

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

RICHARD SAMARTIN

Complainant

v.

No. 97-SPA-0383

METROPOLITAN LIFE
INSURANCE COMPANY

Respondent

ORDER OF THE FULL COMMISSION¹

This matter is before us following a referral from the Investigating Commissioner pursuant to 804 CMR 1.20(3)(b). Complainant, an employee of State Street Research and Management Company went on disability leave in January 1995 because of a “mental illness or nervous disorder.” For the first six months of disability, Complainant received benefits under his employer’s short-term disability plan. Beginning in July 1995, Complainant began receiving benefits under his employer’s long-term-disability (LTD) plan,² offered through Respondent Metropolitan Life Insurance Company.

The parties agree the LTD plan provides benefits to individuals who are unable to work because of sickness or injury after the first six months of disability. The parties also agree that after the first six months, the plan provides benefits to individuals until age 65, unless the recipient has a “mental illness or nervous disorder.” Where the recipient suffers

¹ Pursuant to the Commission's Rules of Procedure, this Order of the Full Commission is not yet subject to judicial review: “For the purpose of judicial review pursuant to M.G.L. c. 151B, s.6, the Decision of the Full Commission on appeal from the Decision of The Hearing Commissioner pursuant to 804 CMR 1.23(1) (h), shall constitute the Final Order of the Commission.” 804 CMR 1.24(1).

² Disability benefits provide salary replacement for employees unable to work due to illness or injury. Some employers provide a right of recall so that disabled employees can return to their jobs once they have recovered.

from a mental illness or nervous disorder, as opposed to a physical disorder, benefits end after 24 months.³

Pursuant to this provision, Complainant received notice that his benefits would cease effective July 5, 1997. Complainant filed a timely complaint with the Commission asserting that the disparity in benefits provided under the LTD plan violated the handicap discrimination provisions of Massachusetts General Law Chapter 151B. The Commission amended the complaint, on Complainant's motion, to include a claim under the public accommodation provisions of Massachusetts General Law Chapter 272, § 98.

Respondent filed its position statement with the Commission and submitted a letter on September 8, 1997, which the Investigating Commissioner treated as a Motion to Dismiss.

The Respondent argues, among other things, that as a matter of law the disparity in benefits

³ States generally regulate the insurance industry under a "fair discrimination" model where they are allowed to classify, or discriminate, as long as the classifications correspond to "sound actuarial principles," or to "actual or reasonably anticipated experience" and as long as the difference in rate structures corresponds to differences in risk. *National Association of Insurance Commissioners, Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Impairment, (1993)*. In the area of health insurance, many states, including Massachusetts, have enacted health insurance parity laws. Massachusetts' law mandates parity for certain biologically-based mental disorders for policies issued or renewed on or after January 1, 2001, or January 1, 2002 for small group plans subject to c. 176J and non-group health plans subject to c. 176M. Massachusetts Division of Insurance Bulletin 2000-006.

The parity law applies to "The following biologically-based mental disorders, as described in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (the DSM): schizophrenia, schizoaffective disorder, major depressive disorder, bipolar disorder, paranoia and other psychotic disorders, obsessive-compulsive disorder, panic disorder, delirium and dementia, and affective disorders." *Id.* Non-biologically based mental, behavioral or emotional disorders described in the DSM that substantially interfere with or substantially limit the functioning and social interactions of children and adolescents under the age of 19 are also subject to the parity law under certain restricted circumstances. *Id.* "Benefits for alcoholism services and chemical dependence found in M.G.L. c. 175, §110(H); c. 176A, §10; c. 176B, §4A1/2; and c. 176G, § 4 are not subject to those statutes' limitations when treatment is rendered in conjunction with treatment for mental disorders as mandated by (St. 2000) Chapter 80 and may not be construed to restrict the mental health benefits mandated by this chapter." *Id.* The parity law "does not apply to self-funded single employer health plans and Taft Hartley Trusts qualified under the Federal Employee Retirement Income Security Act of 1974 (ERISA), and which are exempt from state mandated benefit laws pursuant to ERISA." *Id.*

provided to disabled employees based on the distinction between physical and mental conditions does not violate the anti-discrimination laws.

The Investigating Commissioner determined that this matter presents important questions of law and policy. She certified the questions below to us for resolution pursuant to the Commission's regulations. 804 CMR 1.20(3)(b). The Full Commission may answer legal questions presented without a full hearing on the facts. 804 CMR 1.15. We take jurisdiction to answer the questions of law presented by the Investigating Commissioner and to provide guidance on specific issues of law and policy.

