

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
MARY ANN HELMUTH  
Complainant

v.

DOCKET NO. 00-BEM-0421

HARVARD VANGUARD  
MEDICAL ASSOCIATES, INC.,  
Respondent

Appearances: Richard A. Mulhearn, Esq. for Complainant  
Patricia Holloran, Esq. & James J. Horgan, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 28, 2000, Complainant, Mary Ann Helmuth, filed a Complaint of age and handicap discrimination against her former employer, Respondent, Harvard Vanguard Medical Associates. Complainant specifically alleged that she had been treated differently in the terms and conditions of her employment on account of her age and disability, that she was harassed on account of her age and disability, that Respondent failed to accommodate her disability, and that she was ultimately constructively discharged from her employment with Respondent.

The Investigating Commissioner found probable cause to credit the allegations of the complaint and conciliation efforts having failed, the matter was certified to public

hearing on November 5, 2003. A public hearing was held before the undersigned hearing officer on May 24-27, 2004, and June 16, 18 & 30, 2004. The parties submitted post-hearing briefs and those briefs have been duly considered. Having reviewed the entire record in this matter, I make the following Findings of Fact, Conclusions of Law and Order.

## II. FINDINGS OF FACT

1. The Complainant, Mary Ann Helmuth was born on September 20, 1938. She was 59 or 60 years of age at the time of most of the events at issue in this matter.
2. Respondent Vanguard Medical Associates is an employer within the meaning of G.L. c. 151B s.1(5) and operates a health care facility in Somerville, MA.
3. Complainant began her employment with Respondent in November of 1989 in the Visual Services Department of Respondent's Somerville facility. She worked at the reception desk in the Visual Services Department until October of 1995, where her job was greeting patients, answering the phone and scheduling appointments. Complainant consistently received good performance reviews during those years and got along well with her supervisor Maria Nolan .
4. From September 19, 1995 until October 31, 1995, Complainant was out of work on a medical leave of absence due to knee surgery necessitated by a work-related injury. Upon Complainant's return from her medical leave of absence, she was informed that her position had been eliminated. At the time, Complainant's supervisor, Nolan, asked her if there was any possibility that she could retire, and Complainant stated that she could retire but was not yet ready to change her life-style. Complainant testified that she was

working to save some money for her retirement and to do some extra things for her children and grand-children and she did not plan on retiring until she was 65. I credit her testimony about this discussion. According to Complainant, the file clerk in the Visual Services department who was many years Complainant's junior kept her job and within a few months time was observed by Complainant performing the front desk duties in the Visual Services Department. Respondent asserted that the employee in question held the same position both before and after Complainant's job was eliminated and had more seniority than Complainant. I credit Complainant's testimony that she witnessed this person performing reception duties after her departure.

5. While discussing her options with Nolan, Complainant was informed that there was an opening for a receptionist in the Radiology Department. This job was the same position Complainant held in Visual Services and was on the same floor. Complainant interviewed for the job, was hired and began working in November of 1995. At age 57, Complainant was by far the oldest employee in the Radiology Department. Most of the employees including her eventual supervisor, Susan Copson, were significantly younger than Complainant and the two file clerks were approximately 19 and 20 years of age.

6. When Complainant began working in the Radiology Department she was on crutches for several weeks. She testified that she was experiencing a great deal of pain in her right knee at the time and continued to experience difficulty with pain and mobility because of her knees. On September 20, 1996 Complainant's supervisor completed an incident report when she observed Complainant limping. Complainant indicated that her good knee was bothering her and that she was experiencing a great deal of discomfort. On September 24, 1996, Complainant was evaluated at Respondent and diagnosed with

bursitis of the left knee. (Ex. C-23). Complainant fell going up the stairs at work in March of 1998 and injured her right knee and her left foot. Most of Complainant's co-workers testified that they knew Complainant suffered from significant pain and limitations because of her knees.

7. Complainant endured persistent problems with both knees from 1998 onward. She continues to suffer a great deal of pain in both knees and has difficulty kneeling, squatting, lifting, walking long distances, and climbing stairs. She is unable to run and can not kneel to pick things up, nor can she kneel in church because her knees will not bend. Complainant testified that she cannot lift heavy objects nor can she lift her grandchildren. She is unable to stand for prolonged periods of time, cannot climb more than 3 or 4 stairs and cannot cross her legs.

8. Complainant's duties as the receptionist in the Radiology Department involved primarily meeting and greeting patients, answering the phone, and scheduling appointments. (Ex. C-8). Respondent had a policy that in general the front desk should be covered during working hours. The front desk was very busy and since Complainant was the only receptionist, one of the file clerks or radiology technicians would generally cover the desk if she was away for any significant period of time. They would often relieve Complainant when she went to lunch, went on breaks, or left the department to deliver reports. There would be times when no one was available to cover the desk and Complainant testified that at those times, the practice was to put up a sign that directed patients to proceed to the lab for service.

9. The testimony of most everyone who worked in the department confirmed that there was no absolute requirement that the front desk be covered at all times. The practice was

that the receptionist or person covering would make an attempt to find coverage if they were to be away from the desk for any significant period of time. However, if no coverage was available, the person would just display the sign, transfer the phone to the back area where the techs worked and leave. Coverage was not generally required for short periods of absence such as bathroom breaks and morning and afternoon breaks. There was testimony that Complainant's predecessor frequently used the sign when she left the desk to go outside the building to smoke a cigarette.

10. Complainant's first supervisor in Radiology was Cathy Melcher. Complainant got along well with Melcher and there were no problems. At some point in 1997 Susan Copson became the Supervisor of the Radiology Department and Complainant's immediate supervisor. Copson had worked in Radiology as a technician prior to being promoted to Supervisor. In her new position she reported to Elizabeth Seed. Respondent asserted that a number of Copson's co-workers resented her giving them orders and had difficulty with her as a supervisor. There was testimony that Copson's style of supervision was business-like and formal and that she operated "by the book." Respondent also asserted that Seed and Copson implemented a number of organizational changes, which some employees, including Complainant resisted, and that certain employees resented Copson because of these changes. Notwithstanding, there was credible and compelling testimony from Complainant and other employees of the department, detailing Copson's cruel and derisive behavior of Complainant. Among other things, Copson never said good morning to, nor acknowledged Complainant, while she acknowledged other employees in Complainant's presence. Copson either ignored

Complainant or criticized her needlessly and instituted more stringent rules for her that, by most accounts, were not enforced against anyone else in the department.

11. Prior to July of 1999, Copson told Complainant that she was not allowed to use the above-mentioned sign at all when leaving the front desk and told Complainant she could not leave the desk for any reason without first securing coverage. This directive included Complainant's bathroom breaks, morning and afternoon breaks, lunch-time and departure at the end of her shift. Copson further instructed Complainant to direct all requests for relief to her and stated only she could relieve Complainant. There was credible testimony from most other employees of the department that this directive did not apply to other employees who covered the front desk and they used the sign whenever necessary to take breaks or if some other need arose to leave the reception area.

