COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CECILIA CARTA,

Complainants

vs.

DOCKET NO. 11-BEM-02841

WINGATE HEALTHCARE, INC.,

Respondent

Appearances: J. Mark Dickison, Esq. for Complainant
Jonathan A. Scharf, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 28, 2011, Complainant filed a claim of discrimination alleging that she was terminated from her position as a Clinical Liaison for Wingate Health Care at age 69, on account of her age and disability. Complainant alleged that she was a qualified handicapped individual at the time of her termination and was capable of performing the essential functions of her job with the continuation of a part-time schedule, which she sought to extend, as a reasonable accommodation. She also asserts that Respondent failed to engage in an inter-active dialogue to determine whether her request for a continued accommodation would pose an undue burden on Respondent. The Investigating Commissioner found Probable Cause to credit the allegations of the Complaint and efforts at conciliation were unsuccessful. The matter was certified for a

public hearing and the hearing was held before the undersigned hearing officer on November 3 and 4, 2015. The parties submitted post-hearing briefs in January of 2016. Having reviewed the record of the proceedings and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Cecilia Carta was 72 years old at the time of the public hearing. She is a Licensed Practical Nurse who has an MBA from Northeastern University and has approximately 30 years of experience in health care admissions coordination, health care sales and marketing, account acquisition, contract negotiation, and management experience in administration and nursing. (Complainant testimony; Ex. 1)

2. Respondent, Wingate Healthcare Inc., is a company based in Needham, MA, which manages and operates assisted living centers and nursing homes in Massachusetts and New York. Respondent is an employer within the meaning of G.L. c. 151B.

3. Complainant was hired by Respondent Wingate Healthcare as a clinical liaison, with the title "Admissions Coordinator" in May of 2005. (Ex. 31) She was 69 years of age at the time of her termination from Respondent five years later, on May 12, 2011.

4. The job responsibilities of an Admissions Coordinator included identifying and recruiting appropriate referrals to Wingate's facilities through regular site visits to local hospitals, maintaining relationships with medical providers and hospital case managers as referral sources, assessing patients for admissions eligibility, facilitating patient placement, following up on inquiries and responding to phone calls regarding referrals on a timely basis, and

engaging in promotional and marketing activities for Respondent. (Complainant testimony; Ex. 31)

5. The job duties required driving to various hospitals, carrying and using a lap-top computer, accessing patients' medical records, and dealing with patients' families and medical staff. Although the job description for the position described the required hours "as assigned" meaning accessible and available as needed, prior to August of 2010, Complainant worked a 40 hour week. (Complainant and Perlmutter testimony; Exs. 30, 31) She received above average performance evaluations and regularly received increases in compensation. (Complainant testimony; Ex. 18)

6. Complainant was assigned to Wingate's Brighton facility and was the liaison to Mt. Auburn and Youville Hospitals in Cambridge, and Spaulding Rehabilitation Hospital. Complainant was hired in part, because of her strong ties to Mt. Auburn Hospital where she had worked previously for some ten years, had good relationships and was well respected. As a result, she had full access to the hospital. (Complainant testimony, Perlmutter testimony)

7. In 2009, Respondent's organizational model for clinical liaisons shifted from building-specific liaisons to a centralized model with all liaisons reporting to Barbara Perlmutter, the clinical liaison supervisor. Complainant had a good relationship with Perlmutter and worked with her on marketing events. Under the new system, the central admissions office at Wingate in Needham assigned referrals of patients to the clinical liaisons for screening. As of 2011, Respondent had 14 clinical liaisons working under Perlmutter's supervision. Hospital protocols also changed and clinical liaisons were no longer allowed on the hospital floors to interact with case managers. Instead they had to remain in the hospital common areas such as the lobby or coffee shop and await a referral.

