

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD & JEAN DALY,  
Complainants

v.

05-BEM-01075

CODMAN & SHURTLEFF, INC.,  
Respondent

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Appearances:

Kristopher S. Stefani, Esquire for Jean Daly  
David C. Henderson, Esquire & Matthew P. Richie, Esquire for  
Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about March 11, 2005, Jean Daly (“Complainant”) filed a complaint with this Commission charging Respondent with discrimination on the basis of gender, age and handicap. The Investigating Commissioner found probable cause as to Complainant’s charge of handicap discrimination only, and dismissed her claims of age and gender discrimination. Thus the sole issue before me is Complainant’s claim of handicap discrimination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on March 23-27 and March 30, 2009. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

1. Codman & Shurtleff (“Codman”) or (“Respondent”) is a subsidiary of the company Johnson & Johnson that manufactures and distributes neurological medical devices and diagnostic equipment for surgical applications. Respondent employs 300 people at its headquarters located in Raynham, Massachusetts and 600 employees worldwide. DePuy, Inc. is a parent company of Respondent and a subsidiary of Johnson & Johnson and is also headquartered in Raynham, MA. DePuy Orthopaedics is yet another Johnson & Johnson subsidiary that is a separate corporation from Respondent. (Vol. I, p. 22-25)

2. Complainant Jean Daly (“Complainant”) resides in Brockton, Massachusetts with her husband Richard Daly, Sr. and her two adult sons. Complainant has worked for various subsidiaries of Johnson & Johnson since 1972. From 1972 to 1980 she worked for Codman; from 1980 to 1993 she worked for Johnson & Johnson Orthopaedics and from 1993 to 2000, she worked for Johnson & Johnson Professionals. From 2000 to 2004, Complainant again worked for Codman. (Vol. I, p. 21-25)

3. In December 1997, after experiencing chest pain and difficulty breathing Complainant was diagnosed with coronary artery disease and unstable angina and likely suffered a minor heart attack. Complainant took a two-month medical leave of absence from work and received short-term disability benefits. After a similar episode in 1998, Complainant underwent angioplasty during which a stent was inserted in a blocked artery. She again took a medical leave and received short-term disability benefits. According to Complainant, after returning from each leave, she advised her then supervisor Vin Scribi that she needed to reduce her work load, which he failed to do.

After the second incident, Complainant's health remained stable until 2003. Dr. Clifford Berger, a cardiologist who has treated Complainant since 1997, testified that Complainant likely suffered a mild heart attack in 1997, however, Complainant's heart function is normal and she never had a subsequent heart attack.<sup>1</sup>

4. In the year 2000, Complainant became a Buyer III/PACT Administrator in Respondent's business unit. Complainant's hours were from 5:00 a.m. to 1:30 p.m., a schedule she had maintained since 1989. (Vol. I, p. 25-26) Complainant was involved in business unit 090U which included DePuy Orthopaedics and Codman and their five locations in Raynham, New Bedford, Bridgewater, New Brunswick, New Jersey and Puerto Rico. (Vol. I, p. 32) Complainant testified that in this position she could spend up to 90% of her time on the telephone assisting buyers with computer glitches. (Vol. I, p. 100)

5. As a buyer, Complainant was responsible for purchasing the maintenance, repair and operations supplies for Respondent, known as non-inventory goods. She also was responsible for purchasing inventory goods.<sup>2</sup> In addition, Complainant issued numerous sales, planning and forecasting reports to ensure that Respondent was ordering the appropriate components. (Vol. I, p. 26) Complainant was assigned additional duties, such as responsibility for "supplier diversity" by which she monitored the purchasing of goods from minority owned suppliers to make sure Codman and DePuy Orthopaedics

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<sup>1</sup> Complainant told her employer, her therapists and this Commission that she had suffered numerous heart attacks, although she had only one heart attack. I find that Complainant believed that she had suffered several heart attacks and did not intentionally mislead her employer, therapists or this Commission.

<sup>2</sup> As defined by Respondent, non-inventory goods are supplies or materials purchased by Respondent that support the functioning of its departments, such as copy paper and equipment for machines that produce products. Inventory goods are products Respondent purchases from suppliers that it then sells to customers under the Codman name.

would qualify for government contracts. This involved creating monthly reports and providing them to her team in Warsaw, Indiana. (Vol. I, 39-40) Complainant was involved in the “Supply Rationalization Project” that identified the supplies used by each business unit and focused on negotiating volume discounts with suppliers by working with marketing, human resources and research & development. The goal was to streamline the number of supplies ordered and eliminate redundancy in Respondent’s data base of suppliers. (Vol. I, p. 39-40) Complainant was also involved in the “Green Belt Project” that involved learning to design more efficient programs and involved two weeks of training off site as well as working with approximately 35 buyers and suppliers and accounts payable, to ensure invoices were paid quickly. Setting up each supplier in the system took about two months (Vol. I, p. 39-44)

6. As PACT administrator, Complainant maintained and administered PACT for Codman and DePuy Orthopaedics. PACT was the hardware and the software database that maintained the entire transactional history for purchasing and accounts payable throughout Johnson & Johnson’s companies worldwide. Complainant was responsible for training all associates on the PACT system and was responsible for the security of the system and working with the buyers.

7. Complainant’s use of PACT focused on the business units that included DePuy Orthopaedics and Codman locations in New Brunswick, New Jersey, Puerto Rico, and Raynham, New Bedford and Bridgewater, Massachusetts.

8. In October 2002, Complainant’s director, Joe Doherty assigned her as project leader for Ariba, a new purchasing and accounts payable system that was to be “rolled out” on October 13, 2003 and would replace PACT by the end of 2004. Once Ariba was

rolled out, Complainant was responsible for both the PACT and Ariba systems while they operated simultaneously during the transition. During the transition Complainant was required to have a great deal of interaction with corporate and local IT to deal with glitches. (Vol. I, p. 37-28) Complainant testified that by August 2003 when the Ariba transition was approved she was working 40 hours per week in the office and an additional 30 to 40 hours per week at home. (Vol. I, p. 30-39) I credit her testimony and find that Complainant's myriad duties were complex, multifaceted, and that her job was extremely stressful.

