COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and DONNALYN SULLIVAN,
Complainants

v. Docket No. 07 BEM 00453

MIDDLESEX SHERIFF'S OFFICE,
Respondent

For Complainant Sullivan: Peter Noone, Esq. and Julie Brady, Esq.
For Respondent: Arthur Murphy, Esq. and Michael Maccaro, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 26, 2007, Donnalyn Sullivan ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") against the Respondent Middlesex Sheriff's Office alleging handicap discrimination. Complainant asserts that she was subjected to discrimination when denied a reasonable accommodation for an asthma-related disability. The complaint was amended on July 13, 2009 to include a charge of retaliation.

On April 4, 2010, the Commission issued a Probable Cause Finding and subsequently certified the case to public hearing. A public hearing was held on December 6, 8, 9, 10 and 11, 2011.

At the hearing, the following individuals testified: Complainant, Joseph Cleary, Susan Sullivan, Diane Sullivan, Kevin O'Donnell, Patrick Murphy, Richard Hopkinson,

Kevin Slattery, Richard Looney, and Dr. Lawrence Kenney, MD. The parties submitted fifty-one (51) joint exhibits. Complainant submitted eight (8) additional exhibits plus a chalk and Respondent submitted five (5) additional exhibits plus a chalk.

Based on all the relevant, credible evidence cited below and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant was hired by the Respondent Middlesex Sheriff's Office in 1990 as a correction officer. She has a degree in criminal justice from Salem State College and a master's degree in criminal justice administration from Curry College. Transcript I at 35-36. After her hire, Complainant attended a training academy for four weeks at which she was elected president of her class. Transcript I at 40-41. During the 2006-2007 time frame, Complainant was a grade 15 utility correction officer. Transcript VIII at 130-131.
2. The Middlesex Sheriff's Office has facilities in Billerica and Cambridge which house approximately 1,200 inmates and employ approximately 500 correction officers. Each facility is administered by a Superintendent. Beneath the position of Superintendent there are several Deputy Superintendents and several Assistant Deputy Superintendents. Transcript II at 152-153. The Billerica facility is larger than the Cambridge facility, with a number of free-standing structures and more correction officers. Transcript II at 8; VII at 9 & 24. Transcript V at 116-117; 138.
3. During late 2006/early 2007, the Middlesex Sheriff was James DiPaola and his second in command -- the "Special Sheriff" -- was Paul Norton.
4. Correction officers are charged with the care, custody and control of inmates. Transcript II at 59-60. The job description states that correction officers provide custodial care of

inmates, patrol, take head counts, observe behavior, quell disturbances, investigate suspicious behavior, make referrals, prepare reports, ensure cleanliness and safety, enforce regulations, assist in training and perform other work as needed. Joint Exhibit 33.

5. Correction officer positions are classified into three categories: 1) "bid" positions; 2) utility positions; and 3) "Superintendent pick" positions. Joint Exhibit 6C, Art. IX; Transcript V at 142; VIII at 98. Within the three categories there are multiple assignments ("posts"). Transcript VII at 219; VIII at 58. When an emergency occurs at the Sheriff's Office, some, but not all, correction officers leave their assigned posts to attend to the emergency. Transcript VI at 44. Other officers remain at their assigned posts in order to avoid additional security risks. Transcript VI at 43-45; VII at 223-225.

6. "Bid" positions are occupied by correction officers of grade 15 or higher who apply for and are selected to fill specific jobs such as the canteen, kitchen, transportation, gym, tower, patrol, indoor recreation, laundry, mattress shop, infirmary, medical transportation, K-9, work release van, training center, clerical/mail, platform, and inner perimeter security. Transcript IV at 136, 144; V at 142; VIII at 153, IX at 14-15. There was contradictory testimony about the length of bid position assignments. Former Human Resource Director Kevin O'Donnell testified at one point that the longest duration of a bid assignment is three years and generally is one year, but at another point he testified that bid positions last indefinitely with the bid process only coming into play if someone leaves, retires, or loses a bid position for disciplinary reasons. Transcript V at 149-150; IX at 82, 89. Patrick Murphy, former-Human Resource Manager/current-Special Sheriff, testified that some bid positions last one year, some two years, and others last indefinitely

until an employee bids on something else or is removed for cause. Transcript VII at 43. According to Complainant, correction officers are allowed to remain in bid positions for the duration of their employment. Transcript III at 163. Based on the foregoing testimony, I find that there is variability in the length of bid assignments.

7. When a vacancy occurs in a bid position, selections are made from a pool of six candidates who are determined by seniority. Joint Exhibit 6C, Art. 9 (1); Transcript II at 12, 23; V at 147. Complainant testified that bid positions are primarily indoors and that she was capable of performing all of them. Transcript II at 42, 44, 50, 52. I credit this testimony.

8. "Utility" posts[1] are filled by approximately half of Billerica's uniformed correction officers. Transcript VII at 42. They are placed in a general job pool of employees who perform a variety of assignments including checkpoints, tiers, the front office, outside security (i.e., traps), the "movement response team," and central control. Transcript I at 62 & VIII at 191-193; IX at 15; Joint Exhibit 6C, Art. 9(2). The correction officers perform these assignments annually at a facility (Billerica versus Cambridge) and on a schedule (shifts and days off) but not on a particular post. Transcript V at 133, 138; V at 157; VII at 31; Joint Exhibit 6C (Art. IX of the CBA). Utility posts are assigned daily at roll, approximately fifteen minutes prior to the start of a shift. Transcript II at 150; III at 236-237; V at 130; VII at 33-34. The length of time that a correction officer remains in the same post is discretionary. Transcript V at 74. Deputy Superintendent Richard Hopkinson testified that while he was a Captain from 2001 to 2008, he kept correction officers in the same utility assignment on average for four to six months. Transcript VIII at 57, 133. Kevin Slattery, a Shift Commander in 2006-2007, testified that the average

[1] Utility posts are also referred to as "operational" posts.

duration of a utility assignment during that period was from three to eight months. Slattery and then-Human Resource Manager Patrick Murphy stated that correction officers' utility assignments are changed in order to promote versatility and to permit officers to cover for those who are sick, on vacation, or receiving training. Transcript VII at 46, 51; VIII at 145-147.

9. "Superintendent-pick" positions, which comprise ten percent or less of the positions covered by the parties' collective bargaining agreement, are filled directly by each facility's Superintendent without regard to seniority or qualifications and typically last one year. Transcript V at 160-161; VII at 48, 229; IX at 81; Joint Exhibit 6C, sec. 4A. The Superintendent-pick process takes place in the fall for the following calendar year. Transcript VII at 174.

10. In the 2006-2007, the Billerica facility had multiple buildings that were, for the most part, not connected and not air-conditioned. Transcript V at 117, 119, 127. The main building had a courtyard with doors that were usually kept open during recreation periods. Officers assigned to oversee inmate recreation were permitted to stand at the threshold of the open doors. Transcript V at 122; VI at 47.

11. Numerous bid and utility posts at the Billerica facility are exclusively or primarily indoors such as the gym, the infirmary, the "lower report seg," the central control post, and those staffed by officers on the movement response team, on patrols, making deliveries, accompanying inmates around the prison campus, going to the post office, and operating vans. Transcript I at 66-71, 75-76; IV at 191; VII at 62-66; IX at 68. Most bid and utility posts at the Cambridge facility are exclusively or primarily indoors. Transcript VII at 230; IX at 90-91.

12. After attending academy training in 1991, Complainant bid on and became a caseworker at the Billerica facility until 2001. Complainant described the position as primarily indoors except for when she had to walk from one building to another, cover lunch, or oversee a recreation period in the yard. Transcript I at 44-45. As a dormitory caseworker, Complainant dealt with child support issues, visitation, furloughs, and substance abuse meetings. Transcript I at 42-43.

13. Complainant was first diagnosed with asthma in 1991. Complainant's asthma, when uncontrolled, causes chest tightness, wheezing, and difficulty breathing. Transcript II at 116. Complainant was hospitalized in 1994, 1995, and 1996 for difficulty breathing, tightness of the chest, and wheezing. On at least one occasion in the 1990s, Complainant was placed on a ventilator. In 1996, Complainant was hospitalized for eleven days, was out of work for a couple of months, and returned to work on a light-duty basis working a couple of days a week in four-hour increments. Transcript II at 111-112.

14. During the years that Complainant worked at the Middlesex Sheriff's Office, she could perform all work-related activities when her asthma was under control, including outdoor work for up to a full day. Transcript IV at 209, 214. Complainant experienced difficulties only with prolonged exposure to the outdoor elements in cold weather. Id. She did not go to work when her asthma was not stable. Transcript IV at 114. Complainant's asthma gets worse when she has prolonged exposure to exertion, wintry/ damp weather, hot/humid conditions, and changes in temperatures, but she is not affected by pollen and does not have allergies. Transcript II at 111, 115-116; IV at 33-34, 60, 115-117, 209.

15. Assistant Deputy Superintendent Slattery testified that he never had a problem with

Complainant's ability to perform her job or her ability to respond to emergencies. Transcript VIII at 181.

16. Complainant has been a patient of Dr. Lawrence Kenney, a pulmonary specialist, since 1994. Transcript II at 104. Under his supervision, Complainant has avoided serious incidents of asthma since 1996 through the use of inhaler medication, avoidance of cold weather as much as possible, and by bundling up to keep herself warm. Transcript II at 114, 117-118. Dr. Kenney testified that Complainant is the person best equipped to describe her asthma triggers. Transcript XI at 157.

17. Complainant testified that she notified Respondent about her asthma in 1994 when she brought in a medical note to excuse an asthma-related absence. Transcript II at 103-104. According to Complainant, she carried an inhaler everywhere she went and used the inhaler in the presence of co-workers. Transcript III at 8-9; IV at 125.

