

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION &  
RAYMOND AUGER,  
Complainant,

Docket No. 98-BEM-3374

v.

CROWN CORK & SEAL, INC.  
Respondent

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Appearances: Matthew S. Buehler, Esq. Commission Counsel for Complainant  
Stephen E. Hughs, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 4, 1998, Complainant, Raymond Auger, filed a complaint with the Massachusetts Commission Against Discrimination charging Respondent with disability discrimination in violation of M.G.L. c. 151B §4(16). Specifically, Complainant alleged that his employment was terminated by Respondent, Crown Cork & Seal, Inc., shortly after his return from a medical leave of absence due to a heart attack. The Investigating Commissioner found probable cause to credit the allegations of the Complaint and Conciliation having failed, the matter was certified for a public hearing. A public hearing was held before the undersigned hearing officer on October 5, 6, 7, and 11, 2005. The parties have submitted Proposed Findings of Fact and Conclusions of Law. To the extent the Proposed Findings and Conclusions of the parties match my own, I have adopted them.

Having reviewed the submissions of the parties and the record of the proceedings, I make the following Findings and Conclusions.

II. FINDINGS OF FACT

1. Complainant, who resides in Lawrence, Massachusetts, was employed by Respondent as a printer/operator in its canning factory in Lawrence, Massachusetts from 1985 until April 14, 1997. At all relevant times, Complainant was a member of the International Association of Machinists and Aerospace Workers (IAMAW). Tr. Vol. I, p.28; Tr. Vol. II, p.40.
2. Respondent owns and operates a can manufacturing facility in Lawrence, Massachusetts. At all relevant times, Respondent's union employees were represented by IAMAW. Respondent is an employer within the meaning of G.L. c. 151B. Tr. Vol. I, p.28; Tr. Vol. II, p. 40.
3. Donald Bourque and Harvey Mitchell are co-workers of Complainant, who were employed by Respondent in the position of printer/operator at all times relevant to this matter. Tr. Vol. II, p. 102-103. Mitchell held the position of chief steward of the IAMAW union at the Lawrence canning facility in 1997. Tr. Vol. II, p. 40.
4. Kenneth Pietrzak was the Human Resources Manager for Respondent at the Lawrence facility at all times relevant to this matter. Tr. Vol. III, p. 37.
5. David Bush was the Plant Manager of Respondent's Lawrence facility at all times relevant to this matter. He retired in April of 2003. Vol. IV, p. 6.

6. Adrien Plourde was the Plant Superintendent of the facility, reporting to Mr. Bush. Plourde supervised Complainant's supervisors at relevant times. Tr. Vol. IV, pp. 55-56.
7. Tony Cordeiro was a union forklift operator at the facility from 1985 to March 2004, when he retired. Tr. Vol. III, pp. 9-10.
8. Complainant has a history of heart disease and suffered heart attacks in 1979 and again in 1990, while working for Respondent. As a result of his second heart attack, Complainant underwent an angioplasty and catheterization to unblock an artery. Complainant also had a defibrillator implanted in his chest in November of 1996. His medical records indicate that Complainant has a history of recurrent ventricular tachycardia, myocardial infarction, and coronary artery disease. Tr. Vol. I p. 36, 43-46; Ex. R-5, R-6.
9. Respondent produces aluminum cans for commercial use. The Lawrence plant typically runs four can production lines that turn out over 60,000 cans per hour. These production lines operate twenty-four hours a day. Printer operators work twelve-hour shifts on these production lines with the day shift beginning at 7 a.m. and the night shift taking over at 7 p.m. On a typical shift, one printer works on each of the four production lines and a fifth printer operator works as a floater. Tr. Vol. I, pp. 29-30, 31, 33-34.
10. As a printer/operator, Complainant operated a production line machine that printed ink labels on blank aluminum cans. After printing, the cans traveled down the production line to printer ovens. These ovens were approximately twenty feet from

- the Complainant. As a result of this proximity to the ovens, Complainant regularly performed his duties in an extremely hot work environment. Tr. Vol. I, pp. 29-33.
11. From February to early June 1996 the IAMAW went on strike and Complainant did not work during the strike. Tr. Vol. II, p. 79. In July of 1996, Complainant was disciplined for sub-standard work the previous month when he and other print-operators ran the wrong plate and manufactured many thousands of wrong cans, costing Respondent approximately \$19,000. Complainant was suspended for three days with pay as a result of this incident. Tr. Vol. IV, pp. 12-13, 117.
  12. On November 13, 1996, just prior to the beginning of his shift, Complainant felt sweaty, looked pale, and complained to Don Bourque that his chest was pounding and that he did not feel well. Complainant's supervisor suggested that an ambulance be called, but Complainant refused. He received permission to leave work and Bourque drove him home and then to Lawrence General Hospital. Tr. Vol. I, pp 106-107.
  13. Complainant was treated at St. Elizabeth's Hospital in Boston for several days, by Dr. Charles Haffajee. He was found to have suffered a heart attack and a defibrillator was installed in his chest soon thereafter. Tr. Vol. I, pp.43, 45-46, 107; Ex. R-6
  14. Complainant remained out of work from November 13, 1996 to March 3, 1997, a period of almost four months. During his convalescence he continued to treat with Dr. Haffajee and discussed returning to work. Dr. Haffajee advised Complainant to limit the use of his left arm and not to lift objects weighing over ten pounds. During