8. On August 30, 2010, Complainant was injured during the course of her employment having volunteered to purchase a gift basket for a colleague at Pemberton Farms in Cambridge. She fell on her right arm and sustained what she described as a broken elbow, (radial head non-displaced fracture) and a rotator cuff tear. Complainant returned to work but when she couldn't raise her right arm, Perlmutter took her to Mt. Auburn Hospital where she was treated and advised to seek an orthopedic consultation. Complainant remained out of work for a week and returned following the Labor Day weekend. Complainant saw Dr. Troy, an orthopedist on September 7, 2010 and he prescribed physical therapy and exercises. (Complainant& Perlmutter testimony, Ex. 3) She was released to return to work the following day.

9. On September 10, 2010, Complainant suffered a pulmonary embolism with severe chest pain and trouble breathing. She was admitted to Mt. Auburn Hospital and discharged on September 14, 2010. Complainant was treated at the emergency room again on September 21, 2010. She had to give herself twice daily injections of Heparin, a blood-thinner. As a result of her injuries and complications related to her injuries, Complainant had to take a medical leave of absence and applied for FMLA leave. She was out of work on FMLA leave from September 2010 until December 2010. Upon the advice of Respondent, Complainant also filed a claim for workers compensation and received benefits while she was out on leave and supplementary wages when she returned to work part-time.

10. Rita Barrett Cosby is the Vice President of Risk Management at Wingate. Cosby is a paralegal and has a certification in risk management. Her duties included managing Respondent's workers compensation portfolio with consideration of the risks to patients and the company, including Respondent's bottom-line and loss control. Cosby learned about Complainant's injury from Perlmutter on the day she was injured. Cosby notified Respondent's

workers compensation carrier about Complainant's injury and coordinated with the insurer and with Respondent's Human Resources personnel regarding Complainant's FMLA leave. (Cosby testimony) Cosby filed an incident report with Respondent's worker's compensation carrier, A.I.M. and served as the liaison between the insurer and Complainant. Complainant had occasional email and telephone communication with Cosby regarding her progress. (Cosby & Complainant testimony) She had on-going discussions with Cosby about her need to finish physical therapy and the need to work part time. Cosby had never dealt with an FMLA issue at Respondent prior to Complainant's leave and she had no training in human resources or employment law. (Cosby testimony)

11. In addition to other care, Complainant began treatment at the New England Rehabilitation Hospital on October 19, 2010, and received outpatient physical therapy two to three time a week for her right shoulder and elbow pain and weakness. (Complainant testimony, Ex. 3) On November 16, 2010, Complainant had an MRI on her right shoulder at Mt. Auburn Hospital which revealed that her shoulder injury was caused by a full thickness tear of the supraspinatus tendon. (Complainant testimony, Ex. 3, at CAR000260) Complainant did not opt for surgery to address this injury because of her prior medical history and the likelihood of serious risks and complications. She opted instead to engage in a regimen of physical therapy to treat her shoulder injury. Complainant also developed a reactive airway condition and shortness of breath as a result of the pulmonary embolism she sustained from her fall and subsequent immobility. (Complainant testimony; Ex. 3 at CAR00424)

12. Following her FMLA leave, Complainant returned to work on December 6, 2010 with a part-time schedule working three days per week, four hours per day per order of her doctor. Complainant testified that she was available to see whatever patients she was assigned

by Perlmutter and was not advised that her working part-time was a problem. She purchased a wheeling lap-top bag and was issued a lighter lap-top computer and was able to perform her normal duties on a part-time basis. She also participated in marketing activities. At some point Complainant increased her hours to four days a week for four hours a day for a total of 16 hours. Complainant was not informed by anyone that Respondent was concerned about losing referrals because she worked part-time. Complainant continued to attend physical therapy sessions 2-3 times per week, did her required exercises, and walked up to ten-thousand steps a day to increase her endurance. (Complainant testimony)

13. Cosby testified that Respondent's extension of unpaid part-time leave was purely a "courtesy" to Complainant for which Respondent had no legal obligation. She characterized Complainant's status as being on "Transitional Return to Work" duty. (Cosby testimony) Cosby testified that Complainant's part-time schedule was not meant to be permanent or to last indefinitely. Complainant was never told by Cosby that her part-time status was considered a "courtesy" or that her employment would be in jeopardy if she did not return to full-time status by a date certain. (Complainant, Cosby, Perlmutter testimony) Complainant continued to work a part-time schedule for 23 weeks from December 6, 2010 until May of 2011.