18. In 2001, Complainant bid on and was awarded a transportation post. In the transportation position Complainant had to carry a gun and transport inmates from the Billerica and Cambridge facilities to courts and other locations. Complainant describes the post as "primarily indoors" to the extent she spent most of her time in environmentally-controlled vans, courthouses, and other buildings. Transcript I at 56-57; IV at 114-115, 129. She testified that the assignment involved some exposure to exhaust fumes but such exposure was not a concern unless "prolonged." Transcript IV at 59-60. According to Complainant, she had no problem performing transportation duties even on days that were below freezing. Transcript IV at 130. Respondent witness Richard Looney, who currently works as a transportation officer, testified that he spends approximately one-quarter of each shift outdoors. Transcript IX at 7-8. I credit testimony that the

transportation assignment is a primarily-indoor post which did not trigger Complainant's asthma. Transcript IV at 115.

19. In 2003, during the time that Complainant occupied the transportation post, she expressed her unhappiness about the Sheriff removing her brother from a Sheriff's Department position as a result of her brother's failure to satisfy a physical requirement. Transcript III at 99-100, 104-105; IV at 54.

20. On March 29, 2005, after serving as a transportation officer for over four years, Complainant mistakenly left her gun in a bagel shop after she removed her utility belt to use the bathroom. Then-Cambridge Superintendent Martin Gabriella[2] imposed upon Complainant a five-day suspension with an additional twenty-five days held in abeyance, and he required that she attend eight hours of training. Complainant's gun permit was indefinitely suspended. Transcript II at 130; III at 158. Complainant was removed from her transportation position because it required her to carry a gun. She was assigned to the Billerica facility under then-Superintendent Paul Norton. Joint Exhibit 36; Transcript II at 131; III at 159.

21. Following the gun incident, Complainant was placed in the utility pool and assigned a variety of posts such as the front office, patrol, traps, work release, and pods. Transcript II at 134. Complainant was allowed to keep her schedule of Mondays through Fridays, 8:00 a.m. to 4:00 p.m. Transcript II at 132; V at 158.

22. Complainant testified that she was informed by her union attorney that she would be returned to her transportation post within three to six months. Transcript II at 135. That did not happen. Some three months later, Complainant mentioned to Superintendent

[2] Gabriella became Superintendent of the Billerica facility in or around 2006 after its prior Superintendent, Paul Norton was promoted to Special Sheriff. Transcript II at 139, 152.

Norton that she wanted to return to her transportation position. Transcript II at 136. Complainant continued to speak to Superintendent Norton approximately every three months. Transcript II at 137.

23. On November 4, 2005, Complainant wrote to Sheriff DePaola asking to return to her transportation bid assignment. Joint Exhibit 37A. On December 28, 2005, Norton, who by then had become Special Sheriff, denied her request, stating that her firearms permit remained suspended indefinitely. Id.[3]

24. Complainant did not bid on other specialty positions or apply for Superintendent-pick positions in or after December of 2005 because she didn't want to relinquish what she considered to be her permanent bid in the transportation position. Transcript III at 173-174; IV at 112; VII at 173. She credibly denied ever being told that she had lost her transportation bid because of the gun incident or that she should bid on a different position. Transcript IV at 112. Complainant sincerely believed that she retained her transportation bid after she was removed from the post but according to then-Human Resource Director Kevin O'Donnell and Human Resource Manager Patrick Murphy, Complainant lost her transportation bid when she was assigned to the utility pool in 2005. Id; Transcript V at 155; VII at 172.

25. In February of 2006, Complainant moved into a second floor apartment in her parent's home because her removal from the transportation post reduced her ability to earn overtime income. Transcript III at 171-173.

26. Complainant testified that in mid-year 2006, Union President Rick Looney "insisted" on

[3] Respondent introduced hearsay testimony relative to the firearm permit suspension of an Officer Thomas Sickles for leaving his gun unattended but did not establish the length of time his permit was suspended, the factual circumstances leading to the suspension, or his pre-suspension record as a correction officer. Transcript IV at 57; VIII at 24-26, IX at 45, 94-95. Accordingly, I decline to consider Officer Sickles as a comparator.

talking to Superintendent Gabriella about the refusal to restore Complainant to her transportation bid. Complainant testified that she was reluctant for him to do so. Transcript III at 95-96. According to Complainant, Looney reported back to her that Superintendent Gabriella said the Sheriff's Office did not want Complainant to pursue the re-issuance of her gun permit and if she did, she "wouldn't find [herself] in a cushy little position like work release and ... could easily find [herself] back in the job pool." Transcript III at 96. At the time, Complainant considered herself to be on temporary assignment until her firearm permit was restored and anticipated going back to what she considered to be her permanent bid on transportation. Transcript III at 96. Officer Looney denied ever speaking to Superintendent Gabriella about the return of Complainant's gun permit. Transcript IX at 32-33. I credit Complainant's testimony that Officer Looney spoke to Superintendent Gabriella and that Gabriella did not want her to pursue the return of her gun permit but I find that Officer Looney did so at Complainant's request.

27. Complainant subsequently talked to Human Resource Manager Murphy who agreed to talk to Human Resources Director O'Donnell about the possibility of returning Complainant to her transportation bid. Murphy reported that O'Donnell was not willing to change Complainant's status at that time. Transcript III at 97.

28. Complainant produced a chalk of various bid and utility assignments between August of 2006 and January of 2007. Complainant's Chalk 1. Complainant's analysis indicates that during this period there were 144 correction officers who were assigned to indoor posts, 18 correction officers assigned to part-indoor/part-outside posts, and 71 assigned to outside posts. Transcript II at 84-88. Complainant classifies the following posts as

indoor assignments: tiers, front office, inner perimeter security, tower, training center, canteen, gym, infirmary, central control, movement response team, pod visits, community work program, laundry, mail, platform, work release van, jail, segregation units, pods, and hospital. Chalk 1 at p. 7. Complainant testified that she could function in all of the indoor and partially-indoor posts regardless of the temperatures. Transcript II at 102.

29. Complainant attempted, unsuccessfully, to arrange for an in-person meeting with the Sheriff in September of 2006. Transcript II at 142; III at 101; IV at 53.

30. Complainant was assigned to the outdoor post of Trap 1 commencing on October 10, 2006 by then-Captain Hopkinson who was her direct supervisor at the time. Transcript II at 164. Hopkinson testified that he did not have a particular reason for assigning Complainant to Trap 1. According to Complainant, the Trap 1 post is a utility assignment in which an officer verifies the credentials of vehicle operators as they seek to enter the secure area of the Billerica facility, logs them in, radios ahead, and inspects vehicles as they enter and leave the facility. Transcript II at 32-33, 35-36. Complainant estimates that approximately 30 vehicles go in and out of the facility each day and that a full examination of a vehicle takes between 5 and 10 minutes. Transcript II at 36, 38. Complainant testified that her assignment to the Trap I post required her to be outside most of the day. Transcript II at 41. During the 2006 time frame, the Trap I post had an inadequately-heated wooden shack with no insulation. Transcript II at 34; Joint Exhibit 34. According to Complainant, the temperature inside the shack was almost the same as outside. Transcript II at 41. Complainant asserted that she could work any assignment at Billerica except for Trap I. Transcript II at 63.

31. In contradiction to Complainant's testimony, Union President Richard Looney described

the Trap 1 assignment as only twenty-five percent outdoors. Transcript IX at 19. I do not credit Looney's estimation. I find Complainant's estimate of the outside time involved in manning the Trap I post to be more accurate than Looney's because Complainant's estimation is based on daytime activity whereas Looney's is based on his experience manning the trap during a 4:00 p.m. to midnight shift when fewer vehicles enter and leave the facility. Transcript IX at 68.

32. Deputy Superintendent Hopkinson testified that while he was a Captain in 2006-2007, he would make changes in utility post assignments in order to address conflicts between inmates and officers but that he did not take officer preferences into consideration nor did he move utility officers for health-related reasons. Transcript VIII at 63-63, 113-115. In contrast to Hopkinson's testimony, Former Captain/ current Assistant Deputy Superintendent Joseph Cleary testified that utility correction officers regularly ask for changes in assignments and that when he served as a Shift Commander, he accommodated such requests. Transcript II at 19-20. Assistant Deputy Superintendent Kevin Slattery testified that he would also take into consideration an officer's preferences regarding assignments. Transcript VIII at 161. Complainant described the practice of officers requesting assignment changes as "happen[ing] all the time" for reasons such as coaching activities, a second job, marital problems, and child care. Transcript II at 148-149. I credit the testimony of Clearly, Slattery, and Complainant over that of Hopkinson.

33. Hopkinson estimated that between October 10, 2006 and January 23, 2007, he assigned Complainant to Trap 1 approximately 50-60% of the time, but Departmental records for that period show that he actually assigned Complainant to Trap 1 96% of the time. Transcript VIII at 67, 111; Respondent's Exhibit 3. He testified that he assigned

Complainant to Trap I for "no specific reason" other than she was doing a good job there and there was no reason to move her. Transcript VIII at 85. Hopkinson acknowledged that any correction officer could have filled the Trap I post. Transcript VIII at 111.

34. Complainant testified credibly that during the fall of 2006, she informed then-Captain Hopkinson that she would need an indoor post when the weather became cold because of her asthma. Transcript II at 144. Complainant asserts that she spoke to Captain Hopkinson about her asthma on five to six occasions and that each time he gave her a noncommittal response such as he would deal with her request "when the time comes" or he would "look into it." Transcript II at 144-145; 162, 165-166; II at 10. I credit Complainant's testimony.