- this time, Complainant also began to suffer from depression. Ex. C-2; Tr. Vol. I., pp. 49, 52-53, 109-110.
15. On March 3, 1997, Complainant returned to work, and was welcomed back by Mr. Pietrzak who suggested that he ease back into work with a lighter than usual schedule. As a result, Complainant worked only 8 hour shifts during the week of March 3<sup>rd</sup>. After one week, he was re-instated to the regular 12-hour shift on production line, # 3. Tr. Vol. I, pp. 53-55,110-111.
  16. Respondent's collective bargaining agreement ("CBA") with the IAMAW for the relevant time frame required employees to wait for the employee on the next shift to relieve them before leaving work unless given approval by a supervisor. This rule continued to be a provision of the CBA at the time of hearing. Respondent's Plant Rules and Regulations for the relevant time frame required employees to obtain permission from a supervisor before leaving the plant or their work areas. Tr. Vol. IV, pp.59-61, 7-9 ; Ex. R-4 at §8.4.2 (p. 8); Ex. R-2.
  17. On Thursday, March 13, 1997, Complainant left work at the end of his shift before his relief arrived without permission from a supervisor. Complainant testified that when his replacement did not arrive, another production line operator signaled to him that he could leave, and that this was a common practice. Tr. Vol. I, pp. 56-57. Both Bourque and Mitchell also testified that it was a common practice for printer operators on adjoining lines to cover for each other on shift changes without supervisory authorization. Tr. Vol. II, p.43, 105. Complainant also testified that the fifth printer operator on a shift acted as a floater and could cover a production line if

the replacement operator had not arrived. Tr. Vol. I, p.57. I credit their testimony that this was a common practice.

18. Respondent's management met with Mitchell, the union steward, the following morning, Friday March 14<sup>th</sup>, to discuss whether to discipline Complainant for violating the CBA and Rule 5 of the Plant Rules and Regulations. Since the company had been informed hours in advance that Complainant's relief was going to be late, yet neglected to inform Complainant, Bush decided not to provide Plaintiff with a written reprimand or any other discipline for this infraction. Tr. Vol. I, p. 121; Tr. Vol. II, pp. 49-50; Tr. Vol. IV, p.15.
19. At this meeting, Mitchell informed Bush that it was common at that time for employees to disregard these rules if another printer/operator indicated that he would cover both machines. Bush indicated that Mitchell led him to believe that there was much more of that going on than Bush was aware of, so he advised Mitchell to notify the employees that this is serious infraction and that management would consider such infractions seriously going forward. That same day, Mitchell notified the union members, including Complainant, that the rule would be enforced. Tr. Vol. II, p.51; Tr. Vol. 4, p.16; Tr. Vol. I, p.132.
20. That same night, Complainant's relief was late again, as were other workers at the facility, because of a snowstorm. Nonetheless, Complainant consciously disregarded Mitchell's admonition and left work before his relief arrived without permission from a supervisor. According to Plourde, when the night supervisor, Kennedy realized that there were no cans coming down a production line, he went out to investigate and discovered that Complainant was not at his printer and the printer

was down. Kennedy became angry at this because the employees had just been warned about such infractions and he conferred with Plourde and Bush about what to do. They decided to provide Complainant with a letter of reprimand. Tr. Vol. I, p. 132-133; Tr. Vol. II, p. 60; Tr. Vol. IV, pp. 19-20, 64-65. I found Plourde to be a very credible witness and I credit his version of this incident.

21. Complainant's relief for the night shift on March 13 and 14, 1997 was not reprimanded or otherwise punished because he had not been sufficiently late to violate the company's absenteeism policy. In fact, Complainant testified that he saw his relief arriving as he was leaving the plant on March 13 or 14. Tr. Vol. I, p. 58; Tr. Vol. IV, p.20.
22. Soon after 7:00 a.m. on March 22, 1997, two of Complainant's supervisors (Mr. Kennedy and Mr. Kelley) and Mitchell met with Complainant to present him with a written reprimand dated March 19<sup>th</sup> for leaving prior to his replacement's arrival on March 14<sup>th</sup> without a supervisor's permission. Complainant became angry, protested that he had not left his production line unattended and refused to sign the reprimand. He stated words to the effect of "this is bullshit," and stormed out of the meeting. Tr. Vol. I, pp.61-64, 134; Tr. Vol. II, pp. 62-64; Ex. C-3.
23. A few minutes later, while walking through the plant toward the back-office, Plourde observed Complainant speaking in a heated manner with Bourque near their work stations. Mitchell joined Complainant but was unsuccessful in calming him down and Complainant told Mitchell that he was going home. Complainant testified that he "did not feel right" and that his chest felt tight. Mitchell testified that Complainant looked pretty white and sweaty. Mitchell testified that he asked

Complainant if he was all right and Complainant said he wanted to go home.

Mitchell advised him that he had to get permission from a supervisor to leave and Complainant responded he really didn't want to speak to a supervisor at that time. Tr. Vol. I, p. 63; Tr. Vol. II, pp. 45, 61-64, 67, 68, 108; Tr. Vol. 4, p.69.