12. While Copson denied that she had imposed this stringent requirement on Complainant, I did not credit her testimony. Moreover, at least with regard to Complainant's breaks and lunches, the directive was set forth in a written memo from Copson to Complainant dated 7/19/99. (Ex. C-9). Complainant and others testified that this new directive was extremely onerous because Copson was frequently on the phone when Complainant needed to be relieved or was often outside having a cigarette break and Complainant had to wait some period of time for relief. Complainant and her husband went to lunch together at the same time everyday. Copson knew Complainant's schedule and would frequently go for a cigarette break just at the time Complainant was to leave for her lunch or at the end of her shift. Complainant's husband testified that he frequently saw Copson having a cigarette break outside the office while he was waiting to pick up his wife for lunch or to go home. Complainant would often have to wait up to 15

minutes for Copson to return and relieve her, thus delaying her departure for lunch or at the end of the day. Copson knew that Complainant's husband picked her up for lunch and at the end of the day and was waiting for her outside. In her memo of 7/19/99 to Complainant, Copson references Complainant's desire to leave on time "for personal reasons," but notes that this may not always be possible "due to the operational needs of the department." Other employees were not held to this rule and were generally able to leave for lunch or at the end of the day at their assigned time. The "floats" who covered the front desk after Complainant left for the day did not have to contact Copson for relief or coverage.

13. On one occasion in July 1999, one of the file clerks, Jaime Melendez, insisted that Complainant allow her to cover the desk, since it was Complainant's lunch time and Copson was outside on a cigarette break. Complainant reluctantly agreed, but asked Melendez to let Copson know she had offered to cover. When Complainant returned from lunch, Copson called Complainant to her office for an explanation of why Melendez was covering the front desk. Copson chastised Complainant and reinforced the directive that from then on, only she was to relieve Complainant.

14. Complainant testified credibly that she was required to call Copson for relief even if she needed to use the bathroom that was approximately 10 feet away. According to Complainant and others, Copson was frequently on the phone and did not pick up or answer her calls. Often Complainant's call would bounce to the Radiologists. Other employees of the department confirmed that Copson spent a great deal of time on the phone and did not always respond when Complainant called her. There was ample testimony that no one else who covered the front desk was required to call Copson to take

bathroom breaks. I credit this testimony and find that Complainant was extremely embarrassed and humiliated by having to do this.

15. Julie Simonds, an x-ray technician, testified that Copson treated Complainant badly. She stated that Copson had Complainant “tied” to the front desk and Complainant couldn’t even leave the front desk to go to the bathroom. Simonds would frequently overhear the file clerks telling Complainant to just put the sign up. According to Simonds, it has been a “free for all” at the front desk since Complainant left the department, there is often no one at the front desk, and the sign directing patients to the lab is up all the time. Simonds testified credibly that Complainant’s replacements at the front desk were much younger than Complainant and were not required to call Copson for relief. She even observed that if Copson is covering the front desk, she uses the sign and often will not even answer the phone. I credit her testimony.

16. Susan Pelham a former radiology technician in the department corroborated this testimony stating that Complainant could not move from the desk without telling Copson and was not allowed to use the sign even to go to the bathroom for a few short minutes. Pelham recalled a day when Complainant had a stomach illness and needed to use the bathroom frequently and still had to wait for Copson to relieve her. Pelham confirmed that Complainant also had to seek relief from Copson before leaving at the end of the day, while others covering the desk did not need to do this. She stated that Copson was often not available, or her door would be shut or she would be out having a cigarette when Complainant needed relief. According to Pelham, when Copson or others in the department covered the front desk, they could use the sign and leave as needed. She testified that she witnessed the sign in use frequently after Complainant left the

department. Despite the fact that Pelham had some issues with Copson around attendance, I credit her observations of how Copson treated Complainant.

17. Nancy Morely, another x-ray and mammography technician at Somerville, corroborated the testimony of Simonds and Pelham regarding Copson's disparate treatment of Complainant at the front desk. She stated that Complainant was afraid to leave the front desk to go to the bathroom even in an emergency. She stated that Copson treated Complainant terribly and, by all appearances, was trying to get Complainant to quit. Morely stated that everyone knew that Complainant's schedule had her taking lunch at the same time everyday and Copson always made Complainant late by going out for a smoke or otherwise being unavailable when it was time for Complainant to leave. She confirmed that other employees could leave the desk without Copson's permission.

I credit her testimony.

18. Virginia Mendenhall, former x-ray technician and mammography technician at Somerville testified that Copson made a big deal out of Complainant leaving the desk without first contacting her and that no one else had to do this. She recalled an incident where Copson made a big deal about Complainant using the sign when she had to go to the bathroom very badly. Bonavita, a file clerk in the department who also covered the front desk as needed, testified that when she covered the desk she attempted to get coverage if she had to leave, but if none were available, she was able to use the sign and did not have to contact Copson. Barbara DeCunha, who worked in the Somerville location from 1996 to 1999 in the Lab, sat near Complainant and observed that Complainant always had to call Copson for relief and that Copson would always make Complainant wait 15 minutes or so before relieving her. DeCunha noted that no other

employees who covered the desk were required to do this. DeCunha also corroborated Complainant's testimony that Copson would walk right past Complainant at the front desk without saying good morning or acknowledging Complainant. Copson would, however, acknowledge and speak to DeCunha, who sat next to Complainant. DeCunha noted that this really upset Complainant.

19. Complainant testified credibly that she was the victim of undue scrutiny of her work performance and unwarranted criticism by Copson. Copson would call Complainant into her office frequently to complain about one thing or another. On one occasion when Complainant left on time for a doctor's appointment, Copson was upset because the person covering misdirected a call. Copson would also falsely accuse Complainant of leaving a messy desk, when Complainant was diligent about keeping a neat and organized work area. Complainant felt that these criticisms were unjustified and that Copson scrutinized her every move and accused her of things that weren't true. She stated that Copson would often tell her to do things a certain way and then deny that she had done so. According to Complainant, Copson either ignored her or criticized her. I credit this testimony.

20. Several other employees verified that Copson ignored complainant, or berated her in a rude and disrespectful manner that was entirely unwarranted. Pelham testified credibly that it was like Copson "had a magnifying glass" on Complainant finding things wrong with all she did. Both Pelham and Virginia Mendenhall observed that Copson would often call Complainant into her office at the end of the day and Complainant would frequently leave upset or in tears. DeCunha testified that Copson's tone with Complainant was very sarcastic and nasty, and that Copson seemed to hold Complainant

in contempt. She testified that it was obvious to everyone in the Radiology Department and the Lab that Copson did not like Complainant, while others in the department thought Complainant was a good employee and a kind and caring person. DeCunha testified that Copson's treatment of Complainant bothered her to the point that she approached Copson on several occasions asking, "Why are you so mean to her." According to DeCunha, Copson would deny these allegations and treat her queries flippantly. On one occasion when Copson was badgering Complainant, DeCunha went so far as to tell Copson to leave Complainant alone and stop berating her.

