

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & FRANCIS KILROY,
Complainants

v.

DOCKET NO. 04-BEM-00263

MASSACHUSETTS
HIGHWAY DEPARTMENT &
RUSSELL MCGILVERY,
Respondents

Appearances:

Elizabeth M. LeBrun, Esquire for Francis Kilroy
Christopher J. Groll, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 20, 2004 Francis Kilroy filed a complaint with this Commission charging Respondents with discrimination on the basis of handicap. Specifically, Complainant charges Respondent with failure to reasonably accommodate his handicap, foot injury causing neuropathy and other complications, by harassing him on account of his handicap and by causing him to take an early retirement. The Investigating Commissioner issued a Probable Cause finding. After attempts to conciliate the matter failed, the case was certified for public hearing. A public hearing was held before me on July 23 and 24, 2007.

Respondents were sanctioned for failing to respond to Complainant's discovery requests and were not permitted to present evidence or a defense at the public hearing, but were permitted to cross-examine Complainant's witnesses. After careful

consideration of the post-hearing submission of the Complainant and the entire record in this matter, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Francis Kilroy resides in Danvers, Massachusetts. On December 1, 1998 Complainant was hired by Respondent Massachusetts Highway Department as a business management specialist. Shortly thereafter he was assigned as a Relocation Specialist at Respondent's Boston office located in the Transportation Building in Park Square. He maintained the title Business Management Specialist throughout his employment.

2. As a Relocation Specialist, Complainant performed site visits to areas where residential or commercial customers were being relocated due to an eminent domain taking. He interviewed customers, ascertained their needs, ensured that the Highway Department was in compliance with all federal laws and that customers were receiving all the rights and benefits due them, including allowances for rental adjustments, packing, storing and moving. In his position, Complainant worked primarily with a partner, Nancy Scopa and sometimes with Richard Rooney.

3. Complainant's supervisor in the relocation department was Shirley Waite. Complainant described Waite as a hands-on manager who was extremely knowledgeable about relocation issues. Waite worked closely with her employees and Complainant met with her frequently to discuss work matters. During his first year in the relocation unit, Complainant would report to the Boston office and then be out on the road approximately four days a week, mainly to locations in Agawam, Worcester and Springfield.

4. Complainant testified that he had a very good relationship with Waite and received positive evaluations from her. His performance evaluations from the years 2001, 2002 and 2003 showed that he met expectations. (Exh. C-3)

5. On January 17, 2001, Complainant slipped and fell on ice while leaving his home on an errand, incurring a serious injury to his leg and ankle. The following day he underwent surgery to have steel plates inserted in the area around his ankle. Complainant was hospitalized for several days and was out of work on a medical leave of absence for a period of eight to 10 weeks or longer and his foot was in a cast for eight months. (Exh. C-1)

6. Complainant was diagnosed with foot neuropathy resulting from the injury that is chronic and impairs his ability to walk. Complainant testified that he had severe pain in his ankle that he described as a constant throbbing and burning and hyper-sensitivity to temperature. Complainant testified that he has limited flexibility in his foot and is limited by pain and pressure and how much weight he can place on it. He stated that since the injury he has never been able to walk comfortably and that his ability to walk is still impaired. I credit his testimony, which is supported by medical evidence. (Exhs. C-1; C-2; C-5; C-6)

7. Complainant testified that following his surgery and recovery, he provided to Shirley Waite a letter from his physician Dr. Lemos recommending that he be transferred to Respondent's Peabody office so that he did not have to commute into Boston because of his decreased ability to ambulate. (Exh. C-2)

8. Waite permitted Complainant to transfer to Respondent's office located on Route 1 in Peabody. Complainant testified that in Peabody he was able to park his car 10

feet from his office, whereas at the Boston office, Complainant had to walk about 150 yards from his car to his desk. I credit his testimony.

9. Complainant testified that he was able to fully perform his duties at the Peabody office, using the lunch room as his work space. Complainant testified that the vast majority of his duties were performed in the field on site visits and that he was able to perform these duties, even with his limitations on walking, as he parked close to residences or to commercial buildings where clients were located. I credit his testimony.

10. Complainant testified that after his assignment to Peabody, the amount of work assigned to his unit began decreasing because the project he worked on, connecting the Mass Turnpike to Worcester, was winding down and the number of clients had dwindled.

11. In spring 2003, Shirley Waite died following a brief illness. After her death, Respondent Russell McGilvray took over Waite's position. Complainant testified that after Waite's death, McGilvray "micro-managed" his work, by frequently calling his cell phone while he was in the field and asking his location and his itinerary.

