COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JAMES EARL HALSTEAD,
Complainant

Docket No. 14 BEM 03135

v.

LEIDOS, INC. and
FRANCIS KERRIGAN
Respondents

Appearances: Marc D. Freiberger, Esq. for Complainant Halstead
Rachel Reingold Mandel, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 12, 2014, Complainant James Earl Halstead filed charges of discrimination based on disability and retaliation against Respondents Leidos, Inc. and Francis Kerrigan. Complainant alleges that due to complications from knee replacement surgery in 2010, he experienced cognitive difficulties that caused him to take an extended leave and required that he return to work on a part-time basis. Complainant attributes his layoff in July of 2014 to his continued need for a part-time work schedule as a reasonable accommodation for his disability.

A probable cause finding was issued and the matter was certified for a public hearing on November 24, 2017.

A public hearing was held on November 13, 15, 16, 19, and 20, 2018. The following individuals testified at the hearing: Complainant, Respondent Francis Kerrigan, Stephanie Madden, Kevin Varney, Myra Halstead, and Shannon Swenson.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant graduated from high school in 1969 and earned a certificate in a Tool & Die Program from the Wentworth Institute in 1974. He commenced working as a draftsman at Plainville Hydraulics in Plainville, MA in 1978. He held similar positions at various other companies between 1981 and 1990. On or about April 1990, Complainant was hired as a layout designer for military products at Geo-Centers, Inc., a predecessor of Respondent Leidos, Inc. Transcript I at 35. Geo-Centers was bought by SAIC which thereafter changed its name to Leidos, Inc.

2. Leidos, Inc. ("Leidos" or "the Company") is a government contractor based in Virginia with local offices at the U.S. Army Labs in Natick, MA where the Army maintains a facility for the research and development of products such as tents, helmets, and body armor. Transcript II at 100. For more than twenty years, Leidos contracted with the Army Natick Labs to provide computer-aided design ("CAD") software support for the development of products by Army engineers. Transcript II at 100, 106-107, 129; IV at 18. CAD services were provided by Leidos through the so-called "CAD contract." After the original contract expired, there were a series of "follow-on" CAD contracts renewed every five years consisting of multiple task orders, fixed hours, and a firm price

for each task. Transcript II at 102-103; IV at 18. Stephanie Madden was the program manager who oversaw the CAD contract on behalf of Leidos. Transcript IV at 17. She testified that the last follow-on contract between the Natick Army Labs and Leidos ended in 2013, although Leidos personnel continued to work on unfinished ("close-out") tasks through 2014 while funding remained for those tasks. Transcript IV at 20. After 2013, the government only accepted bids from small businesses in regard to the CAD contract and therefore did not permit Leidos to participate in bidding. Transcript IV at 19-21.

3. Complainant was a member of Leidos's CAD team. He worked on technical data packages for products used by the US Army. Transcript I at 83. Complainant's area of specialty was making drawings for textile products such as parachutes, harnesses, and backpacks. Transcript I at 82.

4. During the events at issue, the CAD team consisted of Francis Kerrigan, Kevin Varney, Complainant, Pamela Krikorian, Harold Valentin-Welch, Pamela Prager and, for part of the time, temporary employee Michael Dee who was hired from a temp agency. Transcript II at 168; III at 10, 13; IV at 52; Joint Exhibits 120, 121, 226, & 240.

5. According to Complainant, the work that he and other members of the CAD team performed was "similar ... but a little different." Id. Kevin Varney, for instance, worked with metal and steel items, Pamela Krikorian specialized in a 3D computer modeling program called "Solidworks," and Harold Valentin-Welch worked offsite[1] performing textile and metal work assignments. Transcript IV at 174. Complainant

[1] Valentin Welch was located in North Carolina. Transcript IV at 196.

testified that he was capable of performing the work assigned to CAD team members Kevin Varney, Christine Krikorian, Pamela Prager, and Harold Valentin-Welch. Transcript I at 81-83. According to Respondent Kerrigan, however, it was not Company policy to change personnel from one task to another in the middle of a job even though all members of the CAD team, aside from Pamela Prager, were draftsmen. Transcript II at 142; III at 120. Prager input drawings and specifications into a data base so the government could send them out for open bids. Kerrigan stated that no one on the CAD team had Ms. Prager's capabilities. Transcript II at 113, 139, 146; IV at 136; Joint Exhibit 227. I credit Complainant's testimony that he was capable of performing the work assigned to most CAD team members but do not credit this assertion in regard to Pamela Prager. I credit Respondent Kerrigan's testimony that the Company generally sought to avoid changing personnel from one task to another in the middle of a job but do not credit that this policy was implemented without exception.

6. Respondent Francis Kerrigan was head of the CAD group between 1990 and 2014. Transcript II at 98-99. He reported to program manager Stephanie Madden. As head of the CAD group, Kerrigan met with the contracting division of the US Army Natick Labs to determine the scope of potential CAD jobs in terms of pricing, staffing, and engineering drawings. Transcript II at 99, 101. He assigned members of the CAD team to task orders, i.e., various projects under a main contract. Transcript II at 104; IV at 28. In 2010, then-CAD team members Phil Wood and Steve Duke were laid off by Respondent Kerrigan for lack of work. Transcript II at 108-109. Kerrigan testified that over the years, he has laid off approximately ten people. Transcript III at 132.

7. During the time that the Army and Leidos were parties to the CAD contract, the government would authorize the continuation of a task after the hours assigned to it expired, provided there was money to cover the work, i.e, a "no-cost extension." Transcript II at 104; IV at 28-31. According to Kerrigan, if no money was left to pay for ongoing work, the Contracts Division of the Army determined how to proceed. Transcript II at 105.

8. Respondent Kerrigan became Complainant's supervisor in the early 1990s and remained Complainant's supervisor until Complainant's layoff. Transcript I at 38. Complainant was the longest-serving CAD team member under Kerrigan's supervision. Transcript III at 132. Their work spaces were in separate buildings that were walking distance from each other. They spoke approximately twice a week and saw each other at least weekly. Transcript II at 8.

9. Complainant's medical history includes chronic kidney disease for which he received a kidney transplant at some point prior to the events at issue and continues to take immunosuppressant drugs. Joint Exhibits 83 & 84, p.3.

10. In November 2010, Complainant had knee replacement surgery and thereafter developed complications consisting of joint pain and inflammation, altered mental status possibly from monophasic viral encephalitis or from another non-specific infection, the loss of forty-five pounds, impaired memory, impaired reading skills, and fatigue. Transcript I at 39-40. He was out of work for approximately seven months during which he received speech therapy, language therapy, and physical therapy. Joint Exhibit 83.

