COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and MARIE LUNIE DALEXIS,
Complainants

v. Docket Nos.: 10-BEM-01133

TUFTS MEDICAL CENTER and
JULIE MIGLIETTA.
Respondents

Appearances: Elizabeth LeBrun and Howard Mark Fine, Esqs. For Complainants
David Casey, Ilisa Clark and Gregory Brown, Esqs. For Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 30, 2010, Marie Lunie Dalexis ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that the Tufts Medical Center and Julie Miglietta discriminated against her on the basis of national origin (Haitian), race (Black), and disability. A probable cause finding was issued by the Investigating Commissioner on November 30, 2011.

The cases were certified for a public hearing on July 9, 2013. The public hearing took place on September 22, 23, and 29, 2014 and on October 2, 2014. The following witnesses testified at the public hearing: the Complainant, Julie Miglietta Welch, Patti Andrews, Theresa Hudson-Jinks, Alyson Shea, and Dr. Charles Sodkoff. The parties submitted seventy-four (74) agreed-upon exhibits. In addition, Complainant submitted

twenty-two (22) additional exhibits, and Respondent submitted four (4) additional exhibits.

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. The Complainant is Marie Lunie Dalexis. She lives in Stoughton, MA with her husband and three children. Complainant was born in Haiti. She has LPN and RN degrees. Prior to working for Respondent Tufts Medical Center, she worked at Brockton Hospital and at Boston Medical Center. Transcript I at 31.
2. Respondent Tufts Medical Center is a major medical institution in Boston, MA. It includes the Floating Hospital for Children, adult inpatient care, and outpatient clinics. Transcript III at 96-97. There are twenty-two inpatient units at which 694 inpatient nurses worked in fiscal year 2009 (October 1, 2008-September 30, 2009). Transcript III at 97; Complainant's Exhibit 19.
3. Respondent Julie Miglietta Welch (Miglietta) was an Employee Relations Specialist/Manager for Respondent Tufts Medical Center during the period at issue.
4. During all relevant times, the Respondent Hospital operated on three shifts: 1) the day shift from 7:00 a.m. to 3:30 p.m., 2) the evening shift from 3:00 p.m. to 11:30 p.m., and 3) the night shift from either 7:00 p.m. or 11:00 p.m. to 7:30 a.m. Chief Nursing Officer Theresa Hudson-Jinks testified that there were no positions limited solely to the day shift. Transcript III at 103. Hudson-Jinks stated that the majority of nurses are "day/rotators" meaning that they work a combination of

day-evening or day-night shifts. Id. Nurses with relatively little seniority tend to work the night shift although according to nurse-manager Alyson Shea, some people prefer to work nights. Transcript III at 103, IV at 38.

5. The job description for Registered Nurse ("RN") at Tufts Medical Center does not specify that overtime is a job requirement although it does state that RNs are "subjected to irregular hours" as a working condition. Joint Exhibit 23 at p. 6.

6. The Collective Bargaining Agreement between Tufts Medical Center and the Massachusetts Nurses Association states that Management can mandate reasonable overtime. Complainant's Exhibit 3 (Article XVI -- Management Rights); Transcript IV at 43. Chief Nursing Officer Hudson-Jinks testified that *all* inpatient nurses have to work overtime, but the evidence establishes that 5.33 per cent of all inpatient nurses were not paid for working any overtime in fiscal year 2009. Complainant's Exhibit 19; Transcript III at 115; Respondent's Chalk. Of the 94.67 per cent of inpatient nurses who were paid for working overtime during fiscal year 2009, the amount of overtime varied from a minimum of three hours for the entire year to substantially more but only fifty-seven per cent worked in excess of forty hours per work week (the remainder working overtime in excess of their scheduled weekly shifts but not in excess of a forty-hour week). Complainant's Exhibit 19; Transcript III at 102, 106, 109-110, 117, 127-128.

7. According to Chief Nursing Officer Hudson-Jinks, if a night shift nurse calls out sick or if a patient becomes critically ill on an "exigent" basis at the end of an evening shift, an evening shift nurse would have to remain at work on an overtime basis for at least part of the night shift. Transcript III at 107. According to

Complainant, she never had to force a nurse to work overtime when she served as a charge nurse[1] and she never had to work overtime against her will, but she also said that if a patient needed her, she would "never" leave the floor. Transcript I at 43, 46.

8. Per diem nurses at Tufts Medical Center lack guaranteed hours and benefits whereas float pool nurses have benefits and are guaranteed a specified number of budgeted hours per week but are assigned wherever coverage is needed. Transcript I at 40-43, II at 166-170; III at 36; Complainant's Exhibit 8. They are used to fill in for nurses who are absent due to taking paid or unpaid time off, to replace nurses who are on leaves of absence, to temporarily fill vacant hours or to met unexpected increases in patient volume or acuity. Joint Exhibit 3 at pp. 40-41.

9. Open shifts due to vacations or sickness are filled by charge nurses who obtain replacements by contacting staff in the following order: 1) float pool nurses; 2) per diem nurses; 3) staff nurses not scheduled to work on a particular day; 4) nurses "on the floor" who are asked if they are willing to stay for the next shift on an overtime basis; and 5) floor nurses who are required to stay until a replacement is found. Transcript I at 41-42, II at 65-67.

10. In 2002, Complainant obtained a nursing position with Respondent Tufts Medical Center. Her first assignment was on Pratt 8, an oncology unit where she remained until the unit closed in late 2003. Complainant began as a "day-night rotator" but after working on the unit for a year, she switched to the day-evening shift.

[1] A charge nurse takes responsibility for the flow of care on the floor, making sure that patients are properly admitted, collaborating with the emergency room, and assigning nurses to care for patients. Transcript I at 35-36.

Transcript I at 38. When Pratt 8 closed, Complainant transferred to Proger 7, an oncology medical/surgical unit. She remained on Proger 7 until 2005, working as a day-evening rotator. Complainant testified that she took turns with the other RNs functioning as the charge nurse.

11. In 2005, Complainant transferred to Proger 5 North, a medical/surgical unit where she worked on the day-evening shift and served as charge nurse on occasion. Transcript I at 48.

12. Complainant testified that she started having health issues at the end of 2005. She began to feel tired, coughed on and off, and had pain in her joints. Transcript I at 62-63.

