

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
RICKY STROTHERS,  
Complainant,

v.

Docket No. 98-BEM-1803

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF CORRECTION,  
Respondent

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

Appearances: Gary Goldberg, Esq., for Complainant  
Carol A. Colby, Esq., for Respondent

**I. PROCEDURAL HISTORY**

On June 4, 1998, Complainant Ricky Strothers filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”), against his employer, the Commonwealth of Massachusetts Department of Correction (the “DOC” or “Respondent”). In his initial complaint, Complainant alleged that Respondent engaged in unlawful race discrimination and retaliation in violation of M.G.L. c. 151B, §§ 4(1) and (4).

On April 21, 2000, the Commission issued a lack of probable cause finding with respect to all of Complainant’s claims. Complainant then filed a timely appeal of the Commission’s findings. On June 4, 2002, the Commission affirmed the lack of probable cause finding on Complainant’s race discrimination claim, but reversed its finding on the retaliation charge. On February 5, 2003, the Commission certified Complainant’s

retaliation claim for a public hearing. Over the course of seven separate days in March and April 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 is a department of the Commonwealth of Massachusetts and controls and operates the Bridgewater State Hospital (“BSH”), a “level four” medium security correctional facility. Complainant is an African-American male who has been employed as a correction officer (“CO”) at the BSH facility since 1983. At all times pertinent hereto, Complainant usually worked on the day shift (7:00 am to 3:00 pm) and typically worked from Sunday through Thursday each week.

2. In 1993, Complainant filed a claim of race discrimination and retaliation with the Commission (hereinafter the “1993 MCAD complaint”). From July 7, 1997, to February 25, 1998, Commissioner Walker presided over the public hearing this claim.<sup>1</sup> According to Complainant, the public hearing of the 1993 MCAD complaint included the testimony of over fifteen witnesses, many of whom worked as supervisors for Respondent at the

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<sup>1</sup> The hearing took place over the course of fourteen separate days.

BSH facility. On July 16, 1999, Commissioner Walker issued his decision and found that Respondent had subjected Complainant to unlawful retaliation and awarded Complainant damages. Strothers v. DOC, 21 MDLR 115 (1999).

3. From February 1994 to the present, Kenneth Nelson has served as the Superintendent of the BSH facility. The superintendent is the chief administrative officer of the facility and, thus, responsible for the overall operations of the institution. Bernard Brady served as Deputy Superintendent of BSH from 1993 to 2001 and had daily meetings with Nelson regarding a wide range of issues. In addition, Nelson had daily meetings with his staff each morning to discuss both incidents that occurred the previous day and plans for the current day. These morning meetings frequently included Brady, Daniel Charpentier, the Director of Investigation, and Anthony Silva, the Director of Security.

**A. Exposure to Chemicals and Assignment to the Fence Patrol**

4. In 1993, Complainant discovered that he suffered from a respiratory affliction known as sarcoidosis. In May 1994, he self-identified as a handicapped person with Respondent, which it subsequently confirmed. In April 1995, Complainant submitted a medical note to Respondent that stated he should avoid exposure to chemicals at work as a result of his sarcoidosis.

5. On September 25, 1996, Complainant was exposed to a high concentration of cleaning chemicals while working in a unit at the BSH facility. As a result of this incident, he missed four days of work and filed a workers' compensation claim. The "Workman's Compensation Sheet" related to this incident contained the following

limitation: “[Patient] may not be exposed to any chemicals.” On September 26, 1996, Complainant’s legal counsel wrote to Respondent to request that Complainant “be provided reasonable accommodation in his work place due to his handicapped status.” Complainant admitted that Respondent then attempted to accommodate his disability by assigning him to posts where he would be less likely to be exposed to cleaning chemicals.<sup>2</sup>

6. In December 1996, while working in the vehicle trap, Complainant became ill after being exposed to fumes caused by a chemical floor stripper/tile remover. Sgt. Hart, the health and safety officer at BSH, testified that several officers complained of becoming ill from the fumes. The Material Safety Data Sheet (“MSDS”) for the particular chemical that purportedly caused the problem, “NAPHTHA”, indicated that inhalation may cause irritation to the nose, throat and respiratory tract and individuals with respiratory disorders may be aggravated by exposure to this product.<sup>3</sup> After this incident and through May 13, 1997, Respondent continued to assign Complainant to the following posts on a rotational basis: extraction team, fence patrol, vehicle trap, front control, ITU, and video.

7. Ernest Vandergriff presently works for Respondent as its Chief of Staff. During the period of 1996-1997, Vandergriff held the position of Associate Commissioner of Affirmative Action for Respondent. Vandergriff testified that in 1996, he along with the Director of Affirmative Action, Joanne Sollecito, considered appropriate

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<sup>2</sup> These posts included: ITU, front control, court officer, visiting room, vehicle trap, fence patrol, and details.

<sup>3</sup> Complainant testified that Respondent should have known about the scheduled use of the floor stripper/tile remover and taken appropriate precautions not to assign Complainant to the vehicle trap on that day. However, Complainant has not alleged that Respondent’s purported failure to take necessary precautions amounted to unlawful retaliation, which is the gravamen of his present claim.

accommodations for Complainant given his chemical sensitivity. He claimed that he suggested to BSH officials that Complainant be assigned to the posts of fence patrol or yard duty.<sup>4</sup> Vandergriff stated that these posts would permit Complainant to be outside for most of the day and, thus, limit his interaction with chemicals used inside the facility. Nelson testified that as a result of his consultation with Vandergriff and Sollecito, he and Brady again tried to find a post that would minimize Complainant's exposure to chemicals. Specifically, they decided to only assign Complainant to the posts of front patrol, vehicle trap, fence patrol, court officer, and ITU. I credit Vandergriff and Nelson's testimony on this matter.

8. On or about May 13, 1997, Complainant became ill after being exposed to an open container of gasoline while working in the rear control, a post situated in a small room approximately 5 feet by 7 feet in area. According to Complainant, a fellow correctional officer had left a gas container in the room when he entered the area to use the restroom. Complainant immediately called Lt. Christine Gibson about the incident and Gibson promptly relieved him. Complainant subsequently filed a workers' compensation claim as a result of this incident.