14. Complainant continued her physical therapy and treatment with her orthopedist, Dr. Troy throughout this time. She regularly kept Respondent apprised of her condition including her decision to forgo surgical treatment for her injury in lieu of on-going physical therapy. In addition to providing a part-time work schedule, Respondent adjusted Complainant's geographic work region and assignments to allow her to cover more territory in a shorter period of time. Perlmutter testified that the clinical liaisons were a team, they helped cover for each other and she managed by using current employees to cover Complainant's region and facilities when

needed, which she described as a "courtesy." She also stated that she primarily covered for Complainant as a back-up during the weeks Complainant worked part-time. (Carta, Cosby, Perlmutter testimony)

15. Perlmutter testified that she had discussions generally with Cosby about whether clinical liaisons needed to work full-time and if a full-time employee would produce more business. She stated that there was a great deal of pressure from Respondent's management to increase business, that admissions are the bottom-line for nursing homes and that the admissions process is extremely competitive. Both Perlmutter and Cosby testified to the importance of a clinical liaison's relationships and the need for visibility in a hospital and flexible availability. Complainant testified that she continued to have an excellent relationship with her key referral source, Mt. Auburn Hospital, she was always available by telephone even when not on duty, and ensured there was coverage for all referrals. She testified moreover, that all admissions referral phone calls in 2010 and 2011went through Respondent's Central Administration switchboard. Neither Cosby nor Perlmutter could point to the loss of any referrals, decrease in admissions or damage to Respondent's business resulting from Complainant's part-time schedule. (Complainant & Perlmutter testimony)

16. Perlmutter felt that Complainant was comfortable working part-time and was uncertain about whether she wanted to return to full-time work given the extent of her injuries. Complainant testified that she discussed returning to full duty with Perlmutter sometime before May of 2011. On April 28, 2011, Complainant's primary care physician wrote a note clearing Complainant to return to work full-time "from a medical perspective," but stating he would "defer orthopedic clearance to Dr. Troy, her orthopedic surgeon." Ex. 10 at CAR000499) On

May 3, 2011 Cosby sent Complainant an email asking her to fax an "MD note." Presumably this was to determine if Complainant could return to work full time.

17. On May 10, 2011, Complainant provided two orthopedic doctor's notes to Respondent both dated that same day. One was from her orthopedist Dr. Troy and the other reflected a second opinion from a Dr. Curtis. Complainant testified that she had not presented any doctors notes to Respondent prior to this time but there are notes from Dr. Troy written in September and November of 2010 which were presumably presented to Respondent. Cosby did not testify about asking for or receiving medical notes from Complainant. Both May 10th notes stated that Complainant could continue working four hours per day, four days per week, and was restricted in lifting, pushing or pulling more than 5 or10 lbs. Dr. Troy's note states she should avoid overhead activity. (Ex. 10- Dep. Exs. 6 & 7) Complainant's duties included using a lap-top computer and accessing medical records binders that weighed more than 5-10 lbs. She testified much of this information was accessible by computer. Respondent notes that Dr. Troy's previous notes from September and November of 2010 contained some general lifting, pulling and pushing restrictions but did not contain strict weight limitations, and stated that Complainant could work part-time. (Ex. 10, Dep. Exs. 4 &5) Neither orthopedist opinion of May 10th specifically stated a date when Complainant could return to work full-time.

18. Cosby's notes reflect that on May 11, 2011, she talked with Complainant by phone and informed her that her transitional return to work duty was not permanent and was not designed to last indefinitely. She informed Complainant that Respondent had already given her three more months to transition back to full time duty than the company usually permits. Cosby testified that Complainant wanted to continue working her 16 hour per week schedule, stating that she needed to work 16 hours. Cosby told her the doctors' notes indicated that her lifting

restrictions were more stringent and that she was regressing rather than getting better. She suggested that Complainant stay home and get better and apply to return to work full time when she was able. Cosby also told Complainant that she would speak to Human Resources and the workers compensation insurer and get back to her. Cosby testified that in conferring with the insurer she learned that Complainant had opted not to have surgery, and feeling "there was no light at the end of the tunnel," Respondent made the decision to terminate Complainant's employment. (Cosby testimony) Cosby testified that she had discussed Complainant's returning to full duty some 5-6 weeks earlier, but did not tell Complainant her employment would be terminated if she did not return to full duty and never gave Complainant a date certain by which to return to full duty. She further testified that she did not consult with Respondent's human resources or legal departments prior to this decision being made.