9. Jane Clough is currently worldwide director of human services for Respondent. From 2002 to 2008, Clough was manager of human resources for Respondent. Her duties included dealing with employees' workplace complaints and providing assistance to employees in the workplace by answering questions, giving them guidance and coaching. (Vol. IV, p. 74-75) Clough reported to Buck Brougham, Vice President of Human Resources for Codman. (Vol.VII, p. 5-6)

10. Paul Bernard has worked for Respondent for 18 years. He has been purchasing manager in the contract manufacturing department in Raynham for eight years. (Vol. V, p.16-17) In 2003 and 2004, Bernard supervised five people including Complainant and April Amaral. Bernard was responsible for insuring the implementation of the transition from PACT to Ariba for the Codman staff. Complainant and Amaral were responsible for the transition and for training staff.

11. At all times relevant to this matter, Broadspire was a third-party administrator of short-term and long-term disability programs for Respondent. Employees seeking medical leaves would contact Broadspire or Codman's occupational health nurse in order

to apply for a leave of absence. Broadspire would in turn contact the employee's physician, who would provide written information to Broadspire, which would determine whether or not the disability leave was approved. (Vol. VII, p. 10-11) According to Clough, Respondent's human resources department does not have access to employees' medical information and Respondent's managers were not permitted to inquire about an employee's medical condition. Nonetheless, Clough was aware of Complainant's heart attack and coronary artery disease because Complainant told her about them.

12. In April 2001, April Amaral was hired as a part-time NIC PACT coordinator dealing with non-inventory control. (Vol. IV, p. 24-25) Amaral was trained by Complainant, with whom she interacted on a daily basis. Complainant oversaw Amaral's administration of the PACT system and later became Amaral's direct supervisor.

13. In early March 2003, Complainant suffered chest pain and difficulty breathing while attending the first day of a Green Belt training session in Norwood, MA. She was transported to Norwood Hospital and then to Boston Medical Center where she underwent surgery to insert a stent to open a blocked artery. Thereafter, Complainant took another three month medical leave of absence from work during which time she received short-term disability benefits through Broadspire. During her leave she updated her supervisor, Vin Scribi, on her health. She told Scribi that her workload was out of control and she was concerned about the lack of progress toward the transition to Ariba. She asked him whether he had indentified someone to replace her while she was out because the next few months would require a great deal of work and decision-making with respect to Ariba. Scribi told Complainant he had not taken steps to replace her. (Vol. I, p. 77)

14. Upon returning from her leave of absence, on June 4, 2003, Complainant talked with Scribi again and told him that her workload was out of control. She was concerned about the lack of progress with Ariba transition due to her absence and the fact that they were less than three months away from the transition date. She informed him that someone in management needed to make the decision whether to move forward. (Vol. I, p.79-80)

15. On June 4, Complainant also met with Human Resources director Jane Clough. (Vol. I, p. 81) At the meeting Complainant told Clough that Scribi had a poor understanding of her workload, lacked computer skills, was not supporting and developing her and was assigning clerical tasks to April Amaral. (Vol. VII, p. 20-26) She told Clough that she had suffered several heart attacks and was upset about the amount of work assigned to her and stated she could not continue at the same pace. Complainant articulated her fear that she would have another heart attack and die unless her work load was reduced. (Vol. I, p. 80) I credit Complainant's testimony that she was seeking a reduction in her workload and that she made this clear to Clough. Clough told Complainant she would discuss her concerns with Scribi. However, Complainant did not hear from Clough again in all of 2003, a period of seven months, and her workload only increased.

16. Clough corroborated Complainant's testimony regarding their June 4, 2003 meeting. However, Clough testified it was not her responsibility to evaluate an employee's work load and she did not offer Complainant any solutions to reduce her work load. Clough also testified that she did not believe Complainant's medical condition was relevant to whether she could perform the duties of her job and she never

felt that Complainant was asking her for a reduction in work load and for more assistance because of a medical condition (Vol. VII, p. 81-83) I find this testimony totally not credible in light of Complainant's direct assertions to the contrary. Clough testified that the hours of Complainant's assistant, Amaral could not be increased because of Respondent's restrictions on hiring. It is clear from this testimony that neither Scribi nor Clough accepted or undertook responsibility for understanding Complainant's job, evaluating Complainant's workload or exploring possible accommodations.

17. On June 4, 2003 Complainant also met with Dick Bond, a counselor at Respondent's employee assistance program. According to Complainant, she told Bond that she had suffered three heart attacks and with the Ariba transition looming she feared she would become sick again. She told Bond she felt she was being set up to fail so that Respondent would have an excuse to fire her. Complainant's discussions with Bond, who was not a Codman employee, were confidential and according to Clough and Bernard, Bond never had a discussion with them about Complainant.<sup>3</sup>

18. Clough testified that following her meeting with Complainant she talked with Scribi's supervisor, director of operations Joe Doherty, about Complainant's responsibilities and also discussed other employee complaints about Scribi's management skills. Clough and Doherty determined that the business unit would be reorganized.

19. In August 2003, Doherty announced a reorganization of the department and in September 2003, Vin Scribi was assigned to a non-managerial position while Paul Bernard, who had been supervising the contract manufacturing group, began to supervise Complainant and Amaral. According to Clough, at the time of the reorganization, Complainant's inventory purchasing duties were transferred to Scribi, leaving

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<sup>3</sup> Bond did not testify at the public hearing



Complainant more time for non-inventory purchasing. Clough and Bernard could not state that the reason for this change was Scribi's reassignment or to reduce Complainant's workload. At this time Respondent was transitioning its software purchasing system from PACT to Ariba which changed the way that certain employees were to purchase non-inventory goods.

