THE COMMOWEALTH OF MASSACHUSETS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
CARLOS SANTOS,
Complainants

v. DOCKET NO. 12-BEM-00055

X-TREME SILKSCREEN &
DESIGN and RONALD CALIRI
Respondents

Appearances:
Simone Liebman, Esquire, Commission Counsel
Joseph Franzese, Esquire, for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 11, 2012, Carlos Santos filed a complaint with this Commission charging Respondent X-Treme Silkscreen and Design with discrimination on the basis of his disabilities, diabetes and morbid obesity in violation of G.L. c. 151B s. 4 (16). Caliri was added later as a party as discussed below. Complainant alleges that Respondent terminated his employment when he requested time off in order to undergo gastric by-pass surgery. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on April 6 and 7, 2016.[1] The proceeding was recorded by a digital recorder which malfunctioned during the hearing rendering much of the record inaudible. Thereafter, the parties agreed upon a written

[1] A Spanish translator was provided for Complainant on each day of the public hearing. Monica Vinasco translated on day one and William Estrada translated on day two.

"Statement of the Case" as the official transcript of the hearing. After careful consideration of the entire record in this matter, and the post-hearing submission of Commission Counsel[2], I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Carlos Santos resides in Chelsea, Massachusetts. Complainant came to the U.S. from Guatemala in 1994 and became a U.S. citizen in 2008. Complainant, his wife and adult son reside in an apartment in a three-family home that is owned and occupied by his daughter, Heidy Santos. The third apartment is occupied by Complainant's other daughter and her family.

2. Respondent X-Treme Silkscreen and Design ("X-Treme"), an S corporation located in Lynn, MA, designs and produces custom silk screening and embroidery products. X-Treme is owned by Ronald Caliri, who started the company in 1995. Caliri holds all the officer positions at X-Treme and does marketing, billing and sales, hiring and firing and quality control. Caliri employs approximately six people including an embroidery machine operator and graphic designers.

3. Respondent's physical plant was described as having a counter with computers, a main office behind the counter containing computers, an embroidery area at the far end of which was a small office with embroidery computers.

4. In 2001, Complainant was hired by Caliri as an embroidery machine operator at a starting salary of $14 per hour. Complainant's employment was terminated on November 28, 2011.

[2] Respondent did not file a post-hearing brief.

5. Respondent's customers are local schools, colleges and civic groups, including Salem State University and area high schools. A typical customer order might include imprinting the organization's logo and names of its members on clothing such as hats, sweatshirts, pants or other articles of clothing.

6. Caliri testified that when an order comes in, he completes an order form that contains quantity, sizes, and design (such as names, logos, etc.) of the product sought, the order date and due date. Caliri then purchases the necessary articles of clothing, e.g., hats, t-shirts, sweatshirts, pants, etc., depending on the project. The artwork for the embroidered logo is prepared on a disk that is inserted into a computer which creates the design and instructs the machine what to print on the clothing. Respondent is paid when the project is completed. Mistakes in an order may cause delays and problems.

7. Complainant's duties as an embroidery machine operator included inserting a CD containing a computer design and software "stitches" into the embroidery machine, selecting design colors and creating a sample for Caliri's review. Complainant testified that he never printed out a final design without Caliri's approval.

8. Alex Minnehan was hired as a graphic designer for Respondent in August 2011 and was still employed there at the time of Complainant's termination. Minnehan interacted with Complainant on a daily basis and he had no issues with Complainant.

9. Complainant testified that later in his employment he performed design work in addition to working as a machine operator. He testified that 40% of his time was spent doing design work and 60% of his time was spent operating the embroidery machine.

10. Complainant testified that when he would silkscreen a name onto an item, someone would verify the name that was on the list from which he worked.

11. According to Complainant, he occasionally made spelling errors on items that Caliri would then return to him for correction. Caliri testified that prior to 2010Complainant made spelling errors but was not disciplined for these mistakes.

12. Complainant never received a performance evaluation or written warning from Caliri and received three raises during his employment. At the time of his termination, Complainant was paid at the rate of $17 per hour for 20 hours per week.