35. In December of 2006, Complainant began to experience problems with her asthma due to her exposure to the cold. Transcript II at 154. Complainant testified credibly that she repeatedly asked then-Captain Hopkinson if she could be reassigned indoors on days of "extreme" cold as an accommodation to her asthma, but that her request was not granted. Transcript II at 162. According to Complainant, she requested to work inside on specific days rather than to work indoors indefinitely. Transcript IV at 212. Hopkinson was not credible when he denied that Complainant ever asked him to move inside from the Trap I post during cold weather. Transcript VIII at 71-72-73.

36. On December 12, 2006, Complainant took funeral leave in the morning. Respondent's Exhibit 3. When Complainant returned to the Billerica facility in the afternoon, she was assigned to a visiting section of the facility. Transcript II at 146-147. According to Complainant, Captain Sheehan asked if she would be interested in working there in the future and she replied that she would, but she was not subsequently assigned to that

location. Transcript II at 148; Respondent's Exhibit 3.

37. At the public hearing, Deputy Superintendent Hopkinson and Assistant Deputy Superintendent Slattery testified that prior to January 14, 2007, they did not have any discussions with Complainant about her asthma, did not receive any notes about Complainant's asthma, did not receive any requests that her Trap I assignment be changed in cold weather, did not see her carry an inhaler, and were not aware that Complainant suffered from asthma. Transcript VIII at 69-72, 158-159. I do not credit their testimony.

38. Assistant Deputy Superintendent Cleary was subpoenaed to the public hearing by Complainant. At the time of the events at issue, he had a good rapport with Complainant and considered her to be a very good correction officer. Transcript II at 20-21. Assistant Deputy Cleary testified that as a Captain at the end of 2006, he agreed to ask Deputy Superintendent Gabriella whether Complainant could be removed from her outdoor Trap I assignment. Transcript II at 18. Cleary testified that he received the following response from Deputy Superintendent Gabriella: "[The Trap] is where the Shift Deputy wants her. That's where she is." Transcript II at 19.

39. According to Director of Human Resources Kevin O'Donnell, any number of correction officers could have worked at the Trap 1 assignment and Complainant could have been assigned to any of the posts. Transcript V at 74.

40. On December 21, 2006, Complainant wrote to Sheriff DiPaola to ask for the re-issuance of her gun permit and reinstatement to her transportation bid. Joint Exhibit 37B. That request was not granted.

41. A chalk of temperature data from the Northeast Regional Climate Center at Cornell

University indicates that during the first week of January, 2007, Fahrenheit temperatures in Bedford, MA were between the 40s and the high 60s; during the second week of January they were between the high 20's and the high 40's; and during the third they dropped to the low teens to low 30s. Respondent's Chalk 1.

42. The fluctuating weather conditions in January of 2007 caused Complainant's asthma symptoms to destabilize and she experienced wheezing and tightness of the chest. Joint Exhibit 41P.

43. Complainant took four sick days and a pre-planned vacation day between Friday, January 12, 2007 and Friday, January 19, 2007. Respondent's Exhibit 3; Transcript III at 188, 190. Complainant went to see Dr. Kenney on Tuesday, January 16th because she wasn't feeling well after exposure to "extreme cold temperatures" at the trap post. Transcript II at 169; III at 186; IC at 99. Complainant turned in a note from Dr. Kenney dated January 16, 2007 stating that due to being placed on an outdoor detail and due to unstable, variable weather, her asthma had become unstable. Joint Exhibit 41P; Transcript III at 180, 182.

44. Complainant testified credibly that when she returned to work on Monday, January 22, 2007, she asked Captain Hopkinson for a temporary indoor position in order to recuperate, but he assigned her to the outdoor trap post on Monday and Tuesday, January 22-23, 2007. Respondent's Exhibit 3; Transcript III at 193.

45. Complainant called Dr. Kenney on January 23, 2007 about being posted outside on January 22 and 23 in temperatures of 23 and 27 degrees, respectively. Respondent's Chalk 1; Transcript III at 201. Dr. Kenney wrote a note dated January 23, 2007 which Complainant submitted late in the afternoon of the same day. Transcript III at 205. The

note stated that Complainant had moderate to severe asthma and that working outside with "the variability of weather conditions, the allergen exposure, the wind and the cold air" adversely affected her asthma. Joint Exhibit 5; Transcript II at 174. Dr. Kenney opined that Complainant should not work outside, and he cautioned that an outdoor environment "may trigger a severe or life-threatening episode of Asthma" and he urged that Complainant's working environment be changed quickly. Id.

46. Captain Hopkinson testified that he first saw Dr. Kenney's note on January 24, 2007. Transcript VIII at 77. He claims that prior to seeing the note, he had never received a request from Complainant to be shifted to a different post and was unaware that she had asthma. Transcript VIII at 69, 75-77. I do not credit this testimony given Complainant's history of asthma-related emergencies on the job and her use of inhaler medication at work.

47. Human Resource Manager Patrick Murphy testified that he was not "acutely" aware that Complainant had asthma prior to January 24, 2007. Transcript VII at 71, 201. I do not credit this testimony because Murphy had worked at the Middlesex Sheriff's Office with Complainant for many years, was her direct supervisor at one point, and was aware that she had been carried out of the facility on a stretcher in 1995. Transcript VII at 70-72. These circumstances support a finding that Murphy was aware of Complainant's asthma.

48. Complainant testified that she obtained the note from Dr. Kenney because she had repeatedly requested an accommodation and was being "ignored." Transcript II at 171.

49. Respondent's Equal Opportunity and Affirmative Action Policy and Procedure (revised 5/1/06) states that it "shall provide mechanisms to process requests for reasonable accommodation to the known physical and/or mental impairments of such otherwise

qualified persons [but that] [a]ccommodations which would impose undue hardships need not be granted. These include excessive financial cost, substantial disruption to organization structure, direct threats or unreasonable compromises to operational safety, security and health of the public, staff and inmates or accommodations which are inconsistent with the established bona fide job qualifications which apply to all security personnel." Joint Exhibit 9C at 203.03(2) & (3).

50. Assistant Deputy Superintendent Slattery testified that he never had training on how to deal with disabled employees. Transcript VIII at 183.

51. On January 24, 2007, Complainant was assigned to an indoor post involving the escort of prisoners. Transcript IX at 96. Immediately after roll call, she was contacted by then-Shift Commander Kevin Slattery. He said that he had never seen such an extreme letter as Dr. Kenney's note and was going to forward it to the Personnel Office. Transcript II at 179. Later that morning, Slattery and Captain Hopkinson met with Complainant. Slattery informed her that the Human Resource Department was concerned about Dr. Kenney's note because her inability to work outside at the Trap 1 location meant that she couldn't perform her job as a correction officer. Transcript II at 183-184. Captain Hopkinson and Shift Commander Slattery asked Complainant if she wanted to rip up her note because of the drastic language but she refused. Transcript VIII at 80, 107, 163. Slattery ordered Complainant to go home on sick leave per instructions from Human Resources. Id.; VIII at 79, 81. Complainant objected to going home, stating that she was capable of working an indoor post, that she could work outdoors except in bad weather, that she could perform any post except for exclusively-outdoor assignments, and that she could be outside during emergencies. Transcript II at 52, 183-184; IV at 221; VIII at 79,

81.

52. Complainant testified that she attempted to page Dr. Kenney in order for him to speak to her supervisors, but was told by then-Captain Hopkinson that the decision had already been made.[4] Transcript II at 185; IV at 219. Hopkinson does not recall making such a statement and he testified that he would have spoken to Dr. Kenney on the phone but that Complainant could not reach her physician. Transcript VIII at 82, 105. I find Complainant's version to be the more credible of the two versions.

53. Complainant spoke with the Middlesex Sheriff's Human Resource Director O'Donnell before she left for the day. O'Donnell had the sole responsibility to deal with medical notes. Transcript V at 13. It was O'Donnell who decided that, due to the restrictions set forth in Dr. Kenney's note, Complainant should be sent home pending a fitness for duty exam. Transcript V at 14-15; IX at 103, 105. O'Donnell didn't attempt to contact Dr. Kenney before sending Complainant home. Transcript V at 14-15. O'Donnell testified that Complainant was very upset about being sent home and expressed her opinion that she could still do the job. Transcript IX at 104. According to O'Donnell, the Middlesex Sheriff's Office does not allow employees to return to work unless they can produce a medical note with no restrictions. Transcript V at 24; IX at 121. O'Donnell referred to this policy as the "no-restrictions ideology." Transcript V at 79.

54. Deputy O'Donnell interpreted Dr. Kenney's note as seeking a permanent indoor assignment which he deemed to constitute an undue hardship on Respondent because such an assignment would lack the flexibility necessary to deal with absenteeism, inmate

[4] Human Resource Manager Murphy testified that Complainant never gave him permission to reach out to her medical providers after submitting the January 24, 2007 note to the Sheriff's Office. Transcript VIII at 20. I do not credit this assertion in light of Complainant's credible testimony that she attempted to arrange for Dr. Kenney to speak to her supervisors.

escapes and other unanticipated circumstances. Joint Exhibit 5. Transcript V at 21; IX at 134-138, 141- 143. He interpreted the parties' Collective Bargaining Agreement to preclude accommodations. Joint Exhibits 6C and 6E.

55. Middlesex Sheriff's Office Policy 203 states that if an accommodation cannot be made due to an undue hardship or any other reason, "the request shall be brought to the attention of the Special Sheriff for review." Joint Exhibit 9C (Policy 203(5)(3)(e). Neither O'Donnell nor Murphy brought Complainant's note to the attention of Special Sheriff Norton and Norton did not respond when Complainant attempted to see him. Transcript III at 11-12; VI at 97-98.

