

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
KEVIN MCKENNA,

Complainant

v.

DOCKET NO. 03-BEM-01131

BOSTON HOUSING AUTHORITY
Respondent

Appearances: Robert J. Annese, for Complainant
Douglas I. Louison & Regina M. Ryan, for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On April 23, 2003, Complainant, Kevin McKenna filed a complaint of discrimination against his former employer, the Respondent, Boston Housing Authority for retaliation and harassment in refusing to allow him to return to work as a Housing Authority Police Officer and seeking to retire him involuntarily for reasons of perceived handicap. The Complainant alleged that subsequent to supporting co-workers who filed discrimination complaints with the Commission, and filing his own complaint of retaliation against Respondent with this Commission in the year 2000, the Respondent continued to harass and retaliate against him by erecting impediments to his return to

work.¹ The Investigating Commissioner found probable cause to credit the allegations of the instant complaint and conciliation efforts were unsuccessful. The matter was certified for a Public Hearing and a Hearing was held before the undersigned Hearing Officer on February 28, 2007. Both parties submitted post-hearing briefs. Having reviewed the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Kevin McKenna resides in Hanson, MA. He is married with three children, all of whom have special needs, and who range in age from 8 to 12 years of age. Complainant began his employment with Respondent, Boston Housing Authority in 1983 as a patrol officer in the police unit. As an Authority police officer his duties included patrolling large residential housing complexes. He was issued a firearm and had special training from the DEA in the area of drug enforcement.
2. The Respondent's police department has approximately 30 police officers, all of whom patrol individually without partners. The Department is operated in a paramilitary manner with a single command structure headed by its current Chief, Stephen Melia. Complainant's claim of discrimination is rooted in his difficult relationship with Melia.
3. Throughout his tenure as a BHA police officer, Complainant was active in the Patrolmen's Association, the union that represented police officers. He served as

¹ After an adjudicatory hearing on his 2000 retaliation complaint, an MCAD hearing officer found no violation of c. 151B and dismissed the Complaint. 27 MDLR 207 (2005). Evidence of certain events occurring prior to the instant complaint were accepted into evidence as essential background information.

the Association's Treasurer and President and his aggressive representation of fellow patrol officers was a source of friction between him and Melia, who was then the department's Deputy Chief.

4. Complainant assisted two co-workers of his at Respondent who had filed racial and sexual harassment discrimination complaints against the BHA at MCAD. Both of these complaints involved allegations against Stephen Melia and Complainant filed affidavits on behalf of the Complainants. Complainant also filed his own previously referenced retaliation complaint against the BHA in 2000, which was ultimately dismissed after hearing.
5. In August of 2000 Complainant was placed on administrative leave while Respondent investigated allegations of harassment brought by a gay male co-worker against him and several other BHA co-workers. Complainant consistently denied the allegations and stated that a number of other BHA employees were accused of similar conduct by the same person, but were not treated as he was. Complainant received salary and benefits while on administrative leave but he was not returned to work until eighteen months later, after an unusually protracted investigation. Complainant reported that he was pressured on a number of occasions to drop his MCAD complaint in exchange for the BHA dropping its investigation and or allowing him to return to work. (Exs. 45, 46) Complainant's allegations in this regard were consistent and made to at least two physicians who conducted mental health exams during the leave at issue in this case.²

² These allegations were decided in favor of Respondent after a hearing at the Commission and reported at 27 MDLR 2007 (2005). However, the Hearing officer addressed only the protracted administrative leave and concluded this was not retaliation for Complainant's having supported two co-workers in their MCAD complaints.

