

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ROBERT LAING
Complainants

v.

DOCKET NO. 10-BEM-00856

J.C. CANNISTRARO, LLC,
Respondent

Appearances: Maria Mancini Scott, Esq. for Complainant
Andrew P. Botti, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 5, 2010, Complainant, Robert Laing filed a complaint with this Commission charging his former employer, Respondent J.C. Cannistraro, with discrimination based on his disability, for terminating his employment when he declined to return to work as a plumber on light duty, after suffering a work related injury, because he had not yet received medical clearance. Respondent asserted that Complainant had clearance to return to work on light duty and subsequent to his refusal to do so, it terminated his employment. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified for hearing and a hearing was held before the undersigned hearing officer on January 13 and 14, 2015. The parties have filed post-

hearing briefs and after careful consideration of the record and the parties' submissions, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Robert Laing, attended vocational school to study plumbing from 1986-1989. He is a plumber who holds both Journeyman's and Master's plumbing licenses.

Complainant became a member of the Boston Plumber's Union, Local 12, in 2002 and has been a member of the union since then. (Tr. 22-25) His hourly rate and benefits were determined by the relevant Collective Bargaining Agreement. (Tr. 28)

2. Respondent, J.C. Cannistraro, LLC, is a large scale mechanical contractor with a principal place of business in Watertown, MA, and is an employer within the meaning of c. 151B s. 1 (5). Respondent employs more than 100 plumbers. In 2003, Complainant began working as a commercial plumber for Respondent, which is a union shop. (Tr. 26) From January 1, 2008 until his termination on June 12, 2009, Complainant worked exclusively for Respondent. During this time period, Neil Daly was the Outside Supervisor at Respondent and Denise Guillette was the Safety Officer. (Tr. 30-31) Daly testified that Complainant was a good worker and there were no complaints about his work. (Tr. 70-71) Complainant did not receive any verbal or written discipline during his tenure with Respondent.

3. Complainant's duties as a plumber regularly required him to lift pipe that weighed up to 100 pounds and to carry tools that weighed up to 30 pounds. He also had to bend, squat and twist his body on a regular basis. (Tr. 32-33)

4. In the fall of 2008, Complainant was working for Respondent on a job at the Museum of Fine Arts in Boston. (Tr. 35) Complainant reported to Respondent's foreman Joe Duffy at

the MFA worksite. (Tr. I, 35) Respondent was a sub-contractor on the job and the general contractor was a company named John Moriarty and Associates, Inc. Moriarty and its insurer, Liberty Mutual, were responsible for, and managed any worker's compensation claims that stemmed from workplace injuries at the MFA job site. (Tr. III, 9-10, 40)

5. On February 13, 2009, Complainant was working on a ladder at the MFA job site, removing a piece of cast iron pipe from the ceiling when the ladder slipped and Complainant lost his balance and fell backwards onto his rear end, causing injury to his back. Complainant had suffered an elbow injury in December of 2008, which he believed contributed to the accident. He had received treatment for his elbow injury a few weeks earlier but did not miss any work as a result thereof. When he fell, Complainant believed he twisted a muscle in his back, and taped up his abdomen with duct tape. (Tr. 43-52) He told the Supervisor Joe Duffy that he was alright, and filled out a First Report of Injury form. (Ex. 14, Tr. 52) On February 13, 2009, Complainant left work early, called his physician's office (Dr. Brigoli) and saw his physician's assistant, because Dr. Brigoli was on vacation. (Tr. 57-58; Ex. 3) Complainant felt sore over the long weekend, but despite the pain, he intended to report to work on Tuesday. (Tr. 57-60)

6. On the following Tuesday morning, Complainant reported to a new job site in Brighton, MA. Prior to the start of his shift, Respondent's Safety Officer, Denise Guillette approached Complainant and asked about his injury. She informed him that he could not commence work at the new job site until he saw his doctor and provided Respondent with a doctor's note clearing him to return to work. (Tr. 60-62) Guillette was not pleased that Complainant had not sought emergency medical treatment over the weekend and believed incorrectly that Complainant had not reported his injury on Friday in dereliction of company

policy and procedure. She later learned that Complainant had properly reported his injury. (Tr. III, 11, 29, 30)

7. Complainant left the jobsite and went directly to his Doctor's office. The physician's assistant contacted the doctor who was still on vacation. Dr. Brigoli indicated he would not allow Complainant to return to work until he underwent an MRI and Dr. Brigoli had examined him. Complainant provided this information to Guillette who advised him to commence a worker's compensation claim since he was unable to work. (Tr. 62-64)

8. Complainant remained out of work that week. It was the first time since working as a plumber that he had ever missed work due to a workplace injury. (Tr. 71) On February 24, 2009, Complainant saw his physician, Dr. Brigoli whose notes indicated, "still back pain and radiation to the legs and still limping...awaiting okay for MRI." (Ex. 3) Dr. Brigoli would not clear Complainant to return to work without an MRI. The worker's compensation carrier, Liberty Mutual, initially denied the request for an MRI, but it was ultimately approved and Complainant underwent an MRI on March 10, 2009. After reviewing the results, Dr. Brigoli referred Complainant to an orthopedic specialist and would not clear him to return to work until he had seen the specialist. (Tr. 65-66; 69)