The questions presented are:

1. Whether providing different long-term disability benefits to disabled employees based on whether the disability is physical or mental violates the prohibition against handicap discrimination found in M.G.L. c. 151B?
2. Whether providing different long-term disability benefits to disabled employees based on whether the disability is physical or mental violates the prohibition against handicap discrimination found in M.G.L. c. 272, § 98?

We will address each question in turn.

1. Whether providing different long-term disability benefits to disabled employees based on whether the disability is physical or mental violates the prohibition against handicap discrimination found at G.L. c. 151B?

a. Prima Facie Case of Discrimination

As a preliminary question, the Commission must decide whether Respondent is subject to the terms of Massachusetts General Law Chapter 151B. Respondent need not be the actual employer of the Complainant in order to be subject to the prohibitions of M.G.L. c. 151B. Respondent may be subject to liability if it meets the definition of "employer" or

“person” as set out in M.G. L. chapter 151B, section 1. We conclude that Respondent is subject to the terms of c.151B because it is a “person” within the meaning of the statute.

Massachusetts General Law Chapter 151B, Section 4(16) provides that it shall be unlawful for -

any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

Section 4(4A) of Chapter 151B makes it an unlawful practice:

For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

Section 4(5) of Chapter 151B makes it an unlawful practice:

For any person, whether an employer or an employee or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

The term "person" includes “one or more individuals, partnerships, associations, corporations, legal representatives” M.G.L. c. 151B, § 1. As such, Respondent is subject to the prohibitions of c.151B and can be held liable under sections 4(4A) and 4(5).

Next, the Commission must decide whether the Complainant, as a former employee, has standing to bring a claim under the statute. Under Massachusetts General Law Chapter 151B, it is unlawful to refuse to hire, rehire or advance in employment or otherwise

discriminate against “any person” alleging to be a qualified handicapped person. M.G.L. c. 151B, § 4(16). The broad statutory language and use of the words “any person” clearly evinces the Legislature’s intent that the rights identified under section 4(16) not be limited to current employees. The Commonwealth’s anti-discrimination law therefore protects prospective and former employees as long as their claim arises from an employment-related transaction. An employer’s provision of LTD benefits is directly related to an individual’s employment with that employer and, as such, any decision that affects the receipt of those benefits constitutes an employment-related transaction. Thus, Complainant has standing to bring this claim before the Commission.

A final preliminary issue that we must confront before addressing the core issue is the statutory requirement that a handicapped individual be “qualified” in order to prove a *prima facie* case. Courts across the country have split on the issue of whether an employee who brings a claim alleging discrimination in the provision of LTD benefits must first demonstrate that he or she is qualified to perform the essential functions of his or her job. *Compare Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 146 (D. Mass. 2004); *Haynes v. Rhone-Poulenc, Inc.*, 206 W.Va. 18, 521 S.E.2d 331 (1999) (employee temporarily unable to work because of a disability is entitled to the protections of the state disability discrimination law); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 605-07 (3d Cir.1998) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-46 (1997)); *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir.1998) *with Parker v. Metropolitan Life Insurance Co.*, 875 F. Supp. 1321 (W.D. Tenn.1995), affirmed en banc, 121 F.3d 1006 (6th Cir. 1997) (dismissing Americans with Disabilities Act claim of a former employee because “the plain language of the Act indicates that the ADA

was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job they hold or seek.”)

We find that such a requirement, in the context of an employee’s receipt of LTD benefits, would be antithetical to the intent of the statute and, therefore, decline to impose this burden on Complainant. To hold otherwise would vitiate a right granted by statute – the right to be treated equally in all terms and conditions of employment, including the right to receive insurance benefits provided by the employer to those rendered unable to perform their job. In order for an employee to be eligible for LTD benefits, the employee must be no longer able to perform his job and, by necessity, cannot be “qualified” to perform its essential functions. Were the employee qualified, he would have no need for the benefit in the first place. Thus, to impose the “qualified” standard on an employee at the time of application for, or during the receipt of, LTD benefits would be to exempt completely the provision of such benefits from the anti-discrimination laws. *See Fletcher* at *9 citing *Castellano v. City of New York*, 142 F.3d 58, 68-70 (2d Cir. 1998). We decline to read into the statute such an exemption.