21. Complainant testified that Copson frequently changed her work hours for no apparent reason. At one point, Copson changed Complainant's hours several times in one week. Nancy Morely corroborated Complainant's testimony regarding these work hour changes that appeared to be instituted for no particular reason. Complainant felt that this was another deliberate attempt by Copson to harass her.

22. It is apparent from the testimony of a number of employees who worked in Complainant's department that Copson deliberately targeted Complainant for disparate treatment for no apparent reason and that Copson's behavior toward Complainant constituted harassment. I find that such harassing behavior did indeed occur.

Complainant's co-workers in the department all testified that Complainant was a lovely person who did her job well and they did not understand why Copson singled her out for such egregious treatment. They all observed that Copson's harassment of Complainant made her very upset and often made her cry.

23. During the course of Complainant's employment Copson made a number of age-based remarks, talked to Complainant about retiring and demonstrated a bias toward Complainant because of her age and because of her disabling knee problems.

24. Complainant learned in September of 1998, when her daughters took her on a trip to NYC for her 60<sup>th</sup> birthday, that in her absence, Copson remarked to several co-workers that she thought Complainant was 65 years old and not 60. A number of employees testified that Copson appeared visibly disappointed to learn that Complainant was not 65, but only 60 years of age. At least two other people who witnessed this discussion stated that Copson made the statement in the context of Copson's expectation that Complainant would retire soon. Although Copson denied making any remark about Complainant's age, I do not credit her testimony. I do credit the testimony of the other witnesses about the content of this conversation. Complainant heard about Copson's comments and reaction when she returned from her trip. Complainant was so troubled by this that she registered a complaint with Mary Ellen Howe, a Human Resources consultant at Respondent. Howe, who is alleged to have been present when Copson made these comments, told Complainant that Copson "must have been fooling." Howe has since denied being present for this conversation, but I do not believe that Complainant would have fabricated this scenario.

25. Complainant testified that on one occasion Copson asked her "Why are you working anyway?" In the same conversation Copson added that her mother had retired as soon as she was able. Complainant replied that she needed the job, that she had worked very hard to raise five children, and now she was working to help out her husband to save some for their retirement years. Copson denied asking Complainant why she was still working,

but I do not credit her denial. She admitted telling Copson her mother retired early but said this was in a general conversation about retirement with others that Complainant had initiated. I credit the Complainant's version of this conversation.

26. Complainant testified that during her 1998 performance review Copson asked her if there were other departments at Respondent where she would like to work and Copson offered to help Complainant transfer. This was a clear indication to Complainant that Copson no longer wanted her in the department and was encouraging her to leave.

Complainant responded that she liked her current position and did not want to work in another department. On another occasion when Complainant asked Copson to verify the time of a meeting, Copson flippantly replied that if Complainant had to check on the time for a meeting, "it was time to retire."

27. According to Complainant, beginning in 1998, Copson began asking Complainant to help out in the file room. The two women who worked as file clerks were considerably younger than Complainant and one was a student who worked only part-time. According to Seed, Respondent was moving toward creating a "float" position that would involve the file room clerks and the receptionist being cross-trained in each other's duties and all sharing those duties. Each time Copson raised this issue Complainant told her that she would be willing to help out in the file room, but because of the disabling condition of her knees, she could not bend down or kneel to reach files from the bottom shelves, nor could she lift heavy bags with x-ray files in them. Complainant did offer to do anything else that she could to help out. Despite being on notice of Complainant's inability to do a number of tasks related to the file room, Copson continued to raise the issue with her to the point where Complainant felt she was being badgered.

28. Copson denied raising this issue with Complainant at any time prior to October of 1999, when Respondent was preparing to institute the new “float” position. Copson also denied having any knowledge of Complainant’s knee problems until she discussed the “float” position with Complainant in October of 1999. I did not find Copson’s testimony on these matters to be credible.

29. Connie Bonavita, who left the department in late 1998 testified credibly that Copson had previously told both her and Complainant that their jobs were changing and that they would have to do both front desk and file room duties. Bonavita testified that the filing room duties included lifting and handling heavy folders which were put in canvas bags and placed on carts, work that could be very strenuous. The work required a lot of lifting, bending, kneeling and reaching to pull files off of top shelves. One would have to kneel or bend to retrieve or replace files on the lowest shelves, something Complainant was unable to do. Bonavita was aware of the fact that Complainant had serious difficulty with her knees and she did not believe that Complainant would be able to do the physical duties in the filing room job, such as retrieving and carrying files. She told Copson on several occasions that Complainant was not going to be able to do the filing room job because of her knees and she believed that Copson was already aware of the fact that Complainant had great difficulty with her knees. Copson’s response was that Complainant would have to do the job or they would get someone who could. According to Bonavita, Copson stated, “this will be done with her or without her.”

30. Barbara DeCunha testified that she too was aware of Complainant’s knee injuries and the limitations they imposed. She recalled Complainant being very concerned about having to work in the file room and about lifting heavy files. At one point she heard

Copson and Complainant discussing file room duties and heard Copson say to Complainant, "Maybe you should move on if you can't handle the job." DeCunha currently works in the Braintree facility of Respondent where the receptionist is not responsible for any filing room duties. DeCunha was an extremely credible witness and I credit her testimony.

31. In October 1999, Copson informed Complainant that her job description was being changed and that she would be required to float from the front desk to the file room. Copson told Complainant that she would have to be responsible for all of the file room duties in order to retain her job. Complainant once again offered to do whatever she could do with respect to file room duties, but when Copson re-iterated that she was obligated to perform all the duties, Complainant asked for the weekend to think it over.

32. There was absolutely no discussion of whether Complainant could be accommodated in any way because of her inability to bend, kneel and lift heavy objects. Copson did not discuss any potential reasonable accommodation that could be made for Complainant with regard to file room duties, nor did she ask Complainant to medically document any work restrictions that she might have due to her knee problems.

33. Copson admitted in testimony that she subsequently implemented the float position in a manner that allowed the "floats" to decide among themselves what tasks they wanted to do, either filing room work or covering the front desk. There was no requirement that any of them work a minimum amount in either the file room or reception. Copson went so far as to admit that she already knew when she spoke to Complainant in October of 1999, that this was how she would implement the float position. This would suggest that

she lied to Complainant when she told her that there was no option but to do all the duties of the “float” position and that no accommodation was possible.