6. Finally, on November 20, 2001 Complainant was permitted to return to work. On the very day that he returned to work, an article appeared in the Boston Herald about the incident for which Complainant had been placed on leave. Upon his return to work, Complainant was ordered to go sit in the Sergeant's room and was then confronted by then Deputy-Chief Melia who began screaming at him and threw his hands up asking, "what the f 's going on here, who put this article in the paper?" Melia accused Complainant of contacting the newspaper. This reaction was purportedly because the newspaper article was dismissive of the harassment charges that had been brought against Complainant. Melia's outburst caused Complainant to experience difficulty breathing and chest pain and he believed he was having a heart attack. He was taken to the hospital by ambulance where he was placed on a heart monitor and given oxygen. Melia did not testify at the hearing and there is no evidence to rebut Complainant's version of this event, which I credit.³
7. Subsequent to this incident in November of 2001, Complainant remained out of work upon the advice of his primary care physician. He received worker's compensation until December 4, 2001. He contacted the Boston Police Department's Stress Unit and began attending inpatient and outpatient sessions at the Police Academy Stress Unit. He attended meetings of the Stress Unit for well over a year and, during this time, was treated by both his primary care physician,

³ While the prior decision on Complainant's 2000 complaint mentions this event, 27 MDLR at 208, the hearing officer made no findings or conclusions regarding whether these actions of Chief Melia were retaliatory. The decision addresses only whether placing Complainant on administrative leave pending investigation of the harassment allegations against him was retaliation for his actively supporting two co-workers in their discrimination complaints against Respondent. It also does not address whether events subsequent to Complainant's return from administrative leave were retaliation.

- Dr. Brian McPhillips and the BPD Stress Unit's psychologist Dr. Hayden Duggan. He was diagnosed by Dr. Duggan as suffering from post traumatic stress disorder (PTSD). (Ex.29) During this time Complainant was in continuous contact with Respondent through his union and union attorney Timothy Bailey.
8. On January 4, 2002 Respondent's Acting Director of Human Resources, Joyce Tognacci, wrote Complainant that he was expected to return to work by Monday, January 14, 2002, and that if he failed to return to work he would be considered absent without authorized leave and subject to disciplinary action. (Ex. R-9)
 9. Complainant testified that after receiving the notice to return to work, in February of 2002, he showed up at Respondent's Station on West Broadway. He was advised by then Deputy Chief Melia to go sit in a room with no computer or phone and to sit there with nothing to do, pending notice from personnel of a hearing to terminate his employment. Melia also told Complainant that he should not have worn a uniform. When Melia was advised by the Personnel Department that Complainant should not have returned to work without a doctor's note, Melia told Complainant to, "get the fuck out of here." There was no evidence to contradict or rebut Complainant's account of this incident and I find his account of Melia's abusive reaction upon his return to work to be credible. Despite further efforts by Complainant to return to work in late 2002 and early 2003, Respondent never permitted him to return.
 10. On February 21, 2002 the Respondent received communication from Dr. Mary E. Odegaard that Complainant had been seen in her office on 11/9/01, 11/21/01, 1/31/02, 2/7/02 and 2/19/02 for stress/anxiety and chest pains which he reported

were work related. (Ex. 18) On February 26, 2002 Complainant received notice from Joyce Tognacci, the Respondent's Acting Director of Human Resources extending his medical leave through March 15, 2002. (Ex. 19) These communications were through Complainant's union attorney, Timothy G. Bailey.

11. From March until August of 2002, there were a series of communications between Respondent and Complainant's union attorney regarding the need to extend Complainant's medical leave of absence and seeking Respondent's authorized approval for such leave. (Exs. R-20; R-36) In May of 2002 Complainant underwent an independent medical exam by Dr. Robert M. Weiner. Dr. Weiner's report of May 5, 2002 concluded that Complainant was "experiencing anger, depression and anxiety related to charges against him and his administrative leave." He also concluded that Complainant was not suffering from PTSD, and was not psychiatrically disabled from employment. (Ex. R-24).

12. In June of 2002, Dr. Duggan sent a report to the Department of Industrial Accidents regarding Complainant in which he stated that he had been treating Complainant weekly since November of 2001 and that Complainant had also entered a residential program for treatment in February and March of 2002. (Ex. R-29) Dr. Duggan rendered a professional opinion that Complainant was "not malingering" or "faking symptoms," that he had physical symptoms that are evidence of "an acute stress response," which symptoms he experienced "in relation to his return to work each time and that were verified by his doctor." In his view, these symptoms resulted from incidents in his department. Complainant relayed that he "felt abandoned, betrayed, and targeted by his department."

