COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
MAUREEN REED,

Complainants

v.

DOCKET NOS. 13-BEM-03479
14-BEM-01975

PIPEFITTERS ASSOCIATION
OF BOSTON, LOCAL 537 and
LEO FAHEY,

Respondents

Appearances: Dan V. Bair II, Esq. for Complainant
Kevin C. Merritt, Esq. and Paul F. Kelly, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 24, 2013, Complainant, Maureen Reed filed a charge of discrimination with this Commission against Respondents, Pipefitters Association of Boston, Local 537 ('Local 537 or "Union") and Leo Fahey ("Fahey") alleging that the Union had discriminated against her on the basis of her disability, by denying her a reasonable accommodation and that Fahey, the Union's Business Manager, had aided and abetted that discrimination. On July 14, 2014, Complainant filed a second charge alleging that Respondents retaliated against her for her having filed the initial charge of discrimination. Probable Cause was found on both charges and efforts at conciliation were unsuccessful. At the pre-hearing conference on December 11, 2017, Respondents sought dismissal of the discrimination charge, as a matter of law, but a decision on

the matter was deferred until after a hearing of the facts. Thereafter, the parties were directed to brief the legal issues in post-hearing submissions. A public hearing was held before the undersigned Hearing Officer on June 14, and October 24, 2018. Complainant testified on the first day of hearing and Respondent, Fahey testified on the second day. The parties submitted Stipulations of Fact and six joint exhibits at the hearing and filed post-hearing briefs on January 25, 2019. Having reviewed the record of the proceedings and the post-hearing submissions, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Complainant, Maureen Reed is a 52 year old female who suffers from a medical condition known as Tinnitus, which substantially impairs her hearing. Tinnitus is a genetic condition that progresses over time. The impairment causes a ringing in the ears which makes it extremely difficult to hear other sounds. (Tr. Vol. I, 24-26)[1] Complainant was diagnosed with the condition at age 18 and had a 40% hearing loss at the time. She currently has an 85% hearing loss. (Tr. Vol. I, 26-27) She experiences difficulty communicating and relies on lip reading and closed caption devices on her telephone and television. (Tr. Vol, I, 26) Complainant testified that she has tried many types of hearing aids but that none have alleviated the effects of her Tinnitus. (Tr. Vol, I, 74-75) She has never learned sign language. (Tr. Vol. I, 27-28)

2. Complainant has worked as a pipefitter for some 20 years. The job duties of a pipefitter involve welding, laying down and brazing of pipes involved in heating and air conditioning, medical gas and steam lines. (Tr. Vol. I, 28-29) Complainant has been a member

[1] Cites to Tr. Vol. I reference Complainant's testimony. Cites to Tr. Vol. II reference Respondent Fahey's testimony.

of the union, Pipefitters Association of Boston, Local 537 (the "Union") for twenty years. (Tr. Vol. I, 30)

3. Respondent, Pipefitters Association of Boston, Local 537, is a labor organization within the meaning of G.L. c. 151B s. 1(3). At all relevant times, the Union had approximately 2800 members. Complainant estimated that the Union has approximately 50 women members. The Union's relationship with its members is governed by a constitution and by-laws. (Tr. Vol. I, 30; Tr. Vol. II, 42-43; Ex. 5) The Union is a member of and chartered by, its parent organization, the United Association. ("UA") The Union submits proposed changes to its by-laws to the UA for its recommendation. (Tr. Vol. II, 19-20) At all times relevant to this matter, the Union had significant resources of several million dollars in its general fund. (Tr. Vol. II, 29)

4. At all relevant times, Respondent Leo Fahey was the Union's Business Manager. In that role, he had responsibility for day-to-day management of the Union's operations, business dealings and negotiations with contractors over the employment of Union members. (Tr. Vol. II, 5-6; Ex. 5, Art. III, ss. 6A, 6B 1 &2, 6C 1) Fahey testified that his role at Union meetings was limited to giving the Business Manager's report. (Tr. Vol. II, 6)

5. The Union holds regular monthly meetings open to members in good standing and occasional "Special Notified Meetings" called for specific purposes. (Stip. Fact 3; Tr. Vol.I, 31; Ex. 5, Art. I, ss. 1, 3A, 3B, 4) Monthly meetings are held on the first Thursday of each month in the evening and at all times relevant to this matter were held in the Union hall facility on Enterprise Street in Dorchester MA. (Tr. Vol. I 34-35; Tr. Vol. II, 8-9) The room had a stage with tables and chairs for the Business Manager, Recording Secretary and Union President. At the front of the stage was a podium with a microphone where members could speak and there was a microphone on the stage for Union management to use. There were a few hundred chairs

set up in the room for the approximately 100-125 members who attend Union meetings. (Tr. Vol. I, 32-35; Tr. Vol. II, 6-7)