13. In 2006, Complainant was referred by her internist to Dr. Robert Sands who diagnosed her with rheumatoid arthritis. Complainant described herself in 2006 as "really sick," stiff in the morning, and not able to get up. Transcript I at 64. Complainant testified that she kept all her energy for work and had no energy for anything else. Id. Complainant stated that flare-ups caused her to become stiff, sick, and "good for nothing." Transcript I at 65. She was put on a high dose of steroids and gained a lot of weight. Transcript I at 66. The rheumatoid arthritis caused her to contract interstitial lung disease in which the inner portion of her lungs lost function and elasticity, making it difficult for her to breathe normally and causing her to choke, have coughing spasms, pain and crackles in her lungs, pleural effusions (excess fluid around the lungs), shortness of breath, and an inability to run or climb stairs. Joint Exhibit 62; Transcript I at 67-69.

14. Complainant continued to work the day-evening shift, although she took intermittent leaves for health issues. Transcript I at 77-82.

15. In 2007, Complainant's internist, Dr. Harold Greenspan, wrote a "To Whom It May Concern" note stating that due to Complainant's history of interstitial lung disease, she was unable to work past the normal hours of her shift. Joint Exhibit 5.

16. Following receipt of the note, Proger 5 North nurse-manager Melissa Culkins-Bair excused Complainant from working overtime as an accommodation to her medical condition. Transcript III at 31-32.

17. Nurse-manager Elom Amesete replaced Culkins-Bair as nurse-manager on Proger 5 North at some point in 2008.

18. Complainant received an overall rating of "excels" on her 2008 performance appraisal – the last one submitted into evidence. Complainant's Exhibit 3.

19. On October 20, 2008, Complainant submitted an FMLA form to address her intermittent absences. Joint Exhibit 7.

20. Complainant took a medical leave from March 25, 2009 to April 5, 2009 and, again, beginning on May 25, 2009. Joint Exhibits 11, 12, & 14. Complainant intended to return to work on June 22, 2009 but was diagnosed with fluid around her heart and had emergency surgery on June 17, 2009. Joint Exhibits 15, 16, 18; Transcript I at 71, 88. Complainant sought and received short-term disability coverage for her post-surgery convalescence. Transcript I at 92-93; Joint Exhibit 11, 20.

21. While Complainant was out of work on medical leave, the nurse-manager of Proger 5 North became Alyson Shea. Transcript I at 85-86; IV at 10. Shea testified that Complainant worked briefly under her supervision and that during this period Complainant worked nights and overtime. Transcript IV at 11. I do not credit this testimony.

22. The parties' Collective Bargaining Agreement provides for ninety days of protected medical leave during which the Hospital must hold open the position of a nurse on leave. The Hospital sometimes grants extensions of the ninety-day period -- typically lasting thirty to sixty additional days. Joint Exhibit 61; Transcript III at 57. Complainant claims that the Hospital declined to grant her such an extension.

23. By July 15, 2009, the Hospital determined that Complainant was reaching the end of her FMLA leave/contractual job protection and that it was time to consider recruiting to fill her position on Proger 5 North. Joint Exhibits 34-37.

24. Complainant was transferred to the Hospital's "leave of absence cost center" effective July 23, 2009 after her ninety-day job-protected FMLA/contractual leave expired. Joint Exhibit 69; Transcript II at 123, 127; Joint Exhibit 37. As a cost center employee, Complainant retained her health insurance but lost her job protection and had to apply online for vacant positions posted on the Tufts Medical Center intranet website. Transcript II at 120, 122-124 & III at 120.

25. According to Complainant, after she was transferred to the leave of absence cost center, she received a call from nurse-manager Shea saying that her position on Proger 5 North had been filled and that she needed to go to Human Resources to

find another position when she was ready to return to work. Transcript I at 94; IV at 53. Shea testified that she took action to fill Complainant's position because three other nurses had left their positions on Proger 5 North while Complainant was on medical leave. Transcript IV at 13. Shea testified that when she called Complainant on or around July 21, 2009 to inform her that her position was going to be filled, she used a script drafted by Respondent Miglietta. Transcript IV at 15, Joint Exhibit 37. According to Shea, Complainant responded by saying that she wanted to return to a position that wasn't as strenuous physically as a medical/surgical inpatient RN position. Joint Exhibits 20 & 70; Transcript IV at 16.

26. During the summer of 2009, the Hospital was moving to twelve-hour shifts under a new "Care Delivery Model." Transcript III at 33-34. According to Respondent Miglietta, the move involved decreasing day-evening rotations in favor of day-night rotations. Id. However, Miglietta testified that under the parties' Collective Bargaining Agreement, a nurse working a "day-rotator" job could still indicate a preference for working day-evening shifts and the Hospital would endeavor to accommodate the preference to the extent allowed by the nurse's seniority. Joint Exhibit 3, Article V.5.5; Transcript III at 45, 47-48.

27. Nurse-Manager Shea testified that on August 31, 2009, she hired Brendan Nee as a nurse on Proger 5 North into a forty-hour flex rotating position. Transcript IV at 17-18, 23. According to Shea, the position had previously been filled by Complainant. Transcript IV at 17.

28. In a note dated September 8, 2009, cardiologist Dr. Marshall Katz stated that Complainant would be fit to return to work part-time on October 5, 2009 and full-time on October 19, 2009. Joint Exhibit 21; Transcript I at 93-7. Complainant gave the note to Respondent's Risk Manager Patti Andrews. Transcript I at 92, 99. Dr. Katz did not specify any job restrictions. Joint Exhibit 21.

29. Andrews told Complainant to start looking online for available positions and to call Nurse Recruiter Leona Martin who would help Complainant identify job opportunities. Transcript I at 100, III at 67; Joint Exhibit 22. According to Andrews, Complainant said she didn't want to continue to do bedside nursing. Joint Exhibit 44; Transcript III at 68-69. Complainant acknowledged that she would have "welcomed" a job that was a better fit for her health condition such as a case manager or research nurse position but that she was ready to go back to Proger 5, i.e., a "staff" or "bedside nursing" position, if no better fit could be found. Joint Exhibits 51 & 63; Transcript II at 105-108.

30. Complainant met with Nurse-Recruiter Martin on September 22, 2009 and asked why she couldn't return to her day-evening position on Proger 5 North and was told that her job had been filled. Transcript I at 102. Complainant applied for other inpatient nursing positions online but did not receive a single interview. Transcript I at 102-103, 106, 110; Transcript II at 132; Joint Exhibit 63. According to Complainant, Martin only set up one interview for her and called the day before it was scheduled to say that the interview was cancelled because the job was "closed." Transcript I at 109.