Duggan further opined that Complainant was not yet fit to return to duty, but that his prognosis was good, “provided there can be a resolution of legal status with respect to his department.” (Ex. R-29).

13. In August of 2002, Complainant once again submitted to an independent physical examination, after being referred by Respondent. The physician who conducted the exam was Dr. Erik Purins. In a report dated August 8, 2002, Dr. Purins concluded that Complainant was suffering from no “objective measurable physical impairment, and he would not qualify for any physician-directed activity restrictions.” (Ex. R-35).
14. On September 25, 2002, Joyce Tognacci of the BHA sent Complainant a letter notifying him that she was contemplating terminating his employment for his failure to submit a form documenting his continuing need for a reasonable accommodation, despite Respondent having received a Certificate of Need completed by Dr. McPhillips. The letter noted that a hearing would be held on Complainant’s termination on October 9, 2002. (R-37)
15. After the Hearing on October 9, 2002, at which Complainant sought an extension of his medical leave to November 30, 2002, Respondent notified Complainant that his extended leave was approved, but that no further leave time would be granted. The letter also references Complainant’s agreement to report on his treatment at the On-Site Academy and notes his assurances to Respondent that he would be cleared to return to duty subsequent to this treatment and evaluation. (Ex. R-39)

16. In the Fall of 2002 Complainant ended his treatment with the stress unit and in November of 2002, both Dr. McPhillips and Dr. Duggan wrote letters on Complainant's behalf stating that he was fit for full-time duty as a police officer and could return to work without restrictions. (Exs. C-8; C- 2) The union attorney, Timothy Bailey, notified Respondent that Complainant was prepared to go to in-service training. Complainant testified that he complied with all the requirements set out by Tognacci for his return to work at this time, and I find that he did so.
17. Upon receipt of the letters from Drs. Duggan and McPhillips, on November 27, 2002, Tognacci sent a letter to Complainant requesting that he submit to an independent medical examination and that he provide documentation to the Respondent to establish that he would meet the standard and minimum requirements to serve as a BHA police officer. (Ex. R-42)
18. On December 8, 2002 Dr. McPhillips wrote a more detailed opinion regarding Complainant's fitness for duty, in which he stated that Complainant was "doing very well psychologically" and that currently his "only source of stress has been associated with his ongoing litigation and his dealings with individuals associated with that litigation." He further stated: "While I think he can perform as a police officer with no restrictions, I think it is completely unfair to expect him to perform under his prior chain of command as long as outstanding litigation issues with this chain of command remain unresolved," and that he should not be put in a situation where he was "set up to fail." (Ex. R-44)

19. Complainant agreed to submit to an independent medical exam and on December 16, 2002, Alfred G. Jonas, M.D. issued a Psychiatric Evaluation of Complainant as a result of Complainant being referred to him by Respondent for an independent psychiatric exam. Dr. Jonas concluded that Complainant was ready to return to duty as a police officer. (Ex. 45)
20. On December 17, 2002, Complainant submitted to another impartial psychiatric evaluation ordered by Respondent and conducted by Dr. Stuart Grassian. Dr. Grassian opined that, contrary to the views of the insurer's experts, Complainant had suffered from PTSD, which was triggered by the November 2001 incident, and he stated "to a reasonable degree of medical certainty, Mr. McKenna was totally disabled from any employment from November of 2001 until approximately the Summer of 2002, by which time his symptoms had abated considerably." Dr. Grassian stated that he was uncertain that Complainant could resume any employment where he would encounter malice and danger, but recommended a trial period of employment as an option.
21. In January of 2003 the Respondent requested that Complainant comply with other requirements for returning to work including having a valid firearms license and providing a copy of the application for such permit, which requirements Complainant met. (Exs. 47-51)
22. On February 5, 2003, Complainant's union attorney, Timothy Bailey wrote to Joyce Tognacci of the BHA seeking an update on the status of Complainant's return to work and noting that he had submitted all the necessary medical

information and complied with all the Respondent's requirements for return to work. (Ex. R-54)

23. On February 11, 2003, Joyce Tognacci wrote to Attorney Timothy Bailey that she could not approve Complainant's return to work as a police officer given the reports from the two recent independent psychological exams. She stated that since the BHA could not return Complainant to work outside the current chain of command and could not guarantee a work environment free for malice or danger, she could not approve his return to work. She further stated that her office would begin to process the paperwork for an involuntary retirement of Complainant. (Ex. R-54).