24. Shortly after arriving at the back-office, Plourde was joined by Kennedy and Kelley who told him about Complainant's outburst and that Mitchell had gone off after Complainant to try to settle him down. A few minutes later, Mitchell came to the back office and informed Plourde that Complainant was "pissed off" and was going home. Plourde stated that he couldn't stop Complainant from going home and ordered the supervisor Kelly to call someone in for overtime. Kelley then ordered Mitchell to take over Complainant's printer machine until a replacement worker could be found. Tr. Vol. 2, p. 68, 69. Tr. Vol. 4, p.70.
25. Mitchell testified that he assumed that he had received the okay from Plourde for Complainant to leave, and he returned to Complainant's line and told him that he was all set and that he could go home. Tr. Vol. I, p. 64; Tr. Vol. II, p. 46. While Mitchell led Complainant to believe that he had permission to leave the plant, this was not the case, as Plourde believed that Complainant had already decided he was leaving the plant. Complainant went home at approximately 7:20 a.m. and soon thereafter went to Lawrence General Hospital with his wife. Both he and his wife testified that he was feeling sufficiently ill to go to the hospital. He was admitted and remained in the hospital for three days for observation. Tr. Vol. I, p. 61-67; Tr. Vol. II, p.127.

26. Sometime after 8:00 a.m. on March 22<sup>nd</sup>, Bush arrived at the facility and met with Plourde who informed him about what had occurred that morning. Plourde informed Bush that Complainant had left the facility in anger without having asked for permission from a supervisor, because this is what he believed had occurred. They agreed that Complainant's employment should be terminated. Plourde testified that Complainant had acted in defiance of the rules and had to be sent a message that his continued insubordination would not be tolerated, because you "can't run a company like that." Tr. Vol. IV, pp. 71-72. I found Plourde to be a very credible witness in this regard. In accordance with the CBA, Plourde contacted Ken Pietrzak and asked him to promptly notify Complainant by mailgram that he was suspended for three days pending discharge so that Complainant would not come in to work the following day when he was scheduled to work again. Plourde and Pietrzak did not learn until March 24<sup>th</sup> that Complainant was in the hospital. Bush was not sure exactly when he learned that Complainant had been hospitalized, but knew that it was not for some time after March 22, 1997. I credit their testimony and find that Respondent's management did not know at the time this mailgram was sent, that Complainant was ill or that he had been hospitalized. Tr. Vol. IV, pp.24, 45, 70-75; Tr. Vol. III, pp. 62, 103-105; Ex. R-4 §22.2.1.

27. On April 10, 1997, Bush, Plourde, and Pietrzak met with IAMAW President, Beland, IAMAW Business Agent, Salemme, and Mitchell at a Step 3 meeting to discuss the discipline of Complainant. Although he was expected to attend, Complainant did not appear at this or a prior meeting that had been cancelled due to his absence. Pietrzak testified that Bush had agreed to reschedule the earlier meeting because Bush want to

see Complainant “face to face,... to have him at that meeting and have [him] explain to [Bush] what was happening.” Tr. Vol. III, p. 74. I credit this testimony.

Complainant testified that he was counseled by his physician not to attend the Step 3 meeting because he might get too agitated and it might have an adverse effect on his health and Mitchell assured him the Union would act on his behalf. Tr. Vol. I, p. 71.

At the Step 3 meeting the Union argued that Complainant had been given permission to leave work on March 22<sup>nd</sup> because management was informed that he was ill.

Plourde did not concur with this version of events because he had been told by Mitchell on March 22<sup>nd</sup> that Complainant was angry and was going home, and not that he was ill. Tr. Vol. 3, pp. 73-78. Furthermore, on the important issue of whether Mitchell informed Plourde on March 22<sup>nd</sup> that Complainant was going home because he was ill, Plourde’s testimony was eventually corroborated by Mitchell. Mitchell recanted his statement at the April 10, 1997 Step 3 meeting and the one originally made in his deposition taken in 2004 on this subject, and admitted that Plourde was correct that Mitchell had informed him that Complainant was going home because he was upset or agitated. Tr. Vol. II, p. 45.

28. Subsequent to the meeting, Bush discussed the matter with Plourde and Pietrzak and decided that Complainant’s employment should be terminated for several reasons: (1) Complainant did not seem to care enough about his job to come to the Step 3 meeting; (2) Complainant had flagrantly violated company rules on March 14<sup>th</sup> and March 22<sup>nd</sup>; (3) Complainant’s conduct constituted insubordination; and (4) Complainant had a history of not accepting disciplinary action very well. As a result, on April 14, 1997, Bush sent Complainant and the union a letter explaining his

decision and terminating Complainant's employment. Plourde also testified that: "Three days pending discharge is just a common punishment when you want to suspend somebody. When you suspend somebody for three days, they have the opportunity to come back and say this is what they did, whatever the situation may be." This testimony is consistent with Pietrzak's testimony that it was important for Complainant to appear at the Step 3 hearing and defend his actions, because this was an opportunity for management to reconsider its decision. Tr. Vol. 4, pp. 36-37, 71-72, 78, 94-95; R-1.

