

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CAROL CONNORS,

Complainant

DOCKET NO. 04-BEM-02607

vs.

LUTHER AND LUTHER ENTERPRISES, INC.,

Respondent

Appearances: Michael K. Kramer, succeeded by Helene Horn Figman, for Complainant
John E. Heraty, for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 1, 2004, Complainant, Carol Connors, filed a complaint against her former employer, Respondent, Luther and Luther Enterprises, Inc., alleging that Respondent discriminated against her on the basis of age and disability in violation of G. L. c. 151B. Specifically, Complainant alleged that she was treated differently and was harassed and ridiculed in the workplace on account of her disability and age, and that her employment was terminated for discriminatory reasons. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts to conciliate the matter were not successful. The case was certified for a hearing and the hearing was conducted on April 21-24, 2009, before the undersigned hearing officer. Both parties submitted post-hearing briefs. Having considered the entire record and the submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Carol Connors, is a disabled female who was 62 and 63 years of age at the time of the events relevant to this matter.

2. Complainant has a long history of medical impairment stemming from a paralysis of her right leg which resulted from a spinal anesthetic during childbirth some 45 years ago. She suffered subsequent injuries that required a right knee fusion. As a result, Complainant has a permanent limp, is unable to bend her right knee and is significantly impaired in the activities of walking and climbing stairs. She wears a brace that extends from her toe to her knee and drags her right leg. Complainant has extreme difficulty climbing stairs, walking on uneven pavement and getting herself up if she should fall. (Ex. C-1; testimony of Complainant) She finds it very difficult to walk on snow and ice and is frightened of falling because she cannot lift herself up if she falls. In addition to the disability affecting her lower extremities, Complainant suffered a rotator cuff injury to her right shoulder in January of 2000 which prevents her from lifting heavy items with her right arm and impacts her ability to lift her own body weight if she should fall. (Ex. C-2) She testified that she was not disabled from working and could perform the essential functions of her job, and the evidence suggests she performed her job capably.

3. Respondent, Luther and Luther, is an employer within the meaning of G.L. c. 151B §1 (5). In January of 2001, Respondent began operating an auto appraisal firm making recommendations of property damages to auto insurers. The company is owned by Paul Lashua, who is the sole corporate officer. Complainant knew Lashua from having worked previously with him at another auto insurance appraisal business in the

1990's. She testified about an incident that occurred during their previous employment where a new employee had asked her quite innocently if she was "a cripple," and Lashua had laughed at the question and proceeded to make fun of this employee by repeatedly asking Complainant the same question in a joking manner until she told him to stop. Lashua claimed that Complainant thought this was funny and called herself "the cripple," and that there was no insult intended. He admitted that he continued the practice even while Complainant worked for him, referring to her as "the cripple," when he called into the office and she answered the phone. He denied that Complainant ever asked him to stop. I do not believe that Complainant thought this was funny and I find that Lashua's behavior was insensitive and offensive and demonstrated a total disregard for Complainant's disability and her feelings.

4. Complainant came to work for Respondent in 2001 as a result of having contacted Respondent's office for a job reference. She spoke with Respondent's office manager Cindy Clark (now Cindy Igemi) who she also knew from the previous job. Both Clark and Lashua were familiar with Complainant's work, knew she was experienced in the field, and believed she would be an asset to Respondent's new company. Clark suggested that Complainant come to work for Respondent and discussed the matter with Lashua who agreed it was a good idea.

5. Complainant was hired by Respondent and began working on October 1, 2001 as the fourth office worker. Complainant's duties were secretarial and clerical and she scheduled assignments for appraisers who worked outside the office in various auto body garages, and made visits to customer's homes and workplaces. Lashua and Clark testified that Complainant performed her job well, was liked by co-workers, customers

and clients and provided expertise and familiarity with the industry that was a benefit to the Respondent's new business.

6. At the time Complainant was hired she was 61 years of age, and she was the sole member of the office staff over the age of 40. All other employees of the office were young women in their twenties, including the office manager, Clark who was 25. Clark's cousin, Melissa Sullivan who was 24 years old and Sullivan's sister, Alicia Herdman who was 23 years old, also worked in the office. Herdman's initial assignment was for three months only. She filled in for Sullivan when Sullivan took a maternity leave from December 2002 to February 2003. Cassandra Cuddy, a neighborhood friend of the sisters, also worked in the office and was 22 years old. Another short term employee was 24 years old.

7. Respondent had no office manual or written company policies with the exception of two written memoranda issued in 2003. The first was issued on July 30, 2003 advising employees that an audio visual security system would be in place 24 hours a day, seven days a week in order to ensure their safety. (Ex. C-3) The second was a policy concerning e-mail usage issued on October 16, 2003. (Ex. C-4)

8. When she began working for Respondent, Complainant was instructed by the office manager, Clark to report her hours on hand-written weekly time sheets. These sheets were generally issued on Thursdays and collected the following Wednesday. Clark testified that she would add up the hours on the time sheet and round off the reported time to the nearest half hour when she was doing the payroll.

9. Complainant initially reported her hours to the exact minute of her arrival and departure from work. She testified that sometime during the first year of her employment

in 2002, she was instructed by Clark to round off her arrival and departure times to the nearest half hour, and she began doing so, although there are time cards in evidence showing that she did not always adhere to this practice. This was reflected in a review of several time sheets offered into evidence for the year 2002. (Exs. R-8; C-5) Respondent denied that any such instruction was delivered by Clark and other office employees denied that they received this instruction. Clark reviewed the time cards weekly and Lashua occasionally reviewed them.