9. On April 9, 2009, Complainant saw orthopedic surgeon, Dr. Brian Kwon at New England Baptist Hospital. (Tr. II, 6.) His chief complaint was "low back pain for 6 weeks." (Ex. 4) Complainant indicated that his pain was moderate at that time. (Id.) Complainant also reported on the intake form that pain prevented him from lifting heavy weights off the floor, from walking more than half a mile or more than 100 yards, and from sitting for more than half an hour. Complainant identified his work status as disabled. (Id.) Dr. Kwon's progress notes from the April 9 visit in part describe Complainant's pain as "an aching, stabbing quality

throughout his low back radiate somewhat into his buttocks...some numbness and tingling in the left lateral ankle...sitting for prolonged period of time hurts and bending exacerbates pain. The notes also indicate Complainant had pain at night and was on bed rest and taking some medications. (Ex. 4) Dr. Kwon advised Complainant that he was not a candidate for surgery and likely was arthritic from years of strenuous activity. Dr. Kwon also advised Complainant that he had two potentially bulging discs that might be causing some pain and that his pain would likely resolve within 90 days. (Tr. 195) Dr. Kwon prescribed six to eight weeks of physical therapy for Complainant to strengthen his core. He advised Complainant to schedule a follow-up appointment in six weeks, at which time he would reevaluate Complainant's physical condition. (Tr. II, 15; Ex. 4) Dr. Kwon did not clear Complainant to return to work on April 9, 2009, nor did he give him a target date for returning to work.

10. In response to a request from Liberty Mutual, the worker's compensation insurance carrier, Dr. Kwon filled out a form dated April 13, 2009, in which he indicated a target date of June 1, 2009, for Complainant to return to work Full Duty. Dr. Kwon also indicated a target date of May 15, 2009 for Complainant to return to work in a light duty capacity. This was not communicated to Complainant. Dr. Kwon testified at the public hearing that these dates were merely estimates of when Complainant might return to work and that he had no discussion with the insurance carrier's agent and had no information regarding what tasks light duty might involve. (Tr. II, 15, 20-21) Dr. Kwon faxed the form to Liberty Mutual on April 24, 2009. (Ex. 4) Liberty Mutual faxed the form to Respondent that same day. (Tr. III, 56-57) Complainant was unaware of the Liberty Mutual form and that Dr. Kwon had communicated any target dates for him to return to work. He did not learn of its existence until after his termination from Respondent and not until after he had filed the instant complaint. (Tr. 79-80)

11. After some delay, Liberty Mutual approved Dr. Kwon's prescription for Complainant to receive physical therapy for his back. As a result, Complainant did not begin physical therapy treatments until May 4, 2009, nearly one month after his initial appointment with Dr. Kwon. (Tr. II, 22) At the time Dr. Kwon submitted his target dates to Liberty Mutual he was unaware of the delays in securing therapy that Complainant would encounter. Complainant did not see Dr. Kwon for reassessment of his condition until May 27, 2009.

12. On May 5, 2009, at the behest of Liberty Mutual, complainant submitted to an Independent Medical Exam (IME) by Dr. James McGlowan. (Ex. 5) As to Complainant's "Work Capacity," Dr. McGlowan wrote that Complainant was unable to return to his former duties at that time and should continue with therapy for a period of 6-8 weeks, after which he should return to modified duty with no squatting, lifting or bending, and have a 10-15 pound lifting restriction. Thereafter he could advance to full duty as tolerated over a 6 to 8 week period. (Ex. 5) Based on this report, Complainant might have been able to return to work in a light duty capacity at the end of June or early July 2009.

13. On May 13, 2009, a week or so after the IME examiner reported Complainant was not able to return to work, and before Complainant could complete physical therapy, Jennifer Richards, the Liberty Mutual claims manager, left Complainant a voice mail indicating that his worker's compensation benefits were ceasing and that he was to contact his employer about returning to work on May 15, 2009. (Tr. 84-85) Complainant testified that he was stunned by this turn of events. According to Respondent's Safety Officer Guillette, Richards ordered Complainant back to work without any information about his medical restrictions and it was Richard's responsibility to determine what Complainant's restrictions were, in consultation with his physician. (Tr. III, 43-46) Guillette testified that Richards was calling the shots in this case

and that Richard's primary concern was getting Complainant back to work. Guillette's testimony implied that Richards was pressuring her to get Complainant back to work. (Tr. III, 24, 32) Guillette also testified that Complainant was evasive and would not return her phone calls about going back to work, but admitted that Complainant did call her. (Tr. III, 24-25)

14. In response to Richards' message, on May 13, 2009, Complainant contacted his supervisor at Respondent, Neil Daly, because he could not reach Guillette. He informed Daly that he had not yet had a follow-up visit with his doctor and was not cleared to return to work. He also stated that he had only recently begun physical therapy, and had a follow-up appointment with Dr. Kwon in two weeks. Complainant's confusion was understandable given that he was unaware of the form Dr. Kwon had sent to Liberty Mutual and knew nothing of the target dates therein. Complainant stated that he did not believe he could perform light duty at that time. Daly responded that he heard Complainant was coming back to work and was trying to find light duty work for him. He suggested some duties Complainant might be able to perform and Complainant responded he did not yet know what his medical restrictions were and was not certain if he could handle the tools for those jobs. Complainant informed Daly that for these reasons, he would not report to work on May 15, 2009. (Tr. 86-88) Daly did not inform Complainant of any consequences of his failure to return on May 15th.