11. Complainant testified that during the winter of 2011, while he was out of work, Respondent Kerrigan contacted him up to twice a week to inquire about when he was

returning to work. Transcript I at 44; II at 8. According to Complainant, the calls were at first "concerning" and then became "aggressive" and "harassing." Transcript I at 44-45. Complainant and his wife testified credibly that Kerrigan left a message on their answering machine asking, "What the hell is going on?" or "Where the hell are you?" Transcript I at 45; V at 8, 55. Kerrigan denies that he left such a message but his denial is not convincing. Complainant complained to Stephanie Safchuck and Michelle Caruthers at Leidos's Human Resource (HR) Department about Kerrigan's calls. Transcript I at 46.

12. According to Respondent Kerrigan, he only called Complainant three times during Complainant's medical leave to find out how he was doing and to see if and when Complainant anticipated returning to work. Transcript II at 117-118. Kerrigan testified that Complainant did not object to the calls, but Kerrigan acknowledged that the Company's HR Department instructed him not to call Complainant again because Complainant felt the calls were harassing. Transcript II at 118-119; III at 18-20. I credit Complainant's description of the calls over Kerrigan's.

13. According to Respondent Kerrigan, he sought and received permission to hire someone to fill in for Complainant. Transcript II at 119. Kerrigan hired Christine Krikorian as Complainant's replacement and gave her Complainant's work station. Transcript II at 121; III at 10, 133. When Complainant returned to work, he was placed in a trailer on the base and remained there until his layoff in 2014. Transcript II at 112, 121-122.

14. Respondent Kerrigan denies that his attitude toward Complainant changed after Complainant returned to work and denies that it bothered him that Complainant worked

a reduced schedule during his last several years of employment. Transcript II at 119-120, 164. His denials are not credible.

15. At some point in 2011, CAD team member Kevin Varney was made team leader of the CAD team. Transcript III at 9. He reported to Respondent Kerrigan. Transcript II at 110. As team leader, Varney took on day-to-day supervisory responsibility for the team such as delegating work, correcting work, collecting time cards, and dealing with customers. Transcript IV at 184.

16. When Complainant was able to return to work in mid-2011, his neurologist Dr. Bryan Ho recommended that Complainant be allowed to work on a part-time basis starting with half-days, that he be given a quiet place to work, and that he be allowed to take frequent breaks. Joint Exhibit 85; Transcript I at 49-50.

17. The Company initially refused Complainant's request to return to work part-time on a three morning-a-week basis and informed him that he would remain on disability leave until "released" to work full-time. Joint Exhibit 6; Transcript I at 51-51.

18. Complainant filed a charge of discrimination against Leidos with the EEOC in late-May/early June, 2011. Joint Exhibits 5, p.3 & 123; Transcript I at 39, 44, 54. The parties settled the EEOC charge shortly thereafter by agreeing that Complainant could return to work in July 2011 on a reduced schedule (three half-days) and that some of his requested accommodations would be implemented. Transcript I at 55, 57-58; Joint Exhibits 72, 85.

19. Complainant began to receive short-term disability benefits immediately following his November 2010 knee surgery. After his short-term benefits ran out, he began to receive long-term disability ("LTD") payments on June 21, 2011 (retroactive to May 29, 2011).

Transcript I at 133; Joint Exhibit 92. The LTD benefits were supplied by CIGNA Group Insurance Company pursuant to a disability contract providing for a monthly benefit at 66.67% of covered earnings (i.e., 66.67% of the difference between the hours that Complainant worked part-time and the remaining hours of a normal work week) reduced by other income benefits and applicable taxes. Id. Prior to returning to work on a part-time basis, Complainant's LTD benefit was $4,545.00. Joint Exhibit 92.

20. Complainant maintains that after he returned to work in July 2011, his relationship with Respondent Kerrigan became bitter and hostile. Transcript I at 159. According to Complainant, Kerrigan asked him how he was and in response to Complainant saying that he was "a little fatigued," Respondent Kerrigan made the following comment to the CAD team in a mocking tone, "Oh, well, we're all tired aren't we?" Transcript I at 59. Kerrigan denies making this comment. Transcript II at 127. I credit Complainant's version of this interaction over Kerrigan's.

21. At the public hearing, Respondent Kerrigan professed ignorance about the medical basis for Complainant's reduced schedule, but numerous emails indicate that Kerrigan knew that Complainant's part-time schedule was pursuant to his doctor's instruction. Transcript III at 32-33, 42, 45-46, 50.

22. Respondent Kerrigan's 2011 annual evaluation was graded down from a 4 ("frequently exceeds expectations") to a 3 ("consistently meets expectations") due to a "personnel issue" which appears to refer to Complainant's situation. Transcript III at 15-16.

23. Complainant testified that Kevin Varney told people "constantly" that Complainant was independently wealthy because he was able to leave work early. Transcript I at 60, 81,

167. Varney denied that he did so. Transcript IV at 183. I credit Complainant over Varney in regard to this matter.

24. Complainant increased his work week to twenty-eight hours in September 2011 and subsequently to thirty hours in November 2011. Joint Exhibits 86 & 87. In a note dated January 31, 2012, Dr. Ho declined to recommend a further increase in Complainant's work schedule beyond thirty hours per week divided over four days because of Complainant's continuing difficulty with attention, executive functioning, and memory. Joint Exhibit 88; Transcript I at 64.

25. Complainant testified that Respondent Kerrigan consistently asked him to work more hours than the number recommended by his doctors. Transcript I at 160, 165-166. Complainant accused Kerrigan of asking him weekly, "Earl, when can you increase your hours?" to which he would reply that it was up to his doctors. Transcript I at 60-61. Kerrigan acknowledged that he asked Complainant about the possibility of increasing his work hours and sought HR's "encouragement" for Complainant to return to work full-time in late April 2012. In response, HR Manager Sharon Storm emailed Kerrigan that she was "a little concerned about pushing him [Complainant] to full-time when in January we were looking for work." Joint Exhibit 209 at p. 1962; Transcript II at 123; III at 31-32. Kerrigan communicated with HR on numerous occasions about whether/when Complainant would return to full-time status. Joint Exhibit 209 at pp. 1958-1961; Joint Exhibit 213; Transcript III at 34-36, 40.