34. On or about November 3, 1999, Complainant met again with Mary Ellen Howe from Human Resources. Complainant discussed with Howe her concerns about not being able to perform certain of the duties associated with the new “float” position. Complainant also told Howe about how poorly Copson treated her, including some of the nasty remarks Copson had made to her. Howe told Complainant that she was sure that they could make “some adjustments” in the job duties. There was some suggestion of possibly using a cart for files or getting help from the other “floats.” However, Complainant was very skeptical about the prospects of receiving a reasonable accommodation given how Copson had treated her. Complainant also was given to understand that Copson had refused to accommodate another employee who had been injured. For these reasons, Complainant communicated her skepticism to Howe.

35. Howe did not ask Complainant to document her medical condition or any work restrictions she might have, nor did she make any further attempt to address Complainant’s articulated concern that a reasonable accommodation would not be forthcoming from Copson. Neither Howe nor Copson engaged Complainant in an interactive process regarding her disability, any work restrictions she might have if her job was changing significantly, or her need to be accommodated in the new job. Howe also had no discussions with Copson about these issues.

36. While I found Howe to be generally a credible witness, she did not engage Complainant or Copson in any genuine attempt to resolve Complainant’s medical issues. While she did check the weight of the files Complainant might have to lift, she did not go

further in exploring or providing a reasonable accommodation to Complainant. Howe admitted in testimony that Complainant could have sought assistance with certain of the “float” position duties such as lifting and carrying heavy bags with files or kneeling down to file. Howe testified that she knew Complainant could have been excused from performing the filing room tasks that Complainant expressed concern about, however this was not communicated to Complainant or Copson at the time.

37. In early November of 1999, Complainant, believing that she had no other options but to perform all the functions of the “float” position, reluctantly requested and obtained a job transfer to Respondent’s Watertown facility. Complainant testified that this was a very difficult decision for her, but she knew that she could not perform all the functions of the file room clerk and Copson had communicated in her typically hostile manner that she would not accommodate Complainant in any way. Neither Copson nor Howe played any role in assisting Complainant with obtaining this transfer.

38. Complainant testified that she was on the verge of a nervous breakdown at the time of this transfer request. She stated that Copson’s rude, hostile, and demeaning treatment of her over a long period of time had worn her down, left her feeling very depressed, destroyed her self esteem and left her unable to cope with anything in her life. I credit this testimony and found it very compelling.

39. When Complainant informed Copson that she had obtained another position in Watertown, Copson asked Complainant how many weeks of vacation she had. When Complainant replied that she had four weeks, Copson told her she had to give four weeks’ notice before she would be allowed to transfer to Watertown and that this was company policy. Complainant responded that she wanted to begin working in Watertown

sooner and that she was unaware of any policy requiring a notice period equal to one's vacation time. The policy that Copson was referring to is set forth in Exhibit R-53. That policy deals with voluntary terminations and provides for such notice if the employee wants to be eligible for re-hire. It is not applicable to an employee transferring from one position to another within Respondent. While Copson denied having told Complainant she must give four weeks notice and denied that she would have delayed Complainant's transfer, I did not find her testimony at all credible.

40. In fact Complainant was made to continue working in the Radiology Department for four weeks before she was allowed to transfer to the new position in Watertown. There was no change in Copson's behavior toward Complainant during that time. Complainant still had to call Copson to relieve her at the front desk and Copson still treated Complainant with contempt or ignored her.

41. After Complainant left the Radiology Department in Somerville, she was replaced at the front desk by Nicole Delloiacono, who was 19 years old at the time. Delloiacano had previously done file clerk duties but filled in for Complainant at the front desk. Jamie Melandez, age 24, worked in Somerville Radiology from approximately March of 1999 to June of 2000. She began as a file clerk, but the position officially changed to the "float" position sometime in the summer of 1999. Prior to implementation of the "float" position, Copson had met with both young women to discuss the position and described it as one where they could decide among themselves who would do more of the front desk duties or file room duties. This was completely contrary to what Copson had told Complainant. Delloiacono chose to remain primarily at the front desk since she had more prior experience at the desk. She and Melandez worked out their lunch break times

among themselves. Copson was not involved in that nor were they required to call Copson to relieve them. In the Spring of 2000, approximately four months after Complainant had left the Radiology Department a third “float” was hired to replace Complainant who was a young woman in her twenties.

42. Complainant began working at her new position in Watertown on approximately December 2, 2000. On or about January 6, 2000, approximately one month after starting the new job, Complainant went out of work on a medical leave of absence for stress, panic attacks, depression, and anxiety. Complainant has been totally disabled since that time and has been unable to return to work. No incidents occurred at the Watertown site that resulted in Complainant’s becoming emotional disabled from work. Her co-workers in Watertown treated Complainant well and she got along well with them.

43. Complainant and a number of her family members testified about the traumatic effect Copson’s adverse treatment had on her and how she suffered emotionally because of it. Harold Helmuth, Complainant’s husband and a retired firefighter, testified regarding the emotional impact the events at work had on his wife. He and Complainant have been married for 45 years and he would drive her back and forth to work each day and pick her up for lunch. He testified that prior to working for Copson in the Radiology Department, Complainant was upbeat and happy to go to work. He observed that she went from a happy and well-adjusted person to someone who dreaded going to work because of Copson. He testified that after Copson became her supervisor, Complainant would leave work at lunch or at the end of the day agitated and upset. He confirmed that Complainant felt Copson either ignored her or was negative toward her, frequently changed her hours and her schedule, kept her chained to the front desk and made comments about her age

and retiring. He would frequently observe Copson outside, smoking a cigarette and chatting with others while his wife waited for Copson to relieve her for the day or for lunch. According to Mr. Helmuth, near the end of her tenure in the Radiology Department, Complainant would go to work upset and leave upset, and was constantly afraid that each day would bring a new problem or confrontation with Copson. Mr. Helmuth testified that his wife would often be crying when she left work.

I found Mr. Helmuth to be an extremely credible and compelling witness.

44. Complainant's daughters testified that Complainant's personality changed completely as a result of working under Copson. Complainant's daughters testified that Complainant had been a strong and capable person who people depended on to listen to and to help them. After years of experiencing Copson's harassment and hostility on the job, Complainant became a very emotionally needy and dependent person. She was no longer able to make simple decisions, like whether to go out or stay in. One of her daughters testified that she used to drive family members everywhere and was the type of person who would get in her car and drive to New York alone. Now she is fearful and unable to drive anywhere or go anywhere, and does not even pick up her grandchildren, something she used to do frequently. Complainant has become totally dependent on her husband and children in dealing with any situation that is stressful.

45. Complainant and her family members testified that while she was working for Copson and afterwards Complainant went into a state of depression, that she did not look well and lost weight. She also became easily agitated and upset which was unlike her. After she stopped working Complainant was apprehensive about going to Respondent's facility in Somerville to see her doctors for fear of running into Copson.

46. Mr. Helmuth testified that very soon after Complainant began working in the Watertown facility, she came out of work one day saying that she could not go back to work any more. Complainant has been unable to work since then as she is unable to cope with any stressful situation or even simple decisions. Complainant and her husband testified that she had intended to work until she was age 65 and they were using her income for savings for retirement. They also used Complainant's income to pay for special purchases like vacations and buying a truck.

