COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PAUL PEREIRA,
Complainants

Docket No.15 BEM 01461

v.

JS INTERNATIONAL INC.
d/b/a JSI CABINETRY,
Respondent

Appearances: Robert Novack, Esq. for Complainant
Neal McNamara and Aaron Nadich, Esqs. For Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 3, 2015, Complainant filed a charge of handicap discrimination and retaliation against Respondent JS International Inc., d/b/a JSI Cabinetry. Complainant alleges that Respondent's refusal to allow him to remain employed after he retracted his purported resignation and sought intermittent FMLA was in violation of M.G.L. c. 151B, sections 4 (4) and (16).

A probable cause finding was issued and a public hearing was held on August 26 and 27, 2019. The following individuals testified at the hearing: Paul Pereira, Eileen Corvelo, Laslo Burian, and Jessica DiSpirito. The parties jointly offered exhibits 1 through 37. The exhibits were accepted into evidence with the exception of exhibits 20 and 27-30 which were rejected.

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 Paul Pereira is a resident of Fall River. In or around 2006, he began treatment for Hepatitis C. Transcript I at 33-34. Complainant testified that he experienced depression as a side effect of the treatment. Transcript 1 at 36.
2. Respondent JS International Inc. d/b/a JSI Cabinetry is an importer of kitchen cabinets. As of 2014, the company had between 80 to 100 employees. Transcript II at 47. It is owned by Jim Shen and his wife, Julia Shen. Laszlo Burian is the company's operations manager. Mr. Burian has the authority to hire and fire employees. Transcript I at 39; II at 47-48.
3. Complainant started working for Respondent in April of 2007. His first assignment was in the shipping department under the supervision of Deneen Chasse.
4. Complainant's first performance review was in July of 2007. It was signed by Mr. Burian. The review contained positive and negative comments and resulted in an increase in Complainant's hourly rate from $9.00 to $10.25. Joint Exhibit 4. Complainant's second performance review was in July 2008. It was again signed by Mr. Burian. The review contained positive and negative comments and resulted in an increase in Complainant's hourly rate from $10.25 to $11.00. Id. Complainant did not receive a performance review in 2009. Id. He testified that

the company imposed a pay freeze that year due to the recession. Transcript I at 51.

5. On November 5, 2009, Ms. Chasse gave Complainant a memorandum documenting an oral warning for excessive, unexcused absenteeism. Transcript I at 45; Joint Exhibit 5. The memorandum required that Complainant bring in a doctor's note for any future time out of work or else face a written warning followed by possible termination. Id. Complainant testified that after receiving this oral warning, he always brought in a doctor's note for absences. Complainant believed that he could continue to take sick time as long as he provided a doctor's note. Transcript I at 46. Complainant's understanding of the attendance policy was incorrect according to Respondent's Human Resource Manager Eileen Corvelo. Transcript II at 6.

6. In January of 2010, Complainant began another course of treatment for Hepatitis C, from January of 2010 to August of 2011. Joint Exhibit 3; Transcript I at 62-63, 103, 106. The treatment consisted of weekly Interferon injections. Complainant experienced the following effects of the treatment: chills, backaches, vomiting, diarrhea, and exacerbation of pre-existing depression. Transcript I at 64-66, 103. Respondent was informed about the potential impact of the treatment on Complainant's depression. Joint Exhibit 3.

7. Complainant's treatment for Hepatitis C required that he see a nurse weekly and a physician every three to four weeks. Transcript I at 103. In order to accommodate weekly medical appointments, Complainant was permitted to leave work two hours early on Fridays. Transcript I at 104. Complainant was initially

granted intermittent FMLA to accommodate medical appointments but switched to consecutive FMLA until medication stabilized Complainant's condition. Transcript I at 63-66. Complainant was out of work for almost three months. Transcript I at 107. He characterized the company as "very kind" during his course of treatment. Id.; Joint Exhibit 3 (5/8/12 letter).

