

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JOSEPH MORSE AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 99-BEM-2343

MASSASOIT COMMUNITY COLLEGE
Respondent

Appearances: Thomas Canavan, Esq., for Complainant
Kenneth A. Tashjy, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 23, 1999, Joseph Morse (“Complainant”), a janitor at Massasoit Community College (Respondent), filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that Respondent unlawfully discriminated

against him on the basis of age.¹

The MCAD issued a probable cause finding and certified the case for public hearing on December 4, 2003. The case was brought to public hearing on May 24 and 25, 2004.

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 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, Joseph Morse, was a janitor in the Facilities Department of Massasoit Community College in Brockton MA from August 31, 1992 until his retirement in May 2002. He was born on November 4, 1935. He commenced employment at the College at age 57 and retired at age 67.
2. Massasoit Community College is a public institution of higher education in the Commonwealth of Massachusetts and is an employer within the meaning of G. L. c. 151B, sec. 1(5). The College has approximately seven buildings on campus. Transcript at 52.
3. In March 1998, Jana Dengler was hired as the Director of the Facilities Department. She was charged with the responsibility of maintaining the College's physical plant. Dengler performed this job until February 2000 when

¹ Complainant died on December 16, 2003. His claim was prosecuted at public hearing by his estate. In lieu of trial testimony, Complainant's deposition was accepted into evidence as Joint Exhibit 28.

she was reassigned to the Canton campus. She briefly returned to the Brockton campus in April 2000. Several months later, her contract expired and was not renewed. Transcript at 228. Dengler left the employ of Massasoit Community College around June 2000.

4. As of September 23, 1999, the Facilities Department had thirty-eight maintenance personnel, consisting of “maintainers” (i.e., janitors), electricians, HVAC mechanics, and painters. Eight employees of the Department were in their 30’s, sixteen were in their 40’s, eight were in their 50’s, and four were in their 60’s. Joint Exhibit 23. As of September 1999, 78% of the staff in the Facilities Department was forty years old or older. Transcript at 132-134.
5. Dengler hired nine employees during her two-year tenure at the Facilities Department. Five of the new hires were under forty years old and all were forty-five years old or younger. Transcript at 163-164.
6. Soon after Dengler was hired, she toured the College’s grounds with members of the College’s Board of Trustees. Board members expressed dissatisfaction with the condition of the facilities.
7. In 1998, the Student Union was maintained by janitor Ken Doten during the day and Dan Morocco and Complainant during the evening. The evening shift was from 3:30 p.m.– 11:30 p.m. Cleaning was emphasized on the night shift because there was less traffic at night.
8. Complainant was responsible for cleaning the lower level of the Student Union (i.e, the basement) during the night shift. Morocco, aged thirty-six in 1998, maintained the upper level at night. Transcript at 35, 40. The basement had

two sets of bathrooms, office spaces, a counseling placement center, the media center, the college bookstore, a health center, a newspaper office, and a lower lounge. Morocco testified that although he and Complainant were responsible for maintaining different floors in the Student Union, each would help the other out. Transcript at 42. Morocco testified credibly that Complainant was a hard worker and denied that he had any complaints about Complainant's ability to perform his job adequately. Transcript at 34. Morocco testified that some building functions were two-man jobs such as power washing, set-ups for functions, moving heavy tables, stripping the floors, and applying wax. Transcript at 33-34. I credit Morocco's testimony over that of Jana Dengler who testified that Morocco complained to her that, "he was carrying Joe." Transcript at 270.

9. Morocco left the College in September 1998. Transcript at 309. Following his departure, Dengler instituted the following staffing changes: Ken Doten was reassigned to the Field House and Joe Mancuso took Doten's place as the day janitor in the Student Union. Effective November 2, 1998, a crew of 2.5 janitors was assigned to clean the upper level of the Student Union at night in place of Morocco. The 2.5 crew was a team of 4-5 people working from 5:00 p.m. to 1:30 a.m. The 2.5 crew was expected to clean the upper level of the Student Union along with maintaining other locations on campus, but it wasn't always able to complete its entire cleaning assignment. Transcript at 217.
10. Theresa Devoe, a part-time janitorial employee who was assigned to the cafeteria, was given the expanded responsibility of various areas on the lower

level of the Student Union after Morocco left. Her cleaning duties on the lower level of the Student Union included the student lounge, the veterans' room, the student activities office, rooms 14 and 17, the newspaper room, and a game area. Transcript at 268-272; Joint Exhibit 27. Complainant was responsible for the remaining areas of the basement, including the bathrooms. Dengler estimated that after Morocco left, Complaint experienced a thirty percent reduction in the area of responsibility assigned to him. Transcript at 271. I do not credit this testimony.