9. On or about June 1997, Complainant's legal counsel subpoenaed many individuals to testify at the public hearing for the 1993 claim scheduled to begin in July 1997. The witnesses subpoenaed included Lt. Thomas DaSilva and Capt. Robert Collins. Complainant claimed that after DaSilva and Collins received the subpoenas, both superior officers made hostile remarks to Lt. James McManus, who served as a union

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<sup>4</sup> Vandergriff also referred to fence patrol as "perimeter patrol." Also, the shift roster chart prepared by Respondent (Exhibit 23), identified the fence patrol post as "patrol shift."

steward during this time period. According to Complainant, McManus informed him of DaSilva and Collins' comments. Specifically, he claimed McManus told him that DaSilva had said he was going to "get [Complainant's] ass" when he testified at the hearing. Complainant further testified that McManus informed him that Collins referred to him as an "asshole." Complainant stated that after McManus told him about DaSilva and Collins' remarks, he discussed the matter with Superintendent Nelson and asked Nelson to keep DaSilva and Collins away from him. Complainant testified that Nelson said he would "look into it" and see what he could do. Nelson had no recollection of this conversation. Complainant further stated that after McManus told him about DaSilva and Collins' comments, he became "on edge" and began drinking heavily after work. Contrary to Complainant's testimony, McManus testified that DaSilva only said he would be of no help to Complainant if he was called to testify on Complainant's behalf. McManus also did not directly recall Collins' statement. I credit Complainant's testimony with respect to the statements made to him by McManus and his response thereto, but not as to the truth of the matters asserted therein.

10. Nelson testified credibly that following Complainant's exposure to gas fumes in the rear control, he instructed Brady to correct the problem by assigning Complainant to an area where he would have no contact with chemicals. Nelson also claimed that after this incident, he had regular discussions with Brady and other BSH administrators in regard to finding an appropriate post for Complainant that would limit his exposure to chemicals. Although Respondent continued to assign Complainant to the same posts,

after May 13, 1997, it increasingly assigned him to fence patrol.<sup>5</sup> Eventually, in September 1997, Respondent began exclusively assigning Complainant to the fence patrol post. The officer assigned to the fence patrol is responsible for patrolling the outside perimeter and fence line of the facility. The fence patrol is also the most distant and isolated post within the institution. Nelson testified that Respondent assigned Complainant to fence patrol in order to avoid his contact with chemicals, but he acknowledged that Complainant never requested that he be permanently assigned to this post as an accommodation for his medical condition. Nelson further stated that Respondent had no discussions with medical personnel at this time in regard to determining a possible reasonable accommodation for Complainant.<sup>6</sup> Moreover, Brady admitted that Respondent does not possess any written documents substantiating its decision to assign Complainant to the fence patrol as an accommodation for his disability. In addition, Sgt. Hart testified that neither Nelson nor Brady asked him for information, in his capacity as the BSH facility's health and safety officer, with respect to the likelihood of Complainant being exposed to chemicals on any particular post. Although Nelson and Brady claimed that they assigned Complainant to fence patrol as a result of the gasoline incident, Complainant testified credibly that the fence patrol post requires the frequent filling of the patrol vehicle with gasoline.<sup>7</sup> Complainant and other witnesses also testified credibly that the officers assigned to the fence patrol had to operate poorly maintained vehicles that had poor exhaust, heating, or air conditioning systems. Nelson

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<sup>5</sup> From May 14, 1997 to August 31, 1997, Respondent assigned Complainant to the fence patrol on 30 occasions and to the vehicle trap, the next most frequent assignment, on 14 occasions.

<sup>6</sup> Although Complainant has not asserted a handicap discrimination claim, no credible evidence exists that after the gas can incident on May 13, 1997, Respondent's officials engaged in any type of appropriate interactive dialogue with him regarding a possible accommodation for his disability.

<sup>7</sup> Complainant did not introduce any credible evidence that he actually suffered any ill effects from being exposed to gas fumes while refueling the fence patrol vehicle during the many years he was assigned to that post.

acknowledged that the facility's older vehicles were assigned to fence patrol. I credit Nelson and Brady's testimony that they assigned Complainant exclusively to the fence patrol in September 1997 because they sought to avoid his exposure to chemicals.

11. Complainant testified that he did not want to be permanently assigned to the fence patrol because of the isolated nature of the post and his preference for working inside the facility. He also claimed that Respondent could have assigned him to other positions within the facility that would have accommodated his disability, including the posts of yard patrol, vehicle trap, and front control. Instead, Complainant believed that the Respondent assigned him to the fence patrol post in retaliation for his pending MCAD claim. In particular, he emphasized that Respondent did not immediately assign him to the fence patrol after the gas can incident on May 13, 1997; rather, it assigned him to the post 3½ months later in September 1997, after the public hearing of his 1993 complaint had begun. Moreover, he experienced no incidents of chemical exposure during the period of May 14 to September 1, 1997, when he rotated among various posts. Nelson admitted that he could have assigned Complainant to the post of yard patrol, which had little to no exposure to chemicals; but he claimed that he preferred that Officer Nientimp be assigned to that post because Nientimp was a more experienced veteran correctional officer.<sup>8</sup> With respect to the vehicle trap and front control posts, Sgt. Steven Donnelly, testified that Respondent only used minimal cleaning chemicals in those areas and the correctional officers assigned to those posts generally did the cleaning. Donnelly also stated that the cleaning schedule for the floors could be communicated to the shift commander's office in order to notify Complainant and other personnel when certain

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<sup>8</sup> Respondent eventually assigned Nientimp to the yard post position in late December 1997.

cleaning agents were being used. For example, Nelson testified that prior to using the cleaning agent “Klobber” in a unit, an announcement is made at roll call so the entire unit could be vacated to avoid exposure to the fumes released by the chemical. I credit Donnelly’s testimony. However, I also credit Nelson’s testimony with respect to the reasons Respondent assigned Complainant exclusively to the fence patrol as of September 1, 1997.

12. In December 1997, Complainant met with Director of Security Silva and asked to be taken off the fence patrol post. According to Complainant, Silva denied his request. Silva did not recall this conversation. I credit Complainant’s testimony.