20. In September 2003, Respondent held an important meeting in the company parking lot that was attended by the company president. As instructed by Johnson & Johnson's corporate office, Complainant had designed flyers explaining the transition from PACT to Ariba which she planned to distribute at the meeting. Despite having received prior permission from Codman's president to distribute the flyers, at the meeting, human resources manager Buck Brougham instructed Complainant not to distribute the flyers because there would not be enough time to discuss the Ariba transition. Complainant testified that she had difficulty accepting Brougham's instructions, burst into tears and argued with him about the matter. Complainant was upset because Codman management had informed Johnson & Johnson corporate office that Codman would take the necessary measures to increase awareness about the Ariba transition and that it would be Complainant's responsibility to communicate such information to all Codman associates. Complainant asked Joe Doherty why she was not permitted to distribute the flyers, but he gave no concrete response despite her explaining that three of Johnson & Johnson corporate managers had asked her to do it. (Vol. I, p. 218-226) Amaral testified that she told Complainant not to get upset because the matter was out of their control and they had to abide by management's instructions. Complainant remained upset and left the workplace for the day. (Vol. IV, p. 64-65)

21. Complainant testified that in October 2003, on the day after the Ariba roll out she received a congratulatory email regarding implementation of the Ariba system from Brian Bender, chief of procurement at Johnson & Johnson and John McKotch, both of whom were Johnson & Johnson corporate liaisons to Respondent. In a responsive email, Complainant expressed disappointment that she had received no support for the rollout from managers at DePuy Orthopaedics. She did not intend this email to be critical of her supervisor, Bernard, nor did she complain about him in the email.

22. Complainant testified that after her supervisor Bernard learned of her e-mail communication to Bender and McKotch, on or about October 15, 2003, he reprimanded her for going over his head and engaging in this email communication. Bernard told Complainant to consider his reprimand a written warning. Bernard testified that Complainant should have gone directly to him with concerns about her job. According to Complainant, she got along well with Bernard prior to this incident, but that after the incident Bernard's attitude toward her changed and he began bombarding her with e-mails and interrupting her telephone calls with suppliers or customers for trivial matters. She testified that Bernard wanted reports that contained information about Respondent and DePuy Orthopaedics broken down to reflect information about Respondent only, which required Complainant break out the information manually and took a great deal of additional time. In order to provide Bernard with these reports, Complainant had to put aside her other duties. Nonetheless, the numerous telephone requests for information that she received did not stop and her work situation continued to be totally overwhelming. (Vol. I, p. 97-100) I credit her testimony.

23. Complainant testified that in December 2003, Bernard sent her an email message assigning her to the “Sarbanes-Oxley project,” which although appropriate for her position, involved additional duties. Compliance with the Sarbanes-Oxley legislation required changes to PACT and Ariba in order to ensure the information being put into both systems would not be compromised and would remain confidential. Complainant testified that Bernard should have removed some other duties from her when he assigned her the Sarbanes-Oxley project and stated that this additional assignment was the “straw that broke the camel’s back,” and that she became “totally overwhelmed,” and physically and emotionally exhausted. After receiving the email, Complainant went immediately to Bernard’s calendar, which she could access from her computer, and scheduled a meeting with him to discuss exactly what her responsibilities entailed. (Vol. I, p. 100-102)

24. On January 23, 2004, Complainant met with Bernard to discuss reducing her responsibilities. She asked Bernard if he had a copy of her job description from human resources. He said he did and pulled out a copy of the Buyer III description. (Exh. C-73) She asked him about her PACT administration responsibilities and Bernard told her he did not have a description for that position. She became upset that Bernard did not have a complete description of her job duties and did not appear to understand the full range of duties for which she was responsible. She told Bernard that she was scared to death she would have a fourth heart attack and die. When she began to cry, Bernard told her to stop being so emotional and ended the meeting. He instructed Complainant to schedule a meeting with him and April Amaral the following month and to bring along a list of her and Amaral’s job responsibilities so that he could fully understand the extent of her responsibilities. (Vol. I, p. 110-113)

25. On February 12, 2004, Complainant met again with Dick Bond from the EAP program, who told her that she did not look well, and with her permission, he contacted her primary care physician Dr. Black, who set up an appointment for Complainant with psychologist Sheryl Shapiro.

26. On February 16, 2004, Complainant began therapy with psychologist Sheryl Shapiro at Blue Hills Counseling & Psychiatric Associates. Shortly thereafter she met with psychiatrist Dr. Stephen Chabot of the same organization, who prescribed medication. She continued therapy with Shapiro and saw Chabot occasionally, primarily for medication adjustments. At her first meeting with Shapiro, Complainant discussed her family and work and Shapiro noted that Complainant was under a great deal of stress at work. (Exh. C-2) Complainant continued to see Shapiro approximately every other week until 2008. On March 26, 2004, Chabot noted that Complainant was suffering from “major depression.”<sup>4</sup> Complainant initially saw Chabot about once a month. At the time of the public hearing she was seeing him approximately every six weeks. (Vol. I, p. 162-163)

27. On February 26, 2004, Complainant met with Bernard and Amaral. She prepared a written agenda for the meeting (Agreed Exh. 6). She and Amaral started to explain their PACT administration support duties. At the meeting Complainant proposed measures that would reduce her workload, such as increasing Amaral’s hours to full-time and adding another part-time person who would work up to 20 hours per week. (Vol. II, p. 22-24; Exh. C-77) In addition, she presented a flow chart showing how employees from DePuy Orthopaedics and Respondent could share PACT and Ariba duties so that

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<sup>4</sup> During this time Complainant had other stressors in her life. In late 2003, her mother died and her brother was diagnosed with terminal lung cancer.

the work was evenly distributed. Complainant stated that she was so overwhelmed that she began to cry and Bernard yelled at her for over-reacting and being emotional, told her to stop crying and ended the meeting. I credit her testimony. Bernard testified that at this meeting, he again asked Complainant for a detailed job description but she did not provide one. (Vol. V, p. 46) However, I find that Complainant's multiple duties, and particularly those requiring her to interface with, and provide service to, the employees of other Johnson & Johnson subsidiaries, were noted in the flow chart she prepared. Bernard also testified that he was not able to permanently increase Amaral's hours because of Respondent's staffing restrictions. Notwithstanding, Bernard agreed to schedule weekly meetings with Complainant and Amaral. He denied yelling at Complainant and testified that Clough had coached him to end a meeting if Complainant became too emotional. (Vol. V, p. 49-50) Clough corroborated Bernard's testimony that she advised him to break off meetings in order to give Complainant an opportunity to compose herself and to suggest that they meet at another time. (Vol. VII, p. 32) I credit the testimony of Clough and Bernard that he was coached to end meetings if Complainant became emotional. However I do not credit Bernard's testimony that he did not yell at Complainant.