10. Complainant testified that the time-keeping practices were very lax and informal and that office staff frequently asked Clark as they completed their time sheets what time they had arrived at work on a given day. I credit her testimony. Prior to her termination Complainant was never issued any notice or warning, either written or verbal, that she was in violation of any office policy or practice. Throughout her employment at Respondent, there was no policy on wage and hours and there were no postings regarding employees' rights or the employer's obligations. Complainant often worked more than 40 hours per week and was not paid overtime. A review of her time cards from July of 2003 to February of 2004 indicates there were 20 weeks when Complainant worked somewhere between 41 and 42 hours and would have been owed in excess of \$700, but did not get paid for these hours. (Ex. C-5(A)). Clark told Complainant that the office did not pay overtime. Clark testified that she was unaware of an employer's obligation to post a wage and hour policy or to pay for overtime work until shortly before the hearing. She acknowledged at the hearing that Complainant should have been paid for overtime she worked.

11. Some time after November of 2002, an employee who worked in Respondent's drive-in appraisal center was caught falsifying her time sheets and was terminated. After she was allowed to collect unemployment compensation, Respondent notified the staff verbally that stealing time from the company would not be tolerated and would result in immediate termination. Lashua gave this warning after the terminated employee was found eligible for unemployment compensation ostensibly for his failure to warn her that falsifying time records would be grounds for immediate dismissal.

12. In March of 2003, Melissa Sullivan returned from her maternity leave and her sister Alicia's temporary three month employment ended. Upon her hiring, Alicia Herdman had let it be known to both her cousin Clark and Lashua that she was interested in working on a full time basis at Luther and Luther. She repeated her desire to remain working for Respondent at the end of her three-month assignment.

13. From the start of Complainant's employment until the time of Sullivan's return, all office employees worked well together and they testified that they enjoyed each other's camaraderie. It was only after Herdman's departure in March of 2003 that Complainant began experiencing a change in attitude and behavior from Clark and the other employees in the office. Herdman returned to work for Respondent in July of 2003 after Lashua contacted her stating they had a heavy workload in the office and needed more help. Herdman testified that when she returned, the atmosphere was not as friendly as it had been when she initially worked there, that she still got along with all the younger women, and the only difference was difficulty between her and Complainant. She stated it was just a personal feeling; that she did not speak to Clark or anyone else about it, but it bothered her when Complainant was there.

14. Complainant described a number of incidents and certain behavior by the younger women in the office during this time period that left her feeling ostracized by the others and no longer a part of the group. She testified that Clark began to ridicule her and call her names, such as “old bag,” “gimpy,” and “old cripple,” and publically berated her for errors on documents, while simultaneously asking her privately to correct errors made by other employees whose performance went unaddressed. Complainant perceived that she was not included in office discussions and stated that the young women made jokes about her inhibitions toward participating in the sexual jokes or profanity that occurred regularly in the office. I credit her testimony that she was frequently ostracized by the young women in the office and made to feel very uncomfortable and unwanted.

15. After March of 2003, Complainant was subjected to numerous comments regarding her age. The office manager, Clark, told her that she was losing her skills and that it was time for her to retire and be “put out to pasture.” On one occasion when Clark became upset with an older appraiser during a telephone conversation, she referred to him afterwards in Complainant’s presence as a “fucking old geyser,” and then said to Complainant, words to the effect of “Why don’t the two of you old geysers get together and retire.” Complainant told Clark that she intended to work until she could pay off the thirty year mortgage on her recently purchased condominium. Complainant reported the offensive comments to Lashua on two occasions. In one response, she was told, “you know Cindy, she doesn’t like old people. She doesn’t even like her mother.” Complainant made note of this discussion wherein she wrote, “constantly referring to me being old.” (Ex. C-7) Clark and Lashua denied making these statements, but I do not credit their testimony.

16. Complainant was also ridiculed by the office staff on account of her disability. She was mimicked by the younger women who would walk by her dragging a leg behind, poking fun at the distinctive way she limped. The young office staff members testified that Complainant discussed her fear of falling and not being able to get herself up. Clark testified that whenever there was any mention of snow Complainant would get very nervous because she had a fear of falling on snow or ice and not being able to get up. Clark stated that she did not understand why Complainant would get so nervous, and said, "I couldn't understand that, I don't have a fused leg, but if I did, I figured I could get up out of the snow." I find that this comment demonstrates tremendous insensitivity to the limitations of Complainant's disability and her age.

17. Since there was no second means of egress from Respondent's second floor office, Complainant made a request to Clark for accommodations to allow her to escape the second floor office in the event of a fire blocking the only entrance to the facility. Clark failed to appreciate the sincerity and reasonableness of this request, responding that they would have to get a crane to lower Complainant out the window onto the rooftop of the adjacent building. At the hearing she attempted to demonstrate how Complainant could climb out a window in the center of the office to the neighboring roof, again demonstrating incredible insensitivity to Complainant's dilemma.

18. On another occasion when they were discussing Complainant's fear of falling and inability to lift herself up, Clark got down on the floor and proceeded to demonstrate to Complainant how she could get up from the floor in the event of a fall. Clark testified that she couldn't understand why Complainant was afraid of falling and why she couldn't lift herself up. Clark thought she'd be able to pick herself up if she had a fused knee and