26. In a report dated October 23, 2012, neuropsychologist Dr. Haley LaMonica, Ph.D. opined that Complainant's neurological presentation appeared to be stable, with most abilities well within normal limits, that an undiagnosed condition of ADHD might have

been exacerbated by post-surgical infection in 2010, but that Complainant appeared to have returned to his baseline level of functioning. Joint Exhibit 83. Among other suggestions, Dr. LaMonica recommended that Complainant consider pharmacological intervention for attention issues and cautioned that Complainant, his wife, and Dr. Ho "think carefully" about Complainant's return to full-time work in an environment that "will likely tax his weaknesses." Id.

27. In correspondence dated December 19, 2012, Complainant was informed by CIGNA that it intended to terminate his LTD benefits on the basis of Dr. Lamonica's October 23, 2012 evaluation and medical records indicating that Complainant's symptoms were not at a level of severity to preclude his return to work on a full-time basis. Joint Exhibit 93, p.2. Complainant was informed of his right to pursue an administrative appeal of the termination decision. He did so and received a continuation of LTD payments until after his lay-off from Leidos. Transcript I at 134; Joint Exhibit 93, p. 3; Joint Exhibit 94.

28. In a letter dated January 24, 2013, Dr. Ho described Complainant's concentration and attention span as still "significantly impaired" and stated that Complainant would not be able to maintain a workload beyond an 80% schedule. Joint Exhibit 89.

29. Despite Dr. Ho's advice that Complainant continue to limit his work schedule, Respondent Kerrigan continued to ask Complainant to work more than thirty hours per week Transcript I at 66; Joint Exhibit 7. On April 17, 2013, Kerrigan noted in an internal office email that, "This ... has been ongoing for 2 years ...." Joint Exhibit 213 at p. 002013.

30. Complainant received annual performance reviews from the Company. He testified that he was always rated as "consistently meets expectations." Transcript I at 68-72, 76-77;

30. Complainant received annual performance reviews from the Company. He testified that he was always rated as "consistently meets expectations." Transcript I at 68-72, 76-77; Joint Exhibits 142, 143, 147, 148, 152, 153. According to Joint Exhibit 151. Complainant received an overall rating of "frequently exceeds" for 2009-2010. He received the following percentage yearly wage increases beginning in 2006: 4.39 (2006-2007), 4.0 (2007-2008), 4.0 (2008-2009), 4.0 (2009-2010), 4.0 (2010-2011), 2.25 (2011-2012), and 2.5 (2012-2013). In 2013-2014, however, Complainant's merit increase was only 0.5%. Joint Exhibits 144, 149-154, 156; Transcript I at 73-75, 78. Prior to deciding on the 0.5% figure, CAD Manager Stephanie Madden and HR Manager Sharon Storm exchanged emails which questioned whether Complainant was eligible for a salary increase while on partial disability.

31. Complainant's initial salary reviewer for 2013-2014 was Kevin Varney and the next level salary reviewer was Respondent Kerrigan. Joint Exhibit 156. Kerrigan testified that he had no input into the 0.5% increase assigned to Complainant for 2013-2014 despite his designation as salary reviewer. Transcript III at 67. According to Kerrigan, the determination of percentage increases for his team was made by "payroll [or] HR." This assertion was refuted by HR Director Shannon Swenson. Transcript V at 143-144. It is also contradicted by an email from Kevin Varney which mentions the 0.5 % raise which "we" put in for Complainant and testimony by Varney that he and Kerrigan decided on the distribution of percentage increases. Transcript at 186-187; Joint Exhibit 220. I do not credit Respondent Kerrigan's testimony in regard to determining raises and find that the 0.5% recommendation for Complainant's 2013-2014 salary increase originated with him, Varney, and Madden. Respondents' assertion that Complainant's

disproportionally small salary increase for 2013-2014 was due to his being one of the highest paid employees in the CAD team is refuted by the fact that Complainant's 2014 salary ($84,260) was lower that of Kerrigan ($128,472), Varney ($85,100), and Valentin-Welch ($91,362) and yet their increases were higher. Joint Exhibits 75, 256.

32. In July 2012, Complainant and Christine Krikorian received training in 3D software for computer-aided design called SolidWorks. Krikorian thereafter gained extensive experience using SolidWorks on a government-supplied system whereas Complainant did not. Transcript I at 167-168; II at 43-44, 114, III at 134, 135-136.

33. Complainant acknowledged that CAD team members received certain assignments because they were good at those jobs. Transcript I at 179. Respondent Kerrigan characterized Complainant's handling of textile drawings as his specialty, describing it as an area in which Complainant had great skill. Transcript I at 114; III at 34-36, 72. Kerrigan acknowledged that Complainant and Kevin Varney did the same type of work. Transcript III at 9.

34. On August 13, 2013, Respondent Kerrigan sent Complainant the following email: "Earl, We have a lot of work [sic] the plate now. Can you give me an extra day this week to help out with schedule deliveries. If not is there any flexibility to give me any time next week at all. Trying to make schedules. Any consideration will be appreciated." Joint Exhibit 7. When Complainant responded that he had to stay on a thirty-hour per week schedule, Kerrigan wrote him the same day, "How about next week?" Transcript II at 126. I find that Kerrigan's requests were based on his belief that Complainant's reduced schedule was a "goal" or "choice" rather than a medical necessity. Transcript III at 62-63.

35. The CAD contract officially ended on August 31, 2013, but various unfinished tasks under the contract continued for another year pursuant to "no-cost extensions." Joint Exhibits 182 (p.1658), 226; Transcript II at 131-132.

36. Effective September 14, 2013, Respondent Kerrigan moved from the CAD contract to a new position on the so-called "WarPADD" contract between Leidos and the government. Joint Exhibit 161 (p. 1288); Transcript III at 112; IV at 82-83. Kerrigan continued to oversee CAD team members. Transcript III at 109. Kerrigan testified that he moved into a new position at a 30 % reduction in pay in order to remain at Leidos, but documentary evidence indicates that his reduction in salary was 8.62 % and that his designation as a mechanical engineer remained the same, albeit his rank was reduced from level V to IV. Joint Exhibit 161; Transcript II at 150-151; III at 121.

37. On April 2, 2014, Stephanie Madden emailed Respondent Kerrigan saying that they "Need to talk about Earl [Halstead] and potential lay-off. ... Can others pic [sic] up his textile work?" Joint Exhibit 221. Some three months later, Madden again emailed Respondent Kerrigan on July 14, 2014, to say, "NOT GOOD NEWS. ... Could still survive but would need to lay off Earl as no spot for him." Joint Exhibit 239. Kerrigan testified that during this time, he was attempting to find assignments for members of CAD team so that they wouldn't be laid off. Transcript III at 76.