11. Devoe was out of work seven or eight days during December 1998 and Mancuso was out for the month of December 1998 on sick leave. Transcript at 314. In Devoe's absence, the 2.5 crew was responsible for performing Devoe's duties along with the other work assigned to it. Devoe was subsequently terminated for performance issues. Transcript at 167-169.
12. David Tanner worked in the Facilities Department from 1985 to 2003. He was the evening Facilities Manager under Dengler. Tanner was 39 years old at the time Dengler became his supervisor. Tanner testified that after Dan Morocco was replaced by the 2.5 crew, the maintenance staff was shorthanded, especially when Mancuso was out of work during the month of December 1998 and Devoe was absent. Transcript at 220.
13. Tanner described Dengler as setting "high standards" for cleanliness, performance, and professionalism. He credited her for developing cleaning guidelines and checklists for college facilities, implementing random reviews of buildings, requiring janitors to wear uniforms, instituting training regarding

cleaning techniques, purchasing new cleaning equipment, and installing automatically-controlled diluting systems for mixing cleaning chemicals. According to Tanner, Dengler was responsible for an improvement in the cleanliness of the buildings and the work habits of the staff. Transcript at 201.

14. Complainant acknowledged in his deposition that there was some improvement in the physical condition of the College while Dengler was the Director of Facilities. He credited Dengler with installing backpack vacuum cleaners which made vacuuming twice as fast and with introducing pre-mixed chemicals which could be dispensed in the proper amounts at the press of a button.
15. Tanner was responsible for supervising Complainant. Tanner testified that he inspected Complainant's work areas when he arrived in the morning between 7:00 and 8:00 a.m. From 1992 until Dengler's arrival, Tanner would occasionally ask Complainant to improve his work performance in the areas of vacuuming, dusting, and bathroom cleaning. Tanner testified that Complainant was not a problem employee and that, "Joe was really good if you asked him to do something, he did it right away [although] [his performance] might fall back to the way it was before ..." Transcript at 185, 207. Complainant denied at his deposition that Tanner ever criticized his work. Morse Deposition at 28. Complainant denied that Tanner ever had to remind him to complete a special duty or task. Id. at 28-29. I credit Tanner's testimony over that of Complainant's regarding occasional deficiencies in Complainant's work.
16. Prior to Dengler becoming the Director of Facilities, Complainant's evaluations were good or above standard. His 1997 evaluation rated him in all categories as

above standard and commented “Joe is doing a fine job.”

17. Tanner testified that he participated in Complainant’s 1998 evaluation along with Dengler. In that evaluation Complainant was rated as “good” in fourteen areas, as “above standard” in five areas and as “superior” in one area (working well with the public). Joint Exhibit 13. The front page of the 1998 evaluation, which Dengler drafted, states that Complainant “could spend a little more time on details.” Id. Tanner added a comment on the last page of the evaluation which stated that Complainant was doing a “good job” and to, “Keep up the good work.” Id.
18. The charge of discrimination which Complainant filed with the MCAD asserts that his 1998 evaluation rated him as “superior” in supervisory ability and as “above standard” in all other categories but one. These assertions are not accurate.
19. In 1998, the night working foreman Fred Vendt gave Complainant nineteen notes instructing him to sweep corridors and classrooms, remove cigarette butts, vacuum rugs, “detail” restrooms, dust vents, and wash walls. Respondent’s Exhibit 3. David Tanner described Vendt as “the note man.” Transcript at 225.
20. Between March 9, 1998 and December 23, 1998, faculty and staff complained about the condition of the Student Union’s basement. Areas of particular concern were the lack of trash removal, dusting, vacuuming, and the general uncleanliness of the bathrooms.
21. On January 4, 1999, Dengler, Tanner, Vendt, and Rocky Richardi met with Complainant to discuss the cleanliness of the bathrooms in the lower lounge.

On the same day, Dengler issued Complainant a verbal warning regarding poor workmanship and break time abuses. Joint Exhibit 7.

22. Vendt and Dengler spoke to Complainant on or about January 13, 1999 and warned him to adhere to his scheduled work hours.

23. Complainant wrote a memo to Dengler dated January 20, 1999 in which he stated that the cleanliness of the Student Union was adversely affected by the fact that the day janitor, Joe Mancuso, had been out of work for a month and that Theresa Devoe had also been out of work for a period of time.