she proceeded to show Complainant how to do it. The Complainant got down on the floor and tried to lift herself up as Clark had demonstrated, but she could not get up and had to crawl to a nearby desk and pull herself up while the others stood by watching her. She stated that she was tremendously embarrassed and humiliated by this incident, particularly because outside appraiser Ralph Harmon and Lashua were present in the office. I find that this incident was very humiliating to Complainant. She also testified that Lashua took a photo of her in the prone position calling her a “beached whale,” and posted copies of it in and around the office. There was a dispute about when this incident occurred and whether Lashua was present in the office. Respondent’s witnesses testified that it occurred in December of 2002 prior to Melissa Sullivan going on maternity leave and not in December of 2003. They also testified that no one took photographs of Complainant on that day, and none of Respondent’s witnesses recalled ever seeing any photos of Complainant posted anywhere in the office. I believe that Complainant is mistaken in her assertion that photographs taken on that day were posted in the office. The evidence suggests that the incident probably occurred in December of 2002 prior to Sullivan going on maternity leave, however this does not make it any less offensive or humiliating to Complainant. I find that Clark’s insistence that Complainant had the physical strength and ability to lift herself up, as a healthy and fit 24 year old could, demonstrates an utter lack of empathy for Complainant’s disability and fear of falling, and little appreciation of the limitations posed by her age and disability. Further evidence of Clark’s cavalier attitude and insensitivity is manifested in a handwritten note Complainant made at the time, where she noted that Clark stated she could not get up

because of her “big butt.” (Ex. C-7) It is apparent from this comment that Clark found the entire episode amusing.

19. Complainant testified that at some time during the time period of December 2003 to January, 2004, she discovered a sign posted on the bathroom wall opposite the toilet. It read: “Pair of snow boots, \$45.00; New Snow Shovel \$4.95; See Carol fall in the snow and not get up, Priceless.” The Complainant made a note of what this posting said and complained to Clark to have it removed. She testified that the other women laughed and told her not to take it down. According to Complainant she made at least two Complaints to Lashua about this posting but he failed to remove it. Respondent’s denied having any knowledge of this posting. I credit Complainant’s testimony that there was a note with this message posted in the washroom, but I do not believe that it was left up for months. I find that this was someone’s idea of a cruel joke.

20. Complainant testified that at some point in the autumn or winter of 2003 she received a gag gift from Lashua in the form of a cane with various items hanging from it , including a horn and a cup holder. She testified that he brought her this gift upon his return from a trip to Florida and she believed that Lashua was poking fun at her with this gift because of her age and disability. Complainant testified that he gave the cane to her in the presence of the other office staff, but Lashua denied making such a gift. Respondent disputed Complainant’s timing stating that Lashua was not in Florida in December of 2003, but rather in February of 2004. Regardless of when this occurred, I credit Complainant’s testimony that Lashua gave her a cane.

21. Complainant alleged that there was frequent sexual banter in the office in which she did not participate. She relayed one incident where she was on the telephone

with a customer while the boyfriend of one the office staff was repeatedly shouting “blow me, blow me” over a Nextel phone, interfering with Complainant’s discussion with the customer. When Complainant asked the others to quiet down, Clark responded with the obscene remark: “Tell him to go f... himself.” Clark denied making this comment but I do not credit her denial. She admitted that she did at times use profanity in the office. Complaint testified that Clark also asked her if she ever used sex toys. On another occasion, Clark was discussing the aging of female body parts and asked Complainant in front of the others if her private parts sagged to her knees. Complainant also testified that, on at least two occasions, she was asked to view Clark’s and Lashua’s workstation computers, only to be confronted with graphic depictions of pornography which included images of bondage and sexual acts. It is clear that this behavior was calculated to shock and embarrass Complainant and to make her feel uncomfortable. Complainant testified that these incidents embarrassed and disgusted her. By their conduct, Clark and others, including Lashua, demonstrated deliberate disregard for Complainant’s sensibilities and made her feel alienated and unwelcome in the work environment. I find that this behavior was unusually cruel and insensitive.

22. Complainant testified that the other women in the office frequently left the office at lunchtime to pick up food for themselves or others. Clark testified that this could take up to one-half hour and employees were not docked for this time. On other occasions the young women in the office went out for lunch and could be gone for up to an hour. In contrast, Complainant brought her lunch to work, ate at her desk and did not leave the office at lunch time. Office clerks were also allowed to take cigarette breaks which Complainant never did because she was not a smoker. No other breaks were

allowed. It was apparent from the testimony of various office staff that no one monitored time spent on lunch and cigarette breaks, nor was anyone docked for this time.

23. Complainant testified that all the office employees routinely made and received personal phone calls during work hours from spouses, children or boyfriends, and discussed insignificant matters without any limitation or criticism. In contrast, Complainant's daughter Carolyn Aboud's phone calls to the office were routinely treated with disdain. Aboud called Complainant daily to check on her mother and generally received an unfriendly reception from Clark who treated her in a rude and impatient manner. Aboud testified that Clark was "just rude," and would leave her hanging on the phone, saying, "it's her again." If Complainant was away from her desk when Aboud called, Clark would comment on how long it took Complainant to retrieve the call because of her limp. Aboud had a serious auto immune disorder and she relied heavily on Complainant to help care for her two children while she attended medical appointments. Aboud testified that Clark gave her mother grief if she had to take time off to help her with child care or to visit her in the hospital.

24. Complainant testified that when workstation dividers were installed in the office to give each worker more privacy, her desk was the only one turned to face a wall so that she would have no eye contact with the rest of the office. She pleaded with Clark to change the position of her desk and a compromise was reached. She was the only employee who had to get out of her chair and walk around her desk area in order to communicate with the other employees.

25. Complainant testified on days that she called in sick, she would receive phone calls at home from Clark and Lashua asking her if she was really sick or had gone

to Foxwoods, a casino. She never heard them make such calls to the homes of other employees who called in sick. Ultimately other employees kept hand written and video time records monitoring Complainant entering the office building from January of 2004 through February of 2004. This was done without Complainant's knowledge and no other employees were subject to such scrutiny of their time. Alicia Herdman, who testified that she had difficulty with Complainant and felt uncomfortable when Complainant was in the office, was assigned to monitor Complainant's arrival time and keep daily records on her.