28. Despite Bernard's curtailing of the earlier meeting on February 26, 2004, due to Complainant's emotional state, later the same day, Bernard met with her to conduct her annual performance evaluation. At that meeting, Bernard told Complainant she needed to improve communication techniques and gave her an overall rating of "six;" which was lower than her previous ratings of "seven" and "eight." (Agreed Exh. 5) Bernard wrote the evaluation with the input of Scribi, Joe Doherty and other managers. Complainant

did not sign the evaluation because she did not agree with the rating. She was disappointed in Bernard's comments regarding her need to improve her communications as he had no knowledge of the nature and range of communication she had throughout the company and with the corporate office. (Vol. I, p. 119-121) After the meeting, Complainant went back to her desk and contacted Clough to schedule a meeting to discuss her evaluation. (Vol. I, p. 122) Clough testified that managers met yearly in order to discuss performance ratings. The overall ratings were agreed to by the entire operations management team including her. Prior to November 2003, Clough met with Doherty, Bernard, Scribi, and other managers to review Complainant's performance for the year and calibrated her performance against all the other Buyer IIIs. (Vol. VII, p.33-35)

29. Bernard testified that he had several conversations with Complainant about her concerns that her workload was excessive, and he took many steps to decrease her workload. In September 2003, he immediately took away her inventory purchasing responsibilities for at least three suppliers, including Diametrics, Liberty Engineering and CPTMW, and assigned them to Scribi. (Vol. V, p.37-42) Around January 2004, Bernard removed her inventory responsibilities for two alliance partners, Milltech and Plastics Sterilization Trade Company, and managed them himself for a period of time. However, some of these were additional duties that Bernard had assigned to Complainant since becoming her supervisor and thus did not represent a significant reduction her duties. (Vol. V., p. 44-45, 139-140) Bernard also instructed Complainant not to do work for DePuy staff that he considered unnecessary, but Complainant testified that this was not a practical solution. (Vol. V, p. 84-85) He directed Amaral, who had been reporting to

him, to work directly for Complainant and he no longer assigned work to Amaral so that she could more fully assist Complainant. Despite these measures, in January and February of 2004, Complainant was still telling Bernard and Clough that her workload was too burdensome and stressful.

30. Bernard testified that while Codman's Greenbelt Project and supplier diversity teams involved overlapping duties with DePuy, Complainant's responsibility was to Codman only and he instructed her not to deal with DePuy employees on these matters. Complainant told Bernard that she could not say "no" to DePuy employees because there was a great deal of overlap between their tasks and she had to work collaboratively with them in order to complete her tasks. (Vol. V, p. 84-5)

31. Complainant testified that on March 1, 2004 she met with Clough and advised Clough that she remained stressed with her work load and she was unhappy and frightened of having another heart attack and dying. She told Clough that Bernard had no understanding of her duties, despite the fact that she sent him all the information. She told Clough that Bernard had given her a job description for the PACT position but Clough instructed her, nonetheless, to draft a detailed description of her responsibilities. (Vol. I, p. 122-125) Clough testified that in early 2004, Complainant expressed concerns about Bernard that were similar to her earlier concerns about Vin Scribi. Complainant told Clough that DePuy Orthopaedics employees expected her to support them even though they had their own Ariba person. Clough told her she needed to push back and say no and to focus on Codman.

32. Complainant testified that between January and March 17, 2004, her health had worsened and she was physically and mentally exhausted. On March 2 and 3, 2004,

Complainant attended a two-day supplier diversity meeting at corporate headquarters in New Brunswick, New Jersey and at the end of the conference, as she was returning to her hotel, she passed out while crossing the street and was helped up by strangers. She did not seek medical attention at the time and the following week she attended Green Belt training. Upon returning to the office on March 15 she told Bernard that she was physically exhausted and had blacked out while crossing the street during the supplier diversity training two weeks earlier. (Vol. I, p. 126-130) I credit her testimony.

33. Complainant put together a job description and on March 17, 2004 she hand-delivered a copy to Bernard in his office and emailed a copy to Clough the same day. She did not discuss the job description with Bernard on that day. (Jt. Exh. 8) She was upset because Bernard did not seem to care that she had gone through the work of creating a job description. She returned to her office and prepared to leave for an appointment with her psychologist. (Vol. I, p. 130-132)

34. On March 17, 2004, Complainant had appointments with Sheryl Shapiro and her general practitioner Dr. Black. Complainant testified that she was distraught and crying when she arrived at Dr. Black's office. She claimed that Black told her that she would die if she returned to the workplace and instructed her to remain out of work for two weeks. He wrote a note stating "Jean Daly is currently suffering from depression and anxiety. She is also under treatment. At this juncture she will be unable to work for the next two weeks." (Exh.C-46) On March 18, 2004, Complainant called Bernard and read him Black's letter. Bernard told Complainant to mail the note to Broadspire or to Respondent's health and wellness department. (Vol. I, p. 132-136) Complainant



ultimately remained out of work until May 5, 2004, while receiving short-term disability benefits.

35. On March 26, 2004, Dr. Chabot wrote, "I saw Ms. Daly in my office today. I have started treatment for depression but at this time I do not feel she is able to work. I will re-assess in three weeks." (Exh. 42)

36. Dr. Black wrote a note on April 30, 2004 stating: "Jean Daly may return to work starting Wednesday May 5, 2004 to May 19, 2004 for four hours a day and then to full time duty on May 20, 2004." (Jt. Exh. 11) Dr. Black's letter did not impose any restrictions on Complainant after May 20, 2004.

37. Bernard testified that he reviewed the job description Complainant provided to him on March 17 and concluded that it contained numerous responsibilities that were not appropriate to Complainant's position. He also reviewed the job description with Clough and told her he thought Complainant was performing unnecessary tasks. Clough instructed him to separate Complainant's duties into two categories; one consisting of required routine duties and the other consisting of modular duties that would be required occasionally. (Vol. V, p. 57-61)

38. On April 8, 2004, Bernard called the nurse case manager for Broadspire who was seeking a job description for Complainant. Bernard told the nurse case manager that he had only been Complainant's supervisor for a few months and was not completely familiar with all of her duties and would need to discuss her situation with human resources. (Vol. VI, p. 103-116; Exh. C-76)

39. Complainant returned to work on May 5, 2004 part-time as directed by Dr. Black. Bernard testified that on May 5, he met with Complainant to discuss the limited duties Complainant would perform during the next two weeks.

