



probable cause regarding Complainant's initial allegations. On June 12, 2001, Complainant filed a supplemental discrimination charge alleging that Complainant's supervisors subjected him to continuing harassment after the Commission's probable cause finding and that Respondent unlawfully laid him off from employment on or about April 27, 2001. On August 28, 2002, Dorca I. Gomez, Investigating Commissioner, granted Complainant's request to amend his initial complaint to include allegations set forth in Complainant's amended complaint, dated June 12, 2001, related to handicap discrimination, perceived handicap discrimination and retaliation for participation in protected activity.

On May 9, 2003, Walter J. Sullivan, Jr., Investigating Commissioner, denied Raytheon's motion for reconsideration of the Commission's probable cause finding and declined to certify the issue of whether Complainant's layoff in 2001 was discriminatory. On May 12, 2003, Commissioner Sullivan certified this case for a public hearing on the following issues: (1) "Whether Complainant is a handicapped individual within the meaning of G.L. c. 151B, §1(17); (2) Whether Complainant was treated differently in the terms and conditions of his employment and harassed by Raytheon on account of his handicap; (3) Whether Complainant was terminated from his employment in October 1998<sup>1</sup> on account of his handicap; (4) Whether Complainant was harassed by his supervisor subsequent to his reinstatement in retaliation for his having complained of handicap discrimination; (5) Whether Complainant suffered

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<sup>1</sup>Witness testimony and documents submitted at the public hearing established that Complainant's discharge date was December 1, 1998. (Complainant's Exhibit No. 6; Respondent's Exhibit No. 4).

any damages, including emotional distress on account of any alleged unlawful handicap discrimination or retaliation by his supervisors." (Complaint File).

I conducted a public hearing in this case on October 15 and 16, 2003. On December 5, 2003, I granted the parties' joint motion to enlarge the time for filing a post-hearing memorandum on or before December 27, 2003 regarding the application of a continuing violation theory to Complainant's harassment claim. On December 12, 2003, the parties submitted their post-hearing memoranda with proposed findings of fact, conclusions of law and appendices. On December 26, 2003, Complainant submitted his post-hearing memorandum regarding a continuing violation in support of his charges of discrimination based on handicap, perceived handicap and retaliation for participation in protected activity.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

1. Complainant Stephen J. Gillis currently lives in Windham, New Hampshire. In 1991, Complainant married Pamela J. Gillis and they have three children: ages 10, 7 and 2.
  
2. Complainant testified that he began to have difficulties with reading in elementary school and was placed in special education classes for reading and mathematics in elementary school through high school. Complainant also testified that he was diagnosed, in high school, with dyslexia and various learning disabilities. Complainant graduated from high school after attending summer school following his senior year. I credit Complainant's testimony.
  
3. From January 31, 1983 until December 1, 1998, Complainant worked as a janitor at Respondent's facility or complex that was located in Andover, Massachusetts.<sup>2</sup> Complainant began working at Respondent at the age of 20, immediately upon his graduation from high school.
  
4. Complainant's duties as a janitor included emptying trash, dusting, cleaning, sweeping, vacuuming, mopping floors and picking up "garbage." Complainant was responsible for cleaning assigned areas and responding to emergency situations like spills or leaks. From 1983 until 1995, William Labsolu directly supervised Complainant's work activities in the Andover facility. Richard Lynch was Labsolu's immediate supervisor. (Complainant's Exhibit No.

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<sup>2</sup>From January 1, 1983 to December 31, 1998, Complainant took several leaves of absence, including a one-year leave of absence in early 1995 during which he received workers' compensation benefits. (Complainant's Exhibit No. 6, page 2, footnote 1).

6).

5. During the entire period of his employment at Raytheon, Complainant was a member of International Brotherhood of Electrical Workers, Local 1505, AFL-CIO (hereafter: "Local 1505").

6. During the time period relevant to the instant complaint, Respondent was an employer within the meaning of Massachusetts General Laws, Chapter 151B, §1, paragraph 5.

7. Chester Conant has worked for Respondent for approximately 18 years. From September 1987 through 1998, Conant was the labor relations manager in the Andover facility. Conant's primary duty was to administer the collective bargaining agreement with Local 1505 for Respondent's managers and supervisors, interact with union officials on matters pertaining to the collective bargaining agreement and advise Respondent's management on contract issues.

8. Conant testified that there were no explicit progressive discipline provisions in the collective bargaining agreement during 1997 through 1999. Conant also testified that progressive discipline was a general guideline or practice that managers for Respondent used for minor infractions of policy and rules. The five steps of Respondent's progressive discipline guideline were an oral warning, a written warning, a one-day suspension, a 3-day suspension and termination. I credit Conant's testimony.

9. Conant testified that there were five steps in Respondent's grievance procedure before arbitration: (1) an

oral communication between the employee, a union steward and his or her supervisor; (2) communication between the department manager, the employee and the chief union steward; (3) a meeting between the labor relations manager for the plant, the employee, the chief union steward and other managers, as appropriate; (4) a meeting between the corporate representative of Respondent, an assistant business agent for the union, the labor relations manager for the plant, the employee, the chief union steward and other managers, as appropriate; (5) a meeting between the director of labor relations, the labor relations assistant, the business manager for the local union, the assistant business agent, the corporate representative of Respondent, the chief union steward, the employee and appropriate management officials. I credit Conant's testimony.

10. Virginia Simms George has worked as a senior human resources consultant for Respondent since March 20, 2000. Among George's duties and responsibilities, she handles matters related to employee compensation, employee and labor relations, hearings and discrimination cases. George's office is located in the "R" Components building, formerly known as the "ADC" facility. George's work hours are 8:00 a.m. to 6:00 p.m. and she covers the first and second shifts.

11. As part of her labor relations duties, George hears 3<sup>rd</sup> step grievances, mediates complaints, processes layoffs, investigates complaints of discrimination and handles disciplinary actions. George also conducts formal and informal meetings with union officials to address employment issues or complaints.

12. During the time period relevant to this complaint, Respondent published and maintained a non-exclusive list of rules and regulations that governed employee conduct and provided examples of prohibited behavior. Respondent's rules and regulations also provided notice to employees that a violation subjected an employee to "disciplinary action up to and including termination." (Respondent's Exhibit Nos. 1 and 2). The most commonly or frequently violated rules related to tardiness and absenteeism.<sup>3</sup> (Respondent's Exhibit No. 2).

#### Complainant's Work History

13. Complainant took several leaves of absence between 1983 and 1999 because of two mental breakdowns, treatment for alcoholism and eye surgeries. (Respondent's Exhibit No. 4). In 1987, Complainant took a leave of absence and was treated on an inpatient basis at Spofford Hall in New Hampshire for alcohol abuse. (Complainant's Exhibit No. 1).

14. Complainant testified that, during the period of time that Labsolu supervised him, Labsolu harassed him as follows: (1) Labsolu "stayed on top of him everyday," checked on Complainant approximately 15-20 times a day and yelled at him in front of other employees; (2) Labsolu assigned Complainant to clean bathrooms more often than any other janitor and that it was a "punishment type of job" because no one else wanted to clean bathrooms; (3) Labsolu once told Complainant that "if he did not have his head attached, he would forget that too;" (4) Labsolu once

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<sup>3</sup>At the arbitration, Conant also testified that another frequently violated rule prohibited an employee from leaving his or her work area without permission or sleeping on the job. (Respondent's Exhibit No. 2, page 3).

tossed a razor blade to Complainant and told him, "do yourself a favor, slice your wrists for us;" (5) Labsolu yelled at Complainant or commented on his intelligence on a weekly basis when he made comments such as "[Complainant] was not too bright" and "when they gave out brains, where were you?;" (6) Labsolu threatened Complainant when he told him that he would "get him out on Route 93," a highway; (7) Labsolu once ordered Complainant to walk down the length of a building-about a quarter mile-to pick up a cigarette butt in a hallway. Complainant testified that he complained to Fred Weir, his chief union steward, who told Labsolu never order Complainant to pick up a cigarette in this manner; (8) Complainant worked "a little slower" than some of the other janitors. Labsolu often mimicked how he worked in front of other janitors and made them laugh at him. Complainant also testified that Labsolu's treatment of him became worse beginning in 1994. I do not credit Complainant's testimony that Labsolu checked on him 15-20 times a day, yelled at him daily, commented on his intelligence on a weekly basis or often mimicked him in front of other janitors.