47. Anne Marie Whalen, Complainant's daughter testified about the effects of the events at work on her mother's emotional state. She described her relationship with her mother as very close and stated they would see each other several times a week and on weekends. She testified that Complainant enjoyed her previous her position at Respondent in Visual Services, liked her co-workers, and was upset when her position was eliminated after her knee surgery. According to Whalen, except for Complainant's knee problems, she was otherwise in good health and emotionally strong. Whalen described her mother as a happy, secure and independent person who would drive and go places alone, but after working for Copson in Radiology, Complainant became emotionally and physically traumatized. She starting getting sick all the time, began having stomach problems and lost weight. She also became depressed and anxious, losing all confidence and being afraid to do things she had always done. Complainant has stopped driving almost completely and is unable to do simple errands such as returning items to a store or going to her doctor's appointments alone. She is now easily intimidated and fearful and avoids any possible confrontation. Whalen described her

mother now as a “nervous wreck.” I found Whalen to be an extremely sincere and credible witness and I trust that her observations about her mother were accurate.

48. Barbara DaCunha testified credibly that before Copson’s adverse treatment and harassment, Complainant was the most pleasant person to work with. She described Complainant as very patient-oriented, courteous and thoughtful and stated she was never rude or short with people. However, once Copson took aim at Complainant, she became a nervous wreck and stressed out to the point of being sick. Her health began to decline, her stomach was always upset and she would frequently be shaking and on the verge of tears. DaCunha testified that she did not know how Complainant endured coming to work every day under those circumstances. According to DaCunha, Copson abused and harassed Complainant with utter disregard for Complainant’s health and well-being. I found DaCunha to be an extremely credible witness.

49. Susan Pelham testified that after a time, Complainant appeared to be in a constant state of stress and lost a lot of weight. Julie Simonds testified that there was a big change in Complainant’s demeanor over time and that Copson’s treatment left her nervous, stressed and visibly shaken. Virginia Mendenhall testified credibly that Complainant was a great and dependable worker. She observed Complainant crying over the way Copson treated her. I found the testimony of these three witnesses regarding Complainant’s emotional distress to be consistent and credible.

50. Complainant testified that she did not want to transfer out of the Radiology Department, because she enjoyed the work and her co-workers but that she felt forced to leave because of Copson’s on-going humiliation, harassment and intimidation. She had hoped to continue working in the Radiology Department until she was 65 years old.

Complainant testified that the hostile work environment created by Copson caused her severe stress and robbed her of her self-esteem. She was, and is still, so distressed emotionally that she is unable to perform simple daily tasks or to cope with the normal stresses of life. She often finds herself tearful, frightened and irritable. Complainant testified that, consistent with her family's observations, she had always been self-sufficient and someone that others, particularly her family, could rely on for assistance. Now she has to depend upon others to sometimes just get through the day. She no longer feels happy and easy-going and is no longer content doing the things that she once loved to do. Complainant testified that by the time she transferred to the Watertown facility she was on the verge of a nervous breakdown. She had become severely depressed and lost all self-esteem because of how Copson treated her. She was no longer capable of coping with anything including work. She testified that when her husband dropped her off to work at Watertown, she would be so anxious she would want to run after the car like a child being dropped off to school for the first time.

51. Complainant's treating physician, Dr. Joseph McCabe, in a report dated 6/25/03, noted Complainant's diagnosis as major depression with a marked anxiety component. In Dr. McCabe's opinion, Complainant's experiences at work significantly contributed to the onset and worsening of this condition. He stated that he was unable to identify any other precipitants for Complainant's marked symptomatology and deterioration in functioning. [Ex. C-26 (1)].

52. Complainant's treating physician, Dr. Anna Feldwig, began seeing Complainant regularly for gastrointestinal symptoms, weight loss, depressed mood and insomnia in approximately December 1999. Dr. Feldwig stated in her 6/16/03 report that she treated

Complainant for acute anxiety and depression and that Complainant reported antecedent work stress dating back 1 ½ years. In Dr. Feldwig's opinion, Complainant's symptoms developed as the direct result of her work environment. [Ex. C-26 (2)].

53. Dr. Donald Wexler, a board certified psychiatrist and neurologist, examined Complainant as an impartial doctor on behalf of the Massachusetts Department of Industrial Accidents. Dr. Wexler stated in his 11/7/03 report that Complainant's diagnosis in January 2000 and for the next 18 months was "Major Depressive Disorder Single Episode with Severe Insomnia, Anorexia with a 13 pound weight loss, loss of self-esteem and self-confidence, withdrawal, and prolonged periods of crying with failure to respond to medicine for at least six months." Dr. Wexler stated that Complainant's current diagnosis is "Dysthymic Disorder with Labile Mood leading to frequent tearfulness, continuing loss of self-esteem, considerable anger and frustration, feelings of hopelessness, and helplessness with anxiety." The doctor stated that Complainant has difficulty concentrating and making decisions and has a low level of energy. [C-26 (10)].

Dr. Wexler went on to state in his report that it was clear that until Complainant encountered the new manager in the Radiology Department she was functioning at a high level both in her personal and business life. He stated that the hostility of Complainant's manager overwhelmed her self-esteem and self-confidence and she decompensated. He stated that she remains a very dependent person who clings to her husband, her children and grandchildren and clearly has lost the initiative and hopefulness that has sustained her for many years. The doctor found that Complainant is medically disabled, suffering from a significant degree of dysthymia and incapable of returning to work. In his view, Complainant's disability is total and permanent. [C-26 (10)]

54. Had Complainant continued to work at Respondent until age 65 as was her stated intention, her retirement date would have been September 20, 2003. Since Complainant ceased working on January 6, 2000 her claim for lost wages was for a period of 194 weeks or 3.7 years. Complainant's gross pay from Respondent in 1999 was \$29, 610.89. (Ex. C-29) Complainant's average weekly pay in 1999 was \$569.44. Using Complainant's average weekly pay for 1999 as the measure of damages for lost wages, the total amount of lost wages she incurred from January 6, 2000 until the intended date of retirement was \$110, 471.36 ( $\$569.44 \times 194$  weeks). In addition Complainant could have expected raises in the years 2000, 2001, 2002 & 2003. There was testimony that actual wage increases were in the 3% to 5% range on average for those years. Assuming Complainant had received the minimum raise of 3% in the years 2000, 2001, 2002 and 2003 she would have earned additional gross pay in the amount of \$888.33 for the year 2000, \$1803.30 for the year 2001, \$2,745.72 for the year 2002 and \$3, 425.21 for the year 2003. Thus her total additional anticipated wages for these years would be \$8,862.56. If this amount is added to her lost wages it increases her claim for lost wages to \$119,333.92.