40. Complainant testified that on one occasion between May 5 and May 20 she spoke with Clough about the possibility of switching jobs with another buyer, Sarah Canfield, who was on a temporary assignment in the UK. Complainant agreed to the switch that would possibly take place sometime in July, depending on when Canfield returned to the U.S.<sup>5</sup> Complainant believed that after she returned to full time work on May 20, either her job responsibilities would be drastically reduced or she would switch positions with Sarah Canfield. (Vol. I, p. 137-139)

41. Clough testified that sometime between May 5 and May 20 she and Complainant discussed possible changes that would be made to her job if she stayed in her position or, in general terms, the possibility of a job switch. This discussion was not specific as to title or pay. (Vol. VII, p. 44-45) Clough testified that on a second occasion, either May 19 or 20, she told Complainant that if she wanted to remain in her current position she had to follow Bernard's directions about reducing her job duties and not performing tasks requested by DePuy Orthopaedics. Clough then proposed the option of switching jobs with Canfield, with no change in her title or salary and no travel. She told Complainant if she were interested, the switch would take place when Canfield returned from the U.K. Complainant was pleased and agreed to the job switch. (Vol. VII, p. 46). Clough told Complainant that she would call Bernard and Doherty and let them know about the switch. Clough testified that she called Joe Doherty when

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<sup>5</sup> The exact date of Canfield's return was uncertain and depended on how long she was permitted to remain in the U.K. on a work visa.

Complainant left her office and told him that when Canfield returned they would officially make the switch. (Vol. VII, 47-48) In her deposition, Clough stated she did not speak to Complainant about a job switch until May 19 or 20. (Vol. VII, p. 75-77)

42. Clough claimed that the agreement to switch jobs was not put in writing because it was merely an organizational change within the operations group that would involve no change in manager, title, working hours or salary for either woman. (Vol. VII, p. 53-55) Complainant told Clough she was happy with the prospect. However, according to Complainant, when she returned to work part time and asked Bernard about the job switch, he responded that he did not know what she was talking about and stated if it were to happen, he did not know when it would take place. (Vol. I, p. 142-145) I credit Complainant's testimony that she discussed the matter with Clough between May 5 and May 20 and that Bernard did not know the details of the possible job switch. I find that the job switch was merely a proposal that had not been finalized by May 20, 2004.

43. Complainant testified that on May 20, 2004, when she returned to full-time work, she was bombarded with phone calls and email messages and believed that her workload had not been reduced and that nothing had changed. She asked Bernard what was going to happen with her job, and he responded, "What are you talking about?" She explained that Martha at Broadspire and Sheryl Shapiro had both told her that Bernard was going to fax Broadspire a revised job description. He again responded in a nasty manner that he did not know what she was talking about.<sup>6</sup> Complainant testified that she started feeling anxious, sick and light-headed, fearing that now that she had returned to work full time, nothing was going to change. (Vol. I, p.143-147) I credit her testimony.

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<sup>6</sup> Bernard testified that he had previously faxed a cursory job description to Broadspire that stated Complainant worked a desk job. (Jt. Exh. 9)

44. After speaking with Bernard, Complainant immediately went to Clough's office to report that Bernard appeared to know nothing about faxing a revised job description to Broadspire. Clough responded that Bernard had "lied" and instructed Complainant to go back to Bernard and ask him for a copy of the document he had sent to Broadspire. Complainant did so, and Bernard handed her a revised job description. (Vol. I, p. 148-149; Agreed Exh. 10). I credit Complainant's testimony.

45. Complainant testified that after reviewing the document she observed that Bernard had merely condensed the wording of her job description and re-organized her duties in an illogical manner. The proposed job description would not have reduced her duties because Bernard required her to work in all the basic databases she had worked in previously and there was still an insurmountable amount of work involved. She stated to Bernard, "All you did was take pieces of the job description I wrote for you and cut it in half." She testified that she was anxious and upset and returned to her office and began to cry. (Vol. I, p. 152-153) She stated that Amaral asked her if she was alright and she said no. She continued crying and was so upset that she could not catch her breath and had to leave the workplace. She drove home slowly because she felt nauseous, and upon returning home, she felt sick and lay down. This was Complainant's last day of work. I credit her testimony and I find that Bernard's proposed job description was a cut and paste job that did not take into account the realities of Complainant's job and did not substantively reduce her responsibilities.<sup>7</sup>

46. Bernard testified that Complainant's last day of work was uneventful. He stated that after giving Complainant the revised job description, they went through the

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<sup>7</sup> This finding takes into account Bernard's and Complainant's testimony in response to counsel's thorough questioning regarding their versions of the job description.

essential duties and the module duties and Complainant agreed with the new job description and said she could follow it. (Vol. V, p. 73-79) I do not credit his testimony. In his deposition Bernard stated that he did not recall a specific meeting with Complainant about her job description on May 20 and did not recall the exact discussion. (Vol. VI, p. 118-119) He testified that on May 19 or 20 he discussed with Complainant the job switch with Canfield. However in his deposition he did not recall whether he discussed it on those days. (Vol. VI, p. 124-25) I do not credit his testimony that he discussed the job switch with Complainant on May 19, or 20. Clough also denied telling Complainant that Bernard had lied about the new job description but I do not credit her testimony.

47. The next day at approximately 2:00 a.m., Complainant awoke with chest pain. Her husband called 911 and she was transported to Brockton hospital and later to Boston Medical Center where she underwent cardiac catheterization. She testified that after returning home she felt emotionally and physically spent and did not want to talk to anyone or see anyone. (Vol. I, p. 158-159) Following the procedure, Complainant received short-term disability.

48. On June 2, 2004, Dr. Berger signed a form stating that Complainant could return to work without restrictions on June 7, 2004. (Exh. R-33: Exh. R-6) On June 16, 2004 Berger completed a return-to-work release stating that Complainant could return to her full duties, but should avoid excessive stress. (R-7) Despite his authorization, Complainant testified that she never returned to work because she was feared the adverse affects to her health of returning to such a stressful work environment. I credit her testimony.