Having resolved these preliminary issues, we turn to the fundamental question before us: whether the law recognizes that discrimination can be rooted in disparate treatment among members of the same protected class; i.e. individuals with disabilities. The United States Supreme Court’s seminal ruling in *Olmstead v. L.C.*, 527 U.S. 581 (1999), is instructive on this issue. In *Olmstead*, the Supreme Court recognized that the ADA’s⁴ reach goes beyond

⁴ While *Olmstead* dealt with Title II of the ADA, its concept of discrimination applies to claims under Title I as well. *Johnson*, 273 F.3d at 1053 (explaining that the majority in *Olmstead* “substantially import[ed] the definition of Title I into Title II”). Even the *Olmstead* dissenters, who accused the majority of failing to interpret Title II in light of the narrower traditional concept of discrimination, acknowledged that Title I had specifically altered the traditional paradigm for claims under that Title in precisely the way the majority held that Title II had. *See id.* (citing *Olmstead*, 527 U.S. at 616, 622-23 (Thomas, J. dissenting)).

equalizing the rights of disabled and non-disabled, to include discrimination among classes of the disabled. Addressing the dissenting opinion the Court wrote:

The dissent is driven by the notion that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class," *post*, at 2194 (opinion of THOMAS, J.), that "[o]ur decisions construing various statutory prohibitions against 'discrimination' have not wavered from this path," *post*, at 2194, and that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group," *post*, at 2195. The dissent is incorrect as a matter of precedent and logic. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (The Age Discrimination in Employment Act of 1967 "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.*"); cf. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 76, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ("[W]orkplace harassment can violate Title VII's prohibition against 'discriminat[ion] ... because of ... sex,' 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex."); *Jefferies v. Harris County Community Action Assn.*, 615 F.2d 1025, 1032 (C.A.5 1980) ("[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women").

See id. at 598-603.

Our own Supreme Judicial Court has also recognized that discrimination can exist among members of the same class. *See Wynn & Wynn v. MCAD*, 431 Mass. 655, 666 n.22 (2000); *Knight v. Avon Products*, 438 Mass. 413 (2002). Critically, neither the ADA nor c. 151B suggest that a necessary prerequisite to a disparate treatment claim is that one class be favored over another. To the contrary, c.151B simply requires that the conduct at issue be motivated by one's protected status.

The Legislature’s mandate is that Massachusetts General Law Chapter 151B must be liberally construed to effectuate its broad purpose. M.G.L. c. 151B, § 9.⁵ The statute expressly forbids discrimination against an “individual in compensation or in terms, conditions, or privileges of employment.” M.G.L. c.151B, § 4(1).⁶ The Long-Term Disability insurance benefit provided to Complainant was part of a benefit package constituting the terms, conditions and privileges of his employment. Any attempt by Respondent to terminate or limit such benefits on account of his specific handicap constitutes discrimination in the terms, conditions or privileges of his employment. Any other conclusion would exempt LTDs or other disability insurance plans from the protections of the Commonwealth’s anti-discrimination law. Given its broad statutory mandate, the Commission declines to interpret c.151B in such a restrictive manner.

The statute, and particularly its language defining unlawful discriminatory practices, must be read to maximize the chances of eliminating the prohibited biases from the spectrum of employment decisions. *See Iwata v. Intel Corp.*, 349 F.Supp.2d 135, 146 (D. Mass. 2004); *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001) vacated pending en banc hearing, 281 F.3d 1368 (11th Cir. 2002).⁷ To read M.G.L. c. 151B to prohibit discrimination only

⁵ The Legislature based Massachusetts General Law Chapter 151B ““on the concept that opportunity for employment without discrimination is a civil right.”” *Id. quoting Governor's Committee for Racial and Religious Understanding, Public Policy Pamphlet 9 (Rev.1947), quoting New York State Commission Against Discrimination, 'Inside Facts', and created the Commission to combat the invidious nature of a “hideous evil” – discrimination. Liberty Mutual, 371 Mass. at 191. The Legislature has declared that discrimination in employment “is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.”*

⁶ While this language is specific to the statute’s prohibition against discrimination against other protected classes, the Commission reads section 4(16)’s prohibition against an employer “otherwise” discriminating against an employee due to his handicap as referring to one’s terms and conditions of employment. See M.G.L. c.151B, § 4(16).

⁷ Rehearing is not scheduled given K Mart’s bankruptcy.

between classes – i.e. disabled and nondisabled, and not within protected classes would be contrary to the statute’s mandate.

Individuals suffering from mental disabilities encounter bias no less stinging than persons in other protected classes.⁸ "Equal access to unequal benefits" is not the foundation on which Massachusetts General Law Chapter 151B is based. Therefore, the Commission finds that c.151B prohibits discrimination between subgroups within a protected class.

b. *Safe Harbor Provisions*

Respondent posits that G.L. c.151B, § 4 and the ADA create safe harbors for its conduct. We address each in turn.