6. The meetings follow a standard format and are subject to the rules of order spelled out in the Union's constitution and by-laws. (See Ex. 5 Art. II) The Union President at the time, Donald McKee presided over the Union meetings and enforced the rules of order. (Tr. Vol. I, 80, Vol. II, 7, 9-10) The meeting format includes a call to order, an opening prayer, a reading of the minutes of the previous meeting, reports by Union officers and committees, and the discussion and debate about many important topics including vital information about what jobs were winding down, current Union jobs, upcoming Union jobs, the numbers of workers needed on jobs, who the stewards were, political news, new business, and contract negotiation updates. After the reports are made, members have the opportunity to ask questions and speak on issues by coming to the microphone at the front of the stage. There is often heated discussion or debate. (Tr. Vol. II, 7-8, 27-28; Vol. I, 31-33, 36-37) A Recording Secretary prepares a summary of the minutes of the Union meeting. (Vol. II, 44-45; Ex. 5, Art.33-35)

7. Complainant testified that it is important to attend monthly union meetings in order to remain active in the Union, and to keep abreast of the changing job environment. (Tr. Vol. I, 31-32) Fahey concurred that attending meetings is a vital part of Union membership because members receive important information at the meetings. (Tr. Vol. II, 25-26) The Union considers attendance and the right to engage in free and fair discussions at the meetings a benefit of Union membership which provides individual members the opportunity to influence Union decision-making. Fahey agreed that it is important for members to understand what's being discussed at the meetings. (Tr. Vol. II, 40-41, 25).

8. Prior to June 2014, Complainant attended approximately 9 out of 12 scheduled monthly union meetings annually. (Tr. Vol. I, 41, 57-58. Because of her hearing impairment, she typically sat in the front row and often relied on a fellow union member to tell her what was said if she did not hear or could not understand something. (Tr. Vol. I, 35, 38) Complainant testified that over time this situation became unworkable because her hearing impairment worsened and her constant requests to have information relayed to her began to annoy other members. (Tr. Vol. I, 38)

9. In November of 2012, Complainant decided to request an accommodation from the Union that would allow her to hear what was being said at Union meetings. She spoke with the Vice President of the Union at the time, Robert McKay regarding how to go about making a proposal for closed caption capability at union meetings. (Tr. Vol. I, 39) McKay advised Complainant that she should write a proposal for an accommodation to submit to the Union Bylaw Committee, which could consider and vote on a proposed amendment at a special notified meeting of the Union. (Tr. Vol. I, 39; Vol. II, 10-11) Complainant wrote and submitted a proposal to the Bylaw Committee in November 2012. The request asked the Union to consider providing closed caption programming[2] to better enable hearing impaired members to fully understand the information presented at union meetings and as a reasonable accommodation to her hearing impairment. (Jt. Ex. 3; Tr. Vol. I, 40) The Bylaw Committee informed Complainant that the form of her request was improper and advised her to submit a new proposal. (Tr. I, 40-41,77)

10. In January of 2013, Complainant re-wrote her proposal and submitted it to the Bylaw Committee. The re-written proposal read as follows:

[2] Complainant understood closed captioning capability would require the presence of a stenographer who would type the words spoken which would then appear, in real time, on a screen for her or others to read. (Tr. Vol. I, 40; 80-81)

> Before any Union business can be conducted all meetings shall require a stenographer be present in order to provide a same time written word-by-word transcript of the dialogue of all speakers for those members who are hard of hearing. The Union will provide the technology necessary for visualization of the same time transcript during the meeting. (Jt. Ex. 2)

Complainant testified that by this proposal she was not seeking to have the union meetings recorded or to have a permanent written transcript of the meeting produced.[3] (Tr. Vol. I, 42-43) Complainant's proposal was presented to the membership at a special notified meeting on January 17, 2013. The Bylaw Committee recommended that the membership reject her request because the proposal would require a stenographer –presumptively a non-union member—to be present during union meetings, and that creating a verbatim transcript of the proceedings would discourage frank discussion among the members. (Tr. Vol. I, 43-45, 82; Tr. Vol. II 38-40) Fahey testified that after some discussion it appeared Complainant's request would be voted down so he recommended that the proposal be tabled so the Union could investigate possible accommodations and Complainant agreed. (Tr. Vol. I, 44-45; Tr. Vol. II, 13-14) Sometime in January or February of 2013, Fahey directed the Finance Committee to research Complainant's request since it had the authority to approve a potentially expensive measure. He spoke to Kevin Mulligan, the longest sitting member of that Committee who was researching similar issues for a family member who was hard of hearing. (Tr. Vol. II, 14-16)

11. At the next union meeting in February 2013, Complainant raised her hand to speak and asked if the Union had any suggestions regarding her request for stenographic captioning. Complainant stated that Fahey told her at that meeting that Mulligan would be researching the issue. (Tr. Vol. II, 45-46) Complainant was never asked to meet with McKee or Fahey or any other officer of the Union to discuss her request for accommodation and she

[3] The fact that Complainant did not require an actual transcript does not appear to have been considered by the Finance Committee or the Union. The issue of whether a transcription system would be an effective accommodation in the context of the Union meeting also appears not to have been explored by the parties.

testified that she raised the issue publically at Union meetings because that was how she understood members were instructed to raise issues. (Tr. Vol. I, 46)

12. From February until June of 2013, Complainant stood up at Union meetings to inquire about the status of her request for an accommodation. She testified that Mulligan would be called on to give her an update but he often spoke from the far corner of the Union hall. Frequently she could not understand what he was saying, but Fahey repeatedly reassured her that the Union was looking in to the matter. (Tr. Vol. I, 46-47) While Complainant offered to provide the Union with copies of her medical records concerning her impairment, at no point during this time period did the Union seek documentation, ask to meet with her, or inquire about her hearing limitations or restrictions. (Tr. Vol. I, 52-53)