24. Complainant testified that there were a number of assignments within the BHA police department which would have allowed him to have minimal contact with Chief Melia. He stated that he often did routine patrols in a car and never had contact with the Melia when assigned to these patrols. He also stated that he could have been assigned to another specialized unit which would not have required him to work under Melia. He stated that his anxiety attacks arose from his conflicts with the Chief and the manner in which the Chief treated him.

25. Tognacci testified that it was not possible for Complainant to work for the Department and have no contact with Chief Melia. She stated that requests for leave are discussed with the Department Head and Counsel for the Authority. Tognacci testified that she determined that Complainant's request to return to work under the strictures proposed by the examiners was not feasible and could not be granted. She determined that despite the conclusions of Dr. Jonas and Dr.

Grassian, Dr. Duggan, and Dr. McPhillips, that Complainant was fit to return to work, Respondent could not take the risk of returning Complainant to his employment. She felt that given Complainant's medical and mental health issues over the period of a year, she had to consider the conflicting evidence very seriously. Respondent did not consider a period of trial employment, nor did it discuss or explore any other accommodations with Complainant. Tognacci stated that she did not rely on the final report of Dr. Duggan, the psychologist who had been treating Complainant for over a year and who stated that Complainant was fit to return to work, because he was a psychologist and not a psychiatrist.

26. Once Respondent determined that it was not going to permit Complainant to return to work, on April 4, 2003, Joyce Tognacci filed an involuntary disability retirement application on behalf of Complainant with the State Retirement Board. (Ex. R-55) On April 23, 2003, Complainant filed the instant complaint. Complainant opposed the application for his involuntary retirement and the application was ultimately denied in February of 2004. At the time of the hearing Complainant was still an employee of Respondent on inactive status. Complainant testified that he is still seeking to return to Respondent as an active employee. Complainant would have been eligible for retirement from Respondent at age 55, and he only 48 years old at the time of the hearing. He contributed to the City of Boston pension plan and the Respondent contributed \$61.10 per week up to the plan up until November of 2001.
27. Complainant testified about the emotional distress he has suffered over the last six years as he has sought to return to work. He testified compellingly about the

emotional distress of losing his job and his reputation and not having a steady, reliable income. He talked about the difficulty of providing for his three children who have special needs and have significant medical issues. One child is autistic, one has ADD and another has downs syndrome, is deaf, and has dysphasia. Complainant cried as he testified about the inability to give his children the little extra things that make a difference, like small vacations. He stated that he feels they have been shortchanged and this causes him distress. In 2002 he had to file for bankruptcy and this caused him additional stress. He stopped playing golf and working out and the stress of the last several years has caused him to gain 30 pounds. The anxiety and stress caused by Melia's abuse and harassment caused him to seek treatment with various medical and mental health professionals for almost a year. His medical health provider's notes and reports reference extensively the extreme stress and anxiety that Complainant suffered as a result of Melia's harassment, abusive treatment and retaliation.

28. Complainant received no salary from Respondent after February of 2002 when his accrued sick leave and vacation time were exhausted. Complainant testified that he was forced to file for Bankruptcy in 2002 because he was no longer receiving income of any kind from Respondent.

29. Complainant's income in the years 1999 and 2000 were \$70,636 and \$59,955. His base salary was approximately \$41,288 per year and the remainder was for overtime and details. His gross income for the year 2001 was \$44,649, but he did not work the entire year.