13. Prior to January 1998, Respondent assigned two employees per shift to the fence patrol post. During the months of September to December 1997, the Respondent regularly assigned CO Alphonse and Complainant to the fence patrol during the day shift. In January 1998, Respondent eliminated one of the two vehicles assigned to the fence patrol due to the installation of a microwave zone security system. Respondent assigned Complainant, over his objection, to be the remaining officer on the fence patrol on the day shift even though Alphonse had more seniority and desired that post. Complainant then complained to Brady about his continued assignment to fence patrol. He claimed Brady responded that management had decided to put him on fence patrol due to his illness from the exposure to chemicals. Brady admitted to having this conversation with Complainant. Although Nelson testified that he never knew that Complainant wanted to be off the fence patrol, Brady stated that he spoke with Nelson all the time regarding Complainant. I credit Complainant and Brady’s testimony regarding this matter. In particular, I credit Brady’s testimony that Respondent continued to assign him to the

fence patrol in January 1998 in order to avoid his exposure to chemicals used inside the facility.

14. Prior to January 1998, and pursuant to the applicable “post orders”, the two officers assigned to the fence patrol had to do parking lot checks at specified intervals. Complainant testified credibly that after the elimination of the second fence patrol car, the lone vehicle had to remain in a stationary position for the entire shift. Donnelly corroborated Complainant’s testimony. The post order for the fence patrol assignment was subsequently amended on August 31, 1998, to reflect the stationary position of the vehicle.<sup>9</sup> Complainant testified that sometime in 1999, Respondent changed the fence patrol post to a more mobile patrol. I credit Complainant’s testimony.

15. Complainant testified that from January 1998 to December 2000, his medical condition improved, but Respondent continued to exclusively assign him to the fence patrol despite his continued objections to this assignment. Eventually, in or about December 2000, Brady allowed Complainant to rotate between the posts of fence patrol and vehicle trap, effective January 2001. Complainant testified that during one of his conversations with Brady during this time period, Brady told him that management was not happy with Complainant due to his MCAD complaints. Brady denied Complainant’s version of this conversation, but he admitted that Respondent was extremely cautious with Complainant due to the filing of his MCAD complaints.<sup>10</sup> Brady also testified that he fully expected to be sitting in a public hearing involving a claim by Complainant at

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<sup>9</sup> The amended post order, under specific duties, states, “between the hours of 7:00 a.m. and 5:00 p.m., state hospital 117 (patrol) will remain posted behind the ball field between light poles 17 and 18.”

<sup>10</sup> I believe Brady was likely referring to both Complainant’s 1993 complaint as well as the claim at bar, which Complainant filed on June 4, 1998. Moreover, Commissioner Walker issued his decision with respect to Complainant’s 1993 complaint on July 16, 1999.

some point in the future. I credit Complainant's testimony with respect to his conversations with Brady.

16. According to Respondent's shift schedules, Complainant was assigned to the vehicle trap on forty occasions in 2001. Complainant also had no incidents of chemical exposure during 2001. Notwithstanding, beginning in January 2002 and continuing to the date of the public hearing, Respondent ceased assigning Complainant to the vehicle trap and returned to exclusively assigning him to the fence patrol.<sup>11</sup> Brady testified that in 2001, he informed Nelson that Complainant preferred to continue with his assignment to posts other than fence patrol on an intermittent basis. Nelson acknowledged having this discussion with Brady, but claimed he did not feel inclined to grant Complainant's request because he believed the fence patrol post was "the most satisfactory manner" to address his chemical exposure problem.

**B. Visor Incident**

17. Complainant testified that on December 8, 1997, he observed the written inscription "MCAD CO Crybaby" on the driver's side visor of the vehicle he operated on his fence patrol post (vehicle 797). After discovering the inscription, Complainant informed Sgt. Naumowicz<sup>12</sup> of the matter and prepared an incident report. The incident report stated:

On the above date and time... I Officer Strothers noticed after returning from getting gas that someone had inscribed the letters "MCAD C.O. crybaby" on the drivers side visor [sic]. I then notified Sgt. Naumowicz [sic] of this finding and

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<sup>11</sup> In 2002, Respondent assigned Complainant exclusively to the fence patrol except on two isolated occasions (April 12, 2002 and May 10, 2002).

<sup>12</sup> Although Naumowicz was a witness at the public hearing of Strothers' 1993 claim, Naumowicz testified it did not occur to him to mention that the inscription was related to the pending public hearing. Naumowicz stated he did not make any connection between the MCAD and Complainant.

told him that I had noticed the letters “MCAD” last week but could not make out the rest of the writing...

It was not until this day that I saw the other writing clearly because of the way the sun was in the car that I could make out “CO crybaby MCAD.” I knew this was written for me to see due to the fact I always had this vehicle.

Complainant testified credibly that after he saw the inscription, he felt “devastated” and immediately became anxious, angry, and fearful. Specifically, he stated, “it really affected me, I just had all kinds of emotion going through my mind, what extremes would somebody go through... I was afraid.” Complainant immediately sought counseling with Harold Brown, a clinical social worker who regularly treated DOC employees.

18. After Respondent received Complainant’s incident report, Nelson approved an investigation of this matter. Nelson testified that he did not believe the complaint necessarily pertained to retaliation; rather, he believed it alleged a possible claim of harassment. However, at his deposition in the matter, Nelson stated that he “potentially” thought it could be a retaliation claim. CO Kathleen Hill conducted the investigation. Complainant testified credibly that during his interview regarding this investigation, Hill never asked about his prior MCAD complaints, his connection to the MCAD, the ongoing public hearing at the Commission, or information regarding anyone involved with, attending, or testifying at the public hearing. In addition, he claimed that Hill never asked him why he believed the inscription pertained to him. At this time, the public hearing of Complainant’s 1993 claim was still on-going at the Commission. Moreover, the public hearing was scheduled to reconvene on December 17 and December 23, 1997, with management personnel scheduled to testify at that time. Hill admitted that she never asked any questions to any of the witnesses regarding a possible connection between

Complainant and the MCAD.<sup>13</sup> Although Hill testified that she knew Complainant had previously filed a complaint with the Commission, she claimed she did not know that his claim was still pending. Nevertheless, neither Hill nor anyone else at BSH apparently asked Complainant why he believed the writing on the visor was directed toward him. Hill testified that she did not ask Complainant about his connection to the MCAD because Complainant neither mentioned that he had an on-going MCAD hearing, nor identified potential culprits in his incident report or during his interview.

