

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

PRISCILLA HALL and THE MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION,
Complainants

v.

DOCKET NO. 99-BEM-1426
00-BEM-0608
00-BEM-3093

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Mitchell J. Notis, Esq. for Complainant.
Anna M. McKeon, Esq. for Respondent.

I. PROCEDURAL HISTORY

On June 1, 1999, Complainant Priscilla Hall filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against her employer, the Massachusetts Department of Mental Retardation ("Respondent" or "DMR"). In her complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of age and disability in violation of M.G.L. c. 151B, §§ 4(1B) and (16), when Respondent required her to provide additional medical information regarding her disability and submit to a medical examination. On March 9, 2000, Complainant filed a second complaint with the Commission claiming that Respondent again engaged in unlawful disability discrimination as well as unlawful retaliation in violation of c. 151B, § 4(4) as a result of Respondent's alleged release of confidential medical information. Lastly, on October 17, 2000, Complainant filed a third complaint

alleging unlawful disability discrimination and retaliation after Respondent purportedly terminated Complainant's employment.

On June 4, 2001, the Commission issued a probable cause finding with respect to all of Complainant's claims. On February 13, 2003, the Commission certified Complainant's claims for a public hearing. From October 4-7, 2004, the parties appeared before me for a public hearing in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Respondent, Department of Mental Retardation, is a division of the Commonwealth of Massachusetts Executive Office of Health and Human Services. Respondent maintains and operates a number of facilities and community programs throughout the Commonwealth that provide residential, medical, vocational, and rehabilitative services and support to persons or residents with mental retardation. In particular, Respondent operates the Wrentham Developmental Center located in Wrentham, MA. Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

2. Complainant, Priscilla Hall, is an individual who suffers from cerebral palsy. In approximately 1955, when Complainant was three years old, her parents abandoned her at the Wrentham Developmental Center, which was known at the time as the Wrentham State School (“Wrentham”). Although Complainant does not suffer from mental retardation, Complainant remained a resident at the Wrentham for the next ten years. Complainant testified credibly that while a resident at Wrentham, she was subjected to abuse, including radiation experiments, beatings, and mistreatment. From 1965 until 1972, Complainant lived in a foster home, where she attended and eventually graduated high school. Complainant stated she then worked very briefly in a factory, but lived off of public assistance from 1973 through 1984. I credit Complainant’s testimony regarding these matters.

3. In 1984, Respondent hired Complainant as a porter in the housekeeping department at the same Wrentham facility. Complainant testified that when she first began working at Wrentham, she believed no one currently employed at the facility had worked there when she last resided at the facility in 1965. In December 1987, Respondent promoted Complainant to the position of MRW I. Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

4. An MRW I is an entry level “direct care” position. The responsibilities of an MRW I include assisting clients in the skills of daily living such as feeding, bathing, toileting, and clothing maintenance; performing housekeeping and maintenance duties to support the clients’ needs such as performing laundry services, inspecting and washing wheelchairs and other specialized adaptive equipment, cleaning rooms, making beds and emptying trash; lifting and restraining clients, and repetitive lifting of heavy objects; and,

working in a team setting requiring effective cooperative and communication skills. Many of the residents at Wrentham are permanently bed ridden, incapable of speaking, and severely mentally incapacitated. Complainant claimed that in her capacity as an MRW I, she treated the patients “like they were my own flesh and blood.” She emphasized, “I had been on that side of the fence. I know what those poor souls went through.” I credit Complainant’s testimony on these matters.

5. Complainant testified that in 1992, she suffered a work related injury to her back. Denise Atwood, who worked as a Unit Director at Wrentham at this time, testified that on or about August 8, 1992, Complainant presented a note from her primary care physician, Bernard Oakley, MD, regarding her limitations and restrictions. In the note, Dr. Oakley indicated that Complainant had recurrent back pain and recommended that Respondent reduce the number of client lifts per shift. Atwood claimed that on or about August 28, 1992, Respondent accommodated Complainant’s medical restrictions by placing her on a “Temporary Modified Work Plan Agreement.” As part of the modified work plan, Respondent reassigned Complainant to a different work location and provided her with a “maxi lift”, a mechanical device used to lift patients. I credit Atwood’s testimony.

6. In 1993, Complainant filed a Charge of Discrimination (no. 93-BEM-0121) against Respondent. In her complaint, Complaint alleged that Respondent engaged in unlawful disability discrimination when it required her to perform work contrary to her medical limitations. The Commission subsequently issued a lack of probable cause finding with respect to this charge.

7. At all times pertinent hereto, Gerald Scott worked as Respondent's Affirmative Action Officer. Scott testified that in 1993, as a result of Complainant's physical ailments, Respondent had concerns regarding her ability to perform the duties of the MRW I position. Consequently, Scott set up a meeting with the Complainant and her attorney. As a result of the meeting, Complainant and Respondent entered into an agreement, entitled "Terms of Reasonable Accommodation" that modified Complainant's job duties for an indefinite period. The agreement provided that the Complainant would be required to make no more than six to eight lifts per shift and, if Complainant wished to reduce the number of lifts, she had to provide supporting medical documentation. The agreement further provided that the Respondent could review the accommodation every 45 days to ascertain its reasonableness. I credit Scott's testimony.

8. From April 24, 1993 to March 28, 1994, Complainant remained out of work due to an industrial accident. Throughout this time period and continuing thereafter, Complainant regularly submitted medical notes from Dr. Oakley that listed her physical limitations and restrictions. In particular, in a note dated January 6, 1994, Dr. Oakley wrote: "No 1st shift work schedule. Patient's circadian rhythm doesn't agree with the first shift schedule." Shortly after returning to work, Complainant wrote a detailed list of job duties that she believed she could not perform without reasonable accommodation. In this list, Complainant did not state that she could not work on the 1st shift; however, neither party produced any credible evidence that anyone at this time had mentioned or considered transferring or reassigning Complainant off the 3rd shift. On April 22, 1994, Scott and Bruce Zeigler, then an Assistant Unit Director at Wrentham, met with Complainant and her representative to specifically address each of her concerns. In

particular, Zeigler testified that the parties discussed Complainant's job duties and her various medical restrictions. Zeigler claimed that as a result of the meeting, Respondent provided Complainant with specific reasonable accommodations. I credit Zeigler's testimony.

9. Scott testified that at some point in 1997, approximately three years after the incident described in the previous paragraph, Harold Moore, one of the Complainant's supervisors, approached him and expressed concern over the Complainant's ability to perform the essential functions of the MRW I position. However, neither Scott, nor any other witness on behalf of Respondent, provided any credible evidence as to the specific nature of Complainant's work problems. Notwithstanding, on April 11, 1997, Scott requested that Dr. Oakley review Complainant's medical condition to ascertain whether she could perform the essential functions of the MRW I position with her various accommodations. On May 14, 1997, Dr. Oakley responded by stating Complainant suffered from chronic back pain and should be provided various lifting restrictions as well as allowed to miss work when the weather conditions were extremely slippery due to snow and ice.