Massachusetts Law

Paragraph 17 of G.L. c. 151B, § 4, provides that:

Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to . . . observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section . . .

In *Lynn Teachers' Union, Local 1037 v. Massachusetts Comm'n Against Discrimination*, 406 Mass. 515, 549 N.E.2d 97 (1990), the SJC held that M.G.L. c. 151B, § 4(17)(a) applies only to claims of age discrimination in the workplace. Respondent is therefore not entitled to the benefit of G.L. c. 151B’s "**safe harbor**" provision.

⁸ Individuals with a mental illness have historically been treated with contempt, fear, and cruelty. See generally Alison Bass, *Stigma Against Mental Illness Persists Despite New Research*, Hous. Chron., Feb. 16, 1992, at 3. In the United States, persons who were mentally ill, were often confined to "strong-houses," which were, in actuality, tiny structures built for one patient that were about five-by-seven foot in size. Edward Shorter, *A History of Psychiatry, From the Era of the Asylum to the Age of Prozac 2* (1997). Hospitalization began during the eighteenth century. The custodial asylum, served as a way for families to transfer the care and confinement of someone with a mental disability from their care. *Id.* at 8. For those with economic means, treatment could occur outside of the asylum. *Id.* at 24.

Federal Law

Pursuant to 42 U.S.C. 12,201(c) of the ADA,⁹ subchapters I through III are not be construed to prohibit or restrict –

“(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;¹⁰ or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.”

To fall within the safe harbor provision a plan must be a *bona fide* benefit plan, not inconsistent with state law. The safe harbor provision of the ADA is further qualified by the prohibition against using its terms as a subterfuge to evade the purposes of the ADA.¹¹ *Id.*

“[I]nsurers maintain their [safe harbor] exemption so long as their underwriting decisions are in accord with either (a) sound actuarial principles, or (b) actual or reasonably anticipated experience.” *Cloutier*, 964 F. Supp. at 304.¹² Since the information that

⁹ Federal law is not binding on the Commission; however, the Commission may look to federal law for guidance where appropriate.

¹⁰ This subparagraph applies to insurance companies in the Title III (public accommodations) context, while subparagraphs 2 and 3 apply to employers and their agents. 42 U.S.C. 12,201(c).

¹¹ In the ADEA context, the term subterfuge is given its ordinary meaning as “a scheme, plan, stratagem, or artifice of evasion.” *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977). Subterfuge does not require malicious intent to make an insurer or employer liable under the ADA. *See e.g. Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 304 (N.D. Cal. 1997); *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763, 780 n.53 (E.D. Tex. 1996).

¹² In 1993, the EEOC published an Interim Enforcement Guidance on the Application of the ADA to Disability-Based Distinctions in Employer-Provided Health Insurance. In this guidance, the EEOC states that disability-

determines these essential issues lies uniquely with the employer or insurer, some federal courts employ a "burden shifting" scheme to shift the burden of proof to the employer or insurer. *Fletcher v. Tufts Univ.*, 2005 U.S. Dist. LEXIS 7237 (D. Mass. 2005); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995). We hold that a provider (employer or insurer) can avoid liability by demonstrating that its plan provisions are based upon sound actuarial principles. The Respondent before the Commission bears the burden of establishing this defense.

2. Whether providing different long-term disability benefits to disabled employees based on whether the disability is physical or mental violates the prohibition against handicap discrimination found at M.G.L. c. 272, § 98?

An initial question presented is whether the transaction in question comes within the bounds of the Massachusetts public accommodation statute. The broad language of Massachusetts General Laws Chapter 272, Sections 98 and 98A makes clear that the statute guarantees more than mere physical access to a restricted list of enumerated places. In relevant part, Massachusetts General Law Chapter 272, Section 98 makes it unlawful to:

based distinctions in insurance are prohibited unless they fall within the ambit of the ADA's safe harbor provision. www.eeoc.gov/policy/docs/health.html at Part II. For example, if an employer uses a health insurance plan that makes disability-based distinctions, in order to avoid liability the employer must prove that (1) the plan is either a bona fide insured plan that is not inconsistent with state law, or a bona fide self-insured plan, and (2) the disability-based distinction is not being used as a subterfuge to evade the purposes of the ADA. *Id.* at Part III.A. Insurance distinctions that are not based on disability and are applied equally to all insured employees do not violate the ADA. *Id.* at Part III.B. While stating that disability-based distinction occurs when an insurance plan "singles out a particular disability (e.g., deafness, AIDS, schizophrenia), [or] a discrete group of diseases (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general" and provides lesser benefits, the guidance goes on to exclude distinctions made for treatment of mental/nervous conditions than for treatment of physical conditions. The distinction is drawn between biologically and nonbiologically based mental illness. For example, discrimination in the level of benefits provided for treatment of schizophrenia - a biologically based mental illness is unlawful, while discrimination in the treatment for mental illnesses not based in biology is not prohibited. Under this analysis, Complainant would simply have to establish that his mental disability is biologically based.