15. Daly testified that it was his job duty to find light duty work for plumbers when they returned to work after suffering a workplace injury with physical restrictions. He testified that in order to find appropriate light duty work, he needed to know what an employee's medical restrictions were. Daly did not receive any information or speak to anyone but Complainant about his medical restrictions. In his deposition he recalled Complainant informing him on May 13th that he had a specific weight lifting limit, had restrictions of no prolonged sitting or

standing, a ladder restriction and bending restrictions. (Tr. II, 55-57) Complainant testified that he told Daly he was uncertain about what he could lift at that point, since he had not completed his therapy regimen, had been deemed disabled by the IME, and had not been reassessed by Dr. Kwon. Daly had no information about Complainant's restrictions prior to their conversation and admitted that the tasks he discussed with Complainant, which were the least strenuous tasks a plumber could perform, did not meet the medical restrictions he claims Complainant provided him. (Tr. II, 61-62, 104)

16. Complainant spoke to Denise Guillette after he spoke to Daly and told her he was confused about Respondent's protocol for return to work, since he had been told he could not return without a doctor's clearance, and now was being ordered to report to work without a doctor's note. Guillette informed him that Jennifer Richards had the doctor's note, but that Guillette did not have it. (Tr. 90-92) Complainant had never seen this note, and reiterated that he had just begun physical therapy and was not able to return to work on Friday. Complainant expressed that he was getting mixed signals since Guillette had removed him from work, insisted he see a doctor, and told him he could not return without a doctor's clearance. In Complainant's view, he was complying with his employer's and doctor's orders and was being ordered back to work prematurely. He also informed Guillette that he had a follow-up doctor's appointment in two weeks. (Tr. 90 -92)

17. Complainant did not return to work on May 15, 2009. He attended his scheduled physical therapy appointment that day and discussed Respondent's order that he return to work with the therapist. Complainant asked if there were some physical tasks he could perform to help him strengthen and improve his condition and his therapist suggested he try performing some light yard work. Complainant accepted this suggestion and performed some yard work two

days during the following week. Unbeknownst to Complainant, after he declined to return to work on May 15, Liberty Mutual arranged to place him under surveillance by a private investigator who observed him performing yard work on May 19 and 21, 2009 and videotaped him. (Ex. 22) Dr. Kwon testified that it would not have been inconsistent with his treatment plan for Complainant for him to engage in some physical activity to test his strength and ability and tolerance for pain. (Tr. II, 22-23)

18. Respondent was not involved in the decision to engage in surveillance of Complainant. (Tr. II, 91) Respondent did receive a copy of the video from Liberty Mutual. The video shows Complainant lifting a rock, filling and lifting a wheelbarrow, and shoveling and raking dirt and rocks. (Ex. 22) Daly was told about the video by Guillette and HR but did not view the video at that time. Since viewing the video, he believes that Complainant's activities on the video contradicted the restrictions he relayed to Daly upon being ordered to return to light duty. Daly testified that based on his viewing of the video, he believes Complainant could have performed the light duty that Respondent offered him. (Tr. 251-252; 254-255) Denise Guillette reviewed the video tape at some later time and testified that she believed Complainant was committing fraud because his activities appeared to be more demanding than the restricted duty Respondent offered to him. (Tr. III, 22-23)

19. On May 27, 2009, Complainant had his follow-up exam with Dr. Kwon. Complainant reported that he still had fairly significant pain and had concerns about returning to work. Dr. Kwon's medical note indicated that Complainant was making slow progress after four weeks of therapy, and he prescribed 6-8 weeks of additional therapy and predicted Complainant would be at a medical end point sometime between mid-June and early July. (Tr. II, 27; Ex. 4) Dr. Kwon did not clear Complainant to work in a light duty or unrestricted capacity on May 27.

(Tr. II, 24-25)¹ He testified that in order to do so, he would have had to refer Complainant for a functional capacity exam in which he would be tested for his specific job requirements.

20. On May 27, 2009, after viewing the Liberty Mutual surveillance video, Dr. McGlowan, the IME who had examined Complainant earlier, issued an addendum to his May 5, 2009 report opining that Complainant could work in a modified duty capacity with a 20-25 pound lifting restriction advancing to full duty within 6-8 weeks. (Ex. 27) From May 13, 2009 until his termination, no one from Respondent or Liberty Mutual contacted Complainant regarding this revised opinion, to check on his medical progress, or to discuss his returning to work. (Tr. 99, Tr. III, 60-61)

21. On May 28, 2009, the compensation insurer's representative sent an email to Respondent's Officer Guillette, stating that Complainant had seen Dr. Kwon the previous day, but the doctor's office could not verify if he was released for full duty and she did not have Dr. Kwon's report. The email also noted that given the surveillance video, there was no reason Complainant should be out of work. The email also stated: "No further treatment is authorized." (Ex. 24) There is no evidence that Respondent sought or received a copy of Dr. Kwon's May 27, 2009 report and Respondent appears to have relied on the information received from the insurer.

22. On June 15, 2009, Judith Resnick, Respondent's Human Resources Manager, mailed Complainant a letter advising him that his employment with Respondent was terminated. The letter indicated that the reason for the termination was that Complainant was medically cleared to return to work, had been offered light duty work and had refused it. (Ex. 6) Resnick had never met with or spoken to Complainant prior to sending the termination letter. She did not contact Complainant to advise him that his failure to return to work would result in termination. (Tr. I,

¹ Respondent and Complainant had no communication about his condition between his May 27, 2009 exam and the time that he was notified of his termination on or about June 15, 2009.