15. Complainant testified that he never complained to Labsolu or Lynch about Labsolu's conduct or comments because he did not want his situation to get worse. Complainant never called Respondent's ethics "hotline" to complain about Labsolu's treatment of him. Complainant also testified that his union steward may have talked to managers or supervisors for Respondent once or twice about Labsolu's conduct but he did not testify regarding when these "talks" occurred. Complainant also testified that he requested a new supervisor when he wrote several letters with Fred Whittier, union chief steward, in 1994 to 1995.

Conant did not recall any specific instance in which Complainant complained to him about Labsolu's treatment of him.

16. Mrs. Gillis testified that, at holiday parties, Labsolu and other employees of Respondent asked her how "she could be married to Complainant," that he was a real "unit," and that they were not a match. I credit Mrs. Gillis' testimony.

17. Complainant believed that Labsolu directed his comments at him because he was mild-mannered and that he just "took it." Complainant also believed that Labsolu directed derogatory comments at him because of his learning disabilities as he gets "stressed out" and becomes depressed. Complainant also testified that he was able to perform his job duties despite Labsolu's conduct and treatment of him.

18. Complainant denied that he made fun of Labsolu's heavy French accent. Complainant also denied that he believed Labsolu was "homosexual" although Complainant testified that Labsolu had a lot of "feminine ways" about him, including a "limp wrist." I do not credit Complainant's testimony that he did not make fun of Labsolu's accent.

19. Prior to 1995, Complainant testified that he told his spouse that he was depressed and that he was being harassed at work. Mrs. Gillis testified that Complainant was irritable and that he told her that his "work was not going well." Mrs. Gillis also testified that Complainant told her that he was being embarrassed in front of his friends. Mrs. Gillis testified that Complainant became withdrawn,

isolated, was depressed and irritable and had no patience with their children. I credit their testimony.

20. Complainant testified that, beginning in 1995, he began to "dread" coming to work each day because of Labsolu's treatment of him. Complainant testified that he stayed up to write a letter each night to his chief union steward describing his treatment by Labsolu.<sup>4</sup> Complainant testified that Labsolu's alleged treatment caused him to cry a lot, to withdraw from his spouse and not be intimate with her. Complainant also testified that he became depressed, took Prozac and was treated by a psychologist. I credit Complainant's testimony.

21. In January 1995, Complainant testified that he began crying at work and contemplated committing suicide by hanging himself in one of Respondent's bathrooms. I credit Complainant's testimony.

22. On January 30, 1995, Complainant was admitted to Hampstead Hospital, Hampstead, New Hampshire, after his threat to hang himself at work. Complainant's chief complaint, on admission, was that he was depressed and that "his boss [Labsolu] was driving him crazy." During his stay at Hampstead Hospital, Complainant was treated with antidepressants that resulted in "minimal improvement." Hampstead Hospital discharged Complainant on February 10, 1995, with a tentative diagnosis of adjustment disorder of adult life with mixed emotional features and depression. The treating psychiatrist concluded that Complainant could return to work immediately if he was assigned to another

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<sup>4</sup>Complainant testified that he gave the letters to his union steward and did not maintain of a copy of them.

supervisor. (Complainant's Exhibit No. 1).

23. Complainant took a medical leave of absence from January 31, 1995 to February 22, 1996. Complainant also took a leave of absence from June 21, 1996 to July 30, 1996, August 15, 1997 to September 2, 1997 and July 8, 1998 to July 27, 1998. (Respondent's Exhibit No. 4).

24. In his written report, dated October 6, 1995, Dr. Robey diagnosed Complainant as having dyslexia with a reading speed from 50-100 words a minute, dyscalculia<sup>5</sup> and an adjustment disorder with mixed anxiety and depressed mood. Dr. Robey also reported that Complainant's actual intellectual functioning was "probably at a low-normal to normal level although his dyslexia in combination with his arithmetic difficulties would give him borderline retarded scores." (Complainant's Exhibit No. 1).

25. During Dr. Robey's evaluation, Complainant reported that Labsolu had constantly harassed him and "needled" him over a period of several years. Dr. Robey "speculated that [Complainant] has considerable difficulty understanding and taking directions and is extremely intolerant of any criticism, reacting to it as harassment or humiliation." (Complainant's Exhibit No. 1).

26. As part of his evaluation, Dr. Robey diagnosed Complainant with a relatively mild level of depression with associated anxiety attacks. Dr. Robey concluded that Complainant was not disabled with the "sole exception of

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<sup>5</sup>Impairment of an individual's ability to solve mathematical problems, usually resulting from brain dysfunction. American Heritage Dictionary, 2000 edition.

the apparent conflict between himself and his supervisor." Dr. Robey discussed a shift change with Complainant but reported that Complainant was "very reluctant to allow a shift assignment because he would never be able to work again on days." (Complainant's Exhibit No. 1).

27. After Complainant's hospitalization at Hempstead Hospital in 1995, Dr. Ames Robey conducted an impartial psychiatric examination of Complainant pursuant to his worker's compensation claim against Respondent. As part of his examination, Complainant told Dr. Robey that, in 1994 and early 1995, he overate, gained about 25 pounds, slept poorly at night and often cried. (Complainant's Exhibit No. 1).

28. When Complainant returned to work after his stay at Hempstead Hospital, Respondent assigned him to work with a new supervisor, Brian Curley, on the day shift. The schedule for the day shift was 7:00 a.m. to 3:30 p.m., including a 10-minute break in the morning and afternoon and a 30-minute lunch break. Complainant testified that Curley also checked up on him 15-20 times a night but did not yell at him and rarely spoke to him. Complainant testified that he complained to Curley and told him that he was treating him the same way that Labsolu did. Complainant also testified that he asked Curley to stop checking on him but Curley did not stop and merely told him to "just do his job." I do not credit Complainant's testimony about Curley's treatment of him on the job...

29. Complainant was also hospitalized in June 1996 for depression and anxiety. (Respondent's Exhibit No. 4).

30. Sometime in 1998, Douglas G. Janvrin, maintenance foreman, began to supervise Complainant while he worked on the day shift. Janvrin has worked for Respondent since 1983 as a maintenance supervisor or foreman. Complainant testified that he did not see Janvrin often because Janvrin also supervised five to seven custodians in the heating, ventilation and air conditioning (HVAC) unit. Janvrin supervised Complainant until his discharge on December 1, 1998.

31. When Complainant began working with Janvrin, he told Janvrin that he had been hospitalized for depression and was "disabled." Janvrin told Complainant that he would not address his past history with Labsolu and that he would have no problems with Complainant if he did his work.

32. Complainant testified that, on a daily basis in 1998, Janvrin referred to him as his "weak stock" in front of other employees of Respondent. Complainant understood Janvrin's comments to mean that Complainant was slow and had learning disabilities. Janvrin denied that he referred to Complainant as "weak stock" and denied that he called him any names. Complainant testified that he did not ask Janvrin to stop making such comments nor did he object to such comments because he was mild-mannered and he did not fight for himself. Janvrin testified that he never heard other employees refer to Complainant as "not bright," "retarded," "slow" or "dumb." I do not credit Complainant's testimony about Janvrin's treatment of him.

33. Complainant testified that, as a result of Labsolu's ongoing treatment, he had a poor relationship with his wife, he regularly had insomnia and he wrote daily letters

to his chief union steward about his treatment. Complainant also testified that he was depressed, was treated by a psychologist and took anti-depressant medication including Prozac but he did not testify regarding the dates of his treatment and/or his treatment plan, if any. I credit Complainant's testimony that he wrote daily letters to his union steward about Janvrin's alleged treatment.

34. Complainant testified that Conant told him, in October and November 1998, that Respondent would fire him if he took any more leaves of absence. Conant denied making these statements. I do not credit Complainant's testimony.

35. Complainant testified that Conant started calling him "unemployable" in October and November 1998. Complainant testified that he complained to Sonny Durant, the chief union steward, about Conant's comments because he believed Conant was attempting to humiliate him. Complainant testified that his complaint resulted in a meeting between Complainant, Durant and Conant during which Conant repeated his statement that Complainant should not take any more leaves of absences. Conant testified that he never told Complainant that he was "unemployable" and never met with Complainant and Durant to discuss this type of statement. I credit Conant's testimony.

36. Conant testified that, during the relevant time period, Respondent maintained a policy and procedures for employees to request a leave of absence. Conant testified that Respondent held meetings with various union officials in cases involving light duty or reinstatement to work. I credit Conant's testimony.