Complainant stated in the memo that he changed his break times in order to complete work tasks, that he talked to staff in order to be courteous, that he delayed power washing the rest rooms because new bathrooms were being installed, and that he may have neglected to wipe down some bathroom walls but that he cleaned toilets, sinks and floors every night. Complainant charged in his letter that Dengler, "singled out certain workers [she] would like to get rid of because of their age." Exhibit 5 to Deposition.

24. Dengler issued a second verbal warning to Complainant on January 21, 1999.

The reason for the second warning was that Complainant left his shift on January 14, 1999 before it was over.

25. On March 5, 1999, either Dengler or Vendt told Complainant to thoroughly clean the Student Union bathrooms. About a week later, on March 11, 1999, Vendt again instructed Complainant to give the bathrooms a thorough cleaning, consisting of washing the walls, scrubbing and scraping the flushers, and washing the windows.

26. Dengler drafted a memorandum to Complainant on March 11, 1999 notifying him that he was being suspended for one day, effective March 25, 1999, because of his failure to improve his performance after two the verbal warnings and subsequent directives. Complainant's Exhibit 1A. The Grievant's union, AFSCME, Local 1067, grieved the suspension on March 19, 1999. Although the grievance was denied at Step II and Step III, payroll records indicate that Complainant was never docked pay on March 25, 1999 or at any other time in FY 1999.
27. In addition to recommending the suspension of Complainant, Dengler issued one other recommendation for a suspension during her two year tenure at the Facilities Department. The other individual was a male, age 47. Transcript at 300. Dengler also issued verbal and written warnings to other members of the Facilities Department between 1998 and 2000 for matters such as abuse of sick time, performance issues, attendance issues, and unprofessional conduct. Of the individuals who received the warnings, one was 33 years old, seven were in their 40's, two were in their 50's and one was 68 years old. Transcript at 299-301; Joint Exhibit 23. During her tenure as Director of the Facilities Department, Dengler recommended that two employees of the Facilities Department be terminated. One employee was Tom Stevens, age 40, and the other employee was Thersea Devoe, age 41.
28. Dengler's 1999 performance evaluation of Complainant reflected concerns about Complainant's work quality and use of break times. She rated Complainant as "unsatisfactory" in eight categories, as "fair" in ten categories,

as “good” in three areas, and as “above standard” in one category. Complainant did not receive any superior ratings. Joint Exhibit 14. Dengler recommended another review of Complainant in six months. Id.

29. Dengler testified that Complainant took unauthorized breaks to smoke cigarettes, left his post before his shift was over, and engaged in patterned attendance abuse. Transcript at 320, 322. In a memo to Complainant dated September 23, 1998, she stated that, “Due to abuse of sick time, ALL sick time must be accompanied with a note from your doctor.” Joint Exhibit 20. Dengler described Complainant’s sick leave usage as “pattern abuse.” Transcript at 318-322. I do not credit Dengler’s testimony relative to the severity of Complainant’s attendance deficiencies.
30. Complainant took less than four days of sick leave in 1998. Transcript at 319-320. By December 1998, Complainant had accumulated 466 hours of unused sick time and 24 hours of unused personal time. Joint Exhibit 22.
31. Complainant testified at his deposition that some time after September 1998, Dengler said to him something like, “some people are too old to do the job.” Morse Deposition at 120. I credit this allegation.
32. Complainant testified at his deposition that co-workers Daniel Morocco and Joe Mancuso told him that Dengler said she was, “going to get rid of older people, I’m going to get rid of Joe Morse.” Id. at 121-122. At the public hearing, Jana Dengler testified that she may have said that she wanted to get rid of old means and methods that were being used at the College to perform work but that she never stated an intent to get rid of older workers. Transcript at 300. Dengler

also testified that she was aware that some of the janitorial staff, specifically Complainant and John Morrissey, thought she wanted to get rid of older workers. I do not credit Dengler's testimony that she only expressed a desire to get rid of old means and methods of performing work, not older workers.