38. In early July 2014, the entire CAD group, except for Complainant and temporary employee Michael Dee, moved out of the trailers they were occupying and into permanent accommodations in a research building. Transcript IV at 193-195. As a result, Complainant was left alone in a "stacked-up trailer" that was meant to hold "transient people." Transcript IV at 194.

39. In late July 2014, Respondent Kerrigan called a meeting of the CAD team and announced that the CAD contract was ending and that the government was planning to solicit successor contract bids from small businesses only. Joint Exhibit 240; Transcript II at 130, 137. Layoffs were projected to begin with the immediate terminations of Complainant, Harold Valentin-Welch, and Michael Dee with others to follow. Transcript I at 84. According to Respondent Kerrigan, since Dee was not a Leidos employee, his termination could be effectuated simply by calling the temp agency and letting them know. Transcript II at 169.

40. Complainant received a notice dated July 28, 2014 which provided that he would be laid off effective August 8, 2014, followed by a four-week leave without pay period (LWOP) up to September 5, 2014 during which Complainant would receive no pay, would perform no work but would continue to get Company benefits. Joint Exhibit 8. The letter offered to assist Complainant in conducting internal and external job searches and up to six months of career transition services. Id. The letter stated that unused leave (e.g., vacation credits) could not be used to extend LWOP, but could be used in full week increments to provide compensation during the four-week period. Id. According to Complainant, he had a pre-approved vacation scheduled at the end of July which he was told he couldn't take. Transcript I at 87; II at 9-10. Kerrigan testified that he told Complainant to check with HR about the Company's policy of not permitting a vacation to extend a leave date. Transcript II at 154. Complainant was paid for two weeks of unused vacation during the LWOP period. Transcript I at 194-195; II at 10.

41. Harold Valentin-Welch subsequently received a revised notice extending his final separation date to January 28, 2015. Joint Exhibits 3 & 127. According to Respondent

Kerrigan, the government permitted Valentin-Welch to complete his assigned tasks under a no-cost contract extension. Transcript III at 101.

42. Aside from Complainant, Dee, and Valentin-Welch, the remaining members of the CAD team stayed on the Leidos payroll after funding ran out under the CAD contract. They were able to do so by shifting to either the WarPADD contract or a Health and Human Services contract. Transcript III at 84. Kevin Varney worked on a "special ops" shelter project until he left to take a job with the Department of Defense at the Natick Army Labs in May 2015 that mirrored his work on the CAD contract. Transcript IV at 180-181. Pamela Prager continued to input technical data packages until September 2015 when she was laid off. Christine Krikorian worked on a parachute/airdrop project until March 2015 when she voluntarily left to take a government job. Joint Exhibits 120, 121, 226, & 240; Transcript II at 135-136, 139, 149-150; III at 84-98, 107, 129; IV at 45-46, 73, 77, 96-97, 109, 125-132, 157. Respondent Kerrigan received several layoff notices, but they were amended and ultimately rescinded. Transcript III at 108-110; Joint Exhibit 160. He retired from Leidos on September 14, 2018. Transcript II at 97; III at 111.

43. According to CAD program manager Stephanie Madden, Leidos employees are laid off or retained in accordance with the jobs they perform rather than by seniority. Transcript IV at 32, 52. She and Kerrigan both testified that CAD team members Varney, Prager, and Krikorian were transferred to other Leidos contracts because they were "tied" to the tasks they performed. Transcript III at 135-136; IV at 23, 45-46, 65-67, 70-71.

44. After his layoff, Complainant called Respondent Kerrigan and left him a voicemail message asking for a reference. Kerrigan responded by informing Complainant that

"Leidos uses a third-party vendor for all employment verifications." Joint Exhibit 2; Transcript I at 96. According to Kerrigan, he responded in this manner because he did not interpret Complainant's request to be seeking a personal reference as opposed to a Company reference. I do not credit this testimony and find, instead, that Kerrigan was unwilling to provide Complainant with a personal reference. Kerrigan acknowledged that Leidos's policy did not prohibit personal references by a supervisor. Transcript II at 162. As a result of Kerrigan's refusal to give Complainant a personal reference, Complainant was not able to make one available to prospective employers. Transcript I at 99.

45. On August 22, 2014, several weeks after Complainant was laid off but during his "leave without pay" period, Madden sought updated resumes from Varney, Valentin-Welch, Krikorian, and Kerrigan in order for Leidos to participate as a subcontractor in responding to a new request for proposal ("RFP") for CAD services. Transcript IV at 158. Madden testified that she did not reach out to Complainant because he was no longer a member of the current staff. Transcript IV at 158. I do not credit this testimony because Madden included Valentin-Welch's resume even though he, like Complainant, was then on leave with pay status ("LWOP"). Joint Exhibit 127. Madden acknowledged that individuals on LWOP are still considered employees for purposes of reinstating them into other Leidos jobs. Transcript V at 128. Madden also maintained that she didn't have a way of reaching Complainant but this testimony also lacks credibility because Madden could have obtained his contact information from HR or Respondent Kerrigan. Transcript IV at 159

46. Complainant testified that he applied for approximately a half-dozen full-time Leidos positions between July 2014 and 2016: an engineering designer job (Joint Exhibits 12 & 21), a CAD operator/drafter position (Joint Exhibits 14 & 22), an electrical designer/engineer job (Joint Exhibit 15), and an electrical designer/engineer job (Joint Exhibit 16). Transcript I at 88-90, 182; V at 103-104. Complainant's assertion that he submitted applications for all these positions is disputed by Leidos HR Director Shannon Swenson based on her review of the Company's "applicant tracking system." I do not credit Swenson's testimony because no documentation from the applicant tracking system was provided to Complainant during discovery despite relevant discovery requests. Transcript V at 141.

47. Complainant did not receive call-backs for any of the Leidos positions. Transcript I at 93-96; V at 132-134. Complainant was deemed to be "over-qualified" for the CAD operator/drafter position. Transcript I at 92-93; II at 20; V at 105. An individual with two years of CAD drafting experience was selected. Transcript II at 20. Several of the positions were re-advertised after he applied for them. Transcript I at 112-115.

48. Following Complainant's layoff from Leidos, he received unemployment benefits in the amount of $651.00 per week from approximately September 11, 2014 through March 21, 2015. Joint Exhibit 82; Transcript II at 82-85.

