COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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MCAD and PEDRO ARMIJOS,
Complainants

v. Docket No. 04 BEM 01529

MASSACHUSETTS
GENERAL HOSPITAL,
Respondent

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For Complainant Pedro Armijos: Paul Mahoney, Esq.
For Respondents: Joseph L. Edwards, Jr., Esq.

# DECISION OF THE HEARING OFFICER

## I. PROCEDURAL HISTORY

On June 10, 2004, Pedro Armijos ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging that he was subjected to discrimination by Respondents on the basis of race/color and disability and that he was constructively discharged from his employment with Massachusetts General Hospital ("MGH" or the "Hospital") after he returned to work following eight weeks of recuperation from herniated discs in his back. On November 11, 2007, the Commission issued a Probable Cause Finding. The Commission certified the case for public hearing on June 23, 2009.

A public hearing was conducted on May 18, 20, and 21, 2010. The following individuals testified at the public hearing: Complainant, Dr. Henry Kronenberg, Julia MacLaughlin, Dr. Ernestina Schipani, Lynn Moulton, and Karen Minyard. The

following exhibits were accepted into evidence: seventeen (17) joint exhibits; seven (7) Complainant's exhibits; and twenty-five (25) Respondents' exhibits. At the close of the evidence, the undersigned Hearing Officer directed verdicts on the race/color and constructive discharge claims.

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

II. FINDINGS OF FACT

1. Complainant was hired as a laboratory assistant in the Endocrine Unit of MGH on January 11, 2000. He is a native of Lima, Peru. Complainant testified that he is authorized to work in the United States.
2. The Endocrine Unit of MGH is comprised of independent investigators with their own laboratory groups. They conduct research pertaining to osteoporosis and diseases of the bone and mineral metabolism in the Endocrine Unit's laboratory. Dr. Henry Kronenberg was the Chief of the Endocrine Unit at MGH at all times relevant to this case.
3. Endocrine Unit investigators perform research on genetically engineered mice that have mutations in their DNA. Bones and cartilage of the genetically engineered mice are cut, stained, and mounted on slides for study by the investigators. The slides are generally prepared by technicians within the Histology Core of the Endocrine Unit laboratory, although some sophisticated histology techniques are performed by investigators themselves.
4. Dr. Ernestina Schipani is an MD/PhD who heads her own research group in the Endocrine Unit and is also the Director of the Histology Core. As Director of the

Core, Dr. Schipani prioritizes the investigators' work requests and monitors the quality of the Core work product.

5. At all relevant times, Janet Saxton was the senior hystotechnologist in the Histology Core. She ran the histology operations on a day-to-day basis and reported to Dr. Schipani. Saxton also spent part of her time as the general lab manager for the Endocrine Unit. In that capacity, she reported to Dr. Kronenberg. As general lab manager, Saxton was responsible for chemical and radioactive safety procedures and keeping equipment running.
6. Janet MacLaughlin was the grants manager of the Endocrine Unit. She reported to Dr. Kronenberg. She and Complainant were friends. At the end of 2000, MacLaughlin offered Complainant an apartment, rent free, in a building she owned and lived in.
7. Karen Minyard was the office manager of the Endocrine Unit and in this capacity, reported to Dr. Kronenberg.
8. Lynn Moulton was an administrative assistant to Dr. Kronenberg and in that capacity, processed the payroll for the Endocrine Unit. Moulton collected timesheets and entered the hours worked into the computer. Moulton reported to Minyard.
9. Minyard testified that it was Saxton's job to make sure that people followed regulations. Minyard described Saxton as not "interpersonally astute." Minyard said that Saxton unintentionally rubbed people the wrong way but was not deliberately abrasive. Transcript III at 176-177.
10. In January of 2000, Saxton interviewed Complainant for the position of laboratory

assistant. He was hired as a lab assistant at $9.00 per hour, 40 hours a week. Complainant's duties as a lab assistant were to wash lab dishes, deliver dirty lab coats to the laundry, pick up the mail, set up conference rooms for meetings, make coffee, and pick up and deliver supplies. He was supervised by Saxton who signed his timesheets.