make[] any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex . . . or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in any place of public accommodation . . . as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction, . . . shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B; . . . All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, . . . subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

It has been long recognized in Massachusetts that the list of places of public accommodation set forth in M.G.L. c. 272, s. 98A is not exhaustive. *Local Finance Co. of Rockland v. Massachusetts Comm'n Against Discrimination*, 355 Mass. 10, 15 (1968) (loan company is place of public accommodation); *Lumley v. Flynn*, 5 MDLR 1031 (1983) (taxicab service is place of public accommodation); *King v. Hanover Ins. Co.*, 2 MDLR 1429 (1981) (insurance company is place of public accommodation). Further, the right guaranteed by M.G.L. c. 272, s. 98 is “the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation. . . .” The rights guaranteed by M.G.L. c. 272, s. 98 extend to equal access to the advantages and privileges of services and service providers that do not require a person to enter a physical structure. *Stropnick v. Nathanson*, 19 MDLR 39 (1997); *cf. Carparts Distribution Center, Inc. v. Automotive Wholesalers Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) (a trade association that sponsored a health benefits plan was liable under Title III because it was a place of public accommodation); *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 182-183 (6th Cir. 1996) (the Disabilities Act is broad enough to prohibit discrimination in the contents of insurance

products);¹³ *Pallozzi v. Allstate Life Insurance Co.* 198 F.3d 28 (2d Cir. 1999) amended by 204 F.3d 392 (2d Cir. 2000) (The ADA is applicable both to the content of and access to insurance policies).

Limiting Chapter 272's public accommodation provision to physical accessibility only is contrary to the broad scope and purpose of M.G.L. c. 272 and M.G.L. c. 151B. To impose such a limit during a time where business is increasingly conducted through the Internet or over the telephone is incomprehensible. *See e.g. Carparts*, 37 F.3d at 20 ("To exclude this broad category of businesses from the reach of Title III . . . would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public"). As a practical matter, limiting the Commonwealth's public accommodations provision to physical access would allow any number of discriminatory actions that the statute prohibits. For example, individuals who receive inferior or limited service in a restaurant because of their race would have no relief so long as the restaurant did not prevent their access to the property. Thus, we conclude that Respondent's provision of LTD benefits to Complainant is subject to M.G.L. c.272, sections 92A, 98 and 98A.

Finally, by its plain language the public accommodation statute reaches the direct perpetrator of discrimination and anyone who aids or incites such discrimination. Although the Complainant accessed the benefit plan in question through his employer and not directly

¹³ The federal McCarran-Ferguson Act exempts states from federal regulation to the extent that: (1) the practice in question relates to the business of insurance; (2) states have actually regulated the practice in question; and (3) Congress has not preempted state regulation. Comment, "*Escaping the Purpose of the ADA: The 'Safe Harbor' Provision and Disability-Based Distinctions in Insurance Policies and Programs*" Grant P.H. Shuman 36 Gonz. L. Rev. 549 (2000). The federal government generally leaves insurance regulation in the hands of the states. Where a provision specifically relates to the business of insurance the ADA cannot operate to interfere with the way insurers classify and distribute risk or underwrite their policies. If it does, then the ADA supersedes state regulation in that regard. *Id.*

from the Respondent, the Respondent issued the benefit plan and therefore does not escape potential liability.

Consistent with its language and broad remedial purposes, the Massachusetts Public Accommodation statute guarantees equal treatment in the services rendered. We consider the rationale employed in our analysis of Complainant's claim under c.151B to be equally applicable to a claim under c.272, § 98. The complaint in this matter, as amended, therefore states a *prima facie* case of discrimination against Respondent pursuant to Chapter 272, Section 98.

Having found that the Complainant met his initial burden of establishing a *prima facie* case of discrimination in employment and discrimination in a place of public accommodation, the Respondent's motion to dismiss is DENIED. This matter is remanded to the Investigating Commissioner for investigation and determination in accordance with this decision. This decision does not constitute a final order of the Commission for purposes of M.G.L. c.151B, s.6 or M.G.L. c.30A.

SO ORDERED this 18th day of August, 2005.

CYNTHIA A. TUCKER,
Commissioner

WALTER J. SULLIVAN, JR.,
Commissioner