19. As part of Respondent's investigation into the visor incident, CO Chris Wright interviewed CO Doug Harris. The vehicle log for vehicle 797 and the staff rosters indicated that Harris had been assigned to fence patrol and vehicle 797 just prior to Complainant's discovery of the inscription on the visor. Coincidentally, Harris was also a key witness at the public hearing of Complainant's 1993 MCAD complaint.<sup>14</sup> Harris testified that during his interview regarding the visor incident, Wright never questioned him about his involvement with Complainant's 1993 complaint or the public hearing related thereto. Although Harris stated "he had no problems with Officer Strothers" in an incident report prepared in December 1997, at the public hearing of the case at bar, Harris admitted that he was "irritated" with Complainant at that time.<sup>15</sup>

Notwithstanding, Harris denied writing the inscription on the visor.

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<sup>13</sup> Hill testified that at the start of her investigation, she only vaguely knew what the acronym "MCAD" stood for.

<sup>14</sup> The adverse employment action underlying Complainant's 1993 MCAD complaint involved an incident between Complainant, Harris and another correction officer. Although Complainant called Harris to testify at the public hearing of the 1993 complaint, Commissioner Walker found Harris to be a hostile witness. 21 MDLR at 117.

<sup>15</sup> Hill testified that she first learned that Harris was "irritated" at Strothers during her deposition taken as part this action.

20. After completing the investigation, Hill concluded that it could not be determined who wrote the inscription on the visor. Furthermore, she determined that “there is no evidence to support that this writing was directed to C.O. Strothers.” In particular, Hill did not reference any connection between the inscription and Complainant’s pending claim at the Commission. Hill testified that the results of her investigation would not have changed had she known at the time that Harris had been both irritated with Complainant and involved in the public hearing of the 1993 MCAD complaint. Daniel Charpentier, the Director of Investigation, oversaw, reviewed, and approved Hill’s investigation of the visor incident. Similarly to Hill, Charpentier claimed he did not know Complainant had an MCAD complaint pending at that time. He testified that he first learned of this claim after the investigation was completed. Nelson testified that he likewise reviewed the investigative report of this incident and concurred with the findings and recommendations stated therein. However, when questioned at the public hearing about Hill’s statement that “there is no evidence to support that [the inscription] was directed to CO Strothers”, Nelson admitted, “It does not take much imagination to speculate that it was referring to Strothers.” Nelson also acknowledged that at the time of this incident, it was well-known throughout the institution that Complainant had previously filed a claim at the Commission.<sup>16</sup> Although Nelson testified that he knew Complainant had previously participated at a public hearing, he claimed that he did not know whether the public hearing of that matter was still ongoing. On February 24, 1998, Nelson met with Complainant to discuss Respondent’s findings with respect to its investigation into the visor incident. The next day, the Commission concluded the public

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<sup>16</sup> Nelson had no involvement in and did not testify at the public hearing regarding the 1993 MCAD complaint. He became Superintendent of BSH in February 1994.

hearing of the 1993 MCAD complaint. Nelson testified that he had no recollection of waiting to the end of the public hearing to discuss this matter with Complainant.

**C. Bathroom Relief**

21. As previously discussed, in January 1998, Respondent both eliminated the second employee on the fence patrol and made the post a “stationary” patrol. Complainant testified that prior to the change, when Respondent had two vehicles assigned to fence patrol, the two officers assigned to the post made arrangements with each other whenever one had to use the bathroom. However, after the change, in order to get relief to use a bathroom, the fence patrol officer had to call the shift commander’s office over the radio and ask for permission. Lt. Christine Gibson testified that the officer assigned to the fence patrol post was the only officer in the entire facility that had to specifically ask for bathroom relief. Gibson and Alphonse both stated that the fence patrol officer would typically simply call in over the radio and request that he or she “needed to be relieved.” I credit Complainant, Gibson, and Alphonse’s testimony on this matter.

22. Complainant testified credibly that on numerous occasions in January and February 1998, he requested to be relieved from his post on the fence patrol to use the bathroom, but Respondent failed to grant his request or provide timely relief. He believed that his supervisors failed to provide him with timely and appropriate relief in retaliation for his protected activity. Complainant testified credibly that the lack of access to restroom facilities for the fence patrol post disproportionately affected him more than any other employee since he was the only officer “permanently” assigned to that post. Moreover, Respondent offered no credible evidence that any other officer

assigned to fence patrol post had to wait an inordinate amount of time before being provided relief.

23. Specifically, Complainant testified credibly that on January 22, 1998, he requested relief at 11:05 am, because he badly needed to use the bathroom. After 45 minutes passed without any relief being provided, he called again. At 12:10, he called a third time and was told in response that relief would be provided in ten minutes. Eventually, at 12:20, after more than an hour had lapsed, relief was provided. In response to his supervisors' apparent failure to provide timely relief, Complainant filed an incident report. Complainant also stated that he verbally complained about the matter to Capt. Gordon, telling Gordon that "he is not putting up with it, that he just wants to be treated equal." Complainant claimed that Respondent took no action in response to this particular incident report and Respondent did not introduce any evidence to the contrary.

24. Complainant claimed that on February 9, 1998, Respondent again denied him timely relief to use the bathroom. He stated that he initially called in for relief at 11:05 am, and when no relief was provided, he called again at 11:40. He also testified credibly that when he asked for relief a second time, he heard someone laughing over the radio, and was told that he would have to wait 20 more minutes. He believed the officers were laughing at him for having to continually wait for and repeatedly request bathroom relief. Complainant stated that hearing the laughter made him feel degraded. Furthermore, he claimed that while waiting for relief, he attempted to call Tom Silva, the Director of Security, to complain about his need to get relief, but Silva redirected his call back to the shift captain. After this incident, Complainant filed another incident report. He firmly believed that Respondent was "trying to break and isolate" him and was totally

unconcerned about addressing any of his issues. He stated, “They looked at me like the bad guy” for raising these complaints. In addition, he testified that after this incident he began drinking less water so he could avoid the embarrassment of asking for bathroom relief. I credit Complainant’s testimony.