11. After Complainant worked at MGH for a few months, Saxton asked Dr. Schipani if Complainant could number specimen slides and received permission for him to perform this task. Saxton subsequently asked Dr. Kronenberg if Complainant could work part-time in the Histology Core as a technician, cutting bones. Dr. Kronenberg and Dr. Schipani were concerned because Complainant did not have a science background and did not satisfy the educational and scientific background requirements for an entry-level technician position. All other lab technicians had taken college-level courses in biology, chemistry, and biochemistry

12. On November 15, 2000, MacLaughlin emailed Dr. Kronenberg to propose putting Complainant into a technician's position in the Histology Core and pay him at a rate of $13.00 for 40 hours per week plus 10 hours of guaranteed overtime each week. Transcript II at 86-88; Joint Exhibit 5. The proposal amounted to an income of $37,000.00 a year, over twice Complainant's entry-level salary in January of 2000.

13. Despite misgivings, Dr. Kronenberg approved the proposal because the job was narrowly focused on cutting mice bones which did not require as much scientific background as other histology tasks and because the proposal was a "tremendous

opportunity" for Complainant. Transcript II at 78-79. Dr. Schipani did not think the proposal was a good idea. Transcript III at 16-17.

14. Dr. Kronenberg authorized an arrangement whereby Saxton taught Complainant how to cut bone. Saxton wrote out each protocol for cutting bones, showed Complainant how to perform the techniques, and critiqued Complainant as he performed the techniques under her supervision. Dr. Schipani testified that Saxton did a great job training Complainant, and Complainant did a great job cutting bones. Dr. Kronenberg testified that Complainant learned quickly and became very proficient at cutting bones.
15. According to Complainant's 2000 job evaluation filled out by Saxton, Complainant performed in an exceptional manner, was always available, was reliable, obeyed all rules, was well-liked, and performed independently. Joint Exhibit 1.
16. Dr. Kronenberg counseled Complainant repeatedly that in order to advance as a technician, he had to take college-level science courses in biology, chemistry, and mathematics. Respondent's Exhibit 3. Dr. Schipani also expected Complainant to take biology courses in order to advance. Complainant testified that he did not take college courses because he could not afford to do so even with tuition assistance provided by MGH's tuition reimbursement policy. Dr. Kronenberg offered to advance money for science courses from the Endocrine Unit's budget, but Complainant did not follow up on the offer. Transcript II at 82, 108-109.
17. Following his training, Complainant worked part time as a technician cutting bones and the remainder of his time performing lab assistant duties.

18. The standard hospital policy for an employee working two different jobs at different levels of pay is for the employee to be paid different rates in accordance with the number of hours spent performing each job. However, Dr. Kronenberg decided to pay Complainant the higher technician rate for all of the work that Complainant performed.
19. Dr. Kronenberg offered Complainant the opportunity to work ten hours of guaranteed overtime a week. Volume II at 88-89. The guarantee of ten hours of overtime per week was unusual since most technicians did not have the opportunity to work any overtime. Transcript II at 89-90. Dr. Kronenberg thought that Complainant could use the extra money he earned to take courses. Transcript III at 15, 20-21.
20. Complainant's 2001 and 2002 performance evaluations were similar to his 2000 evaluation insofar as he was rated an outstanding performer who was well-liked in the Unit. Joint Exhibits 2 & 3. His 2001 performance evaluation was filled out by Saxton, and his 2002 performance evaluation was filled out by Dr. Schipani. Id.
21. Complainant took Family and Medical Leave Act (FMLA) leave from early October of 2002 through the end of November of 2002 because of a back problem involving herniated discs. Joint Exhibit 17; Transcript I at 48. Complainant testified that prior to going out on leave, he did not experience any discrimination. Transcript I at 163-164. While he was out of work, Complainant received his base pay but did not receive overtime. Transcript I at 183-184.
22. When Complainant returned to work he had physical restrictions consisting of not

sitting or standing for too long and not carrying heavy boxes. Transcript I at 49. In order to accommodate his restrictions, a night time employee put heavy packages on a cart for him, staff got their packages off the cart themselves, volunteers moved tables for conferences and meetings and set up chairs, and Saxton took over some of Complainant's work involving picking up supplies from the basement and lifting heavy boxes even though she also had back problems and was between fifty and sixty years old. Transcript II at 171-172; 201;Transcript III at 104-105.