13. Fahey testified that after the January 2013 meeting, the Finance Committee researched solutions for transcribing the discussion at meetings that would not involve a live, non-member, stenographer. According to Fahey, they also investigated both hardware solutions, such as "assistive listening" sound-systems, and software solutions such as computer programs, and smartphone "apps" intended for the hearing impaired. The Committee also consulted the Boston School for the Deaf for advice. Fahey admitted that investigating options took some six to seven months and proceeded at a snail's pace, leaving Complainant very frustrated. (Tr. II, 17, 22) After months of searching for viable options, the Finance Committee informed him they could not find a workable solution that would not require a live stenographer. (Tr. Vol. II, 16-17, 22, 29-31)

14. At the June 2013 Union meeting, Fahey proposed upgrading the union hall's speaker system and providing a sound-proof booth with special headphones in which Complainant could sit at the front of the room. (Tr. Vol. I, 47-48; Vol. II, 17-18) Complainant

rejected that offer because a sound- proof booth would not have effectively accommodated her impairment which is not related to external noise. Being isolated in the booth would also not assist her because she depends on reading lips and seeing the words written. She noted this option would also have prevented her from participating in the meeting. Complainant testified further that sitting alone in front of several hundred members who were mostly male, would focus attention on her and her disability causing her great embarrassment. (Tr. 48, 52) At the June 2013 meeting, the Union also offered to provide a sign language interpreter at Union meetings and sign language training for Complainant. Complainant rejected that offer because she had never learned to sign, was not fluent in sign language, did not have the time to learn a new language, and did not have anyone with whom to practice signing. (Tr. Vol. I, 48-50) Fahey was not aware of any Union member who was trained as a sign language interpreter. (Tr. Vol. II, 36-37) Although Fahey offered to have meetings recorded for Complainant to listen to later, this option would not have given her the opportunity to ask questions and participate in meeting discussions. (Tr. Vol. II, 20) Fahey also testified that he contacted the United Association, the Union's parent organization which strongly recommended against having a recording at Union meetings and against the presence of stenographer at the meetings. (Tr. Vol. II, 20) Fahey testified the reason for the UA's position is Union members' legal rights to free and frank speech, and its view that the presence of a recording device might chill that speech. (Tr. II, 20-21) Fahey also stressed that any stenographer would have to be a Union member because only members are allowed to attend meetings. (Tr. Vol. II, 21)

15. Complainant suggested the Union explore the use of Dragon Software, a computer dictation system. Complainant had not used this system but understood the program enabled users to speak into a headset and the words would be transcribed onto a computer

screen. According to Fahey, the Finance Committee researched Dragon but determined that it would not be effective in the context of a large meeting with many different speakers because it was designed for use by a single user and would be unable to pick up or distinguish different voices. (Tr. Vol. II, 17; Tr. Vol. I, 49-50, 95-97)

16. At the August 2013 meeting, some seven months after her initial request, Complainant again asked about the status of her accommodation request for stenographic captioning. (Tr. Vol. I, 53-54) Fahey told Complainant the Finance Committee had found no effective closed captioning solutions and reiterated the offer of a sign language interpreter. According to Complainant, Fahey told her that it was either sign language, or nothing, for an accommodation. (Tr. Vol. I, 54) Complainant also testified that Fahey advised her that he had been advised by the Union lawyer that the Union was not obligated to accommodate Complainant. (Id.) I credit Complainant's testimony that Fahey said this to her, regardless of whether it was true.

17. The two reasons stenographic captioning of the discussions at Union meetings was rejected as an accommodation for Complainant were (1) the need for a live stenographer at Union meetings; and (2) any device the stenographer used would be a recording device. (Tr. Vol., II, 30-32) Fahey testified that he simply tasked the Finance Committee to look into researching accommodation options and he did not know what research the Finance Committee did or what options they looked into. (Tr. Vol. II, 40) There is no evidence to suggest that the Union explored the possibilities of any transcript and /or recording made by a stenographer being erased or destroyed at the end of the Union meeting. (Tr. Vol. II, 37-38) There is also no evidence to suggest that the Union explored whether or not a stenographer could sign a confidentiality agreement with respect to what occurred at Union meetings. (Tr. Vol. II, 40)

Moreover, Fahey agreed that the Union's By-Laws could be changed to allow a stenographer to be present at the Union meetings. (Tr. Vol. I, 54) Union members do not take an oath of confidentiality, there is no routine mechanism utilized to strictly monitor or enforce attendance by members only, and cell phones are not barred from Union meetings. (Tr. Vol. II, 46-47) Hence, there is no mechanism for preventing Union members from recording what is said at meetings.