12. On March 24, 2003, Complainant underwent a second corrective surgery to remove the steel plates that had been inserted near his ankle. On April 4, 2003, he obtained a note from his physician stating that he was to remain out of work for seven to 10 additional days and could return to work with restrictions. He was restricted from walking more than 50 yards and from prolonged standing for four to six weeks. (Exh. C-5)

13. On March 28, 2003, Complainant received a letter from Gerald Solomon, Director of Respondent's Right of Way Bureau, stating: "Effective April 14, 2003 at 8:00

a.m. due to operational needs, you are directed to report to Ms. Lori Toscano for reassignment to the Boston office.” (Exh.C-4) Other employees of the relocation unit were also relocated from the Peabody office to another location at around the same time as part of a larger reorganization that brought employees in from the field to the Boston headquarters.

14. Complainant testified that subsequent to receiving the March 28 letter, he telephoned McGilvray several times to explain that he that he had undergone additional surgery and was physically incapable of taking public transportation to the Boston office. He requested reassignment back to Peabody. McGilvray refused his request. Complainant sought permission from Gerald Solomon to remain in Peabody, but Solomon told him that McGilvray was handling the matter. I credit his testimony.

15. Complainant reported to the Boston office on April 14, 2003. He stated that shortly after his arrival, he overheard McGilvray state to a co-worker, Mr. Flynn, “I got your buddy Frank where I want him now. His protection is gone, is dead.” Complainant believed this meant that McGilvray thought that Shirley Waite had been protecting him. I credit his testimony.

16. Complainant testified that upon his reassignment to Boston, he began driving his car to work to avoid the standing and walking involved in taking public transportation. He parked in a lot located across the street from his office where the rates were expensive, requiring him to walk several hundred yards from his car to his work place. Although the Transportation Building where he worked contained a parking garage, Complainant stated that McGilvray refused his request for a designated parking spot in the building. He acknowledged that members of the public were permitted to park

in the Transportation Building, but stated that the garage was often filled to capacity. I credit his testimony.

17. Complainant testified that within days after returning to Boston, McGilvray removed him from his duties as a relocation specialist and assigned him to filing multiple boxes of files which required him to stand all day long. He showed McGilvray that he was unable to perform this duty because his ankle was bleeding from the surgical site, and McGilvray responded by smiling and laughing. Complainant believed that at this time his relocation duties were taken over by a woman named Dawn, whose last name he did not know. I do not credit his testimony that he was replaced as a relocation specialist; however, I otherwise credit his testimony.

18. After an hour of attempting perform the filing assignment, Complainant complained to Solomon, showed him his bleeding foot, explained that he was physically unable to do the filing and requested a transfer back to Peabody. Solomon denied the transfer request, but agreed to remove Complainant from McGilvray's supervision and placed him under the supervision of Charles O'Brien in June or July 2003.

19. Complainant testified that he worked for several weeks for O'Brien. However, he claimed that McGilvray continued to trail him around the building, instructed his co-workers not to have coffee with him, and at times stood in front of his cubicle to prevent him from leaving. He also asked Complainant why he was taking such long breaks and not performing his filing duties. Complainant stated that McGilvray would sometimes meet him at the elevator doors and follow him downstairs to the break room and that McGilvray berated him in private and in front of other employees about a

variety of petty issues, such as returning a few minutes late from a break. I credit his testimony.

20. Complainant testified that co-workers were afraid to have coffee with him out of concern that McGilvray would retaliate against them and that co-worker Bob Brunell stopped commuting into Boston with him because of such concerns.

21. Complainant testified that he complained about McGilvray's conduct to Solomon and attempted to talk to the then current Mass Highway Commissioner, John Cogliano, who invited Complainant to call his secretary to set up a meeting. Complainant called the secretary, who promised to get back to him but he never heard from her.

22. Complainant testified that because of McGilvray's actions, he had dizzy spells and problems standing. On August 13, 2003, he sought treatment with Dr. Thomas Frye. At that time Dr. Frye wrote that [McGilvray],

...has been aggressive and condescending... confrontational... driving [Complainant's] acquaintances away from him for simply associating with him. [Complainant] stated he was upset and he's getting lightheaded and he gets headaches and occasionally he gets dizzy with these confrontations. He also gets sweaty and slight nausea..." These sensations pass as soon as the offending person leaves him alone. However, he gets called frequently on his phone about requests for vacation and what not that gets him riled up even when he is not at work. (Exh.)

