

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEVEN ST. MARIE,
Complainant

v.

Docket No. 04 SEM 01589

ISO NEW ENGLAND, INC.
Respondent

Appearances: Mark H. Bluver, Esq. and Erin F. Thron, Esq., for Complainant
Joan Ackerstein, Esq. and Robert H. Morsilli, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 15, 2004, Steven St. Marie (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that ISO New England, Inc. (“Respondent”) retaliated against him by unlawfully terminating his employment for filing discrimination claims against ISO’s predecessor, Northeast Utilities and another entity, New England Power Pool. On February 7, 2007, the Hearing Officer agreed to bifurcate the proceedings and hear the liability portion first and the damage portion later, if necessary. Accordingly, the decision of March 12, 2008, dealt solely with the issue of liability. It found that Respondent retaliated against Complainant for engaging in the protected activity of participating in the filing of a class action age discrimination claim against Respondent and its predecessors and for delaying the settlement of said claim.

The public hearing reconvened on July 12, 2008 and September 5, 8, and 9, 2008 relative to the issues of damages. Complainant testified on his own behalf and presented the following additional witnesses: economic expert Dr. Craig L. Moore, Ph.D. and Complainant's wife, Mary St. Marie. Respondent presented economic expert Dr. Thomas A. Barocci, Ph.D. and Stephanie L. Krupp, an energy industry recruiter and consultant. The parties presented twenty-nine (29) agreed-upon exhibits. Additional exhibits, 30-47, were offered by one or both parties and were accepted into evidence.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Respondent is a not-for-profit corporation located in Holyoke, Massachusetts which manages the bulk electrical power system in New England, administers wholesale electricity markets in New England, and plans for future energy consumption.
2. Complainant was an employee of Respondent and its predecessors, Western Massachusetts Electric and Northeast Utilities, for more than twenty-one years. Following a December 1, 2003 blackout, Complainant was terminated by Respondent from his position of Operations Shift Supervisor. Complainant, whose date of birth is 10/20/53, was fifty years old at the time he was terminated on January 27, 2004. Immediately after he was informed of his

termination, Complainant was escorted to his desk to gather his personal belongs, escorted to the exit, and let out the gate. Complainant described this experience as humiliating.

3. Complainant testified credibly that after several days, as the reality of his termination sank in, he became angry about the situation, felt incompetent, and was concerned that he had in some way failed. He found his abrupt termination after twenty-one years of service to be humiliating and depressing and he began to experience self-doubt as time went on. Complainant was embarrassed to be looking for work as an electrician when he hadn't worked as an electrician in over twenty years. Transcript I at pp. 31-33. Approximately five weeks prior to his termination, Complainant had begun to experience intestinal pain which was ultimately determined to be diverticulitis. Transcript I at pp. 129-132; Exhibit 17. Complainant had to postpone diagnosis and surgical treatment of the diverticulitis because his medical insurance coverage was interrupted as a result of his termination. Transcript I at pp. 59-60, 137-138. On the witness stand, Complainant appeared to be a quiet and taciturn individual who had some difficulty expressing the emotional turmoil caused by his termination, but he nonetheless conveyed the devastation and humiliation of being terminated at age fifty and summarily escorted out of his place of employment.
4. Complainant's wife characterized Complainant, prior to his discharge, as a person who was "totally competent," confident, and with a "lot of self-worth" but stated that after his termination, he became a person who lacked self-esteem and was "a shell of the person that he was prior to this." Transcript II at p. 168.

She testified credibly that the loss of Complainant's job caused them, as a couple, to feel frightened and uneasy. She described Complainant's pursuit of work as an electrician to be "demeaning" and described Complainant's physical condition while working as an electrician as exhausted, dirty, and emotionally drained. Transcript II at pp. 170-171.