37. Conant testified that, under a letter of intent with Local 1505 that became part of the collective bargaining agreement, Respondent could terminate an employee who was on a leave of absence after two years. Conant testified that it was not an active letter and that he did not know of any bargaining unit employees who were terminated because of their leaves of absence. I credit Conant's testimony.

38. In 1997, Respondent disciplined Complainant because he failed to notify his supervisor that he was taking a leave of absence. Conant sent a telegram to Complainant requiring him to inform management of the circumstances of his absence.

#### Complainant's Discharge on December 1, 1998

39. In August 1998, employees who worked in an area of the Andover facility known as the "MHIP" area moved to Tucson, Arizona. No work was performed in the MHIP area after August 1998 and it was secured with a door that had a combination push lock. Janvrin testified that, in September or October 1998, he did not know of any employees who continued to work in the MHIP area and that he believed that the area was "deactivated" for the purpose of constructing a new office. Janvrin also testified that he had assigned Complainant to clean the MHIP office until it shifted operations to Arizona. I credit Janvrin's testimony.

40. Sometime in September 1998, Janvrin paged Complainant several times to assign him to clean up a water leak. When Complainant did not respond to his pages, Janvrin looked

for him and eventually found him coming out of the MHIP area. Complainant told Janvrin that he was in the MHIP area because he was emptying the trash. Janvrin testified that he and Complainant entered the MHIP area because Complainant had the combination to the push lock and found that it was vacant. Janvrin then directed Complainant to stay out of the MHIP area because he had no reason or need to go there. Janvrin also told Complainant that he would tell him if he received a request to clean the MHIP area. I credit Janvrin's testimony.

41. In late September, 1998, John McCarthy, a security manager for Respondent, commenced a video surveillance of one of the telephones in the MHIP area.<sup>6</sup> The concealed surveillance focused on outside telephone calls made by employees from October 14 through 20, 1998. Based on the surveillance, McCarthy then obtained a call detail that showed the telephone calls that were made from one telephone. Respondent's surveillance did not include the other telephones in the MHIP area. Conant was not involved in setting up the video surveillance in September 1998.

42. On or about October 16, 1998, Janvrin noticed an increase in activity during a two-week period around the MHIP area. Janvrin saw some of the union tradespersons milling around and going into the MHIP area by using the combination on the locked door. After Janvrin learned that construction had not yet begun in the MHIP area, he contacted a security guard who unlocked the door. When

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<sup>6</sup>McCarthy testified before the arbitrator that he commenced his investigation when an unidentified employee told him that Complainant was making personal telephone calls from a vacant office. McCarthy also testified that he entered the MHIP area with a locksmith on October 7, 1998 and saw Complainant who was sitting at a desk. Complainant promptly got up and left. (Complainant's Exhibit No. 6, pages 4-5).

Janvrin entered the room, he saw Complainant sitting at a desk and putting down a telephone. Janvrin saw three telephones, two or three desks and a work bench in the MHIP area. Complainant told Janvrin that he was resting and denied that he was using the telephone. Janvrin told Complainant to return to work, reminded him of his earlier directive not to enter the MHIP area and then told Complainant that he did not want to see him again in the MHIP area. Complainant then left the MHIP area.

43. Janvrin remained in the MHIP area after Complainant left and determined that the three telephones, including the one used by Complainant, were connected to outside lines. Janvrin told Dick Lynch, his direct supervisor, made arrangements to shut off the outside lines and unknowingly ended McCarthy's surveillance. Janvrin did not learn that the security office had conducted a surveillance on one of the telephone lines until after he had arranged for their disconnection. Janvrin then went to security office, viewed the surveillance tapes and identified some of the employees using the telephones.

44. On November 9, 1998, McCarthy completed a written report of his surveillance investigation. McCarthy's report showed that Complainant was in the MHIP area for two hours and 57 minutes on October 16, 1998 and that he made 47 telephone calls outside of the Andover plant. (Complainant's Exhibit No. 6).

45. McCarthy's report also showed that four other employees made telephone calls out of the plant during October 14-20, 1998:

<u>Employee</u>	<u>Dates in Room</u>	<u>Total Time</u>	<u>Calls Made</u>
Luigi Melchionno, Electrician	3 days	3 hours, 19 minutes	64
Edmund Johnson Millwright	3 days	16 minutes	3
James Barrett Electrician	2 days	45 minutes	15
Patrick Joliat Electrician	1 day	9 minutes	2

(Complainant's Exhibit No. 6, pages 5-6).

46. On November 16, 1998, Janvrin again looked for Complainant "well after" his break time had ended and found him in the "GEM Seeker" area, a location that was outside of his assigned work area. Janvrin saw Complainant eating and talking with another employee. Janvrin told Complainant that he was considering disciplinary action against him based on this incident.

47. On November 18, 1998, Janvrin saw Complainant using a telephone for personal matters in another office that was under construction for use by night supervisors. Conant then met with Complainant and a union steward in the labor relations office where he again told Complainant that he was on notice of a potential disciplinary action. Prior to this meeting, Conant had already received documentation from McCarthy regarding Complainant's unauthorized use of the telephone in the MHIP office.

48. Conant testified that Respondent's policy in 1997-1998 allowed employees to use their assigned telephones to make personal calls on a limited or occasional basis. I credit Conant's testimony.

49. On or about November 19, 1998, Conant conferred with Timothy O'Brien, Director of Human Resources, Janvrin, Brad Duffin and Bob Deamer, Complainant's line managers in November 1998, and McCarthy regarding the surveillance investigation. They reviewed the entire case, including the work records for Complainant and the four other employees identified in the surveillance. Conant recommended that Respondent discharge Complainant based on McCarthy's investigation and Complainant's entire work record, including his disciplinary record. Conant testified that O'Brien then agreed with his recommendation to discharge Complainant. I credit Conant's testimony.

50. Conant testified that he did not consider Complainant's multiple leaves of absences in making his recommendation to discharge Complainant nor did he consider his disability, specifically his dyslexia. Conant testified that Complainant was discharged based on his employment record, and overall disciplinary record, his unauthorized telephone use in the MHIP room, leaving his work area on November 16, 1998 and his unauthorized use of the telephone in the night supervisors' office on November 18, 1998. Conant also testified that Complainant's disciplinary record, by itself, would not have warranted his termination in December 1998. I credit Conant's testimony.

51. Complainant's disciplinary record while he worked at

Respondent showed that he received 19 oral warnings: eight for tardiness or absenteeism; three for leaving his work area without permission; six for poor job performance; two for insubordination. Complainant also received at least 12 written warnings, mostly for tardiness, absenteeism or leaving his work area. Complainant was also suspended on eight occasions for lengths of time ranging from a few hours to five days for tardiness, absenteeism, leaving his work area, insubordination, poor work performance, falsification of records, fighting and engaging in "criminal, dishonest or notoriously disgraceful conduct." (Complainant's Exhibit No. 6, pages 3-4).

52. Conant testified that he also reviewed the disciplinary records of Melchionno, Johnson, Barrett and Joliat before making his recommendations for discipline in their cases. Conant did not recall whether Melchionno had a prior disciplinary record but he testified that Johnson had one. Conant recalled that the four employees had lesser disciplinary records than Complainant.<sup>7</sup> I credit Conant's testimony.

53. Conant believed Complainant was not entitled to progressive discipline relative to his unauthorized use of a telephone in the fall of 1998.

54. On or about November 19, 1998, Janvrin told Complainant to report, with him, to the labor relations office but did not give Complainant any reason for the meeting. When they

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<sup>7</sup>Conant's testimony is consistent with the arbitrator's findings that " Melchionno, Joliat and Barrett had virtually no prior discipline. Melchionno had approximately three years' seniority. Johnson had one or two warnings and one or two suspensions on his record, but he had 20 years seniority." (Complainant's Exhibit No. 6, page 8). Neither party submitted written documentation of their disciplinary records.

arrived, Melchionno, Johnson, Barrett and Joliat were waiting outside the office. Complainant then learned, for the first time, that the purpose of the meeting was to discuss their alleged unauthorized telephone use in the MHIP area during October 1998.

55. Complainant, Melchionno, Johnson, Barrett and Joliat went separately into the labor relations office where they met with Conant, Sonny Grant, Janvrin, and Charles McLean, the maintenance foreman for the electrical union. Complainant was the last employee to go into the labor relations office.

