1999.

⁴ Complainant's handicap status is not affected by whether his condition can be controlled by diet or insulin. Under Massachusetts law, the existence of an impairment is generally determined without regard to whether its effect can be mitigated by measures such as medications. See MCAD Handicap Guidelines at 4; Dayhill v. Police Dept. of Boston, 434 Mass. 233 (2001) (Chapter 151B does not require consideration of corrective measures in determining handicap).

with chest pressure, left arm pain, and tingling. Complainant's Exhibit 2. Complainant left school in an ambulance and was admitted to Jordan Hospital to rule out a myocardial infarction. Based on the foregoing, I conclude that Complainant's medical condition substantially limited the major life activity of working.

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 G.L.c.151B; 2) he needed a reasonable accommodation due to his handicap in order to perform his job; 3) the employer was aware of the handicap and that the employee needed a reasonable accommodation to perform his job; 4) the employer was aware of a means to reasonably accommodate the handicap, or failed to investigate a means to reasonably accommodate the handicap; and 5) the employer failed to provide the employee with a reasonable accommodation. See MCAD Guidelines at p. 33; Cox v. New England Telephone & Telegraph, 414 Mass. 375 383(1993) (once Complainant establishes qualified handicapped status, Respondent must provide a reasonable accommodation unless doing so would cause undue hardship).

There is no dispute that Complainant was capable of performing the essential functions of his job despite having diabetes, high blood pressure, and arrhythmias. Complainant's performance evaluations were satisfactory. He had been a teacher in the Boston public schools for over thirty years. Complainant had never been disciplined for abuse of sick leave, although Headmaster Sullivan acknowledged that he was concerned about Complainant's absences and testified that Complainant's absenteeism "got to be a real problem for me." Nonetheless, Complainant was assigned two courses upon

returning to work in early October 1999 and likely would have received additional courses had he remained on the faculty. Based on the foregoing, I conclude that Complainant was a “qualified handicapped person” under c. 151B.

The evidence also supports a conclusion that Complainant needed a reasonable accommodation in order to continue teaching during the 1999-2000 school year. A reasonable accommodation is defined as “any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment.” MCAD Handicap Guidelines, sec. II (C). See Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 n.19 (2004).

Complainant’s diabetic condition, hypertension, and the medications he took to control his diabetes required him to use the bathroom frequently, take snack breaks at predetermined time intervals, and avoid undue stress. These requirements made it difficult for Complainant to transport and securely store a cart containing personal and teaching materials. Unlike teachers who had a single classroom in which to teach, Complainant did not have access to a locked cabinet or a locked closet in which to store items while he attended to his diabetic-related needs. He had no place to leave his materials when he went to the bathroom, ate lunch, or took a snack break. Respondent contends that Complainant could have attended to his personal needs by navigating the school’s crowded halls, cafeteria, and bathrooms with a rolling cart containing all his professional and personal materials or else by asking colleagues for permission to store his belonging in their rooms. However, use of a cart was unwieldy given the amount of

material Complainant was forced to transport, the necessity of pushing the cart onto elevators and through doorways, and the chaotic nature of the school's hallways. Asking fellow teachers or guidance counselors for permission to store items in their rooms was no solution at all since colleagues did not have to agree. Consequently, such proposals do not adequately respond to Dr. Sperling's request that the administration attempt to minimize interference with Complainant's snack and meal schedule and avoid undue stress by giving Complainant a single classroom in which to teach. See MCAD and Sabella v. Boston Public Schools, 27 MDLR 90 (2005) (recognizing as a reasonable accommodation the teaching all classes in one classroom).

The third element of proof in a failure to accommodate case pertains to Respondent's awareness of Complainant's handicap and the need for a reasonable accommodation. Headmaster Sullivan conceded that he was aware of Complainant's handicap and request for an accommodation. Complainant first informed Sullivan about his diabetes in 1995 or 1996. On September 7, 1999, the first day of school for returning teachers, Complainant protested his assignment to three different classrooms. During the second week of school beginning on September 7, 1999, Complainant again protested his assignment to multiple classrooms. At that time, if not earlier, he placed the administration on notice that his diabetic condition required him to use the bathroom frequently and take snack breaks. On or about September 24, 1999, Complainant placed in the mailbox of Headmaster Sullivan a letter from Dr. Sperling, which described his medical symptoms and requested the administration to make "every effort to accommodate Complainant by assigning him a single classroom" On or around September 26, 1999, Complainant filled out a self-identification form for the Boston

Public School's Office of Equity to remind the School Department's administrators that he was a diabetic and to request that he be given a single classroom as a reasonable accommodation.