5. Complainant's wife testified that her own reaction to the termination -- suffering depression and breaking out into a rash -- caused her husband to become even more angry and upset. Transcript II at p. 181. I found Mrs. St. Marie's testimony to be credible and compelling.
6. In 2006, Complainant settled a malpractice claim for \$75,000.00 which he brought against the attorneys who represented him in his original age discrimination action against Respondent. The age discrimination case arose out of events in 1996-1997 and settled in 2003. Transcript I at p.140.
7. Subsequent to the completion of the liability phase of the MCAD proceedings, both sides retained economists to analyze and offer testimony regarding the damages that Complainant suffered as a result of his termination by Respondent. Complainant retained the services of Dr. Craig L. Moore, Ph.D. Respondent retained Dr. Thomas A. Barocci, Ph.D. Both witnesses were qualified as experts during the damages hearing. They testified and provided written analysis of the financial losses sustained by Complainant from the date of his termination by Respondent to his anticipated date of retirement at age sixty. They also evaluated Complainant's efforts to mitigate his economic losses. Neither expert conducted a detailed analysis of the damages sustained

as a result of Complainant losing health and other non-retirement related benefits when discharged by Respondent.

8. In calendar year 2002, Complainant's compensation by Respondent was \$114,466.00. Exhibit 41. In calendar year 2003, Complainant's compensation by Respondent was \$148,519.00, including a one-time bonus of \$41,719.00. Id. In calendar year 2004, Complainant received \$20,374.00 in compensation from Respondent prior to his termination.
9. In order to determine Complainant's projected income had he remained at ISO-NE, Complainant's expert, Dr. Barocci, calculated that the average annual increase for all Operations Shift Supervisors at ISO-NE for the period 2000-2007 was 4.1 %. Transcript III at pp. 49, 52-54; Exhibit 3. Using Complainant's earnings of \$114,465.60 in 2002 as a base, Dr. Barocci increased Complainant's earnings by 4.1% for calendar years 2004-2013 to determine Complainant's projected compensation as an Operations Shift Supervisor at ISO-NE¹ had he not been terminated. Joint Exhibits 36 and 47 (1.8). I credit Dr. Barocci's calculations that Complainant's income, had he remained employed by Respondent, would likely have been the following in calendar years 2004 through 2008: \$124,056.00 (04); \$129,148.00 (05); \$134,449.00 (06); \$139,968.00 (07); and \$145,713.00 (08). Exhibit 47 (1.8).
10. Complainant testified that prior to being terminated by Respondent, he planned to retire at age sixty. When Complainant reaches age sixty, he will receive an annual pension benefit from Respondent in the amount of \$19, 742.00, based on

¹Dr. Barocci did not use calendar year 2003 as a base because Complainant received a one-time bonus that year. Transcript, Volume III at p. 54.

his almost twenty-two years as an employee with Respondent. I credit the pension calculations of Dr. Barocci that if Complainant had worked for Respondent until age sixty, he would have received an annual pension benefit from Respondent in the amount of \$69,676.00 and that his annual loss of pension benefits, as a result of his discharge, will be \$49,933.40. Transcript I at pp. 65-66. Exhibit 47; Transcript III at pp. 89-90. I also accept Dr. Barocci's determination that the present value of the pension loss should be discounted by a nominal² discount rate of 5.7% annually, based on the average rate of return on long-term treasury bills between 1920 and 2007 and that Complainant's life expectancy is age 78.3 years old, based on life expectancy tables assembled by the Center for Disease Control, Social Security Administration, and the United States Department of Labor. Transcript III at pp. 49-50, 69-70. I decline to credit Dr. Moore's computation of \$799,235.88 in pension losses based on a "net real" discount rate of 2% (purportedly derived from a discount rate of 4.2%, reduced by administrative fees and income taxes) and on mortality tables published by the Internal Revenue Service pursuant to the Pension Protection Act of 2006. Dr. Moore's calculations are disregarded because: 1) he relied on the Internal Revenue Service's monthly federal discount rate for September of 2008 as the basis for calculating damages rather than using an historical average of discount rates over an extended period of time (Exhibit 39, p. 2 citing Revenue Ruling 2007-67); 2) the mortality tables he relied on are not

² Nominal dollars are not adjusted for inflation. Dr. Barocci calculated Complainant's damages in nominal dollars because Respondent's pension plan benefits are calculated in nominal dollars (i.e., they are based on a participant's final average earnings over the last sixty months of employment). Transcript III at pp. 71, 77.

referenced in any of his four expert witness reports (Exhibits 31, 32, 33, or 37); 3) the mortality tables he relied on are not gender-specific; and 4) the mortality tables he relied on were published by the Internal Revenue Service in order to address the underfunding of pension plans rather than to address a specific individual's pension losses.

