

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & JOYCE GRAF,
Complainants

v.

DOCKET NO. 06-BEM-01363

W. BRIDGEWATER POLICE DEPT.
& DONALD CLARK,
Respondents

Appearances:

Simone Liebman, Esq., Commission Counsel
David C. Jenkins, Esq. for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about June 5, 2006, Joyce Graf filed a complaint with this Commission charging Respondents with discrimination on the basis of her gender and handicap in violation of 151B §§4(1) and (16A). The Investigating Commissioner issued a probable cause finding on June 30, 2008. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on July 18, 19, 20, 21, 22 and 29, 2011. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Joyce Graf resides in W. Bridgewater. Complainant began working for Respondent W. Bridgewater Police in 1982, first as a crossing guard, then as a matron and a call

firefighter/ EMT. In 1988 Complainant was appointed as a permanent intermittent police officer and she became a permanent police officer in 1993. Complainant held this full-time position until her retirement in March 2009. Complainant was a member of a union, the West Bridgewater Police Association. The terms of her employment were governed by a collective bargaining agreement (“CBA”) between the Association and the Town.

2. Donald Clark has been employed by the West Bridgewater Police Department since 1986. He began as a patrolman and was later promoted to sergeant. Clark was appointed Chief in August 2004. Between 2004 and 2006, the department had 21 employees. From 2004 to 2006, Ray Rogers was the department’s sole lieutenant and second in command to Chief Clark. Kenneth Bryant, Gray Ames, Christopher Werner and Victor Flaherty, Jr. were Sergeants. Complainant reported to Sgt. Bryant, who was responsible for scheduling officers’ shifts.

3. In 2004, Ray Rogers was one of three candidates for Chief, along with Clark and Flaherty. Subsequent to Clark’s appointment to Chief, his relationship with Rogers deteriorated because of Rogers’ bitterness over losing out to Clark.

4. Until 2005, Complainant and officer Ann Savignano were the only female police officers in the department. When Savignano retired in 2005, Complainant was the sole female police officer. Chief Clark was friendly with Savignano and her husband, who was also a police officer for Respondent.

5. Under the CBA, police officers are entitled to sick leave that can be used for illness or injury and for medical, dental or optical appointments or to care for a sick family member. (Ex. C-1)

6. In addition to health insurance provided to officers through the town, the CBA provides for injured on duty (“IOD”) status for police officers who are incapacitated by an injury on the job through no fault of their own. Through this program, officers are paid for their time off and their medical bills. The program requires officers to provide medical documentation of their injury. (Ex. C-1)

7. The CBA also establishes a “sick leave bank” whereby officers with a serious illness or injury who have exhausted all of their sick, vacation and personal time may apply to the sick bank for days off. Every full-time employee who wishes to participate in the sick leave bank must make an initial contribution of three sick days. Any use of the sick leave bank will be paid back at the minimum rate of five days per year until all days are paid back. (Ex. C-1) When Complainant became a full-time police officer, she contributed three sick days to the bank.

8. The sick leave bank committee determines the eligibility of employees to use the sick leave bank and the number of days to be granted in each case. In 2006, the Sick Bank Committee members were Chief Clark, Sgt. Kenneth Bryant and Officer John Pettingill.

9. Complainant testified credibly that prior to 2003 she was in good health, and used sick leave to care for her son and for occasional migraine headaches. She had no back problems prior to 2003.

Injury of September 2, 2003

10. On September 2, 2003, Complainant was dispatched to the scene of a motor vehicle accident. While exiting her squad car at the accident scene, the mirror of a vehicle in traffic

caught on her gun belt and pulled her to the side. After returning to the station, she went to the hospital where she was diagnosed with a back sprain and prescribed a pain medication. She was out of work for two or three days. Then Chief Robert Kominsky granted Complainant's request for IOD, which covered her days off and medical costs. Chief Clark was a Sergeant at the time and had no involvement in the decision to allow IOD for this injury.

11. For the following year, Complainant continued to fully perform her job, despite experiencing some sciatic pain.

12. Complainant testified credibly that after Donald Clark became chief in August 2004, he acted condescending and cold toward her and caused her to feel unwelcome. Her requests to participate in various training went unheeded.

13. In 2004, Clark switched Complainant from the 4:00 p.m. to midnight shift to a "split shift," whereby she worked two 8:00 a.m. to 4:00 p.m. shifts and two 4:00 to midnight shifts per week.