19. On May 12, 2011, Complainant assisted Perlmutter with a marketing event at the Brighton facility. She received a call from Cosby stating that her position needed to be full-time, and since she could not work full-time, her employment with Respondent had to be terminated. Cosby told her that Respondent was posting the position immediately as full-time because it was a critical position and Respondent was losing money. Complainant testified that she was completely blind-sided and shocked by Cosby's statements and asked Cosby to give her three additional weeks to complete physical therapy at which time she would return to work full-time. Cosby responded that Complainant was unable to work full-time and referenced Dr. Curtis' note which called for six more weeks of physical therapy with no guarantee that Complainant could return full-time after that. (Complainant testimony, Ex. 15) Complainant asked to speak to Respondent's Vice President of Human Resources, Elissa O'Brien, who had joined the call with Cosby. O'Brien reiterated that they could no longer extend Complainant's transitional return-to-

work duty because her full-time position was important for Respondent's revenue. O'Brien invited Complainant to remain in touch in the event she was able to return to work full-time and stated she could possibly get preferential hiring. (Complainant testimony, Ex. 15)

20. Cosby testified that Respondent terminated Complainant because there was an immediate need for a full-time clinical liaison. Cosby had only that one conversation with Respondent's Human Resources department between December 2010 and May 12, 2011, during which she and O'Brien reasoned that because Complainant's FMLA leave was exhausted and Respondent claimed it needed someone who could work full-time, Complainant's employment would be terminated. In stark contrast, Perlmutter testified that if she had had the authority, she would have given Complainant the extra time she needed to recover, rather than terminate her employment at that time. Perlmutter was the person closest to the situation and the employee who had the most knowledge of the burdens placed on Respondent by Complainant's part time schedule. Perlmutter managed the clinical liaisons and primarily covered for Complainant, ensuring that the work goals of clinical liaisons were being met and referrals were not being lost. Both Cosby and Perlmutter testified that they were not aware of any declining admissions or loss of revenue. Perlmutter was unaware of the timing of Complainant's termination and was also surprised by the decision. (Cosby and Perlmutter testimony)

21. Following Complainant's termination, Perlmutter took over the region and facilities that had been covered by Complainant. Perlmutter testified that this was stressful but she managed to arrange temporary coverage using current employees, including herself. Respondent did not fill the full-time clinical liaison position until July of 2012, more than one year after Complainant's employment was terminated, despite having at least two candidates for the position in August of 2011. In January of 2012, Respondent again had some strong candidates

for the position but Respondent chose not to fill the position for reasons characterized as business decisions. Perlmutter and Cosby testified they posted the position and conducted interviews, but Respondent's then CEO made the decision not to hire anyone.

22. At the time of her termination Complainant was 69 years old and as such, was the oldest nurse liaison working for Respondent. At the time she was still receiving workers compensation benefits for her injuries. Complainant was paid her full salary for the 16 hours that she worked part-time at the rate of $37.86 per hour. She received worker's compensation benefits for the remaining 24 hours in the work week at a rate of 60% of her regular salary. After her termination, Complainant's worker's compensation benefit changed and she received 60% of her salary for the 40 hour work week. (Complainant testimony)