13. Complainant testified that he worked closely with Caliri on a daily basis and that their work relationship was "so-so." Complainant claimed that occasionally Caliri would yell at him and make statements referring to "f---ing immigrants," presumably referring to Complainant being Guatemalan. Caliri, who employed several people of Central American national origin, denied making such statements.

14. Complainant testified that in 2004[3], he suffered an aneurysm while at work and was hospitalized. After the incident, his doctor restricted his lifting to 20 pounds and he was not allowed to drive. According to Complainant, before his restrictions were lifted, Caliri called him at home, insisted that he return to work and arranged for co-workers to transport him to work. Although Complainant felt his return was premature, he believed he had no choice but to return to work. Caliri denied insisting that Complainant return to work following the aneurysm. Caliri testified that Complainant was out of work for four to five weeks and received four weeks' pay. He then returned to light duty for about a month, during which time he was lethargic and slow and co-workers lifted items for him.

15. Complainant testified that in 2007 or 2008, he hit his head on an iron rod at work. Caliri sent him to the hospital but told him to report that the injury occurred at home. However, Complainant told the hospital staff that his injury occurred at work and his medical costs would

[3] At first Complainant testified that the aneurysm occurred in 2008.

be covered by workers' compensation. Complainant claimed that Caliri paid the medical bills relating to the injury only after he insisted. Caliri denied telling Complainant not to file a workers' compensation claim or to lie to the hospital personnel and testified that Complainant returned to work the day after the accident at work.

16. I find that Complainant and Caliri each presented a distorted version of the events described in Findings 13, 14 and 15 above and that an accurate accounting of these incidents cannot be determined from their testimony.

17. By November 2011, Complainant was morbidly obese, at 5'5" and 280 pounds, was an insulin-dependent diabetic, and had high blood pressure and sleep apnea, for which he used a CPAP machine.

18. Complainant testified that his medical conditions did not affect his daily life or his ability to perform his job. However, Complainant's physician informed him that, given his morbid obesity and other medical problems, he was at risk for kidney and vision problems, infections and problems with his joints and limbs. Complainant's physician recommended that Complainant undergo gastric by-pass surgery in order to reduce his weight.

19. Caliri testified that Complainant's work performance declined steadily in 2010 and 2011. He assumed Complainant's problems were related to his aneurysm from years earlier. Caliri testified that several times around Labor Day in 2011, he observed Complainant at the embroidery machine and asked him if he was okay and if he was on medication, presumably because Complainant appeared ill. According to Caliri, Complainant said nothing and just laughed.

20. Caliri testified that in 2009 or 2010 Complainant made embroidery errors on an order of sweatshirts that had to be replaced. He testified that when he confronted Complainant with

the errors, Complainant told Caliri he would fix them. On cross-examination, Caliri acknowledged that this incident took place in 2004 and not five or six years later.

21. Caliri submitted a photograph of a logo for an order of 26 hats for a small college. The logo read: "Gordon-Conwell Public Safety Leutenant." (Ex. R-2) He stated that that on all of the hats Complainant misspelled the word "lieutenant" and the job had to be re-done. Caliri testified that Respondent made no profit on this job and acknowledged that this error occurred in 2005. Complainant testified that the photograph depicted a sample sewn onto a piece of scrap material and not the actual hat which was the finished product, stating that he had to obtain Caliri's approval before he ran the pieces.

22. Caliri testified that on an order of 30 hats in 2009, Complainant wrote: "Tell Me In Good" instead of "Tell Me I'm Good." The mistake could not be fixed, and Caliri had to purchase another 30 plain hats at the cost of $5.50 per hat. He testified that Respondent lost $500 plus the time spent re-doing the order. He submitted a photograph purporting to be one of the hats with the spelling error. (Ex. R-1) Complainant testified that the photograph in Ex. R-1 is not of a hat, but is a sample sewn onto a scrap piece of material that he showed to Caliri before it was run on the machine. He reiterated that he could not run a job without Caliri's authorization and that the photograph does not represent the final product, which was sewn correctly.

23. Caliri testified that in 2009, Respondent received an order for Dominican League baseball jackets that were supposed to read: "Stars of the Future." Instead, Complainant embroidered the phrase, "Stars on the Future." Caliri testified that he did not see the test run, that each jacket cost $40 and that he lost money on that order.