"He is requesting that he be re-located back to Peabody where he states he was functioning just fine. He also states that he cannot walk the distances that are required for him to walk to Boston, secondary to his neuropathy in his foot. I am recommending at this time he does pursue transfer to Peabody as he seemed like he functioned well there.

(Exh. C-6)

23. On August 13, 2003, Dr. Frye further wrote in a letter to Respondent: "...It seems clear after our clinic visit that Mr. Kilroy would greatly benefit from being transferred back to work in Peabody, as opposed to working in Boston. It appears that he

was feeling well while working in Peabody, but since then in Boston, he has been having dizzy spells, headaches, and has been getting shortness of breath and nausea in the work atmosphere there. He also has worsening of his right foot neuropathy from the added walking involved in the commute to the Boston office.” Complainant testified that he provided a copy of Dr. Frye’s letter to McGilvray and immediately went out on a leave of absence.

24. On August 29, 2003, Respondents’ Attorney wrote a letter to Complainant’s Attorney that stated in part...“the Department is no longer staffing [the Peabody office] All Right of Way projects personnel who had previously been assigned to that location have been reassigned to the District 4 headquarters in Arlington. All property management, conveyance, finance, relocation and clerical personnel were reassigned to the Boston office. One individual, Daniel Gentile, a community compliance officer, has remained in Peabody, and is currently working out of a trailer...” (Exhibit C-8)

25. On September 2, 2003, while still out on a leave of absence, Complainant attended a meeting in Boston to attempt to resolve his status. Present at the meeting were his counsel, Elizabeth LeBrun, Respondents’ Attorney Groll and Gerry Solomon. Complainant testified that he requested a transfer to the Peabody office or another location on the North Shore, such as Boxford. Complainant was told that the Peabody office was closed, except for some employees working out of a trailer, and his request for a transfer was denied. He stated that the meeting was frustrating and thereafter there was “no resolution.”

26. Complainant stated that contrary to Respondents’ assertions, the Peabody office continued to operate. He drove by the office several times a week and frequently

stopped in for coffee with friends and observed people working there on a daily basis, including an employee from the “right-of-way” division, Danny Gentile, as well as other employees, Stanley Slepboy and Bernie Boldasaro. He did not know what type of work these employees were performing at Peabody and did not know whether they were assigned to the office, or merely working in the area. He acknowledged that none was in the relocation unit, as those employees had been transferred to Arlington.

27. Complainant submitted into evidence photographs of the interior and exterior of the Peabody location that he states were taken within the last year. The photographs show a state car parked at the building and evidence of use inside the building. (Exh.C-9).

28. Complainant retired in approximately October 2003 at age 65 under the Early Retirement Incentive Program offered to eligible state employees at the time. Complainant stated that he retired because he was not able to obtain the requested accommodation, for his well-being and to get away from McGilvray. I credit his testimony.

29. Victor Anop is an attorney in private practice, who worked for the Respondent Mass. Highway Department from July 1997 through October 2003 as a special project manager. Anop worked with Complainant on relocation projects, and worked out of the Department’s Northampton office until 2003 when Respondent reorganized its entire operation and required all of its employees to work out of the Boston office. Anop confirmed much of Complainant’s testimony about McGilvray’s harassment.

30. Anop testified that in April 2003 he was present in McGilvray's office and witnessed McGilvray in a heated telephone discussion concerning Complainant's ability to work. Anop claims to have heard both sides of the telephone conversation. According to Anop, McGilvray questioned the validity of Complainant's doctor's note and thought Complainant was faking his injury. The other party to the telephone call told McGilvray that Complainant was authorized to remain out of work with the appropriate written documentation. Anop testified that after hanging up the phone, McGilvray told Anop that he had been talking with Respondent's counsel's office. He told Anop that he did not like Complainant and would get him "out of here." I do not credit Anop's testimony that he heard Respondent's counsel's on the telephone. I otherwise credit his testimony.

31. Anop was out of the office on family leave for most of the time from April through early July because of his father's illness and eventual death. Anop testified that when he returned around July 10, 2003, McGilvray would trail him, along with John Quinn, Bob Brunelle and Complainant, all of whom ate lunch and took breaks together. I credit his testimony.

32. Anop observed McGilvray blocking Complainant's path from his cubicle and yelling at Complainant when Complainant tried to take a break or eat lunch. I credit his testimony.