23. In connection with her worker's compensation claim, Complainant underwent an independent medical exam by Dr. Richard Anderson on May 24, 2011. In his IME report Dr. Anderson concluded that Complainant "does have a work capacity" and opined that she is "able to perform her job duties" subject to lifting restrictions of no more the 5 lbs. and avoiding repetitive overhead lifting. (Ex. 3 at CAR000654; Ex. 22 at CAR001139) On that same day, Dr. Troy wrote a note stating that due to her injury, Complainant "is unable to fully perform the requirements of her job duties as a clinical liaison." On June 6, 2011 Dr. Troy wrote that Complainant was unable to work until re-evaluated and was restricted in lifting more than 5-8 lbs. Complainant testified that this was inconsistent with her hope on May 12th. She explained the inconsistency in these two and subsequent Doctor's reports by the fact that she was able to perform the duties of her job on a part-time basis, and could have continued to do so, just not on a full-time basis. She stated that since Respondent was insisting that she return to work full time before she reached maximum recovery, she could not do the job as was being demanded.

24. Complainant continued with therapy and treatment throughout the summer and fall of 2011. In connection with her ongoing worker's compensation claim, in September of 2011, the IME, Dr. Anderson opined that Complainant was able to resume working as a clinical liaison. (Ex. 10 at CAR0000894) On September 22, 2011, Dr. Troy opined that Complainant would have only a 9% permanent impairment. He also stated that as a result of her injuries she sustained a loss of function in her upper right extremity that "compromises her ability to perform her job as a nurse." (Ex. 3 at CAR000664-665) Complainant testified that she would have been able to return to work full time as of December 2011, however there is no medical evidence supporting Complainant's contention. While Complainant reached an end point in her treatment in December of 2011, there is no record of an orthopedic opinion regarding whether she would have been able to return to full-time work at that time. After her termination from Respondent, Complainant did not look for other part-time or full-time work from 2011 to 2014. She has not been employed at all since May of 2011. She testified that she made the decision to focus on her treatment and recovery from her injuries, and that she considered it unlikely that someone of her age would be hired. In August of 2011, Respondent made an offer of re-instatement to Complainant which she declined, understanding that it was an attempt to settle her discrimination claim against Respondent, and believing that the work environment at Respondent would no longer be welcoming to her. Complainant applied for one job only in November of 2014.

25. Complainant's workers compensation claim was settled for a lump sum of $100,000. She received a net amount of $81,000 from that settlement. Complainant also filed a third-party negligence action in which her doctors claimed she was totally disabled and unable to work.[1]

[1] Respondent asserts that Complainant's claim of total disability in his law suit contradicts her assertion that she could have returned to work full-time for Respondent in June of 2011 or at the very latest in December of 2011. Since, ultimately the medical evidence did not support that Complainant could have worked full-time, I find her assertion of total disability is not contradictory.

Complainant received $300,000 in settlement of a third-party negligence claim related to the fall which caused her injury. One-third of this settlement or $100,000 went to Respondent's worker's compensation insurer, AIM, and Complainant paid her attorney $100,000. In total, Complainant received the amount of $181,000 between the workers compensation settlement and the third-party settlement. Had Complainant continued to work part-time until December of 2011, a full year after she began her part-time schedule, she would have worked another 39 weeks at a rate of $605.76 per week for a total of $23,624.64. Had Respondent permitted her to work part-time until mid-July of 2012, when it hired a clinical liaison, a period of 28 weeks, she would have earned an additional $16,961.28.

26. Complainant testified that she loved her job, thoroughly enjoyed working, and that her job was a social outlet for her. She testified that her termination, and particularly the abrupt and insensitive manner of her termination by a telephone call, without warning, caused her emotional harm. She stated that she felt devastated, mistreated and disposed of suddenly and without good reason. She was upset that friends and co-workers at Respondent were no longer permitted to speak with her. Complainant testified that she felt listless and depressed following her termination and feared for her economic security as a single woman, who was almost 70 years of age and unlikely to find subsequent employment. Complainant's sister testified that Complainant was deeply affected by her injuries and the impact of her injuries on her ability to participate in daily household and social activities.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with or without a reasonable accommodation. The statute requires employers to provide

reasonable accommodation to such disabled employees unless they can demonstrate that the accommodation sought would impose an undue hardship on the employer's business.