102-103) Guillette did not reach out to Complainant prior to his termination, and Daly never spoke with Complainant after May 13, 2009, because it was out of his hands. (Tr. III, 60-61; Tr. II, 63)

23. According to Resnick, Respondent's procedure in worker's compensation cases is to send the employee's job description to the treating physician for review and to ask the physician to provide any restrictions the employee is subject to. Respondent has a template of letter that it uses precisely for this purpose entitled: "Letter to Treating Doctor." (Tr. II, 94, 98, 99; Ex. 29) It was Guillette's job to send this letter to an employee's doctor and Resnick believed this had occurred in Complainant's case. According to Guillette, Daly and Dr. Kwon, this did not occur. Resnick made the decision to terminate Complainant's employment along with Respondent's owner, Joe Cannistraro, believing that Complainant's physician had reviewed his job description and indicated he had no restrictions, although this was not the case. (Tr. II, 116) Complainant's termination occurred after Respondent had information about the video taken by the insurer's investigator that showed Complainant doing yard work. Respondent had no meeting with Complainant prior to his termination. (Tr. II, 116, 117, 119)

24. After his termination Complainant contacted Human Resources Director, Resnick. Resnick testified that Complainant told her Liberty Mutual had cut off his worker's compensation benefits prematurely based on incorrect information, that Complainant's treatment was delayed because of the insurance company and that he had no control over the process. (Tr. II, 85, 121-122; Ex. 21) Resnick testified that she viewed Complainant's protestations as a lot of "complaining and whining" about his benefits having been cut off, that he was blaming Liberty Mutual and Guillette, and that the entire call was about him trying to get unemployment compensation. (Tr. II, 85, 122) Complainant inquired about his termination being converted to a

lay-off so that he would be eligible to collect unemployment compensation because he had no income at that point, but Resnick told him this would be unethical. (Tr. II, 85-86) She later admitted that her interpretation of Complainant's eligibility to collect unemployment was inaccurate. She also testified that she had never met complainant, knew nothing about his work record and had no reason to presume he was a bad employee or a slacker. (Tr. 125) Her negative impressions of Complainant and his motives arose from that one conversation. (Tr. 125) Complainant also told Resnick that he did not want to get a reputation as a "back accident waiting to happen" and that he was a "stand-up guy." (Tr. II, 123)

25. Subsequent to his termination, Complainant completed the regimen of physical therapy prescribed by Dr. Kwon. Complainant did not testify about any further treatment he received between the completion of his physical therapy as recommended by Dr. Kwon and his subsequent exam months later by a physician appointed by the Division of Industrial Accidents (DIA) to assess his medical status for purposes of his pending workers compensation claim. In November of 2009, a DIA judge ordered that Complainant be examined by Dr. William Shea, who was appointed by the DIA to assess Complainant's fitness to work. Dr. Shea found Complainant to be still temporarily disabled from his job, recommended he undergo a work hardening program, and opined that he should be able to return to work full duty in January 2010. (Ex. 7) Complainant attended a multi-week work hardening program at Braintree Rehabilitation Hospital and felt he was able to return to work as a plumber at the end of January 2010. (Tr. I, 118-119)

26. In February of 2010, Complainant agreed to a lump sum settlement of his work related injuries by which he received \$58,250 in workers compensation benefits, which was pro-rated over his life expectancy of 29 years at \$2,008.62 per annum. Pursuant to the agreement,

Complainant could not return to work at Respondent, which is one of the largest union plumbing shops in the area. After receiving the lump sum settlement agreement, Complainant immediately began looking for work as a plumber. He went to meetings at the Union hall and diligently called all the employers who were on the list at the Union hall every week. He also networked outside the Union, talked to fellow Union employees, called job superintendents he knew, and answered ads in the newspaper. (Tr. I, 120-122, 124) Complainant testified that if Respondent had not terminated his employment, he could have returned to work for them when he was physically able to do so, which according to his testimony would have been in late January, 2010. (Tr. I, 119-121) Resnick testified that after Complainant's workers compensation payments ceased, he remained an employee of Respondent until his termination. (Tr. II, 117)

27. Complainant was unable to secure work as a plumber in 2010, but was able to collect unemployment benefits. (Tr. I, 121) In 2011, Complainant worked for KNC Mechanical as a plumber for six weeks until the company no longer had work for him. He earned \$7,425 in 2011 from KNC. Beginning in June 2011, Complainant worked at A. H. Burns, which is a union shop. He worked on and off at A.H. Burns in 2011 and 2012 as there were periods when the company did not have work. (Ex. 11, 12, 13; (Tr. I, 124-126) In December of 2012, Complainant worked a four month temporary job for the Town of Braintree Department of Public Works in the Highway Department. He worked two other temporary jobs for the Town of Braintree which paid hourly wages with no benefits. (Tr. I, 126-128) In August of 2014 he secured a permanent position with the Town of Braintree as a plumber in Facilities and Maintenance. He earns \$22 per hour and works 40 hours per week. (Tr. I, 129-130) Complainant is still a member of the union and has continually sought higher paying work. (Tr. I, 130-131)

28. Complainant asserts that had he not been terminated, he would have returned to work as a plumber for Respondent when he was able. He seeks lost wages in the form of back pay for five years from January 28, 2010, when he would have been able to return to work as a plumber and January 23, 2015, the date of the hearing in this matter. Complainant received unemployment compensation and had interim earnings from subsequent employment at a number of different jobs during this five year period. (See Exs. 10-13) Complainant also received a lump-sum settlement in workers compensation benefits for lost wages in the amount of \$58,250.

29. In his current job, Complainant continues to be compensated at a lower rate of pay than he would if he were still working for Respondent. As a result, Complainant seeks front pay from the date of the hearing when he was age 56 until age 65 based on the difference in what he currently earns and could have earned working for Respondent.