23. After Complainant returned from FMLA leave, MacLaughlin wrote to Dr. Kronenberg about giving Complainant a 7% raise. MacLaughlin's goal was to allow Complainant to earn the same income working 40 regular hours a week plus 7 or 8 hours of overtime as he had previously earned working 40 regular hours a week plus 10 hours of overtime. Transcript II at 170; Joint Exhibits 6 & 16; Respondent's Exhibit 17. Dr. Kronenberg agreed to the arrangement. Transcript I at 173-174.
24. According to Endocrine Unit policy, when an employee works overtime during a week in which their straight time is less than 40 hours due to a holiday or a vacation day, the overtime hours are credited to a different week during which the employee works 40 hours straight time. Such a process permits the employee to receive time and one-half for the overtime rather than straight time. Transcript III at 68-69.
25. Complainant attempted to recover overtime opportunities lost during his eight-week FMLA leave by recording on his timesheet overtime hours he had not

actually worked. Transcript I at 184; II at 18-19; III at 77, 86-91; Respondent's Exhibit 4, 17. According to Moulton, Complainant sought payment for 50 hours of lost overtime even though someone else had done the work while Complainant was on leave. Transcript III at 105; Respondent's Exhibit 7. Moulton testified that she told Complainant and MacLaughlin that she was going to check with Dr. Kronenberg about the propriety of this arrangement. Transcript III at 78-79. According to Moulton, Complainant was very angry and said he was "different from her because he always told the truth." Transcript III at 80. MacLaughlin demanded that the overtime be recorded and told Moulton that she would be "sorry" if she checked with Dr. Kronenberg. Transcript III at 81. Moulton responded by crying for three hours and seeking medical and psychological treatment. Transcript III at 81-82. Moulton reported the incident to her supervisor, Karen Minyard.

26. Complainant had previously put extra hours on his timesheets after a two-week vacation in 2002 in order to make up for 20 hours of lost overtime during the vacation. Respondent's Exhibit 17; Transcript III at 75. At the time, Moulton believed that Complainant was asking for the opportunity to work additional overtime after he returned from vacation, but Complainant understood that he would receive pay for the overtime hours he did not actually work. Respondent's Exhibit 17. Moulton testified that Complainant was the only individual in the Unit who worked enough overtime on a consistent basis to be concerned about losing overtime opportunities for several weeks. Transcript III at 72-73.
27. Dr. Kronenberg determined that Complainant's expectation that he would be paid

for the overtime hours he missed during his medical leave was based on a misunderstanding and that Complainant should receive one-half of the overtime hours he lost. Transcript III at 82-83; 123-124. By email dated February 28, 2003, Moulton summarized a resolution whereby Complainant would be allowed to recover 5 hours a week until 25 hours were completed although she noted in a subsequent email of March 5, 2003 that Dr. Kronenberg had agreed to pay Complainant 40 hours of overtime. Transcript II at 16-17; Respondent's Exhibits 4, 18. Following his return from FMLA leave, Complainant spent 70 or 80 % of his time in the Histology Core whereas prior to his FMLA leave he had spent 50% of his time in the Core.

28. According to Complainant, Saxton never questioned his whereabouts prior to his leave but after his leave, she questioned him relative to his whereabouts, asked whether he was working all of the hours he put down on his timesheet, and instructed him to tell her when he was going to the bathroom, when he came in, and when he left. Transcript I at 61-63. Complainant heard that Saxton was telling people in the office that he was not working all of the hours he reported on his timesheet. Transcript I at 57, 197; III at 124-125, 132. In an email to Minyard, Complainant charged that Saxton became angry with him because he could not lift heavy things and because he received overtime whereas she did not. Respondent's Exhibit 3.

29. Complainant reported to work at 5:30 a.m., which made it difficult for supervisors to keep track of his arrival time. Saxton thought that Complainant was out of the lab more, during the day, than was justified by his work-related activities

throughout the hospital. Saxton reported her concerns to Minyard and to Dr. Kronenberg but Dr. Kronenberg took no action against Complainant because Complainant was getting his work done. Transcript II at 97.