8. Complainant testified credibly that he had numerous conversations with Mr. Burian about his depression. Transcript I at 68-70.
9. Complainant's performance review in November of 2010 was signed by Mr. Burian. It contains positive and negative comments and resulted in an increase in his hourly rate from $11 to $11.35. Joint Exhibit 4.
10. Complainant's performance review in September of 2011 was signed by Mr. Burian. It contains positive and negative comments and resulted in an increase in his hourly rate from $11.35 to $11.70. Joint Exhibit 4.
11. On October 23, 2011, Complainant received a written performance correction notice for "antagonistic behavior" consisting of bickering with a co-worker. Joint Exhibit 7.
12. In November of 2011, Complainant was transferred from the shipping department to the order entry department. Complainant initially reported to Lou Parisi in the order entry department, followed by Donna Graves and then Kim Neal. Transcript I at 53-54; II at 7. His order entry position involved inputting orders from customers into Respondent's system and responding to customer queries about their orders. Transcript II at 6-7.

13. On January 5, 2012, Complainant received a written warning for substandard work performance based on failing to enter orders in a timely fashion. Joint Exhibit 8.

14. In or around May of 2012, Complainant had a relapse of Hepatitis C for which he needed another course of treatment. Joint Exhibit 3 (5/8/12 letter). The course of treatment was expected to last six months. Joint Exhibit 3 (5/8/12 letter); Transcript I at 125. He submitted a second FMLA application on May 31, 2012 which was granted. Transcript I at 108. The leave allowed Complainant to arrive late and/or leave early for medical appointments. Transcript I at 57.

15. On June 8, 2012, Complainant submitted a medical note which asked that he be excused for being late for work on occasion due to side effects of his treatment for Hepatitis C. The note also asked permission for Complainant to leave work early on Thursdays for weekly medical appointments. Joint Exhibit 3 (6/8/12 letter). Respondent agreed to the requests. Transcript I at 108. Mr. Burian testified that Complainant's absences caused a "great strain" on the order entry department. Transcript II at 64.

16. Complainant's intermittent FMLA leave ended in early 2013. Transcript II at 8.

17. Complainant's next performance review was on May 15, 2013, signed by Kim Neal, his then-supervisor in the order entry department. Joint Exhibit 4. The evaluation contains positive and negative comments and resulted in an increase in his hourly rate from $11.70 to $12.40. Id.

18. In June of 2013, Complainant asked for and was given a loan of $400 from company co-owner Julie Shen. Joint Exhibit 14; Transcript I at 115.

Complainant received a second loan of $200 from Ms. Shen in September of 2013 and a third loan in the amount of $500 in January of 2014. Joint Exhibits 15 & 16. Complainant agreed to repay the loans through deductions from his paychecks. Id.

19. Respondent's employee handbook states that abuse of sick leave may result in disciplinary action up to and including termination and that the employer may deviate from progressive discipline where immediate discharge is merited. Joint Exhibit 1 at 6, 12, 25; Transcript I at 145-146. The handbook states that an employee who is absent or late for any reason should, if possible, personally notify his/her supervisor before the start of the workday or within a half-hour of the start of the workday and that failure to do so may result in discipline up to and including termination. Joint Exhibit 1.

20. Complainant testified that for some of his absences in 2014, he made up untrue reasons for being out of work when the real reason was depression. Transcript I at 72, 113. Complainant testified that his depression increased in 2014 after Kim Neal became his supervisor and Jessica DiSpirito became the order entry department's assistant supervisor. Complainant felt that he should have been promoted instead of Ms. Neal and Ms. DiSpirito. Transcript I at 71-72; II at 139-140.

21. Complainant testified that he answered the phone more than other people in the order entry department and that this activity caused him to enter fewer orders than his co-workers. Transcript I at 61. In order to test this rationale, Complainant's productivity was evaluated on a Saturday when there were no phone calls. Id.;

Transcript I at 128-129. According to Complainant, the evaluation indicated that answering the phones impaired his ability to enter orders, but according to Respondent, eliminating phone calls did not improve Complainant's productivity. Joint Exhibit 4; Transcript I at 62.