30. Complainant was emotionally upset by his termination from Respondent. He took a great deal of pride in his work and had a good work record. He felt that his termination stigmatized him for being disabled, while he sought to comply with his doctor's orders and to heed the signs his own body was conveying with respect to pain and his limitations. Complainant was also upset because his termination gave the appearance that he was engaged in wrong-doing and committing fraud, when in fact, he was taking direction from his physical therapist about experimenting with some physical labor to test his strength, stamina and tolerance for pain. Complainant considered himself to be a stand-up guy and he was concerned about getting a reputation for using a work injury as an excuse not to work. He stressed that this was not at all the case and that he wanted to work. I credit Complainant's testimony that he had a

strong work ethic, was anxious to return to work and was not seeking to continue receiving worker's compensation as an excuse to avoid returning to work.

31. After his termination, the fact the Complainant could not use Respondent, a leader in the plumbing industry, as a reference also was distressing to him and inhibited his securing other work. He faced the financial stresses of having bills to pay and no source of income. He had to forgo his plans to make greater contributions to his children's education because of the loss of income over a period of many years due to gaps in his subsequent employment. He feared that he might never again find work in his trade and would have to abandon his 20 year career as a plumber, and change his occupation. (Tr. I, 139-145) The stress of his termination and related financial hardship affected his relationship with his wife and children. Complainant testified that he was not pleasant to be around and argued with his wife over the financial burdens they faced due to his loss of income. (Tr. I, 140- 141)

32. Complainant also suffered physical symptoms of emotional distress. He testified that he did not sleep well and "turned into a zombie." He described himself as a private person who keeps things to himself and he did not seek counseling. He felt he would carry on and make it through, but realizes in retrospect what an emotional impact his termination had on his family. (Tr. I, 143-145) He made significant efforts to secure employment and began to feel better when he was able to find work, return to his profession and to feel good about the work he was performing. (Tr. I, 145-146)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 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. The statute prohibits discrimination against persons with disabilities who are capable of performing the essential functions of the job with an accommodation and requires employers to provide reasonable accommodation to such disabled employees unless they can demonstrate that the accommodation sought would impose an undue hardship on the employer's business.

In order to prevail on a claim of handicap discrimination where Complainant alleges failure to provide a reasonable accommodation, he must demonstrate that: (1) he is a "handicapped person," (2) that he is a qualified handicapped person," (3) that he needed a reasonable accommodation to perform his job; and (4) that the employer was aware of his handicap and the need for a reasonable accommodation; (5) that his employer was aware or could have become aware of a means to reasonably accommodate Complainant's handicap; and (6) the employer failed to provide him with a reasonable accommodation. *Hall v. Department of Mental Retardation*, 27 MDLR 235 (2005). MCAD Handicap Guidelines, p. 33, 20 MDLR (1998)

Complainant is presumed disabled by virtue of fact that he was injured on the job and received workers compensation. As a recipient of Workers' Compensation benefits, Complainant is entitled to a rebuttable presumption of qualified handicapped status under G.L.c.152, section 75B(1).² See *Gilman v. C&S Wholesale Grocers, Inc.*, 170 F.Supp.2d 77, 84 (D. Mass. 2001) (individuals suffering work-related injuries "deemed" qualified handicapped persons

² 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); *Labonte v. Hutchins and Wheeler*, 424 Mass. 813, 819-20 (1996) (application and receipt of long-term disability benefits is not per se bar to claim for handicap discrimination). The laws and regulations governing Workers' Compensation and other disability benefits.

under chapter 151B for as long as their status under Workers' Compensation law influences their treatment by others); *Joubert v. United Parcel Service, Inc.*, 22 MDLR 253 (2000) (Workers' Compensation settlement entitles Complainant to presumption of qualified handicap status under chapter 152); *Cf. Hatch v. Townsend Oil Co., Inc.* 2009 WL 637243 (Mass Super. Jan. 16, 2009) (Workers' Compensation claimants should have their claims under Massachusetts discrimination statute analyzed in same manner as other claimants).

While Respondent disputes the seriousness of Complainant's injury, and attempts to minimize its severity, it was clear from the medical exam reports and Complainant's own testimony that his injury was severe and disabling. Respondent's view of Complainant's injury conveniently ignores that Complainant fell several feet from a ladder onto a concrete floor and landed on his back. The injury Complainant incurred as a result of the fall and the attendant pain he endured impacted his ability to lift heavy equipment and tools and the agility required by the conditions of his job. Ultimately, the impact of the fall rendered him unable to work for one year.

Consistent with his orthopedist's treatment plan, Complainant sought a medical leave of absence for recommended treatment and recuperation as an accommodation to his injury. He was capable of performing the essential functions of a plumber's job, but only after he underwent physical therapy and a work hardening program and had fully recuperated from his injury. He ultimately resumed work as a plumber. I conclude that at the time of his termination and for some time thereafter, Complainant can be deemed to have been a qualified handicapped individual capable of performing the essential functions of the job, with the accommodation of a medical leave of absence as a reasonable accommodation to allow him complete his therapy.

Complainant was on a medical leave and received workers compensation from mid-February 2009 until mid- May 2009. Complainant asserts that he sought and Respondent denied

him a reasonable accommodation in the form of an extended leave of absence. Complainant sought additional leave time to complete treatment and to fully recuperate from his injury. He was denied this request based on the insurer's determination that he was fit to return to light duty as of May 15, 2009 and the cessation of his workers compensation benefits on or about May 13, 2009. Respondent must demonstrate that the accommodation sought was unreasonable.