30. Complainant testified that he currently works as a private detective. He has earned \$21.00 an hour working as a private detective, but receives no medical, dental or pension benefits. Complainant's tax return for the years 2003, 2004 and 2005 indicate that his total income for those years were \$29,947, \$31,233 and \$32,938. No tax return was submitted for 2006, but since Complainant testified that at the time of the hearing, he continued to work as a private investigator 40 hours per week, I can draw the reasonable inference that he earned as least as much as in the previous year.
31. In his job as a private detective he has carried a weapon for work for the last 5 years. He stated that he currently does not receive psychological treatment and had not sought treatment for over four years prior to the time of hearing.

III. CONCLUSIONS OF LAW

Complainant alleges that Respondent harassed him and refused to allow him to return to work in November 2001 and thereafter, in retaliation for his having filed his earlier retaliation complaint with the Commission in the year 2000, and for having supported two co-workers in their discrimination complaints against Melia. He also alleges that the refusal to return him to work and the move to involuntarily retire him were based on a perception of his being disabled and that this constitutes handicap discrimination. The record supports Complainant's allegations that he was harassed and treated abusively subsequent to his engaging in protected activity and that Respondent's move to involuntarily retire him was a part of this pattern of retaliation. The record also supports a conclusion that Complainant was not returned to work because of a perception

by Respondent that he continued to be disabled despite numerous medical reports to the contrary.

A. Retaliation

Massachusetts General Laws, c. 151B, §4(4), prohibits an employer from retaliating against an employee who has participated in protected activity. The statute makes it unlawful “for any person (or) employer... to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.” See *Kelley v. Plymouth County Sheriff’s Department, et al.*, 22 MDLR 208, 215 (2000), citing *Bain v. Springfield*, 424 Mass. 758, 765 (1997). It has been held that retaliation is a separate and independent claim of discrimination, “motivated at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful employment practice.” *Kelley, supra. at 215 quoting, Ruffino v. State Street Bank and Trust Co*, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

Absent direct evidence of an unlawful motive based on retaliation, as in this case, the Commission analyzes a claim utilizing the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in *Wheelock v. Massachusetts Commission Against Discrimination*, 371 Mass. 130 (1976).

In order to establish a prima facie case of retaliation in the absence of direct evidence, of a retaliatory motive, the Complainant must demonstrate that (1) he participated in protected activity; (2) the Respondent knew about the Complainant’s participation in the protected activity prior to taking the adverse employment action(s);

(3) Complainant suffered an adverse employment action after he participated in the protected activity; and (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and the adverse actions taken against him. *Mole v. University of Massachusetts*, 58 Mass. App. Ct. 29, 41 (2003). *Morris v. Boston Edison Co.*, 942 F. Supp. 65, 68-69 (D.Mass.1996); *Ruffino*, 908 F. Supp. at 1044; *Kelley*, 22 MDLR at 215.

Complainant has established a prima facie case of retaliation. He has demonstrated that he engaged in protected activity by filing a complaint of discrimination against his employer in 2000 and in his prior support of two coworkers who brought race and sexual harassment claims against Melia. Respondent was well aware of the Complainant's participation in this protected activity. His 2000 complaint was proceeding through investigation at the MCAD throughout this time period. In March of 2003 the Commission found probable cause to credit the allegations of the retaliation complaint and in December of 2003, the Commission certified the case for a public hearing.

Subsequent to his protected activity, the Chief treated Complainant in an abusive and harassing manner on both occasions when he tried to return to work. Respondent further thwarted every one of Complainant's attempts to return to work beginning in February of 2002, until the Spring of 2003. I conclude that, notwithstanding Complainant's protracted medical leave, and Respondent's assertion that he was unfit to return to work, a causal connection exists between Complainant's protected activity and Respondent's harassment of him and its refusal to allow him to return to work.

Once Complainant has established a prima facie case of retaliation, the burden shifts to Respondent to articulate a legitimate non-discriminatory reason for its actions. *Weber*

v. Community Teamwork, Inc. 434 Mass. 761, 768-769, (2001); *Abramian v. President and Fellows of Harvard College*, 432 Mass. 104, 116-118 (2000). Stephen Melia did not testify at the public hearing and there is no evidence in the record to rebut Complainant's account of Melia's abusive and harassing behavior towards him on the occasions he attempted to return to work in November of 2001 and again in February of 2002.