55. Complainant incurred costs of \$175.00 for her mental health treatment by Mental Health counselor Patrice Birenberg, a cost she claims is directly attributable to the emotional distress she suffered as a result of Respondent's conduct. (Ex. C-31).

Complainant also incurred the cost of co-payments for the medications prescribed by her physician for her mental health problems for the period of 5/17/01 to 6/11/02. (Ex. C-32). These medications were Lorazepam, Trazodone, and Effexor. (Ex. C-26, 10 p.3). The total amount of co-payment for these medications for that period was \$210.19. (Ex.

C-32). Complainant asserts that this cost is directly attributable to the emotional distress caused by Respondent.

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c.151B prohibits discrimination in employment on account of age and handicap. This prohibition has been held to extend to discriminatory harassment in the workplace. Complainant has alleged that she was the victim of disparate treatment and harassment in the workplace on account of her age and handicap, that she was harassed by her supervisor, Susan Copson, over a number of years, and that Copson refused to grant her a reasonable accommodation to her handicap. Complainant alleges that the discriminatory conduct ultimately resulted in her constructive discharge.

At the time Complainant's charge was filed with the Commission, the statute of limitations for filing complaints was six months from the last alleged act of discrimination. G.L. c. 151B s. 5.<sup>1</sup> The last act of discrimination alleged by Complainant was her constructive discharge from Respondent in January of 2000. Therefore Complainant's previous termination from the Visual Services Department in the Fall of 1995 is not a claim that is properly before me for determination as it occurred well outside the statute of limitations for filing claims with the Commission. Furthermore, there is no evidence from which a reasonable fact-finder could conclude that the elimination of Complainant's position from the Visual Services Department was part of a continuing violation. Notwithstanding, I allowed evidence of this event to be presented for purposes of background information only for an understanding of how Complainant

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<sup>1</sup> G.L. c. 151B was amended in August of 2002 to enlarge the time period for filing claims with the Commission to 300 days. This change was effective November 6, 2002.

came to work in the Radiology Department. Respondent asserts that Complainant's charges regarding her age are untimely because Copson's alleged discriminatory comments occurred more than six months prior to the filing of her Complaint. However, I conclude that Complainant has proven that these allegations are part of a continuing violation and thus legitimately form the basis of her complaint. I find that these earlier age-based comments are substantially related to the continuing abuse by Copson which all ultimately culminated in Complainant's constructive discharge. There must be at least once incident of discriminatory conduct within the limitations period, which substantially relates to earlier incidents of abuse, and substantially contributes to the continuation of a hostile work environment such that the incident anchors all related incidents thereby rendering the entirety of the claim timely. See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 533 (2001). I find that Complainant's constructive discharge is the anchoring event in this case. Furthermore, I conclude that Complainant was not unreasonable in waiting to file her Complaint, because she had discussed the situation internally with Howe, hoping that things would improve. When Copson made it clear that she would not be accommodated in the "float" position, Complainant, in her second discussion with Howe finally expressed her hopelessness that the situation would not change. It was shortly after that time that Complainant left her employment with Respondent.

#### Age Discrimination/Harassment

General Laws c. 151B affords employees the right to work in an environment free of discriminatory intimidation that creates a hostile work environment and interferes with

one's ability to do her job. College-Town v. Div. of Interco, Inc. v. MCAD, 400 Mass.156 (2001); Scionti v. Eurest Dining Services, 23 MDLR 234, 239 (2001). The protections of the statute with respect to a sexually hostile work environment have been extended to situations where harassment occurs to members of other protected classes. See Beldo v. Univ. of Mass. Boston 20 MDLR 105 (1998); Richards v. Bull H.N. Information Systems, Inc. 16 MDLR 1639 (1994).

In order to establish a claim of discriminatory harassment Complainant must show that she worked in a hostile work environment that is linked to her protected class, in this case her age, and that the conduct alleged was sufficiently severe and pervasive to interfere with a reasonable person's work performance. Muzzy v. Cahillane Motors, Inc. 434 Mass. 409 (2001); See Cuddyer v. Stop & Shop Supermarket Co. 434 Mass. 521 (2001). A hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization [and that] poses a formidable barrier to the full participation of an individual in the workplace." College-Town, 434 Mass. at 162.

Complainant has established a claim of hostile work environment harassment on account of her age. She was well over the age of 40 and substantially older than all the other employees in the Radiology Department at Respondent's Somerville location. Complainant has demonstrated that despite the fact that she was performing her job well, she was the target of abuse and harassment by her supervisor, Susan Copson. Copson made numerous remarks about Complainant's age and retirement and singled her out for abusive treatment, while not subjecting the younger members of the Department to the such treatment. After making several comments about Complainant's age and asking her

about retirement, sometime in 1999 Copson instituted a policy that Complainant not leave the front desk for any reason without first notifying Copson and waiting for Copson to relieve her. She also refused to allow Complainant to use a sign directing patients to proceed to the lab in the receptionist's absence, something all other employees who covered the front desk were allowed to do. None of the other employees who performed front desk duties, who were all substantially younger than Complainant, were subject to these restrictions. In connection with these restrictions, Copson would often make Complainant wait for relief for a bathroom break, her lunch break, or at the end of the day while she went outside to smoke a cigarette or talked on the phone. It was apparent that Copson acted in deliberate disregard of Complainant's schedule and her designated times for lunch, in a manner that was calculated to upset and frustrate Complainant. Complainant's lunch break was often shortened by the amount of time she had to wait for Copson. Not allowing Complainant to take bathroom breaks without first notifying Copson was extremely embarrassing and humiliating to Complainant and caused her both physical and emotional distress.

Copson also persisted in treating Complainant with disdain that verged on cruelty by refusing to acknowledge her or say good morning on a daily basis, while at the same time acknowledging and talking to others. Several of Complainant's colleagues testified that Complainant was a kind and lovely person who did her job well, was committed to serving the patients, and was undeserving of such treatment.

Complainant also demonstrated that Copson was hyper-critical of her performance, that she was frequently called into Copson's office to be scolded, and that much of Copson's scorn and criticism was unwarranted. Copson's undeniably cruel and

disdainful treatment of Complainant was matched by a number of comments about Complainant's age and her potential retirement. Generally, isolated remarks are not sufficient to imply a discriminatory motive based on age. Fontaine v. Ebtec Corp., 415 Mass. 309, 314 n. 7 (1993). While in another context Copson's comments might be considered "stray remarks" insufficient to establish an impermissible motive of age bias, see Johanson v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 302 (1991), in this case, where they were accompanied by unexplained and unrelentingly rude and uncivil behavior towards Complainant over a period of time, I conclude that Copson harbored an unlawful bias against Complainant on account of her age. This conclusion is supported by the stark difference in age between Complainant and her co-workers and the markedly different way in which Copson treated each. I believe that Copson had difficulty with Complainant on account of this age difference.