33. Anop acknowledged on cross-examination that although he voluntarily resigned from his position in August 2003, a letter terminating his employment had been drafted but "never resolved."

34. Complainant receives an annual pension in the amount of \$19,882.82. He testified that if Respondents had provided him with the requested accommodation, he

would have worked for six or seven more years, would have received the maximum step increases and would have received a higher retirement benefit. In 2003 before his retirement his annual salary was \$52,000.00.

35. Immediately after his retirement, Complainant and his friend William Mahoney started a marketing and consulting company dealing with public contracting called WJM Development Company. The company did some jobs for federal agencies such as the EPA and the VA. Complainant testified that the company “made some money,” but they did not draw salaries, putting money back into the company and taking out “thousands of dollars” for expenses such as gasoline, entertainment, and meals with clients. He stated that business had not been good recently because of the reduction in federal contracts. I credit his testimony.

36. Complainant testified that after being forced to retire, he felt “a certain amount of distress,” an “overall feeling of loss” and considered taking medication but decided against it. He felt “sad” and distressed and wondered what he was going to do next and felt “kind of empty.” He stated that he suffered from insomnia and lost some weight and that these feelings lasted for six to eight months. I credit his testimony.

37. Complainant lost wages in the amount of \$120,439.43; the difference between his pension of \$19,882.82 and his salary of \$52,000.00, from October 26, 2003 to July 24, 2007, the date of the public hearing, a period of 3 years, 9 months.
(\$195,000.00-\$74,560.57)

III. CONCLUSIONS OF LAW

A. Handicap Discrimination-Failure to Accommodate

Complainant has alleged that Respondents engaged in unlawful disability discrimination when they refused to provide him with the reasonable accommodation of working out of the Peabody office. Employers are required to provide reasonable accommodations to disabled employees in order to enable them to perform the essential functions of their jobs. G.L. c. 151B, § 4(16). Labonte vs. Hutchins & Wheeler, 424 Mass. 813, 821 (1997) See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap. See also Forrest v. Wal-Mart, 23 MDLR 110, 117 (2001)

In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) he is a "handicapped person;" (2) he is a "qualified handicapped person" capable of performing the essential functions of a particular job; (3) who needed a reasonable accommodation to perform his job; (4) Respondent was aware of the handicap and the need for a reasonable accommodation; (5) Respondent was also aware, or through a reasonable investigation could have become aware, of a means to reasonably accommodate the handicap and, (6) Respondent failed to provide Complainant the reasonable accommodation. Cox v. New England Telephone & Telegraph, 414 Mass. 375, 383 (1993). Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, aff'd, 26 MDLR 216 (2004); See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX(A)(3).

M.G.L. 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. I conclude that Complainant is a handicapped person within the meaning of M.G.L.c.151B because of neuropathy resulting from a severe ankle injury that substantially limits the major life activity of standing and walking. Respondent was aware of Complainant's disability.

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." See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, § II(C); See Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 n.19 (2004) "The duty to provide a reasonable accommodation is a continuing one." Donohue v. Sodexo-Marriott Services, Inc., 21 MDLR 204, 207, quoting, Ralph v. Lucent Technologies, 139 F.3d 199, 171 (1st Cir. 1998). In particular, an employer is required to engage in an open and ongoing dialogue or "interactive process" with a qualified handicapped individual about providing a reasonable accommodation. Hall, supra, 25 MDLR at 217. This interactive process is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations. Hall, 25 MDLR at 217; Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000).

In this case there was some discussion about accommodating Complainant when Respondent met with Complainant to discuss transferring him to a location other than

Boston; however, Respondent rejected Complainant's request to work at Peabody which was closest to his home and the matter was not resolved at the meeting. There was no evidence that further discussions were held and there was no exploration of any further options.

Complainant testified credibly that the Peabody office continued to be utilized by Highway Department employees. Since Complainant had successfully worked out of the Peabody office for two years, and spent most of his work time in the field, in the absence of evidence to the contrary, I conclude allowing Complainant to work out of the Peabody office would have been a reasonable accommodation.¹ Respondents were precluded from entering into evidence any facts that would have established that allowing Complainant to work out of the Peabody office would create an undue hardship for them. Therefore, consistent with Complainant's evidence, I must conclude that the refusal to allow Complainant to be re-assigned constituted a failure to reasonably accommodate Complainant's handicap.

B. Harassment

In order to establish a claim of unlawful disability harassment Complainant must establish that (1) he is a handicapped person; (2) he was the target of speech or conduct based on his handicapped status; (3) the speech or conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondents knew or should have known of the harassment and failed to take prompt remedial action. MCAD and Helen Abrams v.