49. On June 18, 2004, Dr. Chabot wrote that Complainant “is quite depressed and in my opinion unable to return to work at this time. (Exh. C-43)

50. In September 2004, Complainant transitioned from short-term disability benefits to long-term disability benefits. According to Clough, when Codman employees go on long term disability they become “inactive employees,” who are considered terminated, but continue to receive some benefits, including medical coverage and life insurance, as long as they are eligible for long term disability.

51. On October 4, 2004, Dr. Berger noted that Complainant suffers daily episodes of angina, awakens with chest pain most mornings and has recurrent angina almost every evening if she walks her dog or does anything physical. (Vol. II, p. 114)

52. In May 2005, Complainant began receiving Social Security Disability benefits retroactive to September 16, 2004. Complainant’s long-term disability benefits were terminated after she failed to reimburse Broadspire for disability payments made to her that should have been offset by her retroactive Social Security Disability benefits. (Conditional Joint Stipulation)

53. On June 8, 2005, Complainant filed a Workers’ Compensation claim stating that she had been incapacitated from earning wages on March 17, 2004 because of Respondent’s “intentional failure to accommodate [her] disability causing emotional distress & aggravation of cardiac condition.” The claim was settled on December 1, 2006 for \$90,000.00. (Conditional Joint Stipulation)

54. On September 7, 2005, Dr. Chabot wrote that Complainant suffers from severe depression and that a very stressful and unpleasant work environment was a significant contributing factor. He wrote that Complainant is totally and permanently

disabled from a psychiatric standpoint...her depression is such that she cannot and will not tolerate a return to any type of stressful environment. (Exh. C-44)

55. On March 10, 2006, Complainant was examined by impartial physician Dr. James M. Krainin, a psychiatrist, in connection with her workers' compensation claim. Krainin diagnosed Complainant with "major depression, recurrent, in partial remission, coronary artery disease, with atypical angina and question of one, old myocardial infarction, psychological factors affecting medical condition, non-insulin dependent diabetes mellitus. He wrote that, "I believe Ms. Daly's position at work became increasingly burdensome and stressful, starting in 1996. It appears the company responded to her illness by trying to increase her stress level to force her out, rather than to decrease her stress level to reasonable levels in order to accommodate her, resulting in increasing symptomatology and resulting disability. On the other hand, it appears she took several sick leaves of greater length than one might ordinarily expect." He further states that, in his opinion, Complainant is substantially medically disabled and this disability is permanent. He believes Complainant could only work at certain sedentary, low stress position [sic]... He stated that Complainant is limited physically by her coronary artery disease. (Exh. C-71)

56. Dr. Berger testified that Complainant underwent seven cardiac catheterizations between December 20, 1997 and July 8, 2004 and had several angioplasties and stent procedures from December 1998 to July 2004. She was hospitalized nine times from 1997 to July 2005 and after each hospitalization she was unable to work for a period of time. (Vol. II, p. 103) Berger testified that once someone has coronary artery disease, it is permanent and that Complainant's disease has

progressively worsened over the years with frequent episodes of chest, arm or neck or throat discomfort and shortness of breath. According to Berger Complainant has been permanently disabled since 2004 because of arterial blockages that cannot be repaired and because of ongoing episodes of chest pain and shortness of breath that occur either with exertion or at rest. Berger testified that from a cardiological standpoint, Complainant's disability has permanently impaired her ability to work. (Vol. II, p.114) I credit his testimony.

57. Berger testified that patients who are anxious or depressed have a higher frequency of heart attacks and cardiovascular disease and that conversely patients commonly develop depression after heart attacks, angioplasty and stent procedures. Berger stated that Complainant had a significant component of depression and anxiety because of her cardiac condition and vice versa. (Vol. II, p. 121-123) I credit his testimony.

58. Complainant was earning \$79,700.00 annually in 2004. She testified that she had planned to work until she was 62 years old, an additional 12 years at which time she would have achieved 45 years of employment with the Johnson & Johnson family of companies.

59. Complainant testified that since May 20, 2004 she has not been able to return to work because she could not deal with the stress and just the thought of returning to that environment scares her. She has had insomnia for the past five years, and has nightmares about the workplace which cause her to wake up with angina and shortness of breath. (Vol. I, p.164-168) I credit her testimony.



60. Complainant testified that prior to May 2004, she was able to perform household chores; however, since that time her husband and sons perform all the household chores except cooking. Prior to May 2004, she went camping with her family but since that time they have sold their tent and no longer go camping. Other than visiting her sister in Maine in 2007 and day trips to Twin River Casino in Rhode Island, Complainant spends her days watching television, playing computer games, taking her two dogs for walks or visiting her next door neighbor. (Vol., p.168-171) I credit her testimony.

61. Complainant denied that she suffered emotional distress as a result of the death of her mother and her brother's diagnosis of lung cancer, both of which occurred in 2003. (Vol. I, p. 188-191) I do not credit her testimony in this regard, because I find it unlikely that a person would not be upset about such significant life events, and because it contradicts the testimony of her husband Richard Daly who testified that in 2003 Complainant was upset when her mother died and was upset about her brother's diagnosis of lung cancer. (Vol. III, p.50-51) I credit his testimony.

62. Complainant's husband, Richard Daly, testified that prior to June 2003, Complainant was outgoing, hard working and fun-loving. They used to go dancing, socialize with other couples and play card games with family and friends. After June 2003, Complainant was no longer happy, and did not want to go out or socialize with other people. (Vol. III, p. 24) Mr. Daly stated that between June 2003 and May 2004, Complainant had no drive or motivation and was irritable because her workload at Respondent was overwhelming. He stated that prior to the last six months Complainant did not want to leave the house or socialize, but the situation had improved to the point

where “at least we try to get out and visit people and take rides to get out of the house, before she wouldn’t leave the house.” (Vol. III, p. 27) I credit his testimony.

### III. CONCLUSIONS OF LAW

Complainant alleges that Respondent discriminated against her based on her handicap in violation of G.L. c. 151B §4(16) by failing to heed her repeated requests to reduce her workload or to work with her in any meaningful way to reduce her workload, in order to prevent work-related stress from exacerbating her heart condition. She alleges that Respondent failed to consider or take adequate measures to reasonably accommodate her handicap, resulting in her having to take a number of medical leaves and ultimately her constructive discharge from employment.

