

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JEAN JACKSON AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 06-BEM-00696

MASSACHUSETTS DEPARTMENT
OF TRANSITIONAL ASSISTANCE,
Respondent

Appearances: Richard J Bennett, Esq., for Complainant
Daniel P. LePage, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 22, 2006, Jean Jackson (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging disability discrimination under M.G.L. 151B, sec. 4, para. 16. The complaint arises out of Respondent’s refusal to accommodate Complainant’s request to limit her in-person client contact after being attacked at work in 1995.

The MCAD issued a probable cause finding on July 13, 2007 and certified the case for public hearing on January 9, 2008. A public hearing was held on October 10 and 14, 2008. The Complainant testified on her own behalf as did Janette Santiago, Lori Holland, and Eugenia Paraghamian. Respondent's witnesses were Anne O'Sullivan and Maryalyce Cleveland. The parties submitted nineteen (19) joint exhibits.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the 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. The Complainant commenced employment with the Massachusetts Department of Transitional Assistance (DTA) on March 1, 1987. DTA provides financial assistance and food stamps to indigent persons in need of such benefits.
2. DTA operations consist of: 1) local area offices where intake workers process in-person applications for assistance and 2) centralized eligibility operations at 600 Washington Street in Boston where non-field operations are located, including the Application/Information Unit, the Match Unit, the Computer Unit, the Fraud Unit, the Income Verification Unit, and the Recipient Services Unit.
3. On June 1, 1995, Complainant was working at a local area office as an intake worker and was attacked by a client and his family. The client's mother punched Complainant in the face, grabbed her, and scratched her in the eye. Several individuals then jumped on Complainant, beat her, and kicked her while she was

on the floor. Complainant was treated in the emergency room of a hospital for injuries to her face, eye, and body. Joint Exhibit 12.

4. Complainant took a leave of absence lasting approximately four months because of symptoms including extreme anxiety, flashbacks, depression, crying spells, insomnia, nightmares, palpitations, sweating, and weight loss. Complainant participated in weekly psychotherapy sessions and was prescribed anti-anxiety medication. Joint Exhibit 11. After Complainant returned to work in late 1995, she tried to resume her duties as an intake worker but had panic attacks when she had to interact with clients.
5. Complainant submitted a November 17, 1995 letter from her treating psychologist, James M. Donovan, Ph.D., who diagnosed Complainant with Post Traumatic Stress Disorder (“PTSD”) and recommended that Complainant be transferred to a position with less face-to-face contact with “potentially assaultive people.” Joint Exhibit 11.
6. Shortly after submitting the psychologist’s letter, Complainant was transferred to the Application/Information Unit of the Department’s Centralized Eligibility Operations. At the time, Ronald Newcomb was the Director of Centralized Eligibility Operations. As Director of Centralized Eligibility Operations, Newcomb’s duties included supervising the Application/Information Unit until his retirement in 2003. The Application/Information Unit was created to answer phone calls from the public about eligibility for benefits, types of benefits, and departmental programs; to mail program applications and brochures to individuals requesting them; to inform callers what they needed to bring to appointments at

local offices, and to make referrals to other agencies. Joint Exhibits 6 and 10. Newcomb was told by his supervisor, Assistant Commissioner Joyce Sampson, that Complainant did not have to have direct client contact in the Application/Information Unit. Joint Exhibit 15 at p. 10, 19, 24. This arrangement lasted the entire time that Newcomb was the Director of Centralized Eligibility Operations. According to Newcomb, seeing clients was not an essential part of Complainant's position during the time she worked for him.

7. Complainant and several other individuals in the Application/Information Unit spent most of their time answering phone calls. They also had some direct contact with individuals to answer questions and hand-out food stamp applications. Joint Exhibits 6 and 10. Complainant testified that although she sometimes met with clients, she generally spoke to individuals over the phone. Having mostly phone contact with clients diminished Complainant's anxiety and allowed her to function on the job for approximately ten years. Newcomb considered Complainant to be an excellent worker. Joint Exhibit 15 at p.13. Under Newcomb's supervision, Complainant received an annual rating of "exceeds" on her Employee Performance Review Form for FY 01-03.
8. In 2003, Complainant participated in a successful group request for a position upgrade from Transitional Assistance Social Worker II to Program Coordinator II. The group request referenced, among other responsibilities, the counseling of walk-in individuals. Joint Exhibit 6 at 5 & 7; Joint Exhibit 15 at 33. The upgrade to Program Coordinator II was retroactive to 2002.
9. In October of 2002, Newcomb and his Assistant Director, Carol Siemering,