25. In response to Complainant’s incident report dated February 9, 1998, Nelson ordered an investigation. Charpentier conducted the investigation and corroborated Complainant’s description of the incident. Charpentier concluded that relief to Complainant had to be delayed because the facility conducted inmate checks or counts between 11:15 and 11:45; and, therefore, Respondent had no relief available. Charpentier also found that Silva had been monitoring the radio transmission and ultimately had to intervene by directing Capt. Gordon to immediately get relief to Complainant. Although Complainant acknowledged that the facility did inmate counts during this time of day, he claimed certain posts, such as the front control and visiting room, had no involvement in the count. Gibson corroborated Complainant’s testimony that the inmate counts did not affect the entire facility and other officers were available to provide Complainant relief. I credit Complainant and Gibson’s testimony.

26. Gibson also testified that Capt. Collins had regularly reminded her that Complainant had to call in for relief to use the bathroom, but Collins did not make any similar comment regarding any other officer assigned to the fence patrol. Nelson admitted that Collins and Complainant had a “strained” relationship due to the MCAD complaint pending at that time. In addition, Gibson stated that Collins and Gordon frequently reminded her that Complainant could only be assigned to the fence patrol and he could not come inside for any reason. McManus also recalled once recommending to

Collins that Complainant “be brought inside” for a particular post. According to McManus, Collins responded by saying that Complainant was not coming in off the fence. I credit Gibson and McManus’ testimony.

27. Upon completion of his investigation, Charpentier recommended three possible solutions to getting Complainant timely access to the bathroom: the construction of a tower with restroom facilities (if the position were to remain stationary), rotation with front control on a two hour time schedule, and/or an announcement at roll call identifying the relief party for the fence patrol. Charpentier testified credibly that management rejected all of his recommendations. As a way of resolving this issue, Nelson testified at the public hearing that the shift commander could have assigned a relief for Complainant at the beginning of the shift. However, Nelson failed to offer any credible explanation for not ordering any such “assigned relief” after Complainant complained about these incidents.

28. On February 26, 1998, Complainant again had to call in three times and wait 40 minutes before being relieved to use the bathroom. He then filed another incident report. According to Complainant, after he submitted this incident report, Nelson verbally accosted him and angrily told him that the facility was experiencing a staff shortage at that time due to a funeral and other sick calls. Complainant claimed that Nelson also told him his peers were upset with him for complaining and management had bent over backwards for him. I credit Complainant’s testimony regarding this incident.

29. Eventually, in response to Complainant’s complaints, on February 26, 1998, Respondent issued a post-order addendum in an attempt to address the bathroom relief

issue. The addendum allowed Complainant to call in for relief and once approved, to leave his post unattended. However, approximately one week later, this addendum was replaced by a new post-order addendum dated March 2, 1999. The revised addendum still required Complainant to call for relief to use the restroom. Nelson testified that Respondent adopted the post-order addendums exclusively for Complainant. Although Nelson acknowledged that officers assigned to the fence patrol on different shifts regularly swapped with other officers assigned to the front control post every two hours, he claimed he would not do this for Complainant because he could potentially be exposed to chemicals in front control.

**D. Allegations of Being Off Post**

30. On January 8, 1998, Complainant also filed an incident report against Capt. Collins after Collins allegedly falsely accused Complainant of being off post. Complainant testified credibly that on this occasion, he went to the front control to pick up paychecks for himself and other officers, as was customary. The next day, January 9, 1998, apparently in response to this incident, Silva issued three separate memoranda. First, Silva wrote a memorandum reminding all staff that only certain persons were permitted access into the front control. Pursuant to the memorandum, the officer assigned to the fence patrol post was not allowed in front control without first obtaining permission from the shift commander. Second, Silva issued a memorandum regarding “post relief” that reminded all security personnel to remain at their assigned posts until properly relieved. The memo also stated that officers assigned to perimeter posts (e.g., fence patrol), could not leave their posts for any reason without prior approval of the shift commander. Lastly, Silva issued a memorandum that prohibited personnel from picking

up paychecks for other officers not on duty. I am struck by the gross disparity between the rapidness in which Silva dealt with these issues presumably raised by Collins after his altercation with Complainant on January 8, 1998, and Respondent's delay in providing an appropriate response to Complainant's legitimate complaints about not getting timely bathroom relief.

31. Complainant testified that on March 25, 1998, he was again accused of being off post after he had requested bathroom relief. He stated that he had requested relief in accordance with the appropriate post order addendum and proceeded first to the vehicle trap and then to front control. He then used the restroom facilities in rear control since he was not allowed in front control in accordance with Silva's memo dated January 9, 1998. After using the bathroom, Complainant claimed Capt. Gordon confronted him and asked him why he was not at the vehicle trap. Complainant responded that he was directed to go to front control because the vehicle trap was unable to relieve him. Complainant filed an incident report regarding his confrontation with Gordon. After reviewing the incident reports related to this incident, Nelson believed Complainant had failed to follow proper procedures when he used the restroom in the rear control. Nelson claimed that Complainant should have used the restroom in the front control or in the visitors' lobby. Nelson testified that in order to use the restroom in the rear control, Complainant had to go through five locked gates. As a result of Complainant's failure to follow appropriate procedures, Nelson believed that Complainant was unjustifiably "off post." Nelson then ordered Charpentier to conduct interviews, but not a full investigation of the matter. Charpentier testified that he interviewed various personnel; however, he did not interview Complainant. He determined that the shift commander's office had apparently approved

Complainant's access to front control, but never informed Complainant of its approval. After reviewing the information obtained by Charpentier, Nelson decided against taking any action against Complainant.