31. Three non-float, day-rotator jobs had, the previous May, been posted for Proger 5 North[2] but remained unfilled during Complainant's job search and a fourth one was posted on October 23, 2009. Joint Exhibit 68 at pp. 2 & 7. In addition, two float pool day-rotator jobs had, the previous May and August, been posted for adult medical/surgical units[3] but remained unfilled during Complainant's job search and a third one was posted on October 23, 2009. Joint Exhibits 24, 68 at pp. 2, 4, & 7; Transcript III at 39-43.

32. On October 4, 2009, Complainant's short-term disability benefits ended. Transcript II at 20.

33. On October 27, 2009, Nurse-Manager Shea hired Claudia Ballway into a non-float day-rotator position on Proger 5 North 4, four days after it was posted.[4] Ballway, who worked for Shea as a nursing assistant prior to receiving her RN license in the fall of 2009, was hired the same day that she submitted her application. Transcript II at 177-180, III at 53, IV at 23, 26-30, 54; Complainant's Exhibits 17-18, 68. Shea states that she did not notify Complainant about the posting because that wasn't her "role" even though she had called Complainant the prior summer to inform Complainant that her position was being posted. Shea claims that she was not aware that Complainant had been cleared to return to work despite the note from Dr. Katz clearing Complainant to return to work full-time as of October 19, 2009. Transcript IV at 54-56. Complainant submitted the Katz note to Risk Manager Patti Andrews.

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[2] The jobs included one full-time and two part-time positions posted on May 14, 2009.
[3] The two float pool day-rotator jobs were posted on May 6, 2009 and August 5, 2009.
[4] According to Shea, the position was a day rotating flex position which involved twelve-hour shifts, encompassing days, evenings, and nights. Transcript III at 23, 28. Nothing in the record supports this assertion.

34. After being hired into day-rotator positions on Proger 5 North, Nee and Ballway worked some nights and overtime in addition to day shifts. Transcript IV at 17-19. Ballway worked an average of one night shift per month and one overtime shift per month during the seven-month period following her hire as a day-rotator on Proger 5 North (i.e., 63.50 night hours and 62.50 overtime hours from December 1, 2009 and July 10, 2010). Transcript III at 53-54.

35. Complainant applied for the float-pool day-rotator position which was posted on October 23, 2009, but she didn't get an interview. Joint Exhibit 68 at p. 7; Transcript I at 110-117, III at 34. According to Complainant, had she gotten an interview, she would have informed the nurse manager in charge of the float pool that she could not work night shifts. Transcript I at 115. The position was filled on January 6, 2010 by Mary Massey. Joint Exhibit 68 at p. 7; Transcript III at 34. Respondent Miglietta testified that Complainant wasn't interviewed for the position because Complainant's overtime restriction made her ineligible for the position. Transcript III at 34-35, 124.

36. On October 30, 2009, Risk Manager Andrews emailed Respondent Miglietta that Complainant had "recently" received clearance to return to work on a full-time, no-restriction, basis (presumably referring to the September 8, 2009 note from Dr. Katz which stated that Complainant could return to work full-time on October 19, 2009) but that Complainant "prefers to find an administrative nursing position so as to not further injure what she's been able to heal." Transcript III at 53-55; Joint Exhibits 21, 42.

37. Around the end of October, 2009, Nurse Recruiter Leona Martin left her job at Tufts. Respondent Miglietta told Complainant that she would take over Complainant's case because other recruiters lacked Martin's expertise even though Miglietta was not involved in the hiring of nurses. Transcript I at 120, 147, II at 131-132. Miglietta did not contact Proger 5 North nurse-manager Shea to ask if she needed another nurse on Proger 5 North. Transcript II at 165, 181. In describing how she "assisted" Complainant to return to work at Tufts, Miglietta testified that she "assumed" that if a position on Proger 5 were posted, then Complainant would have applied for it and that Complainant would have been "aware of it." Transcript II at 175.

38. On November 6, 2009, Respondent Miglietta called Complainant to explain that she wasn't considered for any of the positions she applied for since they were in units with specialties that differed from Complainant's background. Joint Exhibit 38. Miglietta asserted that a vacant *night shift* position in Proger 5 North was "the only current option," noting that Complainant's doctor had returned her to work with no restrictions. Id.; Joint Exhibit 45; Transcript III at 11. Contrary to Miglietta's representation that a night shift position was the only option then available, no night shift position was advertised on the "Open Snapshot Spreadsheet." Rather, the spreadsheet advertised day rotator and adult medical/surgical day rotator jobs on Proger 5 North. Joint Exhibit 68. Complainant testified that had she been considered for the day rotator positions on Proger 5 North, she would have asked to work a day-evening shift rather than a

day night shift in accordance with Article V, 5.5 and XIII, 13.3 of the parties' Collective Bargaining Agreement.

39. Complainant responded to the offer of the night shift position by saying, "I love my floor [but] can't work nights" because it would exacerbate her rheumatoid arthritis. Joint Exhibit 45; Transcript I at 148-154. Complainant said she could only return to Proger 5 North on days. Joint Exhibit 45.

40. Respondent Miglietta opined in an e-mail of November 8, 2009 to Chief Nursing Officer Hudson-Jinks that Tufts Medical Center could "probably" terminate Complainant for refusing to accept the night shift offer after being cleared to work with no restrictions. Joint Exhibit 38.

41. Complainant submitted another medical note from Dr. Sands dated November 10, 2009 which stated that she could not work the night shift due to "medical issues." Transcript I at 157; Joint Exhibit 26. The note lacked a diagnosis, a description of her condition, and was unclear about the shifts she could work. Transcript I at 157, II at 140.

42. Complainant submitted a third medical note from Dr. Greenspan dated November 11, 2009 which listed Complainant's diagnoses and cleared Complainant to return to work full-time on 11/16/09 on the *day shift*, explaining that working nights "affects her ability to sleep – and lack of sleep causes her to have flares of her Rheumatoid Arthritis – that is currently in good control." Joint Exhibit 27. The note did not address overtime or working the evening (3:00 p.m. to 11:00 p.m.) shift, but Complainant testified that she was capable of working evening shifts as well as day shifts. Transcript I at 160.