Respondent acknowledges that Complainant had an anxiety attack in November of 2001 which precipitated his leave and his filing for workers compensation. Respondent did not rebut Complainant's allegations of what occurred that day and offered no reasons for the Melia's treatment of Complainant. I credited Complainant's account of these two events and believe that he was treated in an extremely abusive manner by Melia on both occasions. Furthermore, I credited Complainant's allegation that this abusive treatment caused the anxiety and stress which precipitated his medical leave.

Respondent's director of H.R. testified that the reason Complainant was not returned to work for more than a year after the November 2001 events was because he was mentally unfit to work, by his physicians own accounts. There is documentary evidence from Complainant's physician and psychologist that Complainant was unfit to return to work for a period of many months because of the stress and anxiety he was suffering. While there was some suggestion by Respondent that Complainant was malingering, deliberately remaining out of work, and gaming the system by applying for worker's compensation, a close reading of the reports of Complainant's medical and mental health providers clearly rebuts any such assertion. When Complainant did attempt to return to work in February of 2002, in response to Respondent's directive that he do so, he was thwarted by Melia who told Complainant to "get the f--- out of here." Given the lack of

any credible explanation for Melia's conduct on the two occasions that Complainant presented himself for work, I conclude that his abusive behavior was retaliatory and that Melia harbored retaliatory animus towards Complainant arising from Complainant's protected activity that directly implicated Melia in unlawful conduct.

According to the testimony of Joyce Tognacci, Respondent ultimately refused to return Complainant to work in the fall of 2002, because the reports of two independent mental health providers conditioned Complainant's fitness to return upon a work environment free of malice and danger and his not working under the direct chain of command of Chief Melia. Respondent stated that such conditions were impossible to meet. On its face, this appears to be legitimate non-discriminatory reason.

Assuming that Respondent has raised a legitimate non-discriminatory reason for failing to return Complainant to work in 2002 and 2003, Complainant must then prove by a preponderance of the evidence that Respondent's reasons were a pretext for unlawful discrimination; that Respondent acted with retaliatory intent, motive or state of mind.

Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001). I find that Complainant has established that Respondent's refusal to return him to work was a pretext for retaliation. In November of 2002 both Complainant's long term treating physician and mental health provider wrote reports that Complainant was fit to return to work as a BHA police officer with no restrictions. While a subsequent letter from Complainant's physician, Dr. McPhillips, in December of 2002, stated that working under his prior chain of command would present a challenge to Complainant and that such a situation would be unfair while there were still pending litigation issues with that person, he it did not state that Complainant was unfit to handle the challenge. Dr. McPhillips also noted that

Complainant had an exemplary work record and in his opinion could perform at his prior level of excellence if he were not placed in a situation where he was set up to fail.

In response to these letters, Respondent required Complainant to submit to two independent mental health evaluations. These evaluations stated that Complainant was fit to return to work. Dr. Jonas concluded that Complainant suffered from no PTSD related “vulnerabilities” that would “potentially impair his ability to return to work” and found “no active mental health syndrome and no finding of any impairment,” which would interfere with Complainant’s ability to return to work. Dr. Grassian’s report offered some options to avoid unnecessary stress or contact with the Chief and discussed the possibility of a trial period of employment, which Respondent refused to consider. Given the reports and expert opinions of four treatment providers, two of whom were independent, regarding Complainant’s fitness for duty, I conclude that Respondent’s determination not to return Complainant to his employment because, in its view, he could not handle the stress of the job, or working under the Chief, was retaliation and a violation of G.L. c. 151B s. 4(4).

B. Perception of Disability

Massachusetts General Laws c.151B s. 4(16) makes it an unlawful practice for an employer to dismiss an individual from employment because of a handicap. G.L. c.151B s. 1(17) defines handicap to include having a record of a physical or mental impairment or being regarded as having a physical or mental impairment.