**E. Treatment For Emotional Stress**

32. As mentioned above, shortly after the visor incident, Complainant sought treatment with LICSW Harold Brown. In his initial assessment dated December 10, 1997, Brown wrote that Complainant "presents as anxious, and angry as well, due to his work situation, I don't see any underlying pathology. He responded well to our session and wants to return for further therapy. I authorized his going back to work tomorrow." Brown further noted that Complainant had been experiencing anxiety at work as a result of his pending MCAD claim, but has managed his anxiety by drinking excessively. Brown diagnosed Complainant with "adjustment disorder with anxious mood" and recommended that "supportive counseling, cognitive behavioral therapy to help with anxiety, to cut down on his drinking, and to feel more positive about himself despite feeling betrayed by the Dept. of Correction." Brown subsequently treated Complainant on five additional occasions. In his notes dated December 15, 1997, Brown wrote that Complainant was too anxious to go to work yesterday because of the investigation of the writing on his vehicle visor. On February 27, 1998, Brown noted that Complainant appeared anxious and complained of sleeping poorly. On March 13, 1998, Brown indicated that Complainant was doing a little better, but still sleeping poorly. On April 13, 1998, Brown wrote, "slight improvement but still depressed and anxious as work situation is poor and harassment over his taking toilet breaks continues." Complainant testified credibly that he also talked with Brown about possibly retiring as a result of the

incidents of harassment and retaliation. In particular, he claimed he told Brown, “I can’t wait for my 5 years to be up so I can get out of there.” Complainant further stated he told Brown he could not retire at this time because did not have 20 years in the retirement system and needed cash and resources to fund his children’s college education. Lastly, Brown treated Complainant on January 27, 1999, and noted that he “returns with same work problem and increased stress symptoms as MCAD case drags on and harassment at work continues unabated.” Respondent offered no credible evidence to rebut Complainant and Brown’s testimony with respect to Complainant’s emotional distress and, therefore, I credit their testimony in its entirety.

### **III. CONCLUSIONS OF LAW**

Complainant has alleged that Respondent engaged in unlawful retaliation. M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under c. 151B or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B. 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). 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, 22 MDLR at 215, *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997).

In the absence of any direct evidence of retaliatory motive, 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); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). Consequently, in order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent knew he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse employment 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.

As an initial matter, Complainant has clearly established that he engaged in protected activity by virtue of the filing and prosecution of his 1993 MCAD complaint. In fact, the public hearing of his MCAD claim took place during the period when many

of the alleged retaliatory incidents occurred. Further, Complainant has shown that Respondent was well aware of his claim before the Commission. Complainant had subpoenaed many of his supervisors to testify at the proceeding, including DaSilva, Collins, and Naumowicz. Moreover, Nelson testified that as of December 1997, it was well-known throughout the institution that Complainant had previously filed a claim at the Commission. Lastly, I find that the inscription “MCAD CO crybaby”, which Complainant found on the visor of his patrol vehicle in December 1997, clearly related to Complainant and his pending claim at the Commission, and further illustrated that his protected activity was well-known throughout the BSH facility.

Moreover, I find that Respondent subjected Complainant to numerous adverse employment actions. Specifically, Respondent (1) exclusively assigned Complainant to the fence patrol over his objections from September 1999 to December 2000 and then from January 2002 to the present; (2) subjected Complainant to the demeaning “MCAD CO crybaby” inscription on the visor to his patrol vehicle and then conducted an inept investigation of his complaint related thereto; and, (3) unconscionably denied him timely bathroom relief in January and February 1998. In addition, after Complainant complained about not getting appropriate relief for the third time on February 26, 1998, Nelson castigated him for complaining.

I further find that Complainant has established a causal connection between his protected activity and the adverse employment actions. First, Respondent’s decision to assign Complainant exclusively to the fence patrol occurred shortly after the public hearing of his MCAD complaint had begun. Although Complainant regularly complained about his assignment, his objections fell on deaf ears. Moreover, I credited

Complainant's testimony that when he discussed his desire to be reassigned off the fence patrol with Brady on or about December 2000, Brady told him that management was not happy with him due to his MCAD complaints. As stated above, from July 1997 to February 1998, the Commission conducted a public hearing in regard to the 1993 complaint; in June 1998 Complainant filed the present claim; and, in July 1999 the Commission issued its decision with respect to the 1993 complaint and found that Respondent had unlawfully retaliated against Complainant. In addition, Respondent subsequently rotated Complainant between the fence patrol and vehicle trap throughout 2001 without incident; however, in January 2002, it unilaterally and without any explanation ceased assigning him to the vehicle trap and returned him exclusively to the fence patrol.

Complainant also established a causal connection between the inscription on the visor and Respondent's faulty investigation related thereto, and the public hearing of the 1993 MCAD claim. At the time Complainant witnessed the writing on visor, on December 8, 1997, the public hearing had been ongoing for six months. The public hearing was also due to reconvene a few days later on December 17, 1997. As stated above, I believe the inscription "MCAD CO crybaby" on the visor of Complainant's patrol vehicle unquestionably related to him and his pending claim at the Commission, and Respondent has not offered any plausible explanation to the contrary. In addition, Nelson stated that he may not have construed Complainant's report of this visor incident as retaliation, but he believed the report did describe a possible claim of "harassment." Regardless of whether Respondent viewed the complaint as retaliation or harassment, it should have conducted a thorough investigation of this incident. Instead, Respondent's

investigators carelessly failed to inquire as to the nature of Complainant's relationship with the Commission. In particular, the investigators neither questioned Complainant about his relationship to the MCAD, nor asked him why he believed the inscription was directed toward him. In addition, Hill's report never referenced any connection between the inscription and the Commission and further indicated that "there is no evidence to support that this writing was directed to C.O. Strothers." Despite approving and supporting Hill's findings, Nelson testified that it did "not take much imagination to speculate" that the inscription on the visor referred to Complainant. Nelson also admitted that at the time he reviewed Hill's investigative report, he knew Complainant had previously participated in a public hearing at the Commission.

Furthermore, Complainant established a causal connection between his protected activity and Respondent's failure to provide him with appropriate and timely bathroom relief. As stated above, after Complainant became the sole fence patrol officer in January 1998 and, thereafter, he had to call the shift commander's office and ask for permission to obtain bathroom relief. Lt. Gibson testified credibly that Complainant and the other officers assigned to the fence patrol were the only officers in the facility that had to specifically ask for bathroom relief. But Gibson claimed that Capt. Collins regularly reminded her that Complainant had to call for relief to use the bathroom and did not issue any similar commands with respect to any other officer assigned to the fence patrol. Nelson also admitted that Collins and Complainant had a "strained" relationship due to the Complainant's prior MCAD claim. In addition, Gibson testified that Collins and Gordon frequently reminded her that Complainant could only be assigned to the fence patrol and he could not come inside for any reason. Lastly, no credible evidence exists

that Respondent forced any other officer assigned to fence patrol on any shift to wait an inordinate amount of time before being provided relief. Under these circumstances, I find that Complainant has satisfactorily shown a causal connection between his protected activity and Respondent's adverse employment actions and has, therefore, established a prima facie case of unlawful retaliation.