43. Complainant re-applied for a float-pool medical/surgical day-rotator position on November 23, 2009. Transcript I at 149-151; Joint Exhibit 24; Complainant Exhibit 9. The position did not specify whether it was a day-evening or day-night shift and, according to Respondent Miglietta, it could be either. Transcript III at 23. Complainant asserts that Miglietta told her that she wasn't qualified for the job.

44. Respondent Miglietta e-mailed Hudson-Jinks about Complainant's application, stating, "It sounds like we should allow her to proceed through at least the interview process .... Just concerned this issue is going to bubble up with the MNA [the nurses' union]." Joint Exhibit 43.

45. Respondent Miglietta testified that after reading all Complainant's doctors' notes, she understood that Complainant could work a day-evening rotation but was unclear about whether Complainant could work an occasional night shift on an overtime basis as opposed to no nights at all. Transcript III at 18-19. Miglietta had discussions with the nurse manager of the float pool about whether the float pool position could accommodate a no-night work restriction, and the float pool nurse manager asked if Complainant could work an "occasional" night shift. Transcript II at 142. Miglietta sought clarification as to whether Complainant could occasionally do so. Transcript II at 109, 143, 149, 174. Complainant told Miglietta to speak directly to her doctor. Transcript II at 109-113, 141-143. Miglietta communicated with Dr. Greenspan on December 10, 2009. She asked if Complainant could occasionally work overtime including a possible double shift or night hours and wrote down the following as documentation of their

conversation: "no doubles – no nights – no doubles, even occasional not recommended/ Up to her if she wants to try/ Exacerbations occur when tired/ OT not recommended/Permanent restrictions." Joint Exhibit 47.

46. Based on the information from Dr. Greenspan, Respondent Miglietta determined that Complainant could *not* work in the float pool because the ability to work overtime was deemed to be an essential function of the float pool job at Tufts. Transcript II at 150-152. Miglietta determined that based on Complainant's restrictions, a clinic position in a doctor's office would be a better assignment than an inpatient hospital assignment. Transcript III at 28-29. Miglietta, Hudson-Jinks, and Patti Andrews all encouraged Complainant to seek employment outside of Tufts Medical Center. Transcript III at 59, 92; Joint Exhibits 42, 61.

47. In or around December of 2009, Nurse Kara Danz transferred out of the Proger 5. Transcript III at 49-51. Danz had worked mostly day and evening shifts as a day-rotator nurse. Transcript III at 50. Her departure created a potential opening on Proger 5. Transcript III at 52.

48. On December 10, 2009, Complainant grieved her situation, but she was not successful. Transcript II at 16; Joint Exhibits 31 & 32. Hudson-Jinks presided at a grievance hearing on December 17, 2009 and determined that Complainant's protected leave had expired on June 18, 2009 at which time Complainant was not able to return to work; that a July 2, 2009 medical evaluation stated she needed to be on leave through mid-September of 2009; that the position she previously occupied was filled by the Hospital prior to Complainant being cleared to return

to work; that Complainant was cleared to return to work full-time on October 19, 2009; and that she was subsequently offered a night shift position on Proger 5 N which she rejected. Joint Exhibit 31; Transcript III at 125.

49. A Step 2 grievance hearing was conducted by Human Resource Vice President Paul Heffernan in April of 2010. At the Step 2 hearing, Respondent Miglietta asked if Complainant's doctor would lift the restriction on night/overtime work on an occasional basis. Transcript II at 26-27, 81. Complainant contacted Dr. Greenspan regarding a possible modification, but he declined on the basis that over-exhaustion could cause flare-ups of her disease. Transcript II at 83; Joint Exhibit 33. Heffernan issued a decision on May 5, 2010 stating that because Complainant was restricted from working any overtime or nights, her return to work in an inpatient capacity was "unlikely" and she should be processed for separation as of June 5, 2010. Joint Exhibit 32; Transcript II at 84.

50. Complainant has not performed nursing duties at Tufts Medical Center since mid-2009 when she earned approximately $59 per hour. Complainant's gross salary for her last full year at Tufts in 2008 was $117, 348.90. Joint Exhibit 64. Tufts RNs have twice received two percent raises since Complainant left Respondent's employ, but no evidence was submitted as to when the raises were implemented. Transcript III at 134.

51. In 2010, Complainant applied for and received unemployment benefits amounting to $24,057 after she stopped working at Tufts Medical Center. Transcript II at 20, 30, 161-162; Joint Exhibit 60.

52. In December of 2010, Complainant received her master's degree in nursing from Curry College. Transcript II at 33.

53. Complainant testified that she attempted to find alternative employment by looking for jobs at other hospitals and by networking. Transcript II at 34-35. She asked classmates in her master's program if the places they were working were hiring. Most of her job search was performed online. Transcript II at 31. Complainant described herself as "desperate" and without money. Transcript II at 16-17. She testified that she was "over-qualified" for nursing home jobs. Transcript II at 30. In July of 2010, Complainant was offered a position with the Visiting Nurses Association (VNA) Hospice Care Inc. She received $40 per hour for a 37.5 work week along with paid sick time, vacation time, and holidays. Transcript II at 30-31. She worked at VNA Hospice Care Inc. from August 8, 2010 to March 5, 2012. Transcript II at 35. Her gross annual salary at the VNA in 2011 was $84,646.25. Joint Exhibit 56. She earned a total of $138,443.59. Id. Complainant did not work nights and performed very little overtime. Transcript II at 36.

54. While Complainant worked at VNA Hospice Care Inc., she also worked as an adjunct faculty member at Roxbury Community College starting in 2011.[5] Transcript II at 36; Complainant Exhibit 15. In that capacity, Complainant supervised nursing students one day a week. Transcript II at 38.

[5] Complainant had previously worked at Roxbury Community College during a prior stint beginning in 2007. Transcript II at 37-38.

55. In March of 2012, Complainant was terminated from the VNA position. Complainant testified that she was not good at providing hospice care because she was committed to keeping people alive. Transcript II at 35.

56. In the fall of 2013, Complainant obtained a position at Roxbury Community College as a full-time assistant professor. Transcript II at 39. Complainant testified that she loves her job but only earns approximately $50,000 a year. Transcript II at 39-40; Joint Exhibits 54-55; Complainant Exhibit 13.

57. According to Complainant, she would have continued to work at Tufts Medical Center until the projected retirement age of "sixty-five-plus" had she been permitted to do so. Transcript II at 42. Complainant reaches age sixty-five in November of 2021. Joint Exhibit 62 at 1.