A. TRANSFER TO THE MERRILL LAUNDRY

10. At all times relevant hereto, Mark D'Arcangelo worked for Respondent as an Assistant Unit Director at Wrentham. On November 8, 1997, a co-worker, Donna Hopkins, filed a complaint of client mistreatment alleging that Complainant had failed to properly care for a client. Complainant denied doing anything inappropriate and instead claimed that Hopkins was at fault. Complainant then subsequently filed a cross-complaint against Hopkins. After receiving Hopkins' complaint, D'Arcangelo removed

Complainant from direct care coverage and reassigned her to the laundry room in the Merrill Building (“Merrill laundry”). D’Arcangelo testified that Respondent routinely removed employees accused of abuse and mistreatment from direct care coverage pending the investigation of a complaint. D’Arcangelo claimed that he attempted to meet with Complainant to discuss this matter, but Complainant refused to meet with him. I credit D’Arcangelo’s testimony on this particular matter.

11. According to D’Arcangelo, after the reassignment, Complainant performed laundry duties as well as continued to wash wheelchairs in the apartments of the respective clients. However, on November 14, 1997, after working in the laundry for approximately only one week, Complainant presented Respondent with a note from Dr. Oakley that stated she should remain out of work from November 14 to November 27, 1997, as a result of a work related injury. Dr. Oakley’s note also stated that Complainant should continue with previous restrictions “with addition of no washing wheelchairs.” As a result, Respondent refrained from assigning Complainant the task of washing wheelchairs and limited her to performing laundry duties.

12. D’Arcangelo testified that he conducted a thorough investigation of the complaint against Complainant. He claimed that the investigation took three months primarily because Complainant was off-duty at the time and resisted meeting with him. After completing the investigation, D’Arcangelo concluded that Complainant neglected to communicate effectively with staff regarding the care of the particular client. Although D’Arcangelo did not find that Complainant had engaged in abuse or mistreatment, he found that she had engaged in poor communication and judgment that resulted in the client being exposed to an unreasonable risk of harm. On February 5, 1998, D’Arcangelo

notified Complainant that he had completed his investigation and that she would receive a “formal warning.” I credit D’Arcangelo’s testimony with respect to the investigation of the complaint against Complainant as well as the reasons for initially transferring Complainant to the Merrill laundry pending the completion of the investigation.

13. D’Arcangelo testified that after an abuse or misconduct investigation is concluded, an employee temporarily removed from coverage is either returned back to his or her position or is terminated, depending on the results of the investigation. However, D’Arcangelo refused to permit Complainant to return back to her direct care post after he completed the investigation because he believed she could no longer perform the essential functions of the MRW I position. He based his decision on Dr. Oakley’s note of November 14, 1997 that stated Complainant could no longer wash wheelchairs. In addition, both John Grenon and Karen St. Germain testified that the restriction against washing wheelchairs raised concerns as to whether Complainant could perform the essential functions of the MRW I position, even with the various accommodations in place. Grenon worked as an MRW IV at the Wrentham facility and directly supervised Complainant. St. Germain worked for Respondent as a Human Resources Director. Scott likewise believed that Complainant may not have been able to perform the essential functions of her job given the limitation against washing wheelchairs. In particular, Respondent’s witnesses testified that washing wheelchairs was one of the Complainant’s primary duties as an MRW I and took up approximately 40 percent of her time. Although I credit D’Arcangelo, Scott, Grenon, and St. Germain’s testimony with respect to the duties and responsibilities of the MRW I position, they did not provide any evidence that Respondent attempted, in November or December 1997, to

investigate whether Complainant could continue to perform the essential functions of the job.

14. Since Respondent refused to let Complainant return to her direct care post, Complainant remained in the Merrill laundry for the next 2½ years. Complainant aptly referred to the laundry room in the basement of the Merrill building as “the concrete hole.” The room had no phone, exposed sewer pipes, and no windows. In addition, photographs introduced into evidence showed the room to be dark, wet, and little more than an unfinished basement area in an old building. Furthermore, Complainant testified that working in the laundry isolated her from having regular contact with residents and other employees. Although D’Arcangelo testified that other employees had been temporarily transferred to the Merrill laundry as a result of alleged abuse charges, he admitted that those employees had worked in the laundry for no more than a couple of months. I credit Complainant’s testimony regarding the conditions of the Merrill laundry room.

B. REQUESTS FOR ADDITIONAL MEDICAL INFORMATION

15. In early 1998, Scott sought clarification of Complainant’s medical restrictions from Dr. Oakley. On January 28, 1998, Dr. Oakley responded with a letter confirming the previously recommended physical restrictions, including the limitation against washing wheelchairs. After being informed of Dr. Oakley’s letter, D’Arcangelo testified that he and Marlene Trudeau, a Unit Director at Wrentham, requested a meeting with the Complainant to determine her precise physical limitations and the appropriate job accommodations. The meeting did not take place for several months allegedly as a result of scheduling conflicts with Complainant’s attorney. Eventually, in April 1998,

Complainant, her attorney Elliot Brais, and her union representatives Paul Dion and Terese Murphy, met with Scott and D'Arcangelo to discuss Complainant's physical restrictions. According to D'Arcangelo, Scott, and Dion, the parties agreed to submit to Dr. Oakley various documents that identified Complainant's job duties and physical restrictions. Dion testified that Complainant consented to sending this request to Dr. Oakley. Dion then submitted these documents to Dr. Oakley by letter dated June 23, 1998. Contrary to Dion's testimony, Complainant claimed that she never consented to submitting these documents to Dr. Oakley and she believed that her union and her attorney had wrongfully gone behind her back. Complainant testified that when she heard about Dion's letter to Oakley, she "flipped out" and demanded that Dr. Oakley turn over the materials forward to him from Dion. I credit D'Arcangelo, Scott, and Dion's testimony regarding the agreement to have Dr. Oakley review Complainant's medical status. I also find that Complainant hindered Dr. Oakley from performing the agreed-upon assessment.

16. On July 29, 1998, Complainant submitted documentation to Scott in his capacity as Respondent's Affirmative Action Officer, seeking a confirmation of her handicapped status. Similar to the procedure under Sec. 504 of the Rehabilitation Act, a "Confirmation of Handicapped Status" allows a state employee to self-identify his or her disability in order to receive the benefits of an affirmative action protected status. In order to obtain a Confirmation of Handicapped Status, the employee must provide verification of the disability to the employing agency. The documentation submitted by Complainant to Scott included a "Verification of Disability Status" and several medical notes completed by Dr. Oakley that indicated Complainant suffered from cerebral palsy

and chronic back pain. In addition, Complainant submitted the note dated January 6, 1994 from Dr. Oakley that stated: “No 1st shift work schedule. Patient’s circadian rhythm doesn’t agree with the first shift schedule.” On or about August 11, 1998, Scott notified Complainant that Respondent had formally confirmed her handicapped status. The written confirmation is a confidential document kept only by Scott. Complainant testified that she did not share her Confirmation of Handicapped Status with D’Arcangelo, St. Germain, or any of her supervisors. I credit Complainant’s testimony on this matter.