Since Complainant has established a prima facie case of unlawful retaliation, Respondent must articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. I believe that Respondent has met this burden. First, Nelson and Brady testified credibly that following the May 1997 incident involving Complainant's exposure to gas fumes, they sought to assign him to an area where he would have no contact with chemicals. I also credited their testimony that they had regular discussions with other BSH administrators and DOC officials regarding Complainant's medical condition and considered appropriate accommodations that could be provided to Complainant to limit his exposure to chemicals. Although Complainant regularly and repeatedly requested a different assignment, Nelson claimed that he did not honor Complainant's requests because he believed the fence patrol was the most satisfactory manner to deal with Complainant's chemical exposure problem.

With respect to the visor incident and Respondent's investigation related thereto, Respondent's investigators testified that they promptly commenced an investigation of this matter and spoke with every possible person who may have had the opportunity to write the inscription. Although Hill testified that she was aware that Complainant had previously filed a complaint with the Commission, she claimed she did not know that his earlier complaint was still at the Commission during the time period in question.

According to Hill, she did not make a connection between the inscription and Complainant because Complainant neither mentioned that he had an on-going MCAD hearing, nor identified any potential culprits. Charpentier likewise testified he did not know Complainant had an MCAD complaint pending at that time. He claimed he first learned of the pending proceeding after investigation was completed.

Regarding Respondent's failure to provide prompt bathroom relief, Charpentier testified that no relief could be provided to Complainant because the facility was conducting inmate checks or counts at the time. Moreover, on February 26, 1998, the DOC issued a post-order addendum in an attempt to address the bathroom relief issue. The addendum allowed for Complainant to call for relief and once approved, to leave his post unattended.

Although Respondent has articulated legitimate non-discriminatory reasons for its actions, I conclude that Complainant has established that Respondent's reasons are false or not the real reasons for its actions and, therefore, he has proved that Respondent acted with retaliatory intent, motive, or state of mind. First, in regard to the fence patrol assignment, I credited Nelson and Brady's testimony that from September 1997 to February 1998, they assigned Complainant to fence patrol as an accommodation for his sarcoidosis and not in retaliation for his protected activity. However, I believe Complainant has established that Respondent subsequently rejected his requests for a reassignment during the periods of 1999 to 2000 and then from 2002 to the present date, in retaliation for his pending claims at the Commission. As mentioned above, Complainant filed his present claim with the Commission on June 4, 1998, and the Commission issued its decision with respect to Complainant's 1993 claim on July 19,

1999. I also credited Complainant's testimony that in or about December 2000, Brady told him that management was not happy with him due to his MCAD complaints. Moreover, despite Nelson and Brady's apparent concern over Complainant's medical condition and Complainant's repeated requests to be reassigned, Respondent failed to introduce any credible evidence that from 1999 to the present date, they conducted or authorized an investigation into a possible reasonable accommodation for his disability. Moreover, Respondent unilaterally discontinued Complainant's occasional assignment to the vehicle trap in January 2002, despite his having worked at that post without incident on forty occasions in 2001. Nelson's mere explanation that he believed Complainant's continued assignment to fence patrol at this time was "the most satisfactory manner" to address his chemical exposure problem, is simply not credible.

Second, with respect to the inscription on the visor and Respondent's investigation of the incident, Complainant established that at the time Nelson reviewed the investigative report, he knew about the connection between the writing and his MCAD claims. As mentioned above, Nelson testified that it did "not take much imagination to speculate" that the inscription on the visor referred to Complainant. Notwithstanding, Nelson approved the findings of the investigative report that ridiculously concluded, "There is no evidence to support that this writing was directed to C.O. Strothers." Moreover, Nelson approved Hill's report even though Hill never referenced any connection between the inscription and Complainant's claim at the Commission. Thus, I find that Complainant has established that Respondent's articulated reasons for the results of its investigation are simply not believable.

Lastly, Complainant has established that Respondent failed to provide timely bathroom relief in January and February 1998 for retaliatory reasons. In his investigative report of these incidents, Charpentier concluded that Respondent could not provide Complainant with relief because the facility was conducting inmate checks at those specific times. However, I credited Complainant's testimony that certain posts, such as the front control and visiting room, had no involvement in the inmate count. Gibson likewise testified credibly that the counts did not affect all of the areas of the facility and other officers were available for relief. In addition, I credited Complainant's testimony that he heard his colleagues laugh at him when he requested relief over the radio. Moreover, I credited Gibson's testimony that Collins subjected Complainant to disparate treatment with respect to both his ability to both obtain relief and come inside the facility. Lastly, Respondent apparently did not subject any other officer assigned to fence patrol to an inordinate delay before being provided relief. Under these circumstances, Complainant has established that Respondent's repeated failure to provide timely and appropriate bathroom relief was the result of retaliatory animus. Consequently, I conclude that Respondent subjected Complainant to unlawful retaliation in violation of M.G.L. c. 151B, § 4(4).

#### **IV. REMEDY**

Upon a finding of unlawful discrimination, the Commission has broad discretion to fashion remedies best to effectuate the goals of G. L. c. 151B. Conway v. Electro Switch Corp., 825 F.2d 593, 601 (1st Cir. 1987). College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 170 (1987). This includes affirmative relief, an award of compensatory damages designed to make the aggrieved party whole, and damages for

emotional distress suffered as a direct and probable consequence of Respondent's unlawful discrimination. Stonehill College, 441 Mass 549, 576 (2004); Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988); College-Town, 400 Mass. at 169 (1987); Bournewood Hosp., Inc. v. MCAD, 371 Mass. 303, 315 (1976). For the reasons discussed below, I believe Complainant is entitled to affirmative relief and emotional distress damages.

**A. AFFIRMATIVE RELIEF**

As described in detail above, I found that Respondent unlawfully rejected Complainant's requests to be reassigned to a different post in retaliation for his protected activity. Moreover, from January 2002 to the present date, Respondent has continued to assign Complainant exclusively to the fence patrol despite his objections to that assignment. For these reasons, Respondent shall immediately cease assigning Complainant to the fence patrol and instead assign him to one or more of the posts regularly assigned to him during the period of May through August 1997 (e.g., vehicle trap, front control, ITU, extraction team, video, court officer, or special details).