58. Complainant testified that she felt "so bad" when she not allowed to return to a job at Tufts Medical Center. Transcript II at 52. Her husband's income, alone, is insufficient to cover their household expenses, and he was forced to cash out his 401K in order to pay their mortgage. Transcript II at 52-53. Complainant testified that her family had difficulty communicating about the financial burdens caused by losing her job. Transcript II at 53. Complainant described herself as depressed, "blah," and unable to leave her bed to do chores following the loss of her job at Tufts. Transcript II at 54. She testified that she took an antidepressant, Celexa, from February or March to August of 2010, until she began working at the VNA. Transcript II at 55, 63. Complainant's medical records indicate that she was prescribed the medication from June of 2010 to June of 2011. Joint Exhibit 62 at 72-89, 142-147, 195-196 and 311-322.

59. Dr. Charles Sodikoff is an industrial psychologist who received his Ph.D from Wayne State University in Detroit, Michigan. He has helped clients conduct over 1,000 job searches and has provided expert testimony regarding the quality of job searches in over 100 cases on behalf of plaintiffs and defendants alike. Transcript IV at 58-60. He reviewed Complainant's efforts to mitigate her financial losses after leaving Tufts Medical Center. Dr. Sodikoff testified that Complainant failed to conduct a reasonable and diligent job search after leaving Tufts. Transcript IV at 66 at 66. He defined a diligent job search as a full-time occupation. Transcript IV at 67. According to Dr. Sodikoff, an effective job search involves more than just sending out resumes in response to online opportunities. He described an effective job search as creating a strong resume and cover letter, maintaining records in an organized manner, networking, looking at online job sites, consulting with staffing agencies and alumni career centers, and making direct contact with potential employers. Transcript IV at 67-70. Dr. Sodikoff concluded that Complainant did not conduct a reasonable and diligent job search. Transcript IV at 71. He said that Complainant only documented contacts with four potential employers, used only one website, and made contact with only one placement agency despite a plethora of placement agencies for nurses. Transcript IV at 71, 75-81. Dr. Sodikoff said that nursing opportunities were "robust" when Complainant left Respondent's employ and increased during the 2009-2010 recession due to a scarcity of registered nurses and a demand for their services. Transcript IV at 78, 80, 110-111. Dr. Sodikoff testified that in 2013 when he consulted "nurse.com" for nursing positions within a twenty-five mile range of

Complainant's town, he found thirty RN positions available that did not require night work or overtime (but without regard to specialty, salary and duties). Transcript IV at 77-79, 103, 113-114. Dr. Sodikoff indicated that Complainant's age (fifty-three years old at the time of her job search) should not have had a "very strong impact" on her job search and that a specific salary demand should follow, not precede, a job offer and, thus, be irrelevant to obtaining an offer. Transcript IV at 96-99. Based on his job research, Dr. Sodikoff opined that it should have taken Complainant two to four months to find another job.

III. CONCLUSIONS OF LAW

A. Disparate Treatment Based on National Origin and Race

In the absence of direct evidence of discrimination,[6] Complainant may establish a prima facie case of disparate treatment based on national origin and race under M.G.L. c. 151B, sec. 4(1) by showing that she: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of her protected class. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665-666 n.22 (2000); Blare v. Husky, 419 Mass. 437, 441 (1995).

Complainant is a black woman of Haitian national origin who claims that she was denied the same length medical leave which the Hospital allegedly granted to others, that

[6] Complainant did not proffer direct evidence of discrimination and, thus, a direct evidence analysis is not employed. See Wynn & Wynn, P.C. v MCAD, 431Mass. 655, 665 (2000) *quoting* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as resulting in the "inescapable, or at least highly probable" inference of discrimination).

the Hospital refused to allow her to work a day-only schedule when she returned from leave, that hospital administrators declined to reinstate her to a day-rotator position on Proger 5 North, and that she was denied interviews for vacant positions despite having been a satisfactory employee at the Hospital since 2002. These conditions satisfy the requirement of adverse action.

Despite the adverse actions cited above, there is insufficient evidence that other individuals, not of her protected class, were treated more favorably. Apart from names of comparators on an EEOC intake questionnaire, no evidence was provided as to the race or national origin of nurses who received longer medical leaves, job interviews, and appointments to the positions for which Complainant sought consideration. Thus, the record fails to establish a prima facie case of national origin or race/color discrimination.[7]

B. Handicap Discrimination Based on Failure to Provide Reasonable Accommodation

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person. A handicapped person is one who has an impairment which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2. The statute requires that an employer accommodate a disabled employee who can perform the essential functions of his/her job unless the employer can demonstrate that such an accommodation would create an undue

[7] The fact that Complainant did not present witnesses in support of her race/color claim nor brief the issue indicates that she has abandoned this cause of action.

hardship. According to 2008 amendments to the Americans with Disabilities Act ("ADA"), the term "disability" (i.e., handicap) is to be construed in a manner that favors broad coverage and disfavors extensive analysis. See ADA Amendments Act of 2008, Public Law # 110-325, section 2 (b) (5), *amending* Americans with Disabilities Act of 1990, 42 U.S.C sec. 12101 et seq.

There can be no dispute that in 2009, Complainant's chronic conditions of interstitial lung disease and rheumatoid arthritis rendered her a disabled employee. She had trouble breathing due to coughing spasms, pleural effusions, crackles and pain in her chest, and shortness of breath. She also experienced fatigue and pain in her joints, could not climb stairs, and could not run. Rheumatoid arthritis has been held to be a handicap within the meaning of M.G.L. c.151B, section 4(16). See Cargill v. Harvard University, 60 Mass. App. Ct. 585, 587 (2004). The inability to breathe normally, walk upstairs, and run are likewise considered to be substantial impairments of major life functions. M.G.L. c. 151B, sec. 1(17).

Complainant's physical condition, moreover, caused Respondent's nurse recruiters to regard her as disabled. See MCAD Handicap Guidelines 2 A (4) (defining handicapped person as, *inter alia*, one who is regarded as having an impairment which substantially limits one or more major life activities even if s/he has no physical or mental impairment. There is ample evidence in the record that Respondent's recruitment staff did not assist Complainant in finding positions after her job-protected leave expired and suggested she look elsewhere for work. The lack of assistance by Hospital personnel stemmed from a perception that Complainant was incapable of performing the essential functions of an RN.