22. On April 10, 2014, Complainant received a "final written warning" for poor work performance related to removing customer orders from a folder and failing to respond in a timely manner to customer orders. Joint Exhibit 9; Transcript I at 60. Complainant signed his name under an acknowledgment stating that he understood that his job was "in jeopardy" and that he must make "substantial improvements in [his] performance in order to remain employed." Id.; Transcript I at 121.

23. On April 11, 2014, Complainant received two more performance correction notices[1]. Joint Exhibit 10. Both notices were verbal warnings. Id. Complainant received one notice for being rude to a customer and falsely denying that he had sent a defective communication to the customer. Id.; Transcript II at 100. The second notice was for insubordination. Id.; Transcript II at 101-102.

24. Complainant's next performance review was dated May 20, 2014 and was signed by Ms. Neal. Joint Exhibit 4. It contains positive and negative comments. Id. The negative comments describe Complainant's pace of work as unsatisfactory and state that the quantity of his work orders requires "huge improvement." Id.

[1] The notices were originally dated April 7, 2014 but corrected to April 11. 2014. Joint Exhibit 10.

Nonetheless, Complainant received a slight in increase in his hourly rate from $12.40 to $12.55. Id.; Transcript II at 65.

25. Operations Manager Burian described Complainant's performance at the time as "still satisfactory, but [with] some problems starting to happen with the quality and the quantity of the work." Transcript II at 66. He testified that an employee would not receive any raise if "completely unsatisfactory." Transcript II at 56. According to Mr. Burian, there were no notable issues with Complainant's attendance up through May 20, 2014 and as of that date, Complainant was normally on time, willing to perform necessary overtime, and improving in job and product knowledge. Transcript II at 66-67. Mr. Burian stated that Complainant's job was not in jeopardy as of May 20, 2014. Transcript II at 67.
26. On June 27, 2014 and on August 5, 2014, Complainant was loaned $1,500 and $2,200, respectively, by his employer. Joint Exhibits 17 & 18. Complainant agreed to repay a total of $3,700 in loans through deductions from future paychecks. Joint Exhibit 18.
27. Complainant submitted a doctor's note excusing him from work for three days on Friday, July 25, 2014 through Tuesday, July 29, 2014. Joint Exhibit 3.
28. On July 30, 2014, a meeting was held and employees were told not to eat at their desks. Transcript I at 169; II at 103.
29. Complainant submitted a doctor's note dated Tuesday, August 19, 2014 asking that he be allowed to have a snack and water at his desk as an accommodation in order to alleviate stomach upset. Joint Exhibit 3; Transcript I at 78-79, 144.

30. Complainant testified that on Wednesday, August 20, 2014, he was called into a conference room by Ms. Neal and, in the presence of Ms. DiSpirito, was handed two performance correction notices. Joint Exhibits 11 and 12; Transcript I at 74-75. The first correction notice was a written warning dated August 19, 2014 for eating at his desk on August 14 and 15, 2014 after being informed that such conduct was no longer allowed. Joint Exhibit 11. The second correction notice was for exceeding allowable sick time in 2014 following the completion of his second FMLA leave.[2] Transcript II at 10l; Joint Exhibit 12. According to Respondent, Complainant took 13 unscheduled days off in 2014, was late or left early on 14 other occasions, and missed 5 full days of work after his performance review on May 20, 2014. Joint Exhibit 23; Transcript II at 106-107, 132-133.

31. Ms. DiSpirito testified that others in the department continued to eat at their desks after the no-eating rule was announced, but only Complainant was disciplined. Id.; Transcript II at 148-149.