This case presents a complicated scenario because the events at issue were precipitated by the insurer's apparent premature termination of Complainant's worker's compensation benefits.³ The decision to cease benefits was based on some target dates for return to work specified by Complainant's orthopedic surgeon Dr. Kwon, in a note submitted to the insurer at its request, three days after Complainant's initial visit. This occurred prior to Complainant commencing therapy and six weeks before Dr. Kwon could reassess Complainant's condition. In this form, Dr. Kwon indicated May 15, 2009 as a target date for Complainant's return to light duty and July 1, 2009 as a target date for return to full duty. The insurer did not communicate this information to Complainant and he was completely unaware of these target dates. The insurer sent this form to Respondent on April 24, 2009.

There is a significant dispute between the parties as to the significance of these target dates, but I conclude, based on Dr. Kwon's testimony, that they were merely estimates based on the limited information he had at the time and without benefit of his subsequent assessment of Complainant's condition. At the time, Dr. Kwon had had no discussion with the insurance carrier's agent or Respondent, did not have Complainant's job description and had no information regarding what light duty might involve.

³ On May 13, 2009 an Independent Medical Examiner engaged by the general contractor's insurer opined that Complainant was unable to return to his duties at that time and should continue therapy for a period of six to eight weeks, and thereafter might advance to full duty as tolerated over an additional six-eight week period. According to this report Complainant would have been eligible for light duty around July 1, 2009 at the earliest.

Respondent then relied on the insurer's representations that Complainant could return to light duty on May 15, 2009, and directed him to do so absent any communication with his physician about his condition or limitations. Contrary to its practice, Respondent directed Complainant to return to work on light duty without having sent a job description to his orthopedic specialist or physician and without providing any details about light duty. As of mid-May, Complainant had barely begun his physical therapy program and was not released to work by his physician.⁴ Complainant refused to return to work on May 15, 2009 because he believed he was not yet able to perform light duty and needed to complete the recommended regimen of physical therapy. He communicated this to his supervisor and Respondent's Safety Officer, noting that he had another appointment with Dr. Kwon within two weeks. Complainant had a follow-up assessment scheduled with Dr. Kwon on May 27, 2009. At that time, Dr. Kwon recommended an additional six to eight weeks of physical therapy and opined that Complainant would be at a medical end point by mid-June or early July, 2009.⁵ Thus, in In May of 2009, Complainant was seeking a brief continuation of his leave. The lack of communication between Complainant and Respondent regarding Complainant's condition and the dispute about whether he required additional leave time was a significant factor in his termination in mid-June.

There may be circumstances where an extended leave of absence is an appropriate or reasonable accommodation, including a request for a limited extension, which sets a definite time for the employee's return. *Russell v. Cooley Dickinson Hospital, Inc.*, 437 Mass 443 (2002) citing *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 1st Cir. 2000) (under the circumstances requested two-month extension was reasonable); EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA III-23 ("Flexible leave policies

⁴ The delays in securing an MRI and a referral to an orthopedic specialist were caused by the insurer and its failure to timely approve the requests for necessary tests and treatment.

⁵ This diagnosis is largely consistent with the May 9, 2009 report of the IME engaged by the insurer.

should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disabilities....where this will not cause an undue hardship.”)

MCAD Handicap Guidelines, p. 36 20 MDLR (1998)

The reasonableness of the accommodation sought turns in large part whether the accommodation sought will be unduly burdensome to Respondent’s operations and finances and how significantly it will adversely impact Respondent’s business. *Id.* at 26. Had Respondent engaged in meaningful communication with Complainant from the time of his injury to the time of his termination, it is likely that some arrangement could have been reached to extend him additional leave time to recuperate from his injury. *See D’Ambrosio v. MBTA*, 23 MDLR 81 (2001) *citing Mazeikus v. Northwest Airlines*, 22 MDLR 63, 68-69 (2000) (interactive process involves discussion of nature and scope of requested accommodation and an assessment of its feasibility) Respondent’s unilateral decision directing Complainant return to work absent any prior communication with his physician or with him violated the obligation of Massachusetts employers to engage in an interactive process with a disabled employee who requests or requires an accommodation. *See MBTA v. MCAD*, 450 Mass. 327, 341-342, n.16 (2008) *citing Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 648-649 (2004); MCAD Handicap Guidelines (recognizing that an employer is obligated to participate in an interactive process where disabled employee requesting an accommodation) The request for a reasonable accommodation on the part of a qualified handicapped employee imposes an obligation on the part of the employer to engage in a direct, open, and meaningful communication with the employee. *See Mazeikus*, 22 MDLR at 68. The dialogue should include an identification of the employee’s limitations and the potential adjustments to the work environment that would allow the employee to overcome those limitations. *Id.*

Respondent argues that Complainant foreclosed this dialogue when he stated that he was incapable of any light duty on May 15, 2009. Respondent asserts that Complainant was terminated

because he refused the light duty work offered him, never gave Respondent a return to work date and essentially abandoned his job. Respondent believed that Complainant could have and should have returned to work based on the insurer's information even prior to becoming aware of the insurer's video showing him doing yard work. Once it viewed the video of him engaging in yard work, Respondent was convinced that he was lying about his condition. However, on May 15, 2009, and at the time of his termination on June 15, 2009, Respondent had no independent medical information verifying Complainant's limitations and was on notice that Complainant was still undergoing therapy. As of May 15 Respondent was aware that Complainant had a follow-up appointment with his physician within two weeks. Given these circumstances, Respondent had an obligation to continue the dialogue and to seek independent verification from Complainant's physician of his diagnosis and any limitations on his ability to work light duty.