11. Dr. Barocci determined that Complainant sustained lost pension benefits in the amount of \$330,693.00, when calculated at a net present value in 2004 dollars, at a nominal discount rate of 5.7%, using a life expectancy of 78.3 years old. Transcript III at p. 99.
12. Complainant participated in Respondent's 401(k) plan, into which Respondent provided annual matching contributions equal to 4% of Complainant's compensation. Transcript III at p. 62.
13. Following his termination by Respondent, Complainant collected unemployment compensation in the amount of \$10,660.00. He subsequently earned \$6,675.68 as an electrician while working for Lighting Retrofit Services, Inc. for approximately five to six weeks during the summer of 2004. Transcript I at p. 152; Exhibit 1. Complainant was able to work as an electrician, having maintained a master electrician's license and a journeyman's electrician's license throughout his career and having rejoined the International Brotherhood of Electrical Workers ("IBEW") in 2004.
14. Following his discharge by respondent, Complainant applied for three positions in the energy industry: a position at CA ISO in Folsom, California; a position with NY ISO in Albany, New York, approximately seventy miles (70) from his

house; and a position with an ISO in Nova Scotia. He was offered and accepted the position of Generation Dispatcher at CA ISO in Folsom, California. After Complainant accepted the California position, NY ISO offered Complainant the opportunity to take a job screening test. Complainant declined to take the test because NY ISO did not guarantee him employment if he passed the test, he had already accepted a job offer from CA ISO, and he was scheduled to leave for California several days later in order to begin work.

15. While Complainant pursued employment in California, his wife remained at their house in Westhampton, MA and continued to work at her job as a kindergarten aide. Complainant and his wife have lived separately from the commencement of his California employment until the present time except for vacations, holidays, and breaks in shift assignments. During periods of separation, Complainant and his wife communicate through daily phone calls. They decided not to relocate their primary residence to California because they are life-long residents of western Massachusetts, Complainant's elderly parents live there, Complainant's wife has strong social and professional ties to her community, and they occupy the same house that they designed and built twenty-two years ago.

16. Complainant began working in Folsom, California on September 7, 2004. Complainant kept detailed records of the additional living expenses he incurred in California between August of 2004 and June of 2008 while maintaining a primary residence in Massachusetts. Complainant testified credibly, supported by a detailed itemization of costs, that he incurred \$88,045.55 in rent, furniture,

utilities, phone, TV, and travel expenses. Joint Exhibit 44. I find that the expenses are a reasonable and credible itemization of costs incurred as a result of working in Folsom, California.

17. Based on information supplied in his W-2 Wage and Tax Statements and the testimony of Dr. Barocci, I find that Complainant earned \$44,105.28 at the CA ISO in 2004 (exclusive of \$10,660.00 in unemployment compensation and \$6,675.68 in other employment), \$138,072.00 in 2005, \$143,255.00 in 2006, and \$146,536.00 in 2007. Transcript III at 128-129; Exhibits 1, 36, and 47(1.8).³ Based on his income during the first half of 2008, I find that Complainant would have earned \$169,850.00 at the CA ISO in calendar year 2008 had he remained with CA ISO until the end of 2008. Exhibit 36. Based on Complainant's income and average wage growth while employed at CA ISO, I credit Dr. Barocci's calculation that Complainant sustained total back pay damages in the amount of \$4,490.00. I do not credit Dr. Moore's assertion that Complainant sustained \$54,028.00 in back pay damages.
18. Complainant voluntarily resigned from his employment at CA ISO, effective July 6, 2008. Dr. Barocci forecast what Complainant would have earned at his California job from 2008 through 2013, based Complainant's earnings between 2004 and 2008 and using an annual earnings growth of 4.8%. Exhibit 36; Transcript III at p. 131. Dr. Barocci concluded that Complainant's earning potential and 401(k) benefits at CA ISO in years 2009-2013 would have