To establish a prima facie case of discrimination based upon Respondent's failure to accommodate her handicap, Complainant must demonstrate that she is a handicapped person within the meaning of the statute; she is qualified for the position, i.e., able to perform the essential functions of the job with reasonable accommodation; she requested a reasonable accommodation; and she was prevented from performing her job because Respondent failed to reasonably accommodate the limitations associated with her handicap. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1(1998).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities.

Complainant has established that she is a handicapped person within the meaning of M.G.L. c.151B because of severe coronary artery disease that episodically limits

Complainant's ability to breathe, walk and work. Complainant also alleges that she is handicapped because of anxiety and depression that her mental health providers stated significantly impacted her ability to work. I find that Complainant was disabled as a result of her coronary artery disease and its limitations and that her mental health was impaired by stress related to her cardio vascular health and the stress of her workload. This conclusion is supported by the testimony of her treating physicians and an independent medical examination.

In order to establish that she is a qualified handicapped person, Complainant must prove that she is capable of performing the essential functions of her job, with or without a reasonable accommodation. Once Complainant has identified her disability and requested an accommodation from her employer, it is incumbent on the employer to determine if the accommodation sought is reasonable and to engage in an interactive process with Complainant. Once the employer is placed on notice that an employee needs an accommodation, the employer has an affirmative duty to engage in the interactive process in an attempt to offer some form of reasonable accommodation.

MCAD GUIDELINES: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP – CHAPTER 151B, pp.15-16. Mazeikus v. Northwest Airlines, 22 MDLR 63, 69 (2000).

The employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive process of determining the nature of the accommodation sought and whether an accommodation is feasible. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). This process should identify the precise limitations resulting

from the handicap and potential reasonable accommodations that could overcome those limitations. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; EEOC Notice Number 915.002, 10/27/02.

I conclude that when Complainant informed Jane Clough in June 2003 that she sought to reduce her workload because of concerns that she would suffer a heart attack and die, that this was sufficient notice to trigger Respondent's obligation to engage her in the interactive process, in order to determine if there were feasible accommodations that would satisfactorily reduce Complainant's workload. Respondent's assertion that Complainant's requests to Clough did not place Respondent on notice of her handicap or trigger the interactive process is contrary to existing requirements under the law. Moreover, Clough surprisingly testified that she did not believe Complainant's medical condition was relevant to whether she could perform the duties of her job and she never felt that Complainant was asking her for a reduction in workload and for more assistance because of a medical condition. It is evident from this statement that Clough did not hear, and was not responsive to, Complainant's entreaties. Thereafter, Complainant made a number of other requests to both her supervisors and Clough to have her workload reduced, but there was little meaningful discussion about how this should be done or what duties could be lifted from her. Complainant continued to labor under an enormous amount of stress, particularly surrounding the implementation of the new purchasing soft-ware system, which she was assigned to co-ordinate, and the lack of support she received with this initiative.

During the last few years of Complainant's employment she was overwhelmed and exhausted and was compelled to take a number of medical leaves following episodes of cardio vascular distress which required cardiac catheterization and/or stent implantation. Respondent would have me find that granting her leave time was a sufficient accommodation to her disability, but I do not accept this assertion. Respondent also asserts that in response to her requests, Complainant's supervisor Bernard reassigned some of Complainant's duties to Vin Scribi, and purported to have taken on some of her duties himself. He also assigned April Amaral to work directly for Complainant in an attempt to relieve Complainant's work load. The fact that some of Complainant's duties were given to others demonstrates that not all her duties were essential functions of her job. However, despite making these adjustments, Bernard also assigned additional duties to Complainant.

Bernard's attempt to revise Complainant's job description in May of 2004 did not resolve the workload problem and demonstrated that Bernard did not understand the complexity of her job duties or her obligations to interface with, and assist, employees from the other Johnson & Johnson companies. While Complainant believed she had reached an agreement in principle with Respondent to change jobs with a co-worker, when Complainant asked Bernard about the possible job switch on May 20, 2004, he professed to have no knowledge of the status of the job switch.

Ultimately, Complainant became so frustrated with her unsuccessful attempts to get Respondent to focus on her crushing workload, that she felt compelled to leave the job and its attendant stress. She alleges that she was constructively discharged from her employment, as a result of Respondent's failure to accommodate her disability. A

constructive discharge occurs when the employer "materially breaches [an] employee's contract of employment in some manner short of termination" or makes "working conditions so intolerable that the employee feels compelled to quit." Constructive discharge may be found where, "based on an objective assessment of the conditions under which the employee has asserted [s]he was expected to work, it could be found that they were so difficult as to be intolerable." GTE Prods. Corp. v. Stewart, 421 Mass. 22, 34 (1995). A breakdown in the interactive process by the employer may cause the constructive discharge of the employee. Pearlie Talley v. Family Dollar Store of Ohio, et al., 542 F. 3d 1099 (6th Cir. 2008).

In order to prevail on her claim, Complainant must establish that Respondent made her working conditions so intolerable that a reasonable person in her position would have felt compelled to resign. McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1240 (1992). The standard for constructive discharge "is, and should be, a strict one," and requires that an employee must demonstrate that "the threat of physical or psychic harm was so great as to preclude ever returning to work." Complainant justifiably feared that her health would be severely compromised if she continued working. Her concern that the stress of her job would cause a "heart attack" was reasonable, given that her chest pains and other symptoms, including shortness of breath, often arose during stressful situations. Complainant must also show that she exhausted all possibilities to continue working and that resignation proved to be the final and only alternative. Id. at 1241. Complainant testified that when Bernard gave her a revised job description that was unsatisfactory because it did not relieve her workload, and told her that he knew nothing of the job switch Respondent had agreed to, she became very upset, believed she

was being driven out and left the work place. After numerous requests to revise her job duties and three medical leaves resulting in large part from the stress of the job, Respondent had continued to neglect Complainant's underlying concern that her workload was unduly burdensome. It is clear that the stress of Complainant's work environment and Respondent's failure to address her job situation in any meaningful way became so intolerable so as to compel her to leave her employment. I also conclude that Complainant had unsuccessfully sought other avenues of relief. She had repeatedly gone to human resources for assistance with her work issues and was referred back to her supervisor to address her issues, to no avail. Therefore, I conclude that Complainant established that that she was constructively discharged from her employment in this matter.