29. Complainant claimed that he spoke directly to Mitchell prior to the April 10, 1997 Step 3 meeting and informed him he could not attend. However, Complainant's wife testified she did all the communicating with the union at that time. Tr. Vol. II, p. 143. Moreover, Mitchell testified that he never spoke to Complainant after March 22, 1997 and before the Step 3 meeting. Tr. Vol. II, p. 73
30. On March 25, 1997, three days after Complainant left work at Respondent, Complainant's primary care physician and cardiologist, Dr. Chatterjee, informed Complainant that he did not want him to return to work at that time, because he wanted to run more tests. He did not state at that time that Complainant was permanently disabled from working. In December, 1997, in connection with Complainant's application for Social Security Disability benefits, Dr. Chatterjee wrote a note declaring that Complainant was unable to resume any type of employment permanently. Tr. Vol. I, pp. 159-162, 166; Tr. Vol. II, pp.140-141; Ex. R-6.

31. Complainant testified that he became depressed after the termination of his employment and denied that he was depressed in November 1996, however his psychologists' records indicate that he suffered from depression prior to his termination. Tr. Vol. I, pp.94, 107-109; Ex. R-11. Complainant came to believe, at least as early as July 1997, that he could not work any longer. Tr. Vol. I, pp.163-165; R-6.
32. Complainant applied to the Social Security Administration ("SSA") for Social Security Benefits in the fall of 1997 and in early 1998. As part of this application Complainant stated on a form dated February 26, 1998, entitled Work Activity Report Employee, "I became unable to work because of my disabling condition on November 16, 1996. I am still disabled." In addition, he informed an SSA employee that he attempted to work for three weeks from March 3 to March 22, 1997 but had to leave because of disability. Furthermore, he stated on the Work Activity Report Employee portion of his application that his work ended on March 22, 1997 because he was "disabled." On October 10, 1998, the SSA granted his application and declared him to be permanently disabled from all work as of November 13, 1996. Tr. Vol. I, pp. 195, 195-204; Ex. R-8.
33. In 1998, an impartial arbitrator selected by the IAMAW and Respondent presided over an arbitration of the union's grievance concerning the termination of Complainant's employment. Complainant and the union were represented by an attorney at the arbitration. After hearing testimony from all persons chosen by the union and Respondent and reviewing briefs from both parties, the arbitrator found that the union's witnesses were not credible and that Respondent had terminated

Complainant's employment for good cause. Ex. R-9 at 9-10, 12-15; Tr. Vol. I, pp. 206-207.

34. Mitchell, Bourque, and Complainant all testified at the hearing before the MCAD that they were not aware of any instances in which Respondent's managers in this case, Bush, Plourde, and Pietrzak had discriminated against anyone on the basis of disability. In addition, they stated that both Bush and Pietrzak had the reputation of being fair men. Tr. Vol. II, pp. 80-81, 120-121; Tr. Vol. I, pp. 207-208. Mitchell and Bourque also testified that Respondent had a history of welcoming back union workers from medical leaves of absence and of allowing employees to perform light duty at full pay when necessary. Tr. Vol. II, pp. 81-84, 121. Complainant had returned to work twice from lengthy medical leaves of absence due to his heart condition. He testified that he had heart attacks in 1990 and 1996 and was welcomed back to work by Respondent each time without difficulty. In fact, in March 1997, he was accommodated by being allowed to work light duty initially. Tr. Vol. I, pp. 104-105, 107, 110-112.
35. Plourde and Tony Cordeiro testified to a lengthy list of Respondent's employees who returned from leaves of absence for serious medical conditions and whose illnesses or injuries were regularly accommodated. Tr. Vol. III, pp. 15-16, 27-28, Tr. Vol. IV, pp. 80-83. Mitchell testified that there were other printer operators who had heart conditions and who had had heart attacks. Tr. Vol. II, p. 47.
36. Tony Cordeiro had a very similar heart history to that of Complainant and yet was allowed to return from several medical leaves of absence without objection. He had heart surgery in 1988 and was out of work for three months and, like Complainant,

had a defibrillator installed in his chest in December 1996. He returned to work briefly in January 1997 when he acquired a heart infection that kept him hospitalized for months and unable to return to work until May 1997. He worked until he voluntarily retired in March 2004 and testified credibly that he was always treated fairly by Respondent, even when he was disciplined for making a mistake. He testified that the forklift operator position was physically demanding and that he was frequently subject to pressure to get the proper product loaded promptly onto trucks. Cordeiro also testified that all his medical bills were paid by Respondent without objection. Tr. Vol. III, pp. 9-10, 15-17, 18-25, 27, 33.

37. Pietrzak testified that Respondent was self-insured at relevant time frames and paid substantial medical bills for many of its employees and their dependents. He also testified that the other plant supervisors had no knowledge of the medical payments made to employees. Tr. Vol. III, pp. 40-42. Complainant also admitted that all of his bills for both heart attacks were paid by Respondent. Tr. Vol. I, pp. 47-48, 104.
38. Complainant made no attempt to mitigate his damages after he was terminated. Although he was found to be clinically depressed as early as November of 1996, he did little to help his condition over the next several years. He discovered he had sleep apnea and was informed that this affected his mood. Yet he did not follow instructions to lose weight and stop drinking alcohol. Complainant also admits that he also stopped using the breathing apparatus that was designed to help him sleep better. His psychological records from Greater Lawrence Mental Health Center indicate that many of his problems were family issues centered about his drinking of alcohol. Although he was prescribed anti-depressant medications by his

psychotherapists in August 1998, his medical records appear to indicate that he continued to drink alcohol setting up situations in which either he was drinking alcohol while on the anti-depressants, a potentially harmful practice, or drinking in lieu of taking the medications, thereby undermining his treatment. Moreover, even if Complainant was capable of working as of March 22, 1997, he presented no testimony or evidence that he made any effort to obtain work of any kind from any source. Ex. R-7, R-11, R-10; Tr. Vol.1, pp. 181-182, 188-193.