26. Complainant testified that she believed that these unpleasant work place events and interactions were related to her age and disability and created a hostile work environment. Feeling alone and alienated, with no one to complain to, she became increasingly distraught. She recalled crying at work on one occasion when Clark denied her time off to accompany her daughter to a medical procedure. After Complainant cried in front of Melissa Sullivan, Sullivan encouraged Clark to relent. Complainant testified that she was unable to sleep at night and came to dread returning to work each day. She stated that she lashed out at her family as a result of the humiliation, stress and frustration she was experiencing at work, and ignored her daughter's advice to leave the job, because she feared losing her home if she did not continue to work.

27. Several of Respondent's witnesses testified that they observed Complainant in distress at work, but attributed this to concern over her daughter's medical issues. Clark and Sullivan described themselves as compassionate and considerate of Complainant's daughter's needs during this time. Their testimony is sharp contrast to the

behavior described by Complainant and Aboud, and I do not believe their perception of their own behavior is accurate.

28. On December 31, 2003 Clark called into the office in the early morning to ask whether she should bring coffee and learned from Melissa Sullivan that Complainant had not yet arrived. Since the next day was New Year's Day and payroll had to be called in that day, Clark gathered the time sheets for the day and noted that Complainant had signed in at 8:30 am that day, a time she knew to be incorrect. Clark then spoke privately to Sullivan who told her Complainant had not arrived until 9:00 am on that day, just prior to Clark arriving with the coffee. Clark testified that she knew this was a hot button issue for Lashua and that he would be furious about it. Based on this one incident, and without questioning Complainant, Clark went to Lashua to inform him of her suspicions that Complainant was falsifying her time cards, and they decided to start monitoring Complainant's arrival time. Despite testimony that neither Lashua nor his employees had any reason to doubt Complainant's honesty or trustworthiness, immediately upon hearing Clark's allegations, Lashua decided to terminate Complainant's employment. However, since Lashua's stated goal was to render Complainant ineligible to collect unemployment benefits, he and Clark believed they needed evidence to support Clark's allegation. Lashua had contested the unemployment claim of another employee, a young ex-substance abuser who he fired for falsifying time, and was furious when she won her claim for benefits. Neither Lashua nor Clark asked Complainant to explain the discrepancy in her time sheet, nor did they warn her to be more accurate with her reporting. Instead, they set out to obtain evidence to justify Complainant's termination.

29. Starting on January 21, 2004 and continuing through February of 2004, Clark assigned Alicia Herdman, who arrived in the office early, to note Complainant's arrival time and Clark proceeded to scrutinize Complainant's time cards. Herdman claimed not to know why she was monitoring Complainant's time and testified that she never asked Clark why. I do not credit this testimony and believe she was informed of the plan. Herdman was hostile as a witness and she clearly did not like Complainant. Clark and Lashua also set up a video surveillance in the mornings and sometimes Clark arrived early and sat in the parking lot across the street to note what time Complainant arrived. Clark testified that a pattern emerged wherein Complainant would note her arrival time as 8:30, even if she arrived later, on days when she arrived in the office before Clark. On the days when Clark preceded her to the office, Complainant would sign in at 9:00am.

30. Complainant testified that she used her personal wrist watch to keep her time records and rounded her hours off to the nearest half hour as Clark had instructed her to do. Respondent's records indicate that Complainant was arriving before her 9:00 am start time on most days and show a 14-35 minute difference between her time sheets and Respondent's observations. Complainant testified that she made it a practice to arrive at work early to avoid traffic and address any problems with walkways that might pose a hazard to her disability, particularly in the winter. There was testimony that she left work at 5:00pm sharp most days and worked through her ½ hour lunch hour while eating at her desk. Regardless of whether Complainant arrived at 8:30am or 9:00am she worked through her lunch hour and generally left at 5:00pm. (Exs. C-5; R-8) Even if she were marking her time cards a few minutes earlier than her actual arrival time, Complainant worked until 5:00 pm most days, and was paid only for the requisite 40 hour week.

Respondent had no uniform policy on time-keeping practices and no one ever communicated with Complainant regarding discrepancies on her time sheets or questioned her time records. As stated earlier, the evidence suggests that time-keeping practices at Respondent were quite lax and informal and office staff members frequently asked Clark what time they had arrived on a given day, as they were completing their time sheets for the week.

31. Clark presented Lashua with the evidence she had gathered to demonstrate that Complainant was falsifying her arrival times and she and Lashua watched the surveillance video tapes in his office. On February 25, 2004, at 4:45 pm Clark told Complainant that Lashua wanted to speak to her in his office. Lashua told Complainant that he was terminating her employment and that he was very disappointed and hurt, but could not tolerate someone stealing from him. Complainant testified that she was “dazed” and responded to Lashua, “I don’t know what you’re talking about. I’ve never stolen a thing from you.” According to Complainant, Lashua made the allegation that she was stealing and never asked her for any explanation. Complainant testified that Clark had never questioned her time sheets and had never asked her to explain any discrepancies. When confronted with the allegation of stealing, Complainant was so shocked and upset she could not compose herself and began to cry. She told Lashua she believed that this was all about age discrimination. Lashua testified that his relationship with Complainant pre-dated the office and he was closer to Complainant than the others. He testified that she was “like family,” to him. I find it difficult to credit this testimony given that Lashua made the decision to terminate Complainant immediately upon hearing from Clark that she was misstating her time, then set out to trap her, and never questioned

Complainant about her hours nor gave her an opportunity to explain any discrepancy in her time sheets.