Once the employer is placed on notice that an employee needs an accommodation, the employer has an affirmative duty to engage in an interactive process in order to attempt to offer some form of reasonable accommodation. See Nicklas v. Gargano & Assoc., 26 MDLR 67 (2004) *citing* MCAD Handicap Guidelines at 15-16. The interactive process requires an employer to "make a reasonable effort to determine the appropriate accommodation . . . through a flexible . . . process that involves both the employer and the qualified individual with a disability." Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443, 457 (2002). Despite this requirement, the school's administration refused to work with Complainant to fashion an acceptable response to his medical needs. Headmaster Sullivan told Complainant during the first and second weeks of school that there was nothing he could do about the situation at that time. Complainant received no response to his letter from Dr. Sperling soliciting an accommodation or to his voluntary disability self-identification form. Respondent's failure to discuss the situation, together with the other elements of proof set forth above, establish a prima facie case of failure to provide a reasonable accommodation. See MCAD Handicap Guidelines at 33.

Once a prima facie case of failure to accommodate is established, the burden falls upon Respondent to prove that the reasonable accommodation would pose an undue hardship. See id. Whether a particular accommodation would pose an undue hardship is a matter to be determined on a case-by-case basis. See id. at 34 *citing* Yates v. MCI

Norfolk, 17 MDLR 1503, 1514; Mass. Gen Laws, c. 151B, sec. 4(16). Respondent asserts that Complainant's request to be assigned to a single classroom could not be granted because it would have disrupted the school's ninth and tenth grade clusters. However, such an assertion is not supported by the facts. When Complainant first protested his multi-classroom assignment on September 7, 1999, it was the teachers' first day of school, prior to students returning on September 8, 1999. Had Complainant been reassigned to a cluster at that time, the re-assignment would have had minimal impact on students. To be sure, such a last minute change might have disappointed another teacher who expected to teach in a cluster setting, but the disappointment of a teacher removed from a cluster assignment must be balanced against Complainant's right to a reasonable accommodation under c. 151B. Complainant's status as the most senior teacher in the school helped to ensure that his request would not have caused a labor dispute.

Admittedly, there would have been some disruption to students and teachers alike in reassigning Complainant to a single classroom once the 1999-20000 school year began. Had Respondent acted quickly to address Complainant's concerns, the disruption would have been minimized. By the second week of school, Complainant put the administration on notice of the difficulties which his diabetic condition caused in traveling from one class to another and by September 24, 1999, he presented a doctor's note requesting the accommodation of a single classroom. These communications fell on deaf ears. Headmaster Sullivan told Complainant that there was nothing he could do about his schedule at the time, although it might change over the course of the year.

As far as fashioning a reasonable accommodation is concerned, Respondent makes the point that Complainant's many absences impeded communication. However,

Headmaster Sullivan could have interacted with Complainant during the second week of school when Complainant was present or else he could have contacted Complainant at home. Moreover, Sullivan's failure to accommodate Complainant's diabetic condition created its own disruption by contributing to Complainant's absences. Weighing all these factors, I conclude that Respondent has failed to carry its burden of proving that the assignment of Complainant to a single classroom in September 1999 would have posed an undue hardship.

Respondent's unwillingness to provide Complainant with a reasonable accommodation in September 1999 appears to be related to the parties' adversarial relationship over labor disputes and absenteeism rather than insurmountable difficulties associated with the reassignment of teachers. As evidence of labor-related animosity, Complainant points to an incident on or around Bunker Hill day during the 1998-1999 academic year in which Complainant objected to a decision by the headmaster requiring teachers to grade standardized tests during an "in-service" day. As a former union representative at Boston English High School, Complainant helped to get the Boston teachers' union to oppose the assignment. Complainant also opposed Sullivan's proposal that teachers return to school a week prior to the contractual start date for the 1999-2000 school year. In my judgment, these matters, but more importantly, concerns about Complainant's age and past attendance record, were the real reasons why Complainant was one of only five teachers in the entire school assigned to more than two classrooms at the start of the 1999-2000 academic year. Since these matters and not undue hardship were the primary reasons for Respondent's refusal to provide a reasonable accommodation, I conclude that Complainant was a victim of handicap discrimination.