18. Complainant continued to attend Union meetings after August 2013, despite the lack of accommodation to her hearing impairment. On December 24, 2013, Complainant filed her first complaint of discrimination against the Union with the MCAD. (Complaint; Tr. Vol. I, 54-55) According to Complainant, on two occasions after she filed her discrimination complaint, Fahey announced at a union meeting that Complainant had hired an attorney and was suing the Union. (Tr. Vol. I, 55) Complainant testified that this information angered and annoyed some union members and when she rose to inquire about her accommodation request some members yelled and waved their hands at her to sit down. I credit her testimony that their actions made her feel upset and embarrassed. (Tr. Vol. I, 55) Complainant also suspected that a fellow Union member who frequently sat with her at meetings and assisted her when she could not hear stopped sitting with her at some point. Based on a conversation with this member, she had the impression this was because after she filed her complaint, Fahey made him feel uncomfortable about sitting with her. (Tr. Vol. I, 105-107)

19. At the June 5, 2014 union meeting, Complainant again stood up and asked Fahey about the status of her accommodation request. As a heated argument ensued between her and Fahey, she was booed and heckled by some union members and McKee slammed the gavel and ordered her to sit down. (Tr. Vol. I, 56) Complainant's brother told her that one of the members

shouted out "Go home, deaf girl." (Tr. Vol. I, 56-57) Complainant was not actually able to hear what the hecklers were saying, but she was aware that she was being yelled at by members whose reaction was negative. (Tr. Vol. I, 56) Complainant testified that the union officers in charge did not intervene to stop the heckling[4] and she left the union meeting upset, humiliated and in tears. (Tr. Vol. I, 57, 113) She has not returned to a union meeting except for when her brother was sworn in as a member of the executive board because of the embarrassment she suffered and because she cannot hear and can't participate in the meetings. She also stopped participating in union fundraisers, political activities and other events because of how she was treated and is even embarrassed to go to some job sites. (Tr. Vol. I, 58-59)

20. Complainant testified that the long and frustrating process of attempting to secure an accommodation for her hearing impairment, ending with the Union's failure to offer an accommodation she viewed as effective, and the actions of the union leaders caused her to feel depressed, embarrassed and like an outsider. (Tr. Vol. I, 59-60) Complainant suggested she might have made more money if she had been better aware of job opportunities discussed at meetings, but she admitted she has no evidence beyond mere conjecture to support a claim that she lost any income from her inability to hear or participate in meetings. (Tr. 118-119)

21. Complainant also testified that her inability to hear and communicate causes her difficulty on a daily basis and is sometimes emotionally stressful and depressing. She testified that miscommunication can be embarrassing and sometimes other people get annoyed with her or laugh at her. (Tr. Vol. I , 70, 121-124) Complainant also testified that issues in her family life were a significant source of stress for her and that while she has sought therapy for those issues she has not done so for her issues with the Union relating to her disability. (Tr. Vol. I,

[4] Complainant testified that the Union President runs the meetings and uses a gavel to call the meeting to order and to assure the meeting remains orderly. Fahey also did not hesitate to step up to the microphone and take over. (Tr. 116-118)

124-127) She brought this claim because she just wants to be able to know what's being said at Union meetings and be able to participate. (Tr. Vol. I, 137-138)

III. CONCLUSIONS OF LAW

A. Jurisdictional Issue

M.G. L. c. 151B s. 4(2) makes it unlawful for a labor organization to exclude from full membership rights or to expel from its membership or discriminate in any way against any of its members who allege to be qualified handicapped individuals because of their disability. The language of M.G.L. c. 151B, s. 4(2) as it relates to disability essentially tracks the language of s. 4(16) which prohibits discrimination based on disability in employment, except for the words referencing an employee who is "capable of performing the essential functions of the position involved with reasonable accommodation." Also absent is the provision of s. 4(16) which references an employer's ability to raise a defense by proving that the requested accommodation would "pose an undue hardship on the employer's business." The threshold issue in this case is whether, absent language referencing reasonable accommodation and undue hardship, the Union is obligated to provide reasonable accommodation to its disabled members as part of its duty not to discriminate. Respondent argues that it is not so obligated because of the absence of the above cited language and an employment relationship.

While Respondent acknowledges that G.L. c.151B is meant to be broadly construed in aid of the statute's purpose, (c. 151B s. 9), it argues, notwithstanding, that the Union has no legal duty to reasonably accommodate its disabled members absent explicit statutory language mandating such an affirmative obligation. The Union asserts that in interpreting G. L. c. 151B s. 4(2), the Commission is bound by the plain language of statute and cannot impose a duty to accommodate where none is explicitly stated. The Union refers to the "unusual context" of

Complainant's request given that she has no employment relationship with the Union.[5] It asserts there are no essential employment functions to consider since a union member does not perform "functions" as an employee does. [6] Ultimately, the Union suggests that Complainant's claim fails as a matter of law because "under the controlling statutory language, a union has no obligation to accommodate disabled members with respect to their participation in purely internal union activity and that G.L. c. 151B does not extend to a union's internal governance." (Respondent's brief at pp. 10-14)

It is a general rule of statutory construction that statutes be interpreted according to the legislative intent as ascertained by the ordinary and generally accepted use of the words, in conjunction with consideration of the purpose for the statute's enactment and the wrong to be remedied. Marc Flagg v. Alimed, Inc. 466 Mass. 23, 28 (2013). Thus while the words are most significant in discerning legislative intent, "the words must be evaluated in the context of the overarching purpose of the statute itself." Id. General Laws c. 151B is an anti-discrimination statute and its reach has been broadly construed by the courts to "achieve its remedial goal of eliminating and preventing discrimination." Currier v. National Board of Examiners, 462 Mass.1, 18 (2012) *citing* Local Fin. Co. v. Mass. Comm'n Against Discrimination, 355 Mass. 10, 14 (1968) The wrongs sought to be remedied by c. 151B and the primary purpose of the MCAD go beyond injury to the individual and include harm to the entire social fabric and vindication of the broader public interest. Stonehill College v. Mass. Comm'n Against Discrimination, et al., 441 Mass. 549, 562-563 (2004). It is the role of the Commission to interpret the statute in the first instance and to consider its purpose. Rock v. Massachusetts Comm'n Against Discrimination,

[5] While the Union is not an employer, membership in the Union is certainly related to employment, remuneration, and professional advancement.