However, I am mindful that as a result of Complainant's sarcoidosis, he may not be able to perform the essential functions of the job for certain posts throughout the facility, including some of the posts assigned to him from May through August 1997. Consequently, Respondent has the right not to assign Complainant to any post upon making any such determination. But before Respondent makes any such decision, it is suggested that it define and investigate possible reasonable accommodations to Complainant as a result of his medical condition, which would necessarily involve engaging in an interactive dialogue with him; examining any relevant documentation

regarding both his medical condition and the dangers from exposure to the various chemicals used in specific areas in the facility; and, reviewing Respondent's procedures with respect to the use of chemicals in the facility.

**B. EMOTIONAL DISTRESS**

Complainant is also entitled to monetary damages in compensation for the emotional distress he suffered as a direct and probable result of Respondent's unlawful conduct. Stonehill College, 441 Mass. at 575-576; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985). In Stonehill College, the Supreme Judicial Court cited some 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. Many of these factors are present in the case at hand. In particular, Complainant has endured depression and anxiety from 1998 to the present date as a direct and probable result of Respondent's retaliatory conduct. In addition, he has attempted to mitigate the harm by seeking counseling. Specifically, I credited Complainant's testimony that his segregation to the fence patrol post, combined with the visor incident in December 1997, caused him to seek counseling. In his initial assessment dated December 10, 1997, Brown wrote that Complainant "presents as anxious, and angry as well, due to his work situation, I don't see any underlying pathology. He responded well to our session and wants to return for further therapy." Brown further noted that Complainant had been experiencing anxiety at work as a result of his pending MCAD claim, but has managed his anxiety by drinking

excessively. Brown diagnosed Complainant with “adjustment disorder with anxious mood” and recommended that “supportive counseling, cognitive behavioral therapy to help with anxiety, to cut down on his drinking, and to feel more positive about himself despite feeling betrayed by the Dept. of Correction.” Brown subsequently treated Complainant on four additional occasions in 1998. During the counseling sessions, Brown noted that Complainant appeared anxious and complained of sleeping poorly. On April 13, 1998, Brown wrote, “slight improvement but still depressed and anxious as work situation is poor and harassment over his taking toilet breaks continues.” Brown last treated Complainant on January 27, 1999, and noted that he “returns with same work problem and increased stress symptoms as MCAD case drags on and harassment at work continues unabated.”

In addition, Complainant testified credibly that his exclusive assignment to the fence patrol made him feel isolated and humiliated. He was also forced to work in poor working conditions, since the vehicles assigned to the fence patrol were in a state of relative disrepair. Furthermore, I credited his testimony that the visor incident “devastated” him and made him feel angry, anxious, and fearful. The visor incident underscored his loss of trust in both his peers and with management, a loss of trust that has continued to the present. His emotional anxiety and humiliation were significantly heightened in January and February 1998, when he had to endure the cruel indignity of not being provided appropriate and prompt bathroom relief. In particular, he had to suffer the embarrassment of hearing his peers laugh at him when he requested relief. Complainant also testified credibly that as a result of Respondent’s actions, he had to limit his water intake in order to reduce the number of times he needed to use the

restroom. Lastly, Respondent did not offer any credible evidence to rebut Complainant or Brown's testimony with respect to Complainant's emotional distress. For these reasons, I conclude that Complainant is entitled to an award of \$85,000.00 in damages in compensation for the emotional distress he incurred as a direct and probable consequence of Respondent's unlawful conduct.

## V. CIVIL PENALTY

M.G.L. c. 151B, § 5 provides that in the event the Commission finds that a respondent has engaged in unlawful conduct prohibited by this chapter, "it may, in addition to any other action which it may take under this action," assess a civil penalty. I believe a civil penalty is appropriate in this case given the egregiousness of Respondent's actions with respect to Complainant and its repeated bad faith in addressing Complainant's legitimate issues. As noted above, on July 16, 1999, the Commission held that Respondent had engaged in unlawful retaliation and awarded Complainant damages. Strothers v. DOC, 21 MDLR 115 (1999). In that decision, the Commission similarly found that Complainant's superiors had subjected him to adverse employment actions after he filed internal complaints and stated he intended to file a complaint with the Commission. *Id.*, at 120. In particular, the Commission found that Respondent's investigation into an incident in 1991 involving Complainant was designed to put pressure on Complainant to drop his allegations of unlawful conduct. *Id.* I likewise found a causal connection between Respondent's investigation into the "MCAD crybaby" incident and Complainant's pending public hearing at the Commission, and similarly concluded that Respondent's articulated reasons for the results of its investigation were simply not believable and, thus, motivated by retaliatory animus.

With respect to the amount of the sanctions, pursuant to subsection 5(b), the Commission may assess a penalty “in an amount not to exceed \$25,000 if the respondent has been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint.” Complainant filed his pending complaint on June 4, 1998. A few months earlier, on March 13, 1998, the Commission adjudged Respondent liable for unlawful discriminatory conduct and awarded the complainant damages. Pulido v. DOC, 20 MDLR 49 (1998). For these reasons, I hereby assess a civil penalty against Respondent in the amount of \$25,000.

## **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 Correction, shall cease and desist from assigning Complainant to the fence patrol and instead assign him to one or more of the posts regularly assigned to him during the period of May through August 1997; provided, however, that this order shall not be construed as restricting Respondent from declining to assign Complainant to any post upon making a lawful determination that he is not be able to perform the essential functions of the job for any such post.
2. Respondent, Commonwealth of Massachusetts, Department of Correction, shall pay Complainant, Ricky Strothers, within sixty (60) days of receipt of this decision, the sum of \$85,000 in emotional distress damages.
3. Respondent, Commonwealth of Massachusetts, Department of Correction, shall pay the Commonwealth of Massachusetts, within sixty (60) days of

receipt of this decision, a civil penalty in the amount of \$25,000.00. Payment shall be forwarded to the Clerk of the Commission.

4. Respondent, Commonwealth of Massachusetts, Department of Correction shall conduct basic annual training sessions on unlawful discrimination and retaliation for all managers and supervisors, including any employees vested with supervisory authority. 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.



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 20<sup>th</sup> day of January, 2005.

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EDWARD R. MITNICK  
Hearing Officer