49. According to Complainant's wife, Myra Halstead, Complainant lost a $600,000 life insurance policy that he received through Leidos. Transcript V at 16.

50. On August 26, 2014, Complainant received a conditional offer of employment for a Senior Designer job at TriMech Facility in Natick, MA, contingent on the award of a "Natick Soldier" subcontract to TriMech. Joint Exhibit 20. Complainant signed the

conditional offer of employment but was never contacted by TriMech about a start date. Transcript I at 111-112.

51. Complainant applied for the following jobs outside of Leidos: a steel detailer (Joint Exhibit 20), an engineering technician (Joint Exhibit 25), a drafting technician II with United Electric Controls (Joint Exhibit 29), a drafter/detailer with Lawton Welding Company (Joint Exhibit 30), a mechanical design engineer with Formulatrix (Joint Exhibit 31), a steel detailer (Joint Exhibit 32), and a CAD specialist (Joint Exhibit 35). He was not hired for any of these positions. Complainant continued to look for jobs through 2016 and beyond. (Joint Exhibits 37-70, 106-115).

52. Complainant received LTD payments both during and after his employment with Leidos. While he was receiving these payments, CIGNA contacted him repeatedly about applying for Social Security Disability Insurance ("SSDI") benefits. Joint Exhibits 90, 91 & 94. On December 4, 2015, CIGNA informed Complainant that unless he filed an application for SSDI by the end of 2015, it would reduce his LTD benefits by $1,687.00 monthly. Joint Exhibit 95. Complainant testified he did not want to apply for SSDI benefits but that pressure was put on him to do so. Transcript I at 136-137, 139. Complainant ultimately applied for SSDI (filing electronically on December 30, 2015 (finalized on February 1, 2016) because CIGNA threatened to stop making LTD payments which were, at that time, his only source of income. Transcript I at 140; Joint Exhibit 101. Complainant's SSDI application states that Complainant was unable to work because of a disabling condition which occurred on July 24, 2014, that he was disabled, and that he was not going to work in 2016. Joint Exhibit 101 at 00704, 00706, 00722.

53. Complainant testified that he was, in fact, able to work thirty hours a week. Transcript I at 143. He attributed the SSDI statements about being unable to work to a misunderstanding. Transcript I at 141-142; II at 50-51.

54. On March 22, 2016, Complainant received another neuropsychological evaluation by Clinical Neuropsychologist Dr. Thomas Laudate, Ph.D. Joint Exhibit 84. The evaluation did not find that Complainant had clinically significant levels of anxiety or depression at that time. Joint Exhibit 84. The report noted that Complainant and his wife had engaged in couple's therapy about five years prior to the evaluation (i.e., 2011), that Complainant had anger issues and displayed some difficulties in executive functioning, but that other aspects of cognitive functioning were intact. Id. The report noted that Complainant used weights and bicycled in good weather. Id. It was recommended that Complainant work with a psychotherapist to decrease depressive symptoms and manage stress. Complainant didn't pursue these suggestions. Id.; Transcript II at 76.

55. In June 2016, Complainant received a retroactive SSDI benefit of $29,471.00, followed by monthly benefits of $2,085.00. Joint Exhibit 103.

56. In early February 2017, Complainant found a job through Finish Line Staffing as a CAD operator at Fourstar Connections in Hudson, MA for twenty-five hours per week at $15.00 per hour. Transcript I at 129-130. Complainant testified that he informed the Social Security Administration that he had received a job while on SSDI and was told that he did not have to take any action because he was about to reach full retirement age. Transcript I at 147-148. On June 1, 2017, Complainant's SSDI benefits were converted

to Social Security retirement benefits upon reaching age sixty-six. Transcript I at 148-149; Joint Exhibit 104.

57. On September 1, 2017, Complainant was laid off from the Fourstar Connections job. Transcript I at 130-131; V at 19. Complainant testified that that he would have liked to work into his seventies. Transcript I at 131.

58. Complainant testified that he suffered from the following symptoms of emotional distress as a result of his treatment by Leidos: depression, constant arguments with his wife, lack of physical intimacy, anger, despondency, staying at home and watching TV, altered sleep patterns (taking naps, staying up later at night, and sleeping later in the morning), isolation from friends, and being less outgoing. Transcript I at 149-153.

59. Complainant's wife, Myra Halstead, testified that prior to his termination from Leidos in August 2014, Complainant was "happy go lucky," kind to her, and physically affectionate whereas after his termination, Complainant began to yell at her frequently, no longer expressed affection for her, became disinterested in physical intimacy, chose to spend time alone, and was no longer happy. Transcript V at 11-14. According to Mrs. Halstead, their marriage went "down the hill" after he was laid off, but credible evidence in the record establishes that the Halsteads attended marital counseling prior to Complainant's August 2012 termination – either in 2004 (Transcript V at 14-15) or in 2011 (Transcript V at 36) and that Mrs. Halstead was concerned about her husband's poor frustration tolerance, low energy level, and frequent naps in 2012 following his knee surgery. Transcript V at 22-23, 33-34.

III CONCLUSIONS OF LAW

A. Handicap Discrimination

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. In order to be qualified, a handicapped individual must be able to perform the essential functions of a job with or without a reasonable accommodation. A reasonable accommodation is one that does not impose "undue hardship" on an Employer. See MCAD Handicap Guidelines at pp. 6-8.

Absent direct evidence of discrimination, a *prima facie* case of handicap discrimination may be established through the three-stage method adopted in Wheelock College v. MCAD, 371 Mass. 130 (1976). Applying the Wheelock College paradigm to this matter, Complainant must show that he: 1) is a member of a protected class; 2) performed his work at an acceptable level; 3) suffered adverse employment action(s); and 4) similarly-situated qualified persons not of his protected class were treated differently in circumstances that give rise to an inference of handicap discrimination. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 45 (2005); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as "not onerous," requiring only that a qualified individual establish circumstances "which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky,

419 Mass. 437 (1995).

There is credible evidence in the record to support a conclusion that Complainant was a qualified handicapped person who performed his work at an acceptable level. Complainant's disability is medically documented. After knee replacement surgery in 2010, Complainant developed complications consisting of joint pain and inflammation, altered mental status possibly from monophasic viral encephalitis or from another non-specific infection, the loss of forty-five pounds, impaired memory, impaired reading skills, and fatigue. He was out of work for approximately seven months during which he received speech therapy, language therapy, and physical therapy. Following the knee surgery, Complainant received disability benefits, both short and long-term. Although Complainant was able to return to work in 2011, he was unable to maintain a workload beyond an 80% schedule.