Complainant asserts that Respondent refused to return him to work in the fall of 2002 and thereafter, despite the conclusions of his medical providers that he was physically and mentally fit to do so, because he had a record of impairment and was perceived as

being mentally unfit to return to work. Joyce Tognacci testified that she made the determination that Respondent would not permit Complainant to return to work as a police officer because Respondent could not guarantee a work environment free of malice and danger, and because he was required to work within the chain of command of Chief Melia. Tognacci testified that she made this determination in consultation with counsel for Respondent and the Chief. According to Tognacci, she then determined that Complainant could not return to work because Respondent could not guarantee a work environment free of malice and danger, and because he would have to work with the Chief. She made this determination despite ample professional and expert evidence to the contrary. In doing so she relied almost entirely upon the opinion of one independent psychiatrist, Dr. Grassian, who was not Complainant's treating mental health provider, but who saw Complainant for one consultation. In making her determination she essentially ignored the opinions of four other physicians or mental health providers who reported that Complainant was fit for duty. Indeed, Tognacci testified that in reading the medical reports it was clear to *her* that Complainant could not perform the essential functions of the job of police officer and they could not take the risk. She testified further that he was out of work for so long with an uncertain status that *she* concluded it was in BHA's and Complainant's best interests to involuntarily retire him. It is clear from the record that Respondent substituted its judgment for that of the experts in making this decision, and determined that it would be a safety risk to allow Complainant to return to work as a police officer.

Respondent asserts that because Complainant was seeking accommodations that were unreasonable, he was unable to perform the essential functions of his job. It made

this determination in direct contravention of his doctor's medical reports. In a case involving a hearing impaired individual who was denied employment as a firefighter, the SJC noted that in the area of public safety, standards regarding reasonable accommodations for handicapped employees may be instituted by the Commonwealth's Division of Human Resources. The court held that, "In an area where public safety is paramount, we do not read § 4(16) to preclude a determination by the [Commonwealth's] division of [Human Resources] rather than by a judge or jury that an accommodation is not reasonable because it would impose an undue hardship on the conduct of the employer's ... business due to the dangerous type of work involved and the nature of the risk to public safety that would arise if the accommodation failed..." *Carelton v. Commonwealth*, 447 Mass. 791, (2006). However it is unclear that similar undertakings or judgments by private employers would be viewed in a similar manner by the Court.

In this case, despite Respondent's assertion that Complainant sought to return to work under a different chain of command and with a guarantee of no stress, it never explored nor discussed this issue or the feasibility of any accommodation with Complainant, his union attorney, or his treatment providers. An employer is obligated to participate in an interactive process to determine if a reasonable accommodation can be extended. *Russell v. Cooley Dickenson Hospital, Inc.*, 437 Mass. 443, 457 (2002). Instead, Respondent rejected the possibility of any accommodation out of hand in determining that Complainant could not return to work and by submitting an application for his involuntary retirement. In fact, it chose to ignore or reject the opinions of his long standing treatment providers. I conclude that Respondent's actions were in violation of G.L. c. 151B §4(16) and were based on unjustified considerations of Complainant's

record of disability and a perception that he remained disabled, despite the various treatment reports to the contrary.

IV. REMEDY

Complainant seeks damages for lost wages and lost pension benefits, damages for emotional distress and re-instatement to his position as a police officer. Complainant further alleges that he lost out on overtime pay, special details, vacation time, sick time and the pension contribution paid by Respondent weekly. Section 5 of Chapter 151B authorizes the Commission to award remedies to effectuate the purposes of the statute, including damages for lost wages and benefits and for emotional distress. *See Stonehill College v. MCAD*, 441 Mass. 549 (2004); *College-Town div. of Interco. v. MCAD*, 400 Mass. 156, 169 (1987).