32. Ms. Corvelo testified that Complainant's employment status was not in jeopardy as of August 20, 2014 even though she described him as a "mediocre" employee who was argumentative with co-workers. Transcript II at 18, 35-36. Mr. Burian likewise testified that Complainant's job was not in jeopardy as of August 20, 2014. He described Complainant as a seven-year "valued" employee. Transcript II at 74, 77.

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[2] The notice for excessive absenteeism was originally deemed a "final" warning but was changed to a written warning because Complainant had not previously been written up for excessive absenteeism. Transcript I at 128; Joint Exhibit 12.

33. Complainant testified that he started crying during the conference on August 20, 2014 which led to Ms. Corvelo joining the meeting. Transcript I at 81. According to Complainant, he refused to sign the disciplinary notices, saying, "You're trying to make me quit. Is it going to make you happy if I give you my two weeks' notice because I'll give you my two weeks' notice." Transcript I at 82; 130-131. Complainant states that when Ms. Corvelo said "okay" he responded by saying, "Well, wait a minute, I'm not giving my two weeks' notice. I'm just saying that's what you guys are trying to get me to do." According to Complainant, Ms. Corvelo then said, "It's too late. You gave your two weeks' notice." Transcript I at 82-83; 131. Complainant asserts that he then asked to go on FMLA leave, but Ms. Corvelo said he couldn't because he had just given his two weeks' notice. Transcript I at 83. I credit Complainant's statements about the events of August 20, 2014.

34. According to Ms. Corvelo, when she entered the meeting, Complainant's face was red, he appeared to be "furious," he tossed the performance correction notices across the table at her, he refused to sign them, and he said that he brought in notes for his absences. Transcript I at 172-175; II at 16-17. Ms. Corvelo testified that she then saw that she had made an error in identifying one of the notices as a "final" written warning and that before the meeting occurred, the Company did not expect to let him "go." Transcript I at 175, 183; II at 14-15. Ms. Corvelo claims that despite telling Complainant that one of the performance correction notices was mislabeled as final, Complainant still said that he was giving his two weeks' notice which she accepted and that he did not attempt to retract his

resignation until the following Monday. Transcript I at 175-178; II at 17, 44. Ms. Corvelo also testified that she did not recall Complainant saying anything at the meeting about FMLA. Transcript II at 18. I do not credit Ms. Corvelo's recollection of the events of August 20, 2014 because her testimony is contradicted by Complainant's credible assertion that he immediately retracted his resignation and by Jessica DiSpirito who testified that his words about quitting were an emotional response, that he retracted them, and that he sought to invoke FMLA. Transcript I at 176; II at 149-153. I credit Ms. Dispirito's testimony about what transpired because she provided convincing, disinterested testimony as a former employee who voluntarily left the company on friendly terms in order to find a better position.[3] Transcript II at 139.

35. Complainant testified that he spoke to Mr. Burian later the same day and told Mr. Burian that he didn't quit and that he wanted to go on FMLA leave due to depression. Transcript I at 85-86. Mr. Burian acknowledged that Complainant may have denied quitting, that he may have mentioned depression, and that he invoked FMLA, although Mr. Burian also testified in a contradictory fashion that he was "not aware" of Complainant seeking to retract his resignation and wanting FMLA because Complainant was speaking in a "borderline incoherent" fashion.

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[3]Ms. Corvelo asked Kim Neal and Jessica DiSpirito to write up their versions of what happened at the August 20, 2014 meeting. Transcript II at 25. Ms. Neal's statement was not accepted into evidence because she refused to honor duly-noticed subpoenas to attend a deposition and the public hearing. Transcript II at 26. Ms. DiSpirito's contemporaneous statement was accepted into evidence as Joint Exhibit 21. To the extent it contradicts her public hearing testimony, I do not credit her typed statement. It was drafted while Ms. DiSpirito was still employed by Respondent and appears to leave out information because its inclusion would undermine the company's position.

Transcript II at 78, 80, 110, 121-123. I do not find Mr. Burian credible in regard to being unaware that Complainant retracted his resignation and sought FMLA.