³ Complainant contends that he earned \$145,485.77 in 2007, but that figure pertains to "Medicare, Wages and Tips" in Box 6 of his W-2 Wage and Tax Statement whereas Dr. Barocci's figure appears to be Complainant's gross income for 2007. Transcript, Volume I at pp. 111-112.

outstripped his earning potential and 401(k) benefits with Respondent during the same years.

19. Complainant participated in CA ISO's 401(k) plan, into which the employer provided annual matching contributions up to 11% of Complainant's compensation. Transcript III at pp. 62-63. By the time Complainant resigned, he was vested in CA ISO's 401(k) account. Transcript, Volume I at p. 68.
20. Dr. Barocci calculated that if Complainant had not been terminated, Respondent would have given Complainant \$43,210.99 in matching 401(k) contributions between 2004 and 2013, calculated at a net present value in 2004 dollars. Transcript III at p. 99; Exhibit 47 (1.11 & 1.15). Dr. Barocci compared this sum to a figure of \$124,746.00, which he calculated that CA ISO would have contributed to Complainant's 401(k) account between 2004 and 2013, at a net present value in 2004 dollars. Transcript III at p. 99; Exhibit 47 (1.11, 1.15). According to Dr. Barocci, Complainant would have experienced a net gain of \$81,576.00 in employer 401(k) contributions had he worked at CA ISO from 2004 through his retirement in 2013. I credit these projections over the calculations provided by Dr. Moore relative to 401(k) contributions.
21. Neither Complainant's expert nor Respondent's expert valued the medical, dental, and life insurance benefits provided to Complainant by Respondent or by his California employer nor did they value the projected benefits promised by Colorado ISO, his future employer. Both Dr. Moore and Dr. Barocci testified that the medical, dental, and life insurance benefits at the ISO's are not significantly different. Exhibit 37 at p. 6. Transcript III at p. 66.

22. On July 6, 2008, Complainant voluntarily resigned from his employment at CA ISO in order to take a position as a Reliability Coordinator with Western Electricity Coordinating Council (WECC) in Loveland, Colorado. Transcript, Volume I at p. 68. He received a signing bonus of \$35,000.00 and began work at WECC on October 1, 2008. Exhibit 13. Complainant testified that he frontloaded overtime during the first half of 2008 in order to compensate for lost income between July and October of 2008 when he vacationed with his wife. However, Complainant's pay stub from CA ISO indicates that he worked 228.75 hours of overtime in the first six months of 2008, which did not exceed one-half of the overtime he worked in calendar year 2007. Transcript II at pp. 87-90; Exhibit 28. Based on this evidence, I decline to credit the assertion that Complainant frontloaded overtime during the first half of 2008 at CA ISO in order to mitigate lost income as a result of taking a three-month vacation between July and October of 2008.
23. Complainant testified that he views the WECC job in Loveland, Colorado as a "progression" in his career ladder, despite the fact that the WECC job does not involve supervision, the control room is smaller than the one at CA ISO, and the salary, pension and 401 (k) benefits are less than those at CA ISO. Transcript I at pp. 63, 67-68, 126. Complainant estimates that he will earn \$127,000.00 annually, including overtime. Transcript I at p. 67. WECC offers a 401(k) plan in which the employer contributes 4% to 401(k) accounts and matches 50% of an employee's first 6% contribution. Exhibit 13.