While Respondent asserted that Complainant was still subject to disciplinary proceedings for the events that occurred prior to his first administrative leave, there is not evidence that he would have been terminated, and any such finding would be entirely speculative on my part. Therefore, I conclude that Complainant is entitled to lost wages for the years 2002 to 2006. Complainant's income for the years 1999 through 2001 was established. His tax returns showed his income for the years 2003, 2004 and 2005. The income prior to 2002 includes compensation for details and overtime and because this amount fluctuated significantly from year to year, it is difficult to compute with specificity how much income above Complainant's base salary of \$41, 288 he would have earned in subsequent years. In 1999 Complainant earned almost \$30,000 in extra compensation, in 2000, almost \$19,000, but in 2001 he earned only about \$3,000, though he did not work the full year. Despite these significant fluctuations, it seems reasonable

to conclude that Complainant would have earned at least \$50,000 per year in 2002 through 2006 had he remained working for Respondent. I conclude that he is entitled to recoup this amount minus the earnings he made in mitigation of his damages. This amounts to \$50,000 x 5 years or \$250,000 minus \$127,056 (see finding no. 30), for a total of \$122,944 in lost wages. Complainant is also entitled to the pension contributions Respondent would have made for the five years in question, an amount to be calculated by the parties, and to be credited with these years of service for retirement purposes.

While Complainant testified that he is seeking re-instatement to his position with the BHA, it is not entirely clear from the record and the positions of the parties that reinstatement is any longer feasible, given that the BHA police department is about to merge or has merged with the Boston Police Department. Given the more than seven years that have ensued since Complainant last worked and the potential difficulties inherent in any anticipated or completed merger, I decline to order Complainant's reinstatement. However, Respondent is ordered to compensate him for the lost pension benefits and or contributions that it would have made to his retirement account over the period of 2002 to 2006 and to credit him with these years of service for retirement purposes.

I further conclude that Complainant is entitled to damages for emotional distress proximately caused by Respondent's unlawful treatment of him. An award of such damages must be fair and reasonable and proportionate to the harm caused. It must rest on substantial evidence that it 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 Complainant has or expects to suffer , and whether the Complainant has attempted to mitigate the harm. *Stonehill, supra.* at 576.

Complainant worked for Respondent for almost 20 years. He testified credibly and compellingly about the lasting emotional impact of Respondent's abusive conduct and its refusal to permit him to return to his long-standing employment as a BHA police officer. He broke down on the witness stand when describing the emotional upset of having to care for three special needs children after losing his job and facing the potential of no steady reliable income. He worked subsequently, and continues to work, as an independent contractor with no health insurance or other benefits. Complainant was humiliated by the loss of his position and his reputation. He testified about the added stress and emotional impact of having to file for bankruptcy in 2002 and of not being able to provide the extra little things for his children. Complainant sought treatment with various medical and mental health professionals for almost a year. These provider's notes and reports extensively reference the adverse physical and emotional impact, and the extreme stress and anxiety that Complainant suffered as a result of Respondent's retaliation and abuse when he sought to return to work. They also discuss Melia's conduct as a precipitating factor in Complainant's distress. As a result of Respondent's unlawful conduct, Complainant lost his job, his career, his reputation and his ability to provide for his family. I conclude that Complainant suffered significant emotional distress which was still evident at the time of the hearing, over 5 years later, as a direct and proximate result of Respondent's retaliatory and discriminatory treatment. I conclude that he is entitled to an award of damages for emotional distress in the amount of \$50,000.

V. ORDER

Respondent is hereby Ordered to:

- (1) Cease and desist from engaging in retaliatory actions and discrimination based on record or perception of disability in the future.
- (2) Pay to the Complainant within 60 days of receipt of this decision the sum of \$122,944 for lost wages with interest thereon at the statutory rate of 12% per annum, from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (3) Pay to Complainant within 60 days of receipt of this decision, the value of his pension contributions for the period of 5 years and credit him with 5 additional years of service for retirement purposes.
- (4) Pay to Complainant within 60 days of receipt of this decision, the sum of \$50,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or 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 the Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision to the Clerk of the Commission within

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

So Ordered this 20th day of March, 2008.

Eugenia M. Guastaferr
Hearing Officer