In order to prevail on a claim of handicap discrimination where Complainant alleges failure to provide a reasonable accommodation, she must demonstrate that: (1) she is a "handicapped person," (2) that she is a qualified handicapped person," (3) that she needed a reasonable accommodation to perform her job; and (4) that the employer was aware of her handicap and the need for a reasonable accommodation; (5) that her employer was aware or could have become aware of a means to reasonably accommodate Complainant's handicap; and (6) the employer failed to provide her with a reasonable accommodation. Hall v. Department of Mental Retardation, 27 MDLR 235 (2005). MCAD Handicap Guidelines, p. 33, 20 MDLR (1998).

There is no dispute that Complainant was disabled as a result of her injuries and the Respondent was aware of her disability. She filed a workers compensation claim at Respondent's behest shortly after her injury and was granted 12 weeks of leave under the FMLA and then permitted to work a part-time schedule for 23 weeks. Respondent argues that Complainant was no longer a qualified handicapped individual within the meaning of the law as of May 10, 2011, when she received a doctor's report limiting her lifting to no more than 5 or 10 pounds. Respondent asserts that given these limitations, Complainant could no longer perform the essential functions of the job, even on a part-time basis. Respondent also asserts that being available to work full-time was an essential function of the position of clinical liaison.

Complainant contests these assertions, claiming that the limitations contained in her doctor's notes were no different from those she had been operating under since her injury and that she had been performing the essential functions of her job for the last 23 weeks and could

have continued to do so, on a part-time basis. I find that Complainant was a qualified handicapped individual within the meaning of the law, because she was able to perform the essential functions of her position, albeit on a part-time basis. Respondent's assertion that working full-time was an essential function of Complainant's job is dubious since it allowed Complainant to work part-time for 23 weeks and did not fill the position for a year and a half after Complainant's termination.

Respondent asserts that it gave the Complainant every accommodation she requested including 12 weeks of FMLA leave, followed by 23 weeks of a part-time schedule, relocation to a smaller geographic area, a light weight lap-top and the offer of a push-cart or rolling cart. There is certainly a plausible argument to be made that Respondent extended generous accommodations to Complainant by allowing her to work part-time for 23 weeks with these modifications while she was in treatment and receiving workers compensation. I conclude that prior to Complaint's termination accommodations were extended. While Respondent characterized Complainant's part-time schedule as a "temporary transition" to full time work and a "courtesy" to Complainant, this is clearly a matter of semantics. I conclude that allowing Complainant to work part-time was clearly an accommodation to her disability.

In May of 2011, Respondent was aware of the fact that Complainant was seeking to extend this accommodation by continuing her part-time employment pending further recovery. Respondent states that it was under no legal obligation to grant Complainant a part-time schedule at all, let alone to extend her part-time work beyond 23 weeks, or to offer her a leave of absence. It asserts that "reasonable accommodation does not require an employer to wait an indefinite period of time for the recovery of an employee who has a medical condition that bears on job performance. Dziamba v. Warmer & Stackpole, LLP, 56 Mass. App. Ct. 397at 405, 406 (2002)

Respondent further argues that Complainant was seeking "not a reasonable accommodation, but a fundamental redesign of her job that effectively reallocated some of her responsibilities to others." Thompson v. Dep't of Mental Health, 76 Mass. App. Ct. 586, 595 (2010); See also, Russell v. Cooley Dickinson Hospital, Inc. 437 Mass. 443, 450 (2002) The facts do not bear out the assertion that Complainant was seeking a re-design of her job, since she performed the essential functions and Perlmutter managed covering for Complainant to ensure that all referrals were handled. Perlmutter continued to do so for over a year after Complainant's termination. In fact, Perlmutter testified that she was in favor of extending Complainant's part-time employment and would not have made the decision to terminate Complainant at that time, if it had been up to her.