17. On March 26, 1999, D’Arcangelo and Trudeau requested assistance from Karen St. Germain regarding Complainant’s medical status since they had still not received a response to Dion’s letter to Dr. Oakley. Thus, on April 22, 1999, St. Germain sent a letter to Complainant requesting updated medical documentation regarding her ability to do her job. In the letter, St. Germain wrote, “Please send me your updated medical documentation by May 4, 1999. You should be aware that failure to respond to this request may result in disciplinary action, up to and including termination.” Complainant testified credibly that after receiving the letter, she became very angry and felt she had been harassed and retaliated against. Complainant believed she did not have to provide any additional documentation since she had provided medical information to Scott regarding the confirmation of her handicapped status. As a result, she did not respond to St. Germain’s letter.

18. On May 17, 1999, St. Germain again wrote to Complainant. In this letter, St. Germain wrote, “Your updated medical documentation must be received in my office by May 28, 1999. You should be aware that failure to respond to this request may result in

disciplinary action, up to and including termination.” After receiving this letter, Complainant claimed she got very upset and angry about the potential loss of her job. She also believed that the letter constituted harassment and retaliation for her prior complaints. Complainant likewise did not respond to this letter because she believed she did not have to provide any additional medical documentation as Respondent had previously confirmed her handicap status. She testified that St. Germain’s letters of April 22 and May 17 prompted her to file her initial charge at the Commission.

19. After not receiving a response from Complainant, on September 28, 1999, St. Germain wrote to Complainant a third time to notify her that a fitness for duty evaluation had been set up for her on October 13, 1999. In this letter, St. Germain wrote, “Please be aware that failure to keep this appointment may result in disciplinary action, up to and including termination. I regret the necessity to mention this fact, but your failure to provide the facility with current medical information regarding your ability to do your job, despite numerous attempts to afford you the opportunity to do so, is unacceptable.” Complainant testified that after she received this letter, she “really flipped out.” She claimed she became “furious... My blood boiled” and “this was the straw that broke the camel’s back.” She also continued to view Respondent’s requests for further medical documentation to be retaliatory and harassing.

20. On or about October 7, 1999, Scott received a handwritten note written by Dr. Oakley dated August 19, 1999. According to Scott, he received a copy of the note from the investigator at the Commission handling Complainant’s first complaint. In the note, Dr. Oakley wrote that he had reevaluated Complainant on August 19, 1999, and he wanted to continue with her current job restrictions due to her back pain and cerebral

palsy. Dr. Oakley listed several job restrictions related to her physical limitations, but did not mention a medical requirement that the Complainant refrain from working on the first shift. I credit Scott's testimony.

C. **REASSIGNMENT TO THE MAIN LAUNDRY ON THE FIRST SHIFT**

21. In October or November of 1999, St. Germain, D'Arcangelo, Scott, and the Director of the Wrentham Facility, Nicholas D'Alusio, met to discuss Complainant's status. The participants determined that Complainant could no longer perform the essential functions of her job as an MRW I as a result of her various limitations including her inability to wash wheelchairs. St. Germain and Scott testified credibly that this determination would ordinarily result in the employee being terminated. However, D'Alusio opposed terminating Complainant and instead insisted upon creating a new job for her, largely because she was a former client at the facility. According to Respondent's witnesses, the participants at the meeting discussed several alternatives, including creating a position for Complainant in the main laundry on the first shift. Scott testified that he advocated that Complainant continue to work on the third shift since he knew she preferred working at night. Scott claimed that he did not share with the others the contents of Complainant's Confirmation of Handicap Status or Dr. Oakley's note of January 6, 1994, which stated, "No 1st shift work schedule." Despite Dr. Oakley's note, Scott believed that Complainant's preference for working third shift was not the result of medically verifiable restriction, but rather a matter of her own personal preference. Scott testified that he had spoken with Dr. Oakley regarding this matter and asked him if this limitation was "a real major concern" or a "critical concern." According to Scott, Dr. Oakley responded that it was not. D'Arcangelo and St. Germain

testified that they also knew that Complainant preferred to work on the third shift, but they had no knowledge of any medical restriction that would prohibit her from working on the first shift. Over Scott's objection, D'Alusio and the other managers decided to assign Complainant to the main laundry on the first shift. All of Respondent's witnesses testified that they believed the transfer would provide Complainant with a safer working environment with increased supervision. They also believed that the new job would provide her with a "permanent" accommodation which addressed her extensive medical restrictions. Although Complainant would be exclusively performing laundry duties in the Main laundry, Respondent's witnesses testified credibly that Complainant would still receive the same salary and benefits provided to an MRW I.

22. On April 24, 2000, Complainant received notice of her administrative transfer to the Main laundry on the 1st shift. Complainant testified that after receiving the notice, "I had the shakes... I had anxiety... I was fatigued." She further claimed that she suffered a panic attack after receiving the notice of the transfer. Complainant described the panic attack as comparable to having a heart attack. In addition, she stated that she became furious at the thought of having to work on the day shift in contravention of her medical restrictions. Complainant also testified credibly that she had no involvement whatsoever in the decision and neither Scott, nor any other supervisor, spoke to her about the transfer. Respondent did not introduce any credible evidence to the contrary. In fact, both Scott and St. Germain admitted they did not speak to Complainant prior to Respondent's decision regarding the transfer. St. Germain claimed that she did not discuss this matter with her because Complainant had previously demonstrated an inability or unwillingness to communicate with management regarding her status.

D. COMPLAINANT'S SEPARATION FROM EMPLOYMENT

23. On May 8, 2000, before the transfer became effective, Complainant reported that she injured herself while working in the Merrill laundry. Specifically, she claimed she slipped and fell on the wet floor and hurt her back. She subsequently produced a doctor's note stating that she would be out of work for two days. However, Complainant never returned to work. In October 2000, Complainant filed her third complaint with the Commission alleging that Respondent constructively discharged her when it transferred her to the Main laundry on the first shift.

24. At all relevant times hereto, Donald Meyers worked for Respondent as a Workers' Compensation Manager. Myers testified that on June 26, 2000, he sent Complainant a letter that stated she was being placed on an unauthorized leave of absence and had been marked absent since May 8, 2000. According to Meyers, Complainant had failed to contact Respondent regarding her status since she suffered the alleged work related injury. In the letter, Myers urged Complainant to contact him. I credit Meyers' testimony.

25. In August of 2000, Complainant filed a workers' compensation claim. As part of her workers' compensation claim, she produced a letter from a physician stating that her prognosis remained "guarded"; she should avoid prolonged standing, walking, bending, twisting, and lifting heavy objects weighing more than 15 to 25 pounds. As part of the workers compensation case, Complainant also submitted to an independent medical exam performed by Dr. Richard Greenberg, who concluded that Complainant had reached a "medical end result" and was only capable of returning to "light duty", "with the same restrictions that she had prior to her injury."

26. On October 18, 2001, January 2, 2002, May 23, 2002, and October 10, 2002, respectively, Myers sent Complainant letters offering her the modified MRW I job at the Main laundry. Complainant did not respond to any of these letters and never returned to work.