24. According to Caliri, in September 2011, Respondent had a contract with longtime customer Varsity Swim Shop. He testified that there were on-going problems with Complainant's misspelling of words on some items that had to be returned, resulting in Respondent having to give the customer $357 in discounts due to errors on orders. (Ex. R-13) Ex. R-5 is a photograph that purports to show a misspelled name on a varsity swim item. Caliri testified that when Complainant attempted to correct misspellings by shaving off the embroidery, some of the items ripped and had to be replaced. He stated that when he showed Complainant a bag that had been ruined and said, "This has got to stop," Complainant walked away laughing. I credit his testimony.

25. Caliri testified that in October or November 2011, the Salem High School Band ordered approximately 150 hooded sweatshirts for which Caliri purchased plain sweatshirts at the cost of $14 per item; each sweatshirt was then silkscreened front and back.

26. Caliri then brought the sweatshirts to the embroidery room and gave Complainant a list of the band members' names and their instruments. Complainant was to type the names, instruments and color into the computer and embroider the names and instruments onto the sweatshirts.

27. Caliri testified that the finished sweatshirts were shipped to Salem High School. He testified that on Saturday November 26, 2011, a representative of Salem High called and was very upset because 29 of 130 names were incorrectly spelled on sweatshirts.

28. Caliri testified that he went over the sweatshirts with Complainant one by one and was horrified by the number of mistakes. Complainant began to fix the misspellings by shaving off the stitches on the under-side of the garment; however four or five sweatshirts were damaged beyond repair and had to be replaced, reprinted and re-embroidered. I credit his testimony.

29. According to Caliri, he re-sent the sweatshirts that were purportedly corrected to Salem High School. Upon receipt, the bandleader contacted him and was very angry because some of the sweatshirts still contained errors. I credit his testimony.

30. Respondent produced seven photographs purporting to show misspellings on embroidery performed by Complainant on the Salem High School Band order. Caliri testified that the photographs demonstrate that Complainant misspelled band members' positions, names and instruments. (Exs. R-6-R-12) I credit his testimony.

31. Minnehan, then Respondent's graphic designer, recalled that a Salem High School Band customer returned a significant portion of an order with embroidered spelling errors. Minnehan documented the mistakes by taking pictures of them. He also recalled that days later, the customer returned products with more mistakes at which time Caliri pleaded with Complainant to double and triple check his work. I credit Minnehan's testimony.

32. Caliri testified that the Salem High School band terminated its business with Respondent after that order and did not resume doing business with Respondent until four years later. However, Caliri acknowledged on cross-examination that Salem High School continued to place orders with Respondent after Complainant's termination and did not terminate its business relationship with Respondent until five months later. He further acknowledged that Salem High School was dissatisfied with two projects worked on by Complainant's successor.

33. Complainant testified that on Friday, November 25, 2011, at 8:00 a.m. he handed Caliri a letter dated November 18, 2011, from Dr. Denise Gee, a surgeon with the Weight Center at Mass. General Hospital. The letter stated that Complainant was scheduled for gastric by-pass surgery on December 20, 2011, followed by six weeks of recuperation, and that he was expected to return to work on February 1, 2012. (Ex. C-1) According to Complainant, Caliri took the

letter, read it, crumpled it up and threw it in the waste basket. Complainant testified that he asked Caliri if he planned to put the letter in his personnel file and Caliri did not respond. Complainant testified that he worked the remainder of the day with no issues. I credit his testimony.

34. Caliri testified that Complainant handed him Dr. Gee's letter on November 4, 2011, a month before he was terminated. I do not credit Caliri's testimony that he was given Dr. Gee's letter on November 4, 2011 because the letter is dated November 18, 2011 and Caliri's testimony contradicts the credible testimony of Complainant that he handed Caliri the letter on November 25, 2011.

35. Caliri testified he was so angry at Complainant about his recent spelling errors at the time that he did not even want to talk to Complainant. He stated that he handed the letter right back to Complainant and didn't want to look at it. Caliri was aware that Complainant had diabetes, was overweight and had been diagnosed with an aneurysm. He testified that Complainant was constantly giving him letters requesting time off and if Complainant needed a medical leave, Caliri "did not care."