Ultimately, the essential question is whether extending Complainant's part-time work schedule for several more weeks or until the end of December 2011, was a reasonable accommodation. Complainant argues that Respondent should have continued to extend her part-time schedule for at least three more weeks to allow her the opportunity to complete the physical therapy treatment she was undergoing several times a week. Respondent believes it had no obligation to allow Complainant to continue working part-time, because Cosby, after conferring with Respondent's compensation insurer and learning Complainant had declined recommended surgery, concluded there was no end in sight. In essence, Cosby substituted her conclusions about Complainant's future capacity and determined that termination was appropriate based on Complainant's current medical limitations. Respondent then terminated Complainant's accommodation with little to no discussion or advance notice. I conclude for the reasons stated below, that Respondent's assertion that it had no further obligation to Complainant is misplaced.

Prior to May 11, 2011, Complainant was not informed by Perlmutter or anyone else that her part-time schedule was a problem. She was given no advance warning that she faced termination if she did not return to full duty by a date certain and was unaware that her accommodation was about to be revoked. The first indication Complainant had that her continuing part-time employment was a problem came in a discussion with Cosby one day prior to her termination on May 11, 2011. On May 12, 2011, she was completely blind-sided by the phone call advising her of the termination. Perlmutter was also surprised by the timing of the termination. At the very least, Respondent should have considered Complainant's request for a brief reprieve and advised her that if she did not return to full duty by a date certain, she would face termination.

Respondent is correct that open-ended and indefinite leaves are generally not considered a reasonable accommodation under the ADA. Russell v. Cooley Dickenson, supra. at 455. Notwithstanding, the Commission has held that a further brief continuance of a leave to allow an employee to complete recovery may be a reasonable accommodation, and in such instances, termination may be premature. See Santagate v. FSG, LLC, 36 MDLR 23 (2014); Laing v. J.C. Cannistraro, LLC, 37 MDLR 85 (2015). At the time of her termination, Complainant understood that she could not continue to work a part-time schedule indefinitely and was not seeking an open-ended extension of her part-time schedule. When informed of her termination, Complainant sought to briefly extend her part-time schedule until her physical therapy was completed with the hope that she could then return to full-time duty. In hind-sight, Respondent asserts that this was nothing more than Complainant's "wishful thinking" unsupported by any prognosis or medical opinion and her request was denied.

It would be a stretch to conclude that Respondent was obligated to extend Complainant's part-time schedule until the end of the year, since she continued in physical therapy for several more months and subsequent doctor's reports indicate that her condition did not improve significantly. However at the time of her termination, the prognosis for her recovery was still unclear. At the very least, Complainant should have been permitted to complete her physical therapy over the course of the next month, and if then, there was no definitive prognosis for improvement, and no anticipated return to full duty, Respondent's obligation to continue providing an accommodation in the form of a part-time schedule would likely have ceased. Had Respondent delayed Complainant's termination for the brief period of time she requested, and further explored whether her part-time employment was actually an undue burden, other more-considered options might have surfaced. At the very least, the decision to terminate might not have been premature, or been effected in such an abrupt and unsettling manner.

Finally, in assessing the issue of reasonableness of continued part-time work, the undue burden on Respondent must be considered. Respondent's position that Complainant's termination was justified by the immediate need for a full-time clinical liaison at that time was disingenuous as demonstrated by the fact that 1) Complainant was performing most, if not all of the essential functions of the position on a part-time basis, including assisting with marketing; 2) there was no demonstrated undue burden on Respondent's business by virtue of Complainant's part-time employment, and 3) Respondent did not fill Complainant's position until July of 2012, more than a year after her termination, despite having opportunities to hire a replacement.

Despite its representation that Complainant's position was revenue-essential, Respondent made no effort to ascertain or account for revenue losses or other undue burdens on its operations resulting from Complainant's part-time duty. Both of Respondent's witnesses

testified that they were unaware of diminished referrals or revenue losses. Respondent did not otherwise demonstrate that it was losing business or referrals because Complainant was working part-time. While there was additional responsibility placed on Perlmutter as the manager of the clinical liaisons, and she testified to experiencing some additional stress, she also claimed she was able to manage the coverage. She did not claim there was any undue disruption to Respondent's operations.