24. According to Complainant, the position with WECC will be less stressful than his position at CA ISO, the summers will be cooler than in Folsom, California, the cost of living will be lower, and the distance from Massachusetts will be one-third less. Transcript, Volume I at p. 64. Nonetheless, Loveland, Colorado is approximately 1,900 miles from Westhampton, MA where Complainant maintains his primary residence. Complainant's wife has no present plans to move to Colorado. Transcript I at p. 125.
25. I credit Complainant's testimony that after his termination by Respondent, he was unable to secure comparable work within commuting distance from his family's home in western Massachusetts. Complainant made a good faith job search following his termination, but was not able to obtain local employment because he had been fired for cause and because he had reached a level of specialization in his field which limited the number of comparable positions. As a result, Complainant was forced to move to California and lost the full-time companionship of his wife who continues to live and work in Westhampton, Massachusetts. I am not persuaded by the testimony of Respondent's witness, energy industry recruiter Stephanie Krupp, that Complainant, in January of 2004, could have obtained a position comparable to his job with Respondent which would have involved less commuting distance and/or fewer living expenses. The evidence presented by Krupp regarding alternative employment opportunities lacked specifics relative to salary, benefits, job description, availability, and location. Krupp failed to take into account Complainant's negative employment history and focused on positions which a computer search

identified as available months and/or years after Complainant's discharge.

Transcript IV at pp. 17-18.

III. CONCLUSIONS OF LAW

G.L. c. 151B, section 5 authorizes the Commission to award remedies that will make whole a Complainant who is the victim of unlawful discrimination. This includes damages for lost wages, lost benefits and emotional distress resulting from an unlawful employment action. In this case, Complainant has produced ample evidence that he suffered financial losses and emotional distress as a direct result of his termination.

The wealth of material presented by the parties as evidence of damages may be organized around a few basic principles. First, Complainant did not choose to go to California. He was forced to do so as a result of his retaliatory discharge by Respondent. In order to put himself back on the same career path that he had prior to termination, Complainant was forced to endure years of separation from his wife. Complainant's relocation to California was not a "lifestyle" choice as Respondent asserts but, rather, a difficult decision to subordinate personal preferences to his career goals and economic best interests. I credit Complainant's testimony that after his termination by Respondent, he was unable to secure comparable work within commuting distance from his family's home. Testimony to the contrary, presented by an energy industry recruiter, was not persuasive because it lacked specificity regarding salary, benefits, job description, location, and job availability in early 2004 and the testimony failed to take into account that Complainant's discharge was for cause. Complainant made a good faith job search following his termination, but was not able to obtain local employment because he had a

negative employment history and because he had reached a level of specialization in his field which limited the number of comparable positions.

The necessity for Complainant to move to California in order to find comparable work in his field justifies his request for reimbursement of the itemized living expenses he incurred as a result of the move. Such expenses include the cost of setting up a second household apart from his wife. The fact that his retaliatory termination forced him to live and work in California does not mean that his wife was also required to separate herself from her friends, family, and career in Massachusetts. Just as Respondent must bear the emotional distress caused by the separation, so must it bear the reasonable living expenses, which Complainant has credibly itemized, associated with maintaining a second household in California. See Buckley Nursing Home v. MCAD, 20 Mass. App. Ct 172, 185 (1985) (Complainant is entitled to damages resulting from Respondent's unlawful act, absent a showing by Respondent that Complainant has failed to mitigate his damages).

The second principle which forms a basis of the damage award is that Complainant is not entitled to front pay damages because he secured, and then voluntarily left, a highly-paid position in California to take a position in Colorado with a lower salary and inferior 4019K) benefits. Complainant must bear the financial consequences of leaving such employment in mid-2008 for another position that paid less than his previous job and still required that he live apart from his wife. By choosing to leave a highly-compensated position in California for a less well-paid one in Colorado, Complainant can no longer credibly assert that that his lost front pay is attributable to Respondent and/or that he is fulfilling his duty to mitigate. See Beaupre v. Cliff Smith & Associates, 50 Mass. App.