27. Myers testified that Respondent then applied to have Complainant involuntarily retired on an “accidental” disability basis as a means to resolve her workers compensation claim. As result of Respondent’s application for disability retirement, Complainant was subjected to an impartial medical examination by a medical panel of three doctors operating under the auspices of the State Board of Retirement. The medical panel found Complainant to be eligible for an “ordinary” disability retirement and she was involuntarily retired effective June 2003. Complainant insisted that the retirement was against her will. She also claimed that she became very upset about the conditions of her involuntary retirement, which included earning restrictions and possibly being subjected to another physical examination to determine her continued eligibility for retirement benefits. Complainant has not filed a separate claim or charge specifically related to the events related to her involuntary retirement.

E. AGE DISCRIMINATION

28. Complainant testified that Respondent’s supervisors treated a number of younger employees in her unit better than they treated her. However, she only provided vague and non-specific testimony that the younger individuals in her unit had received promotions, had not endured harassment, and had not been transferred to the Merrill laundry.

F. RELEASE OF CONFIDENTIAL MEDICAL INFORMATION

29. Complainant claimed that on March 8, 2000, while working in the Merrill laundry, she overheard Pat Cunuff, a supervisor, and David Pacheco, a co-worker, talking about her former status as a patient at the facility. According to Complainant, Cunuff told Pacheco that Complainant was a former patient to which Pacheco replied, “Oh, ex-patient, ex-retard. Now we can really have fun with her now.” Later that same day, Complainant claimed she heard Pacheco and Cunuff tell another supervisor, Debbie Flagg, that Complainant had previously been a patient at the facility. Specifically, Complainant testified she heard Pacheco tell Flagg, “Guess what Debbie, guess who is an ex-retard here?” Complainant claimed that after Pacheco told Flagg that Complainant was a former patient, Flagg responded, “Now we can have fun with her.” Complainant claimed that Cunuff, Pacheco and Flagg were unaware that she was eavesdropping on their conversations. Complainant testified that after she heard these comments, she became furious and felt “ripped apart” as a result of the apparent disclosure of this very confidential matter. She claimed that since becoming employed at Wrentham in 1984, she never told anyone there that she had previously been a patient at the facility. She also stated that these comments made her feel very cynical, bitter, and distrustful of everyone. Additionally, she believed that Pacheco, Cunuff, and Flagg made these comments in retaliation for her having previously filed a complaint at the Commission. I find Complainant’s testimony regarding these incidents lacked credibility and, therefore, I refuse to credit her testimony regarding this matter.

30. Debra Flagg testified that she has worked for Respondent for over twenty years. She claimed that as of March 8, 2000, she did not know that Complainant was a former

patient at Wrentham. Flagg stated that she had no knowledge that Complainant had resided at Wrentham until Respondent's legal counsel alerted her to the contents of Complainant's second MCAD complaint. In addition, Flagg testified that she never disclosed to anyone that Complainant had formerly resided at Wrentham. Moreover, Flagg denied making any derogatory comments about Complainant's status as a former patient. However, D'Arcangelo testified that when he investigated Complainant's allegations about the comments, Flagg told him that she did know that Complainant had previously resided at the facility. Although I believe Flagg likely knew that Complainant formerly resided at the facility at the time of this incident, I credit her testimony that she did not make any disparaging remarks about Complainant to Pacheco or Cuniff.

31. David Pacheco testified that he has worked with Respondent as an MRW I for over 26 years. According to Pacheco, he and Cuniff never had any conversation on or about March 8, 2000 regarding Complainant having formerly resided at the facility. Pacheco also claimed that he never discussed Complainant's status as a former patient with Flagg. Although Pacheco acknowledged that he became aware that Complainant had formerly resided at the facility, he did not remember when he first heard this information. Pacheco, however, had previously signed an affidavit that stated he became aware of Complainant's history as a patient at Wrentham when he first started working at the facility. Similarly to Flagg, I believe Pacheco likely knew Complainant had resided at the facility at the time of the incident, but I credit his testimony that he did not make any disparaging remarks about Complainant to Flagg or Cuniff.

G. FIRE ALARM INCIDENT

32. Complainant testified that on March 14, 2000, she had a confrontation with Pacheco while working in the Merrill laundry. According to Complainant, Pacheco came down to the Merrill laundry to speak with her. She claimed that he appeared upset. According to Complainant, Pacheco stated that he had heard she complained to others about his work performance. Complainant testified that Pacheco then approached her and said in a very threatening manner that he was going to beat her and slash her tires. Complainant testified that she then pulled the fire alarm because she feared Pacheco was going to hurt her. After pulling the fire alarm, Pacheco allegedly cursed at her and called her a “retard.” Complainant testified that after the fire department arrived, representatives of Respondent informed the fire department that she had previously been a patient at Wrentham.

33. Contrary to Complainant’s testimony, Pacheco claimed that he went to see Complainant to check on the status of some laundry. He claimed that when he entered the laundry room, he asked Complainant if something was wrong since she had failed to deliver the laundry in a timely manner. He stated that his unit had experienced similar problems with Complainant in the past. According to Pacheco, without warning or provocation, Complainant pulled the fire alarm. He testified that he did not verbally or physically threaten her in any manner. Pacheco stated that he then left the laundry to tell the other staff about the false alarm. I credit Pacheco’s testimony regarding this matter.

34. D’Arcangelo testified that he attempted to discuss the firm alarm incident with Complainant. In particular, D’Arcangelo wrote to Complainant on March 17, 2000, and asked her to meet with him to discuss the matter. On March 18, 2000, Complainant

responded by informing D'Arcangelo that he should call her attorney. On or about April 11, 2000, Respondent held a hearing to determine whether Complainant had engaged in unsatisfactory and inappropriate behavior by pulling the fire alarm. Complainant attended the hearing and was represented by counsel. At the conclusion of the hearing, Respondent decided not to discipline Complainant as a result of this incident. Pacheco likewise did not receive any discipline.

H. DAMAGES

35. Complainant claimed that Respondent constructively discharged her in April 2000, when it notified her about the transfer to Main laundry on the 1st shift. She stated that after the constructive discharge, she went several years without earning any income. Complainant testified that in 2003, she eventually began receiving monthly involuntary retirement benefits totaling \$692.00. She claimed that if she had continued to work for Respondent as she had planned, she would have eventually received retirement benefits of \$700.00 to \$800.00 per month.

36. When Complainant last worked for Respondent in May 2000, she was earning \$25,400 per year. She did not work again until December 2003, when she began working approximately 16 to 24 hours per week as a security officer at Foxboro State Hospital, earning between \$153 and \$190 per week. Complainant claimed that her security job does not provide her with the same benefits she enjoyed while working at Respondent, including health and dental insurance, and vacation and sick time.

37. Complainant testified that as a result of being constructively discharged, she felt very depressed, bitter, cynical, and torn apart. She stated that she could not come back

to work for psychiatric reasons. In addition, despite the fact that she had substantial amounts of personal time, vacation time, and sick time “on the books,” she claimed Respondent did not allow her to use any of that time and as a result received no compensation or benefits from Respondent after June 2000. According to Complainant, her life then “went down the tubes” and she became poverty stricken, destitute, and unable to pay her bills. In particular, she claimed she had her electricity shut off in February 2003. Complainant stated that she was also forced to apply for welfare and food stamps. She also testified that the constructive discharge caused her to become very depressed.