Injury of August 6, 2005

14. On August 6, 2005, Complainant responded to an alarm at W. Bridgewater High School. As she exited her cruiser, her seatbelt caught on her holster and she twisted her back. She was treated for low back strain and was cleared for full duty on August 9, 2005. Chief Clark approved her request for IOD pay for the injury. (Ex. R-7)

Off- Duty Medical Incident on August 23, 2005

15. On August 23, 2005, while off-duty, Complainant was driving her truck when she developed palpitations and lost partial vision. She spent several days in the hospital undergoing

tests and remained out of work for about five weeks. Complainant provided Clark with medical documentation regarding her condition. It was subsequently determined that Complainant had suffered a possible TIA, or mini-stroke.

16. On October 5, 2005, Chief Clark informed Complainant that all of her sick, vacation and personal time had been exhausted and that she would have to either return to work or go on “no pay” status. Complainant then requested to use sick bank time. Clark responded that the sick bank committee would have to vote on her request, taking into account her “use and abuse” of sick time. (Ex. C-2) Complainant testified that she had never abused sick time and was shocked by the Chief’s statement, but did not respond. She did not apply for sick bank leave and, feeling as though she had no choice, she returned to work the following week. I credit her testimony.

17. Complainant testified credibly that throughout the course of her employment, she used a “fair amount” of sick time because of migraine headaches and other ailments. In addition, as a single parent, Complainant took sick days to care for her son (now an adult) during childhood illnesses. However, from 2001 through 2005, Complainant carried over sick time from the previous years and had never been accused of abusing sick time.

18. In October, 2005, after returning to work following the TIA, Complainant experienced some sciatic pain and some lower back problems, but was able to perform all of her duties.

19. On January 4, 2006, Complainant received an epidural steroid injection, pursuant to a physician’s order for treatment of back pain. Complainant requested IOD for the injection. She submitted to Chief Clark medical documentation showing she had received the treatment; but did

not provide him with any document indicating the cause of the pain. At the time, Complainant told Chief Clark she believed the back pain for which she received the steroid treatment was caused by either the September 2003 injury or August 2005 injury. Clark told her he did not see the connection between the January 4 treatment and any previous injury.

20. On March 9, 2006, Clark wrote to Complainant denying IOD coverage for the steroid injection because there was no documentation linking the treatment to either the September 2, 2003 or August 6, 2005 injury. (Ex. C-8; testimony of Chief Clark) Complainant did not grieve or appeal the denial of IOD for the injection and its cost was paid through her medical insurance.

Injury on March 28, 2006

21. On March 28, 2006, Complainant began her shift at 4:00 p.m. and was assigned the duty of removing street signs from school crosswalks. Complainant testified credibly that as she pulled one of the heavy street signs, Complainant felt a pop in her back and severe pain in her left leg and her lower back. After responding to a medical call, she returned to the station and logged in her injury. She was then transported by ambulance (Ex. C-9) to the hospital where she was examined by Dr. Harkness, and diagnosed with acute lumbar sprain caused by “pulling heavy sign.” Dr. Harkness prescribed painkillers, instructed Complainant to follow up with her primary care physician and wrote that she was to return to “light duty” on April 1. (Ex. C-10a)

22. On March 30, 2006 Complainant was seen by her primary care physician, J. Paul Mikus, who diagnosed Complainant with acute low back strain and noted she had a history of chronic low back pain since 2003, a contributing cause of her injury. Dr. Mikus recommended Complainant remain out of work for an indeterminate amount of time and to follow up with him in ten days. Dr. Mikus also completed an insurance form for receipt of IOD. (Ex. C-11)

23. Complainant requested IOD status for the injury. Chief Clark, a member of the Massachusetts Chiefs of Police Association, which provides legal counsel to chiefs around the state, contacted the Association's attorney, Jack Collins, for his opinion regarding granting IOD status to Complainant. Collins advised Clark to deny IOD status because it was easier to reverse a denial of IOD than to reverse an approval of benefits. Clark could not recall when he spoke to Collins. I do not credit Clark's testimony that he spoke to Collins regarding the initial denial of IOD. I find that it is more likely that he consulted with Collins after Complainant filed her union grievance in this matter.

24. On April 6, 2006 Chief Clark denied Complainant's request for IOD status for the March 28 injury and informed Complainant that she would be placed on "no pay" status as of April 7, 2006 and could appeal the decision to the Board of Selectmen. (Ex. C-13)

25. Chief Clark testified that he questioned whether the March 28 injury had even occurred on-the-job or that it was related to an earlier on-the-job injury. He believed the injury may have been occurred while Complainant was grooming or riding her horse, although he had received the medical information from Dr. Mikus stating that the injury related back to Complainant's earlier injuries. I do not credit his testimony.