### III. CONCLUSIONS OF LAW

Massachusetts General Law c. 151B § 4 makes it an unlawful practice to dismiss from employment a qualified handicapped individual, on account of his handicap. An employee may prove a claim of discrimination on the basis of handicap by presenting credible evidence that (1) he is handicapped within the meaning of the statute; (2) he is a qualified to perform the essential functions of the job with or without reasonable accommodation; (3) he was terminated or otherwise subject to an adverse action by his employer; and (4) that he was terminated because of his handicap. Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 449 (2002); citing Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998).

Complainant may prove discrimination by direct evidence or in the absence of direct evidence, by employing the burden shifting analysis initially established in McDonnell Douglas v. Green, 411 U.S. 792, 802-803 (1973), and adopted by the our Supreme Judicial court in Wheelock College v. MCAD, 371 Mass. 130 (1976). Pursuant to this burden-shifting analysis, once the Complainant has established a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for its actions, supported by some

credible evidence. Once it has done so, the employee must prove that the employer's reasons are a pretext for unlawful discrimination because it was motivated by discriminatory intent or state of mind. Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000); Lipchitz v. Raytheon, 434 Mass. 493 (2001).

Since there is no direct evidence of disability discrimination in this matter, Complainant may prevail only by proving his case by circumstantial evidence under the McDonnell Douglas/ Wheelock College burden shifting analysis. While I conclude that Complainant in this case has established a *prima facie* case, Respondent has articulated credible reasons for its actions and Complainant has failed to show pretext for the termination, thereby compelling a ruling for Respondent in this matter.

Complainant has established that he was a handicapped individual within the meaning of G.L. c. 151B § 1(17). The term handicap includes someone with a physical or mental impairment which substantially limits one or more major life activities or has a record of having such impairment, or is regarded as having such impairment.

Complainant suffers from a heart condition that has caused him to suffer two heart attacks one in 1979 and again in 1990. He has undergone cardiac catheterization and angioplasty and had a defibrillator installed to keep his heart beating regularly. His medical records indicate that he has a history of recurrent ventricular tachycardia and a history of myocardial infarction. His heart disease has caused him to be unable to work for significant periods of time over period of several years. While Complainant may not have been significantly impaired in any major life functions at the time he was terminated from his employment, he certainly had a significant history of heart disease that would qualify him as having a record of a major life impairment, within the meaning of the statute. I conclude that

given his history of symptoms and treatment for heart disease, Complainant was a handicapped individual.

Respondent would have me find that Complainant was not a qualified handicapped individual within the meaning of the statute because he cannot show that he was qualified to perform the essential functions of his job. Respondent argues that Complainant is unable to establish the second prong of a *prima facie* case because he applied for Social Security Disability benefits and declared, as part of that application, that he was no longer able to work as of the time of his last hospitalization in November of 1996. Respondent asserts that the testimony at the Hearing, as well as the oral and written pronouncements of his physicians during 1997, support the conclusion that Complainant was fully disabled from work as soon as he left Respondent's workplace on the morning of March 22, 1997 and that he is also estopped from claiming he was a qualified individual with a disability at relevant times due to his application for SSDI benefits.

Complainant testified that he felt sweaty and his chest was pounding when he left work on March 22, 1997. He was admitted to the hospital complaining of two recent episodes of indigestion and burning in his chest and remained there for observation for three days. He also testified that his cardiologist told him he did not want him to return to work at that time because he wanted to run more tests. His physician did not state in writing at that time, that Complainant was unable to return to work permanently and even asked him prior to April 22, 1997, if he had returned to work. Complainant stated that he did not discuss returning to work with Dr. Haffajee, the heart surgeon who installed his defibrillator.

Prior to that time, Complainant had worked from March 3<sup>rd</sup> to March 22<sup>nd</sup>, a period of three weeks, without incident. He does not allege that he was unable to perform the

essential functions of the job when he returned to work in March of 1997, nor was he seeking an accommodation. I find that there is insufficient evidence that in March of 1997 Complainant was not capable of performing the essential functions of his job and could not have returned to work had he not been terminated from his employment. Complainant stated that he came to believe he was no longer capable of returning to work in the summer of 1997. It was not until December of 1997 in connection with Complainant's disability application that both his physicians wrote letters stating that he was permanently disabled from working.