38. In October 2000, Complainant began treating with a psychologist, Mary Moore, for depression, anxiety, and panic attacks allegedly brought on by Respondent’s actions.

In a letter dated June 28, 2001, Dr. Moore wrote:

[Ms. Hall] was seen weekly for individual psychotherapy sessions and also is prescribed antidepressant medication by her family physician, which she is unfortunately not taking at this time due to extreme financial straits. Her depression was most likely caused by the loss of her regular third shift job as a mental health worker at the Wrentham State Hospital, and worsened by a series of personnel actions as well as severe stress of the last year. I cannot begin to describe to you what this situation has done to an individual with Ms. Hall’s background.

With respect to her being reassigned to the Merrill laundry, Dr. Moore wrote, “my information is that Ms. Hall was removed from her position and ultimately and punitively placed in an isolated laundry room in the basement, which activated not only strong feelings of failure and humiliation and disrupted her familiar routine but also activated intense feelings of danger and re-activated her post-traumatic stress disorder.” In addition, Dr. Moore stated, “It has been a terrible blow to her to be both wrongfully accused of patient abuse and to lose her familiar and well-loved patient care job.”

According to Dr. Moore, “Ms. Hall took a great deal of pride in her job, and in making sure that the patients in her care did not suffer the way that she suffered as a child at Wrentham State School. Moreover, Dr. Moore noted,

I am unsure as to the length of time it will take for Ms. Hall to regain her previous level of functioning, and in fact, I am concerned that she will not regain her previous level of functioning. I remain quite concerned for the well being of Ms. Priscilla Hall. ... She seems to have been treated in a punitive and arbitrary fashion, which has led to a profound decline in her level of functioning.”

Respondent did not offer any expert medical or psychological evidence to rebut or contrast Dr. Moore’s findings with respect to Complainant’s emotional distress. Consequently, I credit Dr. Moore’s opinions with respect to the emotional distress incurred by Complainant and related to both her transfer to the Merrill laundry and her not being provided reasonable accommodations for her disability.

III. CONCLUSIONS OF LAW

A. DISABILITY DISCRIMINATION

1. Disparate Treatment

Pursuant to Massachusetts General Laws c. 151B, § 4(16), an employer is prohibited from discriminating against a person on the basis of handicap. In this case, Complainant has alleged that Respondent took various adverse actions against her as a result of her status as a disabled individual.

As a threshold issue, Complainant must establish that she is a “handicapped person” within the meaning of M.G.L. c. 151B, § 4(17). The statute defines a “handicapped person” as 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. Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996); Dahill v. Police Department of Boston, 434 Mass. 233, 241 (2001); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 3 (1998); Talbert Trading Co. v. MCAD, 37 Mass. App. Ct. 56, 61 (1994).

It is uncontested that Complainant suffered from cerebral palsy. In addition, from 1993 to the present date, Complainant has suffered from chronic recurrent back pain necessitating continual medical treatment including physical therapy and medication. As a result of her condition, her physician prescribed numerous work restrictions, most of which pertained to her limited ability to lift persons or heavy objects. Respondent has also admitted that since 1994, it has granted reasonable accommodations to Complainant as a result of her medical condition. Lastly, in 1998, Respondent confirmed Complainant's "Handicapped Status." For these reasons, Complainant has established that she is a handicapped individual under the law.

Complainant must also establish that she is a "qualified handicapped person" within the meaning of M.G.L. c. 151B, § 1(16). A qualified handicapped individual is someone who can perform the essential functions of his or her particular job with or without reasonable accommodations. German v. Building Technologies Engineers, Inc., 25 MDLR 414, 421 (2003); Disability Discrimination Guidelines, § II(B). In the Joint Statement of Agreed upon Facts submitted to the Commission prior to the public hearing, Respondent stipulated that Complainant was a qualified handicapped person. However, during the course of the public hearing, Respondent attempted to distance itself from the stipulation, particularly since Respondent's supervisors testified that they repeatedly expressed concern about whether Complainant could perform the essential functions of

her job as an MRW I. Although Respondent claimed that it agreed to the stipulation based upon a mistake or misunderstanding, I agree with Complainant that it would be unfair and prejudicial to allow Respondent, after the commencement of the public hearing, to reverse its strategy and revoke its acceptance of the stipulation.

Notwithstanding the stipulation, I note that from April 1994 to November 1997, Complainant appeared to have satisfactorily performed the essential functions of her job under the agreed upon "Terms of Reasonable Accommodation" that modified Complainant's job duties for an indefinite period. Moreover, Respondent did not seriously question Complainant's ability to perform the essential functions of her direct care position until November 1997, after Complainant presented Respondent with a doctor's note that indicated she could no longer wash wheelchairs. Lastly, Respondent has continually asserted that she could have performed the essential functions of the new job it created for her in the Main laundry. Given these circumstances, Complainant has established that she is a qualified handicapped individual under the law.

a. Direct Evidence of Discrimination

Complainant has established by direct evidence that Respondent refused to reassign her back to her direct care position as a result of her disability. Direct evidence is evidence, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000), *quoting*, Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991); *see also*, Chief Justice for Administration and Management of the Trial Court (CJAM) v. MCAD, 439 Mass. 729, 732, n. 11 (2003) (typically, direct evidence consists of statements of discriminatory intent attributable to an employer). In a direct evidence

case, Complainant does not have to adhere to the three stage burden shifting paradigm because she does not need the benefit of an inference. Rather, a mixed motive analysis is applied to her allegation of discrimination. Pursuant to this analysis, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the employment decision. Wynn & Wynn, 431 Mass. at 665-667, Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000); *see*, CJAM, 439 Mass. at 735; *citing*, Lipchitz v. Raytheon Co., 434 Mass. 493, 506, n.19 (2001) (where discriminatory and nondiscriminatory hiring motives are both present, decision is unlawful if discriminatory animus is a "material and important ingredient").

If Complainant produces direct evidence of disability discrimination, then the burden of persuasion shifts to Respondent to show that it would have taken the same actions absent the illegitimate motive. Wynn & Wynn, 431 Mass. at 667, *citing*, Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). The appropriate question becomes whether Respondent's "proffered legitimate reason also motivated the employment decision, and if so to what extent." Wynn & Wynn, 431 Mass. at 667, *citing*, Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 301, *quoting*, Price Waterhouse, 490 U.S. at 252. In other words, if Complainant shows that an impermissible motive played a material part in an employment decision, then Respondent "must show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.*; Fountas, 22 MDLR at 269.

In this case, Respondent refused to assign Complainant back to her direct care position as a result of her medical restrictions related to her disability. D'Arcangelo testified that after an abuse or misconduct investigation is concluded, an employee

temporarily removed from coverage is either returned back to his or her direct care position or is terminated, depending on the results of the investigation. However, Respondent acknowledged that it refused to permit Complainant to return back to her direct care post because its supervisors had “concerns” regarding her ability perform the essential functions of the MRW I position given her numerous medical restrictions. Moreover, D’Arcangelo acknowledged that when other employees had been temporarily transferred to the Merrill laundry as a result of abuse charges, the employees only remained in the Merrill laundry for no more than a couple of months. Complainant, on the other hand, had to work in Merrill laundry for 2½ years.