The aforementioned evidence establishes that Complainant had a disability cognizable under Chapter 151B which impacted his ability to work on a full-time basis. That he was nonetheless capable of performing the essential functions of his job on a part-time schedule is evidenced by yearly job evaluations which consistently rated him as "meeting expectations" or better. Complainant had no record of any discipline and his supervisors noted at the public hearing that he excelled at creating textile drawings.

To be sure, Respondent Kerrigan never ceased endeavoring to have Complainant return to a full-time schedule. However, the evidence indicates that Kerrigan campaigned for Complainant's return to a full-time schedule out of resentment over what he perceived to be Complainant's special privileges rather than a job-related need to have Complainant return to a full-time schedule. Notably in April 2012, HR Manager Sharon Storm

cautioned Kerrigan against "pushing" Complainant to full-time employment when just several months earlier, the Company had been "looking for work."

That it was not essential for Complainant to return to a full-time schedule is also supported by the fact that in 2011, Respondent Kerrigan hired Christine Krikorian to fill in for Complainant during the latter's medical leave. Rather than reduce her hours once Complainant returned, Krikorian was retained as a full-time employee without any evidence that the Company experienced financial hardship as a result of the expanded workforce. The Company likewise added the services of a "temp" member to the CAD team. Under these circumstances, maintaining Complainant's thirty hour-per-week schedule between 2011 and 2014 cannot be deemed an undue hardship under Chapter 151B. Compare White v. Standard Ins. Co., 529 F. Appx. 547, 549-550 (6th Cir. 2013 (half-time slot not a reasonable accommodation where excess work had to be rotated among employees who performed it on an overtime basis); Lamb v. Qualex, Inc., 33 F. Appx. 49, 57 (4th Cir. 2002) (part-time work not a reasonable accommodation where other employees had to be brought in from other states to cover some of disabled employee's job responsibilities which required prompt responses).

In regard to whether Complainant suffered adverse action, Respondent seeks to frame the issue narrowly, focusing solely on Complainant's layoff rather than the entirety of his employment experience between 2011 and 2014, but such a narrow focus ignores the backdrop to Complainant's separation from the Company. While each step prior to layoff -- unkind words, placement in a trailer, the denial of a meaningful merit raise -- may have been insufficient on an individual basis to signal that Complainant's employment situation was pervasively hostile and unlikely to improve, together they create a pattern of negative

actions culminating in Complainant being the first out the door after expiration of the CAD contract and being deprived of promised assistance in locating an alternative job. See Cuddyer v The Stop & Shop Supermarket Co., 434 Mass. 521, n.10 (2001). Such an ongoing pattern of discrimination permits an extension of the three hundred day statute of limitations to encompass the adverse actions preceding Complainant's layoff.

An examination of the totality of adverse actions directed at Complainant gives rise to an inference of handicap discrimination. Complainant testified credibly that while he was on medical leave, Respondent Kerrigan contacted him at home up to twice a week to inquire about his return-to-work date until HR barred Kerrigan from making further calls. Kerrigan gave Complainant's work station to newly-hired CAD member Christine Krikorian even though Complainant was planning to return to work. After Complainant returned to work, Kerrigan moved him to a trailer on the Natick Army base and left him there after other members of the CAD team were transferred to permanent accommodations in a research building. Between 2011 and 2014, Kerrigan repeatedly asked Complainant to work more hours than the number recommended by his doctors, endeavored to have HR pressure Complainant to return to a full-time schedule, and treated Complainant in a hostile manner. On one occasion, Kerrigan mocked Complainant's assertion that he was "a little fatigued." Kerrigan's resentment of Complainant was mirrored by CAD team leader Kevin Varney who sarcastically told individuals that Complainant was able to leave work early because he was "independently wealthy." In proposing merit raises for 2013-2014, Kerrigan and Varney suggested that Complainant receive an increase that was significantly lower than those given to other members of the CAD team.

In August 2014, Complainant was laid off while the other permanent members of the CAD team remained with the Company until 2015. Kerrigan admitted that during 2014, he was attempting to find other assignments for members of the CAD team so that they wouldn't be laid off. Such efforts, however, did not extend to Complainant despite his acknowledged skill at handling textile drawings. Rather than find Complainant another assignment, Kerrigan and CAD Manager Madden discussed having "others pic [sic] up his textile work." Kerrigan declined to provide Complainant with a personal reference despite the fact that during their twenty-four year employment relationship, Kerrigan had never rated Complainant lower than "meeting expectations." Nor did the Company assist Complainant with career transition services as promised following his separation. To the contrary, it rejected Complainant for an open CAD operator/drafter position based on the specious rationale that he was too qualified ("over-qualified") for the position.

In contrast to Complainant's expedited layoff in 2014, none of the other permanent CAD team members were laid off until the following year. Valentin-Welch's layoff date was delayed until the beginning of 2015, Varney and Krikorian stayed with Leidos until mid-2015 when they shifted to other government jobs, and Prager did not leave the Company until the latter part of 2015.

Since the foregoing circumstances support a prima facie case of discrimination based on disability, the burden of production shifts to Respondents to articulate and produce some credible evidence to support a legitimate, nondiscriminatory reason for its treatment of Complainant. See Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34, 50 (2005) *quoting* Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 138 (1976).

Respondents have produced credible evidence to carry their burden at stage two, namely that the CAD contract between Leidos and the U.S. Army which had been in effect for more than twenty years was terminated in 2013, resulting in its various task orders winding down between 2014 and 2015. According to Respondents, Leidos did not continue employing individuals past their task order end dates. Respondents also cite Complainant's application for SSDI benefits which states that Complainant became unable to work because of a disabling condition on July 23, 2014. These circumstances are sufficient to prevail at stage two, thereby causing the burden of persuasion to shift back to Complainant to demonstrate by a preponderance of evidence that Respondents' reasons are pretextual. See Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass. 437, 444-446 (1995).