36. In order to calm Complainant down on Wednesday, August 20th, Mr. Burian told him that they would "work everything out." Transcript II at 81, 112. Complainant thereafter calmed down and returned to work for the rest of the day. Transcript I at 85-86; II at 81-82.

37. Ms. Corvelo was present when Complainant spoke to Mr. Burian on Wednesday, August 20, 2014. She testified that Complainant began to cry and speak in an incoherent manner until Mr. Burian calmed him down. Transcript II at 18-19. She doesn't recall Complainant mentioning FMLA at the meeting with Mr. Burian. Transcript II at 20, 35. Ms. Corvelo denies that Complainant asked her for FMLA paperwork on that day or the next (Thursday, August 21st). Transcript II at 20. I do not credit this testimony.

38. Complainant had a pre-arranged vacation day on Friday, August 22, 2014. Transcript II at 27. On that date, there was a Company meeting during which Complainant's status was discussed and a decision was made to accept his resignation. Transcript I at 185; II at 86. According to Ms. Corvelo and Mr. Burian, they decided to "stand behind" the decision made two days earlier to accept Complainant's resignation. Transcript II at 28; 86. Mr. Burian testified that after reviewing the situation and conferring with a personnel agency that worked with Respondent on a consulting basis, he was "fine" accepting Complainant's resignation. Transcript II at 116.

39. On Monday, August 25, 2014, Complainant arrived at work and was taken to Mr. Burian's office where Mr. Burian said that the Company was going to accept his resignation. Transcript I at 90; 132; II at 28. Complainant protested that he wasn't quitting, but Mr. Burian said that the decision was final and that "we're standing by it." I at 91; II at 89-91. Ms. Corvelo and Mr. Burian acknowledged that Complainant said he "didn't mean it" and "didn't want to quit." Transcript II at 28, 122. Nonetheless, Mr. Burian continued to say that he was accepting Complainant's resignation. Complainant was given a letter dated Friday, August 22, 2014 which accepted the resignation purportedly given on Wednesday, August 20, 2014. Joint Exhibit 2.

40. Complainant testified that he told Mr. Burian that he did not wish to quit but that Mr. Burian responded that his two weeks' notice had been accepted. Transcript I at 93. Mr. Burian arranged for Complainant to pack up his personal items and escorted Complainant out of the building. Transcript I at 94. As he left, Complainant told Mr. Burian to "suck dick" and uttered some expletives at Ms. DiSpirito. Transcript I at 132-133; II at 118. Complainant described the experience as being treated "like a leper." Transcript I at 94. Ms. DiSpirito testified that as he was packing his belongings at work, he said to her, "Fuck you. Go to hell." Transcript II at 157.

41. Complainant was paid through Wednesday, September 3, 2014. Id. In lieu of continuing to work, Complainant was given two checks: 1) a check for $263.83 to cover the period from of Monday, August 25 through Friday, August 29, 2014

and 2) a check for $119.48 to cover the period from Monday, September 1 through Wednesday, September 3, 2014. Joint Exhibit 26.

42. According to Complainant, he was devastated and depressed at being let go. He states that his emotional state caused him to throw his sobriety "down the drain." Transcript I at 95. Complainant testified that the company "threw [him] out" after seven years and that they "didn't do right" to him which made him really depressed. Transcript I at 99. He said that he had a hard time getting up in the morning and that he would lay in bed and say to himself, "What am I going to do?" Transcript I at 100.

43. After a few weeks of getting high on drugs, Complainant returned to a Suboxone program. Transcript I at 96. Complainant told Dr. Cilley on September 17, 2014 that he had engaged in IV opiate usage and that he had lost his job due to drugs. Joint Exhibit 37; Transcript I at 135. At the public hearing, Complainant maintained that he gave false information to Dr. Cilley in order to get into a Suboxone program and that he didn't actually use IV drugs after losing his job although he did snort bags of opiates. Transcript I at 136-130. I credit this testimony.