56. During his six-year tenure as Respondent's Human Resource Director, O'Donnell did not grant any accommodations to correction officers. Transcript V at 30, 50. O'Donnell testified that he did not consider The Americans with Disabilities Act to apply to correctional officers, he deemed accommodations to involve situations in which officers "couldn't perform correctional functions," and he interpreted the collective bargaining agreement between the Middlesex County Sheriff and the union representing correction officers, sergeants and lieutenants[5] to preclude light-duty assignments and accommodations even though Articles IX and XX do not address these matters. Transcript V at 31, 33, 35, 40, 51; Joint Exhibits 6C; 6E.

57. Patrick Murphy testified that he, too, had never implemented a request for a reasonable accommodation despite reviewing hundreds of doctors' notes during his tenure with Human Resources and that he had never received training about how to handle a

[5] The National Association of Government Employees (NAGE) represented correction officers employed by the Middlesex Sheriff's Office from 2003-2006. Joint Exhibit 6D. From July 1, 2006 through June 30, 2008, the union was the New England Police Officers Benevolent Association – Local 500. Joint Exhibit 6E.

reasonable accommodation request as a Human Resource Manager. Transcript VI at 80-82, 88; VII at 78, 201-203. Murphy confirmed that if a correction officer had a medical restriction, the officer could not remain at work. Transcript VI at 80; VII at 87.

58. Both Human Resource Manager Murphy and Human Resource Director O'Donnell interpreted Dr. Kenney's note as preventing Complainant from working outdoors at all and as seeking a permanent indoor post. Transcript VI at 95. Deputy O'Donnell concluded that granting such an accommodation would have caused an undue hardship because of the need for correction officers to function interchangeably. Transcript V at 35-37, 46-49, 68.

59. As Superintendent of the Billerica facility on January 24, 2007, Martin Gabriella had the authority to assign Complainant to any position provided that he did not violate the parties' collective bargaining agreement. Transcript VI at 31-32.

60. Complainant never returned to work at the Middlesex Sheriff's Office after January 24, 2007. As she departed the Billerica facility on January 24th, she left a handwritten note for Special Sheriff Norton. Complainant's Exhibit 1. Complainant did not receive any response. Transcript III at 12. Neither Special Sheriff Norton nor any other supervisor from the Middlesex Sheriff's Office ever dialogued with Complainant or her doctor about her medical condition, the extent to which it restricted her, what jobs she could perform, or the possibility of working inside on cold days or on other occasions when conditions required that she do so. Transcript III at 17-18; VI at 90-101; VII at 245-246.

61. O'Donnell arranged for Complainant to have a fitness-for-duty evaluation by Dr. Reid Boswell two days after she was sent home. Joint Exhibit 28. On January 26, 2007, Dr. Boswell examined Complainant and asked various questions about her asthma.

Transcript III at 21.

62. Complainant did not receive any feedback from the exam for approximately three weeks. Transcript III at 29. She contacted the Sheriff's Office and was sent a medical report from Dr. Boswell which concluded the following: "Ms. Sullivan is unable to work as a correctional officer outside during cold (i.e. less than 50 degrees) or damp conditions. Otherwise, it is my opinion that she is capable of performing all job duties of a correctional officer as outlined in the job description provided to me." Joint Exhibit 7 at 00079. Human Resource Director O'Donnell did not seek clarification about whether Complainant could work outside for short intervals of one or two hours. Transcript V at 63-65. Based solely on the notes from Drs. Kenney and Boswell, O'Donnell determined that Complainant was incapable of working as a correction officer at the Middlesex Sheriff's Office.

63. On February 7, 2007, the International Brotherhood of Correction Officers (IBCO) filed a grievance on Complainant's behalf in response to the decision to send her home from work. Exhibit 40A. The grievance was denied by Human Resource Director O'Donnell on February 27, 2007 on the basis that the Middlesex Sheriff's Office did not have a light-duty option. Exhibit 40B. The IBCO appealed the denial to the next stage of the grievance process. On March 12, 2007, Special Sheriff Norton denied the grievance on the same basis. Exhibit 40D.

64. On February 26, 2007, Complainant filed an MCAD complaint alleging handicap discrimination. Transcript III at 40; IV at 109.

65. On February 28, 2007 and in succeeding months (4/18/07, 6/1/07, & 8/1/07), Complainant filled out, with the assistance of Human Resource Manager Murphy, a

series of applications for Extended Illness Leave Bank withdrawals. Joint Exhibit 39A-D; Transcript IV at 88-89. The first application was for the period between February 21, 2007 and March 3, 2007. In the application, Complainant checked off statements asserting that she was unable to work full or part-time in her current position, was unable to perform light duty, and was unable to return to work in another capacity. Joint Exhibit 39 A, p. 2. Dr. Kenney filled out the physician portion of the application in which he diagnosed Complainant as having severe, persistent asthma and allergic rhinitis; stated that Complainant would be totally disabled until at least 3/28/07; estimated that Complainant could return to work in April of 2007; and restricted her from working out of doors during the winter due to cold air and during high pollen seasons. Id. at 4-5.

66. On February 28, 2007 Dr. Kenney dictated a letter in which he opined that it "would be possible for Complainant to work within a controlled temperature environment, such as indoors, at this time." Joint Exhibit 31 at 00027.

67. On March 6, 2007, the Middlesex Sheriff's Office received the MCAD charge of discrimination filed by Complainant. Complainant's Exhibit 2.

68. On March 15, 2007, Human Resource Director O'Donnell signed a notice of intention to file an application for involuntary ordinary disability retirement on behalf of Complainant. Joint Exhibit 7 at 00095. He testified that he did so after "apprising Legal [the Sheriff's Legal Department] of the situation." Transcript IX at 166, 195. O'Donnell stated that he based his decision on Dr. Kenney's January 23, 2007 note and the written determination by Dr. Boswell that Complainant could not perform the duties of a correction officer in less than 50 degrees Fahrenheit. Transcript V at 52. O'Donnell claimed that he was not aware of Complainant's MCAD complaint when he initiated

Complainant's disability retirement application. Transcript IX at 177. I do not credit this testimony. The evidence establishes that O'Donnell worked closely with the Legal Department, discussed all MCAD complaints and grievances against the Sheriff's Office with Legal Department personnel, and communicated with them about Complainant's specific situation. Transcript, IX at 196-202. These circumstances outweigh O'Donnell's denial of knowledge about the MCAD complaint.

69. On March 20, 2007, Human Resource Manager Murphy wrote Complainant to inform her that the Sheriff's Office was moving forward with the involuntary disability retirement application on her behalf and to provide her with a copy of the application. Joint Exhibit 7 at 00103, 00276, & 00277. Murphy testified that he was not aware of Complainant's MCAD complaint when he drafted Complainant's disability retirement application. Transcript VII at 141, 250. I do not credit his testimony for the same reasons I discredit O'Donnell's alleged lack of knowledge.

70. Complainant testified that she did not want to take a disability retirement from the Middlesex Sheriff's Office because disability retirement benefits are subject to a reduction up to the difference between: A) what she would have earned in base pay at the Sheriff's Department plus $5,000.00 and B) the amount of her disability retirement income plus outside earnings. G.L. c.32, sec. 91A; Transcript III at 57, 62, 65-66. Complainant testified credibly that she had planned to continue working for Respondent until age fifty-five or older and also work elsewhere on a part-time basis as an adjunct professor and/or as a massage therapist. Transcript I at 37-38; III at 70. Had Complainant continued working at the Middlesex Sheriff's Office for only three additional years in order to achieve twenty years' service and then retired, she would

have been entitled to retirement income of fifty percent of her salary with no cap on the amount of money she could earn in the private sector. Transcript I at 39, V at 96; G.L. c.32, secs. 28N, 91.

71. In a letter dated March 26, 2007, Complainant requested a hearing in connection with her involuntary disability retirement application. Transcript X at 38-39. The Executive Director of the State Board of Retirement responded in a letter dated April 18, 2007, stating that Complainant did not qualify for a hearing pursuant to M.G.L. ch. 32, sec. 16(1) (based on age and years of service). Joint Exhibit 7 at 134; Transcript III at 91-92, 112. Complainant was told that she could appeal this determination, but she chose not to do so. Id.

72. Several notations contained in the State Board of Retirement's records indicate that at some point after March 26, 2007, Complainant communicated to the Board that she was no longer contesting her disability retirement. Joint Exhibit 7 at 136-137; Transcript X at 39. Complainant does not recall making such a statement to the Board. Transcript III at 123-125. Former Human Resource Director O'Donnell testified that Complainant did not object to the application for involuntary retirement. Transcript IX at 192. I find that at some point, Complainant decided not to actively oppose the application.

73. On April 18, 2007, Complainant filled out another Extended Illness Leave Bank withdrawal application for the period from April 16, 2007 through May 31, 2007. Complainant's application states that she is unable to work full or part-time in her current position and is unable to perform light duty. Complainant filled out two subsequent Extended Illness Leave Bank withdrawal forms in June and August of 2007. Joint Exhibit 39 C & D. She continued to state that she could not work full or part-time in her

current position, perform light duty, or return to work in another capacity. Id. In the June, 2007 application, Dr. Kenney described her work restrictions as "No cold air immersion; No heavy dust exposure" (Joint Exhibit 39 C at p. 5) and his partner, Dr. Trayner states in the August application that Complainant "cannot work outdoors." (Joint Exhibit 39 D at p. 5).

74. In a letter dated July 18, 2007, the Middlesex Correction Officers Association, the correction officers' then-representative, communicated to Complainant that the Union had decided not to take her grievance to arbitration based on the statements in Dr. Kenney's letter. Exhibit 40E; Transcript IX at 51-52.

75. Had Complainant continued working at the Middlesex Sheriff's Office, her base 2008 and 2009 salary would have been $56,695.10, exclusive of: voluntary overtime, a training incentive of $40.00 per paycheck ($1,040 per year), and a stipend of $3,000.00 a year for her master's degree. Transcript III at 53, 55; Complainant's Exhibits 3 & 4. Her base salary for 2010 would have been $57, 262.06. Complainant's Exhibits 4 & 5. Complainant testified credibly that she often worked overtime at a rate of 1.5 her hourly ($27.00) wage, i.e., $40.50. Transcript III at 53-55.