30. In July of 2003, Dr. Kronenberg emailed Saxton about the Endocrine Unit's system for disposing of broken glass which potentially contained radioactive materials or carcinogens. Transcript II at 101, 105; Respondent's Exhibit 10. They decided to place boxes around the lab for collecting glass and to have Complainant, as lab assistant, manage the process. Transcript II at 101-102. In December of 2003, Minyard asked Complainant to put together several boxes for the disposal of glass. The boxes were pre-formed cardboard that could be folded into place in seconds. Transcript I at 244. Minyard sent Complainant three emails about putting together the boxes which he ignored. Respondent's Exhibits 2 & 3. Complainant testified that he had more important things to do than put together the boxes. He believed that it was Saxton who was behind the request. Transcript II at 45-46; Respondent's Exhibit 3.
31. In early September of 2003, Complainant went on vacation. He subsequently submitted a timecard with fourteen (14) hours of overtime. Minyard was handling payroll because Moulton was not at work. Minyard refused to pay Complainant seven (7) of the requested fourteen (14) because Dr. Kronenberg said that Complainant was not authorized to work more than seven (7) hours of overtime per week. Transcript III at 128-130; Respondent's Exhibits 1 & 21.
32. On September 23, 2003, Complainant took the day off but sought to credit it as a work day on the timesheet in order to compensate for the seven (7) hours he lost

earlier in September. Transcript III at 135-138; Respondent's Exhibit 23. Dr. Schipani signed off on the timesheet after Saxton refused to do so. Id.

33. After Saxton refused to sign Complainant's timesheet in September of 2003, the relationship between Complainant and Saxton deteriorated. Transcript III at 138. According to Saxton's credible testimony, Complainant became passive aggressive, surly, and would do things to annoy her. On October 3, 2003, Saxton reported to Minyard that Complainant intentionally tied a venetian blind cord in such a way that the blind could not be lowered, causing a glare in Saxton's work area. Transcript 138-140; Respondent's Exhibit 24. On another occasion after Saxton accidentally bumped Complainant as she opened a drawer, he claimed it was intentional. Id. Complainant pretended to make telephone calls to HR representative Mark Clementi in Saxton's presence to complain about her. When Minyard attempted to discuss with Complainant where else he could sit other than in Saxton's workplace, Complainant asserted that he had the right to sit anywhere he chose. Transcript III at 142; Complainant's Exhibit 2.

34. Complainant testified that Saxton committed intentional acts of physical aggression against him beginning in August or September of 2003 consisting of pushing him with a cart, hitting him with a drawer, and banging him with her shoulder. Transcript I at 61-63, 215, Transcript II at 4. I do not credit Complainant's testimony.

35. Complainant attributed Saxton's treatment of him to racism on her part and to his inability to lift objects because of his bad back. Transcript I at 180-182. He claimed that Saxton made a racist statement but could not remember what it was.

Transcript I at 181. Complainant testified that Saxton accused him of not understanding overtime because he wasn't American. Transcript II at 5. I do not credit Complainant's testimony. During his deposition, Complainant did not accuse Saxton or any else at MGH of racism. Transcript I at 229.

36. Dr. Kronenberg met with Clementi, Saxton, and Complainant about the complaints lodged by Saxton and Complainant against each other. Dr. Kronenberg removed Saxton as Complainant's supervisor, but told them that they had to work together. Transcript II at 97-98. Dr. Kronenberg assigned Minyard to supervise Complainant in his role as lab assistant and Dr. Schipani to supervise Complainant in his role as technician in the Core. Dr. Kronenberg told Complainant to check in with Minyard at some point during each day but Complainant did not always do so. Minyard did not always "push the matter." Transcript III at 150-152.
37. At the end of November of 2003, Dr. Schipani gave Complainant an outstanding evaluation on his 2003 performance review. Transcript I at 67-68; Joint Exhibit 4.
38. Complainant testified that he was not allowed to perform bone cutting in the Histology Core from November of 2003 through January of 2004. I do not credit this assertion on the basis that Complainant acknowledged in his deposition that he continued to work as a technician in the Histology Core through January 5, 2004. Transcript I at 71, 78.
39. Complainant testified that Dr. Kronenberg promised him that his histology training would be assumed by Dr. Schipani. Transcript I at 77. I do not credit

this assertion since Dr. Schipani was Director of the Core and would not have been instructed by Dr. Kronenberg to train a technician.