Turning to whether Complainant was capable of performing as an inpatient RN at Tufts Medical Center in 2009 notwithstanding her handicaps, the evidence indicates that she would have been able to do so had she been granted the reasonable accommodation of being excused from working nights and overtime. A reasonable accommodation is defined as "any adjustment or modification to a job that makes it possible for a handicapped individual to perform the essential functions of the position . . . ." MCAD Handicap Guidelines, section 2C; Ocean Spray Cranberries Inc. v. MCAD, 441 Mass. 632, 648 (2004). Accommodations may take many forms including changes in work schedules and assigned tasks [and] some modifications of job requirements . . . ." MCAD Handicap Guidelines, section 2C.

An accommodation is not reasonable if it requires a fundamental alteration of a job or the waiver of an essential job function. See Godfrey v. Globe Newspaper Inc., 457 Mass. 113, 121-124 (2010) (assignment to new position, indefinite leave of absence, and elimination of essential job duty are not reasonable accommodations because they create undue hardship on employer); Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443, 454 (2002) (employer not required to "fashion a new position" or grant indefinite medical leave); Beal v. Selectmen of Hingham, 419 Mass. 535, 541-542 (1995) (same); Cox v. New England Telephone & Telegraph Co., 414 Mass. 374 (1993) (reasonable accommodation doesn't waive performance of essential job functions); Tompson v. Department of Mental Health, 76 Mass. App. Ct. 586, 596 (2010) (can't require employer to reallocate responsibilities to others); Dziamba v. Warner and Stackpole, 56 Mass. App. Ct. 397, 405-506 (2002) (reduction in work hours not legally required where it would

require that employer reallocate the employee's duties and make substantial changes in the job).

Respondents argue that the elimination of an overtime requirement was not a reasonable accommodation, but the unique facts of this case indicate otherwise. See Godfrey., 457 Mass. at 121 *quoting* Cox v. New England Telephone & Telegraph Co., 414 Mass 374, 383-384 (1993) *quoting* School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (determination as to whether a job duty is an essential function is "intensely fact-based"); Cargill v. Harvard University, 60 Mass. App. Ct. 585, 588 (2004) (same). Evidence in the record establishes that prior to 2009, nurse-manager Culkins-Bair excused Complainant from performing overtime. While the waiver may have been temporary, a permanent restriction could similarly have been implemented without undue hardship given: 1) the large pool of inpatient nurses -- 694 in 2009 – from which to obtain individuals to work an overtime shift, 2) the fact that some inpatient nurses sought overtime and night-shift work in order to earn more money and to be relieved of work obligations during the day, 3) the Hospital's reliance on "per diems" and "floaters" to cover nursing absences due to vacations and sickness, 4) the fact that approximately five per cent of inpatient nurses did not work any overtime in 2009, 5) the ability of Complainant to work evenings as well as days, 6) Complainant's assurance that that if an emergency were to occur, she would never abandon a patient, 7) the existence of day-evening rotating schedules at Tufts which Complainant could have performed, and 8) the lack of any provision in the parties' Collective Bargaining Agreement mandating (as opposed to permitting the Hospital to impose) overtime. Compare Godfrey, 457 Mass. at 121 (where parties' statement of undisputed material facts acknowledged that climbing

newspaper presses was an essential function of assistant press foreman position, court deemed it to be so); Laurin v. The Providence Hospital, 150 F.3d 52 (1st Cir. 1998) (where rotating schedules were mandated by a collective bargaining agreement, it was deemed unreasonable for a disabled nurse to request the accommodation of not working both evenings and nights on a maternity ward); Tardie v. Rehabilitation Hospital of Rhode Island, 168 F. 3d 538 (1st Cir. 1999) (where Director of HR requested an accommodation of not working overtime, the request was deemed unreasonable because she was the sole individual occupying the position).

The Employer makes much of the possibility that nurses in emergency situations have to remain at work beyond the conclusion of their shifts, but according to Complainant, no such emergencies ever occurred during the seven-years she worked for Respondent. The fact that Complainant performed some overtime for a subsequent employer – VNA Hospice Care Inc. – supports her assertion that she would work overtime if necessary rather than abandon a patient in an emergency situation. I accept her statement notwithstanding the opinion of her internist that night and overtime work were ill-advised for her. Dr. Greenspan's reluctance to approve overtime was undoubtedly impacted by being asked if Complainant could work overtime on a double-shift basis – a worst case scenario that Complainant said never happened.

Unlike situations in which a labor contract impedes the implementation of an accommodation, the contract in this case did not bar the accommodation sought by Complainant. To the contrary, the parties' labor contract permits the Hospital to impose overtime but does not require that it impose overtime. Aside from overtime, the contract recognizes a variety of work schedules which may be used to cover vacant shifts such as

"per diems" and "floats." Apart from the labor contract, the job description for a Tufts RN makes no reference to overtime nor is there a reference to overtime in job postings for the position. See Cargill v. Harvard University, 60 Mass. App. Ct. 585, 599 (2004) (reversing summary judgment, in part, because of lack of express mention in librarian's job description to paging/retrieval and shelving as necessary job functions).

The evidence also refutes the assertion that overtime is a universal practice at Tufts Medical Center. Rather than a universal practice, overtime in excess of forty hours per work week was performed by only fifty-seven per cent of inpatient nurses in 2009 (the remainder worked overtime in excess of their scheduled weekly shifts but not in excess of a forty-hour week). Of the 94.67 per cent of inpatient nurses who were paid for working any overtime during fiscal year 2009, some performed as little as three overtime hours during the entire year. Claudia Ballway, who was hired into the Proger 5 position sought by Complainant in the fall of 2009, performed overtime and night-shift work only on an average of one shift each during the seven months following her hire. Nurse Kara Danz, who worked on Proger 5 until December of 2009, likewise performed few night shifts in her assignment as a day rotator.

The foregoing evidence supports a conclusion that the Hospital could have fashioned a reasonable accommodation whereby Complainant, in October of 2009, returned to Proger 5 North or to a float assignment in a day or day-evening rotator capacity without overtime and night-shift requirements. Rather than permit Complainant to do so, however, Respondents offered her a single night-shift position, discussed the possibility of firing her if she refused the position, failed to interview her for numerous vacant day-rotator positions on Proger 5 North, and only relented on interviewing her in

order to placate her union, the Massachusetts Nursing Association. These actions indicate that Respondents sought to thwart, not assist, Complainant's return to work

The Hospital focuses on Complainant's stated desire to stop performing inpatient nursing and to look for a less strenuous administrative position, but such reliance is a red herring because no such administrative position came her way. Complainant testified credibly that in the absence of a less demanding job, she would have accepted a day-only or day-evening rotator position. Her multiple applications for such positions attest to her interest in and willingness to accept an inpatient assignment.