Age Discrimination

M.G.L. c. 151B, sec. 4(1B) makes it unlawful “[f]or an employer . . . because of the age of any individual . . . to discriminate against such individual . . . in terms, conditions or privileges of employment unless based upon a bona fide occupational qualification.” The state protects persons of age forty (40) and over. The elements of a prima facie case of discrimination vary depending on the type of discrimination alleged. See Knight v. Avon Products, 438 Mass. 413, 420, n.4 (2003). In order to establish a prima facie case of age discrimination in this case, Complainant must demonstrate that he is a member of a protected class who was adequately performing the responsibilities of his position and was denied the opportunity to teach in a single classroom while others, substantially younger, were allowed to do so. See id. (Complainant must show he was denied a condition or privilege of employment granted to someone at least five years younger or present other evidence that the disparate treatment occurred under circumstances that would raise a reasonable inference of unlawful age discrimination); Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000); Murphy v. Pub Ventures, 15 MDLR 1098, 110-11 (1993).

Complainant is a member of a protected class based on age in that he was fifty-seven (57) years old at the start of the 1999-2000 school year. He was assigned to teach four classes in three different classrooms located on different sides of the fourth floor. Approximately five teachers, including Complainant, were assigned to more than two classrooms. One was Ernie Green, the second most senior teacher at the school with over thirty years teaching experience. A third was Carol Bynum, who also had more than thirty years teaching experience. Although their ages were not established at the public hearing, a reasonable inference is that they were over age fifty. During the 1999-2000

school year, younger, less experienced teachers were given single classrooms in which to teach their classes at the same time Complainant, Green, and Bynum were given carts and three different classrooms. A memorandum subsequently issued by the Mentor Committee of the Boston Public Schools in May, 2001 stated that novice teachers should be given a classroom of their own, rather than a floating classroom. While not all novice teachers are young, it is a reasonable assumption that a majority are in their twenties and thirties. These facts are sufficient to establish a prima facie case of age discrimination.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent meets this burden, then Complainant must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003). In other words, Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. If the Complainant presents such circumstantial evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

Respondent offers as a legitimate, nondiscriminatory reason for its action its cluster initiative. Beginning in September 1999, Boston English High School implemented a restructuring program for the tenth grade curriculum in which tenth grade classrooms were placed next to each other on the third and fourth floors, creating a “tenth grade cluster.” The administration attempted to give teachers participating in the tenth-grade cluster initiative a single classroom in which to teach all their classes. The purpose of this consolidation was to minimize the need for students to travel in school corridors. By the start of the 1999-2000 school year, the restructuring program had already been implemented at Boston English High School in the ninth grade and in the bilingual program. The classroom that Complainant taught in during the 1998-1999 school year was reassigned to the ninth grade cluster for school year 1999-2000. Respondent asserts that the reorganization of the school into clusters had the result of requiring some teachers such as Complainant, who did not teach in a cluster, to travel from one classroom to another.

Respondent’s explanation of the cluster initiative is, on its face, a legitimate, nondiscriminatory reason for its action. This reason is sufficient to rebut an inference of age discrimination since the employer’s burden of production at stage two is not onerous. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003).

While Respondent’s explanation is sufficient to survive stage two, I conclude that Complainant has presented credible evidence at stage three to prove that Respondent’s articulated reason for assigning Complainant to three classrooms was not the real reason for its action. Headmaster Sullivan testified that Complainant’s failure to get involved in the cluster initiative was the reason why Complainant was not assigned to a single

classroom but participation in the restructuring process was only one way to be placed in a cluster. The administration could have assigned Complainant and other senior teachers to the tenth grade cluster had it chosen to do so.

Headmaster Sullivan also testified that “fate” or “luck of the draw” played a role in determining which teachers were required to float to multiple classrooms, but the facts suggest that age, not fate, correlated with which teachers were forced to travel from one room to another. Of the five teachers assigned to teach in more than two classrooms, three were individuals with more than thirty years seniority. The assignment of long-term teachers to multiple classrooms was supported by a memorandum issued by the Mentor Committee of the Boston Public School in May, 2001. The memo advised schools to give novice teachers a classroom of their own, rather than a floating classroom. A reasonable presumption to be drawn from the memo was that floating assignments were to be given to long-term teachers. The fact that three-fifths of the teachers assigned to more than two classrooms in academic year 1999-2000 had over thirty years teaching experience lends credence to this presumption. Headmaster Sullivan’s testimony acknowledged a perception in the school that some older teachers were “coasting until retirement.” He professed not to feel that way about Complainant, but the facts indicate that he shared in the age-related animus which existed at the school. In this respect, the case is distinguishable from Hazen Paper Co. V. Biggins, 507 U.S. 604 (1993) (finding that age was not a factor in an employment decision even though the motivating factor was correlated with age).