[6] The Union argues that the ADA's provisions regarding reasonable accommodations are likewise explicitly limited to the employment context and say little about the rights of union members. (Respondent's brief at pp. 10-11)

384 Mass. 198, 206 (1981); East Chop Tennis Club v. Mass. Comm'n Against Discrimination, 364 Mass. 444, 446, The statute is to "be construed liberally for the accomplishment of its purposes." Id. at 446.; G. L. c. 151B, s. 9.

The courts and the Commission have found that there is a duty to accommodate in other areas of anti-discrimination law that do not involve employment and where the obligation to provide an accommodation is not explicitly stated in the statute. The issue of reasonable accommodation has arisen in the context of the statute governing access to, and treatment in, places of public accommodation and in situations related to test-taking. The Commission has interpreted G.L. c. 272 s. 98 to implicitly require places of public accommodation to make reasonable accommodation to a patron or customer's disability where to do so would not cause undue hardship to the operation. Bachner v. Charlton's Lounge & Restaurant, 22 MDLR 1274, 1288 (1987) (unreasonable refusal by a place of public accommodation to accommodate an individual's physical or mental disability can constitute discrimination and "some degree of accommodation must reasonably be implied in the statute"); Bachner v. MBTA, 22 MDLR 183,186 (2000) (MBTA had a duty to accommodate disabled person with Tourette's syndrome); Horseman v. Rehoboth Summer Athletic Program, et al. 25 MDLR 255 (2003) (summer camp accommodated disability of student to the extent possible); Poliwczak v. Mitch's Marina& Camp Ground, et al. 33 MDLR 133, 136-137 (2011) (campground operators had a duty to accommodate long-time member who was disabled with a designated handicap parking space).

In Currier v. National Board of Medical Examiners, 462 Mass. 1 (2012) which did not explicitly deal with the issue of disability, the Court recognized that the plaintiff, a breast-feeding mother, was potentially entitled to statutory relief under the public accommodations statute when she sought the accommodation of additional time and a suitable place to express breast milk

from the organization administering the US Medical licensing examination. Recognizing that the Americans with Disabilities Act (ADA) requires the provision of reasonable testing accommodations to applicants with disabilities,[7] the Court held that the duty to provide accommodation also extends to the state public accommodations statute, holding that the refusal to provide additional time for the test as an accommodation was gender discrimination and violated G.L. c. 272 s. 98. It is reasonable to analogize from these cases that are divorced from, or not directly related to employment, that the duty of the Union not to discriminate against a disabled member pursuant to G.L. c. 151B s. 4(2) includes an obligation to provide reasonable accommodation, absent an undue burden on its operations. [8]

Union members should be entitled to all the rights, benefits and privileges of union membership. Complainant asserts that she was denied the right to fully participate in Union meetings because of her disability. There is no dispute that rights of membership in the Union include the right to attend, speak and or otherwise participate in Union meetings. An essential element of participation is the ability to comprehend what is happening at a meeting and the ability to respond. Where a member is unable to do so, due to a disability, and the Union has the ability to remedy the situation without undue hardship, it only stands to reason that a failure to do so would violate s. 4(2). In light of the purpose and objective of G.L. c. 151B and the wrongs it seeks to remedy, a duty to reasonably accommodate a union "member's disability can be reasonably read into the statute, even in the absence of explicit language. I therefore reject the Union's threshold argument that there is no such obligation. The Union argues, in the

[7] The types of accommodations that may be considered include additional time to complete exams, additional break time, large print or audio examinations, assistance in recording answers, private testing rooms. See Currier, supra. at 6 & 7.

[8] It is doubtful the Union would assert that it has no obligation to provide an accessible venue for its meeting to accommodate injured or disabled members.

alternative, that even if the Complainant were entitled to a reasonable accommodation, she failed to prove that the Union unlawfully denied her one.

B. Disability Discrimination/ Failure to Accommodate

Having determined as a threshold matter, that s. 4(2) of G.L. c. 151B may require a union to provide its members with reasonable accommodation for a disability, I turn to Complainant's claim that she was entitled to such an accommodation with respect to Union meetings and that her requested accommodation, which the Union denied, was reasonable.

Complainant is disabled within the meaning of G.L. c. 151B s. 1(17).[9] She suffers from a significant hearing impairment that is chronic, has worsened over time, and substantially impacts her ability to hear, communicate and interact with others. She currently has 85% hearing loss and relies on lip reading and closed caption devices on her telephone and her television. Her impairment is obvious to anyone who speaks and interacts with her and she testified credibly that Union officials were aware of her impairment.