26. After being denied IOD status, on April 10, 2006, Complainant wrote to the sick bank committee seeking compensation for expenses related to the March 28th injury. Complainant explained to the committee that her IOD request had been denied and her vacation, sick and personal time had been depleted. (Ex. C-14) The sick leave bank committee, consisting of Chief Clark, Sgt. Kenneth Bryant and Officer John Pettingill, unanimously denied her request, stating that it believed that her past record of sick time use indicated she would not be able to

repay the sick bank. (Ex. C-15) Bryant acknowledged testifying at his deposition that he believed Clark had the final say regarding sick leave bank decisions. Clark acknowledged that, according to the CBA, the sick leave bank committee could approve any amount of sick days and was not required to approve any set amount. I find that the sick leave bank committee's decision was essentially a rubber stamp of Chief Clark's denial of sick leave.

27. Chief Clark testified that from January 1, 1999 to August 19, 2009 the town had not denied sick bank withdrawal to anyone other than Complainant.

28. On April 12, 2006, Complainant grieved the denial of IOD relative to the March 28th injury. Chief Clark denied her grievance on April 20, 2006. (Ex. C-16) On April 20, Complainant appealed the denial of IOD to the Board of Selectmen. Around the same time, the Board of Selectmen advised Chief Clark to seek an independent medical examination for Complainant. Until this time, Clark had not requested an independent medical examination.

29. On May 1, 2006, Complainant was examined by Dr. Alan Rodgers¹, an Independent Medical Examiner, ("Dr. Rodgers") of the Occupational Health Services at Morton Hospital and Medical Center. Dr. Rodgers diagnosed Complainant with LS back strain with radiculopathy and completed a medical form, noting that Complainant could perform no more than four hours per day of "sedentary work" and should change positions frequently until further notice. (C-17) Complainant gave Dr. Rodgers' form to the Chief's secretary, Joan McAndrew.

30. Clark testified that on May 1, when he received the initial paperwork from the IME, he instructed Lt. Ray Rogers to advise Complainant to return to light duty. I credit Clark's testimony.

¹ No relation to Lt. Rogers

31. On May 2, Lt. Rogers instructed Complainant to return to work immediately. She worked four hours of desk duty that day.

32. On May 3, 2006, at Complainant's request, Dr. Rodgers provided a new form clarifying Complainant's physical limitations. The revised form stated that Complainant's back strain was work-related, that she could perform limited duty for no more than four hours per day, should not work alone and have no inmate contact or be required to restrain suspects. Clark testified that after receiving the subsequent paperwork on May 2[sic], he instructed staff that Complainant was not to work alone. (C-18)

33. Complainant continued to work desk duty four hours per day. She testified that on days where only three officers were assigned to her shift, the other two officers were out on patrol and she was left alone at the station. Complainant informed Lt. Rogers that being alone at the station was not consistent her medical limitations. Rogers responded that until instructed otherwise by Chief Clark, he would not alter her working conditions. Complainant continued to work four hours per day and did not complain to Chief Clark regarding her light duty.

34. On May 10, 2006, Dr. Rodgers completed a "fitness for duty" evaluation stating that Complainant's March 28, 2006 injury was causally related to her work activities. The two-page detailed report stated that Complainant was not capable of performing the essential duties of a police officer, but could perform sedentary desk work, with no lifting, no prolonged standing, sitting, or walking. The report also stated that Complainant should not wear a gun holster or other heavy objects on her waist. She should have no physical contact with suspects or inmates and should not work alone because of the risk of having to restrain inmates or suspects. Dr.

Rodgers anticipated Complainant would be fit to return to full duty within three to nine months.
(Ex. R-8)

35. Chief Clark testified after receiving the complete medical evaluation from Dr. Rodgers on March 11, which clearly indicated that Complainant's injury was work related, he received authorization from the board of selectmen to approve Complainant's IOD. Clark then contacted Officer Tim Nixon, the union vice president, to inform him of the IOD approval. He wrote Complainant a letter approving her IOD status on May 16, 2006 with back pay and benefits retroactive to March 28. Complainant continued to work desk duty, four hours per day and Clark instructed staff that Complainant was not to work alone.

36. Clark testified that on May 20, he was told that Complainant was sometimes left alone in the station. He then wrote a memorandum to the staff, reiterating that Complainant was not to be left alone in the station. I credit his testimony.

37. Complainant testified that in the month after returning to work, Respondent was short-staffed and there were often only three officers assigned to her shift. This meant that while two other officers were out on patrol, Complainant was alone in the station. On occasion, inmates were present during her shift; however, Complainant was never required to restrain an inmate. I credit her testimony.