56. During the meeting, Conant asked Complainant whether he used a telephone in the MHIP area on October 16, 1998 and, if so, for what reasons. Complainant initially did not recall using the telephone but he admitted to Conant that he had used the telephone to make a few calls. Complainant told Conant that the telephone belonged to Carlos Morales, an employee who had an office in the MHIP area before the project moved to Arizona. Complainant also told Conant that Morales had given him verbal permission to use his telephone in the MHIP area.

57. Complainant testified that he told Conant that the MHIP area was open and that he routinely saw 20 to 30 Raytheon employees use Morales' telephone during the day. Complainant testified that he used Morales' telephone "a lot" or daily to make personal calls but asserted that he completed his assigned tasks. Complainant testified that no one, including Janvrin, told him not to use the telephone or to stay out of the MHIP area. I do not credit Complainant's testimony.

58. Complainant testified that, during this period, it usually took him only three hours to complete his assigned tasks and that he spent the remainder of his work day in the MHIP area. Complainant testified that Janvrin knew he only had approximately three hours of work each day but did not direct Complainant to report back to him for other assignments. Complainant also testified that Janvrin never assigned him an additional work area after the MHIP work unit moved to Arizona. I do not credit Complainant's testimony.

59. During the meeting on November 19, 1998, Conant told Complainant that he had a videotape of Complainant using a telephone in the MHIP area and then gave a sheet to him that listed the 47 personal telephone calls he made on October 16, 1998. Complainant reviewed the list and then acknowledged that he made the listed calls.

60. Conant also authorized McCarthy to conduct an inquiry into Complainant's claim that Morales had given him verbal permission to use his telephone in the MHIP area. Conant testified that McCarthy reported to him that he had contacted Morales who told him that he gave verbal permission to Complainant to use the telephone on an occasional basis for business purposes and not his personal use. I credit Conant's testimony.

61. On November 20, 1998, Morales faxed a memorandum to Garrant, the maintenance chief union steward. In his memorandum, Morales stated that he gave permission to Complainant "to use his telephone when [Complainant] needed to." (Complainant's Exhibit No. 2).

62. On or about December 1, 1998, Respondent discharged Complainant based in, in part, his unauthorized telephone use on October 16, 1998 as shown during the video surveillance conducted by Respondent's security staff.

63. Based on its record of out of plant telephone calls, Respondent suspended Barrett for the balance of his shift on December 1, 1998, plus two additional days. Respondent suspended Johnson and Joliat for the balance of their shifts on December 1, 1998, resulting in their loss of one hour's pay. Respondent discharged Melchionno but ultimately reinstated him pursuant to a settlement made at the 4<sup>th</sup> step of Respondent's grievance procedure.

64. On December 3, 1998, Morales faxed a memorandum in which he clarified his earlier memorandum regarding the verbal permission he purportedly gave to Complainant. Morales wrote that he did not give verbal permission to Complainant or any other employee of respondent to use the MHIP area or his desk and telephone for a recreational and/or personal use. Morales also wrote that he thought the verbal permission that he gave to Complainant was "understood for company business activities."  
(Respondent's Exhibit No. 1).

65. After his discharge, Complainant testified that he became severely depressed, broke down and cried with his daughters. Complainant testified that he was concerned about paying his mortgage and getting another job because of his disability. Complainant also testified that he sought treatment for his depression but did not continue it because he did not have insurance coverage. Mrs. Gillis

testified that Complainant's condition has improved recently.

66. Complainant reported on his federal tax returns that he earned \$26,121.00 and \$9,192.00 in 1998 and 1999, respectively. Complainant also reported that he received \$9,940.00 in unemployment insurance benefits in 1998. (Complainant's Exhibit Nos. 4 and 5).

67. Contemporaneous with his filing of the instant complaint, Complainant filed a grievance pursuant to the applicable collective bargaining agreement between Respondent and Local 1505. Conant testified at the arbitration hearing on behalf of Respondent. On May 18, 1999, an arbitrator ruled that Respondent lacked just cause to discharge Complainant on December 31, 1998.<sup>8</sup> The arbitrator ordered Respondent to reinstate Complainant to his custodian position without back pay. (Complainant's Exhibit No. 6).

68. On June 15, 1999, Respondent reinstated Complainant and he returned to work on the day shift. On June 28, 1999, Complainant accepted bumping rights and Respondent assigned him to work on the day shift in the ADC building, also known as the Micro Electronics building (MEC). Respondent assigned Complainant to work as a clean specialist in a dust-free "clean" room. Complainant's duties as a clean specialist included cleaning, restocking gloves and hand wipes, vacuuming and mopping floors, disposing of "sticky" floor mats that removed sand and debris from shoes and emptying barrels that contained potentially hazardous

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<sup>8</sup>The arbitrator concluded that Raytheon failed to follow its progressive discipline policy when it discharged Complainant and it failed to discipline Complainant with reasonable promptness. (Complainant's Exhibit No. 6, page 14).

materials. While in the clean room, Complainant wore a gown, hat and booties over his "street" clothing.

69. On June 29, 1999, Complainant transferred to the night or second shift in the ADC building where David J. Bortalino, the second-shift supervisor directly supervised him. In 1999-2001, Complainant was the only cleaning specialist who worked on the second shift in the ADC building.

70. During the period relevant to this complaint. Bortalino worked on the second shift, 2:30 p.m. to 11:00 p.m. Bortalino's office was located in the production FAB where he supervised 30 bargaining unit employees, including Complainant. Bortalino testified that he was Complainant's primary supervisor and that John Shattuck did not become a second-shift supervisor until late 1999.

71. Bortalino occasionally assigned Complainant to perform duties that required him to travel outside of the ADC building.

72. The clean room had several open areas or bays that were separated by floor to ceiling walls with small open areas at the bottom to facilitate the flow of air. Because of the layout in the clean room, including the walls, employees were not visible to each other while they were in a bay or in their work areas.

73. While some clean room employees had telephones in their bays, Complainant did not have a telephone or a pager and was not assigned to a fixed work area. When Bortalino needed to communicate with Complainant or other employees

in the clean room, he either paged them over the loudspeaker or walked over to their bays or work areas to look for them. Bortalino testified that Complainant never complained to him about being paged and he did not know of any instance in which Complainant complained to other employees about being paged. I credit Bortalino's testimony.

74. Complainant testified that Shattuck asked him why he had a telephone since he was dyslexic and occasionally told him, "everybody thinks you're dumb but you're not dumb." Complainant also testified that, in November 1999 though January 2000, Shattuck paged him on the loudspeaker approximately 15 times each work night. (Complainant's Exhibit No. 3). I do not credit Complainant's testimony regarding Shattuck's pages.

75. Complainant testified that he told Shattuck that he had filed a complaint with the Commission, was becoming depressed, and had headaches based on his treatment. Complainant testified that he asked Shattuck to stop paging him and verbally harassing him based on his disability. Complainant testified that he told Steve Schaefer, the union steward, who met with Bortalino and Shattuck on December 18, 2000, about his complaint regarding Shattuck's repeated pages. (Complainant's Exhibit No. 3). Complainant testified that Shattuck stopped his harassing pages immediately after the meeting except that he continued to occasionally tell Complainant that he was "not as dumb" as everyone thought he was. I do not credit Complainant's testimony regarding his notice to Shattuck about the instant discrimination complaint.

76. Bortalino testified that he did not know that Complainant had filed the instant complaint with the Commission until he began to prepare his testimony shortly before the public hearing in this case.

77. On October 11, 1999, Complainant accepted bumping rights and was assigned to the second shift at the ADC facility. (Respondent's Exhibit No. 4). From October 12, 1999 until November 11, 1999, Complainant took a leave of absence for medical reasons.

78. On November 15, 1999, Complainant accepted a recall to work on the day shift at the ADC facility where he remained until December 20, 1999, when he accepted a bumping right to work on the second shift at Andover's main building. On January 6, 2000, Complainant returned to the second shift at the ADC facility where he remained until Respondent laid him off on April 27, 2001 with no rights. (Respondent's Exhibit No. 4).

79. While working on the second shift in the clean room and after the labor strike, Complainant received a one-day suspension when he pulled the wrong wire when attempting to connect a speaker and caused it to register in Respondent's security office as a faulty wire. George met with Complainant, the union steward and the managers to resolve the issue.

80. George never received any complaints from Complainant or any union official regarding Shattuck's alleged harassment of Complainant.