Complainant made two formal requests to the Union in writing seeking an accommodation for her hearing impairment through some sort of stenographic recording of the meetings. Respondents assert that Complainant did not provide the Union with medical documentation referencing the nature of her impairment and the need for an accommodation of her disability and argue that the burden was on Complainant to request meetings with Union officers to discuss her impairment and her request. Respondents further assert that Union meetings were not a proper forum for raising her accommodation request. Complainant states that she offered to provide her medical records to union officers, but that no union official ever requested such documentation or sought to meet with her. I am persuaded that the Union was on

[9] 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);

notice of her disability. Complainant also testified that it was her understanding that Union meetings were the proper forum for members to raise issues and that she followed proper protocol. Complainant was advised by the Vice President of the Union that she needed to submit a written proposal to the Union Bylaw Committee which she did. After her initial proposal was rejected by the Bylaw Committee she was advised to submit a new proposal which the Committee recommended against. I conclude that Complainant made her requests in the manner she believed was appropriate through the formal channels available to her. When at the January 2013 special meeting, the membership was poised to vote down her request, Complainant agreed to table her proposal at Fahey's suggestion so that the Union could explore options to reasonably accommodate her. Thereafter, she demonstrated remarkable patience over many months when it was clear that her request was not being promptly addressed. From February through June of 2013, she continued to inquire about the status of her request at the monthly union meetings and got the same vague response that it was being looked into. There is no evidence that at any time throughout this period Union officials or leaders asked to meet personally with Complainant.

Respondents argue that Complainant's claim must fail because she could not prove that Respondents knew or could have known of a reasonable accommodation that they failed to offer. Respondents assert that they proposed and Complainant rejected two offers of accommodation that were reasonable and would have addressed her hearing impairment. In June of 2013 the Union offered the option of a sound-proof booth with headphones, or a sign language interpreter, both of which Complainant rejected because they would not meet her needs. She testified that the first option of wearing headphones would not remedy the problem because of the nature of her hearing impairment which blocks out sound. She also testified that being placed in the front

of the auditorium in a booth would have caused her great humiliation and prevented her participation. She also testified she had never learned sign language, relied on lip reading and closed caption devices, had other challenges that did not allow for time to learn a new language, and had no one with whom to practice. While the Union is not obligated to provide the best accommodation or the one specifically requested by Complainant, the accommodation offered must be effective, and meet the Complainant's needs. MCAD Guidelines Employment Discrimination on the Basis of Handicap s. II. C., 20 MDLR Appendix (1998). In this case Complainant's needs were to understand what was discussed and be able to participate in the meetings. Complainant has persuaded me that the accommodations the Union offered her would not have been effective to meet her needs, given the nature of her impairment, its unique challenges, and her lack of knowledge of sign language. Complainant persuaded me that the sound booth option was not viable[10] and to require Complainant to learn sign language would have placed an undue burden on her, and would not have constituted a prompt and effective accommodation since to learn to sign would presumably have required a significant commitment over time.[11]

Respondents assert that the Union met its duty to engage Complainant in an interactive process, and that in addition to the options it offered Complainant, it also explored Dragon software, a computer dictation system, which it determined would not be effective. The Union claims that because Complainant rejected the accommodations offered her, its duty to her ceased. It argues that her request was not reasonable because she demanded and would consider only stenographic closed captioning, and that her subjective responses to the Union's offers expressed

[10] Respondent focuses only on Complainant's stated embarrassment at being placed in a sound-proof booth and not her argument that the booth would not ameliorate the unique feature of her hearing impairment, which is less about external background noise and more about internal ringing in her ears. It also does not address her inability to participate in the meeting while being housed in a sound-proof booth.

[11] There was no evidence in the record as to how long it takes for one to learn and become fluent in sign language.

only her preferences and did not render its offers objectively unreasonable. The assertion that Complainant bears responsibility for the breakdown in communication because she would not accept the offered accommodations and essentially insisted on transcription as the only acceptable solution is unavailing. Once the Finance Committee informed Fahey that they could not find a workable solution that would not require a live stenographer, it was incumbent on the Union to explore this option, or at the very least begin a dialogue to consider it. For the reasons stated above and below, I conclude that Complainant did not abdicate her responsibility to continue a dialogue and this argument does not relieve Respondents of all further duty to act in the matter.

I turn to the issue of whether the Union has met its burden to demonstrate that the accommodation Complainant sought would have placed an undue burden on it operation or finances. Respondents claim that Complainant's insistence on a stenographic transcription of the proceedings with closed captioning would have created an undue hardship for the Union. The Union first claims that to permit a stenographer to attend its meetings would have constituted a breach of its By-Laws which permit only members to attend Union meetings. The Union was not aware of any Union members who were stenographers.[12] I conclude that this argument is specious, since the Union could have amended its By- Laws to permit admittance of a non-Union stenographer at its meetings and there is no evidence that to do so would have been unduly burdensome or difficult. Given that there seems to be no impediment to amending the Union By-laws to allow a non-Union member to attend a meeting, the confidentiality issues could have been addressed in a number of ways.[13]

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[12] The Union was also not aware of any members who were sign language interpreters. It seems apparent that this option would also likely have required a non-Union member to be present at meetings.

[13] The Union did not raise any financial impediments to hiring a stenographer for monthly meetings.