Respondent has not produced any credible evidence that they refused to assign her back to her direct care position for any reason other than the medical restrictions related to her disability. Clearly, Respondent may legitimately attempt to ascertain whether Complainant could perform the essential functions of her job. Pursuant to the MCAD Guidelines: Employment Discrimination on the Basis of Handicap, § VI(b)(2) (2002) (“Disability Discrimination Guidelines”), an employer may ask an employee about their handicap or disability, if the inquiry is job related and consistent with business necessity. In addition, an employer may request medical information or make inquiries regarding a handicap or disability in order to help identify an effective accommodation or to determine whether a handicap or disability exists and whether an employee is entitled to an accommodation. *Id.*, at § VI(B)(2). However, Respondent should have “promptly” investigated the feasibility of providing Complainant with reasonable accommodations in November or December 1997, before it unilaterally decided that she could no longer provide direct care. After it received Dr. Oakley’s note that mentioned the additional

wheelchair restriction, Respondent should have promptly engaged in an appropriate inquiry with Complainant and then made a reasoned determination. Although the evidence indicates that MRW I's perform many different tasks,¹ Respondent, in effect, unilaterally decided she couldn't do the job merely because her physician restricted her from performing one additional duty. As a result, Respondent kept Complainant in a state of purgatory in the Merrill laundry for 2½ years. I, therefore, conclude that Respondent subjected Complainant to disparate treatment when it failed to return her to her direct care position after it completed its investigation of the abuse charges. Although I believe Complainant obstructed Dr. Oakley from providing a clarification of her medical restrictions after the parties agreed to submit a request to him in April 1998; months earlier Respondent had already unilaterally decided Complainant could not return to her direct care position. I believe Respondent should have, under these circumstances, returned Complainant to her direct care position after completing the investigation and then engaged in a legitimate assessment of her ability to perform the essential functions of her job with or without reasonable accommodations.

Complainant has also produced direct evidence that Respondent subsequently engaged in unlawful discrimination when it threatened to terminate her employment for not submitting additional medical documentation regarding her restrictions. Specifically, St. Germain sent two letters to Complainant (dated, respectively, April 22, 1999 and May 17, 1999) threatening "disciplinary action, up to and including termination" in the event Complainant failed to provide her with updated medical documentation. As stated above, Respondent clearly had a legitimate business reason for requesting updated medical information; however, it may not attempt to obtain such information through threats,

¹ See, *supra*, p. 3, ¶ 4.

intimidation, or coercion. As a result of Complainant's refusal to respond to its request, Respondent could have simply denied her request for reasonable accommodations. But it may not take or threaten any disciplinary action for simply not complying with a request for medical information related to her disability.

For these reasons, I conclude that Respondent engaged in unlawful disability discrimination when it refused to reassign her back to her direct care position as a result of her medical restrictions and then threatened her with termination for failing to provide additional medical information about her disability.

2. Failure to Provide Reasonable Accommodations

Complainant has also alleged that Respondent engaged in unlawful disability discrimination when it wrongfully failed to provide her with reasonable accommodations. In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) she is a "handicapped person;" (2) she is a "qualified handicapped person" capable of performing the essential functions of a particular job; (3) who needed a reasonable accommodation to perform her job; (4) Respondent was aware of the handicap and the need for a reasonable accommodation; (5) Respondent was also aware, or through a reasonable investigation could have become aware, of a means to reasonably accommodate the handicap; and, (6) Respondent failed to provide Complainant the reasonable accommodation. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Disability Discrimination Guidelines, at § IX(A)(3), *citing*, Wayne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 25 (1st Cir. 1992). If the Complainant meets her burden, then the burden shifts to Respondent to prove that the reasonable accommodation would pose an undue hardship on the

employer's business or that Complainant's disability would pose a "reasonable probability of substantial harm" to herself or others. Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995); Ryan v. Town of Lunenburg, 11 MDLR 1215, 1242 (1989), *citing*, Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985); Disability Discrimination Guidelines, § IX(A)(3). Complainant may then rebut Respondent's evidence by showing that either the reasonable accommodation would not impose an undue hardship or her disability would not impose a reasonable probability of substantial harm to herself or others. Disability Discrimination Guidelines, § IX(A)(3).

As discussed in detail above, Complainant has established that she is both a handicapped individual and a qualified handicapped individual within the meaning of c. 151B. Respondent was also clearly aware of her disability and the need for a reasonable accommodation. Since 1993, she regularly submitted doctors' notes containing numerous work-related restrictions related to her medical conditions. Moreover, Respondent has admitted that since 1994, it has granted reasonable accommodations to Complainant as a result of her medical condition. In 1998, Respondent also confirmed Complainant's "Handicapped Status" after receiving a completed "verification of disability" form from Dr. Oakley that contained numerous work-related medical restrictions. Thus, under these circumstances, Respondent was obligated to provide Complainant with a reasonable accommodation unless it can establish that doing so would cause an undue hardship on its business. Cox v. New England Telephone & Telegraph, 414 Mass. 375, 383 (1993).

A "reasonable accommodation" is defined as "any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it

possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment.” Disability Discrimination Guidelines, § II(C); *see*, Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 n.19 (2004) (definition is in accord with the statutory framework set out in G. L. c. 151B). An employer’s duty to provide a reasonable accommodation is triggered if an employee, as in this case, identifies herself as a qualified handicapped person and requests reasonable accommodations. Disability Discrimination Guidelines, § VII(A). It is also well settled that “the duty to provide a reasonable accommodation is a continuing one.” Donohue v. Sodexo-Marriott Services, Inc., 21 MDLR 204, 207, *quoting*, Ralph v. Lucent Technologies, 139 F.3d 199, 171 (1st Cir. 1998). In particular, an employer is required to engage in an open and ongoing dialogue or “interactive process” with a qualified handicapped individual about providing a reasonable accommodation. Hall, 25 MDLR at 217. The Commission has broadly construed an employer’s obligation, once it knows or reasonably should know that an employee needs an accommodation, to “search out and define what it could do to reasonably accommodate the employee and to communicate the offer to the employee.”² Forrest v. Wal-Mart, 23 MDLR 110, 117 (2001), *quoting*, Mortimer v. Atlas Distributing Co., 17 MDLR 1713, 1715 (1995); *see*, German, 25 MDLR at 422, Carter v. Boston Public Schools, 13 MDLR 1800 (1991); Williams v. Town of Stoughton, 1 MDLR 1385 (1991); *see also*, Ocean Spray Cranberries, 441 Mass. at 648-649 (when a complainant is entitled to request a reasonable accommodation, the employer is "obligat[ed] to

² The Federal regulations associated with the Americans with Disabilities Act likewise state, “It may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual.” Calero-Cerezo v. United States DOJ, 355 F.3d 6, 23 (1st Cir. 2004), citing 29 C.F.R. § 1630.2(o)(1)(iii).

participate in the interactive process of determining one"), *quoting*, Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002). This interactive process is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations. Hall, 25 MDLR at 217; Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000). "The importance of this interactive process cannot be overemphasized. It is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations." Mazeikus, 22 MDLR at 68-69.