33. Morocco testified that during an annual performance review by Dengler, she asked him if he had any ideas on how to improve the College and after he hesitated, she said, "well I do . . . I'd like to get rid of some of the older gentlemen that work here." Transcript at 25. According to Morocco, Dengler said that she wanted to replace them with younger men. Id. at 26. Morocco testified that he told Complainant about Dengler's remark. Id. at 27. Morocco also testified that when he was on break with Joe Mancuso, Mancuso said that Dengler told him that she wanted to get rid of the older gentlemen in the College and replace them with younger men. Id. at 30. I credit Morocco's testimony.
34. John Morrissey (DOB 4/27/31) began employment with Massasoit Community College in 1988 as an electrician. He was promoted to electrical foreman in the Facilities Department approximately one year later. In that capacity he oversaw the electrical work in all of the buildings on campus. Morrissey retired from the College in 2000 at age 69 or 70. He was the oldest person in the Facilities Department under Dengler. Morrissey testified that he received all above standard evaluations prior to Dengler becoming Director. Transcript at 56. Morrissey filed a grievance against Dengler challenging her dissatisfaction about the time he took to wire a computer room. According to Morrissey, on

one occasion, he informed Dengler that he had a case of gout and would not be in to work for three or four days. Morrissey testified that Dengler responded by saying, “Old man, when are you going to retire?” Transcript at 65. Morrissey also testified that he heard her say about him, “There’s the old man now.” Id. at 66. Morrissey testified that on another occasion, Dengler came into the electrical shop and asked who owned the Grand Marquis. When Morrissey said that he did, Dengler responded by saying, “It figures, all the gray-haired old farts drive them anyway. Id.² According to Morrissey, working conditions “drastically improved” after Dengler left. Transcript at 72.

35. Tanner described Dengler as having a management style that was “direct” but was not hypercritical of older employees. Transcript at 202. Tanner acknowledged that he and Dengler had talked about the age of the Facilities staff and how it was on the older side. Id. at 205. He testified that they discussed this matter in regard to the need for new hires and appropriate equipment. Id. at 206; 240-241. Tanner denied ever discussing with Dengler the desire to get rid of Complainant.

36. Complainant testified at his deposition that in August 1999 that he had to miss four days of working from the stress of interacting with Dengler. Complainant testified that he was sick to his stomach, couldn’t sleep, and had headaches. He testified that he “went through hell with [Dengler].” Morse Deposition at 126. Complainant described Dengler as not a “people’s person.” He stated that she

² Morrissey also testified to numerous hearsay statements by individuals who did not appear at the public hearing and whose failure to attend was not adequately explained. I have discounted these statements. I also discount Morrissey’s assertion that Dengler took away most of his job responsibilities and give them to his subordinate, Gary Moore, a junior electrician because the evidence indicates that the division of labor between Morrissey and Moore came about as a result of a personal dispute. Transcript at p. 82.

didn't have the "proper attitude to handle people." Deposition at 30.

Complainant testified that Dengler was tough on older employees. Morse

Deposition at 30-35.

37. In his sworn answers to interrogatories, Complainant stated that he felt as if he were being "set up." He described every minute of the workday as stressful both physically and emotionally. He stated that his blood pressure became hard to control and his blood sugar hard to regulate.

38. John Morrissey testified that Complainant was "heartbroken" about his employment situation. Transcript at 68. Dan Morocco testified that Dengler's criticisms about Complainant's work were very upsetting to him and that his mood changed after the criticism began. Transcript at 34. I credit this testimony and find it supportive of Complainant's interrogatory responses.

39. Complainant's 2000 evaluation was signed by Dengler's successor. Complainant was rated as above-standard in seven categories, including thoroughness of work and the ability to work without immediate supervision. In the remaining categories, Complainant received all "goods." Joint Exhibit 15.

III. CONCLUSIONS OF LAW

A. 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 statute protects persons of age forty (40) and over.

Complainant may meet his burden of proving a prima facie case of unlawful

discrimination by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, “if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.” Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). In a direct evidence case, the Complainant does not have to adhere to the three-stage burden shifting paradigm because Complainant does not need the benefit of an inference. In such instances, a mixed-motive analysis is employed. See Wynn & Wynn, 431 Mass. at 666. Under a mixed-motive analysis, Complainant must first offer direct evidence that an impermissible reason played a motivating part in the employment decision. Id. at 670. Once Complainant offers such evidence, the burden of persuasion shifts to the Respondent to show that it would have acted in the same manner even without the illegitimate motive. Id.