76. The Medical Panel Unit of the Public Employees Retirement Administration Commission (PERAC) arranged for three doctors to separately examine Complainant and to issue independent medical panel certificates addressing whether Complainant was mentally or physically incapable of performing the essential duties of her correction officer position and, if so, whether the incapacity was likely to be permanent. Joint Exhibit 7. Two certificates were issued by pulmonologists Dr. Ronald P. Sen and Dr. Thomas Morris concluding that Complainant was not physically capable of performing the essential

duties of correction officer, although Dr. Morris questioned whether her job required her to be outside in the cold weather. Joint Exhibit 7 at 00045 & 00061. They both concluded that Complainant's condition was permanent. Id. Dr. Sen noted that "service in a cold or dusty environment could contribute to significant exacerbations of [Complainant's] condition ... [which would] impair her job performance." Joint Exhibit 7 at 00049. Dr. Morris concluded that Complainant should be given an accidental disability retirement since the Sheriff's Department "persisted in placing her outside" and "has not seen fit to keep her indoors during the cold weather" which caused a general worsening of her asthma and that her employer did not accommodate her condition by keeping her indoors during the cold weather. Joint Exhibit 7 at 00064. A third certificate by Internist Mark Lebovits, M.D. concluded the following: "Given that Ms. Sullivan is completely asymptomatic today, with no objective evidence for airways obstruction and given that she is fully functional on a regular basis other than when she is exposed to cold air, it is my opinion that she is not disabled from performing her usual job duties, particularly since her job duty description does not make reference to environmental factors. As such, I do not support her Application For Disability Retirement." Dr. Lebovits determined that Complainant was physically capable of performing the essential duties of her job. Joint Exhibit 7 at 00057.

77. Then-Associate General Counsel of the State Retirement Board Dennis Kirwan testified that he took then-Human Resource Director Kevin O'Donnell at his word about the tasks that Complainant was required to perform as a corrections officer and did not seek any information from Complainant about her job duties. Transcript X at 59.

78. In June of 2007, O'Donnell filled out a questionnaire for the State Retirement Board in

which he denied that Complainant had requested any modification to her job duties in order to accommodate her medical condition but when he previously responded to interrogatories from the MCAD on April 13, 3007, O'Donnell acknowledged that he had told Complainant that Respondent could not honor her "requested accommodation" of working exclusively indoors. Transcript V at 82-83, 86, 88, 93.

79. Complainant received income from her accumulated vacation, personal, and sick leave accounts and from the Extended Illness Leave Bank through mid-September of 2007.[6] Joint Exhibit 39; Transcript III at 137.

80. On September 14, 2007, Complainant filled out a Family & Medical Leave "Certificate of Health Care Provided" in which she stated that due to her asthma and her inability to work outdoors and her employer's inability to accommodate her disability with an indoor post, she was unable to report for duty. Respondent's Exhibit 2 (last page).

81. Beginning in October of 2007, Complainant secured work as a substitute teacher in the Town of Saugus which she performed on a sporadic basis through mid-2008. Transcript III at 74.

82. On December 20, 2007, the State Board of Retirement voted to approve Complainant's Ordinary Disability Retirement, and on January 25, 2008, the matter was approved by the Public Employees Retirement Administration Commission ("PERAC"). Joint Exhibit 7 at 00007; Transcript X at 34, 70. Commencing in February of 2008, Complainant began to receive monthly disability retirement and health benefits along with a lump sum retroactive to December 7, 2007. Transcript III at 134; IV at 110-111.

---

[6] The "Extended Illness Leave Bank Withdrawal Application" (i.e., her sick leave bank application) includes questions about whether Complainant is able to work full or part-time, perform light duty, or return to work in another capacity. Joint Exhibits A-D. Complainant responded to these questions in the negative because Respondent did not have part-time schedules or light duty, wouldn't let her return to an indoor post and was "forcing [her] not to work." Transcript IV at 117; VII at 67.

83. Beginning in June of 2008, Complainant secured employment as an instructor in the criminal justice and allied health programs at Lincoln Technical Institute. Transcript I at 35; III at 74. Complainant teaches Monday through Thursday, 8:00 a.m. to 2:00 p.m. and Monday and Wednesday evenings from 6:00 p.m. to 10:00 p.m. Transcript III at 125. Since November 20, 2011, she has received a bimonthly paycheck in the amount of $1,278.76. Complainant's Exhibit 6. As of the public hearing date, Complainant was earning more from a combination of her Involuntary Ordinary Disability Retirement benefits and her teaching salary than she earned in base salary (i.e., exclusive of overtime and educational and training benefits) at the Middlesex Sheriff's Office. Transcript III at 132. Complainant testified that had she continued to work at the Middlesex Sheriff's Office, she would work part-time at Lincoln Tech either a few nights a week or weekends. Transcript III at 128.[7]

84. Following Complainant's disability retirement, Dr. Kenney drafted a series of reports in which he described Complainant as highly susceptible to rapid changes in humidity and temperature, cold air, particulates, exhaust fumes, chemical, and pollen during the fall, winter and spring. He recommended that Complainant be stationed in an "environmentally controlled"/indoor position during the winter months (Joint Exhibit 41T, dated February 21, 2008); described Complainant's asthma triggers as cats, upper respiratory tract infections, dust, mold, cold weather, wind, alterations in temperatures and atmospheric conditions, motor vehicle exhaust fumes, high humidity, air pollution, and the onset of spring with high pollen counts (Joint Exhibit 31C, at 00020 dated March 20, 2009); and noted that Complainant "tries to remain within air conditioned

[7] Complainant gave up her apartment and moved home to her parents' house in 2006, prior to her disability retirement. After living with her mother for a while, she took over an apartment upstairs in the family home. Transcript III at 75.

environments." (Joint Exhibit 31C at 00018 dated August 21, 2009). To the extent that Dr. Kenney's records (Joint Exhibits 41 S & T) indicate that Complainant is also impacted by pollen and dust, I find that Dr. Kenney's reports are generic descriptions of asthma triggers which are overbroad in Complainant's case.

85. Dr. Kenney testified at the public hearing that as long as Complainant is assigned to a primarily-indoor post on very cold days or when other asthma triggers are present and as long as her asthmatic condition is in a controlled state, she can be outside for limited periods to perform tasks such as supervising inmate recreation. Transcript XI at 46-48. According to Dr. Kenney, limited outdoor exposure for an hour or several hours when her asthma is stable would not pose a concern. Transcript XI at 48-51. He recommended that Complainant's input be taken into consideration regarding her medical needs because she has demonstrated an ability to manage her condition. Id. at 49.

86. Complainant testified that she would be able to control her asthma and perform all the functions of a corrections officer if assigned to an indoor post. Transcript IV at 116. Given the overall content of her testimony, I interpret her answer to mean a primarily, but not exclusively, indoor post. According to Complainant, only some of the areas where inmates reside at Billerica are air-conditioned but all have fans. Complainant maintained that she could function effectively without air-conditioning and that she is capable of responding to emergencies outside, even in January weather. Transcript II at 52; IV at 113-116, 146. According to Complainant, she can function outside in conditions less than fifty degrees Fahrenheit as long as her exposure is not "prolonged." Transcript IV at 114, 146

87. Complainant testified that the loss of her job made her feel worthless. She testified that

she loved working at the Sheriff's Office and had educated herself to qualify for supervisory positions. Complainant said that she had a lot of friends at the Sheriff's Office but those relationships "fell away" because people "couldn't afford to know me anymore." Transcript III at 77. Prior to her removal from the Office, Complainant socialized with friends from work and was especially close to the wife of Special Sheriff Norton, but those relationships became distant after she was removed from her job. Complainant stopped going to work events such as retirement parties. Id. at 77-78. She became more guarded and isolated. Transcript III at 79.

88. Complainant did not seek counseling because she didn't want such assistance to be "used against [her]" in the criminal justice community. Transcript III at 80.

89. Complainant's sister, Susan Sullivan, described Complainant's separation from the Sheriff's Office as "devastating." Transcript IV at 236. Susan Sullivan testified that her sister had socialized with people at work on a very regular basis prior to her separation from employment, that she considered them to be part of her extended family, and that work was a "huge" part of her life. Transcript IV at 227-229. According to Susan Sullivan, after Complainant was involuntarily retired, she felt betrayed because co-workers didn't speak to her anymore and she worried about her loss of livelihood and friends. Transcript IV at 237. Susan Sullivan testified that prior to her sister's separation from employment, Complainant participated in family events and was an involved aunt to her nephews, but for months after her separation, she appeared to be depressed and overwhelmed about the changes in her life. Transcript IV at 240.

90. Complainant's mother, Diane Sullivan, described her daughter as "destroyed" on the day she was sent home from work, very distraught, a nervous wreck, and disillusioned.

Transcript IV at 258-259, 269. Mrs. Sullivan testified that Complainant cried a lot and had trouble sleeping. Mrs. Sullivan allowed Complainant to sleep in her (Mrs. Sullivan's) bedroom on at least a dozen occasions because of insomnia. Transcript IV at 258-259. According to Complainant's mother, Complainant's acute upset lasted approximately six months. Mrs. Sullivan testified that the Complainant lost her fun-loving attitude after her separation from the Sheriff's office and spent more time alone. Transcript IV at 269. According to Mrs. Sullivan, her daughter will "never be who she was . . . She will never be that person again." Transcript IV at 270-271.

91. In 2010, Complainant was ordered to return $11,991.74 of her $23,186.52 disability retirement benefits based on her earnings that year. Id. Under a superannuation (i.e., "regular") state retirement, there is no requirement to pay back pension benefits as a result of earning other income. Transcript III at 68.