### III. CONCLUSIONS OF LAW

#### A. Complainant's Discharge

Complainant contends that Respondent unlawfully discharged him on December 1, 1998 because of his handicap or perceived handicap (attention deficit disorder, dyslexia and other mild learning disabilities). General Laws, Chapter 151B, §4, paragraph 16, provides that it is unlawful for an employer to discharge or otherwise discriminate against qualified handicapped persons who are capable of performing the essential functions of their jobs with a reasonable accommodation. A "qualified handicapped person" is a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with a reasonable accommodation to his or her handicap. See General Laws, Chapter 151B, §4(16); Massachusetts Commission Against Discrimination Guidelines on Employment Discrimination on the Basis of Handicap, "Section II., Definitions (1998)(hereafter: "MCAD Handicap Guidelines").

Under General Laws Chapter 151B, a "handicapped person" is defined as one who (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of having such impairment; or (c) is regarded as having such impairment. Dahill v. Boston Police Department, 343 Mass. 233, 244, n.13 (2001)(a complainant may qualify under one or more of the statutory definitions and the three prongs are to be assessed independently). See also General Laws, Chapter 151B, §§1(17) and (19); MCAD Handicap Guidelines, Definitions. Major life activities include but are not limited to "caring

for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." General Laws, Chapter 151B, §1(20). The Commission's guidelines also define "major life activities" to include "sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others." MCAD Handicap Guidelines, Definitions.

The phrase "substantially limits" means that an impairment prohibits or significantly restricts an individual's ability to perform a major life activity compared to the ability of an average person in the general population to perform that major life activity. MCAD Handicap Guidelines at §11A(6). See Kuhn v. The Kimball Companies, et. al., 23 MDLR 331 (2001); Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686 (1996) (a temporary disability in which plaintiff recovered in one month without residual disability is not a qualifying handicap under Chapter 151B). MCAD Handicap Guidelines, Section II, Definitions. An impairment is also "substantially limiting" if it renders an individual "significantly restricted as to the condition, manner or duration under which the average person in the general population can perform that same major life activity." The determination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment. MCAD Handicap Guidelines, Section II, Definitions.

In the absence of direct evidence of an unlawful motive based on Complainant's handicap, as in this case, the

Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).<sup>9</sup> See also Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001)(Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation); Abramian v. President & Fellows of Harvard College, 432 Mass. 104 (2000); Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

To establish a claim of handicap discrimination, Complainant must prove by a preponderance of credible evidence that (1) he is a "handicapped person," i.e., one has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or was regarded or perceived by Respondent as having such impairment; (2) he was qualified to perform the essential functions of his janitor's position with or without a reasonable accommodation; (3) Respondent discharged him on December 1, 1998, and/or subjected him to an adverse employment action(s); (4) he was replaced by someone not of his protected class or was discharged under circumstances that give rise to a reasonable inference of unlawful discrimination based on his handicap or perceived

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<sup>9</sup>Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

handicap. Abramian v. President & Fellows of Harvard College, supra. at 116-118; City of New Bedford v. Massachusetts Commission Against Discrimination, 440 Mass. 450, 461-462 (2003).

Once Complainant establishes a prima facie case of unlawful discrimination based on his handicap, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason(s) for his discharge. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, 432 Mass. at 116-118. If Respondent meets its burden of production, Complainant must then show by a preponderance of the evidence in the record that Respondent's proffered reason(s) was not the real reason for his discharge and that Respondent acted with a discriminatory intent, motive or state of mind based on his handicap. See Lipchitz, 434 Mass. at 504; Blare v. Husky, 419 Mass. 437, 443 (1995). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Respondent] for making the adverse decision is false." Lipchitz, supra. Complainant retains the ultimate burden of proving that his termination was the result of a discriminatory animus based on his handicap. Id.; Abramian, 432 Mass. at 117.

As a threshold issue, Complainant must prove that he is a "handicapped person" within the meaning of Chapter 151B, §1(17). The Supreme Judicial Court has held that Chapter 151B "anticipates that determining whether a person is a 'handicapped person' [will be] an individualized inquiry. Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination, 441 Mass. 632, 637 (2001). While

attention deficit disorder, dyslexia<sup>10</sup> and depression are certainly qualifying mental "impairments" for purposes of Chapter 151B, not every impairment constitutes a "handicap" within the meaning of Chapter 151B. City of New Bedford, 440 Mass. at 462-463. Under the Supreme Judicial Court's analytical framework, it is insufficient for Complainant to merely submit evidence or medical documentation that he has an attention deficit disorder or dyslexia, and/or suffers from depression. Id. at 462, citing Carroll v. Xerox Corp., 294 F.3d 236 (1<sup>st</sup> Cir. 2001), quoting Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002) (complainants seeking protection under Chapter 151B must offer evidence that "the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial"). To establish that he is "handicapped" within the meaning of Chapter 151B, Complainant must produce credible evidence to show that: (1) his condition(s), actual or perceived, constitutes a mental or physical impairment, (2) the curtailed life activity constitutes a major life activity and (3) the impairment substantially limits a major life activity. City of New Bedford, 440 Mass. at 462.

First, Complainant did not establish, by sufficient evidence, that he had an attention deficit disorder during the time period relevant to the instant complaint nor did Complainant demonstrate the impact of such condition on one

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<sup>10</sup>Dyslexia is a brain-based type of learning disability that specifically impairs a person's ability to read. These individuals typically read at levels significantly lower than expected despite having normal intelligence. Although the disorder varies from person to person, common characteristics among people with dyslexia are difficulty with phonological processing (the manipulation of sounds) and/or rapid visual-verbal responding. Dyslexia is a brain-based type of learning disability that specifically impairs a person's ability to read. These individuals typically read at levels significantly lower than expected despite having normal intelligence. Although the disorder varies from person to person, common characteristics among people with dyslexia are difficulty with phonological processing (the manipulation of sounds) and/or rapid visual-verbal responding. National Institutes of Neurological Disorders and Stroke, dyslexia information page at [http://www.ninds.nih.gov/disorders/disorder\\_index.htm](http://www.ninds.nih.gov/disorders/disorder_index.htm).

or more of his major life activities.<sup>11</sup> Second, Complainant established that, in 1995, he had a "relatively mild level of depression with associated anxiety attacks" and was diagnosed with an "adjustment disorder with mixed anxiety and depressed mood." Complainant's evidence showed that, in 1994 and early 1995, he overate, slept poorly at night, often cried, was hospitalized for depression and took various anti-depressant medications. Complainant did not establish, however, that he suffered from or continued to be treated for depression when he returned to work in 1995-1996, without restrictions, and after Respondent assigned him to a new supervisor. Based on the totality of evidence in the record, Complainant also failed to show that his depression "substantially limited" one or more of his major life activities, and that it was long-term or re-occurred for a substantial period of time after he returned to full-time work in 1995-1996. MCAD Handicap Guidelines, Definition of "Substantially Limits."

To the extent that Complainant contends that he was unable to work under Labsolu's supervision or that Labsolu's actions caused his depression, I find that Complainant has not shown that he was "substantially limited in his major life activity of "working. Based on the evidence in the hearing record, I conclude that Complainant has failed to establish that his depression substantially limits, or is perceived to substantially limit, him from performing a class of jobs or a broad range of jobs in various classes. See City of New Bedford, 440 Mass. at 466 (a perception that

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<sup>11</sup>I note that Complainant's work record includes the following medical leaves of absence that Complainant took after 1996: August 15, 1997 to September 2, 1997; July 8, 1998 to July 27, 1998; July 13, 1999 to October 1, 1999; October 12, 1999 to November 11, 1999. (Respondent's Exhibit No. 4). Complainant presented no evidence to establish that he took these leaves of absence because of his depression or another handicap(s).

an employees is unable to perform a particular aspect (SWAT team membership) of a single job (New Bedford police officer) is not sufficient to satisfy the "substantial limitation" requirement of Chapter 151B); Wareing & Massachusetts Commission Against Discrimination, 26 MDLR 242 (2004); MCAD Handicap Guidelines, Definition of "Substantially Limits." See also Toyota Motor Mfg., Kentucky, 534 U.S. at 200 (the term, "substantially limits," requires that plaintiffs allege that they are unable to work in a broad class of jobs"); Schneiker v. Fortis insurance Company, 200 F.3d 1055, 1062 (7<sup>th</sup> Cir. 2000)(a personality conflict between an employee and a supervisor—even one that triggers the employee's depression—is not enough to establish that the employee is disabled, so long as he employee could still perform the job under a different supervisor); Krocka v. Bransfield and City of Chicago, 969 F.Supp. 1073 (1997)(when connected with only a particular job or supervisor, debilitating stress is not a disability because it does not limit the employee in a range of jobs).