Respondent does not specifically assert that Complainant was terminated because he lied about his ability to engage in physical labor, but does assert that his actions contradicted his representations that he was unable to work light duty. Respondent's position is that Complainant's failure to communicate with them in the three weeks after his follow-up with Dr. Kwon and prior to his termination is evidence that he abandoned his job. It is clear that this determination was reached with influence by the insurer. I conclude that had Respondent engaged in a meaningful interactive process with Complainant and his physicians, it would have determined that a continued reasonable accommodation was necessary and feasible. This would have prevented his termination under a cloud of suspicion. If Respondent had engaged Complainant and his physician in a real dialogue and become fully informed about his condition, Respondent would have come to know why Complainant was engaged in physical activity outside of work and whether this activity was justified. This could have prevented the conclusion that he was dishonest about his limitations and his ability to work and would likely have prevented his termination at that time. Complainant might have

remained an employee on inactive status for a reasonable period of time until his therapy was completed or been separated from Respondent under more congenial circumstances.⁶

Complainant ultimately required additional leave time of up to a year. The question to be determined is whether such an extended leave with no date certain for return to work would have been reasonable. There is no indication that Complainant or Respondent had any further communication regarding his medical condition, including the results of his May 27, 2009 follow-up assessment by Dr. Kwon. Complainant did not testify about any additional treatment he received between July and November of 2009 or the status of his condition during that time. The record is silent on this issue, except to note that five or so months later, in November of 2009, Complainant was directed by a DIA judge to submit to another independent medical exam.

As stated above, it has been held that open-ended and indefinite leave requests may not be considered reasonable, *Russell at 455*. As it turned out, Complainant testified he was unable to return to work for a year. He was injured in February of 2009 and did not return to work as a plumber until February 2010. Given this scenario, I cannot conclude that Respondent had an obligation to extend Complainant's medical leave indefinitely and to hold his job open for a year, absent any definitive prognosis regarding when he could return to work. Had Respondent become fully informed of Complainant's condition and without the benefit of an anticipated return to work date, it likely would have been justified in terminating Complainant's employment.

However, this was not the scenario at the time of Complainant's termination. At the time of the termination Respondent was not fully informed and relied solely on the representations of the worker's comp insurer that Complainant could perform light duty. Moreover, Respondent

⁶ It is unclear from the record if Complainant had to forego re-employment with Respondent as a condition of his Worker's Compensation settlement agreement or because of the circumstances surrounding his termination.

made no showing that, at the time, it would have been an undue hardship to extend Complainant's leave at least until he had completed his therapy in early July and been reassessed by his orthopedist. There is no evidence that Complainant could not have been retained as an inactive employee until his therapy was completed and his condition was re-evaluated.⁷ Respondent did not establish that Complainant's four to five month medical leave of absence posed an undue burden to its operations. This, however, does not allow me to conclude that a one-year leave of absence would have been reasonable, given the circumstances. If when Complainant completed his therapy, there was no definitive prognosis for improvement in the near future and no anticipated return to work date, Respondent's obligation to continue providing an accommodation in the form of an open-ended leave would have ceased. Had Respondent made a fully informed decision to terminate Complainant's employment under these circumstances, the decision would likely have been justified, because an open-ended leave would cease to be a reasonable accommodation. Such a determination would have required ample communication with Complainant and his medical providers, something that did not occur prior to Complainant's termination.

The lack of communication between the worker's compensation insurer and Complainant and Respondent and Complainant is extremely problematic and disturbing. The insurer clearly bears responsibility for terminating Complainant's workers' compensation benefits prior to completion of his recommended treatment and absent any meaningful communication with his orthopedist.⁸ Respondent was not consulted and had no input into the decision to terminate Complainant's worker's compensation benefits, placing it in a difficult position. Respondent had

⁷ As an inactive employee Complainant would not have received compensation, clearly causing him economic hardship. I make no findings about whether or not Complainant would have been eligible to collect unemployment compensation benefits.

⁸ The insurer is also responsible for the unreasonable delays in approving treatment for Complainant.

no authority to reverse the decision of the insurer. Given the employer's level of removal from the decision making process it cannot be penalized for the cessation of Complainant's insurance benefits. Nor should it be held responsible for other actions of the insurer that delayed Complainant's treatment. Respondent is however liable for its failure to communicate with Complainant and his physician, particularly once his worker's compensation benefits ceased and he did not return to work. Its sole reliance upon information from the insurer was irresponsible. This lack of communication was a significant factor leading to Complainant's termination. Contrary to its established practice, Respondent did not send Complainant's job description or a "Letter to Treating Doctor" to Complainant's physician prior to directing him to return to work. Instead Respondent made presumptions about the extent of Complainant's limitations and his willingness to return to work without reaching out to him and based solely on representations from the insurer whose main incentive was stop paying benefits and close Complainant's case. An employer's deviation from its established policies can be probative of pretext and of discriminatory intent. *Lewis v. Area II Homecare for Senior Citizens, Inc.*, 397 Mass. 761, 767-68 (1986); *Dartt v. Browning-Ferris Industries, Inc.*, 427 Mass. 1, 17 (1998). Respondent's failure to follow its own established policies and procedures is particularly significant since Complainant was ignorant of the company's procedures and could not have been expected to know about the process and the company's misguided reliance on the insurance carrier.

Respondent was obligated in May of 2009 to explore with Complainant and his physician whether he required additional leave time and if there was a prognosis for his return to work within a reasonable time.⁹ Such communication would likely have forestalled his termination

⁹ There was some suggestion that Complainant was also lax in his communications with Respondent and the insurance carrier; however this does not relieve the employer of its obligation to obtain the necessary information to decide the feasibility of an accommodation. It is of note that the Human Resources Director had never met Complainant or communicated with him directly until after his termination.

because Respondent would have come to understand that Complainant was merely attempting to comply with his doctor's orders and heeding his restrictions. Ultimately, Respondent is liable for violation of G.L. c. 151B, because it terminated Complainant's employment without exploring whether or not he was actually capable of returning to work on May 15, 2009, whether additional leave time was medically necessary, and whether it was reasonable to extend his accommodation. Further exploration of these issues would likely have prevented the adverse scenario under which he was terminated.