92. Had Complainant continued working at the Sheriff's Office until 2011 which would have been her twentieth year of employment, her annual regular pension would have been $31,809.00 and there would have been no cap on other earnings. Transcript III at 86-87. Had Complainant continued to work until age fifty-five and retired on November 21, 2023 in her thirty-third year of employment, her regular pension would be $50, 056.00 with no cap on other earnings. Joint Exhibit 8B.

III. CONCLUSIONS OF LAW

A. Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with or without a reasonable accommodation. A handicapped person is one who has an

impairment which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2.

Complainant was diagnosed with asthma in 1991. Complainant's asthma, when uncontrolled, causes chest tightness, wheezing, and difficulty breathing. During the 1990s, Complainant was hospitalized in 1994, 1995, and 1996 for asthma-related problems. On at least one occasion she was placed on a ventilator and on another she was hospitalized for eleven days and out of work for a couple of months. Complainant's disorder restricts her from engaging in activities that are of central importance to her daily life such as breathing, working outdoors in certain weather conditions, and exercising. According to 2008 amendments to the Americans with Disabilities Act ("ADA"), the term "disability" is to be construed in a manner that favors broad coverage and disfavors extensive analysis. See ADA Amendments Act of 2008, Public Law # 110-325, section 2 (b) (5), *amending* Americans with Disabilities Act of 1990, 42 U.S.C sec. 12101 et seq.; McNamara v. The General Hospital Corporation, 33 MDLR 3 (2011) (loss of right eye constitutes impairment which substantially limits one or more major life activities; Burley v. Boston School Committee, 27 MDLR 289 (2005) (Diabetes and hypertension accompanied by atrial fibrillation constitute disability). Based on the foregoing, I conclude that Complainant's asthma constitutes an impairment which substantially limits one or more major life activities and renders her handicapped.

Notwithstanding her asthmatic condition, Complainant claims to be a qualified

handicapped individual who could perform the essential functions of her job with a reasonable accommodation. For more than fifteen years following her diagnosis of asthma in 1991, Complainant worked in a variety of correction officer assignments without problem. These assigned posts all fell under the umbrella of Respondent's generic job description for correction officer. The description sets forth a number of job responsibilities which can be performed indoors. Respondent acknowledges that Complainant performed well in each of her assignments.

Complainant and her treating pulmonologist Dr. Kenney testified that up through her termination in 2007, she was capable of spending up to several hours each day outside under all conditions as long as her asthmatic condition was in a controlled state. Dr. Kenney expressed confidence in Complainant's ability to manage her asthma. He urged that Complainant's input be solicited regarding her medical needs because of her demonstrated ability to manage her condition. Dr. Kenney testified at the public hearing that as long as Complainant was assigned to a primarily-indoor post on very cold days or when other asthma triggers were present and as long as her asthmatic condition was in a controlled state, Complainant could remain outside for limited periods in order to perform tasks such as supervising inmate recreation.

Complainant, in turn, asserted that she was capable of responding to emergencies outside, even in January weather, and could function outside in temperatures of less than fifty degrees Fahrenheit as long as her exposure was not "prolonged." Complainant testified credibly that she would be able to control her asthma and perform all the

functions of a correction officer if assigned to a primarily-indoor post.[8] According to Complainant, only some of the areas where inmates reside at Billerica are air-conditioned, but all have fans. Complainant maintained that she could function effectively inside even without air-conditioning.

While some correction officer assignments involve a degree of outdoor activity, few require that officers spend the majority of their day outside. Most correction officer assignments are totally or primarily indoors. Such assignments, whether bid or utility, have been filled by many of the same officers for extended periods of time lasting months or years. Under these circumstances, the requirement of spending a majority of the day outside cannot be deemed an essential function of a correction officer position. Contrast Jones v. Walgreen Co., __ F. 3rd__ (No. 11-1917) (1st Cir. May 10, 2012) (employee not qualified to perform essential functions of store manager job where she could not carry out routine physical tasks associated with job such as climbing ladders or lifting heavy objects); Godfrey v. Globe Newspaper Company, Inc., 457 Mass. 113, 115, 121-122 (2010) (employee not qualified handicapped individual since he could not climb on presses which was an essential aspect of assistant pressman position); Cox v. New England Tel. & Tel., Co., 414 Mass. 375, 383 (1993) (employee not qualified handicapped individual since he could not climb telephone poles which was an essential, albeit rare, job function for an urban splice service technician).

No satisfactory reason was given for Respondent's decision to keep Complainant in the Trap I post during the winter months when her asthma was exacerbated by cold temperatures instead of re-assigning her to a post she could physically handle.

---

[8] Complainant was asked if she could function effectively if allowed to work "inside." Transcript IV at 116. Given the overall content of her testimony, I interpret her answer to mean a primarily, not exclusively, indoor post.

Respondent's intransigence flies in the face of the availability of indoor posts and the frequency of correction officer re-assignments. Based on the foregoing, I conclude that on January 23, 2007, Complainant was a qualified handicapped person capable of performing the essential functions of her job.

To state a case of discrimination based on a failure to accommodate, Complainant bears the initial burden of producing some evidence to prove that she was a qualified handicapped person capable of performing the essential functions of her job who requested a reasonable accommodation. See Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443 (2002); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000). Once an employee makes a facial showing that a reasonable accommodation is possible, the burden shifts to the employer to establish that the suggested accommodation would impose an undue hardship. See Godfrey, 457 Mass. at 120. The record establishes that Complainant fulfilled her initial burden by self-identifying as an individual with a chronic disability who was competently performing the essential functions of her correction officer position as of January 23, 2007 and who made repeated requests for an indoor or primarily-indoor assignment during the winter.

In determining whether Respondent fulfilled its obligation at stage two to reasonably accommodate Complainant's disability, its duty to participate in an interactive process must be evaluated. See MCAD Handicap Guidelines at 15-16, 20 MDLR Appendix (1998); Mammone v. President & Fellows of Harvard College, 446 Mass. 657, 670 n.25 (2006); Shedlock v. Department of Correction, 442 Mass. 844, 856 n. 8 (2004); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 644 (2004). The interactive process

requires the employer to engage in a direct, open, and meaningful communication with the employee. MCAD Handicap Guidelines at p. 24 (Part VII). It is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See MBTA v. MCAD, 450 Mass 327, 342 (2008); Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000).

Rather than engage in an "open" and "direct" communication with Complainant regarding the limitations of her disability and possible accommodations, Respondent insisted that she remain in the Trap I post, an assignment which involved four or more hours per shift of outdoor activity. This post was, in all likelihood, the only correction officer assignment that Complainant was physically incapable of performing. Deputy Superintendent Hopkinson testified that he did not have a particular reason for assigning Complainant to the Trap I post. Complainant repeatedly attempted to dialogue with him about changing her assignment on cold winter days but instead of engaging in meaningful communication with Complainant about these matters, he ignored her, refused to dialogue, and stonewalled her efforts to fashion a reasonable accommodation. Complainant's proposals may have been unsatisfactory to Respondent, but they deserved consideration as potential options capable of addressing her medical needs and the Department's employment issues.

Respondent argues that Complainant could not perform the essential functions of her job with or without an accommodation, and therefore the obligation to engage in an interactive process to accommodate her did not come into play. See Jones v. Walgreen Co., __ F. 3rd__ (No. 11-1917) (1st Cir. 2012). Such an argument ignores the factual

record which establishes that Complainant was capable of performing almost any correction officer assignment when her asthma was under control, including outdoor work for up to a full day and all emergency duties. See Smith v. Bell Atlantic, 63 Mass. App. Ct. 702 (2005) (individualized inquiry required for analysis of essential job functions and such analysis failed to establish that daily presence in office or travel were essential job functions). Respondent's attempt to equate a handful of primarily-outdoor assignments performed by a minority of correction officers during winter months with the essential functions of the correction officer position ignores the vast numbers of its staff who spend the majority of their workdays indoors.

This is not a situation in which Complainant sought to transfer a portion of her duties to others. Compare Tompson v. Department of Mental Health, 76 Mass. App. Ct 586 (2010) (plaintiff's request to limit her work day to four hours was an unreasonable attempt to reallocate her responsibilities to others where her position required that she supervise staff during their eight to ten hour shifts). Complainant's seventeen years of seniority would have allowed her to successfully compete for a variety of indoor bid assignments had she been informed by her supervisors that her transportation bid had lapsed. She would also have been an appropriate candidate for numerous utility posts and Superintendent-pick assignments with substantial indoor components. Under these circumstances, Complainant's requests for re-assignment merited consideration rather than unilateral rejection by Respondent. Contrast MBTA v. MCAD, 450 Mass. 327, 342 (2008) (no obligation to undertake interactive process if all conceivable accommodations would impose undue hardship); Gracia v. Northeastern University, 31 MDLR 1 (2008) (employer not required to participate in fruitless dialogue if clear that

requested accommodations could not be satisfied without undue hardship). Rather than grant Complainant such consideration, Respondent ignored its obligation to work with her to determine if an accommodation were possible, rejected her attempts to initiate a dialogue, and peremptorily removed her from the workforce based on a letter from her physician.