I find, however, that Complainant has demonstrated, by sufficient evidence, that his dyslexia is a "handicap" within the meaning of Chapter 151B, §1(17). Complainant has shown that his learning, thinking and reading skills are significantly impaired or restricted by his dyslexia, and that his condition is permanent or long-term. In his report, Dr. Robey noted that Complainant has difficulty with even relatively simple arithmetic, has to sound out words phonetically until he can hear the pronunciation for himself and that it was likely that Complainant has "considerable difficulty" understanding and following directions. (Complainant's Exhibit No. 1). See Klaus v. Amherst Fire Department & Town of Amherst, 22 MDLR 164 (2000)(the

complainant was a "qualified handicapped individual" where his dyslexia interfered with the major life activities of reading words and numbers, writing and learning); Cavanaugh v. Town of Agawam, 21 MDLR 106 (1999)(the complainant had great difficulty in reading and writing because of her dyslexia); Moore v. Bridgewater State College, 17 MDLR 1579 (1995) (the complainant was a qualified handicapped individual based on his diagnosis of learning disabilities, including dyslexia, that affected his ability to read, write and complete mathematics). Accordingly, I conclude that Complainant is a "handicapped person" as he is substantially limited as compared to the ability of the average person in the general population to perform the major life activities of learning, thinking and reading.

Complainant has not persuaded me, however, that he is a "qualified handicapped individual" within the meaning of G.L. c. 151B, §§1(16), (17) and (19). A "qualified handicapped person" is a "handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap."<sup>12</sup> G.L. c. 151B, §1(16). The record amply demonstrates that Complainant was not adequately performing his essential functions as a janitor when Respondent discharged him on December 1, 1998. I credit Respondent's credible testimony and evidence that Complainant left his

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<sup>12</sup>Commission guidelines define the "essential functions" of a position as those that are fundamental and not incidental or tangential to the position in question. Functions that are identified as part of the job but which are in fact rarely or never performed will likely not be considered essential. In assessing whether a function is essential, the Commission may consider whether removal of the function in question would fundamentally change the nature of the job in question. It may also consider the amount of time an employee spends performing the function and the work experience of past incumbents in similar jobs. Woodason v. Town of Norton School Committee, *supra.*; MCAD Guidelines, *supra.*, Section II, Definitions.

work area without permission in September and October 1998 when Janvrin found him in the MHIP area and once on November 16, 1998 when Janvrin found Complainant in the GEM Seeker's office after his break time had ended. I also credit Respondent's testimony and evidence that Complainant made unauthorized telephone calls from the MHIP area on October 16, 1998, for an extended time period and used a telephone in a supervisor's office, on November 18, 1998, to make many personal calls.<sup>13</sup> Massachusetts Commission Against Discrimination & Schneider v. Berkshire Humane Society, 27 MDLR 127 (2005). The evidence in the record also does not support Complainant's contention that Morales gave him permission to use the telephones in the MHIP area to the extent and in the manner that Complainant did in October 1998; specifically to make over 40 personal calls during a three-hour period.<sup>14</sup> Rather, these incidents support Respondent's position that Complainant was not performing his essential job functions in a satisfactory manner when Respondent discharged him on December 1, 1998.

Finally, Complainant has not met the fourth element of his prima facie case as he did not establish that Respondent replaced him with a less qualified individual who was not of his protected group. Complainant also failed to show, by credible evidence, that Respondent treated him differently

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<sup>13</sup>I note that Complainant's violations of Respondent's work rules in October-December 1998 were consistent with his extensive prior history of workplace misconduct, including insubordination, leaving his work area without permission and poor job performance. (Complainant's Exhibit No. 6, pages 3-4).

<sup>14</sup> Even though Complainant was diagnosed with dyslexia prior to his misconduct in October to November 1998, he cannot rely on his protected status to justify his improper behavior or conduct. A "handicapped individual" cannot be deemed "otherwise qualified" if he commits misconduct that would disqualify an individual who did not fall under the protection of Chapter 151B. Massachusetts Commission Against Discrimination & Schneider, Id. Respondent is not required to lower its standard of qualifying conduct once it learned of Complainant's handicap where it would not have done so for an employee without such a handicap. Garrity v. United Airlines, Inc., 421 Mass. 55, 60 (1995).

or less favorably than similarly situated employees, not of Complainant's protected class, when it discharged him on December 1, 1998. First, Complainant did not submit any comparative evidence of Respondent's overall record of disciplinary actions that it took against other employees during the time period relevant to this complaint. Accordingly, I have no comparative evidence from which I can reasonably infer a discriminatory pattern or practice of disciplinary actions taken by Respondent based on Complainant's handicap. Second, Complainant has produced no evidence that Respondent failed to take comparable disciplinary action, including discharge, against employees who did not have a handicap but who also committed similar infractions as Complainant. Rogers & Massachusetts Commission Against Discrimination v. Massachusetts Department of Correction, 27 MDLR 61 (2005)(the complainant did not establish a pattern or practice of discrimination based on his race (African-American) where the evidence showed that white officers received suspensions for security violations minority officers received reprimands); Glover v. City of Boston Fire Department, 22 MDLR 95 (2000)(the complainant's anecdotal evidence was insufficient for the hearing officer to draw an inference that there was a history of racial hostility and inequality in the Boston Fire Department).

I reject Complainant's contention that the four employees whom Respondent also disciplined for improper telephone usage in the MHIP area during October 1998 were similarly situated to him "in terms of performance qualifications and conduct, without such differentiating or mitigating circumstances that would distinguish their situations." Smith v. Stratus Computer, Inc., 40 F.3d 11,

17 (1st Cir. 1994), cert. denied, 514 U.S. 1108 (1995), quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6<sup>th</sup> Cir. 1992); Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122 (1997); Glover v. Boston Fire Department, 22 MDLR 95 (2000). Based on the totality of evidence in the record, I find that these workers were not "similarly situated" to Complainant regarding the imposition of disparate discipline in several key aspects.

First, I conclude that Respondent disciplined the four employees, unlike Complainant, based solely on their improper telephone usage in the MHIP area during October 1998. Conversely, I conclude that Respondent based Complainant's discipline on his telephone usage that was shown in the video surveillance conducted on October 16, 1998, and his other work violations in October and November 1998, including being out of his work area and an additional incident of improper telephone usage. Second, Respondent calculated the four employees' telephone usage based on the amount of time they spent on telephone calls, the number of their calls and total number of days they used the telephone. Their telephone logs showed usage that was significantly less than Complainant's: Johnson--16 minutes and three calls over three days; Barrett--45 minutes and 15 calls over two days; Joliat--nine minutes and two calls on one day. (Complainant's Exhibit No. 6, pages 5-6). Only Melchionno's telephone usage in October 1998--64 telephone calls during a three hour and 19 minute time period--was comparable to Complainant's, albeit Melchionno made his calls over a three-day period while Complainant made his personal calls entirely on one day. Of course, there is no dispute in the record that, like Complainant, Respondent discharged Melchionno on December 1, 1998.

Finally, I credit Conant's testimony that Respondent considered the disciplinary history of Complainant and the four co-workers when it determined the severity of the discipline that it meted out on December 1, 1998. Based on the totality of the evidence in the record, I conclude that Melchionno, Joliat and Barrett had "virtually" no discipline prior to December 1, 1998 and that Johnson had a prior disciplinary record that was considerably less than Complainant's; specifically, "one or two warnings and one or two suspensions" during a 20 year work record. (Complainant's Exhibit No. 6, page 8). Conversely, Complainant had an extensive and lengthy prior disciplinary record of 19 oral warnings, 12 written warnings and 8 suspensions, including some that were for similar work violations that served as the basis for his discharge on December 1, 1998. Accordingly, I find that Complainant has not established that Respondent treated similarly situated employees not of his protected class more favorably by meting out less severe discipline for comparable work violations during the time period relevant to this complaint. See Glover, Id.; Hickey v. CVS Pharmacy, 24 MDLR 332 (2002). For the reasons discussed above, I conclude that Complainant has not established a prima facie case of a discriminatory discharge based on his handicap.