In November 1997, Complainant submitted a note from Dr. Oakley that restricted her from washing wheelchairs. As stated above, this restriction triggered Respondent's decision to keep Complainant in the Merrill laundry after it completed its internal investigation. Although Scott made efforts in January 1998 to get a clarification on Complainant's restrictions, apparently, Respondent did not engage in any interactive dialogue with Complainant until April 1998, when Respondent's supervisors met with Complainant and her representatives. Regardless of whether the delay in meeting with Complainant was attributable to Complainant's attorney or Respondent's supervisors, by the time of this meeting Respondent had already unilaterally refused to permit Complainant to return back to her direct care post. As discussed above, I believe Respondent had an obligation to discuss possible alternative reasonable accommodations with Complainant before it unilaterally decided to keep her from returning to her former position. Respondent's apparent rush to judgment is inconsistent with the Disability Discrimination Guidelines, which encourages an employer to work with a disabled

employee to identify reasonable accommodations. Kuhn v. The Kimball Companies, 23 MDLR 331, 336 (2001).

Similarly, in April 2000, Respondent determined that Complainant could no longer perform the essential functions of her job as an MRW I and unilaterally decided to reassign her to a new position in the Main Laundry on the 1st shift. Although I credited the testimony of Respondent's witnesses that they had the best of intentions with respect to finding or creating a new position for Complainant, they clearly did not include Complainant or her representatives in these discussions. Without engaging in an interactive dialogue with Complainant, Respondent decided the new job in the Main laundry would provide her with a "permanent" accommodation that would purportedly address her extensive medical restrictions. Ironically, it is my clear impression from the testimony of Respondent's supervisors that they treated her in this particular instance as if she were a resident at the facility, as opposed to an employee who had legally protected rights to reasonable accommodations for her disability. As stated above, Respondent has an obligation to discuss possible alternative reasonable accommodations before it makes an employment decision based on her disability.

Respondent argued that Complainant was solely responsible for the breakdown in the interactive process, and that it persistently made good faith efforts to determine the Complainant's limitations. I disagree. First, St. Germain's repeated threats in 1999 to terminate Complainant's employment if she failed to provide additional medical information could hardly be construed as "good faith efforts" to engage in an interactive dialogue. To the contrary, St. Germain's threats only hindered the possibility of any meaningful interactive discussion and justifiably made Complainant less trusting and

more adversarial toward management. As discussed above, while Complainant obstructed Dr. Oakley from providing a clarification of her medical restrictions after the parties agreed to submit a request to him in April 1998; Respondent had already unilaterally decided months earlier that Complainant could not return to her direct care position. Lastly, while I credited the testimony from Respondent's witnesses that Complainant often refused to communicate with her supervisors, Complainant's inability or unwillingness to discuss matters with her supervisors does not excuse or justify Respondent's utter refusal or complete failure to speak to her about the transfer to the Main laundry.

As a result of Respondent's failure to engage in an interactive dialogue with Complainant on these occasions, I conclude that Respondent failed to properly investigate, define, and provide Complainant with her requested reasonable accommodations in violation of M.G.L. c. 151B, § 4(16).

3. Constructive Discharge

Complainant has also alleged that she left her employment under circumstances giving rise to a constructive discharge. Specifically, Complainant alleged that Respondent subjected her to a constructive discharge when it decided to transfer her to the Main laundry on the first shift in April 2000. To establish a case of constructive discharge, Complainant must prove that her work environment was made so intolerable that a reasonable person in her position would feel compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 35 (1995). Here, Complainant has failed to establish that the transfer amounted to a constructive discharge. First, in order to amount to a constructive discharge, typically the adverse working conditions must be unusually

aggravated or amount to a continuous pattern before the situation will be considered intolerable. *Id.*, 421 Mass at 34. However, Complainant never worked the new assignment as she suffered an on-the-job injury shortly after being informed of the transfer and then never returned to work. In fact, the evidence strongly supports the conclusion that Complainant did not return to work in May 2000 due to her medical condition and physical limitations as opposed to the purported intolerable working conditions. Furthermore, I believe Complainant's objections to the transfer amounted to no more than mere dissatisfaction with the nature of assignment, which generally is insufficient to establish a case of constructive discharge. *Id.*, citing, Stetson v. NYNEX Serv. Co., 995 F.2d 355, 361 (2d Cir. 1993). Ironically, I believe Respondent's supervisors created the position in the Main laundry partly because she had clearly objected to working in the Merrill laundry.³ Although I credited Complainant's testimony regarding the deplorable conditions in the Merrill laundry, her constructive discharge claim is not based on that assignment. Rather, her claim is paradoxically based on Respondent's efforts to find her a suitable position with better working conditions. Under these circumstances, Complainant has failed to establish a claim for constructive discharge.

B. RETALIATION

In her complaints, Complainant also alleged that Respondent engaged in unlawful retaliation. Specifically, Complainant alleged that as a result of her complaints filed at the Commission, Respondent both threatened her with termination for failure to provide additional medical information and then transferred her to the Main laundry.

³ As stated above, Respondent also created the new position in part to attempt to accommodate her numerous physical limitations.

Complainant also alleged that in retaliation for her protected activities, Respondent released confidential medical information regarding her having been a resident at the Wrentham facility. However, I refused to credit Complainant's testimony regarding the incidents in which she purportedly overheard co-workers discussing her confidential medical history, which obviates the need to analyze that particular retaliation claim.

M.G.L. c. 151B, § 4(4) makes it unlawful for any employer to discriminate against any person because she has opposed any practices forbidden under c. 151B or because she has filed a complaint, testified, or assisted in any proceeding under the c. 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Wheelock College v. MCAD, 371 Mass. 130, 136 (1976).

Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) she engaged in protected activity; (2) Respondent knew she had engaged in protected activity; (3) Respondent subjected her to adverse treatment; and, (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse action. 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; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); *see*, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that “one or more of the reasons advanced by the employer for making the adverse decision is false.” Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent’s adverse actions were the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

1. St. Germain Letters.

Complainant has established that she engaged in protected activity by virtue of the filing of her MCAD complaints in 1993 and June 1999. Complainant has also established that she was subjected to adverse employment actions as a result of the St. Germain’s threatening letters dated April 22, 1999 and May 17, 1999. In addition, on September 28, 1999, St. Germain wrote to Complainant a third time to notify her that a fitness for duty evaluation had been scheduled. In the September 28 letter, St. Germain scolded her for failing to respond to her earlier requests for information and again threatened her with termination. Although Complainant failed to produce sufficient credible evidence that St. Germain was aware of the 1993 claim at the time she wrote the

first two letters, I believe St. Germain likely knew about the June 1999 claim when she wrote the letter dated September 28, 1999.