32. Complainant testified that after Lashua informed her of her termination she returned to her desk to retrieve her personal belongings and was crying as she attempted to collect her things. She stated she was so upset, that she left behind her grandson's picture on her desk and then went and sat in her car and just cried and cried the whole way home. Complainant cried uncontrollably while testifying about the events of that day and she clearly continued to be tremendously upset about these events years later. She testified that the ongoing harassment at work and losing her job were very stressful to her, and she knew that, at her age, she would never find comparable work at a comparable level of pay. Complainant testified that as early as August of 2003, when the environment at work was becoming increasingly intolerable, she sought treatment from her doctor, who prescribed Ambien for sleep difficulties and Lorazepam for stress, both of which she continues to take upon her doctor's advice.

33. Complainant's daughter testified that her mother had a history of dealing well with adversity having endured several severe injuries, a permanent disability and divorce, and Aboud's own serious illness. She described watching her mother's emotional health deteriorate over the year or so prior to her termination and testified about Complainant's emotional reaction to the humiliation she endured at work. Aboud recalled her mother telling her about the humiliating incident on the floor when she could not get up and the others did not offer to help her. Aboud was so horrified by this that she wanted to come to the office to confront Clark, but Complainant begged her not to for fear of losing her job. Complainant also told Aboud about the degrading and humiliating sign in the ladies

room and that she was called to view pornographic images on other's computers. Aboud testified that at a family Thanksgiving dinner in 2003, Complainant "just broke down uncontrollably, for no apparent reason." While others in the family wondered what was wrong, Aboud knew from her daily conversations with her mother that her distress stemmed from the terrible experiences she was having at work. Aboud described another time during a dinner with Aboud and her boyfriend when Complainant just kept breaking down and crying. She stated that at a family Christmas party at her Aunt's house on the Cape that year, Complainant was a nervous wreck, high strung, and lost control of her emotions and broke down and cried uncontrollably. She testified: "It got to the point where every time we would see her and be around she couldn't hold it together. It would come out more when she was in the comfort of her family." I credit Aboud's testimony that she witnessed Complainant break down emotionally and knew that it was from the stress of harassment at work.

34. During the months following Complainant's termination her duties were performed by the other young women in the office until Respondent hired two additional office clerks who were both in their 20's sometime around September of 2004. Another young woman who was a friend of Sullivan's brother and also in her 20's was hired subsequently.

35. Complainant testified that but for her termination, she would have continued working until she paid off the mortgage on her residence. Had Complainant continued to work in accordance with her stated intention, she would have worked from February 26, 2004 at least up until April of 2009, the time of the hearing in this matter, when she was 67 years of age. Her claim for lost wages is for a period of 268 weeks or 5.13 years.

Complainant's gross pay from Respondent in 2003 was \$34,476. Her average weekly wage was \$663.00. After her termination, Complainant mitigated her damages as she received unemployment compensation in the amount of \$9,990.00 and earned income from work in the amount of \$4,903. Based on Complainant's weekly salary, the measure of damages for lost wages from February 26, 2004 until April 24, 2009 is \$162,791.00. [\$663.00 x 268 weeks - \$14,893.00] (Ex. C-9)

36. Complainant testified that she began working for \$16 per hour and received an increase of \$1 per hour to \$17 in 2003. Subsequent to her termination, the employee with the nearest seniority to her, Melissa Sullivan, received increases of \$1 for three years and \$0.75 for one year. It is likely that Complainant would have received the same raise for those for years had she remained working for Respondent. Her additional gross pay would have been \$2,080 in the first year, \$4,160 in the second, \$6,240 in the third, and \$7,800 in the fourth, for a total of \$20,280.00. Thus, her total anticipated wage loss from February of 2004 until April of 2009 would total \$183,071.00. Complainant testified that she did not plan to file for Social Security retirement benefits until she could maximize her payments at a later age. She receives approximately \$1600 per month in Social Security benefits, a lesser amount than she would have received if not for her forced retirement. She testified that she looked for other work in 2004 and 2005, but that it became physically exhausting for her to do so. She stated that she still continues to look for full time work.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B prohibits discrimination in employment on account of age and disability. This prohibition extends to discriminatory harassment in the workplace. Complainant alleges that she was the victim of disparate treatment and harassment in the workplace on account of her age and disability. She claims that she was repeatedly encouraged and pressured by Cindy Clark, the office manager, to retire, was subjected to a hostile work environment marked by persistent mocking and ridicule of her age and disability. Complainant alleges that her termination on February 25, 2004 was the last event in a continuing pattern of harassment and disparate treatment that was continuous from on or about March of 2003. For actions that occur 300 days prior to the filing of a complaint to be actionable, there must be at least one incident of discriminatory conduct within the statute of limitations period which substantially relates to, or arises out of, earlier discriminatory conduct and anchors the related incidents, thereby rendering the entirety of the claim timely. *See Cuddy v. Stop & Shop Supermarket Co.* 434 Mass. 521, 533 (2001). I conclude that that the pattern of conduct that Complainant alleges occurred over a period of time constitutes a continuing violation, and that the acts of alleged harassment are sufficiently connected to her termination to be considered as part of her charge.

Age Discrimination/Harassment

General Laws c. 151B affords employees the right to work in an environment free of discriminatory intimidation that creates a hostile work environment and interferes with one's ability to do her job. *College-Town Div. of Interco, Inc. v. MCAD*, 400 Mass. 156

(2001); *Scionti v. Eurest Dining Services*, 23 MDLR 234, 239 (2001); *Helmuth v. Harvard Vanguard medical Associates*, 27 MDLR 177 (2005). The protections of the statute with respect to a sexually hostile work environment have been extended to situations where harassment occurs to members of other protected classes. *See Beldo v. Univ. of Mass. Boston*, 20 MDLR 105 (1998); *Richards v. Bull H. N. Information Systems, Inc.*, 16 MDLR 1639 (1994).