Respondent offered no explanation for Copson's treatment of Complainant other than Copson's denial, which I did not credit, and the need for greater accountability at the front desk. The latter reason was proven to be false from the testimony of those who succeeded Complainant in the position and were not required to operate under similar strictures. Moreover, there was no evidence that Complainant ever shirked her responsibilities at the reception desk. She did request that her schedule not be changed continuously as Copson was wont to do, but she never refused to co-operate when her schedule was changed. Copson admitted discussing retirement with Complainant but denied any ill motive. Copson also denied that Complainant was treated differently regarding her obligations at the front desk, but I did not credit her testimony. Thus, I

conclude that Respondent has failed to produce a legitimate non-discriminatory reason to explain or justify Copson's harassment of Complainant.

Respondent asserts that Complainant has not established a claim because she was not terminated or demoted nor was any condition of her employment materially altered. Notwithstanding, I conclude that Complainant did prove that she was harassed and abused by Copson in a manner that severely impacted her ability to do her job and caused her to labor under significant emotional strain that was observed by all her co-workers. Copson created a hostile working environment for Complainant that interfered with Complainant's ability to do her job in a material way. Copson's conduct was persistent and egregious and was viewed as harassment by any of those who worked in close proximity to Complainant. This behavior occurred in conjunction with a number of comments about Complainant's age and retirement. Complainant was often humiliated, upset, agitated, and fearful at work. As stated earlier, a hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and that] poses a formidable barrier to the full participation of an individual in the workplace." College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass.156, 162 ( 1987). Being subjected to a work atmosphere where one is constantly stigmatized and humiliated as Complainant was, clearly is a material alteration of one's work environment, even absent a tangible job detriment. See MCAD Sexual Harassment in the Workplace Guidelines 24 MDLR (2002). See also. McAuliffe v. Suffolk County Sheriff's Dept., 21 MDLR 27, 29 (1999). I therefore conclude that Respondent subjected Complainant to a hostile work environment based on her age in violation of G.L. c. 151B.

### Handicap Discrimination

In order to prove that an employer failed to reasonably accommodate her handicap, Complainant must prove that (1) she was a qualified handicapped individual; (2) she needed a reasonable accommodation due to her handicap to perform the job; (3) her employer was aware of her handicap, and was aware that she needed the accommodation to perform her job; and (4) her employer was aware of a means to reasonably accommodate the handicap, and (5) the employer failed to provide her with the reasonable accommodation. Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, p. 33 (1998)

Complainant must prove as a threshold issue that she is a handicapped person within the meaning of G.L.c.151B s. 4(17). A handicapped person is one who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of such impairment; or (c) is regarded as having such impairment. Complainant had surgery to her knee, a subsequent injury and a chronic condition all affecting the use of her knees. As a result, she experiences a great deal of pain in both knees and has great difficulty bending at the knees, kneeling, squatting, lifting any heavy objects, walking long distances and climbing stairs. She cannot stand for prolonged periods of time and cannot climb more than three or four stairs. I find that Complainant is substantially limited in the numerous major life functions listed above that affect her mobility. See MCAD Guidelines: Employment Discrimination on the Basis of Handicap-

Chapter 151B, Section II (A)(5) (1998) (Major life activities includes “performing manual tasks,” “walking,” and “lifting.”) <sup>2</sup>

Having established that she is a handicapped person, Complainant must demonstrate that she is a qualified handicapped individual capable of performing the essential functions of her job with or without an accommodation. It is undisputed that Complainant was adequately performing the job of receptionist in the Radiology Department and there was no medical reason why she could not have continued to perform this job. The issue of reasonable accommodation arose only in the context of Complainant’s ability to perform the new “float” position that Respondent sought to implement and whether she would be required to perform all the duties of a file room clerk including bending, kneeling, and lifting heavy files.

Complainant asserts that she was unable to perform a number of the file room tasks and told this to Copson on several occasions. The evidence shows a pattern of refusals by Copson, for over a year leading up to the fall of 1999 when the “float” position was formalized, to accommodate or even to discuss the need to accommodate Complainant’s knee injuries in connection with the assignment to file room duties. In October of 1999 Copson’s response to Complainant was that she was expected to perform all of the duties in the file room and that she could no longer remain solely at the front desk. Complainant had repeatedly indicated that she was willing to help with those file room tasks that she could do, but that her knees prevented her from performing the more strenuous aspects of the job, which included kneeling and bending to reach the

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<sup>2</sup> Complainant also asserts that she is deemed to be a qualified handicapped person pursuant to G.L. c. 152, s. 75B(1), because she has sustained a work related injury and is capable of performing the essential functions of the job with a reasonable accommodation. I concur. See also MCAD Guidelines Employment Discrimination on the Basis of Handicap, *supra*. Section II,(A)(6) at 4 n.3 (1998).

lower files and lifting very heavy bags with x-ray films. Those tasks were then being performed by much younger employees who had no medical restrictions. The person who replaced Complainant and performed these duties was in her early twenties. Copson's response was that Complainant must perform all aspects of the job and was required to do this or give up the job.

Complainant went to Mary Ellen Howe to discuss the issue and when Howe suggested there might be ways to accommodate Complainant, she stated to Howe that given Copson's attitude toward her and her resistance to accommodating another employee, that this would never happen. I conclude that Complainant was reasonably justified in this belief. Complainant testified she was already on the verge of a nervous breakdown as a result of Copson's abusive treatment and felt she had no other option but to transfer to another job within Respondent. I conclude that absent any effort to sit down with Complainant and Copson to discuss all possible accommodations, and to ensure that this occurred, the suggestion by Howe was illusory.

Finally, Complainant offered evidence that subsequent to her leaving Radiology, the two "floats" were given the opportunity by Copson to choose which of the duties they preferred to perform and one of the former file room clerks performed primarily the front desk duties. This was essentially the accommodation that Complainant had sought, and this manner of operation clearly demonstrates that the accommodation Complainant sought was reasonable. Given all of the above, I conclude that Respondent failed to reasonably accommodate Complainant's handicap in violation of G.L. c. 151B.

### Constructive Discharge

In order to establish a claim of constructive discharge, Complainant must show that her working conditions were so intolerable that a reasonable person in her position would be compelled to resign. See Holt v. Minuteman Flames Minor Hockey Assoc., 22 MDLR 373 (2000); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997); Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1240-42 (1992). Thus, a constructive discharge has the legal implications of a termination rather than a resignation. GTE Products Corp. v. Stewart, 421 Mass. 22, citing Turner v. Anheuser-Busch, Inc., 7 Cal. 4<sup>th</sup> 1238, 1244-1245 (1994). Conditions must be unusually aggravated or amount to a “continuous pattern.” Turner v. Anheuser-Busch, Inc., supra. at 1247. Complainant alleges that she sought a transfer to another location within Respondent because she had no other option but to leave the Radiology Department. She also alleges that she was on the verge of a complete emotional breakdown at the time as a result of Copson’s continually abusive behavior and refusal to grant her an accommodation with respect to the new “float” position. Very shortly after she transferred to the new position, Complainant had a total emotional breakdown and left her employment.