Respondent asserts that Complainant's oral requests for accommodation were inadequate because they failed to comply with Respondent's Equal Opportunity/Affirmative Action Policy which specifies that such requests be in writing and be supported by extensive analysis.[9] These unduly technical and burdensome requirements have the effect, if not the purpose, of discouraging such submissions. It is likely that Complainant refrained from submitting a written request with the required analysis prior to January 23, 2007 in order to avoid alienating her supervisors. In contrast to the onerous terms of Respondent's policy, the MCAD Handicap Discrimination Guidelines do not require extensively-drafted, written accommodation requests but only that employees self-identify as a qualified handicapped person who needs a reasonable accommodation. Handicap Guidelines at VII. Based on the MCAD Guidelines, Complainant's five to six oral requests to then-Captain Hopkinson for an accommodation in the fall of 2006 and her oral request for a temporary indoor position on January 22, 2007 all qualify as appropriate and sufficient communications to place

[9] Subsections 203.05(3)(c) and (d) set forth procedures for reasonable accommodations, including the requirement that a reasonable accommodation request be in writing to the appropriate Superintendent or Assistant Superintendent and include an analysis of the job description and functions to determine essential tasks, how the disability limits job functions, how the limitations might be overcome, what possible accommodations might assist in the performance of essential job functions, the most appropriate accommodation, and what are the employee's preferences. If no accommodation is found to be possible because of undue hardship, the request is to be brought to the attention of the Special Sheriff. Joint Exhibit 9C.

Respondent on notice of Complainant's need for an accommodation. In any event, Complainant did present a written and documented accommodation request on January 23, 2007 when she submitted Dr. Kenney's medical note.

Complainant's requests for an indoor assignment triggered Respondent's duty to engage in an interactive process which the Department ignored. See Russell v. Cooley Dickinson Hosp., 437 Mass. 443, 457 (2002) (after employee requests accommodation, employer must participate in interactive process). Dr. Kenney's note, which stated that Complainant's asthma if uncontrolled could cause a life-threatening situation, was undoubtedly extreme, but the evidence indicates that it was an attempt to gain the attention of her supervisors, not to lay down an ultimatum about her demands. Complainant attempted to page Dr. Kenney in order for him to speak with her supervisors on January 24, 2007, but she was told by Captain Hopkinson that the decision to remove her had already been made. Thus, rather than generate an interactive dialogue, Dr. Kenney's note resulted in Respondent unilaterally removing Complainant from her post. I conclude that by taking such preemptive action, Respondent violated Chapter 151B. Contrast Fiumara v. Harvard University, 526 F. Supp.2d 150 (D. Mass. 2007) *aff'd* USCA 1st Cir., No. 08-1129 (May1, 2009) (Respondent did not violate requirements for an interactive process where employee repeatedly failed to attend a physical examination arranged by the employer).

Apart from the refusal to engage with Complainant in an interactive dialogue, Respondent's decision denying Complainant a reasonable accommodation also violated Chapter 151B. A reasonable accommodation is defined as "any adjustment or modification to a job that makes it possible for a handicapped individual to perform the

essential functions of the position and to enjoy equal terms, conditions and benefits of employment." MCAD Handicap Guidelines, section 11(C); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648, n.19 (2004). While an employer need not grant an accommodation if it would impose an undue hardship in terms of difficulty or expense, it is the employer who bears the burden of persuasion on whether a proposed accommodation would impose an undue hardship. See Mazeikus, 22 MDLR at 68.

As Respondent emphasizes, the mandatory transfer of a disabled employee from one position to a different one, the abridging of contractual rights of other workers, and/or the elimination of an essential job function do not constitute reasonable accommodations. See Fiumara v. Harvard University, 526 F. Supp.2d 150 (D. Mass. 2007) *aff'd* USCA 1st Cir., No. 08-1129 (May1, 2009) (no discrimination where employee denied a transfer to position with different licensure requirements or to a position sought by a union member who was the senior qualified bidder for the job); Godfrey v. Globe Newspaper Company, Inc., 457 Mass. at 124 (employer not required to transfer a disabled press foreman to a light-duty position with no climbing requirement because elimination of an essential duty and transfer to an unrelated position are not reasonable accommodations). In this case, however, no such mandatory transfer or elimination of job function was requested. Complainant sought protection only from a small subset of correction officer assignments which would require prolonged exposure to outdoor elements during the cold winter months. Such an accommodation would not have set Complainant apart from numerous other correction officers occupying indoor bid or utility assignments on an indefinite basis. Complainant herself had previously occupied several indoor posts for years on end.

Aside from the intransigence of Respondent, there appears to be no reason why Complainant's supervisors could not have re-assigned her indoors in January of 2007 since correction officers at the Middlesex Sheriff's Department are re-assigned from one post to another for reasons as mundane as personality conflicts, coaching activities, a second job, marital problems, and child care. Deputy Hopkinson testified that he did not have a particular reason for assigning Complainant to Trap I or for keeping her there in the fall of 2006 other than that she was doing a good job and he felt there was no reason to move her. He claimed that he did not take officers' preferences into consideration and never moved officers for health-related reasons, but the more credible testimony of Respondent's other managers establishes that requests for re-assignments are routinely granted.

Complainant sought to avoid prolonged exposure outside, not incidental outdoor tasks, as evidenced by her testimony that she had no problem performing transportation duties on days that were below freezing. She also asserted that if she were well enough to come to work, she could handle outdoor emergency situations if the need arose. Complainant's ability to handle outdoor conditions for limited periods even in cold weather, the varied nature of correction officer assignments, and the constant movement of correction officers in and out of different assignments distinguish this situation from that involving individual positions such as a store manager where reducing, reassigning, or reallocating significant tasks to another job would impact essential functions and thereby constitute an unreasonable accommodation. See Jones v. Walgreen Co., __ F 3rd __ (No. 11-1917) (1st Cir. 2012).

Whether a particular duty is an essential job function is an "intensely fact-based"

inquiry. Godfrey v. Globe Newspaper Company, Inc., 457 Mass. at 121 *citing* Cargill v. Harvard University, 60 Mass. App. Ct., 585 at 587-588 (2004); Smith v. Bell Atlantic, 63 Mass. App. Ct. 702 (2005) *citing* Cox v. New England Tel. & Tel. Co, 414 Mass. 375, 383 (1993). The opinion of the Sheriff's Office as to what constitutes an essential job function is neither credible nor controlling in this case, given the persuasive evidence to the contrary. See Smith at Bell Atlantic, 63 Mass. App. Ct at 712; Labonte v. Hutchins & Wheeler, 424 Mass. 813, 822 (1997). The persuasive evidence in this case establishes that the Sheriff's Office has a variety of primarily-indoor posts which Complainant could have performed successfully. Respondent's unduly strict standard for responding to accommodation requests is evidenced by its having a "no restriction ideology" and by the testimony of former Human Resource Director O'Donnell that he could not cite a single example of a workplace accommodation having been granted.

It may have been the case, as Respondent asserts, that no primarily-indoor correction officer assignment was available on January 23, 2007. Even so, it is reasonable to assume that such an assignment would have become available shortly thereafter through attrition in bid assignments, the availability of a "Superintendent-pick" position, or the exercise of discretion by Superintendent Gabriella. There was no showing that any of these mechanisms violated the parties' collective bargaining agreement.

Respondent points out that in 2007, the same year in which Complainant claims she was capable of working as a correction officer, she communicated to the State Board of Retirement that she was no longer contesting her disability retirement. Complainant successfully reconciled these seemingly contradictory positions at public hearing by claiming that while she was incapable of functioning as a correction officer without the

accommodation she sought, she could function as a correction officer if accommodated. To the extent that Dr. Kenney wrote a series of medical reports in support of disability retirement which focus on Complainant's incapacities, I interpret these reports as also premised on Respondent's unwillingness to grant an accommodation.

It is not axiomatic that an individual who seeks disability benefits is estopped from claiming disability discrimination. See Russell v. Cooley Dickinson Hosp., 437 Mass. 443, 452 (2002); Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997) (no estoppel where law firm administrator with multiple sclerosis sought disability benefits after being terminated from the law firm); D'Aprile v. Fleet Servs. Corp., 92 F.3d 1 (1st Cir. 1996) (no estoppel where senior systems analyst with multiple sclerosis applied for disability benefits after she requested flexible, part-time schedule, her requested accommodation was denied, and she was terminated). The receipt of disability benefits does not preclude Complainant from raising the issue of handicap discrimination because the purpose and standards of the applicable laws are different. See Cleveland v. Policy Management Systems Corporation, 526 U.S. 795, 798 (1999) (applying for and receiving disability benefits does not automatically prevent the recipient from proving a claim of disability discrimination under the ADA); Russell v. Cooly Dickinson Hospital, 437 Mass 443 (2002) (pursuit and receipt of disability benefits based on assertion of total disability does not automatically estop plaintiff from pursuing an action for employment discrimination). In sum, case law permits applications for disability income to stand alongside seemingly contradictory claims regarding employment discrimination where the matters can be reconciled through the provision of reasonable accommodations.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. 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).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); 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).

Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if she "has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, s.5]." The request for a reasonable accommodation, without more, has been held to constitute protected activity. See Wright v. CompUSA, Inc., 352 F.3d 472 (1st Cir. 2003).

Credible evidence establishes that in the fall of 2006, Complainant began to express concern about the impact of her continued outdoor assignment on her asthma and made numerous oral requests for re-assignment.[10] Those oral requests were followed by the submission of Dr. Kenney's January 23, 2007 note which stated that Complainant had moderate to severe asthma and that working outside could adversely affect her condition. Within one day of submitting Dr. Kenney's note, Complainant was subjected to an adverse employment action in the form of being sent home on involuntary sick leave and thereafter being placed on involuntary disability retirement. These circumstances, commencing in the fall of 2006, satisfy the elements of a prima facie case of retaliation

In addition to the aforementioned sequence of events, Complainant again engaged in protected activity when she sent the Middlesex Sheriff's office an MCAD charge of discrimination dated March 6, 2007. Little more than a week later, the Sheriff's Human Resource Director Kevin O'Donnell signed a notice of intention to file an application for involuntary disability retirement on behalf of Complainant. O'Donnell claimed not to have been aware of the MCAD complaint at the time he initiated Complainant's disability retirement application, but his claim is not credible. Consequently, this sequence of events also satisfies the elements of a prima facie case of retaliation.