¹ Respondent may have offered Complainant other reasonable accommodations that he rejected; but Respondents were precluded from offering any such evidence and I am constrained by the record before me.

Paddington's Place, et al, 26 MDLR 149,153-4 (2004) See Beldo v. University of Massachusetts Boston, 20 MDLR 105, 111 (1998). Applying this standard to the facts at hand, Complainant has established an un rebutted prima facie case of unlawful harassment on the basis of handicap. Complainant contends that he was harassed and subjected to intense scrutiny by McGilvray about the time he spent on breaks. He alleges that this constant harassment caused him stress and anxiety, which ultimately resulted in him taking a medical leave of absence. Complainant's testimony was corroborated by Anop, who also testified that McGilvray told him he believed Complainant was faking his injury. Because McGilvray did not testify in this matter, Complainant's allegations of harassment were un rebutted. I found those allegations to be credible. Thus, I conclude based on the evidence in the record that McGilvray harassed Complainant on account of his handicap and that this ultimately caused Complainant to take a medical leave of absence both to relieve anxiety and the physical symptoms of his handicap. I further conclude that, but for Complainant's handicap, he would not have been subjected to persistent scrutiny and monitoring by McGilvray. It is clear that McGilvray's harassment caused Complainant to suffer stress and anxiety and to exhibit physical symptoms of distress. I conclude that McGilvray's actions created a hostile work environment for Complainant and were a violation of G.L.c. 151B.

C. Constructive Discharge

Complainant alleges that Respondents' failure to accommodate his handicap coupled with the hostile worked environment to which he was subjected, made his work situation intolerable and caused him to accept an early retirement package offered to state employees in 2003. A constructive discharge occurs when an "employer's conduct

effectively forces an employee to resign.” GTE Products Corporation v. Stewart, 421 Mass. 22, 33-34 (1995). A constructive discharge can occur when the employer “materially breaches [an] employee’s contract of employment in some manner short of termination” or makes “working conditions so intolerable that the employee feels compelled to quit.” Constructive discharge occurs where, “based on an objective assessment of the conditions under which the employee has asserted [s]he was expected to work, it could be found that they were so difficult as to be intolerable.” GTE Products Co. v. Stewart, at 34 (1995). In order to prevail on his constructive discharge claim, Complainant must establish that Respondent made his working conditions so intolerable that a reasonable person in his position would have felt compelled to resign. McKinley v. Boston Harbor Hotel 14 MDLR 1226, 1240 (1992). The standard for constructive discharge “is, and should be, a strict one,” and requires that an employee must demonstrate that “the threat of physical or psychic harm was so great as to preclude ever returning to work.” He must also show that he exhausted all possibilities to continue working and that resignation proved to be the final and only alternative. Id. at 1241.

Complainant was upset, disappointed and distressed by McGilvray’s excessive hostility and scrutiny of him. According to his doctor’s note, Complainant had dizzy spells, headaches, shortness of breath and nausea from his confrontations with McGilvray and also experienced worsening of his right foot neuropathy from the added walking involved in the commute to the Boston office.” Moreover, according to Complainant’s un rebutted testimony, Respondent refused his request to relocate to the Peabody office and no other offer was made. At the time of Complainant’s retirement he had exhausted all possibilities to continue working for Respondents. Thus, I conclude that

Complainant's objective working environment was so intolerable so as to compel him to leave his employment. Eggert v. Cabot Corp., 21 MDLR 131 (1999). Complainant has established a claim of constructive discharge in this matter.

Complainant is seeking front pay and testified that absent Respondents' discriminatory conduct, he would have worked for six or seven more years, until he was age 72, reaching the top of his pay scale, thereby increasing his salary and receiving a higher pension. However, Complainant did not produce evidence of future salary increases, although this was presumably governed by a collective bargaining agreement. He only "guessed" that he would have continued to receive the same pay as a co-worker, had he remained at work. He also did not produce evidence of what the amount of his pension would have been, had he remained in his position.

D. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B §4(4A) if they "interfere with a Complainant's right to be free from discrimination in the workplace. In order to prove interference with a protected right, Complainant must show that McGilvray had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant's rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant's exercise of rights. Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

The evidence in this record establishes the requisite intent to discriminate required in order to find Mr. McGilvray individually liable for unlawful discrimination on the basis of handicap based on his hostile actions toward Complainant in the office; to wit,

following him, yelling at him and blocking him from leaving his cubicle and requiring him to stand and perform filing duties while recovering from foot surgery. The evidence firmly established Mr. McGilvray's intention to discriminate on the basis of handicap and to interfere with Complainant's rights under c. 151B. I conclude that Mr. McGilvray is individually liable for unlawful discrimination in this matter.