38. Complainant continued to work half-time on desk duty until April 2007, when she underwent surgery on her back.

Comparators

39. In 2005, Sgt. Bryant developed chest pain after working a double shift and was taken to the hospital where he suffered a heart attack the next day while undergoing a stress test. Bryant sought IOD for the heart attack because he believed his symptoms began while he was on duty. Clark did not believe Bryant's heart attack was work-related. After seeking advice from the selectmen and Jack Collins, an attorney who advised police on such matters, Chief Clark denied Bryant's request for IOD. Clark testified that Collins advised him to initially deny IOD because he could later reverse the decision if medical records showed the heart attack was work-related. Clark stated that pursuant to IOD policy, heart attacks occurring on the job are not presumed to be job-related; the reasons for the heart attack determine whether it is covered. Bryant did not appeal the denial of IOD. (Ex. C-22, 23) I credit Clark's testimony.

40. Officer Bruce Holmquist worked for Respondent from 1967 until his retirement in 2010. Holmquist primarily worked as desk officer. Holmquist had chronic knee problems. On January 5, 2005, Holmquist twisted his knee while standing at the copy machine; he underwent a knee replacement on January 12, 2005 and was out of work until May 4, 2005. (Ex. C-24) Holmquist was granted IOD for the period of time from January 12, 2005 and May 4, 2005. His IOD request form indicated that Holmquist had a same or similar condition that started on January 30, 1992 and that he had previous osteoarthritis in his knee and that he had been seen for knee problems since 1992. On January 14, 2006, Holmquist fell off a chair and injured his shoulder and was out of work for ten days. The form submitted by Holmquist with respect to this injury stated that he had the same or similar condition, right shoulder strain, in 1987. He received IOD for the January 14 injury. (Ex. C-25, 26) Chief Clark testified that Holmquist's requests for IOD were immediately granted because his injuries occurred in the station or were witnessed by others. He stated that Holmquist was cleared for full duty after each injury. Clark

stated that Holmquist preferred desk work ever since 1986 when Clark began with Respondent. For a period of time he went out on patrol in the early 2000s, but otherwise he was on desk duty.

41. In February 2006, Officer Danny Desmond injured his lower back when his cruiser was hit by a motor vehicle. Clark testified that prior to 2006, Desmond had problems with his back and the 2006 injury was a re-injury to the same area. Desmond weighed over 300 lbs. in 2006. Chief Clark testified that between 2004 and 2006 Desmond sustained a number of on-the-job injuries for which he was granted IOD status.

42. Officer Christopher Werner injured his back on July 13, 2005 and was granted IOD from July 13, 2005 to September 19, 2005. Werner requested and received IOD several times. Werner reinjured his back on October 31, 2007. He requested and received IOD and was out of the office from October 31, 2007 through February 11, 2008.

43. In September 2005, Officer John Pettingill broke his ankle while on duty when a motorcycle stalled and it fell on him in 2005 and received IOD.

44. Chief Clark testified that the injuries to Werner, Pettingill, Holmquist, Bryant and Desmond were all witnessed by others and he had no doubt that they occurred while the officers were on duty.

Other Allegations of Disparate Treatment

45. Between 2004 and 2006, Sgt. Bryant changed Complainant's shift more frequently than other officers' shifts. Complainant never complained about her shift changes and she acknowledged that during 2005 and 2006 the department was short-handed and officers were required to fill in other shifts.

46. Clark assigned Complainant the duty of assembling uniform crime reports (UCR) which involved compiling statistics, a task Complainant had performed under previous chiefs.

47. Complainant testified that prior to 2005, she placed her gun belt on a chair in the women's rest room at the station while using the facility. In early 2005, while Complainant was out, the chair was removed, requiring her to place her gun belt on the floor when she used the facility. She once asked Chief Clark to return the chair, but he never did so. Bryant testified that male officers placed their gun belts in a locker in the men's room at the station.

48. Police officers ate their meals in a break room at the station. Complainant alleged that Bryant singled her out for criticism for leaving the break room messy. In October 2005, Sergeant Werner once emailed her that she consistently left popcorn in the break room and she needed to clean up after herself. (Ex. C-5) Complainant acknowledged that she sometimes did not clean up after herself after meals. Bryant testified credibly that he spoke to male officers, including Officers Kominsky, Baxter and Regan about leaving the break room messy and he also directed to clean up after themselves. I find that Complainant was not singled out for criticism in this regard.

49. The department's practice was for the police officers to leave their gas tanks $\frac{1}{2}$ to $\frac{3}{4}$ full at the end of their shift. Complainant also alleged that she was treated more harshly than male officers with respect to not filling her cruiser's gas tank at the end of her shift.

50. On August 5, 2005, Sgt. Werner emailed Complainant that she had left the gas tank half empty at the end of her shift and directed her to "gas up" in the future. (Ex. C-3) Bryant testified that he could not recall whom he spoke to about gassing up their cruisers. Complainant claimed that Bryant, Stoddard and the Chief criticized her seven or eight times for failing to gas

up her cruiser. Complainant acknowledged that she did not always gas up at the end of her shift. She complained to Chief Clark about other officers not filling the tank and he acknowledged that it was a wide-spread problem. I find that Complainant was not singled out for not gassing up her cruiser.