In the end, the evidence does not support Respondent's assertion that it had any immediate necessity to fill the position on full-time basis, leading me to conclude that the financial reasons were a pretext for discrimination based on Complainant's disability. Thus I conclude that Respondent's premature termination of Complainant was a violation of G.L. c. 151B and was directly related to her disability. Although Complainant's age may have also been a contributing factor in this decision, there is no evidence pointing to her age as a primary motivating factor in her termination and the issue was not addressed in any significant way by either party.

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. See Stonehill College v. MCAD, 441 Mass 549 (2004).

Complainant's claim for lost wages is premised upon the belief that she would have returned to work full time and would have continued working full time until 2017 when she anticipated retiring. Although Complainant seeks back pay at her full time rate, the evidence

does not support a finding that she could or would have worked full time at any time after her termination from Respondent. Complainant's sister testified that Complainant was exhausted by working even part-time hours while she was recuperating from her fall and that she remained limited in her ability to perform many daily functions. At best, Complainant's back-pay award for part-time work, had she been allowed to continue working, and had been able to do so, even if calculated up to the time Respondent filled her position on a full-time basis is $40,585.92.

Respondent has argued, and I concur that Complainant has been fully compensated for her lost wages by her worker's compensation and third party law suit recovery. A substantial portion of the payments she received from the worker's compensation insurance carrier and the settlement of her third party-negligence claim were to compensate her for lost wages. Respondent points out that approximately $116,383.68 of Complainant's workers compensation insurance recovery was for lost wages, post-termination. (Ex. 23) Even if one were to deduct from this award the amount Complainant paid for attorneys, the compensation she received for lost wages still significantly exceeds what she would have earned had she continued working part-time for Respondent at the rate of 16 hours per week. A significant portion of Complainant's third-party negligence law suit was for recovery of lost earnings. In the end, Complainant netted $181,000 in post-termination recovery from the two law suits, an amount well in excess of any lost wages she may be entitled to resulting from Respondent's refusal to allow her to continue working part-time. I conclude therefore, that Complainant is not entitled to damages for lost wages in this matter.

Respondent is liable to Complainant for damages for emotional distress resulting from her premature termination and the manner in which the termination was effected, without any meaningful inter-active dialogue or warning that her termination was imminent, or a necessary

consequence of her inability to work full-time. Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in awarding such damages are the nature and character of the alleged harm, the severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. Id. at 576. Such awards must rest on substantial evidence that the distress is causally connected to the act of discrimination or retaliation. See DeRoche v. MCAD, 447 Mass 1, 8 (2006) (where evidence that emotional distress was caused by employee's termination and not subsequent acts of retaliation, court found no causal connection between the latter acts and employee's emotional distress)

Complainant testified that she was shocked, devastated and blind-sided by her termination. Both Complainant and her sister offered credible testimony that she suffered emotional harm as a result of her abrupt and premature termination. Complainant testified that she lost one of her primary social outlets when she ceased working and her colleagues were told not to speak to her. She essentially felt that she became persona non grata at Mt. Auburn Hospital where she had many contacts and friends. Complainant testified that after her termination she felt listless and depressed and felt great insecurity about her financial future given her age and the fact that she was a single woman who relied on her income. It is also certain that Complainant suffered significant emotional distress related to her injuries and the long recovery period therefrom and the fact that her stamina and over-all health were significantly diminished. Indeed, her sister testified how depressed she was on account of her injuries and the loss of function that prohibited her from performing many daily tasks that most individuals take for granted. This is a factor contributing to her emotional distress for which Respondent is not liable. Given these factors, I conclude that Complainant is entitled to an award for emotional distress resulting from Respondent's actions in the amount of $25,000.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered:

1) To cease and desist from any acts of discrimination based upon disability.

2) To pay to Complainant, Cecelia Carta, the sum of $25,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

3) To conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources director, managers, supervisors or other employees who have authority to negotiate reasonable accommodations for disabled employees or to terminate disabled employees. Respondent shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. Following the training session, Respondent shall report to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any of the above described employees who fail to attend the original training and for new personnel hired or promoted after the date of the initial training session.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. 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. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 17th day of June, 2016.

Eugenia M. Guastaferri
Hearing Officer