36. Complainant testified that when he arrived at work at 8:00 a.m. the following Monday, November 28, 2011, Caliri showed him a list indicating he had made some embroidery errors and told Complainant his employment was terminated. Complainant testified this was the first time Caliri showed him such a list. Caliri testified that he intended to sit down with Complainant to go over all the errors, but when Complainant arrived to work 90 minutes late, at 9:30 a.m., Caliri told Complainant he was putting Caliri out of business and terminated his employment.

37. Complainant testified that he went into the embroidery room and began to uninstall software programs that he had purchased for Caliri for $2,000 and for which he had never been paid. Caliri testified that he had paid Complainant's friend $2,000 for the software and that Complainant began deleting all of the customer logos, which sent them to the computer trash file but did not uninstall them. Caliri threatened to call the police and Complainant left. According to Caliri, Complainant told him: "I'm going to cause you a lot of problems."

38. Minnehan was present when Complainant's employment was terminated. He testified credibly that Complainant arrived at 9:30 and Caliri asked him why he hadn't called to say he would be late. Caliri told Complainant that there was no more work for him. A few minutes later, Caliri called Minnehan into the office to observe which files Complainant was removing from the computer. According to Minnehan, Caliri told Complainant to please get away from the computer and to leave and threatened to call the police. Minnehan did not recall Complainant's response other than to laugh.

39. Caliri testified that he terminated Complainant mostly because of the loss of Varsity Swim Shop and for the second and third round errors on the Salem High School account. He claimed this was after several customer complaints that they would no longer do business with Respondent. I credit Caliri's testimony that Complainant's embroidery mistakes were a factor in Caliri's decision to terminate Complainant's employment. However, I do not credit his testimony that his mistakes were the primary reason for terminating Complainant's employment.

40. A few days after terminating Complainant's employment, Caliri placed ad on Craigslist for an embroidery machine operator. The ad was answered by a woman whom he interviewed and hired. The woman was still employed by Respondent on the date of the hearing.

41. After his termination, Complainant applied for and collected unemployment compensation for at least a year.

42. Complainant underwent successful gastric by-pass surgery in December followed by six weeks of recuperation. Complainant testified that his doctor then told him to resume normal day-to-day activities. Over time, Complainant lost weight, lowered his blood pressure and was able to lift 50 pounds.

43. Complainant testified that he was physically able to return to work on February 1, 2012. He testified that at this time, he searched for work by looking at classified ads, visiting companies, calling potential employers, searching the internet, and going to employment agencies and temp agencies. He claimed that he looked for work five days per week and did not limit his search to any one location or salary.

44. I do not credit Complainant's testimony that he began looking for work on February 1, 2012. I found Complainant's testimony with respect to his post-termination job search and employment to be vague, evasive and inconsistent with his testimony regarding the impact of his job loss. (Finding #53) He was unable to provide a detailed linear account of the jobs he has held since his termination. Only after Commission Counsel systematically reviewed Complainant's W-2 forms with him at the public hearing did it become clear that he no reported earned income until 2013, after he had exhausted his unemployment compensation benefits.

45. Complainant owns an embroidery machine that is located in the basement of his home which he stated his children bought him in 2013. Complainant testified that he performed a couple of embroidery jobs from his basement and that he tried unsuccessfully to start his own embroidery business in approximately 2013, but was turned down for a loan from the Small Business Administration and could not rent space for the machine.

46. In August 2013, after Minnehan had left his job with Respondent, he and Complainant exchanged text messages and emails regarding a potential embroidery job for Complainant. (Ex. C-5) Complainant acknowledged that he did some embroidery work for a business owner in Revere but did not state when this was and he testified that he does not still work for him.

47. Respondent produced a business card for an embroidery business, SanDix Embroidery Desing[4] [sic] containing Complainant's name and telephone number. Complainant testified that it was a sample business card that he did not distribute and he did not know how Respondent had obtained the card. (Ex. R-14) I do not credit Complainant's testimony. I find that Complainant operated his own embroidery business, but the extent to which he profited from the business is unknown.