Having made out a prima facie case of retaliation, the burden shifts to Respondent to articulate a legitimate reason for its employment decision. See Wright, 352 F.2d at 478; Jones v. Walgreen Co., __ F. 3rd __ No. 11-1917 (1st Cir. 2012). Respondent argues that the adverse action of filing for involuntary disability retirement was mandated by legitimate concerns that Complainant could not perform the essential functions of a

[10] Prior to her late-2006 requests for an indoor assignment, Complainant expressed disappointment about the Sheriff terminating her brother and requested a return to her transportation post, but those matters do not constitute protected activity because there is no evidence that they were related to her disability.

correction officer and would endanger herself and her fellow employees were she to attempt to do so. Respondent's proffered reasons propel the analysis to stage three where the Complainant once again has the burden to show that Respondent's reasons are a pretext. See Wright, 352 F.2d at 478 *quoting* Mesnick v. General Electric Co., 950 F.2d 816, 827 (1st Cir. 1991) (if the employer successfully meets the stage two burden, the burden shifts back to Complainant to show that the so-called legitimate reason is a pretext and that the adverse employment action was, in fact, retaliatory). As addressed in Part III A, supra, Respondent's reasons are not convincing. Rather than stemming from legitimate, job-related concerns, Respondent's actions were motivated by retaliatory animus in violation of Chapter 151B.

IV. REMEDIES AND DAMAGES

A. Affirmative Relief

Pursuant to G.L.c.151B, sec. 5, the Commission has the authority to issue orders for affirmative relief, including reinstatement. I conclude that the findings of fact set forth in this decision merit such action. Accordingly, Complainant is entitled to reinstatement to her former correction officer position if she chooses to return and if she satisfies lawful eligibility criteria. If Complainant accepts and qualifies for such reinstatement, she is entitled to lost seniority status for employment and superannuation retirement purposes from 2007 until to such time as she recommences employment.

B. Back Pay, Front Pay, and Incidental Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct

result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). The period between Complainant's removal from active duty on January 24, 2007 and the commencement of the public hearing on December 6, 2011 must be examined in regard to a claim for back pay damages. See Stephen v. SPS New England, Inc., 27 MDLR 249, 250 (2005) (lost back pay runs to the date of the public hearing); Williams v. New Bedford Free Public Library, 24 MDLR 171, 172 (2002) (same).

Between January and September of 2007, Complainant was forced to use accumulated sick, personal, and vacation benefits as well as receive assistance from the employee Extended Illness Leave Bank in order to maintain an income stream after she was separated from her job. Complainant is entitled to reimbursement for the sick, personal, and vacation benefits she previously earned and was forced to exhaust. She is also entitled to reimbursement for the following losses sustained in 2007: a) base pay in the amount of $14,173.78 for the months of September through December 7, 2007 (the period after which Extended Illness Leave Bank benefits ended and before disability retirement benefits began)[11]; b) $4,040.00 in lost annual training and educational incentives; c) the denial of overtime opportunities equivalent to those earned the previous year; and d) out-of-pocket costs for health insurance between September 2007 and March of 2008.

As far as mitigation is concerned, Complainant testified that she worked briefly as a substitute teacher in 2007 and in her parents' restaurant business. It is Respondent's burden to establish that Complainant failed to mitigate her damages by producing

[11] In February of 2008, Complainant received a lump sum disability retirement allotment retroactive to December of 2007.

contrary evidence. See Duso v. Roadway Express, Inc., 32 MDLR 131 (2010) *citing* Anderson v. United Parcel Service, 32 MDLR 45 (2010). There is no such evidence in the record. Accordingly, I decline to reduce the losses sustained in 2007 by Complainant.

In regard to post-2007 losses, Complainant's base salary would have been $56,685.10 in 2008; $56,685.10 in 2009; and $57,262.06 in 2010 had she been permitted to continue working at the Sheriff's Office. In addition, she would have received training and educational incentives totaling $4,040.00 annually and overtime opportunities approximately equal to 2006. Against such losses, Complainant earned $39,450.40 in 2008 derived from $16,623.88 during the second-half of 2008 from a teaching position at Lincoln Tech and approximately $22,826.52[12] in disability retirement income. In 2009 and 2010, Complainant's earnings from teaching plus disability retirement benefits exceeded by more than $5,000.00 what her base pay would have been had she remained at the Sheriff's Office and as a result, PERAC billed Complainant for refunds of $9,198.12 and $11,991.74 for those years. The refunds had the effect of capping Complainant's income at a level of $5,000.00 above what her base salary at the Sheriff's Office would have been. Had Complainant been permitted to work as a corrections officer in 2009 through 2011, however, she would have earned a base salary for each year, plus $4,040.00 in training and educational incentives, and overtime pay.

As back wage damages, Complainant is entitled to an amount equal to the difference between: 1) what she would have earned at the Sheriff's Office during 2008-2011 (including base salary, training and educational incentives, and overtime pay) and 2) her actual income during those years (including wages from working elsewhere and her

[12] The disability retirement income cited above is taken from Complainant's Exhibit 5 which states that it was the retirement allowance Complainant received in 2009. A 2008 figure does not appear in the record.

disability retirement income). To the extent that a cap was imposed on Complainant's earnings which resulted in payment to the Commonwealth, she is entitled to reimbursement of those amounts. Because of Complainant's relatively young age, her demonstrated ability to increase her income, and the option offered, *supra,* to return to employment at the Sheriff's Office, I decline to award front pay.

C. Emotional Distress Damages

An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004).

Complainant testified sincerely and credibly that the loss of her job made her feel worthless. She testified that she loved working for the Sheriff's Office and had educated herself to move into more responsibility there. Complainant said that she had a lot of friends at the Sheriff's Office but those relationships "fell away" after she was removed from employment. Following her involuntary retirement, Complainant stopped going to social events involving her former colleagues. Notwithstanding feelings of profound sadness, Complainant did not seek counseling because she didn't want such assistance to be "used against [her]" in the criminal justice community.

Complainant's sister, Susan Sullivan, described Complainant's separation from the Sheriff's Office as "devastating." Susan Sullivan testified that her sister had socialized with people at work on a very regular basis prior to her separation from employment, that her sister considered them to be part of her extended family, that work was a "huge" part

of her sister's life, and that after her involuntary retirement, Complainant felt betrayed because co-workers didn't speak to her anymore. According to Susan Sullivan, Complainant appeared to be depressed and overwhelmed about the changes in her life for months after her separation from employment. Complainant's mother, Diane Sullivan, described her daughter as "destroyed" on the day she was sent home from work, very distraught, a nervous wreck, and disillusioned. Mrs. Sullivan testified that Complainant cried a lot and had so much trouble sleeping that she slept in her mother's bedroom on at least a dozen occasions. Mrs. Sullivan testified that the Complainant lost her fun-loving attitude after her separation from the Sheriff's Office and spent more time alone. According to Mrs. Sullivan her daughter was especially distraught for approximately six months and that she will "never be who she was."

After weighing all the factors contributing to Complainant's emotional distress, I conclude that Complainant is entitled to $75,000.00 in emotional distress caused damages by Respondent's failure to accommodate her disability and by its retaliatory actions.

V. ORDER

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

(1) Cease and desist from all acts of handicap discrimination and retaliation;

(2) Pay a civil penalty in the amount of $10,000.00 for the knowing, willful, and egregious discriminatory actions adjudicated to have been committed;

(3) Reinstate Complainant to the position of correction officer if she chooses reinstatement and satisfies lawful and relevant eligibility criteria. If

Complainant chooses and qualifies for reinstatement, she is entitled to lost seniority for job and superannuation retirement purposes retroactive to January of 2007;

(4) Reimburse Complainant for back pay losses sustained in 2007 for: a) the sick personal, and vacation benefits she was forced to exhaust in that year, b) $14,173.78 in lost base pay for the months of September through December 7, 2007; c) lost training and educational incentives in 2007 totaling $4,040.00; d) and lost overtime opportunities equivalent to the amount of overtime she earned in 2006;

(5) Reimburse Complainant for back pay damages in the form of out-of-pocket costs for health insurance between September 2007 and March of 2008;

(6) Reimburse Complainant for back pay damages in 2008, in the amount of $56,685.10 in base salary plus $4,040.00 in annual training and educational incentives, and lost overtime potential (based on 2006 overtime income) less Complainant's actual 2008 income of $39,450.40;

(7) Determine the excess, if any, between what Complainant would have earned at the Sheriff's Office in 2009 to 2011 including base pay, training and educational incentives, and overtime potential (based on 2006 overtime income) and what she actually received from her teaching and disability retirement income during those years, without regard to caps of $9,198.12 and $11,991.74 in 2009 and 2010, respectively, imposed by PERAC as a result of Complainant's earnings, exceeding by more than $5,000.00, what

her base pay would have been at the Sheriff's office. Complainant is entitled to back pay damages in the amount of such excess, if any.

(8) Pay Complainant, within sixty (60) days of receipt of this decision, the sum of $75,000.00 in emotional distress damages.

[Complainant shall receive all of the sums outlined above in sub-parts V (4-8) within sixty (60) days of receipt of this decision plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.]

(9) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Middlesex Sheriff's Department supervisors and managers who exercise decision-making authority in regard to handicap discrimination and accommodation determinations. Such training shall focus on all aspects of handicap discrimination. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date, and location. The Commission has the right to send a representative to observe the training session. Following the training session, Respondent shall send to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any supervisors and administrators who fail to attend the original training

and for new supervisors and administrators who are hired or promoted after the date of the initial training session. The repeat training session shall be conducted within one year of the first session. Following the second training session, Respondent shall send to the Commission, the names of persons who attended the training.

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 of this decision 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 20th day of August, 2012.

Betty E. Waxman, Esq.,
Hearing Officer