Based on the foregoing, I conclude that Respondent assigned Complainant to three classrooms in which to teach four courses during the 1999-2000 school year as a result of age-based discriminatory animus.

Constructive Discharge

Complainant alleges that he was constructively discharged from his position on or about October 1999. A constructive discharge occurs when the employer's conduct effectively forces an employee to resign. See Morrissey v. Holiday Inn, 23, MDLR 74 (2003). To establish a claim of constructive discharge, an employee must show that the working conditions were sufficiently intolerable so that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995); Holt v. Minuteman Flames Minor Hockey Association, 22 MDLR 373 (2000); Norman v. Andover Country Club, 15 MDLR 1395, 1419 (1993); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997). Constructive discharge depends largely on the specific factual situation.

I conclude that Complainant retired for reasons related to his health and not because he was constructively discharged. Complainant was relieved of his classes on or around October 4, 1999 because of the disruption to students caused by his absenteeism and because the administration did not know when he was coming back from sick leave. Within a short time of his return to school on October 4, 1999, Complainant was reassigned to two classes and given a single classroom in which to teach. He acknowledged that his health improved after being given a single classroom because he had time to go to the bathroom and eat snacks at regular intervals. Complainant testified

that he would have returned to Boston English High School the following year had he been assured of a teaching assignment. Although he ultimately decided not to do so, I conclude that this decision was primarily motivated by his poor health and misguided belief that he no longer had a teaching assignment at Boston English High School, for which the school was not responsible.

IV. DAMAGES

Lost Wages

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 v MCAD, 400 Mass. 156, 169 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

During the 1999-2000 school year, Complainant was absent for much of the time on an extended medical leave. At some point his paid sick leave ran out. After that point, he received additional compensation from a sick leave bank. Complainant did not establish how much, if any, income he lost during the 1999-2000 school year. Thus, even if some of Complainant's absences during the 1999-2000 school year are attributable to handicap or age-based discrimination, I cannot assess damages in the form of lost wages for that period. For the period after the 1999-2000 school year, Complainant is not

entitled to back pay damages because the evidence establishes that he voluntarily retired and was not constructively discharged.

Emotional Distress

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. See id.

The evidence indicates that Complainant experienced emotional distress as a result of handicap and age-based discrimination. On or around October 4, 1999, Headmaster Sullivan yelled at Complainant when he attempted to hand Sullivan a note to support his request for an accommodation. Sullivan referred to Complainant's attendance in a disparaging way in front of others. On October 19, 1999, Sullivan approached Complainant in an aggressive manner and threatened him with suspension and firing. Complainant reacted with symptoms including a racing heart and trouble breathing. He left school in an ambulance and was admitted to a hospital for observation and testing related to a possible heart attack. When he returned to school, Complainant

experienced the humiliation of being told to sit in the cafeteria and read a newspaper. Only two classers were assigned to him after he returned. As a result, Complainant felt like the “walking dead” and like the “whole school was talking.” He began taking blood pressure medication for the first time in October 1999. He described losing the English classes that he previously taught as “pretty depressing and humiliating.”

Based on the foregoing, I conclude that Complainant is entitled to emotional distress damages of \$35,000.00.

IV. ORDER

Cease and Desist Order

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.ch. 151B, sec. 5, Respondents is ordered to immediately cease and desist from further acts of age and handicap discrimination.

Relief

Consistent with the findings of fact and conclusions of law recited herein, Respondent Boston School Committee is hereby ordered to:

- (1) Pay to Complainant, Edward C. Burley, within 60 days of receipt of this decision, the amount of \$ 35,000.00 in damages for emotional distress suffered as a direct and proximate result of Respondent’s conduct.
- (2) Cease and desist from engaging in discriminatory practices relative to disability discrimination and requests for reasonable accommodation and age-based discrimination.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondents fail to comply with the terms of this Order within the time period allotted, Complainant should 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. 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 3rd day of November, 2005

Betty E. Waxman, Hearing Officer