As far as direct evidence of age discrimination is concerned, I credit Complainant’s deposition testimony that Dengler told him something like, “some people are too old to do the job” and that he heard from Daniel Morocco and Joe Mancuso that Dengler said she was “going to get rid of older people -- I’m going to get rid of Joe Morse.” Some of these accusations are totem pole hearsay, but they are supported by Morocco’s credible testimony at the public hearing. According to Morocco, Dengler told him during an annual performance review that she wanted to replace some of the older gentlemen with younger men. Joe Mancuso told Morocco that he (Mancuso) had heard the same thing from Dengler. Complainant’s accusations are also supported by the credible testimony of John Morrissey that Dengler asked him when he was going to retire and called him a

“gray-haired old fart.” Complainant’s accusation of age discrimination is also supported by David Tanner’s acknowledgement that he and Dengler had talked about the age of the Facilities staff and how it was on the older side. The foregoing comments constitute direct evidence of age discrimination because they are credible and are attributed to Dengler in her capacity as Director of the Facilities Department. They establish a “highly probable inference” that age bias was present. Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc. 30 Mass. App. Ct. at 300.

Once Complainant offers direct evidence of age discrimination, the burden shifts to the Respondent to show that it would have acted in the same manner even without the illegitimate motive. Respondent has not succeeded in satisfying this burden. The record demonstrates that without Dengler’s discriminatory attitude playing a role in employment decisions, older workers such as Complainant and John Morrissey functioned effectively within the Facilities Department. Both before and after Dengler’s two-year tenure as Director, Complainant and Morrissey were considered to be valued members of the Department. It was only under Dengler’s tenure that Complainant and Morrissey were given poor evaluations and criticized for inadequate performance. Morrissey testified that after Dengler left, working conditions “drastically improved.” These factors show that without the age bias introduced into the Facilities Department by Jana Dengler, Complainant would not have been subjected to a barrage of criticism and disciplinary warnings.

Apart from direct evidence of discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431

Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). 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, was adequately performing the responsibilities of his position, and was treated differently from janitors who were substantially younger. 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 was a member of a protected class based on his age at the time of the events at issue. Even during the 1998 – 2000 period in which his supervisor, Jana Dengler, was critical of his performance, Complainant’s overall employment record was sufficient to satisfy the second element of a prima facie case. I arrive at this conclusion on the basis that Complainant’s 1998 evaluation, drafted by David Tanner and Jana Dengler jointly, rates Complainant as “good” in fourteen areas, as “above standard” in five areas and as “superior” in one area. A comment on the last page of the evaluation, albeit by David Tanner, states that Complainant was doing a “good job.” The following year, Dengler was the sole evaluator of Complainant’s performance, yet Complainant still received more “good” and “fair” ratings than “unsatisfactory” ones. Following Dengler’s departure, Complainant’s 2000 evaluation substantially improved. Complainant received

“above-standard” ratings in seven categories and “good” ratings in the remaining categories. I conclude, based on the foregoing, that Complainant adequately performed the duties of his position.

The final element of a prima facie case requires proof that Complainant was treated differently from janitors who were substantially younger. The evidence establishes that Complainant received numerous verbal and written warnings about alleged performance and attendance deficiencies from Dengler, as did twelve other members of the Facilities Department.³ Except for one individual, all of the members of the Facilities Department who received warnings from Dengler were forty years old or older.⁴ Thus, 98% of the individuals who received warnings from Dengler were in the forty and older age group as compared to the fact that 78% of the individuals employed in the Facilities Department were in the forty and older age group. Only one out of eight employees in their thirties was given verbal and/or oral warnings by Dengler as compared to seven out of sixteen employees in their forties; two out of eight employees in their fifties; and two out of four employees in their sixties. This evidence supports the contention that Complainant was treated differently from co-workers in the Facilities Department who were substantially younger.

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

³ I focus on the imposition of verbal and written warnings within the Facilities Department during Dengler’s tenure rather than the imposition of suspensions and terminations because the former was implemented by Dengler, acting within her sole discretion, whereas the latter required supervisory review and approval. Accordingly, I do not consider relevant the fact that Complainant and one other employee of the Facilities Department, age 47, received recommendations for suspensions by Dengler and that two employees of the Facilities Department, ages 40 and 41, were terminated by the College based on Dengler’s recommendation.

⁴These figures are derived from Joint Exhibit 23 plus information relative to Theresa Devoe who is included because she was a cafeteria worker assigned to janitorial tasks during Dengler’s tenure at the College. Dengler testified that Devoe was one of the employees whom she disciplined. Transcript at 314.

legitimate, nondiscriminatory reasons 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 reasons were not the real ones 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 legitimate, nondiscriminatory reasons for its action alleged deficiencies in Complainant's performance including a failure to thoroughly clean the basement of the Student Union, taking excessive breaks, leaving work early, and engaging in patterned sick leave abuse. These reasons are 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 reasons are sufficient to survive stage two, I conclude that Complainant has presented credible evidence at stage three to prove that Dengler's dissatisfaction with Complainant's performance and attendance were not the real reasons for issuing him verbal and written warnings and initiating (but not following through on)

a one-day suspension. The fact that Complainant was forced to maintain the lower level of the Student Union with little or no help, watched like a hawk for inevitable shortcomings, and accused of sick leave abuse when he took few sick days all suggest that the real reason for disciplining Complainant was to make his employment situation so unpleasant that he would retire.