Ct. 480, 497 (2000) (lost future earnings must be attributable to an employer's misconduct). Based on the foregoing, I conclude that Complainant is neither entitled to compensation for a three-month vacation between jobs in 2008 nor for front pay damages following his voluntary departure from California. I do not accept Complainant's assertion that the Colorado position is a "progression" in his field. The Colorado position lacks supervisory responsibility, has a smaller control room, and compensates Complainant at a lower salary than he earned in California. While Complainant has the right to choose a job with less stress and better weather, he may not hold Respondent financially responsible for the lost income associated with this choice.

As a third principle, I reject Respondent's attempt to calculate what Complainant might have earned in income and in 401(k) employer contributions between 2008 and 2013 had he remained at his California job and to use that sum in order to mitigate Complainant's overall damage award. Potential compensation of this nature is too speculative to offset the financial losses which Complainant will reasonably be expected to incur as a result of his termination by Respondent. The damages attributable to Respondent are forecast on the basis of an almost twenty-two year career that was abruptly terminated. They should not be minimized by attempting to predict what Complainant would have earned in income and in employer 401(k) contributions at a California job where Complainant no longer works, where potential 401(k) benefits are linked to matching employee contributions and are subject to investment losses, and where Complainant's lack of tenure carries an ever-present risk of layoff. Accordingly, the estimate of \$50,000.00 in annual lost pension benefits once Complainant reaches age sixty may not be reduced by hypothetical earnings in California.

Fourth, when calculating an acceptable discount rate, I conclude that it is appropriate to use the average rate of return from conservative, long-term investment instruments such as a treasury bonds rather than a snapshot interest rate, circa September of 2008. I agree with Dr. Barocci that the long term past is the best predictor of the future. For this reason, I decline to accept a discount rate based on a snapshot of time in September of 2008, as proposed by Dr. Moore. I decline to do so for the additional reason that the Pension Protection Act provides for the publication of monthly discount rates by the IRS in order to calculate future pension obligations, not to calculate economic damages in an employment discrimination matter. Instead, I accept Dr. Barocci's discount rate of 5.7%, based on average market fluctuations in long term treasury bills between 1920 and 2007. I likewise reject Dr. Moore's reliance on an IRS mortality table published pursuant to the Pension Protection Act of 2006 in order to address the underfunding of defined benefit pension plans. That table, although published in final form on August 11, 2008, was issued in June of 2007 on an interim basis. It should have been presented to Respondents as part of Dr. Moore's four expert reports. In any event, the table is overly inclusive insofar as it is a unisex table and females live approximately six to seven years longer than men. For these reasons, I conclude that Complainant's mortality should be calculated on the basis of the average life expectancy for males, according to life expectancy tables assembled by the Center for Disease Control in conjunction with the Social Security Administration and the United States Department of Labor, to wit: 78.3 years old.

In consideration of the aforementioned principles, I conclude that Complainant is entitled to receive \$4,493.00 in back pay damages,⁴ no front pay, an award of \$330,693.00 in projected pension losses, and an award of \$88,045.55 in itemized living expenses.

Insofar as emotional distress damages are concerned, Complainant testified credibly that following his termination, he was angry, humiliated, depressed, had self-doubts, and felt incompetent. On the day of his discharge, he was forced to end his almost twenty-two year career by carrying his personal belongings out of the office in a box, past co-workers. Following his discharge, Complainant was embarrassed to be looking for work as an electrician when he hadn't done so in over twenty years. Complainant had to postpone diagnosis and surgical treatment for diverticulitis because of the interruption in medical insurance coverage caused by his termination. Complainant's wife characterized Complainant prior to his termination as a person who was totally competent, confident, and had a lot of self-worth but that after his termination he lacked self-esteem and was a shell of the person that he was before. The loss of Complainant's job caused them, as a couple, to feel frightened and uneasy. Complainant's wife characterized the electrical work that Complainant was forced to do after his termination as "demeaning," "exhausting," "emotionally draining," and "dirty." She described her husband as angry and upset over the fact that she reacted to his termination by suffering depression and breaking out into a rash.