44. Following the end of his employment with Respondent in September of 2014, Complainant received unemployment compensation. Transcript I at 96. He did not look for work until the following year (2015) after he "stabilized" on Suboxone. Transcript I at 96. Complainant did not obtain a new job until March of 2017. Transcript I at 97. Prior to March of 2017, Complainant took vocational courses, joined Linkedin and other websites, submitted resumes, and had gastric

bypass surgery which caused him to be away from a job search for three months. Transcript I at 98-99. On March 17, 2017, he commenced employment as a driving instructor with A&M Driving School which he now owns. Transcript I at 99.

45. Mr. Burian acknowledged at the public hearing that the Company had previously allowed some people to resign and thereafter return to work. Transcript II at 90.

III CONCLUSIONS OF LAW

Disability Discrimination/Failure to Accommodate

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 a claim of handicap discrimination, a complainant must show that: 1) she/he is a member of a protected class; 2) she/he performed work at an acceptable level; 3) she/he suffered

adverse employment action(s); and 4) the adverse employment action occurred in circumstances that give rise to an inference of handicap discrimination. See Gannon v. City of Boston, 476 Mass. 786, 793 (2017) (where parties dispute reason for adverse employment action, case is analyzed in accordance with McDonnell Douglas framework); 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).

Complainant is a member of a protected class by virtue of a longstanding diagnosis of depression.[4] Complainant's depression was exacerbated by multiple courses of treatment for Hepatitis C. Respondent was aware of this disability by virtue of numerous conversations which Complainant credibly maintained that he had with Mr. Burian about his condition. There is a medical form in Complainant's employee file entitled "Hepatitis C Education" which states that depression can get worse during treatment for Hepatitis C. On his final day of work, August 22, 2014, Complainant told Ms. Corvelo and Mr. Burian that he wanted to go on FMLA leave due to depression. These factors establish that Complainant was experiencing debilitating symptoms of depression when Respondent terminated him on the morning of August 25, 2014 and that Mr. Burian was aware of this circumstance.

Despite being disabled by depression, Complainant was deemed to be a satisfactory employee in good standing as of mid-August, 2014 when events occurred

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[4] Apart from Complainant's depression, he is arguably a handicapped person by virtue of having Hepatitis C. However, there is no evidence that Complainant's condition required treatment in 2014, that his health continued to be impaired as a result of having had Hepatitis C, or that he was regarded as impaired. Accordingly, I will focus on Complainant's depression as the basis for his claim of handicap status.

that led to a discontinuation of his employment. Up to that point, Complainant had been evaluated as an acceptable employee in all of his prior performance reviews. He received yearly raises prior to his departure. Respondent lent Complainant a total of $3,700 in the final months of his employment to be paid out of future paychecks. It is reasonable to infer that such loans would not have been made unless Respondent was minimally satisfied with Complainant's work and expected his employment to continue. Mr. Burian acknowledged in his testimony that Complainant was a "valued" employee at the time his employment ended. Thus, the evidence establishes that when Complainant was escorted off Respondent's premises on Monday, August 25, 2014, he was performing his work at an acceptable level.

Turning to whether Complainant suffered an adverse employment action, the evidence establishes that Complainant was involuntarily separated from the company. Respondent denies that the circumstances constituted such a separation, but the facts support Complainant's assertion that he was fired. To be sure, Complainant precipitated his departure by uttering the following words, "Is it going to make you happy if I give you my two weeks' notice because I'll give you my two weeks' notice." Nonetheless, these words were uttered in the heat of the moment and did not convey an actual intent to resign.

Complainant's ill-chosen words may have prompted the events at issue but they were an excuse, not a good faith reason, for his termination. Immediately after blurting out the offer to resign, Complainant retracted it by stating, "Well, wait a minute, I'm not giving my two weeks' notice." Witness Jessica DiSpirito, who was present during the incident, accurately interpreted Complainant's words as an emotional, not literal,

response to being reprimanded at work. In the absence of convincing evidence that Complainant intended to voluntarily leave the company, Complainant's separation was a discharge disguised as a resignation.