The second undue hardship rationale advanced by the Union surrounds the issue of creating a written record of what was said at Union meetings which the Union argues would inhibit the free and frank exchange of information and ideas by its members. While Fahey testified that the United Association, the Union's parent organization recommended against stenographic transcription of meetings, there is no evidence that they prohibited it. The Union nonetheless argues that that it is not obligated to accommodate Complainant's disability in a manner that would violate the rights of its other members to discuss issues freely and openly. It asserts that it is proper for the Union to consider the participatory rights of others that might be impacted by a verbatim transcript of the meetings, and that this was a concern of the national union when consulted. It cites precedent in the area of labor relations and collective bargaining stating it is an unfair labor practice for either party to insist to impasse on the presence of a stenographer. Bartlett-Collins, Co., 237 NLRB 770, 773 (1978). While the analogy to collective bargaining may be helpful, I do not find it controlling for the following reasons.

First the nature and purpose of general membership meetings and collective bargaining sessions are different. Attendance at Union meetings often comprises over one hundred members and matters discussed are of general interest to the membership, including topics such as available jobs, status of on-going projects, up-coming projects, jobs winding down, and the types of labor needed for jobs. Fahey testified that the details and inner-workings of collective bargaining sessions are not revealed at these meetings. Members are permitted to bring cell phones into Union meetings and there is no mechanism to prohibit any member from recording what is being said at the meeting. Ultimately, other than relying on the good-will and trust of Union members, there is no way to prevent them from making a record of what is discussed at meetings. Moreover, any non-Union member attending the meeting such as a stenographer

could be required to take an oath of confidentiality as a condition of their employment contract with the Union.

Second, Complainant does not seek to have a permanent record of any transcript of the Union meetings. She would be satisfied with being able to read what members were discussing in real time in order to follow the topic of conversation and to be able to participate in the moment. She has no interest in a permanent transcript of the meeting being preserved and argues any stenographic record could be erased at the meeting's end. It is also not apparent that Complainant required the transcription be displayed on a large screen or made available for all members to view. The parties advanced no reason why the typewritten transcript could not appear on a computer screen visible only to Complainant and any other hearing impaired members who chose to view the screen. It is reasonable to conclude that the general membership would consider the presence of a stenographer much less objectionable or intrusive to the free exchange of views if it were known that any simultaneous transcription would be seen only by hearing impaired members and erased at the meetings' end. It is apparent that the Union did not consider the feasibility of options that could have addressed its concerns about confidentiality and the free exchange of ideas and, instead, categorically ruled out Complainant's requested accommodation.

C. Individual Liability

The Union argues that Fahey cannot be individually liable for the unlawful refusal to accommodate Complainant because an individual's liability for aiding and abetting discrimination is derivative and must fail of necessity if the underlying claim has no merit. Secondarily, Respondents argue Complainant did not prove that Fahey personally condoned

discrimination. While the former argument is unavailing since I conclude the Union did not meet its obligations, the latter argument is more persuasive.

In order to prevail on an aiding and abetting claim, a plaintiff must show (1) that the defendant committed a wholly individual and distinct wrong, separate and distinct from the main discrimination claim; (2) that the aider and abettor shared an intent to discriminate not unlike that of the alleged principal offender; and (3) that the aider and abettor knew of his or her supporting role in an enterprise designed to deprive the plaintiff of a right guaranteed to him or her under G.L. c. 151B. Lopez, et al. v. Commonwealth et al., 463 Mass. 696, 713 (2012), citing Harmon v. Malden Hosp., 19 MDLR 157, 158 (1997).

Given that Fahey was initially sympathetic to Complainant's request for accommodation and sought to postpone the membership's rejection of her proposal by tabling the matter and seeking more time to explore options, I conclude that he personally was sympathetic to, and sought to advance, her cause. Fahey testified that he delegated the matter to the Finance Committee to investigate and respond with proposals. His failure to follow-up promptly may have been negligent but I cannot conclude that his failure to do so was in deliberate disregard of Complainant's rights to be free from disability discrimination or that he acted with discriminatory motive in deliberately depriving her of a reasonable accommodation. See Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003). Fahey was not unilaterally empowered to grant Complainant's request and he had no authority to authorize expenditures on behalf of the Union. He reported the recommendations of the Finance Committee and the Union's parent organization to the general membership. Given his limited authority to make any final decision on this matter, I decline to find him individually liable for discrimination as an aider and abettor in violation of G.L. c. 151B s. 4(5).

D. Retaliation

General Laws Chapter 151B, sec. 4 (4) prohibits retaliation against an individual for opposing practices forbidden by the statute. 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 engaged in a protected activity; (2) Respondent was aware that he engaged in protected activity; (3) Respondent subjected him to an adverse action; and (4) a causal connection exists between the protected activity and the adverse 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).

Complainant filed her first Complainant against the Union in December 2013 after waiting more than a year after she made her initial request for some resolution that would accommodate her hearing impairment. Her filing was clearly protected activity within the meaning of the statute. She testified that thereafter, Fahey announced at two union meetings that she had hired an attorney and was suing the Union. Complainant testified that this caused some union

members to yell at her and wave at her to sit down when she rose to inquire about her accommodation request. In June of 2014, the matters escalated when Complainant and Fahey got into a heated argument about the status of her accommodation request and she was booed and heckled by some union members and the union President McKee ordered her to sit down. There is credible evidence that at least one member shouted at Complainant, "go home, deaf girl." According to Complainant, the union officials in charge of the meeting did not intervene to stop the heckling and her public humiliation. She claims that Fahey's notice to the membership of her discrimination claim and union officials' failure to ensure that members did not insult or humiliate her was retaliation for her protected activity of filing a claim.