- retired and were replaced by Maryalyce Cleveland and Anne O'Sullivan as Director of Eligibility Operations and Assistant Director, respectively. Newcomb did not recall whether he ever told Cleveland or O'Sullivan that Complainant was not required to meet with recipients in person. Joint Exhibit 15 at p. 44.
10. Complainant testified credibly that when O'Sullivan was first assigned to the job of Assistant Director, she had an introductory conversation with Complainant during which she acknowledged knowing about Complainant's accommodation.
 11. Under Cleveland's supervision, Complainant's EPRS rating and that of her co-worker Eugenia Paraghamian were downgraded to a "meets" for FY 04 and 05. Paraghamian and Complainant both "assisted (on a daily basis) any client/applicant that has walked into the Commissioners [sic] Reception Area." Joint Exhibit 16.
 12. One of the job duties listed on Complainant's EPRS forms prior to 2005 was to "See Walk-Ins." According to Assistant Director O'Sullivan, a "walk-in" is a person who comes into DTA for any reason, such as having questions about food stamps or other benefits. Although Complainant received a "meets" rating for this duty in FY 01-03, she received a score of "exceeds/excels" for this duty in her FY 04 mid-year evaluation. Joint Exhibits 1-4. Complainant testified that co-workers generally performed this function for her prior to 2005, but that she could handle in-person interviews provided that the receptionist screened clients for her and she only had to hand out applications or answer general questions. I credit Complainant's explanation and do not attach any other significance to the "exceed/excels" rating for seeing walk-ins in FY 04.

13. In July of 2004, a new phone system was installed in Centralized Eligibility Operations which identified the number of calls coming in, the names of the employees who answered the calls, how many calls each employee answered, and whether employees were making themselves unavailable to take calls. O'Sullivan testified that numerous employees, including Complainant, did not like the new phone system because it monitored productivity. Between August and December of 2004, the new phone system became operational. Cleveland directed employees to work as a team in answering hotlines for the Application/Information Unit, the Income Verification Unit, and the Recipient Services Unit. A fourth line -- the Food Stamp hotline -- was subsequently added. At some point the hotlines collectively became known as the Call Center.
14. Call Center employees who worked in Centralized Eligibility Operations were also expected to meet face-to-face with people in the Central Office, hand out applications to people who sought all types of public assistance, and explain public assistance programs and eligibility requirements.
15. O'Sullivan testified that in December of 2004, she met with Complainant and Jeannie Paraghamian to address complaints that they were refusing to see walk-in clients. O'Sullivan testified that on one occasion, she observed the receptionist, Linda Gill, handing out a food stamp application to a person who had come into the office. Gill told O'Sullivan that she was giving out applications because the "ladies downstairs told her that they didn't like to see walk-ins." O'Sullivan informed Complainant and Paraghamian that handing out food stamp applications to prospective applicants was their responsibility, not that of the front desk

receptionist.

16. On March 17, 2005, Cleveland held a meeting to discuss coverage issues within the Centralized Eligibility Unit. Cleveland and O'Sullivan presented a rotating duty schedule setting forth which employee had the responsibility to see walk-ins each day. Cleveland instructed Complainant to handle her share of "walk-ins" rather than allow other employees to cover this job function for her. Complainant testified credibly that she responded by stating that she had an accommodation not to see walk-in clients.
17. Cleveland testified that she was surprised at Complainant's assertion that she had an accommodation not to see walk-in clients because: 1) Ron Newcomb, the former Director of the Centralized Eligibility Unit, had not conveyed this information to her; 2) she had seen Complainant interacting with clients at the office; and 3) there was nothing in Complainant's personnel file or in other DTA files about such an accommodation. Cleveland and O'Sullivan both testified that they were not aware of any arrangement whereby Complainant was permitted to limit her direct contact with clients. I credit the assertions of Cleveland and O'Sullivan that they were not aware of a formal, written accommodation having been granted to Complainant, but do not credit that they lacked knowledge of an informal arrangement shielding Complainant from most direct client contact.
18. On May 3, 2005, an individual came to the Call Center in order to obtain an income verification form. The client became upset after waiting for assistance. Receptionist Gill and Assistant Director O'Sullivan asked Complainant to talk to the client after co-worker Albert Cruz declined to do so on the basis that he was