Respondent further argues that Complainant is estopped from claiming he was a qualified individual with a disability at relevant times because he filed for Social Security Disability benefits in the fall of 1997, and declared himself to be permanently disabled from work as of November 1996. The Commonwealth has looked to Federal courts for guidance when ruling upon disability claims brought under M.G.L. c. 151B. Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443, 452 n.6 (2002). Both Massachusetts and Federal courts have ruled that plaintiffs are not necessarily prevented from filing claims of disability discrimination after seeking and obtaining disability benefits, such as SSDI. Id. at 450; Labonte v. Hutchins & Wheeler, 424 Mass. 813, 816-817 (1997); Cleveland v. Policy Management Systems Corp. 526 U.S. 795, 801-806. In Labonte, the Court noted that a majority of courts reject the proposition that seeking benefits automatically disqualifies a plaintiff from bringing a discrimination claim. Id. at 817. Despite the courts concerns about plaintiffs who may "play fast and loose with the courts by claiming to be too disabled to perform the functions of a job and also claiming that they were terminated from their positions despite being able to perform those same

functions . . . if the evidence creates a disputed issue of fact whether the handicapped person can perform the essential functions of the job, then estoppel is not appropriate.” Labonte, 424 Mass. at 816 [citing McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996)]. In this case, Complainant’s assertion that he was terminated because he is handicapped is not inconsistent with his later claim that he was permanently disabled from work. Complainant’s assertion as to the motive for his termination implicates Respondent’s state of mind at the time. Contrary to my findings in this case, Respondent could have acted upon a perception that Complainant was handicapped or because of his record of being handicapped, and its action, if motivated by such considerations, would not necessarily implicate Complainant’s actual ability to do the job. It is precisely this type of scenario that was contemplated by the “regarded as” and “record of impairment” prongs of the definition of handicap, which were intended to protect employees from situations where the employer acts out of a belief that an employee is handicapped when in fact the employee is capable of performing the essential functions of the job. Furthermore, consistent with Respondent’s belief in this case, I conclude that Complainant left work on March 22<sup>nd</sup> because he was angry and agitated and not because he could no longer perform the job, and as a result, was terminated for insubordination. Complainant never declared he was leaving work on March 22<sup>nd</sup> because he couldn’t do the job and had he not been terminated, he might well have returned to work after his brief hospitalization. The fact that, in hindsight, Complainant came to the conclude months later that he was no longer able to work and declared himself to be handicapped as of the date of his last medical leave is irrelevant to Respondent’s mind at the time of his termination.

Therefore, I cannot conclude that Complainant is estopped from claiming that he was a qualified handicapped individual at the time of his termination, and that he is unable to establish, for this reason, the second prong of a *prima facie* case. I conclude that Complainant has satisfied the other elements of a *prima facie* case, in that he has shown that he was subjected to an adverse action, termination of his employment.

Having found that a *prima facie* case is established, the second stage of the three-phase analysis allows the employer to rebut the presumption of discrimination by “produc[ing] credible evidence to show that the reason or reasons advanced [for the termination] were the real reasons.” Blare, 646 N.E.2d at 115. All that the employer must do is present its own credible reasons for its actions based on what it believed at the time. However, “[t]he employer does not have to persuade the trier of fact that it was correct in its belief.” Tate v. Department of Mental Health, 419 Mass. 356, 362 (1995). In fact the employer’s decision need not be sound, but unless it is shown to be discriminatory or pretextual, it is not a violation of M.G.L. c.151B. See Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 766 (1986), citing Smith College v. MCAD, 376 Mass. 221, 229 (1978).

Respondent has met its burden of articulating legitimate non-discriminatory reasons for Complainant’s termination and its reasons are supported by credible evidence. Respondent provided credible testimony from Adrien Plourde and David Bush, the managers who made the decision to terminate Complainant’s employment, that they were not aware that Complainant went home ill on March 22, 1997. Rather, they testified they were informed by the union representative that Complainant left the facility without permission from a supervisor because he was angry and upset. Significantly, Complainant’s union

representative, Mitchell, confirmed that he told Plourde, the highest ranking manager on duty at the time, that Complainant left work because he was upset or agitated. Both Plourde and Bush testified, without contradiction from other testimony or documentary evidence, that they had no reason to believe at the time that Complainant was too ill to obtain permission of a supervisor before leaving work.

That same morning, Respondent's managers had suspended Complainant for three days, pending dismissal, because he left work for a second time in two days prior to his replacement arriving to take over his production line. This was in direct contravention of a company policy and management's admonition to Complainant and other union employees on March 14, 1997, that they intended to enforce this policy, and plant rules. Complainant's final departure occurred immediately after he stormed out of a meeting with two of his supervisors in which he refused to acknowledge his violation of the rules and declared the reprimand to be "bullshit." His conduct was insubordinate and Respondent was within its discretion to discharge Complainant for his flagrant violation of its rules in order to maintain discipline and order at the facility.

Complainant admitted that he left his employment voluntarily at approximately 7:20 a.m. on March 22, 1997. Although he now claims that he did so because he felt ill from his heart condition, it is undisputed that Respondent did not know that day that Complainant claimed to have left work that morning due to health reasons or that he was hospitalized that day. Consequently, the decision made later that morning to terminate Complainant's employment, the first stage of which was to serve him and the union with a notice of three days' suspension pending discharge, was made without any awareness that Complainant had suffered any deterioration of his health that might affect his ability to work. Although the

formal decision was not issued until April 14<sup>th</sup>, this was only after Complainant failed to appear for two scheduled Step 3 meetings with the union and management. Three weeks later, at the Step 3 meeting, the union argued that Complainant's hospitalization was justification for overturning the initial discipline. The union also claimed that Mitchell had informed management that Complainant was ill on March 22<sup>nd</sup> and was given permission to go home. Plourde knew this claim to be false, as did Mitchell, who later admitted under oath that he did not inform management that Complainant was going home ill. The Union's claim at the Step 3 hearing that Complainant left work on March 22<sup>nd</sup> because he was ill was actually a misrepresentation of the events of that morning. Consequently, Respondent's managers felt they had been given no valid reason to change the original decision and Bush issued it several days later. I also am convinced that Complainant's failure to appear at two scheduled Step 3 hearings was a factor in Respondent's decision to uphold his termination. The evidence supports Respondent's position that the motive for Complainant's discharge was violation of company rules and insubordination. Given these facts and Complainant's failure to appear for two scheduled Step 3 hearings to address his termination, I conclude that Respondent has articulated legitimate non-discriminatory reasons for its decision to terminate his employment.