I conclude that the facts of this case establish a claim for constructive discharge. Complainant has demonstrated that Copson subjected her to a work environment that was abusive and discriminatory over a period of time and then refused to grant her a reasonable accommodation. I conclude that given these conditions, Complainant had no other option but to leave the Radiology Department. After Complainant accepted the new position, Copson required her to stay working in Radiology for an additional four weeks pursuant to no valid policy. By the time Complainant began her new assignment,

she was emotionally distraught and worn down. Given her progressively deteriorating physical and emotional condition, she was unable to continue working at the new position and within a very short time, left the job. I am persuaded that Complainant exhausted every reasonable alternative to continue working including choosing to go to a different job, but that her emotional state was by then so fragile that she was unable to continue in the new position. Thus, I conclude that Complainant was constructively discharged as a direct result of the discriminatory treatment she endured both because of her age and her handicap.

#### IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B § 5; Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). The Commission may award monetary damages for, among other things, lost compensation and benefits, lost future earnings, and for emotional distress that is suffered as a direct and probable consequence of the unlawful discrimination. Bournemouth Hospital Inc. v. MCAD, 371 Mass. 303, 315 (1976). The Commission is also authorized to impose civil penalties ranging from \$10,000 to \$50,000 against Respondents who have been found to have engaged in unlawful practices. G.L. c. 151B §5; Stonehill, supra. at 573.

In this case, Complainant was constructively discharged from her employment as a result of the pattern of adverse treatment and abuse that she was forced to endure from her supervisor. Her request for a transfer was the direct result of her supervisor's

discriminatory treatment and refusal to accommodate her handicap. Given my finding that Complainant was constructively discharged she is entitled to lost wages from the date of her constructive discharge up to the time she would have retired which was prior to the public hearing in this matter. Her lost wages should also include whatever salary increases she would have likely received had she continued working until age 65.

Complainant testified that it was her intention to remain working for five more years to earn some additional money for retirement and to continue to provide for special things for her family. The total amount due to Complainant for lost wages is \$119,333.92. This amount is based on Complainant's weekly wages at the time of her constructive discharge and includes anticipated raises in subsequent years of 3%, up to the date of what would have been her retirement.

Complainant is also entitled to damages for emotional distress she suffered as a direct and proximate result of Respondent's unlawful actions. Emotional distress awards must be fair and reasonable and proportionate to the distress suffered. Stonehill, supra. at 576. According to the Stonehill case factors to be considered in rendering such awards "include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the Complainant has attempted to mitigate the harm..." There must also be "sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress." Id. at 576. I have considered all these factors and conclude that a significant award of emotional distress damages is justified in this case.

Complainant, her husband and children and several of her co-workers all offered compelling testimony that Complainant was emotionally devastated by the discriminatory

treatment she endured at work. Complainant went from being an independent, self-assured, happy person, to a fearful, anxiety ridden, and depressed person. Her co-workers all observed this happening over a period of time and saw the impact of Copson's behavior on Complainant and how it ate away at her and caused her to be nervous and upset at work all the time. Complainant's husband and children observed that Complainant can no longer do things for herself, has lost her self-esteem and confidence and is dependent on them for many things, including driving her places. Complainant also experienced the physical symptoms of depression; she had stomach problems, lost weight, cried frequently, and became easily agitated and upset, which was unlike her. At least two witnesses described Complainant as a "nervous wreck" often shaking and on the verge of tears. Complainant was clearly emotionally and physically traumatized by Copson's discriminatory treatment and the effects have lasted to the present time leaving her unable to accomplish simple daily tasks and deal with the normal stresses of life.

Complainant sought medical and psychiatric treatment for her physical and emotional distress. Her treating physicians and an independent certified psychiatrist all stated in written reports that were admitted into evidence that Complainant was suffering from significant depression and anxiety, insomnia and anorexia and attributed these symptoms directly to her situation at work and the resultant stress. The magnitude of credible and compelling evidence about the cause, nature, and duration of Complainant's emotional distress was extensive. Therefore, I conclude the Complainant is entitled to an award of damages for emotional distress in the amount of \$350,000.

### Civil Penalty

Consistent with the Commission's authority to award civil penalties, I find that this matter is appropriate for the assessment of such an award against Respondent. One of a number of factors to consider in assessing such an award is the degree of culpability. See Commonwealth v. Amcan Enterprises, Inc., et al., 47 Mass. App. Ct. 330, 339 (1999). Given that Respondent's treatment of Complainant was sufficiently egregious to ultimately result in her constructive discharge, I conclude that a civil penalty in the amount of \$10,000 is in order.

### Affirmative Relief

Consistent with the Commission's authority and my findings and conclusions above, I hereby order the Respondent to take the following affirmative steps with respect to training its personnel on issues of age and handicap discrimination.

- 1) Respondent shall conduct a basic annual training session on issues related to age and handicap discrimination and the granting of reasonable accommodations, for all its managers and supervisors located at its Somerville location. With respect to such training:
  - a. Each training session must be at least four (4) hours in length. All managers and supervisors, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next two (2) years, for all new supervisors and

managers who were hired or promoted after the date of the initial training session.

- b. Within thirty (30) days of the receipt of this decision, Respondent shall notify the Commission's Director of Training of its decision to select either the Commission or a private trainer to conduct the initial training sessions. If a private trainer is selected, the trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
  - i. If Respondent has selected a private trainer to conduct the initial training sessions, at least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to

attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

- c. For purposes of enforcement, the Commission shall retain jurisdiction over these training and reporting requirements.

V. ORDER

Consistent with the findings of fact and conclusions of law recited herein,

Respondent, Harvard Vanguard is hereby Ordered to:

- 1) Pay to the Complainant, Mary Ann Helmuth, within 60 days of receipt of this decision, the amount of \$119,333.92 for lost wages 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 this order is reduced to a court order and post-judgment interest begins to accrue.
- 2) Pay to the Complainant, Mary Ann Helmuth, within 60 days of receipt of this decision, the amount of \$350,000.00 in damages for emotional distress suffered as a direct and proximate result of Respondent's conduct, 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 this order is reduced to a court order and post-judgment interest begins to accrue.

- 3) Pay to the Commonwealth of Massachusetts within 60 days of receipt of this decision, a civil penalty in the amount of \$10,000. Payment shall be forwarded to the Clerk of the Commission.
- 4) Conduct training as outlined above.
- 5) Cease and desist immediately from engaging in discriminatory practices relative to age and disability discrimination and requests for reasonable accommodation.

The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent fails to comply with the terms of this Order within the prescribed time period, Complainant is instructed to immediately 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 pursuant to 804 C.M.R. 1.23 by filing a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 11<sup>th</sup> day of July, 2005

Eugenia M. Guastaferr  
Hearing Officer