too busy. Complainant refused, asserting that she was still on her lunch hour. Complainant testified that during the incident, she panicked, was “frozen” in her seat, and couldn’t get her legs to work. Complainant’s friend/co-worker Janette Santiago testified that when the client requested service, Cruz was on duty and that Complainant was still on her lunch break. Complainant’s other friend/co-worker Eugenia Paraghamian testified that she heard a voice mail recording of Gill unsuccessfully paging Cruz with an agitated woman in the background. Paraghamian’s testimony is corroborated by shop steward Lori Holland who testified that she heard a voice mail recording of Gill announcing a client and an irate individual in the background repeatedly yelling, “I’m here for a verification.” O’Sullivan testified that she also heard a voice mail recording of Gill paging Complainant, but there was no screaming on the message, and that she met with the client who did not exhibit any anger about being kept waiting. The recording of the call no longer exists. I decline to credit the contents of the alleged voice mail.

19. Complainant testified that after the May 3rd incident, she had difficulty coming into work and sleeping. She submitted a letter dated May 27, 2005 from Dr. Donovan who stated that Complainant was not able to see clients who are threatening and abusive.
20. Complainant submitted a request for an accommodation in June of 2005 to keep her from having to deal with individuals accessing DTA’s Centralized Eligibility Unit on a walk-in basis. Lorraine Woodson, Civil Rights Officer at the Commonwealth’s Executive Office of Health and Human Services, denied the

request on the basis of her conclusion that seeing clients was an essential function of Complainant's job. Woodson testified that she researched Complainant's personnel records and, although she found Complainant's self-description as a person with a disability and her request for an accommodation, there was no written grant of an accommodation. Woodson did not recall being informed that any special arrangements had been put in place after Complainant's 1995 assault to shield her from interaction with clients.

21. In June of 2005, Respondent commenced an initiative in the Malden area office and sought volunteers from Centralized Eligibility Operations to staff the project. Complainant did not volunteer for the project but saw a memo in which her name was mentioned as a transferee because of her relative lack of seniority. Complainant was concerned that the project would require a significant amount of face-to-face contact with clients. Joint Exhibit 14.
22. On June 2, 2005, O'Sullivan wrote a memo to Complainant reminding her that, pursuant to the Department's 2003 Policy on Workplace Violence, an employee faced with a threatening or abusive situation could contact a supervisor, manager, or security guard. O'Sullivan stated that employees were to contact a supervisor if a "walk-in" behaved in an agitated, hostile, or potentially abusive manner. Joint Exhibit 17.
23. On June 14, 2005, O'Sullivan issued a memo stating that Complainant was to perform all the duties of her position including assisting walk-in clients and that other Call Center staff were not to perform this job function for her because of her history of trauma. Joint Exhibit 18.

24. On June 16, 2005, Complainant sought to use a “comp” day to attend the funeral of her stepmother. Joint Exhibit 8. After the request was originally approved, Complainant was informed that her request was denied, because she was scheduled to be on duty that day, unless she could arrange for another employee to switch days with her. O’Sullivan testified that when she denied the request, she was not aware that Complainant was seeking the day off in order to attend her stepmother’s funeral.
25. Complainant left work on an extended leave beginning on June 17, 2005 for which she received Workers’ Compensation coverage for a portion of her lost wages. Joint Exhibit 12. According to Complainant, the denial of a comp day on June 16, 2005 compounded the distress she experienced as a result of the May 3, 2005 incident. Complainant submitted a note from Dr. Donovan, dated June 17, 2005, which stated that she was not able to continue her work for an undetermined period. Joint Exhibit 19. Complainant’s psychiatrist, Dr. Richard Morrill, diagnosed Complainant in January of 2006 with a major depressive disorder. He described Complainant as afraid of crowds, having trouble sleeping, homebound, and living a marginal existence. Joint Exhibit 12.
26. Complainant applied for Accidental Disability Retirement in the latter part of 2006. Joint Exhibit 12. Her treating psychiatrist, Dr. Morrill, submitted a letter drafted on or about 12/21/07 in regard to the application which states that following Cleveland’s insistence that Complainant service walk-in clients and the incident on May 3, 2005, Complainant experienced a recurrence of her PTSD symptoms including flashbacks, increased insomnia, nightmares, anxiety,