During the fall of 2009, Respondent placed Complainant in an unprotected status as soon as her contractual job-protected leave expired despite extending the job-protected status of other individuals for up to sixty additional days. Although her doctors provided medical assurances that Complainant could return to work full-time no later than mid-October of 2009, the Hospital made little or no effort to assist her in locating an appropriate position. More than one hospital administrator suggested that Complainant look elsewhere for a job.

Within Tufts Medical Center, Complainant was encouraged to apply for a night position but was not encouraged to apply for day-rotator positions or even permitted to interview for them. Respondent Miglietta relied on Dr. Greenspan's refusal to approve of Complainant working nights or overtime rather than his statement that it was "up to her [Complainant] if she wants to try." There is nothing in Miglietta's notes of her conversation with Dr. Greenspan that indicates that she explained to him that overtime could be as little as fifteen minutes rather than a double shift. In short, the Hospital neglected its duty to participate in a useful and effective interactive process with

Complainant after she requested an accommodation. See MBTA v. MCAD, 450 Mass. 327 (2008) (blanket assertion that requested accommodation was unreasonable is not a sufficient substitute for an investigation and interactive process); Cargill v. Harvard University, 60 Mass. App. Ct. 585 (2004) (where librarian suffering from rheumatoid arthritis requested "desk-based" work as an accommodation, court required an individualized inquiry as to whether paging/retrieval and shelving were essential functions of her job and determined that summary judgment was inappropriate).

The interactive process requires an employer to engage in a direct, open, and meaningful communication with an employee in order to identity the precise limitations associated with the employee's disability and potential adjustments to the work environment that could overcome the employee's limitations. See MCAD Handicap Guidelines at VII; Mammone v. President & Fellows of Harvard College, 446 Mass. 657, 670 n. 25 (2006)); Shedlock v. Department of Correction, 442 Mass. 844, 856 n. 8 (2004); Ocean Spray Cranberries, Inc. V. MCAD, 441 Mass. 632, 644 (2004); Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000). Rather than engage in such "direct, open, and meaningful" communications, the Hospital unilaterally refrained from interviewing Complainant for day-rotator positions which Complainant could have performed provided she were given the same accommodations she had been granted in the past.

Respondents presented myriad excuses for declining to interview Complainant for day-rotator jobs on Proger 5 North, including arguments that: 1) administrators were not aware she had been cleared to return to work despite Dr. Katz's note of 9/8/09; 2) there were limitations on Complainant's ability to work overtime which made her unqualified;

and 3) some of the positions involved specialties outside of Complainant's expertise. These excuses are unpersuasive. Respondent Miglietta knew in October of 2009 that Complainant was cleared to work yet others professed ignorance of the fact. Miglietta fixated on a single night-shift position as the only slot which was appropriate for Complainant even though it was abundantly clear that Complainant feared that night-shift work would negatively impact her health. I conclude that Respondent's focus on a single night-shift position which Complainant sought to avoid, rather than the numerous day-rotator positions on Proger 5 North which Complainant sought to obtain, amounted to a tactic to avoid an interactive dialogue with Complainant.

During the grievance process which took place following Complainant's unsuccessful efforts to return to work, hospital managers Miglietta and Paul Heffernan looked to Article XVI of the parties' Collective Bargaining Agreement to support their determination that overtime and night shift work were essential job functions, but this provision does not establish such a proposition. Article XVI only *permits* the Hospital to assign overtime; it does not *require* the imposition of overtime. In any event, the imposition of overtime under the parties' contract is subject to a non-discrimination provision set forth in Article II, section 2.3 which prohibits discrimination against any nurse because of handicap. This non-discrimination provision, together with Article V, section 5.1's recognition of the Hospital's right to implement a variety of work schedules, support the conclusion that Respondents could have waived overtime in Complainant's situation without causing undue hardship to the Hospital or to Complainant's co-workers.

C. Constructive discharge

The failure to implement a good faith interactive process in order to enable Complainant to resume her nursing duties had the effect of constructively terminating her employment. See GTE Products Corp. v. Steward, 421 Mass. 22, 33-34 (1985) (constructive discharge consists of circumstances wherein a reasonable person would feel compelled to resign). By mid-October of 2009, Complainant was in a state of limbo, without a salary or job prospects. Throughout the fall of that year she filed multiple applications for vacant positions in response to postings on the Tufts' intranet website but never received an interview, let alone a job offer. Tufts administrators told Complainant that she should look outside the institution for employment. Complainant ultimately did so while applying for and receiving unemployment compensation – a benefit which she would not have obtained had her separation been voluntary. These circumstances support a conclusion of constructive discharge effective October 19, 2009 when Complainant was medically cleared to return to work on a full-time basis but was not given a position she could fill. See Doble V. Engineered Materials Solutions, 35 MDLR 36 (2013) (constructive discharge where employer failed to engage in interactive process to determine the feasibility of a reasonable accommodation); Anderson v. United Parcel Service 32 MDLR 45 (2010) (constructive discharge where employer refused to recognize the employee's need for an accommodation).

IV. REMEDIES AND DAMAGES

A. Lost Wages and Benefits

Chapter 151B provides for monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. See

Stonehill College v. MCAD, 441 Mass. 549, 586-587 (2004) *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976).

Complainant was deemed fit to return to work on a full-time, day-shift basis on October 19, 2009 but, as explained above, was prevented from doing so. Complainant's income thereafter decreased from $117,348 in 2008 to $59,601 in 2009. Complainant looked for nursing positions elsewhere but didn't obtain one until August of 2010. Respondent's expert, Dr. Charles Sodikoff, concluded that Complainant did not conduct a reasonable and diligent job search.[8] I concur with Dr. Sodikoff's opinion that Complainant's job search lacked diligence, but I do not agree that Complainant would have located a comparable position within two to four months even if she had approached the job search with greater energy and perseverance.

Dr. Sodikoff's conclusion that a reasonable and diligent job search should have taken between two to four months was based on statistics from the U.S. Department of Labor, Bureau of Labor Statistics identifying an unemployment rate of 2.5 to 3.1 per cent for female healthcare practitioners in the Boston area during the 2009-2010 period, but the statistics he cited do not differentiate RNs from LPNs, nursing assistants, physicians, X-ray technicians, and physical therapists. Transcript IV at 101-104. Dr. Sodikoff also failed to adequately address the impact of Complainant's age and health on her job search,[9] and he failed to account for the difference between a job search in 2009-2010 during the height of the recession and one in 2014 during the post-recession recovery.