Since Respondent has met its burden under the second stage of the three-part burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, *supra* at 802-803, Complainant must show by a preponderance of the evidence "that the basis of the employer's decision was unlawful discrimination." Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000). Although Complainant may meet this burden by showing the reasons put forth by Respondent are false, he retains the ultimate burden of

proving through credible evidence that the actions allegedly taken against him by Respondent were discriminatory in intent. Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001). Abramian, *supra* at 119.

Complainant asserts that Respondent's decision to enforce a provision of the collective bargaining agreement and its plant rule regarding not leaving the production line without a supervisor's permission, absent the arrival of relief, is evidence of pretext. Complainant would have me find that management's decision to enforce this rule, and to discipline him for violating the rule, is a pretext for discrimination because other employees violated the rule and were not disciplined or terminated. There was testimony that it was common for employees to leave the production lines prior to their relief arriving, without prior authorization from a supervisor. Complainant claims that therefore, the only reasonable explanation for his being "singled out" is his disability. However, Respondent did not reprimand Complainant for his first violation and immediately thereafter on March 14, 1997, managers made it eminently clear to *all* employees that it intended to enforce the policy in question. Mitchell admitted that this admonition was disseminated throughout the facility that day. Nonetheless, Complainant disregarded this directive later that same day. It seems unlikely that if Respondent were trying to entrap Complainant, its plant manager would have insisted on March 14<sup>th</sup> that the union immediately notify Complainant and other employees of management's intent to enforce the rule.

Complainant rests his entire claim upon the assertion that Respondent had never enforced this rule prior to his discipline or subsequent to his violation. Mitchell and Bourque both testified that they were aware of other employees who left work before their relief arrived if a colleague offered to watch their machine until the relief arrived. While

their testimony suggests that, in practice, the rule may have been violated, there was no evidence to suggest that Plourde and Bush were aware of this practice. They testified credibly that the existence of this practice came as a surprise to them. According to Plourde, late arrivals without prior notice are very rare occurrences at the facility because employees generally call in if they are running late. He testified that the use of cell phones has made this practice easier and more common. This advance notice gives the supervisor time to make arrangements to cover for the delay, whether by asking the employee to stay longer, getting someone else to stay longer, or having a printer/operator on an adjacent line, cover both machines. Finally, there also is no evidence to suggest that the decision to discipline Complainant for his flagrant violation of the rule twice in two days, was related to his disability or the intent to rid him from the workplace because of his disability. Respondent's legitimate enforcement of its work rules, once it was placed on notice of the violation, is insufficient evidence of discriminatory animus in this case. While Respondent's business judgment may be questioned as unsound or absurd, if not shown to be discriminatory or pretextual, is not a violation of M.G.L. c.151B. Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 766 (1986). Moreover, the union grievance challenging Complainant's termination was heard by an arbitrator whose specific province is to interpret the collective bargaining agreement, and to determine whether work rules have been applied in a fair and consistent manner. The arbitrator in this matter determined that Complainant's termination was for good cause.

In cases such as the instant one in which there is no direct evidence of discrimination, an employee may support a contention of discrimination through a variety of types of circumstantial evidence including: (1) data or other evidence that the employer

mistreats a particular protected group; (2) comments or writings that strongly suggest discriminatory animus against the complainant's protected status; and (3) temporal proximity of the adverse job action to comments or actions concerning the plaintiff's protected status. See MCAD Guidelines : Employment Discrimination on the Basis of Handicap – Chapter 151B; Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. at 122, 129 (1997); Lipchitz v. Raytheon Co., 434 Mass. 493, 508-509 (2001); McDonnell Douglas supra at 804; Fontaine v. Ebtec Corp., 415 Mass. 309, 314-315 and n.7 (1993).

Complainants in employment discrimination cases may support their claims by introducing credible evidence that a respondent treats a protected group disparately through general customs and practices which are biased against the protected group of which the complainant is a member. Matthews supra at 130, n.4 . Complainant introduced no evidence that Respondent treated employees with disabilities in a disparate fashion.

Other than Complainant's charge that his punishment for violation of the CBA and plant rules was unduly harsh as to him, Complainant has not demonstrated that Respondent engaged in any sort of disparate treatment of individuals with disabilities. To the contrary, there was credible testimony at the Hearing by witnesses for both Complainant and Respondent that Respondent has a demonstrated record of fairness to employees with disabilities, welcoming back numerous union employees from extended medical leaves of absence, providing them with accommodations to ease their return, and assuming the often significant costs of their medical care. This includes Complainant, who was out of work due to his heart condition in late 1990 and again from November 1996 to early March 1997. Complainant admits he was welcomed back to work by Respondent at whose suggestion he eased back in by working shorter shifts his first week back. There was no evidence that any

employee with medical authorization to return to work was not welcomed back by Respondent and Mitchell, the union representative, testified specifically that there were other printer/operators who worked for Respondent who had heart conditions and heart attacks, and suffered no unfair treatment by the company.