episodes of diarrhea, palpitations, decreased concentration and depression but that she could return to work with the accommodation that she not have face-to-face interviews with clients. Joint Exhibit 12. On March 1, 2006, Complainant was evaluated by Melvyn Lurie, M.D., Board Certified in Psychiatry, who diagnosed Complainant as suffering from Post Traumatic Stress Disorder and gave her a poor prognosis for recovery although a “likely” ability to continue in the work force with proper accommodations. Joint Exhibit 13. He concluded that the 1995 assault was the predominant contributing cause of her incapacitating anxiety. Id. Dr. Michael Rater, a psychiatrist hired by the Department of Industrial Accidents, conducted a psychiatric evaluation of Complainant on March 2, 2007 relative to her Accidental Disability Retirement claim. He diagnosed Complainant with chronic PTSD and concluded that she suffered from a permanent partial disability caused by her 1995 assault and concluded that her prognosis was poor for providing direct client service but excellent for working in her prior telephone capacity. Joint Exhibit 14. The record does not address the outcome of Complainant’s application for Accidental Disability Retirement.

27. Complainant was out of work from June 17, 2005 through August 13, 2007 on a leave for which she received partial Workers’ Compensation. During this period she seldom went out unless accompanied by her daughters.

28. Complainant returned to work on or about August 13, 2007. Since returning to work, Complainant’s duties have been limited to answering phone calls.

Complainant testified that it feels good to be back at work.

III. CONCLUSIONS OF LAW

Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with a reasonable accommodation. M.G.L. c. 151B, sec. 1(16). A handicapped person is one who has an impairment which substantially limits one or more major life activities, a record of having an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) (“MCAD Handicap Guidelines”) at p. 2. Complainant claims that she is such a qualified handicapped individual and that Respondent discriminated against her by failing to accommodate her inability to interact with clients as a result of her PTSD.

To state a case of discrimination based on a failure to accommodate, Complainant must prove that she is a qualified handicapped person capable of performing the essential functions of her job who requested a reasonable accommodation and was prevented from performing her job because her employer failed to reasonably accommodate the limitations associated with her handicap. See Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff’d*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000); Bergman v. Town of Burlington School Department, 18 MDLR 143 (1996). A “reasonable accommodation” is defined as “any adjustment or modification to a job that makes it possible for a handicapped individual to perform the essential functions of the position and to enjoy equal terms, conditions and benefits of employment. MCAD Handicap Guidelines, section 11(C); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648, n.19 (2004).

The duty to provide a reasonable accommodation requires an employer to demonstrate its willingness to change the way it operates, including altering job responsibilities. Types of accommodations that have been considered reasonable include modifying when and how an essential job function is performed, obtaining or modifying adaptive equipment, reassigning non-essential job functions, and reassigning the employee to a vacant position. An employer need not make an accommodation if it would impose “an undue hardship” on the operation of its business, such as an action requiring significant difficulty or expense when considered in light of the financial resources of the employer. See Mazeikus, 22 MDLR at 68. It is the employer who bears the burden of persuasion on whether a proposed accommodation would impose an undue hardship. See id.

The credible evidence in this case establishes that Complainant is a qualified handicapped individual who developed PTSD in 1995 as a result of being assaulted at work. Following the assault, Complainant experienced panic attacks when forced to interact with clients. Complainant’s PTSD impacts her ability to communicate with clients and to work in any type of job involving stressful relationships. It therefore limits her ability to engage in the major life activities of communicating and of working in a broad spectrum of jobs. See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (recognizing as major life activities such basic abilities as walking, seeing, hearing, and, in dicta, working in a broad range of jobs);¹ City of New Bedford v. MCAD, 440 Mass. 450 (2003) (police officer’s inability to perform as a SWAT team

¹ Pub. L. No. 110-325, 122 Stat. 3553 (2008) recently amended section 3(2)(A) of the Americans with Disabilities Act to introduce a new, non-exhaustive list of major life activities including concentrating, thinking, communicating and working, but the amendment has not been applied retroactively. See Young v. Precision Metal Products, Inc., ___ F. Supp. 2d ___, 2009 WL 507632 (D. Conn., Feb. 11, 2009) and cases cited.

member does not implicate major activity of working because it did not preclude him from performing a class of jobs); G.L. c. 151B, section 1 (20) (defining term “major life activities” to include working); MCAD Handicap Guidelines stating that, “[A]n impairment substantially limits an individual’s ability to work if it prevents or significantly restricts the individual from performing a class of jobs or a broad range of jobs in various classes.”