Assuming arguendo that Complainant has made a prima facie case of an unlawful discharge based on his handicap, I find that Respondent has articulated a legitimate, nondiscriminatory reason(s) for Complainant's discharge on December 1, 1998. Based on the credible testimony of Janvrin and Conant, I conclude that Respondent discharged Complainant for his violation of its legitimate work rules;

namely, that: (1) Complainant left his work area without permission in September, October and November 1998 when Janvrin found him in the MHIP area and in the GEM Seeker's office after his break time had ended; (2) Complainant made unauthorized telephone calls from the MHIP area on October 16, 1998, and used a telephone in a supervisor's office, on November 18, 1998, to make personal calls. Finally, I conclude that Respondent discharged Complainant based on his unsatisfactory work record and not because he was a "handicapped person."

I summarily reject Complainant's contention that Conant's alleged statements in 1998 that he would fire Complainant if he "took more leaves absence" established a discriminatory animus based on Complainant's handicap. I do not credit Complainant's testimony that Conant threatened to fire Complainant if he took more leaves of absence or referred to him as unemployable." In addition to Conant's credible denial regarding such statements, Complainant produced no evidence that Respondent had terminated an employee within the last 10 years for taking leaves of absence. To the contrary, the record clearly shows that Respondent took no action to fire Complainant until December 1, 1998 despite Complainant's undisputed record that showed he took 16 leaves of absences prior to December 1, 1998. Complainant also failed to establish that, other than one instance in 1995 and 1996, he took leaves of absence related to his handicap, dyslexia, or other alleged handicaps, actual or perceived. I therefore conclude that Complainant has not proven that Respondent's reasons were false or that Respondent acted with a discriminatory intent, motive or state of mind based on Complainant's handicap. Lipchitz, supra.

## B. Retaliation Claim

In his supplemental complaint, dated June 12, 2001, Complainant contends that Respondent's supervisors subjected him to a "continuing pattern of harassment" after the Commission issued its finding of probable cause, dated October 4, 2000.<sup>15</sup> Respondent contends that Shattuck harassed Complainant when he "unremittingly paged" Complainant over the plant loudspeaker from November 1999 January 2000.

Massachusetts General Laws, Chapter 151B, §4, paragraph four, prohibits an employer from retaliating against an employee who has participated in protected activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." See Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208, 215 (2000), citing Bain v. Springfield, 424 Mass. 758, 765 (1997). In addition, Chapter 151B, §4, paragraph 4(A) makes it unlawful "[f]or 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." Retaliation is a separate and independent claim of

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<sup>15</sup>While Complainant asserts that the Commission's probable cause finding was issued on October 4, 1999, I find that it was issued on October 4, 2000.

discrimination, "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful [employment] practice." See Pontremoli v. Spaulding Rehabilitation Hospital, 51 Mass. App. Ct. 622, 625 (2001); Abramian v. President & Fellows of Harvard, *supra.*; Fountas v. Medford Public Schools, 22 MDLR 264 (2000), *citing* Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

The Commission and courts broadly interpret Chapter 151B's anti-retaliation provision to apply to both informal and formal actions opposing unlawful employment practices. See e.g., Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999). The anti-retaliation provision applies to instances where an individual participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). "Participation" includes a formal action such as filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. Massachusetts Commission Against Discrimination & Ramos v. New World Security Associates, Inc., 26 MDLR 173 (2004).<sup>16</sup>

To establish a prima facie case of unlawful retaliation in the absence of direct evidence of a retaliatory motive, as in this case, Complainant must show by credible evidence that: (1) he participated in protected activity; (2) Shattuck knew about Complainant's participation in protected

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<sup>16</sup>The anti-retaliation provision also covers a variety of pre-charge and non-charge conduct, including instances where a complainant has orally "opposed" an unlawful employment practice or action under Chapter 151B (the "opposition" clause). The statutory protection against employer retaliation extends, therefore, to "informal voicing of complaints" alleging discrimination. Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990) For example, the Commission has found liability for unlawful retaliation when an employee complained about unlawful discrimination, but did not file a formal discrimination charge. Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999).

activity prior to his alleged harassment; (3) Respondent suffered an adverse employment action(s) after he participated in protected activity, i.e., Shattuck harassed Complainant based on his alleged "excessive paging; (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and Shattuck's harassment. See Wareing and Massachusetts Commission Against Discrimination v. New Bedford School Department, supra.; Hudson v. Pembroke/Hanover Elks Lodge, et. al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Since a link between protected activity and the adverse employment action(s) at issue is not always explicit, the Commission can infer "a causal connection where the timing of events makes an inference reasonable." See Ritchie v. Department of State Police, 60 Mass. App. Ct. 599 (2004) ("close temporal proximity between the protected activity and the adverse employment action permits an inference of the casual nexus necessary for a finding of retaliation"); Kealy v. City of Lowell, Department of Public Schools, 21 MDLR 19 (1998), citing Cimino v. BLH Electronics, Inc., 5 MDLR 1263, 1287 (1983) (finding retaliation where the discharge occurred within 15 months after the protected activity); Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 1144-1145 (1995)(termination taken within six weeks of participation in protected activity); Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1<sup>st</sup> Cir. 1976).

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I conclude that Complainant has not established a prima facie case of retaliation based on Shattuck's "excessive paging." First, I do not credit Complainant's testimony that he told Shattuck about the Commission's probable cause finding in the instant discrimination complaint.<sup>17</sup> Second, I do not credit Complainant's testimony that Shattuck paged him 14 or 15 times each work day without a work related justification. Based on Complainant's demeanor and manner of testifying, I find that Complainant overstates or exaggerates Shattuck's paging on a daily basis during the relevant time period. I also find that Complainant merely cites to an alleged number of Shattuck's pages and did not address whether any of Shattuck's pages were warranted based on Shattuck's legitimate attempts to contact him because Shattuck did not see Complainant in the clean room or Complainant was not in the clean room when Shattuck needed him.<sup>18</sup> Third, Complainant's evidence established that the "excessive paging" allegedly took place between October 2000 and December 2000. I find that Complainant's written documentation shows that, at best, he complained to his union steward, only on December 18, 2000, about Shattuck's "constantly paging" while Shattuck was standing 10 feet away from him. (Complainant's Exhibit No. 3). Complainant did not tell or complain to Bortalino or George, at anytime, about Shattuck's alleged harassment. Finally, Complainant presented no evidence that Shattuck's alleged harassing pages continued after December 18, 2000, until his layoff on April 27, 2001. To the contrary, Complainant testified that Shattuck's "excessive" pages stopped after Shattuck met with him and his union steward on December 18, 2000. For these

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<sup>17</sup>Complainant also failed to produce any evidence that Shattuck knew that Complainant had filed the instant complaint on April 1, 1999.

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<sup>18</sup>The absence of such testimony or information is relevant given Complainant's well-documented record of leaving his work area without authorization and not performing his job duties.

reasons, I conclude that Complainant did not establish, by credible evidence, a prima facie case of unlawful retaliation based on his participation in protected activity.

Based on the above analysis, I also conclude that Complainant has not proved that his work environment was "so pervaded by [retaliatory] harassment or abuse with the resulting intimidation, humiliation and stigmatization," that it made his employment at Respondent less desirable to a reasonable person in his position. See Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 531, 532 (2001); Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, (2001). I conclude that the conduct cited by Complainant, i.e., Shattuck's pages and his occasional statement that Complainant was not as "dumb" as other employees thought, was not sufficient to create an objectively hostile or abusive work environment based on his participation in protected activity. See e.g., Clark County School District v. Breeden, 532 U.S. 268 (2001)("simple teasing, off-hand comments, and isolated incidents unless extremely serious will not amount to discriminatory changes in terms and conditions of employment"); Horzesky v. R&M Construction Co., 15 MDLR 1171 (1993)(casual comments or accidental or sporadic conversations are insufficient to constitute a pervasive, hostile work environment). Accordingly, I conclude that Complainant has not established a prima facie case of a retaliation based on his participation in protected activity.

Even if I were to find that Complainant established a prima facie case of a retaliation based on his participation in protected activity, which I do not, I credit Bortalino's

testimony, as corroborated by Complainant, that the physical layout in the clean room was such that employees were not visible to supervisors although they were a mere few feet away. In addition, I credit Bortalino's testimony that, as Complainant's primary supervisor, he occasionally sent him outside of the clean room on assignments where paging was obviously necessary. Accordingly, I find that Bortalino and Shattuck had a legitimate business reason for occasionally paging employees in the clean room, including Complainant.