In order to establish a claim of discriminatory harassment, Complainant must show that she worked in a hostile work environment that is linked to her protected class, in this case her age and disability, and that the conduct alleged was sufficiently severe and pervasive to interfere with a reasonable person's work performance. *Muzzy v. Cahillane Motors, Inc.* 434 Mass. 409 (2001). *See Cuddy v. Stop & Shop Supermarket Co.* 434 Mass. 521 (2001). A hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization [and that] poses a formidable barrier to the full participation of an individual in the workplace." *College-Town Div. of Interco, Inc. v. MCAD*, 400 Mass. at 162.

Complainant has established a claim of hostile work environment based on her age. Complainant was in her early 60s at the time of the events in question, and was substantially older than every member of office staff she worked with, all of whom were very young women primarily in their twenties. Complainant has established that she was doing her job quite capably and there were no complaints about her job performance.

Complainant testified that the owner of Respondent, Paul Lashua had a long-standing habit, dating back to a previous job where they worked together, of calling Complainant "the cripple or the "old cripple." On numerous occasions Clark referred to

Complainant as “old, or “old bag,” and she urged Complainant to retire at other times, stating that “old people get put out to pasture.” Clark referred to an elderly appraiser as “a fucking old geyser,” and suggested he and Complainant get together and retire. While some of these comments may have been made in a teasing manner, I conclude that they were offensive and unwelcome and created an atmosphere of intolerance that allowed other more insidious behavior to occur and be accepted. Lashua, who testified that he, himself, was disabled, due the effects of agent-orange exposure in Viet Nam, showed a surprising lack of sensitivity toward Complainant’s disability.

Clark and the other young women in the office had a family connection or were friends and they socialized outside the office. Complainant testified that they routinely discussed their sexual escapades, used embarrassing profanity and sometimes viewed pornography on the office computers. Complainant did not participate in these activities and was made to feel embarrassed and humiliated when these situations occurred. The evidence suggests that the young women in the office delighted in shocking or embarrassing her. Their comments and behavior demonstrate complete disregard for the sensibilities of a person of Complainant’s age and for the disabled.

Sometime after March of 2003, Complainant was subjected to an increasingly hostile work environment and to a pattern of discriminatory behavior by Clark and others that was related to her age. Complainant testified that after March of 2003, Clark repeatedly urged her to retire, made her feel uncomfortable and commented repeatedly on her age and disability. Complainant complained to Lashua about Clark’s behavior but he laughed it off, saying “Cindy doesn’t like old people.” This increasing hostile environment coincided with the end of Herdman’s temporary assignment and the

common knowledge that she wanted to remain working at Respondent. Herdman, who was eventually re-hired as an additional staff person in July of 2003, testified that upon her return, the atmosphere in the office was not as friendly as it had been in December 2002 through February of 2003. It was Herdman, who admittedly had a problem with Complainant, who was assigned to monitor Complainant's arrival time in January and February of 2004.

The credible evidence leads me to conclude that the young women in Respondent's office no longer wanted to work with Complainant and considered her old fashioned and prudish because she did not tolerate, or participate in, their puerile sexual behavior and banter. It is clear that they preferred to surround themselves with individuals who were more like them in age and outlook, and on some level, either conscious or unconscious, they conspired to oust Complainant from the workplace.

While Lashua denied any knowledge of a hostile work environment, I did not credit this testimony, and it is clear that he failed to comprehend, or just chose to ignore, the severity of the offensive behavior Complainant was subjected to, casting off the reports as harmless. An employer may be held liable when it is on constructive notice of unlawful conduct, or when it should have known of the conduct. *See e.g., Parent v. Spectro Coating Corp.*, 22 MDLR 221, 225-26 (2000).

Respondent is strictly liable for any unlawful harassment perpetrated by any manager or supervisor. *College-Town Div. of Interco. v. MCAD, supra.* at 166-67. An employer is liable for the actions of its managers and supervisors because they are conferred with substantial authority over subordinates and thus are considered agents of the employer. *See MCAD Guidelines on Sexual Harassment p.8*

While there is evidence that the young women in the office were not always unkind to Complainant, and that Complainant continued to attend company functions such as the Christmas party, it is more than evident that they were ignorant of, or chose to ignore the fact, that their offensive behavior ostracized Complainant and created an atmosphere that interfered with her full participation in the workplace. Complainant testified about how the behavior of her supervisor and coworkers humiliated and embarrassed her and caused her to cry at work and break down when she was with her family. She testified about how difficult it was to continue to work each day knowing that she was no longer welcome there and her peers noted the difference in her mood.

Given these circumstances and the fact that Respondent hired another clerk, who was 24 years of age to perform Complainant's functions, I find that Complainant was subjected to a hostile work environment and ultimately terminated for reasons related to her age.

Disability Discrimination/Harassment

General Laws c. 151B s. 4(16), makes it an unlawful practice to discriminate against a qualified handicapped person who is capable of performing the essential functions of the 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, a record of having such an impairment, or is regarded as having such an impairment.

G.L. c. 151, s. 1(17). *Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap- Chapter 151B, 20 MDLR Appendix at p. 2 (1998)*

In order to establish a claim of harassment based upon her disability Complainant must demonstrate that (1) she is a handicapped individual; (2) she was the target of speech or conduct based on her handicapped status; (3) the speech or conduct was sufficiently severe or pervasive as to alter the conditions of her employment and to create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to the Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action. *Kilroy v. MCAD*, 30 MDLR 69, 73 (2008), citing *Abrams v. Paddington's Place, et al*, 26 MDLR 149, 153-54 (2004), *Beldo v. UMass Boston*, 20 MDLR 105, 111 (1998).