Complainant, moreover, received Workers’ Compensation for extended leaves on two occasions related to her difficulty engaging in direct client contact, first in 1995 and subsequently from June 17, 2005 to August 13, 2007. During these periods, Complainant suffered from PTSD symptoms including flashbacks, insomnia, nightmares, anxiety, diarrhea, palpitations, decreased concentration, and depression. Complainant’s condition was documented by her treating psychologist, Dr. Donovan, and by her treating psychiatrist, Dr. Morrill, who diagnosed Complainant in January of 2006 with a major depressive disorder and a recurrence of her PTSD. Dr. Morrill described Complainant as afraid of crowds, unable to sleep, homebound, and living a marginal existence. Complainant also received diagnoses of chronic PTSD and permanent partial disability from independent medical examiners hired by the Industrial Accident Board.

As a recipient of Workers’ Compensation benefits, Complainant is entitled to a rebuttable presumption of qualified handicapped status under G.L.c.152, section 75B(1).²

² The receipt of disability benefits does not preclude Complainant from raising the issue of handicap discrimination because the purpose and standards of the applicable laws are different. See Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, 798 (1999) (applying for and receiving disability benefits does not automatically prevent the recipient from proving a claim of disability discrimination under the ADA); Russell v. Cooly Dickinson Hospital, 437 Mass 443 (2002) (pursuit and receipt of disability benefits based on assertion of total disability does not automatically estop plaintiff from pursuing an action for employment discrimination); Labonte v. Hutchins and Wheeler, 424 Mass. 813, 819-20 (1996) (application and receipt of long-term disability benefits is not per se bar to claim for handicap discrimination). The laws and regulations governing Workers’ Compensation and other disability benefits

See Gilman v. C&S Wholesale Grocers, Inc., 170 F.Supp.2d 77, 84 (D. Mass. 2001) (individuals suffering work-related injuries “deemed” qualified handicapped persons under chapter 151B for as long as their status under Workers’ Compensation law influences their treatment by others); Patel v. Everett Industries, 18 MDLR 26,28 (1996) (complainant who sustained injury for which she received Workers’ Compensation is presumed to be handicapped pursuant to c. 152, sec. 75B); Joubert v. United Parcel Service, Inc., 22 MDLR 253 (2000) (Workers’ Compensation settlement entitles Complainant to presumption of qualified handicap status under chapter 152); but see Hatch v. Townsend Oil Co., Inc. 2009 WL 637243 (Mass Super. Jan. 16, 2009) (Workers’ Compensation claimants should have their claims under Massachusetts discrimination statute analyzed in same manner as other claimants).

Respondent challenges the presumption of qualified handicapped status conferred by chapter 152, section 75B on the basis that having direct client contact is an essential part of Complainant’s job. Respondent relies on the testimony of Civil Rights Officer Lorraine Woodson to support this proposition but Woodson’s views are not supported by the evidence. According to former Director of Centralized Eligibility Services Ronald Newcomb, seeing clients was not an essential part of the Complainant’s position under his tenure even though Complainant’s EPRS forms prior to FY 05 contained an entry devoted to seeing walk-in clients and Complainant participated in a group request for a position upgrade based, in part, on seeing walk-in clients. Over the years, Complainant

determine whether a claimant is disabled for the purposes of those laws but they do not address whether the employee could work with a reasonable accommodation. Id. at 803. In this case, there is no contradiction between deeming Complainant partially incapacitated for purposes of Workers’ Compensation law, while considering her capable of performing her job with the reasonable accommodation of not seeing walk-in clients.

was able to minimize her contact with clients because fellow workers performed this function for her. Although Respondent argues that such an arrangement created hostility among co-workers, there is no evidence that this was the case. In fact, the evidence indicates that Eugenia Paraghamian and other co-workers were willing to see clients for Complainant.