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[8] Dr. Sodikoff's expert opinions regarding the reasonableness of a job search have been excluded in several federal district court cases on the basis that they interfere with the role of a jury. See Castelluccio v. International Business Machine Corp., 2012 U.S. Dist. Lexis 158801 (D. Conn. 2012); Roniger v. McCall, 2000 U.S. Dist. Lexis 11999 (S.D.N.Y.2000). Such a concern is not present in this matter where there is no jury and where Dr. Sodikoff's opinions shall not be accepted without due evaluation.

[9] Dr. Sodikoff testified, without support, that at age fifty-three, "the data isn't (sic) very strong in terms of how long it adds to the job search." Transcript IV at 96. Concerning health, he testified that, "I guess if you're that sick and that unhealthy, it probably would have an effect, yeah." Transcript IV at 97.

Transcript IV at 80-81, 95-97. For all these reasons, I conclude that his estimate that a reasonable job search should have taken two to four months is unduly optimistic and that a more reasonable job search would have taken six months.

Based on the foregoing, I conclude that Complainant is entitled to six months of back pay damages in the amount of $34,617.45, consisting of one-half of her 2008 income from Tufts Medical Center as reported in a 2008 W-2[10] less $ 24,057.00 in unemployment compensation. Complainant is also entitled to compensatory damages in the amount of $51,076.00, which represents the difference between the salary she would have earned at Tufts Medical Center had she been permitted to remain there as an employee during the one-year, seven-month period between August of 2010 and March of 2012 and what she actually earned at VNA Hospice Care Inc. during that period.[11]

Following her termination by VNA Hospice Care Inc. in March of 2012, Complainant did not obtain another RN position. Had she done so, she could have made a viable claim for additional back and front pay damages consisting of the difference between what she earned at Tufts Medical Center and what she earned upon re-employment. See Johnson v. Spencer Press of Me., Inc, 364 F3d 368 (where employer discriminatorily terminates employee from job A and employee thereafter obtains job "B" but is subsequently terminated from job "B" and then obtains job "C," the discriminating employer is obligated to pay both the differential in salaries between jobs "A" and 'B" and between jobs "A" and "C"). In this case, however, Complainant chose

[10] I used one-half of Complainant's 2008 income as the basis for determining back pay rather than income reported on Complainant's 2009 W-2 because the latter does not specify the time frame in which it was earned.

[11] For the purpose of computing this salary differential, I increased Complainant's 2008 salary at Tufts by two per cent to reflect a raise that went into effect on June 13, 2010 per the Collective Bargaining Agreement between the Massachusetts Nurses Association and Tufts Medical Center.

not to seek another RN position and opted, instead, for a full-time academic position teaching student nurses.[12] Having removed herself from the field of inpatient care in favor of a position involving less physical and emotional stress, she is not entitled to the salary accompanying her former endeavor. In short, Complainant's voluntary decision to change careers precludes further back pay. See Avila v. J&S Restaurant Enterprises, Inc., 35 MDLR 19 (2013) (where waitress is constructively terminated due to sexual harassment and thereafter obtains a job as a practical nurse which she voluntarily leaves, no back pay accrues for the period following her employment as practical nurse); Bendell v. Lemax, Inc., 22 MDLR 259, 263 (2000) (neither back nor front pay damages are appropriate after quitting subsequent employment).

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages 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 time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's

[12] Complainant 's earnings as an adjunct professor following her constructive discharge from Tufts Medical Center are not subject to offset from her back pay award because she also worked as an adjunct professor during her employment with Tufts.

own testimony regarding the cause of the distress. See id. at 576; Buckley Nursing Home, 20 Mass. App. Ct. at 182-183. Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 Mass. at 576.

I conclude that Complainant is entitled to $45,000 in emotional distress damages. Complainant testified about her sadness, disappointment, and frustration when not allowed to return to a job at Tufts Medical Center. She said that her family had difficulty communicating about the financial burdens caused by losing her job. Complainant described herself as depressed, "blah," and unable to leave her bed to do chores. She took an antidepressant, Celexa, from February to August of 2010, until she began working at VNA Hospice Care Inc.

According to Respondents, the emotional distress suffered by Complainant was caused by circumstances other than those involving her employment at Tufts Medical Center and, thus, is not compensable. I concur that some of Complainant's emotional distress is not attributable to her constructive discharge by Tufts. In support thereof, Respondents correctly point to the fact that Complainant's physicians encouraged her to seek mental health treatment as early as 2007. Such advice detracts from the causal connection between all of her distress and her employment situation in 2009.

D. Individual Liability

Complainant named Julie Miglietta individually in the complaint of discrimination. Individual liability is predicated upon G.L. c. 151B, sec. 4(4), 4(4A), and (5) which prohibit "persons" from discriminating against or assisting others in discriminating against an individual in the opposition of practices forbidden under

Chapter 151B and from interfering with an individual in the exercise of rights protected under Chapter 151B.

Miglietta was a non-management employee during some of the events at issue, although she gained managerial status during the latter part of Complainant's employment by the Hospital. Her role at all times was intertwined with that of numerous other individuals who also played a part in administering Complainant's leaves of absence, determining the conditions upon which Complainant could return to work, identifying potential positions that Complainant could fill and, in general, dealing with Complainant's employment status. Under these circumstances I conclude that the requisite intent required to find Miglietta individually liable for unlawful discrimination does not exist. See Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003) (individual employee may be held liable if found to act in deliberate disregard of complainant's rights sufficient to give rise to an inference of an intent to discriminate). Respondent Miglietta may have been mistaken in some of her employment decisions but her actions do not amount to egregious misconduct because they do not appear to have been taken in bad faith.

VI. ORDER

Based on the foregoing 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) Cease and desist from all acts of disability discrimination;

(2) Pay Complainant a total of $ 85,793.45 in back pay damages. An interest rate of twelve per cent per annum shall be added to this amount and shall continue until

paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(3) Pay Complainant the sum of $ 45,000 in emotional distress damages with interest at the rate of twelve per cent per annum continuing 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 28th day of September, 2015.

Betty E. Waxman, Esq.,
Hearing Officer