However, Complainant has failed to establish a causal connection between St. Germain's letters and her protected activity. First, St. Germain's letters from April and May 1999 pre-date the protected activity and I believe the September 28, 1999 letter merely constituted St. Germain's next attempt to ascertain Complainant's medical status since she had failed to provide any medical information in response to the earlier letters. Further, even if a casual nexus could be established, Respondent has articulated legitimate non-retaliatory reasons for its actions. Namely, St. Germain testified credibly that she sent the letters to obtain additional medical information pursuant to the agreement reached between the Complainant's representatives and Respondent in April 1998. Lastly, as discussed at length above, although I found that the threats of discipline constituted unlawful disability discrimination, Complainant has failed to show that St. Germain's articulated reason for sending the letters was false or not the real reason for her actions. Thus, Complainant has failed to establish that Respondent engaged in unlawful retaliation as a result of St. Germain's conduct.

2. Transfer to Merrill Laundry

Similarly, Complainant has failed to prove that Respondent reassigned her to the Merrill laundry in April 2000 in retaliation for her protected activity. In particular, Complainant failed to produce sufficient credible evidence from which I could draw an inference that the transfer was the product of retaliatory animus. I credited the testimony of St. Germain, D'Arcangelo, and Scott that Respondent decided to transfer Complainant after they determined she could no longer perform the essential functions of the MRW I

position. Again, while their conduct may have constituted unlawful disability discrimination for failure to provide her a reasonable accommodation, Complainant has failed to show that the legitimate non-retaliatory reason for the transfer was false or not the real reason for Respondent's action. Consequently, Complainant has failed to establish Respondent engaged in unlawful retaliation in violation of M.G.L. c. 151B, § 4(4).

C. AGE DISCRIMINATION

In her initial complaint, Complainant also alleged that Respondent engaged in unlawful discrimination on the basis of age in violation of M.G.L. c. 151B, §§ 4(1B) when Respondent required her to both provide additional medical information regarding her disability and submit to a medical examination. In order to establish a case of age discrimination under M.G.L. c. 151B § 4(1B), Complainant has the initial burden of establishing a prima facie case of discrimination. Thus, Complainant must show that (1) she was over 40 years of age; (2) she was performing her job adequately; (3) she was subjected to an adverse employment action; and, (4) similarly-situated individuals were not subjected to the same adverse employment action. Wynn & Wynn, 431 Mass at 666 n. 22, *citing*, Wheelock College, 371 Mass. at 135, n.5 (1976).

In this case, Complainant was approximately forty-six years of age as of 1999 and, therefore, in a protected class under G.L. c. 151B. Moreover, as stated above, Complainant has established that she was subjected to adverse employment actions as a result of the St. Germain's threatening letters. However, I declined to credit Complainant's vague and non-specific testimony regarding Respondent's purported disparate treatment of the basis of age. Complainant has, therefore, not established

similarly-situated individuals were treated differently on the basis of age. For these reasons, Complainant has failed to establish that Respondent engaged in unlawful age discrimination in violation of M.G.L. c. 151B, § 4(1B).

IV. REMEDY

M.G.L. c. 151B, § 5 authorizes the Commission to fashion remedies to make Complainant whole. College-Town v. MCAD, 400 Mass. 156, 168-169 (1987). Since Complainant has failed to establish that Respondent subjected her to a construct discharge, she is not entitled to lost wages. But Complainant is entitled to monetary damages in compensation for the emotional distress she suffered as a direct and probable result of Respondents' unlawful disability discrimination. Stonehill College v. MCAD, 441 Mass 549, 576 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985). In Stonehill College, the Supreme Judicial Court cited factors that should be considered in determining an appropriate award for emotional distress damages, including: "(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 (e.g., by counseling or by taking medication)." 441 Mass. at 576.

As described above, I found that Respondent engaged in unlawful disability discrimination when it refused to allow Complainant to return to her direct care position and instead assigned Complainant, over her objections, to the Merrill laundry. I credited Complainant's testimony that during the 2½ years she was forced to work in the Merrill laundry, she endured significant emotional distress. Complainant aptly referred to the dark, wet, isolated, and deplorable basement facility as "the concrete hole" and her

assignment there isolated her from having regular contact with residents and other employees. More importantly, I credited Complainant's testimony regarding the importance of engaging in direct patient care with developmentally disabled people, which was a central aspect of her life.

In addition, I believe Complainant has established that she suffered emotional distress as a result of Respondent's threats to terminate her employment for not submitting additional medical documentation regarding her restrictions. Complainant testified credibly that after receiving the threatening letters from St. Germain, she "flipped out" and became very angry. She further claimed that she became "furious... My blood boiled" and "[these letters were] the straw that broke the camel's back."

With respect to Respondent's decision in April 2000 to transfer her to the Main laundry on the first shift, I credited Complainant's testimony that after she became aware of the reassignment, she experienced, "the shakes", anxiety and believed she had suffered a panic attack. In addition, she stated that she became furious at the thought of having to work on the day shift in contravention of her medical restrictions. She also testified credibly that she had no involvement whatsoever in the decision and neither Scott, nor any other supervisor, spoke to her about the transfer.

Complainant also sought treatment with a psychologist. I credited Dr. Moore's opinion that Respondent's refusal to return her to direct care position and her banishment to the Merrill laundry for 2½ years "activated not only strong feelings of failure and humiliation and disrupted her familiar routine but also activated intense feelings of danger and re-activated her post-traumatic stress disorder." In addition, Dr. Moore stated, "It has been a terrible blow to her to be both wrongfully accused of patient abuse

and to lose her familiar and well-loved patient care job.” According to Dr. Moore, “Ms. Hall took a great deal of pride in her job, and in making sure that the patients in her care did not suffer the way that she suffered as a child at Wrentham State School.”

Respondent failed to submit any credible evidence that rebutted or contrasted Dr. Moore’s opinions.

However, as described in detail above, Complainant failed to establish that she was constructively discharged from her employment. In addition, I believe Complainant failed to mitigate her damages by not meeting with or discussing her situation with Meyers. As stated above, Meyers repeatedly attempted to contact Complainant about her employment status from June 2000 to October 2002. Considering all of the medical evaluations related to her last workers compensation injury and Complainant’s refusal to engage in a dialogue with Meyers, Respondent filed for an involuntary retirement, which under these circumstances appeared to be a legitimate and reasonable. Thus, Complainant is not entitled to compensation for the emotional distress damages related to her leaving her job in May 2000 or the circumstances surrounding her status with Respondent after May 2000. Notwithstanding, I believe Complainant is entitled to an award of \$105,000 in compensation for the emotional distress she incurred as a direct and probable result of Respondent’s unlawful conduct.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

1. Respondent, Commonwealth of Massachusetts Department of Mental Retardations, shall pay Complainant, Priscilla Hall, within sixty (60) days of receipt of this decision, the sum of \$105,000 in emotional distress damages.
2. Respondent, Commonwealth of Massachusetts Department of Mental Retardation, shall conduct basic annual training sessions on unlawful handicap discrimination for all supervisors, managers and any other employees vested with supervisory authority at the Wrentham Developmental Center. 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 requirements.

3. 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 time periods allotted, 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. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 12th day of September, 2005.

Edward R. Mitnick
Hearing Officer