While Complainant was compelled to take a job in California in order to pursue his career, his wife remained at their house in Westhampton, Massachusetts and continued to

⁴ I do not accept Complainant's calculations of back pay damages for the reasons set forth in Finding of Fact 16.

work at her job as a kindergarten aide. Thus, Complainant had to give up his home and life in Massachusetts and lose the full-time companionship of his wife from the commencement of his California employment in 2004 through the present time, except for vacations, holidays, and breaks in shift assignments. During periods of separation, Complainant and his wife communicated through daily phone calls. They decided not to relocate their primary residence to California because they are life-long residents of western Massachusetts, Complainant's elderly parents live there, Complainant's wife has strong social and professional ties to her community, and they occupy the same house that they designed and built twenty-two years ago.

In assessing a reasonable monetary value for emotional distress, I adhere to the principle that Complainant may be awarded damages that are based solely on witness testimony. See Stonehill College, 441 Mass at 576. Evidence of physical manifestations of distress or expert testimony is beneficial, but not necessary. Id. An award must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of the time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

I am persuaded that, notwithstanding Complainant's understated words and low key demeanor, his ignominious termination after almost twenty-two years of employment was a traumatic and wrenching experience for him. The humiliating circumstances of his departure were compounded by a five-year separation from his wife. Respondent would penalize Complainant for failing to "mitigate" his emotional distress through counseling or medication, but the decision to refrain from such treatment in 2004 might have been

due to dissatisfaction with his counseling experience in 1999-2000 or to the disruption in his medical insurance coverage after losing his job rather than due to a lack of emotional distress. Rather than pursue psychological counseling or medication to assuage the humiliation and depression associated with his termination, Complainant appears to have focused his efforts on resurrecting his career. I accept Complainant's premise that he regained his self-esteem by working in California rather than through psychological intervention.

Complainant's decision to obtain employment in California, while his wife remained in Massachusetts, was not a "lifestyle" choice as Respondent claims but a personal sacrifice for a professional goal. Complainant's relocation to California was the decision of a stoical individual to rehabilitate his career and reputation by making the difficult choice to accept the best possible job, in a highly specialized field, regardless of location. Complainant and his wife did not choose to live apart; they were forced to do so by Respondent's retaliatory conduct. I am persuaded by the credible testimony of Complainant and his wife that they have endured years of loneliness in order for Complainant to achieve the professional stature and financial remuneration that he enjoyed prior to his retaliatory discharge.

Respondent argues that Complainant suffered from multiple sources of distress, including stress arising out of a malpractice suit against lawyers who represented him in the original age discrimination action which I found to be causally-linked to his termination in the liability phase of this proceeding. The original age discrimination case arose out of events in 1996-1997, the case settled in September of 2003, and the malpractice claim arising out of the litigation was settled in 2006 for \$75,000.00. I do

not consider this matter to be a significant source of emotional distress between 2004 and the present, in comparison to the distress emanating from Complainant's job loss in 2004 and his residence in California beginning in August of 2004. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004) (emotional distress existing from circumstances other than the actions of the respondent not compensable); Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002) (presence of other stressors in complainant's life does not absolve a respondent from liability); Raffurty v. Keyland Corp., 22 MDLR 125, 128 (2000) (where complainant experiences more than one source of emotional distress, hearing officer looks to whether discriminatory conduct was a significant source).

In consideration of the foregoing, I conclude that Complainant is entitled to \$200,000.00 in emotional distress damages. See Stonehill College v. MCAD, 441 Mass. 549 (2004).

III. ORDER

Based on my findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L. c. 151B, sec. 5, Respondent is ordered to:

- 1). Pay Complainant, within sixty (60) days of receipt of this decision, the sum of \$422,621.55 in monetary damages (\$4,493.00 in back pay, plus \$330, 693.00 in projected pension losses and \$88,045.55 in living expenses) plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- 2). Pay Complainant, within sixty (60) days of receipt of this decision, the

sum of \$200,000.00 in damages for emotional distress, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 14th day of August, 2009.

Betty E. Waxman, Esq.,
Hearing Officer