40. Complainant emailed Minyard about why his training was halted and was told to contact Dr. Kronenberg and Dr. Schipani. Respondent's Exhibit 3. Dr. Kronenberg told Complainant on January 5, 2004 that he already was trained on many histology techniques and in order to learn more sophisticated histology techniques, he had to first take basic biology and chemistry courses. Transcript II at 105-107; Joint Exhibit 11. Complainant could continue to perform bone-cutting in the Core without taking college courses. Transcript I at 71, 78, 101-103, 179-180; Transcript III at 54; Joint Exhibit 12.
41. When Dr. Kronenberg met with Complainant on January 5, 2004, he directed Complainant to put the boxes together as Minyard had instructed him to do. Joint Exhibit 11.
42. At some point in early January of 2004, Complainant called Clementi about his desire to see Saxton disciplined for allegedly harassing him. When this effort was unsuccessful, Complainant resigned his employment in an email to Dr. Kronenberg. Complainant stated that he was resigning because he was not allowed to perform technician work and was no longer being trained. Transcript I at 81-83; Joint Exhibit 12.

## III. CONCLUSIONS OF LAW

### A. Directed Verdicts on Race Discrimination and Constructive Discharge

At the close of the evidence, the undersigned Hearing Officer directed verdicts for Respondent on the race/color and constructive discharge claims.

1. Race Discrimination

In order to prevail on a charge of discrimination in employment based on race and/or color under M.G.L. c. 151B, s. 4(1), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace" and played a motivating part in the employment decision. Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) and at 670. Absent direct evidence, Complainant may establish a prima facie case of race discrimination by showing that he: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of his protected class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

As far as direct evidence is concerned, Complainant claimed at public hearing that Saxton made a racist statement to him about non-native Americans being unable to grasp the concept of working overtime. This accusation is not supported by credible evidence. During Complainant's deposition, he did not accuse Saxton or any else at MGH of racism even though Complainant was questioned about the discriminatory conduct he allegedly experienced. Complainant was unable to remember at trial what Saxton purportedly said, and he failed to mention any allegedly racist comment at his

deposition.

Turning to indirect evidence, there is likewise no basis for asserting that Complainant suffered from an adverse employment action based on race or color or was treated differently from similarly-situated persons not of his protected class. Rather than portray Complainant as a victim of discrimination, the credible evidence shows Complainant to have been the beneficiary of his supervisors' good will. Within months of Complainant being hired, Saxton arranged for his promotion to part-time technician, trained him to cut bones, wrote out protocols for his guidance, and taught him to perform lab techniques. MacLaughlin proposed the doubling of Complainant's salary shortly after he was hired, arranged for Complainant to receive a 7% raise in 2003, and invited him to live, rent free, in an apartment she owned. Dr. Kronenberg offered to advance Complainant money from the Endocrine Unit budget in order to finance Complainant's continuing education, approved a technician salary for Complainant even when he performed a substantial amount of non-technician work, and guaranteed Complainant a regular amount of overtime work on a weekly basis. Dr. Schipani, who was initially concerned about whether Complainant could be trained to perform histology work, became an enthusiastic supporter of Complainant's technical ability. In sum, Complainant's experience at MGH appears to have been long on mentoring and short on mistreatment. To the extent that was treated differently from similarly-situated, qualified person(s) not of his protected class, the credible evidence shows that Complainant was treated more favorably, not less favorably, than other individuals hired as lab assistants. The foregoing circumstances call for a directed verdict in regard to Complainant's charge of race/color discrimination.

2. Constructive Discharge

In order to establish a prima facie case of constructive discharge, Complainant must prove that his working conditions were so intolerable that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995); Said v. Northeast Security, 18 MDLR 255, 259 (1996). Adverse working conditions must be unusually "aggravated" or amount to a "continuous pattern" in order to be deemed "intolerable." Robinson v. Hafner's Service Stations, Inc., 23 MDLR 283 (2001). A claim of constructive discharge under chapter 151B does not arise out of general dissatisfaction with the workplace. See GTE Products, 421 Mass. at 35. An employee is expected to make a reasonable attempt to straighten out any misunderstandings before claiming constructive discharge. See Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997). The standard to prove a constructive discharge is an objective one; an employee's subjective perceptions do not govern. See Lee-Crespo v. Schering-Plough del Caribe, 354 F.3d 34, 45-46 (1st Cir. 2003).