48. In 2011, Complainant received $615.00 in unemployment compensation. (Ex. C-2) In 2012, Complainant received $10,660.00 in unemployment compensation. (Ex. C-2)

49. In 2013, Complainant received $2,355.00 in unemployment compensation. That year he also received $7,789.48 in wages from Corner Office Gourmet and $5,608.76 in wages from Brae Burn Country Club for a total of $15,753.24. (Exs. C-2; C-3; C-4)

50. For the past two years, Complainant has earned more money than he would have made had he remained working for Respondent.

51. Heidy Santos, Complainant's daughter, testified credibly that Complainant has a close family and that they all lived together in her three-family house. She testified that Complainant enjoyed going out to dinner with his family, joking with his son, taking family vacations and attending church.

[4] Notably, the word "design" is misspelled.

52. Ms. Santos testified that when Complainant told the family about his termination, he was really upset and sad. Complainant and Ms. Santos testified that when Complainant told her he could no longer pay her the monthly rent of $850 paid prior to his termination he was very upset. Having no income was tough on Complainant because he had been the primary breadwinner for the family and after his termination he had to choose between buying food and paying bills. Ms. Santos testified, however, that Complainant continues to live rent-free in the family home.

53. Complainant testified that after his termination he felt depressed, had low energy and mood and did not go out with his children as often as he had in the past. He stated that he stayed in the house for eight to 12 months after his termination and in fall 2012, he spoke with his physician about his lack of energy.[5]

54. After about a year, Complainant began to walk and bicycle for exercise several times a week and his mood improved. At the public hearing he stated he was "90%" well.

III. CONCLUSIONS OF LAW

A. Reasonable Accommodation

Chapter 151B §4 (16) prohibits discrimination in employment based on disability and the refusal to grant a reasonable accommodation to a disabled employee who can perform the essential functions of the job. Complainant alleges that Respondent unlawfully terminated his employment because he required a medical leave of absence to have gastric by-pass surgery to address his disabilities, which were morbid obesity, diabetes, hypertension and sleep apnea and that Respondent failed to reasonably accommodate his request for a leave of absence and instead

[5] There is no supporting documentation from Complainant's treating physicians with respect to his physical condition post-surgery and the reasons for his lack of energy.

terminated his employment. In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) that he is a "handicapped person within the meaning of the statute;" (2) that he is a "qualified handicapped person" capable of performing the essential functions of his job; (3) that he needed a reasonable accommodation to perform his job; (4) that Respondent was aware of his handicap and the need for a reasonable accommodation; (5) that Respondent was, or through reasonable investigation could have become, aware of a means to reasonably accommodate his handicap and; (6) that Respondent failed to provide Complainant the reasonable accommodation. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, aff'd, 26 MDLR 216 (2004); See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX (A) (3) 20 MDLR Supplement (1998). M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities.

In order to establish that he is a qualified handicapped person, Complainant must prove that he is capable of performing the essential functions of his job, with or without a reasonable accommodation. I conclude that Complainant has established that he is handicapped within the meaning of the statute. At the time of his termination, Complainant suffered from morbid obesity, insulin dependent diabetes, hypertension and sleep apnea that put him at risk of serious complications and it was recommended by his physician that he undergo surgery to drastically reduce his weight. When Complainant presented a request for a leave of absence to Caliri to allow him to undergo and recuperate from surgery, Caliri rejected his request and terminated Complainant's employment the following work day.

Once Complainant has identified his disability and requested an accommodation from his employer, it is incumbent on the employer to engage in an interactive dialogue with Complainant and to determine if the accommodation sought is reasonable. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). A leave of absence may be a reasonable accommodation under some circumstances, if it does not create an undue hardship for the employer. Thibeault v. Verizon New England, Inc., 33 MDLR 39, 47 (2011) While there may be circumstances where an extended leave of absence is an appropriate or reasonable accommodation, including a request for a limited extension, which sets a definite time for the employee's return, each case must be evaluated on the circumstances. Russell v. Cooley Dickinson Hospital, Inc., 437 Mass 443 (2002) *citing* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (under the circumstances requested two-month extension was reasonable); EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA III-23 ("Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disabilities....where this will not cause an undue hardship.") MCAD Handicap Guidelines, p. 36, 20 MDLR (1998) The factors in determining undue hardship include: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets; (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and (3) the nature and costs of the accommodation needed. MCAD Guidelines: Employment Discrimination of the Basis of Handicap, at II, B. (1998)