The most convincing evidence on this subject was the testimony of Tony Cordeiro, a former employee of Respondent, who suffered from a heart condition almost identical to that of Complainant and had a defibrillator installed in his heart at almost the same time. Nonetheless, he was out of work due to severe complications and additional surgery on several occasions in 1996 through 2000, yet was always welcomed back to work without any negative repercussions. While Complainant attempted to undermine Cordeiro's testimony by suggesting that his situation was different because he was a forklift operator, not a printer/operator, I did not find this distinction persuasive. Cordeiro testified credibly that the forklift operators also work under pressure in a physically demanding job. I conclude that his testimony exemplified Respondent's even-handed policy toward employees with disabilities, injuries, or illnesses.

Complainant's suggestion that Respondent treated him disparately and discharged him due to concerns about his extensive medical bills and possible lost time from work is equally unsupported by the evidence. Complainant himself admits that all of his bills associated with his heart attacks in 1990 and 1996 were paid by Respondent. Furthermore, Cordeiro testified that all of his substantial bills for medical services (which, unlike Complainant, involved months of in-patient hospitalization and a second pacemaker implant) were paid in full, even those that took place later in 1997 and again in May of 2000.

Finally, Pietrzak rebutted these allegations by credibly describing a number of instances in which Respondent made far greater medical payments to other employees or their insured dependents than it did on behalf of Complainant. These employees, such as Carol Garvey and Tony Cordeiro, were returned to work when medically able despite these payments. In addition, Pietrzak testified that decisions to make such payments were made in Philadelphia, not by the managers at the Lawrence facility who made the decision to discharge Complainant, and who were not even aware of these payments.

While Complainants may also point to general negative comments or writings by supervisors against a protected group or comments directed against the complainant or other employees due to their membership in a protected group. Abramian, *supra*. Complainant did not produce evidence of any comments or written statements evidencing discriminatory animus against the disabled or against him and his heart condition by any of the managers who participated in the decision to discharge him. Neither Complainant, nor Mitchell, nor Bourque testified to any such comments by management. To the contrary, the evidence from Complainant's own witnesses was that they were unaware of any situation where Bush discriminated against an employee on the basis of health or disability, and had always found him to be fair. They also testified that they were not aware that Plourde or Pietrzak, the other managers who participated in the termination decision, had ever evidenced discriminatory animus toward any employee based on the employee's ill health or disability.

Lastly, Complainant has not demonstrated, absent more, that the temporal proximity of his termination to his having recently returned from an extended medical leave points to a discriminatory motive. As stated earlier, Complainant was welcomed back to work from his medical leave and granted an accommodation. In light of the above, I find no evidence of

pretext pointing to discriminatory animus on the part of Respondent's managers in reprimanding Complainant and terminating his employment.

The reasons Respondent proffered for the termination were legitimate and non-discriminatory. The decision was premised on Complainant's three violations of Rule 8.4.2 of the CBA and Rules 4 and 5 of the Plant Rules and Regulations within a brief period of time in March 1997; his angry outburst at the meeting with two supervisors on the morning of March 22<sup>nd</sup>, his failure to acknowledge the written reprimand and storming from the meeting, and finally his leaving the plant. Respondent was justified in considering these actions as insubordination. Moreover, Complainant's failure to appear at two scheduled Step 3 hearings to explain and attempt to justify his actions, including leaving the workplace without apparent authorization on March 22<sup>nd</sup> was sufficient reason for Respondent to uphold his termination.

Moreover, Respondent's actions occurred within the context of Complainant's recent history of workplace infractions and his obstinate reaction to prior discipline. Only a few working months prior, Complainant had committed two other serious infractions. In February 1996, Complainant was disciplined for substandard work. Shortly thereafter, the union went out on strike for almost 6 months. A few weeks after Complainant's return to work, in July 1996, he responded angrily to three days of suspension<sup>1</sup> for substandard work that caused the company a loss of \$18,000. A few months later he went out medical leave due to a heart attack. Hence, in the period of six to seven months during which he was actually working at the facility, Complainant had a significant history of infractions.

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<sup>1</sup> A colleague was fired for his role in this major work error.

Under these circumstances, Respondent had legitimate non-discriminatory reasons to terminate Complainant's employment. It also had a legitimate expectation of proper adherence to its rules and the requirements of the CBA. Complainant was unable to present credible evidence that Respondent's explanation for its actions was false or that its managers were motivated by discriminatory animus. Given all of the above, I conclude that Complainant has not proved a violation of G.L. c. 151B and his Complaint should be dismissed.

IV. ORDER

I hereby Order that the Complaint in this matter be dismissed. This Decision is 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 with the Clerk of the Commission within ten days of receipt of this Order and a Petition for Review within thirty days of receipt of this Order.

So Ordered this 3<sup>rd</sup> day of October, 2006

Eugenia M. Guastaferr  
Hearing Officer