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. *See Stonehill College v. MCAD*, 441 Mass 549 (2004).

Since Complainant was unable to work as a plumber for an entire year, from February of 2009 until February of 2010, he is not entitled to lost wages for that period of time. He was unable to find employment as a plumber in 2010 and did not return to work as a plumber until June of 2011, but did collect unemployment compensation during that time. He asserts that had he not been terminated from Respondent, he would have returned to work for the company full time in February of 2010 at his former rate of pay. He seeks lost wages for that period of time and additional lost wages from July 2011 up to the time of hearing for the differential in his earnings for that period. Finally Complainant asserts that an award of front pay is appropriate from the time of the hearing when he was 56 years of age up to age 65, when he anticipated he would retire from Respondent. Given my determination that Respondent would not have been

obliged to hold open Complainant's job for a year, particularly where there was no date certain for his return in sight, to award damages for back pay and front pay would not be appropriate. There is no guarantee and I cannot speculate that Respondent would have had a position for Complainant in February of 2010. Moreover, to assume that Complainant would have returned to work full time for Respondent is also speculative since he had not worked full time or exclusively for Respondent in the years prior to 2008. Therefore, I conclude that an award for lost wages in this case would not be appropriate.

Having found that Respondent did violate G.L. c. 151B when it terminated Complainant without sufficient verifiable information about his condition and without considering the feasibility of additional leave time for him to complete his physical therapy, I conclude that Respondent is liable to Complainant for damages for emotional distress.

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in awarding such damages are the nature and character of the alleged harm, the severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Id.* at 576. Such awards must rest on substantial evidence that the distress is causally connected to the act of discrimination or retaliation. *See DeRoche v. MCAD*, 447 Mass 1, 8 (2006) (where evidence that emotional distress was caused by employee's termination and not subsequent acts of retaliation, court found no causal connection between the latter acts and employee's emotional distress)

Complainant obviously was distressed at his workers compensation benefits being cut off prior to the completion of his therapy and before he was cleared by his orthopedist to return to work. This is an action for which Respondent is not liable and the distress Complainant suffered from losing his sole source of income while he remained disabled is not compensable by his

employer. However, had Respondent engaged in the necessary communication to become fully informed about Complainant's medical condition, his separation from Respondent would not have occurred prior to the completion of his treatment and under such negative circumstances. Complainant was terminated from Respondent knowing that he was still unable to work as a plumber and believing that he was entitled to additional leave as an accommodation. He was very upset that he was not extended some further leave time to fully recuperate or at the very least until his physical therapy regimen was concluded and his condition could be reassessed medically.

Moreover, Complainant was terminated under a cloud of suspicion that he was dishonest and using his injury as an excuse to avoid work while continuing to collect worker's compensation undeservedly. Complainant was extremely distressed about these allegations and believed that his termination under these circumstances resulted in his reputation being maligned. He was someone who took great pride in work, work was important to his self-image and he was labeled as a liar and a malingerer. Indeed Complainant's concern that he was perceived as lazy, unwilling to work, and dishonest was born out by the testimony of both Resnick¹⁰ and Guillette who both stated they believed Complainant was lying about his ability to return to work because he doing some yard work. This suggestion was also evident in the emails the insurer's representative sent to Respondent. Complainant believed that his termination under these circumstances damaged his reputation. This greatly disturbed him. He felt strongly that this undeserved reputation that would make finding subsequent employment difficult. He could no longer utilize Respondent as a reference in his job search and was deeply concerned about getting a bad reputation in the plumbing industry. He feared that he might never again find

¹⁰ Resnick testified that she had never even met Complainant and had no reason to question his work ethic.

work in his field and might have to abandon his career as a plumber after twenty years and seek a new occupation at the age of 51.

I fully credited Complainant's testimony that he had a strong work ethic, was anxious to return to work and was not seeking to continue receiving workers compensation as an excuse to avoid returning to work. I also credit his testimony that the circumstances of his termination and the accusations that he might be committing fraud greatly upset him. The stress he suffered contributed to deteriorating relationships with his family and caused him sleepless nights. He stated that his emotional state improved when he was able to secure employment as a plumber and felt good about the work he was doing. Given the evidence and fully considering the other sources of stress in Complainant's life at the time, including the physical pain he continued to suffer, I conclude that he is entitled to an award of damages for emotional distress in the amount of \$50,000.

V. ORDER

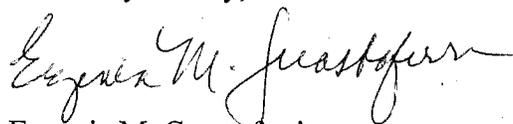
Based on the forgoing Findings of Fact and Conclusions of Law Respondent is hereby Ordered:

- 1) To cease and desist from any acts of discrimination based upon disability.
- 2) To pay to Complainant, Robert Laing, the sum of \$50,000 in damages for emotional distress 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 until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 3) To conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources director, managers, supervisors or other

employees who have authority to negotiate reasonable accommodations for disabled employees or to terminate disabled employees. Respondent shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. 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 of the above described employees who fail to attend the original training and for new personnel hired or promoted after the date of the initial training session.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. 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. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 19th day of May, 2015.



Eugenia M. Guastaferrri
Hearing Officer