When measured against the above standard, the evidence presented by Complainant does not support a constructive discharge claim. Dr. Kronenberg took decisive action to address Complainant's charges against Saxton, including the removal of Saxton as Complainant's supervisor. Complainant continued to receive outstanding evaluations following his complaints of mistreatment. Although Complainant drafted an email stating that he was resigning because of not being allowed to perform technician work and because of not being trained, Complainant conceded in his deposition that he was not barred from working in the Histology Core prior to his resignation. At public hearing, Complainant failed to produce any evidence that the discontinuation of his

training prevented him from performing histology work. Rather than being forced to resign as a result of negative job actions, the evidence produced by Complainant establishes that he voluntarily resigned after failing to persuade his supervisors to discipline Saxton. Since the evidence does not show Complainant's work environment to have been objectively intolerable, I conclude that a directed verdict must be entered on the claim of constructive discharge.

B. Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with a reasonable accommodation. A handicapped person is one who has an impairment which substantially limits one or more major life activities, the record of an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1 (17); Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2.

Complainant alleges that he suffered from a back problem involving herniated discs. He took an eight-week FMLA leave from early October of 2002 through the end of November of 2002 to seek treatment for back pain. When Complainant returned to work, he had physical restrictions related to sitting, walking, and carrying heavy objects. The record provides scant evidence concerning the degree to which Complainant's back problems interfered with his work or with other major life activities. Nonetheless, in order to analyze Complainant's handicapped discrimination claim, I shall assume that Complainant was a qualified handicapped individual during and after his two-month

leave, in deference to longstanding precedent of the Commission and the Massachusetts courts and in recognition of amendments to the Americans with Disabilities Act ("ADA"), all of which encourage a liberal construction of the term "disability." See Dahill v. Police Department of Boston, 434 Mass. 233, 240 (2001); Duso v. Roadway Express Inc., ___ MDLR ___ (2010) (total knee replacement resulting in a limited range of motion and impacting ability to kneel and climb rendered individual disabled). Pursuant to the 2008 Amendments to the ADA, "the definition of disability … shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA, and the determination of whether an individual has a disability should not demand extensive analysis." Appendix to 29 CFR 1630, Public Law # 110-325, section 2 (b) (5) – Interpretive Guidance on Title I of the Americans with Disabilities Act. Thus, for the purposes of this analysis, I accept the proposition that Complainant's back pain substantially limited one or more major life activities but did not prevent Complainant from performing the essential functions of his position. Complainant's continuing effectiveness on the job is evidenced by his receipt of a raise and an outstanding job performance evaluation following his return from FMLA leave.

To state a case of discrimination based on a failure to accommodate, Complainant must prove that he was a qualified handicapped person who requested a reasonable accommodation but was unable to perform his job because his employer failed to reasonably accommodate the limitations associated with his handicap. See Russell v. Cooley Dickinson Hospital Inc., 437 Mass. 443 (2002); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff'd*, 26 MDLR 216 (2004); Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000). A reasonable accommodation is defined as "any adjustment or

modification to a job that makes it possible for a handicapped individual to perform the essential functions of the position and to enjoy equal terms, conditions and benefits of employment." MCAD Handicap Guidelines, section 11(C); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648, n.19 (2004). The duty to provide a reasonable accommodation requires an employer to participate in an interactive process with a disabled employee who requests an accommodation. See MCAD Handicap Guidelines at VII; Mammone v. President & Fellows of Harvard College, 446 Mass. 657, 670 n.25 (2006).

When Complainant returned from his FMLA leave, he asked to be excused from having to sit or stand for extended periods and from carrying heavy boxes. In order to accommodate these restrictions, Respondent's supervisors arranged for a nighttime employee to put heavy packages on a cart for Complainant, instructed staff to get their own packages rather than rely on Complainant, asked volunteers to move tables and chairs for conferences and meetings, and had Saxton assume some of Complainant's responsibilities for picking up supplies from the basement and lifting heavy boxes, even though she also had back problems and was between fifty and sixty years old. An interactive process undoubtedly took place in light of the aforementioned adjustments to Complainant's duties. These circumstances demonstrate that Respondent reasonably accommodated Complainant's handicap and refute Complainant's charge of disability discrimination based on failure to accommodate.

To the extent that Complainant alleges handicap discrimination in the form of disparate treatment, a prima facie case requires a showing that Complainant, as a qualified handicapped individual, was treated differently from similarly-situated, non-

disabled employees. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1 (1998). Upon this showing, the burden of proof shifts to Respondents to articulate a legitimate, nondiscriminatory reason for the adverse employment action, supported by credible evidence. See Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 441-442 (1995). If such a reason is provided, the burden shifts back to the Complainant at stage three to persuade the fact finder by a preponderance of evidence that the articulated justification is a pretext for discrimination. See Blare, 419 Mass. at 444-445.