I conclude that Respondent failed to demonstrate that granting Complainant a leave of absence would have caused undue hardship to its business. Caliri was aware that Complainant

suffered from diabetes, was obese and had had an aneurysm. While he testified that he was not aware that an employer was required to provide a reasonable accommodation to a handicap, he stated he "did not care" if Complainant took a leave of absence because business was slow in December and January. However, Caliri took no steps to determine an appropriate accommodation for Complainant, did not discuss it with him, but threw the letter in the trash after reading it. Given the evidence that business was slow at that time of the year, Complainant's absence would not have created an undue hardship for Respondent and the six-week leave of absence Complainant sought was a reasonable accommodation. Rather than engage in an interactive dialogue about the feasibility of providing Complainant with a leave, Respondent terminated Complainant's employment on the first workday following his request for leave, in violation of M.G.L. c. 151B.

B. Termination based on Disability

In order to establish a prima facie case of termination of employment based on disability, Complainant must establish that he is handicapped within the meaning of the statute; that he is capable of performing the essential functions of the job with or without a reasonable accommodation; that he was terminated or otherwise subjected to an adverse action by his employer, and the adverse action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998). Complainant established a prima facie case of unlawful termination on the basis of disability. He is disabled within the meaning of the law by virtue of obesity, insulin-dependent diabetes, hypertension and sleep apnea, he performed his job for over a ten year period and he was terminated within a business day of his request for a leave of absence.

Once Complainant has established a prima facie case of discrimination, Respondent may articulate, legitimate, non-discriminatory reasons for its action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000). Respondent denied that Complainant's disability was a factor in its decision to terminate his employment and stated that Complainant was terminated primarily because of the number of errors he made on two of its accounts. There was evidence that Complainant's performance had declined and that he made spelling mistakes in his embroidery work. Respondent has thus met its burden of articulating a legitimate, nondiscriminatory reason for its actions.

Once Respondent has articulated legitimate, non-discriminatory reasons for its disparate treatment of Complainant, Complainant must establish by a preponderance of the evidence that these reasons are a pretext and that Respondent "acted with discriminatory intent, motive or state of mind." My observations regarding Caliri's credibility lead me to conclude that some of his criticism of Complainant's performance was exaggerated and an ex post facto justification for terminating his employment.[6] Some of the examples of Complainant's errors occurred much earlier than Caliri initially testified, some as long as six years prior to his termination. Nevertheless, I conclude that based on the evidence, there is truth to Respondents' allegations that that Complainant was making excessive errors and that there was a corresponding decline in his work performance. Caliri was justifiably upset in November when Complainant made numerous spelling errors on the order for the Salem High School band.

While the decision to terminate Complainant's employment may have resulted in part from concerns about his performance, I find that Complainant's request for time off for surgery was the primary reason he was terminated, as the termination occurred the next work day after

[6] The evidence depicts a long-term work relationship between Complainant and Caliri characterized by mutual antipathy and mistrust. Neither was entirely truthful in his testimony on certain issues.

Complainant requested a leave of absence. Given the circumstances, I conclude that Respondent had "mixed-motives" for terminating Complainant's employment.

Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainant carries his initial burden, the burden of persuasion shifts to Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" even without the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299. While the decision to terminate Complainant's employment may have resulted in part from concerns about his performance, I find that his request for medical leave was the but-for cause of his termination.

Respondent has failed to persuade me that it would have terminated Complainant's employment had he not requested a leave of absence. While his performance may have declined, I conclude that Complainant's request for a leave was the primary reason for terminating his employment. I conclude that Respondent's actions were motivated primarily by unlawful discriminatory animus and not by lawful considerations as it contends. For the reasons stated above, I conclude that Respondent engaged in unlawful discrimination on the basis of disability, when it terminated Complainant's employment, in violation of M.G.L. c.151B.

C. Individual Liability

At the pre-hearing conference in this matter, Complainant filed a motion to add Ronald Caliri as a named Respondent in this matter. At that time, I denied the motion without prejudice

indicating I would review the matter at the close of the hearing and upon review of the post-hearing briefs. Commission Counsel renewed the motion at the time of the filing of her post-hearing brief. Respondent has filed an opposition thereto, but did not file a post hearing brief.