At stage three, an employee may prevail by persuading the factfinder that one or more of the employer's reasons are false, allowing, but not requiring, the factfinder to infer that the employer is covering up a discriminatory motive. See Chief Justice of the Trial Court, 439 Mass. 729, 733 (finding for employee based on factfinder determining at stage three that a legitimate reason advanced at stage two is actually a pretext); see also Lipchitz v. Raytheon, 434 Mass. 493, 501 (2001). Complainant fulfills this stage three burden by successfully challenging the validity of Respondents' defenses which, along with the suspicious timing of his layoff and his adverse treatment at the hands of his supervisors, lead to an inference of discriminatory animus as the "determinative cause" for the disputed actions. See Chief Justice of the Trial Court v. MCAD, 439 Mass. 729, 735 (2003) (even if non-discriminatory reasons play a role in adverse employment action, decision may still be unlawful if discriminatory animus was a "material and important ingredient."); Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001) (to prevail at stage three, a preponderance of the

evidence must show that the employer's reasons are not the real reasons, but a pretext for discrimination); Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Abramian v. President & Fellows of Harvard College, 402 Mass.107 (2000) (third step of circumstantial method of proof may be satisfied by proof that one or more of the reasons advanced by the employer is false leading to inference of discriminatory animus).

Respondents maintain that members of the CAD group were laid off in accordance with the completion of their task orders, but control of the task orders resided with Respondent Kerrigan who resented Complainant's sick leave and subsequent part-time work schedule. Kerrigan was able to delay the departures of all other permanent members of the CAD team for at least six months after the July 2014 announcement of the termination of the CAD contract. Kerrigan, himself, moved to the WarPADD contract, arranged for Harold Valentin-Welch to remain on the CAD contract until January 28, 2015 under a no-cost contract extension, and arranged for Varney, Prager, and Krikorian to relocate to the WarPADD and Health and Human Services contracts. Respondents defend these actions on the basis that Leidos employees are laid off or retained in accordance with the specific tasks they perform rather than by seniority, but such a rationale fails to explain why CAD manager Stephanie Madden sought to have others assume Complainant's textile work in anticipation of the CAD contract ending or why she did not include Complainant's resume in a solicitation for subcontract work during his LWOP period along with the resumes of Varney, Valentin-Welch, Krikorian, and Kerrigan.

The argument that staffing decisions at Leidos were made by government customers who wanted Prager and Varney to shift onto the WarPADD contract is refuted by the lack of documentary evidence supporting this assertion and by the fact that Varney and Prager

ended up working on the Health and Human Services contract rather than the WarPADD contract. That Complainant's expedited layoff was due to Respondent Kerrigan's animus towards Complainant is likewise supported by Kerrigan's disingenuous explanation for failing to provide Complainant with a personal reference, to wit: he thought Complainant was seeking a Company reference rather than a personal one. The record makes clear that Complainant was seeking a personal reference from Kerrigan who was his supervisor of twenty-four years and that Kerrigan's failure to provide such a personal reference impeded Complainant's ability to obtain a new job.

Insofar as Complainant's application for SSDI benefits is concerned, I conclude that statements on his SSDI application about being incapable of working as of July 24, 2014 pertained to his inability to handle a full-time job, not the thirty hour-per-week schedule he was successfully performing at Leidos. Complainant was pressured by the Company's insurance carrier to apply for SSDI benefits and would not have done so in the absence of such pressure. Notwithstanding statements on the SSDI application pertaining to his inability to work, Complainant was capable of performing his drafting responsibilities at Leidos with the reasonable accommodation of a thirty hour-per-week schedule. Under such circumstances, I conclude that Complainant is not estopped from pursuing his disability discrimination claim based on his SSDI application. See Cleveland v. Policy Management System Co., 526 U.S. 795, 803 (1999) (ADA suit, premised on the need for an accommodation, may be reconciled with a SSDI claim that the plaintiff could not work without such accommodation); Russell v. Cooley Dickerson Hospital, Inc., 487 Mass. 443, 452 (2002) (receipt of benefits based on being totally disabled is not automatic bar to a claim of disability discrimination); Sullivan v. Middlesex Sheriff's Office, 34 MDLR 118

(2012) (where plaintiff accepted disability benefits because she was denied a reasonable accommodation, the acceptance of disability benefits is not a bar to a disability discrimination suit).

Based on the foregoing, I conclude that discriminatory animus was the primary motivating factor why Complainant, alone among the permanent members of the CAD team, was forced to leave the Company's employ in 2014 rather than remain until 2015. The record establishes that but for disability-based discrimination, Complainant's layoff would have been delayed until January 28, 2015 when fellow employee Harold Valentin-Welch was laid off.

Complainant argues that discriminatory animus also played a role in Complainant's failure to obtain another job at Leidos following his layoff, but, in this regard, there is insufficient evidence for concluding that vacant positions at Leidos could have been performed on a part-time basis without undue hardship. 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); 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) (reasonable accommodation does not extend to a fundamental redesign of job with shorter hours on an open-ended basis that effectively

reallocates 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).

The determination of whether adjustments to a job are reasonable, on the one hand, or an undue hardship, on the other, is an "intensely fact-based" question. Godfrey v. Globe Newspaper Co. Inc., 457 Mass. 113, 121 (2010) *citing* Cargill v. Harvard Univ., 60 Mass. App. 585, 587-588 (2004); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3rd 638, 650 (1st Cir. 2000) (denial of extended medical leave as an accommodation for breast cancer treatment depends on an individualized showing of undue hardship). See Lamb v Qualex, 33 F. App. 49, 57 (4th Cir 2002) (part-time employee is not a qualified individual with a disability if the ability to work full-time is essential to his job). Unlike the CAD position occupied by Complainant prior to August 2014, there is an insufficient factual record that the Company positions for which Complainant submitted applications in 2014 and beyond could have been performed on a part-time basis without causing undue hardship to the Company.

B. Retaliation

Retaliation is defined by Chapter 151B, sec. 4 (4) as punishing an individual's opposition to practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case by demonstrating that: (1) he/she engaged in a protected activity; (2) Respondent was aware that Complainant had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Applying the above framework to the factual record, it is noteworthy that Complainant, in mid-2011, requested that he be allowed to work on a part-time basis after his November 2010 knee surgery as a reasonable accommodation for a medical disability, and when this request was denied, Complainant filed an EEOC charge of discrimination against Leidos in late May/early June 2011 based on the Company's refusal. These matters constitute protected activity. See Wright v. Compusa, Inc., 352 F.3d 472 (1st Cir. 2003); Freadman v. Metropolitan, 484 F.3d 91 (1st Cir. 2007).