C. Harassment Claim

Complainant filed his initial discrimination charge with the Commission on April 9, 1999. Since all of the alleged acts of harassment by Labsolu occurred more than six months prior to the filing of the instant complaint, Respondent contends that Complainant's supplemental claim based on Labsolu's alleged harassment, is untimely and is not part of a continuing violation.<sup>19</sup> Sleeper v. New England Mutual Life insurance Co., 24 MDLR 55 (2002) (harassment on the basis of handicap is subsumed within a claim for handicap discrimination within the meaning of General Laws, Chapter 151B, §4(16)). During the period relevant to the instant complaint, General Laws Chapter 151B, §5, required a complainant to file a charge of discrimination with the Commission within six months of the occurrence of the alleged discriminatory act(s) or event(s). Lynn Teacher's Union v. Massachusetts Commission Against Discrimination, 406 Mass. 515, 520 (1990). Accordingly, a complainant's failure to file a discrimination charge within six months of

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<sup>19</sup>Complainant did not raise Labsolu's alleged harassment from 1983 until 1995 in his initial or supplemental complaints.

the alleged discriminatory act(s) or event(s) operates as a bar to proceeding before the Commission.

The six-month filing period is not jurisdictional. It is akin to a statute of limitations that is subject to waiver, estoppel, and equitable tolling. Sanderson v. Town of Wellfleet Fire Department, 16 MDLR 1341 (1994). The Commission can toll or extend the six-month limitations period when there are equitable considerations. Vera & Saltmarsh v. Massachusetts Commission Against Discrimination, 26 MDLR 341 (2004). The Commission has recognized an exception to the six month filing requirement where a complainant alleges facts "which indicate that the unlawful conduct complained of is of a continuing nature." MacNeal v. Boston Public Schools, 23 MDLR 132, 135 (2003); Morrissey v. Holiday Inn, 23 MDLR 74, 77 (2003). See 804 C.M.R. §1.10(2)(continuing violation exception to the six-month statutory filing requirement). The continuing violation exception recognizes that some discrimination claims involve a series of related acts that must be viewed in their totality to adequately assess their discriminatory nature and impact. Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001); Rock v. Massachusetts Commission Against Discrimination, 384 Mass. 198, 205-08 (1981) (upholding "continuing violation" regulation).

To invoke the continuing violation doctrine to recover for otherwise time-barred violations, Complainant must first show that Labsolu's harassing acts were "part of an ongoing pattern of discrimination," and "there is a discrete violation within the six-month limitations period to anchor the earlier claims." Cuddyer, 434 Mass. at 531-532. This rule allows the Commission to fulfill its statutory

obligation of providing an effective "remedy [for] ongoing discriminatory policies by an employer." Cuddyer, Id. at 532. Consequently, Complainant must establish that at least one incident of unlawful conduct occurred, "which standing alone might not necessarily support [his] claim, but which substantially relates to earlier incidents of abuse, and substantially contributes to the continuation of a hostile work environment, such that the incident anchors all related incidents, thereby making the entirety of the claim for discriminatory conduct timely." Id. at 533.

To satisfy this standard, Complainant must establish that the alleged untimely and timely discrimination allegations are related based on the following: "(a) the subject matter of the acts, e.g., do they involve the same managers or supervisors and the same type of discrimination, although not necessarily the same discriminatory acts?; (b) their frequency, e.g., are the alleged discriminatory acts recurring, or more in the nature of isolated acts?; (c) earlier violations outside the six-month limitations period outside the limitations period did not trigger Complainant's 'awareness and duty' to assert his rights, i.e., that Complainant could not have formed a reasonable belief at the time that the employment actions occurred that they were discriminatory. Rapoza v. Ocean Spray Cranberries, Inc., 23 MDLR 263 (2001)(Full Commission decision). For the reasons discussed below, I conclude that Complainant has not established a continuing violation based on Labsolu's alleged harassment from 1983 until 1995.

Complainant has not shown that managers and supervisors for Respondent were engaged in an ongoing pattern of discrimination or a continuing violation that included

unlawful conduct that occurred within six months prior to filing his initial complaint on April 1, 1999. All of Complainant's allegations relate to Labsolu's alleged harassment that occurred before October 9, 1998. There is also no evidence that Labsolu supervised Complainant, or allegedly harassed him, on a daily basis, after Respondent assigned Complainant to a new supervisor when he returned from his leave of absence sometime in 1995 or 1996. Second, I do not credit Complainant's testimony that Labsolu subjected him to a pervasive and continuous pattern of daily harassment from 1983 through 1995 when Respondent assigned Complainant to another supervisor. Based on his demeanor and manner of testifying, I find that Complainant's testimony is wholly not credible and is not corroborated by other evidence or credible testimony. Third, as discussed herein, Complainant did not establish that Respondent discriminated against him based on his handicap when it discharged him on December 1, 1998, or that Respondent retaliated against him for his protected activity when it allegedly subjected Complainant to "excessive paging" between October 2000 and December 2000. I also conclude that Complainant's harassment claim arising out of Labsolu's conduct is not substantially related to his alleged discriminatory discharge on December 1, 1998 or retaliatory harassment in October 2000. Complainant's allegations of a discriminatory discharge or retaliation are obviously based on a different subject matter of discrimination, took place at least two years after the alleged harassment by Labsolu ended and arise from discrete, isolated adverse employment actions that were taken by supervisors and managers who were not involved in Complainant's harassment claim against Labsolu. Rapoza, supra.

Based on the above analysis, I conclude that Complainant has not proved that at least one substantial and related discriminatory act occurred within six months prior to his discrimination complaint filed on April 1, 1999. I also conclude that there is no timely discrete violation(s) to "anchor" Labsolu's alleged earlier unlawful harassment dating back to 1983. Cuddyer, supra. at 532. Even if Complainant establishes a continuing violation, his claim for the earlier conduct is barred if he knew or reasonably should have known, more than six months prior to filing his initial complaint, that his work situation was pervasively hostile and unlikely to improve and, therefore, a reasonable person in his position would have filed a seasonable complaint with the Commission.<sup>20</sup> Id. at 541; Clifton v. Massachusetts Bay Transportation Authority, 62 Mass. App. Ct. 164, 174 (2004) (under the Cuddyer standard, for a claim to be untimely, the [complainant] must not only be aware that his or her work situation is pervasively hostile, but have knowledge that it is unlikely to improve and the delay in filing a complaint with the commission is unreasonable). The determination of when Complainant believed his work situation is hopeless is a factual situation. Vera & Saltmarsh v. Faust, supra.; Morrissey v. Holiday Inn, 25 MDLR 75, 86 (2003).

Based on the totality of evidence in the record, I find that Complainant knew or reasonably should have known, more than six months before he filed his discrimination complaint, that his work situation was unlikely to improve and that a reasonable person would have filed a seasonable

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<sup>20</sup>If Complainant fails this standard, the acts or events prior to the limitations period is barred as a basis for the recovery of damages. However, Complainant may use the time-barred events as evidence of a hostile work environment but may only recover damages for acts that occurred within the limitations period. Cuddyer, 434 Mass. at 541.

complaint with the Commission. Complainant testified that he was hospitalized for depression in January 1995 because of Labsolu's alleged harassment that allegedly continued from 1983 to 1995. It is also undisputed in the record that Complainant filed a workers' compensation claim in 1995 that was based, in part, on his claim of depression caused by Labsolu's alleged harassment. In addition, Complainant also reported Labsolu's alleged harassment to the health care professionals during his hospitalization, evaluative diagnosis and as part of his evaluation pursuant to his workers' compensation claim. Complainant also presented no evidence that he reasonably relied on Respondent's ability to remedy his situation through its internal procedures. To the contrary, Complainant testified that he did not report Labsolu's alleged harassment to any management officials because of his unsubstantiated claim that such it would worsen. Under such circumstances, Complainant can not now claim that he had "no awareness and duty" to assert his rights, or could not have formed a reasonable belief by his hospitalizations and worker's compensation claim in 1995 and 1996 that the Labsolu's alleged actions constituted unlawful harassment and were unlikely to improve. Consequently, I find that Complainant's claim of unlawful harassment by Labsolu prior to October 1998 does not constitute a continuing violation and is time barred. Cuddyer, supra.

#### V. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby order that the claim be dismissed in its entirety.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 28th day of October, 2005.

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Kenneth B. Grooms  
Hearing Officer