The evidence, at most, establishes that seeing walk-in clients was a part of Complainant's job, not that it was an essential part of her job. For the entire ten-year period between 1995 and 2005, Complainant was allowed to control the amount of direct client contact she could handle. During that period, she generally limited her direct client contact to individuals who required applications for food stamps or sought answers to general questions. Both before and after Complainant's 2005-2007 industrial accident leave, she was permitted to man the DTA Application/Information hotline and only see individuals whom she felt would not pose a threat to her. These circumstances rebut the Respondent's assertion that Complainant was not a qualified handicapped individual because she refused to perform the essential functions of her position.

In 2005, Respondent made a unilateral decision to cease accommodating Complainant's disability after doing so for ten years. Where an employer has a long history of providing a particular type of accommodation, the employer is generally required to continue to provide the benefit to a handicapped employee. See Donohoe v. Sodexo-Marriott Services, Inc., 21 MDLR 204 (1999) (rejecting respondent's unilateral determination that long-established reasonable accommodations would no longer be provided); Cook v. Town of Wakefield Municipal Light Department, 18 MDLR 253, 254 (1996); Yates v. Mass-C.E.O.P.S.-MCI Norfolk, 17 MDLR 1503, 1515(1995).

Respondent's unilateral decision to cease accommodating Complainant's disability violated the obligation of Massachusetts employers to engage in an interactive process with a disabled employee who requests or requires an accommodation. See MBTA v MCAD, 450 Mass. 327, 341-342, n.16 (2008) *citing* Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648-649 (2004); MCAD Handicap Guidelines (recognizing that an employer is obligated to participate in an interactive process where disabled employee requesting an accommodation); Johansson v. MCAD, 2005-P-1367, n.7 (Appeals Court, March 19, 2007) (DOC failed to make a good faith effort to determine whether a reasonable accommodation was feasible). The request for a reasonable accommodation on the part of a qualified handicapped employee imposes an obligation on the part of the employer to engage in a direct, open, and meaningful communication with the employee. See Maizukus, 22 MDLR at 68. Included in the dialogue must be an identification of the employee's limitations and the potential adjustments to the work environment that would allow the employee to overcome those limitations. Id.

Had Respondent engaged in an interactive process with Complainant, it is possible that an arrangement could have been fashioned to prevent Complainant's 2005-2007 industrial accident leave. See D'Ambrosio v. MBTA, 23 MDLR 81 (2001) *citing* Mazeikis v. Northwest Airlines, 22 MDLR 63, 68-69 (2000) (interactive process involves discussion of nature and scope of requested accommodation and an assessment of its feasibility). The possibility that Complainant's PTSD could have been accommodated is supported by the medical records of Psychiatrist Melvyn Lurie who concluded that Complainant was "likely" able to continue in the work force with proper

accommodations. It is also supported by Psychiatrist Michael Rater, who provided an independent analysis for the Department of Industrial Accidents in 2007. Dr. Rater opined that although Complainant suffered from a permanent partial disability caused by her 1995 assault, she had an excellent prognosis for working in her prior telephone capacity. No interactive process took place, however, because Respondent acted unilaterally in 2005 to force Complainant to have client contact.

Respondent asserts that it had no obligation to participate in an interactive process in 2005 because Complainant had never requested a reasonable accommodation prior to that point. However, there is credible evidence that in 1995, Assistant Commissioner Joyce Sampson told Ronald Newcomb that Complainant was not to have client contact and that the arrangement lasted, in some form or another, for ten years. Woodson acknowledged that Complainant's personnel records contained a self-description of disabled status and a request for an accommodation. Records pertaining to the 1995 assault and Complainant's medical status were also on file in the office, including an 11/17/95 letter from her treating psychologist diagnosing Complainant with PTSD and strongly recommending a transfer to a department having less face-to-face contact with potentially assaultive people. Although Newcomb and Cleveland do not recall discussing Complainant's accommodation, Complainant continued to refrain from most direct client contact until 2005. When the March 17, 2005 meeting took place during which a rotating duty schedule for seeing walk-ins clients was presented, Complainant made it clear that she had an accommodation not to see walk-in clients.