Given all of the above, I conclude that Respondent engaged in unlawful discrimination against Complainant on the basis of handicap by failing to accommodate her handicap, coronary artery disease, which resulted in Complainant's constructive discharge in violation of M.G.L.c.151B§4(16).<sup>8</sup>

#### IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4

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<sup>8</sup> There was no evidence that Respondent failed to accommodate or otherwise discriminated against Complainant on the basis of anxiety and depression, conditions that were first diagnosed and brought to Respondent's attention in March 2004. Complainant was granted a short-term leave of absence based on anxiety and depression and otherwise requested no accommodation for these conditions. Therefore her claim of handicap discrimination based on anxiety and depression is dismissed.

MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on Complainant’s credible testimony and that of her husband and on the records of her treating mental health professionals as well as an independent psychiatrist, I am persuaded that Complainant suffered severe and persistent emotional distress as a result of Respondent’s unlawful conduct. Complainant testified to numerous instances of anxiety and fear of dying in the workplace in the time period beginning in June of 2003, until she left the workplace, while vainly attempting to get her work load addressed. Complainant stated that in the final year of her employment she experienced anxiety, depression, insomnia, and feared dying if her workload was not reduced. Prior to May 2004, she was able to perform household chores and went on family camping trips. Since



that time her husband and sons perform most household chores and she spends her days watching television, playing computer games, taking her two dogs for walks or visiting her next door neighbor. While there is evidence that there were events in Complainant's life in 2003 that would have caused her emotional distress, including the death of her mother and her brother being diagnosed with terminal cancer, notwithstanding these events, the evidence suggests that the primary source of Complainant's anxiety and stress was her employment at Respondent. Complainant's husband, Richard Daly, testified that prior to June 2003, Complainant was outgoing, hard working and fun-loving. They used to go dancing, socialize with other couples and play card games with family and friends. After June 2003, Complainant was no longer happy and fun-loving, and did not want to go out or socialize with other people. Mr. Daly stated that between June 2003 and May 2004, Complainant had no drive or motivation and was irritable because her workload was overwhelming. According to Mr. Daly, up until the six months preceding the hearing Complainant did not want to leave the house, but since that time, her mood has improved to the point where they try to get out of the house and visit people.

Having considered other factors that may have contributed to Complainant's emotional distress, I conclude that there is ample evidence that the depression and anxiety she experienced in the year prior to losing her job, and thereafter, resulted from how her disability was treated at work, and Respondent's the failure to address and accommodate her disability by modifying her enormous workload in any meaningful way. The stress of her workload, exacerbated her health problems, affected her physically and psychologically and ultimately resulted constructive discharge. I conclude that conditions at Complainant's workplace were a significant cause of her emotional pain

and suffering. The evidence also suggests that the struggle to seek accommodation and loss of her job continued to affect her emotional well being for some years thereafter. I conclude that an award of damages in the amount of \$100,000.00 is appropriate to compensate Complainant for the emotional distress she suffered as a direct result of Respondent's unlawful actions.

**B. Back Pay**

Complainant seeks back pay from the time she left her employment up to the time of the hearing and front pay to the age of 62, when she planned to retire after 45 years with Respondent. I decline to award Complainant front pay up to the age of 62 because it is unclear how long Complainant would have been able to work given the progression of her coronary artery disease. Notwithstanding the causal connection between Respondent's failure to accommodate Complainant's coronary artery disease and her increased levels of depression and anxiety, the evidence also suggests that Complainant's coronary artery disease had advanced to the point of total disability by September of 2004, by which time, according to her cardiologist, Complainant had symptoms of angina and shortness of breath even when at rest and absent any other contributing factor. The medical evidence suggests that Complainant's coronary artery disease was progressing in a manner that would have prevented her from working at some point after her constructive discharge. I am unable to speculate as to how those circumstances might have differed, had her disability been accommodated or if she would have been able to continue working for many years thereafter. Given these difficult circumstances, I conclude that Complainant is entitled to a period of back pay beginning on May 20, 2004, when she was constructively discharged and ending on September 16,

2004, the date she was declared to be totally disabled from gainful employment and became eligible for social security disability benefits, a period of 17 weeks.

Complainant's annual salary at Respondent was \$79,500.00. Based on the prorated portion of her annual salary, I conclude that Complainant is entitled to an award for back pay in the amount of \$29,990.38.

#### V. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M.G.L. c. 151B, §5, it is hereby ordered that:

- 1) Respondent immediately cease and desist discriminating on the basis of handicap.
- 2) Respondent pay to Complainant the amount of \$100,000.00 in damages for emotional distress with interest thereon at the statutory 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) Respondent pay to Complainant the sum of \$29,990.38 in damages for back pay with interest thereon at the statutory 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.
- 4) Respondent Codman & Shurtleff shall conduct an initial training on unlawful discrimination on the basis of handicap for all managers and supervisors employed by

Respondent at any and all of its facilities in the Commonwealth of Massachusetts. With respect to such training:

a. Each training session for managers and supervisors must be at least six (6) hours in length. All managers and supervisors, employed in the Commonwealth of Massachusetts shall be required to attend the initial training. No more than 25 persons may attend each training session. Codman & Shurtleff shall repeat this training, once each calendar year for the next five years, for all new supervisors and managers who were hired or promoted after the date of the initial training session.

b. Within 30 days of the receipt of this decision, Codman & Shurtleff shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training. Within one week of Codman & Shurtleff's selection of a trainer, a copy of this decision must be forwarded to the trainer for his or her review.

c. At least one month prior to the training date, Codman & Shurtleff must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Codman & Shurtleff will provide the Commission representative with unfettered access to the training sessions.

d. Within one month after the completion of the training, Codman & Shurtleff must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the

training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

e. In the event that Codman & Shurtleff is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Codman & Shurtleff (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

i. The majority of the managers and supervisors employed by Codman & Shurtleff as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of Codman & Shurtleff's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;

iii. The new owners are relatives of Codman & Shurtleff, or previously employed by Codman & Shurtleff as a manager or supervisor; or,

iv. Codman & Shurtleff continues to retain an interest in the successor entity.

For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 8th day of February, 2010.

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JUDITH E. KAPLAN,  
Hearing Officer