Dengler's assertion that Complainant's workload was reduced by thirty percent after Dan Morocco left, is not supported by the evidence. Rather than a reduction in Complainant's workload, the facts establish that staffing changes in 1998 made life more difficult for Complainant. The 2.5 crew didn't always have sufficient time to clean the upper floor of the Student Union during the night shift. Day shift janitor Joe Mancuso was absent for the better part of December 1998, which negatively impacted the cleanliness of the Student Union at night. Complainant's co-worker on the night shift, Thersa Devoe, was absent for seven or eight days in December 1998. Evening Facilities Manager David Tanner acknowledged that the maintenance staff was shorthanded after Dan Morocco was replaced by the 2.5 crew, especially when Mancuso and Devoe were out of work during December 1998.

Dengler's negative assessment of Complainant's job performance was undercut by other witnesses who testified that Complainant was a good janitor. Dan Morocco disputed Dengler's assertion that he and Joe Mancuso expressed concern that Complainant was not pulling his weight. Evening Facilities Manager Dave Tanner testified that Complainant was not a problem employee and that, "Joe was really good if you asked him to do something." Complainant's employee evaluations before and after

Dengler's tenure at the Facilities Department were uniformly positive.⁵

To be sure, Complainant was not perfect. There is evidence that he left his shift early on occasions and took unscheduled cigarette breaks. Tanner testified that he would occasionally have to ask Complainant to improve his work performance. There is, however, no evidence to support Dengler's steady stream of verbal and written warnings to Complainant about unsatisfactory job performance nor her assertion at public hearing and in a memo dated September 23, 1998, that Complainant abused sick leave. Dengler's decision to require Complainant to accompany absences after September 23, 1998 with a doctor's note is, at best, puzzling in light of the fact that Complainant took less than four days of sick leave in 1998 and had accumulated 466 hours of unused sick time and 24 hours of unused personal time.

In addition to evidence that Dengler was unduly harsh in her assessment and treatment of Complainant, her record of hiring supports the contention that her actions were motivated by age bias. During her tenure as Director of the Facilities Department, Dengler hired nine individuals. Five of the nine were under forty and all were under forty-five. These hires were significantly younger than the incumbents of the Department, 78% of whom were forty or older.

B. Damages

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. c. 151B and to render the injured

⁵ Respondent makes much of the fact that Complainant incorrectly states in his charge of discrimination filed with the MCAD on August 23, 1999 that his June 1998 employee evaluation rates him as "superior" in "supervisory ability" and "above standard" in all other categories but one. The misstatement is likely an unintentional error since the charge of discrimination appears to have been drafted by a third person. The error is readily ascertainable by a comparison to records within the Respondent's custody and control.

Complainant whole. Remedies include damages for lost wages and benefits and for emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Complainant did not experience a loss of wages and benefits but did sustain emotional distress damages. In this regard, 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, while not necessary to sustain an award for emotional distress, is beneficial. See Stonehill, 441 Mass. at 576. An award must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Complainant testified at his deposition that in August 1999 that he had to miss four days of working from the stress of interacting with Dengler. Complainant testified that he was sick to his stomach, couldn't sleep, and had headaches. In his answers to interrogatories, Complainant stated that he felt as if he were being "set up." He described every minute of the workday as stressful both physically and emotionally. He stated that his blood pressure became hard to control and his blood sugar hard to regulate. John

Morrissey testified that Complainant was “heartbroken” about his employment situation. Dan Morocco testified that Dengler’s criticisms about Complainant’s work were very upsetting to him and that his mood changed after the criticism began. Based on the foregoing, I conclude that Complainant’s estate is entitled to \$25,000.00 in emotional distress damages.

IV. 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, Respondent is ordered to immediately cease and desist from further acts of discrimination. Respondent shall pay Complainant’s estate, within sixty (60) days of receipt of this decision:

- (1) The sum of \$25,000.00 in damages for emotional distress

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

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

days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 6th day of February, 2006.

Betty E. Waxman, Hearing Officer