Complainant charges disparate treatment based on his claims that Saxton allegedly hit and bumped him in or around October of 2003, that he was removed from performing technician duties in the Histology Core in November of 2003, and that his training was halted around the same time. Complainant fails to identify any non-disabled comparators who received more favorable treatment, but even if he had done so, his allegations fail to make out a claim of handicap discrimination because they are unsupported by credible evidence.

To the extent that Complainant premises a disparate treatment claim on the charge that Saxton intentionally hit and bumped him, the evidence contradicts this assertion. Rather than intentionally assault Complainant, Saxton occasionally came into accidental physical contact with him as a result of their working in close quarters and as a result of Complainant's penchant for invading Saxton's workspace. Other charges of disparate treatment are likewise unconvincing, such as the claims that Complainant was removed from the Histology Core at the end of 2003, that the Director of the Histology Core refused an order by Dr. Kronenberg to train Complainant as a lab technician, and that Complainant's training was suspended for discriminatory reasons. These claims are

contradicted by Complainant's own testimony that he spent even more time in the Histology Core after his FMLA leave than before and that he continued working there through January 5, 2004. Complainant's charges are also contradicted by the credible testimony of Drs. Kronenberg and Schipani that Complainant was adequately trained on histology tasks when his training ceased in 2003 and that he needed to complete basic biology and chemistry courses before receiving additional training. Insofar as Complainant alleges that Dr. Kronenberg directed Dr. Schipani to take over his training after Saxton refused to do so, this claim is patently absurd in light of Dr. Schipani's status as Histology Core Director.

Rather than validate Complainant's charges, the credible evidence indicates that Complainant became belligerent to fellow employees when denied payment for overtime opportunities lost during his eight-week FMLA leave. Dr. Kronenberg ultimately resolved the matter by agreeing to pay Complainant for approximately half of his lost overtime, but the dispute aroused Complainant's anger and irreparably damaged relationships within the Endocrine Unit. It was this dispute which caused Saxton to begin to question Complainant relative to his whereabouts, about whether he was working all the hours he put down on his timesheet, and about when he arrived and departed from work.

The fallout from the parties' dispute over Complainant's overtime led to a series of negative interactions which were unrelated to Complainant's alleged disability. For instance, on September 23, 2003, Complainant took the day off but sought to credit it as a work day in order to compensate himself for 7 hours of unearned overtime. Saxton refused to sign off on his hours. In December of 2003, Minyard asked Complainant, in

his role as lab assistant, to put together several boxes for the disposal of contaminated glass. Although Minyard sent Complainant three emails, Complainant ignored her on the basis that he had more important things to do and because he believed that it was Saxton who was behind the request.

The ongoing hostility between Complainant and Saxton was fed by mutual distrust. According to Saxton's credible testimony, Complainant became passive-aggressive, surly, and did things to annoy her. Complainant intentionally tied a venetian blind cord in such a way that she could not lower the blind, causing a glare in her work area. Complainant pretended to make telephone calls to HR representative Mark Clementi in Saxton's presence during which he complained about her. When Minyard suggested that Complainant sit elsewhere than in Saxton's workplace, Complainant asserted that he had the right to sit anywhere he chose.

Until the hostility between Complainant and his co-workers overshadowed his technical skills, he was the beneficiary of efforts by Endocrine Unit supervisors to transition him from lab assistant to lab technician. Numerous individuals went to bat for Complainant in areas involving his compensation, his schedule, his training, and his requested accommodations. Complainant reaped the benefits of their efforts but then proceeded to fight with his supervisors over unearned overtime, to harass fellow employees, to nurse grudges, and ultimately to resign. The road to resignation was paved with mutual recrimination involving all aspects of employment except for Complainant's acknowledged skill at performing histology work. Whatever the cause for the parties' deteriorating relationship, there is no credible evidence that it was the result of discriminatory conduct in violation of Chapter 151B. Accordingly, the complaint must

be dismissed.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 10th day of November, 2010.

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Betty E. Waxman, Esq.
Hearing Officer