Under the circumstances set forth above, I do not credit the assertions of Cleveland and O'Sullivan that they were unaware that Complainant had an

accommodation -- albeit unwritten -- protecting her from seeing walk-in clients. They place undue reliance on the fact that there was no written accommodation in Complainant's personnel file but such reliance places form over substance. Complainant's assault, her subsequent fear of face-to-face encounters with clients, and her ten-year arrangement of communicating with clients over the phone rather than in person were well-known. In fact, the irritation of Cleveland and O'Sullivan with this arrangement fostered the on-duty schedule which essentially retracted Complainant's ongoing accommodation. Respondent makes much of the fact that Complainant's EPRS forms and her requests for upgrades contain references to seeing walk-in clients, but I interpret these references to be group chores performed primarily by Complainant's co-workers. Complainant, on occasion, saw walk-in clients but only under circumstances which did not create stress.

The aforementioned facts and conclusions convince me that Complainant was a qualified handicapped person capable of performing the essential functions of her job. She requested and received a reasonable accommodation which was unilaterally retracted by Respondent from 2005 to 2007 and subsequently restored. I therefore conclude that Complainant was prevented from performing her job during this period because her employer failed to reasonably accommodate the limitations associated with her handicap.

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct of discrimination. 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).

Lost Wages

I decline to make a ruling on the issue of lost wages because the record contains no competent evidence as to what Complainant would have earned had she worked from June 17, 2005 to August 13, 2007 and the amount to be offset as a result of monies received in Workers' Compensation benefits and/or Disability Retirement benefits. In Complainant's post-hearing brief, counsel introduces some relevant information as a bald, unilateral assertion but nowhere points to documentary or testimonial evidence establishing these matters as fact.

Emotional Distress Damages

An award of emotional distress damages 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 Stonehill College v. MCAD, 441 Mass. 549, 576 (2004).

The evidence establishes that after the May 3, 2005 incident in which Complainant was called upon to see a walk-in client, she had difficulty coming into work and sleeping. Complainant took an extended leave from June 17, 2005 to August 13, 2007 related to the denial of her request not to see individuals accessing DTA's Centralized Eligibility Unit on a walk-in basis. Complainant received a part-time Workers' Compensation award for her leave. During the twenty-six months she was out of work, Complainant worried about the loss of her job, was afraid to associate with

people, had trouble sleeping, suffered from depression, and was essentially housebound unless accompanied by her daughters. Complainant's psychiatrist, Dr. Morrill, described Complainant's initial visit with him on June 3, 2005 as precipitated by a recurrence of PTSD resulting from a new job assignment. Joint Exhibit 12, p. 74. He described Complainant as presenting with anxiety and flashbacks when thinking about seeing clients again. Id. In a medical entry dated 12/21/06, Dr. Morrill summarized Complainant's symptoms as chronic depression, anxiety, isolation from others, increased startle response, flashbacks of the trauma at the worksite, nightmares of the attack, and difficulty experiencing normal emotions with her granddaughter. Joint Exhibit 12, p. 32. He recommended 40 mg of Paxil and 150 mg of Trazodine daily. Joint Exhibit 12, p. 53.

Complainant's treating psychologist, Dr. Donovan, diagnosed Complainant in February of 2006 as having a major depressive disorder and as exhibiting symptoms of PTSD. Joint Exhibit 12, pp. 55-59. He described Complainant as getting very little sleep, afraid to go into crowds, and living a very marginal existence. Id. at p. 59.

Complainant is entitled to emotional distress damages related to Respondent's unilateral retraction of her reasonable accommodation and its refusal to reinstate the accommodation upon Complainant's formal request that it do so. On the other hand, it would be unfair to lay all of Complainant's emotional distress at Respondent's doorstep due to its actions in 2005 since the evidence supports a conclusion that Complainant's assault in 1995 was the primary cause of her disability. See Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002) (declining to attribute all of complainant's emotional distress to discriminatory act where it also stemmed from independent factors). The evidence supports a conclusion that Respondent's actions in 2005 exacerbated

Complainant's symptoms and undermined some of the improvements Complainant had made in her emotional state over the ten-year period following the assault. I conclude that Complainant is entitled to an award of \$50,000.00 in emotional distress damages.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.c. 151B, sec. 5, Respondent is ordered to pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$50,000.00 in damages for emotional distress, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

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 13th day of April, 2009.

Betty E. Waxman, Esq.,
Hearing Officer