51. Complainant also alleges that she was routinely assigned an inferior cruiser. There was no evidence to support this allegation. She testified that she was satisfied with the cruisers she was assigned. Sgt. Bryant testified that in September 2005, he began to assign cruisers to particular officers in order to keep track of items, such as coffee cups, left in the cruiser. On September 1, 2005, Bryant assigned each officer a primary and a back- up cruiser. He assigned Complainant cruiser 227 as her primary cruiser and 226 as her secondary cruiser. Pettingill was also assigned cruiser 227. Officers Flaherty, Richmond, Sullivan and Pettingill were assigned 226 as primary or backup. Pettingill had the same primary and back up cruiser as Complainant. Bryant testified that neither of them complained to him about their cruisers. I credit his testimony.

52. Officers were expected to report for duty at 10 minutes before the hour, and could leave 10 minutes before the hour at the end of their shift. In other words, officers assigned to the 8:00 a.m. to 4:00 p.m. shifts were expected to arrive at 7:50 a.m. and leave at 3:50 p.m. Complainant contends that she was chastised by her superiors for arriving late to her shift on several occasions. However, she acknowledged that she frequently arrived late for duty. She observed Bryant and Flaherty reporting late several times and acknowledged she did not know whether male officers were criticized for arriving late for duty. (Ex. C-6)

53. Complainant alleges that while on patrol on November 8, 2005, she radioed Sgt. Bryant that she needed to return to the station. Bryant texted to ask her why she was coming in. Bryant testified that he needed to know each officer's reasons for returning to the station and that he communicated by text instead of radio because if she were returning to use the bathroom he did not want to broadcast that information over the radio. I credit Bryant's testimony.

54. Bryant testified that he allowed Complainant an extra 15 minutes for a dinner break so that she could go home and feed her animals, rather than have her go back and forth to her house during her shift. I credit his testimony.

55. Bryant testified that he might have come in late to a shift if he were working a detail, and on such occasions he would pre-arrange for the overnight sergeant to stay on until he arrived. The midnight sergeant could also come in for him if he were working a detail. I credit his testimony.

56. Complainant testified that she was very upset about the denial of IOD. She was angry and cried all the time. She suffered from insomnia, was concerned about her financial situation and feared she would become homeless. She testified that she suffered from more frequent migraine headaches, especially leading up to the public hearing in this matter when she felt she was reliving the denial of her IOD. Complainant testified that her good relationship with her son deteriorated during this time because he became the target of her frustration. Complainant testified that she became more distressed when she was denied sick bank leave because she had hoped to rely on that as a means of support after her request for IOD was denied. I credit her testimony.

57. Complainant's son Leonard Graf testified credibly that Complainant was very upset at the denial of IOD and the sick leave bank benefits and felt she had been treated unfairly. According to him, she was depressed and lethargic, unmotivated, irritable, sensitive and short-tempered. He testified that she lost interest in cooking, lost interest in seeing her friends and was reclusive. He observed the effect of her treatment at work over the years, and testified that during this time she had to muster a great deal of emotional energy to go to work.

58. Joyce Kish, a good friend of Complainant's testified credibly that in 2006, Complainant was very unhappy, cried frequently and suffered from headaches and vomiting.

59. Complainant testified that when her IOD was denied she had to take \$5,000.00 out of her retirement account and had to pay taxes on the income.

60. Complainant retained an attorney, Alexandra Deal, during the conciliation process at the MCAD. Complainant paid Attorney Deal \$6,078.67 in attorney's fees.

61. Former Lt. Raymund Rogers was permitted to testify at length, over the objections of Respondents, regarding whether the atmosphere at the West Bridgewater Police Department was hostile toward women. I found Rogers' testimony, in general, not relevant to the claims before this Commission and I make no findings with respect to the credibility of Rogers' testimony.

III. CONCLUSIONS OF LAW

M.G.L.c.151B§4(1) prohibits an employer from discriminating against an employee in the terms and conditions of employment on the basis of gender. In order to establish a prima facie case of gender discrimination, Complainant must show that she is a member of a protected class, that she was subjected to adverse treatment and that similarly situated persons not of her

protected class were treated differently. Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976). Complainant has established the first prong of her prima facie case by virtue of her gender, female. She has also established that she was adequately performing her job. She asserts that there were several instances wherein she was treated differently from similarly situated male police officers. I consider these allegations in turn.