The Complainant is clearly disabled within the meaning of c. 151B as she suffers from a long-standing impairment, a paralyzed right leg and inability to bend her right knee. She is significantly impaired in her ability to walk and climb stairs, has a pronounced limp and drags one leg. She wears a brace on her leg, uses a cane to assist her with walking and is unable to get up unaided should she fall. Complainant is an otherwise qualified handicapped individual within the meaning of the statute because she was able to perform well all the essential functions of her job with no accommodation. The only accommodation that she sought which she was granted was to leave work early during winter snow storms or to get assistance walking to her car because of her difficulty walking and fear of falling.

Complainant has established a prima facie case of harassment based upon her disability. She testified credibly that she was subjected to ridicule and humiliation on account of her impairment and her fear of falling on ice or having to walk in snow, the prolonged time it took her to walk up and down stairs and to get to the restroom and her

fear of not being able to escape the office in the event of fire. She alleged that Lashua routinely called her “the cripple,” to the extent that she began referring to herself in those terms when he asked. By his example of routinely calling Complainant “the cripple,” Lashua made it permissible to mock or ridicule a disabled person. As the company’s owner he set the tone for acceptable behavior in the workplace, and his actions tacitly permitted others to engage in insensitive and offensive behavior toward Complainant.

Complainant discussed how humiliated and embarrassed she felt when she was encouraged to drop to the floor and to emulate Clark’s demonstration on how to lift herself up in the event of a fall, and then could not get up. The fact that she even agreed to engage in this futile exercise is telling about the fragility of her emotional state at the time. When Complainant discussed the need for an emergency exit in case of fire, Clark mocked her stating that they would need a crane to lift Complainant out the window on to an adjacent roof. Clark’s cavalier explanation of how she explained to Complainant that she could climb out the side window and down to the roof top below was further evidence of Clark’s utter inability to comprehend the limitations of Complainant’s disability. Complainant testified credibility about the joke posted in the restroom stating: “See Carol fall on her ass in the snow and can’t get up, priceless,” and how much this hurt and humiliated her.

I find that there is sufficient evidence to conclude that Complainant was the victim of harassment in the workplace on account of her disability, as well as her age, and that Respondent knew, or should have known, that the atmosphere in the workplace was hostile. The evidence established that Lashua did not take prompt remedial action to investigate Complainant’s allegations about the humiliating poster regarding her

disability, the numerous references to her age and disability, or Clark's suggestions that she retire. His own actions only served to empower his subordinates and perpetuate the violations.

Discriminatory Termination

General Laws c. 151B ss. 4(1B) and 4(16) respectively make it unlawful for an employer to discharge an individual from employment on account of that individual's age or disability. Complainant has established a prima facie case of discriminatory termination. As a disabled person in her 60's Complainant is a member of two protected classes; she was performing her job well; and she was terminated under circumstances that give rise to an inference of discrimination.

Once Complainant has established a prima facie case, Respondent must articulate a legitimate, non-discriminatory reason for its action. *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 116,117 (2000). In this case, Respondent has asserted that Complainant's termination was for falsifying records of her arrival time and "stealing time" from the company. There was evidence that on days when the office manager arrived at work after Complainant, that she would mark her arrival time as 8:30am but on days when the office manager preceded her to the office, Complainant would mark her arrival time as 9:00 am. Complainant's explanation for this was that she was told to round off her arrival time to the nearest half-hour. Others in the office denied being given this instruction. Respondent has thus articulated a legitimate non-discriminatory reason for Complainant's termination.

If Respondent meets its burden of production, Complainant must demonstrate that the stated reasons are a pretext for unlawful discrimination, or that Respondent acted with

discriminatory intent, motive or state of mind. *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 504 (2001). I conclude that regardless of whether or not Complainant was told to round off her hours, the issue of her time is a red herring and is not the real reason for her termination. I conclude that the time issue was a pretext for a discriminatory termination based on Complainant's age and disability. One of the most probative means of establishing pretext is to demonstrate that Complainant was treated differently from similarly situated employees outside her protected class. *Matthews v. Ocean Spray Cranberry, Inc.* 426 Mass. 122, 129 (1997). Proof of pretext may also be shown by direct evidence of age animus. *Lipchitz, supra.* at 502. In this case Complainant was treated differently by Lashua and Clark and her time was scrutinized in a manner not applied to the other office employees. I am persuaded that Complainant's age and disability were the ultimate reasons for her termination based on the entirety of the evidence: the many ways she was ridiculed and mocked with respect to her age and disability; the manner in which she was ostracized for not being a part of the office clique comprised of young women, who were related or friends; and finally, the fact that time keeping practices were quite lax and informal. The evidence is clear that strict time keeping was not an issue for the office staff. The young women in the office went out to get lunch frequently taking sometimes up to half an hour and they sometimes ate lunch out. Those who smoked took cigarette breaks. Complainant ate lunch at her desk every day and did not smoke. She testified that she frequently worked more than 40 hours in a week but was paid only for forty hours. Complainant has presented credible evidence to persuade me that her time was not the real reason for her termination. I am persuaded that the young women in the office preferred not to work with an older disabled person

who did not share their views and interests and who found their conduct juvenile and offensive. I am convinced that Complainant's presence made them uncomfortable and unable to freely engage in inappropriate sexual banter and other offensive behavior. It is clear that they wished Complainant would retire because she did not fit in. Clark's increasingly hostile behavior, motivated by a desire to have Complainant retire, coincided with Herdman's departure and return to the office. After temporarily filling in for her sister, Herdman got her wish to obtain a full time job with Respondent.