The aforementioned circumstances are sufficient to satisfy a prima facie case of handicap discrimination. They likewise satisfy a prima facie case of failure to accommodate a disability based on: a) Mr. Burian's characterization of Complainant as a "valued" employee as of August 20, 2014; b) Complainant's request for FMLA leave on that date; and c) Complainant's involuntary separation from the company within days of his request. This evidence is sufficient to establish that Complainant was a qualified handicapped person capable of performing the essential functions of his job who unsuccessfully sought an accommodation in the form of a medical leave that would permit him to address his depression while remaining employed. See Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443 (2002); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000). The Supreme Court characterizes the burden of establishing a prima facie case of discriminatory treatment as "not onerous." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky, 419 Mass. 437 (1995).

Once a prima facie case of handicap discrimination/failure to accommodate is established, 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 Gannon v. City of Boston, 476 Mass. 786, 794 (2017) (once a prima facie case is established, employer bears burden of showing with credible evidence

that real reason for adverse action is not employee's handicap); 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).

Respondent attempts to satisfy the stage two requirement by relying on Complainant's so-called "voluntary" tender of his resignation as a defense. However, no one could reasonably interpret the words that Complainant uttered in a fit of pique as a thoughtful, intentional resignation. Ms. Corvelo and Mr. Burian both acknowledged that Complainant said he "didn't mean it" and "didn't want to quit."

It is noteworthy that a seven-day retraction period attaches by law to severance agreements negotiated with employees over age forty. See Older Workers Benefit Protection Act, 29 CFR 1625.22(f) (vii). Surely, Complainant, who was battling depression, deserved no less consideration after blurting out words he immediately retracted. The evidence at stage two thus falls short of presenting a legitimate, non-discriminatory for Respondent's action.

Moreover, even if Respondent satisfied the stage two burden, Complainant nonetheless succeeds in proving at stage three that the real reason for his termination was Respondent's wish to avoid granting Complainant another FMLA leave. See Gannon, 476 Mass. at 794; Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass. 437, 444-446 (1995) (once stage two requirement is satisfied, burden of persuasion shifts back to Complainant at stage three to demonstrate by a preponderance of evidence that Respondent's reasons are pretextual). The significant words uttered on August 20, 2014 do not pertain to Complainant giving two weeks' notice but rather, his request for FMLA

leave. It was the latter words with their concomitant financial and personnel consequences which drove Respondent to falsely characterize Complainant's words as a resignation. Respondent places great emphasis on the fact that Ms. Corvelo said "okay" immediately after Complainant impulsively offered his notice but her response has little weight in light of Mr. Burian's authority to reverse any action she took.

Of greater significance than Ms. Corvelo's words is the fact that Mr. Burian stood by Ms. Corvelo's acceptance of Complainant's two week notice even after Complainant pleaded that he did not intend to quit and sought FMLA in lieu of resigning. Rather than entertain a FMLA request that was real, Mr. Burian adhered to a resignation that was fictional. In its post-hearing brief, Respondent asserts that Complainant was using illicit drugs during his final year of employment. Even assuming arguendo that the use of drugs was a factor undermining Complainant's performance in 2014, Respondent took no affirmative steps to separate Complainant from the company until he requested FMLA for depression. Such an action leads to the reasonable inference that but for Complainant's request for an accommodation to treat his depression, Respondent would not have pushed Complainant out the door.

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, Complainant must establish a prima facie case of retaliation by demonstrating that: (1) he/she engaged in a protected activity; (2) Respondent was aware of the 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).

On August 20, 2014, Complainant engaged in protected activity by requesting the accommodation of FMLA leave. Such a request constitutes protected activity. See Wright v. Compusa, Inc., 352 F.3d 472 (1st Cir. 2003); Gauther v. Sunhealth Specialty Services, 555 F. Supp. 2d 227, 243 (D. Mass. 2008). Less than a week later, Complainant was separated from the company against his will. These facts establish a prima facie case of retaliation.