I therefore conclude that Respondents engaged in unlawful discrimination on the basis of handicap in violation of M.G.L.c.151B §4 and I find them jointly and severally liable for unlawful discrimination.

IV. REMEDY

Pursuant to M.G.L.c.151B §5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of Respondents' unlawful actions. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Lost Wages

Complainant seeks damages for back pay in the amount of \$52,000.00 per year from August 2003 to the date of the determination in this matter and \$52,000.00 in front pay from the date of the determination until December 2010 when Complainant claims he would have retired. Complainant also seeks damages of \$5,600.00 in step increases from 2003 to 2010. Complainant did not produce evidence of the amount of step increases he would have received, which presumably were governed by a collective bargaining agreement. He only "guessed" that he would have received the same pay increases as a

co-worker, had he remained at work. Nor did he produce evidence of what the increased amount of his pension would have been, had he remained in his position. Moreover, I cannot conclude that the Complainant would have remained working until age 72.

Therefore I decline to award front pay or increased pension benefits. I conclude that Complainant is entitled to lost wages in the amount of \$120,439.43, the difference between his pension of \$19,882.82 and his salary of \$52,000.00 from October 26, 2003 to July 24, 2007, the date of the public hearing, a period of 3 years, 9 months.

(\$195,000.00-\$74,560.57)

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. However, the evidentiary burden is on the Respondent to show that the Complainant failed to mitigate damages. J. C. Hillary's v. Massachusetts Commission Against Discrimination, 27 Mass App. Ct. 204 (1989). Black v. School Committee of Malden, 369 Mass. 657, 662 (1976). Upon his retirement, Complainant started a consulting business with a friend. Complainant testified that he and his partner received government contracts, did not draw salaries for a “couple of years” but put their earnings into the company and drew out “thousands of dollars” of expenses from the business. He testified that after a time, the company secured fewer contracts.

Respondents did not elicit evidence of Complainant’s interim earnings during cross-examination and were otherwise precluded from offering evidence of his failure to mitigate damages. Thus I conclude that Respondents did not meet their burden to establish Complainant’s failure to mitigate damages.

B. Emotional Distress

The Commission is authorized to award damages for emotional distress damages resulting from unlawful discrimination. Stonehill College v. Massachusetts Comm'n Against Discrimination 441 Mass. 549 (2004); Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303(1976); Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Court 172(1985).

Emotional distress damages should be fair and reasonable, and proportionate to the distress suffered. Stonehill, supra, at 576. Some of the factors to be considered are; the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has suffered and reasonably expects to suffer and whether the complainant has attempted to mitigate the harm. Id. The Complainant must show a sufficient causal connection between the Respondent's unlawful act and the Complainant's emotional distress. Id. I conclude that Complainant suffered emotional distress as a result of Respondent's unlawful discrimination against him. He was upset, disappointed and distressed about McGilvray's treatment of him. According to his doctor's note, Complainant had dizzy spells, headaches, shortness of breath and nausea from his confrontations with McGilvray and also experienced worsening of his right foot neuropathy from the added walking involved in the commute to the Boston office." After his retirement, he felt "a certain amount of distress," an "overall feeling of loss" and considered taking medication but decided against it. He felt "sad" and distressed and wondered what he was going to do next and felt "kind of empty." He stated that he suffered from insomnia and lost some weight and that these feelings lasted for six to eight months.

I conclude that Complainant's emotional distress was causally connected to Respondent's discriminatory conduct and lasted for a period of months after his retirement. I conclude that Complainant is entitled to an award for emotional distress in the amount of \$30,000.00.

V. ORDER

Respondent is hereby Ordered to:

(1) Immediately cease and desist discriminating on the basis of handicap.

(2) Pay to Complainant Francis Kilroy the sum of \$120,439.43 for lost wages within 60 days of receipt of this decision with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made.

(3) Pay to the Complainant Francis Kilroy the sum of \$30,000.00 in damages for emotional distress within 60 days of receipt of this decision, with interest thereon from the date the complaint was filed until such time as payment is made.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 21st day of May, 2008.

JUDITH E. KAPLAN,
Hearing Officer