Finally, I believe that what was a relatively minor time card issue was presented by Clark to Lashua as a serious infringement of office protocol, and I find it incredible that he chose not to discuss the issue with Complainant, nor to ask for any explanation. He immediately determined he would terminate her employment and set out to gather evidence to prevent her from collecting unemployment. He made this determination having known and worked with Complainant for many years, calling her "like family," and without good reason to question her honesty and integrity. The purported timekeeping violation occurred in the same period of time that Complainant was complaining to Lashua about a humiliating poster that poked fun at her disability and fear of falling on the ice, and simultaneous to her complaints about Clark repeatedly urging her to retire, and her being subject to comments and criticism regarding her age and the effects of aging on her body.

Given Lashua's own conduct toward Complainant and the fact that he was aware of the situation in the office, I conclude that Respondent is liable for the discriminatory conduct which he sanctioned. The hostile work environment to which Complainant was subjected, and the manner in which she was secretly investigated and summarily

terminated, all lead me to conclude that her termination was for discriminatory reasons related to her age and disability.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole, and to ensure compliance with the anti-discrimination statute. G.L.c. 151B s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). The Commission may award monetary damages for, among other things, lost compensation and benefits, lost future earnings, and emotional distress suffered as a direct and probable consequence of the unlawful discrimination. In addition the Commission may award non-monetary relief, issue cease and desist orders, order other affirmative relief, and assess civil penalties against a Respondent.

Back Pay

In this case, Complainant seeks an award of back pay from February 25, 2004, when she was unlawfully terminated, through the date of the public hearing. I believe that had Complainant not been terminated she would have continued to work up to the time of the hearing, a period of just over five years, in accordance with her stated intentions, as she was trying to pay off a mortgage on her residence. I conclude that based on her salary at the time of her termination and the fact that she could have reasonably anticipated yearly raises in accordance with what the other office staff received, she is entitled to lost wages in the amount of \$183,071.00. This amount also takes into account earnings and unemployment compensation she received in mitigation of her damages. (See Findings of Fact 35 & 36).

Emotional Distress Damages

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. I conclude that Complainant suffered great humiliation, embarrassment and emotional suffering as a result of the ridicule to which she was subjected. Her disability was mocked, she was the butt of office jokes about her age and disability, and she was treated with disdain and disregard by Clark and others in the office. She testified that she cried frequently in the office, felt worn down and fatigued by the harassment, and was deliberately ostracized and made to feel unwelcome and uncomfortable at work. Complainant cried frequently during the hearing when asked to describe the stress and humiliation she underwent. She testified that she had difficulty sleeping and suffered from anxiety resulting from the fear that she was no longer welcome at work and feared losing her job. She consulted her physician in August of 2003 complaining of stress and fatigue and was prescribed Ambien for sleeping and Lorazepam for stress and anxiety. She continued to take these medications at the time of the hearing. Complainant is obviously a strong woman who, having become partially paralyzed at an early age, suffered through a prolonged divorce, and raised a daughter with a serious and chronic illness, has endured and overcome much adversity in her life.

Complainant's daughter confirmed how rudely her mother was treated at work and testified as to the number of times her mother broke down emotionally at family events in 2003 and 2004. She testified that she witnessed her mother's emotional health deteriorate in the year or so prior to her termination. She recalled how humiliated her

mother was by the incident where she tried in vain to get up off the floor and by the sign mocking this incident.

Complainant was also greatly distressed at having been accused of dishonesty and stealing from Lashua. She felt that her loyalty and integrity were questioned without good reason and that her reputation was harmed. She testified credibly that when confronted by Lashua she was shocked and dismayed and told him she had no idea what he was talking about. She left his office crying and cried all the way home. It was not until after she filed her complaint that Complainant learned she had been spied upon and set up by the office manager and co-workers. Learning about the deliberate and secretive methods calculated to ensure her termination and to challenge her right to unemployment benefits caused her additional distress. Given Complainant's demeanor at the hearing it was apparent that she remains gravely upset by these events and continues to suffer from the harassment and false accusations she endured.

Given all of the above, I conclude that Complainant is entitled to an award of damages for emotional distress in the amount of \$200,000. Considering the severe and long-lasting emotional harm Complainant has suffered, I conclude that this award is consistent with awards for emotional distress in discrimination cases that have been affirmed by the courts. *See Kealy v. City of Lowell*, 21 MDLR 19 (1999) (\$200K for emotional distress); *Sabella v. City of Boston Schools*, 27 MDLR 90 (2005) (\$195K for emotional distress); *Dalrymple v. Town of Winthrop*, 50 Mass. App. Ct. 611, 620, 621 (2000) (\$200,000 for emotional distress); *Smith v. Bell Atlantic*, 63 Mass. App.Ct. 702, 723, 724 (2005) (\$207,000 for emotional distress).

V. ORDER

Consistent with the forgoing Findings of Fact and Conclusions of Law,

Respondent is hereby Ordered to:

1) Pay to Complainant, Carol Connors the sum of \$183,071.00 for lost wages with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.

2) Pay to Complainant, Carol Connors, the sum of \$200,000 in damages for emotional distress suffered as a direct and proximate result of Respondent's unlawful conduct, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court order and post-judgment interest begins to accrue.

3) Conduct annual training of its entire staff on issues related to age and disability discrimination annually for the next five years. The training shall focus on the prevention of age and disability harassment/discrimination in the workplace, shall be conducted by a trainer certified by the Commission, whose name and credentials shall be provided to the Commission in advance, along with a proposed training curriculum. The training sessions shall be no shorter than three hours in duration. Any new employees hired between annual trainings shall be provided with a copy of the training materials.

4) Cease and desist immediately from engaging in any further discriminatory practices relative to the age and disability of any employees in its workplace.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804CMR 1.23 by

filing a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 17th day of May, 2010,

Eugenia M. Guastaferr
Hearing Officer