Respondent attempts to rebut the prima facie case by attributing Complainant's separation from the company to his voluntary resignation but for reasons set forth, supra, such an argument is unpersuasive. Accordingly, Complainant presents a convincing case of retaliation based on handicap.

Compensatory Damages

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

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

Complainant testified that he was without employment from September 3, 2014 through March 17, 2017. According to Complainant, he did not look for work until 2015 because he was in the process of "stabilizing" on Suboxone. Since Complainant does not seek compensation for his relapse into and treatment for drug usage, back pay is not awarded for the seventeen-week period from September 3, 2014 to January 1, 2015.[5] Thereafter, Complainant elected to have gastric bypass surgery for reasons unrelated to the events at issue. The procedure and recovery comprised a three-month period during which Complainant did not look for employment. Following his recuperation from surgery, Complainant allegedly took vocational courses, joined Linkedin and other websites, and submitted resumes. These efforts were not described with specificity and are insufficient to establish that comparable positions were impossible to secure. [6] Accordingly, I decline to award compensatory damages.

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[5] Based on the collateral source rule, I decline to deduct unemployment benefits from lost wages based on the collateral source rule. This rule is grounded in the theory that the party who caused the injury is responsible for the damages and any resulting windfall arising from the receipt of certain benefits should inure to the benefit of the injured party rather than the wrongdoer. See Jones v. Wayland, 374 Mass. 249, 262 (1978); School Committee of Norton v. Massachusetts Comm'n Against Discrimination, 63 Mass. App. Ct. 839, 849 (2005) (it is within the discretion of the hearing officer to decline to offset any unemployment benefits received by the complainant).

[6] Some cases place upon the employer the burden of proving mitigation of damages. See Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172 (1985) *quoting* Black v. School Comm. of Malden, 369 Mass. 657, 661-662 (1976) (employer has burden of showing existence of comparable employment opportunities that, if pursued, might reasonably have resulted in the employee obtaining a comparable job); Ryan v Superintendent of Schools of Quincy, 374 Mass. 670, 673 (1978). Such a burden does not apply here, however, where the type of position at issue is a non-supervisory job at a minimum wage, requiring no particular skills or qualifications. It defies credulity that such a position could not have been obtained during a two-year period.

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 is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College, 441 Mass. at 576. Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's 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.

According to Complainant, he was devastated and depressed at being let go from JSI Cabinetry. He states that his emotional state caused him to throw his sobriety "down the drain." Complainant felt that the company "didn't do right" to him by throwing him out after seven years. He said that he had a hard time getting up in the morning and that he would lay in bed and say to himself, "What am I going to do?"

There were, to be sure, other stressors in Complainant's life unrelated to being fired. Complainant acknowledged that he fought substance abuse. His medical records also indicate that multiple treatments for Hepatitis C exacerbated Complainant's depression. Given the existence of these factors, it would be inequitable to lay the full

responsibility for Complainant's post-termination emotional distress at Respondent's doorstep. Nonetheless, stressors which pre-date Complainant's discharge do not absolve Respondent from liability for emotional distress attributable to its actions. See Franklin Publishing Co., Inc. v MCAD, 25 Mass. App. Ct. 974, 975 (1988); Raffurty v. Keyland Corp., 22 MDLR 125, 128 (2000) (recognizing that employees often experience emotional distress from more than one source and are still entitled to damages resulting from the distress attributable to unlawful discrimination at work). Weighing the emotional distress attributable to pre-existing conditions and the emotional distress caused by termination, I conclude that Complainant is entitled to $ 35,000.00 in emotional distress damages.

IV. ORDER

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

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

(2) Respondent shall pay Complainant the sum of $ 35,000.00 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.

(3) Respondent shall send its managerial staff to a 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 of 5th day of February, 2020.

Betty E. Waxman, Esq.,
Hearing Officer