The plain language of G.L.c.151B provides for individual personal liability. Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480, 491(2000). The Commission has held that individuals may be liable under M.G.L.c.151B§4(4A) if they "interfere with a Complainant's right to be free from discrimination in the workplace." In order to prove interference with a protected right, Complainant must show that Caliri had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant's rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant's exercise of his rights. Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

Respondent argues that a 4(4A) interference claim should be disallowed as unduly prejudicial to Mr. Caliri and that it deprives him of his due process, since it was not raised by Complainant until several years after the filing of his complaint. I do not agree with this assertion.

The Commission has the long recognized the authority to consider a claim where, as here, the Respondent is not prejudiced, nor are any rights substantially affected by allowing such a claim to proceed where the facts in the complaint and the record are sufficient to support a such a claim. Sturdivant v. Joshi, 12 MDLR 1134, 1146 (1990). Moreover, the right of a hearing officer to amend the complaint to conform to the facts adduced at the public hearing has long been recognized by the Commission. See e.g., Riggs v. Town of Oak Bluffs, 23 MDLR 306, 311

(2001) affm'd on appeal to Full Commission, 25 MDLR 348 (2003); MCAD and Abrams v. Paddington's Place, et al., 26 MDLR 149(2005) (Full Commission). In this case, an interference claim against Caliri is supported by the facts as originally presented and does not prejudice Respondent or Caliri since Caliri is the individual charged as the perpetrator of the unlawful action and, as Respondent's owner, he has answered and defended the charges from the outset. The claim against Caliri is based on the same set of facts raised in the initial complaint and does not require Caliri or Respondent to investigate further or to raise additional defenses.

The evidence establishes the requisite intent to discriminate that would permit one to find Caliri individually liable for unlawful discrimination. He is the sole owner of Respondent and he made the decision to terminate Complainant's employment. Therefore, I conclude that the claim in this matter is properly amended to add Caliri as a party-Respondent.

I conclude that by terminating Complainant's employment, Caliri unlawfully interfered with Complainant's right to be free from discrimination in the workplace in violation of M.G.L.c.151B§4(4A). I further conclude that Respondent X-Treme is liable for unlawful discrimination on the basis of disability under M.G.L.c.151B§4(18) in this matter.

IV. REMEDY

Pursuant to M.G.L.c.151B§5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his termination by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), *citing* Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); *See* Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

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

Based on Complainant's testimony and the testimony of his daughter Heidy, I am persuaded that he suffered some emotional distress as a result of Respondents' unlawful conduct. Complainant testified credibly that he was upset about losing his job and the resulting financial hardship. He had low mood and energy, he did not enjoy going out with his family as he used to. His relationships with his family were strained for a period of time. His claim that he did not leave the house for a year or more contradicts his testimony that he was out looking for a job daily from the time he recovered from his surgery. I am not convinced that Complainant's emotional distress was as significant as he and his daughter portrayed and I conclude that their testimony was exaggerated in order to bolster his claim. Notwithstanding, I conclude that Complainant's termination caused him some emotional upset and disrupted his social and family

life. I conclude that he is entitled to an award of $10,000.00 for the emotional distress he suffered as a result of Respondents' unlawful conduct.

B. Back Pay

The Complainant has the responsibility to mitigate damages by making a good faith search for employment. In this matter, I found that Complainant's testimony regarding his job search and work history was evasive and unconvincing and I conclude that Complainant did not make a good faith effort to seek work until 2013. I also conclude that Complainant was running an embroidery business, however sporadic, that was more extensive than he let on at the public hearing, and the proceeds from the business are unknown. Since Complainant was not forthcoming about his interim earnings, gave vague and unconvincing testimony about his job search, and failed to account for all of his income, I conclude that an award of back pay is unwarranted and I decline to compensate Complainant for his claimed lost wages.

V. ORDER

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

1) The complaint in this matter is hereby amended to add Ronald Caliri as a party Respondent

2) Respondents immediately cease and desist from discriminating on the basis of disability.

3) Respondents pay to Complainant the sum of $10,000 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 until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 21st day of September, 2016

Judith E. Kaplan

JUDITH E. KAPLAN,
Hearing Officer