Following the protected activity, Complainant was subjected to adverse activity as discussed in part III A. *supra*. The sum total of this negative treatment constituted a three-plus year campaign against Complainant beginning in mid-2011. I conclude that

Complainant's mistreatment was in response to protected activity. It is apparent that the CAD managers viewed Complainant's request for reduced hours as unwarranted and unnecessary and believed that Complainant was relying on disability benefits to subsidize a part-time work schedule out of personal choice, not medical necessity. Such a perception is made explicit by Kevin Varney's sarcastic references to Complainant working part-time as a result of being "independently wealthy." The link between Complainant's protected activity and Respondents' adverse action is likewise established by Respondent Kerrigan's aggressive and harassing calls to Complainant, his hostility towards Complainant after he returned to work, his relentless efforts to increase Complainant's work hours without a demonstrated need, and the disingenuous explanation for failing to give Complainant a personal employment reference, to wit: he didn't understand that Complainant was asking for one. The fact that Kerrigan's own job evaluation in 2011 was lowered from a 4 ("exceeds") to a 3 ("meets") for mishandling Complainant's return to work lends additional support for the conclusion that Kerrigan's treatment of Complainant was related to protected activity.

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for its action supported by credible evidence. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). Respondents denied that there was any retaliatory animus in this matter, asserting that the completion of Complainant's task order under the CAD contract was the sole reason for his August 2014 layoff. This

assertion, supported by credible evidence, is sufficient to satisfy Respondents' burden at stage two.

Since the record contains a legitimate, non-retaliatory reason for the layoff, the burden shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason but a pretext for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001); Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655, 666 (2000). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondents are covering up a retaliatory rationale which is a motivating cause of the adverse employment action. Id.

I conclude that Complainant fulfills his stage three burden by proving that the motivating cause for his expedited layoff was protected activity in the form of seeking a modified work schedule as a reasonable accommodation for his disability, filing an EEOC complaint when his request for a reasonable accommodation was denied, and refusing to deviate from the modified work schedule despite pressure that he do so. See Wynn and Wynn, 431 Mass. at 666-667 (2000). To be sure, the termination of the CAD contract was ultimately responsible for his separation from the Company, but the fact that he was let go six months before the next team member lost his position is attributable to the Company's desire to rid itself of an employee perceived to stubbornly cling to truncated hours without medical cause. Thus, retaliatory animus was a "material and important ingredient" in Complainant's premature layoff prior to the rest of his team. Chief Justice of the Trial Court, 439 Mass. at 735 *quoting* Lipchitz v. Raytheon Co., 434 Mass. 493, 506 (2001).

C. Individual Liability

Both the Company and Respondent Kerrigan are liable for damages based on the above determinations. As Complainant's supervisor, Respondent Kerrigan initiated and/or made employment decisions adverse to Complainant's interests based on resentment over Complainant's need for an accommodation. Those actions include but are not limited to subjecting Complainant to unremitting pressure to return to work full-time, declining to extend or locate alternative employment for Complainant as he did for other members of the CAD team, limiting Complainant's merit raise in 2013 to a fraction of what Complainant and other team members were accustomed to receiving, and refusing to provide Complainant with a reference after twenty-four years of working on the same team. In short, Respondent Kerrigan acted in "deliberate disregard" of Complainant's right to be free from handicap discrimination and from retaliation. Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003). Accordingly, he is jointly and severally liable to Complainant for unlawful discrimination in violation of G.L. c. 151B sections 4(4A) and 4(5).

IV. Remedy

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).

Based on the findings of fact set forth in part II, *supra*, I conclude that Complainant is entitled to back pay damages for the period between August 8, 2014, when he was

prematurely laid off, and January 28, 2015, when the next CAD team member -- Harold Valentin-Welch -- was separated from employment. Valentin-Welch was originally scheduled to be separated on the same date as Complainant, but his separation date was extended under a no-cost contract extension. CAD managers justified delaying Valentin-Welch's separation on the basis that he was "tied" to the tasks he performed whereas in regard to Complainant, they looked for others to "pic [sic] up his textile work." Such a double standard is evidence of discriminatory and retaliatory animus and supports a back pay award consisting of lost wages for the specified period.

Complainant's back pay award shall be based on the weekly income he earned from Leidos at the time of his layoff and shall cover the period between August 8, 2014 and January 28, 2015. Any unemployment compensation received for this period may be deducted from the total amount owed. Long term disability payments shall not reduce the compensatory damages owed to Complainant unless the amount increased after his layoff.

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized 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 the distress 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 Complainant's 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.

Complainant testified that he suffered from the following symptoms of emotional distress as a result of his treatment by Leidos: depression, constant arguments with his wife, lack of physical intimacy, anger, despondency, staying at home and watching TV, altered sleep patterns (taking naps, staying up later at night, and sleeping later in the morning), isolation from friends, and being less outgoing. His wife testified that prior to his termination from Leidos in August 2014, Complainant was "happy go lucky," kind to her, and physically affectionate whereas after his termination, Complainant began to yell at her frequently, no longer expressed affection for her, became disinterested in physical intimacy, chose to spend time alone, and was no longer happy. According to Mrs. Halstead, their marriage went "down the hill" after he was laid off. However, there is also credible evidence in the record that the Halsteads attended marital counseling prior to Complainant's August 2012 termination – either in 2004 or in 2011 -- and that Mrs. Halstead was concerned about her husband's poor frustration tolerance, low energy level, and frequent naps in 2012 following his knee surgery.

Based on the foregoing, I conclude that some symptoms of emotional distress preceded Complainant's layoff and may have originated from sources other than his employment situation but that they were exacerbated by the disability discrimination and retaliation he experienced at the hands of Respondents. In consideration of all these factors, Complainant is entitled to $175,000 in emotional distress damages.

V. 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, Respondents are subject to the following orders:

(1) As injunctive relief, Respondents are directed to cease and desist from engaging in acts of disability discrimination and retaliation.

(2) Respondents, jointly and severally, are liable to pay Complainant compensatory damages consisting of a back pay award covering the period of August 8, 2014 to January 28, 2015 in the amount of the weekly income that Complainant earned from Leidos Inc. at the time of his layoff. The parties are ordered to work together to calculate the amount owed. Unemployment compensation received for this period may be deducted from the total amount. Long term disability payments shall not reduce the compensatory damage award unless such payments increased after Complainant's layoff. Added to the resulting amount shall be interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Respondents, jointly and severally, are liable to pay Complainant the sum of $175,000 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Respondent Leidos Inc. shall send all HR managers who are affiliated with the operations of the Army Natick Labs to an MCAD-sponsored training pertaining to disability discrimination and retaliation within ninety (90) days of this order and shall provide documentation of their attendance.

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 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 29th day of March, 2019.

Betty E. Waxman, Esq.,
Hearing Officer