A. Denial of IOD and Sick Bank Leave for Back Injury

Complainant alleges that Respondents treated her differently from male officers with respect to denying Injured on Duty (IOD) status and Sick Leave Bank time for her back injury on March 28, 2006. I conclude that Complainant has established a prima facie case of gender discrimination with respect to Respondent's handling of her request for IOD. Complainant requested IOD status for the injury to her back caused by pulling a heavy sign while on duty on March 28, 2006. Complainant was treated at the emergency room where a physician explicitly noted that her injury was caused by pulling the sign. Two days later, Complainant's primary care physician explicitly noted that the injury on March 28 was a contributing cause of her injury. Complainant submitted medical documents to Respondents noting that her symptoms first appeared on the date of the accident.² Despite this evidence, Chief Clark did not "see the nexus" between Complainant's pulling the sign and her injury, denied her IOD and notified her that she would be placed on "no pay status." Chief Clark had never put any other police officer on no-pay status. Likewise, Complainant was denied sick bank leave, the only police officer in 10 years to have been denied this benefit.

² It is disputed precisely which documents were supplied to Chief Clark. I conclude that, in any case, Chief Clark received documents sufficient to determine that Complainant's injury incurred on the job.

Complainant was treated differently from male police officers with respect to the decision to deny her IOD status. Several male officers were immediately granted IOD status by Chief Clark for injuries, including Officer Bruce Holmquist, Officer Werner, Officer Pettingill and Officer Desmond. The only male officer who was not granted IOD was Sgt. Bryant, who suffered a heart attack off-duty. Complainant was also treated differently from her male counterparts with respect to denying her sick leave bank time. She was the only person denied sick leave bank time. I conclude that Complainant has established a prima facie case of gender discrimination with respect to Respondent's treatment of her request for IOD status and with respect to the sick leave bank denial.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000). Respondents' legitimate, non-discriminatory reasons for denying Complainant's IOD were that Complainant's history of chronic back pain going back to 2003 disqualified her from seeking IOD for the injury of March 28 and that Clark was skeptical that Complainant's March 28 injury occurred on-the-job, because it was not witnessed and was close in time to the January steroid treatment that the Chief believed to be unrelated to the job. Respondents distinguished the injuries of the male officers for whom Chief Clark immediately approved IOD because their injuries occurred either at the station or were witnessed by others. Respondents also argue that Sgt. Bryant's IOD was not approved because Bryant's heart attack did not occur on-the-job and that his situation was most similar to that of Complainant.

Respondents asserted that Complainant was denied sick leave bank time because of the sick leave bank committee's concern that she would be unable to repay the time she used. I

conclude that Respondents have articulated legitimate, non-discriminatory reasons for their actions.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduct, the burden shifts to Complainant to establish that the reasons articulated by Respondent are pretext for discrimination. Abramian v. President & Fellows of Harvard College, *supra*. Complainant has convinced me that Respondent's articulated reasons for denying her IOD status and sick leave bank were a pretext for gender discrimination.

Respondents' non-discriminatory reasons for denying Complainant IOD have been shown to be pretextual. Chief Clark testified variously that he denied Complainant's IOD because her injury was close in time to a treatment (steroidal injection) that Clark did not approve for IOD. He also stated that Complainant's medical documentation showed a history of back injuries, a fact that should not have precluded her from receiving IOD. In addition, Chief Clark claimed that he did not believe Complainant's injury was work-related, but there is no credible evidence to support what was no more than conjecture and speculation on his part as to the cause of Complainant's injuries. However, Clark readily approved IOD for other officers. Notably, he immediately approved IOD for Officer Bruce Holmquist for a knee injury, despite medical evidence that Holmquist had chronic knee problems. Likewise, Chief Clark approved Holmquist's IOD for a shoulder injury, despite the existence of a prior shoulder injury. Clark acted similarly with respect to other male officers' on-the-job injuries, including Officer Danny Desmond's lower back injury in a motorcycle accident on duty, despite Desmond's prior back problems, and a number of previous on-the-job injuries for which he was granted IOD status. Officer Christopher Werner requested and was immediately granted IOD on numerous occasions

for back injuries and other injuries and Officer John Pettingill broke his ankle while on duty when a motorcycle fell on him in 2005 and received IOD.

I am not persuaded by Respondents' argument that Sgt. Bryant's situation was the most similar to Complainant's and this justified Clark's denying IOD to Complainant as he had to Bryant. In reality, Bryant's situation was dissimilar to Complainant, in that Bryant's heart attack occurred not on the job but the following day in the hospital. Furthermore, Chief Clark agreed that heart attacks are in a category by themselves respecting whether their victims should be granted IOD status and are not presumed to be on-the-job injuries. IOD is not granted for heart attacks until there is evidence showing that the heart attack was work-related. Thus, I conclude that while there were policy reasons for Respondents to deny Bryant's IOD, the same reasoning did not apply to Complainant's injury, that was, in essence, a re-injury to her back.