It is unclear whether Fahey had an obligation to inform the Union membership of Complainant's discrimination complaint, or whether the appropriate manner to do so was an announcement at a general membership meeting. Regardless, I conclude that Fahey's notification does not constitute an act of retaliation by the Union or him individually. While the announcement may have served to anger or upset some members who engaged in disturbing behavior that humiliated and embarrassed Complainant, I do not find the announcement was motivated by retaliation. Complainant argues that Respondents are liable for retaliation because she was subjected to an adverse action by some members who were upset by her law suit and because union officials failed to stop the heckling and control the meetings. The heckling by individual members at the June 2014 meeting who were unable to control their vitriol seems to have erupted spontaneously. While their behavior was abhorrent, there is no evidence that the union leaders participated in or condoned the heckling in any way. I decline to ascribe a retaliatory motive by Respondents to the conduct a few unidentified individuals who acted spontaneously. I am also not persuaded that the Union's failure to promptly regain control of the

meeting was retaliation. The situation, as described, was clearly somewhat raucous and out-of-control. The fact that the Union President McKee told Complainant on that occasion to sit down, was apparently an attempt by him to regain control of the situation and not to punish Complainant in retaliation for protected activity. The Union also asserts that the causal connection between Complainant's protected activity and alleged adverse action is weakened because there is no temporal proximity between the filing of the complaint in December of 2013 and the events of a union meeting more than six months later. While some individual members may have harbored ill will toward Complainant for her persistence in raising the issue of accommodation at almost every meeting, I am inclined to agree that the timeline does not necessarily support a claim of retaliation by Respondents.

Complainant also speculates that the individual who often assisted her with understanding what was said at union meetings stopped sitting with her and assisting her because of Fahey's intervention. She believes this was an act of retaliation by Fahey, but there was no concrete evidence to support this assertion. Given these circumstances, I conclude that Respondents are not liable for retaliation in violation of G.L. c. 151B s. 4(4).

IV. REMEDY

General Laws c. 151B provides remedies for victims of discrimination including affirmative relief to make them whole and damages for any actual losses occasioned by the discrimination. This includes damages for emotional distress resulting directly from the unlawful acts. See Stonehill College v. MCAD, 441 Mass. 549, 586-587 (2004) *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976).

Complainant did not provide evidence that she lost any income or other concrete financial benefit as a result of not being able to comprehend what was being discussed or voted on at union meetings. She has, however, demonstrated that she suffered embarrassment, humiliation and significant emotional distress from being unable to participate in Union meetings and having to make repeated requests to accommodate her disability over a period of some eighteen months. Complainant testified that the long and frustrating process of attempting to secure an accommodation for her hearing impairment, ending with the Union's failure to discuss the accommodation she viewed as effective, caused her to feel depressed, embarrassed and like an outsider. After a year with no resolution, Complainant became convinced that the Union did not take her request seriously and was not making a good faith effort to effectively meet her needs. This belief prompted her to file her first MCAD complaint in December of 2013, approximately a year after her first request for accommodation. After filing the complaint she did not receive any encouraging responses to her repeated inquiries. Although I did not reach the conclusion that Respondents acted in retaliation against Complainant, the Union's failure to explore the feasibility of an effective accommodation over a period of eighteen months resulted in Complainant having to repeatedly raise the issue at membership meetings, caused members to be annoyed, and ultimately contributed to her extreme humiliation at the meeting in June of 2014. Complainant was so upset that she left that meeting in tears and thereafter never returned to a union meeting with the exception of one where her brother was sworn in as a union officer. Despite the challenges in Complainant's everyday life surrounding her inability to hear and communicate, which admittedly cause her significant stress, I conclude that Union's actions created an additional source of emotional distress, humiliation and embarrassment and

exacerbated the emotional pain and suffering she encounters daily. For this I conclude that the Union is liable for damages in the amount of $25,000.

In addition to monetary damages Complainant is entitled to affirmative relief to be discussed and negotiated by the parties with the goal of facilitating resumption of her attendance at Union meetings with a reasonable accommodation, which may include stenographic transcription, that permits her to understand and participate meaningfully in the proceedings.

V. ORDER

In light of the foregoing Findings of Fact and Conclusions of Law I hereby issue the following Order:

(1) The claims against Respondent Fahey in his individual capacity and the complaint of retaliation against both Respondents are hereby dismissed.

(2) Respondent Pipefitters Association shall cease and desist from failure to promptly explore and provide reasonable accommodation to its disabled members who seek accommodations to be able to participate fully in Union activities.

(3) Respondent Pipefitters Association shall explore the feasibility of and provide options for reasonable accommodation, including stenographic transcription of its meetings as a means to permit Complainant to participate meaningfully Union meetings.

(4) Respondent Pipefitters Association shall pay to Complainant, Maureen Reed, the amount of $25,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal 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.

Eugenia M. Guastaferri
Hearing Officer