While Clark acknowledged that he did not normally review or question medical records when assessing IOD applications, in Complainant's case, he scrutinized her medical documentation that supported her claim of a work-related injury and, notwithstanding he rejected her IOD request. With respect to male officers who had physical injuries or re-injuries, Clark quickly approved their IOD requests, while it was not until Complainant filed a union grievance that Chief Clark, upon the advice of counsel and the board of selectmen, arranged for an independent medical examination for Complainant.

With respect to denying Complainant time from the sick leave bank, Respondents asserted that Chief Clark was concerned about Complainant's abuse of sick time, yet there was no evidence that Complainant had ever abused sick time and was never accused of doing so by Clark. The sick leave bank committee was concerned that Complainant would not be able to

repay the sick leave bank pursuant to the CBA. However, despite using sick time for various injuries and even after being out for several weeks after suffering a stroke, Complainant had carried over sick leave every year through 2005. Respondent asserts that because two of the three sick leave bank committee members, Sgt. Bryant and Officer Pettingill, were members of Complainant's bargaining unit, she cannot attribute their decision solely to Chief Clark. However, this argument fails because Bryant believed at the time of the decision that the Chief has the ultimate decision regarding sick leave bank decisions, and I conclude that the sick bank committee decision was essentially a rubber stamp of the Chief's prior denial. In any event, Complainant was the only person for whom sick leave bank time was denied, leaving her with no income for six weeks.

While Complainant was ultimately awarded IOD and was made whole for her time out of work, she suffered unnecessarily during that time because of Respondent's disparate treatment of her. I conclude that Complainant, the only female officer, has established that Respondents' purported reasons for initially denying her IOD and denying her any sick leave bank time were a pretext for unlawful discrimination based on gender.

B. Other Allegations of Disparate Treatment

With respect to other aspects of her employment wherein Complainant alleges that she was treated differently from her male counterparts; such as being occasionally instructed to clean up after herself in the break room, being told to gas up her car at the end of her shift, being assigned more frequent shift changes, being assigned to compile statistics, removal of a chair from the ladies' room which required her to place her gun belt on the floor when she used the facility, being assigned to an inferior cruiser and being chastised for coming late to her shift, I

conclude that Complainant has failed to establish that she was treated differently from her male counterparts. Complainant acknowledged that during 2005 and 2006 the department was short-handed which required officers to fill in other shifts. Complainant acknowledged that she sometimes left the break room messy and there was credible evidence that other officers were similarly directed to clean up after themselves as well. With respect to the gas tank issue, Complainant acknowledged that she did not always gas up at the end of her shift and there was credible evidence that male officers were chastised for not 'gassing up' at the end of their shifts also, and that this was a department wide problem. I find that Complainant was not singled out for not gassing up her cruiser. As to Complainant's allegation that she was routinely assigned an inferior cruiser, there was no evidence to support this allegation and she testified that she was satisfied with the cruisers she was assigned. Complainant contends that she was chastised by her superiors for arriving late to her shift on several occasions. However, she acknowledged that she frequently arrived late for duty and acknowledged she did not know whether male officers were criticized for arriving late for duty. As for her claim that she was somehow singled out by Sgt. Bryant when he asked her why she was returning to the station, Bryant testified credibly that all officers were required to state their reasons for returning to the station and that she was not singled out in this regard. It is notable that Complainant was never written up or disciplined in any manner for coming in late or leaving the break room messy. I conclude that with respect to these matters while Complainant may have viewed herself as the object of disparate treatment, because of unfair treatment regarding her leave requests, she has failed to establish a prima facie case of gender discrimination as to these allegations. I hereby dismiss these claims.

C. Handicap Discrimination

Complainant alleges that Respondent discriminated against her based on her handicap in violation of G.L. c. 151B §4(16). She alleges that Respondent failed to consider or take adequate measures to reasonably accommodate her handicap.

To establish a prima facie case of discrimination based upon Respondent's failure to accommodate her handicap, Complainant must demonstrate that she is a handicapped person within the meaning of the statute; she is qualified for the position, i.e., able to perform the essential functions of the job with reasonable accommodation; she requested a reasonable accommodation; and she was prevented from performing her job because Respondent failed to reasonably accommodate the limitations associated with her handicap. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass 1(1998).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. Complainant has established that she was a handicapped person within the meaning of M.G.L. c.151B because of her back injury which limited her ability to walk, stand, sit and lift, to work a full day and to physically handle prisoners. I find that Complainant was disabled as a result of her back injury.

In order to establish that she is a qualified handicapped person, Complainant must prove that she is capable of performing the essential functions of her job, with or without a reasonable accommodation. Once Complainant has identified her disability and requested an accommodation from her employer, it is incumbent on the employer to determine if the

accommodations sought are reasonable and to engage in an interactive dialogue with Complainant.

The employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive process of determining the nature of the accommodation sought and whether an accommodation is feasible. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). This process should identify the precise limitations resulting from the handicap and potential reasonable accommodations that could overcome those limitations. I conclude that when Complainant informed Respondents that she was restricted to light duty, Respondents reasonably accommodated Complainant's handicap. Respondents assigned Complainant to four hours of desk duty per day within days after her examination by the IME, Dr. Rodgers. Complainant's sole complaint with respect to Respondents' failure to accommodate her was that she was sometimes left alone at the station during the first month of her light duty, when manpower shortages prevented Respondents from putting more than three officers on her shift.³ During this time she was not required to restrain an inmate or suspect. When Chief Clark learned on May 20 that Complainant was sometimes alone at the station, he reiterated in writing, that Complainant was not to be left alone. I conclude that Respondents made every effort to reasonably accommodate Complainant's injury and her claim of handicap discrimination is hereby dismissed.

³ Respondents' assertion that Complainant was not a qualified handicapped person because she could not perform the essential function of restraining suspects is specious. Complainant's injury precluded her from performing many of the "essential functions" of a police officer. Whether assignment to light duty is a reasonable accommodation depends on whether it constitutes an undue hardship to Respondents.

D. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B§4(4A) if they “interfere with a Complainant’s right to be free from discrimination in the workplace. In order to prove interference with a protected right, Complainant must show that Chief Clark had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant’s rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant’s exercise of rights.

Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

The evidence in this record establishes the requisite intent to discriminate required in order to find Chief Clark individually liable for unlawful discrimination. Clark was Chief of the Department and was the decision-maker with respect to denying Complainant’s IOD and sick bank leave. The evidence firmly established Chief Clark’s intent to treat Complainant in a disparate fashion from her fellow male officers in the granting of leave and to interfere with Complainant’s rights under c. 151B. I conclude that Clark is individually liable for unlawful discrimination in this matter.

I conclude that Respondents engaged in unlawful discrimination on the basis of gender by virtue of the decision to deny Complainant her IOD and her sick leave bank, in violation of M.G.L.c.151B§4.

IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost

wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

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

Based on the credible testimony of Complainant I am persuaded that she suffered emotional distress as a result of Respondents’ unlawful actions. Complainant testified that she was very upset about the denial of IOD, and that she was angry and cried frequently. She suffered from insomnia, was concerned about her financial situation and feared she would become homeless. She testified that her migraine headaches increased in frequency, especially leading up to the public hearing in this matter when she felt she was reliving the denial of her

IOD. Complainant testified that her good relationship with her son deteriorated during this time because he became the target of her frustration. Complainant testified that she felt even worse when she was denied sick bank leave because she hoped to use sick leave time as a means of support when her IOD was denied.

Complainant's son Leonard Graf testified credibly that Complainant was very upset and felt she had been treated unfairly. He observed that Complainant was depressed and lethargic, unmotivated, irritable, sensitive and short-tempered. He testified that she lost interest in cooking and seeing friends and was reclusive. Having observed the effect of her treatment at work over the years, he stated that Complainant had to muster a great deal of energy just to go to work.

Joyce Kish, a friend of Complainant, testified credibly that in 2006, Complainant was very unhappy, cried frequently and suffered from headaches and vomiting.

I conclude that Complainant suffered from emotional distress as a direct result of Respondents' discriminatory acts and I conclude that an award in the amount of \$35,000.00 is appropriate compensation for the emotional distress she suffered.

B. Lost Wages

I conclude that Complainant was made whole when she was retroactively awarded IOD status and therefore she is not entitled to damages for lost wages.

C. Out of Pocket Expenses

Complainant testified credibly that she retained an attorney, Alexandra Deal, during the conciliation process at the MCAD and paid Attorney Deal \$6,078.67 in attorney's fees for legal services in connection with her MCAD claim. I conclude that she is entitled to compensation for

those attorney's fees. Complainant testified that when her IOD was denied, she had to withdraw \$5,000.00 from her retirement account and had to pay taxes on the amount withdrawn. While Complainant testified that she incurred expenses in connection to withdrawal of funds from her retirement account, she did not specify the amount of those expenses and therefore, I am unable to award her damages for such expenses.

V. ORDER

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

1. Respondents immediately cease and desist from engaging in discriminatory leave practices on the basis of gender.
2. Respondents pay to Complainant the sum of \$35,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondents pay to Complainant the sum of \$6,078.67 for attorney's fees paid to her former counsel in connection with this case.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 3rd day of April 2012.

JUDITH E. KAPLAN

Hearing Officer